

Volume 7  
Issue 2  
Winter 2014

# European Journal of Legal Studies

## Editorial

*Jan Zglinski*

On Age and Legal Genius

I

## New Voices

*Guido Comparato*

Challenging Legal Culture

5

*Josbua Andresen*

Challenging the Perplexity over Jus in Bello Proportionality

18

## Articles

*Nuno Garoupa and Mariana Pargendler*

Law and Economics Perspective in Legal Families

33

*Andreas Grimm*

The European Court of Justice and the Myth of Judicial Activism in the Foundational Period of Integration through Law

56

*Maija Dalhberg*

'...It is not its task to act as a court of fourth instance': The Case of the ECtHR

77

*Nathalie Neumayer*

Unjust Factors or Legal Ground? A Matter of Principle

109

*Stefano Berte* and *Claudio Sarra*

Foreign Precedents In Judicial Argument: A Theoretical Account

128

*Elisabetta Catelani and Elettra Stradella*

Equal Opportunities and Legal Education: A Mainstream Perspective

163

## **Editorial Board**

### **Editor-in-Chief**

Jan Zglinski

### **Managing Editors**

Lucila Almeida, Cristina Blasi Casagran

### **Executive Editor**

Emma Linklater, Marita Szreder

### **Heads of Section**

François Delerue, Afroditi Marketou,  
Vincent Reveillere, Mikhel Timmerman

### **Senior Editors**

Lucila Almeida, Tiago Andreotti, Camille Aynès,  
Cristina Blasi Casagran, Stephen Coutts, Michail  
Dekastros, François Delerue, Emma Linklater,  
Vincent Reveillere, Alba Ruibal, Jan Zglinski

### **Editors**

Zoe Adams, Birte Böök, Elias Deutscher,  
Leticia Diez Sanchez, Esther Drabkin-Reiter,  
Fabrizzo Esposito, Tessa Paci Innocenti, Betul Kas,  
Stavros Makris, Afroditi Marketou, Sergii Masol,  
Argyri Panezi, Stavros Pantazopoulos,  
Chloé Papazian, Veronica Pavlou,  
Theodosia Stavroulaki, Mikhel Timmerman,  
Dieneke de Vos, Raphaele Xenidis

## **Departmental Advisory Board**

Loïc Azoulay, Fabrizio Cafaggi, Dennis Patterson, Martin Scheinin

## **Website**

[www.ejls.eu](http://www.ejls.eu)

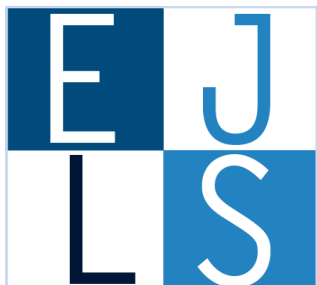
## **Submissions**

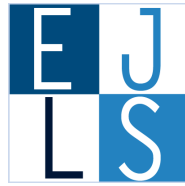
The European Journal of Legal Studies invites submissions from professors, practitioners, and students. In particular, we welcome articles demonstrating a comparative, contextual and interdisciplinary approach to legal scholarship. Articles should be submitted in electronic format to [subejls@gmail.com](mailto:subejls@gmail.com). If electronic submission is not practicable, please send a hard copy to:

The Editor-in-Chief  
European Journal of Legal Studies  
c/o EUI Department of Law  
Villa Schifanoia, Via Boccaccio 121  
50133 Florence – Italy

Footnotes should conform to The Oxford Standard for Citation of Legal Authorities, available for downloading from [www.law.ox.ac.uk/publications/oscola.php](http://www.law.ox.ac.uk/publications/oscola.php).

The name of the author and contact details should appear only on a separate cover sheet to facilitate objective, anonymous evaluation. The Journal is committed to multilingualism and accepts submissions in any European language within the competence of the Board.





European Journal of Legal Studies  
Vol. 7 No. 2 (Winter 2014)

TABLE OF CONTENTS

**EDITORIAL**

- Jan Zglinski*  
On Age and Legal Genius 1

**NEW VOICES**

- Guido Comparato*  
Challenging Legal Culture 5
- Joshua Andresen*  
Challenging the Perplexity over Jus in Bello  
Proportionality 18

**ARTICLES**

- Nuno Garoupa and Mariana Pargendler*  
Law and Economics Perspective in Legal Families 33
- Andreas Grimm*  
The European Court of Justice and the Myth of  
Judicial Activism in the Foundational Period of  
Integration through Law 56
- Maija Dalberg*  
'It is not its task to act as a court of fourth instance'.  
The Case of the ECtHR 77
- Nathalie Neumayer*  
Unjust Factors or Legal Ground? A Matter of Principle 109
- Stefano Bertea and Claudio Sarra*  
Foreign Precedents In Judicial Argument: A Theoretical  
Account 128
- Elisabetta Catelani and Elettra Stradella*  
Equal Opportunities and Legal Education: A Mainstream  
Perspective 163

## BOOK REVIEWS

*Marion Guerrero*

D Anagnostou (Ed), 'Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-Level European System.'

194

*Mihalis Dekastros*

W-G Ringe and PM Huber (eds), 'Legal Challenges in the Global Financial Crisis: Bail-outs, the Euro and Regulation.'

198

*Carlo Maria Cantore*

B De Meester, 'Liberalization of Trade in Banking Services – An International and European Perspective.'

202

## EDITORIAL: ON AGE AND LEGAL GENIUS

Jan Zglinski\*

Science's most famous cat was an oddity. Not only did she have the formidable capacity to be both dead and alive when put in a box with radioactive material, her master Erwin Schrödinger was, even at the tender age of 38, thought much too old to have 'created' her in the first place.<sup>1</sup> Theoretical physics was a young man's game at the beginning of the 20<sup>th</sup> century. Heisenberg was 25 when formulating the uncertainty principle, Einstein published his work on the photoelectric effect at 26, Bohr proposed the model of the hydrogen atom when 28. Quantum mechanics lived by the maxim: 'a person who has not made his great contribution to science before the age of thirty will never do so'.<sup>2</sup>

The relationship between age and genius has fascinated humankind for a long time. What seems to be clear is that age matters when it comes to creative and scientific output.<sup>3</sup> After a period of little or no creative output, our ingenuity peaks in our 30s and 40s before slowly, yet steadily, declining. What is less clear is how exactly age matters. Overall, the average age for great scientific contributions seems to have gone up. Formal education and the increasing wealth of information, coined the 'burden of knowledge' by Benjamin Jones, play a key role in this development. Yet, the age of genius varies strongly for different fields, a fact suggested to depend on the nature of the activity. Conceptual breakthroughs require less time than experimental ones. As a result, writers peak earlier than chemists.

Is law more like poetry or experimental physics then? There is no systematic data on age and 'legal genius'. This might partly be due to the absence of legal equivalents to the Nobel Prize or Fields Medal, which serve as core indicators for scientific success.

Equally likely, this empirical gap might be caused – as much as it might pain us – by the limited attraction of legal scholarship for the wider public,

---

\* Ph.D. Researcher (European University Institute), M.Jur. (Oxon).

<sup>1</sup> John Polkinghorne, *Quantum Theory - A Very Short Introduction* (Oxford University Press 2002) 19 et seq.

<sup>2</sup> Quote attributed to Albert Einstein. Somewhat ironically, Einstein himself could be seen to have violated his own principle by publishing what many hold to be his most significant contribution, the general theory of relativity, at the age of 37.

<sup>3</sup> For an overview over this field of research and some interesting insights that have informed this editorial, see Benjamin Jones, E.J. Reedy and Bruce A. Weinberg 'Age and Scientific Genius' (2014) NBER Working Paper 19866.

compared with fields such as physics, medicine and literature.

The work of some key figures in legal research in the 20<sup>th</sup> century suggests that we are a field of late-bloomers. Kelsen was 53 at the publication of the first edition of the *Pure Theory of Law* (79 at the publication of the better-known second edition), Hart was 54 when *The Concept of Law* came out and Dworkin 46 at the time of *Taking Rights Seriously*, his first major publication. The quality of legal scholarship, so it seems, grows with experience.

Yet, research lays bare one central advantage of the young age: the willingness to challenge the *status quo* more radically. The ability to depart from existing paradigms ‘may be greatest shortly after initial exposure to a paradigm, before it has been fully assimilated’.<sup>4</sup> It is this ability of young researchers that the EJLS has always sought to promote. As of this issue, we want to make this commitment even more visible by including a section entitled ‘New Voices’. Its objective is to give young talented scholars, those currently enrolled in a PhD program (and equivalent, including the J.S.D.) or in post-doctoral positions, the opportunity to put forward an original argument in a reader-friendly way.

Two contributions are featured in the first edition of ‘New Voices’. The authors’ task was simple yet demanding. We asked them to submit pieces that would challenge a particular claim, idea or statement. Anything from mainstream arguments in the literature, to current regulatory proposals or recent court decisions was accepted. To ensure conciseness and legibility, the length of contributions was limited to a maximum of 5,000 words. The general idea was to think essay rather than academic article, to be shorter and more provocative, to footnote only where necessary.

Guido Comparato, research associate at the European University Institute, targets the use of legal culture in EU law scholarship. The cultural dimension of law has been prominent in debates on the Europeanisation of national legal orders, notably with respect to private law. Going beyond black-letter approaches, analyses focused on legal culture promised to explain the difficulties the European project has faced in view of the diversity among Member States. Yet, might ‘the employment of the notion of legal culture [lead] to more orthodox outcomes than expected’ and ‘[impoverish] rather than [enrich] the legal debate’? Do cultural approaches aiming at explaining diversity in fact ‘presuppose homogeneity’?

Proportionality in *jus in bello* is the object of our second submission, authored by Joshua Andresen from Yale Law School. The almost universal

---

<sup>4</sup> *ibid*, at 20.

acceptance of proportionality has, somewhat paradoxically, gone hand in hand with the belief that it is largely impossible to apply the doctrine in this domain. The author deconstructs the ‘perplexity over proportionality’ and challenges the claim that lies at its core: that ‘the demand to balance military advantage and injury to civilians is extraordinarily difficult because we are asked to balance two incommensurable values’. Can proportionality, properly applied, help us with decisions that involve the weighing of complex factors, such as targeted killings, and ‘improve both the protection of civilian lives and the attainment of military goals’?

We welcome ‘New Voices’ submissions by authors interested for future issues of the EJLS.

### **GENERAL SECTION**

The articles featured in our general section are a natural progression of the above two contributions in terms of both originality and critical bite.

The issue starts off with two pieces that offer us fresh perspectives on themes with a long pedigree in legal scholarship. Nuno Garoupa and Mariana Pargendler analyse the question of legal families, an issue that has fascinated legal research for centuries, through the lens of law and economics. Andreas Grimm takes on the topic of judicial activism in the early days of the Court of Justice of the European Union. The argument put forward is bold: is the charge of activism a mere ‘myth’ resulting from a context-insensitive reading by political scientists?

The ‘fourth instance’-doctrine of the European Court of Human Rights is the object of Maija Dahlberg’s contribution. Although presented as homogenous by the Court, the doctrine is shown to be used in four greatly varying ways, some defensible, others not. The following two contributions deal with the question of legal exports. Nathalie Neumayer inquires into whether the English law of unjust enrichment could use a German-style absence of basis doctrine. Stefano Berteà and Claudio Sarra target the question of foreign precedents and provide some theoretical foundations in this respect. The issue concludes with a sharp analysis and, at the same time, powerful plea for change. Elisabetta Catelani and Elettra Stradella lay bare the gender biases inherent in Italian legal education and provide suggestions for progress.

We hope you will enjoy reading these as much as we did.

**MASTHEAD CHANGES**

It is the natural element of the cycle of life of a journal run by PhD students that people come and go. Yet, this issue stands out as it marks the departure of two editors that have left an important imprint on the EJLS. Emma Linklater, who has been the soul behind many of the recent changes within the journal, will step down from the position of executive editor. She will be replaced by Marita Szreder, who has already co-edited the current issue. Stephen Coutts, one of our most senior and dedicated editors, has also left the journal. Mikhel Timmermann has taken over Stephen's responsibilities as the Head of Section for European law. We wish Emma and Stephen the best of luck for their new projects and challenges.



**NEW VOICES:**  
**CHALLENGING LEGAL CULTURE**

Guido Comparato\*

*With a view to stimulating discussion regarding one of the most widespread methodological approaches in current studies and, in particular, in comparative private law, this paper challenges the notion of legal culture. Although focussing on the link between law and culture can be considered a heterodox approach that contributes to a better understanding of the dynamics of the legal system, this paper argues that the way in which legal culture is mostly understood in the discussions of comparative and European (private) lawyers is biased such that instead of shedding light on the deeper dynamics of the legal system it rather obfuscates them. This is mostly due to a static understanding of legal culture as national legal culture. Rather than erroneous, this conceptualisation appears as insufficient. This hints at the necessity of adopting a dynamic and pluralistic understanding of legal culture that escapes hegemonic consequences.*

**TABLE OF CONTENTS**

I. INTRODUCTION .....	5
II. ORIGINS AND EVOLUTION .....	7
III. PLURALISM AND HEGEMONY .....	9
IV. RISKS FOR LEGAL STUDIES .....	12
V. IMPLICATIONS .....	15

**I. INTRODUCTION**

In academic debates about the relationship between national and supranational law, one increasingly encounters the argument – either explicit or implicit – that the diversity of ‘legal cultures’ existing in various countries represents a constraint on either the feasibility or desirability of greater harmonisation and convergence of national legal systems. Laws are the direct manifestation of the culture of particular communities and as such are necessarily local constructions which should possibly be protected. According to that view, it makes little sense – and it can be even dangerous – to continue imposing regulations derived from the supranational level when it is clear that the cultural pluralism existing in

---

\* Research Associate, European University Institute, Florence.

different nations will necessarily lead to regulatory failure. In this sense, not only positive laws and the practices of legal operators differ, but even the cultural diversity of citizens impacts and indirectly shapes the law.<sup>1</sup> This approach, which is widely used in academic as well as political debates about the Europeanisation of law, is in reality built upon the broader comparative law concept of the impossibility of legal transplants and the legal sociological literature on the distinction between legal and social rules. Applied in the European context, which we can take here as a recurring and revealing example to give substance to more notional considerations, such an approach represents a strong and interesting reaction to the now traditional and ‘orthodox’ view among EU lawyers that law can be used to produce integration of legal systems and shape legal cultures<sup>2</sup> rather than depend upon them. That view poses virtually no conceptual limits on the possibilities of supranational law and tends to disregard its concrete impact in specific contexts. Indeed, the cultural argument has been of fundamental importance especially in the extensive discussions about the Europeanisation of private law, but re-emerges in different forms also in the debates among public lawyers about the ‘constitutional identities’ of the Member States, let alone in the political discourse. What are, in reality, distinct notions of legal culture and legal identity tend to merge in lawyers’ discussions so that references to legal culture in this sense entail a defence of cultural pluralism and the protection of one’s identity. To cope with this cultural critique, advocates of Europeanisation are most likely to either deny the cultural dimension of legal rules<sup>3</sup> or, less frequently, to show that there is also a European dimension to legal culture,<sup>4</sup> often with a view to support the Europeanisation project. More seldom are attempts to deconstruct the notion of legal culture itself, either in its national or European dimension.<sup>5</sup> This paper argues that the latter approach is much needed.

---

<sup>1</sup> For a wide range of contributions dealing with the different links between law and culture specifically in the European context, see T Wilhelmsson, E Paunio and A Pohjolainen (eds), *Private Law and the Many Cultures of Europe* (Alphen aan den Rijn: Kluwer 2007).

<sup>2</sup> S Weatherill, ‘Review of G Helleringer and K Purnhagen (eds) *Towards a European Legal Culture* (Baden-Baden: Nomos 2014)’ (2014) 51 *Common Market Law Review* 1851.

<sup>3</sup> O Lando, ‘The Principles of European Contract Law and the Lex Mercatoria’, in J Basedow (ed), *Private Law in the International Arena / Privatrecht in der internationalen Arena. Liber Amicorum Kurt Siebr* (The Hague: T.M.C. Asser Press 2000) 396.

<sup>4</sup> V Reding, *The European Law Institute – Tracing the Path towards a European Legal Culture*, speech delivered at the opening of the European Law Institute in Vienna, 17 November 2011; MW Hesselink, *The New European Legal Culture* (Deventer: Kluwer 2001).

<sup>5</sup> For a more critical account of the concept of legal culture, see R Michaels, ‘Rechtskultur’, in J Basedow, K Hopt, R Zimmermann (eds) *Handwörterbuch des*

To be sure, elaborated in scholarship we find a new deeper heterodox approach to analysing the dynamics of European legal integration that differs from the usual positivist and hierarchical approach. However, even if it is employed to challenge the general orthodox view of EU law, the new emphasis on cultural pluralism and the law is also at closer examination not a new and heterodox approach at all. Certainly, it represents a valuable broadening of the methodology most often employed in the study of law, which has traditionally been positivistic or dogmatic on the basis of the idea that there could be a 'pure' theory of law, which does not deny political elements that surround the legal rules but rather neglects them. Nevertheless, this short paper objects that even the employment of the notion of legal culture might lead to more orthodox outcomes than expected, paradoxically impoverishing rather than enriching the legal debate unless particular care is used when referring to the notion of 'legal culture'.

The aim of this paper is not to attempt to re-establish the supposed primacy of the traditional positivist view, which is focussed only on the law in the books and simplistically (or optimistically) assumes that the legal rule will be followed by its addressees producing social change. Nor does it suggest that law is a 'technical' matter independent of culture. Rather, the paper aims to critically address and reconstruct the only apparently heterodox approach focused on legal culture, suggesting that this relies on too static an understanding of culture. The main argument is that such use of legal culture presupposes homogeneity, de facto reproducing hegemony, which also explains its success as an argument to support particular legal-political projects. To show this, references to the evolution of the concept as well as to other disciplinary fields from which the notion is borrowed will be made throughout. The paper therefore initially sketches out the origins and development of the notion and later shows by means of simple examples how this concept might offer a misleading image of homogeneity within communities if interpreted in too static a way. It concludes by addressing the political potential of the references to that notion and suggests a dynamic and pluralist interpretation of culture as a more appropriate tool to describe the multifaceted interrelation between law and society.

## II. ORIGINS AND EVOLUTION

To support the claim that the success of the idea of legal culture is not evidence of the development of a new approach to law, it would be

sufficient to quickly turn an eye to (not only legal) history. This can also help us understand the ideological connotations of the approach as well as its limits. From history, becomes apparent that a wide range of adherents of extremely diverse methodological and political approaches to legal studies already employed similar arguments, from – most recently – critical scholars to – going back in history – communitarians, nationalists, romantics and all the way back to Aristotle at least. However, this does not yet tell us much, and it would be misguided to assume the continuity of an argument through such a long historical period without considering the changing context in which it developed and was employed. For this reason, if it were necessary to pin down a particularly revealing period in history that has most strongly shaped the current understanding of legal culture, one could certainly say that it was Romanticism. In the legal field, it was the German Historical School that mostly contributed to the development of the idea in its modern version,<sup>6</sup> soon hijacked by nationalist movements linking the specificity of cultural traits with the rising idea of the nation state.<sup>7</sup>

Historians (not *legal* historians) have already explained how the rising nation state has required a nationalisation of culture in the first instance, as a (very successful) attempt to delineate some characteristic features holding together its own citizens and differentiate them from those of other nations.<sup>8</sup> Such a cultural understanding of the nation, or the *Kulturnation* as is well exemplified in the German terminology has been promoted by various means, including the creation of a common national press, a common educational system and, even plainly an ‘invention’ of the national tradition.<sup>9</sup> In addition, law has been – and still is being – used as an instrument for the State to shape popular culture.<sup>10</sup> It is neither possible nor necessary here to expand upon the huge debates in political

<sup>6</sup> The deeper historical roots are revealed by J Schröder, ‘Zur Vorgeschichte der Volksgeistlehre. Gesetzgebungs- und Rechtsquellentheorie im 17. und 18. Jahrhundert (1992) 109 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung 1.

<sup>7</sup> G Comparato, ‘The Long Shadow of the Volksgeist, or: the Nationalist Dimension in European Private Law Debate’ (2012) 8 European Review of Contract Law 245; H Dedek, ‘When Law Became Cultivated: “European Legal Culture” between *Kultur* and Civilization’, in G Helleringer and K Purnhagen (eds) *Towards a European Legal Culture* (Baden-Baden: Nomos 2014) 351.

<sup>8</sup> AM Thiesse, *La création des identités nationales : Europe XVIIIe-XXe siècle* (Paris: Editions du Seuil 1999).

<sup>9</sup> EJ Hobsbawm, ‘Introduction: Inventing Traditions’ in EJ Hobsbawm and T Ranger (ed), *The Invention of Tradition* (Cambridge: Cambridge University Press 1983) 1.

<sup>10</sup> See, with a focus on the UK: S Hall, ‘Popular culture and the State’, in T Bennett, C Mercer and J Woollacott (eds), *Popular Culture and Social Relations* (Milton Keynes: Open University Press 1986) 22–49.

science discussing the question of whether culture was plainly invented or whether the nation state just institutionalised a series of existing cultural characteristics. To avoid chicken-and-egg discussions, it suffices here to say that a certain standardisation of culture has been produced by the establishment of the nation state.

In respect of the law, this leads to a particular result. If both the law and culture are nationalised, it is easy to establish their overlap in the form of a national legal culture. These events have led to the almost full alignment of legal culture with the 'national legal culture' that is today perceivable in most debates about the law. The increased complexity of the modern (more or less) globalised world and the amplified intersection of very different legal orders and populations have only favoured the re-emerging of these arguments in the legal discourse. In spite of its 'standardising' origin, (national) legal culture is now more often than not employed as an argument to protect diversity of identities, which are continuously threatened by new levelling supranational legislation, and in broader terms the idea of cultural pluralism.

What is more, the protection of cultural pluralism goes beyond a simple recommendation; it is rather a normative principle, although quite an unclear and controversial one, within the legal order of the European Union that is protected by the provisions of the Treaties concerning respect for the national identities of the Member States. Certainly, it would be interesting, although not particularly enlightening for our purposes, to insist on the particular political circumstances and concerns which surrounded the introduction in the Lisbon Treaties of those provisions that, at least symbolically, safeguard the constitutional specificities of the Member States. It would equally be interesting to consider how these provisions can de facto be contradicted by a series of other provisions in the same treaties.<sup>11</sup> However, the point here is rather that the respect of pluralism and *national* identities is also a normative requirement specifically in the European Union.

### III. PLURALISM AND HEGEMONY

At any rate, regardless of the contentious historical roots of that concept, one might certainly argue that the idea of legal culture as an expression of pluralism is a valuable achievement in European legal studies. Cultural pluralism would appear as the perfect starting point to reflect seriously about the law in a complex context such as the European one. The EU, we

---

<sup>11</sup> LFM Besselink, 'National and constitutional identity before and after Lisbon' (2010) 6 Utrecht Law Review 36.

might even say, is characterised on the one hand by an allegedly considerable diversity and, on the other hand, by harmonising tendencies which stand in contrast to that cultural diversity and that at any moment risk annihilating national competences. This being so, what is wrong about continuing the Romantic tradition and accepting that private law – possibly as well as other fields of the legal system – is an expression of a national legal culture, and subsequently employing culture as a methodological instrument to analyse the law? All in all, Romanticism is a magnificent intellectual movement – if we just content ourselves with linking legal culture only to that movement and arbitrarily decide to ignore its links with both earlier and later less marvellous political developments. This might all be true, however, there is something profoundly anti-pluralistic in this defence of cultural pluralism.

An emphasis on national legal culture, in contrast to what one might expect, coincides with a defence of cultural hegemony that disrespects deeper cultural as well as political, social and economic considerations that inspire legal rules. In this sense, national legal culture does not help us to reach a deeper understanding of the law, but might rather impede us from doing so. Quite disappointingly, legal science at least in Europe seems to have embraced a rather minimalistic and static notion of culture borrowed from mainstream anthropology, ignoring those trends in anthropology which have discussed the notion of culture in more critical terms or exposed some of its limits.<sup>12</sup>

The problem lies in our very conceptualisation of culture. In particular, this is mostly static and takes culture as self-contained, a ‘monad’ that is internally coherent and discernible from others’ ‘monads’ externally, without questioning its internal structure. This static conception, on the one hand, ignores links, parallels and interrelations between the different cultures represented as the necessary product of a specific historical process.<sup>13</sup> On the other hand, it denies the existence of a much deeper cultural pluralism within the category that we take for granted. It has already been mentioned in a previous section of this contribution that the definition of culture requires in the first place a process of standardisation; in other words, cultural homogenisation. This process might be spontaneous and endogenous to a particular community, or it might be

---

<sup>12</sup> See U Hannerz, *Transnational Connections. Culture, People, Places* (London: Routledge 1996).

<sup>13</sup> By the same token, Duve has recently criticised the general approach to European legal history which offers the ‘self-assurance’ that one of Europe’s major achievements is its legal culture, rather pleading for a new combination of a regional focus and global perspectives: T Duve, ‘European Legal History – Global Perspectives’, Max Planck Institute for European Legal History Research Paper Series, No. 2013-06.

authoritatively steered by elites or political institutions with a deliberate view to imposing a particular set of values. In this context, cultural homogeneity coincides with cultural hegemony. If this is true, the question that we should ask ourselves while employing the notion of legal culture is whether we are defending pluralism as we claim to be doing, or if we are in fact supporting hegemony.

In political philosophical terms, this aspect can be exemplified in the debates opposing the similar positions of liberal nationalists and communitarians. While the former highlights the homogeneity of the national category, the latter challenges it and rather pleads for policies of recognition. Nonetheless, communitarian policies of recognition in turn get challenged by those who argue that such policies embody the same hegemonic practice, disrespecting the values and the views of some categories of people within the recognised community. More specifically, the hegemonic potential of the concept can be highlighted referring to the feminist critique. Especially within the ambit of critical legal studies, feminist authors lamented that legal systems generally embody masculine values imposing its rules and ultimately values on women under the false representation of a homogeneity that in reality preserves the masculine standpoint. Criticising communitarian representations of multiculturalism, feminist scholars have highlighted the risk that policies of recognition in favour of specific minorities contribute to the oppression of women in those communities, making women vulnerable to the injustice perpetrated by the majority values of the group, so that such cultural policies ultimately work 'to reinforce some of the most hierarchical elements of culture'.<sup>14</sup>

Let us then continue employing the gender example to highlight this dimension, as well as the case of family law since its cultural dimension is quite self-evident and even allows us for some audacious historical cross-references, in contrast other fields of private law where the cultural and political dimension is often concealed under a veil of apparent technical neutrality. Gustav Hugo, generally regarded as the founder of the Historical School of Law (the most famous scholar of which was Savigny), made the observation that in countries where the fertility and beauty of women tend to diminish rapidly, polygamy tends to be more accepted in law. This vigorously illustrates the link between culture and the law.<sup>15</sup> Although the concrete link between this cultural factor and the law is not further discussed, one can imagine that polygamy and the beauty of women

---

<sup>14</sup> A Schachar, *Multicultural Jurisdictions. Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press 2001) 3.

<sup>15</sup> G Hugo, *Lehrbuch eines civilistischen Cursus*, 2.Band [1799] quoted by J Schröder, 'Zur Vorgeschichte der Volksgeistlehre' 31.

are correlated in Hugo's idea since polygyny would simply give the husband the possibility to have a wide range of wives of different ages so as to rapidly 'replace' the elder ones. Whatever the concrete reason might be, and even praising the efforts of Hugo to contextualise the law and relativize its underlying values, there is no doubt that by any standard this is to be regarded as quite a sexist practice. Accepting for a moment this explanation, it would clearly appear that this conceptualisation of the law – and in broader terms the legal cultures of all polygyny-permitting countries – completely embodies a point of view that coincides with the prevailing male perspective. The feminist critique would be to ask where the women's perspective is, and question whether we can be sure that what we have identified as legal culture of a country is not just the recognition on anthropological terms of a particular (male) point of view probably not necessarily shared by others (female)?

The aim of this example is certainly not to deem a particular legal regime or rule as more or less appropriate to represent pluralism or, on the other hand, to comply with some supposed universal value which should be embraced by all States. Rather, it aims to show that such a static representation of culture as referred to by a country and in its law in general terms might fail to describe other cultural, social and political dynamics within the society. This contributes to offering an image of homogeneity, while at the same time promoting hegemony. In the example considered, for instance, the existence of a specific and quite early feminist debate in countries where polygyny has been traditionally allowed by law indeed offers evidence of the more intricate and pluralistic dynamics of culture and family law, notably including the continuous cross-fertilisation of different cultures.<sup>16</sup>

Outside of the legal field, therefore, these and other considerations have been employed to challenge a certain conceptualisation of culture, as this 'operates in anthropological discourse to enforce separations that inevitably carry a sense of hierarchy'<sup>17</sup>, while cultural classifications grouped on the basis of nationality continue show several methodological flaws.<sup>18</sup>

#### IV. RISKS FOR LEGAL STUDIES

<sup>16</sup> Q Amin, 'The Liberation of Women' [1899] in *The Liberation of Women and The New Woman. Two Documents in the History of Egyptian Feminism* (Cairo: The American University 2001) 83.

<sup>17</sup> J Abu-Lughod, 'Writing Against Culture', in RG Fox (ed) *Recapturing Anthropology. Working in the Present* (Santa Fe: School of American Research Press 1991) 137.

<sup>18</sup> J Leerssen, 'Over nationale identiteit' (1988) 15 *Theoretische geschiedenis* 417-429.



Keeping in mind these reservations, and limiting our view to legal studies, we can perceive that this approach might lead to quite peculiar results that are plainly in contradiction with the initial expectation that the employment of the cultural argumentation might offer a heterodox alternative to the positivistic approach. Due to the way in which legal culture is employed as a tool to explain the rule, it often ends up offering de facto the allegedly anthropological justification for a positive rule, such that anthropology paradoxically pays lip service to legal positivism.

This explains in the first place why scholars, in attempting to elaborate new and more comprehensive categories than those usually proposed by the comparative lawyers often criticised for being positivistic and Western-centric, tend to re-propose those very same comparative law categories when they themselves catalogue legal cultures. They will, for instance, distinguish a German legal culture from a French legal culture, a common-law legal culture from a civil law legal culture<sup>19</sup> or, in broader terms, even Western legal culture from socialist legal cultures.<sup>20</sup> Again, a word of caution is needed: This is not to say those cultures do not exist or are wrong conceptualisations of legal diversity, just as it is impossible to say that there is no difference between German and French positive law or the civil-law and the common-law approaches are identical. The point is rather that such a notion of legal culture is of limited use for adding something to what we already know from the study of positive law, other than a certain kind of cultural justification for the status quo which reinforces a particular distribution of power within the community. Rather, culture can become a useful descriptive tool for comparative law when if it is viewed as a dynamic concept, as it might serve for instance to explain the historical continuation of a pre-existing positivistic characteristic. As an example, the extent to which the 'internal legal culture' that was widespread in the now extinct socialist legal family has left an impact in the legal culture of certain countries might be investigated, to show whether a certain kind of socialist legal culture survives the death of socialist legal regimes (although in this case we are more precisely in the field of tradition rather than the one of culture).<sup>21</sup>

However, the main difficulty lies not so much in the imprecision of general comparative categorisations (and this would honestly be quite an easy and banal criticism to make), but rather in the capacity of the emphasis on

---

<sup>19</sup> For instance, see P Legrand, 'European Legal Systems Are Not Converging' (1996) 45 *International and Comparative Law Quarterly* 52.

<sup>20</sup> For instance, see HW Ehrmann, *Comparative Legal Cultures* (London: Prentice-Hall 1976).

<sup>21</sup> R Mańko, 'Is the Socialist Legal Tradition "Dead and Buried"? The Continuity of Certain Elements of Socialist Legal Culture in Polish Civil Procedure', in T Wilhelmsson et al (eds), *Private Law and the Many Cultures of Europe* 83.

legal culture to obfuscate internal social dynamics. In other terms, the approach poses major problems in addressing the pluralism existing *within* the community. As stated, the standardisation of the national culture has historically been an instrument to promote national unity at the price of the repression of infra-national differences. Legal scholars like to compare law to language, which can be a particularly fitting example to exhibit the popular origin of the law. However, accepting this fitting comparison, another similarity should not be ignored, which is that policies of linguistic unification are an example of the tendency to repress minorities: Education systems in most newly unified countries promoted the standardisation of the national language, which necessarily entails a repression or at least marginalisation of local vernaculars. According to this viewpoint, it is immaterial whether this process happened violently through persecution of linguistic minorities, through the prohibition of employing the language, or more liberally through valuable school education in the common language because the practical result is always a hegemonic one. The very same process might impact countless cultural minorities and their ability to reflect their interests in the rules of the legal order.

Nonetheless, the example of linguistic minorities should not lead us to think that the question is just one of ethnic pluralism within a national state. Quite to the contrary, cultures and identities (a bit imprecisely assuming a certain degree of overlap between these concepts) can be of very different types: They can be ethnic, but may also be related to gender identity (as in the previous example), profession, social status and so on. This would obviously include also the important category of national identity. Each of these categories presents a set of ‘ways of doing things’<sup>22</sup>, as well as arguably a certain degree of homogeneity of preferences and interests.

This is exactly the kind of pluralism which tends to be neglected by a too static definition of culture understood in ‘geographical’ terms. If one considers more concretely the specific case of the construction of the category of ‘national legal culture’ it becomes particularly clear that such neglect is not an accidental side-effect of standardisation but most likely the deliberate objective of the representation of homogeneity within the national community. This was initially the suspicion of early socialists,<sup>23</sup> ie that the emphasis on national distinctiveness between the nineteenth and

---

<sup>22</sup> RE Goodin, ‘Conventions and Conversions, or, Why Is Nationalism Sometimes so Nasty?’ in R McKim and J McMahan (ed), *The Morality of Nationalism* (Oxford: Oxford University Press 1997) 95.

<sup>23</sup> PJ Proudhon, *Œuvres Choisies* (Paris: Gallimard 1967) 207.

the twentieth century could be an instrument to downplay social differences and ultimately weaken the labour movement which ideally aimed to unite workers beyond national borders. To put this concern more directly, as Anatole France famously stated speaking about the First World War: '*on croit mourir pour la patrie, on meurt pour les industriels*'.

## V. IMPLICATIONS

As for legal analysis, these considerations hint at the necessity of articulating further the category of legal culture as a general concept which covers a series of more specific and potentially different cultures. In the first sense, a fundamental distinction to be considered is the one between and internal and an external legal culture,<sup>24</sup> which in our context could be further constructed as a distinction between the professional and the societal legal culture. It is, for instance, completely justified to assume a much higher degree of homogeneity within the professional legal culture (the way in which legal operators think about the law) that has been authoritatively created through legal education, as compared to the societal legal culture which should on the contrary characterise a much wider and heterogeneous group of people. This latter is, indeed, made up of a series of further cultures, identities and interests, of disparate national but also social, political and economic nature. Admitting this plurality, it would be flawed to assume the absolute prevalence of any of these cultures, for instance that the 'national' segment will always be more important than a social identity. In the same way it would be erroneous to think that social identities will always be more important than national ones. As stated, a dynamic understanding of cultures and identities requires that their interaction, including conflicts and overlaps in specific cases,<sup>25</sup> should always be considered.

It is important to highlight that these dynamics interest the construction of any legal system and the establishment of any political power. From this point of view, although in the specific European context the cultural argument is most often employed in opposition to the possibility of achieving more legal Europeanisation, even references to a common European legal culture – together with the emphasis on a common European interest – might easily be flawed by the same ideological

---

<sup>24</sup> LM Friedman, *The Legal System. A Social Science Perspective* (New York: Russell Sage Foundation, 1975) 223.

<sup>25</sup> In a recent quite provocative paper on EU law, for instance, a distinction has been proposed between centre, periphery (as geopolitical coordinates building upon national ones), businesses and workers as categories encompassing different 'interests, demands or claims' which diverge or converge in concrete legal cases; D Kukovec, 'Law and the Periphery' (2014) *European Law Journal* DOI: 10.1111/eulj.12113.

preconceptions of legal culture when it refers to the nation or to other kinds of communities. In this sense, both at the local and at the supranational level references to common legal culture might easily respond to the very same proposition of promoting the edification of the community, in an attempt that with regard to the construction of the nation state historians have famously qualified ‘nation-building’ and that, in a broader context, we can refer to as ‘community-building’.<sup>26</sup>

What is then the bottom line of these considerations? That culture should be avoided as a term? That culture by itself does not exist, or is always an ideological construction, so that in the end, modifying Margaret Thatcher’s famous remark, it should be concluded that there is no such thing as ‘culture’, just individuals? At this point, also the critique of (legal) culture faces the risk of becoming ideological – an inherently libertarian proposition meant to delegitimise and loosen community ties leaving the individual alone with her own deconstructed identity, interests and self-centred rationality in a further globalising world where there is increasingly less space for the public sphere. To be sure, Hayek employed arguments to sustain the pluralism of society and its separation from the State<sup>27</sup> that paradoxically perfectly echo those now used by progressive thinkers in favour of ‘multiple identities’.<sup>28</sup> In this sense, the critique of national culture would have shifted from one end of the political spectrum to the other, turning from an argument initially employed by socialists against a capitalism-driven State to an argument to advance the neo-liberal liberation of the individual from her community and her inclusion in an increasingly less State-centred global economy.

Rather, what is necessary is to dissect more clearly the idea of legal culture, sidestepping its employment as just a rhetorical expression to cover quite different concepts justified by different political agendas or preconceptions. In order to avoid this, what appears necessary is that culture be rather explored in a dynamic and pluralistic way. At the same time, such a dynamic and pluralistic interpretation of legal culture can help to steer clear of the risk that the notion is employed in an even unconsciously hegemonic way, to support the status quo and justify the prominence position of that cultural segment that has already managed to implant its own values and interests in the legal system. In this sense,

<sup>26</sup> G Comparato, ‘Europe vs the Nation State in Private Law? Legal Cultures and their Community-building Function’, in G Helleringer and K Purnhagen (ed) *Towards a European Legal Culture* 329

<sup>27</sup> F.A. von Hayek, *Law, Legislation and Liberty. Vol.3. The Political Order of a Free People* (London: Routledge & Kegan Paul 1979), 140.

<sup>28</sup> A Sen, ‘Justice across Borders’, in P De Greiff and C Cronin (ed), *Global Justice and Transnational Politics* (Cambridge: The MIT Press, 2002) 42.

clarifying the title of this contribution, the goal here is not much to 'challenge legal culture' per se, but rather to challenge the static way in which this is too often employed, in an attempt to problematise it without necessarily discarding it.

**NEW VOICES:**  
**CHALLENGING THE PERPLEXITY OVER JUS IN BELLO**  
**PROPORTIONALITY**

Joshua Andresen<sup>\*</sup>

*Contrary to the common claim that jus in bello proportionality is an obscure and intractable principle of modern warfare, this paper shows that proportionality balancing has a central role to play in assuring efficient military operations with a minimum number of casualties. Military commanders can and should want to understand proportionality as a requirement to measure military advantage in terms of lives saved and direct their operations toward the most life-saving operations. The targeted killing context in particular highlights the advantage of making proportionality analysis a central component of military strategy in asymmetrical conflicts.*

**TABLE OF CONTENTS**

I. CHALLENGING THE PERPLEXITY OVER JUS IN BELLO	
PROPORTIONALITY .....	18
II. THE UNIVERSAL ACCEPTANCE OF PROPORTIONALITY .....	20
III. THE PERPLEXITY OVER PROPORTIONALITY .....	23
IV. UNDERSTANDING AND BALANCING MILITARY ADVANTAGE AND	
CIVILIAN LIVES .....	26
V. CONCLUSION.....	32

**I. CHALLENGING THE PERPLEXITY OVER JUS IN BELLO**  
**PROPORTIONALITY**

This paper calls into question the central thesis that is ubiquitous in discussions of *jus in bello* proportionality: that the demand to balance military advantage and injury to civilians is extraordinarily difficult because we are asked to balance two incommensurable values.<sup>1</sup> The most simple

---

<sup>\*</sup> Yale Law School.

<sup>1</sup> As Gabriella Blum has recently written: “Much has been written on the indeterminacy of the principle of proportionality and on the unworkable test of comparing the incommensurable values of military advantage and civilian lives.” Gabriella Blum, ‘On a Differential Law of War’ (2011)52 Harv. Int. Law J. 163, 189. See, eg Aaron Fellmeth, ‘The Proportionality Principle in Operation’, (2012)45 Israel L.R. 125, 127.

response to this claim would be to point out that the hallmark of legal practice today is balancing incommensurable values, e.g. privacy and free speech<sup>2</sup> or freedom of religion and national security.<sup>3</sup> Thus proportionality balancing cannot be *extraordinarily* difficult simply because it requires us to balance two incommensurable values. We balance incommensurable values all the time.

Such a response would be too facile, however, and would overlook the fact that there are, in fact, two theses embedded in the claim: that *jus in bello* proportionality imposes a particularly arduous burden and that it asks us to balance two incommensurable things. I want to show that both of these claims are false. Proportionality balancing *is* challenging, particularly as the state of theory now stands. However, unlike abstract values such as privacy, free speech, or religious freedom, proportionality asks us to measure and compare concrete things. If proportionality is approached as I will suggest it ought to be, it has the distinct possibility of being much more straightforward than other routine instances of legal balancing.

*Jus in bello* proportionality is all the more approachable when we recognise that its two prongs are far more commensurable than we might at first imagine. Preventing the loss of civilian life, injury to civilians, and damage to civilian objects is one of the central, if not the central, reasons for use of military force today. In a world where no state will use violent military force in the name of acquisition of territory or spoils, the only legitimate uses of force are defensive, to end conflict and restore peace and security. As the U.S. Army/Marine Corps Counterinsurgency Field Manual puts it, '[t]he moral purpose of combat operations is to secure peace.'<sup>4</sup> If we fight today to secure peace, then military advantage, particularly in the counterterrorism context, should be thought about explicitly in terms of preventing harm and saving lives.

Central to making proportionality analysis more concrete is showing that targeted killing and counterterrorism generally will be more successful if military advantage is approached in terms of saving lives. The traditional approach to thinking of military advantage in terms of depletion and attrition may have little or no place in the asymmetric conflicts fought against transnational terrorist networks where neither a peace treaty nor unconditional surrender is likely to be forthcoming. Indeed, attacks that temporarily deplete the enemy but also kill civilians or only low-level enemy

---

<sup>2</sup> Eg C-131/12 *Google Spain v AEPD*, decision of 13 May 2014, nyr.

<sup>3</sup> Eg *W Virginia State Bd of Educ v Barnette*, 319 US 624 (1943).

<sup>4</sup> U.S. Army/Marine Corps Counterinsurgency Field Manual 2006 [hereinafter COIN], 7-26.

combatants may have a negative military advantage by serving to bolster enemy ranks.<sup>5</sup> As the COIN Field Manual insightfully notes, some actions that ‘provide a short-term military advantage’ may actually ‘help the enemy.’<sup>6</sup> Identifying those military actions that will actually shorten conflicts and save lives requires a more intelligent approach to military advantage than attention to attrition and depletion can provide.

In the first part of the paper, I lay out the requirements of proportionality and show that nearly every nation, particularly those frequently involved in armed conflicts, has committed itself to *jus in bello* proportionality in treaty obligations, written the rule of proportionality into military manuals, and publically espoused adherence to proportionality. In the second part of the paper, I show that despite nearly universal recognition of proportionality as a central limitation on war, official legal assessments of proportionality characterise the rule as vague and indeterminate, effectively rendering proportionality an empty rule of warfare. In the third part of the paper, I set out an approach to proportionality that enables a more concrete application of the principle through a more rigorous approach to military advantage and the value of human lives. Once we see that military advantage can only be defined in relation to political goals, the value of a particular operation becomes much easier to measure and balance against harm to civilian lives. In conclusion, I discuss the extent to which the approach to proportionality sketched here can be applied more broadly to asymmetrical and conventional conflicts.

## II. THE UNIVERSAL ACCEPTANCE OF PROPORTIONALITY

The modern principle of proportionality was initially codified in the first Additional Protocol to the Geneva Conventions.<sup>7</sup> Article 51 prohibits attacks ‘which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military

---

<sup>5</sup> As U.S. State Dept. spokesperson, Richard Boucher, said over a decade ago: “Israel needs to understand that targeted killings of Palestinians don’t end the violence but are only inflaming an already volatile situation and making it much harder to restore calm.” Jane Perlez, ‘U.S. Says Killings by Israel Inflame Mideast Conflict,’ New York Times, 28<sup>th</sup> August 2001.

<sup>6</sup> COIN (n 4), A-28. See also A-37, 38.

<sup>7</sup> Many trace *jus in bello* proportionality to the Lieber Code, which allowed for “all direct destruction of life and limb of armed enemies, and of other persons whose destruction is incidentally unavoidable [...]” Instructions for the Government of Armies of the United States in the Field, Art. 15, prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln, 24<sup>th</sup> April 1863.



advantage anticipated.’<sup>8</sup> The principle of proportionality is a procedural requirement on those engaged in hostilities designed to temper the perceived demands of military necessity where civilian casualties can be anticipated. It presupposes the identification and distinguishing requirements of the principle of distinction<sup>9</sup> and adds an additional requirement to measure and compare the anticipated military advantage and anticipated civilian casualties.

The *jus in bello* requirement of proportionality has received almost universal acceptance, with 174 nations ratifying the first Additional Protocol and several non-ratifying nations, including the US and Israel, explicitly acknowledging their acceptance of proportionality as binding customary international law. Dozens of nations have taken the further step of directly writing the requirements of proportionality into their military manuals and rules of engagement.<sup>10</sup> For instance, the United States Air Force Doctrine Document, *Targeting*, states that:

The ‘law of war’ is a term encompassing all international law for the conduct of hostilities *binding* on the United States including treaties and international agreements to which the United States is a party, and applicable *customary international law*.<sup>11</sup>

The Air Force goes on to specify that ‘[t]argeting must adhere to the [law of war]’ which ‘rests on four fundamental principles that are inherent to all targeting decisions,’ among which are ‘proportionality’ and ‘distinction.’<sup>12</sup> Moreover, *Targeting* defines the ‘Role of the Judge Advocate’ as including ‘an affirmative duty to provide legal advice to commanders and their staffs that is consistent with the international and domestic legal obligations.’<sup>13</sup> Military lawyers are *required* to make a legal evaluation of distinction and proportionality before any strike. While commanders may override the judge advocate’s recommendation, commanders are still bound to adhere to the laws of distinction and proportionality.

<sup>8</sup> Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977, Art. 51(4) & 51(5)(b) [hereinafter: AP I]. Cf. AP I, Arts. 57(2)(a)(ii), 57(2)(b); the Rome Statute of the International Criminal Court Art. 8(2)(b)(iv).

<sup>9</sup> AP I Art. 48. See also Arts. 44(3), 48, 51(3), 51(5)(a), 52(2), 57(2)(a)(ii), 57(3).

<sup>10</sup> See the ICRC’s *Customary IHL*, ‘Practice Relating to Rule 14. Proportionality in Attack,’ available at [www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule14\\_sectiona](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule14_sectiona), accessed 12.01.2015.

<sup>11</sup> United States Air Force Doctrine Document, *Targeting*, 88. (emphasis added)

<sup>12</sup> *ibid.* The other two principles are military necessity and unnecessary suffering, or ‘humanity.’

<sup>13</sup> *Targeting* (n 11) 95.

The requirements set out in the Air Force's *Targeting* document have been echoed by U.S. officials. In April 2012, then Assistant to the President for Homeland Security and Counterterrorism, John Brennan, in his remarks on the U.S.'s counterterrorism strategy stated that '[t]argeted strikes conform to the principle of proportionality—the notion that the anticipated collateral damage of an action cannot be excessive in relation to the anticipated military advantage.'<sup>14</sup> In March 2010, then Legal Adviser to the U.S. State Department, Harold Koh, stated in his address to the American Society of International Law:

[T]he principles of distinction and proportionality that the United States applies are not just recited at meetings. They are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law.<sup>15</sup>

Given the nearly universal acceptance of proportionality and claim by the world's most active militaries that they diligently apply and respect it, we might expect to find rich and detailed accounts of precisely what proportionality demands. One of the most disturbing contradictions in discussions of proportionality today is that the nearly universal subscription to it as a fundamental law of armed conflict is coupled with the claim that its demands are fundamentally unclear and difficult or impossible to apply in practice. Thus the most extensive legal discussion of *jus in bello* proportionality, the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, found that '[t]he main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied.'<sup>16</sup> Unfortunately, the NATO Bombing Report is not exceptional in finding the requirements of proportionality essentially vague and open to divergent interpretations.<sup>17</sup> As we will now see, proportionality has appeared vague and indeterminate primarily because the two elements it requires us to measure and balance, military advantage and civilian lives, have never been subjected to rigorous analysis.

---

<sup>14</sup> John O Brennan, 'The Ethics and Efficacy of the President's Counterterrorism Strategy,' remarks at the Woodrow Wilson International Center for Scholars in Washington, DC on 30<sup>th</sup> April 2012.

<sup>15</sup> Harold Hongju Koh, 'The Obama Administration and International Law,' remarks at Annual Meeting of the American Society of International Law, Washington, DC 25<sup>th</sup> March 2010.

<sup>16</sup> Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, [48-50].

<sup>17</sup> *ibid*, [50].

### III. THE PERPLEXITY OVER PROPORTIONALITY

The two most extensive legal discussions of proportionality stand in sharp contrast to the widespread affirmative commitment to proportionality, suggesting that it is not much more than a legal fiction. The NATO Bombing Report describes the problem thus:

It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.<sup>18</sup>

In addition to locating the difficulty in the purported incommensurability of military advantage and civilian lives, the Report identifies a number of factors that remain under-theorized, but necessary, for assessments of proportionality. These include how to value military advantage and civilian casualties, how narrowly the assessment should be made in time and space, and to what extent a commander has an obligation to expose his own forces to danger in order to limit civilian casualties.<sup>19</sup> Unfortunately, the Report makes no attempt to resolve any of these questions by formulating legal standards or tests. Rather, the Report effectively throws up its hands and offers only the platitude that “[t]he answers to these questions are not simple. It may be necessary to resolve them on a case by case basis, and the answers may differ depending on the background and values of the decision maker.”<sup>20</sup>

The lack of definite criteria by which to evaluate the proportionality of an attack is also reflected in the recent German *Fuel Tankers* case. The case arose after a German colonel ordered an airstrike on two fuel tanker trucks that had been stolen by members of the Taliban in Afghanistan. By the time the trucks were bombed, however, the Taliban had abandoned them and the tanker trucks were surrounded by civilians syphoning off fuel for their own use. As a result, the bombs killed or severely injured more than one hundred civilians. Attempting to determine whether the attack on the tanker trucks was proportionate, the German Federal Court of Justice found that:

Even if the killing of several dozen civilians would have had to be

---

<sup>18</sup> *ibid*, [48].

<sup>19</sup> *ibid*, [49].

<sup>20</sup> *ibid*, [50].

anticipated (which is assumed here for the sake of the argument), from a tactical-military perspective this would not have been out of proportion to the anticipated military advantages. The literature consistently points out that *general criteria are not available for the assessment of specific proportionality because unlike legal goods, values and interests are juxtaposed which cannot be “balanced.”* Therefore, considering the particular pressure at the moment when the decision had to be taken, an infringement is only to be assumed in cases of *obvious excess* where the commander ignored any considerations of proportionality and refrained from acting “honestly,” “reasonably,” and “competently.” This would apply to the destruction of an entire village with hundreds of civilian inhabitants in order to hit a single enemy fighter, but not if the objective was to destroy artillery positions in the village. There is no such obvious disproportionality in the present case. Both the destruction of the fuel tankers and the destruction of high-level Taliban had a military importance which is not to be underestimated, not least because of the thereby considerably reduced risk of attacks by the Taliban against own troops and civilians. There is thus no excess.<sup>21</sup>

The Court rehearses the common refrain that proportionality cannot be assessed in specific instances because proportionality asks us to balance two incommensurable values. It goes on to draw the logical inference that proportionality is an all but empty requirement that would be violated only where a commander appears to ignore proportionality altogether. Given the claim that proportionality is essentially vague and indeterminate, it is difficult to understand why it would impose any legal requirement on commanders at all. It is thus particularly surprising that the Court unequivocally finds not only that there was no excessive civilian casualties in the bombing of the fuel tanker trucks, but that there are other clear cases in which civilian casualties could be judged as excessive or justified.

There are clearly several elements of the *Fuel Tankers* case that do not add up. Aside from the obvious result of reducing disproportionate attacks to wholly indiscriminate attacks and thus making the proportionality requirement superfluous, a legal system that routinely balances incommensurate values in other contexts seems to overstate the hardship of balancing military advantage and civilian casualties.<sup>22</sup> As we have already

<sup>21</sup> Germany, Federal Court of Justice, the Federal Prosecutor General, *Fuel Tankers* case, Decision, 16<sup>th</sup> April 2010, 66 (internal citations omitted; emphasis added).

<sup>22</sup> Among some of the well known cases from the German Constitutional Court are BVerfGE 7, 198 (the “Lüth”-decision): balancing free speech vs. “right to

seen, even if military advantage and civilian casualties have no common denominator, there is no reason to think they could not be balanced in the way that other apparently incommensurable values are balanced in constitutional rights cases. Second, the opinion conflates the legal standard of proportionality with the evidentiary requirements of holding someone criminally liable for its violation. While it may be right to think that criminal liability should be reserved only for the most egregious violations of the law, there is no reason to think that the criteria of criminal liability define the threshold of proportionality violations. There may well be a range of violations of proportionality for which damages or reparations rather than criminal liability is the appropriate response.<sup>23</sup>

Perhaps the most troubling aspect of the *Fuel Tankers* judgment is that, despite having abjured the possibility of assessing proportionality in specific cases, the court is quite prepared to pronounce both on the case at hand and its own hypotheticals. But here it is not at all apparent on what principles or criteria the court is relying. What makes bombing a village to kill a sniper excessive? What if the sniper reliably could be anticipated to kill hundreds of soldiers and civilians in the coming months? Likewise, what makes the court so sure that the destruction of artillery positions would warrant killing hundreds of civilians in the village? It seems the court is relying on the vague notion that artillery are generally capable of more destruction than a single sniper. That seems reasonable enough. The question, however, is what makes the killing of hundreds of civilians excessive in one case but not in the other. Here the court seems to resort to no more than a vague feeling. We do not know why, but we are convinced killing hundreds of civilians to kill a sniper is disproportionate. Likewise, we do not quite know why, but we might more readily accept the same number of civilian deaths to eliminate artillery positions. Under its 'vague feel' standard, the court suggests, only 'cases of obvious excess' could allow us to infer that the commander failed to fulfill the minimal requirements.

The problem with this approach is not only that it lowers the bar of proportionality to making a mere consideration rather than an actual assessment, it also renders entirely opaque just how cases of obvious excess can be identified. The Court offers no account of what would make one attack clearly excessive and another not. There is thus no way to assess its

---

personality"/personal honour; BVerfGE 90, 145 ("Cannabis-Urteil"): balancing general liberty to consume drugs vs. public health; and BVerfGE 104, 337 (on halal slaughter of animals): balancing religious freedom vs. animal rights.

<sup>23</sup> See 'Basic Principles and Guidelines of the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law.' General Assembly Resolution 60/147 (16<sup>th</sup> December 2005).

ultimate finding that the death or severe injury of over one hundred civilians in the bombing of two stolen fuel tanker trucks exhibited ‘no excess.’ Although neither the German military nor the government admitted wrongdoing, the government did subsequently agree to a settlement of roughly \$5,000 to each victim’s family.<sup>24</sup> It would thus seem, at the very least, that the German government felt it made a mistake in assessing the relative value of military advantage and civilian casualties. Presumably, if military commanders had known the tankers were abandoned by the Taliban and surrounded by civilians, they would have called off the airstrike. But the Court suggests that even if several dozen civilian casualties had been anticipated, the strike still would not have violated proportionality. Yet the Court offers no way to even begin to draw the line between cases of ‘obvious excess’ and cases of ‘no excess.’

Military commanders can and should want to do better. War will be fought more successfully and efficiently if military advantage is well articulated and enemy civilians are not disproportionately harmed by attacks. In the remainder of this paper I want to show how the values of military advantage and civilian casualties can be analysed and balanced.

#### **IV. UNDERSTANDING AND BALANCING MILITARY ADVANTAGE AND CIVILIAN LIVES**

As we have seen, *jus in bello* proportionality prohibits attacks

[W]hich may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.<sup>25</sup>

Proportionality is a principle designed both to protect civilians in armed conflict and to foster accountability by establishing a mechanism that guides military commanders to take account of both anticipated civilian casualties and military gains before conducting an operation. Military forces are thus barred from undertaking military operations absent some (quantifiable) assessment of what is at stake in the operation itself. As with military necessity, when the survival of a state is truly at issue, as was arguably the case for many European nations during World War II,

---

<sup>24</sup> Matthias Gebauer, ‘Aftermath of an Afghanistan Tragedy’ (Spiegel Online International) <[www.spiegel.de/international/germany/aftermath-of-an-afghanistan-tragedy-germany-to-pay-500-000-for-civilian-bombing-victims-a-710439.html](http://www.spiegel.de/international/germany/aftermath-of-an-afghanistan-tragedy-germany-to-pay-500-000-for-civilian-bombing-victims-a-710439.html)> accessed 15.12.2014.

<sup>25</sup> AP I, Art. 51(4) & 51(5)(b).

anything that weakens the military capability of the enemy could bolster military advantage. However, outside of a 'total war' where the survival of a nation is not seriously in question, we must know what the goals of the use of force are in order to know what serves military advantage. In the age of the U.N. Charter, uses of military force are supposed to be for the purpose of restoring peace and security.<sup>26</sup> As is particularly clear for targeted killings in counter terrorism operations, the elimination of terrorist threats is for the purpose of saving lives. A strike that merely damages the enemy but has no anticipated effect of saving lives or restoring peace and security may not have any positive military advantage. Because the military advantage of a targeted killing is fundamentally linked to saving lives, I will argue that what at first appears to be a balancing of two incommensurable values, military advantage and excessive civilian casualties, actually has a common denominator at least in cases of targeted killing, if not in most conflicts today.

Before looking more closely at the two prongs of proportionality, it will be useful to clarify some of its technical aspects. First, actual results are not what is in question: 'The legal question is the relationship between expected harm and anticipated advantage in the operation as planned, not that which eventuated.'<sup>27</sup> Second, proportionality analysis is based on a reasonableness standard. As the ICTY held in *Galić*, the question is 'whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.'<sup>28</sup> Third, giving an account of the anticipated military advantage and civilian casualties depends on having already identified and distinguished military from civilian targets. The military target must then be connected to a military advantage by giving a credible account of how a particular attack, such as an attack on a line of communication, will yield a concrete military advantage. While giving a credible explanation in a conventional conflict may be relatively straightforward, targeted strikes in

---

<sup>26</sup> This is not to say that the many other coercive measures deployed in international relations today are or should be guided primarily by considerations of peace and security. A variety of 'carrots' and 'sticks' may be used, for instance, in economic trade negotiations or environmental treaty negotiations, as well as for direct peace and security interests. However, when military force is deployed, with its immediately destructive and violent effects, it is acceptable today only when peace and security interests are directly at stake. Thus military force for economic gain, or to coerce another state into joining an environmental treaty, or even to coerce a state into joining a sanctioning regime, is fundamentally unacceptable.

<sup>27</sup> Michael Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance,' 50 Va J Intl L 795, 825 (2010).

<sup>28</sup> Case No. IT-98-29-T *Prosecutor v Galić*, Judgement and Opinion, [58] (ICTY, 5<sup>th</sup> December 2003).

a counter-terrorism operation do not adhere to the same logics of depletion and attrition. Killing one terrorist may well spawn two new ones, particularly if injuries to civilians and minors are involved.<sup>29</sup> The U.S. military states the new approach succinctly in their 2006 Counterinsurgency Field Manual:

[T]he number of civilian lives lost and property destroyed needs to be measured against how much harm the targeted insurgent could do if allowed to escape. If the target in question is relatively inconsequential, then proportionality requires combatants to forego severe action, or seek non-combative means of engagement.<sup>30</sup>

As with counterinsurgency, a different approach to proportionality is needed in the targeted killing context, one that accounts for the anticipated lives saved and lives lost on each side.

Once military targets have been identified and expected civilian casualties assessed, expected military advantage must be weighed against civilian losses. As we have seen, many practitioners and scholars presume that any hope for a rigorous balancing of military advantage and civilian losses necessarily gives way to a vague assessment of incommensurables. For example, Michael Schmitt argues that it is wrong to understand proportionality analysis as balancing. He explains that the test calls us to focus on excessiveness in order to

[A]void [...] the legal fiction that collateral damage, incidental injury, and military advantage can be precisely measured. Ultimately, the issue is reasonableness in light of the circumstances prevailing at the time.... and nothing more.<sup>31</sup>

Schmitt's analysis is misleading, particularly in the context of modern warfare. It is true that civilian casualties and military advantage can only be estimated using methods and criteria that must ultimately be judged for their reasonableness. However, modern technology and data analysis can and should be employed to enable proportionality analysis that rests on more than a vague feeling of the commander. For example, given the hundreds of drone strikes carried out in the last decade, data on civilian casualties, militant casualties, threats avoided, and increases or decreases in enemy numbers can and should be brought to bear on proportionality

<sup>29</sup> Gabriella Blum and Philip Heymann refer to this phenomenon as the 'Hydra effect.' See 'Law and Policy of Targeted Killing,' (2010) 1 Harv Nat'l Sec J 145, 165.

<sup>30</sup> COIN (n 4), [7-32].

<sup>31</sup> Michael Schmitt, *Essays on Law and War at the Fault Lines* (Springer 2012), 190.



assessments. Doing so will not only enable more rigorous compliance with proportionality, it will also enable militaries to use force more effectively. Given limited resources and budget constraints, more effective use of force through data-driven assessment of military advantage should be attractive to any military.

As the discussion thus far has sought to highlight, proportionality analysis has been notorious for its difficulty largely because we lack a systematic approach to assessing military advantage and the value of civilian lives. As with any hard problem, much of the difficulty can be mitigated by identifying the component variables and understanding how they interact. In the case of military advantage, we can identify three central variables. First, the anticipated military advantage must be measured in terms of the value of eliminating the target in question. If, say, the target is Hitler and the data show that killing him will likely shorten the conflict considerably and save hundreds of thousands of lives, then killing him will have very significant military advantage. Second, the anticipated military advantage must be adjusted for likelihood of success. If the advantage of killing Hitler by aerial bombardment during WWII would have been great, but the likelihood of success miniscule, then the assessment of *anticipated* military advantage must be adjusted accordingly. That is, one cannot assess anticipated military advantage based on the unrealistic presupposition of 100% success rate for an operation. Third, the anticipated military advantage should be assessed on a scale of anticipated opportunity from unique or very limited, to highly repeatable. Unique opportunities to strike a military target will have greater military advantage than strike opportunities that are standing or which are anticipated to recur frequently in the future.

An assessment of military advantage that takes each of these three variables into account will enable a reliable measure of how many lives are likely to be saved by carrying out a particular strike. Moreover, accounting for these variables should not place any additional burden on military targeting than what is already accepted. The language surrounding U.S. targeted killing, for example, is replete with references to 'high value targets,' assessments of uniqueness of opportunity, and a recognition that not all strikes will be successful. By making these valuations explicit in the assessment of military advantage, commanders will have a more concrete sense of the lives at stake in the choice of targets and be able to channel their resources most effectively.

The valuation of civilian casualties requires at least as much clarification as the valuation of military advantage. Focusing just on civilian deaths for the moment, it is a daunting task to assess the value of human lives. It is

helpful to bear in mind, however, that the actors bound by proportionality will be, in principle, engaged in defensive war designed ultimately to save civilian lives and property. Given that the intent of defensive war is protection of a state's own people, there are two relatively straightforward principles that should govern proportionality assessments. The first is an adaptation of crude utilitarian principles that sidesteps a direct valuation of human life and proceeds directly to the weighing of relative outcomes. Given that military targeting is designed to weaken the enemy and bring hostilities more quickly to a close, commanders should ask how many lives the strike in question can be anticipated to save by bringing the conflict to a swifter end or by eliminating a terrorist threat likely to harm fellow civilians or military personnel. I acknowledge that in many instances such a calculation may only be made with limited certainty and approximation. However, in the targeted killing context, an assessment of the number of lives saved by eliminating a particular threat is essential to identifying and prioritizing the most significant threats. Moreover, in many instances such a calculation will not be prohibitively difficult. For a state engaged in a defensive war, data on rates of their own civilian and military casualties resulting from the armed conflict should be readily available. The anticipated military advantage should, in turn, relate to some assessment of the length of time the conflict is likely to be shortened by the strike, adjusted for likelihood of success. The consequent shortening can then be compared to the rates of civilian and military deaths. Thus on a crude utilitarian calculation, if the anticipated shortening of the conflict would save 20 civilian and military lives (at present rates of loss), then it would be excessive to kill 21 or more civilian lives in the process. Thus, if 21 or more civilian deaths are anticipated, the rule of proportionality in this case would dictate abandoning the strike.

The first utilitarian principle that I have outlined is a good starting criterion, but may give way to bias toward one's own civilians or military personnel and a desire to shift the risk onto foreigners with whom we feel no relation. The principles of distinction and proportionality are supposed to check those biases. It is for that reason that we must recall what lies at the basis of protecting civilian lives. Just as we no longer embrace the 'Napoleonic dictum that soldiers "are made to be killed,"'<sup>32</sup> we are no longer supposed to embrace the total war doctrine that civilians in enemy territory can be sacrificed en masse to save our fellow civilians. Thus, I want to suggest that at the basis of the law of war today is recognition of the inherent value, or dignity, of all human lives. We do not seek to save lives because they are our own, a logic that would apply better to cattle

---

<sup>32</sup> Larry May, 'Jus Post Bellum Proportionality and the Fog of War,' (2013)24 EJIL 315, 321.

than to humans today. Rather we seek to save lives because we recognise their inherent dignity. As such, the second principle that should govern the assessment of loss of human life in the proportionality calculation is an adaptation of the Golden Rule that also sidesteps a direct valuation of life and instead focuses on the targeting community's own assessment of acceptable civilian death. There are at least two important implications of this principle. First, as in the utilitarian calculus, those contemplating the strike are required to value the lives of enemy civilians to the same extent that they value the lives of their own civilians and military personnel. What this means is that we should not understand any opposition between protecting one's own civilians and protecting other civilians. Following this logic, the loss of two enemy civilians to save a single civilian or military person is disproportionate. Second, the Golden Rule requires the attacking force to put themselves in the shoes of those on the receiving end and ask whether they would abide such an attack as legitimate. The purpose of such self-assessment is not simply to act as a check on excessive uses of force and the discounting of enemy civilian lives in relation to the lives of fellow citizens. Adhering to these principles is the only way to systematically abide by the principle of proportionality. For if military advantage is ultimately measured in numbers of lives saved, a coherent determination of excessive civilian casualties from an attack can only take place if foreign civilians are valued equally with fellow civilians and military personnel. The reason that the lives of fellow and foreign civilians should be valued equally is because the value of their lives derives from a feature common to both, ie their dignity, and not secondary considerations of citizenship or allegiance. Citizenship by itself, whether fellow or foreign, tells us nothing about whether we should guard the life of the person who possesses it. Because respect for life is both more fundamental and universal than citizenship and rests on the peculiarly human attribute of dignity, each life, whether fellow or foreign, should be valued equally.

Beyond its usefulness in helping to clarify how lives should be valued, the further advantage of adopting these principles is that it forces military strikes to be contemplated in terms of actual outcomes in relation to the conflict at hand. Commanders should ask whether and by how much contemplated actions will shorten the conflict and save lives. The great advantage of this approach to proportionality is that it defines military advantage concretely, and does so such that military advantage and civilian casualties can be commonly measured in lives saved and lost.

I have argued that once military targets have been properly identified and distinguished from civilian targets, the military advantage of striking those targets should be assessed in terms of what can be reasonably claimed to shorten a war and save lives. Requiring an explicit focus on saving lives,

particularly where enemy civilian lives are valued equally with fellow citizen lives, achieves the purposes of protecting civilians in conflict, holding parties to conflicts accountable for their actions, and enabling military commanders to direct their focus on the most valuable targets and thereby fight more effectively.

## **V. CONCLUSION**

My focus on targeted killing highlights the extent to which proportionality analysis is centered on the common denominator of saving lives and can be carried out in an intelligent, data-driven manner. Because targeted killing consists of a pre-planned attack in a particular place against specific persons, a great deal of information can be assessed that may not be available 'in the heat of battle.' Targeted killings thus allow a more accurate application of proportionality supported by greater intelligence information. The fact that proportionality can be assessed more carefully and on the basis of more data in the targeted killing context does not, however, invalidate it as a model for more complex contexts such as asymmetrical conflicts or conventional wars. Although proportionality assessments in these other contexts may have to be made on the basis of less available information, the process and approach I have outlined should still serve to improve both the protection of civilian lives and the attainment of military goals. Every military should be interested in more effectively eliminating enemy threats and protecting and saving lives. By evaluating military advantage and proportionality in the light of all of the data at its disposal, militaries will fight shorter conflicts with fewer civilian casualties.

# A LAW AND ECONOMICS PERSPECTIVE ON LEGAL FAMILIES

Nuno Garoupa and Mariana Pargendler\*

*The relationship between comparative law and the field of economics is increasingly important, but controversial. In the legal origins literature, economists have drawn from comparative law scholarship to suggest that common law systems may be more conducive to financial and economic development than civil law systems. Yet comparativists have been skeptical of the use of legal families to explain economic outcomes. After reviewing the discussion of legal families in the disciplines of comparative law, on the one hand, and economics, on the other, we conclude that a more nuanced approach is advisable. At the same time, we urge comparativists to engage in this debate more actively.*

Keywords: Legal families, Civil law, Common law, Law and economics, Legal origins theory.

## TABLE OF CONTENTS

I. INTRODUCTION.....	33
II. LEGAL FAMILIES.....	37
III. THE CRITIQUES TO THE LEGAL ORIGINS THEORY.....	43
IV. THE LAW AND ECONOMICS OF LEGAL FAMILIES.....	47
V. FINAL REMARKS.....	53

## I. INTRODUCTION

The discussion about the relative comparative advantages of civil law over common law and vice-versa, or statutory law over judge-made law or vice-versa, has a long intellectual pedigree. From Sir Fortescue's 1475 opus to Jeremy Bentham, Max Weber, and Friedrich Hayek, scholars have presented competing views about the benefits of these different systems of legal adjudication and decision-making.<sup>1</sup> Both the U.K. and the U.S

---

\* Nuno Garoupa, University of Illinois (USA) and Mariana Pargendler, FGV (Brazil). We are grateful to the anonymous reviewers from EJLS for helpful suggestions. The usual disclaimers apply.

<sup>1</sup> See Sir J Fortescue, *De Laudibus Legum Angliae (In Praise of the Laws of England)* (CUP 1825), defending the superior properties of English law compared to Roman law); J Bentham, 'Law as It Is', in J Browning (ed), *The Works of Jeremy Bentham*, vol. 5 (William Tait 1843), criticizing the unpredictable and arbitrary character of decisions by common law judges); M Weber, *Economy and Society: An Outline of Interpretive*

witnessed a significant and intense debate over the advantages of codifying the common law in the nineteenth century.<sup>2</sup> In the last decades, however, a series of empirical works has reignited this debate by providing new evidence that the common law system is more conducive to the development of financial markets – and perhaps even to economic growth – than the civil law system, especially that of French origin.<sup>3</sup> Although highly controversial, this perspective has become popular in academia as well as in policy circles (in particular, under the auspices of some programs associated with the World Bank) under the designation of “legal origins theory.”<sup>4</sup>

The literature on legal origins sought to contribute to the understanding of the relationship between law and economic development. Inaugurated in the mid-1990s by economist Andrei Shleifer and his co-authors (which came to be known by the acronym LLSV), the originality of this line of work was twofold.<sup>5</sup> First, the authors employed quantitative methods to compare a multitude of legal systems to a greater extent than their

---

*Sociology*, vol. 1 (University of California Press 1978), attributing the persistence of the common law in England to special interest pressure from lawyers’ guilds, despite the “rational form of Roman law” and the “technically superior training of Roman-law jurists”; F Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Routledge & Kegan 1973): “the ideal of individual liberty seems to have flourished chiefly among people where, at least for long periods, judge-made law predominated”.

<sup>2</sup> See discussion by N Garoupa and A P Morriss, ‘The Fable of the Codes: The Efficiency of the Common Law, Legal Origins and Codification Movements’ (2012) 5 *University of Illinois Law Review* 1443-1497.

<sup>3</sup> For a review of this literature, see R La Porta, F Lopez de Silanes and A Shleifer, ‘The Economic Consequences of Legal Origins’ (2008) 46(2) *Journal of Economic Literature* 285-332. Even though this literature has identified correlations between legal origin and a number of regulatory and economic outcomes, the link between legal tradition and economic growth is certainly more tenuous. Paul Mahoney, the author of the main study identifying a direct relationship between legal origin and economic growth has backed off from this claim in subsequent work. See P Mahoney, ‘The Common Law and Economic Growth: Hayek Might Be Right’ (2001) 30(2) *Journal of Legal Studies* 503-25, finding that “common-law countries experienced faster economic growth than civil law countries during the period 1960-92”. Cf see D Klerman, P Mahoney, H Spamann, and M Weinstein, ‘Legal Origin or Colonial History?’ (2011) 3(2) *Journal of Legal Analysis* 379-409, finding that “that the identity of the colonizer is indeed a better predictor of post-colonial growth rates than legal origin”.

<sup>4</sup> See, among others, V Grosswald Curran, ‘Comparative Law and Legal Origins Thesis: [N]on Scholae Sed Vitae Discimus’ (2009) 57 *American Journal of Comparative Law* 863-80.

<sup>5</sup> For the first and most-cited work in this literature, see R La Porta, F Lopez de Silanes, A Shleifer and R Vishny, ‘Law and Finance’ (1998) 106(6) *Journal of Political Economy* 1113-150.

predecessors.<sup>6</sup> Second, LLSV relied heavily on the categories devised by comparative law scholars to overcome the endogeneity problem that plagues most attempts to determine the causal relationship between law on the one hand, and economic outcomes on the other. That is, in view of the statistical correlation (as shown by many studies) between “effective” legal institutions and economic development, one may be tempted to conclude that law causes economic development.<sup>7</sup> However, the reverse is equally plausible, with effective legal institutions being a superior good whose desirability increases as countries become richer.<sup>8</sup>

In LLSV’s model, legal rules and institutions derived from certain legal families, which, in turn, resulted from involuntary processes of conquest and colonization that took place in the distant past.<sup>9</sup> Legal families could therefore be deemed to be exogenous, which permitted the authors to conclude that legal institutions had a causal impact on economic outcomes, and not the other way around.<sup>10</sup> Although the first studies in this literature used legal families as an instrumental variable in two-stage regressions, later studies abandoned that approach, as they increasingly understood that legal families had a direct and independent effect on the variables of interest.<sup>11</sup>

---

<sup>6</sup> For a discussion of the benefits and pitfalls of quantitative methods, see H Spamann, ‘Large-Sample, Quantitative Research Designs for Comparative Law?’ (2009) 7(4) *American Journal of Comparative Law* 5797-810. A recent survey summarizes forty-nine scholarly articles on this matter (with around two-thirds proposing empirical evidence to support the legal origins claim; G Xu, ‘The Role of Law in Economic Growth: A Literature Review’ (2011) 25 *Journal of Economic Surveys* 833-871).

<sup>7</sup> There are in the literature significant controversies concerning the concept and measurement of “effective” institutions.

<sup>8</sup> See, among others, D Klerman, ‘Legal Infrastructure, Judicial Independence, and Economic Development’ (2007) 19(2) *Pacific McGeorge Global Business & Development Law Journal* 427-434.

<sup>9</sup> R La Porta et al. base their approach to legal systems on Alan Watson’s theory of legal transplants. Their influential article on “Law and Finance” begins by citing Alan Watson and taking as its starting point “the recognition that laws in different countries are not written from scratch, but rather transplanted.” R La Porta, F Lopez de Silanes, A Shleifer and R Vishny, ‘Law and Finance’ (1998) 106(6) *Journal of Political Economy* 1113-150.

<sup>10</sup> The alleged “exogeneity” of legal families has been disputed. The process of colonization was not historically random. The United Kingdom defeated all other European powers in the eighteenth and nineteenth centuries. Therefore, the British Empire resulted from those areas of the world that the United Kingdom understood as more valuable in the eighteenth and nineteenth centuries. If so, the current common law jurisdictions were partially determined by economic variables (namely perceived resources) and not the output of a random process.

<sup>11</sup> R La Porta, F Lopez de Silanes and A Shleifer, ‘The Economic Consequences of

The rapidly-expanding legal origins theory now relates conventional legal-family classifications to major economic variables and relevant puzzles in the development literature (e.g. why some countries grow successfully and others do not, why there is a trap for middle-income countries, which legal institutions are important in explaining successful and unsuccessful reforms<sup>12</sup>). At the same time, significant developments on the finance literature have taken place (in this case, under the original name of “law and finance”). There are now empirical studies employing legal families to explain cross-country variation in issues as diverse as labor markets regulation, entry restrictions, government ownership of banks and the media, and military conscription.<sup>13</sup>

The initial works by LLSV provided no clear theory. Later works by these and other authors have conceptualized two potential mechanisms to explain the empirical patterns observed by LLSV.<sup>14</sup> The first one, the so-called “adaptability channel” proposes that the common law is more effective in promoting financial markets (and possibly economic growth) because common law judges have more power to adapt the law to economic needs. At the same time, civil law judges are supposedly more constrained by codified principles. Comprehensive statutory codification undermines judicial ability to make law in new circumstances and where economic needs are pervasive. The “adaptability channel” evidently echoes the so-called efficiency of the common law hypothesis, a point we will explore later.

The second suggested mechanism has been known to be the “political channel”. Here the argument is that the common law emphasizes private property rights and contractual approaches while the civil law gives a greater play to social or collective rights and mandatory rules. As a consequence, common law courts are more independent and more effective in restraining state expropriation, while civil law courts are presumably weak in constraining executive power. In this reasoning, the

---

Legal Origins’ (2008) 46(2) *Journal of Economic Literature* 285-332, p 298: “even if instrumental variable techniques are inappropriate because legal origin influences finance through channels other than rules protecting investors, legal origins are still exogenous, and to the extent that they shape legal rules protecting investors, these rules cannot be just responding to market development”.

<sup>12</sup> See generally discussion by M Trebilcock and M Prado, *What Makes Poor Countries Poor? Institutional Determinants of Development* (Edward Elgar 2012).

<sup>13</sup> R La Porta, F Lopez de Silanes and A Shleifer, ‘The Economic Consequences of Legal Origins’ (2008) 46(2) *Journal of Economic Literature* 285-332.

<sup>14</sup> See generally T Beck, A Demirgüç-Kunt and R Levine, ‘Law and Finance: Why Does Legal Origin Matter?’ (2003) 31(4) *Journal of Comparative Economics* 653-75.



efficiency of the common law hypothesis is implicit; it only makes sense if courts are better than legislators at promoting law more conducive to economic growth.

As others have recognized, these two mechanisms are actually the same.<sup>15</sup> The “adaptability channel” only works if the “political channel” exists. Moreover, these two potential channels are introduced as exogenous mechanisms while, in fact, they are endogenous to the political process. In this light, these channels are themselves shaped by economic and social outcomes. If so, we might have an argument for reverse causality which inevitably undermines the alleged theoretical argument.

Nevertheless, the very application of economic methodology to legal family categories is subject to significant difficulties. We will focus here on the serious methodological critique of this line of work, which reflects both conceptual and empirical concerns about the distinction between common law on one hand, and French, German and Scandinavian civil law systems on the other.

The Article goes as follows. The following section describes the rise and decline of legal family categories in comparative law scholarship. The goal is both to understand the promise of their use in economic models and the reasons behind comparativists’ resistance to the legal origins theory. By highlighting the historical contingency of legal-family distinctions, the intellectual history of legal families casts doubt on their use as instrumental variables. This analysis also shows that the legal origins theory emerged in the economic literature precisely when comparative law scholars were growing skeptical about the continued relevance of these categories which, in turn, might explain the lack of interest in the topic they have largely shown so far. In section three, we then summarize the main critiques of the premises, methods, and conclusions of the legal origins literature, some developed by legal economists and a few by comparative law scholars. In section four, we examine the hypothesis of the efficiency of the common law and its shortcomings, as it constitutes the most solid theoretical foundation for the legal origins model. Section five concludes with explicit proposals for more involvement by comparative law scholars.

## II. LEGAL FAMILIES<sup>16</sup>

---

<sup>15</sup> See J Reitz, 'Toward a Study of the Ecology of Judicial Activism' (2009) 59 University of Toronto Law Journal 185-196.

<sup>16</sup> This section is inspired by M Pargendler, 'The Rise and Decline of Legal Families' (2012) 60(4) American Journal of Comparative Law 1043-1074.

The relationship between the comparative law literature and the economic literature on legal families is replete with ironies. The legal origins theory relies heavily on the classifications of legal families devised by comparative law scholars. Yet economists have popularized the concept of legal families precisely when comparative lawyers have begun to abandon this landmark contribution of their field.<sup>17</sup> The output of the economic literature on legal origins arguably came to exceed that of all comparative law scholarship combined,<sup>18</sup> but comparativists have by and large ignored or strongly rebuffed the legal origins line of work.

Comparisons among foreign legal systems, whether casual or profound, have a long history – and so does the idea that English law is significantly different from French and Roman law.<sup>19</sup> The effort to extrapolate from differences between individual legal systems and divide the world map into a handful of “legal families” based on the heritage and character of the underlying legal systems is far more recent. This project is closely intertwined with the history of modern day comparative law itself, a discipline whose birth, for most scholars, dates back to 1900.<sup>20</sup> As we will see, reigning conceptions of legal families varied over time, which cast doubt on the reliability and historicity of these categories. Still, these categories are key to the economists’ purposes.

Notions of legal families or traditions played a relatively minor role in comparative studies in the nineteenth century. At the time, a number of jurisdictions had recently acquired independence, so anti-colonialist sentiment often led them to view (the imposed) legal tradition as inherently suspect. This phenomenon was, in turn, reinforced by the model of economic liberalism prevailing at the time, which encouraged economic integration and the free flow of goods, people, and ideas to an

---

<sup>17</sup> See fn 33–36 *infra* and accompanying text.

<sup>18</sup> D Vagts, ‘Comparative Company Law – The New Wave’, in R Schwizerl, H Burkert, and U Gasser (eds), *Festschrift für Jean Nicolas Duey zum 65. Geburtstag* (Schulthess 2002), pp. 595–605, judging the recent developments in comparative corporate governance, inspired by the law and finance literature, as an “astonishing phenomenon” whose output “outdoes all of the publications in the rest of comparative law put together”.

<sup>19</sup> See, eg, Sir J Fortescue, *De Laudibus Legum Angliae (In Praise of the Laws of England)* (CUP 1825).

<sup>20</sup> See H C Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal study & Research* (CUP 1946), noting that the International Congress on Comparative Law held in Paris in 1900 “came to be regarded by many as the occasion in which modern comparative law first came into being”; K Zweigert and H Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* (Mohr Siebeck 1969): “[c]omparative law as we know it started in Paris in 1900, the year of the World exhibition”.

extent that was not replicated until the last decades of the twentieth century. Nineteenth century works on "comparative legislation," as the field was then known, had an eminently practical orientation. Rather than emphasizing genetic differences among legal systems, they focused on paving the way for legal convergence.<sup>21</sup>

The first categorizations of legal systems conceived in the nineteenth century had modest ambitions. They served primarily to organize the exposition of the laws of different jurisdictions, as in Spanish scholar Gumersindo de Azcárate's study on comparative legislation.<sup>22</sup> These early taxonomies looked significantly different from their later counterparts. Take, for instance, Ernest Glasson's pioneer classificatory scheme developed in his book on Marriage and Divorce.<sup>23</sup> Glasson's defining criterion for grouping different jurisdictions was the degree of Roman law influence: (i) Spain, Portugal, Italy, and Romania shared a strong Roman influence; (ii) England, Russia, and Scandinavian countries were grouped as legal systems exempt from the influence of Roman law; and (iii) France and Germany belonged to a third category of jurisdictions that combined elements of Roman and barbaric inspiration. These resulting categories have little in common with contemporary classifications. For instance, England, Russia, and Scandinavian countries are now habitually classified as belonging to distinct groups. Perhaps more strikingly, an overarching division between civil law and common law jurisdictions was conspicuously absent from Glasson's scheme.

Glasson's framework soon spread to the other side of the Atlantic. In Brazil, Clovis Bevilacqua, a professor of comparative legislation and future draftsman of the Brazilian Civil Code of 1916, adapted Glasson's classification to cover Latin American as well as European countries. In contrast to twentieth century authors, however, Bevilacqua did not classify Latin American jurisdictions as direct descendants of European systems, but rather as members of a fourth category of jurisdictions boasting original legal systems that could not possibly be pigeonholed into existing

---

<sup>21</sup> See G de Azcárate, *Ensayo de una Introducción al Estudio de la Legislación Comparada*, (Revista da Legislacion 1874).

<sup>22</sup> Ibid, organizing his exposition of legal systems according to the ethnicity of their people: (i) Neo-Latin peoples, (ii) Germanic peoples (which included not only Germany and some of its neighbors, but also England and the United States), (iii) Scandinavian peoples, (iv) Slavic peoples, and (v) a residual categories for "other peoples of Christian-European civilizations," including Greece, Malta and the Jonic Islands.

<sup>23</sup> E Glasson, *Le Mariage Civil et le Divorce dans l'Antiquité et dans les Principales Législations Modernes de l'Europe*, 2nd ed (A. Durand 1880).

European groupings.<sup>24</sup>

It was not until the International Congress on Comparative Law (*Congrès international de droit comparé*) held in Paris in 1900 that legal families came to assume a central role in the then emerging agenda of comparativists to make their field more scientific. Up until that point, comparative works typically provided short summaries of the laws of a large number of jurisdictions, often with the aim of instructing merchants about legal variation around the globe in a period marked by economic liberalism and growing international trade. The comparative law scholars present at the Congress revolted against this prevalent model of merely collecting and juxtaposing foreign laws as a futile exercise unworthy of academic attention.

In this context, comparativists came to view the classification of different jurisdictions into families – akin to the family taxonomies then popularized by linguistics and biology – as a more constructive model for the scientific aspirations of the discipline. Gabriel Tarde, a participant in the meeting, argued that “under this new viewpoint, the task of comparative law is less to indefinitely collect exhumed laws than to formulate a natural – that is, rational – classification of juridical types, branches and families of law.”<sup>25</sup> Moreover, legal family classifications held the promise of not only complementing, but also effectively replacing the need for effective knowledge of numerous legal systems. For Tarde, the right taxonomy would encompass all legal systems “known or to be known.”

In his contribution to the Congress, Adhémar Esmein likewise emphasized the need to “classify the legislations (or customs) of different peoples, by reducing them to a small number of families or groups, of which each represents an original system; creating awareness about the historical formation, the general structure, and the distinctive traits of each of these systems seems to be a first, general, and essential part of the scientific comparative law education.”<sup>26</sup> Esmein’s suggested categorization divided Western legal systems into groups of Latin, Germanic, Anglo-Saxon, and Slavic laws.

---

<sup>24</sup> C Bevilacqua, *Resumo das Lições de Legislação Comparada sobre o Direito Privado*, 2nd ed (Magalhães 1897).

<sup>25</sup> G Tarde, ‘Le Droit Comparé et la Sociologie’, in *Congrès international de droit comparé tenu à Paris du 31 juillet au 4 août 1900, Procès-Verbaux des Séances et Documents*, Librairie générale de droit de jurisprudence (1905) pp 439-40.

<sup>26</sup> A Esmein, ‘Le Droit Comparé et l’Enseignement du Droit’, in *Congrès international de droit comparé tenu à Paris du 31 juillet au 4 août 1900, Procès-Verbaux des Séances et Documents*, Librairie générale de droit de jurisprudence, (1905), pp 445-51.

Nevertheless, despite the growing intellectual force of the legal families' project, Esmein's proposed scheme soon fell into oblivion, as the relevant criteria to guide such taxonomies remained highly contested. In 1913 Georges Sauser-Hall advanced a different classification that grouped legal systems according to the race of the peoples concerned. Ten years later, Henri Levy-Ullman also refuted Esmein's approach as "terribly obsolete" and proposed a new categorization based on "scientifically determined affinities" among legal systems.<sup>27</sup> Levy-Ullman's approach was to group jurisdictions according to their dominant "sources of law": (i) legal systems of continental Europe, which rely on written sources of law; (ii) legal systems of English-language countries, which adopt the common law; and (iii) legal systems of Islamic countries.

Meanwhile, Latin American scholars continued to rely on modified versions of Glasson's classificatory scheme, which regarded their jurisdictions as members of a family that was distinct from that of their European colonizers.<sup>28</sup> Brazilian jurist Candido Luiz Maria de Oliveira included Latin American countries in a category of its own. For Argentinean author Enrique Martinez Paz, the countries in the region, combined with Switzerland and Russia, formed a separate group of Roman-Canon-Democratic legal systems. In their comprehensive comparative law treatise of 1950, Pierre Arminjon, Boris Nolde, and Martin Wolff divided the globe into "parent systems" and "derived systems," which together comprised seven different legal families of French, German, Scandinavian, English, Russian, Islamic, and Hindu jurisdictions.<sup>29</sup>

Yet, the final ascendancy of legal families as one of the main theoretical achievements of comparative law came in the 1960s as a result of the work of René David, as well as of Konrad Zweigert and Hein Kötz. Retreating from his earlier view that the distinction between common law and civil law systems was of only modest importance,<sup>30</sup> the French author's celebrated opus '*Les grands systèmes de droit contemporain*' divided the globe

---

<sup>27</sup> H Levy-Ullman, 'Observation Générales sur les Communications Relatives au Droit Privé dans les Pays Etrangers', in *Les Transformations du Droit dans les Principaux Pays depuis Cinquante Ans (1869-1919) (Livre du cinquantenaire de la Société de Législation Comparée)*, Librairie Générales de droit et de Jurisprudence (1923), pp 81-108.

<sup>28</sup> C Luiz Maria de Oliveira, *Curso de Legislação Comparada* (J. Ribeiro dos Santos 1903); E Martinez Paz, *Introducción al Estudio del Derecho Civil Comparado* (Imprenta de la Universidad 1934).

<sup>29</sup> P Arminjon, B Nolde and M Wolff *Traité de Droit Comparé* (Librairie Générale de Droit et de Jurisprudence 1950).

<sup>30</sup> R David, *Traité Élémentaire de Droit Civil Comparé* (Librairie Générale de Droit et de Jurisprudence 1950).

into three main families of Romano-Germanic, Common Law, and Socialist legal systems. This partition was based not only on the principal legal concepts and techniques employed in different jurisdictions, but also on their dominant worldview and ideology.<sup>31</sup> In doing so, however, David was acutely aware that categorizations were inherently arbitrary, serving merely “didactic ends” rather than as depictions of a “biological reality.”<sup>32</sup>

In 1969, Zweigert and Kötz proposed another equally well-known classificatory scheme.<sup>33</sup> Exemplifying the national bias of comparativists when devising such taxonomies,<sup>34</sup> the German authors subdivided the civil law family into three separate strands – the French, the German, and the Scandinavian civil law systems – thus elevating their country of origin as a parent of a family of its own. The three civil law families, together with the common law, far-Eastern law, Islamic law, and Hindu law families, defined the main “styles” of legal systems around the globe. The scheme advanced by Zweigert and Kötz was widely popular and subsequently came to serve as the basis for the large empirical literature seeking to ascertain the economic consequences of legal institutions. This categorization was, however, of relatively minor importance in their treatise, whose primary purpose was to redefine the study of comparative law in functional terms – an intellectual ambition that was different from the legal families project.<sup>35</sup>

The works of David and Zweigert and Kötz came to form the mainstream of legal family classifications, and, for some, should have put an end to the need for further taxonomies.<sup>36</sup> However, studies seeking to supersede or refine existing legal family categorizations continued to emerge,<sup>37</sup> as did

<sup>31</sup> R David, *Les Grands Systèmes de Droit Contemporain* (Dalloz 1962).

<sup>32</sup> Ibid.

<sup>33</sup> K Zweigert and H Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* (Mohr Siebeck 1969).

<sup>34</sup> Y-M Laithier, *Droit Comparé* (Dalloz 2009).

<sup>35</sup> D Kennedy, ‘The Methods and Politics of Comparative Law, The Methods and Politics of Comparative Law’, in P Legrand and R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP 2003), pp. 345-433: “[l]egal families’ and ‘functions’ mark poles of the functional-technical spectrum for comparative law in the nineteen fifties”.

<sup>36</sup> J Langbein, ‘The Influence of Comparative Procedure in the United States’ (1995) 43 *American Journal of Comparative Law* 545-554, arguing, with respect to legal family classifications, that “once René David has written, once you have Zweigert and Kötz on the shelf, there seems to be less reason to keep doing it”.

<sup>37</sup> U Mattei, ‘Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems’ (1997) 45 *American Journal of Comparative Law* 5-44, p 9, advocating a new categorization of jurisdictions as subject to the rule of professional law, the rule of political law, or the rule of traditional law; V Palmer ‘Introduction to the Mixed Jurisdictions’, in V V Palmer (ed), *Mixed Jurisdictions Worldwide: The Third Legal*

some of the most sophisticated works on the peculiarities of different legal traditions, such as John Merryman's study on the civil law<sup>38</sup> and Mirjan Damaska's seminal work on the distinct systems of legal procedure in continental and Anglo-American jurisdictions.<sup>39</sup>

Yet, since the end of the twentieth century, a number of prominent scholars, no doubt inspired by the world's increasing globalization and rapid legal convergence, began to challenge the continued utility of legal family classifications for comparative law. James Gordley has described the distinction between common and civil law as "obsolete."<sup>40</sup> Hein Kötz, co-author of one of the most influential of such taxonomies, has questioned whether the time has come to bid farewell to legal family classifications.<sup>41</sup> All in all, a significant strand of the comparative law literature has come to believe that legal family distinctions are largely outmoded.<sup>42</sup> This literature shows that legal families are problematic, variant and subject to many different classifications in comparative law. We suggest that it explains why comparativists are conceptually skeptical of the legal origins theory.

### III. THE CRITIQUES TO THE LEGAL ORIGINS THEORY

The legal origins theory has proved to be as controversial as it is influential. Despite its popularity, the criticisms both of its methodology and conclusions are numerous – in fact, too numerous to be addressed in full here. We will focus on only a few of the most conspicuous challenges to

---

*Family* (CUP 2001), pp. 3-6. (defending a view that mixed jurisdictions form a legal family of their own); D Whitman, 'Consumerism versus Producerism: A Study in Comparative Law' (2007) 117 *Yale Law Journal* 340-406, arguing that the distinction of consumerism and producerism as categories are "more revealing" than legal families in analyzing modern legal systems.

<sup>38</sup> J Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford University Press 1969).

<sup>39</sup> M Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press 1986).

<sup>40</sup> J Gordley, 'Common Law und Civil Law: eine überholte Unterscheidung' (2003) 3 *Zeitschrift für europäisches Privatrecht* 498-518.

<sup>41</sup> H Kötz, 'Abschied von der Rechtskreislehre?' (2008) 3 *Zeitschrift für europäisches Privatrecht* 6493-505.

<sup>42</sup> See, eg, B Fauvarque-Cosson and A-J Kerhuel 'Is Law an Economic Contest? French Reactions to the Doing Business World Bank Reports and Economic Analysis of Law' (2009) 57 *American Journal of Comparative Law* 811-32, p 829: "the legal origins thesis bases its analysis on a classification of legal systems divided into legal families which is now by and large outdated"; H Spamann, 'Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law' (2009) 6 *Brigham Young University Law Review* 1813-877, p 1815, describing the growing consensus among sophisticated comparativists that there are "there are few if any relevant differences between common and civil law today".

this line of inquiry. First, there is a growing literature, produced mostly by French scholars, that simply rejects efficiency as a relevant metric to compare different legal systems. Although specifically directed to the legal origins theory, the criticism here is broader in nature; it applies to the entire field of law and economics and to any kind of economic-oriented argument.<sup>43</sup> Researchers affiliated with this approach will invariably conclude that efficiency or other economic measures are inadequate in describing and evaluating legal regimes.<sup>44</sup>

Second, other authors have attacked the legal origins literature as a defective exercise in comparative law due to the irrelevance or fluidity of legal family categories as well as the inherent difficulties in measuring legal institutions.<sup>45</sup> Legal family categories were without exception designed by lawyers and for lawyers. The defining criteria of such classifications – such as the “sources of law” – are of interest to legal scholars and lawyers, but hardly relevant for most questions that are the object of social science research.<sup>46</sup> In fact, these categorizations had didactic purposes, and did not seek to accurately describe the laws of affiliate legal systems. Zweigert and Kötz go so far as to urge comparatists to “ignore the affiliate [legal system] and concentrate on the parent system.”<sup>47</sup> Relatedly, comparative law scholars have always regarded the defining criteria for legal family

---

<sup>43</sup> For an English overview, see C Ménard and B du Marais, ‘Can We Rank Legal Systems According to their Economic Efficiency?’ (2008) 26 Washington University Journal of Law and Policy 55-80. Other critiques in the same venue include R Aguilera and C Williams, ‘Law and Finance: Inaccurate, Incomplete, and Important’ (2009) 9 Brigham Young University Law Review 1413-434, proposing economic sociology as a better methodology; and P Legrand ‘Econocentrism’ (2009) 59(2) University of Toronto Law Journal 215-22. See response by G Hadfield, ‘The Strategy of Methodology: The Virtues of Being Reductionist for Comparative Law’ (2009) 59(2) University of Toronto Law Journal 223-235.

<sup>44</sup> For a different perspective, see H P Glenn, ‘Are Legal Traditions Incommensurable?’ (2001) 49(1) American Journal of Comparative Law 133-45; M Siems, ‘Numerical Comparative Law - Do We Need Statistical Evidence in Order to Reduce Complexity?’ (2005) 13 Cardozo Journal of International and Comparative Law 521-40; and H Spamann, ‘Large-Sample, Quantitative Research Designs for Comparative Law?’ (2009) 57(4) American Journal of Comparative Law 797-810. See also M Siems, ‘Legal Originality’ (2008) 28(1) Oxford Journal of Legal Studies 147-64.

<sup>45</sup> See, among others, A B Engelbrekt (2010) ‘Toward an Institutional Approach to Comparative Economic Law?’, in A B Engelbrekt and J Nergelius (eds), *New Directions in Comparative Law* (Edward Elgar 2010), pp 213-51.

<sup>46</sup> D Whitman, ‘Consumerism versus Producerism: A Study in Comparative Law’ (2007) 117 Yale Law Journal 340-406.

<sup>47</sup> K Zweigert and H Kötz, *An Introduction to Comparative Law*, vol. 2 (Clarendon Press 1987), p 64 suggesting that scholars interested in the Romanistic tradition focus exclusively on France and Italy, as “[t]he legal systems of Spain and Portugal (...) do not often call for or justify very intensive investigation”.



categories, as well as the classification of individual countries under one group or another, as highly problematic, which arguably makes them unbecoming variables for e.g. statistical regressions or social science explanations more broadly.<sup>48</sup>

Third, the use of legal families by economists relies on the assumption that such groupings have deep historical (and exogenous) roots. It is revealing that what comparative lawyers call “legal families” economists have come to term “legal origins,” an expression that highlights the purported historicity of these categories that is key to their proponents’ purposes. Not only did the relevant classifications undergo significant change over time, but the comparativists who designed them explicitly recognized that their taxonomies were temporally grounded. David’s famous work was translated into English as “Major Legal Systems in the World *Today*,”<sup>49</sup> while Zweigert and Kötz expressly warned that any taxonomy “depends on the period of which one is speaking,” so that “the division of the world’s legal systems into families, especially the attribution of a system to a particular family, is susceptible to alteration as a result of legislation or other events and can, therefore, be only temporary.”<sup>50</sup>

Moreover, the view of law as a “politically neutral endowment” reflected on the legal origins literature has also come under attack.<sup>51</sup> Some of the most significant differences in corporate governance and capital market development across jurisdictions are arguably due to context-specific political developments in the twentieth century.<sup>52</sup> There is also evidence that at least some countries voluntarily picked and chose their rules of commercial law ever since the nineteenth century, thereby challenging the view that legal origins are necessarily exogenous.<sup>53</sup>

Fourth, the studies on the relationship between law and development carry

---

<sup>48</sup> See M Siems, ‘Legal Origins: Reconciling Law & Finance and Comparative Law’ (2007) 52(1) McGill Law Journal 55-82.

<sup>49</sup> Emphasis added, R David and J Brierley, *Major Legal Systems in the World Today: An Introduction to Comparative Study of Law*, 3d ed (Stevens 1985).

<sup>50</sup> K Zweigert and H Kötz, *An Introduction to Comparative Law*, vol. 2 (Clarendon Press 1987), p 66.

<sup>51</sup> C Milhaupt and K Pistor, *Law and Capitalism: What Corporate Crises Reveal About Legal Systems and Economic Development around the World* (University of Chicago Press 2008).

<sup>52</sup> See, eg, M Roe, ‘Legal Origins, Politics and Modern Stock Markets’ (2006) 120 Harvard Law Review 460-527; M Pargendler, ‘State Ownership and Corporate Governance’ (2012) 80 Fordham Law Review 2917-973.

<sup>53</sup> M Pargendler, ‘Politics in the Origins: The Making of Corporate Law in Nineteenth-Century Brazil’ (2012) 60(3) American Journal of Comparative Law 805-850.

an implicit assumption that law and legal institutions matter a great deal for economic outcomes.<sup>54</sup> Inevitably this is an empirical question. Not surprisingly, many authors have focused on the particular econometrics to criticize the legal origins literature.<sup>55</sup> A number of studies have provided countervailing empirical evidence to challenge the claim that common law is superior to civil law from an economic standpoint. These works identify the advantages of civil law over common law institutions,<sup>56</sup> show reversals in the patterns of financial development across legal traditions over time,<sup>57</sup> or find that other variables are superior to legal origins in predicting economic outcomes.<sup>58</sup>

<sup>54</sup> F Cross, 'Law and Economic Growth' (2002) 80(7) *Texas Law Review* 1737-775.

<sup>55</sup> See, among others, B Ahlering and S Deakin, 'Labor Regulation, Corporate Governance and Legal Origin: A Case of Institutional Complementarity' (2007) 41 *Law and Society Review* 865-903; J Armour, et al., 'How do Legal Rules Evolve? Evidence from Cross-Country Comparison of Shareholder, Creditor and Worker Protection' (2009) 57 *American Journal of Comparative Law* 579-630; J Armour, S Deakin, P Sarkar, A Singh and M M Siems, 'Shareholder Protection and Stock Market Development: An Empirical Test of the Legal Origins Hypothesis' (2009) 6(2) *Journal of Empirical Legal Studies* 343-80; J Armour, S Deakin, V Mollica, and M M Siems 'Law and Financial Development: What We are Learning from Time-Series Evidence' (2009) *Brigham Young University Law Review* 1435-500; H Spamann, 'The "Antidirector Rights Index" Revisited' (2009) 23 *Review of Financial Studies* 467-86; see H Spamann, 'Large-Sample, Quantitative Research Designs for Comparative Law' (2009) 7(4) *American Journal of Comparative Law* 5797-810; H Spamann, (2010) 'Legal Origins, Civil Procedure, and the Quality of Contract Enforcement' (2010) 166(1) *Journal of Institutional and Theoretical Economics* 171-77; M Siems and S Deakin, 'Comparative Law and Finance: Past, Present, and Future Research' (2010) 166(1) *Journal of Institutional and Theoretical Economics* 120-40; E Helland and J Klick, 'Legal Origins and Empirical Credibility', in M Faure and J Smits (eds), *Does Law Matter? On Law and Economic Growth* (Intersentia 2011), pp 99-113; and D Klerman P Mahoney, H Spamann, and M Weinstein, 'Legal Origin or Colonial History?' (2011) 3(2) *Journal of Legal Analysis* 379-409.

<sup>56</sup> See, eg, N Lamoreaux and J-L Rosenthal (2005) 'Legal Regime and Contractual Flexibility: A Comparison of Business's Organizational Choices in France and the United States during the Era of Industrialization' (2005) 7(1) *American Law and Economics Review* 28-61; T Guinan R Harris, N Lamoreaux, J-L Rosenthal, 'Putting the Corporation in its Place' (2007) 8(3) *Enterprise and Society* 687-729.

<sup>57</sup> R Rajan and L Zingales, 'The Great Reversals: The Politics of Financial Development in the Twentieth Century' (2003) 69 *Journal of Financial Economics* 5-50; A Musacchio, 'Law and Finance c. 1900' (2010) NBER working paper, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1648016](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648016).

<sup>58</sup> See, eg, D Acemoglu, D Cantoni, S Johnson, and J A Robinson, 'The Consequences of Radical Reform: The French Revolution' (2011) 101(7) *American Economic Review* 3286-3307; D Berkowitz, K Pistor and J-F Richard, 'Economic Development, Legality, and the Transplant Effect' (2003) 47(1) *European Economic Review* 165-95; A Licht, C Goldschmidt and S H Schwartz, 'Culture, Law, and Corporate Governance' (2005) 25 *International Review of Law and Economics* 229-55; M Roe, 'Legal Origins, Politics and Modern Stock Markets' (2006) 120 *Harvard Law Review* 460-527; D

Last but not least, even if one was to accept the conclusions of econometric studies showing the purported advantages of common law institutions, the inquiry would remain incomplete without identifying the mechanisms and channels that account for the superiority of the common law system – an issue to which we now turn.

#### IV. THE LAW AND ECONOMICS OF LEGAL FAMILIES<sup>59</sup>

The legal origins literature suggests that legal systems stemming from the English common law have institutions that are more conducive to economic development than those of civil law jurisdictions (in particular, those of French origin).<sup>60</sup> The mechanism for the economic superiority of the common law versus French civil law is however intrinsically convoluted and debatable.<sup>61</sup> In searching for a sound theoretical background, some economists have related to two standard discussions within law and economics, namely the efficiency hypothesis of the common law and the inferiority of legislation.

The so-called efficiency of the common law has generated discussion among legal economists quite early in the law and economics literature.<sup>62</sup> According to Richard Posner's early work, there is an implicit economic logic to the common law. In his view, the doctrines of the common law provide a coherent and consistent system of incentives which induce efficient behavior, not merely in markets, but in all social contexts (the so-

---

Klerman P Mahoney, H Spamann, and M Weinstein, 'Legal Origin or Colonial History?' (2011) 3(2) *Journal of Legal Analysis* 379-409.

<sup>59</sup> This section develops economic arguments suggested by N Garoupa and C Gómez Ligüerre, 'The Syndrome of the Efficiency of the Common Law' (2011) 29 *Boston University International Law Journal* 287-355; N Garoupa and C Gómez Ligüerre, 'The Evolution of the Common Law and Efficiency' (2012) 40 (2) *Georgia Journal of International and Comparative Law* 307-340; N Garoupa and C Gómez Ligüerre, 'The Efficiency of the Common Law: The Puzzle of Mixed Legal Families' (2012) 29(4) *Wisconsin International Law Journal* 671-693; and also M. Pargendler 'The Rise and Decline of Legal Families' (2012) 60(4) *American Journal of Comparative Law* 1043-1074.

<sup>60</sup> See the extensive discussion by K Dam, *The Law-Growth Nexus: the Rule of Law and Economic Development* (Brookings Institution 2006); also, M Roe and J I Siegel, 'Finance and Politics: A Review Essay Based on Kenneth Dam's Analysis of Legal Traditions in the Law-Growth Nexus' (2009) 47(3) *Journal of Economic Literature* 781-800.

<sup>61</sup> For an attempt to identify the channels for the relationship between legal origin and financial development, see T Beck, A Demirgüç-Kunt and R Levine, 'Law and Finance: Why Does Legal Origin Matter?' (2003) 31(4) *Journal of Comparative Economics* 653-75.

<sup>62</sup> R Posner, *Economic Analysis of Law*, 8th edn (Aspen 2011).

called implicit markets). For example, as Posner claims, the common law reduces transaction costs to favor market transactions when that is appropriate. Quite naturally, Posner recognized that not all doctrines in common law are economically justifiable or even easy to understand from an efficiency perspective.<sup>63</sup>

Posner's hypothesis of the efficiency of the common law begged for a more detailed explanation from the start. In particular, it lacked a more explicit mechanism for why the common law should be efficient. A remarkable literature emerged in order to find such mechanism. Law and economics scholars proposed different explanations, which are based essentially on evolutionary models that identify the forces that have shaped the common law to generate efficient rules.<sup>64</sup>

One explanation for the efficiency of the common law is that judges themselves have a preference for efficiency.<sup>65</sup> Another possible justification is that efficiency is promoted by the prevalence of precedent (more efficient rules are more likely to survive through a mechanism of precedent).<sup>66</sup> A further argument relies on the incentives to bring cases and the role of court litigation (since inefficient rules are not welfare maximizing).<sup>67</sup> Nevertheless, the precise nature of the mechanism that justifies the efficiency hypothesis is problematic, even taking these early explanations into account (these explanations were produced almost immediately after the publication of Richard Posner's thesis).<sup>68</sup>

The search for a more convincing setup for the efficiency of the common law hypothesis has sparked important academic work. This literature essentially looks at how litigation improves the law, or some specific legal doctrines, taking into consideration that only a self-selected number of cases is actually litigated (that is, not all conflicts get to be solved by courts;

---

<sup>63</sup> Ibid.

<sup>64</sup> Evolutionary theory models is the denomination used by P Rubin, 'Micro and Macro Legal Efficiency: Supply and Demand' (2005) 13 *Supreme Court Economic Review* 19-34.

<sup>65</sup> R Posner, 'Utilitarianism, Economics, and Legal Theory' (1979) 8 *Journal of Legal Studies* 103-40.

<sup>66</sup> P Rubin, 'Why is the Common Law Efficient?' (1977) 6(1) *Journal of Legal Studies* 51-63.

<sup>67</sup> G Priest, 'The Common Law Process and the Selection of Efficient Rules' (1977) 6(1) *Journal of Legal Studies* 65-82.

<sup>68</sup> See N Gennaioli and A Shleifer, 'The Evolution of Common Law' (2007) 115(1) *Journal of Political Economy* 43-68; N Gennaioli and A Shleifer, 'Overruling and the Instability of Law' (2007) 35(2) *Journal of Comparative Economics* 309-28; and T J Miceli, 'Legal Change: Selective Litigation, Judicial Bias, and Precedent' (2009) 38(1) *Journal of Legal Studies* 157-76.

common law evolution depends on which conflicts are addressed by courts while legal stagnation is expected for those areas that are not addressed by courts).<sup>69</sup> In particular, the efficiency of the common law is unequivocally related to the observation that litigation follows private interests. Presumably, bad rules are challenged more often than good rules, so naturally court intervention will improve the overall quality of the law. However, this line of reasoning is not without problematic shortcomings. It could be that the subset of cases that are actually litigated is not representative enough to trigger the necessary improvements, hence biasing evolution of legal rules against efficiency.<sup>70</sup> Furthermore, the emergence of efficiency in common law depends on a number of factors in the evolutionary mechanism, namely initial conditions, path dependence and random shocks.<sup>71</sup>

The literature on the efficiency of the common law that followed Posner's hypothesis is not comparative in nature, but effectively looks at judge-made law. The Posnerian hypothesis does not set a common law system in a better position than a civil law system in the evolution towards efficient rules. It does not provide a convincing framework to argue that judicial precedent is a superior way to promote an efficient solution than a statutory rule precisely because the focus is on judge-made law. Under the common law reasoning, bad decisions are overruled, in the same way that under civil law, bad statutes can be effectively corrected by the judiciary.<sup>72</sup> There is no (theoretical or empirical) basis to assert that courts and juries are in a better position in common law than in civil law jurisdictions to

---

<sup>69</sup> See J Goodman, 'An Economic Theory of the Evolution of the Common Law' (1978) 7(2) *Journal of Legal Studies* 393-406; R Cooter and L Kornhauser, 'Can Litigation Improve the Law without the Help of Judges' (1980) 9(1) *Journal of Legal Studies* 139-63; P Terrebonne, 'A Strictly Evolutionary Model of Common Law' (1981) 10(2) *Journal of Legal Studies* 397-407; P Rubin, *Business Firms and the Common Law: The Evolution of Efficient Rules*, (Praeger 1983); G von Wangenheim, 'The Evolution of Judge-made law' (1993) 13(4) *International Review of Law and Economics* 381-411; V Fon and F Parisi, 'Litigation and the Evolution of Legal Remedies: A Dynamic Model' (2003) 116(3-4) *Public Choice* 419-33; B Depoorter, V Fon and F Parisi, 'Litigation, Judicial Path-dependence, and Legal Change' (2005) 20(1) *European Journal of Law and Economics* 43-56; V Fon and F Parisi, 'Judicial Precedents in Civil Law Systems: A Dynamic Analysis' (2006) 26(4) *International Review of Law and Economics* 519-35; F Parisi and V Fon, *The Economics of Lawmaking* (OUP 2009).

<sup>70</sup> G Hadfield, 'Biases in the Evolution of Legal Rules' (1992) 80 *Georgetown Law Journal* 583-616.

<sup>71</sup> M Roe, 'Chaos and Evolution in Law and Economics' (1996) 109 *Harvard Law Review* 641-671. In fact, more recently, A Shleifer, *The Failure of Judges and the Rise of Regulators* (MIT Press 2012) defends the rise of regulators in common law jurisdictions largely reflects the failure of judges in providing efficient social control.

<sup>72</sup> See, for example, V Fon and F Parisi, 'Judicial Precedents in Civil Law Systems: A Dynamic Analysis' (2006) 26(4) *International Review of Law and Economics* 519-35.

calculate the consequences of their decisions more appropriately than the government. Moreover, that judge-made law can be better understood as a set of rules designed to maximize economic efficiency, as Judge Posner proposed, is not an exclusive feature of common law jurisdictions.

If the Posnerian hypothesis is true, at least in the long run, rules that do not promote efficient results should be repealed in any legal system (in the short run, transaction costs might explain why inefficient laws survive). Therefore, the central question is not whether one legal family or the other promotes an economic efficiency solution, but which of these two main legal families reaches the adequate result (always from the economic perspective) at a lower cost in terms of delays and opportunity costs. From a cost perspective solely, it is not clear that the type of cost attached to general axiomatic legal solutions, characteristic for civil law approaches, is necessarily higher than litigation costs incurred in the approach developed by common law.

The mere Posnerian efficiency hypothesis of the common law cannot alone support the conclusion that lawmaking by legislation is necessarily less efficient than court intervention. One of the main arguments for the superiority of judge-made law is that private interests are more likely to capture the legislature than the courts, although such argument is debatable at the theoretical as well as at the empirical level.<sup>73</sup> In fact, there is no systematic evidence that rent-seeking is more persistent with the legislature than with the courts, since demand and supply conditions are fundamentally different.<sup>74</sup> Moreover, courts and legislators have their own

<sup>73</sup> See M Crew and C Tawit, 'On the Efficiency of Law: A Public Choice Perspective' (1990) 66 *Public Choice* 15-36, arguing that common law is less subject to rent-seeking than statute law; and P Rubin, 'Common Law and Statute Law' (1982) 11 *Journal of Legal Studies* 205-33, arguing that both are influenced by private interests to advance their goals. The most devastating criticism is G Tullock, *The Case Against the Common Law* (Carolina Academic Press 1997) and G Tullock, 'Rent-Seeking and the Law', in C K Rowley (ed), *The Selected Works of Gordon Tullock*, vol. 5 (2005), pp 184-95. See also B Luppi and F Parisi, 'Litigation and Legal Evolution: Does Procedure Matter?' (2012) 152 *Public Choice* 181-201; and J Biser, 'Law-and-Economics: Why Gordon Tullock Prefers Napoleon Bonaparte over the Duke of Wellington, and Why He May End Up on St. Helena' (2014) 158 *Public Choice* 261-279.

<sup>74</sup> See, among others, W Landes and R Posner, 'The Independent Judiciary in an Interest Group Perspective' (1975) 18 *Journal of Law and Economics* 875-901; R. Tollison and W M Crain 'Constitutional Change in an Interest-Group Perspective' (1979) 8(1) *Journal of Legal Studies* 165-175; W M Crain and R Tollison, 'The Executive Branch in the Interest-Group Theory of Government' (1979) 8(3) *Journal of Legal Studies* 555-67; F McChesney, 'Rent Extraction and Rent Creation in the Economic Theory of Regulation' (1987) 16(1) *Journal of Legal Studies* 101-18, discussing several theories of capture in rulemaking; T Merrill, 'Does Public Choice

goals in terms of enhancing their influence, which complicates the potential effect of private interests in lawmaking.<sup>75</sup>

The more adversarial nature of litigation in common law than in civil law could well generate more rent-seeking and more rent dissipation in the process of rulemaking.<sup>76</sup> Furthermore, given the growing predominance of statutes in common law jurisdictions, the inevitable conclusion would be that the overall efficiency has been reduced. This conclusion seems to be reinforced by the argument that the efficiency of the common law is not really demand-side induced (i.e., through the incentives provided by litigation), but supply-side induced. The historical competition between common law and equity courts was the driving force; once these courts were merged and monopoly had been achieved, the efficiency forces had lost stimulus.<sup>77</sup> Nevertheless, a similar historical competition between royal, guild, and ecclesiastical courts existed in civil law jurisdictions.

Notice that the relative efficiency of judge-made versus statutory law by itself does not provide a good framework to justify the superiority of the common law system as compared to the civil law system. First, statutes are important in common law jurisdictions and many key areas of private law such as torts are essentially case law in civil law jurisdictions. Second, the biases of legislation and litigation are not qualitatively and quantitatively similar in both legal systems due to procedural and substantive differences. As argued by scholars, the efficiency hypothesis of the common law, coupled with the alleged bias of legislation for private capture, is insufficient to support the argument that French civil law is necessarily inferior to the common law from an economic perspective.<sup>78</sup>

In fact, as noted in the literature, the traditional Posnerian analysis could

---

Theory Justify Judicial Activism After All?' (1997) 21(1) *Harvard Journal of Law & Public Policy* 219-30; and T Merrill, 'Institutional Choice and Political Faith' (1997) 22(4) *Law and Social Inquiry* 959-98.

<sup>75</sup> See discussion by A C Pritchard and T J Zywicki, 'Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation' (1999) 77 *North Carolina Law Review* 409-521. For a very interesting comparison between lawmakers and its influence under English and French systems, see J W F Allison, *A Continental Distinction in the Common Law. A Historical and Comparative Perspective on English Public Law* (Clarendon Press 1996).

<sup>76</sup> T J Zywicki, 'Spontaneous Order and the Common Law: Gordon Tullock's Critique' (2008) 135(1-2) *Public Choice* 35-53.

<sup>77</sup> T J Zywicki, 'The Rise and Fall of Efficiency in the Common Law' (2003) 97 *Northwestern Law Review* 1551-633. A more comprehensive discussion is provided by D Klerman, 'Jurisdictional Competition and the Evolution of the Common Law' (2007) 74(4) *University of Chicago Law Review* 1179-226.

<sup>78</sup> See N Garoupa and C Gómez Ligüerre, 'The Syndrome of the Efficiency of the Common Law' (2011) 29 *Boston University International Law Journal* 287-355.

be transposed to French civil law in many ways and multiple forms. It could be argued that general law (code) is more efficient than specific statutory interventions (potentially prone to more capture). It could be also said that bottom-up law (for example, case law pilling up under general code provisions) is more appropriate than top-down law (including very detailed code provisions as well as specific statutes). Nothing in the discussion so far makes the argument unique to common law or provides a complete framework to derive implications for comparative law.

The pro-market bias of the common law (the idea of some Hayekian bottom up efficiencies in the English legal system and top down inefficiencies in the French legal system<sup>79</sup>) might be an important argument in its favor, but the existence of some anti-market bias in French law is debatable. It could be that traditional French legal scholarship has been less concerned with efficiency arguments. However, the lack of interest exhibited by French legal scholars concerning pro-market legal policies (which might be explained by cultural reasons) does not constitute strong evidence that French law itself is inefficient.<sup>80</sup>

Even the thesis that French law is less effective than the common law in protecting property rights from state predation is subject to dispute.<sup>81</sup> The current formal models developed to explain these differences are the object of serious criticism.<sup>82</sup> Stability of the law is another possible

<sup>79</sup> See P Mahoney, 'The Common Law and Economic Growth: Hayek Might Be Right' (2001) 30(2) *Journal of Legal Studies* 503-25.

<sup>80</sup> See discussion by C Valcke, 'The French Response to the World Bank's Doing Business Report' (2010) 60 *University of Toronto Law Journal* 197-217. See also B Fauvarque-Cosson and A-J Kerhuel, 'Is Law an Economic Contest? French Reactions to the Doing Business World Bank Reports and Economic Analysis of Law' (2009) 57 *American Journal of Comparative Law* 811-32.

<sup>81</sup> See, for two different perspectives, S Djankov, E Glaeser, F López-de-Silanes, and A Shleifer, 'The New Comparative Economics' (2003) 31 *Journal of Comparative Economics* 595-619; and B Arruñada, 'Property Enforcement as Organized Consent' (2003) 19(2) *Journal of Law, Economics and Organization* 401-44.

<sup>82</sup> For the economic models, see E L Glaeser and A Shleifer, 'The Rise of the Regulatory State' (2001) 41(2) *Journal of Economic Literature* 401-25; and E L Glaeser and A Shleifer, 'Legal Origins' (2002) 117(4) *Quarterly Journal of Economics* 1193-230. For discussion, see F Cross, 'Identifying the Virtues of the Common Law' (2007) 15(1) *Supreme Court Economic Review* 21-59; D Klerman and P Mahoney, 'Legal Origin?' (2007) 35 *Journal of Comparative Economics* 278-93; M Roe, 'Juries and the Political Economy of Legal Origin' (2007) 35(2) *Journal of Comparative Economics* 294-308; H Rosenthal and E Voeten, 'Measuring Legal Systems' (2007) 35(4) *Journal of Comparative Economics* 711-28; G Hadfield, 'The Levers of Legal Design: Institutional Determinants of the Quality of Law' (2008) 36(1) *Journal of Comparative Economics* 43-73; R Michaels, 'Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Comparative Law' (2009)



argument to favor judge-made law with deference to precedent against systematic and chaotic legislative production. In this respect, however, the existence and importance of dissenting opinions – which are pervasive in the United States, but absent in France – cannot be seen as a contribution to the stability of the law. Furthermore, empirically it is not clear that case law is more stable and less ambiguous than legislation.<sup>83</sup> Another possibility is the enhanced willingness in common law jurisdictions to allow choice of law. However, globalization of business transactions has exerted enormous pressure for change in civil law jurisdictions in this respect. Overall, it might well be that the common law is more efficient and positively correlated with positive economic outcomes, but the causation is definitely under-theorized to a larger extent.<sup>84</sup>

Furthermore, the competition between common law and civil law in a hybrid system does not provide an empirical answer as to which legal system prevails in the long-run (since we would expect the most efficient legal system to be chosen by the relevant legal actors in a hybrid system). Finally, even if common law systems were more conducive to economic growth, the question of how to move from one to the other remains largely unaddressed. Legal culture, rent-seeking, and the accumulated human capital raise the costs of such transplantation.<sup>85</sup>

## V. FINAL REMARKS

---

57(4) *American Journal of Comparative Law* 765-97; C Milhaupt, 'Beyond Legal Origin: Rethinking Law's Relationship to the Economy – Implications for Policy' (2009) 57(4) *American Journal of Comparative Law* 831-45; J Reitz, 'Legal Origins, Comparative Law and Political Economy' (2009) 57(4) *American Journal of Comparative Law* 847-862; and R Harris, 'Law, Finance and First Corporations', in J J Heckman, R L Nelson and L Cabatingan (eds), *Global Perspectives on the Rule of Law* (Routledge 2009), pp 145-72.

<sup>83</sup> See mixed evidence by F Cross, 'Law and Economic Growth' (2002) 80(7) *Texas Law Review* 1737-775.

<sup>84</sup> Moreover, alternative theories might explain why certain institutions, related or unrelated to legal origin, cause economic growth. See, among others, R M Grier, 'Colonial Legacies and Economic Growth' (1999) 98(3-4) *Public Choice* 317-35; D Acemoglu, S Johnson, and J A Robinson, 'The Colonial Origins of Comparative Development: An Empirical Investigation' (2001) 91(5) *American Economic Review* 1369-401; D Acemoglu and S Johnson, 'Unbundling Institutions' (2005) 113(5) *Journal of Political Economy* 949-95; D Acemoglu and S Johnson, 'Disease and Development: The Effect of Life Expectancy on Economic Growth' (2007) 115(6) *Journal of Political Economy* 925-85; D Acemoglu, D Cantoni, S Johnson, and J A Robinson, 'The Consequences of Radical Reform: The French Revolution' (2011) 101(7) *American Economic Review* 3286-3307.

<sup>85</sup> See, among others, N Garoupa and A Ogus, 'A Strategic Interpretation of Legal Transplants' (2006) 35(2) *Journal of Legal Studies* 339-64.

This Article discussed the role of legal families in the comparative law and in the economic literature. We have summarized the traditional approach taken by comparativists and the different perspective taken by economists. While mainstream comparative law has lost interest in legal families to a large extent, economists have used these categories to explain the cross-country variation, not only in the depth of financial markets, but also in other factors and institutions relevant for economic development. The significant criticism faced by the legal origins theory from both conventional comparativists and economists only underscores the importance of this literature.

The economic literature has identified six factors to explain why a legal system could matter for economic growth: (1) the costs of identifying and applying efficient rules; (2) the system's ability to restrain rent-seeking in rule formulation and application; (3) the cost of adapting rules to changing circumstances; (4) the transaction costs to parties needing to learn the law; (5) the ease of contracting around rules; and (6) the costs of transitions between systems.<sup>86</sup> How these six factors relate in a meaningful way to legal families is largely under-theorized and generally unanswered.

Yet, the premise of the economic superiority of the common law is now the model for legal reform embodied by the Doing Business reports promoted by the World Bank.<sup>87</sup> Nevertheless, without a better understanding of the relationship between legal traditions and economic outcomes, there are good reasons to be skeptical about the legal origins theory as well as the Doing Business reports and related prescriptions that they have inspired.<sup>88</sup>

Statistical analysis seems to show consistent patterns by which a distinction between common and civil law matters for economic development. Extensive critique has challenged the empirical methodology.

---

<sup>86</sup> See N Garoupa and A Morriss, 'The Fable of the Codes: The Efficiency of the Common Law, Legal Origins and Codification Movements' (2012) 5 University of Illinois Law Review 1443-1497.

<sup>87</sup> <http://www.doingbusiness.org>.

<sup>88</sup> B Arruñada, 'Pitfalls to Avoid when Measuring the Institutional Environment: Is 'Doing Business' Damaging Business?' (2007) 35(4) Journal of Comparative Economics 729-747; and K Davis and M Krause, 'Taking the Measure of Law: The Case of the Doing Business Project' (2007) 32 Law and Social Inquiry 1095-120. A more comprehensive criticism is provided by B du Marais, 'Les Limites Méthodologiques des Rapports Doing Business' (2006) Working paper AED-2006-01; D Blanchet, 'Analyses Exploratoires des Indices Proposés par les Rapports Doing Business 2005 et 2006 de la Banque Mondiale' (2006) Working paper AED-2006-03; and B du Marais (ed), *Des Indicateurs pour Mesurer le Droit? Les Limites Méthodologiques des Rapports Doing Business* (La Documentation française 2006).

Still, in our view, there is no clear robust theory for the legal origins account, that is, the allegedly consistent patterns suggested by LLSV have not been fully explained. Law seems to matter for growth, and legal institutions are regarded as important by economists. Therefore, a sound theory is needed. Effective legal policymaking cannot possibly be based on mere statistical patterns; it requires a deep understanding of causation mechanisms. Comparativists should get involved in that discussion instead of avoiding engagement based on the prevailing skepticism about legal families.

# **‘THIS IS NOT LIFE AS IT IS LIVED HERE’: THE COURT OF JUSTICE OF THE EU AND THE MYTH OF JUDICIAL ACTIVISM IN THE FOUNDATIONAL PERIOD OF INTEGRATION THROUGH LAW**

Andreas Grimmel\*

*What characterises the EU today is that it is not only a multi-level governance system, but also a multi-context system. The making of Europe does not just take place on different levels within the European political framework, executed and fostered by different groups of actors or institutions. Rather, it also happens in different and distinguishable social contexts – distinct functional, historical, and local frameworks of reasoning and action – that political science alone cannot sufficiently analyse with conventional and generalising models of explanation. European law is one such context, and it should be perceived as a self-contained sphere governed by a specific rationality that constitutes a self-generating impetus for integration. By way of re-examining the much-debated ‘foundational period’ of the CJEU’s jurisdiction, it will be shown here that only by analysing the context of European law as an independent space of reasoning and action can the role of Europe’s high court in the process of integration be adequately captured.*

Keywords: CJEU, EU law, European integration, judicial activism, European legal order

## **TABLE OF CONTENTS**

I. INTRODUCTION.....	57
II. OPENING THE BLACK BOX – UNDERSTANDING THE CONTEXT OF EUROPEAN LAW .....	58
1. <i>Functional</i> .....	59
2. <i>Local</i> .....	60
3. <i>Temporal</i> .....	61
III. ESTABLISHING AND DEFINING THE AUTONOMY OF EUROPEAN LAW: THE MYTH OF JUDICIAL ACTIVISM IN THE FOUNDATIONAL PERIOD OF INTEGRATION.....	63

---

\* Postdoctoral Researcher at the University of Hamburg, Institute for Political Science. The author thanks Arif Ahmed, Catherine Barnard, Bengt Beutler, Thomas Bruha, Alan Dashwood, Renaud Dehousse, Geoffrey Edwards, Markus Gehring, Armin Hatje, Jane Heal, Christopher Hill, Julie Smith, and Marianne Takle for their many helpful comments on this research. This article is based on a working paper that was published in early versions in the *Europa-Kolleg Hamburg Discussion Paper Series* (2/2011) and *Les Cahiers européens de Sciences Po* (03/2011).

1. <i>The Historical Context – the Need for Coherent Adjudication Over Time</i> .64	
2. <i>The Functional Context Crossing the Dividing Line Between Law and Politics?</i> .....	68
3. <i>The Local Context – Marking Off a Distinct European Legal Order</i> .....	72
IV. CONCLUSION .....	75

## I. INTRODUCTION

In political science, there seems to be a broad consensus that the role of law can be adequately analysed by adopting the theoretical approaches originally invented to describe and explain integration processes induced by politically motivated actors. Accordingly, European law is understood to constitute just another political arena where, amongst a variety of actors – from private national litigants, to diverse pro-integration activists, to nation states, to the genuine European institutions – the Court and its representatives are seeking to implement a ‘highly politicised’ and ‘pro-integrative jurisprudence’<sup>1</sup> and, by doing so, show their ‘ability or willingness to act as a motor of integration.’<sup>2</sup> However, recent empirical evidence from the CJEU<sup>3</sup> – like that brought to light by Solanke,<sup>4</sup> Malecki,<sup>5</sup> and Grimm<sup>6</sup> – could not support these assumptions, instead confirming the CJEU judge who states: ‘this is not life as it is lived here.’<sup>7</sup>

This article will follow an alternative approach to examining the role of law and the Court in the integration process, highlighting the options and limitations of reasonable action within European law as a specific functional, historical, and local context. Such a context is to be understood as an autonomous sphere of thought and action that constitutes a self-generating impetus for integration. This does not imply that neither actors

<sup>1</sup> Alec Stone Sweet, ‘The European Court of Justice and the Judicialisation of EU Governance’ (2010) 5 *Living Reviews in European Governance* 27.

<sup>2</sup> R. Daniel Kelemen and Susanne K. Schmidt, ‘Introduction – The European Court of Justice and Legal Integration: Perpetual Momentum?’ (2012) 19 *Journal of European Public Policy* 1, 2.

<sup>3</sup> For the purposes of stylistic flow, the contemporary abbreviation ‘CJEU’ will also be used in a historical context and especially to refer to the European Court of Justice (ECJ) throughout the article.

<sup>4</sup> Iyiola Solanke, ‘Stop the ECJ? An Empirical Assessment of Activism at the Court’ (2011) 17 *European Law Journal* 764.

<sup>5</sup> Michael Malecki, ‘Do ECJ Judges All Speak with the Same Voice? Evidence of Divergent Preferences from the Judgments of Chambers’ (2012) 19 *Journal of European Public Policy* 59.

<sup>6</sup> Andreas Grimm, *Europäische Integration im Kontext des Rechts* (Springer VS 2013), 275-354.

<sup>7</sup> Anonymous, personal interview, Court of Justice of the EU, Luxembourg, April 2011.

nor institutions play any role in the litigation processes happening within European law. Political science research, especially constructivist studies of the last two decades, have done a convincing job of showing theoretically and empirically how various institutions and norms are able to shape action and ‘socialise’ actors’ interests. However, to derive substantial explanations about integration through law in Europe this is not enough: one must inevitably engage with the law itself and perceive it as a self-contained, non-positivist space of reasoning and action.<sup>8</sup> In other words: it is about understanding the rules of the game, not just the motives of the players, or the way the game shapes their thoughts and actions.

By way of re-examining some of the best-known landmark cases and doctrines of the much-debated ‘foundational period,’<sup>9</sup> it will be shown here that there are good reasons to take the legal context of reasoning and action seriously, and to figure this into theory-driven analyses that seek to understand the roles European law and the Court play in the process of integration through law.

## II. OPENING THE BLACK BOX – UNDERSTANDING THE CONTEXT OF EUROPEAN LAW

European law today is based on a variety of norms, rules, methods, and procedures. Not all of these are codified and written down in the texts of the Treaties, or the countless initiatives, regulations, directives, decisions, recommendations, and statements originated in Brussels and Strasbourg. There is also a broad range of legal traditions, doctrines, and approved customs, as well as craft-bound forms and methods of interpretation, legal reasoning, and argumentation that constitute and shape EU law. All of these became ‘habits’<sup>10</sup> and are widely acknowledged and accepted by lawyers, legal scholars, and legal representatives throughout Europe as coercing legally relevant action. In short, the EU’s legal system consists of and is shaped by much more than mere statutory provisions and regulations. It constitutes a specific *context* – a dense net of commonly known and accepted rules, concepts, and procedures possessing a specific ‘meaning-in-use’<sup>11</sup> and providing actors with reasons for meaningful action

<sup>8</sup> Gráinne de Búrca, ‘Rethinking Law in Neofunctionalist Theory’ (2005) 12 *Journal of European Public Policy* 310.

<sup>9</sup> Joseph H H Weiler, ‘The Transformation of Europe’ (1991) 100 *The Yale Law Journal* 2405, 2413; what is meant here is the phase of CJEU jurisdiction starting in the late 1950s and ending in the mid 1970s.

<sup>10</sup> Ted Hopf, ‘The Logic of Habit in International Relations’ (2010) 16 *European Journal of International Relations* 539.

<sup>11</sup> Antje Wiener, ‘Enacting Meaning-in-use: Qualitative Research on Norms and International relations’ (2009) 35 *Review of International Studies* 175.

– that are distinct from other contexts in one or more of the following three different dimensions:

1. *Functional*

Every context can be delimited by the mere fact that it is a functionally distinct social institution. As such, it constitutes a space of specific meaning and rational reasoning. Max Weber argued very convincingly in his seminal ‘Economy and Society’ (1922) that modern societies have developed several ‘value spheres’ over time, each with its own means and ends. Although one does not have to agree with Weber’s particular distinction of such spheres (economy, politics, law, science, religion, etc), his findings are useful for understanding the autonomy of law. In modern, functional, differentiated societies, the ‘sphere of law’ forms an independent and acknowledged social space of reasoning where inter-subjective legal rationalisation, justification, and acceptance of certain actors become possible. At the same time, law as a functional, differentiated entity must be clearly distinguished from the legislative and political democratic processes whose aim is to set and negotiate the law. Legal reasoning shall, and at least in democratic systems, never be legal politics: there has to be an ideal dividing line between both. The fact that Courts sometimes have to deal with questions that also arose in political circles or are subject to political debates does not yet make the judicial process political, or the Courts political actors.

Although in effect, law and politics elaborate and concretise legal rules, the specific task of jurisprudence is interpreting, applying, and to some extent, further developing laws, which in praxis can neither be self-enforcing nor logically coercive. It has to be kept in mind that, other than in politics, all this is determined by a highly formalised procedure and by litigants or Member State courts approaching the CJEU with very concrete questions. As Judge Prechal notes:

People sometimes just forget how our work functions over here. [...] We first need to have a case to do something ... if there is no case and no arguments by the parties we cannot just send out messages.<sup>12</sup>

Beyond this, courts and their judges have to provide legal explanations – the basis of which must be certain forms of argument that rationalise the actions within the borders of a legal community, thereby distinguishing the context of law – at least ideally, but also in some kind of actual practice – from politics and other functional distinct contexts. Of course, a legal text

---

<sup>12</sup> Alexandra Sacha Prechal, personal interview, Court of Justice of the EU, Luxembourg, 06.04.2011.

can be interpreted in manifold ways – there is quite simply no coercive ‘causal mechanism’<sup>13</sup> in law. But there are also commonly shared rules about how to interpret rights that can never be solely subject to private interpretation: these are the acknowledged forms of legal argument<sup>14</sup> that allow deliberation of the more fundamental problems by specific rules and concepts. They are specific to each legal order and must be seen as ways of producing convincing, or at least acceptable and therefore legitimate, judicial outcomes. The decision about which legal arguments and decisions are acceptable and which should be refused is one that can certainly not be undertaken by merely referring to a legal formalism.<sup>15</sup> It can only be made by asking for the concrete embeddedness and justifiability of the argument in the wider context of law, and with regards to the following two dimensions of the context.

## 2. *Local*

The European Union has developed an autonomous legal order with its own forms of legal rationalisation that make it locally distinguishable from other legal contexts like national law, international law, individual Member State law, and non-European legal orders. In a local sense, European law is distinct from other legal orders simply in the fact it is *European* law, possessing a unique legal tradition and genesis. In this sense, the borders of the context formally consist of membership in the European legal community, which constitutes a specific legal system providing its own, genuinely European judicial sources and patterns of interpretation, legal cognition, and justification. This is particularly apparent in the forms of judicial argument that are canonically accepted and commonly used to interpret European law. These, together with the stock of legal norms, build the inevitable basis of meaningful action in European law. However, there can never, as Hunt points out, be ‘acceptance of legal rulings simply because they have the quality of law.’<sup>16</sup> To develop an inter-subjective ‘persuasion pull’ and ‘compliance pull’<sup>17</sup>, judges cannot merely rely on the

<sup>13</sup> Michael Zürn and Jeffrey T. Checkel, ‘Getting Socialized to Build Bridges: Constructivism and Rationalism, Europe and the Nation-State’ (2005) 59 *International Organization* 1048; cf Marlene Wind, Dorte Sindbjerg-Martinsen, and Gabriel Pons-Rotger ‘The Uneven Legal Push for Europe: Questioning Variation when National Courts Go to Europe’ (2009) 10 *European Union Politics* 63.

<sup>14</sup> Joxerramon Bengoetxea, Neil MacCormick and Leonor Moral Soriano, ‘Integration and Integrity in the Legal Reasoning of the European Court of Justice’, in Gráinne de Búrca and Joseph H H Weiler (ed) *The European Court of Justice* (Oxford University Press 2001), 43.

<sup>15</sup> cf Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002).

<sup>16</sup> Jo Hunt, ‘The End of Judicial Constitutionalization’, (2007) 3 *Croatian Yearbook of European Law and Policy* 155.

<sup>17</sup> Joseph H H Weiler, ‘Journey to an Unknown Destination: A Retrospective and



power bestowed by their institution or a legal formalism, but have to build upon the shared European legal repository of rules, concepts, and methods that allow common comprehension and acceptability. What is most characteristic in the local dimension, however, is the fact that Europe is a largely incomplete construct that has to be further developed, also by means of law. The term 'Europe' neither marks a fixed territory nor a settled political or judicial system: it is in constant movement. This is true also in a temporal sense.

### 3. *Temporal*

European law as a context is and must always be a historically distinct space that is never identical to other past or future configurations of the same (functional or local) context. This is due to the fact that, like every legal system, it is in permanent fluctuation and dependent on the social and political developments that surround it. As Vassilios Skouris, president of the European Court of Justice, describes it:

The historical context plays an important role. [...] And the political environment also plays a role. [...] Jurisprudence does not grow by itself. Jurisprudence grows together with legislation and also with the questions that arise then. You sometimes have to state your position on highly political and socially important questions. [...] All of this is of course time-related.<sup>18</sup>

This embeddedness of jurisprudence in certain historical and political circumstances does certainly not imply that it is politicised and pro-integrative, or that European law comes into being from nowhere. From the dawn of the European Community, the legal order could not have been brought into being without considering the repository of joint legal knowledge and commonly shared legal traditions that still build the core of the EU's legal system today. The same applies to the way the CJEU further develops the law case by case. It can only depend on a steadily adjusted nexus of laws, legal insights, doctrines, and rules that emerged in Europe over decades and centuries. Surrounded by this broad framework and in order to ensure the consistency and historical coherence<sup>19</sup> of its decisions, the CJEU's decision-making is very path-dependent<sup>20</sup> and can hardly make

---

Prospective of the European Court of Justice in the Arena of Political Integration' (1993) 31 *Journal of Common Market Studies* 417, 419.

<sup>18</sup> Vassilios Skouris, personal interview, European Court of Justice, Luxembourg, 12.04.2011.

<sup>19</sup> Seminal on coherence still Nicholas Rescher, *The Coherence Theory of Truth* (Clarendon Press 1973).

<sup>20</sup> cf Susanne K Schmidt, 'Who Cares About Nationality? The Path Dependent Case

abrupt changes in direction. Or as a judge of the CJEU vividly depicts it: 'The Court is like an oil tanker. It moves extremely slowly, which is probably right, [because] you do not want a court going zig-zag all the time.'<sup>21</sup>

From a contextual perspective of the law, it is not of paramount importance to figure out if judges have a certain attitude towards a legal issue or case at hand or are a 'true believers.'<sup>22</sup> This is for a simple reason that lies in the institution of law itself: the goal of a judgment is never to prove the integrity or honesty of the judges, but to make a convincing argument in the context of the law by the means of the law. Otherwise, adjudication would not be about legal provisions and their appropriate application, but about showing the moral qualities of the human beings in charge of interpreting the law. It goes without saying that this, at least in democratic political systems, can and must never be the task of the law or any legal argument. Beyond this, the need to ensure acceptability by judicial reasoning has very practical reasons, namely to ensure the functioning of the Court. As one judge with many years of experience of on the Court explains:

[N]one of us [judges] wants to see the Court lose in standing or public influence. In order to function as a court you need to have general respect for your judgments. [...] You have to explain [your decision] in the language people expect from judgments.<sup>23</sup>

For one reason or another, although judges possess their own interests, motives, and preferences, the judgments and rationale behind a decision must stand alone and detached from the personalities in charge of the decision-making.

Therefore, the proposed shift towards the context should not be misunderstood as proposing a naïve perspective on law as a world where interests have no relevance. It is indisputable that judges – in national as well as in the European Court's chambers – can never be totally free of personal considerations. Notwithstanding the importance of these and other factors, like institutional entanglements,<sup>24</sup> the core power a Court

---

Law of the ECJ from Goods to Citizens' (2012) 19 *Journal of European Public Policy* 8.

<sup>21</sup> n 7.

<sup>22</sup> Alastair Iain Johnston, 'Conclusions and Extensions. Toward Mid-Range Theorizing and Beyond Europe' (2005) 59 *International Organization* 1013.

<sup>23</sup> n 7.

<sup>24</sup> cf Fritz W Scharpf, 'The Joint-Decision Trap Revisited' (2006) 44 *Journal of Common Market Studies* 548; Fritz W Scharpf, 'Perpetual Momentum: Directed and

has and that its judges must rely on is still the ability to convince; and it can only be convincing by reference to the *common* European legal norms, procedures, and traditions that are specific to a certain context of reasoning and action. In this sense, neither the proof nor the disproof of ‘politics in robes’ can be found outside the law. To open the black box of European law and understand it and the Court in context, therefore, must be seen as a pre-condition of engaging with law, legal argument, and legal actors.

### III. ESTABLISHING AND DEFINING THE AUTONOMY OF EUROPEAN LAW: THE MYTH OF JUDICIAL ACTIVISM IN THE FOUNDATIONAL PERIOD OF INTEGRATION

Today it is hardly contested in political science anymore that, in the early years of integration, the CJEU created the autonomy of European law driven by a political interest in expansionist law-making, laying the cornerstone for a series of steps that siphoned ever more power from the nation states to the European level – all without state consent. In this reading setting up a common European legal system was a ‘power struggle’ the CJEU fought ‘with the help of the definitional power (symbolic capital) available to it.’<sup>25</sup> This would render institutionally influential cases like *Fédéchar* and *AETR* on the principle of implied powers, *van Gend en Loos* on the principle of direct effect, *Costa/ENEL* on the principle of supremacy, or even *Internationale Handelsgesellschaft* on the protection of fundamental rights,<sup>26</sup> ‘original sins’ in a continuing story of European judicial empowerment. This story, however, seems to be a myth reflecting a certain theoretical perception of the Court as a political and interest-driven actor, rather than recounting the actual reasons for the European judicial process and the historical circumstances in which the decisions were made. It will be shown that although the legal decisions of the foundational period can be unhesitatingly characterised as a ‘quiet revolution’<sup>27</sup> spearheaded by the CJEU and had a considerable political impact, they were not only quite understandable from a contextualist viewpoint, but also necessary in light of the historical, local, and functional dimensions of the context of the

---

Unconstrained?’ (2012) 19 Journal of European Public Policy 127; R Daniel Kelemen, ‘The Political Foundations of Judicial Independence in the European Union’ (2012) 19 Journal of European Public Policy 43.

<sup>25</sup> Richard Münch, ‘Constructing a European Society by Jurisdiction’ (2008) 14 European Law Journal 534.

<sup>26</sup> Cases 8/55, *Fédéchar* [1956] ECR 245; 22/70, *AETR* [1971] ECR 263; 26/62, *van Gend en Loos* [1963] ECR I; 6/64, *Costa/ENEL* [1964] ECR 614; 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125.

<sup>27</sup> Joseph H H Weiler, ‘A Quiet Revolution. The European Court of Justice and Its Interlocutors’ (1994) 26 Comparative Political Studies 510.

emerging European legal order.

The line of argument is the following: to draw a picture that can convincingly explain the CJEU's role in these early days, it is not sufficient to merely note the fact that the Court engaged in an expansionist construction of European law. It is essential to be able to answer the pivotal question of *how*, on *which basis*, and for *which reasons* the law was developed. These questions can be only answered sufficiently by taking the context into account. So, other than in an analysis by Alter and Helfer that examined how the CJEU established 'its legal and political authority,'<sup>28</sup> the focus here will be not on the fact that the Court possesses a considerable *authority*, but on how and under which contextual circumstances the CJEU established *autonomy of European law*<sup>29</sup> in the early years of integration.

The picture that will be drawn here about such landmark doctrines on implied powers, direct effect, and supremacy in the foundational period of adjudication will be a different one than those of actor-centred and rationalist theories of EU integration.<sup>30</sup> First and foremost, it is a story about law, although the aim is not and cannot be to provide judicial argument for or against particular CJEU rulings. To judge the veracity of judicial argumentation is and must remain the task of jurisprudence. Also, it is not a perspective that attempts a close reconstruction of historical evidence.<sup>31</sup> The promise, however, is to offer a broader understanding about integration through law in the early years of integration, and to try to understand the Court as a *judicial* actor embedded in the context of law rather than a political actor functioning as a motor for integration.

### 1. *The Historical Context – The Need for Coherent Adjudication Over Time*

To approach the Court's decisions and most fundamental doctrines in the early years of integration, it is essential to first envision their institutional

---

<sup>28</sup> Karen J Alter and Lawrence Helfer, 'Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice' (2010) 64 *International Organization* 563, 569.

<sup>29</sup> The word 'autonomy' is composed of the ancient Greek words *auto*=self and *nomos*=law. Here, the autonomy of European law will be referred to as an independent, self-contained space of action and thought no longer dependent on the benevolence of the Member States and their political acceptance to interpret and implement laws.

<sup>30</sup> An overview and critique on the legacy of rationalist studies can be found at Andreas Grimm, 'Judicial Interpretation or Judicial Activism?: The Legacy of Rationalism in the Studies of the European Court of Justice' (2012) 18 *European Law Journal* 518.

<sup>31</sup> cf eg Bill Davies and Morten Rasmussen, 'Towards a New History of European Law' (2012) 21 *Contemporary European History* 305.

and contractual basis in the 1950s and 1960s. Only a few years after the European Coal and Steel Community (ECSC, 1951-52) was brought into being as the first supranational organisation since the end of World War II, the Rome Treaties establishing the European Economic Community (EEC, 1957/58) were signed. Today, it is largely undisputed in law that unlike the Treaty of Paris, which formed the basis of the ECSC, the EEC-Treaty was not a 'traité loi,' but a 'traité cadre.'<sup>32</sup> As such, it did not just contain explicit legal regulations for a specific area of common action, but laid the cornerstone for a supranational entity with autonomous institutions and equipped with far-reaching legal competences. This builds the backdrop of the further legal developments, one that is crucial for comprehending the judgments made by the CJEU in the following years.

Apart from this, it is important to bring to mind the particular historical situation in which the doctrines of implied powers, direct effect, and supremacy were developed. This must be carefully differentiated from other past and future configurations of the context of European law. Against a background of long and devastating warfare, all six Member States made the qualitative step towards deeper integration by signing the Rome Treaties in the late 1950s, fully aware of the fact that it was new soil they were stepping on. Although there was indeed no agreement about bringing a European federation into being, there was broad consent that the old system of nation states has to be contained within an effective institutional structure.

Therefore, the explanation that 'the most assertive supranational court of that time managed to fly under the radar so successfully'<sup>33</sup> and Member States did not notice the reach of its jurisdiction is too simplistic. From a historical standpoint, there can hardly be any doubt that the Member States knew the consequences of their decision to take the Community agreement, including the European Judiciary, to a higher level.<sup>34</sup> But, as Heisenberg and Richmond analyse, they 'displayed little interest in the details of the legal system. Instead, they delegated the construction of the judicial system to a Judicial Group composed of legal experts, with significant autonomy from Member State direction. This Group was given broad authority in devising a judicial system.'<sup>35</sup> This certainly does not

---

<sup>32</sup> cf. eg Koen Lenaerts and Piet Van Nuffield, *Europees recht in hoofdlijnen* (Maklu 2003) 43.

<sup>33</sup> Vlad Perju, 'Reason and Authority in the European Court of Justice', *Boston College Law School, Legal Studies Research Paper Series*, Research Paper No. 170, 331.

<sup>34</sup> cf G Federico Mancini, 'The Making of a Constitution for Europe' (1989) 26 *Common Market Law Review* 595; G Federico Mancini and David T Keeling, 'Democracy and the European Court of Justice' (1994) 57 *Modern Law Review* 186.

<sup>35</sup> Dorothee Heisenberg and Amy Richmond, 'Supranational Institution-Building in

preclude the development of a ‘transnational judicial esprit de corps’<sup>36</sup> amongst judges. However, the assumption that the CJEU extended European rules constraining national sovereignty far beyond the Member States’ original intent<sup>37</sup> is true only in so far as the historical legislator could not foresee all the cases and judicial problems that might one day arise in Europe’s unfinished Community. Therefore, the Court was granted a considerable leap of faith in the conscientious and competent development of the legal system by judicial interpretation.

Moreover, from an empirical point of view, it is also interesting to note that even as the wind began to change in the wake of de Gaulle’s self-confident nationalist politics of the mid-1960s, the States did not show any serious incentive to disempower the Court, overturn its rulings, and go back to the modus of the ECSC Treaty. This, however, should have been the logical consequence from a rationalist perspective, since it can be assumed that there was a broad convergence of interests, only few players,<sup>38</sup> and a strong motivation to cut back the Court’s power among the six Member States in order to correct or amend the Treaty under Article 236 EECT, which demanded unanimity.

So, why did the nation states not act to reverse the Court’s decisions if they obviously could and should have had a high incentive to do so? From a contextual perspective, an answer can be found in the law itself, namely in the fact that the CJEU formulated its decisions in a quite coherent way, and based on reference to former judgments (if available), shared legal knowledge, and common legal traditions, which made it hard for the Member States to find a good reason for calling the legitimacy of the CJEU jurisprudence into question and obstructing the further development of European law. This is all the more true since it is the Member States themselves who have been the main promoters of ‘peace through law’ in Europe, and who created the Court to ensure the

---

the European Union: a Comparison of the European Court of Justice and the European Central Bank’ (2002) 9 *Journal of European Public Policy* 201, 204.

<sup>36</sup> Antoine Vauchez, ‘Keeping the Dream Alive: the European Court of Justice and the Transnational Fabric of Integrationist Jurisprudence’ (2011) 5 *European Political Science Review* 1, 3; cf also Antoine Vauchez, ‘How to Become a Transnational Elite. Lawyers’ Politics at the Genesis of the European Communities (1950-1970)’, in Hanne Petersen et al (eds) *Paradoxes of European Legal Integration* (Ashgate 2008), 129; Antoine Vauchez, ‘The Transnational Politics of Judicialization: Van Gend en Loos and the Making of EU Polity’ (2010) 16 *European Law Journal* 1; Morten Rasmussen, ‘The Origins of a Legal Revolution: The Early History of the European Court of Justice’ (2008) 14 *Journal of European Integration History* 77.

<sup>37</sup> Karen J. Alter and Lawrence Helfer, (n 28).

<sup>38</sup> The Community just consisted of six members in those days (Belgium, France, Italy, Luxembourg, the Netherlands and Germany).

effectiveness and bindingness of the newly established legal order.

It is important to note in this regard that the landmark cases were not decided by the judges on an ad-hoc basis, but had to be constantly unfolded over time, ensuring connectedness to earlier precedents and existing jurisprudence, and trying to anticipate future judicial problems.<sup>39</sup> The function of such a continuity of coherent decisions, and the resulting ‘collage effect’<sup>40</sup> of judgments, should be considered much more than a mental exercise for judges, or seen as filling new bottles with old wine.<sup>41</sup> There is a deeper reason to this practice that should be taken seriously. What it ensures is that:

[...] there is a degree of legal certainty which is an important principle – that people do not come to the Court finding that it is like playing the lottery every day where they do not know what the result is going to be. There has to be at least some degree of certainty. But obviously, sometimes the Court will have earlier cases that will not necessarily grapple with the same situation, and then it has to try and find out which of the earlier cases is closest to the [current] situation. [...] Not all cases are exactly the same, so the Court tries to develop concepts to be found in other cases and to apply the relevant principles to the new case.<sup>42</sup>

At this point, one might object that there could still be some kind of motivation or intent ‘to reduce the domain of national autonomy ... and create the conditions for the gradual Europeanisation of national administration and judging’<sup>43</sup> hidden behind a veil of legalese, and that the

<sup>39</sup> This fact can be seen, for example, in the chain of judgments concerning the direct and indirect implementation of directives that arose as a logical consequence of *van Gend en Loos* and *Costa/ENEL* in the cases 8/81 *Becker* [1982] ECR 53; 152/84 *Marshall I* [1986] ECR 723; 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969; 103/88 *Fratelli Costanzo* [1989] ECR 1839; 106/89 *Marleasing* [1990] ECR I-4135; joined cases C-6/90 and C-9/90 *Francovich* [1991] ECR 5403; 91/92 *Faccini Dori* [1994] ECR I-03325; 80/97 *Inter-Environnement Wallonie* [1997] ECR I-7411; 131/97 *Carbonari* [1999] ECR I-01103; C-443/98 *Unilever* [2000] ECR I-7565.

<sup>40</sup> Loïc Azoulay, ‘The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization’ (2008) 45 *Common Market Law Review* 1335, 1339.

<sup>41</sup> Antonin Cohen, ‘Constitutionalism without Constitution: Transnational Elites between Political Mobilization and Legal Expertise in the Making of a Constitution for Europe (1940s-1960s)’ (2007) 32 *Law & Social Inquiry* 109, 131.

<sup>42</sup> Aindrias Ó Caoimh, personal interview, Court of Justice of the EU, Luxembourg, 12.04.2011.

<sup>43</sup> Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004) 232.

ongoing process of judicial law-making is its proof rather than its disproof. To verify this assumption, however, would require two things: that the strains of adjudication emanating from the early landmark cases reflect a linear, rather than a continuous process (the contrary would be empirical evidence to counter political motivation), and that there is no convincing justification making the adjudication acceptable within law (the contrary would be the intervening variable in a political explanation).<sup>44</sup> This leads us to the functional dimension of the context.

## 2. *The Functional Context – Crossing the Dividing-Line Between Law and Politics?*

Three questions have to be addressed here in regard to the foundational period and the Court's role in this phase: first, if the CJEU and its judges had the competency to develop such momentous legal doctrines as *Fédéchar*, *van Gend en Loos*, *Costa/ENEL*, and *Internationale Handelsgesellschaft*, or if the judicial development of the law crossed the divide into politics in these early years of jurisdiction; second, if it was imperative or at least necessary to develop the doctrines; and third, presupposing answers to the former questions, if the Court's justifications delivered as grounds for its decisions have been reasonable – ie understandable, acceptable, and therefore legitimate in terms of law.

The first question seems to be relatively easy to answer, although it is certainly not uncontested in jurisprudence and political science. Keeping the historical circumstances in mind, and on the basis of the objective of the Treaty being the establishment of a Community with supranational institutions – which must have implied building a legitimate governing system in which the separation of powers is secured – Article 164 EECT<sup>45</sup> must be read in a broad sense, equipping the CJEU with far-reaching competencies. The European Court of Justice was never intended to be a panel of judges dependent upon the goodwill of its contracting parties, like the International Court of Justice or the European Court of Human Rights. As the Community's judiciary body, it was commissioned to balance the shift of legislative and executive power and to construct a legal system that brings the objectives of the Treaty to fruition, and therefore,

---

<sup>44</sup> If it can be shown the CJEU used sound legal reasoning in all the contexts examined, this must be the intervening variable disproving the claim of 'judicial politics,' as it would be invalid to suspect political motivation in these cases (otherwise the critics' argument would obviously violate the essential separation of law and politics and therefore do what they object to – unduly mix law and politics).

<sup>45</sup> 'The Court of Justice shall ensure observance of law and justice in the interpretation and application of this Treaty'; see also Article 169(2) ; 170, 173, 175, 177-180, 228 EECT.



to ‘breathe life into the Treaty’<sup>46</sup>.

To answer the second question about the legal necessity of the Court’s doctrines of supremacy and direct effect, we have to take a closer look at the reasons for its decisions. In numerous political science studies, both doctrines have been portrayed as cutting down the autonomy of the states. However, this is only one side of the coin. More concretely, it is the state-centred side. The other one is that the clarification of supremacy and direct effect have been invaluable and absolutely indispensable in helping European citizens to assert their legitimate rights and be protected by law – not only, but especially in the CJEU’s protection of fundamental rights as in *Internationale Handelsgesellschaft*, *Nold*, or *Defrenne III*.<sup>47</sup> Rather than wilfully trying to ‘pursuing an integrationist project,’<sup>48</sup> from a legal point of view the CJEU laid down the necessary constitutional basis that served to protect the legitimate expectations of the people living under the rule of the European Community. It was not by chance that the Court, only a few years later, affirmed the principle of protecting legitimate expectations in the cases *Commission v Council*, *Westzucker*, and *Einfuhr- und Vorratsstelle Getreide*;<sup>49</sup> and the principle of legal certainty in *Brasserie de Haecht*, *BRT v Sabam*, and *Ministère Public v Asjes*.<sup>50</sup> Both the protection of legitimate expectations and the principle of legal certainty aim to strengthen the position of individuals and safeguard the citizens’ confidence in the law.<sup>51</sup> Portraying these cases and judicial developments as expansionist in order to undermine the autonomy of the Member States, or to carry any other institutional or private interests into effect would be a caricature of the decisions and the legal rationale behind them.

Before this backdrop, the CJEU not only possessed the competence to act, but was also called into action in order to ensure the legal protection of the European people. Without the supremacy and direct effect of Community law, there simply would have been no binding effect for European institutions and states (acting on the supranational level) at all. Nor would there have been effective legal control over European politics. As the

<sup>46</sup> Stephen Weatherill, *Law and Integration in the European Union* (Clarendon Press 1995), 185.

<sup>47</sup> Cases 4/73 *Nold* [1974] ECR 491 and 149/77 *Defrenne III* [1978] ECR 1365.

<sup>48</sup> Vlad Perju, (n 33), 331.

<sup>49</sup> Cases 81/72 *Commission v Council* [1973] ECR 576; 1/73 *Westzucker* [1973] ECR 723; 8/44 *Einfuhr- und Vorratsstelle Getreide* [1975] ECR 475.

<sup>50</sup> Cases 48/72 *Brasserie de Haecht* [1973] ECR 78; 127/73 *BRT v Sabam* [1974] ECR 314; joined cases 209-213/84 *Ministère Public v Asjes* [1986] ECR 1457.

<sup>51</sup> This motive already appears in the very early joined cases 7/56, 3/57 to 7/57 *Algera* [1957] ECR 41; cf also John A. Usher, *General Principles of EC Law* (Longman 1998), 54-57, 65-67.

CJEU argued in 1964, ‘the obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent,’<sup>52</sup> an argument which is still very convincing today. In other words, there were not directly providing individuals with any rights, while political integration and the transfer of competences to the supranational level moved forward. It should be clear that this would have primarily meant an erosion of fundamental rights and political control of the people, not the states, since recourse to national courts in cases concerning European regulations or directives would have been impossible.<sup>53</sup> For these reasons, it *must* never have been the intention of the founding States, acting on behalf of the European people,<sup>54</sup> to install a judiciary that is merely ‘*la bouche qui prononce les paroles de la loi*’ (Montesquieu), but instead to create and enforce an institution that breathes life into the young and incomplete legal order, and facilitates legal certainty and trust.<sup>55</sup>

To continue the previous discussion about the historical context and to answer the third question about the legal justification of the early landmark cases, we have to take a closer look at the specific rules of legal rationalisation by which the functional context of European law is characterised in the foundational period. It seems beyond controversy that the CJEU never shied away from formal legal demands<sup>56</sup> in its rationales for decision. However, the contention that the judges have detached themselves from the texts of the Treaties by arbitrarily using teleological arguments in order to enhance the European rule of law keeps coming up over and over again in many studies.<sup>57</sup> While it is true for the early decisions of the 1950s and 1960s that the Court had to use teleological arguments in the absence of clear legal provisions, the rulings of the following years, in contrast, show another picture. The preferred forms of

<sup>52</sup> ‘This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens’ (Case 26/62 *van Gend en Loos* [1963] ECR I).

<sup>53</sup> cf. Stephen Weatherill (n 46), 117.

<sup>54</sup> See also preamble of the EECT.

<sup>55</sup> cf also Dorothee Heisenberg and Amy Richmond, (n 35), 206.

<sup>56</sup> cf. Stephen E Toulmin, *The Uses of Argument* (Cambridge University Press 1958); Dennis Patterson, ‘Normativity and Objectivity in Law’ (2001) 43 William and Mary Law Review 325.

<sup>57</sup> See, eg Karen J Alter and Lawrence Helfer, (n 28), 569; V. Perju, (n 33), 369; Martin Höpner, ‘Usurpation statt Delegation: Wie der EuGH die Binnenmarktintegration radikalisiert und warum er politischer Kontrolle bedarf’, *MPIfG Discussion Paper*, No. 2008/12, Cologne, Max Planck Institute for the Study of Societies, 29; cf. also Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Martinus Nijhoff 1986) 526.

judicial argumentation shifted and contextual arguments concerning the coherence of the common legal order, as well as, most notably, the ‘effet utile’ (principle of effectiveness), moved to the centre of the CJEU’s reasoning.<sup>58</sup>

At this point, it might be objected that the Court just picked the forms of argument that best supported its interests, eg, in expanding the ambit of European law or the Court’s power vis-à-vis the nation states.<sup>59</sup> In light of empirical evidence, however, this explanation is unconvincing, since it is far from true that all landmark cases were decided in favour of the expansion of EU law; not even in cases where the CJEU must have been in a good strategic situation to pursue pro-integrationist or other political interests. It should also be remembered that:

‘[s]upremacy’ is primarily an enabling doctrine, which authorises the CJEU to hand down prescriptions for the handling of legal diversity but not a carte blanche for the gradual building up of a comprehensive body of substantive European law provisions which would suspend Europe’s legal diversity.<sup>60</sup>

In *CILFIT*, for example, the Court restricted its own further jurisdiction, and in *Francovich* the Court reconsidered and revised its earlier judgments on state liability made in *Russo v AIMA* and *Rewe v Hauptzollamt Kiel*; <sup>61</sup> also, in *Keck*, *Grant*, and *Greenpeace*, <sup>62</sup> the

<sup>58</sup> cf eg the influential cases concerning the implementation and embodiment of supremacy and direct effect, like the cases 9/70 *Leberpfennig* [1970] ECR 825; 41/74 *van Duyn* [1974] ECR 1337; 106/77 *Simmmenthal II* [1978] ECR 629; joined cases 205-215/82 *Deutsche Milchkontor* [1983] ECR 2633; 314/85 *Foto-Frost* [1987] ECR 4225; 217/88 *Tafelwein* [1990] ECR I-2899; joined cases 143/88 and 92/89, *Zuckerfabrik Süderdithmarschen* [1991] ECR I-534; 46/93 *Brasserie du Pêcheur* [1996] ECR I-1131; 224/01 *Köbler* [2003] ECR I-10290.

<sup>59</sup> cf Karen J Alter, ‘The European Legal System and Domestic Policy: Spillover or Backlash?’ (2000) 54 *International Organization* 489, 513; Sally J Kenney, ‘Beyond Principals and Agents: Seeing Courts as Organizations by Comparing Référéndaires at the European Court of Justice and Law Clerks at the U.S. Supreme Court’, (2000) 33 *Comparative Political Studies* 593, 597; Andrew Moravcsik, ‘Liberal Intergovernmentalism and Integration. A Rejoinder’ (1995) 33 *Journal of Common Market Studies* 611, 623; Geoffrey Garrett, ‘The Politics of Legal Integration in the European Union’ (1995) 49 *International Organization* 171, 173.

<sup>60</sup> Christian Joerges, ‘Deliberative Political Processes’ Revisited: What Have we Learnt about the Legitimacy of Supranational Decision-Making’ (2006) 44 *Journal of Common Market Studies* 779, 792.

<sup>61</sup> Cases 238/81 *CILFIT* [1982] ECR 3415; 60/75 *Russo v AIMA* [1976] ECR 46; 158/80 *Rewe v Hauptzollamt Kiel* [1981] ECR 1807;

<sup>62</sup> Joined cases C-267/91 and 268/91 *Keck and Mithouard* [1993] ECR I-6126; Cases C-249/96 *Grant* [1998] ECR I-636; Case C-321/95 *Greenpeace* [1998] ECR 1702.

Commission's executive competences in financial matters were brought under better legal control. Another interesting strain of decisions emerging from the doctrine of direct effect can be found in *Marshall I*, *Faccini Dori*, and *Unilever*.<sup>63</sup> Here, the judges repeatedly rejected the general horizontal direct effect of directives. This must be even more astonishing from the viewpoint of a rationalist-marked approach, since recognising claims concerning private individuals relying on unimplemented directives would have led to an enormous boost in the enforcement of Community law, and the CJEU had extremely good chances of being successful in its ruling. Yet, in the course of the Single European Act (SEA, 1986/87) and the Treaty of Maastricht (TEU, 1992/93), Member States and European institutions displayed a strong will to take further steps towards deeper integration. Therefore, the opportunity to expand the law further into the national legal systems must have been perfect. Nevertheless, not until the much-debated case *Mangold*<sup>64</sup> did the Court see the necessity of carefully claiming a general principle of horizontal direct effect of directives.

Taken all together, the judicial development of European law with regard to the establishment and embodiment of autonomy appears to be more of a constant and continuous process, not a linear one pointing in just one direction. The CJEU notably followed a differentiated adjudication rather than merely deciding in favour of the proponents of an ever-closer union. Therefore, all three questions posed above have to be answered in a way that casts into doubt the claim of the CJEU as an actor engaging in some kind of pro-federalist politics. The CJEU has not only had the competency to act and formulate the doctrines of direct effect and supremacy, but taking the context of law into account, it was rather necessary and legitimate to develop such momentous legal doctrines.

### 3. *The Local Context – Marking Off a Distinct European Legal Order*

In the local perspective of the context, it is very interesting to see that the European Court and EU law have been frequently measured against other national or international courts and their legal systems. Although it is true that there are several concordances between the European and other legal systems, and it might be indeed interesting to compare these with other political-administrative entities, it should be emphasised that by definition, European law must be neither international nor national law. It is a legal system *sui generis*, comparably young and still struggling for emancipation from individual national legal systems as well as from the international legal order, as in the more recent cases *Kadi* (2008) or *Melli Bank* (2009,

<sup>63</sup> *Marshall I*, *Faccini Dori*, and *Unilever* (n 39).

<sup>64</sup> Case C-144/04 *Mangold* [2005] ECR I-10013.

2012).<sup>65</sup> Most characteristic of this genuinely European system is the fact that it was and is far from being settled, although many legal gaps have been closed. This applies to political legislation, as well as to judicial aspects of interpreting and applying the law. Lord Denning, senior appellate judge of England, once described the situation as follows:

[The Treaty] lays down general principles, it expresses aims and purposes. All in sentences of moderate length and commendable style, but it lacks precision. It uses words and phrases without defining what they mean. An English lawyer would look for an interpretation clause, but he would look in vain. There is none. All the way through the Treaty, there are gaps and lacunae. These have to be filled by judges, or by regulations or directives.<sup>66</sup>

In this respect, the CJEU's work is unique and has to be clearly differentiated from that of other constitutional Courts. Direct analogies to international or supranational appellation bodies like the International Court of Justice, the European Court of Human Rights, or the Andean Court of Justice,<sup>67</sup> as well as national European high courts and even the U.S. Supreme Court,<sup>68</sup> just fall short. The European Court is embedded in a very different political-structural and legislative setting, and possesses rules and concepts with a different 'meaning-in-use.'<sup>69</sup>

Embedded in the wider context of European law and being dependent on the difficult political realities of EU legislative decision-making, the European Court most notably has to perform the balancing act of further developing a legal system with an unknown destination, while simultaneously staying connected to the settled legal knowledge and traditions of all the Member States to ensure enduring trust in the legitimacy of its jurisdiction. From a judicial point of view, this is an extraordinarily challenging and difficult situation that is aggravated by the fact that the legislator still avoids and even rejects<sup>70</sup> stating the exact legal nature of the European community (something in between confederation and federation on the road to an 'ever closer union among the peoples of

---

<sup>65</sup> Joined cases 402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351. T-246/08 & T-332/08 *Melli Bank v Council*, Judgment of 09.07.2009.

<sup>66</sup> British Court of Appeal, Case *Bulmer v Bollinger* [1974].

<sup>67</sup> cf Karen J Alter and Lawrence Helfer, (n 28).

<sup>68</sup> eg James A Caporaso and Sidney Tarrow, 'Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets' (2009) 63 *International Organization* 593, 613; Sally J. Kenney, (n 59).

<sup>69</sup> Antje Wiener (n 11).

<sup>70</sup> This can be seen most recently in case of the negotiations about the Constitutional Treaty and the Lisbon Treaty.

Europe<sup>71</sup>). Moreover, it has to be kept in mind that the Court does not have the luxury of a long history of genuine European case law like the European national courts do. There were simply no available precedents that could have served as points of reference for legal interpretation and adjudication – just the vast number of 248 Articles of the Treaty.

At the same time, the judges never had – qua foundational assignment – the option of rejecting the jurisdiction of admissible cases or preliminary reference (*déni de justice*), nor did they have the opportunity to pass decisions about justice or injustice on to the legislator, although the Treaties often contained no case-adequate provisions. As Vassilios Skouris notes:

[As a judge] you are not able to avoid an answer by saying: ‘that this is a difficult question, a highly political matter or the opinions are divided in this question.’ The task of the judge is to make a decision.

<sup>72</sup>

The CJEU never made a secret of this need to fill the lacunae and gaps in the treaties and provisions by judicial means, but stated it explicitly from the start, as documented in *Algera*.<sup>73</sup>

In short, the CJEU was thrown into a double bind right from the very beginning, which must be seen as typical for the nature of the whole EU integration project, not just Europe’s legal sphere. This dilemma is at the heart of all the well-known leading cases of the early days. In each of these, be it *Algera*, *Fédéchar* and *AETR*, *van Gend en Loos* or *Costa/ENEL*, the Treaty lacked sufficiently clear provisions, although it must have been obvious from the viewpoint of the legislator that these general questions about the implementation and enforcement of Community law would arise sooner or later. Yet, this shifting of political questions from politics to law must be seen as the difficult basic condition of a ‘European way’ of judicial interpretation, especially characteristic and symptomatic of the foundational period. That this situation has not fundamentally changed today also becomes apparent in the words of CJEU Judge Ó Caoimh:

[T]he Union legislator is on occasions vague in what it has done. The legislation may lack precision such that the provisions of law may be very unclear. This may result from the fact that the decision reached at the political level is a compromise, and no one wants to

---

<sup>71</sup> EEC Treaty, preamble.

<sup>72</sup> Vassilios Skouris, (n 18).

<sup>73</sup> Joined cases 7/56, 3/57 to 7/57 *Algera* [1957] ECR 41.

be too prescriptive in regard to how the legislation should be understood. Those negotiating may agree on the basic statement of law, but they may not wish to commit themselves further and hope that the judges one day or another will come down in one direction or another to support their own views in interpreting the legal text that results from the political decision.<sup>74</sup>

In other words, the European Court is especially dependent on the political realities in the EU – and its well-known flaws. In cases where the legal provisions are obscure or political questions have been shifted from politics to law, the claim that the CJEU is a ‘political Court’<sup>75</sup> or has been activist can hardly be convincing. From the perspective of the specific situation in Europe’s community of law, it was not *judicial* activism but the lack of *legislative* activism (surely promoted by the Community’s political architecture) that was the problem in the early years of integration and forced the Court to act.

#### IV. CONCLUSION

In rationalist and actor-centred analyses, the creation of the Court’s influential doctrines in the foundational period of EU law must look like a story of European judicial empowerment. It was argued here that this story turns out to be a myth, although this is not to say that it cannot be proven. The point is, rather, that the proof or the disproof of ‘politics in robes’ has to be found in the context of law itself and not in the allegation of the Court being a political actor. Without a doubt, sometimes the line between politics and the indispensable development of law by judges is not easy to draw, and should therefore be a point of particular attention. The autonomy of European law does not mean immunity from criticism. But such criticism has to be based on more than a ‘broadly positivist understanding of law as a system of authoritative rules, and an instrumentalist view of courts acting as strategic players who sometimes exploit the indeterminacy of those rules to pursue particular interests or achieve particular ends,’<sup>76</sup> as de Búrca once pointed out.

The model of context analysis outlined here should be understood as a contribution to the discussion about integration through law by offering such a non-positivist analytical framework for approaching and assessing the role of law in Europe. It aims to close a gap in current research by not

---

<sup>74</sup> Aindrias Ò Caoimh, (n 42).

<sup>75</sup> Ian Ward, *A Critical Introduction to European Law* (Cambridge University Press 2009), 81.

<sup>76</sup> Gráinne de Búrca, (n 8), 318.

focusing on the role of law in a wholly political integration process, but on how legal frameworks, especially the European one, function; how they change over time, and how they impose demands for reasoning and action on actors – judicial as well as political ones. One can even take the argument one step further and say: by entering the context of law, every actor becomes a legal actor or, more precisely, every actor compulsorily takes a legal role that constrains him or her within certain legal rules.

This proposed shift towards the context does not entail a naïve or idealistic perspective on law as a world where interests can never prevail, and where actors strive for justice and nothing but justice. Quite the contrary: interests have and have always had their place in law. But, although there might be interests in law, there are also strict and commonly accepted rules defining who might pursue legal claims, how these have to be brought forward, and which forms of argument are legitimate and which have to be refused. These rules are the dividing line between law and politics, although they are never totally detached from other contexts and therefore also underlie demands arising from politics.



# **‘... IT IS NOT ITS TASK TO ACT AS A COURT OF FOURTH INSTANCE’: THE CASE OF THE EUROPEAN COURT OF HUMAN RIGHTS**

Maija Dahlberg<sup>\*</sup>

*This article discusses the so-called fourth instance doctrine under Article 6 of the European Convention on Human Rights, focusing in particular on its role in fair trial cases. It attempts to determine when the European Court of Human Rights has given weight to the fourth instance doctrine. Owing to the dynamic and free-range nature of the Court's interpretative methods, challenges are often mounted on the basis of the fourth instance doctrine and the interpretation of Article 6 (fair trial). This article examines the case law, amounting to forty-four cases, on the provision of fair trials. It divides the role of the fourth instance doctrine into four distinct categories: (1) 'clear fourth instance nature'; (2) 'length of proceedings'; (3) 'balancing approach'; and (4) 'disregard of fourth instance approach'. Lastly, the article evaluates whether or not the application of strict fourth instance doctrine arguments in fair trial cases can be justified.*

Keywords: ECHR, ECtHR, fourth instance doctrine, right to a fair trial, effective interpretation.

## **TABLE OF CONTENTS**

I. INTRODUCTION .....	78
II. ARTICLE 6 AND THE FOURTH INSTANCE DOCTRINE .....	84
1. <i>Interpretation of Article 6</i> .....	84
2. <i>The Fourth Instance Doctrine</i> .....	86
III. CASE STUDY: THE ROLE OF THE FOURTH INSTANCE DOCTRINE .....	89
1. <i>Case Categories</i> .....	89
2. <i>Category one: Clear fourth instance nature</i> .....	91
3. <i>Category two: Length of proceedings</i> .....	93
4. <i>Category three: Balancing approach</i> .....	94
5. <i>Category Four: Disregard of Fourth Instance Approach</i> .....	99
IV. CONCLUSIONS .....	106

---

<sup>\*</sup> M. Sc. (constitutional law), E.MA (human rights and democratisation), PhD candidate and lecturer in Constitutional Law at the University of Eastern Finland Law School. E-Mail: maija.dahlberg@uef.fi. I wish to extend my sincere thanks to Prof. Jaakko Husa, Prof. Toomas Kotkas, Judge, Docent, LLD Mirjami Paso, and the anonymous reviewers for the valuable comments and guidance. All mistakes and omissions remain my own responsibility.

## I. INTRODUCTION

The European legal system, in which the European Court of Human Rights ('the Court') is situated, rests on the principle of subsidiarity to a great extent. This means that the Contracting States are responsible for enforcing the rights and freedoms protected under the European Convention on Human Rights ('the Convention'). The fourth instance doctrine constitutes the principle of subsidiarity<sup>1</sup> and adheres to it on the basis that the Contracting States are the main actors under the Convention. Under the fourth instance doctrine the Court does not address errors of fact or law allegedly made by a national court, unless and insofar as such errors infringe the rights and freedoms protected by the Convention.<sup>2</sup>

The Court regularly invokes the principle of subsidiarity and its doctrinal corollary, the margin of appreciation doctrine.<sup>3</sup> The latter means that States are allowed a certain margin for discretion in order to take into account the special circumstances of each State. It has been stated that in order to maintain its institutional credibility, the Court must refrain from interfering with the margin of appreciation granted to Contracting States.<sup>4</sup> One might assume that the fourth instance principle, the margin of appreciation and the principle of subsidiarity reflect different aspects of the Court's competence, as there would otherwise be no need for the three different principles. It has, however, been argued that they are essentially

---

<sup>1</sup> See Herbert Petzold, 'The Convention and the Principle of Subsidiarity', in Ronald St J Macdonald, Franz Matscher and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers 1993), 41-62.

<sup>2</sup> Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009), 257-76.

<sup>3</sup> These principles also form part of the Convention, and are not only based on the case law of the Court. See Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 213) which adds the principle of subsidiarity to the Preamble of the Convention ('Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.'). Protocol No. 15 was opened for signature on 24 June 2013 and will enter into force as soon as all State Parties to the Convention have signed and ratified it. On the margin of appreciation doctrine, see, eg Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2001).

<sup>4</sup> Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights* (OUP 2010), 3-4. Furthermore, the margin of appreciation has been seen as a method that hinders the reception of international law in the ECHR system (ibid, 7-9).

synonymous. Christoffersen stresses that the different concepts are generally confined to separate areas of case law, but it would be a mistake to assume that this makes any substantive difference.<sup>5</sup>

That said, I contend that there is a distinction to be drawn between these three principles. The principle of subsidiarity, the margin of appreciation doctrine and the fourth instance doctrine represent different aspects of national sovereignty.<sup>6</sup> In other words, national sovereignty lies at the heart of these principles, but the approach differs in each case. The fourth instance doctrine relates to the question of whether it is possible to appeal a national court's decision, while the subsidiarity principle has a broader meaning.<sup>7</sup> As Carozza states, the principle of subsidiarity needs a broad formulation and there are several layers within the principle.<sup>8</sup> Consequently, I argue that the fourth instance doctrine belongs to the first layer of the subsidiarity principle. In this layer local communities are left to protect and respect human rights, provided they are capable of achieving those ends themselves. Also the margin of appreciation doctrine belongs to the first layer. In this case, the subsidiarity principle gives the national authorities a degree of discretion over the interpretation and implementation of Convention rights and freedoms.<sup>9</sup>

---

<sup>5</sup> Christoffersen (n 2), 239-40; see also Petzold (n 1) and Paul Mahoney, 'Universality Versus Subsidiarity in the Strasbourg Case Law on Free Speech: Explaining Some Recent Judgments' (1997) EHRLR 364-79. Cf. Sweeney sees the margin of appreciation doctrine as separate but closely connected to the principle of subsidiarity (James A. Sweeney, *The European Court of Human Rights in the Post-Cold Era: Universality in Transition* (Routledge 2013), 33); Breitenmoser also makes a distinction between the margin of appreciation doctrine and subsidiarity principle, Stephan Breitenmoser, 'Subsidiarität und Intressenabwägung im Rahmen der EGMR-Rechtsprechung', in Stephan Breitenmoser and others (eds), *Human Rights, Democracy and the Rule of Law*, Liber amicorum Luzius Wildhaber (Dike Verlag 2007) 119-42.

<sup>6</sup> See, also, Paolo Carozza, 'Subsidiarity as a structural principle of international human rights law' ((2003) 97 *AJIL* 38-79, at 69-70) who describes several important differences between the margin of appreciation doctrine and subsidiarity principle. Carozza also points out that many use the term subsidiarity principle to refer generally to the idea of deferring decisions to local authorities.

<sup>7</sup> The admissibility criteria concretise the subsidiarity principle: Article 35(1) of the Convention provides that the Court can only hear cases when the applicant has exhausted all available national remedies. The subsidiarity principle is also known in EU law, but its content differs from that applied in the Convention system. See on the subsidiarity principle in EU law, Takis Tridimas, *The General Principles of EU Law* (2nd edn; OUP 2006), 183-8.

<sup>8</sup> Carozza (n 6), 57-8.

<sup>9</sup> The second layer of subsidiarity supports the integration of local and supranational interpretation and implementation into a single community of discourse. The third and final layer of subsidiarity is founded on the idea that to the extent that local

The difference between the fourth instance doctrine and the margin of appreciation doctrine is rather complex. In practice, the difference is often a matter of degree; both doctrines allow considerable discretion to the national authorities.<sup>10</sup> The discernable difference that sets them apart is that the argumentation in cases concerning the margin of appreciation doctrine is more extensive than the argumentation in fourth instance cases.<sup>11</sup> For this reason, compared to the fourth instance doctrine, the margin of appreciation doctrine has a more developed body of case law and is more often used in the Court's praxis.

The central difference is that the margin of appreciation doctrine is linked to argumentation by consensus. In short, the margin of appreciation is concerned with whether there is a consensus between the states, or not. If there is consensus, then the margin will be narrower and when there is no consensus, then the margin afforded to the states is wider. By contrast, there is no such tool to measure the scope of application of the fourth instance doctrine.<sup>12</sup> Furthermore, the application of the margin of appreciation doctrine is more detailed and precise in the Court's case law. The extent of the margin is closely evaluated, whereas the fourth-instance nature of the case is evaluated in a rather rough and brief manner. The fourth instance doctrine focuses its evaluation on whether the complaint, which concerns the national proceedings, contains elements that are of a fourth-instance nature. In other words, it evaluates if the claim that the decision of the national proceedings was erroneous. The fourth instance doctrine usually concerns Article 6 cases, while the margin of appreciation doctrine concerns every Article in the Convention, especially Articles 8, 9, 10 and 11.<sup>13</sup>

---

bodies are unable to accomplish the ends of human rights, the larger branches of international community have a responsibility to intervene, *ibid* 58.

<sup>10</sup> David Harris and others, *Law of the European Convention on Human Rights* (3rd edn; OUP 2014), 16.

<sup>11</sup> See the Court's argumentation of the margin of appreciation doctrine eg *S.A.S v. France*, 43835/11, 1 July 2014, GC, paras 123-59 and compare it to the argumentation with the fourth instance doctrine eg *Tautkus v Lithuania*, 29474/09, 27 November 2012, para 57.

<sup>12</sup> The existence of consensus will, however, not automatically restrict the margin of appreciation of the state concerned. Much depends on the circumstances of the case and especially on the question of whether a particularly important facet of an individual's existence or identity is at stake. See more e.g. Egbert Myjer, 'Pieter van Dijk and His Favourite Strasbourg Judgment. Some Remarks on Consensus in the Case Law of the European Court of Human Rights' in Marjolein van Roosmalen and others (eds), *Fundamental Rights and Principles*, Liber amicorum Pieter van Dijk (Intersentia 2013) 49-71, at 65; see also Harris and others (n 10), 11.

<sup>13</sup> Harris and others (n 10), 14-6.

The fourth instance doctrine is also applied by other quasi-judicial and judicial bodies, which employ human rights to determine the admissibility of a complaint. Phrases such as ‘this commission/court will not sit as a court of fourth instance over domestic legal decisions’ are typically seen in such situations.<sup>14</sup> These phrases mean that the international forum is not to act as a quasi-appellate court as to the correctness of a national court’s judgment under its national law. This fourth-instance formula states briefly that the international forum will not second-guess the national court’s findings of fact or whether the national court has applied national law properly.<sup>15</sup>

The Court has proved itself to be a dynamic and far-reaching interpreter of the provisions of the Convention. It has adopted several methods of interpretation, which emphasise the Convention’s objectives, as well as its ‘living’ nature and responsiveness to social change.<sup>16</sup> However, it regularly reminds states that it does not possess *de jure* power to revise the Convention, although it increasingly appears to consider that it has an important oracular, rights-creating function.<sup>17</sup> This often gives rise to a contradiction between the Court’s interpretations and the fourth instance doctrine, since it has been argued that its far-reaching interpretations encroach on the sphere of national authorities.<sup>18</sup>

In sum, it has been argued that the Court must, on the one hand, protect

---

<sup>14</sup> See, eg Human Rights Committee, Communication No. 1763/2008, *Pillai v Canada*, Views adopted on 25 March 2011, para 11.2; Communication No. 1881/2009, *Masih v Canada*, Views adopted on 24 July 2013, dissenting opinion of Committee member Mr Shany, joined by Committee members Mr Flinterman, Mr Kälin, Sir Rodley, Ms Seibert-Fohr and Mr Vardezelashvili, para 2; Inter-American Court of Human Rights (I/A Court H.R.) Case No. 12.683, *Melba del Carmen Suárez Peralta v Ecuador*, 26 January 2012, para 83; Inter-American Court of Human Rights (I/A Court H.R.) Case No. 12.004, *Marco Bienvenido Palma Mendoza et al. v Ecuador*, 24 February 2011, para 53.

<sup>15</sup> See H. Victor Condé, *A Handbook of International Human Rights Terminology* (2nd edn; University of Nebraska Press 2004), 91-2; Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn; OUP 2013), 20-1.

<sup>16</sup> See Franz Matscher, ‘Methods of Interpretation of the Convention’, in Ronald St J Macdonald, Franz Matscher and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers 1993), 63-81; Ed Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010), 319-58; George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2009).

<sup>17</sup> See Alex Stone Sweet and Helen Keller, *A Europe of Rights* (OUP 2008), 6.

<sup>18</sup> For more on this tension, see eg Wilhelmina Thomassen, ‘Judicial Legitimacy in an Internationalized World’, in Nick Huls, Maurice Adams and Jacco Bomhoff (eds), *The Legitimacy of Highest Courts’ Rulings* (T.M.C. Asser Press 2009) 399-406, 402.

fundamental rights to the highest degree possible and must do so in a dynamic and progressive way. On the other hand, it must take due account of its position as a supranational court for 47 different States, whose opinions on fundamental issues may vary dramatically.<sup>19</sup> The Court's interpretation of the Convention provides a basis to evaluate its role in general and, consequently, to evaluate questions of legitimacy in particular, and whether its jurisdiction in relation to national courts is justified.<sup>20</sup> I argue that the Court's reasoning takes centre stage and that it either gains or loses its legitimacy on the basis of its judicial interpretations.

This article surveys the case law on fair trial cases with specific reference to Article 6 of the Convention, which directly requires the Court to evaluate fourth instance questions in the context of procedural human rights interpretations, an approach not taken elsewhere in the Convention. The focus is on the tensions and problems involved in balancing the fourth instance doctrine against an expansive interpretative approach of the right to a fair trial. This article has two aims. Firstly, it endeavours to systematise the role of the fourth instance doctrine in fair trial cases. Secondly, it conducts a critical evaluation of the justifiability of the fourth instance doctrine in these cases.

The evaluation of the justifiability of the fourth instance doctrine leads to an analysis of the Court's argumentation. The justification of a legal decision has been divided according to the internal justification and external justification. The internal justification relates to the consistency of the deliberation and the judicial reasoning but does not address why one fact is considered relevant, while another is deemed irrelevant and is therefore ignored.<sup>21</sup> The external justification means that the judge must justify the chosen norm and the substance given to that norm. He or she must also decide which facts are taken into account—in other words,

---

<sup>19</sup> It must be noted that there will be 48 Contracting Parties after the European Union accedes to the European Convention on Human Rights. The accession became a legal obligation under the Treaty of Lisbon, see Article 6(2) of the Consolidated version of the Treaty on European Union [2012] OJ C326/1. Janneke Gerards, 'Judicial Deliberations in the European Court of Human Rights', in Nick Huls, Maurice Adams and Jacco Bomhoff (eds), *The Legitimacy of Highest Courts' Rulings* (T.M.C. Asser Press 2009) 407–36, 429.

<sup>20</sup> Marc Bossuyt, 'Should the Strasbourg Court Exercise More Self-Restraint? On the extension of the jurisdiction of the European Court of Human Rights to social security regulations', 28 HRLJ (2007) 321; Luzius Wildhaber, 'A Constitutional Future for the European Court of Human Rights?' 23 HRLJ (2002) 161.

<sup>21</sup> On internal justification, see Robert Alexy, *A Theory of Legal Argumentation, The Theory of Rational Discourse as Theory of Legal Justification* (trs by Ruth Adler and Neil MacCormick, Clarendon Press 1989), 220–30; Alexander Peczenik, *On Law and Reason* (2nd ed; Springer 2009), 158–9.

which facts are legally relevant—and justify their choice.<sup>22</sup> Justifiability implies that a person faced with a practical statement can ask ‘why’ there was an Article 6 violation in the first place, and therefore demand reasons that support such a finding.<sup>23</sup> This article concentrates on the external justification, which has been characterised as an attempt to achieve comprehensive, general legitimacy for a judgment.<sup>24</sup> In context of the Convention, justification means that the reasoning must be transparent and that all competing interests must be taken into account, thereby incorporating *pro* and *contra* types of argumentation. Moreover, since it is a human rights Convention, the focus should be on the content of the rights in dispute and not only procedural aspects. This also applies when evaluating the justifiability of the fourth instance doctrine in the Court’s case law.

Methods borrowed from the theory of rational argumentation are used in analysing the relevant case law, and reveal a clear tension owing to the Court’s inconsistency in its decisions on the breadth of domestic obligations and the extensiveness of fair trial rights. The Court usually takes either the fourth instance doctrine or the right to a fair trial into account in its judicial reasoning, while leaving all other considerations aside. The question of legitimacy is involved in both instances. The fourth instance doctrine refers to formal legitimacy.<sup>25</sup> It acts as a brake on the Court’s interpretations of the Convention by ensuring that it bears in mind the constitutional limits on its competence. From the fourth instance viewpoint, legitimacy is assessed in terms of formality, focusing on procedural steps as opposed to substance. If all the required procedural steps are taken at the national level, then no criticism is required. Consequently, the Court guarantees its own legitimacy through a formalistic approach in which it pays attention to procedural requirements only. By contrast, the legitimacy question manifests itself differently when it comes to the interpretation of rights, in which the Court’s legitimacy is viewed from the opposite position. As Letsas has recently argued the living instrument interpretation does not threaten the legitimacy of the Court. On the contrary, the Court loses legitimacy without it.<sup>26</sup> Legitimacy in this

---

<sup>22</sup> On external justification, see Alexy (n 21), 228-30; Peczenik (n 21), 158-60.

<sup>23</sup> Peczenik (n 21), 44-5, 166.

<sup>24</sup> Mirjami Paso, ‘Rhetoric Meets Rational Argumentation Theory’ 2 *Ratio Juris* 27 (2014) 236, 239.

<sup>25</sup> For more on formal legitimacy, see Thomassen, (n 18), 402-3; Tom Barkhuysen and Michiel van Emmerik, ‘Legitimacy of European Court of Human Rights Judgments: Procedural Aspects’, in Nick Huls, Maurice Adams and Jacco Bomhoff (eds), *The Legitimacy of Highest Courts’ Rulings* (T.M.C. Asser Press 2009), 437-49.

<sup>26</sup> George Letsas, ‘The ECHR as a Living Instrument: its Meaning and Legitimacy’ in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe, The*

sense stresses substance, which means that the Court gains legitimacy by evaluating issues of content as opposed to purely procedural matters. It is not enough for the national authorities to take all necessary procedural steps, since the focus in this approach is on the content of these procedures. The Court's reasoning in respect of the fourth instance doctrine is viewed from a substantive legitimacy viewpoint.

Section 2 of this contribution outlines the scope and interpretation of Article 6 and the fourth instance doctrine in the Court's practice. Section 3 surveys the case law and categorises the judgments relating to the fourth instance doctrine in fair trial cases into four groups. This categorisation reveals that a strict approach to the fourth instance doctrine could threaten the effective protection of the right to a fair trial. Therefore, in Section 4, a more flexible and practical approach to the fourth instance doctrine is suggested.

## II. ARTICLE 6 AND THE FOURTH INSTANCE DOCTRINE

### I. *Interpretation of Article 6*

While Article 6(2) and 6(3) contain specific provisions setting out minimum rights applicable in respect of those charged with a criminal offence, Article 6(1) applies both to civil and criminal proceedings. The core of Article 6(1) is the following passage:

In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within reasonable time by an independent and impartial tribunal established by law.

Article 6 is the provision of the Convention most frequently invoked by applicants.<sup>27</sup> Many of the terms used in Article 6(1) bear autonomous meaning and require interpretation. There is consequently substantial case law on the provision's application and the Court has identified separate requirements and positive obligations that derive from it. This contribution restricts itself to presenting only the main requirements derived from the provision.

---

*European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013), 126, 141.

<sup>27</sup> In 2000, almost 70 per cent of all new applications included at least one complaint under Article 6. The Court no longer keeps these kinds of statistics but it is likely that the proportion is still broadly the same. Some indicators provide that in 2012 there were in total 480 violations of Article 6 (there were 1,093 violations in total). See statistics from the Court's website: [www.echr.coe.int](http://www.echr.coe.int).



From the early 1970s, the Court has held that Article 6(1) includes a universal right to access to justice, even though this is not expressly stated in the Article.<sup>28</sup> The Court also made it clear that ‘civil rights and obligations’ have an autonomous meaning under the Convention and this concept may also extend to administrative and executive decision-making.<sup>29</sup> Furthermore, the requirement of a fair trial ‘by an independent and impartial tribunal established by law’ is the Court’s definition of the meaning of impartiality (the prior involvement of a judge, objective impartiality),<sup>30</sup> independence (administrative agencies and disciplinary bodies)<sup>31</sup> and the term ‘established by law’.<sup>32</sup> Article 6(1) also requires that such determinations must be made in a ‘fair and public hearing’. Publicity is seen as one of the guarantees of a fair trial.<sup>33</sup> In addition to this, while absent from the Convention, fairness has been held to require ‘equality of arms’.<sup>34</sup>

The Court has also held that a ‘fair and public hearing’ includes the right to examine witnesses,<sup>35</sup> the right to legal representation,<sup>36</sup> the right not to incriminate oneself<sup>37</sup>, and the requirement that national courts must give sufficient reasons for their decisions.<sup>38</sup> Article 6(1) also provides that everyone is entitled to a hearing ‘within a reasonable time’. There have been numerous cases on the promptness of proceedings.<sup>39</sup> It is possible to

<sup>28</sup> *Golder v the United Kingdom*, 4451/70, 21 February 1975; *Posti and Rahko v Finland*, 27824/95, 24 September 2002.

<sup>29</sup> *Pellegrin v France*, 28541/95, 8 December 1999, GC; *Vilho Eskelinen and Others v Finland*, 63235/00, 19 April 2007, GC.

<sup>30</sup> *Fey v Austria*, 14396/88, 24 February 1993; *AB Kurt Kellermann v Sweden*, 41579/98, 26 October 2004.

<sup>31</sup> *Belilos v Switzerland*, 10328/83, 29 April 1988; *Incal v. Turkey*, 22678/93, 9 June 1998, GC.

<sup>32</sup> *Oleksandr Volkov v Ukraine*, 21722/11, 9 January 2013.

<sup>33</sup> *Pretto and Others v Italy*, 7984/77, 8 December 1983. See also on the sub-rights derived from the right to a fair hearing, Eva Brems, ‘Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms’ 1 Human Rights Quarterly 27 (2005) 294, 295-8.

<sup>34</sup> *Dombo Bebeer B.V. v the Netherlands*, 14448/88, 27 October 1993.

<sup>35</sup> *Van Mechelen and Others v the Netherlands*, 21363/93, 21364/93, 21427/93 and 22056/93, 23 April 1997.

<sup>36</sup> *Granger v the United Kingdom*, 11932/86, 28 March 1990.

<sup>37</sup> *Saunders v the United Kingdom*, 19187/91, 17 December 1996, GC.

<sup>38</sup> *Hadjianastassiou v Greece*, 12945/87, 16 December 1992; *Van de Hurk v the Netherlands*, 16034/90, 19 April 1994.

<sup>39</sup> *Zimmermann and Steiner v Switzerland*, 8737/79, 13 July 1983; *König v Germany*, 6232/73, 28 June 1978; *Bottazzi v Italy*, 34884/97, 28 July 1999.

waive some, but probably not all, of these rights under Article 6(1).<sup>40</sup> The scope of the rights guaranteed under Article 6 is therefore rather wide and is constantly being refined and redefined within the Convention system. It is impossible to provide an exhaustive list of the rights contained in Article 6 since the Court's decisions constantly create new rights and shape old ones. Its interpretations have, arguably, moved away from the original text of the fair trial provision.

As this brief overview of the progressive content of Article 6 demonstrates, the Court has developed several tools and techniques to underpin its extension of rights and freedoms provided for in the Convention. The most frequently cited methods of interpretation are as follows: (1) the living-instrument approach; (2) the theory of autonomous concepts; (3) the practical and effective approach; and (4) the common ground method.<sup>41</sup> All these interpretative methods were created by the Court's case law. Furthermore, all the decisions reached in these cases reject the idea that the rights enshrined in the Convention must be interpreted like they were in the 1950s. Article 1 of the Convention is the starting point for the Court's interpretation, and states the following: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.'

It is noteworthy that the Court's approach to interpretation, taken as a whole, can be described as creative and dynamic. It abandoned the strict textual approach to interpretation some time ago and advanced special methods of interpretation.<sup>42</sup>

## 2. *The Fourth Instance Doctrine*

The fourth instance doctrine was developed in the Convention system in the late 1950s and 1960s.<sup>43</sup> In the *Belgian Linguistic* case, the Court held

<sup>40</sup> *Zumtobel v Austria*, 12235/86, 21 September 1993; *Jones v the United Kingdom*, 30900/02, 9 September 2003.

<sup>41</sup> See Letsas (n 16); Harris and others (n 10), 7-21; Clara Ovey and Robin CA White, in Jacobs & White, *The European Convention on Human Rights* (5th edn; OUP 2010), 73-8; Christoffersen (n 2), 54-63; Gerards (n 19), 428-35; Alistair Mowbray, 'Between the Will of the Contracting Parties and the Needs of Today: Extending the Scope of Convention Rights and Freedoms beyond Could Have Been Foreseen by the Drafters of the ECHR', in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2013), 17-37.

<sup>42</sup> Christoffersen (n 2), 49-50; Alex Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe' (2012) 1 *Global Constitutionalism* 53, 73.

<sup>43</sup> See eg *X v Belgium*, 458/59, 29 March 1960. See more Christoffersen (n 2), 238-9, 274.

that:

It [...] cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiarity nature of the international machinery [...] The national authorities remain free to choose the measures which they consider appropriate [...] Review by the Court concerns only the conformity of these measures with the requirements of the Convention.<sup>44</sup>

The Court adopted the Commission's approach in the 1970s, and in its leading case *Schenk*,<sup>45</sup> the Court stated the following:

According to Article 19 of the Convention, the Court's duty is to ensure the observance of the engagements undertaken by the Contracting States in the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and insofar as they may have infringed rights and freedoms protected by the Convention.<sup>46</sup>

The fourth instance doctrine stems from two main sources. Firstly, it is a simple matter of efficiency in the use of resources. Secondly, at the level of legitimacy, it is recognised that democratically non-accountable judges in Strasbourg should not use their jurisdiction to override national authorities.<sup>47</sup> The main rule is clear: the facts of the case brought before the Court will not be questioned. This means in practice that the Court accepts that the national authorities investigate the facts of the case. However, if the national court's decision violates the rights and freedoms protected by the Convention then it is necessary for the Court to step in.<sup>48</sup>

In addition to upholding national sovereignty, the fourth instance doctrine

---

<sup>44</sup> Case 'Relating to certain aspects of the laws on the use of languages in education in Belgium' v Belgium (Merits) (Belgium Linguistic case), 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, 23 July 1968, para 10.

<sup>45</sup> *Schenk v Switzerland*, 10862/84, 12 July 1988.

<sup>46</sup> *ibid*, para 45. For more recent case law, see, eg *Tautkus v Lithuania* (n 11), in which the Court emphasised that it is not the task of the Court to assess the facts which led a national court to adopt one decision over another. The application of the fourth instance doctrine also means that an applicant's argument that was not accepted by the national court cannot be upheld by the Court (para 57).

<sup>47</sup> *Arai-Takahashi* (n 3), 235-6.

<sup>48</sup> Ben Emmerson, Andrew Ashworth and Alison Macdonald (eds), *Human Rights and Criminal Justice* (3rd edn; Sweet & Maxwell 2012) 129, 134, 645; Andreas Føllesdal, Birgit Peters and Geir Ulfstein, 'Introduction', in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe, The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013), 15-7.

also respects the principle of democracy. Respecting the choices and evaluations made by the national authorities reflects respect for the democratically elected members of the parliament and the people who have democratically voted for their representatives.<sup>49</sup> The Preamble to the Convention states that on the one hand, fundamental rights and freedoms are best maintained by an effective political democracy and, on the other, by a common understanding and observance of the human rights upon which they depend.<sup>50</sup>

The Court frequently reiterates that it is not its role to act as quasi-appellate court as to the correctness of a national court's judgment under its national law.<sup>51</sup> Unlike a national court of appeal, it is not concerned about whether the conviction was safe, whether the sentence was appropriate, or whether the level of damages awarded was in accordance with national law, and so forth.<sup>52</sup> However, questions relating to the fairness of the domestic proceedings under Article 6 of the Convention blur the lines.

The Court has considered that insofar as the remaining 'fairness' complaints under Article 6 have been substantiated, this raises issues that are of no more than a fourth instance nature, and which the Court has limited power to review under Article 6.<sup>53</sup> For example, if the Court considers the domestic court failed to consider certain factors when assessing the legal nature of the case, it risks going beyond its competence and acting as a court of fourth instance.<sup>54</sup> But how can the Court evaluate

---

<sup>49</sup> Judicial minimalism has the same aim and affect: judging narrowly and superficially leaves things open for further decision in the future. This also promotes democracy: by saying no more than is strictly necessary, minimalism leaves issues open for political discussion. For further discussion of the Court's judicial minimalism, see Aagje Ieven, 'Privacy Rights in Conflict: In Search of the Theoretical Framework behind the European Court of Human Rights' Balancing of Private Life against Other Rights' in Eva Brems (ed), *Conflicts Between Fundamental Rights* (Intersentia 2008), 55-60.

<sup>50</sup> See more Alistair Mowbray, 'The Role of the European Court of Human Rights in the Promotion of Democracy', (1999) 51 PL 703; Susan Marks, 'The European Convention on Human Rights and its "Democratic Society"', (1995) 66 BYIL 209.

<sup>51</sup> See eg *Pelipenko v Russia*, 69037/10, 1 October 2012, para 65: 'the Court reiterates that it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law, even in those fields where the Convention "incorporates" the rules of that law, since the national authorities are, by their very nature, particularly qualified to settle issues arising in this connection [...]'; see also Wildhaber (n 20), 162.

<sup>52</sup> For more on this subject, see Ovey and White (n 41), 243.

<sup>53</sup> See *García Ruiz v Spain*, 30544/96, 12 January 1999, GC, para 28; *Fruni v Slovakia*, 8014/07, 21 June 2011, para 128.

<sup>54</sup> See, eg the concurring opinion of judge Dedov in the case of *Brežec v Croatia*, 7177/10, 18 July 2013.

fairness in the first place without, in fact, acting as a court of fourth instance? Evaluating the overall fairness of national procedure leads the Court to make a concrete assessment of the arguments and the application of national laws and their interpretation by national authorities.<sup>55</sup> This creates an unclear and confusing situation. On the one hand, the starting point is obvious, the national authorities play the lead role in investigating and interpreting national law. On the other hand, the fact that the Court steps in if the national interpretation violates provisions of the Convention muddies the waters. In such cases, who is the arbitrator that decides when the line is crossed? Questions about the fairness of the proceedings and its outcome can be easily assessed by reference to the facts of the case at hand. Arguments concerning, for example, the appropriateness of the imposed punishment are open to criticism as instances of fourth-instance assessments.<sup>56</sup> It seems that the fourth instance doctrine draws a fine line, whose precise position must be decided by the Court on a case-by-case basis. I argue that the doctrine defines the limits within which the human rights interpretation can be made. In other words, it provides a point of departure for subsequent interpretation. I also argue that the Court in some cases acts as a fourth instance court.<sup>57</sup>

### III. CASE STUDY: THE ROLE OF THE FOURTH INSTANCE DOCTRINE

#### 1. *Case Categories*

The forty-four cases chosen for the purposes of this study were found in the HUDOC database by using the search terms ‘fourth instance’ and ‘effective.’ No time limits were applied.<sup>58</sup> Based on a close reading of the

<sup>55</sup> It has been pointed out that a question of law and a question of fact are hard to distinguish. See the dissenting opinion of judge Zupančič (*Hermi v Italy*, 18114/02, 18 October 2006): ‘Here at the European Court of Human Rights we continue to make the point that we are not a fourth-instance court and that we do not wish to deal with any facts which are subject to the guiding principle of immediacy in a trial. Nevertheless, a new major premise in legal terms will always call for new elements making up the minor premise, that is, some kind of facts.’

<sup>56</sup> See the concurring opinion of judge Kalaydjieva in the case of *Maktouf and Damjanović v Bosnia and Herzegovina*, 2312/08, 34179/08, 18 July 2012, GC.

<sup>57</sup> Costa considers the fourth instance doctrine to be one of the devices that delimit the Court’s domain *vis-à-vis* national authorities. See Jean-Paul Costa, ‘On the Legitimacy of the European Court of Human Rights’ Judgments’ (2011) 7 *EuConst* 173, 179.

<sup>58</sup> The search terms ‘fourth instance’ and ‘effective’ were chosen because they helped locate the relevant cases. The word ‘effective’ is widely used by the Court both in the practical and effective interpretations as well as in other interpretations, such as in positive obligations and living instrument argumentation. See, eg the dissenting opinion of judge Kalaydjieva in the case of *Dimitar Shopov v Bulgaria*, 17253/07, 16

cases, four categories were identified in order to systematically categorise the role of the fourth instance doctrine under Article 6. This categorisation was carried out by applying the methods of rational argumentation theory, which offers a deeper insight into the substantive reasons given by the Court.<sup>59</sup> Argument analysis is a method that focuses on the Court's reasoning, which results in the researcher moving to the level of legal culture. This allows more general remarks to be made about the use of the fourth instance doctrine in the Court's practice.<sup>60</sup>

The first category is 'clear fourth instance nature'. Here the Court's task is easy, since one can easily observe that questions before the Court are purely fourth-instance-related so the Court is prohibited from looking at them. The second category is 'length of proceedings'. Here the Court's task is relatively straightforward and the Court must assess whether the length of the proceedings at national level was unreasonable. The third category is 'balancing approach'. In these cases the Court takes the view that it has no grounds to interfere because the assessment of the evidence or establishment of the facts made by the national courts is not manifestly unreasonable or in any way arbitrary. The threshold for interference is relatively high. Here, the Court tends to place an emphasis on the fourth instance doctrine over the right to a fair trial. The fourth category is 'disregard of fourth instance approach'. In the cases belonging to this category, the Court emphasises the fair trial provision over the fourth instance doctrine by finding positive obligations under Article 6. In these two latter categories one can find arguments both for and against the fourth instance doctrine and the right to a fair trial.

Based on the results of my search, I have decided to present the most representative examples of the role of the fourth instance doctrine in each particular category. In other words, these examples are chosen on the basis that they best demonstrate the character of the particular category at hand.

---

April 2013, 16. The search terms, however, clearly omit some relevant cases, since it would be impossible to apply search terms that would cover all potential relevant cases. The task of searching for cases was conducted from 1 August 2013 until 1 November 2013.

<sup>59</sup> Paso (n 24), 240; Aulis Aarnio, *The Rational as Reasonable. A Treatise on Legal Justification* (D Reidel Publishing Co 1987). See also Alan McKee, *Textual Analysis: A Beginner's Guide* (SAGE Publications 2003); see also on discursive analytic research, Alexa Hepburn and Jonathan Potter, 'Discourse Analytic Practice', in Clive Seale and others (eds), *Qualitative Research Practice* (SAGE Publications 2007), 168-84; Ruth Wodak, 'Critical Discourse Analysis', in Clive Seale and others (eds), *Qualitative Research Practice* (SAGE Publications 2007), 185-201.

<sup>60</sup> In respect of the levels of the law, especially on the level of legal culture, see Kaarlo Tuori, *Critical Legal Positivism* (Ashgate 2002), 161-83.

## 2. *Category one: Clear fourth instance nature*

These cases almost immediately reveal themselves as falling squarely within the fourth instance doctrine and the Court will consider them no further. Claims, which are clearly of a fourth instance nature, include general claims where there is no suggestion that the national court has misinterpreted the domestic legislation or balanced the evidence incorrectly.

In *Tomić*, twelve applicants complained about the decision of the domestic court proceedings.<sup>61</sup> The Montenegrin Government maintained that these complaints were of a fourth-instance nature and therefore inadmissible before the Court. The Court agreed with the assessment,<sup>62</sup> and it was, therefore, not necessary to justify its decision. It sufficed to refer to the fourth instance formula as follows: ‘it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may infringed rights and freedoms protected by the Convention’.<sup>63</sup> This is a classic example of an issue that is clearly a case of the fourth instance doctrine so the Court cannot investigate the decision of the national proceedings.

The complex *Karpenko* case involved several complaints under Article 6.<sup>64</sup> The applicant alleged that the criminal proceedings, in which he was accused of murder, the possession of firearms and forgery charges, were unfair as the courts had erred in their assessment of the facts and evidence and had incorrectly applied domestic law. The Court reiterated that under the fourth instance doctrine its task was not to act as a court of appeal or a fourth instance court, and pointed out that it is for the domestic courts to exclude evidence it considers irrelevant.<sup>65</sup> It then assessed the evidence on which the charges were based, noting that there were multiple documents, witnesses and expert testimonies and that the national judgment was well-reasoned. The Court also noted that the applicant was present throughout the proceedings and was able to cross-examine witnesses and challenge the evidence.<sup>66</sup> On the basis of these facts, the Court considered that: ‘in so far as the remainder of the “fairness” complaints under Article 6... has been substantiated, it raises issues which are no more than a fourth-instance

---

<sup>61</sup> *Tomić and Others v Montenegro*, 18650/09, 18676/09, 18679/09, 38855/09, 38859/09, 38883/09, 39589/09, 39592/09, 65365/09, 7316/10, 17 April 2012.

<sup>62</sup> *ibid*, paras 62-3.

<sup>63</sup> *ibid*, para 62. In respect of the alleged violation of Article 6 as regards the outcome of the proceedings, see also *FC Mretebi v Georgia*, 38736/04, 31 July 2007, paras 31-33.

<sup>64</sup> *Karpenko v Russia*, 5605/04, 13 March 2012. Other complaints under Article 6 are discussed below.

<sup>65</sup> *ibid*, para 80.

<sup>66</sup> *ibid*, para 81.

nature, and which the Court has a limited power to review [...]’<sup>67</sup> It concluded that this part of the application must be rejected.

*Fruni* dealt with the impartiality and independence of the courts.<sup>68</sup> The applicant complained that he was not granted a fair hearing by an independent and impartial tribunal established by law, as provided for in Article 6(1). More precisely, he complained, *inter alia*, that his trial and conviction was politically motivated, and that the court had taken inadmissible evidence into account. The Court went through the points of the complaint with reference to the facts of the case, and held as follows with respect to the fourth instance doctrine: ‘[T]he admission of evidence is a matter for domestic courts. It is also for domestic courts to decide what evidence is relevant [...]’<sup>69</sup>

The Court observed that the applicant’s conviction was based on extensive documentary, witness and expert evidence, and found nothing that undermined the fairness of the procedure. Consequently, it rejected the application and observed: ‘in so far as the remainder of the “fairness” complaints under Article 6 [...] has been substantiated, it raises issues which are of no more than a fourth-instance nature’.<sup>70</sup>

Fair trial provisions were widely invoked in *Shalimov*.<sup>71</sup> The applicant complained that the proceedings were unfair, that the domestic courts were not impartial and independent, and that they had falsified the case materials against him and misinterpreted the evidence. The Court reiterated the fourth-instance formula—that it is not its task to act as a court of fourth instance—and also noted that the domestic courts are best placed to assess the credibility of witnesses and the relevance of evidence.<sup>72</sup> The applicant had not substantiated any of the allegations. The Court held that the mere fact that the court had decided against the applicant was not sufficient to conclude that it was not impartial and not independent.<sup>73</sup> There was consequently no balancing issue and the case was clear and undisputed. Complaints about the domestic court’s interpretations of the evidence provide a fitting example of an issue, which, according to the fourth instance doctrine, do not fall under the Court’s jurisdiction.

---

<sup>67</sup> *ibid*, para 82.

<sup>68</sup> *Fruni v Slovakia* (n 53).

<sup>69</sup> *ibid*, para 126.

<sup>70</sup> *ibid*, para 128.

<sup>71</sup> *Shalimov v Ukraine*, 20808/02, 4 March 2010.

<sup>72</sup> *ibid*, para 67.

<sup>73</sup> *ibid*, paras 68–9.



### 3. *Category two: Length of proceedings*

The length of proceedings amounts to a category of its own in fair trial cases. In cases where the national authority has delayed the proceedings beyond a reasonable length of time, the Court can, irrespective of the doctrine of fourth instance, conclude that the national trial has been unfair due to the unreasonableness. In the Court evaluation of the length of the proceedings, the heart of the fourth instance doctrine remains untouched. The Court's analysis in this regard is rather straightforward: if the length of the proceedings was unreasonable, then there is a violation of Article 6(1). There are very few problems with this interpretation, and thus these questions are rather easy and quick to resolve.

In *Sebahattin Evcimen* the proceedings before the domestic courts had lasted nine years and eight months and took place at two levels of the court system.<sup>74</sup> The Court's approach to evaluating the reasonableness of the length of the proceedings involved taking into account the circumstances of the case, its complexity, the conduct of the applicant and the relevant authorities, and what was at stake for the applicant in the dispute.<sup>75</sup> The Court pointed out the obligations of the state: 'it is the role of the domestic courts to manage their proceedings so that they are expeditious and *effective*.'<sup>76</sup> Consequently, it concluded that the national courts had not acted with due diligence overall, and that the Turkish Government had not put forward any facts or arguments capable of persuading it to reach a different conclusion. Consequently, the Court unanimously ruled that the length of the proceedings was excessive and failed to meet the reasonable time requirement.

In *Shalimov* the applicant's complaint was based on several grounds under Article 6, including, *inter alia*, that the criminal proceedings against him had taken an unreasonably long period of time. The Court's evaluation started by reiterating that the reasonableness of the length of the proceedings must be assessed in the light of the circumstances of the particular case and with reference to the criteria as laid down in the Court's case law.<sup>77</sup> The Court then turned to the facts of the case, which amounted to criminal proceedings against the applicant that took four years, eleven months and three days to complete, and included multiple periods during which little or no action was taken. It appeared that it had taken more than a year for the domestic authorities to conduct additional medical and ballistic examinations in the case. Furthermore, no action had

---

<sup>74</sup> *Sebahattin Evcimen v Turkey*, 31792/06, 23 February 2010.

<sup>75</sup> *ibid*, para 30.

<sup>76</sup> *ibid*, para 32 (emphasis added).

<sup>77</sup> *Shalimov v Ukraine* (n 71), para 76.

been taken between the preparatory hearing of 15<sup>th</sup> of April 2002 and the hearing on the merits on 9<sup>th</sup> of September 2002; a period of almost five months. The Court emphatically stressed that:

[S]uch delays are attributed to the domestic authorities and are not justified by the complexity of the case or the by the applicant's behaviour. Furthermore, special diligence was required [...] given that the applicant was in detention during the period in question.<sup>78</sup>

The Court emphasised that the State was obliged to provide a fair trial within reasonable time. I consider this to be purely a fair trial issue and questions relating to the fourth instance doctrine are irrelevant. The Court concluded that '[t]he foregoing considerations are sufficient to enable the Court to conclude that the proceedings... were excessively long'.<sup>79</sup>

#### 4. *Category three: Balancing approach*

This category of cases requires the Court to balance the effectiveness of the fair trial provision with the limits imposed by the fourth instance doctrine. This is not an easy task to accomplish, since it is possible to frame the arguments according to the fourth instance doctrine or the practical and effective right to a fair trial. However, the Court maintains a relatively high threshold for interference in respect of these cases, requiring that the assessment of the evidence or establishment of the facts by the national courts may not be 'manifestly unreasonable or in any other way arbitrary'.<sup>80</sup>

In *Tomić*, the applicants claimed that the domestic courts violated Article 6 in rejecting their claims while at the same time permitting identical claims by other applicants.<sup>81</sup> They submitted copies of the domestic courts' rulings in six other cases to support their claim. The Court's assessment commenced with the following statement:

[I]t is not its role to question the interpretation of domestic law by the national courts. Similarly, it is not [...] its function to compare different decisions of national courts, even if given in apparently similar proceedings; it must respect the independence of those

<sup>78</sup> *ibid*, para 77.

<sup>79</sup> *ibid*, para 78; see similarly *Štavbe v Slovenia*, 20526/02, 30 November 2006, paras 43-44; *Josephides v Cyprus*, 33761/02, 6 December 2007, paras 71, 76; *Christodoulou v Cyprus*, 30282/06, 16 July 2009, para 59; *Richard Anderson v the United Kingdom*, 19859/04, 9 February 2010, para 29.

<sup>80</sup> See eg *Ebanks v the United Kingdom*, 36822/06, 26 January 2010, para 74.

<sup>81</sup> *Tomić and Others v Montenegro* (n 61).

courts.<sup>82</sup>

The Court indicated the relevant threshold is as follows:

[C]ertain divergences in interpretation could be accepted as an inherent trait of any judicial system which [...] is based on a network of trial and appeal courts [...] However, profound and longstanding differences in the practice of the highest domestic court may in itself be contrary to the principle of legal certainty [...]<sup>83</sup>

The Court laid down certain criteria to be followed in order to assess whether inconsistent decisions of domestic Supreme Courts violated the fair trial requirement under Article 6(1). These criteria comprised in establishing whether ‘profound and long-standing differences’ existed in the Supreme Court’s case law, whether the domestic legislation provided measures to overcome these inconsistencies, and whether these measures had been applied and, if appropriate, to what effect.<sup>84</sup> Next, the Court examined the six national cases, which the applicants referred to, and concluded that only three decisions ruled in favour of claimants, whose situation was similar to that of the applicants. It also noted that the Supreme Court never examined these decisions. The Court also examined the case law of the national High Court and observed that it had heard a total of eighty-eight appeals, of which eighty-four decisions were against the claimants and only four in favour. The Court concluded that: ‘It would appear that these four favourable decisions could be considered an exception and inconsistent in comparison with the other eighty-four, rather than the other way round’.<sup>85</sup>

The Court found some inconsistencies in the national case law, which it held could not be seen as ‘profound and long-standing differences’. On this basis, it concluded that there was no violation of Article 6(1). This case illustrates that the threshold under which inconsistencies in national case law may violate the fair trial provision, which I argue has been raised relatively high.

The Grand Chamber’s votes were finely balanced in *Şahin*, in which ten judges, with seven dissenting, supported the majority vote.<sup>86</sup> The key issue in this case was whether the fourth instance doctrine took precedence over

---

<sup>82</sup> *ibid*, para 53.

<sup>83</sup> *ibid*, para 53.

<sup>84</sup> *ibid*, para 54.

<sup>85</sup> *ibid*, para 57.

<sup>86</sup> *Nejdet Şahin and Perihan Şahin v Turkey*, 13279/05, 20 October 2011, GC.

the ‘practical and effective’ requirements of Article 6(1). The majority voted in favour of the fourth instance doctrine, with the dissenting opinion favouring the effectiveness of rights approach. The applicants claimed that the proceedings before the domestic courts were unfair and argued that it was possible that the same facts could give rise to different legal assessments that varied from one court to another, which amounted to a violation of Article 6(1).

The facts of the case were that there had been a military plane crash and the courts awarded some, but not all, of the victims’ families a pension. The majority of the judges of the Court held that the fourth instance doctrine was the decisive principle,<sup>87</sup> and the Court reiterated on several occasions that a conflict in national case law does not automatically result in a violation of Article 6(1).<sup>88</sup> It emphasised that it had found no evidence of arbitrariness, stating that:

[E]xamining the existence and the impact of such conflicting decisions does not mean examining the wisdom of the approach the domestic courts have chosen to take [...] its role [...] is limited to cases where the impugned decision is manifestly arbitrary.<sup>89</sup>

The Court concluded that the ‘interpretation made by the Supreme Military Administrative Court [...] cannot be said to have been arbitrary, unreasonable or capable of affecting the fairness of the proceedings, but was simply a case of application of the domestic law’.<sup>90</sup> Finally it stressed its role: ‘it must avoid any unjustified interference in the exercise by the States of their judicial functions or in the organisation of the judicial systems’.<sup>91</sup> The majority held that there had been no violation of Article 6(1).

The dissenting opinion stressed that different interpretations must not place the public in a situation of legal uncertainty, where the outcome of a case is dependent on a mechanism incapable of guaranteeing consistency in court decisions.<sup>92</sup> It prioritised the requirement of a fair trial and had little to say about the question of subsidiarity in the case.<sup>93</sup> By contrast, the

<sup>87</sup> *ibid*, paras 49-50, 68-70, 88.

<sup>88</sup> *ibid*, paras 51, 88.

<sup>89</sup> *ibid*, para 89.

<sup>90</sup> *ibid*, para 93.

<sup>91</sup> *ibid*, para 94.

<sup>92</sup> Joint dissenting opinion of judges Bratza, Casadevall, Vajić, Spielmann, Rozakis, Kovler and Mijović in *Nejdet Şabin and Perihan Şabin v Turkey* (2011), para 6.

<sup>93</sup> *ibid*, para 5. See the similarly dissenting opinion of judge Šikuta joined by judge Myjer in *Popivčák v Slovakia*, 13665/07, 6 December 2011, para 12: ‘[T]his is not a fourth-instance case but rather a case of lack of access to a court [...]’.

majority view emphasised the formal aspects of the fourth instance doctrine. However, the dissenting opinion neglected to address how the fair trial provision must be interpreted in light of the Preamble to the Convention, which declares the rule of law is part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty.<sup>94</sup> The Preamble to the Convention also recognises the democracy principle, which means that respecting the evaluation made by the national authorities entails respect for the democratically elected members of parliament. The fourth instance doctrine, among other things, ultimately serves this democracy principle.

Based on my reading of the majority's decision, the judges were determined to uphold the independence of the national court at all costs. Even taking into account the constitutive principles of the fourth instance doctrine, I argue that the decision was unacceptable because it essentially pronounces that the national court's decision on the same matter may differ from chamber to chamber of the same court. The majority was of the view that this was neither arbitrary nor likely to affect public confidence.

In *Sebahattin Evcimen* questions about the fairness of the hearing arose.<sup>95</sup> Fairness entails giving each party a reasonable opportunity to present his or her case and to have knowledge of and the right to comment on all evidence adduced or observations submitted. The applicant complained that he had not received a fair hearing, arguing that the domestic courts had erred in the establishment of the facts and in their interpretation of the law. More precisely, the applicant claimed that the national decision was based on insufficient evidence. The Court reiterated the fourth instance formula:

[I]t is not its task to act as a court of appeal or, as is sometimes said, as a court of fourth instance, for the decisions of domestic courts [...] the latter are best placed to assess the credibility of witnesses and the relevance of evidence to the issues in the case.<sup>96</sup>

Taking a strict approach to the fourth instance doctrine, the Court, after examining the facts of the case, decided as follows:

Following a thorough examination of the case file, the Court finds no element which might lead it to conclude that the domestic court

---

<sup>94</sup> *Nejdet Şahin and Perihan Şahin v Turkey* (n 86), para 57.

<sup>95</sup> *Sebahattin Evcimen v Turkey* (n 74).

<sup>96</sup> *ibid*, para 25.

acted in *an arbitrary or unreasonable* manner in establishing the facts or interpreting the domestic law.<sup>97</sup>

The complaint was manifestly ill-founded and was accordingly rejected. The Court's wording indicates that the Court was critical of the domestic proceedings; otherwise, the Court would have referred to the clear fourth-instance formula. A strict approach to the fourth instance doctrine sets a relatively high threshold: there must be something so manifestly arbitrary or unreasonable in the domestic proceedings for the Court to interfere. This required further elucidation, which was not forthcoming in this decision. The judgment remained at a general level and made no evaluation on the questions of arbitrariness and unreasonableness.<sup>98</sup>

The quality of the evidence used in criminal proceedings was at issue in *Bykov*.<sup>99</sup> The problematic question here was whether the proceedings as a whole were fair, taking into account the manner in which the evidence was obtained. In this case the Grand Chamber had already found a violation of Article 8 (right to private life) in the State agents' covert operation. Evidence against the applicant was obtained in a covert operation and was subsequently used in the criminal proceedings. The Grand Chamber had to decide whether the evidence obtained in violation of Article 8 can be used in the criminal proceedings and fulfils the requirements of fairness under Article 6. Its decision was not unanimous. The majority, by eleven to six, emphasised that the proceedings must be taken as a whole and that there had been no violation of Article 6.<sup>100</sup> The Court's evaluation commenced with the reminder that:

*its only task* is to ensure the observance of the obligations [...] it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention.<sup>101</sup>

The Court made the fourth instance doctrine clear by continuing:

It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence [...] may be admissible or, indeed, whether the applicant was guilty or not. The

<sup>97</sup> *ibid*, para 26 (emphasis added).

<sup>98</sup> Cf. *Ebanks v the United Kingdom* (n 80) where the arbitrariness and unreasonableness is better dealt with.

<sup>99</sup> *Bykov v Russia*, 4378/02, 10 March 2009, GC.

<sup>100</sup> *ibid*, paras 89-90 and 104.

<sup>101</sup> *ibid*, para 88 (emphasis added).

question [...] is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair [...]<sup>102</sup>

After outlining the main principles the Court turned to the facts of the case. It addressed the applicant's claim that the evidence obtained from the covert operation breached his defence rights and thus gave rise to a violation of the right to a fair trial under Article 6. It also noted that the evidence obtained as a result of the covert operation was not the sole basis for the applicant's conviction, and concluded that: '*nothing* has been shown to support the conclusion that the applicant's defence rights were not properly complied with in respect of the evidence adduced or that its evaluation by the domestic courts was arbitrary'.<sup>103</sup>

This case demonstrates the difficulties inherent in evaluating the evidence in the domestic proceedings, whilst remaining within the limits of the fourth instance doctrine. Furthermore, the way in which the Court formulated its decision was, in my opinion, rather pretentious. The pretentiousness is revealed when the Court underlines that '*nothing*' has been shown to support the conclusion that the applicant's defence rights were not properly complied with in relation to the fair trial standards. Rather than undermining the specific circumstances, a violation of Article 8 in such covert operations should be evaluated properly in order to assess a possible violation of Article 6. The Court remains silent on the issue that the covert operation had in itself violated other Convention articles.<sup>104</sup> Evaluating this argumentation from the fair trial view leads one to conclude that the right to a fair trial remains theoretical or merely illusory, since the Court certainly had grounds to interfere.

##### 5. *Category Four: Disregard of Fourth Instance Approach*

The cases in this category prioritise the provision of a fair trial over fourth instance questions. In *Lalmahomed* the applicant claimed in the domestic proceedings that he should have been acquitted on the grounds of mistaken identity.<sup>105</sup> The national court dismissed this claim as implausible without further investigation and refused leave to appeal. The Court reiterated that under Article 6, 'for the requirements of a fair trial to be satisfied, the accused, and indeed the public, must be able to understand

---

<sup>102</sup> *ibid*, para 89.

<sup>103</sup> *ibid*, para 98 (emphasis added).

<sup>104</sup> The dissenting opinion criticises this omission. See the partly dissenting opinion of judge Spielmann, and the concurring opinions of judges Rozakis, Tulkens, Casadevall and Mijović in *Bykov v Russia* (2009).

<sup>105</sup> *Lalmahomed v the Netherlands*, 26036/08, 22 February 2011.

the judgment or decision that has been given'.<sup>106</sup> It used rather strong language:

[t]he Court cannot overlook the fact that the single-judge chamber of the Court of Appeal [...] refused the applicant leave to appeal on the ground that he '[did] not consider plausible the applicant's statement that his identity details [were] systemically misused by someone else'<sup>107</sup>

The Court, for its part, considered it more appropriate to deal with the matter, having previously highlighted the fourth instance doctrine: '*as long as the resulting decision is based on a full and thorough evaluation of the relevant factors [...] it will escape the scrutiny of the Court*'.<sup>108</sup>

The Court unanimously came to the conclusion that the applicant's claim that his identity had been misused ought not to have been discounted without further examination. The national court's judgment violated the fair trial provision as a whole because it failed to fully investigate the case. Consequently, there was a violation of Article 6(1) taken together with Article 6(3)(c).<sup>109</sup> This case can be seen as a harsh and unfortunate example of a national court's failure to base its judgment on a full and thorough evaluation. Due to neglect at national level the Court had no choice but to assume *de facto* the role of a domestic court.

*Jovanović* dealt with the right to access the courts.<sup>110</sup> The applicant complained that his national Supreme Court had arbitrarily refused to consider his appeal when he had the right to use this remedy. The Court reiterated that Article 6 does not compel states to establish courts of appeal. However, if such courts exist the guarantees contained in Article 6 must be upheld, *inter alia*, by ensuring effective access to them. This right is, however, not absolute. Certain limitations are permissible, but these must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired. The Court therefore emphasised proportionality.<sup>111</sup>

The facts of this case were that the national Supreme Court barred the applicant from filing an appeal. It ruled without further clarification that the assessment of the value of the dispute showed it was clearly below the

<sup>106</sup> *ibid*, para 43.

<sup>107</sup> *ibid*, para 42.

<sup>108</sup> *ibid*, para 37 (emphasis added).

<sup>109</sup> *ibid*, paras 46-8.

<sup>110</sup> *Jovanović v Serbia*, 32299/08, 2 October 2012.

<sup>111</sup> *ibid*, para 46.



applicable statutory threshold. The Court held that there had been an interference with the applicant's right to access a court and proceeded to assess whether this interference had been proportionate.<sup>112</sup> It placed weight on the fact that the national Supreme Court had not held a preliminary hearing. Furthermore, regarding the applicant's alleged procedural errors, the Court emphasised that it was the plaintiff and not the applicant who had set an unrealistic value in respect of the dispute, which the applicant apparently challenged before he had concluded his own response to the claim. The value of the dispute was decisive, as there was a certain threshold required for the lodging of an appeal on points of law. The applicant was therefore entitled to believe that an appeal on points of law would be available to him in due course and if necessary.<sup>113</sup> At this juncture, the Court showed that it was fully aware of the fourth instance requirements by stating as follows:

It is, of course, primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. The Court's role is not, save in the event of evident arbitrariness, to question it.<sup>114</sup>

The Court then diverged from the strict fourth instance limits by giving guidance to the national court on how to interpret domestic law:

The authorities should respect and apply domestic legislation in a foreseeable and consistent manner and the prescribed elements should be sufficiently developed and transparent in practice in order to provide legal and procedural certainty [...]<sup>115</sup>

Since there had clearly been shortcomings in terms of transparency and legal certainty in the national proceedings, the Court unanimously held that there had been a violation of Article 6(1). It is noteworthy that the last paragraph of the Court's judgment stated, while finding a violation, that 'it being understood that it is not this Court's task to determine what the actual outcome of the applicant's appeal on points of law would have been had the Supreme Court accepted to consider it on its merits'.<sup>116</sup> While emphatically trying to avoid being a fourth instance court, the Court acted

---

<sup>112</sup> The Court solved the legitimate aim question relatively quickly: the statutory threshold for appeals to the Supreme Court is a legitimate procedural requirement having regard to the very essence of the Supreme Court's role to deal only with matters of the requisite significance (*ibid*, para 48).

<sup>113</sup> *ibid*, para 49.

<sup>114</sup> *ibid*, para 50.

<sup>115</sup> *ibid*, para 50.

<sup>116</sup> *ibid*, para 51.

to the contrary. It also used rather contradictory language in making its decision under Article 41 with regard to it not being a court of fourth instance:

The Court reiterates that *the most appropriate form of redress* for a violation of Article 6(1) would be to ensure that the applicant [...] is put in the position in which he would have been had this provision not been disregarded. Consequently, it considers that *the most appropriate form of redress* would be to reconsider the applicant's appeal [...]<sup>117</sup>

The Court's language here undeniably resembles that of a constitutional court: it gives instruction to the national court to reconsider the case. As result, this particular case amounts to a revelation because it reveals the difficulties involved in interpreting procedural rights while staying within the limits of the fourth instance doctrine. One or the other must yield, and in this case it was the fourth instance doctrine that triumphed.

A positive obligation to put in place a system for enforcement of judgments under Article 6 arose in *Pelipenko*.<sup>118</sup> Here, the applicant complained that because the bailiffs failed to take any necessary steps to enforce the execution of the final judgment against the applicants. The Court commenced by reiterating that execution of a judgment given by any court must be regarded as an integral part of the 'trial' for the purpose of Article 6. It then noted that the state has a positive obligation to put in place a system for enforcement of judgments that is effective both in law and in practice and ensures their enforcement without undue delay. It also stated that:

[W]hen final judgments are issued against 'private' defendants, the State's positive obligation consists of providing legal arsenal allowing individuals to obtain, from their evading debtors, payment of sums awarded by those judgments.<sup>119</sup>

The Court emphasised that the State's positive measures must be adequate and sufficient. Consequently, when it is established that measures taken by the national authorities were adequate and sufficient, the state cannot be held responsible for a 'private' defendant's failure to pay the judgment debt. The Court also took the fourth instance doctrine into account and stated:

---

<sup>117</sup> *ibid*, para 59 (emphasis added).

<sup>118</sup> *Pelipenko v Russia* (n 51).

<sup>119</sup> *ibid*, para 49.

The Court [...] is not called upon to examine whether the internal legal order of the States is capable of guaranteeing the execution of judgments given by courts. Indeed, it is for each State to equip itself with legal instruments which are adequate and sufficient to ensure the fulfilment of positive obligations imposed upon the State [...] The Court's *only task* is to examine whether the measures applied [...] were adequate and sufficient.<sup>120</sup>

Considering the facts of the case at hand, the Court unanimously held that by refraining from taking such adequate and effective measures for several years, as required in order to secure compliance with the enforceable judicial decision, the national authorities had violated Article 6(1) by depriving its provisions of all useful effect.<sup>121</sup> The fourth instance formula takes a different form in this case, and highlights one of the positive obligations as stipulated in Article 6(1). In essence, the Court's threshold for interference permits the state to choose the measures required in order to secure adequate and effective enforcement of judicial decisions. This also serves the democracy principle.<sup>122</sup>

In *Karpenko* the applicant complained that he had been denied a fair trial. He had not been given an opportunity to publically cross-examine the four co-accused, who were alleged accomplices in the robberies for which he was charged, because none of four attended the trial or testified before the court.<sup>123</sup> The Court first went over the general principles relating to the rights of the defendant deriving from the fair trial provision, noting that these require that the defendant be given an adequate and proper opportunity to challenge and question a witness testifying against him.<sup>124</sup> It then conducted an in-depth assessment of all the statements given in the pre-trial stage by ten witnesses, in a relatively similar manner to that of the appellate court.<sup>125</sup> The applicant's conviction was based, to a decisive extent, on two of the witness statements given at the pre-trial stage. The Court remained unconvinced by the Russian Government's arguments as to why the witnesses were not present at trial.<sup>126</sup> It considered the national

---

<sup>120</sup> *ibid*, para 51 (emphasis added).

<sup>121</sup> *ibid*, para 56.

<sup>122</sup> This case could also be viewed from the margin of appreciation doctrine: the Court leaves a certain margin of discretion to the state authorities to choose the means to fulfil their obligations. This case is a good example to demonstrate the close relationship between the fourth instance doctrine and the margin of appreciation doctrine. See Harris and others (n 10) 16.

<sup>123</sup> *Karpenko v Russia* (n 64).

<sup>124</sup> *ibid*, paras 61-2.

<sup>125</sup> *ibid*, paras 63-9.

<sup>126</sup> The Court stated that: '[it] has serious doubts as to whether the Town Court's

court's reasons to be superficial and uncritical, thereby alluding to a positive obligation under Article 6:

[T]o take positive steps, in particular, to enable the accused to examine or have examined witnesses against him. Such measures form a part of the diligence which the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in *an effective manner* [...]<sup>127</sup>

The choice of words by the Court was robust and unambiguous. After framing the positive obligation under the effectiveness principle, it ruled that the national court's decision to justify the witnesses' absence was not sufficiently convincing and that the authorities had failed to take reasonable measures to secure their attendance at trial.<sup>128</sup> It ruled that the applicant had not been granted a fair trial and that as a result, there was a violation of Article 6(1) when read with Article 6(3)(d).

The applicant had also complained under Article 6 that the national courts refused to ensure his attendance in proceedings concerning his parental rights. The Court paid particular attention to the nature of the dispute in this particular case, which concerned the termination of parental rights that required assessment of the very special legal and factual relationship existing between a parent and a child.<sup>129</sup> The Court commenced by reiterating that the principles of adversarial proceedings and equality of arms, which are elements of a fair hearing, require that each party be given a reasonable opportunity to have knowledge of and comment on the observations made or evidence adduced by the other party.<sup>130</sup> However, it pointed out that in non-criminal matters there is no absolute right for a parent to be present at trial, except with respect to a limited category of cases, such as trials where the character and lifestyle of the person concerned are directly relevant to the substance of the case, or where the decision involves the person's conduct.<sup>131</sup> The Court referred to effectiveness, stating that it was 'not convinced that the representative's appearance before the courts secures an *effective, proper and satisfactory* presentation of the applicant's case'.<sup>132</sup> Finally, it held, again emphasising effectiveness, that 'the domestic courts deprived the applicant of the

---

conclusion that it was impossible to secure the witnesses' attendance can indeed be accepted as warranted.' *ibid*, para 74.

<sup>127</sup> *ibid*, para 75 (emphasis added).

<sup>128</sup> *ibid*, para 75.

<sup>129</sup> *ibid*, para 92.

<sup>130</sup> *ibid*, para 89.

<sup>131</sup> *ibid*, para 90.

<sup>132</sup> *ibid*, (emphasis added).

opportunity to present his case *effectively*'.<sup>133</sup> Consequently, there had been a violation of Article 6(1). The Court refrained from ruling on the fourth instance doctrine.

In *FC Mretebi*, the applicant's complaint to the Court was that its national Supreme Court had refused to waive the excessive court fees, thus denying him access to justice, which, in turn, violated Article 6.<sup>134</sup> The Court handed down a judgment, following a close vote of four to three. The majority took the view that the applicant was obliged, in effect, to abandon its appeal before the Court of Cassation because he was unable to pay the court fees. The question was whether these court fees restricted the right to access to justice disproportionately. The Court noted that the national Supreme Court had given no reason as to why it could not waive the fees, and ruled that:

[A]ssessing the facts of the case as a whole, the Court concludes that the Supreme Court failed to secure a proper balance between, on the one hand, the interests of the State in securing reasonable court fees and, on the other hand, the interests of the applicant in vindicating its claim through the courts.<sup>135</sup>

The dissenting opinion stressed the Court's role and criticised the majority's reasoning:

*It is not for our Court to impose on national jurisdictions 'to request parties more information' or 'to try to obtain, either from the applicant or the competent authorities, any supplementary proof in the examination of a civil case.'*<sup>136</sup>

The dissenting opinion viewed the case from the fourth instance perspective and therefore came to the opposite conclusion. This case clearly demonstrates the way in which the Court acts *de facto* as a court of fourth instance. It imposes obligations on national jurisdictions to request parties to provide more information and to obtain supplementary proof in the trial of civil cases. However, the dissenting opinion also proceeded to evaluate questions of a fourth-instance nature, asking whether there was sufficient evidence to prove the applicant's insolvency.<sup>137</sup>

---

<sup>133</sup> *ibid*, para 94 (emphasis added).

<sup>134</sup> *FC Mretebi v Georgia* (n 63).

<sup>135</sup> *ibid*, para 49.

<sup>136</sup> Joint dissenting opinion of judges Türmen, Mularoni and Popović in *FC Mretebi v Georgia* (2007) (emphasis added).

<sup>137</sup> *ibid*.

#### IV. CONCLUSIONS

The Court's argumentation concerning the fourth instance doctrine in the first two categories – 'clear fourth instance nature' and 'length of proceedings' – is well-defined and unproblematic from the justifiability position. Issues which are clearly of a fourth instance nature should be ruled inadmissible. In these cases, arguments concerning the fair trial provision have little weight. Issues concerning the length of the proceedings are also clear. There is little to weigh up in order to determine that the length of the proceedings was unreasonable, since a decision by the Court that proceedings took too long does not go to the heart of the fourth instance doctrine.

The next two categories – 'balancing approach' and 'disregard of fourth instance approach' – reveal the tensions and problems involved in balancing the fourth instance doctrine against an expansive approach to the interpretation of the right to a fair trial. In these cases, in particular, the judicial reasoning given must be transparent and take account of both sides in order for the judgment to be justifiable and convincing.<sup>138</sup> Cases in the category of 'balancing approach' can be criticised on the basis that rights should be practical and effective and that the provision under Article 6 should be interpreted more dynamically. In contrast, cases in the category of 'disregard of fourth instance approach' can be criticised from the fourth instance doctrine and formal legitimacy perspectives. The fourth category also demonstrates how the Court occasionally acts *de facto* as a court of fourth instance. On the one hand, the Court is very strict in the way it articulates its role, according to which it is not a fourth instance court and it is not its task to evaluate the national court's findings or interpretations. On the other hand, its case law shows that the Court has been rather active and bold in investigating and broadening the obligations and rights laid down in Article 6. For example, it has stated that as long as the national decision is based on a full and thorough evaluation, it will not interfere.<sup>139</sup>

Article 6 is a relatively sensitive provision because it requires legal proceedings to be fair in the broadest sense of the word but it is the national authorities themselves that are responsible for these proceedings.

---

<sup>138</sup> The third and fourth categories deal with cases that are considered to be hard cases and must be well justified. See eg Peczenik (n 21), 15, 305, Alexy (n 21) 228-30.

<sup>139</sup> See *Lalmahomed v the Netherlands* (n 105), para 37. The 'as long as' formula is famous in the German Constitutional Court's judgments concerning the protection of fundamental rights in the European Union legal order (BVerfGE 37, 271 2 BvL 52/71 *Solange I-Beschluß*, 29 May 1974; BVerfGE 73, 339 2 BvR 197/83 *Solange II-Beschluß*, 22 October 1986).

In the same way as other Convention articles, Article 6 is interpreted dynamically and effectively. The tension lies in the fact that in evaluating the fairness of proceedings, the Court cannot avoid evaluating the acts and interpretations of the national authorities. In so doing, the Court may inevitably find itself fulfilling the role of a fourth instance or even a constitutional court. For example, its ruling in *Jovanović*, in which it reiterated that the most appropriate form of redress for violation of Article 6 is to ensure that the national court reconsiders the applicant's appeal, the Court used language typical of a constitutional court.<sup>140</sup>

*Karpenko* and *Pelipenko* are interesting examples as they demonstrate the way in which the Court has unanimously interpreted the fair trial provision by emphasising the effectiveness principle as well as the positive obligations derived from it.<sup>141</sup> There are no explicit signs in the Court's reasoning that it took the fourth instance doctrine into account. Its consideration of the statements given by the ten witnesses in *Karpenko*, in particular, show the Court acting in a role similar to that of a fourth instance court.

The Court has acknowledged this problem, for instance in the Grand Chamber's approach in *Şahin*,<sup>142</sup> which divided the judges into two blocs. The majority emphasised a strict approach to the fourth-instance formula, while the minority stressed public confidence and the effective interpretation of the right to a fair trial. *Bykov* was another Grand Chamber case in which the judges' decision was not unanimous.<sup>143</sup> In this case the majority placed greater weight on a strict approach to the fourth-instance formula, and the minority argued that the right to a fair trial must be interpreted in such a way as to give effect to this right.<sup>144</sup>

In my opinion, it is obvious that the Court cannot both strictly avoid acting as a fourth instance court and at the same time interpret the right to a fair trial provision effectively. Either it should apply a lower threshold in cases concerning the fourth instance doctrine and continue to interpret Article 6 in an effective manner, or it should stick with its strict fourth-instance formula and refrain from interpreting Article 6 in an effective way. The latter is by no

---

<sup>140</sup> *Jovanović v Serbia* (n 110), para 59. See also Evert A Alkema, 'The European Convention as a constitution and its Court as a constitutional court' in Paul Mahoney and others (eds), *Protecting Human Rights: The European Perspective* (Carl Haymanns Verlag KG 2000), 61-2.

<sup>141</sup> *Karpenko v Russia* (n 64); *Pelipenko v Russia* (n 51).

<sup>142</sup> *Nejdet Şahin and Perihan Şahin v Turkey* (n 86).

<sup>143</sup> *Bykov v Russia* (n 99).

<sup>144</sup> See the partly dissenting opinion of judge Spielmann, joined by judges Rozakis, Tulkens, Casadevall and Mijović, in *Bykov v Russia* (2009), GC, paras 10-5.

means desirable or probable as far as the protection of human rights is concerned.

Legitimacy arguments can be used to support both possible positions. In the context of the fourth instance doctrine, legitimacy stresses formality and the limits placed on the Court's competence, while the rights perspective emphasises substantive legitimacy. From the perspective of the latter, legitimacy is gained through the effective protection of human rights. It would be more appropriate to consider first how the line should be drawn in each case and then openly and transparently give reasons for choosing between the fourth instance doctrine and the right to a fair trial. One should not forget that the bedrock of the fourth instance doctrine is the principle of democracy and national sovereignty. These core principles are not articulated by the Court *per se* but are of fundamental importance. For the fourth instance doctrine and its application in the Court's case law to be justified, it requires that all competing interests must be taken into account, including *pro* and *contra* types of argumentation, and are balanced carefully. Furthermore, the underlying values should be stated transparently. Owing to the strict and declaratory nature of fourth instance doctrine, it does not fulfil these requirements.

*Pelipenko* indicates a step towards a more flexible and practical approach to the fourth instance doctrine, in which the Court interpreted it to mean that the state has authority to choose the measures needed to secure adequate and effective enforcement of judicial decisions.<sup>145</sup> A strict approach to the fourth instance doctrine threatens, in my opinion, the effective protection of human rights. If the starting point of legal interpretation is dominated by an extremely strict approach to the fourth instance doctrine, then it is on the wrong track from the outset. The Court should continue using the fourth instance doctrine in the first two approaches: 'clear fourth instance nature' and 'length of proceedings'. The last two categories, 'balancing approach' and 'disregard of fourth instance approach' are more critical and complex: the application of the fourth instance doctrine is a matter of balancing as well as transparent reasoning of the scope of the fourth instance doctrine in relation to the effective application of the right at issue. The strict fourth instance doctrine, which simply emphasises that there must be 'something arbitrary or manifestly unreasonable' in the domestic proceedings in order the Court to interfere, should not be used at all by the Court.<sup>146</sup> Finally, words such as 'arbitrary or manifestly unreasonable' should be openly explained and evaluated on a case-by-case basis.

---

<sup>145</sup> *Pelipenko v Russia* (n 51), para 51.

<sup>146</sup> See *Sebahattin Evrimen v Turkey* (n 74), para 26; *Rybczyński v Poland*, 3501/02, 3 October 2006, para 37.



# UNJUST FACTORS OR LEGAL GROUND? ABSENCE OF BASIS AND THE ENGLISH LAW OF UNJUST ENRICHMENT

Nathalie Neumayer\*

*Traditionally, there are two main approaches to enrichment by transfer, the common law ‘unjust factors’ approach and the civilian ‘absence of basis’ approach. In the aftermath of the so-called ‘swaps cases’, Peter Birks proclaimed the dethronement of the unjust factors in the English system, said that English law has embraced a German-style absence of basis approach, and proposed a new system of unjust enrichment. This article proceeds in two steps. Firstly, it asks whether one of the two systems is superior to the other. Concluding that the ‘absence of basis’ approach may be conceptually clearer, it then argues that the English system should nonetheless be careful to adopt this approach for two reasons. First, this new approach may not be suited to neighbouring fields of law (especially contract), and secondly, unjust enrichment does not occupy the same place in the legal landscape in Germany and England, it is of a different normative quality.*

Keywords: Comparative law, Unjust enrichment, Enrichment by transfer, Legal transplants, Harmonisation.

## TABLE OF CONTENTS

I. INTRODUCTION .....	II0
II. THE TWO SYSTEMS.....	III
1. <i>Unjust Factors</i> .....	III
2. <i>Absence of Basis</i> .....	II3
III. ANALYSIS.....	II5
1. <i>The ‘swaps cases’</i> .....	II6
2. <i>Mistake of Law</i> .....	II6
IV. AN ENGLISH SYSTEM OF ABSENCE OF BASIS? .....	II9
1. <i>Transplanting a Legal Concept</i> .....	I20
2. <i>Transplanting the ‘Absence of Basis’ Approach?</i> .....	I22
3. <i>Unjust Enrichment in the Legal Landscape</i> .....	I24
V. CONCLUSION.....	I26

---

\* Doctoral Candidate in Private Law and Teaching and Research Assistant at the Department of Roman Law and Antique Legal History at the University of Vienna, Austria. Mag. iur. (University of Vienna, 2010), LL.M. (Comparative and European Private Law, University of Edinburgh, 2013), e-mail: nathalie.neumayer@gmail.com. I would like to thank Dan Carr (University of Edinburgh), Shane McNamee (University of Bayreuth) and the anonymous reviewers of the EJLS for their comments on an earlier draft.

## I. INTRODUCTION

Since different routes may lead to the same result<sup>1</sup> and surely all roads lead to Rome, I shall begin by quoting a Roman: '*Iure naturae aequum est neminem com alterius detrimento et iniuria fieri locupletiores*' (It is fair according to the law of nature that no one should be enriched by loss and injustice to another).<sup>2</sup> This seems to be stating the obvious. All too often, however, the picture gets blurrier the more one zooms in. How is 'injustice' to be understood? What determines the 'just' in unjust enrichment?

The field of unjust enrichment is a vast one, so the present article is focusing on the scenario where the claimant transfers value to the defendant which was not due, what Birks calls the 'core case'. There are two main approaches to this problem, one of which we shall call the common law and the other the civil law approach.

Traditionally, the common law has dealt with this scenario in terms of so-called unjust factors, even though it has been pointed out that 'no common lawyer had heard of unjust factors before Birks introduced them in 1985', meaning that before Birks, the law of unjust enrichment was far less organised.<sup>3</sup> Civil law countries, on the other hand, favour an approach that focuses on the absence of a legal basis. As examples for a common law and a civil law system, the English and the German systems of unjust enrichment are the most prominent representatives of each legal family. These two systems are, on the one hand, deeply rooted in the system of unjust factors (England) and, on the other hand, possibly the most highly developed system of unjust enrichment in civilian countries. For reasons of simplicity and clarity, I will briefly outline both approaches by reference to the English and German systems of unjust enrichment by transfer.

In the course of a general tendency towards unification or convergence of the legal systems within the European Union, the system of unjust factors

---

<sup>1</sup> The reader may forgive the pun. The 'different routes' are the different legal systems, and the 'result' is the answer to the question when restitution is due. For enrichment by transfer, which is the focus of this paper, it will be shown below that the results, that is whether there has to be restitution or not, are similar in both systems. Given the same facts of a case, restitution may have to be made due to mistake in the context of English law, or due to an absence of legal basis in the context of German law.

<sup>2</sup> Pomponius, *De Regulis Iuris*, D50, 17, 206; translation taken from Peter Birks, *Unjust Enrichment* (2<sup>nd</sup> edn, OUP 2005) 268, (n 4).

<sup>3</sup> Steve Hedley, 'The Empire Strikes Back? A Restatement of the Law of Unjust Enrichment' (2004) 28 *Melbourne University Law Review* 759, 766.

has had to face some criticism. Most notably, Sonja Meier's article 'Unjust factors and Legal Grounds'<sup>4</sup> has, if not kicked off, then at least intensified the academic discussion on whether a system based on the German model is superior to an unjust factors-based system. In fact, her arguments have managed to convince one of the champions of the unjust factors approach, Peter Birks, who in his last book famously proclaimed that '[a]lmost everything of mine now needs calling back for burning'.<sup>5</sup> Birks claimed that an English absence of basis approach was not a product of his academic creativity, but had already seeped into English case law via the so-called 'swaps cases',<sup>6</sup> which will be sketched out in due course. Although the proclamation of having to burn everything previously written might have been a little premature, it can be observed that, without doubt, Birks's book has fuelled academic discussion.

This essay will deal with two main questions. The first one is, whether it can be said that one of the two systems of unjust enrichment is superior to the other. Is one of the systems simply better suited to the type of cases that come before the courts? Can it be said that one system excels in terms of conceptual clarity? The second question is, with reference to Birks's arguments, whether English law should adopt the German approach.

For the second question, I will briefly outline the new model of unjust enrichment based on absence of basis as suggested by Peter Birks in his last book<sup>7</sup> and argue that the approach as presented might need more thought. As it is, it might not be suited to the English system of private law generally and the English system of unjust enrichment specifically. Changing the legal construction behind unjust enrichment does not only affect this field of law, but also interacts with other fields of law, most importantly contract law.

## II. THE TWO SYSTEMS

### I. *Unjust Factors*

The law of unjust enrichment is a rather young area of law in England.<sup>8</sup> In *Moses v MacFerlan*, Lord Mansfield described various circumstances in

---

<sup>4</sup> Sonja Meier, 'Unjust Factors and Legal Grounds' in David Johnston and Reinhard Zimmermann (eds), *Unjustified Enrichment. Key Issues in Comparative Perspective* (CUP 2002).

<sup>5</sup> Birks, *Unjust Enrichment* (n 2), xii.

<sup>6</sup> Birks, *Unjust Enrichment* (n 2), 99.

<sup>7</sup> Birks, *Unjust Enrichment* (n 2).

<sup>8</sup> Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung* (3rd edn, Mohr Siebeck 1996), 553.

which a transfer of value needs to be reversed,<sup>9</sup> but those instances were understood to be specific remedies and not a closed area of law. In 1966, the first textbook on restitution was published,<sup>10</sup> but even 12 years later, in 1978, the judiciary had not been convinced of the existence of unjust enrichment as an independent field of law.<sup>11</sup> It was not until 1991 that unjust enrichment was finally accepted by the courts in *Lipkin Gorman v Karpnale Ltd*.<sup>12</sup>

The English law of unjust enrichment (by transfer) builds upon four requirements, which have been expressed for example in *Banque Financière de la Cité v Parc (Battersea) Ltd*. The defendant (i) must be enriched (ii) at the claimant's expense. This enrichment has to be (iii) unjust and (iv) the defendant must not have a valid defence against the claim.<sup>13</sup> It is the third requirement that is of interest in this context. How does the injustice of a transfer manifest itself? The common law asks the claimant to show that the transfer was unjust. This idea has existed in the common law for centuries, even though it has not been referred to as 'unjust factors approach'.<sup>14</sup> More modern textbooks have included positive lists of unjust factors.

However, the concrete list differs from textbook to textbook. Andrew Burrows, for example, includes mistake, duress, ignorance, undue influence, exploitation, legal compulsion, necessity, failure of consideration, incapacity, illegality, *ultra vires* demand of public authorities, etc.<sup>15</sup> In his influential categorisation of unjust factors, Peter Birks distinguishes between non-voluntary and policy-motivated unjust factors. Non-voluntary

<sup>9</sup> (1760) 97 Eng. Rep. 676 (K.B.).

<sup>10</sup> Lord Goff of Chieveley and Gareth Jones, *The Law of Restitution* (Sweet & Maxwell 1966).

<sup>11</sup> *Orakpo v Manson Investments Ltd* [1978] AC 95 (HL) 104 (Lord Diplock): '[T]here is no general doctrine of unjust enrichment recognised in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based on the civil law.'

<sup>12</sup> Christiane Wendehorst, 'Die Leistungskonditionen und ihre Binnenstruktur' in Reinhard Zimmermann (ed), *Grundstrukturen eines Europäischen Bereicherungsrechts* (Mohr Siebeck 2005) 47, 55; *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 578 (Lord Goff of Chieveley): 'The recovery of money in restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money at common law is made as a matter of right; and even though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied, it is denied on the basis of legal principle.'

<sup>13</sup> *Banque Financière de la Cité v Parc (Battersea) Ltd* [1998] 2 WLR 475, 479.

<sup>14</sup> Mitchell McInnes, 'The Reason to Reverse: Unjust Factors and Juristic Reason' (2012) Boston University Law Review 1049, 1052; Hedley, 'The Empire Strikes Back?' (n 3), 766.

<sup>15</sup> Andrew Burrows, *The Law of Restitution* (3<sup>rd</sup> edn, OUP 2011).

factors concern the nature of the claimant's (non-)consent. Birks further subdivides these possible vitiations of consent into 'impaired consent' (mistake, duress, undue influence, exploitation of weakness, human incapacity, 'qualified consent' (failure of consideration) and 'no consent'.<sup>16</sup> As those factors do not cover all cases in which restitution should be granted, Birks also includes a supplementary category of so-called policy-motivated factors. Within this category, a claimant will be successful if he can show that, regardless of his intention, there is a specific reason for restitution, for example in order to 'reinforce governmental respect for the rule of law or to encourage withdrawal from illegal actions'.<sup>17</sup> An example for a policy-motivated factor, the 'Woolwich' factor, will be briefly discussed below.

However, it needs to be pointed out that if there is a legal obligation, the mere existence of an unjust factor will normally not justify the retention of the money conferred.<sup>18</sup>

As can be easily seen, the unjust factors approach revolves largely around the transferor's intent (with policy reasons acting as a corrective measure). If his or her decision to transfer a benefit has not been made freely and without vitiating factors, the benefit is to be returned. The intention to transfer cannot be said to have an equal all-importance in the so-called 'no basis' approach.

## 2. *Absence of Basis*

The German system of unjustified enrichment (rather than unjust enrichment) follows a very different model. If we can define the English approach to unjust enrichment as 'the transfer of benefit is only unjust if your will has been vitiated in a legally relevant way', the German model takes a different path.

§ 812 (1) BGB states that '[a] person who obtains something as a result of the performance of another person or otherwise at his expense without legal grounds for doing so is under a duty to make restitution to him. This duty also exists if the legal grounds later lapse or if the result intended to be achieved by those efforts in accordance with the contents of the legal transaction does not occur'.<sup>19</sup>

---

<sup>16</sup> Peter Birks, *Introduction to the Law of Restitution* (OUP 1985).

<sup>17</sup> Birks, *Unjust Enrichment* (n 2), 106; Andrew Burrows and others, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) 5 [s 3(2)(b)].

<sup>18</sup> Burrows and others, *Restatement* (n 17), 6 [s 3(6)].

<sup>19</sup> Translation via [http://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p3396](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3396); 'Wer durch die Leistung eines

This is to say that a transfer of benefit must be justified by a legal ground. Should this legal ground turn out to have been void from the beginning or if it is avoided *ex tunc*, no legally relevant justification will remain. From this it follows that if there is no basis for the transaction, it ought to be reversed. But what counts, under German law, as a valid legal ground?

As a general rule, it can be said that contracts are the most common legal grounds. Contracts of sale, lease, etc. all provide the enriched with a reason to keep the benefit transferred to him or her. Unlike English law, German law includes gifts, gratuitous use and gratuitous services in its definition of contract.<sup>20</sup> In addition, in some special cases even non-contracts can act as a sufficient legal basis. There are three different kinds of 'just factors' (as Thomas Krebs calls them in a semi-serious way).<sup>21</sup> Firstly, a valid legal basis can still be established where a contract is unenforceable solely due to shortcomings of a formal nature. By way of example, § 518 contains a requirement for gifts to be acknowledged by a notary in order to be binding. If, however, a gift is executed without having complied with this rule, it can nevertheless not be claimed back. Secondly, restitution will not be granted in cases of so-called 'natural obligations'. Natural obligations are claims that are not completely void, but merely unenforceable. Still, money that has been paid on the basis of a natural obligation may be retained by the defendant. The most important applications of this exception are gambling contracts. Although gambling contracts cannot be validly concluded, a 'debtor's' performance will not be recoverable.<sup>22</sup> Thirdly, obligations that are unenforceable because they have become time-barred continue to be a sufficient justification for retention.<sup>23</sup>

Restitution will not only follow where there has not been a legally enforceable obligation in the first place. Transactions may be avoided, that is rescinded with retroactive effect. In this case, the rules of unjustified enrichment will be applied.<sup>24</sup>

---

anderen oder in sonstiger Weise auf dessen Kosten etwas ohne rechtlichen Grund erlangt, ist ihm zur Herausgabe verpflichtet. Diese Verpflichtung besteht auch dann, wenn der rechtliche Grund später wegfällt oder der mit einer Leistung nach dem Inhalt des Rechtsgeschäfts bezweckte Erfolg nicht eintritt.'

<sup>20</sup> Gerhard Dannemann, 'Unjust Enrichment as Absence of Basis: Can English Law Cope' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law. Essays in Memory of Peter Birks* (OUP 2006), pp 364-369.

<sup>21</sup> Thomas Krebs, 'In Defence of Unjust Factors' in David Johnston and Reinhard Zimmermann (eds),

*Unjustified Enrichment. Key Issues in Comparative Perspective* (CUP 2001), pp 88-90.

<sup>22</sup> § 762 (1) BGB.

<sup>23</sup> § 222 (2) BGB.

<sup>24</sup> § 142 (1) BGB.

Illegality of transactions is a special case in German unjustified enrichment law. The mere illegality of a transaction does not automatically trigger § 812 et seq. BGB even though it may render a contract void. Once an illegal contract has been executed, it depends on the nature of the legal prohibition whether the transaction can be reversed.<sup>25</sup>

It can, therefore, be said that unjust factors are reasons that justify restitution, while legal grounds act as a justification for the enriched to retain the gain. While a system based on unjust factors might be called subjective, as it focuses on the claimant's will, the *sine causa* model can be described as objective, since it builds on the factual lack of a legal justification for the transfer.<sup>26</sup>

### III. ANALYSIS

Having now briefly introduced the two systems of unjust enrichment, we can turn to the first question of this essay. How well do both approaches perform in comparison to each other? Can it be said that one of them yields fairer results than the other one, that is, is one approach more prone to rendering solutions to cases that are in accordance with ideas of justice and fairness?

Let us start with Birks's core case, the direct payment of money by the claimant to the defendant. A pays B money under the mistaken assumption that he owes him money, when in reality this is not the case. The problem now arises when the claimant desires to have this money returned to him. According to German law, the starting point is that the enrichment that has taken place is initially unjustified, unless there is a legal basis to justify it. This legal basis, as we have seen, can be a contract or a natural obligation. In the present case, there is no such legal basis, therefore the claimant will be successful.

An English claimant would have to deal with an inverse situation, namely that the enrichment would be thought of as just, unless he can show that there has been an 'unjust factor' at work that vitiated the transaction. If he can show that he was labouring under a mistake which caused the transaction, and the defendant does not have a valid defence which would entitle him to keep the money, he will be successful with his claim. As can

---

<sup>25</sup> § 134 BGB.

<sup>26</sup> David Johnston and Reinhard Zimmermann, 'Unjustified Enrichment: Surveying the Landscape' in David Johnston and Reinhard Zimmermann (eds), *Unjustified Enrichment. Key Issues in Comparative Perspective* (CUP 2005), 5.

be seen, the results in both systems are the same for this core case.

### 1. *The 'swaps cases'*

Now let us turn to a series of cases that proved to be very important to the discourse on unjust enrichment law, the so-called 'swaps cases'. The cases shall be briefly sketched: an interest swap is, in essence, a mutual loan. While one party agrees to pay interest at a fixed rate, the other one pays a floating charge that varies over the course of the loan. In the early 1990s, a lot of local (UK) authorities were parties to such arrangements. When the House of Lords decided in 1992 that such contracts were void because they exceeded the authorities' money management powers, the question as to restitution arose. Some contracts had already been fully performed, others had not. On which ground could restitution be granted? Following the German approach, the solution would simply be that the contract has been declared void and therefore, the transactions have to be reversed for want of legal ground.

The situation presents itself as slightly more complicated if one were to adhere to the unjust factors approach. The parties had not been acting mistakenly, given that the contracts were not void at the time they were entered into. Restitution was finally granted on the basis of 'absence of consideration'.<sup>27</sup> Additionally, in *Kleinwort Benson v Lincoln CC*, it was decided that restitution could also be granted because of mistake of law.<sup>28</sup> Again, the destination of the restitutionary journey remains the same, it is only the routes that diverge.

### 2. *Mistake of Law*

This generous application of the unjust factor of mistake has led to some discussion. At common law, the same mistake can work on two levels. On a 'lower' contractual level it may be substantial enough to make the contract, which underlies a transfer, voidable. On a 'higher' level or in unjust enrichment, it may give rise to a claim for restitution. So, even if it is one mistake, it is taken into account in two different fields of law.

Sonja Meier has looked into the relationship between the mistake that triggers unjust enrichment rules and the mistake that avoids the underlying contract. She contends that 'it is not possible to differentiate mistakes in restitution without resorting to a legal-ground analysis',<sup>29</sup> pointing out that

<sup>27</sup> *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 4 All ER 890; *Kleinwort Benson Ltd v Sandwell BC* [1994] 4 All ER 890; Birks, *Unjust Enrichment* (n 2), 110; the implications of this decision will be discussed in the next part.

<sup>28</sup> *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349 (HL).

<sup>29</sup> Meier, 'Unjust Factors and Legal Grounds' (n 4), 53.



English law has given some relevance to a legal ground in denying recovery in the case of a mistaken payment of an existing obligation.<sup>30</sup> She has argued that in actuality what the common law rules on which mistakes lead to restitution really deal with is an analysis of the existence of a legal basis.<sup>31</sup> For this, she mentions two examples.

Firstly, she discusses the rules on mistake of law. In English law, the mistake of law has a turbulent history. While mistake of fact had always been a reason for recovery of a payment, *Bilbie v Lumley*<sup>32</sup> rendered a mere mistake of law legally irrelevant. However, following the swaps cases (which have been discussed above),<sup>33</sup> mistake of law is – once again – recognised as a valid ground for recovery.

The question whether recovery is possible based on a mistake of law is particularly relevant for natural obligations. Natural obligations are contracts which are not void, but merely unenforceable. In *Moses v MacFerlan*, a so-called negative list of unenforceable claims has been established by Lord Mansfield. A claim:

‘does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the Statute of limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or, for money fairly lost at play: because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering.’<sup>34</sup>

This list has regained relevance because of the abolishment of the mistake of law rule. Does this mean that recovery is now possible for all payments made in discharge of a natural obligation? According to Meier, this inconsistency reveals the reasoning behind the special status of a mistake of law: ‘This (...) obscures the true reason why recovery is excluded: not because of the nature of the mistake, but because of the obligation on which the claimant paid: an obligation which provided the defendant with a justification to keep the benefit.’<sup>35</sup>

---

<sup>30</sup> *Steam Saw Mills v Bearing Brothers* [1922] 1 Ch 244.

<sup>31</sup> Meier, ‘Unjust Factors and Legal Grounds’ (n 4), 56.

<sup>32</sup> (1802) 2 East 469.

<sup>33</sup> Notably *Kleinwort Benson v Lincoln City Council* [1998] 3 WLR 1095.

<sup>34</sup> *Moses v Macferlan* (1760) 2 Burr 1005 (KB).

<sup>35</sup> Meier, ‘Unjust Factors and Legal Grounds’ (n 4), 56.

### 3. *Payment in Doubt*

The second example deals with the situation in which a claimant makes a payment in order to discharge an obligation which he or she is not sure exists.

When the payer is unaware of the invalidity of the obligation, the situation presents itself as fairly straightforward. While German law focuses entirely on the circumstance that there is, in fact, no obligation (with the possible defence of knowledge in case the claimant knew of its non-existence), English law takes the other route and asks the claimant to show a mistake. As long as the claimant does not have any doubts about his liability, the outcomes in both systems are the same. The results only diverge if the payer is not sure whether or not he or she is bound to pay.

The case of *Woolwich v IRC*<sup>36</sup> can be taken as an example. The Inland Revenue demanded taxes from the Woolwich Building Society, which it was not allowed to levy, thus acting *ultra vires*. The Woolwich Building Society submitted to the claim, but expressed a reservation. After having challenged the tax and having it repaid, Inland Revenue refused to pay interest on the amount. In order to have a restitutionary claim on the interest, the Woolwich Building Society would have had to show that there had been an unjust factor. However, it had not been labouring under mistake (or any other unjust factor) because it knew that Inland Revenue was acting *ultra vires*. Eventually, the case was decided in favour of the Woolwich Building Society for reasons of policy.

In German law, there is a policy to limit recovery for payments made in doubt. Following the good faith principle, the defendant should be able to rely on the conduct of the claimant. If there is a payment, there is an assumption of its intended finality. However, the claimant can make an express reservation. In doing so, he or she retains the option of recovery.

In England, the payer in doubt has two options: he can either submit to the claim, pay, and thus exclude recovery (because doubt seems to exclude the possibility of labouring under a mistake of any kind), or he can refuse to pay and litigate. That means that nullity does not automatically trigger restitution in English law, although for the majority of cases there will be restitution on the basis of an unjust factor.<sup>37</sup>

Meier criticised this approach as impractical. The question of liability is

---

<sup>36</sup> *Woolwich Equitable Building Society v IRC* [1993] AC 70, 161.

<sup>37</sup> Krebs, 'In Defence of Unjust Factors' (n 21), 78.

usually unclear to both parties and not solely to the claimant.<sup>38</sup> To her, an approach that tries to reconcile the problem of submission with a system of unjust factors just misses the goal. Even if one were to introduce new unjust factors like 'transactional inequality',<sup>39</sup> it would only distract from the actual reason for recovery, which is the absence of a legal basis. She advocates a submission principle that takes the form of a defence in case the defendant was ignorant of the claimant's doubt.<sup>40</sup>

By way of summary, it can be noted that the unjust factor approach and the absence of basis approach both yield essentially identical results.<sup>41</sup> That means that 'English law certainly allows a plaintiff to sue in most of the situations where he would have a claim for enrichment on the Continent'.<sup>42</sup> The difference, however, lies in the route that is taken to get there. Whereas English law assumes that an enrichment is 'just' as long as there is no unjust factor vitiating the transfer, German law has a different starting point. According to German logic, the enrichment is initially unjust and must be justified by a legal ground. German law is therefore 'looking for 'justification' rather than 'injustice'".<sup>43</sup> For reasons of elegance and conceptual clarity, the absence of basis approach could seem preferable to some. However, it seems to be a matter of juridical taste whether elegance and conceptual clarity are categories that should be relevant in this context.

Peter Birks seems to have been convinced. But should English law really jump the unjust factors ship and join the legal ground force? This shall be examined in the following paragraphs.

#### IV. AN ENGLISH SYSTEM OF ABSENCE OF BASIS?

This leads us to the next question that shall be dealt with. Accepting that the absence of basis approach displays some advantages to looking for unjust factors (conceptual clarity and elegance), would it be the next logical step for the English system to adopt this approach?

<sup>38</sup> Meier, 'Unjust Factors and Legal Grounds' (n 4), 60.

<sup>39</sup> Peter Birks, 'No Consideration: Restitution After Void Contracts' (1993) 23 University of Western Australia Law Review 233.

<sup>40</sup> Meier, 'Unjust Factors and Legal Grounds' (n 4), 61.

<sup>41</sup> Reinhard Zimmermann, 'Unjustified Enrichment: The Modern Civilian Approach' (1995) 15/3 Oxford Journal of Legal Studies 403, 414; cf. Hedley, 'The Empire Strikes Back?' (n 3) pp 766-769.

<sup>42</sup> Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (trans by Tony Weir, 2<sup>nd</sup> edn, Clarendon Press 1992), 590.

<sup>43</sup> Hedley, 'The Empire Strikes Back?' (n 3), 766.

### 1. *Transplanting a Legal Concept*

Before dealing with this question, it is useful to first very briefly outline the theoretical background in comparative law that such a potential transplantation assumes. The discussion about the 'transplantability' of legal rules, institutions, etc. is an old one in comparative law. On one end of the transplantability spectrum, it is asserted that law as a system is closed in itself and functions autonomously, without the necessary influences of culture and society. Theorists on the other end of this spectrum believe that law is to a great extent a product of other, meta-legal factors, like culture, sociology, psychology, philosophy, etc. It is these two ends of the spectrum that I restrict the account of this debate to.

The expression 'legal transplants' was coined by Professor Alan Watson in his 1974 book *Legal Transplants. An Approach to Comparative Law*. In this book, he examines the history of legal developments and comes to the conclusion that the main motor of legal progress has always been a vivid practice of borrowing (one could almost say stealing) legal rules and institutions from other systems.<sup>44</sup> He comes up with numerous historic examples, e.g. the adoption of Roman systematics in Scottish law.<sup>45</sup> In demonstrating the possibility and indeed practice of implanting foreign legal building blocks into another system, Watson opposes what William Ewald calls the 'mirror theories' of law.<sup>46</sup> Mirror theories are theories that assume, 'sometimes explicitly, more often tacitly, that the law changes in response to forces external to law - that law reflects the power relations of society, or the workings of the market, or the ideology of possessive individualism, or the promptings of the judicial sub-conscious, or the cunning of the *Weltgeist*, or the self-interest of the dominant class, or the political ideology of the age; that, because law does not possess an autonomous existence, legal scholars should steep themselves in other disciplines, such as sociology, or anthropology, or philosophy, or economics, or literary criticism, or critical theory.'<sup>47</sup>

One of the most vocal proponents of this view, i.e. the view that the law is an expression of 'something else', of values that underlie a particular society, is Pierre Legrand. He emphasises the importance of legal culture

<sup>44</sup> Alan Watson, *Legal Transplants. An Approach to Comparative Law* (2<sup>nd</sup> edn, The University of Georgia Press 1993) 95.

<sup>45</sup> Watson, *Legal Transplants* (n 44), 36 ff.

<sup>46</sup> William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43/4 *American Journal of Comparative Law* 489, 492; for examples of such theories see Watson, *Legal Transplants* (n 44) 21ff and Lawrence Friedman, *A History of American Law* (1<sup>st</sup> edn, Simon & Schuster 1973), 595.

<sup>47</sup> Ewald, 'The Logic of Legal Transplants' (n 46), 490.

to the meaning of rules, therefore closely tying together sociological, philosophical and legal aspects. Others have identified factors that might play into the understanding of law within a particular culture – in addition to ‘black letter law’, the social acceptance thereof, the role of courts, judges and the legal profession, the notion of what law is in a particular society in general, legal reasoning and methodology, etc. may all play into the particular appearance of law in a given culture.<sup>48</sup> Therefore, to Legrand, rules are inseparably intertwined with cultural aspects.<sup>49</sup> This is why legal transplants (of rules) are impossible to Legrand and others at this end of the spectrum. –‘Anyone who takes the view that ‘the law’ or ‘the rules of the law’ travel across jurisdictions must have in mind that law is a somewhat autonomous entity unencumbered by historical, epistemological, or cultural baggage.’<sup>50</sup>

The problem with Legrand is, however, not least a political one. If we believe that legal cultures or systems or however one wishes to group them, are so insurmountably different, the underlying assumption must be that, for example, a German citizen *per se* is essentially different from a French citizen *per se* or an English citizen *per se*. This would open the gates to all kinds of generalisations and prejudices. Of course, it would be a futile exercise to deny the obvious differences in the legal systems, but conversely it would be inappropriately fatalist to assert their ‘unchangeability’, or indeed to understand culture as a homogeneous unit. As Watson says himself, ‘[m]uch about Legrand’s approach and our disagreement is revealed by his statement (...) that the word *Brot* in German means something different from the French word *pain*. (...) *Pain* in French and in France is not the same as *pain* in French and in France. For a poor village housewife ‘bread’ has not the same meaning as for the wealthy Parisian businessman. (...) It is banal to notice that the same legal rule operates differently in two countries: it operates to different effect even within one.’<sup>51</sup>

The influence of such cultural differences (national or regional) should not be overemphasised. History has shown that legal borrowing has been going

<sup>48</sup> David Nelken, ‘Towards a Sociology of Legal Adaptation’ in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart Publishing 2007), 7, pp 24-6.

<sup>49</sup> Anthony Forsyth, ‘The ‘Transplantability’ Debate in Comparative Law and in Comparative Labour Law: Implications for Australian Borrowing from European Labour Law’ (2006) University of Melbourne Working Paper Series, Working Paper No. 38 via <http://www.law.unimelb.edu.au/files/dmfile/wp381.pdf>, 5.

<sup>50</sup> Pierre Legrand, ‘The Impossibility of ‘Legal Transplants’ (1997) 4 Maastricht Journal of European and Comparative Law 111, 114.

<sup>51</sup> Alan Watson, ‘Legal Transplants and European Private Law’ (2000) 4/4 Electronic Journal of Comparative Law via <http://www.ejcl.org/ejcl/44/44-2.html>.

on for centuries, or indeed millennia, and in many instances successfully (e.g. the *Bürgerliches Gesetzbuch*, which united the previously fragmented laws in what is Germany today, or the acceptance of the Uniform Commercial Code by all states of the USA).<sup>52</sup> So on a practical level, the possibility of transplanting legal rules or institutions is a historical fact.

## 2. *Transplanting the 'Absence of Basis' Approach?*

After this brief theoretical excursion, let us return to the question that has been posed earlier, which is whether English law should adopt the 'absence of basis' approach. In this context, the 'swaps cases', which have been discussed above, are of particular interest. They constituted an important landmark in the academic discourse on the law of unjust enrichment in England. Not only did they reintroduce 'mistake of law' as a ground for recovery,<sup>53</sup> but also they caused Peter Birks to overthrow his previous model of unjust enrichment. Birks understood the granting of restitution based on failure of consideration as a dethronement of the system of unjust factors – what 'failure of consideration' really meant is that there was no contract. Birks could come to this conclusion only by re-examining the concept of 'consideration'. He asserted that the consideration that fails in an unjust enrichment context is the same that would conclude a contract, and does not merely concern counter-performance.<sup>54</sup> The court had therefore engaged in a legal ground analysis.<sup>55</sup>

In the aftermath of these cases, Peter Birks therefore attempted to combine the common law and the civil law approaches and suggested a new system of unjust enrichment for English law. His most radical change is that he replaced the positive requirement of an unjust factor with the negative requirement of an absence of basis. In order not to completely give up on the traditional system, unjust factors feed into the 'super category' of no basis. Whether there is a basis or not depends on the nature of the enrichment. Birks distinguishes between participatory and non-participatory enrichments, further subdividing the first category in obligatory and voluntary enrichments. In non-participatory enrichments, on the other hand, the benefit may be claimed because the claimant did not participate in the acquisition of the gain. In obligatory enrichments,

<sup>52</sup> Watson, 'Legal Transplants and European Private Law' (n 51).

<sup>53</sup> *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349 (HL); Zimmermann, 'Unjustified Enrichment: The Modern Civilian Approach' (n 41), 414.

<sup>54</sup> Birks, *Unjust Enrichment* (n 2), 118; for the different meanings of 'consideration' see also Graham Virgo, 'Failure of consideration: myth and meaning in the English law of restitution' in David Johnston and Reinhard Zimmermann, *Unjustified Enrichment: Key Issues in Comparative Perspective* (CaCUP2002), 103.

<sup>55</sup> Birks, *Unjust Enrichment* (n 2), pp 117-118; critically: Hedley, 'The Empire Strikes Back?' (n 3), pp 771-772.

the benefit was transferred without an obligation, while in voluntary enrichments the benefit has been transferred in expectation of a purpose to come about which subsequently fails.

This Birksian model faced a lot of criticism. Andrew Burrows has pointed out that the results are mainly the same, regardless of which approach is applied to cases, which also has been shown here previously.<sup>56</sup> Concerning the elegance and ease of application of both systems, Burrows holds that they are superficial.<sup>57</sup> He gives two main reasons for this conclusion.<sup>58</sup>

Firstly, Birks's wide notion of gift is problematic. In his concept of by-benefits, Birks understands as gift benefits transferred upon the defendant, but which are not unjust enrichment.<sup>59</sup> This is the case if, for example, the defendant, who lives in the flat above the claimant, profits from the claimant's heating. To understand this as a gift indeed seems a bit far-fetched. It could probably just as well be assumed that the claimant would prefer to keep all of the heating energy to him- or herself, were this technically feasible. To see donative intent in an act that is a result of lack of alternatives is pushing the notion of a gift a little too far. The claimant's intent cannot be simply assumed.<sup>60</sup>

The second point corresponds to a point that has been made by Sonja Meier (see above). However, while for her it is problematic that an unjust factors approach treats the same factual mistake on two different levels (contract and unjust enrichment), Burrows criticises Birks's model for it 'pushes out of sight many of the difficult questions of law that are dealt with 'up front' under the common law approach'.<sup>61</sup> From a conceptual perspective, it is hard to understand why this should be detrimental to the elegance of a system. Separating the question of whether there is a basis or not from the rules on unjust enrichment can only contribute to an enhanced clarity of the subject. Ultimately, he does not altogether dismiss Birks's model, but suggests its use as a point of reference for a 'cross-check' in difficult cases.<sup>62</sup>

---

<sup>56</sup> Andrew Burrows, 'Absence of Basis: The New Birksian Scheme' in Andrew Burrows and Alan Rodger, *Mapping the Law. Essays in Memory of Peter Birks* (OUP 2006) 33, 44.

<sup>57</sup> Also Chris L Hunt, 'Unjust Enrichment Understood as Absence of Basis: a Critical Evaluation with Lessons from Canada' (2009) Oxford U Comparative L Forum 6 at [ouclf.iuscomp.org](http://ouclf.iuscomp.org).

<sup>58</sup> Burrows, 'Absence of Basis: The New Birksian Scheme' (n 56), 45-48.

<sup>59</sup> Birks, *Unjust Enrichment* (n 2), 158.

<sup>60</sup> See also Hedley, 'The Empire Strikes Back?' (n 3), 780.

<sup>61</sup> Burrows, *The Law of Restitution* (n 15), 111.

<sup>62</sup> Burrows, *The Law of Restitution* (n 15), 114; However, one may be left to wonder

On the more favourable side of reception, it has been said that a shift to the absence of basis approach is feasible in English law and has its advantages, like speeding up the process of legal development.<sup>63</sup> However, in order for a no basis approach to dovetail with the general English law, a few adaptations would have to be made, as Dannemann points out. First and foremost, English law would have to recognise certain agreements outside of contract law as valid legal bases, such as gratuitous services, gratuitous use, gifts and trusts. As it stands at the moment, the law on what qualifies as a legally binding contract under English law is very restrictive. German law recognises a greater range of agreements as contracts. Secondly, more attention would have to be given to the distinction between merely unenforceable and void contracts, considering the latter are altogether unfit to provide a justification for retention.<sup>64</sup> Finally, English law would have to find new solutions to cases like *Woolwich v IRC*, where the claimant performs under protest (see above).<sup>65</sup>

### 3. *Unjust Enrichment in the Legal Landscape*

In this last section, the place of unjust enrichment law in the whole of private law shall briefly be examined. Why is that important? It is a question of whether one can compare the functions that unjust enrichment law has in the German system to that in the English system. It is vital to the question of whether the English system should adopt the continental approach to examine whether the law of unjust enrichment has the same function and place within the whole of the law. If that is not the case, one would be comparing apples with pears.

Can unjust enrichment law be perceived as a uniform or unified system of law in its own right or is its role rather that of a gap-filler which is applied to the 'leftovers' of contract and tort law? Stephen Smith and Peter Jaffey have made two distinctions that can be used for the purpose of locating unjust enrichment.

What is the law of unjust enrichment? Having started out as a part of the catch-all category of quasi contracts in Roman law, it has without doubt gained in substance over the last centuries. But where can we locate it now in the interplay of the different legal areas?

Stephen Smith has divided the different approaches to the law of unjust

---

what value there is in a principle that cannot be universally applied.

<sup>63</sup> Dannemann, 'Unjust Enrichment as Absence of Basis' (n 20), 377.

<sup>64</sup> Also: Burrows, 'Absence of Basis: The New Birksian Scheme' (n 56), 47.

<sup>65</sup> Dannemann, 'Unjust Enrichment as Absence of Basis' (n 20), pp 376-377.



enrichment in what he calls the unitary and the pluralist approach.<sup>66</sup> While the unitary approach is, in short, the civilian approach which has a single overarching principle, the pluralist approach corresponds to the system of unjust factors. Smith bases this distinction on an analogy with tort law. Here, similarly, the fault lines between the civilian and the common law can be traced along either the plurality of torts or the one principle of tort law (*Schadenersatz*).

In contrast, Peter Jaffey has looked into what he calls the strong theory and the weak theory of unjust enrichment.<sup>67</sup> Both theories deal with the nature of the defendant's duty to give back the benefit obtained. On the one hand, the weak theory of unjust enrichment merely says that 'there are claims that arise from the receipt of a benefit by the defendant and that serve to transfer the benefit from the defendant to the claimant.'<sup>68</sup> This does not tell us anything about where the claims come from or why they should be given back. 'To state that something amounts to unjustified enrichment is merely a conclusion, that because the enrichment is unjustified it should be returned, restored or made over to the person properly entitled to it. That conclusion is in need of supporting normative argument. But what sort of argument?'<sup>69</sup> A weak theory of unjust enrichment points toward a field of law different from unjust enrichment to make clear which types of enrichment are just or unjust.

On the other hand, the strong theory recognises unjust enrichment as a field of law which is equivalent to either contract or tort. All claims arising having received a benefit can be based on one principle, which unites the whole of the law of unjust enrichment. The strong theory of unjust enrichment implies that the duty to restore finds its reason in the legal realm of unjust enrichment rules. Therefore, the strong theory is a normative theory.

According to Jaffey, many common law writers accept the 'strong theory' as a given and unjust enrichment as a 'tertium quid', a separate domain of private law.<sup>70</sup> Indeed, it appears that the civilian approach would adhere to

---

<sup>66</sup> Stephen A Smith, 'Unjust Enrichment: Nearer to Tort than Contract' in R Chambers, C Mitchell, J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009), pp 202-206.

<sup>67</sup> Peter Jaffey, 'Two Theories of Unjust Enrichment' in J W Neyers, M McInnes, S G A Pitel (eds), *Understanding Unjust Enrichment* (Hart Publishing 2004).

<sup>68</sup> Jaffey, 'Two Theories of Unjust Enrichment' (n 67), 141.

<sup>69</sup> David Johnston and Reinhard Zimmermann, 'Unjustified Enrichment: Surveying the Landscape' (n 26), 628.

<sup>70</sup> Jaffey, 'Two Theories of Unjust Enrichment' (n 67) 163; Birks, *Unjust Enrichment* (n

Jaffey's 'weak theory' and Smith's unitary approach. In the words of Reinhard Zimmermann, '[i]t is difficult to see why the law of unjustified enrichment should be saddled with the task of sorting out the fate of the contractual relationship between recipient and transferor.'<sup>71</sup> Similarly, Gerhard Dannemann describes the German law of unjust enrichment as dovetailing with the law of contract in the BGB.<sup>72</sup> Jan Smits talks of the 'residual character of restitution law'.<sup>73</sup> Although a member of the common law academia, James Gordley argues in a similar vein. The law of unjust enrichment is not a complete field of law in its own right, but rather a means to cater to 'the need in disparate cases to fill gaps left by other branches of the law'.<sup>74</sup> Despite the seemingly denser, more unified structure of unjust enrichment law in Germany, the law of unjust enrichment by transfer acts more like an *automaton* following one overarching principle, the reversal of enrichments (whose unjustness needs to be determined by a legal norm that lies outside of the law of unjust enrichment itself). It takes effect once an unjust enrichment has been detected (due to the lack of legal ground). Almost parasitic in its essence, it does not aim to establish rules on when an instance of enrichment is unjust.

But what does this mean for our present enquiry? The answer is two things. First, it shows that the place and function of unjust enrichment are substantially different in Germany and England. While in Germany it has a distinctly residual character depending strongly on legal norms outside of unjust enrichment, England's unjust factors are structurally parallel to tort law, which means English unjust enrichment is more independent from other fields of law. Secondly and as a consequence, one should be careful to implant a foreign concept to another legal system. In order for England to embrace an absence of basis approach, many adaptations would have to be made, specifically to the law of contract.

## V. CONCLUSION

Whether unjust factors or absence of basis, the different approaches of common law and civil law systems seem deeply engrained in the scholars'

---

2), ix.

<sup>71</sup> Zimmermann, 'Unjustified Enrichment. The Modern Civilian Approach' (n 41), 416.

<sup>72</sup> Dannemann, 'Unjust Enrichment as Absence of Basis' (n 20), 363.

<sup>73</sup> Jan Smits, 'A European Law on Unjustified Enrichment? A Critical View of the Law of Restitution in the Draft Common Frame of Reference' in Antoni Vaquer (ed), *European Private Law Beyond the Common Frame of Reference* (Europa Law Publishing 2008), 157.

<sup>74</sup> James Gordley, *Foundations of Private Law. Property, Tort, Contract, Unjust Enrichment* (OUP 2006), 419.

minds. In this essay, both systems have been sketched in broad strokes, and then analysed and compared. By way of conclusion, it can be said that even though the results may be the same or at least very similar, the absence of basis approach has a slight advantage over the unjust factors approach in that it is conceptually clearer and seems more straightforward in its application.

Even if the elegance has been called 'superficial' by some, it appears that having one principle that applies to all cases is preferable to having to deal with a vast casuistry that will need to resort to adventurous explanations in order to achieve results that are in accordance with ideas of justice and fairness.

Regarding the question whether the English law should adopt this conceptually clearer approach, the consequences of this conceived preference are, however, limited. Unjust enrichment occupies different areas in the legal landscapes of German and English law, therefore simply implanting a foreign concept will inevitably produce problems.

# FOREIGN PRECEDENTS IN JUDICIAL ARGUMENT: A THEORETICAL ACCOUNT

Stefano Berteà and Claudio Sarra \*

*Recourse to precedents in legal adjudication is a source of intriguing theoretical challenges and serious practical difficulties. That is especially so when we have to do not with domestic precedents but with foreign ones, that is, with decisions taken by foreign courts and international judicial institutions, particularly when there is no formal obligation for a court to resort to foreign law. Can a case decided by the judiciary of a different legal order - even if that case is remote and that legal order operates under different procedural rules and substantive laws - have any bearing on a dispute arising domestically here and now? Should such a foreign precedent be acknowledged to have any (formal) binding force on the case in question? How could the practice of following foreign precedents be justified? This paper is primarily meant to lay the theoretical basis on which those questions can be addressed. The basis on which we proceed in answering those questions essentially lies in a theory of legal reasoning that, for lack of a better phrase, can be labelled a dialectical approach informed by standards of discursive rationality.*

Keywords: Foreign precedent, Legal Reasoning, Jurisprudence, Dialectical Rationality, Legal Authority.

## TABLE OF CONTENTS

I. INTRODUCTION .....	129
II. FOREIGN PRECEDENT IN LEGAL ADJUDICATION .....	133
III. THE DOMINANT VIEW .....	138
IV. AN ALTERNATIVE PERSPECTIVE .....	143
1. <i>Dialectical Model for Legal Reasoning</i> .....	145

---

\* We wish to express our indebtedness to Daniele Velo dal Brenta, Stefano Fuselli, Federico Reggio, Paolo Sommaggio, Sean Thomas, Filippo Valente, Francesca Zanuso, and the anonymous reviewers for this journal for reading and commenting on earlier drafts of this work. Needless to say, responsibility for the views expressed herein, as well as for any errors of form or content, rests solely with us. Finally, thanks are due to the University of Leicester that granted one of the authors one academic semester of study leave during which time the work towards the completion of this essay has been finalised. Stefano Berteà is Reader in Law, School of Law, University of Leicester; Claudio Sarra is Lecturer in Law, School of Law, University of Padua. While the authors discussed every single point of this work, paragraphs I, III, IV.1 and V can be attributed to Stefano Berteà, and paragraphs II, IV and IV.2 to Claudio Sarra.

2. <i>Dialectic and Reasoning with Foreign Precedent</i> .....	152
V. CONCLUSION.....	161

## I. INTRODUCTION

Precedents matter in law. To be sure, not every legal order attaches the same weight and significance to precedent, but none of them treats it as entirely insignificant: it stands as a cornerstone of common law systems, for example, while enjoying informal recognition in civil law systems. Under the doctrine of precedent, decisions taken by courts of higher rank in the judicial hierarchy, as well as earlier decisions by the same court, must also apply to later cases that fall within the purview of the same decision.<sup>1</sup> As much as the doctrine of precedent may be widely practiced and supported by a presumptively strong set of justificatory reasons, it has hardly commanded general acceptance. Recourse to precedents in legal adjudication is a source of intriguing theoretical challenges and serious practical difficulties.<sup>2</sup> That is especially so when we have to do not with domestic precedents but with foreign ones, that is, with decisions taken by foreign courts and international judicial institutions, particularly when there is no formal obligation for a court to resort to foreign law. Can a case decided by the judiciary of a different legal order - even if that case is

<sup>1</sup> Precedents are traditionally said to have *vertical* effect when they bind lower courts and *horizontal* effect when they bind a court to its own earlier decisions (and the doctrine of precedent is correspondingly called vertical in the former case and horizontal in the latter). For an introduction to this distinction, see F Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge, Mass. Harvard University Press 2009), 36-7 and 41-4.

<sup>2</sup> The doctrine of precedent has been a topic of extensive theoretical debate. Among the most significant contributions to this debate are A Goodhart, 'Determining the *Ratio Decidendi* of a Case' (1930) 40 Yale Law Journal 161; A Goodhart, 'The *Ratio Decidendi* of a Case' (1959) 22 Modern Law Review 117; R Summers, 'Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification' (1978) 63 Cornell Law Review 707; J Raz, *The Authority of Law: Essays on Law and Morality* (OUP 1979), 180; N MacCormick, 'Why Cases Have *Rationes* and What These Are' in L Goldstein (ed), *Precedent in Law* (Clarendon Press 1987), 155; M Moore, 'Precedent, Induction, and Ethical Generalization', in L Goldstein (ed), *Precedent in Law* (Clarendon Press 1987), 183; S Perry, 'Judicial Obligation, Precedent and the Common Law' (1987) 7 Oxford Journal of Legal Studies 215; F Schauer, 'Precedent' (1987) 39 Stanford Law Review 571; S Perry, 'Second-Order Reasons, Uncertainty and Legal Theory' (1989) 62 Southern California Law Review 913; L Alexander, 'Precedent' in D Patterson (ed), *A Companion to the Philosophy of Law and Legal Theory*, (Blackwell 1996), ; B Levenbook, 'The Meaning of a Precedent' (2000) 6 Legal Theory 185; G Lamond, 'Do Precedents Create Rules?' (2005) 15 Legal Theory 1; F Schauer, 'Authority and Authorities' (2008) 94 Virginia Law Review 1931; and G Lamond, 'Persuasive Authority in the Law' (2010) XVII The Harvard Review of Philosophy 16-35.

remote and that legal order operates under different procedural rules and substantive laws - have any bearing on a dispute arising domestically here and now? More to the point, should such a foreign precedent be acknowledged to have any (formal) binding force on the case in question? And how could the practice of following foreign precedents be justified? These are but a few of the main questions raised by appeal to precedents set in other jurisdictions.

Whereas answering these questions is not just of theoretical significance - especially today, issues concerning the use of foreign precedents in judicial decision-making are practically relevant, as international economic transactions and transnational social interactions are multiplying, and with them the potential for legal disputes involving actors from different legal orders - this paper is primarily meant to lay the theoretical basis on which one can make sense of the use of foreign precedents in domestic adjudication. More specifically, the central question for us will be: What role, if any, should foreign precedents have in domestic adjudication? The basis on which we proceed in answering that question fundamentally lies in a theory of legal reasoning. We will be arguing, in other words, that in order to determine whether and why foreign precedents should be relied on, it is essential to have a correct grasp of the nature of reasoning in law. This is to say that we proceed from the premise that for an insightful account of the *practice* of recourse to foreign precedent in judicial decision-making, we will first need a *theory* of both law and reasoning.

For lack of a better phrase, the theoretical framework we set up in this essay will be labelled a dialectical approach informed by standards of discursive rationality. We call the approach 'dialectical' because it conceives of legal reasoning as an exchange of arguments concerning what given subjects ought to do in a specific context. The structure of legal reasoning will accordingly be understood as shaped by discussions between individuals who defend conflicting claims and argue against one another. This also means that legal reasoning is an essentially context-dependent activity: the specific forms taken by sound legal reasoning depend heavily on, and so are largely defined by, how actual interactions proceed among those who take part in the argumentative exchanges constitutive of legal reasoning in a courtroom, typically the judge, the prosecutor, and the parties to a dispute.<sup>3</sup> Therefore, no adequate account of legal reasoning can

---

<sup>3</sup> Our stipulation in this essay is that the actors in courtroom proceedings are the judge, the prosecutor, and the parties. We are aware that the prosecutor's role is absent from a number of legal systems and types of legal proceeding. In addition, it may be that a mediator or arbitrator, replaces the judge in some proceedings. So, we ask the reader to bear in mind that our argument may need some adjustment when set in the context of legal orders and proceedings where some of the actors we

be provided while neglecting the argumentative moves and strategies of actual discussants in a courtroom. But, on the other hand, the context-dependence is not radical, and so neither is the indeterminacy of the processes of reasoning in law. That is because sound legal reasoning unfolds in a space whose outlines are broadly framed in advance by a set of general rational standards which we call the principles of discursive rationality. These rational standards governing legal reasoning are so described - as principles of *discursive* rationality - because their content is owed to the necessary presuppositions underpinning the communicative interactions between parties in a legal proceeding (which parties can for all practical purposes be equated with discussants, or participants in a discussion). So, as much as legal reasoning may be context-sensitive, its exercise in any specific instance and context will still be bound by general standards of reason. Hence the label we have chosen for our account as offering a dialectical approach to legal reasoning shaped by principles of discursive rationality.

This approach issues from two theoretical streams: on the one hand, we find the tradition emphasising the dialectical element of reasoning in law, on the other hand, there is the tradition conceiving practical reasoning as a discursive practice. Our study is, thus, meant to combine two existing traditions of legal thoughts that so far have largely proceeded independently from one another and yet, we think, can be made to work together towards a better understanding of legal adjudication. Whilst the theoretical framework we introduce builds on views that have already been championed by others, the combination of ideas offered here has not been discussed in any systematic way before. The originality of the argument is due to the (novel) effort to defend a view combining a universalist element - the claim that certain general, inescapable principles exist which govern any form of reasoning aimed at settling legal disputes - with a context-sensitive and, ultimately, particularistic dimension - the conceptual scheme that characterises dialectical approaches to practical reasoning. This makes our conception at once universalistic and particularistic: Kantian in the former sense, Aristotelian in the latter. For, on the one hand, we draw on the idea of necessary preconditions of deliberation, qua specific form of action, which is an idea central to Kant's practical philosophy; on the other hand, we look to dialectic, which is an idea that finds a most comprehensive and sophisticated treatment in Aristotle's body of work.

---

mention are absent or are replaced by others. But we are inclined to believe that the required adjustments do not entail any revision of the main argument we offer or of the central claims we defend. Finally, by way of terminological clarification, by 'parties' we mean not only the actual persons asserting claims against each other in a dispute but also their counsel.

This may give rise to the impression that we are looking at an impossible portmanteau theory seeking to bring together two irreconcilable stances (the universalistic and the particularistic), which are rooted in two traditions (the Kantian and the Aristotelian) conventionally regarded as incompatible.<sup>4</sup> However, that is only an impression, because the two aspects of the theory (the dialectic one and the discursively rational one) are welded by way of a unifying element through which we seek to explain legal reasoning as an activity based on discussion. This notion of discussion, as properly understood and carried out, provides us with a model that functions as both a heuristic device and a normative-practical tool enabling different parties to work out their controversies by reasoning about the issues in question. What this theoretical framework translates to is not an algorithm but a conceptual scheme within which to reason in law. So, while the framework itself is context-*independent* (it relies on constitutive principles that apply everywhere across the board for any kind of argumentative discussion), its *use* is going to be necessarily context-*dependent*, for there is no discussion that can take place *in abstracto*, independently of the interests, contents, and conceptions that the parties bring to the table. It is in this way that dialectic, as an enabling framework for discussion, can secure the unity and coherence of a general theory of legal reasoning, a theory in light of which one can explain the nature of recourse to foreign precedent in domestic judicial adjudication, while laying out the conditions subject to which such recourse can be justified.

The argument we are making is organised as follows. We begin (in Section II) by introducing the current debate over the practice of relying on foreign precedent in legal adjudication. Then (in Section III) we show that the dominant view - which tends to consider that use questionable, permitting it only under strict conditions - implies a given conception of reasoning in law. We run through the theoretical assumptions underlying the dominant view and finally (in Section IV.) we introduce an alternative account - a dialectical approach to legal issues informed by the idea of discursive rationality. The account will be used to support the conclusion that there is nothing either puzzling or objectionable about the appeal to foreign precedents in law, provided that the foreign precedent a court plans to invoke in its decision is discussed and tested for relevance by the prosecutor and the parties through the adversarial procedures that frame a legal proceeding. The argument so laid out does not amount to a complete theory of foreign precedents to be sure, but it does at least offer a broad

---

<sup>4</sup> The otherwise widespread view that the Kantian tradition and the Aristotelian tradition of practical philosophy are incompatible, or even conflicting, has recently been challenged in C. Korsgaard, *Self-Constitution* (Oxford University Press 2009), 14 in a convincing way.



conceptual framework within which such a comprehensive theory can be worked out.

## II. FOREIGN PRECEDENT IN LEGAL ADJUDICATION

In several legal systems around the world recourse to foreign case law in domestic legal adjudication is both a recurrent occurrence and a novel development.<sup>5</sup> For a long time, institutions entrusted with adjudication in colonies have looked to the case law of the relative imperial states - and in particular to the case law of those countries' highest courts - especially in deciding disputes not covered by domestic statutes and precedents. Over time, this international judicial communication has progressively become bidirectional, so much so that today the courts in one country will find themselves at the same time drawing on the case law of those in another and seeing their own case law invoked by courts in countries elsewhere in the world.<sup>6</sup> In addition, with the establishment of international institutions and transnational orders having their own adjudication systems (as in the case of the EU and the WTO), national courts have found themselves engaging in different ways and to different degrees with the jurisprudence (or case law) of the international courts attached to those institutions and orders. At the same time, international courts have reciprocated, at least occasionally, by taking national legal practices and case law into account in their own opinions.<sup>7</sup>

<sup>5</sup> Countless cases are decided by appeal to foreign precedents in different areas of law. Worthy of mention among them are, in the United States: *New York v. United States*, 326 U.S. 572 (1946); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980); *Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir. 1995); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Printz v. United States*, 521 U.S. (1997); *Washington v. Glucksberg*, 521 U.S. 721 (1997); *Knight v. Florida*, 528 U.S. 990 (1999); and *Lawrence v. Texas*, 539 U.S. 558 (2003); in South Africa: *State v. Makwanyane*, 1995 (3) SALR 391; *State v. Zuma*, 1995 (2) SALR 642; *Ferreira v. Levin*, 1996 (1) SALR 984; *Shabalala v. Attorney-General, Transvaal*, 1996 (1) SALR 725; and *State v. Coetzee*, 1997 (3) SALR 527; in Canada: *Calder v. Attorney General of British Columbia* [1973] S.C.R. 313 and *Van der Peet v. The Queen* [1996] 2 S.C.R. 507; in the United Kingdom: *Derbyshire County Council v Times Newspapers Ltd.* [1992] UKHL 6; and, in Italy: Corte di Cassazione, sent. 14488/2004, and Corte di Cassazione, sent. 21748/2007.

<sup>6</sup> For a detailed introduction to this evolution in the use of foreign precedents around the world, see A Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191 and G De Vergottini, *Oltre il Dialogo tra le Corti: Giudici, Diritto Straniero, Comparazione* (Il Mulino 2010). See also S Levinson, 'Looking Abroad When Interpreting the U.S. Constitution: Some Reflections' (2004) 39 *Texas International Law Journal*, 353; C G Nucera, 'L'Influence du Précédent Étranger sur le Juge National' (2009) 1 *Diritto e Impresa/Europa* 32.

<sup>7</sup> Paradigmatic in this respect is the relationship that has gradually developed, over the course of several judgments, between the European Court of Justice and the constitutional courts of EU member states.

There is a quite important point that bears mentioning in regard to the role those courts play in the development of transnational orders. Sometimes a transnational court is created in order for a set of principles enshrined in a treaty to have concrete meaning and application, and yet no code or statute can be found that will fill up the space between the sweeping principled assertion (as in the European Convention on Human Rights) and its specific instantiations. What follows is a great deal of room for manoeuvre in determining whether something is prohibited under those principles. One can appreciate, then, how important it becomes, in this sort of situation, to be able to rely on a settled use of precedents, as well as on local judicial practice, in dealing with the adjudication of rights. And this also shows why it makes sense for judicial decisions to travel across jurisdictions: supranational courts can draw on those local practices in backing up their own opinions, thus packaging together a more general and cohesive set of rules and principles that national courts can in turn invoke as binding. Foreign precedents have thus become the basis for a complex multi-directional development in the development of many legal systems.

As these preliminary remarks suggest, recourse to foreign jurisprudence is not a monolithic practice but rather an internally differentiated one. At one extreme we find courts simply pointing out a precedent from abroad, and they may even do so in generic terms.<sup>8</sup> At the other extreme, we find courts genuinely engaging with foreign jurisprudence. This engagement may in turn take different forms: it may consist in a court drawing on precedents from other legal systems without interacting with their judiciary on the merits of the decisions, or it may consist in an actual 'dialogue', where courts in different countries governed by different legal systems consciously participate in what can be regarded as a form of collective deliberation leading to the settlement of a legal issue.<sup>9</sup> There is

<sup>8</sup> This practice can be observed, for example, in the decision rendered in the United States in *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>9</sup> This was the practice followed in the South African cases *Du Plessis v. De Klerk*, 1996 (3) SALR 850; *State v. Solberg*, 1997 (4) SALR 1176; *Premier, KwaZulu-Natal v. President of the Republic of South Africa*, 1996 (1) SALR; *Bernstein v. Bester*, 1996 (2) SALR 751; and *Minister of Finances v. Van Heerden*, 2004 (11) BCLR 1125, to name but a few. The 'dialogue' metaphor is a metaphor widely used today in legal doctrine in order to give a unitary account to the many different ways in which courts ultimately resort to foreign legal contents. In keeping pace with a widespread doctrinal tradition (that is well summarised in G De Vergottini, *Oltre il Dialogo tra Corti: Giudici, Diritto Straniero, Comparazione*, (Il Mulino 2010), for instance), we use the metaphor to refer only to the situation in which different courts belonging to formally distinct legal systems mutually refer to the precedents established by other courts in a consistent way, by so contributing to set up a procedure of 'informal collective' adjudication, so to speak,

authentic cooperation among courts in this scenario, in that they operate in different legal systems and so are not bound by any formal hierarchical relationship. Forms of mutual recognition and even cross-citation (the previously mentioned practice where courts in one legal system resort to precedents set in a different system, and at the same time see their own precedents invoked by courts in that other system) may thus emerge.

The practice of relying on foreign precedents, therefore, reveals itself to be a variegated and multifaceted phenomenon. Yet, for all this diversity, the practice can also be observed to share at least two elements common to all its forms. In the first place, in order for courts in different legal systems to be able to interact - whatever form such interaction may take (mere citation, one-way engagement, or genuine 'dialogue') - the different systems must share some fundamental legal traditions and general principles of law. Courts, in other words, tend to look to the jurisprudence of legal systems that share with their own systems more than just a few marginal features. In the second place, unless a court is hierarchically subordinate to the one whose precedent it appeals to, the force of that precedent is most likely not going to be binding, but at most persuasive. In fact, recourse to foreign precedents is generally regarded as legitimate but not mandatory: while a court may well invoke precedents set in foreign systems, it is under no obligation to do so, and these precedents will not carry the force of law in the domestic system (a domestic court may disregard them if it finds that they do not capture any superior wisdom).

In this practice of transnational judicial communication, much of the attention usually goes to the supreme courts and constitutional courts of certain countries, as well as to certain international courts, whose jurisprudence has accordingly come to form what appears to be a global judicial repository. This repository is widely consulted, and recourse to it often appears decisive in determining the outcome of a case, even though the domestic courts that draw on that case law belong to legal systems that on the whole may be markedly different from the one where the precedent was set.

---

even in the absence of any formal obligation. An example of a dialogue between courts (as it is understood in this contribution) is the so-called 'multi-level' protection of human rights in the European space that has been provided by the (informal) coordinated effort of the Court of Justice of Luxembourg and the European Court of Human Rights of Strasbourg. Whilst those courts formally belong to different systems, they have embarked into a process of mutual coordination through the practice of cross-citation, which practice has in turn contributed to generating a convergent vision of human rights (on this process see S Douglas Scott, 'A Tales of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis', (2006) 43 Common Market Law Review 629).

There seems to be little to object to, at least on an intuitive level, in the rationale behind the practice where precedents circulate across the world: it makes sense, when facing a hard case, to try and learn from comparable legal cases, and from the arguments deployed by other trained professionals in dealing with them, whenever and wherever these are available. The same ideal of cognitive and decision-making efficiency that justifies recourse to domestic precedent can be extended to the use of foreign precedents too. Apparently, if this justification for recourse to foreign precedents is to stand, the practice of turning to them cannot be perfunctory (mere citation), but must be fully engaged (ie it must be accompanied by thorough analysis), precisely because such precedents are not formally binding, which makes it all the more important to lay out the reasons that make them pertinent and compelling.

Still, as much as recourse to foreign precedent in domestic adjudication may be a time-honoured, widespread, and *prima facie* justified practice, it continues to spark a great deal of debate and controversy. On the one hand, we will find praise for a court's reliance on foreign precedents even without any formal obligation to do so.<sup>10</sup> On this view, the practice concretises a valuable idea of judicial transnational cooperation that facilitates the circulation and sharing of legal wisdom. There is nothing objectionable about the use of foreign precedents, especially if the aim is not to mechanically import a specific rule from abroad, but to arrive at a better understanding of the case in question. In other words, it is hardly surprising that the same set of facts should find a consistent legal interpretation across judicial boundaries on the part of judges whose legal background and training is roughly similar, and it is not improbable (in light of those premises) for their legal analyses to be mutually illuminating. So, when it comes to finding a basis on which to rest a solid legal qualification of a given dispute, a previous decision can prove valuable even

<sup>10</sup> Recourse to foreign precedents in legal adjudication has been defended by D Beatty, 'Constitutional Rights in Japan and Canada' (1993) 41 *American Journal of Comparative Law* 535; D Beatty, 'Law and Politics' (1996) 44 *American Journal of Comparative Law* 131; C Steiker, 'Pretoria, Not Peoria: *FCIS S v. Makwayanyane* 1995 (3) SALR 391' (1996) 74 *Texas Law Review* 1285; and S Levinson, 'Looking Abroad When Interpreting the U.S. Constitution: Some Reflections' (2004) 39 *Texas International Law Journal* 353, and J Waldron, 'Foreign Law and the Modern *Jus Gentium*' (2005) 119 *Harvard Law Review* 129, among others. The practice has also been defended by judges both in the United States - with Calabresi (see, eg *United States v. Then*, 56 F.3d 464 (2nd Cir. 1995), at 469), S Day O'Connor, 'Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law' (1998) 45 *Federal Lawyer* 20 and S Breyer, 'Keynote Address' (2003) 97 *American Society of International Law Proceedings* 265, 266 - and in Canada, with L'Heureux-Dube (see, eg *The Queen v. Elshaw* [1991] 3 S.C.R. 24).

if it comes from a foreign court. At the same time, recourse to foreign jurisprudence may prove to be a wholesome exercise in modesty: it is not indiscriminate that judges will look abroad in deciding a case, nor is the point to make a display of judicial acumen and learning. Quite the contrary, what prompts such recourse is a realisation that domestic law may be inadequate to the task - silent, unclear, vague, indeterminate, even contradictory in relation to the facts in question - or that the judge *personally* lacks the skills and intellectual resources needed to decide the case in a satisfactory way. In view of these limitations, which are both objective and subjective, it seems quite reasonable to engage with the way that other judges in other legal systems have decided a given question, especially when those systems are rooted in legal traditions comparable to one's own and rest on compatible fundamental legal principles.

On the other hand, there are legal practitioners and theorists who stand firmly opposed to the practice of resorting to foreign jurisprudence.<sup>11</sup> A legal system, they claim, is the product of unique institutional histories, specific legal traditions, political arrangements not amenable to generalisation, and locally coloured social relations. Legal norms and institutions emerge from historical, cultural, and social ties that shape a people's national identity under a given jurisdiction. Since even superficial similarities between legal traditions and disciplines are bound to dissolve on closer scrutiny, any cross-cultural intervention aimed at assimilating legal categories, traditions, institutions, and provisions to one another will ultimately show itself to be ungrounded and arbitrary. So, far from being a case of benign legal cross-fertilisation, the use of foreign precedents in judicial decision-making should be understood as a form of legal 'transplantation'. Like any attempt to export something uniquely bound up with a given domain so as to transplant it into a different domain, judicial reliance on foreign precedents involves a great degree of discretion, thus lending itself to the creation of atypical constructs. In this sense it proves to be a largely uncontrollable activity. For this reason, the practice in question should be considered inherently subjective and fundamentally unjustified.

---

<sup>11</sup> Among the number of those opposing the practice one may include R Alford, 'On the Limits of "Grand Theory" in Comparative Law' (1986) 61 Washington Law Review 945; R Alford, 'Misusing International Sources to Interpret the Constitution' (2004) 98 *Agora* 57; and E Young, 'Foreign Law and the Denominator Problem' (2005) 119 *Harvard Law Review* 148. Practitioners who criticise the use of foreign precedents in domestic adjudication are Justice Scalia (cf. *Thomson v. Oklahoma*, 487 U.S. 815, at 868-9, for instance; see also his 'Foreign Legal Authority in the Federal Courts' (2004) 98 *American Society of International Law Proceedings* 305) in the US and Justice LaForest (cf. *The Queen v. Rabey* [1987] 1 S.C.R. 588, just to make one example) in Canada.

In sum, recourse to foreign precedent in legal adjudication is at once widespread (courts in many legal systems we are familiar with routinely engage in this practice) and controversial, in that legal practitioners, commentators, and theorists are deeply divided over the question whether the practice is legitimate, reasonable, or even expedient. In what follows, then, we offer a closer discussion of the theoretical assumptions involved in the practice. This will make it possible to bring the practice under critical scrutiny and may help us not only to understand what is at stake in the debate, but also to bring in our own alternative proposal, which lends qualified support to the practice.

### III. THE DOMINANT VIEW

Currently most legal practitioners and scholars in the Western world believe that foreign precedents should be distinguished and treated differently from domestic precedents. On this view, *domestic* precedents are formally binding (at least in common law systems): every court is bound to follow the precedents set by any higher-ranked or equally ranked court that has already decided a case of the same kind.<sup>12</sup> A *foreign* precedent, by contrast, is said to have merely persuasive force. There is no obligation to follow it, or at least it having been set in the past is not in itself ground on which to make it binding. Related, the impact of a foreign precedent on future cases depends exclusively on its soundness, as evidenced by its ability to convince courts in a different legal system that it has been decided correctly as a past case identical to the present one in all relevant respects.

The view just introduced assumes a rigid dichotomy in dealing with precedents, or a clear demarcation between domestic and foreign precedent, which in law are claimed to operate differently. This dualist approach we will henceforth refer to as the ‘dominant view’, since it not

---

<sup>12</sup> The formal binding force of domestic precedents is not absolute, or exceptionless. Lower courts are on occasion allowed to depart from a precedent by *distinguishing* it, that is, single out features of an earlier case in such a way as to attenuate its precedential effect, thus making it irrelevant to the case at hand. Similarly, later courts are allowed to overrule previous decisions that can be argued to be extremely wrong or to have serious implications. Apart from those exceptions, however, domestic precedents are, to put it in the legal vernacular, sources of law. For an introduction to the standard doctrine of domestic precedents, see L Alexander, ‘Precedent’ in D Patterson (ed), *A Companion to the Philosophy of Law and Legal Theory* (Blackwell 1996), 503; G Lamond, ‘Precedent’ (2007) 5 *Philosophy Compass* 699; and F Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Harvard UP 2009), 36.

only underpins a significant amount of academic studies of precedent-based adjudication, but is also adhered to by most practitioners, especially judges.<sup>13</sup> Crucially, the dominant view's distinction between types of precedents is instrumental to justifying the claim that courts should be wary of relying on foreign precedents in settling domestic disputes. There are at least two main reasons why those embracing the dominant view regard the appeal to foreign precedents as problematic (at least presumptively).

The first of these is that the practice turns into domestic law what is essentially foreign law: it does so almost by definition, since the practice consists precisely in bringing a domestic case under the rule of a foreign precedent, which in a strict sense cannot be regarded as part of the legal system within which the dispute arose. This raises a problem because non-domestic law, on the dominant view, does not qualify as law to begin with (not from the domestic point of view): it must (from that point of view) be treated as extra-legal material, in the literal sense that it lies outside the boundaries of what a domestic system can recognise as its own law. It follows that to resort to foreign precedent is ultimately to blur the distinction between what is legal and what is extra-legal: it amounts to indirectly justifying the practice of adjudicating cases - that is, determining what the *law* says in regard to those cases - in light of *non-legal* material, inclusive of social norms, moral standards, and policy considerations, among other things.<sup>14</sup> This cannot but strike us as contradictory if we follow that logic closely. So, the argument here is that by introducing into one country the law in force in another country - governed by another set

---

<sup>13</sup> Among the advocates of the dominant view one may include G Fletcher, 'The Universal and the Particular in Legal Discourse' (1987) 2 *BYU Law Review* 335; G Fletcher, 'Constitutional Identity' (1993) 14 *Cardozo Law Review* 737; F Schauer, 'Free Speech and the Cultural Contingency of Constitutional Categories' (1993) 14 *Cardozo Law Review* 865; R. Posner and C. Sunstein, 'The Law of Other States' (2006) 59 *Stanford Law Review* 131; and F. Schauer, 'Authority and Authorities' (2008) 94 *Virginia Law Review* 1931.

<sup>14</sup> Accordingly, G Smorto, 'L'Uso Giurisprudenziale della Comparazione' (2010) 1 *Europa e Diritto Privato* 223, and G De Vergottini, *Oltre il Dialogo tra Corti: Giudici, Diritto Straniero, Comparazione* (Il Mulino 2010) 140, distinguish at least three different uses of foreign precedents in judicial adjudication: a) a purely 'ornamental' use of precedents, that takes place when the justification can be considered sound and complete even without the quotation of the relevant foreign precedent (which, therefore, from a logical point of view adds nothing to the decision); b) a 'normative' use of precedents, wherein the decision of the present case is the direct application, or emanation, of the rule embodied in some foreign decision; c) a 'dialectical' use of foreign precedents, which occurs when the court refers to the factual reconstructions made in the justification of the foreign precedent in order to get a better understanding of the domestic case at stake.

of rules and institutions set in a different political context - the use of foreign precedent in judicial decision-making winds up making judicial reasoning ultimately indistinguishable from practical reasoning at large. That, on the dominant view, is an illegitimate intrusion of external influences in a sphere, the legal domain, which should maintain an identity of its own.

The second problem the dominant view has with recourse to foreign precedent lies in the discretionary vacuum within which the practice ordinarily takes place. Indeed, in most cases there is no express obligation to have recourse to foreign precedents, nor is there any set of principles on which basis to (a) determine whether to have such recourse and, if so, (b) select the proper precedent. The problem here is not so much the use of foreign precedents *per se* as the ability to make any decision in that regard on whatever basis seems reasonable enough, without reference to any agreed framework for making such choices. In exercising this ability to 'shop around' in search of the best foreign precedent, courts essentially gain the power to choose the grounds on which a case is to be decided. This is too much discretion - far greater than one should accept as part of the regular process, or 'physiology', of legal adjudication, for it becomes a breeding ground for creative judicial decision-making. Since there is no rule mandating appeal to foreign precedents in legal adjudication (the practice is permissible but not obligatory), nor is there any rule under which to determine which precedents ought to govern in any given case, different courts are going to use that discretionary power in different ways in deciding cases brought before them. The consequence of this state of affairs is that controversies of the same type may wind up being decided on different legal grounds within the same legal system. As a result, we end up with a scenario of reduced control of legal adjudication, making for a less certain process given to greater unpredictability of outcomes.

Even when the critical arguments just outlined do not altogether disqualify the practice of resorting to foreign precedent, they do suggest caution: they point up the need to introduce strict criteria governing and limiting the use of foreign precedents so as to make that use legitimate. On the dominant view, three such criteria are typically held up. First, recourse to foreign precedent is legitimate only when the body of domestic law is inconclusive, particularly when interpreted literally or in accordance with the legislator's original intention. This means that appeal to foreign precedent is legitimate, if its use serves the purpose of filling gaps in domestic law: it is *not* legitimate as a way to overturn or bypass a holding issued on the basis of domestic law (that is, as a technique of judicial



activism).<sup>15</sup> Second, courts may not proceed *ad hoc* in making decisions about the relevance of foreign precedents to domestic cases: they must proceed in a consistent manner, in keeping with a doctrine of foreign precedent having a degree of generality and comprehensiveness comparable to that which characterises doctrine of domestic precedent.<sup>16</sup> Third, if a court does decide to resort to foreign precedent as a basis on which to settle a domestic case, it cannot borrow from any legal system of its own choosing: the precedent appealed to ought to be one set in a legal system whose institutional framework and fundamental legal principles are similar to, or at least consistent with, the domestic legal system in which the case is being heard. The rationale for this requirement is that a precedent does not exist in isolation from the legal system it is part of. So, a precedent at least indirectly bears the mark of the institutional framework it is derived from. This in turn means that through the practice of deciding a domestic dispute on the basis of legal materials originating in a foreign system, we not only inject a specific rule of foreign law into the domestic system but also, more problematically, we bring in a whole set of accompanying institutional arrangements, general principles, and justificatory arguments. Accordingly, the more alien the foreign system, the greater the likelihood that the importation of foreign precedent will give rise to normative inconsistencies, local ones, but also conceivably deeper ones, precisely because to import a single rule or precedent is to import its underlying or system-wide rationale. Hence the need for courts to limit the reservoir of foreign law from which to draw by selecting only those precedents whose enveloping legal system is similar to the domestic one not just on the surface or in a broad sense, but on a foundational level too.

Now, in order for one to get a full sense of this set of restrictions on a court's reliance on foreign precedent, one has to dig deeper and consider the theoretical assumptions underpinning the dominant view. We submit that the dominant view of foreign precedents needs to be viewed in light of a broader conception of the legal system and of the reasoning and authority associated with it.<sup>17</sup> On this conception, which one may want to

---

<sup>15</sup> This is a view defended in M Lupoi, *Sistemi Giuridici Comparati* (EDS 2001) and G Smorto, 'L'Uso Giurisprudenziale della Comparazione' (2010) 1 *Europa e diritto privato* 223, among many others.

<sup>16</sup> This view is defended in M Ramsey, 'International Materials and Domestic Rights: Reflections on *Atkins* and *Lawrence*' (2004) 98 *Agora* 69, for instance.

<sup>17</sup> We should add here that this broad conception is not always made explicit by those who urge caution in appealing to foreign precedents in legal adjudication. Therefore, the reader should be aware of the fact that in these pages we are in fact reconstructing and reinterpreting the theoretical assumptions underpinning the dominant view, as opposed to describing those assumptions as they have expressly

categorise as sociologically oriented and broadly positivistic, the law is understood primarily as a set of issuances coming from the political institutions linked to a given domestic jurisdiction. Law is the ‘will’ of a political institution: it is the expression of a sovereign power through which a rule becomes legally valid and socially effective. From the standpoint of one who is committed to these claims, the problem with the use of foreign precedents is that foreign precedents are *not* issued by the political institutions empowered to make (the rest of) the law in a given jurisdiction.<sup>18</sup> When courts appeal to foreign precedents in deciding disputes, they are not relying exclusively on the law created by, or traceable to, the institutions entrusted with law-making in their own legal order. Accordingly, from the standpoint of one who conceives of the law as the product of the political institutions endowed with authority in a given jurisdiction, the practice of appealing to foreign precedents in adjudication finds no straightforward justification, since it can be argued that the practice itself eventually resorts to an unwarranted use of extra-legal material in adjudication.<sup>19</sup> The point can be restated from a different angle by noticing that what on the dominant view makes the recourse to foreign precedent objectionable is that the practice ultimately severs legal adjudication from the law. However, this amounts to making legal adjudication an activity whose nature is at least partly *non-legal*. Moreover, one can see the contradiction this statement seems to give rise to: how can we legitimately call ‘legal’ a form of adjudication that largely proceeds independently of the law?

These remarks show that the dominant view is grounded in the conception of a legal system as a closed and self-contained space: a geographically delimited domain that can be kept distinct from the outside world. A legal system, in other words, singles out a territorial entity only moderately and partly permeable to external influences: each legal system is largely independent of the other systems of laws, understood as demarcating altogether different institutional spheres. Overlaps between different systems of law must therefore be kept to a minimum, for otherwise it would no longer be possible for those systems to retain the separation that on the dominant view constitutively defines the identity of law.<sup>20</sup> What is

---

been set out by the advocates of the dominant view.

<sup>18</sup> This point is made most clearly by a critic of the dominant view, J Waldron, in his ‘Foreign Law and the Modern *Jus Gentium*’ (2005) 119 Harvard Law Review 129-47, 146-7.

<sup>19</sup> Indeed, on the sociologically oriented and positivist conception, anything not traceable to domestic law-making institutions must be regarded as non-legal material or, stated otherwise, nothing that is not created by such domestic institutions can be counted as law.

<sup>20</sup> As a matter of fact, some regard the distinction between in and out - what is *inside*

problematic about recourse to foreign precedent in legal adjudication, then, is its blurring of the boundaries of a legal system, which accordingly wears away at its identity and independence. By importing foreign decisions and modes of reasoning into the domestic system, recourse to foreign precedent makes permeable the wall of separation between what is *inside* the system (law) and what is *outside* (non-law). For this reason the recourse to foreign precedents can be legitimised only if exceptional and subjected to a rigorous internal discipline.

This broad conception of the legal system is in turn inextricably bound up with a specific model of legal authority: the model that depicts legal authority as an institutional arrangement whose directives are to be obeyed not on the merits, but simply because they issue from those arrangements. One can see that this conception of legal authority cannot easily be made to cohere with the practice of recourse to foreign precedent, for the force associated with foreign precedents is not procedural or formal, but rather persuasive. Legal adjudication based on foreign precedents is thus primarily a matter of reasoning one's way through disputes and controversies, as opposed to following directives that are formally valid and binding just because they come from certain bodies. Whenever courts appeal to a foreign precedent, they resort to a substantive argument aimed at convincing the parties, as well as the legal community at large, that the settlement of a given dispute is convincing by virtue of its content. To the extent that foreign directives are content-based - or to the extent that they rely on content-dependent reasons that take precedence over formal, content-independent reasons - their introduction into the domestic system is liable to undermine its authority (in the formal sense being explained), a circumstance that seems intuitively puzzling, considering that law ought to be a paradigmatic instance of an authoritative institution.

#### IV. AN ALTERNATIVE PERSPECTIVE

Thus far we have noted that, on the dominant view, foreign precedents do not have equal standing with domestic precedents: whereas domestic precedents are formally binding and their use is mandatory, foreign precedents have conditional persuasive force and their use is merely permissible. The dominant view can in this sense be said to offer a radical

---

a legal system and what falls *outside* - as a defining element not only of a legal system but also of the very idea of law. The radical variant of this claim amounts to the so-called 'limited domain thesis', which is a fundamental tenet of legal positivism (cf. J Raz, 'Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment' (1998) 4 Legal Theory 1-20, for instance) and has found a recent revisionary statement in F Schauer, 'The Limited Domain of the Law' (2004) 90 Virginia Law Review 1909.

two-tiered account of precedent in law, where one type of precedent (the domestic) is recognised as a binding source of law, while the other type (the foreign) at best rises to the rank of a source that *may*, but need not, be relied on in legal adjudication. We submit that this dualism informing the whole dominant view is problematic, for it can encourage practices that have us distinguish law from non-law in an arbitrary and rigid way, making for a sort of conceptual schizophrenia in handling the two. In this section we intend to offer an alternative approach to the practice of appealing to foreign precedent. In so doing, we also lay the basis for an integrated account of precedents that significantly reduces the gap the dominant view sees between domestic and foreign precedents. This will make it possible to subject the two types of precedent to different conditions of use, while giving them an equal status as authoritative sources of law, sources that courts are not only entitled but also expected to appeal to in adjudication.

We will argue for our alternative conception by first introducing its fundamental theoretical presuppositions and then proceeding to bring those presuppositions to bear on the specific debate on the use of foreign precedents in law.<sup>21</sup> The two treatments are meant to work in combination: the theoretical presuppositions are introduced as part of a discussion of their role in the claims made about foreign precedents, for in this way we can provide the foundations on which to rest a conception that, if coherently developed by bringing out its implications, can become general enough as a framework within which to address the full range of essential questions traditionally discussed in connection with the practice of resorting to foreign precedents in legal adjudication.

The nature of the conception we introduce is primarily normative, and the ensuing discussion of foreign precedent should also be understood that way. As much as we may start out from current legal practice in our investigation of recourse to foreign precedent in legal adjudication, our primary concern is not to *explain* these practices (such as they exist), but to understand how reasoning with foreign precedent in law *ought to* proceed in order for it to be justified. In a nutshell, then, in what follows we lay out a normative and theoretical account that both idealises and abstracts from actual adjudication practices based on the use of foreign precedents. This means that the account we present will be designed to provide a basis on which to distinguish *justified* recourse to foreign precedent from a recourse that is *not* justified. We will do so in particular by offering a theory of

---

<sup>21</sup> We have chosen to so organise our exposition, in that order, because we believe that only by making the theoretical assumptions underpinning our view explicit will it be possible to work out a truly alternative way to approach foreign precedent in law.

sound reasoning with foreign precedent in law, namely, a theory pointing out a mode of argumentation that courts *should* use vis-à-vis foreign precedents.

### 1. *Dialectical Model for Legal Reasoning*

As was just remarked, our project consists in contributing to a theory of legal reasoning setting out the conditions subject to which the citation of foreign precedents can be justified. The natural place from which to start is a discussion about the nature of reasoning in legal adjudication. To anticipate the basics of our proposal, it is our view that legal reasoning in the courtroom should properly be considered a dialectical exercise: an argumentative exchange between the prosecutor and the parties in a courtroom.<sup>22</sup> Our hypothesis, therefore, is that what determines the soundness of legal reasoning is a discussion-based, or dialectical, ideal. This ideal is in turn defined and partly determined by the principles of discursive rationality, that is, by the standards of reason on which any debate in the practical domain rests, and absent which there could be no exchange of views involving a decision on a matter of common interest. So, legal reasoning will be understood here as a dialectical activity geared towards solving legal disputes amenable to a discursive solution. This concise statement of our position requires some further elaboration and argument.

We begin with the understanding that legal reasoning - by which phrase, unless otherwise specified, in this essay we mean the activity of reasoning, arguing, and deliberating in a courtroom - paradigmatically consists in, and

---

<sup>22</sup> From here on out, and unless stated otherwise, the term *legal reasoning* will be used to refer to the whole of the deliberative activities that take place in courtroom proceedings. We do realise that in common parlance “legal reasoning” has a much broader meaning and it is not confined to deliberative activities engaged in by judges, prosecutors, and the parties in a courtroom setting - for forms of legal reasoning are also undertaken *outside* the courtroom by academics, laypeople, and the media. We also agree that for many purposes a broad conception of “legal reasoning” - a conception under which legal reasoning is understood as any deliberative activity that is concerned with legal standards and is carried out by any subject (be it a legal scholar, a public official, a practitioner or a layperson) - is fully justified and acceptable. We make use of a narrower conception - the conception that “legal reasoning” stands for the activity of reasoning, argument and deliberating in a courtroom - in this essay in order to delimit the concern of our argument by thus making it both clearer and more manageable. We would like to think, even if we are unable to show this here, that the account of legal reasoning we present can itself be expanded so as to cover that broader range. Anyway, the reader should be aware that our decision to reserve the phrase “legal reasoning” to a specific subset of deliberative activities is understood as a purely terminological stipulation bearing no substantive, or theoretical, implication.

can be reconstructed as, a series of communicative exchanges between parties arguing for competing normative theses and providing evidence for alternative reconstructions of the facts. The structure of these exchanges is adversarial, in that they are conducted under a procedure designed to give all parties a fair shot at laying out their arguments and counterarguments: the claims made by one party (the proponent) are challenged by the other party (the challenger); the proponent will then rebut by looking for flaws in the challenge or seeking to take it down altogether, at which point the challenger will be expected to defend the challenge so criticised, and so on. In this adversarial procedure lies the basic structure of reasoning in courtroom proceedings. The structure of legal reasoning can thus be described at its barest as an adversarial succession of speech acts performed in a courtroom by parties who for all practical purposes can be equated with discussants. This is the basis on which we claim that legal reasoning ought to be conceived as dialectical.

The dialectical exchanges constitute, and at the same time are made possible by, the adversarial procedures by which argumentative activity in the courtroom is structured. Their relevance for the construction of a rational decision cannot be overstressed. An adversarial procedure sets one party against another, both of whom are guaranteed equal rights and duties. Starting from this position of formal equality, the parties in an adversarially structured courtroom proceeding will be attempting to convince each other that the claims they made are grounded and so should be accepted by everyone. At the same time, the opponent's view would be shown to be unacceptable or even absurd or inconsistent. On this view, adversarialism not only captures the core of reasoning in law, but also provides the source of its justification. This is because adversarial procedures are not simply structural methods enabling parties to settle a dispute in an orderly fashion, but, more importantly, they are to be understood as intrinsically valuable from an epistemic point of view: they can be shown to be the most reliable strategy we have to achieve the regulative ideals of normative correctness. In view of the constitutive partiality and inherent situatedness of any single perspective, the search for normative correctness eludes the efforts of particular individuals. The prosecutor and the parties, considered in isolation from each other, can hardly aspire to move beyond their own qualified notions of correctness, which is intrinsically one-sided and thus ultimately incomplete. This means that the discursive exchanges shaped by adversarial procedures are equipped to connect otherwise partial viewpoints, while putting them to the test to see if they stand up to scrutiny. By enabling prosecutor and parties to state and defend their claims, while giving them an opportunity to challenge the position held by the counterparty, courtroom debates based on adversarial procedures and mutual confutation take us a step closer to what is normatively correct in

the practical domain.<sup>23</sup> The conception just outlined frames legal reasoning as a collective deliberative exercise. In this framework, the prosecutor, the parties, and the judge each play a fundamental role in shaping the structure and outcome of reasoning in legal adjudication. Legal reasoning is thus a three-party affair.<sup>24</sup> On the one hand, one can hardly overemphasise the essential role played by the prosecutor and the parties in the activity of reasoning in law. The prosecutor and the parties put forward arguments and set out to counter each other's claims. They do so by asking questions, replying to queries, offering narratives, interpreting norms, and collecting evidence, among other activities. On the other hand, one should not underrate the role of judges, in shaping reasoning in the courtroom, since they are entrusted with the essential task of supervising the discursive exchanges between the prosecutor and the parties. Indeed, at a minimum the judge will be acting as a referee, overseeing the communication between courtroom discussants. Even though this may be reconstructed as a passive, spectator-like role, the fact that the judge is presiding as an *expert* spectator, entrusted with making sure that the parties are proceeding in the right way in challenging each other's claims should not be downplayed. This, in turn, brings into focus the judge's *structural* role in the proceedings: the judge is primarily there to structure and organise the exchange between the parties, correct any substantive disparity hidden behind the formal equality, weigh in with legal expertise and experience, and see to it that the overall adversarial procedure does not depart from its dialectical logic. So, central to reasoning in law, on a dialectical approach, is the critical exchange, or debate, in which narratives and normative interpretations are put forward as valid and are subjected to scrutiny, where they are challenged, a process in which they may be falsified or shown to be untenable. We can see, thus, that the discussion carried out in a courtroom proceeding can hardly be resolved into a two-party confrontation: it is an adversarial engagement that unfolds under the watchful eye of a *third* party, the judge, acting as a 'guardian' of the fundamental principles by which debate, qua dialectical exchange, is governed in the courtroom, or by which reasoning is constitutively and

---

<sup>23</sup> On this view, normative correctness is secured by, and anchored to, the adversarial structure of legal deliberation in court. In other words, normative correctness is not defined by, and grounded in, some pre-established authority. The justification and binding force of normative conclusions transcend the boundaries of the specific controversy; there is no external social fact or practice that can ground the correctness of the normative conclusions drawn in legal adjudication. This position is argued at length in F Cavalla, *La Prospettiva Processuale del Diritto* (CEDAM 1991), 36-45 and F. Cavalla, *Retorica Processo Verità* (Franco Angeli 2007). For a philosophical foundation of this position, see O O'Neill, *Constructions of Reason* (CUP 1989), 28.

<sup>24</sup> In *De iudiciis*, Bulgarus accordingly describes legal reasoning as an *actus trium personarum*.

essentially shaped in legal adjudication.

In sum, reasoning in law, on a dialectical approach, is paradigmatically an activity aimed at settling a dispute under the oversight of a *judge* mediating the exchange that unfolds in a courtroom between *prosecutor* and *parties*. The outcome of a legal controversy thus emerges gradually and requires the participation and interchange of prosecutor, parties, and judge. No outcome can be regarded as correct - that is, acceptable by any rational discussant - unless the reasons proffered by the prosecutor and the parties in legal deliberation are heard and scrutinised, a process through which they will either be found to carry weight in a judicial decision or will be shown to be untenable.<sup>25</sup>

Now, discussants engaged in discursive interaction or deliberative activity may well disagree on how the legal disputes at hand ought to be settled (and in fact disagreement is typically the norm). However, their participation in adversarial procedures aimed at dealing with those disagreements at least implicitly commits them to certain standards of practical rationality. These are the standards that state the conditions for the very *possibility* of dialectical interaction among individuals having different interests and objectives. For absent a set of rational criteria, which by virtue of their being constitutive of adversarial, or dialectical, exchanges also regulate those exchanges from within and so amount to inherently normative standards, there can be no dialectical process; meaning that there can be no discourse aimed at settling controversies. This is to say that any practical discourse aimed at solving disputes is a distinctive form of engagement whose identity is defined by criteria of rationality acting as necessary presuppositions lacking which practical discourse itself as a form of deliberation would not be possible to begin with.<sup>26</sup>

The standards of practical reason implicit in dialectical exchange frame an

<sup>25</sup> An insightful discussion of these questions can be found in P Sommaggio, *Contraddittorio, Giudizio, Mediazione* (Franco Angeli Sommaggio 2012), 129-66.

<sup>26</sup> For a comprehensive treatment and justification of this view, see F van Eemeren and R Grootendorst, *Speech Acts in Argumentative Discussions* (Foris 1984) and F van Eemeren and R Grootendorst, 'Rationale for a Pragma-Dialectical Perspective' (1988) 2 *Argumentation* 271. This general approach is contextualised in the study of legal reasoning in E Feteris, 'Conditions and Rules for Rational Discussion in a Legal Process: A Pragma-Dialectical Perspective' (1990) 26 *Argumentation and Advocacy* 108; E Feteris, 'Rationality of Legal Discussions: A Pragma-Dialectical Perspective' (1993) XV *Informal Logic* 179; J Plug, 'Reconstructing Complex Argumentation in Judicial Decisions' in F van Eemeren and R Grootendorst (eds), *Studies in Pragma-Dialectics* (SicSat 1995), 246, and S Berteau, 'The Arguments from Coherence' (2005) 25 *Oxford Journal of Legal Studies* 369.



ideal that can be described as discursive rationality, since those standards define a specific activity, namely, discourse, or deliberation.<sup>27</sup> Thus understood, discursive rationality is a form of communicative rationality: it refers to the principles underlying the discursive exchanges through which different views are put forward, conflicting claims are asserted, and disputes are settled. Discursive rationality thus emerges as an arrangement of principles that any practical argument needs to satisfy as a necessary presupposition. Among these principles, which govern the discursive moves in any form of communication aimed at subjecting some viewpoint to critical scrutiny, we should at least find the principles of consistency (or logical non-contradiction), coherence (both narrative and normative), and universalisation.<sup>28</sup> This means that legal reasoning - understood as a sequence of discursive moves structured around adversarial procedures - can be characterised as sound when it at least lacks internal contradictions, is overall coherent, and can be accepted by others solely on the basis of universalizable reasons or arguments advanced in support of its conclusions. So, the two basic features of sound reasoning are that its conclusions should not be contradictory (either with each other or with their premises) and that everyone who uses its principles should have to acknowledge those conclusions as correct.<sup>29</sup>

The principles just introduced can be regarded as rational in that a failure to follow them makes inconceivable any debate aimed at resolving disputes,

---

<sup>27</sup> The idea of discursive rationality finds a thorough discussion in the works of Karl-Otto Apel and Jürgen Habermas. See, in particular, KO Apel, 'Das Apriori der Kommunikationsgemeinschaft und die Grundlagen der Ethik' in *Transformation der Philosophie* vol. 2 (Surkamp 1973), 358-35; J Habermas, *The Theory of Communicative Action*, vol. 1 (McCarty 1981); J Habermas, *The Theory of Communicative Action*, vol. 2 (McCarty 1984); J Habermas, *The Tanner Lectures on Human Values*, vol. 8 (University of Utah Press 1988); and J Habermas, *Moral Consciousness and Communicative Action* (MIT Press 1990). The discursive approach to reasoning is applied to law and legal reasoning in R Alexy, *A Theory of Legal Argumentation* (Clarendon Press 1989, or edn 1978), 177-295.

<sup>28</sup> A discussion of these criteria of rationality can be found in A Aarnio, R Alexy and A Peczenik 'The Foundation of Legal Reasoning' (1981) 21 *Rechtstheorie* 133-58, 259-73 and 423-48; F Cavalla, 'Della Possibilità di Fondare la Logica Giudiziaria sul Principio di non Contraddizione' (1983) 12 *Verifiche* 5; A Aarnio, 'Why Coherence: A Philosophical Point of View' in A Peczenik (ed), *On the Coherence Theory of Law* (Juristförlaget i Lund 1998), 33-9; R Alexy, 'Coherence and Argumentation or the Genuine Twin Criterialess Super Criterion' in A Peczenik (ed), *On the Coherence Theory of Law* (Juristförlaget i Lund 1998), 39-49; F Cavalla, 'Retorica, giudiziale, logica e verità' in F. Cavalla (ed) *Retorica, Processo, Verità*, (CEDAM 2007), 17-84; and P Sommaggio, *Contraddittorio, Giudizio, Mediazione* (Franco Angeli Sommaggio 2012), 180-204.

<sup>29</sup> On this point see, in particular, F Cavalla, *La Prospettiva Processuale del Diritto* (CEDAM 1991), 68-83.

and in some cases makes inconceivable the very practice of communicating. In much the same way as discussion is considered a rational way to settle controversies, we should consider rational the criteria by which practical discourse is regulated. So, it is by looking at the principles of discursive rationality that we can tell what forms of legal reasoning are correct: no legal dispute can be said to have found a legitimate solution if it was settled in violation of any of these principles. This means that sound legal reasoning can be characterised as a sequence of communicative exchanges carried out in keeping with the principles of discursive rationality.

Predictably, the principles of discursive rationality, as general and abstract requirements, do not conclusively determine the correct structures or the justified outcomes of deliberation in law: they are not formulas or algorithms that you apply to the premises of a dispute so as to self-sufficiently yield conclusions. They cannot on their own and in advance dictate the form, the substance, or the outcome of the deliberative practices carried out in accordance with them. Their role is structural in a rather more open-ended way, in that they only set the general boundaries within which legal reasoning can be characterised as sound. It follows that the principles of discursive rationality do not exhaust and replace actual debate in a courtroom proceeding; rather they set out the minimal conditions for a discussion to exist, and in so doing provide the method that needs be followed in order to embark on rational discussion. Hence, the normative framework so constructed - the framework outside which no discussion can take place - is context-dependent not only by virtue of its being compatible with any number of outcomes, but also in the more poignant sense that, in order to make it operative, the discussants need to bring into it the substantive presuppositions, or shared knowledge, forming the necessary background of the claims they make. These are what Aristotle called *endoxa*, the 'commonplaces' that make up our 'shared knowledge' or widely accepted beliefs. *Endoxa* act as general premises on which the (non-private) validity of the claims asserted by the discussants rests. Clearly, the *endoxa* one brings into the discussion are specific to the issue at hand, and so each rational discussion will have its own *endoxa* (and no genuine discussion can go without *endoxa*, either). The rationale of the appeal to *endoxa* can be thus summarised: *endoxa* can support the specific arguments that unfold in dialectical exchanges because they embody what deserves to be acknowledged once the social context in which a specific discussion is undertaken is taken due account.

To conclude, on the dialectical model introduced in this section, legal reasoning must satisfy the principles of discursive rationality, if it is to constitute a sound method for dealing with legal disputes. So, as much as the adversarial procedure framing the discursive exchanges made in

courtroom proceedings is an essential part of the reasoning involved in legal adjudication, it does not, on a fully articulated dialectical approach, complete the picture of sound legal reasoning. For sound legal reasoning is more than a structured sequence of discursive exchanges, insofar as the latter need to be understood as part of an argumentative practice informed by the principles of discursive rationality.<sup>30</sup>

---

<sup>30</sup> The fundamental tenets shaping the framework we theorise differentiate it from two influential theoretical approaches to legal reasoning that may arguably be interpreted as defending claims conceptually akin to those we theorise in this work, namely, the hermeneutical account of legal argument and the view of legal reasoning associated with Martin Shapiro's 'political jurisprudence'. The affinity between the theory we defend, the conception theorised by the champions of legal hermeneutics and the account advocated by Shapiro is due to the fact that they all deny the existence of a neat distinction between law and legal reasoning, on the one hand, and politics and practical decision-making on the other hand. In addition, they all pay specific attention to the processes of communication going on between the subjects who take part in the activities of legal deliberation. Finally, all three accounts agree, at least to some extent, that the use of foreign precedents is best understood as a way of coordinating and harmonising practices of adjudication that are carried out by units (namely, courts of different legal systems) inhabiting a space that is not informed by hierarchical structures (this point is formulated most clearly in M Shapiro and A Stone Sweet, *On Law, Politics, and Judicialization* (OUP 2002), 90-101). In that respect, the three accounts may be argued to at least superficially converge on the view that the practice of appealing to foreign precedents ultimately constitutes a form of 'unhierarchically coordinated judge-made law' and that in the areas covered by that practice courts seek to achieve coordination through 'horizontal interstate *stare decisis*' and so they adopt a 'mode of non-authoritative legal communication' (M Shapiro and A Stone Sweet, *On Law, Politics, and Judicialization* (OUP 2002), 95). These elements set the three theoretical approaches apart from most of the other theories of legal reasoning supported nowadays. Despite this conceptual continuity, however, the account we offer can neither be reduced to legal hermeneutics nor be equated to Shapiro's theory of legal reasoning. The project undertaken by legal hermeneutics is best interpreted as aimed to provide a heuristic device for an adequate understanding of the forms of legal deliberation. As a result, the hermeneutical approach grants one invaluable insights on the actual pre-conceptions and specific pre-understanding affecting the interpretive processes framing legal adjudication. Related, it makes one acutely aware of the nature of those processes as well as their discretionary quality. Yet, contrary to the theory introduced in this section, legal hermeneutics is not directly concerned with the normative dimension of adjudication and so is unable to establish any normative standard for legal reasoning (for further remarks on the shortcomings of legal hermeneutics see F Zanusso, 'In Claris non Fit Interpretatio: las Ilusiones del Normativismo en la Crítica del la Hermenéutica' in Aa.Vv., *Hermenéutica Jurídica: Sobre el Alcance de la Interpretación en le Derecho* (Comillas 2011), 255-75). The normative dimension is largely absent from Shapiro's proposal too. His political jurisprudence is programmatically meant to apply the principles of social sciences to the study of law (cf. M Shapiro and A Stone Sweet, *On Law, Politics, and Judicialization* (OUP 2002), 3-18). As a result, Shapiro's political jurisprudence is less a normatively oriented full-scale legal philosophy than a sophisticated and insightful contribution to behavioural social

## 2. *Dialectic and Reasoning with Foreign Precedent*

It was just remarked that the dialectical model of legal reasoning introduced in the previous section defines an argumentative practice necessarily informed by the principles of discursive rationality. It follows from that feature of the model that foreign precedents are presumed to have some kind of bearing on the cases at hand. Foreign precedents are here understood to comprise both the *argument* offered in support of a judicial decision and its substantive *outcome*. There is an intrinsic rationality to the practice of relying on past arguments and decisions in dealing with present issues. The intrinsic rationality of the practice is owed to the fact that precedents - including foreign ones - result from past legal proceedings. Insofar as they are carried out in accordance with adversarial procedures enabling prosecutor and parties to engage in argumentative activities where the parties defend their own claims before the judge and argue against those put forward by the counterparty, legal proceedings have an inherent value. The inherent value of practices so framed lies in their being structured in a rational way rather than simply occurring as a series of events involving certain individuals and taking place in a certain place at a certain time and under certain conditions. Legal proceedings, in other words, do not exist as mere facts, but concretise the general and abstract principles of discursive rationality. It is for this reason - namely, because courtroom proceedings make it possible to decide disputes in a rational way - that the arguments and rulings contained in precedents are *prima facie* justified. They are justified, in other terms, by virtue of the presumptively rational manner in which they have dealt with a dispute in the past. Since, in the context of a legal proceeding, the judge, the prosecutor, and the parties learn a great deal by engaging with disputes decided beforehand in accordance with rational procedures, a foreign precedent can legitimately extend its effect to subsequent domestic cases so long as it can be found to have been correctly decided.

---

science that can be comfortably situated within the American realist movement (broadly understood) and related pragmatic turn in jurisprudence (paradigmatic in that respect is the treatment of the doctrine of precedent that can be found in M Shapiro and A Stone Sweet, *On Law, Politics, and Judicialization* (OUP 2002), 102-11). On this basis, political jurisprudence present courts and judges as 'part of government', which as such 'must be studied empirically' (M Shapiro and A Stone Sweet, *On Law, Politics, and Judicialization* (OUP 2002), 13). This feature neatly distinguishes Shapiro's peculiarly empirical approach to precedents in law from the account of precedents introduced in this paper, which, by contrast, is essentially characterised by the explicit endorsement of the normative standpoint - namely, the standpoint that is mostly absent in both legal hermeneutics and Shapiro's view. Hence the distinctiveness of the approach we set out to defend in this work when compared to the approaches to legal reasoning that show some continuity with our research programme.

These introductory remarks show that, on a dialectical account informed by the principles of discursive rationality, foreign precedents are endowed with presumptive binding force. We call their binding force presumptive because it is ultimately conditioned upon the rational acceptability of both the previous deliberative activities carried out in the courtroom and their outcomes. It follows from that that the authority of a foreign precedent ultimately rests on how convincing the courts should find its argument and ruling. This admittedly blunt statement of the dialectical position that we endorse needs to be refined and qualified. On the one hand, the statement should not be taken to mean that the provenance of the precedent - foreign, as opposed to domestic - is completely irrelevant. On the other hand, it starts out from an idea of legal authority that can be seen to be instantiated by precedents. Both of these points call for further elaboration.

Let us take them up in turn and consider first the main issues relating to the *provenance* of a precedent. From a dialectical perspective shaped by the standards of discursive rationality, the bindingness of a precedent - be it domestic or foreign - is constructed in the process of carrying out a courtroom proceeding, where a prosecutor and the parties exchange arguments under a judge's control and supervision. This principle is general and so applies to domestic and foreign precedents alike. However, the argumentative burden one carries in resorting to these two types of precedent is not the same. As part of the same legal system where the present controversy has arisen, a domestic precedent can be presumed to apply to that controversy, provided that it can be argued to apply to a situation relevantly similar to the case presently before the court. A domestic precedent can accordingly be assumed to authoritatively apply to the present dispute, unless its relevance is challenged by one of the parties involved in the dispute.

The process by which to validate recourse to *foreign* precedents is, by contrast, more thorough and detailed. Foreign precedents cannot enjoy the same presumption that domestic ones do concerning their relevance and applicability. There is therefore an additional argumentative burden, peculiar and more demanding, that comes with the use of foreign precedents. This burden mainly consists in the requirement that an argument be produced showing that the foreign precedent at issue does not come from institutional contexts informed by legal traditions, principles, and norms incompatible with the ones shaping the legal system in which the present case is being decided. This means that, before foreign precedents can be used in adjudication, they need to be carefully introduced and systematically discussed in the courtroom. Such extensive debate offers the prosecutor, the parties, and the judge an opportunity to

assess the soundness of a foreign precedent in the context of the present dispute so as to make sure that the precedent is relevant and that, despite its foreign provenance, it cannot be regarded as completely alien to the legal framework in relation to which it is being considered as authoritative. Conversely, any appeal to foreign precedents should be regarded as arbitrary and unjustified if the precedents used in the judicial justification of a ruling have not been specifically debated in the courtroom.

It emerges from the foregoing remarks that the dialectical approach we are defending, for one thing, locates our present engagement with precedents front and centre, and for another it makes the binding force of a foreign precedent by and large conditional on that precedent's substantive justification in the eyes of the prosecutor, the parties, and the judge in the current legal proceeding. To many, the latter conclusion flies in the face of the classic doctrine of precedent, which attaches formal, vis-à-vis substantive, authority to precedents in law. As a result, the dialectical approach may be interpreted as effectively denying the authoritative force of foreign precedents. However, this interpretation can only be defended if legal authority is conceived in accordance with what can be termed the 'deferential model' of authority - a model irreconcilable with the fundamental idea behind the dialectical approach. From a dialectical point of view, no authority can conclusively command deference, since all legitimate authority ultimately owes its binding force and directive power to the rationality of discursive processes. Therefore, in a framework based on dialectic, the authority associated with precedent in law can only be characterised as 'dialogic' authority, in contrast to deferential authority. Let us further expand on this point, which is fraught with theoretical implications.

An authority can be characterised as deferential insofar as it issues content-independent directives providing exclusionary reasons for action.<sup>31</sup> On this conception, an authoritative statement is considered binding, not by virtue of the soundness of its substantive rationale, but simply in virtue of its having been issued by a competent institution at some point in the past. When considered authoritative in this deferential sense, past decisions are claimed to affect later disputes even if those decisions turn out to be substantively incorrect or mistaken. Precedents so construed can

---

<sup>31</sup> This notion of authority is paradigmatically argued for in J Raz, *The Authority of Law: Essays on Law and Morality* (OUP 1979), 3-33; J Raz, *The Morality of Freedom* (OUP 1986), 23-105; J Raz, 'Facing Up: A Reply' (1989) 62 *Southern California Law Review* 1153-1235, 1179-1200; J Raz, *Practical Reason and Norms* (Hutchinson 1990), 49-84; J Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1994), 194-221, and J Raz, 'The Problem of Authority: Revisiting the Service Conception' (2005) 90 *Minnesota Law Review* 1003.

thus be qualified as 'opaque' to their own rationale: their binding force is independent of their underlying justification. Now, that is the traditional doctrine of precedent, implied in which it is, then, a deferential notion of authority. To state it otherwise, precedents in law are traditionally found to be authoritative in the deferential sense just discussed.

This is not so from a dialectical perspective, which outright rejects the notion of deferential authority. In fact, the deferential model of authority is grounded in theoretical presuppositions that cannot be made compatible with the fundamental principles of discursive rationality. Deferential authority can be said to follow an *exclusionary* logic, for it instructs one to behave in a certain way and to disregard certain substantive reasons for acting otherwise. This exclusionary logic makes it so that, in the words of Joseph Raz, the statements issuing from an authority enjoy "a relative independence from the reasons which justify them" and can be regarded as "complete reasons in their own right".<sup>32</sup> Quite the opposite is true of discursive rationality, which proceeds from an ideal of communicative exchange operating on a principle of openness to criticism. Discursive rationality gives expression to the idea of a dialogue, or discursive exchange, between parties making different claims. It thus frames and legitimises discussions in which each party is allowed to introduce any claim or argument whatsoever (so long as it is pertinent) and to rebut any claim or argument made by the counterparty.<sup>33</sup> On this approach, then, every claim will be assessed on its own merits. Here we have an ideal of rationality where nothing escapes the reach of critical scrutiny, and so everything may be brought into the discussion and then also challenged. This means that from a dialectical perspective shaped by the principles of dialectical rationality, (legitimate) authority is not based on deference, since on the dialectical model certain questions are not barred from consideration for the sole fact that a competent institution has decided that there should not be any further deliberation on a given rule, and so the rule is protected from additional scrutiny. On a dialectical approach, by contrast, authority is grounded in dialogue, understood as a form of communication where any claim needs to be subjected to collective scrutiny before it becomes the basis for a decision.<sup>34</sup> So, on a dialectical theory, the kind of authority

---

<sup>32</sup> J Raz, *Practical Reason and Norms* (Hutchinson 1990), 79.

<sup>33</sup> This point is argued at length in R Alexy, *A Theory of Legal Argumentation* (Clarendon Press 1989, or edn 1978), 187-197.

<sup>34</sup> The idea of discursive rationality, we submit, is best accounted by relying on the metaphor of a dialogue between parties making conflicting claims. This statement is justified by the fact that in our framework of thought discursive rationality refers to a set of standards emerging from the structure of exchanges between individuals who mutually recognise the counterparty as a partner having equal rights and dignity in a joint enterprise (practical deliberation). Related, one only complies with the

precedents can aspire to is not deferential, but dialogic.

Dialogic authority can be defined in the sense expounded in Cunliffe's and Reeve's seminal work as a kind of authority that only commands temporary power-delegation and conditional submission.<sup>35</sup> What it means for one to be under an authority in the dialogic sense under consideration is to be under certain practical constraints. Those subject to dialogic authority are not free to act on the basis of their best judgment about the case at hand: they understand that they may very well have to accept a course of conduct contrary to that judgment. However, this submission to dialogic authority does mean that one has to unconditionally suspend her capacity for practical judgment and independent action. Those subject to authority are rather dealing with a momentary and partial delegation of our practical prerogatives. By acknowledging an institution or practice as a dialogic authority, one accepts to defer to it in practical matters of public policy, while retaining the right to question those in authority if they should issue directives that may be argued to depart too much from what is substantively correct in accordance with the principles of dialectical rationality.<sup>36</sup> So, dialogic authority is such that those in authority are

---

requirements constitutive of discursive rationality insofar as, when putting forward her claims, she does not seek to *impose* her views on the counterparties or to merely *persuade* them, but rather she is concerned with *convincing* the counterparties of the soundness, or normative correctness, of her position. Accordingly, the notion of discursive rationality can hardly be described in terms of kinds of interpersonal conversations that follow a non-dialogic structure, such as, for instance, negotiations going on between parties bearing conflicting interests. For, whilst those concerned play an essential role in the proceedings governed by the standards of discursive rationality, in the theoretical model we are defending, controversies cannot be settled in any way the parties may like, or regard it to be in their own interest, as it is instead the case with negotiation-like processes. By contrast, the conduct of the parties involved in an exchange informed by the standards of discursive rationality is controlled by a set of principles that put constraints on the options available to those parties. Hence, discursive rationality shapes practical reasoning as an activity regulated by norms that are not settled by, or negotiated between, the concerned parties and so largely pre-exist the actual interactions between those parties. This dimension sets the processes governed by the principles of discursive rationality apart from the standard forms of bargaining and negotiation, which the parties are free to model as they go along on the basis of their own preferences. The metaphor of dialogue we rely on, in sum, is meant to emphasise the fact that discursive rationality is not reducible to the merely prudential kind of practical reason governing negotiation-like enterprises, or bargaining-like activities, which are ultimately intended to merely match the actual objectives and needs of the concerned parties.

<sup>35</sup> J Cunliffe and A Reeve, 'Dialogic Authority' (1999) 19 Oxford Journal of Legal Studies 453.

<sup>36</sup> As it is put in J Cunliffe and A Reeve, 'Dialogic Authority' (1999) 19 Oxford Journal of Legal Studies 453, 462, 'a movement from deferential authority to dialogic



empowered to govern, but on the understanding that that power can be revoked at any time. This means that, on the one hand, those *in* authority are always accountable for the rules they issue, but at the same time those *subject to* authority retain their independence even in those areas where they have delegated their power to act on their own best judgment, since that delegation is temporary and revocable, having been granted subject to a condition of accountability.

So, the claim that precedents are authoritative in a dialogic sense, rather than in a deferential one, means that while precedents do have a binding force, that force is neither absolute nor content-independent. Recourse to a precedent is justified only insofar as the conclusion it reaches and the reasons offered in support of that conclusion are found to be compelling by those who subsequently participate in settling legal disputes involving relevantly similar cases. Failing this condition, precedents cannot be legitimately used in legal adjudication, and so cannot be said to have a binding force.

It bears pointing out here that, on a dialectical approach, authoritative precedents come not with just *any* sort of reason, but with *reinforced* reasons that carry extra weight in supporting a judicial decision. Unlike an ordinary, or not reinforced, reason, which can only be judged on its own merits, a reinforced reason gains justificatory force, on top of that inherent soundness, by virtue of its source. In other terms, if a reason or argument was put forward by an authoritative institution in keeping with an established method of reasoning, it will enjoy a *prima facie* plausibility, or presumption of correctness, that other reasons (those not so issued) cannot claim for themselves. However, the point here is that reinforced reasons, and the precedents in which they are contained, can be understood in two different ways depending on the view of authority in light of which they are considered.

From the standpoint of authority in a *deferential* sense, reinforced reasons are exclusionary (they bar competing reasons regardless of how compelling they may be); from the standpoint of authority of in a *dialogic* sense, their reinforced status does not rule out a priori the ability to invoke other substantive reasons. So, on a dialectical approach, as much as precedents may trump other reasons in light of which the case at hand could be decided, this 'reinforced' priority is not so entrenched as to exclude those other reasons altogether: these will always live in the background, from which they can always be pulled out, reintroduced, and brought to bear on

---

authority occurs when the authority-subject begins to insist on some elaboration of the reasons underlying the requirements or judgements of authority'.

the case at hand. That is because, as we have been discussing, precedents owe their binding force not just to their source (to the fact of their having been issued by a competent authority) but also, and importantly, to their underlying justification, and precedents that no longer reflect this second component - by virtue of their ruling out all justificatory reasons other than the ones adduced in the precedent itself, thereby forestalling any further reasoning - cannot be said to be binding.

In sum, on a dialectical approach, precedents and the justificatory reasons adduced in their support are distinct, but ultimately connected: although they form distinct classes, the separation is only temporary and limited, not absolute. This is so because, on this view, an authoritative precedent differs from a substantive justification by reason of its force. An authoritative precedent bears on the outcome of judicial deliberation not by barring substantive reasoning, but by competing with other practical reasons from a position of advantage (by virtue of its having a pedigree, or being 'reinforced'). Reasoning with precedent therefore involves a systematic bias: the reinforced reasons attached to precedents will generally outweigh, by virtue of their source, any other reasons that would otherwise apply. As a result, a precedent will as a matter of fact prevail on conflicting substantive reasons most of the time, though not always. For there may well be cases in which the additional strength built into an authoritative precedent will not enable it to trump or outweigh conflicting substantive reasons. In these cases it will be legitimate for courts to depart from precedent. Such a departure is possible only under special circumstances, however, meaning that it is a really strong argument that one will have to present in order to rebut a precedent.<sup>37</sup> This means that when a court is confronted with a precedent, it is presumptively bound to follow it. However, this obligation is neither absolute nor ultimately content-independent, since it can be disobeyed when concurrent reasons supporting an alternative decision turn out, upon scrutiny, to be stronger than those sourced to a precedent. So, although precedents come with a stronger justificatory force, that force is nonetheless defeasible.<sup>38</sup>

Now, the reader may have noticed that in our account of the authority of precedents we have not distinguished domestic and foreign precedents.

---

<sup>37</sup> On the defeasibility of authoritative directives, and the exceptional circumstances in which they may fail to exert their authority, see W Waluchow, 'Authority and the Practical Difference Thesis: A Defence of Inclusive Legal Positivism' (2000) 6 *Legal Theory* 45.

<sup>38</sup> These points are expanded in S Perry, 'Judicial Obligation, Precedent and the Common Law' (1987) 7 *Oxford Journal of Legal Studies* 215 and S Perry, 'Second-Order Reasons, Uncertainty and Legal Theory' (1989) 62 *Southern California Law Review* 913.

That is because, from a dialectical perspective, both kinds of precedents should be understood as authoritative statements in the dialogic sense. This position follows from the more general claim that we should do away with any rigid separation between what is *inside* a system of law and what is *outside*. From a dialectical perspective, legal systems can hardly be conceived as standalone or rigorously separated orders: the separation between different legal systems is at best partial and relative. Indeed, on a dialectical approach, law is conceived as a global phenomenon, an interconnected web of principles, policies, and provisions that may well have its boundaries, making for discontinuities and local differences, but not to such an extent as to result in a set of isolated units without any communication between them. Law so conceived is only contingently connected to its territory, since the legal domain is a common space inhabited by courts and litigants from different regions and traditions.

This should not be taken to mean that local history, tradition, and culture have no role in shaping the law. Quite the contrary: it is a significant role that they play in that regard. But it is also true, as a matter of practice, that the line between national law and international law is constantly being blurred in adjudication. In light of that background, the idea that national legal systems are self-contained and mutually impenetrable spheres - an idea typically associated with the dominant view - turns out to be no more than an ideological claim sitting poorly with current practices in legal adjudication. Indeed, that idea fails to appreciate the interconnectedness of law in a world where economic, social, and political interactions cross national borders, and the fact that legal adjudication must adapt, for it is increasingly dealing with legal disputes which often reflect that reality, involving parties operating in a transnational context. So, just as the socioeconomic system is internationalising, so should legal deliberation and decision-making. In fact, this is precisely the trend, considering that adjudication is increasingly being shaped by principles shared on a global level.

The dialectical approach to reasoning with precedent must accordingly be understood as conceptually linked to an internationalist legal perspective. From such a perspective, the use of foreign precedents in domestic adjudication is seen as an example of the increasing internationalisation of law and as a paradigmatic way in which a legal system can affirm its membership in the international community through processes of adjudication. Accordingly, the rigorous distinction between domestic and foreign precedents can be argued to be artificial - grounded in ideology rather than in theory. In this context, a precedent should be conceived as a legal resource capable of shedding light on disputes beyond the domestic sphere. From the dialectical point of view, thus, when an issue debated in

one jurisdiction crops up in another, those engaged in settling the more recent dispute should not be barred from borrowing legal arguments previously devised elsewhere. Because legal systems around the world often face similar problems, comparing and testing solutions found abroad is not only legitimate, but also rational. After all, past decisions may well make it possible to see the present controversy from a different angle and turn it into a tractable affair. With the ability to rely on precedents regardless of where they have been set, a constitutional court or an international tribunal can broaden its perspective by including new ideas, viewpoints, and opinions into the current legal proceeding. Since useful insights can be garnered from other legal systems, a system of law stands to lose by clinging to a practice of foreclosing possible avenues of deliberation, excluding potentially sound modes of reasoning and decision-making just because they are not the product of domestic judicial practices.

In the same spirit, it is essential, from a dialectical perspective, that foreign precedents should not merely be cited as window-dressing. In order for foreign precedents to be able to serve as valuable lessons in domestic adjudication, they need to be thoroughly discussed in the legal proceedings in the jurisdiction for which they are being considered as possible solutions: the legal experience developed elsewhere needs to be genuinely engaged with by the prosecutor, the parties, and the judge in their effort to find the best solution to the case at bar, for otherwise recourse to foreign precedent would turn into a mere academic exercise, which is not how legal reasoning and reasoning with precedent are conceived on the dialectical approach. In accordance to the latter, legal argumentation is conceived not as a monological enterprise, but as a form of collective deliberation; it is not something that can be achieved by a lone agent - typically the judge - on an isolated, almost heroic quest for the normatively correct settlement of any legal dispute.<sup>39</sup> Even assuming that judges do have such skills, and even considering that they have the last word in the settlement of a legal dispute, its outcome will not have the backing of a full justification unless the claims made by the parties are debated in the context of an adversarial procedure that contributes to shaping the final judicial decision through a process of discursive exchange. Judges, in other words, should not be able to ignore the claims, reasons, arguments, interpretations, and narratives that prosecutor and parties introduce in the courtroom in making their case: in order for a judicial

---

<sup>39</sup> The reference here is to Dworkin's law-as-integrity theory, which conceives legal adjudication as a practice shaped by Hercules, a mythical figure of judge entrusted with the solitary task of reconstructing the entire legal system as a coherent whole in deciding any dispute. This view is introduced in R Dworkin, *Taking Rights Seriously* (Duckworth 1977) and fully developed in R Dworkin, *Law's Empire* (Fontana 1986).

opinion to be legitimate, it must take into account the full spectrum of possibilities laid out by prosecutor and parties through a procedure that makes it possible for them to hear and challenge each other's claims.<sup>40</sup>

In conclusion, on a dialectical approach, which views reasoning in law as a structurally open process that can legitimately bring outside sources of adjudication into the legal proceeding, adversarial procedures and discussion are central to the process of legal reasoning. The only condition is that those sources come into the legal proceeding through a process of discussion. For it defeats the purpose of adjudication to introduce reasons and decisions into it uncritically, without the benefit of adversarial scrutiny through the participation of prosecutor and parties.

## V. CONCLUSION

In this paper, we have set out to offer a qualified justification for a practice that has become widespread among courts in several jurisdictions across the world: that of settling domestic disputes by recourse to foreign precedents. To this end we blocked out a dialectical theory of legal reasoning as an activity structured by communicative exchanges between the parties in a courtroom and governed by general principles of discursive rationality. Legal reasoning, we argued, can thus be understood as an open-ended dialectical enterprise defined by two components, one of which is structural (the adversarial procedure) and the other substantive (the principles of rationality). What makes it open-ended is both the structure (that of a debate) and the substantive principles, since these are solid enough that they cannot be dismissed, so they have a role in shaping the discussion, and yet they are not so specific that they can fully determine its outcome. The gist of the argument, thus, was that this view of legal reasoning adequately captures the nature of authority in law and that of recourse to precedents (including foreign ones) in legal adjudication.

The theory we defended recognises both the context-sensitive nature of legal reasoning and its discursively rational character. On the one hand, we claimed that from a dialectical perspective, no deliberative activity carried out in legal proceedings is fully legitimate unless it is grounded in adversarial structures enabling all the parties affected by the judicial decision to discuss and scrutinise the arguments and narratives offered by the counterparties. This is a process through which not only the outcome, but also the structure of legal reasoning in adjudication cannot be predetermined. That is, a decisive factor in determining the structure and

---

<sup>40</sup> This point is discussed at length in P. Sommaggio, *Contraddittorio, Giudizio, Mediazione* (Franco Angeli 2012), 139–42.

outcome of legal reasoning is given by the behaviour of the prosecutor, the parties, and the judge as they engage in debating competing reconstructions of the dispute and the applicable law. On the other hand, we argued that this particularistic element, inherent in the very idea of dialectic, is combined with another element, which is that all sound reasoning is governed by a number of general and abstract principles of discursive rationality. These principles act as regulative ideals internal to, and constitutive of, the very practice of arguing and discussing. They are, in other words, an essential condition of the possibility of legal reasoning. Importantly, this claim also is supported by our view of legal reasoning as a dialectical activity. Indeed, we noted that a dialectical approach to reasoning in law requires a prosecutor, the parties, and a judge to set up exchanges in such a way as to enable them to work through some dispute or disagreement. To this end they each need to be able to proffer, assess, and challenge a range of reasons and arguments that can be adduced in support of the claims they or the other side is making. This practice - that of deliberation, argument, and counterargument - rests on constitutive principles of its own that define the fundamental presuppositions failing which the practice would not be possible to begin with (if it is to come out as a deliberative practice rather than a conversational one in a broader sense). At least three such principles of discursive rationality can be named - those of non-contradiction, coherence, and universalisation - and they are recognised as universally binding insofar as they are necessary, for, clearly, you cannot have a proper discussion with someone, or come to an agreement with them, if they insist on making contradictory claims and offering reasons which only they can accept or which only suit their own interests. A discussant may make a strategically successful move, but if the claims and arguments put forward in making that move turn out to be inconsistent or incoherent, or if they cannot be universalised, then the move places the discussant outside the argumentative realm, that of genuine reasoning. This means that no one who ignores the principles of consistency, coherence, and universalisation can have access to the realm of argumentation. The principles of discursive rationality should in this sense be considered necessary standards: they are valid independently of whether those engaged in argumentation explicitly recognise them, and so they act as preconditions for anyone wishing to argue intelligibly with anyone else.

# EQUAL OPPORTUNITIES AND LEGAL EDUCATION: A MAINSTREAM PERSPECTIVE

Elisabetta Catelani and Elettra Stradella \*

*This article aims at discussing the role of legal education in spreading awareness about gender issues amongst legal operators, judges and public administrations and institutions. In particular, the authors investigate the methodologies of integration of 'gender skills' in legal curricula.*

*Asking why and in what form sexism is found in legal education, and starting from criticisms from the gender perspective, the paper studies the inadequacies of legal education with respect to gender from the point of view both of the structural limits of common methodologies and of specific discriminatory attitudes in present teaching activities, curricula and courses.*

*Lastly, it attempts to propose some methodological innovations in legal education, aimed at opposing the predominant indifference towards considering gender as a legal matter. Specially: (1) a cross teaching of gender topics in (existing) general courses; (2) the inclusion of gender topics within (existing) general courses on fundamental rights; and (3) the growth of specific courses on law and gender.*

Keywords: Legal education, gender, teaching, sex discrimination.

## TABLE OF CONTENTS

I. INTRODUCTION .....	164
II. GENDER BIAS AND THE LAW IN ITALY .....	165
1. <i>Does gender matter in Italy?</i> .....	165
2. <i>The role of lawmakers in reinforcing gender bias</i> .....	168
a. Social care, pension law, insurances, social benefits.....	169
b. Fundamental rights and freedoms .....	170
c. Political participation.....	174
III. SEXISM AND LEGAL EDUCATION .....	176
1. <i>Which methodological innovations in legal education to go beyond sexism?</i> ..	176
2. <i>Historical perspective in legal education</i> .....	178

---

\* Elisabetta Catelani is Full Professor of Constitutional Law at the Department of Law, University of Pisa. Elettra Stradella is Assistant Professor of Comparative Public Law at the Department of Law, University of Pisa, and Affiliate researcher at Scuola Superiore Sant'Anna of Pisa. This work is the result of the shared discussion and research of the authors. In particular, Elisabetta Catelani wrote Section 2 and Elettra Stradella Section 3. The introduction and conclusions were co-authored.

3. <i>Empirical approach v theoretical approach: Abstract and concrete ideas about including women in legal education</i> .....	183
4. <i>Proposals</i> .....	187
IV. CONCLUDING REMARKS .....	192

## I. INTRODUCTION

The main research question of the paper concerns the understanding and discussion of the role of legal education for the promotion of a gender awareness amongst legal operators and society as a whole. Starting from a description of the unsatisfactory Italian scenario of indifference and biases towards gender issues, this essay aims at analysing the possible integration of what we call ‘gender skills’ in legal programs and curricula.

The Italian context represents for us a case-study, relevant from various points of view: first of all it clearly constitutes an example of the negative impact that a gender-blind education produces on the recognition and implementation of equal opportunities in family, society, politics and work. Stereotyping and sexist education from the very beginning of a child’s integration into the educational and social setting contributes to determining the widespread perception that women are of a lower status, shaped through their role within family and their function as caregivers. The relationship between a gender-blind education and the common perception of a feminine lower status seems to be double-sided: from one side this kind of education represents one of the reasons for women’s lower status, while from the other it is one of the many consequences of the lower social status of women.

The recent legislative interventions in Italy concerning equal opportunities evidence on the one hand the growing awareness of the necessity to take measures directed to rebuilding women’s status and promote a gender culture; on the other hand the enduring lack of political will to implement a long-term plan on gender equality and go beyond the traditional approach towards equal opportunities. We can therefore ask where this political and legislative attitude originates and whether it influences social perceptions and ideologies. This is the ‘connecting tissue’ of the work; lawmakers, politicians and administrators are strongly influenced by the education they have received, and they have chiefly received legal training that instead of placing the foundation stones for the promotion of culture and behaviour enabling equal opportunities, has instead passed down to them an abstract and ‘aseptic’ concept of law and justice. The effect of this phenomenon is twofold: firstly, legal actions, norms and rules infrequently use a gender perspective as a lens to read and understand the social context.



Secondly, and as a consequence, the social context itself converts this gender-indifferent (and often discriminatory) legal language into a general background for values that are to be found at all levels of education and training.

Based simply on the importance that we assign to legal education and its (even indirect) social and cultural impact, it seems interesting to compare the Italian scenario of legal education with the American scenario and more generally the common law approach to legal education. This is because such a comparison will allow us to investigate whether and how the integration of gender in legal education could follow the same methods and contain the same content in the two different scenarios.

The research takes the following structure in order to pursue these objectives. In Section 2, we try to answer the question of whether gender matters in Italy; in Section 3 we analyse the role of the Italian lawmakers in strengthening gender biases through legal norms, studying briefly the most significant statutes adopted (during the last legislature) in some fields variously linked with across-the-board gender issues. In Section 4, we investigate why and how sexism characterises legal education, starting from criticisms of legal education from the gender perspective. We study the inadequacies of legal education with respect to gender, from the point of view both of the structural limits of common methodologies and of specific discriminatory attitudes in present teaching activities, curricula and courses. Finally, we propose some methodological innovations in legal education that could improve the situation.

## II. GENDER BIAS AND THE LAW IN ITALY

### I. *Does gender matter in Italy?*

Jurists and legal scholars are generally indifferent towards the issue of equal opportunities for men and women; a very small number among them deal with gender issues, and almost all the scholars engaged with these issues are women. The methods that characterise the approach to gender issues are also significant: very often topics concerning gender are taken into consideration separately and autonomously, as if they were distinct fields of study, and gender issues are not included at all in legal reflections when teaching topics where a gender perspective is, strictly, relevant.<sup>1</sup>

---

<sup>1</sup> A significant example comes from the reading of the main handbooks of legal disciplines in the Italian academic context: they never take into consideration gender as a general point of view by which investigate norms, cases and build a theoretical framework. Constitutional Law, Private Law, Criminal Law, Social Law and Labor Law, are all explained and taught without any reference to the gender perspective.

For instance, in scientific and academic meetings or seminars on the electoral system (which are very common nowadays in Italy), it does not often happen that speakers discuss the mechanisms that can assure equal opportunities in order to promote the political participation of women. Their main aim is to enforce the accountability of the government and its centrality within the institutional system, through electoral mechanisms that, without modifying the text of the Constitution, assign to the winner of the political competition a large number of seats, using a first-past-the-post system (with proportional correctives) or single-member constituencies.

Irrespective of the choices and the preferences expressed, the question of the need to establish anti-discriminatory measures in order to guarantee an equal presence of men and women within the electoral lists (in the case of multiple-members constituencies), or an equal number of candidates of each sex (in single-member constituencies), has in any case a secondary (or low) relevance. This lack of relevance remains even though in very recent years some interesting provisions have been adopted to promote gender equality and the courts have gradually started to change their point of view.

Here, we can refer to Law l. n. 120/2011, containing provisions that establish penalties (such as the dissolution of the governing body of a listed corporation) for discrimination and to various anti-discriminatory measures for the governance of local authorities (provisions concerning local electoral systems such as the 'double gender preference' and some others regarding the composition of local government bodies).

The administrative tribunals have developed some strong principles in their decisions to disband local authorities whose members were all of the same sex or which were evidently gender unbalanced. These tribunals have said that:

---

Many are the question that academic handbooks do not pose, and we can find only sporadically in articles and monographs that facially deal with gender issues and topics. For instance: how much the social and political status of women affected the evolution of political representation in the Italian institutional system? In which way the constitutional protection of civil and social rights and liberties has had an effect on women and their role? Have family law and all the rules concerning marriage, children and relationships within the familiar context influenced and been influenced by the social perception of women? Does criminal law dedicate a specific attention to 'gender crimes'? And what kind of impact could have on the criminal system the present incorporation of peoples and groups that ground their legal system of values on the consideration of a lower juridical and social status for women? To what extent will the reform of the labor market and the social security contribute to a general reassessment of women's role and could it produce some discriminations?

governmental bodies when unbalanced in gender representation underline a lack in democratic representation of the heterogeneous composition of social background and electoral body [...] they are potentially not fully functional lacking the contribution of the gender that is not adequately represented.<sup>2</sup>

The Italian Constitutional Court<sup>3</sup> has affirmed that Article 51 of the Italian Constitution (as modified in 2003) requires, as right and proper, actions to be taken that are directed at guaranteeing equal access to elections. Evaluating the ‘double gender preference’<sup>4</sup>, the Constitutional Court has affirmed that this mechanism is coherent with the goal of the effective and concrete implementation of the equality principle, which has not yet been fully implemented in political and electoral behaviour and procedures. Finally, decision n. 81/2012 explicitly declares that a requirement for gender balancing that is established by the law (the law at issue was the Regional Statute of Campania) must be in harmony with the Constitution.

In spite of these significant steps, the prevalence of indifference as the main attitude towards gender issues is demonstrated by numerous examples that are slowly coming to light after recent political and institutional events. We can mention for example the documents produced by the Committee of Experts nominated by Prime Minister Enrico Letta in 2013 to give details about a proposal to reform the Second Part of the Constitution. Reading the preparatory works, it is possible to verify the marginal role assigned to gender issues in the representation, participation and composition of institutional bodies.<sup>5</sup> We can also find something in the recent Bill adopted by the Senate in order to significantly modify the Constitution, and in particular the parliamentary system (although this may require further readings before entering into force): therein, Article 1, amending Article 55 of the Italian Constitution

---

<sup>2</sup> TAR Lazio, n. 6673/2011, and TAR Lazio n. 633/2013, where the threshold of 40% is set as the minimum presence of each sex in local government bodies.

<sup>3</sup> Constitutional Court decision n. 49/2003.

<sup>4</sup> Constitutional Court decision n. 4/2010.

<sup>5</sup> In the final report (Presidenza del Consiglio dei Ministri, Italian Government, ‘Per una Democrazia Migliore’ [2013], 70), we find only few words concerning gender issues, regarding in particular the electoral system, where the Commission proposes: (1) in case of choosing a proportional system, to provide a ‘double gender preference’; and (2) in case of choosing a majority system, a gender provision on the ‘gender balance’ (32). These are the only references in the written report, although many other and significant proposals had been supported by the women within the Commission during the preparatory works (one of the authors of this paper, Elisabetta Catelani, was member of the Commission).

establishes that statutes containing the electoral system for Parliament will promote the balance between men and women in their representation. This weak provision joins on to Article 51 that declares the equal opportunities between men and women in the access to the public offices, even elective, and gives to the Republic the task to promote equal opportunities between men and women. The more recent events concerning the adoption by Parliament of the new system for election to the Chamber of Representatives clearly demonstrates the (guilty) indifference towards the inclusion of anti-discriminatory provisions in a text that directly affects the level of political participation of women and their presence in the higher political institutions.

Despite the opposition of women in Parliament, who in symbolic ways also displayed their aversion to the unsuitable (and wrongful) decision not to include in the statute anti-discriminatory norms and percentages of women to be included in the lists of candidates by the political parties, the bill sent to the Senate does not contain any provisions on equal opportunities.

Furthermore, the general content of the statute would damage not only the democratic representation as a whole, but also the empowerment of merit and gender competences: there are to be closed lists, without preferential voting, and no provisions for binding or compulsory primary elections for the selection of candidates.

From this background, the main question that arises is: what are the causes of this indifference and, as is often the case, intolerance towards gender issues? How can legal education represent an instrument for settling these issues in society and public debate and awareness?

## 2. *The role of lawmakers in reinforcing gender bias*

In this section, before focusing on the issue of sexism in education and the role of gender issues in legal education, we will discuss the role of lawmakers in strengthening certain gender biases through legal norms, and we will identify and understand gender biases, considering how and to what extent they influence the general approach towards gender issues in the social and public environment. We have chosen to start from the point of view of the lawmaker because we believe that this strongly influences social behaviours and perceptions and, establishing norms and rules, also builds the grounds for the interpretative activity of the judiciary. Moreover, the relationship between legal education and the role of the lawmaker emerges even from the factual verification that a significant portion of lawmakers is represented by people with legal *curricula* of studies.

To analyse this we will take into consideration the Italian State statutes adopted in the XVI and XVII legislatures.

The investigation of the legal provisions will be conducted according to a list of indicators, including: (a) the use of gender-related stereotypes and preconceptions; (b) the assumption of the immutability of gender identity; (c) the media relevance of the particular statute; and (d) the inclusion of positive actions for the promotion of equal opportunities in the field of the statute.

Social care, pension law, insurances, social benefits

This field is very relevant in Italy when looking at sexual discrimination imposed by the law. The European Commission has just opened an infringement procedure against Italy concerning the norm that establishes a gap between men and women in the pension contributions that they need to have deposited in order to take early retirement.

In 2010, the European Commission began a dispute with Italy that was grounded on the specific regulation for public employment. At that time, the Italian Government faced the question of adopting legislative reform that shifted the retirement age for women to 65 years.

The decision of the CJEU of the 18<sup>th</sup> of November 2010 in Case C-356/09<sup>6</sup> underlined the fact that a public employer was able to dismiss an employee who had reached retirement age in order to promote the professional inclusion of younger personnel: this condition would give an advantage of five years to women, who would reach retirement age before men.

The recent infringement procedure<sup>7</sup> is directed towards law n. 214/2011 (Article 24 of the governmental decree n. 201/2011, which was ratified by Parliament with amendments), that establishes a different minimum number of years of contributions for men and women to take early retirement. Recent proposals made by the Italian Government led by Matteo Renzi would neutralise the gap, but for the moment it is interesting to analyse the statute with respect to two of the four parameters listed above: a. the use of gender-related stereotypes and

---

<sup>6</sup> Case C-356/09 *Pensionsversicherungsanstalt v Kleist* [2010] ECR I-11939.

<sup>7</sup> We refer to the procedure n. 2013/4199, challenged by the European Commission because of the incompatibility with Article 157 of the Treaty which establishes that the wage for workers will be equal for men and women, and Directive 2006/54/CE (Articles 5, 7 and 14). These last provisions provide that the access to retirement pensions cannot depend on the sex of the worker.

preconceptions; and d. the inclusion of positive actions for the promotion of equal opportunities in the field of the statute adopted.

Concerning point (a), we could say that a gender-related stereotype and social preconception is at the basis of this statute. Indeed, the different conditions for (early) retirement (there is a more general differentiation between men and women in policies on retirement taken as a whole) assume that men and women have a different status; there is no immediate 'biological' cause for this and, indeed, if we remember that on average women live for longer than men, that would lead to exactly the opposite solution to the issue. This preconception considers the different role of women in care-giving activities and, above all, their exclusive (or, at least, dominant) role in assisting the elderly: the scenario that is assumed is that a woman leaves work, retires, and starts to assist her parents. Unfortunately this scenario corresponds to a real social context, and the stereotype has become a protective habit for women, who often have no choice because of the serious lack of public social services and support in managing vulnerable people such as the elderly and children.

In many other European countries, a differentiation between men and women in terms of retirement age can be evaluated as unreasonable discrimination that apparently (and maybe concretely) worked in favour of women, but was largely able to stereotype them in their social and familial role.

Moving to point (d), in Italy the provision could be interpreted as a reasonable discrimination the function of which was to allow a better balance between work and familial engagement. In fact, this is not an ordinary way to reach a balance, because in this case the woman's work stops and the greatest weight is assigned to the familial/social role. For the same reasons, the provision cannot be considered as an affirmative action: the legislative intervention does not introduce a policy of providing special opportunities for women, favouring them, or of allowing them to do or participate in something, to be represented (quotas), or to be preferred and incentivised to realise an initiative.

a. Fundamental rights and freedoms

In this field we can take into consideration law n. 119/2013 regarding 'Gender Violence', which was adopted after the ratification and execution of the Convention of Istanbul of the 11<sup>th</sup> of May 2011, under law n. 77/2013. This statute contains the ratification of the governmental decree on the criminalisation of domestic abuse, sexual assault, and stalking.

First of all, punishments for all crimes are increased when the offender's behaviour is directed at his or her spouse, even if they are separated or divorced, or at his or her partner. Secondly, some provisions have been introduced regarding stalking. The offence of stalking has been widened to include aggravating circumstances, acts perpetrated against the offender's spouse, and every kind of act committed using information and communication technologies; moreover, law n. 119/2013 establishes that the charge of stalking in the case of 'serious and continual threats' (for instance made by the use of weapons) cannot be withdrawn.

Particular attention should be paid to this last provision, because in the first version of the decree there was no possibility of the charge being withdrawn, while now it is possible for this to be done except in cases in which the threats are repeated. The Supreme Court of Cassation has expressed some doubt about introducing this modification by a ratifying parliamentary statute, even if it is established that the withdrawal of the charge is merely procedural. The rule means that the judge will effectively have to assess whether the withdrawal is voluntary, but withdrawal by the judicial police or special lawyer would be accepted: the rationale for the rule is to prevent illegal influence being used on the victim, and this is strongly supported by the Court of Cassation, which considers the definitive provision adopted by the lawmaker to be inadequate.<sup>8</sup>

Using the indicators set out above, we can underline some relevant features:

With regards to (a) (use of gender-related stereotypes and preconceptions) this legal instrument has a clear symbolic meaning, which is simply to break down the cultural stereotypes that have for many years allowed men to make women subordinate, using the discriminatory instrument of *jus corrigendi*. In this paper we do not aim to investigate the extent to which the symbolic and performative use of criminal law is compatible with the constitutional role of punishment and the protection of fundamental rights. However, we need to underline how the performative intention of the norm is, in this case, aimed at destroying the mechanisms of women's

---

<sup>8</sup> The Court of Cassation also decided that the redefinition of stalking is a positive step (Court of Cassation, Massimario Office, Report on law n. 119/2013, 16.10.2013): until this statute was passed, law n. 11/2009 restricted the crime to offences by a separated or divorced spouse or the former partner of the victim, whilst now the only requirement for the crime of stalking is an emotional bond between the stalker and the victim. Many scholars (T Padovani, 'Quel Collasso dei Codici 'Figlio della Rincorsa' all'ultima Emergenza' in *Guida al Diritto* (2013), 36) have criticised the vagueness of this notion, and the risks of vagueness in criminal law are well-known, but we will come back to this point in our analysis under the parameter c).

subordination. It is significant that in no part of the law is there introduced an express distinction between men and women in the application of the criminal descriptions, although it is clear that the legislative intent was to fight against the dramatic phenomenon of gender violence. Indeed, the term ‘femminicidio’ has been created in order to represent not only the fact that the victim of this kind of crime is always a woman, but also (and above all) that the crime is ‘gender violence’, because it is committed by a partner or former partner. The word ‘femminicidio’ has only existed in Italian since 2001<sup>9</sup> and the use of the word has spread since 2008.<sup>10</sup> The term, created by Diana Russel and spread by Marcela Lagarde, means ‘the murder of a woman because she is a woman’, and has recently also been used in the case law of the Court of Cassation (Sez V, 9<sup>th</sup> April 2013, n 34016).

With respect to this point, the assumption of the immutability of gender identity (b) comes more from the public interpretation of the statute than from the statute itself. Indeed, an explicit exclusive reference in the statute to acts committed by men against women could have constituted a violation of the equality principle of Article 3 of the Constitution, given the strict boundaries of criminal law. From this point of view, the statute implicitly presupposes that it will apply largely or wholly to crimes against women, but it does not assume the immutability of gender identity, because it is directed against gender violence in total, as a form of violence that takes place against a person on the basis of gender.<sup>11</sup>

European law has been moving in the direction of countering gender-based violence, through the Resolution of the European Parliament adopted on the 26<sup>th</sup> of November 2009 on the elimination of violence against women, and then with the Directives 2011/99/EU and 2012/29/EU.<sup>12</sup> The first of

<sup>9</sup> V Della Valle, ‘Femminicidio’, *Enciclopedia Treccani* (Treccani 2013)

<sup>10</sup> B Spinelli, *Femminicidio. Dalla Denuncia Sociale al Riconoscimento Giuridico Internazionale* (Franco Angeli 2008)

<sup>11</sup> Gender-based violence and violence against women are often used interchangeably because most gender-based violence is inflicted by men on women and girls (European Institute on Gender Equality). It is estimated that 20 to 25% of women in Europe have suffered physical violence, and that the number of women who have suffered other forms of gender-based violence is much higher.

<sup>12</sup> Resolution of the European Parliament adopted on the 26<sup>th</sup> of November 2009 on the elimination of violence against women [2010] OJ C285/53; Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order establishing a mechanism for the mutual recognition of protection measures in criminal matters between Member States [2011] OJ L388/2; Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012]



these introduces the European protection order and the second establishes minimum standards for the rights, support and protection of the victims of crime. The relevance of these acts lies in how they improve the legislation of Member States to counter all kinds of violence against women and to enforce all types of judgment and judicial decisions.

Finally, these Directives are included in a coherent and comprehensive set of measures on victims' rights that are particularly directed at protecting victims of gender crimes. In any case, in the approach to gender violence, gender construction prevails with respect to sexual identity in itself: the moral and psychological dimension is relevant in the definition of the conduct ascribed to gender violence.

With regards to (c) (the media relevance of the statute), we can say that it has had a strong presence throughout the media; the problem is the kind of interpretation that is given to the word 'femminicidio'. There is a sort of social trend that sees 'femminicidio' and violence against women as inexplicable events.<sup>13</sup> Why would an apparently *compos mentis* man kill the woman that he loves? Why would a young boy decide to imprison his girlfriend and submit her to continual abuses for three whole days? What reason leads a rich and powerful politician to attempt to carry out a rape? The media usually explains violent or murderous actions taken by men in various ways: asserting that too intense a feeling can produce such strong pain that it may lead to violence; holding that pain and suffering can be strong enough to 'alter' love and drive a man to violence; or affirming that the male sex drive can be so strong that it results in physical violence towards a woman.

Recently, it has been underlined that very few media reports assert that gender violence and 'femminicidio' are not the possible results of a 'distorted' love, but rather are the outcome of a cultural heritage that assigns a socially subordinated role to women, a role that even includes submission or physical elimination when a woman moves away from the social paradigm designed for her.<sup>14</sup>

The lawmakers have to take this social background into consideration, and laws can contribute to its reinforcement or weakening, through the creation of new paradigms of values and roles within society and family. The statute concerning 'femminicidio' tries to do this, but the use of the

---

OJ L315/57.

<sup>13</sup> L Lipperini, M Murgia, *L'ho Uccisa Perché l'Amavo. Falso!* (Laterza 2013)

<sup>14</sup> F Pischedda, *La Violenza Contro le Donne e il Sessismo Implicito nel Discorso Giornalistico Scritto*, Master Thesis dissertation, University of Bologna, 2013.

criminal law to further cultural and social goals has attracted much criticism, criticism that emphasises the (wrongful and hypocritical) idea that the law cannot be used to achieve equality between men and women.

The main feature in this field is that gender crimes do not have the same characteristics as other violent crimes: crimes against women can and should be considered separately because of their intrinsic particularity. This is just what is being done with the roadmap of European directives that try to harmonise the criminal law in the Member States by calling on them to improve their national laws and policies to combat all forms of violence against women, and to act to tackle the causes of violence against women, not least by employing preventive measures, and by calling on the EU to guarantee the right to assistance and support for all victims of violence.

b. Political participation

In this field some important norms were adopted in 2012. The law n. 215/2012 introduces three categories of provisions to the Italian legal system that can all be included in the legal phenomenon of affirmative action.

The first field of norms concerns the affirmative action that is required in order to promote an equal presence in all local political representative bodies, and also in other bodies called to assume relevant political and administrative decisions.

With respect to this first intervention, the statute modifies the provision of the code of local authorities - legislative decree n. 267/2000 - by establishing that the statutes of municipalities must include rules that guarantee the presence of both sexes in local government bodies and all non-elected collective bodies.

The second field of norms concerns elections, electoral systems and general principles. It requires that in municipal elections the lists must contain candidates of both sexes, and that not more than two thirds of the candidates can belong to the same sex. Every voter can express one or two preferences for a candidate on the list linked to the mayoral candidate: if the voter expresses two preferences, the second must be for a candidate of the different sex, otherwise the second preference is cancelled.

Moreover, the statute adds to Article 4 of law n. 165/2004 (providing principles that the regions should follow in setting up their electoral systems) a paragraph *c-bis* that introduces the objective of promoting the

equality of men and women in access to political offices, through the provision of measures that allow the access of the under-represented gender in electoral offices to be prioritised. With regards to the general provisions concerning elections and, in particular, electoral campaigns, the statute adds to law n. 28/2000 a regulation establishing that when the media publish political communications, they have to act in compliance with Article 51 of the Constitution concerning the equal opportunities of women and men.

The third and last field is represented by Article 57, which modifies Article 61 of the legislative decree n. 9/1993 concerning public employment and establishes (amongst other provisions on equal opportunities for access and treatment at work) that public administrations must, except in the case of justified impossibility, appoint women to at least one third of the positions on examination boards. The nomination to the boards is overseen by the 'Consigliera di parità', who can order the administration to remove the board when this rule has not been respected.

Recently, in April 2014, the Italian Parliament introduced quotas in the electoral system for the election of the Italian members of the European Parliament. From 2019, each list of candidates must contain no more than 50% of members of either sex, and the first two candidates must be of different sexes. The circuit election office will control compliance with this provision by the lists, and if more than 50% of the candidates on a list are of the same sex the office will reduce the list by cancelling the names of those candidates belonging to the most represented sex. Parliament also adopted a temporary measure for the next European elections to be held in May 2014: if a voter states three preferences (the number of votes is proportional to the preferences), both sexes shall be represented in the choices and a third same sex preference shall be invalid.

This legislative intervention represents an affirmative action: it should constitute the direct precedent for a more effective provision regarding the national electoral system and the composition of national governmental bodies. On the contrary, the important steps taken for local bodies, and the choices made for the European Parliament, do not correspond to an engagement by the lawmakers with guaranteeing equal opportunities and access to national representative organs. The (free) choice made by the current Prime Minister to compose his cabinet of an equal number of men and women seems to be of little importance, because it is evident that the relevance of the roles assigned to the women are actually inferior to those roles assigned to their male colleagues.<sup>15</sup>

---

<sup>15</sup> Seven are the women ministers: three among them are 'without portfolio' and two

### III. SEXISM AND LEGAL EDUCATION

In this paragraph we will investigate why and how sexism is found in legal education, starting from criticisms of legal education from the gender perspective. We will study the inadequacies of legal education with respect to gender, from the point of view both of the structural limits of common methodologies and of specific discriminatory attitudes in present teaching activities, curricula and courses. The grounds for all cultural education are definitely sexist, and recent studies have also underlined how the majority of books written for young girls and boys at primary school contain significant gender stereotypes.<sup>16</sup>

Sexism is a term that came into use in the sixties and seventies in the cultural field of American neo-feminism, and was inspired by the term 'racism'. It describes an arbitrary stereotyping of males and females based merely on the sex to which they belong.

Generally, investigations into the phenomenon of sexism focus on features of language, from two points of view: (i) the problem of how language is used to speak about women (the use of language); and (ii) the problem of what the linguistic system makes available to use when referring to women in discourse (by which we mean the morphosyntactic characters). In a wider sense - the sense that directly concerns our topic - linguistic sexism takes into consideration the image of women that emerges from linguistic practice and the increasingly evident contrast between the social achievement of women and the rigidity of a language built by and for men.<sup>17</sup>

#### I. *Which methodological innovations in legal education to go beyond sexism?*

The relationship between sexism and education ought to be considered from the specific perspective of legal education. Over recent years, a wide-ranging investigation has been of interest in the field of education, for two main reasons: the reform of academic curricula has, since the beginning of this century, imposed a new method of teaching law (caused by the shorter

---

are charged with the traditional 'feminine' sectors, such as Education and Health. Only two women lead 'hard fields' (using of course an usual as arguable distinction): Economic Development and Defense. Nine are men, and all Ministers with portfolio. There are no women among the undersecretaries at the Government: four positions and four men.

<sup>16</sup> I Biemmi, *Educazione Sessista. Stereotipi di Genere nei Libri delle Elementari* (Torino: Rosenberg & Sellier 2010)

<sup>17</sup> C Robustelli, 'Lingua e Identità di Genere. Problemi Attuali nell'Italiano', in *Studi Italiani di Linguistica Teorica e Applicata* (2000).

times available for lessons and courses), and new technologies have simplified but also modified teaching methodologies and communication between teachers and students.

In Italy, two teams of scholars have studied these features. One of these is the group led by Orlando Roselli who has published a large number of books regarding legal education.<sup>18</sup> to having passed the exam in Family Law Reading these works, we find some up-to-date thoughts on the education of jurists that can be divided into three sections: (a) the role of the historical perspective in legal education; (b) the indivisibility of the legal sciences; and (c) the alternatives to the empirical approach and the theoretical approach. These three aspects will be summarised, and it will become apparent that the total absence of a gender perspective from these studies corresponds to a strong correlation between them and the need to integrate gender into legal education.

(a) With regards to the role of the historical perspective in legal education, we can start from the statement of Paolo Grossi, who wrote that the real jurist is not a mere technician of law, but is able to collocate the legal phenomenon, in its very nature as a social science, all along its historical evolution, using the past in order to understand the present and the possible future developments.<sup>19</sup>

This teaching is greatly neglected by our legal educational system, where the teaching of 'History of Law' is definitively distinguished from the teaching of substantial law.<sup>20</sup> In the following pages we will underline the extent to which the historical perspective is basic to the 'genderisation' of education, in terms of the necessity of rethink legal history and the role of law in its historical evolution in producing cultural and social norms.

(b) The differences that exist between the various legal disciplines, and, consequently, between the different approaches to teaching them, should not obscure the unitary nature of legal science. All legal teaching should aim for this objective and should sacrifice at least some of the sectorial approach in order to promote the unitary matrix of all the legal fields. It is evident that, in this context, gender mainstreaming could find a clear

---

<sup>18</sup> O Roselli, *Scritti per una Scienza della Formazione Giuridica* (Napoli: Edizioni Scientifiche Italiane 2012).

<sup>19</sup> P Grossi focused on this issue in various works, especially in 'La Formazione del Giurista e l'Esigenza di un Odierno Ripensamento Metodologico'; in V Cerulli Irelli and O Roselli (eds), *La Riforma degli Studi Giuridici* (Edizioni scientifiche Italiane 2005), 31, and P Grossi, *Prima Lezione di Diritto* (Laterza 2003).

<sup>20</sup> This is different from what happens in Germany, where history is an essential part of legal education as a whole (ibid).

realisation because the deepening of gender issues would pass through all the possible legal scenarios and affect the various articulations of laws and rights.

(c) The controversy between the empirical and the theoretical<sup>21</sup> approach is long-standing, and maybe unsolvable. We should emphasise the need to build on an exclusively theoretical legal training (typical of the civil law systems) by integrating this into a practical context of the evaluation of concrete cases, trying to make students understand how legal norms operate within the social system. This point becomes crucial not only with regards to legal education directed at the training of lawyers, attorneys, judges, and notaries, but also when education is directed at training public officers called to work within public administration (both local and state administration, of course).

We will see that these reflections on the careers mentioned above are quite widespread abroad, above all in the Northern American context. The situation is different with regards to administrative careers, although the problems in this field are just as relevant. Indeed, within administrative organisations we very often find violations of gender rights and freedoms deriving from various types of behaviour that can be described as gender bullying, sexual harassment and gender discrimination. Additionally, the limits for women in the taking on top positions are especially serious now.

## 2. *Historical perspective in legal education*

Now we aim at underlining some more specific aspects with regards to the question of the ‘historisation’ of legal studies, and the point of the empirical approach to them.

---

<sup>21</sup> As it was written already in 1987, “Most discussions on legal education do not see the question of what is theoretical and what is practical as a problem. [...] The issue, or them, is how to strike the balance between the theoretical and the practical. Those who favor more practice argue that the balance has been struck too far in favor of theory; those who favor more theory argue that legal education is too professional or practical at the expense of the theory, The point is that all strongly depends from how we choose to define the terms”, see M Spiegel, ‘Theory and Practice in Legal Education: An Essay on Clinical Legal Education’, (1987) 34 UCLA Law Review 578. Some Authors, for instance, criticise the linear connection between practical education and clinics, stating that “Clinical education can be a methodology similar to the case method, or it can be an exploration of theory borrowed from other disciplines similar to legal realism. Clinical education can be considered either theory or practice in the same way that the case method and legal realism can be either. That is, the characterization can be determined more by what features are emphasized and by the perspective of the person answering the question than by the object of the question”, (Spiegel, 594).

From one point of view, scholars have emphasised the need to rethink the dominant narratives of legal history and the role of the law and gender in producing and reflecting cultural and social norms, because gender methodology could overturn some of the current basic assumptions about citizenship, law, the state and nation building.<sup>22</sup>

This methodological use of gender presupposes a consideration of gender as something different from a mere substitute for the biological category of 'woman': in these reconstructions gender becomes a producer of hierarchies, of deep-rooted structures of power. This means that, according to the reflections of some respected authors<sup>23</sup>, gender is certainly one way through which power becomes legitimised.

Thinking about the relationships between the evolution of institutions and systems of power, the protection of fundamental rights and freedoms, and gender issues, we realise that the historical reading of many institutional passages and could benefit from an attention to the gender profile.

A very interesting example, drawn from American legal history<sup>24</sup> regards the well-known Dawes Act, adopted by Congress in 1887, by which Congress authorized the President of the United States to survey American Indian tribal land and divide it into lots for individual Indians. Those who accepted a lot and lived separately from the tribe would be granted United States citizenship. This Act broke up Native American Land and conveyed it to individual families, which were presumed to be headed by men. Cott demonstrates how legislative interventions like this one were related to marriage and were profoundly based on gender. The federal legislators sought to transform immigrant families into acceptable male-headed households, and did this by way of an immigration law that allowed only certain types of marriage. Quoting Cott, 'the creation of the Nation passes just through the enforcement of male headed household'.<sup>25</sup> Nation building and the subordination of women are two sides of the coin that represent the cultural reinforcement of consolidated systems of powers and relationships.

We can also mention the *common law* institute of 'coverture' establishing that upon marriage women's legal rights and obligations were subsumed by those of her husband, in accordance with the particular and diminished status of woman: this was enshrined in common law jurisdictions for

---

<sup>22</sup> F Batlan, 'Engendering Legal History' [2005] *Law & Social Inquiry* 823.

<sup>23</sup> J W Scott, 'Gender: A Useful Category of Historical Analysis', (1986) 91 *The American Historical Review* 1053.

<sup>24</sup> N Cott, *Public Vows: A History of Marriage and the Nation* (Harvard University Press 2000).

<sup>25</sup> *Ibid*, 28.

several centuries and throughout most of the 19th century, creating wives as dependents of men, and affirming men's status and power over women. Another significant example of the role of law in creating and reflecting separate male and female spheres in society is represented by the notorious case of *Bradwell v Illinois*.<sup>26</sup> In this case, the US Supreme Court ruled that the Fourteenth Amendment did not prohibit a state from denying a woman admission to the legal bar. Concurring, Bradley wrote that:

law, as well as nature herself, has always recognised... the respective spheres and destinies of man and woman. Man is, or should be woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.

He added that the 'destiny and nature of woman is to fulfil the noble and benign offices of wife and mother'. At about the same date, the Wisconsin Supreme Court stated that the qualities of womanhood 'are surely not qualifications for forensic strife'.

In ways like this, the law not only treated men and women differently, but also 'naturalised' distinct spheres for them, even by means of the rules of contract, labour and familial relationships.<sup>27</sup> Moreover, the results of the *Bradwell* case not only reflect gender asymmetries but also give important ideas about the discriminatory nature of legal education, where a woman cannot be considered as a possible recipient of knowledge and training because of the intrinsic 'male' nature of law and its practice.

Furthermore, although in both domestic relationships and family law, issues of women and gender are easily seen, scholars some years ago began to find gender in areas of law that are apparently unrelated to gender, such as tort law and railroad accidents.<sup>28</sup> It is really amazing to observe how, in so many cases, women have been 'presumed incompetent, governed by emotion rather than reason, and unable to fully comprehend danger', and because of this kind of consideration women's contributory negligence was excused by courts and juries. Working in some women's favour from the point of view of their criminal liability, this standard, reducing a woman's agency, contributed to crystallising and conveying the stereotype of a woman, and caused her enduring subordination. This mechanism looks

---

<sup>26</sup> 83 US 130 (1873).

<sup>27</sup> D Polan, 'Toward a Theory of Law and Patriarchy,' in D Kairys (ed), *The Politics of Law: a Progressive Critique* (Basic Books 1998).

<sup>28</sup> B Y Welke, *Recasting American Liberty: Gender, Race, Law and the Railroad Revolution 1865-1920* (Cambridge University Press 2001).



somewhat like the present trend of the courts to define certain conduct as culturally based in order to reduce the corresponding criminal liability, but at the same time contributing to the stigmatization of that conduct as being conduct directly linked to a specific ethnic group or minority.<sup>29</sup> The group benefits from the application of the cultural defence (or something similar), but this very application means that the group becomes entangled within the net represented by the values and characteristics ascribed to it by public powers (this is a case of the use of 'state speech' to create categories, minorities and classes).<sup>30</sup>

Even civil law systems give us many examples of the inter-relationships between women, society and institutions, and of the relevance of the historical approach in legal studies.

Looking at the case of Italy, we can recall the process of the (legal) unification of the codes after the Italian (political) unification, when the struggle amongst different forms of government resulted in a total defeat for women. The result was the new code that summed the worst solutions known in the Borbonic Code of the Two Sicilies (1819) and in the Savoy Code of the Realm of Sardinia, whilst there were other possible solutions, much more satisfactory, such as the Austrian Code (1811) that was in force in Lombardy and Veneto.

The new Article 134 of the Code introduced the husband's authorisation for all the acts that woman intended to carry out: women are treated just like incompetents. Married women cannot donate, transfer real estate, mortgage, cede or obtain assets, and so on and so forth, without the husband's authorisation.

We do not focus on the political rights here, this being enough to form a completely separate paper, but only aim at underlining the interest in a study of legal history that uses gender as one of the points of view, maybe even the principal point. Moreover, it is particularly significant that, even after the adoption of the Italian Constitution, equality between men and women has not been completely achieved. Unfortunately the examples are very numerous, but here we focus on one of them, an example that is directly linked to the issue of legal education and to how it affects the actual behaviour of legal practitioners.

---

<sup>29</sup> See the case of the Rom people, described in P Pannia, 'Grammatica di un'esclusione: I Rom sotto processo', (2014) Studi sulla questione criminale, forthcoming

<sup>30</sup> O Lee, 'Classifying Acts: State Speech, Race, and Democracy', (2001) 8(2) Constellation 187; in Italy, we can mention the recent case law concerning Roma people, Cass Pen, decision n. 29734, 04.05.2011; Cass Pen, decision n. 37638, 15.06.2012.

A statute adopted in 1956 (n. 1441), regarding the participation of women in the administration of justice by the Italian First Degree Criminal Courts and Tribunals for minors, tried to answer the continual requests made by women's associations and movements for the entry of women into the judiciary system, to match what Article 51 of the Constitution already provided (this provision has been modified and strengthened by the constitutional reform of 2003). This provision is certainly very weak, and the presumed weakness of women is itself codified insofar as Article 25 allows for a woman to be relieved from public office if she needs to provide for the necessities of her family. It is evident how much a statement like this can contribute to reinforcing the paternalistic vision that aims to protect women from engagements that are too difficult and that means substantially excluding them from socially relevant and important appointments.<sup>31</sup>

In the period between 1951 and 1956, many judicial complaints were presented by women who wanted to demonstrate their willingness to acquire the right to administer justice. The courts evaded and gave no standing to the constitutional principle of equality, expressing positions that hark back to suggestions in the American case law mentioned above: men and women are not equal, by their very nature; some activities seem to be reserved by nature to men, some other activities to women. Public offices include functions that the supreme natural law and experience discern to be more appropriate for one sex or the other.<sup>32</sup>

The closing speech of the General Prosecutor of the Court of Cassation is amazing in this respect: First, he quoted Ulpiano '*Foeminae ab omnibus officiis civilis remotae sunt, et ideo nec iudices esse possunt nec magistratum gerere nec potulare*'; then he ignored the Constitution, claiming that constitutional norms did not give useful support to the plaintiff, because they were general statements that evidently referred to parliamentary statutes directed at the regulation of specific institutes; and finally, he confessed that a woman has her most desirable mission above all within the family and that in motherhood she sparkles incomparably, but anyway, if she longs to become a judge, her request ought to be received by the legislator, and not by the courts.

This last statement is an example of how the question of the overblown distinction in the Italian Constitution between 'compulsory norms' and

<sup>31</sup> A M Galoppini, *Il lungo viaggio verso la parità* (Zanichelli 1992).

<sup>32</sup> Court of Appeal of Rome, 29.03.1952, in *Foro it*, 1952, II, 84 ff, confirmed by the Court of Cassation.

‘programmatic norms’ (which were, of course, thought to be the most progressive) can be studied using the gender perspective as an impressive catalyst to demonstrate the political intention implicitly to abrogate innovative constitutional provisions.

3. *Empirical approach v theoretical approach: Abstract and concrete ideas about including women in legal education*

The gender perspective on legal education has been a central topic in the American legal literature for several years. In its early stages the topic was monopolised by feminists, who most often argued for equal professional opportunities on the grounds that men and women are the same: women should have access to legal education because they have the same capabilities as men.<sup>33</sup>

Over the last two decades the concept of sameness has been replaced by the aim of exploring and empowering difference, moving towards the evaluation of gender skills and concerns that are generally absent from legal education programmes, and leaving in the background the issue of women’s presence in law schools and law departments (which, anyway, has not yet been much investigated). Feminist critiques proceed on the two levels of inadequacies – those that directly concern gender (first of all, the indifference to gender issues in standard courses and texts), and those that raise basic doubts and challenges to the general organisation of legal education.

From the first point of view, many scholars within feminist literature argue that the educational *milieu* is a microcosm that reflects, reinforces, and reproduces asymmetrical gender relations.<sup>34</sup> In particular, it has been underlined how the law school curriculum continues to marginalise or even to withhold issues of concern and interest to women, which are absent from legal studies in a very significant way).<sup>35</sup> It would be simple to transfer American critiques that directly concern gender to the Italian educational context, with much more relevance given to the under-representation of women in positions of greatest academic reward, security and influence<sup>36</sup>

---

<sup>33</sup> D L Rhode, ‘Missing Questions: Feminist Perspectives on Legal Education’ (1992-1993) 45 Stanford Law Review 1547.

<sup>34</sup> L Amede Obiora ‘Neither Here nor There: of the Female in American Legal Education’ (1996) 21 Law and Social Inquiry 355.

<sup>35</sup> N Erickson, ‘Sex Bias in Law Course: Some Common Issues’, (1988) 38 Journal of Legal Education 101; and N Erickson ‘Legal Education: The Last Academic Bastion of Sex-Bias?’, (1988) 10 Nova Law Review 457.

<sup>36</sup> We think here, for instance, of the research into women’s presence in the highest posts in universities, led by R Frattini and P Rossi, *Report on Women at the Italian University*, <<http://www.df.unipi.it/~rossi/RossiFrattini.pdf>> accessed 05.12.2014.

and to the lack of interest in issues of gender in standard courses and texts; and with less relevance to the existence of sexually harassing and demeaning conduct and the devaluation of women's classroom participation (but only because of the reasons that we will underline below concerning the general structure of legal education, where participation in the classroom receives a very small endorsement particularly in basic courses).

From the second point of view, a milestone is represented by Gilligan's distinction between an ethics of rights and an ethics of care.<sup>37</sup> According to Gilligan's perspective, the ethics of care is very distant from legal studies, and this fact strongly hinges on the abstract attitude of legal education, which rarely translates general principles and rules into concrete cases and life situations to be faced and solved.

Whether the distinction between an ethics of care and an ethics of rights is useful for women is another sensitive issue. Some scholars have claimed that this dichotomy is not authentic and is at the same time derived from and reinforcing the subordinate status of women<sup>38</sup>, particularly because it neglects considerations of race and ethnicity, culture, class, consciousness and all the features that are likely to mediate the 'voice' by which individuals express themselves.

Other scholars have found that the shared experience of institutional oppression and/or racial stratification that informs the construction of self and the formation of identity amongst men and women in specific communities produces a convergence in the vocabulary of rights, morality, and social good.<sup>39</sup> Some suggestions in the literature underline the fact that what relational feminists identify as characteristically feminine (versus masculine) personalities, ontologies, epistemologies, and worldviews bears a remarkable resemblance to what other cultures categorise as non-Western (versus Western) personalities and worldviews.<sup>40</sup>

---

<sup>37</sup> C Gilligan, *In a different voice: Psychological Theory and Women's Development* (Harvard University Press 1982), see also MF Belenky, B McVicker Clinchy, N Rule Goldberger, and J Mattuck Tarule., *Women's Ways of Knowing* (Basic Books 1986); S Ruddick *Maternal Thinking: Toward a Politics of Peace* (Beacon Press 1989); and N Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (1984).

<sup>38</sup> CA MacKinnon, *Feminism Unmodified. Discourses on life and law* (Harvard College 1987).

<sup>39</sup> CB Stack, 'Different Voices, Different Visions: Gender, Culture and Moral Reasoning' in M Zinn, B Dill (eds), *Women of Color in U.S. Society* (Temple University Press 1994).

<sup>40</sup> S Harding, 'The Instability of the Analytical Categories of Feminist Theory' in MR Malson, JF O'Barr, S Westphal-Wihl and M Wyer (eds), *Feminist Theory in Practice and Process* (University of Chicago Press 1991).

It is evident that theory and practice also affect the methodology of the consideration of women in legal education, and the corresponding instruments. It is just the comparison between theory and practice that shows that ‘what most feminists want from legal education looks much like what other informed critics have wanted’<sup>41</sup>, and that:

obvious examples include the call by realists and clinicians for law schools that focus more on practical lawyering skills; the demands by humanists and critical theorists for less hierarchical and less authoritarian teaching techniques; the argument of law and society leaders for more contextual analysis and interdisciplinary teaching materials.<sup>42</sup>

The comparison between theory and practice confirms that the traditional law school format assumes that learning is a rational, largely unidirectional process; that professors try to transmit knowledge about what law is and does through reasoned discourse; and that at the end students attempt to replay this account in their final exams.<sup>43</sup> All these features seem to allow an appreciation of the theoretical framework built by Gilligan.

We do not know whether only women reason in a ‘different voice’, are less likely to privilege abstract rights over concrete relationships, and are more attentive to values of care, connection, and context.<sup>44</sup> In any case, this ‘different voice’ certainly exists, and could bring a distinctive perspective to the resolution of human problems, one that is silenced by the ‘competitive, combative, and a contextual structure of legal education’.<sup>45</sup> On this point we need to distinguish between the common law context and the civil law context. In the US a substantial problem is that the educational structure at most law schools strengthens students’ competitive capacity to the exclusion of other attributes, particularly because of the dynamics that characterise the relationships within the classrooms. These considerations are not applicable to the Italian legal educational system, where the less interactive method of teaching makes it impossible to favour rational and competitive men over empathetic and prismatic women.

---

<sup>41</sup> DL Rhode, ‘Missing Questions: Feminist Perspectives on Legal Education’ (1992-1993) 45 Stanford Law Review 1548.

<sup>42</sup> Ibid, 1552.

<sup>43</sup> SH Williams, ‘Legal Education, Feminist Epistemology, and the Socratic Method’, (1993) 45 Stanford Law Review 1571.

<sup>44</sup> C Gilligan, *In a Different Voice: Psychological Theory and Women’s Development*, *op cit.*

<sup>45</sup> DL Rhode, *op cit.*

However, just because there is a need for greater concreteness in legal education, which is hardly present in the Italian system, there ought to be a common commitment to more co-operative and empathetic training, and this would affect academic structures and content in various ways. In terms of academic structure, a special emphasis would be given to legal clinics, simulations and other settings for interactive, experimental learning. Collaborative projects and the development of interpersonal skills would occupy a more central role in standard courses and evaluation processes. In terms of content (which is what we are going to investigate in the next section) dimensions such as gender, race, class, ethnicity, and sexual orientation would become more central categories in the analysis of legal institutions, the protection of rights and the organization of power.

Legal education would not simply need to acknowledge the differences, but would need to have an exploration of the processes that give rise to the social meaning and consequences of those differences.<sup>46</sup>

In Italy, another aspect to be underlined regards the management of the 'Scuola per la magistratura' (a new school for the judiciary), which was recently created by a governmental decree, n 26/2006 and effectively began in 2012. Not only is the number of women on the executive committee definitely small (two out of twelve), but also, from the point of view of content, there are very few lessons on gender issues or issues even partially linked to gender. Analysing the curriculum in 2013, the continuing education only includes a lesson on criminal protection against stalking and bullying (and, furthermore, this is supplied by e-learning). Considering that basic legal education is not 'genderised', the absence of gender issues and a gender perspective in specialised training is much graver.

This reflection on content is particularly significant, and we will take it into consideration in the next section. For now, it is important to remind ourselves that the very approach to the law should change, considering that (for historical reasons) the law presupposes a mythical creature: a coherent, rational legal subject, capable of freely choosing and consenting to a wide range of options and capable, under normal circumstances, of being considered totally responsible for its actions.<sup>47</sup> Indeed, in Europe as in the US, the legal subject is modelled on a white, heterosexual, middle to upper class male with no disability. He is the male bourgeois landowner whom we

---

<sup>46</sup>B Ong Hing, 'Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses' (1992-1993) 45 *Stanford Law Review* 1807.

<sup>47</sup>MV Rodriguez, 'Pedagogy in Law: Ideas for Integrating Gender Into Legal Education' [1998-1999] *American University Journal of Gender Social Policy and the Law* 267

find in the Napoleonic Civil Code. The social contract itself is modelled around this kind of subject.<sup>48</sup>

#### 4. *Proposals*

First of all, if it is not already evident, why should a feminist legal curriculum or gender courses, be introduced?

In Italy, until now, the terminological issue has found no place, because there is no experience that could be ascribed to the 'genderisation' of legal education that we have been talking about. Our investigation reveals that the only current course on 'Law and Gender' is an optional course at the University of Trento that is taught by professors of private comparative law. Of course, we do not consider as relevant to our investigation all the (existing) courses on gender (from an anthropological, historical, philosophical and sociological perspective) that are included in programmes that, even when they can be followed in law departments, are not directed at training students to become attorneys, prosecutors, judges and notaries. We mean that the field of our analysis is specifically the role of gender in legal curricula – curricula that lead to the participation in public examinations from which the professionals mentioned above are selected.

An English expert scholar has underlined three basic reasons that make gender and feminist studies necessary in the field of legal studies.<sup>49</sup> Firstly, there is the high number of women amongst law students and practitioners. In the United Kingdom (where the paper was written) more than half of all law students and more than half of all entrants to the legal profession are women. The data is quite similar in Italy, and, in any case, more than half the population of the world are women. This quantitative element ought to be reflected in legal curricula, starting with the breaking of the traditional distinction between compulsory and optional subjects that marginalises matters that are central to the growth of gender consciousness: family law (always optional), and women's legal history (which is definitely not taught, even within the context of general legal history, where an inclusion of the gender perspective would be preferable).

---

<sup>48</sup> M. Nussbaum, *Frontiers of Justice*, (Belknap Pr 2007). Critiques towards contractualism from the point of view of feminism are clearly expressed in C. Pateman, *Sexual Contract* (Stanford University Press 1988), where she underlines that 'In contract theory universal freedom is always a hypothesis, a story, a political fiction. Contract always generates political right in the forms of domination and subordination', above all against women.

<sup>49</sup> R. Auchmuty, 'Agenda for a Feminist Legal Curriculum in Legal Studies', (2003) 3 *Legal Studies* 23.

The effect of this absence is strongly seen in the lack of a female perspective in many judgments in which such a perspective would be significant for the resolution of the concrete case. The female perspective seems to be very hard to achieve, because there is a complete overlap between the perspective of men and the perspective of the law.

The second reason is the relevance given in our legal systems to the equality principle:

It is in the law school that the values, ethics and principles of the law and the legal profession are first introduced, developed and inculcated. And, it is the law students of today who will become the lawyers, academics and judges of tomorrow and who will, therefore, exert a considerable influence on both the role and status of women lawyers, and on the ways in which the law itself interacts with women's lives.<sup>50</sup>

This claim perfectly illustrates the relationship between gender, equality, law and justice.

The third reason concerns the fact that while discrimination varies between countries, peoples, geographic places and cultures, 'evidence of the continued global oppression of women remains overwhelming'.<sup>51</sup> This evidence should be challenged by the law, which we believe is the social weapon called on to eradicate women's subordination and to give full implementation to the equality principle.

After we have considered all these points, at the end of this section we have to focus on possible proposals. The question is how gender can be integrated into legal education. What strategies can render legal education more able to develop public awareness of the role of gender in social relationships and dynamics of power, and to produce legal professionals who would make gender relevant in the recognition and protection of rights?

Feminist legal theorists propose three methods.<sup>52</sup> The first method is 'the woman's question': this means that students should be called to identify the gender implications of rules and practices that appear to be neutral and

---

<sup>50</sup>C McGlynn *The Woman Lawyer: Making the Difference* (Butterworths 1998), 27.

<sup>51</sup>J Conaghan 'Reassessing the Feminist Theoretical Project in Law' (2000) 27 *Journal of Legal Studies* 354.

<sup>52</sup>K Barlett, 'Feminist Legal Methods', in K Barlett and R Kennedy (eds) *Feminist Legal Theory: Readings in Law and Gender* (Westview Press 1991).



objective. The second is practical feminist reasoning: this reasoning consists in posing open-ended questions about concrete issues in order to determine both the possible solution and the problem that is actually found in the situation under consideration. In this way students can identify different points of view and perspectives that may be far from the systems of values prevailing in society. The third method is the raising of consciousness, which can be interpreted as an interactive and cooperative process in which women share and compare their personal experiences.<sup>53</sup>

All these 'gender factors', useful for building a different methodology, are reinforced by giving a special role to legal clinics<sup>54</sup>, where students are asked to offer pro bono assistance in cases with a high public impact, such as those that expose unconstitutional practices or the systematic subordination of and discrimination against women. It is important that students work on cases that demonstrate the role of the law in changing society, beliefs and conventional wisdom.

Recently, the roadmap for integration has been presented in four steps: the inclusion in legal departments, faculties and law schools (to which, in Italy, we could certainly add the 'Scuola di magistratura' mentioned above) of instruments like a gender audit, self-assessment exercises or a gender needs assessment; the sensitisation of gender terminology; the inclusion of exercises for confronting stereotypes, through the students writing a story on a gender value conflict (real or hypothetical) and then analysing and

---

<sup>53</sup>K Barlett, *ibid.*

<sup>54</sup>In Italy only three legal clinics have been launched in the last years. The first optional course in Legal Clinic started at the Faculty of Law of the University of Brescia, during the academic year 2009/2010, as an experiment. It was promoted by a group of legal scholars engaged in innovative teaching methodologies within the field of legal education and it was led in collaboration with very important American Legal Clinics such as the ones operating at the Yale Law School, the New York University Law School, the CUNY Law School and the University of Connecticut Law School. The other two legal clinics operate at the University of Rome Tre and the University of Turin.

At the University of Rome Tre was opened a public legal desk specialised in immigration and human rights, where people offer concrete cases to be analysed and treated by young legal students who render legal assistance to disadvantaged persons. Small groups of students, supervised by law professors and lawyers, follow the cases and participate to the judicial hearings, although they cannot legally represent their assisted. Generally, the cases are recommended by associations, labor unions and religious charity organisations.

Even the University of Turin opened in 2013/2014 a legal clinic in 'Person and family', where students could deepen their knowledge of family law and protection for 'weak adults' through this new methodological approach. The Law Department has made an active participation in the course has been made equal to having passed the exam in family law.

discussing the stories; and the integration of gender and anti-discrimination courses and modules into the curricula.<sup>55</sup>

The role of the practical approach becomes much more evident when we think about some of the recent Italian provisions that we considered in the previous paragraphs, such as those concerning ‘femminicidio’ or political representation and quotas.

Our first main point is that if there is the possibility for legal students to have direct experience of concrete cases concerning gender violence, and to employ theoretical instruments in order to guarantee the wider protection of women's fundamental rights and freedom, then this could produce legal practitioners in the future who have a gender consciousness. This feature is crucial, above all, for some professionals, such as police officers, and in the exercise of general public safety functions. Many studies have underlined how the intrinsic elbow room that characterises law enforcement risks working to the detriment of women and minorities. As an example, domestic violence is still considered by police officers as an ‘unproductive, messy and not real’ field of work.<sup>56</sup> Police officers, although they often have to intervene in this kind of crime, also tend to manage them outside the roadmaps and instruments provided by the criminal procedure code, even when violence is evident. Another problematic feature concerns the treatment of women who have suffered rape: many sociological and criminological studies have underlined an insensitive and sometimes hostile attitude by some police officers. Clearly, the basic level of the services of law and order is performed by people who have not had legal training, and very often they do not have a Master's degree in law, but those at the higher level of command and control have received an academic education, usually in law. These managers should therefore have the responsibility of organising training programmes for their subordinates that include gender topics, and they need to be well aware of the issue in order to be proactive and undertake the necessary measures.

Our second point is that the habit of considering the participation of women in politics, and more generally in society, in work and in the ‘free marketplace of ideas’, desires and ambitions, as essential and undeniable to be needs to be built through a long training process, where a fundamental role is played by legal education. An education based firmly on affirmative

---

<sup>55</sup> OL Odigie-Emmanuel, ‘Gender and Racial Issues in Legal Education: Law as Mechanism for Social Control’ (2013) Global Alliance for Justice Education conference, Jindal Global Law School, < [www.gaje.org/conferences/7th-worldwide-conference/](http://www.gaje.org/conferences/7th-worldwide-conference/) > accessed 10.12.2014.

<sup>56</sup> R Reiner, *The Politics of the Police* (Oxford 2010), 172

action and substantial equality would improve the capacity of students (and future legal practitioners) to recognise the need for public interventions to promote and guarantee a female presence in political institutions and governments and in all places where crucial decisions are taken. And it would prevent, for the future, legal scholars from making (sometimes) unintentional references to the principle of equality in such a way that limits women's rights while formally pretending to guarantee equal treatment for men and women, starting from the misleading presupposition that parity between men and women has been achieved.

Of course, the educational approach chosen in this paper also reminds us of the importance of a continuing legal education that connects the boundaries of law schools and departments to the judicial environment which, for instance, is recognised by legal doctrine as a fundamental agent of change.<sup>57</sup>

We cannot spend time on the first point, as that would require a specific investigation. Instead, we dedicate the final reflections of this third section to the legal curriculum and how it might be modified in order to pursue the goals set out in this paper.

The appropriate consideration from which we want to start seems very obvious: the effect of designating some subjects as compulsory and others as merely optional is naturally to depreciate the latter subjects. A worse case is, of course, the absence of a subject from the curriculum, which is what happens in the case of Gender and Law. Anyway, looking at the Italian context, the Master's degree in law needs a broadly-based compulsory curriculum that includes subjects like family law (which is currently optional), women's legal history, and courses on gender, race and sexuality perspectives; this would encourage a study of law that started from the person and not from the legal category.<sup>58</sup> This approach to radical topics and perspectives would promote a different way of thinking in students (especially in the excellent students who are now chiefly relegated to a passive and often mnemonic learning of legal categories, notions and case law): a critical, empathetic reasoning that will allow students to acquire methodological skills that they will be able to apply across their studies and in future research and legal activities.

---

<sup>57</sup> L Armytage, 'Judicial Education on Equality' (1995) 58 (2) *Modern Law Review* 160 underlines how the US model of judicial education focuses on the role of attitudes and values in judicial decision making, supported by examples relating to a range of disability types.

<sup>58</sup> See the considerations of R Auchmuty, 'Agenda for a Feminist Legal Curriculum in Legal Studies', (2003) 3 *Legal Studies* 23.

Transforming the curriculum also means another basic thing: adding a few subjects that are considered to be particularly close to women because of their content and their specific topics would not be sufficient to change the general structure of legal education, and the way the compulsory subjects are delivered.

Every subject ought to be delivered through a binary approach: after students have learned the positive law and statutes, legal doctrine and case law, in the way that is particular to the various disciplines, they ought to be asked to consider the law from other standpoints, learning to do so from their professors, who should show them how cultural diversity and inclusiveness can affect the reading of law, of rules, and of decisions.<sup>59</sup>

#### **IV. CONCLUDING REMARKS**

In this paper we have described the necessity of a deep reflection on the inclusion of gender issues, and above all gender perspective, in legal education. We have described criticalities and already existing experiences, and proposed some possible methodologies, paying attention to the relevant differences between civil law and common law systems of legal professions and training.

Indeed, the predominant indifference towards considering gender as a legal matter, deserving time and space in legal programmes, seems basically to need three interventions: (1) a cross teaching of gender topics in (existing) general courses; (2) the inclusion of gender topics within (existing) general courses on fundamental rights; and (3) specific courses on law and gender.

The goal of social inclusion is particularly important within the perspective of this work, because it becomes much more relevant during the crises, when excluding policies prevail over the protection of social rights and over the achievement of equal opportunities. Studying gender equality and equal opportunities within a context of economic and social crisis serves to debunk the false perception that gender equality may be an important aim to achieve, but not in times of crisis when societies and governments should concentrate on creating economic growth.

We believe, and have to demonstrate, that education has a strong role in influencing women's choices for their future learning, working and building a social and professional status. Above all, we want to underline the role

---

<sup>59</sup>NKS Banks, 'Pedagogy and Ideology: Teaching Law as if it Really Matters' (1999) 19 *Legal Studies* 450.

that legal education in particular assumes. It is a double role: from one side legal education represents the background and the training for the future lawyers, judges, public employees asked to give implementation and enforcement to fundamental rights and liberties, putting into effect gender equality and the recognition of subjectivities. Going even further, legal education constitutes an important channel of awareness even for lawmakers, that mainly come from schools of law: the endurance of gender biases and the limits in the legislative promotion of equal opportunities is telling from the lack of the gender perspective in legal curricula.

## **BOOK REVIEW:**

### **DIA ANAGNOSTOU (ED) RIGHTS AND COURTS IN PURSUIT OF SOCIAL CHANGE: LEGAL MOBILISATION IN THE MULTI-LEVEL EUROPEAN SYSTEM**

(Oñati International Series in Law and Society:  
Hart Publishing 2014) ISBN: 978-1-84946-390-4, 250 pp, 50 GBP.

Marion Guerrero \*

This 220 page volume collects nine essays on a strikingly under-researched topic: strategic legal activism in Europe. Editor and author Dia Anagnostou starts the book with a fetching and ambitious introduction, making a compelling case for the necessity of examining legal mobilisation as a phenomenon that cuts through various disciplines as well as different political and legal arenas. She takes a decidedly actor-centric stance, in particular zooming in on agents of social change who advance their goals by way of litigation. A great number of pages are devoted to carving out the numerous questions that are touched upon in the subsequent essays. Due to the complexity of the matter, the reader needs to focus to stay on track. However, Anagnostou's enthralling style and her ability to produce precise definitions make it easy to pay attention.

The articles that follow take on different aspects of legal mobilisation. In a refreshingly unorthodox manner, most of them focus on activist opportunities or existing legal activism, instead of analysing law and court decisions in a 'traditional' top-down way (with the exception of Bruno de Witte's essay on language rights). Xavier Arzoz, for example, examines the struggle for the recognition of the Basque language in Navarre, describing the role of local activist groups and domestic courts, and the additional opportunities provided by European legal materials (including Council of Europe instruments). Evangelina Psychogiopoulou traces the development of Greek migrant and asylum litigation before the European courts, explaining how arbitrary litigation developed, over time, into strategic goal-oriented legal activism. Intriguingly, she depicts the shift of activist focus from targeting the European Court of Human Rights (ECtHR) to litigating before the Court of Justice of the European Union (CJEU), illustrating the multifaceted interplay of both courts and the respective adaptations of activist strategies. Going one step further, Dia Anagnostou writes about the influence which activist lawyers and organisations had on the development of the case law of the ECtHR in the context of

---

\* PhD Candidate, European University Institute, Florence (Italy).

safeguarding human rights in armed conflicts. After the Court was first reluctant to take a decisive stance on human rights violations during the Northern Ireland crisis in the 1970s and 80s, the cases brought forward by dedicated lawyers nonetheless set the stage for Kurdish activists who tried evoked human rights protection under the European Convention of Human Rights (ECHR) a decade later. Anagnostou mentions the exchange of experience and knowledge between lawyers involved in Northern Irish and Kurdish cases, and explains how this cooperation consequently shaped legal strategies. The emerging case law was then re-applied in Northern Ireland in the 1990s, as well as in the context of the conflict in Chechnya. From Anagnostou's essay, it becomes clear that litigants have considerable leverage in influencing the Court's interpretation of certain rights. After all, litigants bring issues to the attention of the Court; they are the ones who frame the question to be decided in their applications. Evidence which litigants bring forward not only publicises human rights violations, but also serves to inform and possibly educate the judges on the intricacies of particular conflict situations.

Along similar lines, Loveday Hodson elaborates on the rise of LGBT rights activism before the ECtHR. Impressively, she points out that activist groups were involved in the great majority of relevant cases, stating that litigation has been, and is, a political strategy for LGBT movements. However, the use of legal strategies is not without costs; there are certain risks attached for a movement wishing to engage the Court in its struggle for equality. For instance, translating a political issue into legal terms will necessarily reduce its complexity and possibly de-radicalise its impetus. Furthermore, Hodson warns, focussing too much on litigation might distance an organisation from its grass-root basis. She also addresses the scarce democratic legitimacy of NGOs who *de facto* change the political landscape by strategic litigation; after all, an interest group organisation lacks public accountability. However, she concludes that these concerns might be negligible, since NGOs do not nearly exert the same kind of power as other institutions in the political game. As long as litigation is but one route by which NGOs choose to advance their agendas, chances are they are on the safe side, democratically speaking.

Two essays stand out in the volume: the first is the article of Liora Israël on the rise of legal activism to support migrant workers in France, and the second is the 'Tool-Box for Legal and Political Mobilisation' by Mark Dawson, Elise Muir and Monica Claes.

The former is noteworthy because it is recognisably written by a social scientist with ample legal knowledge, which adds a distinctive and important voice to the book. Israël convincingly argues that legal

mobilisation cannot be understood without taking into consideration the domestic socio-political environment. Not only is this chapter a highly entertaining read which paints the atmosphere of post-1968 France in living colours; Israël concentrates on actors of social change in a remarkable way, constructing a compelling narrative of the motivations and consciousness of legal professionals which led to the creation of community-minded 'law shops' in the 1970s. These leftist cooperatives had the intention of providing legal aid, and, what is more, tools of self-empowerment to the population, fundamentally questioning the hierarchical lawyer-client relationship. Without giving in to social romanticism, Israël problematises the paradox of this format: The people seeking the help of the law shops were often looking for straight-forward legal advice; instead, they encountered highly political collectives with lofty ideals of do-it-yourself empowerment, which sometimes turned out to be overwhelming for clients. Moreover, the whole concept of representing groups which the members of the law shops themselves did not belong to – namely, immigrant workers – might be dubbed as intrinsically elitist. Nonetheless, the law shops were instrumental in promoting a change of perspective in the political left regarding legal strategies as instruments of social change, especially in light of the traditional Marxist view of the law as a bourgeois tool for perpetuating existing power structures. Initiatives like the GISTI (Information and Support Group for Immigrant Workers) profited from this debate, carrying on the idea that law could indeed be instrumentalised for progressive reform. What is remarkable about Israël's essay is that it seems to answer a question which is only hinted at in the other essays: How did it happen that someone came up with the idea of using law and litigation as political strategies?

Whereas Israël answers the 'Why?' of legal mobilisation, Dawson, Muir and Claes look at the 'How'. Since the ECtHR has been covered (although maybe not extensively) in terms of opportunities for legal activism, the trio take on the procedural conditions of the CJEU in order to determine whether this court would be a promising arena for social change projects in the area of non-discrimination. The language and style of the article are clear and structured: It is segmented according to possible litigants (individuals, institutions and collective organisations), and possible opponents (EU institutions, states and private parties). Although technical at times, the essay delivers its promise: An in-depth analysis of the different procedural mechanisms in light of their suitability for promoting rights. Rights, to be clear, not necessarily as a means of achieving justice for a single litigant, but as a gateway for wider political reform.

After finishing the book, the reader might experience a short episode of



confusion. The topics covered are so diverse and the perspectives taken so numerous that the thread running through the volume can be lost momentarily. Anagnostou admirably attempts to tie everything together in the concluding chapter. However, the book seems to make most sense if seen as a discussion opener – as an initial exploration into the manifold layers of legal activism in Europe. This is exactly what Anagnostou promises in her introduction, and this is what the book achieves. Strategic litigation in Europe – especially as a subject of legal literature, and particularly from an activist perspective – is urgently in need of thorough academic investigation. European legal practice appears to be way ahead of scholarship, and this becomes crystal clear when reading this book, especially when contrasted with the breadth of Anglo-American law literature in this respect. Anagnostou herself points to this fact and calls for further academic exploration. Indeed, one of the most intriguing features of this volume is the sheer range of its contributions, which underlines Anagnostou's initial claim – there seems to be an obvious need for comprehensive systematisation of the discussed topics, especially from a legal standpoint. This cannot possibly be achieved in 220 pages; as such, the book reads like an open invitation to get rid of antiquated notions of top-down legal analysis and instead recognise the political and activist potential of law.

## BOOK REVIEW:

**WOLF-GEORG RINGE AND PETER M HUBER (EDS)  
LEGAL CHALLENGES IN THE GLOBAL FINANCIAL CRISIS:  
BAIL-OUTS, THE EURO AND REGULATION**

(Oxford and Portland, Oregon: Hart Publishing 2014)  
ISBN 9781849464390, 288 pp, 60 GBP

Mihalis Dekastros\*

The global financial crisis that commenced in 2008 is definitely the most important economic and societal development of our times. Abundant literature regarding the global financial crisis as well as the several shapes and forms it has since evolved to has been published in an effort to understand what went wrong.<sup>1</sup> This is also the context into which '*Legal Challenges in the Global Financial Crisis*' fits.

This edited volume is, above all, a very welcome addition to the limited European legal literature on the global financial crisis.<sup>2</sup> Admittedly, European legal scholars (unlike their American counterparts) have been slower to react to the avalanche of legal change that resulted from the financial crisis – especially its acute European phase after 2010. This is largely understandable since the new legal architecture that emerged in the EU as a response to the European Sovereign Debt crisis was not part of a plan to complete the Economic and Monetary Union (EMU) but came as a collection of piecemeal legal arrangements attempting to respond to rapidly developing financial and political events.<sup>3</sup> Furthermore, this is the first comprehensive effort to approach the crisis from a cross-disciplinary legal perspective. The literature concerning the

---

\* Ph.D. Researcher (European University Institute).

<sup>1</sup> For a general overview of the effects of the global crisis on issues of monetary and financial law see Mario Giovanoli and Diego Devos (eds), *International Monetary and Financial Law: the Global Crisis* (Oxford University Press 2010).

<sup>2</sup> See eg Wyn Grant and Graham K Wilson (eds), *The Consequences of the Global Financial Crisis: the Rhetoric of Reform and Regulation* (Oxford University Press 2014); Kaarlo Heikki Tuori, *The European Financial Crisis: Constitutional Aspects* (EUI Working Papers LAW No 2012/28 2012); Stefan Grundmann and Yesim M Atamer, 'Financial Services, Financial Crisis and General European Contract Law' (2012) 31 *Yearbook of European Law* 524.

<sup>3</sup> For an extremely detailed overview of the legal instruments that were created as a result of the European Financial Crisis as well as their impact on the legal structures of the Member States of the EU see the Country Reports from the European University Institute Department of Law, 'Constitutional Change through Euro Crisis Law'. <<http://eurocrisislaw.eui.eu>> accessed 12.12.2014.

financial crisis remains fragmented to different disciplines and, in the case of legal studies, to different specialisations within the discipline itself. Against this background, as the editors succinctly point out in the introduction, the different national legal background as well as the different law specialisations of practitioners and academics tend to limit if not obscure our understanding of the crisis. This work ostensibly aspires to remove the 'artificial limitations' (p 1) that each of these legal sub-disciplines place on our understanding of the financial crisis as 'an holistic affair' (p 1). In this context, the editors make a laudable attempt to bring together scholars and practitioners from different backgrounds, institutions and countries in order to provide a more coherent narrative of the law's response to the global financial crisis. In essence, however, they bring together lawyers from the UK and German legal traditions and focus on issues of constitutional law, financial markets regulation and European law.

The edited volume features six main contributions focusing on three different legal fields affected by the crisis: constitutional law, EU institutional and State aid law, and financial markets regulation. Further, a response essay from a discussant accompanies each of the six main contributions.

The first part of the book focuses on issues of EU and domestic constitutional law. In the second chapter, Peter Huber provides the reader with an extensive overview of the German Constitutional Court decisions relating to the Eurozone crisis and the bailout mechanisms that were set up as a response to it. He argues that these decisions, and the limitations they place upon further European integration, largely reflect a particularly German conceptualisation of democracy that, on the one hand, places politics beneath the law but, on the other, emphasises that 'the willingness to be subject to a majority vote involve[s] historical, cultural, economic and political preconditions that require a certain degree of social cohesion and matching interests' (p 26). This prompts Pavlos Eleftheriadis to argue that this particular conceptualisation of democracy by the German Constitutional Court corresponds to an idea of democracy as collective self-government, which would not be suitable to operate at the European level. Thus, he argues that an idea of democracy as a 'set of egalitarian institutions' with increased accountability would be more suitable to a European polity (chapter 3). In the fourth chapter, Gregor Kirchof engages in an historical overview of public debt in Germany and provides us the context of how the concept of 'debt brake', which later formed the basis of the European 'Fiscal Compact', came to be created in Germany. In the last chapter of this first part of the book, John McEldowney offers a British perspective to this particularly German concept, which comprises a 'less

rigid alternative that is capable of adapting to changing economic and fiscal conditions' (p 63). He appears sceptical and raises concerns about the appointment and competence of judges in relation to deciding upon economic and political issues.

Part II shifts the focus to issues of 'pure' EU Law. Paul Yowell in chapter 5 draws attention to the role of the ECB and its mandate under EU law. He produces a very thorough and insightful analysis of the law governing its operation and makes a convincing argument that the ECB's legal mandate 'precludes it from acting as a lender of last resort to governments' (p 82). In addition to that, he decidedly claims that EU law is not to be cast aside even in response to extreme exigencies according to what economists 'dictate' as that would replace 'the rule of law with the rule of experts' (p 119). This point is further elucidated by Christopher Ohler who points out that the EU system of governance is not flexible enough to address the problems brought about by the crisis. Particularly insightful contributions to the collection are the ones, which immediately follow, and in which the authors focus on issues of State aid. Conor Quigley assesses the operation of the EU State aid rules with respect to recapitalising European banks. Interestingly, he observes, the Commission adopted a very flexible approach to the rules that resulted in a piece-meal and rather nation-centric plan of action. He admits, however, that there was no other suitable legal framework the Commission could utilise at the time in order to 'prevent national action from resulting in protectionist subsidies' (p 148) and, as a consequence, it is still early to assess its success. In chapter 9, Thomas Ackermann, further commenting on State aid rules, notes that the aforementioned 'bending' of these rules is only of a temporary character but it has achieved the inter-institutional strengthening of the Commission's position.

Part III of the book highlights issues arising out of the legal developments in the field of financial markets regulation. In chapter 10, Alexander Hellgardt offers a very insightful comparative account of public, private, criminal and tax law as instruments of financial regulation and explains which instrument would be most optimal in achieving different regulatory purposes. John Vella subsequently sets apart the use of corrective taxation and further elaborates on its role as an instrument of financial regulation, a development that only came about as a result of the recent crisis (chapter 11). Finally, Gustav Sjöberg, presents a detailed analysis of 'banking resolution' mechanisms as well as the different needs and objectives they ought to serve (chapter 12). Indeed, he attempts to conceptualise the resolution of banks as a 'governance tool' (p 187) that seeks to minimise moral hazard (by imposing losses on shareholders and creditors) and strengthen legal certainty. He, nevertheless, recognises that this approach

would only be effective in containing non-systemic bank crises and that authorities need to enjoy a significant degree of flexibility when dealing with systemic events. This prompts Christos Hadjiemmanuil to reply and voice his scepticism about the use of resolution mechanisms as governance tools (chapter 13). He criticises banking resolution mechanisms, like the ones described by Sjöberg, as either not prescribing ‘the eventual outcomes in a relative determinate way’ or as not being ‘credible’ (p 231).

The final two chapters of the edited volume (chapters 15 and 16) aspire, perhaps counter-intuitively, to demonstrate that legal instruments themselves are very often of limited help or even significance when dealing with important or sensitive political issues. Rudolf Streinz expresses his disbelief that the ‘Fiscal Treaty’<sup>4</sup> will be effective in enforcing more stringent rules about highly political fiscal issues where the Maastricht Treaty failed; Franz-Christoph Zeitler complements that view by suggesting the introduction of a ‘state restructuring law’ (p 248) for insolvent states in order to incentivise fiscal self-responsibility and make the whole legal framework credible.

Ultimately, *Legal Challenges in the Global Financial Crisis* is a commendable attempt to bring together legal scholars of multiple sub-disciplines and present a detailed account of the most avant-garde issues that sprung from the recent financial crisis. Further, as the editors themselves claim, it is also an attempt to assess whether legal rules could actually serve as useful instruments in resolving the related economic and sovereign problems. Arguably, the former objective is fully accomplished but, regrettably, not the same can be undoubtedly said for the latter. The ‘golden thread’ running through all the essays is often obscured by the very specialist nature of the debates whilst a final concluding chapter bringing together some of the main themes and fleshing out any conclusions that can be drawn from the collection would be particularly welcome in that context. Despite this, it constitutes an important contribution in the field and it is certainly to be applauded for paving the way for further cross-disciplinary discussion amongst lawyers.

---

<sup>4</sup> Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, 02.03.2012, < [http://european-council.europa.eu/media/639235/stootscg26\\_en12.pdf](http://european-council.europa.eu/media/639235/stootscg26_en12.pdf)> accessed 12.12.2014.

## **BOOK REVIEW:**

### **BART DE MEESTER LIBERALIZATION OF TRADE IN BANKING SERVICES – AN INTERNATIONAL AND EUROPEAN PERSPECTIVE.**

(Cambridge: Cambridge University Press 2014) ISBN: 978-1-107-03849-3,  
388pp + xx, 75 GBP (Hardback).

Carlo Maria Cantore<sup>\*</sup>

## **VI. INTRODUCTION**

Financial markets have not yet fully recovered from the 2007 and 2008 financial crisis. Whilst it is impossible to point to one isolated cause for the turmoil that spread across all of the major economies of the world, liberalisation of trade in banking services has been often accused of being one of the forces that pulled the trigger. By forcing governments to ease their regulation as regards access to their markets for foreign suppliers - so this recurring argument goes - trade liberalisation has tilted the balance of sovereignty in the domain of financial services towards international organisations and led to forced and unnecessary deregulation.<sup>1</sup>

Traditionally, financial services were considered a small niche in the field of international trade law. Since the entry into force of the General Agreement on Trade in Services (GATS), only one case on financial services has been adjudicated by a WTO Panel,<sup>2</sup> and the issue at stake pertained to questions of interoperability of payment services, not financial regulation as such. Moreover, it is often complicated to bridge a gap between internationally agreed trade rules and domestic policies and regulations on financial services. This is even more the case in the context of the European Union. The EU, in fact, adheres to the WTO as one Member and has exclusive competence in the domain of trade. However, the EU is a union of 28 different Member states, hence measures on financial services adopted in Brussels have then to be implemented at the domestic level in 28 different jurisdictions, thus making the picture even

---

<sup>\*</sup> PhD Candidate, European University Institute, Florence (Italy). Email: carlo.cantore@eui.eu.

<sup>1</sup> See, for instance, para 51 of the Report of the Commission of Experts of the President of the United Nations General Assembly, 'Reforms of the International Monetary and Financial System' (commonly known as the 'Stiglitz Commission's Report'), 21.09.2009.

<sup>2</sup> DS413 *China — Certain Measures Affecting Electronic Payment Services* (Panel Report, Adopted on 31.08.2012).

more complicated.

Bart De Meester, the author of the book under review, is a scholar and a member of the Trade Team of the Legal Service of the European Commission (ie, the team of lawyers that defends the European Union before the courts of the World Trade Organization (WTO)). The book has two ambitious aims. The first is to provide a fair overview of the state of the art of the interplay between financial regulation and trade obligations and commitments undertaken by the EU in the context of the WTO. The second is to challenge the myth that trade liberalization was one of the main causes of the crisis. It is fair to say that both goals were successfully achieved and that the author has set a very high standard for future contributions in this field.

## **I. OVERVIEW OF THE BOOK**

The volume, which originates from the PhD thesis that De Meester defended at the Katholieke Universiteit Leuven in Belgium is divided into three parts. Part I (*Policy concerns underlying the regulation and liberalization of banking*) analyses the implications of the opening up of financial markets to foreign suppliers. Based on an overview of the literature on the issue, the author explains the pros and cons of liberalisation of trade in banking services. Essentially, grounded in the explanations provided by economists, De Meester shows that there is a trade-off that must be taken into account when analyzing this subject. On the one hand, liberalisation of cross-border trade in financial services increases opportunities for competition, increases efficiency and facilitates easier access to credit and other financial instruments. On the other hand, it enhances the degree of interconnectedness between different domestic financial systems. This, in turn, may lead negative externalities due to the possibility of bank runs or financial crises spreading more easily across the borders and affecting a higher number of actors than they would have otherwise.

Part II (*The international approach to liberalization of trade in banking services*) explains in greater detail the sources of the obligations provided by the GATS in the framework of the WTO. The analysis is accurate in distinguishing the different instruments specifically dealing with the disciplines on financial services (the Annex on Article II Exemptions, the First Annex and the Second Annex on Financial Services, the Understanding on Commitments in Financial Services). The volume also gives an account of the attempts to reduce regulatory asymmetries and to coordinate supervisory standards at the international level, which mainly take place in the context of informal institutions whose recommendations and standards are not legally binding. The book then examines the

limitations to the right for WTO Members to regulate the market for financial services and the situations in which governments may deviate from their obligations. Besides the general exceptions specified in the GATS, Members enjoy more leeway when they enact pieces of legislation for the pursuit of macroeconomic policy management and prudential objectives. Part II concludes with an overview of the limitations on the right of WTO Members to supervise the banking sector.

Part III (*The European approach to international trade in banking services and its interaction with the GATS*) gives an account of the evolution of the EU legislation with regard to third-country banks seeking access to the European market. Starting from the First Banking Directive of 1977, De Meester provides an extensive analysis of the different pieces of legislation, including the very last instruments enacted as a means to respond to the 2007-2008 crisis.

## II. THE CONTRIBUTION OF THE BOOK

The book is extremely well written. The analysis is conducted with scientific rigor and the structure makes the volume easy to read. It is not excessive to say that it represents an important contribution in the field. It certainly belongs to the category of those rare books that make the reader more curious about the topic after reading them. Moreover, it contributes to providing long-awaited answers to relevant questions for our times.

*Has trade liberalization led to the watering down of financial regulation?* The answer to this question cannot be a straight 'yes' or 'no'. It is difficult to say because commitments on financial services were rather the reflections of the conditions already applied to foreign suppliers – a snapshot of the existing situation – than real concessions made to the other Members of the WTO. Perhaps the situation is a bit different with regard to those trading nations that entered the WTO at a later stage and as such were asked to make more concessions in order to be allowed to join the club (but this was not the case of the European Union). However, as the author mentions, in the case of those countries that were already Members of the WTO before joining the EU, their original Schedules of Specific Commitments still apply and this may lead to a situation in which some concessions on National Treatment or Market Access are in place for some EU Members but not for all. In any event, if a deregulation of financial markets has occurred towards the end of the last century, that was mainly due to a precise political strategy pursued by national governments, rather than being a consequence of the adhesion to the multilateral organization governing the world trade.



*Have WTO obligations prevented Members from modifying their legislations on financial services?* In this case as well the answer should most probably be negative. Looking at the evolution of the legislation in the EU, it does not seem that the existence of a multilateral agreement on trade in financial services has severely shrunk the regulatory freedom of the EU authorities. De Meester points to situations in which the existence of multilateral obligations has most likely played a role, for example in the elimination of the reciprocity requirement with regard to National Treatment branches of foreign banking institution on the Capital Requirements Directive (p 279).

*Are prudential considerations sufficiently protected at the WTO level?* According to the author, the answer to this question is certainly positive. Prudential concerns, like the protection of financial institutions or the protection of the financial system as a whole override the principles on trade liberalization. Paragraph 2(a) of the Annex on Financial Services of the GATS allows Members to deviate from their obligations or commitments in pursuance of prudential regulatory objectives that are only vaguely described in an indicative and non-exhaustive list. De Meester classifies the provision as an exception and warns that arbitrarily discriminatory measures may be considered as not satisfying the requirements set out in the so-called prudential carve-out. However, he maintains that authentically prudential measures, if reasonably drafted and not arbitrary in their application, will certainly be covered by the prudential carve-out.

### III. CRITICAL REMARKS

The book is extremely precise and complete. However, a eulogy of the book is of no interest for the readers of this book review and probably not even for the author himself. Therefore, it is probably time, at this stage, to make a critical remark and a suggestion.

The critical remark concerns the legal function of the prudential carve-out of the GATS. It must be acknowledged, to begin with, that there is no case law at the moment that can help the interpreter to better understand this provision, which is written in a rather tortuous and maybe even 'self-cancelling' way. However, the heading of the provision (*Domestic Regulation*) and its negotiating history may probably contribute to the interpretation of the provision in a different, more nuanced, way. In fact, the story of the negotiations of trade agreements on financial services is often the story of clashes and misunderstandings between financial regulators and central bank officials on the one side and trade officials on the other, with a more prominent role for the former. This, in itself, can help to explain why the language used in the prudential carve-out differs from traditional

exception-type provisions in trade agreements.

The provision, therefore, can be read in a different way, that is a strong restatement of the right to regulate of WTO Members according to prudential concerns, irrespective of any other obligation or commitment. Moreover, contrary to traditional WTO exceptions, the prudential carve-out does not contain a *chapeau* according to which measures are covered only if they are not arbitrary or do not amount to a disguised restriction to trade. Such requirements cannot be introduced through the backdoor if they do not appear in the wording of the provision. This different reading would mainly have implications with regard to the allocation of the burden of proof, which should therefore remain on the complainant and on the deferential attitude that judges should pay to the regulating Members. However, such a difference in point of view is likely to have higher consequences from a theoretical perspective than a practical one, therefore the disagreement should not be over-emphasised. In any event, a Panel report which will likely provide some more clarity is supposed to circulate in the summer of 2015, according to rumors which report that the provision has been invoked for the first time in a dispute between Panama and Argentina.<sup>3</sup>

Finally, it could be suggested – and this should not be seen as a critique of the volume at all – that there could have been a third dimension of the analysis in order to really complete the effort made in the book under review. The entire dimension of preferential trade agreements signed by the EU with its partners is not touched upon in the volume, and one may wonder whether there has been an evolution with regard to the rules on financial services at that level and to what extent this may represent a challenge for future reforms of the financial system at the EU level. Perhaps this is an area that the author may want to explore in his future work.

#### IV. CONCLUSIONS

The volume is a most welcome contribution to the existing literature. De Meester takes a position with regard to the most controversial topics in the field of trade in services, such as the discipline on Market Access or the scope of application and legal function of the prudential carve-out, only after having carefully examined the views already expressed in the

---

<sup>3</sup> See the blog post by Simon Lester: 'The Scope of the Prudential Exception' (International Economic Law and Policy Blog, posted 18.07.2014). <<http://worldtradelaw.typepad.com/ielpblog/2014/07/the-scope-of-the-prudential-exception.html>> accessed 08.12.2014.

epistemic community and in case law. He does so in a reasoned and balanced way, thus making his book even more enjoyable.

The volume is an important contribution and is likely to represent a milestone for future research in the topic. It is definitely a must-read book for researchers in the field.