GERMAN LAW JOURNAL

Developments in German, European and International Jurisprudence

www.germanlawjournal.com

ISSN: 2071-8322 / ISSNL: 2071-8322

Vol. 18 No. 03 **Pages 441-770** **01 May 2017**

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Articles

Psychoanalyzing International Law(yers)

By Matthew Nicholson[*]

Abstract

This Article reads the work of Martti Koskenniemi—arguably the most significant international legal thinker of the post-Cold War era—as an exercise in (Lacanian) psychoanalysis. Excavating the links between Koskenniemi and French psychoanalyst Jacques Lacan, and analyzing the origins of those links in Koskenniemi's debt to the Harvard branch of the American Critical Legal Studies (CLS) movement, it argues that over almost thirty years Koskenniemi has employed psychoanalytic techniques to rebuild the self-confidence of international law(yers). The success of this confidence-building project explains the acclaim Koskenniemi's work enjoys. As international law's psychoanalyst he has defined the identity of the international lawyer and mapped the structure of international legal argument, stabilizing international law's present reality by synchronizing it with narratives of its past. Any attempt to destabilize that reality or depart from present structures into an alternative future must start from an analysis of Koskenniemi's methods and it is in this sense, and not out of a more pure interest in Koskenniemi's work, that this Article deconstructs Koskenniemi's *oeuvre*. It situates his method, reveals his choices, and explores their limits in an effort to develop (tentative) proposals for a "new" international law(yer) and an international legal future outside the structure that Koskenniemi has mapped so effectively and affectively.

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> [A] genuine critique of structuralism commits us to working our way completely through it so as to emerge . . . into some wholly different and theoretically more satisfying philosophical perspective.[1]

> "le nom-du-père"/"le non du père"/"les non-dupes errant" . . . those who think that they are not duped err.[2]

> "those who are not taken in err"[3]

A. Introduction

Martti Koskenniemi is perhaps the most significant international legal thinker of recent times. His first book, *From Apology to Utopia*,[4] has been described as "the most significant late 20th century English language monograph in the field of international law,"[5] his second, *Gentle Civilizer,*[6] has been credited with "trigger[ing] a 'historiographical turn' in the discipline of international law,"[7] and no textbook is complete without a section on Koskenniemi's work.[8] Widely regarded as having defined and explained the structure of

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[1] FREDRIC JAMESON, THE PRISON-HOUSE OF LANGUAGE: A CRITICAL ACCOUNT OF STRUCTURALISM AND RUSSIAN FORMALISM vii (1972).

[2] PAUL VERHAEGHE, ON BEING NORMAL AND OTHER DISORDERS: A MANUAL FOR CLINICAL PSYCHODIAGNOSTICS 68 n.37 (2008) (quoting JACQUES LACAN, LE SÉMINAIRES LIVRE XVII: L'ENVERS DE LA PSYCHOANALYSE (1991)).

[3] SLAVOJ ŽIŽEK, LESS THAN NOTHING: HEGEL AND THE SHADOW OF DIALECTICAL MATERIALISM 969 (2012) (quoting and translating NICOLAS FLEURY, LE RÉEL INSENSÉ: INTRODUCTION À LA PENSÉE DE JACQUES-ALAIN MILLER 93–94 (2010)).

[4] MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT—REISSUE WITH NEW EPILOGUE (2005).

[5] David Kennedy, *The Last Treatise: Project and Person*, 7 GERMAN L.J. 982, 982 (2006). *See also* Jean d'Aspremont, *Martti Koskenniemi, the Mainstream, and Self-Reflectivity*, 29 LEIDEN J. INT'L L. 625 (2016) (discussing the evolution of the response to *From Apology* and its central role in recent debates about international legal theory).

[6] MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960 (2001).

[7] Bardo Fassbender & Anne Peters, *Introduction: Towards a Global History of International Law*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 1, 23 (Bardo Fassbender & Anne Peters eds., 2012).

[8] *See, e.g.*, JAN KLABBERS, INTERNATIONAL LAW 13 (2013); MALCOLM SHAW, INTERNATIONAL LAW 45–46 (7d ed. 2014); MARTIN DIXON, ROBERT MCCORQUODALE & SARAH WILLIAMS, CASES AND MATERIALS ON INTERNATIONAL LAW 12, 16 (5d ed. 2011) (extracting from KOSKENNIEMI, FROM APOLOGY, *supra* note 4, and web post by Koskenniemi); ANDREW CLAPHAM, BRIERLY'S LAW OF NATIONS xii (2d ed. 2012) ("Although legal methods may . . . vary, understanding the deeper structures and the legal labels used to explain them is essential to seeing how international law works").

international law and the identity of the international lawyer in the post-Cold War era,[9] he has virtually unrivalled influence over international legal discourse.[10] While *From Apology* is *the* standard reference on international legal theory,[11] Koskenniemi's work extends beyond theory and into international legal practice.[12] This is reflected in his leadership of the final stages of the International Law Commission's (ILC) important work on fragmentation, perhaps the most significant challenge to the coherence of international legal order in modern times.[13]

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[9] *See* Deborah Z. Cass, *Navigating the Newstream: Recent Critical Scholarship in International Law*, 65 NORDIC J. INT'L L. 341, 342 (1996) (observing "post Cold War confidence in international law has been replaced by a muted anxiety about its limitations"); *Id.* at 360, 383 (discussing Koskenniemi's response to the "anxiety" identified at 342); David Kennedy, *The Last Treatise*, *supra* note 5, at 990 ("He has opened up the field's professional practices for [political] contestation."); Jason A. Beckett, *Rebel Without a Cause? Martti Koskenniemi and the Critical Legal Project,* 7(12) German L.J. 1045, 1045 (2006) ("Few books have attained the influence and impact of Martti Koskenniemi's *From Apology to Utopia*.").

[10] Koskenniemi is, for example, a contributor to many of the most significant edited collections. *See, e.g.*, Martti Koskenniemi, *Projects of World Community*, *in* REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW 3 (Antonio Cassese ed., 2012); Martti Koskenniemi, *A History of International Law Histories*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 943 (Bardo Fassbender & Anne Peters eds., 2012); Martti Koskenniemi, *Transformations of Natural Law: Germany 1648–1815*, *in* THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 59 (Anne Orford & Florian Hoffmann eds., 2016).

[11] *See* Kennedy, *The Last Treatise, supra* note 5, at 982 ("Martti Koskenniemi's *From Apology to Utopia* is the most significant late twentieth century English language monograph in the field of international law . . . it could well turn out to have been the last great original treatise in the international law field."); Mario Prost, *Born Again Lawyer: FATU as An Antidote to the "Positivist Blues",* 7 GERMAN L.J. 1037, 1037 (2006) ("[*From Apology*] might very well have been the single most influential book of the last 15 years in the field of international legal theory.").

[12] *See* Martti Koskenniemi, *Curriculum Vitae*, http://www.helsinki.fi/eci/Staff/Koskenniemi_CV.pdf (last visited May 17, 2017) (on Koskenniemi's practice experience).

[13] *See* Anne-Charlotte Martineau, *The Rhetoric of Fragmentation: Fear and Faith in International Law,* 22 LEIDEN J. INT'L L. 1 (2009); Gerhard Hafner, *Risks Ensuing from Fragmentation of International Law*, UN. Doc. A/55/10, annex, 143 (2000); Tomer Broude, *Keep Calm and Carry On: Martti Koskenniemi and the Fragmentation of International Law*, 27 TEMPLE INT'L & COMP. L.J. 279 (2016); Sean D. Murphy, *Deconstructing Fragmentation: Koskenniemi's 2006 ILC Project*, 27 TEMPLE INT'L & COMP. L.J. 293 (2016). *See also* Akbar Rasulov, *From Apology to Utopia and the Inner Life of International Law*, 29 LEIDEN J. INT'L L. 641, 646 (2016) (commenting in terms that seem to capture the relationship between Koskenniemi's fragmentation work and his work more generally, for all that Rasulov himself does not make this connection:

> [W]hat the author of [*From Apology*] recognized from the very outset . . . was that the key to winning any kind of intra-disciplinary theoretical struggles in modern international law lies in producing not just a new set of critical-theoretical ideas accessible primarily to professional legal academics, but a new system of intellectual tools and concepts accessible above all to the community of international

This Article reads Koskenniemi's work as an exercise in Lacanian psychoanalysis; an application of Jacques Lacan's psychoanalytic theory to international law and international lawyers.[14] Casting Koskenniemi as Lacanian analyst and international law(yers) as analysand or patient, it treats Koskenniemi's psychoanalysis as a process which "enable[s]" the patient to "get over itself,"[15] a course of therapy which "enable[s]" the patient to recognize and live with(in) his neurosis by accepting that it cannot be "cure[d]."[16]

The argument develops in three parts. The first, 'Diagnosis,' excavates the Lacanian foundations of Koskenniemi's work; the second, 'Therapy,' links Koskenniemi's work and Ernesto Laclau's political theory; and the third, 'Prognosis,' considers the patient's health and prospects after therapy.

Psychoanalysis has, I argue, given the patient a modern, elitist self-confidence, inuring it to the injustices of global postmodernity.[17] The patient needs "new codes,"[18] specifically, new

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> legal practitioners: a system of tools and concepts which the practising lawyers could use to describe and express their day-to-day professional experiences and anxieties.)

[14] *See* COSTAS DOUZINAS, THE END OF HUMAN RIGHTS: CRITICAL LEGAL THOUGHT AT THE TURN OF THE CENTURY 297–318 (2000) (on the relevance of Lacanian psychoanalysis to the study of law); David S. Caudill, *Freud and Critical-Legal Studies: Contours of Radical Socio-Legal Psychoanalysis*, 66 INDIANA L.J. 651, 669–74 (1991) (discussing Lacanian psychoanalysis and law); Anthony Carty, *Language Games of International Law: Koskenniemi as the Discipline's Wittgenstein*, 13 MELBOURNE J. INT'L L. 859, 867 (2012) (suggesting that Koskenniemi's 1999 text, *Between Commitment and Cynicism*, *infra* note 90, "provide[s] a window . . . into the psychological state of the profession"); Sahib Singh, *The Critic(al Subject)*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2648277 (last visited May 17, 2017), at 3 (noting that "smatterings of psychoanalytic [theory] . . . undergird *From Apology to Utopia*"); Maria Aristodemou, *A Constant Craving for Fresh Brains and a Taste for Decaffeinated Neighbours*, 25 EUR. J. INT'L L. 35 (2014) (applying Lacanian psychoanalysis to the study of international legal theory).

[15] Aristodemou, *supra* note 14, at 37.

[16] *Id.*:

> [T]he message from the (nasty) Lacanian analyst is not to cure the patient's ego and return it to her well adjusted to reality—in other words, not to strengthen and perpetuate international law's self-delusions but to lead it, kicking and screaming no doubt, to finding out the bloody histories that constituted it as a subject and enable it, in short, to 'get over itself.'

See also, in the context of international criminal law, and with reference to Koskenniemi's work, Frédéric Mégret, *The Anxieties of International Criminal Justice,* 29 LEIDEN J. INT'L L. 197 (2016).

[17] *See* FREDRIC JAMESON, POSTMODERNISM OR, THE CULTURAL LOGIC OF LATE CAPITALISM 2 (1991) ("[T]he prophetic elitism and authoritarianism of the modern movement [in architecture] are remorselessly identified with the charismatic Master."); David Kennedy, *Apology to Utopia: The Structure of International Legal Argument,* 31 HARVARD J. INT'L L.

historical-materialist codes,[19] through which to re-imageine itself and engage with global postmodernity,[20] because:

> [O]ur [postmodern] social order is richer in information and more literate, and socially, at least, more 'democratic' in the sense of the universalization of wage labor . . . [and] this new order no longer needs prophets and seers of the high modernist and charismatic type, whether among its cultural producers . . . its politicians [21]

or, indeed, its international lawyers.[22]

It is important to be clear about the nature and extent of the claims I am making about Koskenniemi's work. In *reading* Koskenniemi's work as a psychoanalysis of international law(yers) I am not claiming that it *is* a psychoanalysis of international law(yers), nor that this is the only viable reading. I am claiming, however, that Koskenniemi's work can and should be read as a Lacanian psychoanalysis,[23] and that this reading provides the basis for re-thinking international law's present and future.

385, 387 (1990) ("[Koskenniemi] seems determined to narrate his discipline to its end—to write the last modern book on public international law.").

[18] JAMESON, POSTMODERNISM*, supra* note 17, at 394.

[19] *See* Carty, *supra* note 14, at 865 (advocating "a phenomenological posture vis-à-vis reality for which new languages need to be found").

[20] *See* Matthew Nicholson, *Walter Benjamin and the Re-Imageination of International Law*, 27 LAW AND CRITIQUE 103 (2016).

[21] JAMESON, POSTMODERNISM, *supra* note 17, at 306.

[22] *See* Balakrishnan Rajagopal, *Martti Koskenniemi's From Apology to Utopia: A Reflection,* 7 GERMAN L.J. 1089, 1091 (2006):

> [W]hile I agree wholeheartedly [with Koskenniemi] that international law is what international lawyers make of it, I am not sure that there is a clear consensus that all practitioners need to be international lawyers, especially in the post-modern world of the early 21st century when international law-talk is occurring at the popular level.

[23] *See* Caudill, *supra* note 14, at 654 ("My thesis is that psychoanalytic theory offers insights with which to confront some of the problematic aspects of CLS [critical legal studies]—insights that are already contains within the radical traditions on which CLS draws.").

Recasting these claims in the language of Fredric Jameson's *The Political Unconscious*,[24] this Article presents Lacanian psychoanalysis as the "hidden master narrative" of Koskenniemi's work,[25] the "allegorical key" that unlocks and reveals the relationship between its "multiple meanings,"[26] "unmask[ing]" his texts as "socially symbolic acts,"[27] therapeutic exercises that have "enable[d]" international law to "get over itself."[28] It is in this sense, and while recognizing that my reading is not the only reading, that I argue for its "priority":[29]

> [I]t projects a rival hermeneutic to those already enumerated . . . not so much by repudiating their findings as by arguing its ultimate philosophical and methodological priority over more specialized interpretive codes whose insights are strategically limited as much by their own situational origins as by

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[24] FREDRIC JAMESON, THE POLITICAL UNCONSCIOUS: NARRATIVE AS A SOCIALLY SYMBOLIC ACT (1981). *See* Matthew Nicholson, *The Political Unconscious of the English Foreign Act of State and Non-Justiciability Doctrine(s)*, 64 INT'L & COMP. L.Q. 743 (2015) (using Jameson's concept of the "political unconscious" in legal analysis).

[25] JAMESON, POLITICAL UNCONSCIOUS*, supra* note 24, at 13.

[26] *Id*. *See also id.* at 14 ("Allegory is . . . the opening up of the text to multiple meanings, to successive rewritings and overwritings which are generated as so many levels and as so many supplementary interpretations."); Paavo Kotiaho, *A Return to Koskenniemi, or the Disconcerting Co-optation of Rupture,* 7 GERMAN L.J. 484, 485 (2006) (noting a "contradiction between the appearance and essence of Koskenniemi's work").

[27] JAMESON, POLITICAL UNCONSCIOUS*, supra* note 24, at 5 ("The assertion of a political unconscious proposes that we . . . explore the multiple paths that lead to the unmasking of cultural artifacts as socially symbolic acts.").

[28] Aristodemou, *supra* note 14, at 37.

[29] For the most compelling readings of Koskenniemi's work in the literature, over which I claim this psychoanalytic reading has "priority," see generally Beckett, *supra* note 9 (critiquing what Beckett sees as inconsistencies in Koskenniemi's work); Rasulov, *supra* note 13 (focusing on the importance of "Kelsenian legal positivism" and "Saussurean structuralist semiotics" in FROM APOLOGY, *supra* note 4; *Id.* at 641); Justin Desautels-Stein, *Chiastic Law in the Crystal Ball: Exploring Legal Formalism and its Alternative Futures*, 2 LONDON R. INT'L L. 263 (2014) (reading Koskenniemi through the work of Soren Kierkegaard); Sahib Singh, *Koskenniemi's Images of the International* Lawyer, 29 LEIDEN J. INT'L L. 699 (2016) (reading Koskenniemi through the work of Jean-Paul Sartre); Singh, *The Critic(al Subject)*, *supra* note 14 (again reading Koskenniemi through the work of Jean-Paul Sartre); John Haskell, *From Apology to Utopia's Conditions of Possibility*, 29 LEIDEN J. INT'L L. 667 (2016) (focusing on the historical aspects of FROM APOLOGY, *supra* note 4). Where relevant, in footnotes *infra*, I explain how my reading relates to the alternative readings offered by these authors.

> the narrow or local ways in which they construe or construct their objects of study.[30]

B. Diagnosis

I. Myth and Neurosis

The opening page of Koskenniemi's *From Apology to Utopia: The Structure of International Legal Argument*, published in 1989 and reissued in 2005, diagnoses international law's neurosis:

> Lawyers seem to have despaired over seeing their specific methodology and subject-matter vanish altogether if popular calls for sociological or political analyses are taken seriously. Ultimately, they believe, there is room for a specifically 'legal' discourse between the sociological and the political . . . and that this is the sphere in which lawyers must move if they wish to maintain their professional identity as something other than social or moral theorists.[31]

Koskenniemi rejects the possibility of a "specifically 'legal' discourse" as a response to the threat from "sociological or political analyses." "The structure of international legal argument" is defined by the "dynamics of [the] contradiction" between "normativity" and "concreteness";[32] there is no way out:[33]

> A law which would lack distance from State behaviour will or interest would amount to a non-normative

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[30] JAMESON, POLITICAL UNCONSCIOUS, *supra* note 24, at 5. *See also id.* at x (relating to Marxist literary interpretation); Rasulov, *supra* note 13, at 642 (advancing an argument with a similar intention—"excavating [*From Apology*] from beneath the mountain of misreadings and misrememberings under which it has come to be so unceremoniously buried over the last quarter-century"—which also draws on Jameson's *Political Unconscious*); Singh, *The Critic(al Subject)*, *supra* note 14, at 6 n.28 (making a passing reference to Jameson's *Political Unconscious*).

[31] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 1.

[32] *Id*. at 58. *See also id.* at 17.

[33] *See id.* at 16 ("[I]ntellectual operations [which seek to distinguish international law from the sociological and the political] do not leave room for any specifically legal discourse.").

> apology, a mere sociological description ["concreteness"]. A law which would base itself on principles which are unrelated to State behaviour, will or interest would seem utopian, incapable of demonstrating its own content in any reliable way ["normativity"].[34]

"Concreteness" and "normativity" are "criteria" for legal "objectivity,"[35] prerequisites for an international law that exists "independently of what anyone might think that the law should be" and "appli[es] even against a State (or other legal subject) which opposed its application to itself."[36] The lesson of *From Apology*'s chapters two to six—covering fundamental and diverse topics such as sovereignty, the sources of international law and the interpretation of treaties—is that "the structure of international legal discourse on *all* doctrinal spheres undermine[s] the objectivity on which it constructed itself,"[37] that "law is constantly lapsing into what seems like factual description or political prescription."[38]

"[T]he legal mind [therefore] fights a battle on two fronts,"[39] trapped between "'descending' and 'ascending' patterns of justification," the former "premised on the assumption that a normative code overrides individual State behaviour," the latter "on the assumption that State behaviour, will and interest are determining of the law."[40] "[T]here is [ultimately] no real discourse going on within legal argument . . . but only a patterned exchange of argument" between the two "patterns."[41] International law does not, therefore, exist *in* a "specifically 'legal' discourse" situated "between the sociological and the political,"[42] but *as* an oscillation "between the sociological and the political."[43]

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[34] *Id*. at 17.

[35] *Id.* at 513.

[36] *Id*.

[37] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 515.

[38] *Id*. at 16.

[39] *Id*.

[40] *Id*. at 59.

[41] *Id*. at 511-12.

[42] *Id.* at 1.

[43] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 1. *See also id.* at 65 ("[D]octrine is forced to maintain itself in constant movement from emphasizing concreteness to emphasizing normativity and vice versa without being able to establish itself permanently in either position.").

The anthropologist Claude Levi-Strauss, following Sigmund Freud's work on psychoanalysis, recognized that "two traumas . . . are necessary in order to generate the individual myth in which a neurosis consists."[44] It is the impossibility of finding validation in either "the sociological [or] the political" (first trauma),[45] together with the unavailability of a tenable position between the domains (second trauma), that "generate[s] the . . . myth" of a "specifically 'legal' discourse." Koskenniemi diagnoses international law's neurosis as "consist[ing]" in that myth, "in" the oscillation between "concreteness" and "normativity."

Lacan explores the relationship between trauma, myth, and neurosis, mapped by Levi-Strauss, by reevaluating Freud's case of "The Rat Man."[46] The parallels between Lacan's analysis of the Rat Man and Koskenniemi's analysis of international law are, as we will see, significant.

II. Lacan and the Rat Man

The Rat Man's father, a soldier, "gambled away the regimental funds," relied on "a friend" to bail him out,[47] and failed to reimburse the friend, who disappeared.[48] The family remembers and speaks of this "episode in the father's past" and "a kind of belittlement by his contemporaries permanently follows" him.[49]

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[44] Patrice Maniglier, *Acting Out the Structure*, *in* CONCEPT AND FORM VOLUME TWO: INTERVIEWS AND ESSAYS FROM THE CAHIERS POUR L'ANALYSE 25, 41 (Peter Hallward & Knox Peden eds., 2012) (quoting Claude Levi-Strauss, *The Structural Study of Myth*, in CLAUDE LEVI-STRAUSS, STRUCTURAL ANTHROPOLOGY 228 (1963)). *See* KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 6 n.1, 8 n.4, and 11 n.9 (referring to two of Levi-Strauss' major works without subjecting them to sustained analysis); *see also* Caudill, *supra* note 14, at 670 (discussing structuralism, Levi-Strauss and Lacan); Singh, *The Critic(al Subject)*, *supra* note 14, at 3, 10, 14 (suggesting, with reference to Roland Barthes, that "myth" plays an important role in Koskenniemi's work without, however, defining the specific "myth," or the function of "myth" as a concept, in Koskenniemi's work).

[45] *See* KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 1.

[46] *See* Maniglier, *supra* note 44, at 41; *see also* Frederick J Wertz, *Freud's Case of the Rat Man Revisited: An Existential-Phenomenological and Socio-Historical Analysis,* 34 J. PHENOMENOLOGICAL PSYCHOL. 47 (2003) (discussing the case of the Rat Man).

[47] Jacques Lacan, *The Neurotic's Individual Myth,* 48 PSYCHOANALYTICAL Q. 405, 411 (1979).

[48] *Id*. at 414.

[49] *Id*. at 411.

As a young man, the father had a "strong attachment . . . to a poor but pretty girl" but he married the woman who would become the Rat Man's mother because she "occupie[d] a much higher station in the bourgeoisie and [brought him] . . . both the means of livelihood and even the job he [held] at the time they [were] expecting their child."[50]

When "[the Rat Man's] father urged him to marry a rich woman [possibly his cousin] the neurosis proper had its onset."[51] He ordered new glasses for delivery by post from his optician in Vienna, having lost his original glasses at around the time he flirted with "a servant girl . . . during maneuvers."[52] After losing the glasses an army captain told the Rat Man about a form of punishment in which "a rat stimulated by artificial means is inserted into the rectum of the victim."[53] Once the glasses arrived the captain told the Rat Man "that he must reimburse Lieutenant A who is in charge of the mail and who is supposed to have paid" for the delivery of the glasses.[54] The charges were, in fact, paid by "[a] generous lady at the post office" rather than Lieutenant A and, in any event, Lieutenant B was responsible for the mail.[55]

To fulfil his self-imposed obligation to the captain the Rat Man devised a plan: "Lieutenant A will reimburse the generous lady at the post office, and, in his presence, she must pay over the sum in question to Lieutenant B and then he himself will reimburse Lieutenant A."[56] Linked to this neurotic plan, the Rat Man suffered delusional fantasies about the infliction of the rat punishment on his (dead) father or the "servant girl."[57]

"[T]he neurotic's individual myth" involved a "phantasmic scenario" of debt, love and punishment in which the Rat Man "re-enact[ed] a ceremony which reproduce[d] almost exactly [the] inaugural relationship" of "the father, the mother, and the friend."[58] The captain stands in a position similar to that of the father. The Rat Man feels a duty to obey him (the captain) "even though (or, rather, because he knows that) he has no grounds for

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[50] *Id*. *See also* Maniglier, *supra* note 44, at 42.

[51] Lacan, *Myth*, *supra* note 47, at 411; Maniglier, *supra* note 44, at 42.

[52] Lacan, *Myth*, *supra* note 47, at 412, 415.

[53] *Id*. at 409.

[54] *Id*. at 412.

[55] *Id*. at 413; *see also* Maniglier, *supra* note 44, at 43.

[56] Lacan, *Myth*, *supra* note 47, at 413.

[57] *Id*. at 412.

[58] *Id*. at 414.

obeying him."[59] The fact that the Rat Man feels compelled to obey the captain/father despite the fact that he feels he/they have no right expect obedience causes him to fantasize about inflicting the rat punishment on his father.[60]

By gambling away the regiment's money and failing to repay his friend's loan the father castrated himself.[61] That established a chain of events that led him to marry the rich girl (the Rat Man's mother) rather than the "poor but pretty girl" he seems to have loved. The father's (supposedly) poor choices locked the Rat Man into a "perennially unsatisfying turning maneuver" which "never succeeds in closing the loop."[62] Repaying the debt to the "lady at the post office"/Lieutenant B/Lieutenant A would, in the Rat Man's neurotic mind, "[close] the loop" by re-writing his/his father's history,[63] un-castrating both men, restoring their "viril[ity]" and allowing them to live according to their own free will, rather than in circumstances dictated by fate and error.[64]

For Lacan, "the wellspring of analytic experience" is the shedding of "more light" on the neurotic's condition,[65] not by curing the neurosis but by enabling the neurotic to understand the causes of his condition so that he can accept and exist within *his* structure.[66] The analyst facilitates this process of adjustment by:

> [A]ssum[ing] almost surreptitiously, in the symbolic relationship with the subject, the position of . . . the master—the moral master, the master who initiates the one still in ignorance into the dimension of fundamental human relationships and who opens for

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[59] Maniglier, *supra* note 44, at 43.

[60] *See id*.

[61] *See* Lacan, *Myth, supra* note 47, at 415 ("[T]he frustration, indeed a kind of castration of the father.").

[62] *Id*.

[63] *See* Jacques Lacan, *The Subversion of the Subject and the Dialectic of Desire*, *in* JACQUES LACAN, ÉCRITS 671, 698 (Bruce Fink trans., 2006) ("The Father the neurotic wishes for is clearly the dead Father—that is plain to see. But he is also a Father who would be the perfect master of his desire—which would be just as good, as far as the subject is concerned.").

[64] *See* Lacan, *Myth, supra* note 47, at 416–17.

[65] *Id*. at 425.

[66] *See id*. at 407.

> him what one might call the way to moral consciousness, even to wisdom, in assuming the human condition.[67]

Lacan's analysis of the Rat Man's neurosis maps onto Koskenniemi's analysis of international law's relationship with sociology/apology vs. politics/utopia, leading to two key conclusions. First, that Koskenniemi treats international law as a neurotic patient and, second, that in doing so he becomes international law's analyst/"master."[68]

Koskenniemi's four-part, two-group structure of sociology/apology and politics/utopia can be represented thus:

Politics ("the political")	**Sociology ("the sociological")**
Utopia	**Apology**

This mirrors—indeed, the above diagram is based on the structure of—this representation, by Patrice Maniglier, of the Rat Man's "[f]amilial [c]omplex":[69]

Father	**Wife**
Friend	**Poor Woman**

Merging the two diagrams above makes the parallels between the Rat Man's neurosis and international law's neurotic condition clear:

Politics/Father	**Sociology/Wife**
Utopia/Friend	**Apology/Poor Woman**

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[67] *Id*. at 407–08.

[68] *See* David Kennedy, *The Last Treatise*, *supra* note 5, at 991 ("I continue to be struck . . . by the relative scarcity of work picking up, reworking, extending, or contesting the broad argument of *From Apology to Utopia* . . . Martti's book is rarely challenged or deeply engaged . . . I often have the feeling that the book's symbolic meaning has somehow overtaken its analysis."); Jan Klabbers, *Towards a Culture of Formalism? Martti Koskenniemi and the Virtues*, 27 TEMPLE INT'L & COMP. L.J. 417, 418 (2016) (commenting on Kennedy's review of *From Apology*: "*From Apology to Utopia*, or Koskenniemi's work in general, is treated as the gospel, the final word marking, as Fukuyama might be tempted to put it, "the end of history." (citation omitted)); Singh, *The Critic(al Subject)*, *supra* note 14, at 11 ("The image we see in *From Apology to Utopia* is that of a critic who aspires to less domination as his ideal, all the while constantly perpetuating a form of domination himself.").

[69] Maniglier, *supra* note 44, at 42.

"Normativity" and "concreteness" might be added to the picture as synonyms for utopia and apology but that does nothing to disturb the four-part, two-group structure.

Politics is the unsatisfied, dead father who would have his son (international law) be a real man, bending the world to his will. The unachievability of this ambition is reflected in the connection Koskenniemi establishes between politics and utopia; utopia is, by definition, a non-place, a dead father. The parallel between utopia for international law and the friend in the story of the Rat Man is established by the fact that the friend has vanished; the son/Rat Man cannot repay the debt to him, even if he wants to, because he cannot find him, in the same way that international law is unable to find utopia.

Sociology is international law's wife/mother. The story of the Rat Man is permeated by a sense that the father married the wrong woman. The tacit argument in the family's history is that if he were a "real man" he would have married the "poor but pretty girl," found money and status for himself rather than through marriage, and secured utopia rather than settling for an apology of a marriage. International law's relationship with sociology—with the concrete reality of the world—is similarly apologetic. To accept the world as it is, rather than as you would have it be, is to deny utopia and castrate yourself in the interests of an easy life.

International law, like the Rat Man, cannot satisfy its father (politics), cannot find its missing friend/"true" lover (utopia), and, by satisfying its mother/wife (sociology), apologizes for its lack of virility. Faced with no choice outside of this utopia/apology structure, international law/the Rat Man "makes a perennially unsatisfying turning maneuver and never succeeds in closing the loop":[70]

> The dynamics of international legal argument is provided by the contradiction between the ascending and descending patterns of argument and the inability to prefer either. Reconciliatory doctrines will reveal themselves as either incoherent or making a silent preference . . . doctrine is forced to maintain itself *in constant movement from emphasizing concreteness to emphasizing normativity and vice-versa* without being able to establish itself permanently in either position.[71]

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[70] Lacan, *Myth, supra* note 47, at 415.

[71] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 65 (emphasis in original).

Lacan's analysis of the Rat Man revises Freud's theory of the structural causes of neurosis.[72] As David Macey explains, Freud understood neurosis as a result of children being unable to make the "difficult transition from an immediate relationship with the mother" into "a triangular situation" that also included "the father."[73] Lacan prefers a four-part structure, with an "emphasis . . . on more abstract and universal structures of kinship and alliance,"[74] to Freud's two-part structure of mother/father and his emphasis on the "family."[75]

Lacan's preference is explained by his debt to Levi-Strauss.[76] As Macey explains, Levi-Strauss applied Ferdinand de Saussure's and, in particular, Roman Jakobson's work on the structure of language, to the study of culture.[77] For Jakobson, "a phoneme is a basic unit of signification . . . a [purely] differential unit,"[78] a form without content or fixed meaning. Levi-Strauss adopts this concept of the "phoneme" in his analysis of the prohibition on incest as "an empty but indispensable form, making both possible and necessary the articulation of biological groups in a network of exchange that allows them to communicate with one another."[79] Maniglier charts Levi-Strauss's application of this structural-linguistic understanding of human behavior to the study of myth and neurosis, noting the connection with Lacan's Rat Man analysis.[80]

Macey's and Maniglier's analysis of the links between Saussure and Jakobson (linguistics), Levi-Strauss (anthropology), and Lacan (psychoanalysis) situates neurosis as a product of the neurotic's troubled relationship with his mythical structure. The patient's behavior—in the context of sovereignty doctrine, or questions about the nature of customary

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[72] *See* Maniglier, *supra* note 44, at 41–46.

[73] David Macey, *Introduction*, *in* JACQUES LACAN, THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHOANALYSIS vii, xxv (Jacques-Alain Miller ed., Alan Sheridan trans., 1994).

[74] *Id.* at xxiii.

[75] *See id*. at xxiii–xxv.

[76] *See* DOUZINAS, *supra* note 14, at 301 ("Jacques Lacan . . . turn[ed] Freud's story [about the origins of law in murder, crime, and violence] into a mythical structure and . . . read it, in a way similar to Levi-Strauss's explanation of the elementary structures of kinship.").

[77] *See* Macey, *supra* note 73, at xxiii.

[78] *Id*. at xxiii.

[79] *Id*. at xxiv.

[80] Maniglier, *supra* note 44, at 39–46. *See also* Lacan, *Subversion, supra* note 63, at 676–77 (on his work, Freud, Saussure and Jakobson).

international law, for example—can be understood through "kinship" ties to father, mother, wife, friend and lover/politics, sociology, utopia and apology.

In *From Apology* Koskenniemi diagnoses international law's neurosis, "initiat[ing] the one still in ignorance"—international law itself—"into the dimension of fundamental . . . relationships . . . open[ing] . . . what one might call the way to moral consciousness, even to wisdom, in assuming the [international legal] . . . condition."[81] *From Apology* allows international law(yers) to "[assume] the [international legal] . . . condition" by encouraging it/them to live with(in) international law's "mythic network."[82] Koskenniemi's "project is to try to revive a sense of [international law's] original mission, its importance. I suspect I am creating a myth (for it probably never was much better)—but myth-creation is an important aspect of political activity and activism."[83]

From Apology maps the "twisted relations" between "normativity" and "concreteness," tracing the "echoes" of the double trauma of pursuing sociological *and* political validation across "*all* [of international law's] doctrinal spheres."[84] This mapping leads to the conclusion that "there is no real discourse going on in international legal argument but only a patterned exchange of argument,"[85] and that means that "recourse to equity, good faith and the like" is "less a cause for despair than for hope."[86] "[T]he objectivist dream [of a determinative discourse] was faulted from the outset" and "lawyers [therefore] need to take seriously their unconscious shift into arguing from moral obligation."[87] The international lawyer remains "constrained . . . inasmuch as he experiences the conflicting pull of the criticisms of [his "kinship" with wife/mother/sociology/concreteness/] apology and [his "kinship" with father/politics/friend/lover/normativity/] utopia, [but] he is not

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[81] Lacan, *Myth*, *supra* note 47, at 407–08.

[82] *Id*. 415.

[83] Emmanuel Jouannet, *Koskenniemi: A Critical Introduction*, *in* MARTTI KOSKENNIEMI, THE POLITICS OF INTERNATIONAL LAW 1, 1 (2011) (quoting Koskenniemi's comment, in 2004, at the Sorbonne).

[84] Maniglier, *supra* note 44, at 41. ("[I]t is not an isolated event which can be traumatizing but rather the kind of twisted relations that it bears with another event, which it echoes . . . by transforming it in a way which then makes it impossible for it not to be endlessly repeated."); KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 515 ("[*A*]*ll* doctrinal spheres" - emphasis in original).

[85] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 511.

[86] *Id*. at 511, 515.

[87] *Id.* at 515.

fully so."[88] There is a limited freedom for the international lawyer, but only *within* the "kinship" structure.[89]

In "Between Commitment and Cynicism,"[90] his most overtly psychological text,[91] Koskenniemi notes that while utopianism attracts practitioners to international law experience moves them towards cynicism.[92] International lawyers cannot be entirely "genuine" in their commitment to international law, rejecting any and all cynicism, because "an unwavering belief in its intrinsic goodness" is untenable.[93] We are left with the consolation prize of the "light" that psychoanalysis shines onto the condition of international lawyers,[94] illuminating our neurotic place in international law's (mythical) structure.

*III. International Law "*As *a Language"*

> Language both in its structure and action is homologous with the law . . . 'the law of man has been the law of language since the first words of recognition.' [95]
>
> [T]he unconscious is structured as a language [96]

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[88] *Id.* at 549.

[89] *See* Beckett, *supra* note 9, at 1087 ("[L]aw is not our tool; *we* are constructs of international legality") (emphasis in original).

[90] Martti Koskenniemi, *Between Commitment and Cynicism: Outline of a Theory of International Law as Practice*, *in* COLLECTION OF ESSAYS BY LEGAL ADVISERS OF STATES, LEGAL ADVISERS OF INTERNATIONAL ORGANIZATIONS AND PRACTITIONERS IN THE FIELD OF INTERNATIONAL LAW 495 (1999).

[91] *Id*. at 497 ("I shall aim at providing a somewhat impressionistic sketch of the structure of the psychological positions available to international law practitioners.").

[92] *Id*. at 498, 502–06.

[93] *Id*. at 497.

[94] Lacan, *Myth, supra* note 47, at 425 ("[M]ore light").

[95] DOUZINAS, *supra* note 14, 305 (quoting Jacques Lacan, *The Function and Field of Speech and Language in Psychoanalysis*, *in* JACQUES LACAN, ÉCRITS 197, 225 (Bruce Fink trans., 2006)) (using a different version of Lacan's text).

[96] Jacques Lacan, *Of Structure as the Inmixing of an Otherness Prerequisite to Any Subject Whatever*, LACAN.COM, http://www.lacan.com/hotel.htm (last visited May 17, 2017).

> 'structured' and 'as a language' for me mean exactly the same thing.[97]

Understanding international law, in Koskenniemi's terms, "*as* a language" does not offer normative clarity in particular cases,[98] nor is it possible to explain the content of the language through particular events or concrete facts. *À la* Saussure's theory of language, international legal "[m]eaning is not . . . present in the expression itself" but "relational."[99] International legal words or terms "are somehow self-defining,"[100] "like holes in a net . . . [e]ach empty in itself . . . identi[fied] only through the strings which separate it from the neighbouring holes."[101] "Knowing a language—understanding the meaning of words—is to be capable of operating these differentiations,"[102] and it is "the feeling of the native speaker which remains . . . the test of the presence or absence of distinctive features."[103]

Koskenniemi's Saussurean approach distinguishes between "the system of differences within which the meaning of speech-acts is constituted," or "*langue*," and "individual, historical speech-acts," or "*paroles*," focusing on the former ("*langue*") as the structurally determinative force in language and discourse.[104] A prioritization of present system ("the synchronic") over past acts ("the diachronic") defines Saussurean linguistics, according to Fredric Jameson.[105] "[T]he synchronic" is concerned with "the immediate lived experience

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[97] *Id*.

[98] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 568 (emphasis in original).

[99] *Id*. at 8–9. *See also id.*, at 8 n.4 (inviting the reader to "[s]ee generally *Saussure* (Course)"); FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 9 (Charles Bally & Albert Sechehaye eds., Wade Baskin trans., 1966):

> But what is language [*langue*]? It is not to be confused with human speech [*langage*], of which it is only a definite part . . . It is both a social product of the faculty of speech and a collection of necessary conventions that have been adopted by a social body to permit individuals to exercise that faculty.

[100] JAMESON, PRISON-HOUSE, *supra* note 1, at 17.

[101] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 9.

[102] *Id*. at 9.

[103] JAMESON, PRISON-HOUSE, *supra* note 1, at 17.

[104] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 7.

[105] *See* JAMESON, PRISON-HOUSE, *supra* note 1, at 3-39.

of the *native speaker*" [106] or, as Macey puts it, "the dimension in which language exists as a system."[107] *From Apology* is a synchronic, internal, linguistic account of international law's ontology and practice; an account of international law "*as* a language," "a system of production of good legal arguments," written by and from the perspective of a "native language-speaker."[108] "Diachrony," the antithesis of synchrony, "is the historical dimension in which languages evolve."[109] It "rests on a kind of intellectual construction, the result of comparisons between one moment of lived time and another by someone who stands outside . . . substitut[ing] a purely intellectual continuity for a lived one."[110]

Lacan, like Saussure, prefers the synchronic to the diachronic:

> A psychoanalyst should find it easy to grasp the fundamental distinction between signifier and signified . . . *The first network, that of the signifier, is the synchronic structure of the material of language* insofar as each element takes on its precise usage therein by being different from the others; this is the principle of distribution that alone regulates the function of the elements of language [*langue*] at its different levels, from the phonemic pair of oppositions to compound expressions, the task of the most modern research being to isolate the stable forms of the latter. The second network, that of the signified, is the diachronic set of concretely pronounced discourses, which historically affects the first network, just as the structure of the first governs the pathways of the second. What dominates here is the unity of signification, which turns out to never come down to a pure indication of reality [*réel*], but always refers to another signification. In other words, signification comes about only on the basis of taking things as a

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[106] *Id*. at 6 (emphasis added).

[107] Macey, *supra* note 73, at xxiii.

[108] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 568.

[109] Macey, *supra* note 73, at xxiii.

[110] JAMESON, PRISON-HOUSE, *supra* note 1, at 6.

> whole [*d'ensemble*] . . . . The signifier alone guarantees the theoretical coherence of the whole as a whole.[111]

The signifier, which Lacan associates with the synchronic, is that which signifies—language. The signified is that which is signified by language—"reality." Lacan represents the relationship between signifier ('S') and signified ('*s*') thus:[112]

$$\frac{S}{s}$$

The point, here, is that "linguistics" as a "science is . . . based, in effect, on the primordial position of the signifier and the signified as distinct orders initially separated by a barrier resisting signification."[113] Because "no signification can be sustained except by reference to another signification,"[114] because "there is no existing language [*langue*] whose ability to cover the field of the signified can be called into question,"[115] and because the notion that "the signifier serves . . . the function of representing the signified, or better, that the signifier has to justify . . . its existence in terms of any signification whatsoever" is an "illusion,"[116] the signifier has priority over the signified or, more accurately, "the signifier in fact enters the signified . . . in a form which, since it is not immaterial, raises the question of its place in reality."[117] As Yannis Stavrakakis explains, for Lacan "meaning is produced by signifiers; it springs from the signifier to the signified and not vice versa (as argued by realist representationalism)."[118]

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[111] Jacques Lacan, *The Freudian Thing or the Meaning of the Return to Freud in Psychoanalysis, in* JACQUES LACAN, ÉCRITS 334, 345 (Bruce Fink trans., 2006) (emphasis added).

[112] *See* Jacques Lacan, *The Instance of the Letter in the Unconscious*, *in* JACQUES LACAN, ÉCRITS 412, 414 (Bruce Fink trans., 2006).

[113] *Id*. at 415.

[114] *Id*. (citation omitted).

[115] *Id*.

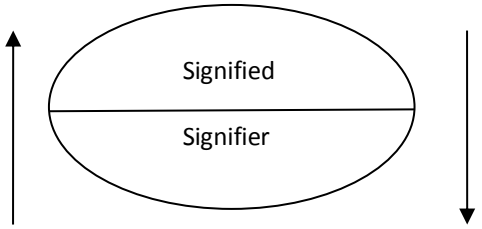
[116] *Id*. at 416

[117] *Id*. at 417.

[118] YANNIS STAVRAKAKIS, LACAN AND THE POLITICAL: THINKING THE POLITICAL 25 (1999).

Lacan draws extensively on Saussure's work but "deviate[s] from the Saussurian model."[119] "The primacy of the signifier is not an idea found in Saussure's work";[120] indeed, as Michel Borch-Jacobsen explains, "Saussure's langue"—which Koskenniemi defines in terms of a "controlling legal *langue*, the *conditions of what can acceptably be said within* [international law], or what it is possible to think or believe in it"[121]—"does not gain entry into Lacan's doctrine before having been emptied of all representative functions."[122]

Saussure's concept of the relationship between signifier and signified, in contrast to the diagram ('S' and '*s*') above depicting Lacan's concept, can be represented thus:[123]



As Dany Nobus explains:

> The most conspicuous difference between Saussure's and Lacan's diagrams concerns the positions of the signifier and the signified relative to the bar that separates them. Whereas in Saussure's schema, the signified and the signifier are located above and beneath the bar respectively, in Lacan's version their position has been interchanged. Secondly, whereas Saussure's diagram suggests if not an equivalence, at least a parallelism between the signified and the signifier, owing to the similarity with which they are

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[119] Owen Hewitson, *What Does Lacan Say About the Signifier?,* LACANONLINE.COM (June 20, 2010), http://www.lacanonline.com/index/2010/06/what-does-lacan-say-about-the-signifier/ (last visited May 17 2017).

[120] *Id*.

[121] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 11 (emphasis in original).

[122] MIKKEL BORCH-JACOBSEN, LACAN: THE ABSOLUTE MASTER 173 (Douglas Brick trans., 1991).

[123] The diagram that follows is reproduced from Dany Nobus, *Lacan's Science of the Subject: Between Linguistics and Topology*, *in* THE CAMBRIDGE COMPANION TO LACAN 50, 52 (Jean-Michel Rabaté ed., 2003).

> graphically inscribed above and beneath the bar, Lacan's algorithm underscores visually the incompatibility of the two terms. For in Lacan's formula the signifier is written with an upper-case letter (S) and the signified appears in lower-case type (s), and is italicized (*s*).[124]

The signified does not feature in *From Apology*.[125] It is a Lacanian inquiry into the internal "dynamics" of international legal argument,[126] and it understands international law as a pure signifier with (Lacanian) "primacy" over the signified.[127]

IV. "[F]rom Structure to Subject"

Despite its emphasis on the perspective of the "native speaker," international law's synchronic language is "prior" to the subject.[128] The lawyer/subject is an "effect" of the structure:[129] "[T]he very relation [he] has to [him]self must be rooted in the impossibility of coinciding with [him]self."[130]

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[124] *Id*. at 53. *See also* Ernesto Laclau, *Identity and Hegemony: The Role of Universality in the Constitution of Political Logics*, *in* JUDITH BUTLER, ERNESTO LACLAU & SLAVOJ ŽIŽEK, CONTINGENCY, HEGEMONY, UNIVERSALITY: CONTEMPORARY DIALOGUES ON THE LEFT 44, 69 (2000); STAVRAKAKIS, *supra* note 118, at 24–25.

[125] *See* Rasulov, *supra* note 13, at 656–63 (commenting, without reference to Lacan or the connection between Lacan and Saussure, on Saussurean linguistics and *From Apology*'s focus on the signifier).

[126] *See* KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 58.

[127] *See id.* at 13 ("By providing an 'insider's view' to international legal discourse."); *see also* David Kennedy, *Apology to Utopia*, *supra* note 17, at 386 ("[R]ather than applying criticisms developed by other fields or writing from a viewpoint outside international law, [Koskenniemi] produces a criticism that is internal and, ultimately, situated in the best traditions of the discipline."); Carty, *supra* note 14, at 864 ("[B]eyond Wittgenstein-style language games there is no reality, no referent."); Rasulov, *supra* note 13, at 642 ("[*From Apology*'s] most important theoretical legacy [is] a highly novel and very powerful argument in defence of the *anti-anti-disciplinarian theoretical agenda* in the field of academic international legal studies" - emphasis in original).

[128] Jacques-Alain Miller, *Action of the Structure*, *in* CONCEPT AND FORM VOLUME ONE: KEY TEXTS FROM THE CAHIERS POUR L'ANALYSE 69, 74 (Jean-Michel Rabaté ed., 2012).

[129] Maniglier, *supra* note 44, at 27. *See also* Yves Duroux, *Strong Structuralism, Weak Subject*, *in* CONCEPT AND FORM VOLUME TWO: INTERVIEWS AND ESSAYS FROM THE CAHIERS POUR L'ANALYSE 187, 199–200 (Peter Hallward & Knox Peden eds., 2012).

[130] Maniglier, *supra* note 44, at 27. *See also* DOUZINAS, *supra* note 14, at 304 ("I must identify with my image in the mirror and with my name . . . I must accept division and negativity, I must accept that I am what I am not, in [Arthur] Rimbaud's felicitous phrase that 'Je est un autre.'").

The statement "I am an international lawyer" is circular and meaningless without international law's structure.[131] The international lawyer is "a paradoxical entity" that "can only constitute itself as being different from itself: its very identity is to escape itself."[132] The subject/international lawyer "escape[s] itself" by *subject*ing itself to international law's linguistic structure. This is the Lacanian meaning of the statement "I am an international lawyer;"[133] "[t]he subject speaks and comes into existence by being spoken in language, in other words by being alienated one more time from bodily and sensory experience into the cold world of the sign."[134]

From Apology moves "from structure to subject" because the structure has "prior[ity]."[135] It does this by identifying the longed-for "specifically 'legal' discourse" as a myth, by mapping neurotic efforts to validate the myth in a search for "concreteness" *and* "normativity," and by exploring viable modes of practice within the linguistic structure that myth and neurosis create:

> [L]awyers' expectations of certainty should be downgraded . . . they—as well as States and statesmen—must take seriously the moral-political choices they are faced with when arguing 'within the law' and accept the consequence that in some relevant

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[131] Maniglier, *supra* note 44, at 27 ("[T]he rationale for such a paradoxical definition of subjectivity has to do with the problem of the relation between *being* and *subjectivity*. Does it make sense to say that "I" am . . . is it possible to apply the category of truth to the subject of knowledge itself?" – emphasis in original). *See also* Ernesto Laclau, *Power and Representation*, *in* ERNESTO LACLAU, EMANCIPATION(S) 84, 92 (2007) ("The hegemonic subject cannot have a terrain of constitution different from the structure to which it belongs.").

[132] Maniglier, *supra* note 44, at 28.

[133] *See* Thomas C. Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127, 140 (1984)

> Structuralism argued that the systematic form of language, rather than the particular linguistic elements of actual spoken words, gave rise to intelligibility . . . the role of the speaker as agent was displaced. The speaker was now dependent on language itself to engage in meaningful activities . . . . The subject was better understood as a product of culture, an identity created in language, a potentiality limited by the language that defined the conventions of a world.

See also KOSKENNIEMI, *FROM APOLOGY*, *supra* note 4, at 7 n.1 (describing Heller's article as "useful").

[134] DOUZINAS, *supra* note 14, at 303.

[135] Miller, *supra* note 128, at 74.

> sense the choices are theirs and that they therefore should be responsible for them.[136]

V. Structure/Subject/Suture

If, as Lacan's collaborator and editor Jacques-Alain Miller maintains, "[s]tructure [is] that which puts in place an experience for the subject that it includes" then structures are existentially dependent on the "inclu[sion]" of a subject.[137] Without a declaration of subjectivity the subject features in the structure only as a "lack," as something that is "lacking . . . [but] not purely and simply absent."[138] "Suture" expresses "lack" in this sense, by "nam[ing] the relation of the subject to the chain of its discourse."[139] By declaring its subjectivity the subject "stand[s]-in" or "tak[es]-the-place-of" the subject that the structure originally lacked,[140] occupying the space that the structure held open for it.[141]

Ernesto Laclau evokes this notion of a sutured subject, asserting "the subject who takes the decision is only partially a subject; he is also a background of sedimented practices organizing a normative framework which operates as a limitation on the horizon of options."[142] *From Apology*'s international lawyer is sutured into the structure, "stand[ing]-in" the structure's prefabricated subject-space.

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[136] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 536.

[137] Miller, *supra* note 128, at 71.

[138] *Id*. at 93.

[139] *Id.*

[140] *See id.*

[141] *See* Laclau, *Power*, *supra* note 131, at 92 ("[T]he structure is not fully reconciled with itself . . . it is inhabited by an original lack, by a radical undecidability that needs to be constantly superseded by acts of decision. These acts are precisely what constitute the subject, who can only exist as a will transcending the structure."); *see also* Slavoj Žižek, *Class Struggle or Postmodernism? Yes Please*, *in* JUDITH BUTLER, ERNESTO LACLAU & SLAVOJ ŽIŽEK, CONTINGENCY, HEGEMONY, UNIVERSALITY: CONTEMPORARY DIALOGUES ON THE LEFT 90, 119 (2000) ("[F]or Lacan, the subject prior to subjectivization is not some Idealist pseudo-Cartesian self-presence preceding material interpellatory practice and apparatuses, but the very gap in the structure that the imaginary (mis)recognition in the interpellatory Call endeavours to fill in."); Singh, *The Critic(al Subject)*, *supra* note 14, at 9 and 12, wrestles with the relationship between subject and structure in Koskenniemi's work without reference to "suture" or discussion of its place in the broader Lacanian/Laclauian framework and is, consequently, unable to grasp the dialectical, mutually constitutive relationship between subject and structure in Koskenniemi's work. This leads to the (in my view) mistaken conclusion – on which *see infra* note 152 – that "the absolute free and empty subject is presupposed by Koskenniemi's critique". *Id.* at 13.

[142] Laclau, *Identity and Hegemony*, *supra* note 124, at 82.

The possibilities of "critical lawyer[ing]," [143] of a "critical politics which does not need to rely on utopian justice nor become an apology of actual power," [144] are defined by the structure. [145] International legal practice "is not the application of ready-made, general rules or principles but a conversation about what to do, here and now." [146] "Uncertainty and choice are an ineradicable part of [international legal] practice" because the notion that international law provides unambiguous, ready-made solutions to conflicts involves an "objectification mistake," [147] treating law as a (definite, defined) object when it is, in fact, an (ambiguous, interpretable) social construct. [148]

International lawyers are not only entitled but obliged to make political choices which resolve legal disputes in line with their "authentic commitment" to international law, [149] their "integrity as . . . lawyer[s]." [150] Being an "authentic," committed international lawyer "is [to exist in] the distance between the undecidability of the structure and the decision," [151] to live with(in) international law's neurosis, with(in) the search for

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[143] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 548.

[144] *Id.* at 539.

[145] *See* Caudill, *supra* note 14, at 660 n.46 ("In Lacan's [concept of the] unconscious, society precedes individuality.").

[146] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 544.

[147] *Id.* at 555, 537.

[148] *See id.* at 537–48.

[149] *Id.* at 546-47. *See also* Koskenniemi, *Between Commitment and Cynicism*, *supra* note 90, at 512 ("It is, I believe, precisely [the] sense of doubt, uncertainty, and occasional schizophrenia . . . that is in the background when international lawyers describe their practice in terms of a *commitment*, instead of, say, a knowledge or a faith" – emphasis in original); *id.* at 508 ("The law brings the committed lawyer to the brink of the (legal) decision, but never quite into it. If a civil strife arises, the law tells the lawyer: 'Here are two rules, "self-determination" and "uti possidetis." Now choose.'").

[150] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 555. *See also* Koskenniemi, *Between Commitment and Cynicism*, *supra* note 90, at 498–99:

> To be a voice for no particular interests or position is not a lucrative affair; it calls for commitment! . . . . This aspect of commitment has to do with the avoidance of politics, prejudice and everything else that appears as external, as strictly outside the law and is often described in terms of the good lawyer's particular 'integrity.'

[151] Laclau, *Identity and Hegemony*, *supra* note 124, at 79.

"concreteness" *and* "normativity," by "get[ting] over" the idea that we ought to have found a "specifically 'legal' discourse" by now.[152]

Koskenniemi's psychoanalysis of international law is, ultimately, a psychoanalysis of international lawyers also. International law and international lawyers are inseparable because the international legal subject is sutured into the linguistic structure.[153]

C. Therapy

I. Hegemony

From Apology is an argument for the hegemony of the international lawyer as a therapeutic response to international law's neurosis.[154] It advocates political decision-making by international lawyers within international law's linguistic structure as the form of legal practice most appropriate in a fragmented, global socio-political context.[155]

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[152] Aristodemou, *supra* note 14, at 37 ("get over"); KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 1 ("specifically 'legal' discourse"). *See* Laclau, *Power*, *supra* note 131, at 89 ("[A] contingent intervention taking place in an undecidable terrain is . . . a hegemonic intervention."). *See also* KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 553 (discussing the international lawyer's "role"); Prost, *Born Again Lawyer*, *supra* note 11, at 1039 ("[P]art of what [*From Apology*] does is illustrate how there is no such thing as an 'objective' system of international law, i.e. an autonomous law which judges can 'find' and use as a non political device for settling disputes, and which students can learn 'as it is.'"); Singh, *Koskenniemi's Images*, *supra* note 29. I disagree with Singh when he concludes that "the Sartrean subject [is] at the heart of *From Apology to Utopia*," claims that "the absolute free and empty subject is presupposed by Koskenniemi's critique," and argues that "[s]he [the international lawyer] is able to briefly separate herself from the grounds of her own construction." *Id.* at 710, 714, 724. KOSKENNIEMI, FROM APOLOGY, *supra* note 4, is, in my view, and as explained above, based on a Lacanian understanding of the sutured relationship between subject and structure.

[153] *See* KOSKENNIEMI, GENTLE CIVILIZER, *supra* note 6, at 7 ("It may be too much to say that international law is *only* what international lawyers do or think. But at least it is that" – emphasis in original); Justin Desautels-Stein, *From Apology to Utopia's Point of Attack*, 29 LEIDEN J. INT'L L. 677, 687 (2016):

> *From Apology to Utopia* suggested that it may very well be impossible to 'think' outside of [the] structure of legal thought, and if this was the case, then an understanding of the menu of such structures clued us in to the availability of different ways of conceptualizing the international legal order.

[154] *See* KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 13 (referring to "a therapeutic effect on lawyers").

[155] *See* ERNESTO LACLAU & CHANTAL MOUFFE, HEGEMONY AND SOCIALIST STRATEGY: TOWARDS A RADICAL DEMOCRATIC POLITICS x (2d ed. 2001) ("Our approach is grounded in privileging the moment of *political* articulation, and the central category of political analysis is, in our view, *hegemony*" – emphasis in original); *see also* Martti Koskenniemi, *"By Their Acts You Shall Know Them . . ." (and Not by Their Legal Theories)*, 15 EUR. J. INT'L L. 839, 851 (2004) ("[*A*]*ll law* (and not just semantically unclear law) is infected by indeterminacy. There is, in this sense, no middle-of-the-road

In *Hegemony and Socialist Strategy* Ernesto Laclau and Chantal Mouffe define hegemony as "appear[ing]" in the "context" of a "fault (in the geological sense) . . . a fissure that had to be filled up . . . a contingency that had to be overcome."[156] Hegemony is something that "fills a space left vacant by a crisis of what . . . should have been a normal historical development,"[157] and it "supposes a theoretical field dominated by the category of *articulation*."[158]

Laclau and Mouffe define "articulation" as "any practice establishing a relation among elements such that their identity is modified as a result of the articulatory practice,"[159] explaining that "[t]he structured totality resulting from the articulatory practice" is a "discourse."[160] "[E]lements'" are "floating signifiers, incapable of being wholly articulated to a discursive chain,"[161] and "articulation" involves "the transition from 'elements' to 'moments,'"[162] for all that this "transition" is "never entirely fulfilled."[163] "[M]oments" are defined as the "differential positions . . . articulated within a discourse,"[164] arguments formed out of a particular arrangement of "elements," and "articulation" ultimately "consists in the construction of nodal points which partially fix meaning,"[165] of "*points de capiton* . . . privileged signifiers that fix the meaning of a signifying chain."[166]

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solution at all: even one that initially seems such, is an occasionalist reliance on a momentarily hegemonic solution" – emphasis in original); Desautels-Stein, *Point of Attack*, *supra* note 153, at 680–81 ("*From Apology to Utopia* sought to uncover practices of international legal argument in order to assist the international community in better understanding the structured relationship between international law and international politics." (citation omitted)).

[156] LACLAU AND MOUFFE, HEGEMONY, *supra* note 155, at 8.

[157] *Id.* at 48.

[158] *Id.* at 93 (emphasis in original).

[159] *Id.* at 105. *See also* Caudill, *supra* note 14, at 673 ("[A]rticulation is always an approximation of truth.").

[160] LACLAU & MOUFFE, HEGEMONY, *supra* note 155, at 105.

[161] *Id.* at 113.

[162] *Id.* at 110.

[163] *Id*.

[164] *Id*. at 105.

[165] *Id.* at 112.

[166] LACLAU & MOUFFE, HEGEMONY, *supra* note 155, at 113.

"Articulatory practice" is "possible" only because of the "incomplete," "contingen[t]" nature of . . . discourse,[167] "the impossibility of fixing ultimate meanings,"[168] the fact that "no discursive formulation is a sutured totality,"[169] and because "moments [are] never entirely fulfilled."[170] Subjects take up "'subject positions' within a discursive structure" by "sutur[ing]" themselves into it,[171] and practice hegemony as "a political type of relation, a form . . . of politics,"[172] a "game" played through "articulatory practice" in conditions of "contingency and ambiguity . . . social division and antagonism."[173] "[H]egemonic articulation" takes place in a climate of "antagonism" and "equivalence,"[174] on the basis that "society" is neither "totally possible," because of irresolvable antagonisms between "subject positions," nor "totally impossible" because of commonalities or equivalences between "subject positions."[175]

International law "should [, in the course of its] normal historical development,"[176] have become a "specifically 'legal' discourse [situated] between the sociological [its mother] and the political [its father]."[177] It did not, and that failure left it in a contingent, neurotic state. *From Apology* argues for hegemonic "articulatory practice" as the appropriate methodological response to the fact that the son (international law) is a young adult who did not enjoy a "normal historical development," a healthy adolescence. He is, therefore,

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[167] *Id.* at 110-11.

[168] *Id.* at 111.

[169] *Id.* at 106.

[170] *Id.* at 110.

[171] *Id*. at 115; *Id.* at 47, 88 n.1 ("The concept of 'suture' . . . is taken from psychoanalysis. Its explicit formulation is attributed to Jacques Alain-Miller . . . although it implicitly operates in the whole of Lacanian theory. It is used to designate the production of the subject on the basis of the chain of its discourse."). For discussion of "suture," see *supra* Section B. V., "Structure/subject/suture."

[172] LACLAU & MOUFFE, HEGEMONY, *supra* note 155, at 139.

[173] *Id*.

[174] *Id*. at 122–34.

[175] *Id*. at 129. *See also* Laclau, *Identity and Hegemony*, *supra* note 124, at 74 ("An always open intertextuality is the ultimately undecidable terrain in which hegemonic logics operate.").

[176] LACLAU AND MOUFFE, HEGEMONY, *supra* note 155, at 48.

[177] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 1. On sociology as "mother" and politics as "father," see *supra* Section B. II., "Lacan and the Rat Man."

unable to satisfy both his mother (sociology) and his father (politics), largely because he has still not moved out of the family home and found a place of his own:

> Normative imagination—reasoned folly—must take over where legal interpretation left off . . . . As international lawyers, we have failed to use the imaginative possibilities open to us . . . we were cast as players in game, members in somebody's team. It is not that we need to play the game better, or more self-consciously. We need to re-imagine the game, reconstruct its rules, redistribute the prizes.[178]

From Apology's *sotto voce* message seems to be that the "game" can be "re-imagine[d]" as hegemony, and Koskenniemi makes this almost explicit in a 2004 article arguing for an understanding of international law "as a hegemonic technique."[179]

My point, in tracing the origins of Koskenniemi's argument for international legal practice as hegemony back to the original publication of *From Apology* in 1989, is that hegemony has been the foundation of Koskenniemi's work from the beginning, and that it did not arrive as a mere add-on sometime around 2004. Beyond questions of timing, however, a more subtle and important point concerning Koskenniemi's treatment of the relationship between hegemony and international law also needs to be made.

Koskenniemi associates hegemony with "an argumentative practice in which particular subjects and values claim to represent that which is universal,"[180] placing particular emphasis on the "objective[s] of the contestants,"[181] on the arguments advanced by states,[182] and on the notion that "[p]rofessional competence in international law is precisely about being able to identity the moment's hegemonic and counter-hegemonic narratives and to list one's services in favour of one or the other."[183] While he highlights

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[178] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 560–61.

[179] Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 CAMBRIDGE REV. INT'L AFF. 197, 198 (2004).

[180] Martti Koskenniemi, *What is International Law For?*, *in* INTERNATIONAL LAW 29, 46 (Malcolm D. Evans ed., 4d ed. 2014).

[181] Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 EUR. J. INT'L L. 113, 119 (2005).

[182] Koskenniemi, *A Reconfiguration*, *supra* note 179.

[183] *Id.* at 202.

international law's function as "a hegemonic politics,"[184] he does not present his argument *as* an argument for the hegemony of the international lawyer.

Hegemony, as a form of political practice, is compatible with, even produced by, deconstruction—recalling Koskenniemi's description of *From Apology*'s "approach" as "'deconstructive.'"[185] For Laclau, "deconstruction discovers the role of the decision out of the undecidability of the structure"—in our context, out of the fact that international law is neither "concrete," nor "normative," nor can it find and occupy a space between the two—with "hegemony as a theory of the decision taken in [the] undecidable terrain" that deconstruction unveils.[186]

Through "deconstruction" Koskenniemi reveals "the contingent character of the connections existing in [international law's] terrain."[187] He does this by, for example, showing that international legal doctrine on sovereignty and the sources of international law can be analyzed with equal validity from opposing "ascending" and "descending" perspectives.[188] "Deconstruction" creates the space for sutured international lawyers to make legal arguments *qua* political decisions.[189] If the structure or discourse does not have the answer international lawyers are free to make "contingent, precarious, . . . pragmatic" political arguments within the discourse.[190]

In making political decisions, in "aiming to act as . . . 'genuine republican[s]' encompassing the perspective of the whole,"[191] international lawyers are "burden[ed] . . . with the

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[184] *Id*. at 214.

[185] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 6–14.

[186] Laclau, *Power*, *supra* note 131, at 90. I disagree with Sahib Singh when he claims that Koskenniemi's *From Apology* is a work of "structuralism" rather than "deconstruction," insofar as he implies an either/or relationship between structuralism and deconstruction. *See* Sahib Singh, *International Legal Positivism and New Approaches to International Law*, *in* INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD 291, 296–97 (Jörg Kammerhofer & Jean d'Aspremont eds., 2014).

[187] Laclau, *Power*, *supra* note 131, at 90.

[188] *See* KOSKENNIEMI, FROM APOLOGY, *supra* note 4, 224–302, 303–87.

[189] *See* Laclau, *Power*, *supra* note 131, at 92 ("[T]he structure is not fully reconciled with itself . . . it is inhabited by an original lack . . . by a radical undecidability that needs to be constantly superseded by acts of decision.").

[190] *Id*. at 90.

[191] Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 THEORETICAL INQUIRIES IN LAW 9, 31 (2007).

impossible task of making [global] democratic interaction achievable."[192] They are "hegemonic" precisely because they are "not closed in a narrow corporatist perspective,"[193] not *wholly* apologetic for the current distribution of power, opportunity and wealth, "but [present themselves] as realizing the broader [utopian] aims either of emancipating or ensuring order for wider masses of the [global] population."[194] It is in this sense international lawyers are, collectively, *The Gentle Civilizer of Nations,*[195] and taking that as his title, Koskenniemi develops the argument for hegemonic practice further in his second book.

II. Structuralism, Synchrony, and the "Move to History"

Koskenniemi tells us that *Gentle Civilizer* "move[s] from structure"—*From Apology*'s concern—"to history" through "intuitively plausible and politically engaged narratives about the emergence and gradual transformation of a profession that plays with the reader's empathy,"[196] and by "infus[ing] the study of international law with a sense of historical motion and political, even personal, struggle."[197] Another way to characterize the book would be to say that, consistent with *From Apology*'s concept of international law as a structure or discourse, *Gentle Civilizer* focuses on the "articulatory practice" of particular (sutured) subjects—Jellinek, Kelsen, Scelle, and Lauterpacht,[198] for example—and that this is "a story of kings . . . and the achievements of the great,"[199] and quite deliberately not a story of the forgotten, ignored and marginalized.[200]

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[192] Ernesto Laclau, *Universalism, Particularism and the Question of Identity*, *in* ERNESTO LACLAU, EMANCIPATION(S) 20, 35 (2007).

[193] Ernesto Laclau, *Why do Empty Signifiers Matter to Politics?*, *in* ERNESTO LACLAU, EMANCIPATION(S) 36, 43 (2007).

[194] *Id.*

[195] *See generally* KOSKENNIEMI, GENTLE CIVILIZER, *supra* note 6.

[196] *Id.* at 6, 10.

[197] *Id*. at 2.

[198] *See* KOSKENNIEMI, GENTLE CIVILIZER, *supra* note 6, 198–208 (on Jellinek), 238–49 (on Kelsen), 327–38 (on Scelle), 353–412 (on Lauterpacht).

[199] FREDRIC JAMESON, THE ANTINOMIES OF REALISM 111 (2013) (discussing "the dynastic tradition of history writing and historical narrative, which was essentially a story of the kings and queens and the achievements of the great, that is to say individuals, who are grasped in our own spirit of the word as the protagonists of historical actions and narratives").

[200] *See* KOSKENNIEMI, GENTLE CIVILIZER, *supra* note 6, at 9

> If all the protagonists in this book are white men, for instance, that reflects my concern to retell the narrative of the mainstream as a story about its cosmopolitan sensibilities and political projects . . . .

Consistent with *From Apology*'s understanding of international law as a synchronic "language . . . a total system . . . complete at every moment, no matter what happens to have altered a moment ago,"[201] we can read *Gentle Civilizer*'s various essays, on themes such as international legal practice in Germany in the period 1871-1933, as stories about past "kings", past "gentle civilizers" retold in order to "sharpen [the] . . . ability [of present day princes] to act in the professional contexts that are open to [them] as [they] engage in [or "suture" themselves into their] practices and projects."[202]

The book's "move from structure to history" is synchronic;[203] it is dictated by *From Apology*'s structuralist understanding of international law "*as* a language."[204] If, as Jameson maintains, Saussurean, structuralist linguistics is synchronic rather than diachronic, then any account of international law's history, built out of an understanding of international law "*as* a [synchronic] language,"[205] will synchronize "individual events [in]to various manifestations of some basic idea . . . so that what at first seemed a series of events in time at length turns out to be a single timeless concept in the process of self-articulation."[206] *Gentle Civilizer*'s "single timeless concept" emerges out of the story of a May 1966 debate

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> This should not, however, be read so as to exclude the possibility—indeed, the likelihood—that in the margins . . . there have been women and non-Europeans whose stories would desperately require telling so as to provide a more complete image of the profession's political heritage.

[201] JAMESON, PRISON-HOUSE, *supra* note 1, at 5–6

[202] Koskenniemi, GENTLE CIVILIZER, *supra* note 6, at 10. *See also* Matt Craven, *Theorising the Turn to History in International Law*, *in* THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 21, 34 (Anne Orford & Florian Hoffmann eds., 2016), rejecting diachrony as method:

> [I]nternational law is not simply something that one can examine through the lens of history as if it were some historical artefact existing independently of the means chosen by which it is to be represented, but a field of practice whose meaning and significance is constantly organized around, and through the medium of, a discourse that links present to past.

[203] KOSKENNIEMI, GENTLE CIVILIZER, *supra* note 6, at 6.

[204] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 568.

[205] *Id.*

[206] JAMESON, PRISON-HOUSE, *supra* note 1, at 70.

between Professors A.J. Thomas, Adolf Berle and Wolfgang Friedmann.[207] In Koskenniemi's hands the story is an allegory. Themes and tensions that permeate international law's history play out in interactions between its characters, and Koskenniemi extracts a moral from it, using that moral to synchronize the individual essays into a coherent book.[208]

The debate concerned the legality of US military intervention in the Dominican Republic. For Thomas "[t]he purpose of the rule against intervention [in a foreign state] was to protect 'the liberty and self-determination of a people,'" values that could not be protected "[o]nce the communists control a government".[209] It followed that US military intervention was lawful, in particular because communist "infiltration" of the internal uprising amounted to an "armed attack."[210] Berle argued in favor of US military intervention despite

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[207] *See* KOSKENNIEMI, GENTLE CIVILIZER, *supra* note 6, at 497–501.

[208] *See* FREDRIC JAMESON, THE ANTINOMIES, *supra* note 199. His observations on Alfred Döblin's method, in his novel *Wallenstein*, seem equally applicable to Koskenniemi's method, with money as Döblin's moral and formalism as Koskenniemni's:

> [F]illed at every moment with names, with all the characters of history, some known, some only mentioned in passing: and with place names as well, not even the map is enough to accommodate them all. It is a pulsing interminable uninterrupted flow, true textuality (not mere form without content) in which everything is in perpetual change back and forth across Central Europe yet driving forward temporally so that time itself, the passing instants, become invisible, only the events are generated and they never stop, the writer never stops (he thereby disappears also), and the sources are so thoroughly used up that nothing is any more allusion . . . there can be no longer any competition with this unending flow of text but only the affect the pulses through it and changes color from pallor to flush . . . all the tonalities of the affective spectrum stream through the interminable moments, none of them truly fulfilled or effectuating any lasting pause or destiny . . . . Not the least interest of this novel is indeed the recurrence in the form of an allegorical habit . . . . Everything here . . . has to do with money, and with an immense coral polyp that refuses to starve or die away but keeps itself in life for unforeseeable years by the very strength with which it draws money out of its hiding place . . . Wealth then becomes the very conduit of energy itself.

Id., at 244–45.

[209] KOSKENNIEMI, GENTLE CIVILIZER, *supra* note 6, at 497 (quoting A.J. Thomas & Ann Van Wynen Thomas, *The Dominican Republic Crisis 1965. Legal Aspects*, *in* A.J. THOMAS, ANN VAN WYNEN THOMAS & JOHN CAREY, THE DOMINICAN REPUBLIC CRISIS 3, 26–27 (1966)).

[210] *Id*.

the lack of UN Security Council authorization or a credible self-defence argument,[211] but Friedmann insisted that:

> "[T]here are norms of international law. If we wish to ignore them, then let us say frankly that international law is of no concern to us. But don't let us pretend that we argue in terms of international law, when in fact we argue in terms of power or of ideology."[212]

Koskenniemi maintains that Friedmann was "well aware of the shades of grey in all legal argumentation,"[213] well aware, recalling the discussion of *Hegemony and Socialist Strategy* above, of the contingent, articulatory nature of legal practice. Analyzing Friedmann's position, Koskenniemi emphasizes that "differential [legal] positions" can be "articulated within," but not outwith, "[the] discourse":[214]

> Perhaps what Friedmann finds objectionable is the nonchalance with which Thomas and Berle treat his profession, the (to him) self-evident hypocrisy that accompanied their reasoning and that seemed to fatally undermine the profession's faith and integrity. Indeed, it may have seemed to him that what Thomas and Berle were doing was not part of legal discourse at all.[215]

Thomas and Berle break "the chain" that binds the subject to "its discourse,"[216] and that break is the source of the objection Koskenniemi expresses allegorically through Friedmann.[217] Friedmann is a "stand-in," an ideal-typical international lawyer *qua* sutured

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[211] *See id*. at 497–98.

[212] *Id*. at 499 (quoting A.J. THOMAS, ANN VAN WYNEN THOMAS & JOHN CAREY, THE DOMINICAN REPUBLIC CRISIS 113 (1966)).

[213] *Id*.

[214] LACLAU AND MOUFFE, HEGEMONY, *supra* note 155, at 105.

[215] KOSKENNIEMI, GENTLE CIVILIZER, *supra* note 6, at 499.

[216] Miller, *supra* note 128, at 93.

[217] Koskenniemi's objection, *via* Friedmann, to Thomas and Berle seems to echo Freud in the sense captured by Caudill, see *supra* note 14, at 661 ("Freud believed that the primordial and dangerous passions of the individual must be controlled by inherently oppressive social structures."); *see also* Anne Orford, *A Journal of the Voyage*

subject, who "take[s] the place" of *the* subject, the "profession," within international law's structure/discourse.[218]

The allegory of the May 1966 debate is the "nodal point," the "*point de capiton*," of *Gentle Civilizer* and of Koskenniemi's work as a whole.[219] A collection of "privileged signifiers"—the arguments advanced by Thomas, Berle, and Friedmann—"[collectively] fix the meaning of [the] signifying chain" that runs through *From Apology* and *Gentle Civilizer*,[220] "partially fix[ing] [the] meaning" of international legal practice in the process.[221] For Koskenniemi, and under the banner of the "culture of formalism . . . the story of international law from Rolin to Friedmann"—from the foundation of the *Institut de Droit International* in 1873 by Gustave Rolin-Jaequemyns and the other "men of 1873" to Friedmann's 1966 rejection of Thomas' and Berle's political pragmatism—"does have coherence."[222] It is the story of an attempt to serve, in the *passé* language of 1873, as "the 'legal conscience . . . of the civilized world'";[223] of attempts to sustain "a practice that builds on formal arguments that are available to all under conditions of equality . . . insist[ing] that absent the possibility of building social life on unmediated love or universal reason, persuading people to bracket their own sensibilities and learn openness for others, is not worthless."[224]

"What at first seemed a series of events in time"—*Gentle Civilizer*'s apparently disparate historical essays—"turns out to be a single timeless concept in the process of *self-*

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from Apology to Utopia (2006) 7 GERMAN L.J. 993, 995 (2006) ("I was struck . . . by the ease with which Koskenniemi accepts, even embraces, the constraints of institutional life.").

[218] Miller, *supra* note 128, at 93.

[219] *See supra* Section C. I., "Hegemony" (on "nodal point"/"*point de capiton*").

[220] LACLAU AND MOUFFE, HEGEMONY, *supra* note 155, at 112.

[221] *Id.* at 113.

[222] KOSKENNIEMI, GENTLE CIVILIZER, *supra* note 6, at 502 (discussing the "culture of formalism"); *id.* at 39–41 (discussing the *Institut*'s foundation in 1873). *See* Andrew Lang & Susan Marks, *People with Projects: Writing the Lives of International Lawyers*, 27 TEMPLE INT'L & COMP. L.J. 437, 446 (2016) ("Martti sees the founders of the *Institut de droit International* and their twentieth century successors as exemplifying and enacting in their professional lives some version of the kind of responsible moral agency which he seeks to enliven in the practice of international lawyers today.").

[223] *Id.* at 41. The phrase still features in Article 1(2)(a) of the Statute of the *Institut*. *See* Institut de Droit International, *Statutes of the Institut de Droit International*, JUSTITIAETPACE.ORG, http://justitiaetpace.org/status.php (last visited May 17, 2017).

[224] KOSKENNIEMI, GENTLE CIVILIZER, *supra* note 6, at 501, 502. *See also* Koskenniemi, *Between Commitment and Cynicism*, *supra* note 90, at 498 ("To struggle for 'world peace through law', 'world order models', the rights of future generations, 'fairness' or indeed global governance is far from a recipe for diplomatic success. But we would not recognize the profession for what it is if it did not hark back to such objectives.").

articulation."[225] If the "culture of formalism" *looked* as though it had been articulated by Koskenniemi, if it *looked* like an "intellectual construction" produced out of "comparisons between one moment of lived time and another by someone who stands outside" international law,[226] it would appear diachronic and lose the quality of seeming internal to international law's discourse. By *apparently* emerging out of "a series of events in time" at the end of *Gentle Civilizer*, the "culture of formalism" *seems* to articulate itself. Crucially, however, behind this "self-articulation" lurks Koskenniemi's *a priori* preference, expressed (covertly) in *From Apology*, for the synchronic over the diachronic. "[T]he decision as to whether one faces a break or a continuity,"[227] the choice between synchrony and diachrony, between "whether the present is to be seen as a historical originality or as the simply prolongation of more of the same under different sheep's clothing,"[228] is pure rather than "empirically justifiable or philosophically arguable . . . since it is itself the inaugural narrative act that grounds the perception and interpretation of the events to be narrated."[229] If the choice between synchrony and diachrony is not "justifiable" then, methodologically, the best course of action is to use the fabric of the text to cover over the fact that you have chosen one over the other. To do this the text must be structured so as to make your choice seem natural and uncontroversial. This explains why the "culture of formalism" *appears* to articulate itself and why, despite being Koskenniemi's core message, he only introduces it at the end of his second book.

Gentle Civilizer does not, then, "move from structure to history,"[230] insofar as that implies an opposition between structure and history. Rather, the book is a structuralist-synchronic history of international law, and it needs to be read as such.[231] I will return to the possibility of choosing diachrony over synchrony as the foundation of an alternative theory of international law and its practice in the final part of this Article. For now, I simply want to emphasize the fact a choice between synchrony and diachrony exists.

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[225] JAMESON, PRISON-HOUSE, *supra* note 1, at 170 (emphasis added).

[226] *Id.* at 6.

[227] JAMESON, POSTMODERNISM, *supra* note 17, at xii–xiii.

[228] *Id.* at xii.

[229] *Id.* at xiii.

[230] KOSKENNIEMI, GENTLE CIVILIZER, *supra* note 6, at 6.

[231] Compare George Galindo's review of *Gentle Civilizer* and his conclusion that it "represents a historiographical turn in the work of Koskenniemi and paves the way for the same in the field of international law." *See* George Galindo, *Martti Koskenniemi and the Historiographical Turn in International Law,* 16 EUR. J. INT'L L. 539, 542 (2005).

III. "Empty" Universalism

The "culture of formalism" is an argument for an "'empty' . . . negative" universalism that "avoids the danger of imperialism" by being "recognizable . . . only in terms of its opposition to something that it is not."[232] While "Thomas and Berle saw politics as a clash of incompatible particularities—'identity politics' . . . Friedmann kept open the space for something beyond the merely particular,"[233] for an "empty" universalism.

Koskenniemi derives his non-imperialist, "empty," formal universalism from Laclau,[234] and it recurs throughout his work.[235] For Laclau hegemony is a political practice in pursuit of an unrealizable universal. The process of Italian unification that began in the nineteenth century, for example, is not so much a "concrete political programme" as "the name or . . . symbol of a lack," [236] and the process is capable of sustaining Italian politics "over a period of centuries" because it is built around that "constitutive lack" [237]

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[232] KOSKENNIEMI, GENTLE CIVILIZER, *supra* note 6, at 504, 507.

[233] *Id.* at 501.

[234] *Id*. at 505–508 n.307–11. Justin Desautels-Stein, *Chiastic law*, *supra* note 29, reads Koskenniemi's "culture of formalism" through Soren Kierkegaard's figure of the 'Knight of Faith,' emphasizing the extent to which Koskenniemi's formalism involves "having faith in a universal that is at once impossible and realisable." *Id.* at 288. The Laclauian-Lacanian reading offered here has, I claim, "priority"—on "priority" see *supra* Section A, "Introduction"—over Desautels-Stein's reading.

[235] *See, e.g.*, Koskenniemi, *Constitutionalism as Mindset*, *supra* note 191, at 31 (arguing that the international lawyer *qua* "moral politician" is "the actor conscious that the right judgment cannot be reduced to the use of instrumental reason and who, in judging, aims to act as a 'genuine republican'"); Martti Koskenniemi, *The Lady Doth Protest Too Much: Kosovo, and the Turn to Ethics in International Law,* 65 MOD. L. REV. 159, 174 (2002) ("[F]ormalism constitutes a horizon of universality, embedded in a *culture* of restraint, a commitment to listening to others' claims and seeking to take them into account" – emphasis in original); Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics,* 70 MOD. L. REV. 1, 30 (2007):

> [T]he tradition of international law has often acted as a carrier of what is perhaps best described as the regulative idea of universal community, independent of particular interests or desires. This is Kant's cosmopolitan project rightly understood: not an end-state or party programme but a project of critical reason that measures today's state of affairs from the perspective of an ideal of universality that cannot be reformulated into an institution, a technique of rule, without destroying it.

See also Martti Koskenniemi, *International Law in Europe*, *supra* note 181, at 120, 122–23.

[236] Ernesto Laclau, *Subject of Politics, Politics of the Subject*, *in* ERNESTO LACLAU, EMANCIPATION(S) 47, 63 (2007).

[237] *Id.*

Hegemonic practices are attempts to resolve "the openness of the social," "to fill in" or "suture" fractures in the social fabric.[238] Because "a closure of the social is . . . impossible" hegemonic practices are more attempts than achievements[239]—efforts to articulate ways in which society might be changed without any real prospect that this will achieve a "totally sutured society . . . where this filling-in would have reached its ultimate consequences."[240]

Koskenniemi uses formalism as a euphemism for hegemony. He presents his argument for international legal practice as hegemony in the abstract,[241] in the footnotes.[242] The term "formalism" seems somehow more consonant with international legal discourse than

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[238] LACLAU AND MOUFFE, HEGEMONY, *supra* note 155, at 88 n.1

[239] *Id*.

[240] *Id. See also* Ernesto Laclau, *Structure, History and the Political, in* JUDITH BUTLER, ERNESTO LACLAU & SLAVOJ ŽIŽEK, CONTINGENCY, HEGEMONY, UNIVERSALITY: CONTEMPORARY DIALOGUES ON THE LEFT 182, 199 (2000) ("[I]nstead of . . . impossibility leading to a series of substitutions which attempt to supersede it, it leads to a symbolization of impossibility *as such* as a positive value.").

[241] Martti Koskenniemi, *What Should International Lawyers Learn from Karl Marx?,* 17 LEIDEN J. INT'L L. 229 (2004). Koskenniemi notes, *in the article's abstract*, that "[t]he task . . . is to move from doctrinal critique to progressive practice" and that "the theory of hegemony provides the best available account of how that can be undertaken without losing the ambition of the law's universality." *Id.* at 229. Koskenniemi does not, however, directly advocate the practice of international law as hegemony in the article's main text. *See also* Martti Koskenniemi, *Law's Negative Aesthetic: Will it Save Us?*, 41 PHIL. & SOC. CRITICISM 1039 (2015) (summarizing the argument for the practice of international law as hegemony without presenting it *as* an argument for hegemonic practice); Martti Koskenniemi, *What is Critical Research in International Law? Celebrating Structuralism*, 29 LEIDEN J. INT'L L. 727, 734 (2016), arguing, in abstract terms, for an understanding of research in international law as an exercise in hegemonic intervention:

> Structural research of the kind displayed in [*From Apology*] tries to keep alive the political intuitions of the researcher by demonstrating that there really is no safe ground of 'mere professionalism' where attitudes of blasé neutrality would be appropriate. On the other hand, by making express the rules that provide for legal competence, such research seeks to empower the critical researcher to operate in actually existing institutions in potentially influential ways, aware of the structural constraints but also of the malleability, gaps and loopholes of their official rhetoric.

[242] Koskenniemi, *The Lady Doth Protest*, *supra* note 235, at 174 n.51 (referring to and linking LACLAU & MOUFFE, HEGEMONY, *supra* note 155, and JUDITH BUTLER, ERNESTO LACLAU & SLAVOJ ŽIŽEK, CONTINGENCY, HEGEMONY, UNIVERSALITY: CONTEMPORARY DIALOGUES ON THE LEFT (2000), with his discussion of the "culture of formalism" in KOSKENNIEMI, GENTLE CIVILIZER, *supra* note 6).

"hegemony," more consistent with the suture between the international lawyer and his discourse.[243]

The hegemonic practice of international law within international legal discourse sustains the "authentic[ity]" and "integrity" of international law,[244] creating "a continuity operating through partial discontinuities" that counterbalances "the openness of the social" by keeping the fractures,[245] the "fissure[s],"[246] within manageable bounds. For Koskenniemi international law's value, as a hegemonic practice, does not lie in any particular achievement or track-record of success but in its status as an open, "empty" space of articulation in which "the common good of humankind [is] not reducible to the good of any particular institution . . . 'regime' [or particularity]":[247]

> [I]nternational law's formalism . . . brings political antagonists together as they invoke contrasting understandings of its rules and institutions. In the absence of agreement over, of knowledge of, the "true" objectives of political community—that is to say, in an agnostic world—the pure form of international law provides the shared surface—the *only* such surface—on which political adversaries recognize each other as such and pursue their adversity in terms of something shared, instead of seeking to gain full exclusion—"outlawry"—of the other. In this sense, international law's value and its misery lie in its being the fragile surface of political community among social agents . . . who disagree about their preferences but do this within a structure that invites them to argue in terms of an assumed universality.[248]

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[243] On "suture" see *supra* Section B. V., "Structure/Subject/Suture."

[244] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 546 (advocating "authentic commitment" to international law); *Id*. at 555 (on "integrity").

[245] Laclau, *Identity and Hegemony*, *supra* note 124, at 78; LACLAU AND MOUFFE, HEGEMONY, *supra* note 155, at 88 n.1.

[246] LACLAU AND MOUFFE, HEGEMONY, *supra* note 155, at 8.

[247] *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law—Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi*, U.N. Doc. A/CN.4/L.682, at 244.

[248] Koskenniemi, *What is International Law For?*, *supra* note 180, at 48.

So conceived, "law becomes a partial cure for the traumas of society, in a fashion not dissimilar to that applied to individuals in therapy."[249] If psychoanalysis is a talking therapy then international law, for Koskenniemi, is a "speaking" therapy,[250] a way of articulating *some*-things after we (international lawyers) have realized that we cannot articulate *every*-thing, that we have been (metaphorically) castrated.[251]

IV. Necessity/Impossibility/"Three Endeavours"

Building on the discussion thus far, this Section considers the place of what Laclau describes as "the double condition of necessity and impossibility" in Koskenniemi's work.[252]

Laclau explores the formal "necessity" of pursuing the concretely "impossible" through hegemony by outlining "three endeavours," each central to the construction of "hegemonic articulatory logics."[253] My aim in this Section is to show that Koskenniemi engages in each of these endeavours in pursuit of an "intellectual strategy" that is designed to establish,[254] first, that international law is a Laclauian discourse and, second, that the making of international legal arguments involves, and throughout its history has involved, "articulatory practice" by sutured subjects.

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[249] DOUZINAS, *supra* note 14, at 305.

[250] *See* KOSKENNIEMI, FROM APOLOGY, at 567–68 ("The descriptive thesis in *From Apology to Utopia* . . . seeks to articulate the competence of native language-speakers of international law . . . . Native language speakers of, say, Finnish, are also able to support contrasting political agendas without the question of the genuineness of their *linguistic* competence ever arising." (citations omitted)). *See also* DOUZINAS, *supra* note 14, at 308–09:

> Speaking leads to a truce, rivalry is abandoned in order to participate in discourse and share our imaginary scenarios or symbolic representations with the other. But speech is a lie, a denying negating, deferring discourse which places the love-object, death and its desire, (temporarily) in abeyance. But this lie is also the whole truth.

[251] KOSKENNIEMI, FROM APOLOGY, *supra* note 19, at 13 ("By providing an 'insider's view' to legal discourse, such an approach might produce a therapeutic effect on lawyers frustrated with their inability to cope with the indeterminacy of theory and the irrelevance of doctrine.").

[252] Laclau, *Identity and Hegemony*, *supra* note 124, at 75.

[253] *Id*.

[254] *Id*.

The first "endeavour" involves "understand[ing] the logics by which each of the two dimensions [necessity and impossibility] subverts the other."[255] *From Apology* understands the "subvert[ing]" relationship between necessity and impossibility in international law through the political/"normativity" vs. sociological/"concreteness" opposition. While it may appear *necessary* for international law to find and occupy a space between these two domains, a "specifically 'legal' discourse,"[256] finding and occupying that space is *impossible*. The impossibility of finding that space does not, however, make the search for it *unnecessary*. The search itself may be the product of the "myth" of a "specifically 'legal' discourse" but the fact that the search is mythical does not mean that international law can stop searching. While, therefore, "intellectual operations [which seek to distinguish international law from the sociological and the political] do not leave room for any specifically legal discourse,"[257] "[t]he structure of international legal argument" is defined by the "dynamics of [the] contradiction" between "normativity" and "concreteness."[258]

This leads into the second of Laclau's "endeavours," which involves "look[ing] at the political productivity of [the] mutual subversion [of necessity and impossibility]—that is, what it makes possible to understand about the working of our societies which goes beyond what is achievable by unilateralizing either of the two poles."[259] International law needs to be understood as a "grammar,"[260] as a "discourse,"[261] rather than as a "specifically 'legal' discourse,"[262] precisely because finding and occupying the space "between the sociological and the political" is a necessary impossibility *and* an impossible necessity.[263] That the occupation of such a space is impossible does not mean that the idea of that space is not existentially necessary to international law *qua* discourse. Equally, the fact that the search for that space is necessary to the discourse of international law does not make it possible to actually find that space.

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[255] *Id*.

[256] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 1.

[257] *Id.* at 16.

[258] *Id*. at 58.

[259] Laclau, *Identity and Hegemony*, *supra* note 124, at 75.

[260] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 11 ("[I]t [*From Apology*'s "deconstructive study of legal argument"—*id.* at 10] seeks to make explicit the legal "grammar" which controls the production of particular arguments within discourse and which counts for the lawyers specific legal 'competence.'").

[261] Laclau, *Identity and Hegemony, supra* note 124, at 76 (using "grammar" as a synonym for "discourse").

[262] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 1.

[263] *Id*.

It is in this sense that international law lives with(in) its neurosis, with(in) a search for a "specifically 'legal' discourse" that is as necessary as it is futile. International law "get[s] over" its neurosis,[264] and lives within its myth, by recognizing the necessary impossibility *and* the impossible necessity of the search—a move, as discussed above, that *From Apology* argues for—but that does not abolish the myth or cure the neurosis.

The idea of a "specifically 'legal' discourse" is a mythical "constitutive lack" at the heart of international law;[265] something that constitutes and structures the discourse by its absence. It designates a gap in the structure of the discourse which cannot be sutured by hegemonic, "articulatory practice," but which creates the space for that practice. Abolishing the myth of a "specifically 'legal' discourse" or ending the neurotic search for sociological *and* political validation would abolish the "constitutive lack" and, consequently, destroy international legal discourse *qua* discourse.

The "constitutive lack" of a place "between the sociological and the political" in *From Apology* translates into the "empty" universalism of *Gentle Civilizer* because hegemonic, "articulatory practice" within a discourse is incompatible with any concrete, universal program:

> It is only as long as the ideal social order remains formal that it can accommodate autonomy and community and be acceptable. Immediately as it is given concrete content—as soon as it becomes a programme of *what to do*—it will appear to overrule somebody's preferred substantive view and seem illegitimate as such.[266]

This is consistent which Laclau's Italian unification example, quoted above.[267] Hegemonic "formalism projects the universal community as a standard—but always as an unachieved one,"[268] because:

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[264] Aristodemou, *supra* note 1, at 37.

[265] *See* Laclau, *Subject of Politics*, *supra* note 236, at 63 (on "constitutive lack").

[266] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 484 (emphasis in original).

[267] See *supra* note 237 and accompanying text.

[268] KOSKENNIEMI, GENTLE CIVILIZER, *supra* note 6, at 508.

> [T]he fullness of society is an impossible object which successive contingent contents try to impersonate through catachrestical displacements. This is exactly what hegemony means. And it is also the source of whatever freedom can exist in society: no such freedom would be possible if the 'fullness' of society had reached its 'true' ontic form.[269]

The third "endeavour" involves "trac[ing] the genealogy of this undecidable logic [between necessity and impossibility], the way it was already subverting the central texts of our political and philosophical tradition."[270] *From Apology* "trace[s] the genealogy of [the] undecidable logic" of necessity and impossibility, mapping the interaction between necessary, "ascending," concrete, apologetic and impossible, "descending," utopian arguments across the core "categories of classical" international legal thought,[271] from "[s]overeignty" to "[s]ources" and "[c]ustom."[272] *From Apology* "[conceives] of [those "categories"] . . . as objects *presupposed* by hegemonic articulatory logics."[273] It does not "flat[ly] reject" them because of their "undecidable logic,"[274] because they can be approached with equal validity from "ascending" and "descending" perspectives. It treats each category as an aspect of a discourse that is structured so as to demand articulatory, hegemonic decision-making by its practitioners.

Likewise, *Gentle Civilizer* "trace[s] the genealogy of [the] undecidable logic" of "the culture of formalism." Perhaps Hersch Lauterpacht's early to mid-twentieth century moderate, "modernist," "utopian federalism" was, ultimately, just a bit too utopian,[275] and perhaps it

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[269] Laclau, *Identity and Hegemony*, *supra* note 124, at 79.

[270] *Id*. at 75.

[271] *Id*:

> [W]ith the need to assert both sides—necessity and impossibility—I could hardly be in disagreement, for it is the cornerstone of my own approach to hegemonic logics—the latter not involving a flat rejection of categories of classical political theory such as 'sovereignty', 'representation', 'interest', and so on, but conceiving of them, instead, as objects *presupposed* by hegemonic articulatory logics but, however, always ultimately unachievable by them.

[272] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 224, 303, 388.

[273] Laclau, *Identity and Hegemony*, *supra* note 124, at 75 (emphasis in original).

[274] *Id.*

[275] KOSKENNIEMI, GENTLE CIVILIZER, *supra* note 6, at 357.

is no longer possible to "ha[ve] no doubt about the universal and intrinsically beneficent character of legal reason."[276] But, for Koskenniemi, that does not mean that Lauterpacht's "Victorian tradition" of "political commitment" and a "consistent attempt to maintain, through projection, the wholeness of a social world and [a] personal identity" lacks contemporary relevance.[277] And perhaps Hans Kelsen, by cutting law off from "its relationship to the surrounding world,"[278] went too far in his attempts to establish a "pure theory" but, for Koskenniemi, that does not mean that his efforts can be ignored or dismissed: "Since Kelsen, lawyers have looked for professional identity in a middle ground between that which is sociological description (of what works) and that which is moral speculation (of what would be good)."[279]

Gentle Civilizer argues that international law is, and always has been, an "undecidable," unsuturable logic—a Laclauian discourse—whose future depends, and always has depended, on subjects suturing themselves into the discourse and making political choices through hegemonic, "articulatory practice."[280] It makes that argument through a synchronic history of the discipline; a history that tells the discipline what it now is by explaining how it has always been this way.

The aim, in this Section, has been to demonstrate the Laclauian character of Koskenniemi's argument. This moves us closer to the core argument of this Article—that Koskenniemi's work can and should be read as a Lacanian psychoanalysis of international law(yers)—but, to demonstrate the ultimate dependence of Koskenniemi's Laclau-inspired argument for the hegemony of the international lawyer on Lacanian psychoanalytic theory, the relationship between Laclau and Lacan needs to be addressed directly.

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[276] *Id.* at 412.

[277] *Id*. at 376, 412. *See also* Koskenniemi, *Between Commitment and Cynicism*, *supra* note 90, at 498:

> The hopes of the reconstructive scholarship of the inter-war era as well as the projects for peaceful settlement and collective security within the League of Nations were easily dashed by Fascist aggression. Though tragedy is the name we apply to that period, we still admire the heroism of the profession's leading names: Anzilotti, Kelsen, Lauterpacht, Scelle . . . their belief in public governance through international institutions and the pacifying effects of interdependence remain part of the professional ethos today.

[278] KOSKENNIEMI, GENTLE CIVILIZER, *supra* note 6, at 249.

[279] *Id*. at 494.

[280] LACLAU & MOUFFE, HEGEMONY, *supra* note 155, at 105.

V. Laclau and Lacan . . . and Koskenniemi

Lacan's political theory of hegemony is largely based on Laclau's psychoanalytic theory.[281] Like Lacan, Laclau insists on the "primacy of the signifier."[282] Language and "articulation" are the focus of hegemonic politics because they are the means by which our social reality is formed: "The bar in the relation *S/s* is the very precondition of a primacy of the signifier without which hegemonic displacements would be inconceivable."[283]

Lacanian psychoanalysis and Laclauian "hegemonic analysis" are concerned with truth rather than meaning,[284] while insisting on the unachievability of any fixed truth:

> The ultimate point which makes an exchange between Lacanian theory and the hegemonic approach to politics possible and fruitful is that in both cases, any kind of unfixity, tropic displacement, and so on, is organized around an original lack which, while it imposes an extra duty on all processes of representation—they have to represent not just a determinate ontic content but equally the principle of representability as such—also, as this dual task cannot but ultimately fail in achieving the suture it attempts, opens the way to a series of indefinite substitutions which are the very ground of a radical historicism.[285]

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[281] *See* Laclau, *Identity and Hegemony*, *supra* note 124, at 71; STAVRAKAKIS, LACAN AND THE POLITICAL, *supra* note 118; YANNIS STAVRAKAKIS, THE LACANIAN LEFT: PSYCHOANALYSIS, THEORY, POLITICS (2007).

[282] Hewitson, *supra* note 119.

[283] Laclau, *Identity and Hegemony*, *supra* note 124, at 68–69. Laclau, *id.*, reproduces Lacan's representation of the signifier/signified relationship in Lacan, *The Instance of the Letter in the Unconscious*, *supra* note 112, at 414, (with the 'S' above the '*s*'). The 'S' and '*s*' are placed side by side in this quotation for typographical reasons only.

[284] *See id*. at 69

> In Lacan's words, the psychoanalytic process is concerned not with meaning but with truth . . . . The importance of this disassociation of truth from meaning for hegemonic analysis is that it enables us to break with the dependence on the signified to which a rationalist conception of politics would have otherwise confined us.

[285] *Id.* at 71.

The foundations of Laclau's political theory of hegemony lie in Lacanian psychoanalysis. The truth of any subjectivity—the truth of who or how someone, like the Rat Man, is—is understood through the structure in which they were formed and into which they have been "sutured." That structure exists in language, in the signification of the roles or qualities—wife/mother/sociology/concreteness/apology or father/politics/friend/lover/normativity/utopia—and the recounting of stories about a father's gambling, a mother's riches, or a May 1966 debate in New York.

The aim of Lacanian psychoanalysis and Laclauian hegemonic politics is not to reconstruct the present out of the past (diachrony) but to explain the possibilities of present action within pre-formed structures (synchrony). Psychoanalysis cannot "perfect" the Rat Man's life, and we cannot uncastrate ourselves, but we can shed "light" on our situation and find progressive ways to act if we psychoanalyze our situation, our structural position.[286] Hegemony, in this sense, is a psychoanalytic-structuralist theory of political praxis.

Koskenniemi's message is that an understanding of the structures which condition and create the subjectivity of the international lawyer can secure the future of international legal practice, just as an appreciation of the reasons for his neurotic behavior—his elaborate scheme to repay the debt—makes it possible for the Rat Man to continue with his life. An accommodation with or understanding of your structure as *your* structure

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[286] *See* Lacan, *Myth*, *supra* note 47, at 425 ("more light"). *See also* Aristodemou, *supra* note 14, at 37 ("[Lacanian psychoanalysis] requires the annihilation of the fantasies and misrecognitions that the patient used to rely on, and the constitution of a new, perhaps less confident and arrogant, but also . . . a truer and more ethical subject."); Jacques Lacan, *Discourse Analysis and Ego Analysis*, *in* THE SEMINAR OF JACQUES LACAN: BOOK I, FREUD'S PAPERS ON TECHNIQUE 1953–1954 62, 67 (Jacques-Alain Miller ed., John Forrester trans., 1988) ("Nothing other than this is at stake in analysis—recognising what function the subject takes on in the order of the symbolic relations which covers the entire field of human relations."); Koskenniemi, *Celebrating Structuralism*, *supra* note 241, at 728:

> One type of 'structural' analysis that arose in the twentieth century aimed to make explicit the rules of production of . . . 'there-ness', the sense in which we end up feeling that something is so 'true' that we allow it to determine the way we live. According to this type of analysis, of which [*From Apology*] is a specimen, learning to know how such 'truths' are produced would release us of their power so as to take action in order to deal with problems that otherwise seemed intractable (because they were based on 'truths') and allows us to lead in some sense better lives.

guarantees continued life (within the structure), and, in this sense, the future of international law depends on synchronization with its past.[287]

VI. The Psychoanalysis of International Law

Summarizing the analysis and argument thus far, Koskennieni's work should be read as a psychoanalysis of international law/the international lawyer because, by applying Laclau's Lacanian political theory of hegemony, described by Laclau and Mouffe in terms of the maintenance of a coherent, modernist political practice in the turbulence of the post-Cold War era,[288] it keeps the "modernist . . . charismatic,"[289] quasi-"heroi[c]" international lawyer alive despite his/international law's near-fatal contradictions, flaws and anxieties.[290] It does this without curing his neurosis, and without resolving the fundamental contradictions in international law's basic structure, just as psychoanalysis kept the Rat Man alive without "uncastrating" him/his father.[291]

For some international lawyers it may be enough that they are (professionally) alive.[292] I disagree. Maybe I, *qua* international legal academic, have suicidal tendencies,[293] a "death

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[287] *See* Martti Koskenniemi, *Histories of International Law: Significance and Problems for a Critical View*, 27 TEMPLE INT'L & COMP. L.J. 215, 216 (2013) ("[W]hat seems needed is a better understanding of how we have come to where we are now."); *see also id.* at 238:

> The turn to contextual readings of international law marks a welcome advance from the older search for origins and the progressive accounting of international doctrines that accompanied traditional histories . . . . Nevertheless, there was something valuable in the sweeping normativity of older histories, in the way they sought to produce "lessons" from their narratives. A careful reconstruction of the context cannot be all. Critical history must also examine how those contexts were formed and to what extent they have persisted to make the world into what it has become today.

On the importance of tradition and the passage of time in international law, *see* Nicholson, *supra* note 20.

[288] *See* LACLAU & MOUFFE, HEGEMONY, *supra* note 155, at vii–xix.

[289] JAMESON, PRISON-HOUSE, *supra* note 1, at 306.

[290] Koskenniemi, *Between Commitment and Cynicism*, *supra* note 90, at 497 ("[A] commitment, distinguished from mere "work," has an aspect of heroism in that it works against all odds.").

[291] *See supra* Section B. II., "Lacan and the Rat Man".

[292] *See* Caudill, *supra* note 14, at 661 (noting that a Freudian psychoanalytic perspective "may be helpful in social analysis . . . [but] invite[s] pessimism and provides the basis for an implied conservatism rather than for a radical or utopian critique of the status quo").

[293] *See* Jon Mills, *Reflections on the Death Drive*, 23 PSYCHOANALYTIC PSYCHOLOGY 373, 375 (2006):

instinct,"[294] but my point, foreshadowed in the introduction and developed in the final part of this Article, is that it is time to euthanize the image of the modernist international lawyer *qua* quasi-hero that Koskenniemi has kept alive. Before developing this argument, however, one final, fundamental question about the relationship between Koskenniemi's work and Lacan needs to be addressed.

VII. Reality Affects and the "Lack" of Lacan

That final and fundamental question is this: How is it possible to read Koskenniemi's work as a Lacanian psychoanalysis of international law, as this Article has, given: (i) the lack of Lacan's name in Koskenniemi's texts, and; (ii) the absence of deliberate concealment by Koskenniemi of Lacan's place in his work (which I am not suggesting)?

Lacan provides the answer to (i): "every discourse derives its effects from the unconscious."[295] Lacanian psychoanalysis is, in Jameson's terms, the "political unconscious" of Koskenniemi's work, its "hidden master narrative" and the "hidden narrative" of its "master" (Koskenniemi).[296] It is because Lacan is an "unconscious" presence, a "constitutive lack"—someone present in Koskenniemi's texts for all that the reader thinks he is not there—that Koskenniemi's work has been so "effect[ive]."

> A logical claim can be advanced that life is only possible through the force of the negative that brings about higher developmental achievements through the destruction of the old . . . . Psychoanalysts are often confused by viewing death as merely a physical end-state or the termination of life, when it may be memorialized in the psyche as a primary ontological principle that informs the trajectory of all psychic activity

(citation omitted).

[294] Sigmund Freud, *Beyond the Pleasure Principle*, *in* THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD VOLUME XVIII (1920-1922) 7, at 38-41, 44, 46-47, 49-57, 60 (James Strachey trans., 1955) (1920). *See also* SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 55 (James Strachey ed., Joan Riviere trans., 1982):

> [B]esides the instinct to preserve living substance and to join it into ever larger units, there must exist another, contrary instinct seeking to dissolve those units and to bring them back to the primaeval, inorganic state. That is to say, as well as Eros there was an instinct of death.

[295] Lacan, *Subversion*, *supra* note 63, at 701.

[296] JAMESON, POLITICAL UNCONSCIOUS, *supra* note 24, at 13.

To *tell* international law/international lawyers that it/they are being psychoanalyzed—to reveal that in the text, rather than concealing it in the subtext—would make the whole exercise ineffectual.[297] It/they may not, after all, consent to the analysis and, even if it/they did, they may not want to read the analyst's report. Without telling it/him what he is doing, the analyst/master "initiates the one still in ignorance into the dimension of fundamental . . . relationships" through psychoanalysis by "open[ing] . . . what one might call the way to moral consciousness."[298] He *shows* the analysand/patient the structure within which he exists through a process of "self-articulation,"[299] in which the analysand/patient self-articulates their structure as *their* structure,[300] suturing themselves into it in the process.[301]

Koskenniemi's process of "showing" rather than "telling" produces a reality "affect";[302] it *affect*-ively makes the image of international law and the (sutured) identity of the international lawyer it produces and advocates—commitment to hegemonic practice within a linguistic structure, the "culture of formalism"—seem (really) real, seem more than the (mere) image or "fiction" it (really) is.[303] In *The Antinomies of Realism* Fredric

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[297] *See id.* at 68.

[298] Lacan, *Myth*, *supra* note 47, at 407–08.

[299] On "self-articulation," see Section C. II., "Structuralism, synchrony and the 'move to history'".

[300] *See* Section B. II., "Lacan and the Rat Man".

[301] The necessity of "self-articulation" and self-suturing—of *showing* the international lawyer his structure rather than *telling* him about it—explains why Koskenniemi does not adopt Jason Beckett's position and insist on formalism as "the *only competent way* in which [international law] may be spoken or practiced" (emphasis in original). Beckett, *supra* note 9, at 1079. *See also* Section II E., "Structure/Subject/Suture," above.

[302] JAMESON, THE ANTINOMIES OF REALISM, *supra* note 199, at 21–26 (on "showing" and "telling"); *id.* at 36, 70 (on "affect").

[303] According to Jameson: "[W]e must think our way back into a situation in which th[e] question [of fiction/non-fiction] makes no sense and in which . . . the distinction between fiction and nonfiction (or history) does not yet obtain . . . postmodernity as such has now rendered those distinctions obsolete." JAMESON, THE ANTINOMIES OF REALISM, *supra* note 199, at 253. Jameson also observes:

> In the postmodern, where the original no longer exists and everything is an image, there can no longer be any question either of the accuracy or truth of representation . . . where the true is ontologically absent, there can be nothing false or fictive either: such concepts no longer apply to a world of simulacra, where only the names—Lacan's "*points de capiton*" . . . –remain.

Id. at 293. *See also* Lacan, *Subversion*, *supra* note 63, at 684 ("Thus Truth draws its guarantee from somewhere other than the Reality it concerns: it draws it from Speech. Just as it is from Speech that Truth receives the mark that instates it in a fictional structure."); Jacques Lacan, *Psychoanalysis and Its*

Jameson considers the production of reality "affect" as a technique or style in literary realism associated, in particular—and not without relevance for international law given the foundation of the *Institut de Droit International* in 1873 and the significance that Koskenniemi attaches to that event in *Gentle Civilizer*[304]—with "nineteenth-century realism."[305]

For Jameson "the realm of affect" involves "the 'insurrection of the present against other temporalities.'"[306] The synchronic manifests this "insurrection" in its prioritization of the present, of "the immediate lived experience of the native speaker," over the diachronic's emphasis on "comparisons between one moment of lived time and another."[307] Koskenniemi's synchronic methodology, analyzed throughout this Article, can therefore be seen to exist within "the realm of affect."

"Affect" itself is "resistan[t] . . . to language," "a fleeting essence."[308]Affects are "nameless and unclassifiable";[309] anything that "means something" is not an affect.[310] Affects are not "emotions" because "emotion is preeminently a phenomenon sorted out into an array of names" and names have "reifying effects" that turn sensations into named things.[311] Affects are "characterized . . . in terms of physical sensation or sensory perception."[312]An affect is a "representational presence,"[313] something which cannot be told or defined, something that is made real through representation and being shown. "At its outer limit,

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Teaching, *in* JACQUES LACAN, ÉCRITS 364, 376 (Bruce Fink trans., 2006) (regarding "facticity" and the notion that "the truth brings out its fictional structure").

[304] *See* Section C. II., "Structuralism, synchrony and the 'move to history'"; Section B. III, "International law "as a language".

[305] JAMESON, THE ANTINOMIES OF REALISM, *supra* note 199, at 35.

[306] *Id.* at 10 (quoting and translating the title of ALEXANDER KLUGE, DER ANGRIFF DER GEGENWART GEGEN DIE ÜBRIGE ZEIT (1985)).

[307] *See* Section B. III, "International law '*as* a language"'.

[308] JAMESON, THE ANTINOMIES OF REALISM, *supra* note 199, at 31.

[309] *Id.* at 33.

[310] *Id.*

[311] *Id.* at 30.

[312] *Id.* at 35.

[313] *Id.* at 35.

affect becomes the organ of perception of the world itself, the vehicle of my being-in-the-world,"[314] an image of international law as "pure form."[315]

Koskenniemi's work, from *From Apology* through *Gentle Civilizer* and beyond, is an exercise in producing a reality "affect."[316] That affect cannot be defined or captured in concepts or names, but we come close to a direct encounter with it in the notion of the "culture of formalism." Because it *shows* the reader the "culture of formalism" in practice, the allegorical story of the May 1966 debate between Thomas, Berle, and Friedmann is, in my view, the "nodal point," the "*point de capiton*" of Koskenniemi's work,[317] the single most important story or "element" in Koskenniemi's work.[318]

An affective methodology is closely related to the Lacanian concept of "the real, or what is perceived as such, [as] . . . [that which] resists symbolisation absolutely."[319] The nature of "affect," and of the Lacanian "real," is such that you cannot (effectively) tell international lawyers who or what they real-ly, unconsciously are—you cannot symbolize or name them—but you can (affectively) *show* them.

That, in my view, is what Koskenniemi has done. His work shows that the reality of international law is an "affect" of its form but, precisely because it is an "affect," you

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[314] *Id.* at 43.

[315] Koskenniemi, *What is International Law For?*, *supra* note 180, at 48.

[316] Koskenniemi makes a point about reality affects in relation to Philip Allott's work:

> [The] style simultaneously affirms and erases the authorial voice . . . . A few lines of this text and every international lawyer will know who has written them. *Erasure*: but it is a voice that denies its own personality and seeks to rise above anything as superficial or flimsy as authorial. Where Roland Barthes famously analysed the *effet de réel* in literature, the power of the literary style—the style of 'realism'—to create the impression that reality itself spoke, Philip uses an *effet d'histoire*—an effect as if history itself were speaking in his writing.

Martti Koskenniemi, *International Law as Therapy: Reading the Health of Nations,* 16 EUR. J. INT'L L. 329, 333 (2005).

[317] On which see Section C. II., "Structuralism, synchrony and the 'move to history'".

[318] *See* LACLAU & MOUFFE, HEGEMONY, *supra* note 155, at 105 ("element").

[319] Lacan, *Discourse analysis and ego analysis*, *supra* note 286, at 66. *See also* Macey, *supra* note 73, at xxvi ("[T]he real . . . is not synonymous with external reality, but refers to the residual dimension that constantly resists symbolism and signification.").

cannot formally tell anyone that.[320] His inquiry into "the real" of international law, into its "deep-structure,"[321] works on the basis of the production of reality "affects." It has to show rather than tell because, as noted above, the real "resists symbolisation absolutely." The reality "affect" that it produces is a "pure form,"[322] a "vehicle of . . . being-in-the-world," [323] *qua* international legal form(alism).

International lawyers who refuse to accept Koskenniemi's analysis, who remain immune to its reality "affect," are, apparently, mistaken. They do not understand themselves: "les non-dupes errant" /'"those who are not taken in err"'.[324] Because they "are not taken in," not "affected," not "committed" to (formal) international law above all else, Thomas' and Berle's contributions to the May 1966 debate are mistaken.[325] Similarly, "activists" who prioritize the pursuit of political causes through legal argument over their commitment to international law itself are, apparently, not real lawyers.[326]

The "political" (Jameson's term) "effect" (Lacan's term) of Koskenniemi's psychoanalysis "derives" (Lacan's term) from its production of a reality "affect" (Jameson's term),[327] from the fact that it is done "unconsciously" (both Lacan and Jameson focus on the

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[320] *See* Haskell, *supra* note 29, at 667, noting:

> [T]he irony . . . that while unquestionably a profoundly important text that bring to light central historical, methodological and theoretical problems confronting the discipline, it often does so inadvertently—in other words, it is exactly how these problems are circumvented, obscured, silenced in the text that brings them into focus.

(citation omitted)); Singh, *The Critic(al) Subject*, *supra* note 14, at 14 ("From Apology to Utopia presumed into existence the type of psychological and social subject that was desired and required by its author's politics . . . without being seen to do so.").

[321] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 6.

[322] Koskenniemi, *What is International Law For?*, *supra* note 180, at 48.

[323] JAMESON, THE ANTINOMIES OF REALISM, *supra* note 199, at 43.

[324] *See supra* notes 2–3 and accompanying text.

[325] *See* Section C. II., "Structuralism, Synchrony, and the 'move to history'".

[326] Koskenniemi, *Between Commitment and Cynicism*, *supra* note 90, at 518–21. *Cf.* Rajagopal, *supra* note 22.

[327] JAMESON, POLITICAL UNCONSCIOUS, *supra* note 24; Lacan, *Subversion*, *supra* note 63, at 701; JAMESON, THE ANTINOMIES OF REALISM, *supra* note 199, at 36, 70 (on "affect").

"unconscious"), and *via* "show" rather than "tell." If "there is nothing that is not social and historical" and if "everything is 'in the last analysis' political" then Koskenniemi's attempt to synchronize the history and present of international law, in a project designed to affectively delimit international law's form, is "political."[328] It achieves political "*e*ffect"—it influences the polity's self-consciousness—by producing a reality "*a*ffect." Ultimately, "the power of [Koskenniemi's] text[s], with [their] hidden assumptions, lies in a suppression of [their] mode of production not unlike the ego's repression of its own self-constructive processes."[329]

Characterizing the master's/analyst's process as a "political" move in which the patient/analysand is *shown* the benefits of psychoanalysis without consenting to it may seem to contradict my claim (in (ii), at the start of this Section) that Koskenniemi has not deliberately concealed Lacan's influence in his work. To overcome this apparent contradiction, we need to consider the links between Koskenniemi's, David Kennedy's and Duncan Kennedy's work.

1. "Theses," "Commentaries," and Apologies

In his 1980 "Theses about International Law Discourse" David Kennedy outlined an "*analytic* approach" to international law,[330] a "style that could be labelled structuralist because it seeks to explain the current pattern of discourse and commentary and the interconnectedness of both doctrinal areas and conceptual schools by reference to their underlying structures."[331] Kennedy notes that this "style" is based in part on Saussure's 1966 *Course in General Linguistics* and Levi-Strauss's 1966 *The Savage Mind,*[332] two works that Koskenniemi references when explaining that *From Apology* takes a similarly "analytic approach," "argu[ing] . . . 'backwards' from explicit arguments to their 'deep-structure.'"[333] Neither Kennedy nor Koskenniemi subjects these major works to analysis, simply referring to them in footnotes.[334]

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[328] JAMESON, POLITICAL UNCONSCIOUS, *supra* note 24, at 5.

[329] Caudill, *supra* note 14, at 673.

[330] David Kennedy, *Theses about International Law Discourse*, 23 GERMAN YEARBOOK OF INT'L L. 353, 354 (1980).

[331] *Id.* at 355 n.4.

[332] *Id.* at 355.

[333] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 6.

[334] *See* David Kennedy, *Theses*, *supra* note 330, at 355; KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 6, 8.

For Kennedy "international legal scholarship is in crisis" because "as the practice of international law has expanded, it seems to have become weaker."[335] This "crisis" and weakness are caused by "a conflict between the autonomy and cooperation of states,"[336] reflecting what David Kennedy and Duncan Kennedy label "[t]he fundamental contradiction" between individual freedom and collective, social life.[337] David Kennedy uses the term as a shorthand for the "basic quandary" in which the interests of "individual nations" and "other sovereigns" conflict,[338] acknowledging the origin of the concept in Duncan Kennedy's 1979 article "The Structure of Blackstone's Commentaries,"[339] while Duncan Kennedy uses it as shorthand for the fact "that relations with others are both necessary to and incompatible with our freedom."[340] "Blackstone's Commentaries" outlines "a method for understanding the political significance of legal thinking, a method that might be called structuralist or phenomenological, or neo-Marxist, or all three together,"[341] setting up a tension between ideas of law as "an instrument of apology" and "a utopian enterprise."[342] Legal analysis is, so the argument goes, inspired by a "utopian" motive which tries "to discover the conditions of social justice" yet simultaneously driven by an apologism that seeks to explain why things are, and will remain, the way they are.[343]

David Kennedy's "Theses" translates Duncan Kennedy's analytical approach to "American legal thought" for an international legal audience.[344] International legal discourse's "fundamental contradiction" has a "binary" structure – there are "two mutually exclusive possibilities which never exist without each other."[345] The "contradiction" is also

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[335] *Id.* at 356.

[336] *Id.* at 362.

[337] David Kennedy, *Theses*, *supra* note 330, at 361; Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 213 (1979).

[338] David Kennedy, *Theses*, *supra* note 330, at 361.

[339] *Id.*, at n.9; Duncan Kennedy, *Blackstone's Commentaries*, *supra* note 337.

[340] Duncan Kennedy, *Blackstone's Commentaries*, *supra* note 337, at 213.

[341] *Id.* at 209.

[342] *Id.* at 210.

[343] *Id.* ("[A]n instrument of apology—an attempt to mystify both dominators and dominated by convincing them of the 'naturalness', the 'freedom' and the 'rationality' of a condition of bondage.").

[344] *Id.* at 209.

[345] David Kennedy, *Theses*, *supra* note 330, at 364.

"transformational" in the sense that "positions . . . are connected in a particular way" with "[e]ach pole of the binary opposition seem[ing] to contain its opposite in some sense."[346]

This "binary," "transformational" analysis is echoed in Koskenniemi's apology/utopia analytic, something he acknowledges in a footnote: "I have received the theme apology/utopia from [David Kennedy's "Theses"] . . . article."[347] In another footnote he highlights the importance of "Blackstone's Commentaries" as "the most influential" work on "[t]he strategy of 'revealing' contradictions within legal argument and tracing them back to more fundamental distortions in our ways to conceptualize human nature and social life," without specifically highlighting the (apparent) origin of *From Apology*'s title in Duncan Kennedy's article.[348]

While the connection between Koskenniemi's, David Kennedy's and Duncan Kennedy's work is well charted in the literature,[349] the significance of that connection has not, to date, been fully articulated. Forensic analysis of the connections between the key texts—"Theses," "Blackstone's Commentaries," *From Apology*, and related works by their authors—is required to remedy this.

That analysis starts with recognition that *From Apology* is not only connected to David Kennedy's 'Theses'; it picks Kennedy's project up where he left off, continuing it and adopting his methodology. In *From Apology*'s introduction Koskenniemi outlines a "deconstructive" methodology based on Saussure's work which he then develops into an account of international law as a "discourse."[350] This reflects David Kennedy's argument, supported with reference to Levi-Strauss and Saussure,[351] that "concentration upon discourse and upon the hidden ideologies, attitudes and structures which lie behind discourse, rather than upon the subject matter of legal talk" is required.[352]

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[346] *Id.* 364–65.

[347] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 10 n.7. *See also id.* at 107 n.140.

[348] *Id.* at 62 n.151. *See also* text accompanying *supra* note 342.

[349] *See, e.g.*, Lea Brilmayer, *From Apology to Utopia: The Structure of International Legal Argument,* 85 AM. POL. SCI. REV. 687 (1991); David Kennedy, *The Last Treatise*, *supra* note 5, at 982–83; Christoph Möllers, *It's About Legal Practice, Stupid*, 7 GERMAN L.J. 1011, 1013 (2006); Rasulov, *supra* note 13, at 649–51.

[350] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 1–15 (note, in particular, 7 and 13).

[351] David Kennedy, *Theses*, *supra* note 330, at 355 n.4.

[352] *Id.* at 355.

Kennedy maintains that "good arguments do not resolve the questions posed by legal cases";[353] Koskenniemi "[t]hat there is no real discourse going on within legal argument . . . but only a patterned exchange of argument."[354] For Kennedy "[o]ne may imagine law to be either critical of or grounded in state behaviour, and neither understanding of law is sufficient";[355] for Koskenniemi, "international legal discourse cannot fully accept either of the justificatory patterns ["ascending" or "descending," "concrete" or "normative]" and it therefore produces "an incoherent argument which constantly shifts between the opposing positions whilst remaining open to challenge from the opposite argument." [356]

For Kennedy "practitioners . . . must act as though their discourse should be convincing without actually believing that they would be convinced were they to hear themselves"; [357] for Koskenniemi, international lawyers have to maintain a "commitment" to international law despite very real and credible reasons which might lead them to lapse into "cynicism."[358]

Kennedy calls for "an alternative style of discourse aimed at revealing and resolving the dilemmas of social life, rather than hiding them or factoring them out of the discourse of law";[359] Koskenniemi produces a theory of international legal practice as hegemony which tackles the dilemmas of social life through "empty" universalism.[360] Kennedy notes that, in "Theses," he "confine[s] [him]self to a theoretical description of the patterns which seem responsible for indeterminacy" but that "[t]he next step . . . is to analyse a series of decisions and doctrines more rigorously,"[361] and Koskenniemi takes that "next step," analyzing recurrent doctrinal and theoretical "patterns" throughout *From Apology*.

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[353] *Id.* at 358.

[354] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 511–12.

[355] David Kennedy, *Theses*, *supra* note 330, at 383.

[356] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 60.

[357] David Kennedy, *Theses*, *supra* note 330, at 387.

[358] Koskenniemi, *Between Commitment and Cynicism*, *supra* note 90.

[359] David Kennedy, *Theses*, *supra* note 330, at 391.

[360] *See* Section C. III., "'Empty' universalism".

[361] David Kennedy, *Theses*, *supra* note 330, at 367.

David Kennedy's basic concept of international law as a "discourse" is arrived at by "crudely borrow[ing] from the field of structural linguistics"—from Saussure's *Course in General Linguistics.*[362] This generates a linguistic concept of international law as a "largely *unconscious structure* which both controls and permits communication by the choice and recognition of the variable contents according to fixed patterns."[363] For Kennedy this approach "can serve as the starting point for explanation of a theory of legal argument,"[364] indeed, it seems to be Koskenniemi's "starting point" in the introduction to *From Apology*.[365] Kennedy expands, very modestly, on the concept of a "largely unconscious structure" in his 1985 "Critical Theory, Structuralism and Contemporary Legal Scholarship,"[366] "barely acknowledg[ing] Lacan's work" as "instructive for legal analysis," as David S. Caudill puts it.[367]

Echoing David Kennedy's notion of a "largely unconscious structure," Koskenniemi focuses on the "deep-structure" of international legal discourse.[368] That "structure" is captured in Koskenniemi's apology (concrete)/utopia (normative) analytic or, in Kennedy's terms, in "the contradiction . . . between consent based norms which must be externally validated (or implied from 'objective' facts) and external norms which must be subjectively justified and defined."[369] This is a tension which, as Koskenniemi demonstrates in chapters five and six of *From Apology*, "cuts across all such traditional sources as treaties, custom, principles or the writings of judges or publicists."[370]

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[362] *Id.* at 374.

[363] *Id.* at 375 (emphasis added).

[364] *Id.* at 375.

[365] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 1-15.

[366] David Kennedy, *Critical Theory, Structuralism and Contemporary Legal Scholarship*, 21 NEW ENG. L. REV. 209 (1985–1986). *See id.* at 250 n.96, 277, 282–83 n.180 for references to Lacan. Kennedy, *id.*, is not included in the bibliographies of *From Apology* or *Gentle Civilizer*. *See* KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 618–75; KOSKENNIEMI, GENTLE CIVILIZER, *supra* note 6, at 518–58.

[367] Caudill, *supra* note 14, at 676, 679.

[368] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 6.

[369] David Kennedy, *Theses*, *supra* note 330, at 370.

[370] *Id.*

2. Rising and Falling

David Kennedy's concept of an "unconscious structure" mirrors Duncan Kennedy's concept of a "legal consciousness."[371] Duncan Kennedy developed this concept in *The Rise and Fall of Classical Legal Thought*—a book written in 1975,[372] circulated at around that time within closed networks and Harvard Law School,[373] but only published for a general audience in 2006—and he deploys it in "Blackstone's Commentaries."

According to Duncan Kennedy, *Rise and Fall* influenced "students and young colleagues [who] entered directly into the effort to reconstruct the structural transformations of legal discourse,"[374] including David Kennedy.[375] While he does not suggest that David Kennedy's "Theses" was influenced by *Rise and Fall* and,[376] similarly, David Kennedy does not cite *Rise and Fall* in "Theses," for reasons set out in the preceding analysis, the idea of "reconstruct[ing] the structural transformations of legal discourse" permeates "Theses" and *From Apology*.

The parallels between Koskenniemi's notion of a "deep-structure,"[377] David Kennedy's notion of a "largely unconscious structure,"[378] and this definition, from Duncan Kennedy, of "legal consciousness" are striking:

> [L]egal consciousness [is] an entity with a measure of autonomy. It is a set of concepts and intellectual operations that evolves according to a pattern of its own, and exercises an influence on results distinguishable from those of political power and economic interest. The autonomy of legal

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[371] Duncan Kennedy, *Blackstone's Commentaries*, *supra* note 339, at 220; DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT xiv–xvii (2006).

[372] DUNCAN KENNEDY, RISE AND FALL, *supra* note 371, at vii.

[373] *Id.* at vii–viii, xl.

[374] *Id.* at xli.

[375] *See id.* at xliii n.41.

[376] *See id.*

[377] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 6.

[378] David Kennedy, *Theses*, *supra* note 330, at 375.

> consciousness is a premise; yet that autonomy is no more than relative.[379]

The identification of a "legal consciousness" is predicated on the idea that "it is possible to isolate and describe the significant dimensions or aspects of the body of ideas through which lawyers experience legal issues."[380] This is a "descriptive", synchronic, analytical, "native speaker" approach to law.[381] It analyzes and describes a thing called law internally, through its language, ignoring and avoiding the possibilities and challenges of diachronic inquiry into law's ontology, of inquiry into law from perspectives external to it:[382]

> The point [in *Rise and Fall*] was not to convert the reader to belief in a theory called structuralism . . . . Rather it was to take very specific ideas from the literatures of structuralism and critical theory, revise them as seemed appropriate, and use them to illuminate, hopefully, specific aspects of legal discourse.[383]

I want to focus on the notion of description here, given its psychoanalytic-linguistic connotations.[384] To reveal those connotations I want to *almost* break the word apart into

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[379] DUNCAN KENNEDY, RISE AND FALL, *supra* note 371, at 2.

[380] *Id.* at 3.

[381] *See* Duncan Kennedy, *Blackstone's Commentaries*, *supra* note 339, at 220–21 ("[W]hat I have to say is descriptive, and descriptive only of thought. It means ignoring the question of what brings a legal consciousness into being, what causes it to change, and what effect it has on the actions of those who live it."). On synchrony and "native speaker" approaches, see *supra* Section B. III., "International law '*as* a language.'"

[382] *See* Rasulov, *supra* note 13, at 643 (describing "the [*From Apology*] project [as one that] follows directly in the footsteps of what can be called the *study of the inner life of the law* tradition," without tracing the internal or "inner" character of Koskenniemi's work back to Duncan Kennedy's thought – see *infra* note 411 on this point).

[383] Duncan Kennedy, RISE AND FALL, *supra* note 371, at xiv.

[384] *See* Caudill, *supra* note 14, at 661:

> Whilst psychoanalysis can be viewed solely as an explanatory model for individual human behaviour, "it also contains the possibilities for an approach that analyses the mechanisms by which the social world enters into the experience of each individual, constructing the human 'subject' and reproducing itself through the perpetuation of particular patterns of ideology."

(quoting STEPHEN FROSH, THE POLITICS OF PSYCHOANALYSIS: AN INTRODUCTION TO FREUDIAN AND POST-FREUDIAN THOUGHT 11 (1987)).

de-scribe. "Scribing" is, of course, the process of writing. "*De*-scribing" is, then, a process of un-writing, of getting inside the text, of "providing an 'insider's view.'"[385] It involves extraction of "specific aspects of legal discourse,"[386] its "deep-structure,"[387] through a process of de-construction, of taking apart, which leads to an understanding of how the discourse fits together.

This is the analytic methodology advocated by Duncan Kennedy in *Rise and Fall*, applied by Duncan Kennedy in "Blackstone's Commentaries," translated for an international legal audience by David Kennedy in "Theses," and "received" by Koskenniemi in *From Apology*.[388] A review of the literature on psychoanalysis would seem to be an essential part of any inquiry into "legal consciousness," but Lacan and Freud are absent from *Rise and Fall*'s bibliography,[389] and Duncan Kennedy defines "consciousness" without reference to their work:

> *Consciousness* refers to the total contents of a mind, including images of the external world, images of the self, of emotions, goals and values, and theories about the world and self. I use the term only in this vague, all-inclusive sense. It defines the universe within which are situated the more sharply-delineated concepts that are the vehicles for analysis.[390]

This definition of "consciousness" in structuralist terms but without reference to Lacan, the principal theorist of structuralist psychoanalysis, reflects Caudill's argument that "[c]ritical [t]heory and [s]tructuralism . . . are most often identified as the forerunners of critical legal scholarship," obscuring the importance of psychoanalysis as one of the foundations of

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[385] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 13.

[386] DUNCAN KENNEDY, RISE AND FALL, *supra* note 371, at xiv.

[387] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 6.

[388] *Id.* at 10 n.7. *See also id*. at 567 (referring to "[t]he descriptive thesis in *From Apology to Utopia*"). Desautels-Stein, *Point of Attack*, *supra* note 153, at 681, notes that "[i]n [*From Apology*], Koskenniemi built a 'classical' structure of legal argument," using "classical" in the sense of Duncan Kennedy's RISE AND FALL, *supra* note 371. Desautels-Stein does not, however, save for repeated references to "classical legal thought," develop the point or trace the deeper methodological connections between Duncan Kennedy's work and Koskenniemi's thought.

[389] *See* DUNCAN KENNEDY, RISE AND FALL, *supra* note 371, 265–69.

[390] *Id.* at 27.

critical legal studies (CLS), despite the fact that "both [critical theory and structuralism] signal a latent role for psychoanalytic theory in critical legal studies."[391] If psychoanalysis features in CLS work only as "a series of suggestive traces," [392] then, in a sense, this Article produces a new reading of Koskenniemi's CLS-inspired work by finding and linking those "traces."

More generally, there is a cherry picking quality to Duncan Kennedy's engagement with theory, methodology and philosophy.[393] Kennedy explains "[t]he goal" of *Rise and Fall* as the "introd[uction of] critical theory and structuralism, including the Frankfurt School and . . . the work of Clause Levi-Strauss and Jean Piaget, into American jurisprudence and legal sociology."[394] Theodor Adorno, Max Horkheimer and Walter Benjamin, three of the Frankfurt School's leading lights,[395] are, however, absent from a bibliography that, at five pages, is brief to the point of absurdity given *Rise and Fall*'s ambitious "goal."[396] Duncan Kennedy assumes that heterogeneous intellectual traditions—critical theory and structuralism—can be synchronically homogenized "in the analysis of law,"[397] paying little attention to the distinct literatures that constitute each of those traditions.[398]

Duncan Kennedy's methodology advocates a structuralist concept of "consciousness" without reference to the literature on psychoanalysis, and an approach to theory, methodology and philosophy that is "vague" and homogenistically "all-inclusive."[399] Adopting that methodology, *via* David Kennedy's "Theses," Koskenniemi has, in *From Apology*, *Gentle Civilizer* and his later work analyzed above, written what can and should be read as a Lacanian psychoanalysis of international law without referring to Lacan.

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[391] Caudill, *supra* note 14, at 662.

[392] *Id.* at 676.

[393] *See* Alan Hunt, *The Theory of Critical Legal Studies,* 6 OXFORD J. LEG. STUD. 1, 23 (1986) (noting a CLS "tendency," which he associates with Duncan Kennedy, "to cite the theoretical origins of their positions in a very loose way"). Koskenniemi notes the "review" of CLS in Hunt without analysis or discussion. KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 63 n.151.

[394] DUNCAN KENNEDY, RISE AND FALL*, supra* note 371, at ix.

[395] *See* SUSAN BUCK-MORSS, THE ORIGIN OF NEGATIVE DIALECTICS (1977).

[396] DUNCAN KENNEDY, RISE AND FALL*, supra* note 371, at 265–69.

[397] *Id.* at xiv.

[398] *See id.* at xiv. See supra Section B. III., "International law '*as* a language,'" on synchrony. There is a general tendency in the literature on critical approaches to international law to synchronically homogenize structuralism and critical theory despite their distinctive natures. *See, e.g.*, Singh, *International legal positivism*, *supra* note 186, at 299-300; Rasulov, *supra* note 13, at 655.

[399] DUNCAN KENNEDY, RISE AND FALL, *supra* note 371, at 27.

The roots of Koskenniemi's work in Duncan Kennedy's thought have been hiding in plain sight. The notion of a movement "from apology to utopia" is at the heart of Duncan Kennedy's *Blackstone's Commentaries* and forms the title of Koskenniemi's first book,[400] and they have both written books that include "Rise and Fall" in their titles.[401] While these might, at first glance, seem like insignificant, even trivial, coincidences or parallels, the analysis undertaken here reveals them to be anything but.

Koskenniemi has loomed large as the "master" of "critical" international legal scholarship and yet, because we have remained unconscious of the "priority" of a psychoanalytic reading of his work—something that this Article aims to remedy—we have described or, at best, *de*-scribed international law.[402] We lack the ability and reject the possibility of fundamentally changing or re-imageining international law precisely because we have focused our energies on description.[403] Our capacity to describe/*de*-scribe "legal consciousness"—our appreciation of and enthusiasm for "culture[s] of formalism"—has risen because our insight into the thinking that underpins that capacity has fallen. In recent debates on international legal theory, therefore, "les non-dupes errant"/"those who are not taken in [are seen to] err."[404] The international legal scholar's job—my job—is

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[400] *See supra* notes 342, 348 and accompanying text.

[401] *See* DUNCAN KENNEDY, RISE AND FALL, *supra* note 371; KOSKENNIEMI, GENTLE CIVILIZER, *supra* note 6.

[402] *See supra* Section A, "Introduction," on "priority."

[403] As Hunt observes:

> The heart of [Duncan] Kennedy's 'antagonism to philosophy' centres around the question of the abstract character of theory and philosophy. The objection against abstraction is that distancing and generalization sacrifices the particularity or specificity of reality. Thus, if the objective of thought is to understand and to change reality, 'abstraction' is seen as conflicting with this goal . . . . Kennedy is asserting the view that only those elements of a discourse which are capable of participating in 'effective communication' are to count as knowledge. This is a perfectly plausible position *within* philosophy, but it neither abolishes philosophy nor does it overcome his primary objection to abstraction. 'Effective communication' is not free of abstraction, but rather it privileges those abstractions that are part of 'common sense' or ordinary discourse.

Hunt, *The Theory of Critical Legal Studies*, *supra* note 393, at 27. See Nicholson, *supra* note 20, on "re-imageination."

[404] *See supra* notes 2, 3 and accompanying text.

apparently synchronic, not diachronic.[405] It apparently involves the production of reality "affect[s]" through the *de*-scription of international law's content from inside its structure, rather than any attempt to change that structure from the outside.[406]

3. An Unconscious Language Structure

To recap, and in summary, Koskenniemi's work is, for the reasons outlined in this Section, based on his adoption and application of David Kennedy's "analytic approach" in "Theses." It can and should be read as Lacanian for all of the reasons outlined throughout this Article, but most especially because David Kennedy's and Koskenniemi's shared and fundamental notion of a "largely unconscious [international legal] structure,"[407] "within which the problems which modern lawyers face, either in theory or in doctrine, are constituted,"[408] originating out of Duncan Kennedy's concept of "legal consciousness," is synonymous with Lacan's twin claims that "every discourse derives its effects from the unconscious,"[409] and that "the unconscious is structured as a language."[410]

That synonymy is neither coincidental nor accidental—synonymy is not to be confused with similarity. It is a product of the fact that David Kennedy and Koskenniemi, drawing, ultimately, on Duncan Kennedy's work, base their inquiry into international law's structure on the intellectual foundations of Lacan's work, on Levi-Strauss' structuralist anthropology and Saussure's structuralist theory of linguistics (see parts II and III above).[411] On this foundation Koskenniemi erects a theory of international legal practice, using Laclau's Lacanian theory of hegemony for support.[412]

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[405] For discussions of synchrony and diachrony, and internal and external perspectives, see *supra* Section B. III., "International law '*as* a language.'"

[406] *See* Anne Orford, *In Praise of Description,* 25 LEIDEN J. INT'L L. 609 (2012); Martti Koskenniemi, *Celebrating Structuralism*, *supra* note 241, at 732 ("[T]he task of legal research would be to understand legal professionalism not just be examining what institutions say but what makes them *choose* from equally plausible alternatives the ones they do, and draw from them the conclusions they draw" – emphasis in original).

[407] David Kennedy, *Theses*, *supra* note 330, at 375.

[408] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 6.

[409] Lacan, *Subversion*, *supra* note 63, at 701.

[410] Lacan, *Of Structure*, *supra* note 96.

[411] Rasulov maintains that *From Apology*'s "intellectual genealogy" is not rooted in Duncan Kennedy's work but in "the French structuralist tradition" and, in particular, the work of Levi-Strauss and Michel Foucault. *See* Rasulov, *supra* note 13, at 649–51. For the reasons set out in this Section and, more generally, throughout this Article, it is possible, *via* Lacan and psychoanalysis, to link "the French structuralist tradition" with Duncan Kennedy and critical legal studies more generally and, to that extent, I disagree with Rasulov.

[412] *See* Section C. V., "Laclau and Lacan . . . and Koskenniemi".

Like David Kennedy, Koskenniemi starts with Lacan's forebears—Levi-Strauss and Saussure—and comes (unlike Kennedy) to rely on Ernesto Laclau, one of Lacan's principal followers. The fact that he works with Lacan's major forebears and follower but not with Lacan himself is traceable to his adoption of Duncan Kennedy's methodology (see the immediately preceding Section, "Rising and falling"). Koskenniemi's work can and should be read as a *de*-scription of international law's (linguistic) "unconscious" that is (unconsciously) based on Lacan's insistence that "the unconscious is structured as a language" and that "words are the only material of the unconscious."[413] Lacanian psychoanalysis is, for these reasons, the "political unconscious" of and "allegorical key" to Koskenniemi's work.[414]

D. Prognosis

I. Therapeutic Benefits: The Work of the "Master"

I agree with Aristodemou that international law has largely overcome its late twentieth-century "apologetics, restorative rhetoric and self-abnegating excuses" to become "a ubiquitous presence in [early twenty-first century] global policy making," a "discourse that is 'hard to escape.'"[415] For me, unlike Aristodemou, however, the "sudden embrace, adulation, and self-congratulation amongst and for public international lawyers" after a period of sustained, even neurotic, "diffidence and self-questioning,"[416] is linked and even largely attributable to Koskenniemi's Lacanian psychoanalysis of international law and its reality "affect" on international law(yers).

The International Law Commission's work on the fragmentation of international law is perhaps the best example of the beneficial effect of Koskenniemi's psychoanalytic therapy on international law's state of mind and self-confidence. In response to a widespread, late-twentieth-century belief that international law was fragmenting into disparate elements, each focused on a distinct area of policy—human rights, the global environment,

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[413] Lacan, *Of Structure*, *supra* note 96.

[414] JAMESON, POLITICAL UNCONSCIOUS, *supra* note 24, at 13.

[415] Aristodemou, *supra* note 14, at 35–36 (quoting James Crawford and Martti Koskenniemi, *Introduction*, *in* THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 1 (James Crawford & Martti Koskenniemi eds., 2012).

[416] *Id.* at 36.

international trade, for example—the International Law Commission embarked on a study of fragmentation and possible responses to it.[417]

The latter stages of that study were led by Koskenniemi and he produced an "analytical study"—perhaps "psychoanalytical study" would have been more apt—explaining the study group's conclusions.[418] The "study" reads like an executive summary of *From Apology* and *Gentle Civilizer*.[419] Recalling the discussion of *Hegemony and Socialist Strategy* above, it amounts to an affirmation of hegemonic practice as the response to "fault[s]," "fissure[s]" and fragmentation in the "normal historical development" international law had envisioned for itself.[420]

International law is, according to the "study", not fragmented but a synchronic "language . . . a total system . . . complete at every moment":[421] "Although there may be disagreement among lawyers about just how the systemic relationship between the various decisions, rules and principles should be conceived, there is seldom disagreement that it is one of the tasks of legal reasoning to establish it."[422] Legal practice is a political endeavor, fashioning coherence out of the seemingly incoherent:

> Legal interpretation, and thus legal reasoning, builds systemic relationships between rules and principles by envisaging them as parts of some human effort or

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[417] See Martineau, *supra* note 13, for an overview of fragmentation and the ILC's work. I have addressed fragmentation in previous work – see Nicholson, *supra* note 20.

[418] *See Report of the International Law Commission on the Work of Its Fifty-Eighth Session*, U.N. Doc A/61/10, at 402 (2006) ("The Study Group . . . emphasized that [its] conclusions had to be read in connection with the analytical study, finalized by the Chairperson [Martti Koskenniemi], on which they are based.").

[419] *See Report of the Study Group*, *supra* note 247. *See also* Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 578-579 (2002) (foreshadowing the outcome of the ILC's work in its conclusion that while "no overall solution" is available to resolve fragmentation anxieties "consensual formalism" is the way forward).

[420] *See* text accompanying *supra* notes 156 and 157. My reading of the ILC's fragmentation work as consistent with Koskenniemi's work in general conflicts with the existing literature. *See* Sahib Singh, *The Potential of International Law: Fragmentation and Ethics,* 24 LEIDEN J. INT'L L. 23 (2011) (suggesting there is an inconsistency between Koskenniemi's scholarly work and the ILC study); Maksymilian Del Mar, *Systems Values and Understanding Legal Language*, 21 LEIDEN J. INT'L L. 29 (2008). Del Mar critiques the ILC study for 'taking "the law itself" as an object', arguing for an approach based on 'the use of the language of law as a resource in the exercise of judgement'. *Id.* at 34, 48. *See also* Broude, *supra* note 13; Murphy, *supra* note 13. Broude and Murphy point to but do not fully explore the connection between Koskenniemi's scholarship and his ILC fragmentation work.

[421] JAMESON, PRISON-HOUSE, *supra* note 1, at 5–6.

[422] *Report of the Study Group*, *supra* note 247, at 23.

> purpose . . . it may . . . be rationalized in terms of a *political obligation* on law-appliers to make their decisions cohere with the preferences and expectations of the community whose law they administer.[423]

The "good" served by legal reasoning is, consistent with the "culture of formalism," an "empty" universal. Hence the "principle of systemic integration" in Article 31(3)(c) of the Vienna Convention on the Law of Treaties:[424]

> The principle of systemic integration . . . looks beyond the individual case. By making sure that the outcome is linked to the legal environment, and that adjoining rules are considered . . . any decision also articulates the legal-institutional environment in view of substantive preferences, distributionary choices and political objectives . . . . Without the principle of "systemic integration" it would be impossible to give expression to and to keep alive, any sense of the common good of humankind, not reducible to the good of any particular institutions or 'regime.'[425]

Koskenniemi's psychoanalytic approach to international law was uniquely well-equipped to address the "phallic" nature of fragmentation. As Deborah Luepnitz explains, "Lacan observed that many human beings use the penis to cover their pervasive sense of bodily lack, and so he chose the term 'phallus' to refer to our wish for completeness. The phallus therefore signifies, paradoxically, the opposition of completeness—that is, lack."[426] Fragmentation is international law's "phallic" complex—an expression of its unfulfillable "wish for completeness"—and it gave the (Lacanian) "master" the perfect opportunity to demonstrate his mastery.

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[423] *Id.* at 24 (citation omitted).

[424] Vienna Convention on the Law of Treaties, art. 31(3), 1155 U.N.T.S. 331 ("There shall be taken into account, together with the context: . . . (c) any relevant rules of international law applicable in the relations between the parties.").

[425] *Report of the Study Group*, *supra* note 247, at 244.

[426] Deborah Luepnitz, *Beyond the Phallus: Lacan and Feminism*, in THE CAMBRIDGE COMPANION TO LACAN 221, 226 (Jean-Michel Rabaté ed., 2003).

II. Utopian "Archaeologies of the [International Legal] Future."[427]

In this Article, I have undertaken a diachronic analysis of Martti Koskenniemi's work,[428] an "intellectual [re]construction" of his writings from the "outside."[429] I have tried to avoid the perspective of the "dupe," to be one of "les non-dupes," to resist the master's reality "affect," without "err[ing]" by "dismiss[ing] [international law's] . . . symbolic texture"—its discourse—"as a mere semblance," and without being "blind to its efficacy . . . to the way we can intervene in the Real through [international law's] symbolic [discourse]."[430]

A synchronic methodology, a psychoanalytic *de*-scription of the subject's place within his structure,[431] reproduces the fundamental structures of the past in an "eternal present."[432] Past and present are synchronized in a denial of even the possibility of a future; a denial of any future that is not synchronic with a present which demands that the past synchronize with it, in an "insurrection of the present against [all] other temporalities."[433]

Koskenniemi's psychoanalytic, structuralist, synchronic account of international law is, therefore, in the most fundamental, ontological-methodological sense, a denial of the possibility of significant change in the structure of international law.[434] It is erotic; it is in

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[427] *See* FREDRIC JAMESON, ARCHAEOLOGIES OF THE FUTURE: THE DESIRE CALLED UTOPIA AND OTHER SCIENCE FICTIONS (2007).

[428] *See supra* Section B. III., "International law '*as* a language.'"

[429] JAMESON, PRISON-HOUSE, *supra* note 1, at 6.

[430] ŽIŽEK, LESS THAN NOTHING, *supra* note 3, at 971:

> [F]rom a properly Lacanian standpoint, *les non-dupes errant* means [that] . . . the true illusion consists not in taking symbolic semblances as real, but in substantializing the Real itself, in taking the Real as a substantial In-itself and reducing the symbolic to a mere texture of semblances. In other words, those who err are precisely those cynics [*see* Koskenniemi, *Between Commitment and Cynicism, supra* note 90] who dismiss the symbolic texture as a mere semblance and are blind to its efficacy, to the way the symbolic affects the Real, to the way we can intervene in the Real through the symbolic.

[431] See *supra* Section C. VII. 2, "Rising and falling" (on "*de*-scription").

[432] JAMESON, THE ANTINOMIES OF REALISM, *supra* note 199, at 24, 26, 28, 39–41 (discussing, at 39–41, Richard Wagner's compositional style and the "Wagnerian 'endless melody'").

[433] *Id*. at 10 (quoting and translating the title of ALEXANDER KLUGE, DER ANGRIFF DER GEGENWART GEGEN DIE ÜBRIGE ZEIT (1985)).

[434] *See* JAMESON, ARCHAEOLOGIES OF THE FUTURE, *supra* note 427, at xii ("[T]o adapt Mrs Thatcher's famous dictum, there is no alternative to Utopia, and late capitalism seems to have no natural enemies . . . . What is crippling is

love with the structures and myths of international legal discourse, with an image of the international lawyer as a sutured hegemon,[435] and with (what it sees as) the beautiful truth of international law.[436] The notion that Koskenniemi's work takes us on a "voyage" towards utopia must, therefore, be rejected.[437] His work, in common with fundamental trends in late-twentieth- and early-twenty-first-century thought that accept capitalism as *the* final system, has effectively abandoned a (diachronic) future and the possibility of (legal-) utopian visions of it.[438]

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not the presence of an enemy but rather the universal belief . . . that no other socio-economic system is conceivable, let alone practically available."); *see also* Kotiaho, *A Return to Koskenniemi*, *supra* note 26, at 494 (asking whether "Koskenniemi's project is an attack [on international law] at all," answering "[n]o", and linking "[t]he left-wing international legal project" with an appreciation that "from behind the corner of theoretical eclecticism, one can already hear the co-optive song of the sirens of global capitalism.").

[435] *See* Freud, *Pleasure Principle, supra* note 294, at 42–43 ("[T]he efforts of Eros to combine organic substances into ever larger unities"); *Id.* at 50 ("the Eros of the poets and philosophers which holds all living things together'); *id.* at 46 ('Eros, the preserve of all things"); *id.* at 54 ("Eros, the preserver of life.").

[436] *See* WALTER BENJAMIN, THE ORIGIN OF GERMAN TRAGIC DRAMA 31 (John Osborne trans., 1998)

> If truth is described as beautiful, this must be understood in the context of the Symposium with its description of the stages of erotic desires. Eros—it should be understood—does not betray his basic impulse by directing his longings towards the truth; for truth is beautiful: not so much in itself, as for Eros.

[437] *See generally* Orford, *A Journal of the Voyage from Apology to Utopia*, *supra* note 217.

[438] *See* JAMESON, ARCHAEOLOGIES OF THE FUTURE, *supra* note 427, at xii. *Compare* Lang and Marks, *supra* note 222, at 447–48 ("[Koskenniemi's] project is not one of revival, but one of renewal and reimagination."). Whatever (limited) possibility Koskenniemi's "project" holds for "renewal and reimagination" is, as argued throughout this Article, limited to what can be achieved by hegemonic legal practice by "sutured" subjects situated within an international legal discourse defined by a synchronic history of its present, and it is this ontology of international law which, I argue, needs to be challenged. Lang and Marks seem to cautiously acknowledge the need for such a challenge but their reservations about Koskenniemi's "project" are rooted in the "voluntarism" they associate with his work. By contrast, my analysis of structure, hegemony, and suture in Koskenniemi's work has sought to demonstrate the predominantly anti-voluntarist character of Koskenniemi's, on my reading, psychoanalytic-structuralist scholarship:

> [Koskenniemi] has sought to recapture what he takes to have been an earlier commitment to responsible moral agency. We have noted that in a different time and place and in a different disciplinary context, E.P. Thompson likewise evoked the moralized sensibility of an earlier epoch . . . [through] veneration of heroic agency and self-creation . . . . The poetry of voluntarism is certainly an inspiring art. What is less certain is how well is equips us to pursue the kinds of projects that might one day make us authors of our collective mode of existence as a whole.

The most urgent project in international legal thinking is, in my view, a recovery of the "utopian impulse,"[439] an "archaeology" of international law's future,[440] a diachronic construction of international law's future using "fragments" of the past.[441] That recovery is impossible for so long as the international lawyer *qua* hegemonic subject remains alive as *the* subjectivity that international lawyers are required or expected to adopt when they suture themselves into international legal discourse.[442]

Diachrony and the recovery of the "utopian impulse" imply anti-erotic, destructive, anti-structuralist, anti-hegemonic,[443] anti-discourse kinds of thinking; a process of "intellectual construction" out of the "ruins,"[444] the "fragments" of the collapsing structure,[445] in

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Id. at 453. *See also* Haskell, *supra* note 29, at 675 ("[T]he miscalculation in [*From Apology*'s] polemic to the profession is that it misses out . . . on the extra-linguistic rhetorical practices required to protect and expand intellectual terrain.").

[439] JAMESON, ARCHAEOLOGIES OF THE FUTURE, *supra* note 427, at 8.

[440] *See* generally *id.*

[441] *See* WALTER BENJAMIN, ORIGIN, *supra* note 436, at 29 ("The value of fragments of thought is all the greater the less direct their relationship to the underlying idea, and the brilliance of the representation depends as much on this value as the brilliance of the mosaic does on the quality of the glass paste."); *see also* Nicholson, *supra* note 20 (on Benjamin and "fragments").

[442] *See* Haskell, *supra* note 29, at 676 (protesting against current formulations of the international lawyer's subjectivity by calling on international lawyers to "[leave] the humanist impulse to moralize, to speak of transhistorical sensibilities, to confine ourselves as lawyers to the role of mediating professional differences or political hostilities, and instead to seek out the ruthlessly anti-transcendental, almost inhuman mechanisms that rein us into subjectivities").

[443] *See* Balakrishnan Rajagopal, *Counter-hegemonic International Law: rethinking human rights and development as a Third World strategy,* 27 THIRD WORLD Q. 767, 780 (2006) ("[W]e must start by fundamentally rethinking the shibboleths of the past, especially those that have provided the language of emancipation and justice.").

[444] JAMESON, PRISON-HOUSE, *supra* note 1, at 6 ("intellectual construction"); WALTER BENJAMIN, ORIGIN, *supra* note 436, at 235 ("In the ruins of great buildings the idea of the plan speaks more impressively than in lesser buildings.").

[445] *See* WALTER BENJAMIN, THE ARCADES PROJECT 460 (Howard Eiland & Kevin McLaughlin trans., 2002) ("[T]he rags, the refuse—these I will not inventory but allow, in the only way possible, to come into their own: by making use of them."). Freud develops an analogy between the mind and urban architecture. *See* FREUD, CIVILIZATION AND ITS DISCONTENTS, *supra* note 294, at 6–8. He also asks, with reference to Plato, whether "living substance at the time of its coming to life was torn apart into small particles, which have ever since endeavoured to reunite through the sexual instincts" and whether "these splintered fragments of living substance . . . having] attained a multicellular condition . . . finally transferred the instinct for reuniting, in the most highly concentrated form, to the germ-cells." *Id.* at 52. Walter Benjamin, writing in 1925 (Freud writes *Civilization* in 1920), explores the unification of fragments in "mosaic[s]" and within a platonic framework of base "phenomena," mediating "concepts," and "ideas." *See* WALTER BENJAMIN, ORIGIN, *supra* note 436, at 29, 30–32, 33–34. *See also*, on Benjamin's Platonism, Beatrice Hanssen, *Philosophy at Its Origin: Walter Benjamin's Prologue to the Ursprung des deutschen*

opposition to erotic labors-of-love that synchronically re-enforce it.[446] It is time to think positively about collapse into "the void,"[447] about death as re-birth.[448] It is time to think against our identity as "native language-speaker[s] of international law,"[449] against ourselves.[450] Only after the death of the image of international law's much venerated

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Trauerspiels 110 MODERN LANGUAGE NOTES 809 (1995). Žižek contemplates a "return to Plato" with reference to Plato's "Idea" and on the basis that "everything that appears ultimately appears out of nothing." ŽIŽEK, LESS THAN NOTHING, *supra* note 3, at 37, 41. Nicholson contemplates a negative theory of international law and international legal practice based on Benjamin's platonic framework. *See generally* Nicholson, *supra* note 20.

[446] See Mills, *supra* note 293, at 378:

> Under the pressure of disturbing external forces, a drive becomes an urge or pulsion to repeat itself, the motive of which is to return to an earlier state of undifferentiation, the 'expression of the inertia inherent in organic life' . . . . Because drives are 'conservative,' that is, they follow a conservative economy of regulatory energy, are acquired historically and phylogenetically in the species, and tend toward restorative processes that maintain their original uncomplicated immediacy, Freud speculates that an 'elementary living entity' would have no desire to change, only to maintain its current mode of existence.

(quoting Freud, *Pleasure Principle*, *supra* note 294, at 36, 38)).

[447] ŽIŽEK, LESS THAN NOTHING, *supra* note 3, at 3-4 (commenting, with reference to Galileo's famous "*Eppur si muove*", "'moving' is the striving to reach the void, namely 'things move,' there is something instead of nothing, not because reality is in excess in comparison with mere nothing, but because reality is *less than nothing*. This is why reality has to be supplemented by fiction: to conceal its emptiness"). *See also id.* at 60 ("'Nothing' is the generative void out of which othings, primordially contracted pre-ontological entities, emerge.").

[448] *See* Mills, *supra* note 293, at 379:

> According to Freud, all living organisms die for 'internal reasons,' that is, death is brought about from the cessation of internally derived activity: death is not merely executed by an extraneous force, rather it is activated by endogenous motives . . . the psyche is given determinate degrees of freedom to 'follow its own path to death' . . . that is, to bring about its end fashioned by its own hands. But this end is actually a return to its beginning, a recapturing, a recapitulation or its quiescent inorganic immediacy.

(quoting Freud, *Pleasure Principle*, *supra* note 294, at 38, 39).

[449] KOSKENNIEMI, FROM APOLOGY, *supra* note 4, at 568.

[450] THEODOR W. ADORNO, NEGATIVE DIALECTICS 365 (E.B. Ashton trans., 2007) (1966) ("[I]f thinking is to be true—if it is to be true today, in any case—it must also be a thinking against itself."). On "thinking against" in international law see Nicholson, *supra* note 20.

"*Gentle Civilizer*['s]" past and present will we be able to make "progress and [secure] the production of new [international legal] forms."[451] To build any future worth the name we must first rediscover (legal) means of imageining one.[452]

> Fuseli's *Artist Moved by the Grandeur of Ancient Ruins* shows a figure in a state of utter dejection dwarfed and enclosed by selected bits of a colossus, which though larger and more powerful than he, is in its dismemberment equally ineffectual. The past is conceived as a figure or being, now reduced to abstraction or monstrosity. The artist is part and not part of the collapse: his posture echoes the cascading form familiar in many scenes of ruin, but for all his solidarity with the fallen giant he remains apart, neither buried nor assimilated, revelling now in a fit of melancholy which will pass.[453]

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[451] Freud, *Pleasure Principle*, *supra* note 294, at 37 ("[I]n addition to the conservative instincts which impel towards repetition, there may be other which push forward towards progress and the production of new forms."). *See also id.* at 57–58:

> The pleasure principle [or Eros] seems actually to serve the death instincts. It is true that it keeps watch upon stimuli from without, which are regarded as dangers by both kinds of instincts; but it is more especially on guard against increases of stimulation from within, which would make the task of living more difficult . . . . We must be ready . . . to abandon a path that we have followed for a time, if it seems to be leading to no good end. Only believers, who demand that science shall be a substitute for the catechism they have given up, will blame an investigator for developing or even transforming his views.

[452] *See* Nicholson, *supra* note 20.

[453] Robert Harbison, *Ruins*, *in* ROBERT HARBISON, THE BUILT, THE UNBUILT AND THE UNBUILDABLE: IN PURSUIT OF ARCHITECTURAL MEANING 99, 108 (1991).

Articles

Human Rights, Symbolic Form, and the Idea of the Global Constitution

By Nathan Gibbs[*]

Abstract

This Article develops a methodological basis for elaborating an idea of global constitutionalism. It applies this broader understanding of the idea of global constitutionalism to an examination of the specific role played by human rights within the evolving framework of global legal governance. The methodological basis from which the idea of global constitutionalism is developed derives from work in historical sociology that emphasizes the role played by underlying symbolic forms in the structure of social reality. The approach adopted here lays particular emphasis, following Claude Lefort and Marcel Gauchet, on the role of political theology as the principal mode in which symbolic form is constituted. From this perspective, the notion of the global human rights model is scrutinized as central to the symbolic form of global constitutionalism. Developed in critical engagement with the work of Samuel Moyn, human rights can be seen as central to global constitutionalism viewed as the latest political constellation of a distinctively secular understanding of the symbolic form and limits of political authority.

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A. Introduction

In this Article, we will examine one of the central elements of an evolving global constitution: The concept or notion of the field of global human rights, a field both paradigmatic of what might be termed the global register of the meaning of law as a symbolic form and, as such, essentially contested in its key features. The central purpose of the Article is not so much to add to the empirical and doctrinal literature clarifying distinctive and important developments in this field, nor is the purpose of the Article to elaborate a conceptual basis for unifying, in a strong normative sense, a global doctrinal model for the development of human rights. Instead, the Article will seek to investigate an underlying problem for this entire field of study: Namely, the distinctive historical and ideological context in which the so-called global model of human rights protection has evolved, with a view to explaining the sense in which the idea of human rights fits within the constitutional framework of globalization. In brief, the principal purpose of the Article is to delineate the formative existential and historical basis, centered on human rights, for the globalization of constitutionalism in such a way as to set out the distinctive and fundamental set of problems encountered by human rights law on the level of a global constitution.

Accordingly, and to put the point in a more technical way, the central focus of the Article is to situate the normative and doctrinal problem—the question of the normative basis for the development of the concept of rights-understood-as-universal, a global regime of human rights—within the context of an interconnected set of historical or cultural presuppositions that form the basis for the quotidian operation of rights within its various adjudicative and jurisdictional fora. So far, the term "global" and the notion of "global constitutionalism" have been left undefined: To what extent is it useful to speak about a global constitutional model in general and a global human rights model in particular? These are evidently not new questions, and the principal lines of the debate surrounding the utility of these terms will be familiar to many readers.[1] In the context of the following discussion, however, the theoretical, normative, and empirical cautions about the utility of the use of the terms global, globalization, and so on, for the purposes of legal-doctrinal or socio-legal analysis, will not be directly engaged with as such. As this Article will show, part of the reason for this is that a reconceptualization of the fundamental purposes of the term global as a framing concept in legal studies is proposed. Put negatively, the term "global" does not function here as a descriptive term designating a particular field of social scientific inquiry, nor is it a way

[1] The work of William Twining is particularly important in this regard. *See* WILLIAM TWINING, GLOBALIZATION AND LEGAL THEORY (Butterworths & Co. 2000) (attempting to define notions of globalism and global constitutionalism); *See also* WILLIAM TWINING, GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE (Cambridge Univ. Press 2009) (furthering development of the definitions of globalism and global constitutionalism).

of classifying a discrete range of doctrinal materials for the purposes of a systematic exposition such as in the field of contract or tort law for example.

What sort of re-conception of the global is being proposed here? Following, but also modifying, in critical aspects, Neil Walker's suggestion of treating the term "global" as an indispensable epistemic idea in legal studies, the concept is used here less in order to designate an empirical objectivity chartered observationally than as an attempt to think about the practices and structures within which we develop our own understanding and engagement with the human relations and realities of politics and law.[2] This is crucially not only a matter of developing the idea simply for cognitive purposes, as the term "epistemic" might seem to imply, but it also informs practical action as well. When we talk about the concept of the global as it relates to practical and cognitive modes of generating collective understanding and identity, it is important to note that the global here designates a fundamental dimension of our post-Westphalian lifeworld: A fundamental category that confers a particular shape or character on our experience of ourselves, our environment, and our relations with others. The sense in which the notion of the global can be seen as disclosing fundamental cognitive and practical possibilities within a given lifeworld is designated here by defining the global as belonging to the fundamental symbolic dimension of the political and social field.

This fundamental and formative dimension of constitutional experience can also be understood in terms of a distinction that has developed in the field of political theory between politics and the political.[3] This distinction, now better known in general, but not

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[2] *See* NEIL WALKER, INTIMATIONS OF GLOBAL LAW 10 (Cambridge Univ. Press 2014) (stating that the case in favor of employing the concept of global law, despite uncertainties surrounding the idea of globalization, reduces to, "one argument comprising three layers—rhetorical, structural and epistemic."). Amongst these three reasons, the third, the epistemic reason, appears to be the most telling. Walker describes this as follows: "[The idea of global law] both reflects and encourages an important shift at the margins in the very way that we think about legal authority and strive to refashion law on the basis of that knowledge." *Id.* In other words, the most noteworthy aspect of the shift in favor of the use of the category of "the global" is the way in which it marks a change in our fundamental understanding of legal authority. It is precisely this "epistemic" sense of the global that is developed in this Article. In a move that we will discuss later, Walker locates the character of this transformation in the nature of the authority claim made by any given legal system: That it relates in some sense, not so much to a discrete national or local jurisdiction, but to a jurisdiction that is universal in nature. As he puts it, "[W]hat qualifies law as global law, and what all forms of global law have in common, is a practical endorsement of or commitment to the universal or otherwise global-in-general warrant of some laws or some dimensions of law." *Id.* at 18.

[3] *See* O. MARCHART, POST-FOUNDATIONAL POLITICAL THOUGHT: POLITICAL DIFFERENCE IN NANCY, LEFORT, BADIOU AND LACLAU (Edinburgh Univ. Press 2007) (explaining the distinction between the political and politics itself); *see also* W. BRECKMAN, ADVENTURES OF THE SYMBOLIC: POST-MARXISM AND RADICAL DEMOCRACY (Columbia Univ. Press 2013) (describing

without its difficulties in terms of the variety of ways in which the concept has been deployed, maps a very significant distinction between the ordinary activities of politics—elections, formation of governments, policies, and political parties—and a prior register that is termed "the political." In summary, "the political" denotes a constitutive set of assumptions that determine several things. First, the assumptions determine *formative structures* within which agents are constituted and within their actions can take place: For example, institutions, official roles, and so on. Secondly, they develop the layers of *significance* that provide a meaningful repertoire of actions, including narrative structures, conceptions of the teleology, and modality of social transformation. Finally, and most importantly, they generate the social imaginary itself, the *symbolic form* as the locus where all possibilities of the constitution are reflected on and developed.[4]

The importance of the distinction between the political and politics, and the accompanying notion of "symbolic form," ultimately lies in the fact that it provides an alternative to the familiar distinction in social science between what Anthony Giddens has described as structure and agency.[5] It must be noted that what is involved here is a certain way of conceiving of the social field that is broader than Giddens' work and might include work premised upon alternative concepts like that between regime and subjectivity, as described by Foucault, or habitus and agency, as described by Bourdieu. If it does take up the

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the constitutional experience as a theoretical concept, now understood as the distinction between politics and the political).

[4] This threefold distinction between what might be termed setting, significance, and form is indebted to Claude Lefort's seminal work, which distinguishes between a *mise-en-scènce*, *mise-en-sens*, and finally, a *mise-en-forme*. For Lefort, the term *mise-en-scène* designates his essential interpretation of the place of the political as the transcendent constitutive moment in social relations as society represents this to itself. Central to Lefort's own conception of the political in this sense is the notion of the transcendent that is understood in terms of Merleau-Ponty's phenomenology of corporeality in which what is visible is always tied to an invisible transcendent ground. The phrase that encapsulates this is that there is "an excess of being over appearance." On this reading, the political belongs to a fluid and open-ended domain of essentially embodied existential experience which, as such, precedes quotidian political action and theoretical conceptual determination. The political, according to this view, brings a closure to this field of open-ended possibility, and establishes a framework for meaningful action (*mise-en-sens*), by establishing a central and unifying symbolic point of reference for social interaction. The term *mise-en-forme* designates this entire set of operations as they are performed within any given society. As we will see, critical to the character of modern democratic society is an unprecedented *mise-en-forme* that, in its *mise-en-scène*, represents the key formative dimension of power as essentially open-ended in terms of the persons and ideas legitimately occupying it: This is what he terms the image of the "empty place" of power. We will return to further consider Lefort's work in examining Samuel Moyn's work regarding the "Utopian" consciousness of the human rights movement. *See* BERNARD FLYNN, THE PHILOSOPHY OF CLAUDE LEFORT: INTERPRETING THE POLITICAL (Northwestern Univ. Press 2005) (outlining Lefort's work in this field); *See* CLAUDE LEFORT, *The Permanence of the Theological-Political*, *in* DEMOCRACY AND POLITICAL THEORY (David Macey trans., Polity Press 1988) (delineating the key elements of Lefort's approach to political philosophy and to the analysis of modern constitutionalism).

[5] *See* ANTHONY GIDDENS, THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION (Polity Press 1984) (describing the distinction between the political and politics).

underlying problematic pursued through these concepts, the alternative distinction between politics and the political does so within its own framework of ideas.

Crucially, unlike the structure/agency distinction, the political/politics distinction moves away from any stress on a co-dependent and dialectical relation between what is genuinely constitutional and the forms of social agency within the field it establishes as the key transformative element of modernity. This point will be developed in various ways throughout this Article. The approach might be outlined as follows. In all the different and varied contexts in which it is deployed, the notion of the political, in its essential meaning, designates the transcendence of the constitutive moment with respect to the social formation. On this understanding, there can be no synergy between constitutive meaning and the constituted structures of action as such; rather, the generation and development of possibilities for social action are, on the most fundamental level, given entirely through and from the level of constitutive meaning.

In advance of providing a preliminary account of the overall structure of this Article, a brief summary of the preceding points setting out its overall framework can be outlined as follows. The field of human rights appears to represent a key element in the development of a form of global constitutionalism, which has grown out of the previous form of the nation state. This broader form of constitutionalism needs to be understood as a symbolic form in which a collective form of agency and identity establishes itself and which sets the framework for the wider field of social action. The problem is to establish the sense in which human rights discourse occupies a significant and revealing element within this symbolic framework. Accordingly, in the first section of the Article, the hermeneutical and juridical basis for the doctrinal interpretation and application of human rights will be explained in relation to the concept of the global constitution—sketched in the introduction—as a new symbolic horizon shaping legal action. The primary purpose of this part of the Article will be to set out the idea of constitutional theory as a way of reflecting on the critical political decisions embodied in this symbolic setting. The second section will resituate human rights in the global setting, where the "global" is interpreted in the specific sense that has just been outlined. It will also examine some of the work that seeks to establish the centrality and importance of human rights within this field. The third section will engage with the substance of Samuel Moyn's recent important contextual and historical analysis of the significance of the human rights movement. Moyn's work helps to provide an understanding of the context in which the human rights movement, viewed in relation to the formative dimensions of the global constitution, can be clarified. On the basis of his work a critique of the human rights movement might be developed by arguing that the human rights agenda has been guilty of projecting and reinforcing a utopian conception of constitutionalism that has not enabled the problems of a global constitutionalism to be set out and tackled in an appropriate way. Moyn's work stresses how the previous paradigm of the nation-state

constitution provided the political closure in relation to competing conceptions of personal interests, as well as views of the right and good that was necessary to the formation of a coherent transformative political agency. The human rights declarations formed a key part of this. However, the declarations were subordinate in significance and function to the constitutive form of the nation state. In isolation from this underlying form, as is presently the case in the global context, the same human rights agenda necessarily takes on an abstract, normative, and utopian character. Section four explores possible responses to the human rights that might be drawn out of a reflection on Moyn's work. In contrast to the point of view advanced in section three, but in constructive engagement with some of its central insights, it explores the sense in which human rights can in fact be seen as a central and plausible formative element in global constitutionalism rather than as being a perhaps more peripheral utopian discourse. This view is defended and explained with regard to the work of Michel Gauchet and, in particular, his concept of the distinctive symbolic form of the secularity of modernity. The key implications and tensions present within the human rights discourse, within the global context, can then be set out within this perspective.

B. The Constitutional and the Doctrinal: Questions of Method

Before clarifying the register and terms appropriate to posing fundamental questions concerning constitutionalism at large and global constitutionalism in particular, a number of methodological points should be set out. First, we need to establish where constitutionalism ought to be located in relation to the social field in general. Second, and for the purposes of further consolidating this interpretation, it is also useful to establish the connection between constitutionalism and the distinction that has been drawn between politics and the political. Finally, some indication of how legal studies can be understood in this context is provided.

To begin with the first point, the relationship between constitutionalism and the social field in general. This is evidently a large topic to discuss in an entirely exhaustive manner. Nevertheless, some leading principles can be set out. A useful starting point in this respect is the work of the sociologist Anthony Giddens. Giddens' "structuration theory" is a significant, influential, and important attempt to mediate between two distinctive models of sociological inquiry: An "objective model," which stresses the priority of social structure to individual agency, and a "subjective model," which stresses the priority of individual agency and subjective meaning in the constitution of the social field.[6] Giddens' structuration

[6] *See id.* (distinguishing between "objectivist" and "subjectivist" theories although useful in general does slightly gloss over between different approaches within these models). Within the "objectivist" approach, there is a distinction between functionalist or naturalist accounts of the "objective" determinants of the social field and structuralist accounts that focus on the symbolic character of these objective structures. From within the "subjective" approach, Giddens discusses the *Verstehen* approach pioneered by Dilthey. Other "subjective" approaches might include, for example, rational choice theory, which would be driven by very different

theory instead describes a field of social practice that consists both of structural elements that crystallize over time as well as intentional action that intervenes to operate upon and through these structures with transformative and recursive effects on those same structures.

The primary form of intentional action within such on-going social practice is described by Giddens as being a form of "reflexivity." This involves an intentional and discursive engagement by individual actors with social structures enabling them to formulate objectives and formulate strategies of action. It is tempting to think of the law, and even of constitutional law, as an exemplary set of structures and discourses concerned with reflexive action. Giddens specifies that a distinction needs to be drawn between intentional action, taking the form of "reflexive monitoring" and what he describes as the "motivation" of action.[7] It is arguably with regard to an enlarged and refocused account of the motivational dimension of action that we need to locate a phenomenon like constitutionalism. Whilst "reflexive monitoring" is a "discursive" process, motivation is a matter of "practical consciousness": A dimension of human action that Giddens describes as relatively opaque to discursive elaboration and better explored in phenomenology and ethnomethodology. Within Giddens' theory of structuration, motivational action appears to play a distinctive role primarily in relation to agents' capacity to project certain possibilities for their meaning based on which further reflexivity may occur. It is in relation to these sorts of issues—of setting forth possibilities and potential courses of action—that constitutionalism, as it is discussed here, needs to be located. This level of constitutional action, associated with what Giddens terms "motivation," might additionally be usefully described as being concerned with the symbolic form of action. Legal scholarship concerned with this dimension of constitutional activity might be termed constitutional theory.

Recognizing that constitutionalism was created prior to the quotidian recursive and reflexive forms is crucial to extending a broader understanding of constitutionalism and establishing the basis for types of social transformation within modernity. Whilst Giddens' notion of "motivational action" provides us with a useful starting point for understanding constitutionalism as a field of activity, forming additional developments and generating more complete general ideas requires more emphasis and in particular emphasis on the formation of possibility and potentiality; further additional developments are needed to generate a more complete general idea. The first step is to recognize that although Giddens'

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presuppositions. What follows is a summary of the key elements of his approach outlined in chapter one of THE CONSTITUTION OF SOCIETY.

[7] *Id*. at 6 ff.

notion of reflexivity encompasses a certain amount of dynamic historicity, the theory of structuration is ultimately embedded within the temporal horizon of modernity.[8] By emphasizing the distinctiveness of constitutional thought and practice, the idea is not to deny the reflexive interaction between structure and agency as an important form of social reproduction in modernity; instead, the idea is to begin to understand how such reflexivity and recursiveness operate as elements within a wider constitutional framework—that of modern democratic society at large. This then prepares the way for a more radical examination of certain constitutional phenomena in relation to the presuppositions of the wider structures of democratic society itself. This might be described as the domain of constitutional theory concerning constitutionalism as a symbolic form of social relations. This Article only explores this agenda insofar as it clarifies the importance of global constitutionalism and of human rights as critical aspects of the way in which democratic society currently organizes itself.

In addition to exploring the field of global constitutionalism and its effects on modern social processes at large, a second important concept elucidates the significance and weight of constitutional phenomena as it relates to the distinction between politics and the political, and how this distinction relates to the problem of political theology. According to Carl Schmitt's well-known statement in his book *Political Theology*:

> [A]ll significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development—in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent law-giver—but also because of their systematic structure.[9]

The critical insight Schmitt grasped here has subsequently been elaborated in different ways by writers like Laclau and Mouffe, Claude Lefort and Marcel Gauchet; the insight is not merely that the state borrows concepts from theology. Instead, the status of a fundamental constitutional concept like that of the state derives from the structural role that such concepts play in political life. These roles create what Schmitt calls a "systematic structure" that provides a prior set of presuppositions within which quotidian political structures can evolve in the broadly reflexive way Giddens discusses. In that sense, this prior "systematic

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[8] *See id.* at xvii (understanding "sociology," by contrast, to be not a generic discipline to do with the study of human societies as a whole, but that branch of social science that focuses particularly upon the "advanced" or "modern societies.").

[9] CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 36 (George Schwab trans., MIT Press 1985).

structure" occupies the same place in relation to the social field as that occupied in traditional societies by various religious traditions and representations. Claude Lefort and his notion of *mise-en-forme* of a society provide another example of how the concept of the political should be understood. The following quotation provides a useful summary and description of the relevant distinctions:

> The space called society cannot in itself be conceived as a system of relations . . . . On the contrary it is its overall schema, the particular mode of its institution that makes it possible to conceptualize . . . the articulation of its dimensions, and the relations established within it between classes, groups and individuals, between practices, beliefs and representations.[10]

Before proceeding to a discussion of the global constitutional framework, a further clarification might be made of the terms in which constitutionalism operates, this time with respect to the legal system. Once more, it is useful to refer to certain well-known approaches to legal theory in explaining this, although, as with Giddens' work, this should be seen as setting out certain preliminary directions rather than being entirely definitive. The starting point in this instance is the work of Ronald Dworkin, and in particular the ideas advanced in his final trio of major works: *Law's Empire*, *Justice in Robes*, and *Justice for Hedgehogs*.[11]

In his widely acknowledged account of the legal process, Dworkin presents a picture of legal practice on two levels, each setting including different conceptual tasks. First, on the level of the aspirational concept of law, legal interpretation establishes the general ethical significance of the legal enterprise as a constraint placed by past political decisions in the form of precedent and legislation, which in turn confers rights on individuals regarding the future use of coercion by political authorities. According to Dworkin's preferred conception of the aspirational concept of law, past political decisions should constrain the use of coercion by political authorities, but only where the interpretation of the effective legal content of these decisions is itself constrained by underlying principles of political morality explaining and justifying these decisions. This preferred conception of the aspirational concept of law is termed "law-as-integrity." Second, on the doctrinal level, lawyers guided

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[10] LEFORT, *supra* note 4, at 217–18.

[11] RONALD DWORKIN, LAW'S EMPIRE (Hart Publishing 1998); RONALD DWORKIN, JUSTICE IN ROBES (Harvard Univ. Press 2008); RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (Harvard Univ. Press 2013).

by an aspirational concept of law work out what further specific legal claims to certain rights and duties are capable of being justified by this broader interpretive framework in the context of a particular legal system. In accordance with the idea of law as integrity, the question of which claims are justifiable in this way is best established for Dworkin through a process of constructive interpretation in which, at a preliminary and pre-interpretive stage, the settled meaning of past political decisions is discerned. This is followed by a process in which a set of principles of political morality are assigned to these materials in a way that best explains and justifies them. The analysis concludes with the interpretation of the content and implications of the materials in terms of specific claims, rights, and duties.

In a less discussed and less widely-known dimension of Dworkin's work, it is also clear that he seeks to ground his claims concerning the importance and significance of his model of legal interpretation in meta-ethical theory. This dimension of his work is a constant theme present in *Law's Empire* and its importance grows in *Justice for Hedgehogs*, where it is treated at length. It is perhaps tempting for doctrinally focused legal scholars to treat his concern with meta-ethics as somewhat marginal to the core lessons Dworkin's work can teach us about legal practice. The careful attention Dworkin takes in examining the issue suggests that an important point is at stake. This dimension of Dworkin's work is arguably important here insofar as it gestures toward an acknowledgment of the constitutional–or "political"–dimension of legal practice being discussed in this Section. According to this view, Dworkin's meta-ethical framework is best interpreted as part of a hermeneutic debate directed at shaping the way in which problems of public value are first formulated, precisely in what Giddens has termed a "motivational" sense; that is, Dworkin's meta-ethical work sets the spatial and temporal coordinates of legal practice as a prior condition of possibility, the symbolic form of legal practice. Accordingly, Dworkin emphasizes the "objectivity" of the moral principles underpinning his conception of law-as-integrity, thus sustaining its legitimacy as a way of ordering the public sphere. Further, Dworkin emphasizes the sense in which such "objectivity" is sustained by its capacity to maintain a normative coherence and unity across a range of contemporary legal rights and claims, as well as a sense of narrative coherence over time. In both these senses, Dworkin's meta-ethics serves to shed light on the presuppositions through which law-as-integrity is advanced—on the constitutional or "political" level—as a way of defining the critical parameters through which legal practice itself becomes possible as a meaningful and legitimacy-generating symbolic form of legal activity. The task of constitutional theory is precisely to explore concepts like law-as-integrity and how they operate in relation to fundamental assumptions as to the narrative unity and objectivity of public value as Dworkin presents it in his meta-ethical work.

C. Problematizing the Global Human Rights Model in Context

Having clarified certain key aspects of the methodological approach adopted in this Section the global model of human rights, will be examined more closely from the perspective of constitutional theory. The predominant focus will be on tracking the evolution of the globalization of human rights and on exploring the problems of how their doctrinal

development can be organized on a principled basis. The critical point that will be developed in this Section is that the importance of the "global" discourse of human rights is occluded if the formative elements of the practice of human rights are not properly clarified. Although normative attempts to secure a principled "global" conception of human rights are useful, they arguably do not adequately clarify the more dynamic formative role played by human rights discourse within the global constitution.

Understanding the formative function of human rights is difficult in part because of our inheritance, through the liberal constitutional tradition, of an understanding of human rights as foundational for social relations as opposed to a broader notion of the complex process of social formation. From this inherited perspective, a narrative of human rights can be laid out, presenting human rights as a self-evident component of any legitimate constitutional framework. We can accordingly draw a line originating from the natural rights discourse developed by John Locke, through the American and French revolutionary settlements, down to the Universal Declaration of Human Rights in 1948. This continues to the progress made in actualizing and enforcing that framework and, according to this account, now forms a critical element in the development of a global interpretation of that same human rights framework. Within this narrative framework, the key point is that human rights are presented as a timeless and universal core of constitutional standards that necessarily emerge and are recognized and reinforced over time within various political regimes that are shaped by the same basic liberal presuppositions as to the priority of individual rights. The argument and perspective of this Article, as it emerges over the course of the next set of sections, will try to make sense of the central importance of the human rights tradition within liberal constitution. At the same time, this Section will also attempt to show that the straightforward foundational role of individually indexed rights within the liberal tradition is inefficiently nuanced. In particular, it fails to account for their role in providing a symbolic form through which the collective agency of democratic society is made possible.

The traditional liberal view of the foundational importance of human rights has continued into the present era. Accordingly, the field of human rights law can increasingly become central within a broader paradigm and understanding of law associated with global constitutionalism. This means that human rights are no longer simply one discrete, institutional process or legal idea. Rather, human rights have attained a foundational constitutional status. They not only appear in the documents that form part of the written constitutions of states or the charters of international organizations, but they also constitute, on a deeper level, the basic grammar in which law and politics are conducted. The difficult question that needs to be posed with increasing urgency in the context of current developments is whether it is plausible and practical to transfer the traditional foundational conception of human rights into these new circumstances.

A good starting point for considering these developments is the work of Kai Möller, who has usefully outlined the basic character of what he terms the sphere of the "global constitutional rights."[12] Möller's account of global constitutional rights follows an account that falls under the liberal foundational tradition and stresses the capacity for human rights or liberal constitutional rights to act, in a free-floating manner, as essential generative elements of legitimate governance. For example, he stresses that:

> [I]t is emphatically *not* the case that the moral demands of constitutional rights are inextricably linked to and intertwined with a particular constitution with a particular interpretative history, adopted by a particular political community at a particular point in time. Rather, constitutional rights discourse is governed more by "free-standing" moral argument about what rights and legitimacy require than by considerations relating to the history of a document or people. *Constitutional rights discourse has gone global*.[13]

Upon closer examination, the eventual conception of global constitutional rights that Möller develops from this starting point does not stress the foundational role of such rights in a straightforward sense. Rather, their distinctive role is that they serve as a model for developments in an interconnected set of judicial processes, concerning constitutional rights and involving national, supranational, and international bodies. Möller sets out a two-stage model of global constitutional rights in which, first, an interest is protected as a right and, second, any interference with such a right by a public authority is subjected to the defense of justifiability.[14] That test typically takes the form of proportionality and this is where the bulk of the argumentation takes place.[15] The model provides a normative reconstruction from a set of empirical features common to different types of process.

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[12] KAI MÖLLER, THE GLOBAL MODEL OF HUMAN RIGHTS (Oxford Univ. Press 2012); Kai Möller, *From Constitutional to Human Rights: On the Moral Structure of International Human Rights*, 3 GLOBAL CONSTITUTIONALISM 373 (Cambridge Univ. Press 2014) (concerning the category of "constitutional right," and overlapping sufficiently with what is defined as a narrower category of human rights. Nevertheless, in terms of the wider focus on the role of rights within constitutionalism at large (the focus of the present Article), this set of distinctions is less important).

[13] MÖLLER, *supra* note 12, at 376.

[14] *Id.* at 376–77.

[15] *See id.* at 377 ("In judicial practice, the first stage has become less and less important, largely as a consequence of rights inflation, that is, the phenomenon that more and more interests are protected as rights.").

Two critical points need to be made about this way of construing the role of constitutional rights within an avowedly global model regarding the status of the model and its substance. First, its status as a model of how global constitutional rights are—and how they ought to be—adjudicated appears less as an insistence of foundational rights in terms of global constitutionalism and more as a particular procedure or model of judicial rights adjudication that provides a suitable element within the broader formative process of global constitutionalism. Second, the question then shifts to how this broader formative process could possibly be conceived. In terms of substance, the emphasis on the proportionality element of the test means that, although the model disavows the notion of the dependence of global constitutional rights on context, it nevertheless appears to bring such constitutional and social context back in, insofar as judges will have to make assessments about where the balance lies in any instance where a right is weighted against some local policy justification. These issues point to the further necessity of reflecting on the formative role of rights within the wider symbolic framework of governance and policy instruments associated with globalization especially where the global context of such assessments is also brought into consideration.

D. Moyn and Human Rights Utopianism

Samuel Moyn's work examining the recent historical development of the modern human rights movement in the context of the social and economic changes of globalization provides an interesting and important map of the range of issues involved in developing the problematic posed in the previous section: Namely, the contextual factors that have shaped the emergence of a certain global model of human rights as a key formative part of the developing discourse of global constitutionalism. [16, 17]

The central thesis in Moyn's major work, *The Last Utopia*, is that the increased importance of human rights in the global context is driven by a loss of faith in collective institutional and political processes as a means of achieving social self-determination and unity. Moyn links this loss of faith not so much to the collapse of Communism in Eastern Europe in 1989 as to

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[16] SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (Harvard Univ. Press 2010). For a critical discussion of Moyn's work, see Philip Alston, *Does the Past Matter? On the Origins of Human Rights*, 126 HARV. L. REV. 2043 (2013) and Christopher McCrudden, *Human Rights Histories*, 35 OXFORD J. LEGAL STUD. 179 (2015). Subsequent discussions of Moyn's book, THE LAST UTOPIA, refer to the edition cited here.

[17] *See* LYNN HUNT, INVENTING HUMAN RIGHTS: A HISTORY (W.W. Norton & Co. 2007) (engaging in an examination of the historical context of the emergence of human rights with a view to clarifying and specifying their present role and function, comparable to the work of Samuel Moyn); *see also* JENNY MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW (Oxford Univ. Press 2012) (examining human rights and clarifying human right's role and function within the context of constitutionalism, also similar to the work of Samuel Moyn).

an earlier set of disappointments in attempts to bring about democratic change in Eastern Europe and Latin America from the late 1960s to the early 1970s. Replacing the mobilizing ideals that depended on a unified sense of collective agency, human rights instead supplied an alternative politics of categorical moral demand capable of being made by individuals and more decentered groups of agents.[18] The exact point of Moyn's critique needs to be determined carefully. If we examine certain of his other works in addition to *The Last Utopia*, it becomes apparent that the human rights movement is problematized not so much for the individualistic features of its ideal, but for its utopianism. Further, this utopianism is not only characteristic of human rights but of a range of different ideals associated with the revolutionary self-consciousness political modernity; hence, it is precisely the *last* utopia.

A work Samuel Moyn wrote on the influential philosopher Emmanuel Levinas provides the context for this far wider skepticism concerning the utopian idea of social transformation.[19] The work charts a little-known development from nineteenth century liberal Protestantism through to the "neo-orthodox" theology of Karl Barth (1886–1968) and on to the work of the philosopher Emmanuel Levinas (1906–1995) and it follows what we might, for general purposes, classify as a Durkheimian approach to the historical sociology of modernity that emphasizes the role of religion, understood in a broad sense, in social integration.[20] Moyn's work on the genealogy of elements of the discourse of human rights utopianism traces it from Levinas back to Karl Barth's critical engagement with liberal Protestantism.[21] Karl Barth's engagement with liberal Protestantism contested a deep assumption that had underpinned a great deal of thinking about the nature of the state and of liberalism during the nineteenth century. This line of thinking–emerging from Rousseau's and Kant's work and reaching its most decisive philosophical articulation in the work of G.W.F. Hegel and, in a more theological idiom, in the work of Freidrich Schliermacher–was concerned with establishing the principled coherence of the nation-state form of liberal constitutionalism as

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[18] MOYN, *supra* note 16, at 8.

> The best general explanation for the origins of this social movement and common discourse around rights remains the collapse of other, prior utopias, both state-based and internationalist. These were belief systems that promised a free way of life, but led into bloody morass, or offered emancipation from empire and capital, but suddenly came to seem like dark tragedies rather than bright hopes.

[19] SAMUEL MOYN, ORIGINS OF THE OTHER: EMMANUEL LEVINAS BETWEEN REVELATION AND ETHICS (Cornell Univ. Press 2005).

[20] *See* Charles Taylor, *Foreword* in MARCEL GAUCHET, THE DISENCHANTMENT OF THE WORLD: A POLITICAL HISTORY OF RELIGION, at x (Oscar Burge trans., Princeton Univ. Press 1997) (explaining that, according to this approach, religious ideas—including concepts like secularism—provide a symbolic form for "the way we experience or belong to the larger social whole.").

[21] *See* MARK LILLA, RELIGION, POLITICS AND THE MODERN WEST (Vintage Books 2008) (making a similar stress on the link between twentieth-century utopianism and the political theology and nineteenth-century liberal Protestantism).

the product of a distinctive human process of self-development.[22] A certain approach to theology and religion that saw it as a hermeneutic attestation of this process of self-development, albeit in some cases superseded by philosophical discourse, accompanied this approach to the legitimation of constitutionalism. Liberal Protestantism can thus be argued to have contributed to an ideology of social unity that served to mask the increasing social tensions of a more dynamic industrial society experiencing its own process of globalization. Equally, it was also possible to frame a more revolutionary understanding of democracy in which social unity and the overcoming of division was the task for future development. This was the line taken by the left-Hegelians like Bruno Bauer and, most notably, Karl Marx. Such currents could also draw comfort from a certain kind of teleological and eschatological reading of the historical process of change inaugurated by the secular form of modern society. These symbolic elements within revolutionary politics were reinterpreted and developed in later Marxist writers such as Ernst Bloch (1885–1977).[23]

As Moyn in *Origins of the Other* presents it, Karl Barth's central critique of liberal Protestant view was that theology was not able to offer any strong ethical critique of society and state and was thus condemned to play a narrowly ideological role. These dangers and questions evidently became more pressing to Barth after the First World War and were later to resurface even more urgently during the 1930s. Barth sought in particular to problematize the relationship between theology and the social formation. The social formation, in this sense, could no longer be seen as the outworking of an Absolute embedded in the dialectical turns of history, as it had been for Hegel. It is at this point that we can rejoin Moyn's analysis and the human rights movement and we can reconstruct in its key insight as follows. The basic direction of Moyn's analysis points–across the Levinas book and *The Last Utopia*–to the wider historical and sociological transposition of Barth's theology of divine alterity with respect to the ethical underpinnings of the social order. Accordingly, it articulates a certain social experience of alienation and disorientation and the attempted recovery of a commanding and infinite ethical imperative but one that was eventually located in the field of quotidian intersubjective relationships.[24] This was a basic stance that was ultimately eloquently articulated by Emmanuel Levinas, and Moyn's later work suggests a close association between this position and the underlying impetus of the human rights

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[22] *See* GARY DORRIEN, KANTIAN REASON AND HEGELIAN SPIRIT: THE IDEALISTIC LOGIC OF MODERN THEOLOGY (Wiley-Blackwell 2012) (thoroughly accounting nineteenth century ideology).

[23] *See* COSTAS DOUZINAS, THE END OF HUMAN RIGHTS (Hart Publishing 2000) (seeking an alignment between the human rights movement and the utopian elements of the revolutionary tradition).

[24] *See* MOYN, *supra* note 19, at 113–64 (tracking the development of ideas from Protestant liberalism, through Barth and also the religious philosopher Rosenzweig to Levinas in more detail).

movement. The point of this distinctive approach to the ethical problems embodied in modern life, articulated in theological terms by Karl Barth and in philosophical terms by Emmanuel Levinas and eventually underpinning, as Moyn's overall analysis implies, the human rights movement, is that it justified the formulation of stringent ethical demands for existing social relations, without folding such demands and ideals back into the existing social order or projecting such a social order as a task to be definitely realized in a utopian future, as with revolutionary Marxism.[25]

Moyn's work, constructively interpreted as a whole, initially appears to lend itself to forming a skeptical assessment of the importance and utility of human rights within a global context. According to this skeptical view, human rights as a global "model" or movement appears to provide discourse that has become detached from the classic tradition of liberal constitutionalism connected to the form of the nation state. It responds to a set of concerns about social conflict and division, set in motion by the dynamics of a modern secular society of global dimensions. In reaction to the dangers of a complacent consensus or of the pursuit of a political vision of utopia, it articulates a basic form of ethical demand capable of tackling these concerns and reestablishing an overall direction and coherence to the complex formations of secular society. While the transcendent ethical imperative of the human rights movement of the "last" utopia eschews any unified project for the political resolution of social division, it nevertheless implies an overarching idealistic diagnosis of a set of problems and prescriptions for immediate responses that are equally ambitious and indeterminate in nature. Consequently, to avoid the problematic expectations and assumptions raised by seeking a wider, more utopian role for human rights, expectations that might well have distortive impacts on the functioning of other societal institutions, it appears that we are called back to a cautious, modest, and incremental view of their role on a global level.[26]

At this point, it is difficult to determine where human rights and constitutional lawyers seeking to define an ethically grounded but appropriately cautious understanding of human rights might gain a more realistic direction in planning various interventions and proposals of reform. The principal consequence of such caution and skepticism seems to be that a global human rights movement will collapse into a relatively self-contained discourse, turning inwards for self-direction. In this sense, it would come close to instantiating the sort

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[25] *See id.* (noting crucially that the claim here does not argue for a causal link between Levinas and the human rights movement as it develops in the 1970s but rather a more basic solidarity in their basic ethical position).

[26] *See* MOYN, *supra* note 16 (concluding in his prologue that there is a paradox between the ambition of the human rights movement and its minimalistic approach to problems of collective political action). A similar set of skeptical concerns about the indeterminacy and institutional lacunae of the human rights movement have been articulated more directly by the political philosopher and sociologist Marcel Gauchet in two important articles. *See* Marcel Gauchet, *Les droits de l'homme ne sont pas une politique*, LA DÉMOCRATIE CONTRE ELLE-MÊME (Gallimard 2002) (1980), and Marcel Gauchet, *Quand les droits de l'homme deviennent une politique*, LA DÉMOCRATIE CONTRE ELLE-MÊME (Gallimard 2002) (2000).

of auto-poetic or self-referential "social systems" logic theorized by writers like Luhmann and Teubner.[27] With the loss of its utopian aspiration in terms of its capacity to address itself to social development in its universal aspects, human rights would simply belong as one component to the process of social differentiation itself.

This skeptical diagnosis with its accompanying somewhat hermetically pragmatic agenda, which we might be tempted to draw from Moyn's work, may yet be somewhat precipitous in so far as a crucial presupposition of Moyn's analytical template needs to be examined more closely. Although playing a background role in *The Last Utopia*, Moyn has also engaged in a careful analysis of Claude Lefort's understanding of modernity, in particular, against the backdrop of the work of the French anthropologist, Pierre Clastres.[28] While Moyn is cautious in drawing normative implications from Lefort's work, it might be argued that Moyn's somewhat skeptical analysis in *The Last Utopia* and certainly any further normative conclusions we might be tempted to draw from it are in fact capable of being underpinned by certain sorts of conceptual moves that derive from Claude Lefort's construction of modern constitutionalism. As we shall see, at first glance, Lefort's work might reinforce the skeptical conclusions that have been drawn and serves to elaborate their basis.

From this Lefortian point of view, the key problem with the utopian interpretation of human rights is that it is derived from an understanding of modern politics that sets, implicitly or explicitly, a standard of social unity as the central criterion for assessing historical development. This is inappropriate to the basic character of modern democratic society that is constituted by a symbolic form that does not anchor social development over time to an immutable "law of origins."[29] Instead of this, modern society is constituted in accordance with essentially open symbolic structures that enable social space to be open to a plurality of social differences and identities. Such structures also condition the emergence of a distinctive form of historical temporality to in which future horizons of possibility shape and

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[27] See GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION (Oxford Univ. Press 2012) (providing a useful discussion of globalization from a systems-theoretic perspective); *see also* CHRISTIAN BORSCH, NIKLAS LUHMANN (Routledge 2011) (providing a useful clarification of the key theoretical underpinnings of the concepts of autopoesis and systems theory).

[28] Samuel Moyn, *Claude Lefort, Political Anthropology and Symbolic Division*, *in* 19 CONSTELLATIONS 37 (2012); Samuel Moyn, *The Politics of Individual Rights: Marcel Gauchet and Claude Lefort*, *in* FRENCH LIBERALISM FROM MONTESQUIEU TO THE PRESENT DAY (Raf Greenens & Helena Rosenblatt eds., Cambridge Univ. Press, 2012); *see also* Samuel Moyn, *Of Savagery and Civil Society: Pierre Clastres and the Transformation of French Political Thought*, 1 MODERN INTELLECTUAL HISTORY 55 (2004).

[29] *See generally* BERNARD FLYNN, THE PHILOSOPHY OF CLAUDE LEFORT: INTERPRETING THE POLITICAL (NW Univ. Press 2005) (providing an overview of Lefort's work generally): *See also* LEFORT, *supra* note 4 (discussing in more detail Lefort's work on the issues discussed here).

determinate the sense of the present and past. In that sense, visions of social unity developed within a modern horizon that attempt to close off its spatial and temporal openness represent a dangerous atavistic temptation that is all the more dangerous for the powerful resources for social transformation made available by modern societies.

At the same time, as well as reinforcing the skeptical conclusions we might be tempted to draw from this body of work, Lefort's work stresses the fact that not only is the open-ended character of modern constitutionalism supported negatively through suspending any kind of ideal of social unity, whether backward or forward looking but also Lefort tends to emphasize the role played by democratic institutions and processes of contestation in maintaining and establishing this sense of openness and of transformative possibility.[30] This latter emphasis in Lefort's work, on the role of liberal-democratic institutions in establishing the symbolic space of modern politics and society appears to support the strong connection Moyn insists on throughout *The Last Utopia*, between the classical structures of the nation state and human rights. Such a connection might be supported on classic Hegelian grounds, namely that the abstract moral demands embedded in human rights claims are only supportable and effective within the complex "ethical life" of the nation-state comprising family life, civic association, and the political constitution. Such a vision of social unity, centered on the nation-state, is unavailable from within Lefort's perspective on constitutional modernity. Nevertheless, from this point of view, an argument might still be made that a political association with the comprehensive juridical scope of the nation-state is still necessary to actualize the symbolic functions of modern constitutionalism, albeit with the important complementary role played by human rights in holding open the social space of contestation given the hegemonic capacity of the state.[31] The final picture that emerges–if we accept a Lefortian inspired analysis of contemporary events–is paradoxical, as the very complex process of social differentiation that characterizes a global society premised on a constitutionalism that constructs an open symbolic space and temporality ends up weakening and decentering the very institutional structures—the nation state and its connected framework of human rights—that were responsible for initiating the process.

How do we move beyond the cautious skepticism that emerges from this Lefortian analysis of modern constitutionalism and, derivatively, of human rights in the context of global constitutionalism? Part of the answer lies in a subtle re-thinking of the nature of modernity as a society characterized by an "open" symbolic form. As we will see in the final section, Marcel Gauchet's extended engagement with Claude Lefort's emphasis on the symbolic dimensions of modernity is of considerable assistance in this task.

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[30] *See* LEFORT, *supra* note 4, at 224–27 (discussing this concept in more detail).

[31] *See* CLAUDE LEFORT, *Politics and Human Rights*, *in* THE POLITICAL FORMS OF MODERN SOCIETY: BUREAUCRACY, DEMOCRACY AND TOTALITARIANISM (John Thomson ed. and trans., MIT Press 1986) (discussing the importance of human rights in the scope of the nation-state to actualize symbolic functions of modern constitutionalism).

E. Human Rights and the Global Constitution as Symbolic Form

In this final Section, the uncertainties surrounding the role of human rights in the context of global constitution will be explored largely in relation to the work of Marcel Gauchet. Gauchet's work, like Lefort's, emphasizes the importance of the symbolic role of constitutionalism in the shaping of a modern society. By paying close attention to Gauchet's conception of how this register operates in contemporary society, we are able to move beyond the *prima facie* skepticism concerning the role of human rights that Moyn's work, taken in conjunction with Lefort, might initially invoke.

It is important to begin a review of the key elements of Marcel Gauchet's work with his idea of modern society as essentially secular in character. This idea was developed in a number of places and in particular in the thorough genealogy of modern society developed in his best known work, *The Disenchantment of the World*.[32] Gauchet presents us with the idea of secular society as constituted by developing a historical consciousness of itself as organized in accordance with a changing set of structures and forms that it has generated for itself out of what it has inherited from the past, and that relate to an uncertain and mutable future. Linked to this historical understanding of its changing structural forms, and brought about as a result of this fact is an understanding of individual identity as distinct from the social matrix. Such an understanding is produced both by the secular process of structural change, and by the sense in which such change is understood as effected by the institutionally mediated collective empowerment of associative action.

How is such a secular society, characterized by its entrance into a dynamic experience of historical development, constituted as such? The secular society is, according to Gauchet, brought about by a gradual withdrawal from an intellectual and symbolic horizon shaped by what he terms "religion," understood in a public and political sense. Religion functions in this way as a socially instituted symbolic form through which the essential organizing divisions of a society are projected, through religious and other symbolic motifs, precisely as ineluctable and predetermined formations necessary to the very identity, unity and legitimacy of the society in question. The emergence of a secular society is the result of a profound symbolic shift in the relationship between social organization and religious conviction, a development that Gauchet ascribes primarily to the growing influence of the Judeo-Christian understanding of the transcendence of God to any given social formation. This transcendence of the divine in respect of the social order, allows, paradoxically, for a space to emerge for conceiving of political organization in essentially secular terms. While

[32] GAUCHET, *supra* note 20.

the details and legitimacy of Gauchet's overall thesis need not concern us for present purposes, the principal insight that Gauchet's genealogy provides us with is that the emergence of a secular democratic political form occurs as a mutation in the symbolic form of society. In sum, the shift in question thus involved a gradual withdrawal of a priori religious representations of legitimate political and social authority. Not only do the divisions through which society organizes itself emerge in a more transparent manner, but due to the loss of their ineluctable and incontestable status, the structures through which these divisions are organized are themselves opened up to a dynamic process of historical development and transformation.

For Gauchet, a politics of symbolic representation plays a distinctive role in secular modernity. Given secular modernity's open-ended manner of organizing itself, its openness to an historical process of transformation, the function of politics is reconceived by Gauchet less as a central coordinating power, although many coordinating functions are in turn enabled through this process, than as a power whose function is precisely and primarily to represent society's open-ended historical identity to itself. Gauchet describes this function, in line with his overall understanding of the development of secular society, as "symbolic." At this point, it is useful to set out what exactly the function of representation entails in this sense.[33] First, and most straightforwardly, it is not cognitive: It does not present society's objectivity and identity to itself as a matter of scientific understanding. The de facto forms of social co-ordination are exactly what will be developed from this starting point. Second, symbolic representation, as Gauchet attempts to articulate it, is best seen as distinct from social construction. This is an important point because it distinguishes Gauchet's notion of secular democratic society from what might be described as "Rousseauian" versions that emphasize self-determination. Without further consideration, the Rousseauian model is the natural way in which we would seek to represent political power, certainly when considering it entirely from within a legal and especially a constitutional standpoint. Accordingly, then, the "symbolic" representative function involved is not a matter of the political instance setting out an idea or direction for social organization and then implementing and enforcing this through various institutional means. Rather, representation functions in a context shaped by the open-ended historical horizon of secular social and political relations and a closed project of self-determination does not lie within its grasp. Essential to the symbolic function of political representation is the dimension of what, as we have discussed, Giddens might describe as "motivation" or "practical consciousness." In other words, it establishes transformational projects and structures but it does so by presupposing a horizon of secular change, more as a matter of practical know-how, within which such projects are carried out.

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[33] MARCEL GAUCHET, *L'Expérience Totalitaire et la Pensée de la Politique*, *in* LA CONDITION POLITIQUE at 455 et seq. (Gallimard 2005).

This function of symbolic representation is perhaps best understood as present throughout a modern society, and not located in any particular instance: Its critical role is always to make available a grasp of fundamental possibilities of change and development—the social space as such—as the symbolic form underpinning any intentional project. The key function of political representation, as a fundamental type of social activity, is to maintain, set out, and recall secular social action back to its conditions of possibility. Gauchet's wider historical account of the origin of the secular matrix of society, appears to suggest that he places less emphasis than Lefort does on the notion of a *mise-en-scène*: Of a public "staging" of the place of power as empty. Certainly, on the basis of Gauchet's wider discussion of the broader historical currents underpinning secularism, it might be argued that the symbolic continuity of modernity is not so much a matter of political power or any other type of power itself generating and maintaining the sense of secular social space and historical consciousness, but rather of exercises in recalling it and reviving an understanding of it in a plurality of contexts. Furthermore, this would enable the function of political power in its representative sense to be complemented by various social movements that enter into contests over the current organization of the social field and also serve precisely the same ends.[34] This type of contestatory and developmental action further exemplifies the nature of the symbolic functions of politics as linked primarily to the presupposition of action, rather than to its intentional or discursive content. As an inherently dynamic process, it is also possible to see how the current network of institutions and processes that make up a "global constitution" might be inherently and coherently linked to the historical development of secular modernity, replacing previous forms and structures, such as that of the primacy of the nation state.

What finally of human rights within this picture of the "secular" constitution of modern society? As we have seen, Gauchet shares some of the skeptical views that we might be capable of drawing from Moyn's work. Gauchet is particularly alert to the danger that the individualism that is a product of the withdrawal of religious representations from their symbolic role in social development can develop an illusory emphasis on the independence of its own self-conceptions, at the expense of an understanding of the complex social matrix that forms its effective presupposition. Human rights according to this view represent a double illusion insofar as they harness this type of individual focus to a broader agenda of symbolic change—the human rights movement—constructed precisely out of these sorts of individually-indexed demands, but which, like other modern "utopias," is directed at establishing some kind of overarching strategical and normative direction to the process of secular transformation and differentiation. In the case of its individual focus, the human rights movement risks occluding the wider social matrix and associated social institutions in

[34] *Id.* at 459–62.

managing the social transformation in modernity. In the case of its utopianism and its desire to impose a normative grid on the process of transformation it perhaps ignores the radical futurity and openness to which secularism and, by extension, individually-indexed rights movements are committed.

However, an alternative construction of human rights is possible and indeed becomes more plausible once the global and decentered structures of the present constellation of secular authority are understood. Once we see, after Gauchet, the crucial and fundamental importance of the deep historical structures underpinning the secular dynamism of modern societies, then we can see how human rights are potentially detachable from a particular type of institutional structure, such as the nation state, which represents not so much a fundamental political category, but rather one means of organizing action within a broader framework of social interaction. From this perspective, global constitutionalism, far from representing a world-historical departure from the Westphalian state, instead presents a fresh constellation of institutions and forms of co-ordination within a symbolic order that in essential respects has remained the same. The human rights movement, however imperfectly, addresses, reveals, and problematizes the social and existential conditions of the possibility of a constitutional framework that secures the secular symbolic form of modern politics. At the core of this secular dynamic, as it now sustains itself, is that it involves an existential refusal of personal identity being determined in accordance with a heteronomous law by political authorities that usurp the space of essential historical conditions and possibilities. With its basis in the notions of autonomy and dignity, this kind of recollection of the basis of these personal claims in the symbolic forms constitutive of secular social relations is precisely what the "global constitutional rights" model emphasizes. At the same time, the indexation of this model to a proportionality review that places this demand in conjunction with wider social necessity and policy imperatives arguably serves to counter-balance its individualistic dimensions with reference to questions of social solidarity. It is thus arguably this more basic and also more pragmatic and limited symbolic function rather than the utopian and overarching function of human rights that will become more plausible and prevalent within the present global constitution.

Articles

"Just Business" – Is the Current Regulatory Framework an Adequate Solution to Human Rights Abuses by Transnational Corporations?

By Benny Santoso[*]

Abstract

Parallel to exponential proliferation and ever-increasing allegations of human rights violations by transnational corporations, the sparks produced by the friction between the normatively distinct disciplines of business and human rights have invited scrutiny across the media, academia, and industries alike. Given the fact that regulatory capacities of home and host states have evidenced an inability to keep pace with the developments, concerted efforts at the international level are imperative. By constructing its own benchmark of adequacy with reference to regulatory instruments' underlying objectives, this Article explores whether the existing regulatory framework is adequate, with a particular focus on the UN Framework and UN Guiding Principles—currently the most robust regime yet. The Article's analysis centers on (1) the terminologies utilized, (2) the human rights due diligence mechanism, and (3) access to remedies requirements, to reveal their inherent inadequacy with the hope of warning against uncritical acceptance and to inform future developments.

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A. Introduction

At the pinnacle of neo-liberal economic policies,[1] many businesses took advantage of deregulations, liberalization, and privatization to metamorphose into today's transnational corporations ("TNC(s)").[2] Nevertheless, according to a study[3] by the Special Representative of the United Nations (UN) Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises ("SRSG"), while Fortune 500 companies recognize the importance of human rights in their operations as a matter of both legal compliance and good practice,[4] empirical evidence reveals an unprecedented 70% increase (2008–2014) in businesses abusing human rights globally.[5] High profile human rights allegations,[6] in conjunction with widespread state failures,[7] provide some context to TNCs' impunity for human rights violations,[8] thereby reinforcing this issue's gravity. Have two decades of calls for concerted international action generated an adequate regulatory framework? This Article posits that even the most robust of the current plethora of regulatory instruments[9] is inadequate[10] for holding TNCs accountable for this abuse of the corporate form.

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[1] Stuart Hall, *The Neoliberal Revolution, Thatcher, Blair, Cameron—The Long March of Neoliberalism Continues,* 25 CULT. STUD. 705, 710 (2011).

[2] Adopting the terminology used in the UN Norms.

[3] Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporation and Other Business Enterprises, Human Rights Policies and Management Practices: Results from Questionnaire Surveys of Governments and Fortune Global 500 Firm, Human Rights Council, U.N. DOC. A/C/4/35/ADD.3 (Oct. 28, 2007).

[4] Michael Addo, *The Reality of the United Nations Guiding Principles on Business and Human Rights,* 14 HUM. RTS. L. REV. 133, 135 (2014).

[5] Marilyn Croser, *Human Rights Violations Have Increased 70% Since 2008 Globally*, The Guardian (Sept. 9, 2014), http://www.theguardian.com/sustainable-business/2014/sep/09/human-rights-violations-increase-corporate-responsibility.

[6] Jim Yardley, *Garment Trade Wields Power in Bangladesh,* N.Y. TIMES (July 24, 2013), http://www.nytimes.com/2013/07/25/world/asia/garment-trade-wields-power-in-bangladesh.html?_r=0.

[7] Amnesty Int'l, *Corporations–Corporate Accountability*, Amnesty Int'l (Dec. 1, 2014), http://www.amnesty.org/en/what-we-do/corporate-accountability/.

[8] Verisk Maplecroft, *2016 Human Rights Dataset*, Maplecroft (2016), http://maplecroft.com/themes//.

[9] *See inter alia Corporate Codes, Civil Society Guidelines, OECD Guidelines, ILO Tripartite Declarations*, and the *UN Global Compact*.

[10] Tara J. Melish & Errol Meidinger, *Protect, Respect, Remedy and Participate: 'New Governance' Lessons for the Ruggie Framework,* in THE UN GUIDING PRINCIPLES ON BUSINESS RIGHTS FOUNDATIONS AND IMPLEMENTATIONS 303, 307 (Radu Mares ed., 2012).

B. Definition of Terms and Scope

I. Abuse of the Corporate Form

Why does this Article regard human rights violations by corporations[11] as an abuse of the corporate form? United Kingdom (UK) company law recognizes the doctrines of separate corporate personality and limited liability (*Salomon v. Salomon*)[12] ("the corporate form"), as do most civil and common law systems.[13] As these doctrines developed to protect investors[14] in an era when corporations could not acquire shares in other corporations without an express charter,[15] this Article argues that extending them to corporate groups misappropriates the fiction of separation.[16] While each jurisdiction has corporate veil piercing/lifting mechanisms (UK: *Prest v. Petrodel*),[17] these rules are generally inapplicable in the context of human rights violations[18] and are arguably ineffective when corporations "legitimately" establish subsidiaries to facilitate or manage investment, trade, and future legal risks. Consequentially, claims brought against subsidiaries are often undercompensated[19] (e.g. Bhopal plant disaster).[20] Therefore, when parent companies, exercising control—*de facto* or *de jure*—over subsidiaries' actions, facilitate, enable, benefit from, or negligently fail to prevent human rights violations by subsidiaries, the corporate form is abused to immunize parent companies from liability and responsibility.[21]

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[11] Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 AM. U. J. INT'L L. & POL'Y 1, 8 (1993).

[12] Salomon v. A Solomon & Co. Ltd., [1896] UKHL 1.

[13] OXFORD PRO BONO PUBLICO, OBSTACLES TO JUSTICE AND REDRESS FOR VICTIMS OF CORPORATE HUMAN RIGHTS ABUSE 356 (2008), http://www2.law.ox.ac.uk/opbp/Oxford-Pro-Bono-Publico-submission-to-Ruggie-3-Nov-2008.pdf.

[14] *See generally* Cindy A. Schipani, *Infiltration of Enterprise Theory into Environmental Jurisprudence*, 22 J. CORP. L. 599 (1997).

[15] PHILLIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY 52 (1993).

[16] Surya Deva, *Corporate Code of Conduct Bill 2000—Overcoming Hurdles in Enforcing Human Rights Obligations Against Overseas Corporate Hands of Local Corporations*, 8 NEWC L. REV. 87, 100 (2004).

[17] Prest v. Petrodel Res. Ltd., [2013] UKSC 34.

[18] *Id.*

[19] LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT 53-54 (1st ed. 2001).

[20] *See generally* M.J. Peterson, *Bhopal Plant Disaster–Situation Summary*, *in* INTERNATIONAL DIMENSIONS OF ETHICS EDUCATION IN SCIENCE AND ENGINEERING CASE STUDY SERIES (2009).

[21] *See generally* Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L. J. 1879 (1991).

Nevertheless, this abuse is aggravated in the context of TNCs, which possess features that enhance the means of evading liability available to TNCs. These include, *inter alia*, dissolving or reincorporating subsidiaries to become "legally invisible,"[22] creating a global market for legal norms[23] by arranging operations to exploit laxer overseas standards, and utilizing *forum non conveniens*.[24] These arise from the corporate form, which perceives each company separately and as a national of its state of incorporation and governed by its regulations. As such, this Article analyzes the adequacy of the existing regulatory framework with reference to TNCs[25] which present the greatest challenge and demand an accordingly adequate solution. In addition, the complexity of constructing an all-encompassing definition of TNCs is well-recognized,[26] but for analytical stringency, this Article's definition presents TNCs' relevant features in their strongest form: A corporation based in one country that owns, controls, or manages operations, either through subsidiaries or other entities, in another country and possesses a strong bargaining position relative to those countries.

II. Regulatory Instruments Analyzed

Traditionally, there have been legal doctrinal barriers to imposing direct human rights obligations on non-state actors through international law,[27] and political barriers against using human rights instruments to police corporate excesses.[28] Only recently has regulation focused directly on non-state actors, endeavoring to close the "governance gaps"[29] created by globalization and shortcomings of legal standards. These gaps gave TNCs immense economic and political power vis-à-vis emerging economies,[30] which welcomed TNCs'

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[22] Sagarika Chakraborty, *Transnational Corporations, Other Business Enterprises And Human Rights: The Right Step Toward Corporate Social Responsibility?*, Washington College of Law: Business Law Brief (2006), https://www.wcl.american.edu/blr/03/1chakraborty.pdf.

[23] Jean-Phillippe Robé, *Multinational Enterprises: The Constitution of a Pluralistic Legal Order*, *in* GLOBAL LAW WITHOUT A STATE 45, 60–62 (Gunther Teubner ed., 1997).

[24] *See generally* Edward L. Barrett Jr., *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947).

[25] For example: uni-national corporations.

[26] *See generally* Cristina Baez, Michele Dearing, Margaret Delatour & Christine Dixon, *Multinational Enterprises and Human Rights,* 8 U. MIAMI INT'L & COMP. L. REV. 183 (2015).

[27] ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE 61–63 (1996).

[28] *See generally* Sumithra Dhanarajan & Claire Methven O'Brien, *The Corporate Responsibility to Respect Human Rights: A Status Review*, NUS LAW WORKING PAPER NO. 2015/005 (2015).

[29] Björn Fasterling & Geert Demuijnck, *Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights*, 116 J. BUS. ETHICS 799, 808 (2013).

[30] *See generally* Justine Nolan, *Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights*, 30 UTRECHT J. OF INT'L & EUR. L. 7 (2014).

foreign investments,[31] resulting in the aforementioned market for norms[32] and creating a "permissive [human rights]-free environment,"[33] where "blameworthy acts . . . occur without adequate sanctions or reparations."[34] For qualitative rather than quantitative analysis,[35] this Article focuses on Professor John G. Ruggie's masterwork,[36] *Protect, Respect and Remedy: A Framework for Business and Human Rights*[37] ("Framework"), and *Guiding Principles on Business and Human Rights*[38] ("UNGP").

Professor Ruggie was tasked[39] with "identify[ing] and clarify[ing]" practicable human rights norms for states and corporations, implications of infringements,[40] and resolve the "deontic confusion"[41] around the nature and scope of duties. After three years of consultation, the Framework received "unanimous welcome" by the United Nations Human Rights Council.[42] Subsequently, the UNGP, containing thirty-one guiding principles ("GP(s)"), with commentaries, was published to operationalize the Framework, translating its conceptual

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[31] Robé, *supra* note 23, at 64–68.

[32] Jeanne M. Woods, *A Human Rights Framework for Corporate Accountability*, 17 ILSA J. OF INT'L & COMP. L. 328, 333 (2012).

[33] Olivier de Schutter, *Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporation*, Business and Human Rights Resource Centre (Dec. 1, 2006), http://business-humanrights.org/en/pdf-extraterritorial-jurisdiction-as-a-tool-for-improving-the-human-rights-accountability-of-transnational-corporations.

[34] *Rep. of the Office of the United Nations High Commissioner for Human Rights on the Impact of the Global Economic & Financial Crises on the Realization of all Human Rights & on Possible Actions to Alleviate it,* Human Rights Council, U.N. DOC. A/C/13/38 (Feb. 18, 2010).

[35] Peter Utting, *Rethinking Business Regulation: From Self-Control to Social Control,* TECHNOLOGY, BUSINESS AND SOCIETY PROGRAMME PAPER No.15, 14-15 (2005).

[36] The Special Representative of the Secretary General of the United Nations (SRSG).

[37] *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Rights to Development—Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the SRSG,* Human Rights Council, U.N. DOC. A/C/8/5 (Apr. 7, 2008) [hereinafter *Framework*].

[38] *Guiding Principles on Business and Human Rights, Implementing the United Nations 'Protect, Respect and Remedy' Framework*, Human Rights Council, U.N. DOC. A/HRC17/31 (Mar. 21, 2011) [hereinafter *Guiding Principle(s)*].

[39] Human Rights Council Res. 2005/69, U.N. DOC. E/CN.4/RES/2005/69 (Apr. 20, 2005).

[40] John G, Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. OF INT'L L. 819, 826 (2007).

[41] Melish & Meidinger, *supra* note 10, at 306.

[42] Human Rights Council Res. 8/7, U.N. DOC. A/C/RES/8/7 (June 18, 2008).

responsibilities into practical results.[43] As these represent an intricate synthesis of existing standards, legal and voluntary—and a truly global attempt to address widening governance gaps—they were well-received by stakeholders[44]—States, business associations,[45] and civil society organizations.[46] Indeed, they have become an "authoritative focal point"[47] in contemporary regulatory development, evidenced by incorporation into, *inter alia*, the OECD Guidelines,[48] ISO 26000 Guidance,[49] and further establishment of a United Nations Working Group[50] to promote its dissemination and implementation.[51]

This overwhelming reception warrants critical analysis, as it risks promoting a "groupthink" mentality, [52] and unquestioning acceptance of its authority might prevent future improvement. If consensus and uptake,[53] rather than fitness for purpose, indicate success,[54]

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[43] U.N. Office of the High Commissioner for Human Rights, *Council Holds Dialogue with Experts on Summary Executions, Independence of Judges and Lawyers, Transnational Corporations*, Office of the High Commissioner for Human Rights (May 30, 2011), http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11082&LangID=E.

[44] Robert McQuorcodale, *Corporate Social Responsibility and International Human Rights Law*, 87 J. BUS. ETHICS 385, 387 (2009).

[45] For example: International Council on Mining and Metals.

[46] For example: Amnesty International.

[47] U.N. Human Rights Council, *The UN "Protect, Respect and Remedy" Framework for Business and Human Rights*, (2011), http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf.

[48] OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011).

[49] ISO, GUIDANCE ON SOCIAL RESPONSIBILITY (2010), http://www.iso.org/obp/ui/#iso:std:iso:26000:ed-1:v1:en.pdf.

[50] U.N. Office of the High Commissioner for Human Rights, *Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises,* Office of the High Commissioner for Human Rights (undated), http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx.

[51] Human Rights Council Res. 17/4, U.N. DOC. A/C/RES/17/4 (June 16, 2011).

[52] *See generally* Jessica A. Pautz & Donald A. Forrer, *The Dynamics of Groupthink: The Cape Coral Experience*, 2 J. OF INTERPROFESSIONAL EDUC. & PRAC. 1 (2013).

[53] Surya Deva*, Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles*, *in* HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 78, 81 (Surya Deva & David Bilchitz eds., 2013).

[54] Addo, *supra* note 4, at 146.

TNCs may sign up[55] to "bluewash"[56] their human rights failures, reenacting problems the United Nations Global Compact once faced.[57] This Article thus seeks to revive inquiry into whether these regulations are adequate to meaningfully change corporate behavior.

III. Human Rights

For terminological clarity, this Article defines "human rights" as fundamental moral rights,[58] the "natural rights"[59] people possess *qua* rational and self-determined beings,[60] independent of voluntary action[61] or institutional arrangements,[62] and distinct from "corporate social responsibilities" of corporations characterized by voluntarism.[63] Human rights are therefore generally absolute, and cannot be compromised in pursuit of other interest, for example, economic interests. In the language of obligations or duties, human rights equate to perfect obligations, and TNCs' responsibility to respect, elaborated below, is a universal perfect obligation not to violate human rights. Nevertheless, not all obligations the UNGP covers are perfect obligations, and this Article concedes that its argument is less persuasive with regard to duties besides perfect moral duties.

C. Methodology

I. Foundational Presumption

This Article first considers a fundamental question in the business-human rights clash:[64] Why should TNCs be subjected to human rights obligations in the first place? This question has

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[55] Fletcher Forum, *Business and Human Rights: Together at Last? A Conversation with John Ruggie*, 35 THE FLETCHER FORUM OF WORLD AFFAIRS 117, 120 (2011).

[56] Andreas Rasche, *A Necessary Supplement: What the United Nations Global Compact Is and Is Not*, 48 BUS. & SOC'Y 511, 539 (2009).

[57] U.N. Global Compact, *The Ten Principles of the UN Global Compact*, United Nations (undated), http://www.unglobalcompact.org/what-is-gc/mission/principles.

[58] Amartya Sen, *Elements of a Theory of Human Rights,* 32 PHILOS. PUB. AFF. 315, 319–21 (2004).

[59] H.L.A. Hart, *Are There any Natural Rights?*, 64 PHIL. REV. 171, 175–76 (1955).

[60] EUGENE SCHLOSSBERGER, A HOLISTIC APPROACH TO RIGHTS: AFFIRMATIVE ACTION, REPRODUCTIVE RIGHTS 157 (2007).

[61] Hart, *supra* note 59, at 177.

[62] Fasterling & Demuijnck, *supra* note 29, at 802.

[63] *See generally* Archie B. Carroll, *A Three-dimensional Conceptual Model of Corporate Performance,* 16 ACAD. MGMT. REV. 312 (1979).

[64] *See generally* Frank J. Garcia, *The Global Market and Human Rights: Trading Away the Human Rights Principle*, 25 BROOK. J. INT'L L. 51 (1999).

its origins in the Berle-Dodd debate,[65] which contrasted shareholder and stakeholder models of the company—a dichotomy still debated in corporate governance scholarship today. Engagement with the normative question lies beyond this Article's scope, but the following analysis assumes a convincing justification for subjecting TNCs to human rights responsibilities.

II. Benchmarks for Analysis

In contemplating "adequacy," this Article measures the UNGP against its objectives, adopting a conceptual analysis of fitness for purpose, rather than an empirical evaluation of practical effectiveness.[66] The underlying objective of the UNGP is to improve TNCs' human rights performance, and to ensure respect of their human rights obligations. Adequacy is thus a question of whether the UNGP can effectively realize this objective,[67] assessed according to the degree to which it satisfies this Article's criteria of (1) deterrence and (2) enforcement.

Deterrence, inspired by criminal jurisprudence,[68] requires that the norms impose clear, accurate, and substantive responsibilities prior to decision-making, as TNCs need conceptual clarity regarding what obligations they have, when they are in breach, and how to avoid this. Technically, the deterrent effect derives from sanctions giving these norms teeth, but these are considered under the enforcement criterion below. The above requirements are prerequisites for effective deterrence, as sanctions require clear formulation of protected rights.

Enforcement, including compensation, builds on jurisprudence that includes enforceability in the definition of legal rights.[69] No instrument, however robust, can prevent all abuses, especially since some TNCs' actions defy enterprise rationality,[70] thus necessitating effective responses. In defining this criterion, the insider perspective of the relevant parties is adopted.

For TNCs, effective enforcement means regulations must impose sanctions with reasonable certainty in a high percentage of cases, as adverse penalties are *sine qua non* for adequacy.

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[65] E. Merrick Dodd, *For Whom Are Corporate Managers Trustees?,* 45 HARV. L. REV. 1145, 1155–62 (1932).

[66] *See generally* KATHARINA STRASSMAIR, THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: THE IMPLEMENTATION ON THE INTERNATIONAL, REGIONAL, NATIONAL AND COMPANY LEVEL (2015).

[67] Françoise Tulkens, *Human Rights, Rhetoric or Reality?,* 9 EUR. REV. 125, 129 (2001).

[68] *See generally* Anthony Ellis, *A Deterrence Theory of Punishment,* 53 PHIL. Q. 337 (2003).

[69] MORRIS GINSBERG, ON JUSTICE IN SOCIETY 247 (1971).

[70] ARUN KUMAR & RACHANA SHARMA, PRINCIPLES OF BUSINESS MANAGEMENT 433 (2000).

According to Hohfeld's analysis of legal rights, every right entails a correlative duty to act or to refrain from acting.[71] Unless enforceable, rights are a "dead letter," and duties are merely voluntary obligations that may be fulfilled or ignored—*ubis jus ibi remedium*.[72]

Compensation, a sub-point of enforcement, is constructed from the victims' perspective. Building on Amnesty International's research into the denial of justice,[73] theories of retributive justice,[74] and zemiology,[75] regulations must provide "effective compensation," both "in practice and in law,"[76] expanding on the "right to an effective remedy and reparations" found in major international treaties.[77] Effectiveness is further subdivided: Procedural effectiveness concerns the mechanisms for determining liability for breaches,[78] requiring, *inter alia*, "equality of arms"[79]–affording parties equal opportunities to present their case[80]–the "right to be heard,"[81] and expeditious procedure.[82] Conversely, substantive effectiveness concerns outcomes, converting "finding of facts and law"[83] to concrete results and granting "adequate . . . and appropriate"[84] relief for violations, entailing "a full and

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[71] *See generally* Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, YALE LAW SCHOOL FACULTY SCHOLARSHIP SERIES, Paper 4378 (1917).

[72] *See generally* Tracy A. Thomas, *Ubis Jus, Ibi Remedium: The Fundamental Right to a Remedy*, 41 SAN DIEGO L. REV. 1633 (2004).

[73] Amnesty International, *Major new book calls for radical changes to stop corporate abuses*, Amnesty Int'l UK (Mar. 11, 2014) http://www.amnesty.org.uk/press-releases/major-new-book-calls-radical-changes-stop-corporate-abuses.

[74] D. WOOD, RETRIBUTIVE AND CORRECTIVE JUSTICE, CRIMINAL AND PRIVATE LAW (2010), http://www.scandinavianlaw.se/pdf/48-33.pdf.

[75] CAROLINE HANNAH MCGILL, ZEMIOLOGY AND THE DARK SIDE OF GLOBALISATION: THE CASE OF NAIVASHA'S CUT-FLOWER INDUSTRY (2012), http://eprints.lincoln.ac.uk/16180/1/__ddat01_staffhome_bjones_Downloads_53-194-1-PB.pdf.

[76] *Kudla v. Poland* [2000] 35 All ER 198 at [156].

[77] For example, EC, UDHR, ICCPR.

[78] *Z. v. United Kingdom*, [2002] All ER 97 at [108].

[79] International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171, Art. 14 [hereinafter *ICCPR*].

[80] *Dombo Beheer B.V. v. The Netherlands* [1993] 18 EHRR 213 at [33].

[81] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, Art. 6 [hereinafter *ECHR*].

[82] *Id.*

[83] Dinah Shelton, *The Jurisprudence of Human Rights Tribunals on Remedies for Human Rights Violations*, *in* INT'L PROTECTION OF HUM. RTS. AND VICTIMS' RTS. 57, 59 (J.F. Flauss ed., 2009).

[84] G.A. Res. 60/147, at Principle 2(c) (Mar. 21, 2006) [hereinafter *Reparation Principle*].

effective reparation"[85] proportionate to harm,[86] to restore the *status quo ante*,[87] jurisprudence well-established in theories of reparations.[88]

III. Limitations

This Article recognizes that Ruggie's mandate[89] "was not to win an award for academic excellence but to produce tangible policy results,"[90] and to break the post-Norms stalemate.[91] Nevertheless, this Article focuses on conceptual analysis, unconstrained by limitations of policy-making. Hence, critiques of the process and Ruggie's "principled pragmatism"[92] bypassing controversial issues,[93] analyzed exhaustively elsewhere,[94] will not hamper this analysis. While these findings may never realistically materialize in policy, their value lies in raising issues that inform, or persuade, policymakers in developing effective regulation.

D. Analysis

While the Framework's pillars are mutually reinforcing, as the first pillar (GPs 1–10) uncontroversially[95] reiterates the obligations of states under international law,[96] focus lies

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[85] *Id.* at Principle 18.

[86] *Scordino v. Italy (No. 1)*, [2006] ECHR 276 at [93].

[87] Shelton, *supra* note 83, at 87.

[88] *See generally* Lisa J. Laplante, *Just Repair*, 48 CORNELL INT'L L. J. 513 (2015).

[89] John G. Ruggie, Opening Statement to United Nations Human Rights Council (2006), http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-statement-to-UN-Human-Rights-Council-25-Sep-2006.pdf.

[90] Florian Wettstein, *Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment,* 14 J. OF HUM. RTS. 162, 163 (2015).

[91] Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. DOC. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter *UN Norms*].

[92] Fasterling & Demuijnck, *supra* note 29, at 881.

[93] Melish & Meidinger, *supra* note 10, at 308.

[94] Karin Buhmann, *Navigating from 'Train Wreck' to Being 'Welcomed': Negotiation Strategies and Argumentative Patterns in the Development of the UN Framework*, *in* HUMAN RIGHTS OBLIGATIONS OF BUSINESS—BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 29, 29–56 (Surya Deva & David Bilchitz eds., 2013).

[95] SIMON BAUGHEN, HUMAN RIGHTS AND CORPORATE WRONGS, CLOSING THE GOVERNANCE GAPS 256 (2015).

[96] CLAPHAM, *supra* note 27, at 61–63.

on the latter two, concerning corporations' human rights responsibilities (GPs 11–24) and victims' access to remedies (GPs 25–31) respectively, with specific GPs that engage this Article's adequacy criteria being analyzed.

I. Terminologies Utilized

Adherence to discourse's unique language[97] is essential to properly dictate the nature and scope of the human rights obligations of those subject to regulation. Nevertheless, this analysis suggests Ruggie's pursuit of consensus has produced "weak language concerning human rights responsibilities of business,"[98] compromising adequacy.

1. Responsibility vs. Duty

Founded upon Ruggie's conception of "differentiated but complementary responsibilities,"[99] GP 11 distinguishes TNCs' human rights obligations from those of the States' obligations. TNCs have a "*responsibility* to respect,"[100] likely derived from the principle *sic utere tuo ut alterum non leades*,[101] in contrast with GP 1,[102] the State's "*duty* to protect." Together with the use of "should"—rather than "must"—throughout the second pillar, GP 11 deliberately avoids implying that it imposes legal obligations on TNCs,[103] reflecting the conventional division between the duties of state and non-state actors in international human rights law.[104] Indeed, GP 11's Commentary confirms it is "distinct from issues of *legal liability* and enforcement."[105]

[97] Christiana Ochoa, *Advancing the Language of Human Rights in a Global Economic Order: An Analysis of a Discourse*, 23 B.C. THIRD WORLD L.J. 57, 59 (2003).

[98] Deva, *supra* note 53, at 91.

[99] Framework, *supra* note 37, at paragraph 9.

[100] Guiding Principles, *supra* note 38 (emphasis added).

[101] HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 76 (2nd ed. 1980).

[102] Guiding Principles, *supra* note 38, Principle 1.

[103] BAUGHEN, *supra* note 95, at 261.

[104] Astrid Sanders, *The Impact of the 'Ruggie Framework' and the United Nations Guiding Principles on Business and Human Rights on Transnational Human Rights Litigation,* LSE LAW, SOCIETY AND ECONOMY WORKING PAPERS 18/2014, 8 (2014), https://www.lse.ac.uk/collections/law/wps/WPS2014-18_Sanders.pdf (emphasis added).

[105] Guiding Principles, *supra* note 38, Commentary to Principle 11 (emphasis added).

This duty/responsibility dichotomy parallels Kant's conception of perfect/imperfect obligations.[106] Rights, for example, human rights, must possess peremptory force,[107] and consist of perfect obligations that are clearly defined and owed to specific right-holders,[108] and must be fulfilled to the "fullest extent."[109] Conversely, imperfect obligations are indeterminate, not owed to—and incapable of being claimed by—any specific right-holder, may be overridden, and only bind parties to act in benevolence. While Ruggie claims responsibility to respect possesses normative value,[110] he conceptualizes TNCs' human rights obligations as arising only from the "[basic] expected conduct"[111] that society has of businesses, grounded in the "social license"[112] needed to operate—an implicit agreement between society and TNCs. Nevertheless, if TNCs are only "encouraged, but not obliged"[113] not to violate human rights, and society only has an expectation–not a claim–against them, non-violation of human rights moves from an absolute, "perfect duty of justice"[114] to an imperfect obligation, analogous to Corporate Social Responsibility ("CSR"). Deterrence is therefore compromised, as GP 11 fails to impose clear, unconditional human rights obligations on TNCs, thereby merely perpetuating the *status quo*.[115]

Furthermore, no clarification on the nature/origin of the "social license," defined as "prevailing social norms,"[116] was provided, and its current conception is too nebulous to

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[106] *See generally* Immanuel Kant, *Fundamental Principle of the Metaphysics of Morals*, *in* ETHICS: THE CLASSIC READINGS 166 (David E. Cooper ed., 1998).

[107] JOEL FEINBERG, SOCIAL PHILOSOPHY 58–59 (1973).

[108] Allen Buchanan, *Perfecting imperfect Duties: Collective Action to Create Moral Obligations*, 6 BUS. ETHICS Q. 27, 28 (1996).

[109] *See generally* IMMANUEL KANT, THE GROUNDWORK OF THE METAPHYSICS OF MORALS (1991).

[110] WEIL, GOTSHAL & MANGES LLP WEIL, GOTSHAL & MANGES LLP, CORPORATE SOCIAL RESPONSIBILITY FOR HUMAN RIGHTS: COMMENTS ON THE UN SPECIAL REPRESENTATIVE'S REPORT ENTITLED "PROTECT, RESPECT AND REMEDY: A FRAMEWORK FOR BUSINESS AND HUMAN RIGHTS" (2008), http://198.170.85.29/Weil-Gotshal-legal-commentary-on-Ruggie-report-22-May-2008.pdf.

[111] Guiding Principles, *supra* note 38, at Principle 11.

[112] Framework, *supra* note 37, at paragraph 54.

[113] Arvind Ganesan, *UN Human Rights Council: Weak Stance on Business Standard—Global Rules Needed, Not Just Guidance,* Human Rights Watch (June 16, 2011), http://www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards.

[114] Wettstein, *supra* note 90, at 169.

[115] Susan A. Aaronson & Ian Higham, *Re-righting Business: John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms*, 35 HUM. RTS. Q. 333, 358 (2013).

[116] *See generally* Neil Gunningham, Robert A. Kagan & Dorothy Thornton, *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 L. SOC. INQUIRER 308 (2004).

provide coherent consensus on any particular issue. Societal expectations can only realistically generate rules in small, close-knit environments,[117] and in the modern globalized economy rife with competing interests[118] and value emphases, even TNCs committed to respecting human rights would be hard-pressed to identify what societal expectations are outside of the most obvious instances, since these can be spatially contingent:[119] For example, China's tolerance of violations of freedom of expression.[120] While guidance could be found in social practices, media, etc., social norms are also temporally contingent,[121] constantly changing with societal views. People, society, and Norm Entrepreneurs[122] act as the agents of such changes,[123] which can occur rapidly ("*Norm Bandwagons*"),[124] before TNCs can respond.[125] TNCs, and stakeholders, cannot therefore know with certainty the content of the human rights that require respect, since the UNGP omit an explicit catalogue of human rights—elaborated below—instead leaving identification to prevailing social norms. Without clarity and certainty, GP 11 cannot meaningfully inform TNCs' decision-making and prevent them from violating human rights, thereby compromising deterrence.

Lack of legal liability does not necessarily mean lack of sanctions, as the soft law consequences[126] prescribed by GP 11 could cause significant reputational damage to violating TNCs.[127] Nevertheless, whether this punishment, administered through the "courts

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[117] H.L.A. HART, THE CONCEPT OF LAW 92 (1997).

[118] Yadong Luo & Rosalie L. Tung, *International Expansion of Emerging Market Enterprises: A Springboard Perspective,* 38 J INT'L BUS. STUD. 481, 497 (2007).

[119] McQuorcodale, *supra* note 44, at 392.

[120] Dan Levin, *China Escalating Attack on Google*, N.Y. TIMES (June 2, 2014), http://www.nytimes.com/2014/06/03/business/chinas-battle-against-google-heats-up.html?_r=0.

[121] Carloz Lopez, *The 'Ruggie Process': From Legal Obligations to Corporate Social Responsibility?* in HUMAN RIGHTS OBLIGATIONS OF BUSINESS—BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 58, 67 (Surya Deva & David Bilchitz eds., 2013).

[122] Cass R. Sunstein, *Social Norms and Social Rules*, 96 COLUM. L. REV. 912, 913 (1996).

[123] Patricia Illingworth, *Global Need—Rethinking Business Norms,* in THE BUSINESS AND HUMAN RIGHTS LANDSCAPE: MOVING FORWARD, LOOKING BACK 175, 177 (Jena Martin & Karen E. Bravo eds., 2015).

[124] Sunstein, *supra* note 122, at 914.

[125] Michael Addo & Jena Martin, *The Evolving Business and Society Landscape: Can Human Rights Make a Difference?*, in THE BUSINESS AND HUMAN RIGHTS LANDSCAPE: MOVING FORWARD, LOOKING BACK 348, 348–49 (Jena Martin & Karen E. Bravo eds., 2015).

[126] Anthony D'Amato, *Softness in International Law: A Self-Serving Quest for New Legal Materials: A Reply to Jean d'Aspremont*, 20 EUR. J. INT'L L. 897, 899 (2009).

[127]Chikako Oka, *Accounting for the Gaps in Labour Standard Compliance: The Role of Reputation-conscious Buyers in the Cambodian Garment Industry*, 22 EUR. J. DEV. RES. 59, 78 (2010).

of public opinion" Ruggie adverts to,[128] is consistent and certain enough to satisfy enforcement remains questionable: Who could realistically be expected to hold TNCs accountable and which rights or norms would they be held accountable to? With expectations of employees, communities, consumers, civil society, and investors comprising the standard by which TNCs are judged, can these distinct groups be expected to apply the same criteria? Furthermore, their assessments of TNCs' activities are subject to significant information asymmetries, compounded by the questionable credibility and accuracy of corporate reporting.[129] According to the enforcement criterion, a system like the UNGP necessarily requires an effective theory of compliance. Without explicit mechanisms[130] for obtaining relevant information and communicating it to the "judges,"[131] the UNGP blindly trusts market forces (e.g. consumer awareness) to sanction human rights violations,[132] which is unsatisfactory for enforcement, as this mechanism cannot impose sanctions with the consistency and certainty this Article requires.

2. Protect vs. Respect

The use of "protect" and "respect" likewise warrants scrutiny. The UNGP clarifies "respect" as: "[Doing] no harm"[133] and "[avoiding] causing or contributing"[134] to human rights impacts. Commentators have interpreted this as *negative responsibility*,[135] not encompassing "fulfilment or promotion"[136] of human rights, in contrast with states' *positive responsibilities* to protect human rights. Nevertheless, the conceptual accuracy and internal consistency of this dichotomy is suspect, and this has ramifications for GP11's adequacy. First, while some are indeed negative rights, requiring TNCs to refrain from certain acts–for example, Article

[128] Framework, *supra* note 37, at 16.

[129] Sally Wheeler, *Global production, CSR and Human Rights: The Courts of Public Opinion and the Social Licence to Operate,* THE INT'L J. OF HUM. RTS. 757, 769 (2015); See *infra* Part D.II.

[130] Ganesan, *supra* note 113.

[131] Wheeler, *supra* note 129, at 770.

[132] RICHARD M. LOCKE, THE PROMISE AND LIMITS OF PRIVATE POWER 157 (2013).

[133] Framework, *supra* note 37, at paragraph 24.

[134] Guiding Principles, *supra* note 38, at Principle 13.

[135] Florian Wettstein, *CSR and the Debate on Business and Human Rights: Bridging the Great Divide*, 22 BUS. ETHICS Q. 739, 753–55 (2012).

[136] BUSINESS & HUMAN RIGHTS INITIATIVE, HOW TO DO BUSINESS WITH RESPECT FOR HUMAN RIGHTS: A GUIDANCE TOOL FOR COMPANIES 45 (2010).

5 of the UDHR prohibiting torture–[137] this dichotomy becomes "tenuous and murky"[138] when considering socio-economic rights, which contain positive rights that are as integral to the UNGP as civil and political rights. For example, what does Article 7 of the ICESCR, "right to a safe workplace,"[139] entail? TNCs cannot simply refrain from imposing dangerous working conditions. Respect must entail "doing something that provides some good or material as required by the right,"[140] for example, positively providing safe conditions.[141] Second, this dichotomy contradicts other sections of the UNGP, notably Pillar III,[142] where Ruggie considers that a "grievance mechanism is part of the corporate responsibility to respect."[143] How is the positive action of developing grievance mechanisms consistent with Ruggie's conception that respect merely entails negative obligation? Furthermore, if "social license" is the normative basis for TNCs' responsibility to respect, could societies potentially expect them to bear positive responsibilities, such as in regions where businesses are expected to contribute to positive realization of rights, for example, alleviating poverty?[144]

Given these issues, TNCs clearly must bear both negative and positive responsibility. Using "respect" to artificially distinguish the responsibilities of states and TNCs obfuscates the true scope of their duties, especially when these spheres are blurring together morally[145] and legally,[146] compromising deterrence. If TNCs view positive human rights responsibilities as state-exclusive, such interests are necessarily excluded from TNCs' decision-making,[147] and the UNGP cannot deter TNCs from infringing them.

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[137] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, U.N. Doc. A/810 at 71 (1948), Art. 5 [hereinafter *UDHR*].

[138] Justine Nolan & Luke Taylor, *Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy*?, 87 J. BUS. ETHICS 433, 443 (2009).

[139] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3, Art. 7 [hereinafter *ICESCR*].

[140] SHUE, *supra* note 101, at 62.

[141] G.C. Brenkert, *Business, Respect, and Human Rights The Third Pillar: Remedies, Reparations, and the Ruggie Principles*, in THE BUSINESS AND HUMAN RIGHTS LANDSCAPE: MOVING FORWARD, LOOKING BACK 154 (J. Martin & K.E. Bravo eds., Cambridge University Press 2015).

[142] *See infra* Part D.III.

[143] Framework, *supra* note 37, at 24.

[144] Illingworth, *supra* note 123, at 189.

[145] Wettstein, *supra* note 90, at 172.

[146] Nolan & Taylor, *supra* note 139, at 438–39.

[147] Deva, *supra* note 53, at 95–6.

3. Scope of Human Rights

GP 12 compounds this ambiguity by providing that TNCs have the responsibility to guarantee minimum standards of human rights, defined as those "*expressed in the International Bill of Human Rights"*[148] and "*International Labour Organization's Declaration on Fundamental Principles and Rights at Work*,"[149] without distinguishing between different categories of rights. Ruggie justified this scope with reference to Business and Human Rights Resource Centre reports,[150] concluding that "there are few…internationally recognized rights business cannot impact," and a definitive, comprehensive set of standards (*n.b.* UN Norms) would be inappropriate.[151] Nevertheless, lack of clarity as to how extensive TNCs' responsibilities are with regards to particular rights is a well-known conceptual obstacle,[152] because a requirement to respect "all of them" cannot meaningfully guide TNCs.[153] The "omission of a catalogue [applicable] to companies"[154] is problematic, as the instruments cited are state-focused.[155] Consider Article 12 of the ICESCR—the right to enjoyment of the highest attainable standard of physical and mental health.[156] How extensive is TNCs' responsibility regarding this right? Must TNCs provide four days' rest per week for pristine mental health? The complexity of such questions compromises deterrence, as over-referencing state-centric human rights[157] causes inherent difficulties in transplantation,[158] which would "neither be easy nor free from conceptual problems," requiring interpretation of abstract standards into quantifiable measuring tools and real-world deliverables that TNCs are

[148] Constituted by the UDHR, ICCPR, and ICESCR (emphasis added).

[149] Guiding Principles, *supra* note 38, at Principle 12 (emphasis added).

[150] Framework, *supra* note 37, at paragraph 52.

[151] John G. Ruggie, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. DOC. E/CN.4/2006/9, paragraph 55 (Feb. 22, 2006).

[152] Brenkert, *supra* note 142, at 146.

[153] Roy Sullivan & Nicolas Hachez, *Human Rights Norms for Business: The Missing Piece of the Ruggie Jigsaw-The Case of Institutional Investors*, in THE UN GUIDING PRINCIPLES ON BUSINESS RIGHTS FOUNDATIONS AND IMPLEMENTATIONS 217, 230 (Radu Mares ed., 2012).

[154] Surya Deva, *Guiding Principles on Business and Human Rights: Implications for Companies*, 9 EUR. COMPANY L. 101, 108–9 (2012).

[155] SIGRUN SKOGLY, THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND 68 (2001).

[156] ICESCR, *supra* note 140, Art. 12.

[157] SURYA DEVA, REGULATING CORPORATE HUMAN RIGHTS VIOLATIONS—HUMANIZING BUSINESS 116 (2013).

[158] Michael Goodhart, *Human Rights and Non-State Actors: Theoretical Puzzles*, *in* NON-STATE ACTORS IN THE HUMAN RIGHTS UNIVERSE 23, 34–35 (George J. Andreopoulos, Zehra F. Kabasakal Arat & Peter Juviler eds., 2006).

accustomed to.[159] Effective deterrence would require responsibilities[160] which are "easily translated into a compliance/non-compliance assessment framework."[161] GP 12 is thus inadequate, as it "swamps rather than clarifies," and whether TNCs are willing or able to respect rights with indeterminate content is doubtful.

II. Due Diligence Mechanism

"Responsibility to respect" is discharged[162] by TNCs through a management, governance, and communication process,[163] constituting (1) a human rights policy commitment (GPs 15–16);[164](2) ongoing human rights due diligence to identify, monitor, mitigate, and account for human rights impacts (GPs 17–18);[165] [166] and (3) remediation (GP 22).[167] Analysis centers on due diligence, as it is central to the UNGP,[168] imposes the most onerous obligation on TNCs, effectively governs the scope of a TNC's human rights obligation, determines TNCs' response to human rights issues, and forms the basis for remediation.

Conceptually, due diligence possesses great potential to satisfy deterrence, since proper execution requires TNCs to stringently assess their human rights footprint. While due diligence was originally recommended by the International Commission of Jurists vis-à-vis states' duties,[169] it is also standard industry practice for TNCs.[170] Ruggie recognized that this

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[159] Addo & Martin, *supra* note 125, at 381.

[160] *See infra* Part C. II.

[161] Sullivan & Hachez, *supra* note 154, at 230.

[162] Larry Catá Backer, *From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nation's 'Protect, Respect and Remedy' and the Construction of Inter-systemic Global Governance*, PAC. MCGEORGE GLOBAL BUS. & DEV. L. J. 102, 202 (2011).

[163] Fasterling & Demuijnck, *supra* note 29, at 801.

[164] *See generally* Guiding Principles, *supra* note 38.

[165] *Id.*

[166] *Id.* at Principle 17.

[167] *Id.* at Principle 22.

[168] Backer, *supra* note 163, at 202.

[169] *See generally* INTERNATIONAL COMMISSION OF JURISTS, CORPORATE ACCOUNTABILITY, INTERNATIONAL HUMAN RIGHTS LAW AND THE UNITED NATIONS (2005).

[170] Jeffrey S. Perry & Thomas J. Herd, *Mergers and Acquisitions: Reducing M&A Risk through Improved Due Diligence,* 32 STRATEGY & LEADERSHIP 12, 15 (2012).

broad rhetorical appeal[171] and familiarity[172] would ease its integration into management mindsets.[173] Furthermore, by transforming TNCs' relationship with human rights from "naming and shaming" by external actors post-violation, to "knowing and showing,"[174] due diligence changes managerial attitudes, thereby embedding human rights issues within routine decision-making processes. TNCs can thus engage in proactive prevention of human rights violations rather than retrospective reactions to claims.[175] *Prima facie*, therefore, due diligence satisfies deterrence—prevention is better than cure, after all. Nevertheless, certain flaws in the UNGP's conception of due diligence result in disappointing shortfalls in discharging the "responsibility to respect." Unlike other instruments[176] which have imposed due diligence responsibilities[177] on TNCs, the UNGP lack precise expectations of human rights due diligence, particularly in four significant areas.

1. Concept and Execution

TNCs' familiarity with the due diligence concept creates the risk that inappropriate practices are retained, treating existing models of corporate monitoring due diligence as perfectly translatable to human rights. This Article clarifies that due diligence is fundamentally different in each context: The former relates to TNCs protecting themselves against economic risks, the latter to protecting rights of others. TNCs conducting human rights due diligence might thus apply the inappropriate company law duty of care, balancing directors' entrepreneurial freedom against shareholders' interests, whereas the more onerous human rights duty of care is not linked to financial success, but owed to people outside the company.[178] Even worse, GP 18 conceptualizes human rights violations as "risks" to TNCs,

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[171] JONATHAN BONNITCHA & ROBERT MCQUORCODALE, IS THE CONCEPT OF 'DUE DILIGENCE' IN THE GUIDING PRINCIPLES COHERENT? (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2210457.

[172] McQuorcodale, *supra* note 44, at 391.

[173] Wheeler, *supra* note 129, at 763.

[174] Christina Hill & Serena Lillywhite, *The United Nations 'Protect, Respect and Remedy' Framework: Six Years On and What Impact Has it Had?,* 2 THE EXTRACTIVE INDUSTRIES & Soc'y 4, 5–6 (2015).

[175] *Business and Human Rights: Further Steps Toward the Operationalization of the 'Protect, Respect and Remedy' Framework*, Human Rights Council, U.N. DOC. A/HRSC/14/27, 16 (Apr. 9, 2010).

[176] J.J. Eluyode, *The Notion of Collective Human Rights and Corporate Social Responsibility: Issues and Trends in International Law*, 24 INT'L COMPANY & COM. L. Rev. 209, 214 (2013).

[177] James Anaya, *Extractive Industries and Indigenous Peoples—Report of the Special Rapporteur on the Rights of Indigenous Peoples*, U.N. DOC. NA/HRC/24/41 (July 1, 2013).

[178] Peter Muchlinski, *Implementing the New UN Corporate Human Rights Framework*, 22 BUS. ETHICS Q. 145, 161 (2012).

implying they should be considered only if they pose business risks.[179] The misconceptualization of due diligence as corporate risk assessment—compared with human rights protection[180]—opens the possibility for trade-offs between economic and human rights interests, treating violations as "business overheads" that may be outweighed by fiscal gains. Adequacy, therefore, hinges on individual TNCs' interpretation of due diligence, with adequacy diminishing the closer an interpretation comes to corporate risk management. This Article doubts, therefore, that due diligence can meaningfully deter TNCs from violating human rights, as it merely achieves internal self-validation of existing assessments and policies[181] without meaningfully incorporating human rights interests into decision-making. Furthermore, if respecting human rights is contingent on benefiting the TNCs, it can be balanced against—and outweighed by—profit-maximization considerations in decision-making, weakening deterrence.[182]

2. Transparency

GP 21 establishes that TNCs "should" be prepared to provide "sufficient information" to external stakeholders to enable evaluation of how they address human rights impacts. This tenuous wording, combined with the UNGP's "soft" self-regulation, permits an unacceptable degree of latitude in disclosure, enabling TNCs to purport to undertake due diligence without disclosing documentation,[183] thereby undermining its credibility. Likewise, GP 18, regarding the identification of adverse human rights impacts, encourages "*meaningful* consultation"[184] with external stakeholders, but the extent of such engagement is entirely at TNCs' discretion. Stakeholders have no right to ensure the accountability of due diligence processes,[185] and as TNCs can apply their own standards and define human rights that they "identify" free of independent scrutiny, the content of such human rights become so "elastic . . . that they lose value as measures of performance."[186]

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[179] L. J. Dhooge, *Due Diligence as a Defense to Corporate Liability Pursuant to the Alien Tort Statute*, 22 EMORY INT'L L. REV. 455, 496 (2008).

[180] Fasterling & Demuijnck, *supra* note 29, at 808–12.

[181] James Harrison, *Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment*, 3 J. OF HUM. RTS. PRAC. 162, 172 (2011).

[182] Fasterling & Demuijnck, *supra* note 29, at 808–12.

[183] James Harrison, *Establishing a Meaningful Human Rights Due Diligence Process For Corporations: Learning From Experience of Human Rights Impact Assessment*, 31 IMPACT ASSESSMENT & PROJECT APPRAISAL 107, 112–12 (2013).

[184] *Id.* (emphasis added).

[185] Wheeler, *supra* note 129, at 767.

[186] James Harrison, *Human Rights and Transnational Corporation: Establishing Meaningful International Obligations*, *in* INTERNATIONAL ECONOMIC LAW, GLOBALIZATION AND DEVELOPING COUNTRIES 205, 214 (Julio Faundez & Celine Tan eds., 2010).

TNCs can therefore freely employ standards and methodologies inconsistent with deterrence, as illustrated by the following scenarios. Considering the high administrative costs "proper" due diligence involves,[187] TNCs may favor form over substance, engaging in superficial "box-ticking" for reputational purposes rather than genuinely integrating human rights interests into decision-making,[188] or strategically emphasize or obscure certain activities,[189] a CSR tactic[190] that regresses to the "anecdotal descriptions of isolated projects and philanthropic activity"[191] that Ruggie intended to avoid.[192] While TNCs may consider human rights issues in decision-making, without transparency and external verification, the clarity and substance of human rights obligations is lost. If TNCs intentionally or inadvertently overlook certain human rights obligations,[193] due diligence has no deterrent impact whatsoever.

3. Culpability

If due diligence reveals adverse human rights impacts, GP 19 requires TNCs to take "appropriate action"[194] depending on whether it "causes or contributes to an adverse impact," or where "impact is directly linked to its operations, products, or services by a business relationship."[195] The former applies to situations whereby parent companies are involved in subsidiaries' operations, analogous to direct tortuous liability (*Chandler v. Cape Industries*),[196] while the latter covers situations where parent companies have no direct involvement. Notwithstanding the Commentary's contemplation of factors relevant to

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[187] Fasterling & Demuijnck, *supra* note 29, at 808.

[188] Muchlinski, *supra* note 179, at 158.

[189] *See generally* John M. Conley & Cynthia A. Williams, *Engage, Embed and Embellish: Theory versus Practice in the Corporate Social Responsibility Movement*, 31 J. CORP. L. 1 (2005).

[190] Norman Jackson & Pippa Carter, *Organizational Chiaroscuro: Throwing Light on the Concept of Corporate Governance*, 48 HUM. REL. 875, 886 (1995).

[191] *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, Human Rights Council, U.N. DOC. A/HRC/4/035 (Feb. 9, 2007).

[192] *Rep. of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie—Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts,* Human Rights Council, U.N. DOC. A/HRSC/4/35 (Feb. 19, 2007).

[193] Harrison, *supra* note 184, at 205–17.

[194] Guiding Principles, *supra* note 38, at Principle 19.

[195] *Id.*

[196] *Chandler v. Cape Industries*, [2012] EWCA Civ 525.

determining appropriate action, the "causing or contributing" threshold delimits TNCs' responsibility to act, and Ruggie himself denied responsibility for TNCs where causality, whether direct or indirect, was absent.[197] Nevertheless, as the large-scale institutional structures of TNCs can invisibly subsume the individual agency of actors further down the chain of causation,[198] obscuring the ultimate causes of impacts,[199] this apportionment of responsibility is perhaps inappropriate for correcting structural injustice.[200] Enforcement is therefore compromised, as this conception allows TNCs to rely on remoteness to impacts as a defense against claims.

4. External Monitoring

GP 20 provides only for internal tracking of due diligence effectiveness, rather than independent external monitoring, compounding the issues considered above with unenforceability. Without access to sufficient information,[201]or objective assessments of individual TNC's due diligence results,[202] the courts of public opinion cannot distinguish between TNCs that are genuinely committed to respecting human rights and those merely paying them lip service,[203] and, therefore, cannot appropriately sanction violators. Indeed, TNCs, knowing that the quality of due diligence cannot be questioned, may exploit this to "Ruggie-proof" their operations,[204] employing due diligence processes to strategically and preemptively defend against claims, subverting its intended purpose[205] and further compromising enforcement. Without the threat of sanctions, TNCs are unlikely to undertake stringent human rights due diligence that goes beyond voluntary disclosure or CSR reporting, for instance on subsidiaries/contractors involved in its operations, undermining due diligence's effectiveness. This has particular implications for GP 22, in determining whether claimants have "direct links" to the TNC for remediation.

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[197] Framework, *supra* note 37, at 20.

[198] Onora Nell, *Lifeboat Earth*, 4 PHIL. PUB. AFF. 273, 286 (1975).

[199] SAMUEL SCHEFFLER, BOUNDARIES AND ALLEGIANCES: PROBLEMS OF JUSTICE AND RESPONSIBILITY IN LIBERAL THOUGHT 43–45 (2003).

[200] IRIS MARION YOUNG, RESPONSIBILITY FOR JUSTICE, 102–107 (2013).

[201] *See supra* Part D.II.2.

[202] Harrison, *supra* note 184, at 114.

[203] Fasterling & Demuijnck, *supra* note 29, at 807.

[204] *Id*. at 805.

[205] J.F. SHERMAN & A. LEHR, HUMAN RIGHTS DUE DILIGENCE: IS IT TOO RISKY?, 17–20 (2010), http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_55_shermanleHRs.pdf.

III. Access to Remedies

The UNGP's third pillar (GPs 25-31) addresses the provision of effective remedies and grievance mechanisms[206] for human rights violations at state and corporate levels. As the "lynchpin of the entire accountability structure,"[207] it is crucial for victims. This Article considers the adequacy of the UNGP's conception of "procedural and substantive significance"[208] against the compensation aspect outlined above.[209]

Procedurally speaking, Pillar III is relatively robust, establishing grievance mechanisms across multiple layers of institutional structure, potentially improving the UNGP's ability to satisfy the compensation criterion by increasing access to justice, as well as proactively preventing conflicts.[210] The two-pronged approach—judicial and non-judicial—is particularly important, given the systems' distinct characteristics. Judicial mechanisms, specifically GP 25, engage the power and legitimacy of public authority, providing certainty that remedies will be enforced.[211] Nevertheless, this may vary across states, and the process is time- and money-intensive;[212] hence, this remedy might be unrealistic or inappropriate for some victims.[213] Justice systems also cannot realistically carry the burden of addressing all allegations. Alternatively, state-based non-judicial mechanisms such as GP 27 provided by an administrative or legislative branch of the government, for example, establishment of national human rights institutions via legislation or decree, can facilitate alternative dispute resolution, alleviating these limitations and complementing judicial mechanisms. Corporate and operational-level grievance mechanisms raised in GP 22 and reiterated in GP 29 provide further access to remedies, enabling smaller issues not amounting to violations to be identified and resolved directly before they become grave enough[214] to warrant legal

[206] Guiding Principles, *supra* note 38, Commentary to Principle 25.

[207] Jonathan Drimmer & Lisa J. Laplante, *The Third Pillar: Remedies, Reparations, and the Ruggie Principles*, in THE BUSINESS AND HUMAN RIGHTS LANDSCAPE: MOVING FORWARD, LOOKING BACK 316, 316–17 (Jena Martin & Karen E. Bravo eds., 2015).

[208] Guiding Principles, *supra* note 38, at Commentary to Principle 25.

[209] *See infra* Part C. II.

[210] JOHN G. RUGGIE, PRESENTATION OF REPORT TO UNITED NATIONS HUMAN RIGHTS COUNCIL (2009), http://www.reports-and-materials.org/Ruggie-statement-to-UN-Human-Rights-Council-2-Jun-2009.pdf.

[211] RETO WALTHER, UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS & EFFECTIVE REMEDIES: A STATE-BASED NON-JUDICIAL GRIEVANCE MECHANISM FOR SWITZERLAND (2014), http://www.humanrights.ch/upload/pdf/140730_Walther_Klagemechanismus.pdf.

[212] Drimmer & Laplante, *supra* note 208, at 318.

[213] Guiding Principles, *supra* note 38, at Commentary to Principle 27.

[214] Caroline Rees, *Piloting Principles for Effective Company-Stakeholder Grievance Mechanisms: A Report of Lessons Learned*, *in* HARVARD KENNEDY SCHOOL CSR INITIATIVE 9 (2011).

action.[215] Simultaneously, they provide early detection for human rights issues in TNCs' operations, supporting ongoing due diligence efforts in identifying human rights impacts, achieving some deterrent effect. Furthermore, international and regional bodies and collaborative initiatives as part of non-judicial grievance mechanisms are considered,[216] further expanding the remediation system.

The term "grievance," defined as "perceived injustice evoking an individual's or group's sense of entitlement,"[217] is also meaningful. Commentary to GP 25 explains the expansive nature of this definition, including matters that might not attract remediation under existing international human rights law standards.[218] This broader scope enhances the UNGP's procedural effectiveness, further enabling grievance mechanisms to address human rights issues at earlier stages.

Nevertheless, enhanced access notwithstanding, "quality control of remedies is essential for their success,"[219] and the UNGP's benchmark for procedurally effective grievance mechanisms is inherently problematic.[220] First, criteria for judicial effectiveness, inferred from the discussion of obstacles to remedy in GPs 25-26, identifies barriers preventing access to justice, such as *forum non conveniens*, separate corporate personality, enforcing host State judgements, and cost of litigation,[221] the UNGP does not propose concrete policy recommendations to overcome these barriers. Instead, GP 26 only provides that States *should*, *inter alia*, take appropriate steps to ensure judicial mechanisms' effectiveness, and ensure such legal barriers do not obstruct access to remedies.[222] Certainly, GP 26 is "potentially very important"[223] in prompting/reminding states to consider legal obstacles, but given the entrenchment of these doctrines, GP 26's weak language and lack of explicit guidance cannot compel states to resolve them,[224] and such issues have persisted post-

[215] Drimmer & Laplante, *supra* note 208, at 318–19.

[216] Guiding Principles, *supra* note 38, at Commentary to Principle 30.

[217] *Id.* at Commentary to Principle 25.

[218] Drimmer & Laplante, *supra* note 208, at 320.

[219] Guiding Principles, *supra* note 38, at Commentary to Principle 31.

[220] *Id.*

[221] Framework, *supra* note 37, at 22.

[222] Deva, *supra* note 155, at 113.

[223] *See generally* BAUGHEN, *supra* note 95.

[224] Deva, *supra* note 53, at 102.

UNGP.[225] Without properly addressing these obstacles, the UNGP cannot satisfy compensation.

Second, GP 31 details seven criteria for procedural effectiveness of non-judicial remedies,[226] reinforcing Ruggie's emphasis on using non-judicial mechanisms to cover the judicial mechanisms' "governance gaps."[227] Nevertheless, per the UNHRC Expert Workshop, these criteria are not "comprehensive indicators,"[228] and contain conceptual flaws, wherein nonsatisfaction does not necessarily entail ineffectiveness. Consider the criterion of "legitimacy,"[229] which measures effectiveness by the trust stakeholders have in the system. In reality, complaints are often filed even without such trust because stakeholders are unaware of alternatives, particularly considering unresolved obstacles to judicial remedies. These criteria cannot, therefore, be taken at face value, and the degree to which they satisfy the compensation criterion is indeterminate. The European Business Network for Corporate Social Responsibility's tool for assessing effectiveness, containing GP 31's requirements, is currently being tested, so proper evaluation remains to be seen.

Pillar III's focus on procedural effectiveness also emphasizes its neglect of substantive effectiveness, which is considered only briefly in the Commentary to GP 25. As GP 25 is a foundational principle on states' duties, it may be extrapolated that substantive requirements for corporate remedies would be even less demanding. The Commentary's vagueness and lack of force is therefore problematic, as it only contemplates the substantive forms remedies may take, and considers that restoring the *status quo ante* is only, generally speaking, remediation's aim. By contrast, the UN Norms required TNCs to provide specific substantive remedies and made such remedies enforceable in national and international law,[230] and the Reparation Principles[231] clarified that remedies were obligations, not subject to the wrongdoer's discretion. The UNGP does precisely the opposite, construing access to remedies as a duty emanating from states' duty to protect and TNCs' responsibility to

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[225] GWYNNE SKINNER, ROBERT MCQUORCODALE, OLIVIER DE SCHUTTER, THE THIRD PILLAR: ACCESS TO JUDICIAL REMEDIES FOR HUMAN RIGHTS VIOLATIONS BY TRANSNATIONAL BUSINESS, 32–47, 77–84 (2013), http://corporate-responsibility.org/wp-content/uploads/2014/02/The-Third-Pillar-FINAL.pdf.

[226] The seven criteria are that the remedies should be: Legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning, in the case of corporate mechanism, based on stakeholder engagement and dialogue.

[227] WALTHER, *supra* note 212, at 27.

[228] *Rep. from an Expert Workshop entitled "Business Impacts and Non-judicial Access to Remedy: Emerging Global Experience,"* Human Rights Council, U.N. DOC. A/HRC/26/25/Add.3, 10 (Apr. 25, 2014).

[229] Guiding Principles, *supra* note 38, at Principle 31(a).

[230] UN Norms, *supra* note 91, at paragraph 18.

[231] *See generally* Reparation Principle, *supra* note 84.

respect,[232] downgrading remediation from a right in itself[233] to a discretionary decision for states or TNCs,[234] thereby significantly undermining compensation.

The lack of monitoring mechanisms to impose sanctions for non-implementation, or poor implementation, of grievance mechanisms,[235] or failure to provide adequate remedy after grievance mechanisms are engaged[236] further compromises compensation, as the procedural and substantive effectiveness of remedies becomes indeterminate.

E. Conclusion: Going Forward

The Framework and UNGP contain significant conceptual weaknesses, and are inadequate, by this Article's criteria, to address TNCs' abuse of the corporate form in violating human rights globally without repercussions. Nevertheless, the momentum, attention, and support[237] that Ruggie's work brought back to the divisive debate[238] surrounding the role of corporations in protecting human rights,[239] especially since the "virtual halt"[240] after the UN Norms' failure, warrants recognition. Nevertheless, this Article's concerns regarding the UNGP's inadequacy, as well as calls for a "universally binding"[241] basis for human rights duties, have been shared by Ecuador and South Africa, whose proposals to UNHRC have produced a resolution[242] establishing an Intergovernmental Working Group, kick-starting a negotiation process for a binding treaty on business and human rights. This Article's analysis

[232] Deva, *supra* note 53, at 102.

[233] Drimmer & Laplante, *supra* note 208, at 321.

[234] Deva, *supra* note 155, at 116.

[235] Surya Deva and David Bilchitz, *The Human Rights Obligations of Business: A Critical Framework for the Future,* in HUMAN RIGHTS OBLIGATIONS OF BUSINESS—BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 1, 16 (Surya Deva and David Bilchitz eds., 2013.

[236] WALTHER, *supra* note 212, at 25.

[237] Wettstein, *supra* note 90, at 162.

[238] S. Jerbi, *Business and Human Rights at the UN: What Might Happen Next?*, 31 HUM. RTS. Q. 299, 301 (2009).

[239] *Id.*

[240] Nicola Jägers, *UN Guiding Principles On Business And Human Rights: Making Headway Towards Real Corporate Accountability?*, 29 NETH. Q. OF HUM. RTS. 159, 160 (2011).

[241] Denis G. Arnold, *Transnational Corporations and the Duty to Respect Basic Human Rights*, 20 BUS. ETHICS Q 317, 389 (2010).

[242] United Nations Human Rights Council Res. 26/9, U.N. DOC. A/HRC/RES/26/9 (July 15, 2014).

may inform how the new treaty can work as an extension to the UNGP,[243] as every regulatory instrument has conceptual and practical limitations on its adequacy stemming from its nature. Considering that this Resolution[244] was passed by a slight majority vote,[245] and recalling the problems the UN Norms faced in attempting to directly bind corporations, recognizing which inadequacies of the UNGP can be resolved internally by the Working Group is crucial, allowing the prospective treaty to focus on filling what governance gaps remain, and thereby increasing its chances of success. These instruments, along with other instruments at various institutional levels, can then complement one another's strengths and weaknesses in a gestalt integrated regulatory framework,[246] thus maximizing their potential.

Reconciling business and human rights doctrines involves challenging orthodox doctrines, and there is no "single silver bullet" that can resolve this conflict.[247] The Framework and UNGP's long-term (in)adequacy remains to be seen, since certain issues raised here could be resolved if the parties involved were fully committed in practical implementation. Nevertheless, critical scrutiny of the regulatory framework must continue,[248] so as to promote constant evolution. This Article hopes to establish a case for some skepticism regarding claims of "progress," such that Ruggie's willingness to compromise human rights ideals for consensus does not set the precedent for future reforms.

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[243] Joe Zhang, *Negotiations Kick Off on a Binding Treaty on Business and Human Rights*, INVESTMENT TREATY NEWS (Nov. 26, 2015) http://www.iisd.org/itn/2015/11/26/negotiations-kick-off-on-a-binding-treaty-on-business-and-human-rights/.

[244] *See generally* UN Human Rights Council, *supra* note 243.

[245] *See generally* Zhang, *supra* note 244.

[246] Deva, *supra* note 155, at 176–231.

[247] *See* JOHN G. RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS 77 (2013).

[248] Wettstein, *supra* note 90, at 163.

Articles

The Changing Nature of Law's Natural Person: The Impact of Emerging Technologies on the Legal Concept of the Person

By Britta van Beers[*]

Abstract

This article discusses the legal concept of the person against the background of technological developments. Emerging technologies are offering radical ways to transform the biological and physical aspects of life. Several legal scholars claim that the technological artificialization of human life also calls for a more artificial, disembodied account of the natural person in law. According to them, the legal distinction between natural persons (human legal subjects) and artificial persons (non-human legal subjects, such as corporations) is becoming diluted and increasingly redundant. This article argues that, in an era of growing technological and postmodern disembodiment, the traditional legal distinction between natural and artificial persons remains important, albeit in a different form. An examination of the legal concept of the person in biomedical law suggests that law's category of the natural person still has its merits, not just *despite* these technological developments, but, remarkably enough, also *because* of them.

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A. Introduction

With the German legal philosopher Gustav Radbruch it could be said that: "[N]othing is as decisive for the style of a legal era as the conception of the person towards which it is oriented."[1] Radbruch's remark underlines the vital importance of reflection on the question of what it means to be a person in law. Who is the addressee of legal norms, and how is this addressee connected to actual flesh-and-blood human beings?

The apparent simplicity of this basic question proves to be deceptive. Indeed, some of the great names in philosophy and jurisprudence, ranging from Hans Kelsen to Lon Fuller, and from John Dewey to Hannah Arendt,[2] have struggled to come to an understanding of this elementary, yet puzzling notion of law. Moreover, the discussions among 19th century legal scholars about the "endless problem of corporate personality"[3]—resulting in numerous publications and even competing schools of thought—illustrate the strange elusiveness of law's concept of the person.

Given this history, it is remarkable that until recently the legal notion of the person remained largely undertheorized within contemporary legal scholarship,[4] especially among common law scholars. Indeed, within the common law world, the law of persons is not generally recognized as a separate field of study.[5] Additionally, courts and scholars employ different meanings of law's person across different branches of law, seemingly without prior, systematic reflection on the nature of this legal category.[6] The only constant seems to be the distinction between two types of legal persons: On the one hand, *natural*

[1] GUSTAV RADBRUCH, DER MENSCH IM RECHT. AUSGEWÄHLTE VORTRÄGE UND AUFSÄTZE ÜBER GRUNDFRAGEN DES RECHTS 9 (1961) ("Nichts ist so entscheidend für den Stil eines Rechtszeitalters wie die Auffassung vom Menschen, an der es sich orientiert").

[2] *See infra* notes 43, 51, 60, and 62.

[3] *See* Max Radin, *The Endless Problem of Corporate Personality*, 32 COLUM. L. REV. 643 (1932).

[4] *See* David Fagundes, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1768 (2001); Ngaire Naffine, *Who Are Law's Persons? From Cheshire Cats to Responsible Subjects,* 66 MOD. L. REV. 346 (2003); and Jessica Berg, *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 HASTINGS L. J. 370 (2007).

[5] In many civil law countries, however, the law of persons is recognized as a special area of family law, with textbooks, monographs, and sometimes even heated scholarly debates on the subject.

[6] *See* Fagundes, *supra* note 4.

persons,[7] as human bearers of rights and duties are called in legal doctrine; and on the other hand, *artificial persons*,[8] such as corporations or public bodies.

This situation, however, is currently changing in two respects. First, a number of recent monographs[9] and articles[10] on the issue of legal personality suggests a renewed interest among legal scholars in the matter. A recurring theme in these recent studies is the complex interplay between the legal concept of the person and the images of the human surfacing in new technological contexts.

Second, within this emerging body of scholarly literature, the legal distinction between natural and artificial persons is being thoroughly questioned. Recent technologies, such as medical biotechnology and artificial intelligence, are offering radical ways to transform the biological and physical aspects of life, thus challenging the natural outlines of the legal category of the person. In response to these developments, several legal scholars have claimed that this technological artificialization of human life also calls for a more artificial account of the natural person in law. According to them, the legal distinction between natural and artificial persons has lost its credibility in our postmodern and deeply technological society.

These recent attempts at deconstructing the natural/artificial divide in the law of persons raise the question as to how natural and artificial persons can be distinguished in the first place. Indeed, from a strictly legal perspective, natural and artificial persons are similar in many ways. Both can enter into contracts, incur debts, be sued, or own property. Moreover, despite its somewhat confusing designation as "natural," the natural person is clearly as much a construction of legal discourse as the artificial person is: It is the shape we take on when we enter the legal realm, leaving behind our flesh-and-blood selves, to be addressed as subjects of law.[11]

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[7] The term "natural person" is used throughout this article in a strictly legal sense and should not be confused with actual flesh-and-blood human beings.

[8] Even though the terms "juristic" or "juridical person" are also common, "artificial person" is used here because the main theme of this article concerns the artificialization of natural persons and human beings.

[9] *See*, *e.g.*, ALAIN SUPIOT, HOMO JURIDICUS: ON THE ANTHROPOLOGICAL FUNCTION OF THE LAW (Saskia Brown trans., 2007); NGAIRE NAFFINE, LAW'S MEANING OF LIFE: PHILOSOPHY, RELIGION, DARWIN AND THE LEGAL PERSON (2009); SHERYL HAMILTON, IMPERSONATIONS: TROUBLING THE PERSON IN LAW AND CULTURE (2010); Dorien Pessers, *The Symbolic Meaning of Legal Subjectivity*, *in* SYMBOLIC LEGISLATION THEORY AND NEW DEVELOPMENTS IN BIOLAW (Bart van Klink, Britta van Beers & Lonneke Poort eds., 2016); BRITTA VAN BEERS, PERSOON EN LICHAAM IN HET RECHT. MENSELIJKE WAARDIGHEID EN ZELFBESCHIKKING IN HET TIJDPERK VAN DE MEDISCHE BIOTECHNOLOGIE (2009); FLORENCE BELLIVIER, LE DROIT DES PERSONNES (2015); LA PERSONNALITÉ JURIDIQUE (Xavier Bioy ed., 2013).

[10] *See infra* note 11.

[11] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 123 (1765). From that perspective, Blackstone's explanation of the difference between natural and artificial persons is misleading: "Persons also are divided by the law into either natural persons, or artificial. Natural persons are such as the God of nature formed us; artificial

Yet certain important differences in legal design and status remain. Unlike natural persons, artificial persons cannot, for instance, have parental rights, be given jail sentences, or vote. Furthermore, while corporate bodies are formed and dissolved upon resolution, the beginning and ending of natural personality coincide with the biological events of birth and death. More generally, the artificial person is characterized by a high degree of plasticity. Indeed, if a corporation can be described as "the mere creature of law,"[12] it is a very imaginative creature: An invisible, intangible, and immortal entity,[13] "without body and without soul,"[14] which can change identity in a matter of hours, and amputate parts from itself to grow these into new legal life forms.

These basic differences between natural and artificial persons suggest a preliminary answer to the question of what makes the natural person natural in the first place. In certain contexts, the concept of natural personality presupposes an *embodied* subject, as in the case of jail sentences and the semi-organic outlines of natural personality; and, in others, a *human* subject, as in the case of parental rights or the right to vote. In that sense, natural personality is indeed premised on a certain nature, even if that nature is legally constructed.

Nonetheless, these naturalistic underpinnings of law's natural person have become contested. What can the terms "embodied" and "human" mean in a postmodern society, in which common views of the human body and humanity are increasingly being challenged, including on a legal level? More generally, appeals to naturalness or nature are increasingly mistrusted in legal and political decision-making on technological issues. A striking illustration is the outcome of a recent report from the Nuffield Council on Bioethics on the meaning of the term "naturalness" in bioethical debates. One of the report's main conclusions is "that effective communication on the ethics of science, technology, and medicine may be hindered, rather than helped, by appeals to naturalness."[15]

All of these developments make the natural person less self-evident and, in that sense, less "natural" than ever. Has the legal category of the natural person had its best time, and can the artificial person take its place? This article argues that in an era of increasing

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are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic." *Id*.

[12] *See* Trustees of Dartmouth College v. Woodward, 17 US 518 (1819).

[13] Because of its defining asset of perpetual succession.

[14] A.W. Machen, *Corporate Personality*, 24 HARV. L. REV. 253 (1911).

[15] Nuffield Council on Bioethics, *Ideas about Naturalness in Public and Political Debates about Science, Technology and Medicine*, 106 (November 2015), http://nuffieldbioethics.org/wp-content/uploads/NCOB_unnatural_booklet.pdf.

technological and postmodern disembodiment, the traditional legal distinction between natural and artificial persons remains important, albeit in a different form. An examination of the legal concept of the person, as it is emerging in the field of biomedical law ("biolaw"), suggests that the category of the natural person, even if it is going through a period of rapid change, is still thriving. It thrives not only despite technological developments, but, remarkably enough, also because of them. More importantly, the artificialization of the natural person has several problematic consequences for the regulation of biomedical developments which will be discussed in this article.

The line of reasoning is as follows. Section B considers to what extent the biological boundaries by which the natural person has been traditionally demarcated have come under pressure from recent and emerging medical technologies. This is followed by an examination of the scholarly proposals to deconstruct and "denaturalize" the legal concept of the natural person in answer to these developments. These scholars defend a strictly legal and highly technical understanding of the person which can be traced back to Roman law. Section C identifies three characteristics of this artificialistic Roman concept of the legal person, which are of specific significance for the regulation of biomedical technologies. In the Roman tradition, the natural person is: (1) a disembodied entity, (2) characterized by fictional temporal boundaries, and (3) reflecting a role that can be rewritten at will. As will be argued, these three characteristics represent three possible types of artificialization of the legal concept of the natural person which resonate in current debates on biomedical regulation: (1) a disembodiment, (2) fictionalization, and (3) fragmentation of the legal category of the natural person. Sections D, E and F draw out the problematic consequences of each of these three forms in the regulation of biomedical technologies. This analysis leads to the conclusion in Section G that a strictly legal-technical and artificialistic account of the person cannot do justice to the complex interplay between law and the biological dimensions of human life within the currently emerging body of biolaw.

B. Law's Natural Person: Artificial by Nature?

I. The Natural Boundaries of Natural Persons

Even if the category of the natural person is, in essence, a legal construction, the most basic biological facts of life, such as birth, death, and reproduction, have also all left their mark on it, as illustrated by areas of law such as family law, inheritance law, the law of birth registration, and burial law. Thus, natural persons are traditionally characterized, unlike artificial persons, by several biological traits. The following five are the most prominent:

(1) All natural persons belong to the human species;
(2) The beginning of natural personality coincides with birth;
(3) The ending of natural personality coincides with death;

(4) Natural persons are born out of a relationship between two persons of the opposite sex;
(5) Natural persons are either male or female.

Additionally, the major influence of human rights discourse and its naturalistic understanding of the legal person have served to reinforce the distinction between natural and artificial persons. In many contemporary legal contexts, therefore, law's person does not function as a merely legal-technical construction, comparable to the artificial person, but often also presupposes a certain vision of human beings.

This dogmatic distinction between natural and artificial persons, however, is coming under pressure from two directions. On the one hand, the rights of artificial persons are expanding to include rights that were formerly attributed exclusively to natural persons. In this process, artificial persons are, to a certain extent, being humanized and naturalized. A striking example is the European Court of Human Rights' recognition of corporations as holders of certain human rights.[16]

On the other hand, a tendency towards the disembodiment and artificialization of the natural person can be discerned. In a way, the natural person seems to be hemorrhaging into the artificial person by losing elements of its naturalistic aura and thus increasingly resembling the artificial person. Interestingly, where artificial personality was originally thought of as a derivative of natural personality, the natural person is now adopting certain traits of the artificial person. Indeed, all the five naturalistic premises of the natural person mentioned above seem either to be dissolving or to become contested.

II. The Technological Contestation of the Natural Person's Natural Boundaries

Each of these premises have been challenged in their own ways. As to Premise One (the requirement of membership of the human species for conferral of natural personality), an increasing number of scholars and activists are now arguing that the legal circle of persons should be widened to include other forms of life, such as certain animals or forms of artificial intelligence. On a more tangible level, the boundaries between human and animal are also blurring in biomedical settings through, for example, the creation of human-animal "cybrids."[17]

[16] *See* MARIUS EMBERLAND, THE HUMAN RIGHTS OF COMPANIES: EXPLORING THE STRUCTURE OF ECHR PROTECTION (2006); Anna Grear, *Human Rights – Human Bodies? Some Reflections on Corporate Human Rights Distortion, the Legal Subject, Embodiment and Human Rights Theory*, 17 L. AND CRITIQUE 171 (2006); Anna Grear, *Challenging Corporate 'Humanity': Legal Disembodiment, Embodiment and Human Rights,* 7:3 HUM. RTS. L. REV. 511 (2007); Anat Scolnicov, *Lifelike and Lifeless in Law: Do Corporations Have Human Rights?*, *IN* UNIVERSITY OF CAMBRIDGE FACULTY OF LAW LEGAL STUDIES RESEARCH PAPER SERIES 13/2013 (2013), http://ssrn.com/abstract=2268537.

[17] *See HFEA statement on licensing of applications to carry out research using human-animal cytoplasmic hybrid embryos*, http://www.hfea.gov.uk/418.html. In 2008, the UK Human Fertilisation and Embryology Authority (HFEA) granted the first licenses to create these hybrids.

Within the domain of Premise Two, the emergence of assisted reproductive technologies ("ARTs") has put the protection of future children on the legal-political agenda. No longer is this question limited to the status of prenatal life, such as in debates on abortion or the use of human embryonic stem cells. Instead, recent discussions have extended to the question of what we owe to children born from technological settings, and to what extent their projected interests justify intervening in prospective parents' reproductive freedoms.[18] Indeed, the welfare of future children has become one of the central principles in the law and ethics of assisted reproduction.[19]

The ending of personality, Premise Three, has been subject to vigorous legal and ethical debates since death became part of new medical practices. The best-known example is that of organ donation after brain death; however, other medical procedures, such as controlled organ donation after respiratory death[20] and continuous deep sedation at the end of life,[21] have more recently also elicited debate.

Until recently, Premise Four—legal parenthood—was largely modeled on a biological understanding of parentage, with the major exception of adoption. In response, however, to the new types of family formation that have emerged within the context of ARTs, it has now become legally possible in a number of countries for a partner in a same-sex relationship to be registered as the second parent of a child conceived through ARTs, without that partner having to go through an adoption procedure.[22] Moreover, the legal possibility of having three or four legal parents is currently being discussed in various countries and has recently even been introduced in several legal systems.[23] Also, the

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[18] In the UK, both the Congenital Disabilities Act 1976, especially Section 1A, and the Human Fertilisation and Embryology Act 1990 ("HFE Act"), especially Section 13(5), refer to the welfare and protection of children born from ARTs. For a recent discussion of the complexities surrounding this legal guideline, see Sally Sheldon, Ellie Lee & Jan Macvarish, *'Supportive Parenting', Responsibility and Regulation: The Welfare Assessment under the Reformed Human Fertilisation and Embryology Act (1990)*, 78 MOD. L. REV. 461 (2015).

[19] *See, e.g.,* G. Pennings, G. de Wert, F. Shenfield, J. Cohen, B. Tarlatzis, & P. Devroey, *ESHRE Task Force on Ethics and Law: The Welfare of the Child in Medically Assisted Reproduction*, 22 HUM. REPRODUCTION 2585 (2007).

[20] *See* Seema K. Shah & Frank G. Miller, *Can We Handle the Truth? Legal Fictions in the Determination of Death*, 36 AM. J. L. & MED. 540–85 (2010).

[21] *See*, *e.g.*, Kasper Raus, Sigrid Sterckx & Freddy Mortier, *Continuous Deep Sedation at the End of Life and the Natural Death Hypothesis*, 26(6) BIOETHICS 329 (2012).

[22] *See*, *e.g.*, Human Fertilisation and Embryology Act 2008 c. 2 (Eng.); *see* Wet Lesbisch Ouderschap 1 April 2014 (Neth.); *see* Dorien Pessers, *De Terugkeer van de Bastaard*, 88 NEDERLANDS JURISTENBLAD 2595–96 (2013) (a critical analysis of the Dutch act).

[23] In British Columbia (Canada) and California (USA), it has become possible to have three legal parents. *See* Patricia Cassidy, *Canada: Three Parents Listed on Baby's Birth Certificate*, BIONEWS (Feb. 17, 2014), http://www.bionews.org.uk/page_396795.asp; *see also* Patrick McGreevy & Melanie Mason, *Brown Signs Bill to*

creation of what has been called "three-parent babies" could be seen as a more technological refutation of the traditional legal model of two parents, even if the resulting child will be genetically related to the second mother to only a minimal extent.[24]

Lastly, the legal distinction between male and female, Premise Five, is no longer self-evident. The medical and social recognition of transsexuality and intersexuality has led to a renegotiation of the legal construction of gender. A clear indication of this is the European Court of Human Rights' 2003 ruling that the right to a private life includes the right of post-operative transsexuals to have their new gender identities recognized in official documents and birth registries.[25] Furthermore, until recently, many countries allowed recognition of a new gender identity only after operations for gender reassignment and irreversible sterilization.[26] In an increasing number of legal systems, however, these invasive requirements are now being abandoned.[27]

III. From the Artificialization of Human Life Towards the Artificialization of Law's Natural Person?

In each of the aforementioned examples, technology plays an important role in the reassessment of the natural person's naturalistic premises. All these examples suggest that the technological artificialization of human life is resulting in a corresponding artificialization of law's natural person. Indeed, emerging technologies, such as medical biotechnology and cognitive sciences, endorse a view of the human body, human life, and human nature as objects that can be redesigned, updated, and improved.

This biogenetic approach to human life has led to intense philosophical debates on the relationship between human nature and technology. How far can we push the artificialization of human nature, human reproduction, and human evolution, before they cease to be human at all? Or are technology and artificiality part of what makes us human,

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Allow Children to Have More than Two Legal Parents, LOS ANGELES TIMES (Oct. 4, 2013), http://articles.latimes.com/2013/oct/04/local/la-me-brown-bills-parents-20131005.

[24] The United Kingdom is the first nation worldwide to allow this technology. *See* H. Devlin, *Britain's House of Lords approves conception of three-person babies*, *The Guardian* (Feb. 24, 2015), http://www.theguardian.com/politics/2015/feb/24/uk-house-of-lords-approves-conception-of-three-person-babies.

[25] Christine Goodwin v. United Kingdom, App. No. 28957/95 (11 July 2002), http://hudoc.echr.coe.int/.

[26] According to Transgender Europe, 21 European countries in 2014 still, for example, required transgender people to undergo sterilization before their new gender identity could be legally recognized. *See Trans Rights Euro Map, 2014*, http://www.tgeu.org/sites/default/files/Trans_Map_Index_2014.pdf.

[27] For an overview of the European situation regarding the human rights of transgender people, see Amnesty International, *The State Decides Who I Am: Lack of Legal Gender Recognition for Transgender People in Europe* (Feb. 4, 2014).

and has human enhancement in that sense only radicalized the ways in which we have always been "artificial by nature," in the seminal words of German philosopher Helmuth Plessner?[28]

These questions resonate on a legal theoretical level through renewed reflection on the nature of law's natural persons. Do biomedical developments lead to a denaturalization or even dehumanization of law's natural person? Or rather, should it be said that the legal concept of the natural person has, in essence, always been "artificial by nature," and that biomedical developments have only served to unveil that artificial nature?

Evidently, techno-enthusiasts, "transhumanists,"[29] and advocates of "robot rights," will answer this last question in the affirmative. Less obvious is that several legal scholars—who have written extensively on the legal concept of the person—have recently joined this group by arguing for a further and more deliberate denaturalization and artificialization of the natural person.

Ngaire Naffine, for instance, whose comprehensive studies[30] of common law's person have been of enormous value to this field, proposes to "liberate the legal person" from its naturalistic confines. To her, the merits of a more artificial concept of the person are that it "allows for multiple legal identities, so that the one entity can assume different legal natures depending on her circumstances and her place in a given set of relations."[31] Following Naffine, Sheryl Hamilton finds "the greatest intellectual and social potential" in the artificialistic conception of personality as it offers "a malleable, mobile concept, thus permitting subjects to morph into other identities."[32] Jessica Berg, in turn, proposes extending the scope of the legal concept of artificial personality to include fetal, animal, and artificial forms of life in law.[33] Anna Grear argues that artificial personality is better able to "respond to the complexities, mutations, hybridities and multiplicities confronting law in the twenty-first century," including biotechnological developments and the emergence of transhumanism.[34] Lastly, according to French legal scholar Marcela Iacub,

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[28] HELMUTH PLESSNER, DIE STUFEN DES ORGANISCHEN UND DER MENSCH: EINLEITUNG IN DIE PHILOSOPHISCHE ANTHROPOLOGIE 383 (1981).

[29] Transhumanist philosophers, such as Nick Bostrom, Julian Savulescu and John Harris, advocate altering the human condition through human enhancement technologies, such as artificial intelligence, nanotechnology and biotechnology.

[30] *See supra* note 9, for her monograph *Law's Meaning of Life*, which builds on earlier work.

[31] Ngaire Naffine, *Review Essay: Liberating the Legal Person*, 26 CANADIAN J. L. & SOC'Y 202 (2011).

[32] HAMILTON, *supra* note 9, 20–21

[33] Berg, *supra* note 4.

[34] Anna Grear, *Law's Entities: Complexity, Plasticity and Justice*, 4 JURIS. 101 (2013).

any legal limit to human enhancement that is based on human dignity or human nature is at odds with the inherently constructed nature of law's concept of the person.[35]

These authors, each in their own way, propose distilling the artificialistic aspects of the legal person and bringing them to fruition. To them, the complexities of life in a postmodern society—in which the categorical distinctions between person and thing, alive and dead, human and animal, male and female, and natural and artificial are being contested in various ways—require recognizing the "multiplicity and fluidity of legal identity."[36] Indeed, their description of the legal person as "mutable and fluid,"[37] "chimeric,"[38] and "highly plastic"[39] could equally apply to the artificial humans who feature in the futuristic scenarios of techno-optimists and transhumanists. From that perspective, a strictly legal-technical understanding of the person would seem the best candidate. Within this artificialistic approach, there are no limits to the possibilities of legal personification, only the limits of lawyers' imagination.

These recent claims raise the question of what the exact relationship is between the technological artificiality of enhanced human beings on the one hand, and the legal artificiality of legal personality on the other. Should the legal concept of the natural person make place for the artificial person to keep up with the technological artificialization of human life?

In order to come to a critical discussion of these claims, first a better understanding of the artificialistic concept of the legal person is needed. The following section traces the artificialistic tradition back to Roman law: the legal person as *persona*. Three characteristics of *persona* are identified, which can also be recognized in current biolaw debates.

C. *Persona*: The Natural Person as a Legal-Technical Fiction

I. The History of Legal Personality as a Dialectical Process Between Nature and Artifact

It is not the first time in the history of the legal person that its boundaries have been subjected to vigorous renegotiation. In fact, the current wave of artificialization can be

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[35] MARCELA IACUB, LE CRIME ÉTAIT PRESQUE SEXUEL (2002); MARCELA IACUB, PENSER LES DROITS DE LA NAISSANCE (2002).

[36] Ngaire Naffine, *Our Legal Lives as Men, Women and Persons*, 21 LEGAL STUD. 642 (2004).

[37] NAFFINE, *supra* note 9, at 45.

[38] Yan Thomas, *Le Sujet de Droit, la Personne et la Nature: Sur la Critique Contemporaine du Sujet de Droi*t, LE DÉBAT 106 (1998).

[39] Grear, *supra* note 34.

regarded as the latest manifestation of an ongoing dialectical evolution of the legal concept of the person. The main question underlying these dialectics concerns the extent to which legal persons can be understood as a reflection of real-life, flesh-and-blood human beings, or rather as disembodied and strictly legal-technical abstractions. The resulting tension can be described in various terms, such as the contrast between realistic and nominalistic conceptions of the person;[40] between legal naturalism and legal artificialism;[41] or between metaphysical and metaphorical understandings of legal personality.[42]

Whichever terms are used, both conceptions have left their mark on current approaches to the legal person. Throughout its "chameleon-like change"[43] the legal person has gone through alternating currents of artificialization and naturalization. For example, there is general agreement that the artificialistic components of legal personality largely date back to Roman law.[44] From Byzantine law on, the growing influence of the view of man as *imago dei* (the image of god) and as a unity of body and soul led to gradual domestication of Roman law's imaginative approaches to *persona*. Indeed, as legal historian Jan Lokin writes, "there is no area of law in which the influence of Christian doctrine was so great as in the law of persons."[45] A more recent example is the way in which the rise of legal positivism contributed to a strictly legal-technical understanding of the person. This development stagnated when the inherent human dignity of man and his inalienable human rights were invoked in post-war human rights discourse as a naturalistic safeguard against systematic legal depersonalization of individuals in society, such as occurred in the Third Reich.

Yet through most of its reincarnations over time, the legal person remained a "curious mixture of physical reality and abstraction,"[46] "a messy imbrication"[47] of both traditions. Various naturalistic and legal-technical views on personhood followed one after the other,

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[40] David Deroussin, *Personnes, Choses, Corps*, *in* LE CORPS ET SES REPRÉSENTATIONS 79 (Emmanuel Dockès and Gilles Lhuilier eds., 2001).

[41] Yan Thomas, *Le Sujet Concret et Sa Personne. Essai d'Histoire Juridique Rétrospective*, *in* DU DROIT DE NE PAS NAÎTRE. À PROPOS DE L'AFFAIRE PERRUCHE (Olivier Cayla and Yan Thomas eds., 2002) 88-170; Iacub, *supra* note 35.

[42] *See infra* Section C.II.

[43] John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 658 (1926).

[44] Richard Tur, *The "Person" in Law*, *in* PERSONS AND PERSONALITY (A. Peacocke and G. Gillett eds., 1987) 123); Thomas, *supra* note 41; Deroussin, *supra* note 40.

[45] Jan H.A. Lokin, *Byzantine Law: Persons*, *in* OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY (S.N. Katz ed., 2009).

[46] Thomas, *supra* note 41, at 145.

[47] Hamilton, *supra* note 9, at 13.

without later concepts completely replacing older ones. Consequently, within our contemporary understanding of the legal person, "almost all concepts have persisted side by side in a confused intermixture,"[48] as the American pragmatist philosopher John Dewey writes.

To add to the confusion, judges and legal scholars have continued to use both conceptions inconsistently and randomly, without making their underlying choices explicit. As Fagundes concludes from his elaborate analysis of the American law of persons: "Courts have not been able to distinguish cleanly between these two points of view, alternately treating the issue of personhood as a commonsense determination of what is human or as a formal legal fiction unrelated to biological conceptions of humanity."[49] What is clear, however, is that the latter position, which portrays legal personality as a legal-technical fiction, is currently becoming more dominant within legal doctrine.

II. The Natural Person as a Legal Fiction: From Legal Metaphysics to Legal Metaphors

The aforementioned authors, who propagate an artificialistic account of the legal person in answer to technological developments, tend to depict the legal person as a legal fiction. In their view, the legal concept of the person has no metaphysical aspirations whatsoever. Naffine, for example, eloquently describes her own position as follows:

> Legal personification, I suggest, is not best understood as a metaphysical exercise in working out the meaning of life—or, more particularly, what it is to be a person. Jurists are not metaphysicians . . . . Rather, the legal person is better regarded as and deployed as a legal fiction that can be flexibly adapted to a wide variety of beings and things . . . .[50]

Undoubtedly, some of the fictional dimensions of law's concept of the person are inevitable and even necessary. First, if the person can be regarded as an allocation point (*Zurechnungspunkt*) for rights and duties, to borrow Hans Kelsen's terminology,[51] the natural person cannot but offer a highly generalized and abstract account of human beings. Moreover, a certain level of abstraction of legal personality is necessary in order to

[48] Dewey, *supra* note 43, at 658.

[49] Fagundes, *supra* note 4, at 1745.

[50] Naffine, *supra* note 30, at 201.

[51] More precisely: "Der gemeinsame Zurechnungspunkt für die als Pflichten und Rechte normierten Tatbestände menschlichen Verhaltens." *See* HANS KELSEN, REINE RECHTSLEHRE 53 (Erste Auflage, 1934).

achieve equality before the law[52] and to protect against intrusions by the state in the personal lives of its citizens.[53]

As a result, the law's account of the person is characterized by certain peculiarities that distinguish it from commonplace understandings of the person. The French legal scholar Maurice Hauriou captures the fictional and even mysterious nature of *homo juridicus*[54] well in the following, oft-quoted words: "Individual legal personality appears to us as continuous and self-identical; it emerges at the same time as the individual and is immediately constituted; it remains unchanged throughout its existence and unfailingly subtends unchanging legal situations; it is watchful when Man sleeps, and remains sane when Man loses his reason."[55]

Indeed, when lawyers talk about persons, they seem to talk about a different species than flesh-and-blood human beings.[56] This can explain why nominalist approaches to legal personality abound within the literature on the subject. Dewey, for example, commences his influential article on the person in law with the observation that "person signifies what law makes it signify."[57] In this vein, legal scholars often underline the difference between the legal-technical understanding of the word "person," and actual human beings.[58] Many argue that there is no essential legal difference between the artificial personality of corporations, and the personality which befalls us naturally at birth. To them, natural persons are equally artificial creatures, as much disconnected from physical reality as the artificial person.

From this perspective, it seems unfortunate that the term "person," with all its connotations from everyday speech, is used to designate what is in fact a bundle of rights and duties, as Kelsen writes.[59] According to this line of thinking, it is better to regard the legal term "person" as a metaphor.[60] The Roman etymology of the word *persona* can be

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[52] In this sense, see Naffine, *supra* note 36, at 623.

[53] In this sense, see Jacques Ellul, *Sur l'Artificialité du Droit et le Droit d'Exception*, 8 ARCHIVES DE PHILOSOPHIE DE DROIT 26 (1963).

[54] SUPIOT, *supra* note 9.

[55] *Id.* at 15.

[56] *See* Fagundes, *supra* note 4.

[57] Dewey, *supra* note 43, at 655.

[58] *See, e.g.,* J.C. GRAY, THE NATURE AND SOURCES OF LAW 27 (1909).

[59] *See* HANS KELSEN, PURE THEORY OF LAW 172 (2nd ed. 1967); B. Smith, *Legal Personality*, 37 YALE L.J. 293 (1928).

[60] Lon L. Fuller, *Legal Fictions* 25 U. ILL. L. REV. 363, 373 (1930). In similar vein, see Fagundes, *supra* note 4; Naffine, *supra* note 30; Hamilton, *supra* note 9.

used in support of this view. As is frequently mentioned in academic literature on the subject, *persona* originally stood for the mask that actors wore in Roman theatre. Thus, "the term's application to human beings was at first metaphorical," as Lon Fuller writes in one of his famous articles on legal fictions.[61]

III. The Roman Roots of Persona

As already mentioned, it is generally agreed that the "metaphorical" and artificialistic understanding of the legal person can be found in its purest form in Roman law.[62] A brief examination of the meaning of legal personality in Roman law is therefore useful to draw out several remarkable characteristics of the artificialistic conception of legal personality.

Persona in Roman law initially referred to roles that one performed in particular legal contexts.[63] In this sense, one individual could simultaneously sustain various personae. Depending on the legal and social situation one was in, one could play the legal role of *paterfamilias*, creditor, owner, employer, and so on. Conversely, in certain circumstances two persons were regarded in law as one *persona*.[64] It is clear from this characterization that legal personality in this period did not aspire to have any metaphysical connotations with the human individual.

Instead, personality in this period is closely connected with the different statuses that could be distinguished within Roman society. The roles one could play depended on the social groups of which one was part, and on the statuses that one acquired or lost throughout one's life.[65] More specifically, one's position was affected by three factors: *status libertatis* (all men are free or slave), *status civitatis* (all free men are citizens or aliens), and *status familiae* (all citizens are either *paterfamilias* or *filiusfamilias*). Together these assets formed one's *caput*. A *capitis deminutio*, or diminishing of personality, could occur when one of these assets changed.[66] According to Richard Tur, the consequence of a diminution in status was that a new person took the place of the old person. Accordingly,

[61] Fuller, *supra note 60*, at 377.

[62] Thomas, *supra* note 38; Thomas, *supra* note 41; Giorgio Agamben, *Identity without the Person*, *in* NUDITIES 46–54 (Giorgio Agamben, 2010); Tur, *supra* note 44; HANNAH ARENDT, ON REVOLUTION 102–03 (1966). For a different view, see JOHN AUSTIN, LECTURES ON JURISPRUDENCE: OR THE PHILOSOPHY OF POSITIVE LAW 348 (1885).

[63] Tur, *supra* note 44; Thomas (2002), *supra* note 41; Deroussin, *supra* note 40; AUSTIN, *supra* note 62.

[64] Deroussin, *supra* note 40, at 81; Thomas (2002), *supra* note 41, at 126–27.

[65] Deroussin, *id*.; Tur, *supra* note 44, at 117; Thomas (2002), *supra* note 41, at 127.

[66] Tur, *supra* note 44, at 117; P.J. du Plessis, *Roman Law: Persons,* in OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY (S.N. Katz ed., 2009).

"Romans could have a series of different legal lives, through the loss or acquisition of particular statuses."[67]

From the fifth and sixth centuries onwards, *persona* no longer stood for the various legal roles an individual could have, nor for one's resulting status, but rather became synonymous with the capacity to play these roles on the stage of the law.[68] It can be said that, from then on, *persona* became the legal counterpart of the individual, and that one could speak in terms of either having or not having legal personality (*personam habere* or *non habere*). Nevertheless, the flesh-and-blood individual still did not enter the theatre of law, with the most striking illustration of this being that legal personality functioned as a mechanism to include or exclude individuals in or from the legal order. Indeed, the legal status of slaves exemplifies how, in Roman law, not all human beings were equally endowed with legal personality.

As this overview shows, law's person was subject to change from its very beginning. *Persona* morphed from mask to legal role, to status, to legal capacity.[69] Yet throughout these metaphorical shifts, the radical disjunction between *persona* and *homo*—between person and human being—persisted within Roman law.[70] The concept of legal personality has been evolving since its Roman origins and will undoubtedly continue to do so. If the artificiality of Roman law's person still seems quite audacious to modern minds, that is because the concept has lost many of its nominalist edges over time and has gone through several waves of naturalization. There are indications, however, that the Roman concept of the person is about to make a come-back on the "stage" of law. As explained above, technological developments have prompted several scholars to go back to the Roman roots of the legal person, and propagate a renewed disjunction between *persona* and *homo*. Are these authors right in claiming that the artificialistic account of personality is better equipped to deal with the technological and postmodern interrogations of the human and the physical?

Although there are undoubtedly certain advantages to an artificialistic concept of the legal person over a naturalistic one, this article's central thesis is that a purely artificialistic concept shows several important shortcomings in the legal regulation of biomedical technologies. To substantiate that position, the following sub-section identifies three characteristics of the Roman concept of legal personality, which can also be recognized in contemporary debates on medical biotechnology.

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[67] Tur, *supra* note 44, at 117.

[68] Thomas, *supra* note 41, at 128; Deroussin, *supra* note 40, at 84–5.

[69] For a similar account of this evolution, see Austin, *supra* note 62, at 353.

[70] Arendt, *supra* note 62, at 102; Agamben, *supra* note 62; Thomas, *supra* note 41.

IV. Three Consequences of the Disjunction Between Persona *and* Homo

Three aspects of the Roman understanding of legal personality stand out in the context of legal debates about biomedical issues: (1) the relation between legal persons and their bodies, (2) the temporal boundaries of legal personality, and (3) the relation between legal subject and legal order which is reflected in the legal category of the person.

1. The Legal Person as a Bodiless Entity

The legal person within the Roman tradition is essentially a bodiless entity. The physical does not fit well into the picture of the person when the latter is viewed merely as a legal-technical abstraction and fiction. This absence of the human body can be understood as part of a more general tendency in the history of law to relegate the physical aspects of life from the legal realm. Interestingly, according to legal historian Jean-Pierre Baud, it was especially the classical and late Roman concept of the legal person that set into motion a long period of "disincarnation of law."[71]

Similarly, modern legal doctrine often views the person in law as an empty and neutral category,[72] an empty slot,[73] or a mold that can hold whatever contents the legal order deems appropriate at that specific time and place. Artificial legal persons such as corporations clearly offer the best example in contemporary law of this legal category's bodiless character. In the future, however, other entities may also fill the legal mold of personality.

2. The Fictional Temporal Boundaries of Legal Personality

The Roman concept of *persona* also offers a striking illustration of the differences between the constructed, statutory temporality of our legal lives on the one hand, and the biological and biographical temporality of our actual lives on the other.[74] According to Tur, the fact that within Roman law one individual could have various personae throws light on the peculiar temporal boundaries that characterize the legal person:

> When I ask my students, 'What did Romans have in common with cats?', the answer I seek, but very rarely get, is that both have many lives . . . . There was in

[71] 'Désincarnation du droit.' *See* JEAN-PIERRE BAUD, L'AFFAIRE DE LA MAIN VOLÉE. UNE HISTOIRE JURIDIQUE DU CORPS 47 (1993).

[72] Thomas, *supra* note 38, at 104.

[73] Tur, *supra* note 44, at 121.

[74] Thomas, *supra* note 41, at 136.

> Roman law no one-to-one relationship between the physical being and that physical being's legal life or lives. Thus, while it is often thought that the legal life of an individual is in some sense natural . . . even the legal life of a human being is artificial in the sense that it need not . . . stand in a one-to-one relationship with his physical life . . . . In Roman law, human beings had legal lives that started and stopped during their natural lifetimes.[75]

Indeed, legal history provides us with various examples to illustrate that legal life does not have to begin and end with birth and death. From a strictly legal-technical perspective, there are no fundamental objections to the use of legal fictions to determine the beginning and ending of legal personality. For example, according to the Roman *nasciturus* fiction,[76] which is still recognized in many legal systems, a fetus in utero is considered already born whenever that is to the child's advantage; for instance, with regard to inheritance. As to the ending of legal personality, the legal figures of *homo sacer,*[77] *mort civile* (civil death), and outlawry offer historical examples of discrepancies between legal and biological death.

3. Legal Personality as a Role That Can be Rewritten

Finally, the partially Roman origins of the current conception of legal personality demonstrate that ultimately, the legal person is a representation of the individual within the confines of the law. As such, legal personality operates as a reflection of the relation between legal subject and legal order. From this point of view, legal subjectivity is not a reflection of one's concrete, natural self, nor is it a natural attribute which befalls one automatically with birth, as is solemnly stated in the recitals of human rights declarations and conventions. Instead, as *persona*'s etymological roots in Roman theatre also show, the conferral of legal personality, like the civil status that is connected to it, can be compared to a role or mask, developed by the law for its subjects to play on the legal stage. This also means, however, that the role can be rewritten or a different mask may be chosen at any given time.

Interestingly, these three characteristics of the Roman concept of *persona* correspond with three possible types of artificialization of legal personality that can be recognized within

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[75] Tur, *supra* note 44, at 117–18.

[76] "Nasciturus pro iam nato habetur, quotiens de commodis eius agitur." (D 1.5.7).

[77] For an analysis of the concept *homo sacer* in the light of current biopolitical strategies in law, see GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE (1998) which explains that the term *homo sacer* is a figure of Roman law that signifies a person who is banned and may be killed by anybody without punishment, but who may not be sacrificed.

the current calls for a more fluid, hybrid, chimeric and plastic account of the natural person. The separation of person and body corresponds with the proposed *disembodiment* of the natural person; the fictional temporal boundaries of persona point in the direction of *fictionalization* of the natural person; and, lastly, the account of *persona* as a role or mask opens the way for a more individualized account of the legal concept of the person, resulting in a *fragmentation* of the natural person. In the next three sections, these three forms of artificialization will be critically examined, starting with the tendency towards disembodiment. As will be argued, each of these approaches falls short to explain the complexities involved in locating our human, embodied natures in biomedical law.

D. Disembodiment: The Legal-Technical Separation of Person and Body

The first implication of the artificialistic disjunction between *persona* and *homo* is the disembodiment of the legal person. Tellingly, the artificial nature of legal personality leads some legal scholars to conclude that "the embodiment of man is for his legal personality a completely irrelevant feature."[78] This should not, however, be taken to mean that the body is necessarily absent in the legal-technical framework. What it does mean is that in this legal approach, the body can be represented only as separate from and ancillary to the legal person, as a physical *superfluum*[79]—and not as an integral part of the person. In other words, from this dualistic perspective, the human body can only be viewed as an object of rights (*res*), rather than as part of the legal subject (*persona*).[80]

This separation of person and body, which follows from the strictly legal-technical understanding of the natural person, would seem to correspond with the technological separation of person and body in biomedical contexts. As biomedical technologies have brought the possibilities to isolate, conserve, and transfer human body parts and materials to a new level, so, too, have they subsequently created the conditions under which the human body can, in theory, be perceived as an object of property law and thus as separate from the person owning this body. One would consequently expect the artificialistic, legal-technical conception of personality to be dominant in this field.

I. Biolaw's Naturalization of the Legal Person

Yet, legal systems have responded more ambiguously to the emergence of biomedical technologies. Although biomedical technologies radically challenge the naturalistic premises of law's natural person, law continues to refer to the lived reality of the human

[78] "Die Leiblichkeit des Menschen ist für seine Persönlichkeit eine ganz irrelevante Eigenschaft." *See* ERNST ZITELMANN, BEGRIFF UND WESEN DER SOGENANNTEN JURISTISCHEN PERSONEN 68 (1873).

[79] Gray, *supra* note 58, at 28 (citing Meurer).

[80] *See* Baud, *supra* note 71; *see also* Deroussin, *supra* note 40.

body and to human life in its biological dimensions. In fact, the biomedical artificialization of human life has also led, somewhat paradoxically, to a renewed naturalization of law's person. This can be explained by a closer examination of the struggles within biolaw to represent the human body.

To establish a legal framework for biomedical developments, the physical realities of life must be captured, to a certain extent, in legal language. This process has so far proven to be challenging, with most of these "objects" of human origin defying existing legal categories: They go beyond the *summa divisio* of person and thing that runs through the entire system of law.[81] In some cases, human biological materials are represented in law as being distinct from their donors. The European Regulation on Advanced Therapy Medicinal Products[82] illustrates, for instance, how the allocation of medical products of human biological origin is now governed largely by internal market law. According to this logic, once human biological materials have been donated and transformed into advanced therapies, they can primarily be qualified as the object of property rights. In this context, a legal-technical account of the person will, to a large extent, suffice.

In other cases, however, the legal ties between person and body have not been severed. In most legal systems, for example, the general rule is that there is no property in the body and its parts.[83] A clear indication of this is the widely recognized legal principle of non-commercialization, according to which elements of the human body cannot give rise to financial gain for the donor.[84] The main reason for the special legal status of human body parts and materials is that, even if it is technologically possible to alienate and transfer these materials, they remain *connected* to the person in genetic, cultural-symbolic, but also legal ways.[85]

To bring this connection between the body and the person to legal expression, an embodied, more naturalist account of the legal person is necessary. Consequently, the

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[81] *See*, *e.g.*, DONNA DICKENSON, PROPERTY IN THE BODY: FEMINIST PERSPECTIVES 1–25 (CUP 2007); Muireann Quigley, *Property in Human Biomaterials—Separating Persons and Things?*, 32 OXFORD J. OF LEGAL STUD., 659 (2012).

[82] Council Regulation 1394/2007 on advanced therapy medicinal products and amending Directive 2001/83/EC and Regulation (EC) No 726/2004 2007, Nov. 13, 2007 O.J. (L 324) 121.

[83] *See, e.g.,* Jesse Wall, *The Legal Status of Body Parts: A Framework*, 31 OXFORD J. LEGAL STUD. 783 (2011); Dickenson, *supra* note 81; Radhika Rao, *Genes and Spleens: Property, Contract, or Privacy Rights in the Human Body?*, 35 J. L. & MED. ETHICS 371 (2007).

[84] *See, e.g.,* Convention of Human Rights and Biomedicine, art. 21, Apr. 4, 1997; art. 12 Council Directive 2004/23/EC on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells, March 31, 2004, 2004 O.J. (L 102) 48.

[85] Dickenson, *supra* note 81; ALASTAIR V. CAMPBELL, THE BODY IN BIOETHICS (2009); Jesse Wall, *The Trespasses of Property Law*, 40 J. MED. ETHICS 21 (2014); Charles Foster, *Dignity and the Use of Body Parts*, 40 J. MED. ETHICS 44 (2014); Rao, *supra* note 83.

biomedical artificialization of human life has, despite first appearances, also led to a renewed naturalization of law's person. In response to the spectacular rise of new medical technologies and their accompanying legal regimes, an accelerated process of "embodiment" of the legal subject is taking place: The natural person is becoming endowed with a legal body, of which human blood, genes, organs, bones, and gametes are already part.

Moreover, human dignity has emerged as one of the central principles in the juridification of the human body. The importance of human dignity for a legal understanding of the human body is illustrated by the first chapter of the EU's Charter of Fundamental Rights, which is entitled "Dignity." As well as the general right to human dignity (Article 1), this chapter brings together the right to life (Article 2), the right to physical and mental integrity (Article 3), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4), and, lastly, the prohibition of slavery and forced labor (Article 5). What connects these various fundamental rights is that each relates to the protection of physical and biological aspects of life. More specifically, each of these rights depicts the human body as a fundamental part of one's personality and humanity. It is precisely this symbolic unity and interconnectedness of person and body that can be identified as the underlying thought of the legal principle of human dignity.[86]

This reading explains how the legal principle of human dignity has become of central importance to biolaw. The unity of person and body functions as a normative view of mankind within the legal regulation of new technologies which may ultimately affect the human condition. Thus, within this field, human dignity is not understood solely as the underlying principle of human rights, but is also mobilized as a legal norm in its own right.[87]

In this elevation of human dignity to one of the central legal standards of biolaw, the transformation of law's person from *norm addressee* into independent *legal norm* is slowly becoming visible. This is because human dignity can be understood as a normative depiction of what it means to be a human person. As a result, the legal concept of the person is currently becoming so substantial and so full of content that it no longer functions solely as the subject of rights, but is also starting to have an effect on the demarcation and interpretation of those rights themselves.

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[86] *See also* Britta van Beers, Luigi Corrias & Wouter Werner, *Probing the Boundaries of Humanity, in* HUMANITY ACROSS INTERNATIONAL LAW AND BIOLAW 11–12 (Britta van Beers, Luigi Corrias, & Wouter Werner eds., 2014).

[87] DERYCK BEYLEVELD & ROGER BROWNSWORD, HUMAN DIGNITY IN BIOETHICS AND BIOLAW (2001); Van Beers, Corrias & Werner, *supra* note 86; CHARLES FOSTER, HUMAN DIGNITY IN BIOETHICS AND LAW (2011); Christopher McCrudden, *In Pursuit of Human Dignity: An Introduction to Current Debates*, *in* UNDERSTANDING HUMAN DIGNITY 3 (Christopher McCrudden ed., 2013).

II. The Biolegal Person as a Hybrid of Persona *and* Homo

Admittedly, the naturalistic account of biolaw's person also has its weaknesses. First, the biolegal naturalization of the legal subject through the concept of human dignity has been contested from the start. Controversially, human dignity's implicit norm can also imply certain limitations as to what one can do with one's own body or reproduction—as the current prohibitions on human germline genetic engineering and organ selling demonstrate. In reaction, some authors have contested such biolegal provisions by appealing to alternative readings of human dignity that stress the importance of autonomy. The resulting conflicting interpretations of human dignity have been described in various ways in the academic literature, such as empowerment versus constraint,[88] as the individual versus the collective dimension,[89] and as rights-supporting versus rights-constraining.[90] Each of these pairs lays bare the inherent tensions in this essentially contested concept, thereby fueling further critique of the concept.

Second, the rebirth of human dignity in biolaw tells only one side of the story. Because human biological materials can vary from hair and nails to organs and gametes, the law has come up with a myriad of legal constructions and ingenious intermixtures of persons and things, as well as law and biology, to represent the new biomedical realities in law. In some contexts, classic property approaches to the human body will be more adequate, while in other contexts the legal interconnectedness of person and body will be emphasized. During this process, artificialistic and naturalistic visions of the natural person blend in new ways. As such, the legal struggle to come to an understanding of the human body demonstrates, in the words of British legal scholars Herring and Chau, that "the meaning and understanding of the self is a concept that cannot be fully captured by a single concept or approach."[91]

Nonetheless, it is clear from the outset that the resulting complexities of the relationship between law's person and the human body cannot be grasped, without distortion, from a purely artificialistic or legal-technical perspective. A naturalistic account of the legal person is equally necessary to bring into view the various connections established in biolaw—between law's person and the biological dimensions of life, between *persona* and *homo*—especially given that the artificialistic lens will filter away any reference to the physical world as a violation of the inherent purity and autonomous logic of the legal system.

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[88] Beyleveld & Brownsword, *supra* note 87.

[89] Roberto Andorno, *Human Dignity and Human Rights as a Common Ground for a Global Bioethics*, 34 J. MED. & PHIL. 223 (2009).

[90] Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 702 (2008).

[91] Jonathan Herring & P.-L. Chau, *My Body, Your Body, Our Bodies*, 15 MED. L. REV. 60 (2007).

More importantly, if the legal-technical account of law's person is nevertheless used in biomedical regulation, the outcome will inevitably and directly contradict the nominalist spirit of this approach. As argued, the artificialistic concept of legal personality can represent the human body only as a separate and alienable object. Regardless of its validity, such a Cartesian approach undeniably introduces a set of metaphysical presumptions into the supposedly "empty" category of legal personality. This is at odds with the anti-metaphysical premises of the artificialistic approach. This contradictory outcome reveals that the legal-technical category of the person is essentially not designed to arrive at a legal understanding of the relationship between person and body.

E. Fictionalization: The Use of Legal Fictions at the Start and End of Life

The second shape which the artificialization of the natural person can take on, based on the earlier analysis of the concept of *persona* in Roman law, is a contestation and fictionalization of the natural person's temporal boundaries. The remarkable temporal outlines of the legal person in Roman law have acquired new meaning and relevance against the background of new medical technologies. In this manner, within the complex medical practices surrounding organ transplantation and ARTs, the beginning and ending of legal personality are no longer a static given, but have instead become subject to renegotiation, as already mentioned. In reaction to these shifting realities and complexities, new legal fictions have been introduced that tinker with law's representation of the biological boundaries of life. To explain both the novelty and problematic nature of these biolegal fictions, more needs to be said about the nature and function of legal fictions in general.

I. Fictio Legis

As mentioned earlier, the peculiarities of law's account of the person have led some authors to refer not just to artificial personality, but also to natural personality as a legal-technical fiction.[92] Legal fictions are the most striking example of law's capacity to bend the truth for its own purposes. They can be defined as openly false statements in law, or as false statements that serve a certain legal purpose.[93] In a way, the use of fictions in law results from "willing suspension of disbelief,"[94] to use Coleridge's famous definition of literary fiction. As "conceits of the legal imagination"[95] they testify to law's technical and

[92] *See* Fagundes, *supra* note 4; *see also* Fuller, *supra* note 60, at 377; and Naffine, *supra* note 30.

[93] Fuller, *supra* note 60, at 369.

[94] WILLEM J. WITTEVEEN, DE RETORIEK IN HET RECHT. OVER RETORICA EN INTERPRETATIE, STAATSRECHT EN DEMOCRATIE 409 (1988).

[95] Fuller, *supra* note 60, at 363.

nominalist dimensions. The aforementioned *nasciturus* fiction, for instance, is clearly not meant to deceive anyone about the child's actual date of birth, but rather to enable the child, once he or she is born, to retroactively enjoy certain benefits. Similarly, corporate personality is often regarded as a legal fiction because its purpose is not to mask the differences between actual persons and corporations, but instead to offer an efficient way for some of the rules pertaining to natural persons to also apply to corporations.

The emergence of new legal fictions, and the re-emergence of old ones, in the rapidly developing area of medical law underline Fuller's claim "that the age of the legal fiction is not over."[96] These legal-medical fictions also illustrate the view that "the fiction is generally the product of the law's struggles with new problems."[97] In those cases, legal fictions can offer a smooth transition from the old to the new situation, without requiring the development of an entirely new legal framework. Correspondingly, new legal fictions have been called into existence to establish a legal understanding of the shifting boundaries of birth and death in the new contexts of organ transplantation and ARTs. However, the use of fictions in these areas comes at a certain price. The legal fictionalization of the ending of life will first be analyzed, followed by an examination of new legal fictions at the beginning of life.

II. The Fictionalization of Death in the Practice of Post-Mortem Organ Procurement

The technological possibility of postmortem organ procurement confronts legal orders with the question of how to facilitate organ removal at a sufficiently early stage without violating the "dead donor rule." Under this rule, vital organs can be removed only after the patient's death, and thus cannot be the cause of death. As is commonly known, the solution found for this problem has been to create new legal definitions of death, the best known of which is brain death. In earlier times, death was determined exclusively by verifying that the body had no pulse, was cold to the touch, and was without breath. If transplant surgeons had to wait until this stage, however, most organs would already be damaged before transplantation. The concept of brain death consequently offers a solution by redefining death as the irreversible cessation of all brain functions. Without this redefinition, the removal of organs in such contexts would amount to murder.

More recently, a new definition of death has emerged in cases of so-called controlled donation after circulatory determination of death ("cDCDD"). In this practice, life-sustaining support is withdrawn when further treatment is deemed pointless. After circulatory functions such as breathing and pulse have ceased, surgeons will wait a certain time to ensure that the patient's death is irreversible before starting organ retrieval. Surgeons, however, need to procure the organs as soon as possible for the transplantation

[96] Lon L. Fuller, *Legal Fictions: Third Installment*, 25 U. ILL. L. REV. 878 (1930–1931).

[97] *Id*.

to be successful. Although medical protocols have solved this tension by requiring an interval between the cessation of circulatory functions and organ procurement, in practice physicians actually have a certain discretionary power. The interval between cessation of circulatory functions and organ procurement is sometimes so short that questions have arisen as to whether death in these cases is truly irreversible. The most striking illustration is heart procurement from non-heart beating patients,[98] which seems, in itself, a *contradictio in terminis*.

To some, post-mortem organ procurement practices may appear to entail a minor legal shift in the definition of death by taking an alternative and earlier biological event as its basis. Yet, in various respects, it makes more sense to view these new definitions of death as unacknowledged legal fictions, as Shah, Truog, and Miller convincingly argue in a recent series of articles.[99] As they see it, brain death and the concept of death in cDDCD cases are both so far removed from ordinary biological and legal understandings of death, that it is better to be explicit about the artificiality of these legal constructions by calling them what they are: legal fictions.

For example, some brain-dead patients maintain integrative functioning for several years.[100] As to cDCDD, some medical interventions to preserve organs may actually hasten death.[101] Moreover, if brain death were truly to offer a new biological definition of death, then it would have to be similarly endorsed in all contexts. In practice, however, physicians can decide not to use this concept. A good example of such a situation is the status of brain-dead pregnant women. In those cases, brain death cannot be the sole or decisive factor in deciding whether the pregnancy will be continued, as other interests will also weigh in.[102] In this light, brain death can better be regarded as a so-called *status fiction*, as Shah and others argue, whereby medical professionals may, in their discretion, treat persons who are not dead *as if* they were already dead for organ donation purposes.[103] In the practice of cDCDD, medical professionals rely on a different type of legal fiction; an *anticipatory fiction*, whereby surgeons are allowed to proceed as if death has already taken

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[98] A.L. Dalle Ave et al., *An Analysis of Heart Donation After Circulatory Determination of Death*, J. MED. ETHICS doi:10.1136/medethics-2015-103224 (2016).

[99] *See* Shah & Miller, *ibid*; Seema K. Shah, *Piercing the Veil: The Limits of Brain Death as a Legal Fiction*, 48:2 U. OF MICH. J. L. REFORM 301 (2015); Robert D. Truog & Frank G. Miller, *Changing the Conversation about Brain Death*, 14:8 AM. J. BIOETHICS 9 (2014); Seema K. Shah, Frank G. Miller & Robert D. Truog, *Death and Legal Fictions*, 37 J. MED. ETHICS 719 (2011).

[100] *See* D. Allan Shewmon, *Brain Death – Can It Be Resuscitated?,* 39(2) HASTINGS CENTER REPORT 18 (2009).

[101] Shah & Miller 2010, *supra* note 20, at 552.

[102] For a more elaborate analysis of this situation, see Shah, *supra* note 101; Truog & Miller, *supra* note 101.

[103] Shah & Miller, *supra* note 20, at 562.

place, even if circulatory death cannot, with certainty, be declared irreversible at the moment of procurement.[104]

If it is true that legal fictions are used to define death, this raises several important concerns. The American Presidential report *Defining Death* hints at these concerns by stating that the policy in these matters "must accurately reflect the social meaning of death and not constitute a mere legal fiction."[105] Shah and Miller argue that the main reason that new definitions of death are generally denied to be legal fictions—and instead presented as a reflection of social and biological meanings of death—is to take away the impression that this new approach has been devised exclusively to promote the practice of organ donation.[106] Indeed, it could be argued that implicitly using a legal fiction in the context of organ donation obfuscates what may be actually happening: Organs are being procured from patients who are still alive at the moment of procurement, transgressing the dead donor rule.

Depending on one's ethical viewpoint, this abandonment of the dead donor rule is not necessarily problematic as the procedure may save the lives of others. For example, Shah, Truog, and Miller use their analysis to argue for an abandonment of the rule. This position, however, remains highly contested. Many authors continue to defend the rule that organs can only be procured from dead donors, and view recent developments in the field of post-mortem organ procurement as a sign that the dead donor rule should be more carefully applied. More importantly, even if we agree that the end indeed justifies the means in the context of organ procurement, it would be preferable to know exactly what these means are. This would lead to more transparent and honest deliberations on an issue that touches upon fundamental questions of life and death.

III. The Fictional Legal Subject of Wrongful Life Claims

Legal fictions have also been introduced at the start of legal life, specifically within the regulation of ARTs. The welfare of future children has become one of the main principles in this field of law,[107] with the underlying idea being that decisions made by prospective parents during pregnancy, or even before conception, may affect the interests of their future children. This concern can be recognized as one of the guiding thoughts in the UK

[104] Shah & Miller, *supra* note 20, at 563–64.

[105] President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, DEFINING DEATH: A REPORT ON THE MEDICAL, LEGAL AND ETHICAL ISSUES IN THE DETERMINATION OF DEATH 31 (1981).

[106] Shah & Miller, *supra* note 20, at 560.

[107] *See supra* notes 18 and 19.

Congenital Disabilities Act 1976, which made it possible for a child who is born disabled as the result of another's fault to claim compensation for the resulting disabilities.[108]

References to the welfare of future children in the context of ARTs can, however, lead to highly complex legal puzzles and, as shall be demonstrated, the creation of new legal fictions. These complexities have come to light specifically in legal systems, such as the Netherlands and several American states, that allow children resulting from ARTs to sue for wrongful life.[109] Interestingly, these claims seem to have become possible also under English law since the 1990 amendments to the Congenital Disabilities Act. The English situation is used here to illustrate the legal fictions implied by wrongful life actions.

In 1990 the Human Fertilisation and Embryology Act (HFEA) extended the scope of the Congenital Disabilities Act to cover situations involving assisted reproduction, including pre-implantation genetic diagnosis (PGD). PGD involves selecting an embryo, based on genetic criteria, before it is implanted in the prospective mother's uterus. The resulting new section 1A of the Act stipulates that, in cases of assisted reproduction in which an act or omission during selection causes disabilities, "the child's disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable accordingly at the suit of the child."[110]

Even if the 1990 introduction of section 1A intended to put children born through ARTs on an equal footing with those born under natural circumstances, this new section has created the possibility—seemingly unintentionally—of wrongful life claims under English law.[111] This is striking in the light of the well-known decision in *McKay and Another v. Essex Area Health Authority,*[112] which explicitly held that wrongful life actions are unacceptable under English law.

The wrongful life action implicitly recognized in section 1A allows children who are born disabled "from an act or omission in the course of the selection"[113] the legal means to seek recourse for their disabilities. Remarkably, the child can claim damages for diseases that

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[108] In Section 1.1 of the Act.

[109] For an overview of wrongful life actions in several jurisdictions, see Ivo Giesen, *The Use and Influence of Comparative Law in "Wrongful Life" Cases* 8 UTRECHT L. REV. 35 (2012); and Ronen Perry, *It's a Wonderful Life* 93 CORNELL L. REV. 329 (2007).

[110] Section 1A(1)(b).

[111] *See* Rosamund Scott, *Reconsidering "Wrongful Life" in England after Thirty Years: Legislative Mistakes and Unjustifiable Anomalies*, 72 CAMBRIDGE L.J. 118–25 (2013).

[112] McKay and Another v Essex Area Health Authority [1982] 1166 (QB); [1982] 2 All ER 771 (CA).

[113] Section 1A(1)(b).

were already present at conception and that are thus inherent to the child's existence. To put it differently, although the child could not have been born without these disabilities, section 1A presents the latter as damage. It will probably not come as a surprise, then, that the legal construction that section 1A introduces involves legal fictions pertaining to law's person on several levels. Even Tur—who describes legal personality as "wholly formal . . . an empty slot that can be filled by anything that can have rights or duties"[114]—admits to being troubled by the fictions underlying wrongful life claims.[115]

First, as children who sue for wrongful life are often also mentally disabled, it will usually be their parents who claim wrongful life on the children's behalf. Second, if the welfare of children is taken into consideration at this early stage, their legal interests precede their ascendance as legal subjects. It could consequently be claimed that the beginning of legal personality no longer coincides unambiguously with birth. The third and most remarkable legal fiction becomes evident if we focus on the damages awarded to children in wrongful life cases.

Two interpretations of damages in wrongful life claims first need to be distinguished. As the child's disabilities are inherent to his or her existence, a first possible approach is to award damages to the child for the fact of having been born. This seems to be the argumentation followed by the Dutch Supreme Court (*Hoge Raad*) in the Baby Kelly case.[116] This approach is very controversial as, in this interpretation, the fact of being alive is indirectly presented as something for which one can be compensated. How can one have a right or legal interest to be aborted? Is this not at odds with the legal principle of human dignity? Moreover, how can one calculate the amount of damages to award, given that it seems impossible to compare the value of an existence with disabilities with the value of non-existence?

If, however, we take law's artificiality as a starting point, a different interpretation becomes possible, as legal scholar Rosamund Scott argues. From that perspective, awarding damages to the child for his or her entire life does not have to be interpreted to mean that the child, as he or she now is, would rather not live or not be born. Instead, this legal reasoning implies, in Scott's words:

> [A] normative conception of harm in which a person is understood to be worse off in the world in which she is born than in the alternative world, where that alternative world is understood as an *artefact* or a

[114] Tur, *supra* note 44, at 121.

[115] Tur, *supra* note 44, at 126.

[116] HR 18 Maart 2005, NJ 2006, 606 m.nt. JBMV (*Baby Kelly*).

> *construct*, for the purpose of moral, and ultimately legal, reasoning.[117]

Oliver Wendell Holmes' famous phrase that "the life of the law has not been logic" could be used in Scott's defense. Nevertheless, the question remains as to whether these legal-technical fabrications distract our attention from more vital questions, such as the question of whether certain lives can be deemed to be so unbearable that they can be perceived, from a legal perspective, as not worth living. Indeed, a large part of Scott's interesting analysis is focused on the question of which cases involve harm that is severe enough to qualify for a wrongful life action.

A second option is to hold the third party liable only for the child's disabilities. This approach is at the basis of section 1A of the UK Act, and was also chosen by the French *Cour de Cassation* in its famous *Perruche* decision on wrongful life.[118] This interpretation raises other concerns. As the disability is inherent to the child's existence, and only nature or a genetic predisposition could have caused it, holding third parties liable for this disability would seem to go against the "laws of nature." In other words, interpreting wrongful life claims in this way would seem to stretch the concept of legal causation to its limit.

More importantly, it creates a new legal fiction; that is, the fiction that the child could have been born without disabilities. In this interpretation, it is no longer a question of an alleged right or interest not to be born, which would seem to underlie the wrongful life claims in the first interpretation, but rather the right to be born in another body. As this construction fictionalizes the way the natural person relates to his or her body, it could be said that the result is not just a legal fiction, but an entirely fictional legal subject, as Yan Thomas argues in his eloquent analysis of the *Perruche* case.[119]

As such, this new legal fiction takes the artificiality of law's natural person to a whole new level. By recognizing wrongful life claims, children can legally contest the natural state in which they were born, thereby dissociating their legal selves from their embodied selves in a radically new way. Moreover, by exercising their right to be born in another body, these individuals retroactively create a legal persona that precedes their conception.[120] The disjunction between legal and biological temporality, which, as we have seen, goes back to Roman law, is thereby brought to new heights.

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[117] Scott, *supra* note 111, at 131.

[118] Cour de cassation [Cass.] [Supreme Court for Judicial Matters] ass. plen., Nov. 17, 2000, (*Perruche*), *JCP* 2000, II, 10438, 2293. This case law was overturned by the Patients' Rights and Quality of Care Act (2002).

[119] Thomas, *supra* note 41, at 165–66.

[120] *Id*.

This section argued that the use of legal fictions at the start and end of life can have several adverse effects. The case of brain death shows that using legal fictions in questions of life and death, when these fictions remain unacknowledged, can serve to conceal vital arguments and considerations, such as the fact that the dead donor rule may actually be violated. In turn, the legal fictions that are employed in wrongful life cases radicalize the gap between legal and biological reality to such an extent that the natural self and legal self not only become dissociated, but even juxtaposed. Within this context the use of legal fictions rests on a negation of what is biologically possible. Does that offer a new illustration of the inherent artificiality of legal-technical reasoning? Or should one rather say, in Fuller's words, that "there are limits to the elasticity of even legal concepts?"[121]

F. Fragmentation: The Natural Person as *Causa Sui*

The wrongful life fiction, as identified in the previous section, illustrates how the disjunction between the legal person and its flesh-and-blood counterpart opens up the possibility for legal persons to use their legal subjectivity to contest the "natural" shape they take on in law, and claim the right to decide themselves how they are represented in the legal order. This section focuses on the related issue of the increasing numbers of individuals contesting the ways in which they are known and registered in the legal order. They are legal subjects claiming the right to dictate the terms of their own constitution. In other words, if legal personality can be viewed as the role that the law writes for its subjects to play on the legal stage, these individuals demand to be recognized as the authors or co-authors of their own roles. This brings into focus the last of the aforementioned three possible types of artificialization of the natural person: A personal customization and therefore fragmentation of natural personality.

I. "The State Decides Who I Am"[122]

Recent public debates—on the recognition of a third gender, new forms of parenthood, and the option to let individuals decide for themselves on the factors to be considered decisive in the ultimate determination of their death—illustrate how individuals can experience the naturalistic characteristics of their legal personalities as being restrictive of their rights and freedoms. Their question is, "Why should the state decide who I am?"[123]

In a way, these individuals remind one of the sailors on Neurath's boat who must reconstruct their ship on the open sea; they use their legal subjectivity to reshape the

[121] Fuller, *supra* note 60, at 384.

[122] *See* Amnesty International, *supra* note 27.

[123] *Id*.

conditions under which they are known as legal subjects. Although their quest is not logically impossible, it is also clear beforehand that there are certain limits to what aspects of their legal personality can be reconstructed and replaced in the process. If foundational categories of law, such as legal personality, become completely open to subjective interpretation by the legal subjects themselves, the legal system will become too singular and uneven to be able to guarantee legal certainty and equality before the law. The question is when the limit has been reached. Several recent illustrations of the claim to legally define oneself are discussed below in order to provide a tentative answer to that question.

The claim for legal *autopoiesis* can, firstly, be recognized in discussions on transsexuality. Naffine proposes, for example, to outlaw sexing altogether:

> [T]o be true to pure liberal individualism, the law might permit and enable self-ascribed sexing. This might entail a proliferation of sexes from which to choose or at least a third term . . . . We might choose to have a sex to express our individuality . . . or we might choose to have no sex at all.[124]

In other words, "the multiplicity and fluidity of legal identity"[125] that characterizes the legal-technical understanding of the legal person should also be applied to gender. Similarly, Chau and Herring argue that "the law must cease to use sex as a legal category . . . and should instead recognize a wide range of sexual identities" to do justice to the "complexity of every individual."[126]

The case of transsexuality shows how a legal-technical conception of the legal person can be mobilized for emancipatory goals, even if this overtly political agenda means that one is, strictly speaking, abandoning the legal-technical framework. In fact, self-ascribed sexing is close to becoming a legal reality in some legal systems. In Germany and the Netherlands, for example, the legal requirement of surgery as a pre-condition for recognizing one's new gender has recently been deemed a violation of the constitutional right to physical integrity.[127] Physical criteria for legally establishing the new gender have therefore been abandoned. Instead, as with the UK Gender Recognition Act 2004, a permanent conviction

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[124] Naffine, *supra* note 36, at 641.

[125] *Id.* at 642.

[126] P.-L. Chau & Jonathan Herring, *Defining, Assigning and Designing Sex*, 16 INT'L J. L., POL'Y & THE FAM. 358 (2002).

[127] For Germany, see Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 11, 2011, 1 BvR 3295/07, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 909, paras. 70–71; for the Netherlands, see *Transgenderwet* 18 Dec. 2013 Stb. 2013.

that one belongs to the other gender, with such conviction to be tested by a committee of experts, now constitutes sufficient grounds to have one's gender amended in the birth registries. Danish law took it one step further in 2014 by not even requiring evidence from experts for a new gender's legal recognition.[128]

II. "Nobody Can Create Rights for Himself"[129]

In the previous quote, Naffine describes her arguments as a logical application of liberal thought. Indeed, self-ascribed sexing can be interpreted as a liberalization of the gender difference, leaving it to the individual to decide where the boundary between the sexes is drawn. Notwithstanding the positive, emancipatory effects in the case of transsexuality, this logic of self-ascription has its limitations when applied to the legal concept of the person and its attributes. The risk is a somewhat radicalized reading of autonomy and individual rights, which neglects the institutional conditions under which one can become an autonomous subject in the first place.[130]

Interestingly, it is generally agreed, even within the artificialistic tradition, that there are limits to seeing the natural person as its own author, as *causa sui*. The partially Roman origins of the current conception of legal personality can be used, for example, to demonstrate that, ultimately, the legal order determines which entities count as legal subjects, as opposed to the legal subjects themselves.

The ambiguous meaning of the term "subject" is revelatory in that respect; as legal subjects, individuals are part of the legal order to which they are *subjected*, but which in its turn also constitutes them as autonomous *subjects*.[131] This lays bare the following paradox of legal personality: Even though legal subjectivity enables one to perform legal action and, as such, constitutes one's legal autonomy and self-determination, the legal category of the person itself is necessarily *pre*determined by the legal order.

The paradox involved in the constitution of the legal subject reveals what Kelsen refers to as "an antagonism between the law as an objectively valid order, a system of binding norms (the objective law) and the subjective law (the right) as possessed by a subject."[132] It is clear to him that "nobody can create rights for himself . . . . [T]he legal determination

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[128] *See* E. Saner, 'Europe's Terrible Trans Rights Record: Will Denmark's New Law Spark Change?' *The Guardian* (Sept. 1. 2014), http://www.theguardian.com/society/shortcuts/2014/sep/01/europe-terrible-trans-rights-record-denmark-new-law.

[129] KELSEN, *supra* note 59, at 170.

[130] SUPIOT, *supra* note 9, at 21; Paul Ricoeur, *Who Is the Subject of Rights?*, *in* THE JUST 9–10 (Paul Ricoeur, 2000).

[131] In that sense, see SUPIOT, *id.*, at 20–21.

[132] KELSEN, *supra* note 59, 170.

ultimately originates in the objective law and not in the legal subjects subordinated to it. Consequently there is no full self-determination even in private law."[133]

Therefore, even if law's person in the Roman and Kelsenian conception can function without a metaphysical, theological, or naturalistic substrate, it is still the product of a "higher," albeit secular, authority: The legal order. Consequently, there are certain logical limits to the freedom that legal subjects have to choose or appropriate their own masks for the legal stage. These masks reflect their ties to the legal order and are therefore essentially public. To borrow an intriguing phrase from Hannah Arendt, "Personality is anything but a private affair,"[134] even on a legal level.

In that sense, the state inevitably defines, in some way or another, who we are for the law's purposes. As the historical example of slavery demonstrates, as well as the contemporary example of inter- and transsexuality, these definitions can be oppressive and exclusionary. It could be said, however, that allowing self-ascription on a large scale within the law of persons introduces "the illusion . . . of an infinite multiplication of masks," as Agamben writes.[135] This may lead to a shattering of the category of the legal person in multiple interpretations.

Moreover, opening other aspects of the law of persons to individual preferences could have far-reaching consequences. If, for instance, a contractualist logic were to be consistently applied to bioethical questions which touch upon the division between persons and thing, the result would be antithetical to the foundations of much biomedical legislation. Should we leave decisions on the fate of corpses, organs, and frozen embryos entirely to the individuals whose biological materials are involved? That would amount to a conception of these entities as objects of individual property rights.

Another illustration is offered by proposals to personalize the death standard in contemporary debates on organ donation. Ethicists Savulescu and Wilkinson, and legal scholar Bagheri argue that it is time to abandon the dead donor rule and instead to leave it up to individuals themselves to define what would constitute their deaths.[136] Indeed, as they write, legal death is currently defined differently in each country. Why not think bioethical pluralism through more radically and make the death standard dependent on individual preferences? Even if, however, this would perhaps make organs more readily

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[133] *Id.* at 170–71.

[134] HANNAH ARENDT, MEN IN DARK TIMES 72 (1968).

[135] Agamben, *supra* note 62, at 53.

[136] Julian Savulescu & Dominic Wilkinson, *Death Fiction and Taking Organs from the Living*, PRACTICAL ETHICS (Oct. 24, 2008), http://blog.practicalethics.ox.ac.uk/2008/10/death-fiction-and-taking-organs-from-the-living; Alireza Bagheri, *Individual choice in the definition of death*, J. L. MED. ETHICS 33: 146–49 (2007).

available, this approach could also be regarded as a direct contradiction to the Hippocratic oath.

A final example is the way in which ARTs fundamentally challenge the traditional family structure through their multiplication of mothers and fathers. Who should decide what the relationship is between a child and his or her multiple parents? Should the traditional family law system, with its attribution of family statuses and establishment of kinship, be replaced by an intent-based parenthood system, in which filiation is the result of private contracts?[137] It is highly questionable whether such a contractualization of family relations, which turns children into objects of contract law, would be in the child's best interest.

The ambition to abolish legal statuses and replace them with contracts and individual rights would seem, in the long run, a self-defeating project that ignores the vital importance of law's symbolic, constitutive, and expressive functions.[138] More importantly, if the founding categories of law were open to subjective interpretation by the legal subjects themselves, the legal system would become too singular and uneven to be able to guarantee legal certainty and equality for the law. There is a limit, therefore, as to how much fragmentation a legal order can take.

G. Conclusion: The Changing Nature of Law's Natural Persons

Postmodern and poststructuralist philosophy in the 1960s and 1970s announced the death of the human subject. Now, a few decades later, new technologies have led to a more tangible dissolution and fragmentation of the human subject and the human body. The effects of this dissolution have also reached the legal order: Law's natural person now seems less natural and less coherent than ever. In that sense, the artificialization of human life is running parallel with the artificialization of law's natural person.

Each of the naturalistic premises of the natural person, such as the fact that the beginning and ending of legal personality coincide with birth and death, and that natural persons are either male or female, has become contested. Moreover, even if it is clear that the natural person is distinguished from the artificial person by its human and embodied nature, it is also clear that terms such as "human" and "embodied" have become shrouded in

[137] For a recent overview and analysis of this discussion, see Yasmine Ergas, *Babies without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy*, 27 EMORY INT'L L. REV. 138 (2013).

[138] For further reflection on the symbolic functions of legal personality, see SUPIOT, *supra* note 9; Pessers, *supra* note 9. For more general reflection on the symbolic functions of law in biomedical regulation, see SYMBOLIC LEGISLATION THEORY AND DEVELOPMENTS IN BIOLAW (Bart van Klink, Britta van Beers & Lonneke Poort eds., 2016 and Britta van Beers, *Is Europe 'Giving in to Baby Markets'? Reproductive Tourism in Europe and the Gradual Erosion of Existing Legal Limits to Reproductive Markets*, MED. L. REV. 23(1), 103–34 (2015).

controversy. Correspondingly, heated debates have emerged among legal scholars about human dignity and the status of the human body and derived materials.

Has the time now come, then, to declare the death of law's natural person? Should the natural person move over and make place for the inherently plastic and disembodied artificial person? According to several authors writing on the law of persons, a further artificialization of law's natural person—in the form of either a disembodiment, fictionalization or customization of this legal category—is indeed necessitated by the complexities, multiplicities, and fluid realities of life in a postmodern society. These authors stress, moreover, that a more artificial conception of the person is already latently present within law in the form of the Roman concept of *persona*. More generally, it is beyond doubt that law's natural person differs radically from real-life human beings and can be interpreted differently, depending on the legal situation. From that perspective, James Boyle is right by pointing out that "law—out of all the disciplines of market and society—has been the only one with a postmodern subject."[139]

Nevertheless, this Article's main thesis is that law's category of the natural person still has its merits, not only *despite* current developments, but maybe even *because* of them. Without doubt, the legal nature of law's natural persons is no longer self-evident and is currently undergoing a period of vigorous change. Biomedical and other enhancement technologies have complicated and challenged the relationship between the legal person and its natural substrate. Moreover, the legal nature of the natural person is not set in stone, and has been subject to change already from its Roman origins. In that sense, the natural person necessarily remains a hybrid of artifice and nature, also in the era of biomedical technology. Whether these technologies will eradicate the naturalistic premises of law's natural person altogether, however, remains to be seen.

As this article discusses, recent arguments favoring of a more artificial concept of the person ignore the multiple ways in which law brings about hybrid constructions of artifice and nature. Moreover, mobilizing a strictly legal-technical and artificialistic approach to the legal person to resolve issues raised by new medical technologies can also lead to undesirable, extreme and contradictory outcomes. Especially in the case of the legal fiction of wrongful life, the artificial world of law is transformed into a dizzying legal hall of mirrors; the more we peer into it, the more we lose track of where our natural and artificial selves end, and where our legal selves begin. Law's person is then no longer the legal reflection of flesh-and-blood human beings; it is no longer even the reflection of a legal understanding of flesh-and-blood human beings. Instead, the legal person, in its radically artificialized version, seems to become a copy without original, a *simulacrum*.[140]

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[139] James Boyle, *Is Subjectivity Possible? The Postmodern Subject in Legal Theory*, 62 COLO. L. REV. 523 (1991).

[140] *See* GILLES DELEUZE, THE LOGIC OF SENSE 257 (1990). Deleuze gives the following definition of *simulacrum*:

More generally, the answers offered by the artificialistic approach to law's person do not answer the most vital questions raised by biomedical technologies. It is all too easy to maintain that law is radically cut off from biological reality, or that individuals have the right to shape themselves as they want, in an era in which the human condition itself is becoming the object of technological interventions. On the contrary, emerging technologies such as artificial intelligence and medical biotechnology place the essentially contested concepts of humanity, human dignity and human nature back onto the legal agenda. No longer merely a bone of contention in the mainly theoretical debates between legal positivists and natural law thinkers, human nature has now become the focal point of heated political debates on the legal regulation of technologies that may actually affect the human condition. These questions are not of a merely legal-technical nature. Therefore, a strictly legal-technical concept of the person cannot suffice in the regulation of emerging technologies. Instead, what is needed is a legal concept of the person which can bring to expression what is, ultimately, at stake in the coming era of human enhancement technologies: Our embodied, human nature.

> If we say of the simulacrum that it is a copy of a copy, an infinitely degraded icon, an infinitely loose resemblance, we then miss the essential, that is, the difference in nature between simulacrum and copy . . . . The copy is an image endowed with resemblance, the simulacrum is an image without resemblance. *Id.*

Articles

Free Movement of Electricity and the Revival of System Stability Justifications

By Max Salomon Jansson[*]

Abstract

EU Member States have in recent years designed national schemes to support the development of renewable energy. For example, in systems of feed-in-tariffs the states guarantee for a given period of time plants generating electricity from renewable resources the market price plus a premium. These feed-in-tariffs have normally only been awarded to electricity generated in-state. The preference given to in-state industry has been challenged in court as contradicting the principle non-discrimination on the European internal market. The decision by national legislatures to limit the availability of feed-in-tariffs to electricity generated in-state, however, has—to the surprise of many—been found justifiable by the European Court of Justice. This Article illustrates how the objective to ensure system stability has emerged as the strongest ground of justification in the context of cross-border electricity trade and how similar arguments have actually been used previously in the context of the health care service sector. While the reasoning of the court is defendable, the court could have developed an even more nuanced and informative position if it had taken notice of additional aspects that have popped up in the U.S. debate on similar questions.

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A. Introduction

For years, the European Union has already developed a policy to promote energy from renewable resources.[1] A key objective with this strategy is to reduce the dependency on fossil fuel, in part because of the effects their greenhouse gas (GHG) emissions is having on the global climate. These efforts can only be expected to intensify following the international deal struck at the 21st annual Conference of the Parties hosted by the United Nations Framework Convention on Climate Change (COP21).[2]

The responsibility to implement the strategy lies with the EU's Member States. They have indeed put in place schemes that support renewables but have also commonly included provisions that limit the access of this support to domestically produced energy. Such provisions create fragmentation on the internal energy market and run counter to the stated objective of completing the energy union.[3] Importantly, the compatibility of the schemes with the provisions on free movement of goods in Articles 34–36 of the Treaty on the Functioning of the European Union (TFEU) has already been challenged at least three times.

In *PreussenElektra,*[4] the Court of Justice of the European Union (CJEU) was presented with a case concerning the German system of feed-in-tariffs (FITs). According to national law, an energy supplier is required to buy all renewable energy produced in their region of establishment at a fixed price. A supplier could receive a partial reimbursement in case the purchased renewable energy exceeded five percent of the total supply of that supplier. *PreussenElektra* claimed to have an interest in buying more affordable renewable energy from abroad and objected to being obliged to buy a large share of domestic energy on the grounds that this reduced its importing capacity.

In the years after *PreussenElektra*, the EU has formed a concrete strategy to increase the share of renewable energy to 20 per cent of its energy consumption in 2020. In order to achieve this target, each Member State has been assigned a national target and shall, in

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[1] Commission Communication, Energy 2020: A strategy for competitive, sustainable and secure energy, COM (2010) 639 final; Commission Communication, Energy Roadmap 2050, COM (2011) 885 final; Commission Communication, A policy framework for climate and energy in the period from 2020 to 2030, COM (2014) 15 final.

[2] COP21, Adoption of the Paris Agreement, Dec. 12, 2015, UNFCCC/CP/2015/L.9.

[3] Commission Communication, A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy, COM (2015) 80 final.

[4] Case C-379/98, PreussenElektra AG v. Schhleswag AG, 2001 E.C.R. I-2099 (hereinafter PreussenElektra).

accordance with the Renewable Energy Directive (RED),[5] establish support schemes promoting the growth of the renewable energy sector. Article 3 and recital 25 of RED provide that EU Member States may have national support schemes for renewables and may decide whether and to what extent these schemes are open for out-of-state producers. This does not automatically mean that the schemes and the directive would comply with primary law.

Recently, the principles of *PreussenElektra* were tested again before the CJEU. *Essent Belgium*[6] concerned the Belgium's Renewable Portfolio Standard (RPS). The implementation on an RPS means that Belgian suppliers of energy all have to buy a number of renewable energy certificates (RECs) from producers of renewable energy in order to fill a quota that is dependent on total supply volumes. Although the option is in theory not fully excluded by the national law, Belgian authorities have never accepted foreign RECs, nor awarded RECs to imports.

Ålands Vindkraft was a similar case to *Essent Belgium*. It related to the Swedish system, wherein suppliers also have to buy green certificates. The system was not, however, contested by any Swedish energy supplier. The plaintiff was instead *Ålands Vindkraft*, a Finnish wind power company that asked the authorities of Sweden to award Swedish RECs for the power it supplied the Swedish network.[7]

In all three cases, the CJEU upheld the de jure discriminatory provisions of the national schemes. At a first glance, the CJEU approach may seem puzzling given both the rarity of cases in which de jure discrimination has been deemed justifiable and in light of the fact that encouraging support to renewables in other EU Member States could be expected to have positive effects for the environment. It may also be noted that American scholars

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[5] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, O.J. L 140/16, June 5, 2009 (hereinafter RED).

[6] Joined Cases C‑204/12 to C‑208/12 Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt, judgment of Sept. 11, 2014 (hereinafter Essent Belgium).

[7] Case C-573/12, Ålands Vindkraft AB v. Energimyndigheten, Judgment of July 1, 2014 (hereinafter Ålands Vindkraft).

have determined that in-state requirements breach their Dormant Commerce Clause.[8] Furthermore, when these laws have been challenged in court, American states repealed the de jure discriminatory provision.[9]

The objectives of this article are to explore different theories concerning the justification of de jure discrimination in free movement law and provide an explanation as to why the decisions by the CJEU may have been both politically and legally reasonable. The systematization of arguments presented herein will offer tools to tackle future cases of de jure discrimination.

B. Free Movement Law and the Energy Sector

Article 34 of the TFEU prohibits quotas and measures having equivalent effect. In accordance with CJEU case law, measures hindering market access are prima facie prohibited. Despite the ambiguity of this test, it is clear that de jure and de facto discrimination are included.[10] Direct or de jure discrimination has never been defined by

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[8] Trevor D. Stiles, *Renewable Resources and the Dormant Commerce Clause*, 4 ENVIR. & ENERGY L. & POL'Y J. 34, 64 (2009); Carolyn Elefant and Edward A. Holt, The Commerce Clause and Implications for State Renewable Portfolio Standard Programs, CleanEnergy States Alliance: State RPS Policy Report, March 2011, 4-15; Kirsten H. Engel, *The Dormant Commerce Clause Threat to Market-Based Environmental Regulation: The Case of Electricity Deregulation*, 26 ECOLOGY L. Q. 243, 272–74 (1999); Steven Ferrey, *Sustainable Energy, Environmental Policy, and States' Rights: Discerning the Energy Future Through the Eye of the Dormant Commerce Clause*, 12 N.Y.U. ENVIR. L. J. 507, 583 (2004); Nathan Endrud, *State Renewable Portfolio Standards: Their Continued Validity and Relevance in Light of the Dormant Commerce Clause, the Supremacy Clause, and Possible Federal Legislation,* 45 HARV. J. LEGISLATION 259, 270 (2008); Patrick R. Jacobi, Note, *Renewable Portfolio Standard Generator Applicability Requirements: How States Can Stop Worrying and Learn to Love the Dormant Commerce Clause*, 30 VT. L. REV. 1079, 1111–112 (2006).

[9] TransCanada Power Marketing v. Ian Bowles et al., No. 4:10-cv-40070-FDS (complaint April 16, 2010) (D. Mass.) (in-state requirement repealed, case settled); State, ex rel. Missouri Energy Development Ass'n v. Public Service Com'n, 386 S.W.3d 165 (Mo. App. Ct. W.D. 2012) (in-state requirement repealed, case dropped); Nichols and FuelCell Energy, Inc., v. Markell, et al, No. 1:12-cv-00777 (D. Del.) (in-state requirement repealed, case dropped). *See also* In the Matter of the Application of Champaign Wind, LLC, for a Certificate to Construct a Wind-Powered Electric Generating Facility in Champaign County, Ohio, Case No. 13-1874 (Ohio 2014); and In the Matter of the Commission's Review of its Rules for the Alternative Energy Portfolio Standard Contained in Chapter 4901:1-40 of the Ohio Code, Case No. 13-652-EL-ORD (repealing the in-state requirement).

[10] On the general scope of prima facie prohibited measures, see Max S. Jansson and Harri Kalimo, *De Minimis Meets "Market Access": Transformations in the Substance—and the Syntax—of EU Free Movement Law?*, 51 COMMON MKT. L. REV. 523 (2014).

the CJEU.[11] The definition of this term should capture discrimination on the grounds of not only nationality, but also any other direct reference to geographic origin. It would in other words capture measures that differentiate on the basis of the nationality of the producer, the destination of the good as well as the place of production.[12] In addition, criteria on transport distance can be regarded as a comparable form of discrimination in that the link is direct to geographical origin.

It should be noted that different treatment of like products on the basis of geographical origin is not automatically a case of discrimination. To rise to the level of discrimination, the out-of-state origin must also be treated less favorable. Not accepting foreign power when granting feed-in-tariffs or when granting renewable energy credits would clearly fulfill that criterion.[13]

Prima facie prohibited measures may rely on grounds of justification such as the protection of public health or the environment. In addition, any justification must be proportional in light of its legitimate objective. At this point, it is sufficient to note that measures are generally deemed proportional so long as they are suitable and necessary to achieve the legitimate objective. [14] The requirement of necessity essentially means that there should exist no less restrictive or discriminatory alternative that would serve the legitimate non-economic objective equally well.[15]

De jure discrimination rarely survives the proportional review. The CJEU has often rather swiftly rejected the justifiability of de jure discriminatory measures by either stating that

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[11] Case C-73/08, Nicolas Bressol and Others and Céline Chaverot and Others v. Gouvernement de la Communauté française, 2010 E.C.R. I-2735, para. 43 (opinion of AG Sharpston).

[12] Outside the context of free movement of goods, it would also cover differentiation on the basis of, for example, residence. On differentiation on the basis of where a health service was obtained, see also Case C-120/95, Nicolas Decker v. Caisse de maladie des employés privés, 1998 E.C.R. I-1831, paras. 34–36 (hereinafter Decker).

[13] Renewable energy credits (RECs) in different jurisdictions may represent very different attributes and are therefore not like products. There could therefore be an obligation to grant foreign power RECs while there would be no obligation to accept foreign RECs.

[14] Joined cases 279/84, 280/84, 285/84 and 286/84 Walter Rau Lebensmittelwerke and others v. Commission, 1987 E.C.R .1069, para. 34.

[15] Case C-131/93, Commission v. Germany, 1994 E.C.R. I-3303, para. 18.

they are not necessary or that they form arbitrary discrimination.[16] In many cases, a measure will be less discriminatory by simply removing the de jure discriminatory element, without endangering the objective to, for example, protect the environment. An out-of-state product with environmentally friendly characteristics or produced with environmentally sustainable process and production methods (PPMs) will presumably benefit the environment much in the same manner as any identical in-state competing product. A situation in which there is no acceptable alternative for a de jure discriminatory measure would appear to occur only when there is some reason, apart from the origin of the product, to treat products differently. In sum, there needs to be a rational relation between the de jure discriminatory element of the measure and the objective of environmental protection.[17] Rarely is there one, and therefore most measures will not survive any proportionality review.

C. Preliminary Questions

Before taking on theories concerning the justification of de jure discrimination, one must address a couple of preliminary considerations. First, it should be pointed out that apart from primary law, including the rules on free movement, the EU has produced a large body of secondary law covering many sectors. Some secondary laws fully harmonize rules on environmental protection. This means that Member States may not adopt national rules that are stricter than the common EU rules. The CJEU has outlined that when a matter has been fully harmonized in secondary law, cases should be solved on the basis of those provisions and not primary law.[18]

Article 3 RED grants each Member state the right to design their national renewable support schemes and this decision on the non-harmonization of schemes does not represent harmonization in itself.[19] In recent energy cases the CJEU stated that because the RED did not represent full harmonization of support schemes for renewables, Member States could still rely on grounds of justification in defending discrimination that prima

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[16] Case 434/85, Allen and Hanburys Ltd v. Generics (UK) Ltd [1988] E.C.R. 1245, paras. 14–22. *See also* Joined cases C-321/94, C-322/94, C-323/94 and C-324/94 Criminal proceedings against Jacques Pistre, Michèle Barthes, Yves Milhau and Didier Oberti, 1997 E.C.R. I-2343.

[17] BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE 6-46-47 (1999). Bittker discusses similar issues in relation to US constitutional law.

[18] Case C-309/02 Radlberger Getränkegesellschaft mbH & Co. and S. Spitz KG v Land Baden-Württemberg, 2004 E.C.R. I-11763, para. 53; Ålands Vindkraft, *supra* note 7, para. 57.

[19] Armin Steinbach and Robert Brückmann, Renewable Energy and the Free Movement of Goods, 27 J. ENVIR. L. 1, 7-8 (2015).

facie is contra the TFEU.[20] Although this conclusion appears justified, it is in one sense incomplete. Namely, even if the directive had been deemed to have fully harmonized the matter, the directive itself, and by extension the measures adopted in accordance therewith, could still have breached primary law.

Secondly, there has been the question regarding the scope of legitimate objectives that may be referred to as grounds of justification in the case of de jure discriminatory measures. Prima facie prohibited measures can be justified with reference to the grounds listed in Article 36, including the protection of public health. The CJEU has, however, also developed mandatory requirements,[21] including the protection of the environment.[22] While the mandatory requirements traditionally could only justify measures that were not de jure discriminatory, that appears to have changed with more recent case law;[23] yet the CJEU has not, to date, explicitly overturned the traditional doctrine. According to Bjørnebye[24], the CJEU even went so far in *Essent Belgium* as to avoid declaring the in-state requirement as de jure discriminatory, even if it obviously was.

There are two ways to approach the matter: First, environmental protection can be read as part of the objective to protect public health. Hence, it would fall under the scope of Article 36 and could thus justify de jure discrimination. The grounds of justification, however, are exemptions and should be interpreted narrowly.[25] Therefore, it has been argued that the ground of justification stipulated in Article 36 TFEU comes into play only when there is a direct health risk.[26] This might not be the case when the effects only

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[20] Ålands Vindkraft, *supra* note 7, para. 63. *See also* Essent Belgium, *supra* note 6, para. 97.

[21] Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon), 1979 E.C.R. 649, paras. 8–10.

[22] Case 240/83, Procureur de la Republique v. Association de defense des bruleurs d'huiles usages, 1985 E.C.R. 531, para. 15 (hereinafter ADBHU); Case 302/86, Commission v. Denmark (Danish Bottles), 1988 E.C.R. 4607, paras. 6–9.

[23] PreussenElektra, *supra* note 4, paras. 72–77. *See also* ADBHU, *supra* note 22, para 15; Essent Belgium, *supra* note 6, paras. 89–95.

[24] Henrik Bjørnebye, Joined Cases C-204/12 to C-208/12 Essent Belgium, 13 OIL, GAS & ENERGY L. INTELLIGENCE 6 (2015).

[25] Case 46/76, W.J.G. Bauhuis v. The Netherlands State, 1977 E.C.R. 5, para. 12; Case 113/80, Commission v Ireland, 1981 E.C.R. 1625, para. 7.

[26] Ludwig Krämer, Environmental Protection and Art. 30 EEC Treaty, 30 COMMON MKT. L. REV. 111, 118 (1993); ANDREAS R. ZIEGLER, TRADE AND ENVIRONMENTAL LAW IN THE EUROPEAN COMMUNITY 72 (1996).

manifest in the long term;[27] Yet, no bias against slowly accumulating but severe effects should exist. In general, the severity of environmental effects would justify a broader understanding of health as a ground of justification.[28] Thus, many long-term effects should be accepted.[29] The same is true for unlikely but severe effects. Still, the case law of the CJEU is not entirely clear on this point. Nevertheless, the CJEU has hinted that the protection of biodiversity[30] as well as the promotion of renewable energy[31] are of such importance to the environment that they may each be considered as promoting the protection of health.

The above approach of reading environment into the concept of public health in Article 36 would, of course, leave unsettled the faith of other mandatory requirements in relation to de jure discrimination. Alternatively, as advocated by several scholars,[32] the traditional line between Article 36 grounds of justification and environmental protection or even mandatory requirements in general would be erased and could all be used for justification of de jure discrimination.

The fact that a measure, such as a scheme promoting renewables, provides an economic advantage for the domestic industry will not bar justifications as long as the reasons for the FIT were primarily environmental.[33] This leaves us with the decisive question: How does an in-state requirement actually contribute to environmental protection?[34]

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[27] For a critical review of stretching the protection of health to long term effects see JUKKA SNELL, GOODS AND SERVICES IN EC LAW: A STUDY ON THE RELATIONSHIP BETWEEN THE FREEDOMS 180 (2002).

[28] HENRIK BJØRNEBYE, INVESTING IN EU ENERGY SECURITY—EXPLORING THE REGULATORY APPROACH TO TOMORROW'S ELECTRICITY PRODUCTION 109–10 (2010).

[29] PreussenElektra, *supra* note 4, para. 232 (opinion of AG Jacobs).

[30] Case C-67/97, Criminal Proceedings against Ditlev Bluhme, 1998 E.C.R. I-8033, para. 33; Case C-100/08, Commission v. Belgium, 2009 E.C.R. I-140, para. 93.

[31] PreussenElektra, *supra* note 4, paras. 229–38 (opinion of AG Jacobs); PreussenElektra, *supra* note 4, para. 75.

[32] Steinbach & Brückmann, *supra* note 20, 8–12; Marek Szydło, *How to reconcile national support for renewable energy with internal market obligations? The task for the EU legislature after Ålands Vindkraft and Essent*, 52 COMMON MKT. L. REV. 489, 500–03 (2015); Sirja-Leena Penttinen, *Ålands Vindkraft AB v Energimyndigheten—The Free Movement Law Perspective*, 13 OIL, GAS & ENERGY L. INTELLIGENCE 16–20 (2015).

[33] Case 72/83, Campus Oil Limited and Others v Minister for Industry and Energy and Others, 1984 E.C.R. 2727, paras. 23–25, 35–36.

[34] Szydło, *supra* note 32, 504–05. He indicates that there may be no clear and satisfactory answer.

D. The Proximity Principle

I. The Cases of Waste: Transport Risks

The case of *Walloon Waste*[35] concerned a universal waste import prohibition implemented by the Walloon government in Belgium. As it regards hazardous waste, this measure was in breach of the rules on notification procedures laid out in a community waste directive.[36] In contrast, trade in non-hazardous waste was not within the scope of any directive. Hence, the CJEU applied the TFEU provisions on free movement of goods and concluded that the ban on the importation of foreign waste was not discriminatory. This ruling could only be understood as representing the view that domestic and imported waste were not like-products. The CJEU relied on a Treaty article, now 191(2) TFEU, which stipulates that environmental damage shall, as a matter of priority, be remedied at its source.[37] To give further weight to this argument, the EUCJ referred to the principles of self-sufficiency and proximity established by the Basel Convention on hazardous wastes,[38] to which the EU has been a signatory since the Convention's drafting in 1989. All in all, the court applied a principle of proximity in the context of waste transport.[39] Notably, this was opposite to the approach taken by the United States Supreme Court.[40]

The CJEU judgment in *Walloon Waste* received harsh criticism from scholars who argued that the court should have followed existing tests of competition and substitutability in

[35] Case C-2/90, Commission v. Belgium, 1992 E.C.R. I-4431, paras. 34–37 (hereinafter Walloon Waste).

[36] Walloon Waste, *supra* note 35, paras. 20-21; Council Directive 84/631/EEC of 6 December 1984 on the supervision and control within the European Community of the transfrontier shipment of hazardous waste, O.J. L 326, 31 (Dec. 31, 1984).

[37] Walloon Waste, *supra* note 35, para. 34.

[38] UNEP, Basel Convention on the control of transboundary movements of hazardous wastes and their disposal, 22 March 1989. See especially art. 4.

[39] Before Walloon Waste, the EUCJ had appeared critical of the proximity principle. *See* Case 172/82, Syndicat national des fabricants raffineurs d'huile de graissage and others v Groupement d'intérêt économique "Inter-Huiles", 1983 E.C.R. 555, para. 14.

[40] Philadelphia v. New Jersey 437 U.S. 617, 622–26 (1978); Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources (91–636), 504 U.S. 353 (1992); Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334 (1992).

determining likeness. [41] That being said, the recognition of the principle of proximity is in itself significant. Even if the court had adhered to a more restrictive likeness test, this principle could still come into play in law of justification. The attributes of proximity could create the necessary rational relationship between de jure discrimination and the objective.

In the particular context of hazardous waste, the principle of proximity reflects a concern with regards to the risks of transportation. In this respect the reference to the Basel Convention was perhaps puzzling, as it specifically concerns hazardous wastes and the CJEU was, in fact, applying the TFEU provisions only to the ban on import of non-hazardous wastes. Arguably the transport of non-hazardous waste—for example, old solar panels—will pose less of an environmental risk, whereas the transport of radioactive nuclear waste inarguable represents a much greater risk. Indeed, the EU has adopted a directive to restrict the cross-border transport of nuclear waste.[42]

Risk, in general, is a matter of degree of harm and probability. The transport of oil and fuels will increase environmental risks, as would almost any transport to some degree. The Basel Convention and the Nuclear Waste Directive both support the conclusion that de jure restrictions are justified only when the risk is exceptionally severe. A broader application of the proximity principle creates a crack in the fundamentals of trade law. More minor transportation must instead be monitored primarily through laws on accident compensation liability.

II. Transport Distance and Pollution

In much the same way as transport accident risks increase with distance, so may risk of pollution. This is true for the transport of many goods, including but not limited to feedstock and fuel. Thus, potential pollution has constituted one reason for the increased interest in consumption of primarily local food. Electricity is, to some degree, a special case because it is not transported by road, air and sea, but rather along transmission lines. Transmissions over long distances, however, could result in the loss of energy along these power lines. In addition, building power lines may also have detrimental environmental impacts, in particular if sited through environmentally sensitive nature land.

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[41] DAMIEN GERADIN, TRADE AND THE ENVIORNMENT—A COMPARATIVE STUDY OF EC AND US LAW 19–22 (1997); Peter Von Wilmowsky, *Waste Disposal in the Internal Market: The State of Play After the ECJ's Ruling on the Walloon Import Ban*, 30 COMMON MKT. L. REV. 541, 547 (1993); Nicolas Bernard, *Discrimination and Free Movement in EC Law*, 45 INT'L & COMP. L. Q. 82, 94 (1996). *See also* PreussenElektra, *supra* note 4, para. 225 (opinion of AG Jacobs).

[42] Council Directive 2006/117/Euratom of 20 November 2006 on the supervision and control of shipments of radioactive waste and spent fuel, O.J. L 337, 21 (Dec. 5, 2006).

In his opinion in *PreussenElektra,* Advocate General Jacobs appeared to argue that the principle of proximity could come into play. He, however, would have left it to the national court to evaluate whether or not electricity was lost along the power lines to such an extent that discrimination would be necessary and justified.[43] In contrast, in his *Essent Belgium* opinion*,* Advocate General Bot rejected the idea of giving relevance to the principle of proximity in the field of renewable energy by arguing that the Belgian measure could not be justified because electricity from domestic renewables is no more environmental friendly than the same from other Member States.[44]

The long distance transport of any good is bound to cause more pollution and have a more severe environmental impact than local trade. *De jure* discrimination justified based upon transport or transmission distances would nullify the whole idea of an internal market. Although the environmental effects of transport cannot be denied in most cases, national origin is still an inappropriate proxy for determining the potential level of transport pollution.[45] For example, the distance for imports could, in some cases, be shorter than the distance for in-state transport.

An alternative to de jure discrimination would be restrictions of severity in relation to the exact distance, instead of the state of origin. The distance would, in other words, serve as a proxy for pollution. Two potential problems could still remain: First, if states may only justify restrictions with reference to the negative environmental effects that reach their own territory, then distance could be a poor proxy because covering a one kilometer transport distance far away from the state-border would arguably have less of an environmental impact to the importing state than covering the same transport distance closer to the border. Secondly, even if we disregard this concern, it would appear arbitrary to only focus on pollution from transport when similar, if not identical, pollution may occur at other stages of the process from production to end-of-life treatment. Hence, regardless of the proportionality test applied, distance as the sole proxy would seem difficult to justify. Instead, states should include it in a life-cycle analysis.

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[43] PreussenElektra, *supra* note 4, paras. 235–37 (opinion of AG Jacobs).

[44] Essent Belgium, *supra* note 6, para. 104 (opinion of Advocate General Bot).

[45] Eleanor Stein, *Regional Initiatives to Reduce Greenhouse Gas Emissions*, *in* GLOBAL CLIMATE CHANGE AND US LAW 271, 291 (Michael Gerrard & Jody Freeman eds., 2014).

E. Prioritizing Local Environment

States often implement programs to improve the sustainability of in-state PPMs in order to gain local environmental benefits. If such programs are open to out-of-state operators, however, some of the environmental benefits will leak out-of-state.
With regard to schemes promoting renewable energy, even if out-of-state projects would be eligible for such schemes, the benefits of lower GHGs would not leak out-of-state because of their transcendent nature. In addition, the state's implementing support schemes would also forego some of the negative environmental effects associated with renewable energy projects if most of them are carried out out-of-state. With other states reaping the benefits of the program, however, the risk would be significantly greater that the state adopting the measure would not to the same extent be able to phase out its domestic fossil fuel or nuclear energy plants. This could also have negative local environmental impacts such as many forms of air, water and soil pollution. If fossil fuel plants and other factories with high pollution are not replaced domestically, but are instead replaced in other states, then the environmental benefits in the state adopting the measure may be very indirect and small beyond GHG mitigation.[46] From the perspective of adopting state the program might therefore fail to improve local environmental conditions to the targeted extent.

Introducing a de jure discriminatory barrier to the program of promoting renewables would hinder the economic and environmental benefits from leaking out-of-state. The structure of law of justification may lend some support for accepting the preference for in-state environment as justification. According to one unconfirmed theory, states may only be justified in protecting their own environment and global effects to the extent that these effects reach their own territory.[47] Consequently, there is some appeal to the symmetry of then allowing states to give preference to their own respective environments. At no point, however, did the *Walloon Waste* court suggest that the reason for upholding the law was in any way related to any right to prioritize local environments over foreign ones. Both the importation of waste and programs promoting sustainable PPMs naturally have their own particularities. Yet, the principle that seems to emerge represents a rejection of prioritization of the domestic environment.

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[46] Ferrey, *supra* note 8, at 590; Endrud, *supra* note 8, at 263–64; Anne Havemann, *Surviving the Commerce Clause: How Maryland Can Square Its Renewable Energy Laws with the Federal Constitution*, 71 MARYLAND L. REV. 848, 884 (2005).

[47] Case C-5/94, The Queen v. Ministry of Agriculture, Fischeries and Food, ex parte: Hedley Lomas (Ireland) Ltd., 1996 E.C.R. 2553, para. 20; Case 8/74, Procureur du Roi v. Gustave Dassonville, 1974 E.C.R. 837, para. 5 (opinion of AG Trabucchi). *See also* ZIEGLER, *supra* note 26, 84–90; Case C-169/89, Criminal proceedings against Gourmetterie Van den Burg, 1990 E.C.R. I-2143, para. 12.

F. Pollution Accumulation and Concentration

The American waste cases as decided by the Supreme Court of the United States have revealed other potential arguments for de jure discrimination beyond the principle of proximity. In his dissenting opinion in *Philadelphia v. New Jersey,* Justice Rehnquist presented the view that the risk from waste slowly piling up may be a serious enough risk to justify facial discrimination.[48] This was linked to New Jersey's concerns regarding the limited availability of landfills. In theory, waste companies, in a free and competitive market, will ship their waste to areas with cheap land, also benefiting from economies of scale. Thus, some states could be expected to be the destination of a large portion of waste. The majority in *Philadelphia* rejected the view of Justice Rehnquist. In contrast, the CJEU in *Walloon Waste* did refer to the risks of accumulation of waste as a valid ground of justification.[49] The case was, however, primarily solved on different grounds. The few lines on accumulation of waste in the *Walloon Waste* case could still have significance and even be relevant for the energy sector.

Waste and pollution from energy plants share the common feature that their value is generally negative. Accumulation of pollution creates an environmental effect that can be more harmful for both the European and global environments than if the same amount of pollution was distributed more evenly throughout Europe. In other words, the marginal effects of the pollution from energy plants may become more severe with a higher degree of concentration. Consequently, states may be justified in protecting themselves against this form of pollution accumulation and concentration.

How could the pollution concentration risk then materialize? Member States promote clean production methods, including renewables. A small number of states may adopt this strategy despite poor access to renewable resources. If they are barred from limiting their support to electricity generated in-state, there would be, in theory, a risk that the scheme would primarily benefit out-of-state projects with competitive advantages. The consequence of this may be that the states' own fossil fuel plants and/or nuclear power plants may not be replaced by in-state renewable energy plants. For GHG emissions, the location of the replaced plants is of course irrelevant from an environmental perspective. Yet, the local pollution of a coal plant or risks of nuclear power plants would remain high in a few states while other states form the heart of the transition toward renewables. Pollution concentration concerns have led some to note that in-state requirements could

[48] Philadelphia v. New Jersey 437 U.S. 617, 632–33 (1978).

[49] Walloon Waste, *supra* note 35, paras. 30–32.

potentially be justified.[50] Uncertainty, however, remains as to whether these concerns are valid under EU primary law.

The *Ålands Vindkraft* case concerned the decision of Sweden to reject RECs for power imported from the Aland Islands, which form an autonomous territory of Finland. Here, the court noted that Sweden had already achieved a relatively large share of renewables.[51] In fact the same is true for Finland and the islands. There was thus no risk of unusual concentration of fossil fuels or nuclear power and the theory was not put to test.

It should be pointed out that the accumulation of pollution is not fully identical to the accumulation of waste. Even with strict recycling standards some domestic waste will always accumulate, which means imports would need to be permitted in order to avoid discrimination and the importing state would thus have little control over the amounts of waste imported. In the case of pollution or risks of non-renewable energy plants the accumulation originates from in-state PPMs. Thus, even if the state could not manage to divert its funds to develop a renewable energy industry of desired scale in-state, it would be in a better position to tackle the problem of pollution concentration.

The strength of the pollution concentration argument depends upon the analysis of alternatives, such as stricter pollution standards for fossil fuels, bearing in mind the restraints that arise from security of supply concerns. Without the facts of a "real," non-hypothetical case, it is only possible to conclude that the accumulation of pollution argument has some strength, but that it would, at most, remain accessible for states with exceptionally poor access to renewables. Such states may or may not exist within the EU.

G. Difficulties of Verification

In *PreussenElektra*, the CJEU analyzed the proportionality of the de jure discriminatory FIT and decided that, in the current state of EU energy law, discrimination may be justifiable. The court took the view that it would be too difficult for national administrations to confirm whether or not the energy provided for by a foreign producer had been produced from renewable sources.[52] This would suggest that, in cases where the sustainability of the PPMs are impossible to verify for imports, de jure discrimination would be justified.

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[50] Angus Johnston et al., *The Proposed New EU Renewables Directive: Interpretation, Problems and Prospects*, 17 EURO. ENERGY & ENVIR. L. REV. 126, 136 (2008); ANGUS JOHNSTON & GUY BLOCK, EU ENERGY LAW 348 (2012).

[51] Ålands Vindkraft, *supra* note 7, para. 102.

[52] PreussenElektra, *supra* note 4, paras. 78–80.

However, the case was decided in the late 90s and the court noted the possibility that the situation could change with legislative reforms.[53]

The conclusion in *PreussenElektra* seemed to contradict the ruling in *Outokumpu,*[54] decided only a couple of years prior. The *Outokumpu* case did not concern the free movement of goods, but rather the internal taxation of energy in Finland. A lower tax rate applied to domestic energy if the energy had been produced from renewable sources. In contrast, all foreign energy was taxed with a flat rate that lay somewhere in between the rate for domestic renewable energy and that for non-renewable energy. This tax structure created a disadvantage for foreign renewable energy that the Finnish government tried to justify on the ground that it was too difficult to validate that the imported energy actually was from renewable sources.[55] The court declined to accept this argument, stating that the practical difficulty of validating the origin of the energy did not form a ground of justification.[56] The measure was disproportionate because the Finnish authorities did not even give importers the possibility to present documentation proving that the energy was from renewable sources.[57] What the case clearly confirmed was that states would at least need to permit importers to present proof of origin and PPMs. Read together with *PreussenElektra,* these cases left it very uncertain as to whether verification difficulties could justify de jure discrimination when it was impossible to verify PPMs of imports.

After *PreussenElektra*, the EU has introduced the RED and has begun working to create a common energy market. Recently the principles of *PreussenElektra* were put to test again before the CJEU. *Essent* presented the authorities with foreign guarantees of origin (GOs) and asked to get them recognized as Belgian RECs. GOs and RECs are both certificates issued for electricity generated from renewable sources. On the one hand, the function of the GOs is simply to prove to customers that the electricity supplied is sustainably generated from renewable sources. RECs, on the other hand, both prove the origin and entitle the holder to use it for filling a renewable energy quota set on national level. *Essent*, however, reasoned that the GOs are sufficient to prove that the electricity will possess the environmental attributes required for receiving Belgian RECs. Similarly, in

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[53] PreussenElektra, *supra* note 4, paras. 78–80. For criticism, *see* BJØRNEBYE, *supra* note 28, at 108.

[54] Case C-213/96, Outokumpu Oy, 1998 E.C.R. I-1777.

[55] *Id.*, para. 37.

[56] *Id.*, para. 38.

[57] Id., paras. 39–41.

Ålands Vindkraft, the energy producer on the Finnish islands claimed its right to receive Swedish RECs for power it had supplied to Sweden.

With regard to the proportionality review, it should be noted that Advocate General Bot, in his opinion in *Essent Belgium*, argued that it is now possible to verify the source of imported energy[58]; the argument that the CJEU relied on in *PreussenElektra* should therefore no longer be relevant. Although the proposal of establishing harmonized system of guarantees of origin failed,[59] Article 15 (9) and (10) RED still provide that all Member States shall issue guarantees of origin for electricity produced from renewable sources and that these guarantees shall be mutually recognized.[60] Admittedly, the directive clearly distinguishes between GOs and RECs.[61] Yet, the GOs often provide the information necessary to conclude whether or not the electricity that was generated would comply with the requirements for RECs—or any other benefit for that matter.[62]

The CJEU noted that the reasoning in *PreussenElektra* was outdated.[63] Still, it did not agree with the Advocate General when it proclaimed in *Ålands Vindkraft* that the origin of electricity was still too difficult to verify on the European market.[64] This left the impression that not much had changed with regards to legal argumentation from the time of *PreussenElektra* to *Ålands Vindkraft*.[65] Interestingly, a few months later in *Essent Belgium*, the CJEU did not bring up that same argument. The de jure discriminatory law was still upheld in that case, but for other reasons discussed below.

Verification of the PPMs of electricity is in some sense a unique case. Namely, with regard to physically separable goods—for example, fuel—any certificate of sustainable PPMs can

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[58] Essent Belgium, *supra* note 6, paras. 102–03 (opinion of Advocate General Bot).

[59] See Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources, COM 2008(19) final. For a discussion on the weaknesses of the proposal see Johnston et al., *supra* note 50.

[60] It is not compulsory to issue these guarantees of origin for heating and cooling produced from renewable sources. Those forms of energy are, however, not frequently subject to international trade due to difficulties of transfer.

[61] RED, supra note 5, recital 52.

[62] *See also* Johnston et al., *supra* note 50, 136.

[63] Ålands Vindkraft, *supra* note 7, paras. 84–86.

[64] Id., paras. 87–88.

[65] Penttinen, *supra* note 32, 11 & 20.

accompany the good in transactions and can be linked through identification numbers. In contrast, no unit of electricity generated to the network can be identified with any specific GO or REC. GOs will always follow the electricity contract unless sold on a power exchange where the GO becomes part of a certificate over a resource mix sold on the exchange. Furthermore, systems with RECs commonly allow them to be traded separately from the electricity. This creates a complex market wherein states will need to be able to verify that there is no double-counting before they can award their own RECs or any other benefit.

In conclusion, it should be possible to implement different treatment when sustainability cannot be verified. Yet, even if verification might be somewhat more complicated for imports, it would normally not justify de jure discrimination. The only exception would be when verification is not reasonably possible for any imports. These cases have been very rare. EU case law does imply that the PPMs of electricity could fall into that category, although the strength of the argument appears to be diminishing.

H. Free-Riding, Leakage and System Stability

I. Renewable Portfolio Standards and Threat to System Stability

A potential economic consequence of non-discriminatory support schemes is that producers of energy from renewable sources may start to search for the most beneficial national support schemes and only offer their clean energy to those countries.[66] This would create a competitive market for various forms of support schemes, which as such would not be problematic. After all, free competition is at the core of free trade regimes. Yet, the risk of free riding may be a reason for concern. Some states would invest heavily in promoting renewables and companies of other states would reap the benefits, even if their home-states would barely contribute at all. This pattern could endanger system stability.

The CJEU has relied on system stability as a valid ground of justification in free movement law with regards to past cases of de jure discrimination. Most notably in cases on the free movement of patients the CJEU ruled that restrictions for out-of-state persons are upheld when it comes to non-emergency hospital care. The justification for such conclusion lay in the fact that building up the national healthcare system requires extensive planning and

[66] Proposal for a Directive of the European Parliament and of the Council on the promotion of electricity from renewable energy sources in the internal electricity market, COM(2000) 279 final, 6; Angus Johnston et al., *supra* note 50, 137; JOHNSTON & BLOCK, *supra* note 50, at 350.

any abnormal influx of patients would likely threaten the financial stability of the system.[67] The real risk of significant influx of patients is, of course, questionable.

PreussenElektra concerned a German FIT and, even if the system stability argument could have been applicable, the CJEU did not address it. Interestingly, the argument appeared instead to emerge in *Ålands Vindkraft* and *Essent Belgium*, which related to the RPS of each respective country. In *Essent Belgium* the court's focus appeared to shift away from verification difficulties. Thus, perhaps the decisive argument for de jure discrimination presented in the judgments of 2014 was that Member States would otherwise not have control of the effects and costs of the programs.[68] These concerns were already reflected in the preamble of the RED.[69] The court in *Essent Belgium* emphasized that the proper functioning of the national support scheme and the demand for RECs had to be guaranteed.[70] In sum, the court seemed to imply that without de jure discrimination the burden on some states would become too high; other states might free ride, and the stability of the renewable support systems would be endangered.[71]

Leakage has been a problem commonly debated in relation to cap-and-trade (emissions trading) systems.[72] How do benefits then leak under a RPS scheme? Similarly to any ETS, a RPS may in a worst case scenario result in no new incentives for clean PPMs. Granting RECs

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[67] Case C-158/96, Kohll, Raymond Kohll v Union des caisses de maladie, 1998 E.C.R. I-1931, para. 41; Case C-368/98, Abdon Vanbraekel and Others v. Alliance nationale des mutualités chrétiennes (ANMC), 2001 E.C.R. I-5363, para. 47; Case C-157/99, B.S.M. Geraets-Smits v. Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v. Stichting CZ Groep Zorgverzekeringen, 2001 E.C.R. I-5473, paras. 72–81; Case C-385/99, V.G. Müller-Fauré v. Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet v. Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen, 2003 E.C.R. I-4509, paras. 77–82; Case C-56/01, Patricia Inizan v. Caisse primaire d'assurance maladie des Hauts-de-Seine 2003 E.C.R. I-12403, para. 56; Case C-372/04, The Queen, on the application of Yvonne Watts v. Bedford Primary Care Trust and Secretary of State for Health, 2006 E.C.R. I-4325, paras. 112–13. *Compare* with Case C-204/90, Hanns-Martin Bachmann v. Belgian State, 1992 E.C.R. I-249, paras. 21–28. In this latter case, the need for cohesion of the tax system justified a restriction on the free movement of workers. *See also* Max S. Jansson, *EU's kompetens i fråga om hälsovårdstjänster*, 3-4 NORDISK SOCIALRÄTTSLIG TIDSKRIFT 95 (2011).

[68] Ålands Vindkraft, *supra* note 7, paras. 99, 103; Essent Belgium, *supra* note 6, para. 102.

[69] RED, *supra* note 5, recital 25.

[70] Essent Belgium, *supra* note 6, paras. 101, 109.

[71] Already hinting toward this, see Steinbach & Brückmann, *supra* note 20, at 14.

[72] The ETS has been set up by Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, O.J. L 275, 32 (Oct. 25, 2003).

to out-of-state renewable energy projects would allow the quantity of RECs to increase exponentially. The influx of RECs or requests for RECs will especially originate from states that do not have any RPS system or very low quotas. From an environmental perspective, this may be problematic because even if states would not be justified in prioritizing their own environment, the non-discriminatory RPS would invite the states with no or low quotas to get RECs for their renewable energy. The quota of the importing state would then be saturated without there having been any increase in renewable energy globally. The problem could also be described as a form of reshuffling.

The increase in RECs would drive prices down and retailers could fulfill their quota easily by buying dirty energy and very cheap RECs. The environmental benefits of the RPS would be more or less nullified. This explains also why system stability would not be a prohibited pure economic concern, but more of a structural question related to environmental protection.[73] Through discrimination, the state may avoid free riding and secure efficiency.

II. System Stability and Government Spending

The 2014 CJEU judgments in *Ålands Vindkraft* and *Essent Belgium* related to RPS-models. It has been assumed that the reasoning found within these two cases would apply equally to other forms of schemes such as FITs.[74] This presumption requires a bit more elaboration.

RPS schemes rely on quota obligations and do not involve direct government spending. In contrast, FIT and grant programs rely upon public authorities to offer direct financial support. An EU Member State might be concerned that too many applications come in and threaten financial stability. Still, as an alternative to de jure discrimination, the state could opt to limit the number of annually accepted applications. Capping FITs or subsidies will, however, create some uncertainty, as the producers cannot know when funds will run out. In addition, states that implement programs to promote renewables may see their investment leak to other states. This will, in turn, discourage other states from implementing such programs to protect the environment.[75]

In *Ålands Vindkraft* and *Essent Belgium*, the CJEU added that, even for a RPS, the elimination of the in-state requirement would risk resulting in reduced investor

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[73] In the context of free movement of patients and hospital care, see also Vassilis Hatzopoulos, *Recent Developments of the Case Law of the ECJ in the Filed of Services*, 37 COMMON MKT. L. REV. 43, 79 (2000).

[74] Szydło, *supra* note 32, at 497.

[75] Engel, *supra* note 8, at 270.

confidence.[76] Together with the argument of financial stability, the risk of reduced investor confidence could thus justify de jure discrimination. The lines of reasoning in the recent cases thus provide for new grounds of justification for de jure discriminatory FITs and similar programs.

I. Interconnections, Delivery and Consumption Criteria

The CJEU found de jure discrimination to be justifiable in *Ålands Vindkraft* and *Essent Belgium*. Of the various justifications, system stability appeared the most solid. In this process, the court came to reject the alternative of eliminating the in-state requirement completely. It is, however, unfortunate that the court did not discuss any other alternatives.[77]

In accordance with the proportionality principle, states should not adopt a discriminatory measure if there is an alternative that is less discriminatory that would still guarantee the same level of protection. In the U.S., a debate has emerged as to whether not in-state requirements are disproportionate. The alternative would be requirements of grid interconnection with, delivery to, or even consumption in the state where the support, often in the form of RECs, is granted.[78] Electricity generated out-of-state would receive RECs if the interconnection, delivery or consumption requirement is met.

The U.S. debate offers two important lessons for the EU doctrine: First and foremost, the CJEU statements on the necessity of national control of effects and costs of the renewable energy schemes could be understood as recognition of the same risks of reshuffling or REC-inflation that have been discussed by U.S. scholars. Secondly, consumption and delivery requirements as alternatives to de jure discrimination could also have been relevant under EU free movement law. It is unfortunate that the CJEU never addressed this aspect in *Essent Belgium* and *Ålands Vindkraft*.

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[76] Ålands Vindkraft, *supra* note 7, paras. 99, 103; Essent Belgium, *supra* note 6, para. 102.

[77] Szydło, *supra* note 32, at 505–06.

[78] Endrud, *supra* note 8, 271–73; Jacobi, *supra* note 8, at 1128–134; Elefant & Holt, *supra* note 8, 4 & 12; Anne Havemann, *supra* note 46, at 884; Steven Ferrey, *Renewable Orphans: Adopting Legal Renewable Standards at the State Level*, 19 ELECTRICITY J. L. 52, 59–60 (2006); Stiles, *supra* note 8, at 65. *Compare* however with Daniel K. Lee & Timothy P. Duane, *Putting the Dormant Commerce Clause Back to Sleep: Adapting the Doctrine to Support State Renewable Portfolio Standards*, 43 ENVIR. L. 295, 333–34 (2013). Such requirements have already been implemented in state laws. *See* Joel H. Mack et al., *All RECs are Local: How In-State Generation Requirements Adversely Affect Development of a Robust REC Market*, 24 ELECTRICITY J. L. 8, 11–13 (2011).

At least in the case of *Ålands Vindkraft*, the electricity producer actually delivered the electricity to Sweden. This was pointed out by Advocate General Bot, who also noted that, in general, the limited interconnections between national grids in Europe would hinder any massive influx of REC-applications from other states.[79] The CJEU chose not to address this point, consequently leaving the impression that even a delivery requirement would not guarantee the same level of environmental protection. Ironically, had that view been upheld, it would have meant that restrictions to the free movement of electricity would be easier to justify when interconnections and cross-border trade would increase.[80]

A reason for not giving preference to the alternative of delivery or consumption requirements lies in the complexity of such models. In other words, it could be technically difficult and/or financially unreasonable to verify that electricity has actually been delivered from a green power plant and even more difficult to verify that it was never re-exported.

J. Conclusions

While states in the U.S. have quickly repealed the requirement of in-state production from their RPSs when challenged in court, EU Member States have been granted by the legislature the right to implement such de jure discrimination. This right has once again been confirmed by the CJEU in *Ålands Vindkraft* and *Essent Belgium*.

Generally, the rulings in *Ålands Vindkraft* and *Essent Belgium* have received a positive response. Yet, while some have applauded the legal reasoning in those cases,[81] others have read the decisions more in light of political reality.[82] Neither of these approaches is incorrect. Surely, the CJEU was affected by fears linked to the uncertainty of the faith of renewable support schemes that would have followed from striking down the in-state requirements. Relying on system stability, the court may still have found a convincing legal argument to support its reasoning. What is more, this argument had been used before in cases relating to free movement of healthcare services. If this reading is correct, the CJEU

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[79] Ålands Vindkraft, *supra* note 7, para. 98 (opinion of AG Bot). His suggestion to compensate for the REC-inflation with higher quotas would not work though in cases where the influx of RECs is extremely high.

[80] On free movement of patients/healthcare services, see also Mark Flear, Case C-385/99 V.G. Müller-Fauré v. Onderlinge Waarborgmaatschappij O.Z. Zorgverzekeringen U.A. and E.E.M. van Riet v. Onderlinge Waarborgmaatschappij Z.A.O. Zorgverzekeringen, 41 COMMON MKT. L. REV. 209, 223 (2004).

[81] Bjørnebye, *supra* note 24, at 9.

[82] Penttinen, *supra* note 32, at 22; Szydło, *supra* note 32, at 507.

may have been moving away from the argument of verification difficulties that it endorsed almost two decades earlier in *PreussenElektra*, when the energy sector looked rather different.

In future cases, the CJEU may be asked to elaborate why consumption or delivery requirements could not serve as less discriminatory alternatives that guarantee more or less the same level of environmental protection as a requirement of in-state production. From the perspective of comparative law, the rulings in *Ålands Vindkraft* and *Essent Belgium* illustrated that the CJEU was either untouched or unaware of the American debate on identical questions. This is, perhaps, not ideal in a globalized world, especially considering the similarities between EU free movement law and the U.S. Dormant Commerce Clause.

On a final note, the CJEU has, in many sectors, been the driving force of further integration. With regard to energy trade the case law has, however, now for the time being cemented the fragmentation of the EU market. It will be up to the legislature to decide whether to introduce common EU level support schemes.[83] A common system would seem indispensable for fulfilling the ambitions of a fully-integrated internal European energy market.

[83] Szydło, *supra* note 32, at 507–09; Miquel Munoz, Volker Oschmann & David Tabara, *Harmonization of Renewable Electricity Feed-In Laws in the European Union*, 35 ENERGY POL'Y 3104 (2007); Jaap Jansen & Martine Uyterlinde, *A Fragmented Market on the Way to Harmonisation? EU Policy-Making on the Renewable Energy Promotion*, 8 ENERGY FOR SUSTAINABLE DEVELOPMENT 93 (2004).

Developments

To Allow or Refuse Entry: What Does the Law Demand in the Refugee Crisis at Europe's Internal State Borders?

By Alexander Peukert, Christian Hillgruber, Ulrich Foerste, & Holm Putzke[*]

Abstract

The following Article deals with the issue of whether the Federal Republic of Germany is responsible for examining the applications for international protection of third-country nationals who, since the start of the European refugee crisis have arrived at the German land border or, alternatively, whether Germany is obligated to refuse entry to such persons and relegate them to an adjacent transit country. In most cases, this would require Austria, in particular, to examine these applications for protection. The position outlined in this inquiry may be applied to all internal borders between European Union Member States.

[*] The authors are law professors at the universities of Frankfurt a.M., Bonn, Osnabrück, and Passau. The Article originally appeard in German. *See* Peukert *et al.*, *Einreisen lassen oder zurückweisen? Was gebietet das Recht in der Flüchtlingskrise an der deutschen Staatsgrenze?*, 36 ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK (ZAR) 131-136 (2016).

A. Introduction

The migration crisis is also a crisis of law. The fact that hundreds of thousands of migrants, since the summer of 2015, were capable of arriving in Germany via the Balkan route only became possible because many Member States of the European Union (EU) did not fulfill their external border obligations as per the Schengen Borders Code.[1] Third-country nationals may only enter an EU Member State if they have a visa or if they apply for international protection precisely at that location, according to Article 13, paragraph 1 Dublin-III-REG. If arrivals neither have a visa, nor apply immediately for international protection, they are categorically to be turned away according to Article 13, paragraph 1 in conjunction with Article 5, paragraph 1 of the Schengen Borders Code. The combination of these laws means that the practice of "waving through" to the target state, such as Germany, is clearly illegal.

What is contentious, though, is whether the practices that the German Federal Government (Federal Government) has executed since September of 2015 to the time of this writing in February 2017 are compatible with EU law, namely: (a) reintroducing checks at the internal border to Austria, but at the same time (b) permitting the entry of all individuals to Germany who arrive at the border to Austria, and (c) providing protection to these third-state national applicants.

The legal situation is relatively unclear, due to the complex blend of European and German law, and because of the multitude of relevant provisions that have overriding—and sometimes contradictory—application. The result of the analysis is nevertheless unequivocal; the policy of open borders lacks a viable legal basis. As regards the right of asylum under Article 16a of the German Basic Law, this finding follows from the Basic Law itself, which explicitly states that the right of asylum "may not be invoked by a person who enters the federal territory from a member state of the European Communities or from another third state in which application of the Convention Relating to the Status of Refugees and of the Convention for the Protection of Human Rights and Fundamental Freedoms is assured."[2] As will be explained in the following section, the EU asylum *acquis* also provides that persons applying for international protection[3] ought to be refused entry at the German-

[1] Regulation 562/2006, of the European Parliament and the Council of 15 March 2006 Establishing a Community Code on the Rules Governing the Movement of Persons Across Borders (Schengen Borders Code), 2006 O.J. (L 105) 1, 1–32 [hereinafter Schengen Borders Code].

[2] *See* GRUNDGESETZ [GG] [BASIC LAW], art. 16a, para. 2, sentence 1, *translation* at http://www.gesetze-im-internet.de/englisch_gg/index.html; *see also* Asylgesetz [AslyG] [Asylum Act], Sept. 2, 2008, BUNDESGESETZBLATT [BGBL I] at 1798, § 1, para. 1, no. 1–2, § 13, para. 1–2, § 18, para. 2, no. 1, § 26a, para. 1, sentence 1 (Ger.).

[3] For this "second track" of the right of asylum, see Asylgesetz [AslyG] [Asylum Act], Sept. 2, 2008, BGBL. I at 1798, §§ 1 para. 1, no. 2, 3, 4, 13 para. 1–2 (Ger.). *See also* Directive 2011/95, of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted, 2011 O.J. (L 337) 9, 14.

Austrian border—or at other internal borders between Member States. Apparently, the Federal Government has also endorsed this position.[4]

B. Article 20 Paragraph 4 Dublin-III-REG—Requirements and Legal Consequences

Even though the Schengen and Dublin Systems have factually collapsed, they both are still legally valid. At least the German Federal Government as well as the European Commission assume so.[5] For that reason, the Dublin-III-REG[6] is used as the defining legal basis for the following legal assessment. This finding remains valid for the currently debated proposal for a recast of the Dublin-III-REG, because the proposed Dublin-IV-REG leaves the basic structure, the aims, and, in particular, the core provision for our argument—Article 20, paragraph 4 Dublin-III-REG—intact.[7]

First of all, pursuant to the Dublin-III-REG, the question concerning which Member State is objectively responsible for examining the application for granting international protection should be distinguished from the question of which Member State is responsible for starting the Dublin procedure in the first place, which logically precedes the former Dublin procedure, and the later substantive asylum procedure.

According to Article 3, paragraph 1 of the Dublin-III-REG:

> Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III [Dublin-III-REG] indicate is responsible.

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[4] *See* Regierungsentwurf [Cabinet Draft], DEUTSCHER BUNDESTAGS: DRUCKSACHEN [BT] 18/7311, http://dipbt.bundestag.de/dip21/btd/18/073/1807311.pdf (Ger.) (presenting a response of the federal government to a small inquiry) [hereinafter Response].

[5] *See* European Commission Press Release IP/16/585, The Commission, Back to Schengen: Commission Proposed a Complete Restoration of the Schengen System (Mar. 4, 2016), http://europa.eu/rapid/press-release_IP-16-585_en.htm.

[6] *See* Regulation 604/2013, of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person, 2013 O.J. (L 180) 31–59 [hereinafter Dublin-III-REG].

[7] *See Proposal for a Regulation Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (recast)*, at art. 21, para. 4, COM (2016) 270 final (May 4, 2016). *See also* Dublin-III-REG, *supra* note 6, art. 20, para. 4.

Pursuant to this, Germany may only be responsible in exceptional cases, namely when a close family relative of the applicant already has international protection status with permanent residence in Germany or has a current pending application for protection.[8]

In contrast, the logically preceding question on which Member State is responsible to start the Dublin procedure is determined based on Article 20 of the Dublin-III-REG. Under Article 20, paragraph 1 of the Dublin-III-REG, the process of determining the Member State responsible shall start as soon as an application for international protection is lodged with a Member State. An application can be lodged either with a German authority within Germany or with the border guards stationed at the border. In principle, the applicant would then have a right to residence while in the process of waiting for a decision to be made on which Member State is responsible for examining the application.[9]

Yet, there is a previously often overlooked, special provision that applies at EU internal borders; pursuant to the first sentence of Article 20, paragraph 4, subparagraph 1 of the Dublin-III-REG, the duty of conducting the Dublin procedure, and possibly a subsequent substantive asylum proceeding, lies with the state of arrival, for example Austria, and not with the state of destination, for example, Germany. The provision reads: "Where an application for international protection is lodged with the competent authorities of a Member State by an applicant who is on the territory of another Member State, the determination of the Member State responsible shall be made by the Member State in whose territory the applicant is present."

I. The Provision's Scope of Application

This provision, as its wording makes clear, sees the state of residence as responsible for asylum matters and applies not only in the case of an application submitted to embassies and consulates, but also in the case of an application for international protection made at the border to another Member State. This result is in line with the European legislature's intent. The Commission's explanatory proposal on Article 4, paragraph 4 (Section 5 in the proposal) of the Dublin-II-REG—which is the unaltered predecessor norm of Article 20, paragraph 4 of the Dublin-III-REG in that matter—states:

> The procedure for determining the Member State responsible must be conducted by the Member State on whose territory the asylum seeker is, including where the applicant contacts the authorities of another

[8] *See* Dublin-III-REG, *supra* note 6, arts. 8–10.

[9] *See* Directive 2013/32 of the European Parliament and the Council of 26 June 2013 on Joint Procedures for Recognising and Denying International Protection, 2013 O.J. (L 180) 60, 60–95, art. 9, para. 1, sentence 1.

> Member State, e.g. at a diplomatic or consular post or *at the frontier*. The rule established in this paragraph makes it possible to assign the asylum application to the State whose competence is determined by the applicant's presence. [10]

The Commission's explanation is sensible, as transit-countries become disincentivized to tolerate or even support irregular secondary movements to other Member States.

With this procedural rule, the Dublin-III-REG maintains the principle "that the responsibility for examining an application should primarily lie with the Member State which played the greatest part in the applicant's entry into and residence in the territories of the Member States, with some exceptions designed to protect family unity".[11] This reasoning applies not only to the state of initial entry, but also to "transit" Member States that permit and have even previously encouraged third-country nationals to enter their territory and continue their journey to the Member State of their choice. Yet, as is made clear in the Dublin and Schengen Systems, asylum seekers have no right to choose their Member State of destination because the Common European Asylum System is not an economic migration scheme.[12]

Now, the responsibility of Austria as per Article 20, Paragraph 4 of Dublin-III-REG could not be put into practice as long as the German-Austrian border could be crossed without being

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[10] *Proposal for a Council Regulation Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National*, COM (2001) 447 final (July 26, 2001), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOC_2001_304_E_0192_01 (proposing the regulation on the assumption that it does not contradict the genesis of Dublin-II-REG), *with* Roman Lehner, *Grenze zu dank Art. 20 Abs. 4 Dublin-III-VO? Eine Replik*, VERFASSUNGSBLOG (Feb. 26, 2016), http://verfassungsblog.de/grenze-zu-dank-art-20-abs-4-dublin-iii-vo-eine-replik/. *See* Alexander Peukert, Christian Hillgruber, Ulrich Foerste, & Holm Putzke, *Nochmals: Die Politik offener Grenzen ist nicht rechtskonform*, VERFASSUNGSBLOG (Mar. 2, 2016), http://verfassungsblog.de/nochmals-die-politik-offener-grenzen-ist-nicht-rechtskonform/. A contrary view of the legislative body of the Union is not documented to the extent that is evident. The Commission alone cannot reinterpret the Dublin System that was legislated on their request by the Council in 2003, and then by the Parliament in 2013.

[11] *Proposal for a Regulation of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast)*, at 3, COM (2008) 820 final (Dec. 3, 2008); *see also* Dublin-III-REG (showing the increased efficiency of the modus operandi of the Dublin-II-REG).

[12] Session of the European Council–Conclusion, EUCO 1/16, ST 1 2016 INIT (Feb. 18 and 19, 2016) 4. That also applies, whenever the entry into the European Union is made via a Member State such as Greece—where no return can be made due to the systemic shortfalls of the local asylum system. For the meaning of this circumstance of the responsibility, see Dublin-III-REG, *supra* note 6, art. 3, para. 2. For the criminal liability of the smuggling third-state nationals into such a Member State, see Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 26, 2015, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2274.

checked. Yet, since September 13, 2015, Germany has been carrying out border controls at the internal border to Austria as a response to a serious threat to public policy or internal security caused by an uncontrolled influx of exceptionally large numbers of persons.[13] The provisions of Title II of the Schengen Borders Code, that are operative at the external borders of the Union, apply mutatis mutandis to these border controls under Article 28.

II. The Application of Art. 20 Paragraph 4 Dublin-III-REG "At the Border"

According to its plain wording, Article 20, Paragraph 4 of Dublin-III-REG applies as soon as border-crossing checks occur on the border line or in the geographical territory of the "transit" Member State (e.g. Austria). In these situations, the applicant is still undeniably in Austrian territory.

Nothing else can then apply when the border control occurs slightly set back beyond the border and within the territory of the state of destination, such as Germany. According to the Schengen Borders Code, a third-state national has *de jure* not entered the territory of a Member State if he has been denied entry in the course of border controls and border checks "at" a "border crossing point."[14]

The counterargument is that third-state nationals who apply for international protection at a border crossing point located on the German geographical territory have already exited Austria. The German transit zone itself is already German territory under international law, which is why Article 20, paragraph 4 of the Dublin-III-REG could not be applied.[15] This argument is not convincing.

Article 15 of the Dublin-III-REG has a special regulation for transit zones, which states that if an application for international protection is lodged in the international transit area of a Member State's airport, that Member State is responsible for examining that application. This provision, tailored to the external borders of the Union, cannot be applied at the internal land borders between Member States. Rather, in those situations, Article 20

[13] *See* Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, art. 72, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon]; *see also id.* art. 23.

[14] At external Schengen borders that are simultaneously Dublin internal borders—specifically Slovakia/Hungary to Croatia, as well as Hungary and Bulgaria—Art. 13 paragraph 4 of the Schengen Borders Code directly applies. *See* Schengen Borders Code, *supra* note 1, art. 13, para. 4. *See also id*. art. 28, and art. 2, no. 8–10 and 13. On German law, see Aufenthaltsgesetz [AufenthG] [Residence Act], Feb. 25, 2008, BUNDESGESETZBLATT [BGBL I] at 162, § 13, para. 2, sentence 1, which is in clear contrast to mere border crossing under § 13, para. 2, sentence 3.

[15] Anna Lübbe, *Ist der deutsche Transit österreichisches Staatsgebiet?*, VERFASSUNGSBLOG (Mar. 7, 2016), http://verfassungsblog.de/ist-der-deutsche-transit-oesterreichisches-hoheitsgebiet/ [hereinafter Anna Lübbe]; *see* Constantin Hruschka, *Rückkehr zum Recht an der deutsch-österreichischen Grenze? Zur Zuständigkeit für an der deutschen Grenze gestellte Asylanträge*, (Mar. 7, 2016), http://fluechtlingsforschung.net/ruckkehr-zum-recht-an-der-deutsch-osterreichischen-grenze/.

paragraph 4 of the Dublin-III-REG applies. If Article 20, Paragraph 4 of the Dublin-III-REG, as expressly proclaimed by the Commission,[16] is also to apply "at the frontier," the precise geographical locus of the border crossing point cannot be decisive. Otherwise, the intent and purpose of this provision would be misjudged, which is meant to activate the asylum-legal responsibility of the Member State that in turn has permitted the presence of the third-state national on its territory. In its statement that Article 20, paragraph 4 of the Dublin-III-REG also applies "at the frontier," the Commission was well aware that the border check that decides the issuance of an entry permit in fact regularly takes place "at" the border, but "on" the geographical territory of the country of destination. The position advanced here is supported by a legal-teleological interpretation of the notion of "territory":[17] As a "no man's land" between Germany and Austria does not exist according to international law, an application that is submitted to the German border control before passing a German border crossing points, has to be considered as having still been submitted "on the territory" of Austria. If one were to see this differently, the results would be random. A border crossing point can be located—from a German perspective—upstream. It could be in front of the border, on Austrian territory—which would require Austria's cooperation—exactly on the border line or somewhat set back into the interior. In the first two cases, Article 20, paragraph 4 of the Dublin-III-REG would apply "at the border"; in the third and final case, it would not. In practice, that would mean that whoever manages to set foot on German soil would have to be allowed entry, and whoever does not, would have to stay out. Such an extremely state-territorial interpretation of the European asylum and border regime leads to less plausible differentiations and random results.

In any case, what should be noted, is that the border checks can be organized in such a way that due to an applicant being present in Austrian geographical territory, the applicant can be referred to Austria according to Article 20 IV of the Dublin-III-REG.

Apparently, the Federal Minister of the Interior implicitly assumed the general applicability of this provision because, while simultaneously implementing internal border controls to Austria, on September 13, 2015, he decided "that measures at the border for returning third-state nationals seeking protection, *are currently not being applied*."[18]

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[16] *See Proposal for a Council Regulation Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National*, COM (2001) 447 final (July 26, 2001).

[17] CHRISTIAN FILZWIESER & ANDREA SPRUNG, DUBLIN III-VERORDNUNG, KOMMENTAR, art. 20, k. 17 (Berliner Wissenschafts-Verlag 2014) (finding "actually sensible, further teleological interpretation" as hardly compatible with the "precise term 'territory'").

[18] For an answer from the Federal Government, see Response, *supra* note 4, at 2. *See also* Asylum Act § 18, para. 2, no. 2 (enabling a swift return to the state that is responsible for the asylum application under immediate consideration of the Dublin-III-REG); *see also* Asylgesetz [AslyG] [Asylum Act], Sept. 2, 2008, BGBL I at 1798, § 18, para. 2, no. 2; Dublin-III-REG, *supra* note 6, art. 20, para. 4; Regierungsentwurf [Cabinet Draft], DEUTSCHER BUNDESTAGS: DRUCKSACHE [BT] 16/5065, at 215 (Ger.), *with* Dublin-III_REG, *supra* note 6, art. 20, para. 4.

III. The Legal Consequence of Article 20, Paragraph 4 of the Dublin-III-REG

If an application for international protection is lodged at the German-Austrian border, Germany is not legally obligated to issue an entry permit. Rather, the state of residence—the "transit" Member State—"shall be informed without delay by the Member State which received the application and shall then, for the purposes of this Regulation, be regarded as the Member State with which the application for international protection was lodged."[19] The responsibility to start the Dublin Procedure and examine the application thus lies and remains with the state of residence, for example Austria. This legal consequence does not lie at the discretion of the German border agencies.

It also does not lead to any hardships for the applicant that amount to being intolerable or contrary to human rights. The provision does not authorize formless repulsions that in fact are incompatible with the Dublin System.[20] The applicants are rather "informed in writing of this change in the determining Member State and of the date on which it took place."[21] By fulfilling this information obligation, applicants are placed in a position of being capable of claiming their EU-given asylum rights with a clearly-identified Member State. Should it become apparent in the course of Austria's responsibility-examination that Germany is instead responsible for the asylum demand of certain applicants—because, for instance, their family members already reside here[22]—then Austria has to conduct a take charge request according to Article 21 of the Dublin-III-REG.

The terrible scenario of a refugee stuck in transit-orbit[23] could only occur if the Austrian authorities refuse to carry out the asylum procedure which has already been initiated through a successful application lodged with the German border guards. Such a refusal would clearly breach the obligations of Austria under the Dublin-III-REG. Such conduct cannot be implied.[24]

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[19] Dublin-III-REG, *supra* note 6, art. 20, para. 4, subpara. 1, sentence 2.

[20] *See* Sharifi v. Italy, App. No. 16643/09, (Oct. 21, 2014), http://hudoc.echr.coe.int/; HOLGER WINKELMANN, GÜNTER RENNER, JAN BERGMANN & KLAUS DIENELT, AUSLÄNDERRECHT, § 18 Asylum Procedure Act, para. 23 (10th ed. 2013).

[21] Dublin-III-REG, *supra* note 6, art. 20, para. 4, subpara. 2.

[22] *See id*. art. 8–11, 16.

[23] *See* Anna Lübbe, *supra* note 14.

[24] Incidentally, all Member States along the "Balkan route" would naturally have to be informed ahead of time of the hitherto absent application of Art. 20 paragraph 4 of the Dublin-III-REG on the basis of Union loyalty. *See* Treaty of Lisbon art. 4, para. 3. This would bring a definitive end to the policy of "waving through."

C. Differentiating External and Internal Relations

Article 20, paragraph 4 of the Dublin-III-REG integrates well into the overall concept of the Dublin System, which differentiates between applications for protection at an external border and applications at an internal border, and between the relationship between the EU and third countries (external border) and the relationship between Member States (internal borders).

The first sentence of Article 3, paragraph 1 of the Dublin-III-REG states that "[M]ember States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones." This, however, is a collective promise of the Member States that participate in the Common European Asylum System (CEAS). This promise is laid out in the first sentence of Article 78, paragraph 1 TFEU and elaborated in verbatim recitals of Directives in the secondary asylum *acquis*:

> A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of establishing progressively an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection *in the Union*. Such a policy should be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States.[25]

Therefore, it is the EU that is open to all applicants seeking protection. The passage "including at the border" in the first sentence of Article 3, paragraph 1 of Dublin-III-REG signals, in this context, that the requirements of adhering to the principle of *non-refoulement* of Article 33 of the Geneva Convention is completely complied with; specifically, there will be no return to a state where persecution exists or insufficient protection is provided—which generally can only be considered at external borders.[26] The

[25] Directive 2013/32, of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (recast), 2013 O.J. (L 180) 60; *see* Directive 2013/33, of the European Parliament and of the Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection (Recast), 2013 O.J. (L 180) 96; Directive 2011/95 of the European Parliament and of the Council of 13 Dec 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (recast), 2011 O.J. (L 337) 9.

[26] This also explains why Directive 2013/32 of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast), 2013 O.J. (L 180) 60, art. 8,

first sentence of Article 3, paragraph 1 of the Dublin-III-REG thereby ultimately only states—yet at least—that *every* refugee is given the guarantee that his application will be examined by a Member State.[27] Therefore, at the "external border" of the EU, or in an international transit area of an airport, an applicant may not be relegated to seek protection in the third-state from which he has traveled[28]— unless the repulsion is made to a safe third state (Article 3, paragraph 3 Dublin-III-REG).[29]

The "external" openness of the EU does not answer the question of which Member State is responsible for all those who "legitimately seek protection in the Union?"[30] In the case of reintroducing internal border checks, this could either be the Member State on this or the other side of the internal border. This responsibility needs to be clarified.

The fact that the internal distribution of responsibility is not regulated by the first sentence of paragraph 1 of Article 3 of the Dublin-III-REG[31] is made clear by the second sentence of that paragraph, which states that an "application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible."[32] The preceding "[p]rocess of determining the Member State responsible" for this examination has been regulated separately in the section on the "start of the procedure" in Chapter VI of Article 20. The special rules of Article 20, paragraph 4 of the Dublin-III-REG for applications at internal borders also allow for the previous EU state of residence to be considered the state of the initial application, which prevents the assignment of any subsidiary responsibility to Germany as the "first Member State in which the application for

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para. 1, encourages Member States along the external border, to already support applications for international protection, if a willingness for such is discernible merely in transit zones.

[27] *See* The Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities – Dublin Convention, Preamble, Aug. 19, 1997, 1997 O.J. (C 254) [hereinafter Dublin Convention]. For a memorandum of the Federal Government on the Dublin Convention, see Regierungsentwurf [Cabinet Draft], DEUTSCHER BUNDESTAGS: DRUCKSACHE [BT] 12/6485 (Ger.) [hereinafter Cabinet Draft].

[28] *See* Dublin-III-REG, *supra* note 6, art. 15.

[29] *See* Directive 2013/32 of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast), 2013 O.J. (L 180) 60, art. 33, para. 2 (showing that in this case as well the Member States do not have to examine an application for protection in the case of an arrival from safe third states).

[30] *See* Anna Lübbe, *supra* note 15.

[31] *Contra* Jürgen Bast & Christoph Möllers, *Dem Freistaat zum Gefallen: über Udo Di Fabios Gutachten zur staatsrechtlichen Beurteilung der Flüchtlingskrise*, VERFASSUNGSBLOG, http://verfassungsblog.de/dem-freistaat-zum-gefallen-ueber-udo-di-fabios-gutachten-zur-staatsrechtlichen-beurteilung-der-fluechtlingskrise/ (last visited Mar. 7, 2016).

[32] Cabinet Draft, *supra* note 17.

international protection was lodged" under Article 3, paragraph 1, subparagraph 1 of the Dublin-III-REG.

D. The Discretionary Clause and Entry Permit on Humanitarian Reasons

I. The Discretionary Clause of Article 17 I Dublin-III-REG and Its Limits

If it is the "transit" Member State that is responsible for starting the Dublin Process and examining international applications, German authorities need another legal basis for deciding to examine such applications. In fact, and by way of derogation from Article 3, paragraph 1 of the Dublin-III-REG, Article 17, paragraph 1 of the Dublin-III-REG grants Member States the discretion to "decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation." By exercising this discretion, this Member State becomes the responsible Member State and assumes the obligations connected to this responsibility. As a consequence, an asylum-seeker coming from EU countries and other safe third-countries cannot be denied entry.

Germany has clearly made use of this option in the case of Syrian refugees in the course of 2015.[33] Nonetheless, since the end of October 2015, the regular Dublin Procedures have applied again.[34] The German Minister of Justice also declared that the German government relied on the discretionary clause of Article 17, paragraph 1 of the Dublin-III-REG only until November 2015.[35] Whether the temporary reliance on the discretionary clause conformed to European law shall not be examined here, especially because it has been concluded in the meantime. From a procedural perspective, Article 17 of the Dublin-III-REG decrees obligations to provide information. Nothing is known about whether these obligations have been met. Moreover, it is doubtful whether Article 17, paragraph 1 of the Dublin-III-REG is the proper basis to permit the entry of thousands of unidentified persons.[36] In any case, making use of the discretionary clause is an option of Member States, not an obligation.[37] It

[33] This decision, made on Aug. 21, 2015, was communicated via a tweet by the BAMF. *See* BAMF (@BAMF_Dialog), TWITTER (Aug. 25, 2014, 4:30 AM) https://twitter.com/bamf_dialog/status/636138495468285952.

[34] *See Deutschland wendet Dublin-Verfahren wieder für Syrer an*, DEUTSCHE WELLE (Nov. 10, 2015), http://www.dw.com/de/deutschland-wendet-dublin-verfahren-wieder-f%C3%BCr-syrer-an/a-18841749 (last visited on Mar. 7, 2016) (showing that the BAMF, since Oct. 21, 2015 no longer "generally makes use of its right to act sovereignly on its own", but rather "in a continuous process," checks whether the responsibility exists for a different Member State as per Dublin-III-REG).

[35] Heiko Maas, *Wer das Recht wirklich schwächt*, FRANKFURTER ALLGEMEINE ZEITUNG (Jan. 20, 2016), http://www.faz.net/aktuell/politik/fluechtlingskrise/gastbeitrag-von-justizminister-heiko-maas-14041595.html.

[36] *Cf*. Research Section of the German Bundestag, elaboration on Nov. 26, 2105, entry of asylum seekers from safe third countries, Az.: WD 3 - 3000 - 299/15, p. 7 under 2.4.

[37] *See* Case C-4/11, Germany v. Puid, paras. 29, 33 (Nov. 14, 2013), http://curia.europa.eu/.

is an exception to the rules which, from the perspective of EU law, in no way justifies the provision of entry permits to an unlimited amount of people or for an unlimited amount of time.[38] In considering the CEAS as a whole, the CJEU too has clearly rejected a blanket suspension of the Dublin System in the name of fundamental rights.[39]

II. Entry Permits on Humanitarian Grounds, Section 18, Paragraph 4 No. 2 German Asylum Act

Now that the discretionary clause under Dublin is no longer in discussion, entry permits for third-country nationals seeking national and/or international protection at the German-Austrian border can, at most, only be supported by an order of the Federal Ministry of the Interior under Section 18, paragraph 4 of the German Asylum Act "on humanitarian grounds, for reasons of international law or in the political interests of the Federal Republic of Germany." In fact, such an order was apparently made simultaneously with the introduction of border checks at the internal border to Austria. On September 13, 2015, the Federal Ministry of the Interior decided that "[m]easures for repulsion at the border regarding third-country nationals seeking protection . . . are currently not being applied."[40] Irrespective of how narrowly or broadly one interprets this provision, its application must respect the primacy of EU law. And EU law, as explained, provides for a reference procedure if an application for international protection is lodged at an internal border between Member States. This rule of Article 20, paragraph 4 of the Dublin-III-REG is not at the discretion of the German authorities.[41]

[38] FILZWIESER, *supra* note 17, art. 17 (Berliner Wissenschafts-Verlag 2014). The same applies to entry permits according to Art. 13, paragraph 1, first sentence in conjunction with Art. 5, paragraph 4, lit. c of the Schengen Borders Code on "humanitarian grounds," as long as one sees the rule of exception as applicable the permitting reasons are drawn from the reasons for protection of the laws of asylum. Schengen Borders Code, *supra* note 1, art. 13, para. 1, sentence 1, art. 4, para. 4, lit. c.

[39] *See* Joined Cases C-411/10 & C-493/10, N. S. vs. Sec'y of State for the Home Dep't, para. 83 (Dec. 21, 2011), http://curia.europa.eu/.

[40] Response, *supra* note 4, at 2.

[41] The Federal Government acted inconsistently on this when it no longer invoked the right to sole sovereign action under Art. 17, paragraph 1 of Dublin-III-REG, yet at the same time a ministers' order on a national legal base was meant to yield the same result. *See* Dublin-III-REG, *supra* note 6, art. 17, para. 1.

E. Conclusion

As a result, entry shall be refused to third-country nationals or stateless persons who lodge an application at reintroduced control points at internal borders between Member States, in particular at the Austrian-German land border.[42]

The consistent application of Article 20, paragraph 4 of the Dublin-III-REG at all internal borders where border controls are reintroduced due to exceptionally large numbers of irregular secondary movements within the Schengen area is a first step to restoring both the Dublin and Schengen Systems—no more, yet no less either. To tackle the migration crisis beyond that, more comprehensive support—and assistance—measures in favor of the Member States of first entry into the EU (in particular Greece and Italy) and the countries of origin are certainly needed.

[42] *See* Schengen Borders Code, *supra* note 1, art. 13, para. 1; *see also* Aufenthaltsgesetz [AufenthG] [Residence Act], Feb. 25, 2008, BGBL. I at 162, § 14, para. 1, § 15, para. 1; Asylgesetz [AslyG] [Asylum Act], Sept. 2, 2008, BGBL I at 1798, § 18, para. 2, no. 1.

Developments

The Constitutionality of § 89a of the German Criminal Code (StGB) and the Concept of a Serious Act of Violent Subversion: The German Federal Court of Justice (Bundesgerichtshof), Judgement of 8th May 2014 - 3 StR 243 / 13

By Christopher Ohnesorge, Julia Wilkes, Marius Eichfelder, Jinnus Rastegar, Matthias Derra & Julia Balmer[*]

Abstract

As a reaction to the increasing terrorist threat in Europe, the German Parliament (Bundestag) passed a law penalizing the preparation of terrorist acts endangering the state: § 89a German Criminal Code (StGB).[1] The Regional Court of Frankfurt am Main (LG Frankfurt) was the first to apply this section to a case where a young man was accused of building a pipe bomb. Upon his conviction, the defendant appealed to the German Federal Court of Justice (BGH),[2] claiming § 89a StGB to be unconstitutional. The BGH reviewed whether the statute was in conformity with the principles of the German Constitution (GG),[3] including the principle of legal certainty and appropriateness. It held that these principles were fulfilled, if stricter requirements are applied regarding the mens rea in order to counterbalance the broad actus reus. It decided that the Regional Court had not fulfilled this particular requirement and quashed the conviction insofar. This case and § 89a StGB caused ripples amongst legal scholars, especially due to the unusual penalization of preparatory acts and the broad scope of the statute's application. This case also produced an unprecedented change within the judge's bench.

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[1] Strafgesetzbuch [StGB] [German Penal Code], § 89a, *translation at* http://www.gesetze-im-internet.de/englisch_stgb/index.html.

[2] Bundesgerichtshof [BGH] [Federal Court of Justice] May 8, 2014, 3 StR 243/13 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3459 (Ger.) [hereinafter *Judgment of May 8, 2014*].

[3] Grundgesetz [GG], *translation at* http://www.gesetze-im-internet.de/englisch_gg/index.html.

A. Introduction

Threats from international terrorism remain prevalent and potent. According to the Bundestag, when the legislation that included § 89a was first included in the StGB, the risk of serious acts of violent subversion in Europe was, in particular, illustrated by the attacks in London and Madrid, the thwarted attacks on airlines in London, and by the suitcase bombs discovered in regional trains in Dortmund and Koblenz. In recent history, Germany has suffered from terrorist attacks, for example the suicide bombing in Ansbach. Specifically, the significance of internet platforms—which provide for content sharing that guides those committing terrorist attacks—is increasing. Moreover, terrorist instruction camps where perpetrators are instructed have gained relevancy regarding the preparation of terrorist attacks. These kinds of preparation techniques, however, could formerly only be prosecuted if there was proof of one of the following: the offender is a member of a "terrorist group" (§ 129a StGB), there is conspiracy or an attempt to incite a terrorist attack (§ 30 StGB), or such an attack has already been attempted beyond mere planning or preparation (§§ 22, 23 StGB).

The preparation of violent subversive acts incorporates serious danger, particularly considering the short time period between preparation and execution. Besides that, organizational structures of terrorist groups perpetually vary, for example al-Qaeda's hierarchical structures have become decentralized. As a result, § 129a StGB does not sufficiently protect against preparatory acts that precede terrorist attacks.

Therefore, the StGB was amended by including *inter alia* § 89a, which makes merely the preparation of serious violent subversive acts an offense when the perpetrator commits the enumerated actions embracing (1) instructing another person or receiving instruction for instance in a terrorist camp, (2) producing, obtaining, storing or supplying relevant weapons, substances, or devices and facilities, or (3) obtaining or storing objects or substances essential for the production of the weapons and substances mentioned above. Although the punishment for mere preparation is unusual, it is not new in German criminal law.[4]

In addition, the scope of § 89a also includes acts that are committed in another country in order to cope with the fact that terrorism often involves international networks.

[4] *See* Strafgesetzbuch [StGB] [German Penal Code], §§ 80, 83, 149, 202c, 275, 310, *translation at* http://www.gesetze-im-internet.de/englisch_stgb/index.html.

B. Circumstances of the Decision

After receiving German citizenship in 2009, the Afghan-born defendant, K, started studying mechanical engineering. In 2010, K gained the impression that the Western media coverage was generally blaming Muslims for terrorist attacks around the world and thus branding all Muslims terrorists. Subsequently, K began to feel hatred towards Western civilization and a desire for vengeance, because the Western civilization was, in his view, fighting and oppressing the Muslim population.

K began to do research on the internet, focusing on the Islamist-Jihadist area of Islam and especially the theological admissibility of armed Jihad, its territorial applicability, suicide and martyrdom, and collateral damage in Muslim civilization. In Summer 2010, the 24-year-old defendant downloaded and read the Jihad propaganda magazine "Inspire," which contained the article "How to Build a Bomb in the Kitchen of Your Mom." This article gave instructions on how to use readily available materials to build a pipe bomb capable of killing up to ten people.

In 2011—at the latest—the defendant came to the decision to build a pipe bomb as described in the aforementioned article. For that purpose, K rented a room in January 2011 and started the subsequent purchase of any required ingredients. This included nearly 200 boxes of matches, fireworks, metal pipes including seal caps, batteries, sugar, a chain of fairy lights, three alarm clocks, a cell phone, and sodium chlorate. In February 2011, K successfully tested igniting the explosive powder he had mixed from the matchstick heads and the black powder collected from the fireworks. The ingredients K collected were sufficient to construct a pipe bomb with a lethal impact radius of nine meters.

On February 13, 2011, K accidently set off an explosion while grinding flares in a mixer. He inflicted second-degree burns on his face and arms. After being admitted to a hospital he was questioned by police. K was discharged from the hospital on March 5, 2011 and was temporarily homeless. Despite police observation, K managed to take a flight to Pakistan, where he stayed with his wife's family. On May 8, 2011, a warrant was issued for K's arrest. He returned to Germany on December 22, 2012 and was arrested immediately.

The LG Frankfurt convicted K and sentenced him to a term of three years imprisonment for the preparation of a serious violent offense endangering the state pursuant to § 89a StGB. This also included a conviction for negligently causing an explosion pursuant to § 308 StGB. The court based its conviction mainly on the information gained from the evaluation of the materials seized from the room rented by K and the comprehensive statement K gave the police.

The defendant appealed the decision and claimed that § 89a StGB was unconstitutional.

C. Decision of the BGH

The *BGH* addressed the question of whether § 89a StGB was unconstitutional.[5] In the end, it partially set aside the verdict of the LG Frankfurt.

In the following Sections, (I.) the court's scrutiny of the constitutionality of § 89a StGB will be addressed, followed by (II.) its application to the case, and (III.) the unprecedented conflict of interest in the case.

I. Constitutionality of § 89a StGB

The court scrutinized whether § 89a StGB is in line with the constitutional principles of (1) legal certainty and (2) appropriateness.

1. The Principle of Legal Certainty (Bestimmtheitsgebot)

1.1 Significance

Pursuant to Article 20 (3) GG, the precedence of the constitution pertains.[6] This means that every law has to be in compliance with the GG. If this is not the case, the law will be invalid *ab initio* (from the beginning).[7]

One fundamental constitutional principle is the *Bestimmtheitsgebot* (principle of legal certainty). It is consistently a prohibition of analogy in the area of criminal law.[8] In this respect, Article 103 (2) GG, which states that punishment is only constitutional if the criminality of the act is defined by law before the commission, is a peculiarity of the general *Bestimmtheitsgebot* as a part of the *Rechtsstaatsprinzip* (rule of law).[9]

The principle of legal certainty includes the legislative obligation to clarify substantial questions of culpability or exemptions from punishment. Therefore, the legislature is

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[5] *See Judgment of May 8, 2014, supra* note 2, at para. 1.

[6] *See* Hans D. Jarass & Bodo Pieroth, *Jarass/Pieroth Grundgesetz: GG*, Art. 20 para. 32 (13th ed. 2011).

[7] *See* Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court], 1 BvL 83/86, 1 BvL 24/88, 1991, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1602.

[8] *See* Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court], 2 BvR 15/62, 1962, LMRR 14; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 2273/06, 2007, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1666.

[9] *See* Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court], 2 BvR 234/87, 2 BvR 1154/86, 1989, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1663 (1665); *see also* Mark A. Zöller, *Festschrift für Jürgen Wolter zum 70. Geburtstag*, 503–06 (2013).

committed to paraphrasing the conditions of criminal liability in such a precise way that the consequence and area of application of the criminal offense is distinguishable and determinable by an interpretation of the legal provision.[10] The constitutional principles implying the obligation for legislators to take every substantial decision themselves are quite weighty, especially in the area of criminal law. Thus, the principle of legal certainty requests that the legislature captures statutory provisions as precisely as possible so the addressees of a provision may already distinguish through the wording if certain behavior is indictable.[11] In borderline cases, where the punishability of a certain behavior may not be definite, the risk of punishment has to be at least foreseeable.[12] This does not imply that every rule must be clarified down to the last detail. Rather, the legislator should remain in the position of meeting the multifarious requirements of life.[13] Otherwise, there would be a risk that the principles become inflexible and casuistic and hence would not make the necessary adjustments over time in response to changing circumstances. A consequence of the abstractness of criminal provisions is uncertainty as to whether certain behavior constitutes a criminal offense is unavoidable. Accordingly, the principle of legal certainty by no means signifies the obligation of the legislator to outline any criterion in an exclusively comprehensive way. Rather it is legitimate to have recourse to past jurisdictions for an interpretation of the law.[14]

Accordingly, it is not possible to make a general assertion about how certain the legal criminal offense must be. Rather, the offense has to be viewed in its totality to ascertain whether the legislator has adhered to Article 103 (2) GG. With this, characteristics of the particular criminal offense have to be taken into consideration, such as circumstances leading to the statutory regulation as well as the norm addressees.[15] At that point, the higher the threatened punishment is, the more precisely the legislature must determine the culpability requirements.[16]

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[10] Jarass & Pieroth, *supra* note 6, at Art. 103 para. 48.

[11] *See* Wolfgang Mitsch, *Vorbeugende Strafbarkeit zur Abwehr terroristischer Gewalttaten,* NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 209 (2015) (providing an evaluation from the perspective of practitioners).

[12] *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 932/06, 2007, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1666.

[13] *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvR 2150/08, 2010, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 47, para. 107.

[14] *See* Ronald Schmitz, *Joecks/Miebach Münchener Kommentar zum StGB*, §§ 242–45 (2nd ed. 2011).

[15] *See, for e.g.*, Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court], 2 BvR 2559/08 i.a., 2010, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3209.

[16] *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvL 11/85, 1987, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3175.

In the constellation examined here, the *BGH* did not ask the Federal Constitutional Court (BVerfG)[17] for a decision by means of a concrete review of the status in accordance with Article 100 *GG*, but rather took on a constitutional interpretation by itself.

1.2 Application to § 89a StGB

The first condition for culpability is a serious act of violent subversion. The legal definition of § 89a (1) 2 StGB states that the preparatory act must intend to impair and actually be capable of impairing the existence or security of a state or of an international organization, or to abolish, rob of legal effect, or undermine constitutional principles of the Federal Republic of Germany.[18] There are a significant number of terms which still need to be defined. Albeit, the legislature has explicitly seized on the wording of § 120 of the German Courts Constitution Act (*GVG*)[19] and the case law relating thereto.[20] Thereby, it was stated that the factual conditions had already been clarified by superior court decisions and access to the definitions in § 92 StGB is available.[21] The *BGH* held that the text of the law ensures an interpretation of the regulation and consequently an apprehension of the content.[22]

Besides a serious act of violent subversion, one of the three different statutory criminal actions stipulated in § 89a (2) StGB must be performed. The statutory regulation contributes to a clearer distinction amongst indictable conduct and behavior which are not subject to prosecution.[23]

In the present case, the *BGH* had to deal with § 89a (2) No. 1, 3 StGB, on which the conviction from the LG Frankfurt was based. The *BGH* held that the aforementioned regulations are sufficiently concrete and that the legislature insofar adopted a wording

[17] Bundesverfassungsgericht.

[18] *See* Strafgesetzbuch [StGB] [German Penal Code], §§ 211, 212, 239a or 239b, *translation at,* http://www.gesetze-im-internet.de/englisch_stgb/index.html (having committed an offense according to such sections of StGB).

[19] Gerichtsverfassungsgesetz.

[20] *See, e.g.,* Bundesgerichtshof [BGH] [Federal Court of Justice] 2001, 3 StR 378/00 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1359, .

[21] *See* Regierungsentwurd [Cabinet Draft] Deutscher Bundestag: Druckashen [BT] 16/12428, 14.

[22] *See Judgment of May 8, 2014, supra* note 2, at para. 3461.

[23] *See* Strafgesetzbuch [StGB] [German Penal Code], *translation at* http://www.gesetze-im-internet.de/englisch_stgb/index.html (excluding §§ 80, 83 and 234a (3) StGB, which are restricting hereunto).

similar to § 310 (1) StGB.[24] Concerning the prerequisite of special equipment required for the accomplishment of the deed, it is understood that a particularly technical apparatus and instruments, detonators, and other engineered products are included. Due to the subjects and substances listed, as well as the necessity of the conduct, a further ascertainment through the common legal interpretation methods is possible. Anyhow, the question arises whether everyday items are covered by § 89a (2) No. 3 StGB as well. A mobile phone, for example, may be indispensable for manufacturing a weapon.[25] It is not apparent from a reading of § 89a (2) No. 3 StGB, however, that the legislator aimed to exclude items such as mobile phones and alarm clocks with the prerequisite of necessity.[26]. That is why it is particularly suggested to cover everyday items under No. 3 if their purpose of use is intentionally changed.[27] Additionally, it is differentiated according to whether or not the possession of the item is socially accepted and therefore legally permitted.[28] Everyday items are then crucial in terms of § 89a (2) No. 3 StGB, if all objects together represent an efficient weapon according to § 89 (2) No. 1 StGB.

2. Appropriateness of the Norm

2.1 Legitimate Legislative Purpose

The *Bundestag* passed § 89a StGB in August 2009. It was argued that the already existing sections pertaining to terrorist threats were no longer sufficient for an effective prosecution. The objective was *inter alia* to ensure that preparatory actions of offenders that are unaffiliated with a terrorist organization would be punishable.[29] The BGH deemed this pursued purpose unequivocally constitutional.[30]

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[24] *But see* N. Gazeas, *Leipold/Tsambikakis/Zöller, Anwaltskommentar zum StGB*, § 89a para. 6, (1st ed. 2011) (offering critical commentary on this position).

[25] *See* Sternberg-Lieben, *Schönke/Schröder, StGB Kommentar* § 89a para. 15 (29th ed. 2014).

[26] *See supra* note 21, at para. 15; *see* J. Schäfer, *Joecks/Miebach, Münchener Kommentar zum StGB* § 89a para. 48 (2nd ed. 2011).

[27] *See* K. Backes, *Der Kampf des Strafrechts gegen nicht-organisierte Terroristen,* StV 654, para. 658 (2008).

[28] *See* R. Haverkamp, *Verbrechen - Strafe - Resozialisierung: Festschrift für Heinz Schöch zum 70. Geburtstag am 20. August 2010* 381, 392 (2010).

[29] *See supra* note 21, at para. 1.

[30] *See* H.-U. Paeffgen, *Kindhäuser/Neumann/Paeffgen § 89a StGB* (2013) (opposing the notion that the de facto law includes the endangerment of all states, not just the BRD—which could be critical under international law).

2.2 Suitability (Geeignetheit) and Necessity (Erforderlichkeit)[31]

Furthermore, the law had to be held suitable and necessary to attain this purpose, because it constitutes an infringement of Article 2 (1) and (2) GG.[32]

In relation to this aspect, the *BGH* referred to the margin of discretion which the legislature possesses.[33] Due to this prerogative, the court is not obliged to ascertain whether the enacted legislation is the most reasonable and purposeful option. Therefore, it can only be deemed unconstitutional if it is self-evident that the legislators have transgressed their boundaries, which was not the case.[34]

This substantiation has been criticized by voices in jurisprudential literature, presuming it to be superficial. Some reason that the court would even evade the most basic control and would leave almost unlimited leeway for the legislature. Whether the law was suitable at all is debatable, because it has not been established empirically that criminal law is the most adequate tool to combat terrorism.[35]

2.3 Reasonability (Angemessenheit)

Lastly, § 89a StGB shall fulfill the prerequisite of reasonability. A law will only be reasonable if its intensity and the way it afflicts the individual is not disproportionate to the protected basic right.[36] Because no general rules exist, the reasonability of each law must be examined individually. This means that every aspect of the statute has to be considered critically.[37] In this case, regarding § 89a StGB, five aspects need to be scrutinized particularly in the light of the German Constitution: (a) the high custodial sentence, (b) the criminalization of the preparation, (c) the question of whether the statute is an unlawful

[31] Geeignetheit means that the measure taken by the state must be appropriate to further or reach the intended aim, while Erforderlichkeit denotes that the measure must be the least severe in comparison to other options. *See* B. Grzeszick, *Art. 20 GG-Kommentar, Maunz/Dürig*, para. 112 (2016).

[32] See *Judgment of May 8, 2014, supra* note 2, at para. 3459.

[33] This margin of discretion cannot be fully scrutinized by the courts due to practical reasons. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvL 43/92, 1994, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1577 (commenting further regarding the margin of discretion).

[34] See *Judgment of May 8, 2014, supra* note 2, at para. 3459.

[35] *See* M. Zöller, *Die Vorbereitung schwerer staatsgefährdender Gewalttaten nach § 89 a StGB – wirklich nicht verfassungswidrig?*, NSTZ 373 (2015).

[36] *See* S. Huster & J. Rux, *V. Epping/C. Hillgruber, Beck'scher Online-Kommentar zum Grundgesetz*, Art. 20 para. 197 (26th ed. 2015).

[37] See *Judgment of May 8, 2014, supra* note 2, at para. 3462.

punishment of a criminal's attitude, (d) the constitutionality of the state security provision, and (e) the broad mens rea.

a) The High Custodial Sentence

As mentioned above, every aspect of the *Angemessenheit* must be judged by the right of Article 2 (2) 2 GG, which guarantees one's right to liberty. This basic right might be affected in an inappropriate way due to the high sentence mandated by § 89a StGB. Pursuant to this section, a perpetrator who prepares a terrorist act is liable to a term of imprisonment of six months to ten years. Even in minor cases, the sentence amounts to three months, in accordance with § 89a (5) StGB. It is left to the judge's discretion, however, whether and how to mitigate the sentence or even exempt a defendant from a punishment if the culprit shows remorse.[38] Hence, it is possible to adapt the sentence justly in each case. In addition, the prosecution service could theoretically eliminate the perpetrator from the enquiry if there is no significantly high level of guilt. Finally, in view of conceivable terrorist attacks aiming to murder hundreds of people, the maximum sentence of ten years seems proportional.[39]

b) The Criminalization of the Preparation of a Crime

Apart from the high custodial sentence, it could be argued that § 89a StGB must be rendered unconstitutional because it criminalizes the preparation of a crime which occurs prior to the actual attempt.[40] This system applies to other areas of German criminal law as well: for instance, §§ 80, 83, 87, 149, and 310 StGB—as well as other criminal laws[41]—render conduct distant from the actual attempt of a crime punishable by law. To substantiate this argumentation, the BGH refers to § 80 StGB,[42] which criminalizes the preparation of a war of aggression. This is also entrenched in Article 26 (1) 2 GG. Therefore, rendering preparation acts criminally liable cannot be unconstitutional in general.[43] In addition, the *Bundesverfassungsgericht* decided in 1970[44] that the legislature may

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[38] *See* Strafgesetzbuch [StGB] [German Penal Code], §§ 89a, para. 7, 49, para. 2, *translation at* http://www.gesetze-im-internet.de/englisch_stgb/index.html.

[39] See *Judgment of May 8, 2014, supra* note 2, at para. 3462.

[40] *See* Mitsch, *supra* note 11, at 211; *see* Zöller, *supra* note 35, at 377.

[41] See *Judgment of May 8, 2014, supra* note 2, at para. 3463 (detailing a list of similar statutes).

[42] *Id.*

[43] *Id.*

[44] *See* Bundesverfassungsgericht. [BVerfGE] [Federal Constitutional Court], 2 BvR 396/69, year, BVerfGE 28, para. 175 (referring to a previous version of § 100e StGB, which criminalized conduct that may endanger official secrets).

criminalize actions in the earliest possible stages to alleviate any danger for state security.[45] This decision was stated more precisely in several other judgements of the *Bundesverfassungsgericht*,[46] in which the court ruled that new criminal laws can be justified if a valuable object of legal protection is endangered.

Thus, § 89a StGB can be rendered constitutional if it protects valuable rights of the individual or the public. The *BGH* held that § 89a StGB might deter others from committing terrorist attacks and enables police and prosecutors to prevent any such offenses. This should subsequently protect the rights of individuals and the public more efficiently.[47]

Following this argumentation, the *BGH* did not render the criminalization of the preparation of a crime to lead to the unconstitutionality of § 89a StGB.[48] The BGH correctly ignored the critique in legal literature.[49]

c) Unlawful Punishment of the Criminal's Attitude

Furthermore, the *BGH* held that § 89a StGB did not punish the attitude of the criminal, but rather perilous conduct.[50] Otherwise, this would render § 89a StGB unconstitutional due to the fact that criminal law must not punish the thoughts of a person; instead it shall refer only to specific conduct.[51] In the present case, the judges argue that the mens rea of § 89a StGB comprises specific, precisely paraphrased conduct.[52] Without this objective part, one cannot be convicted on the basis of this section. Therefore, the statute does not punish definite plans or attitudes; it relates, rather, to the specific conduct that imperils the rights of third parties or the public.

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[45] *Id.* at para. 186, 188.

[46] *See* [BVerfG] [Federal Constitutional Court], 2 BvR 869/92, 1993, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1911, (regarding a previous version of § 180a StGB); *see* [BVerfG] [Federal Constitutional Court], 2 BvR 1656/03, 2006, [NVwZ] 583 (584), (regarding § 316b StGB).

[47] See *Judgment of May 8, 2014, supra* note 2, at para. 3463.

[48] *Id.*

[49] *See, e.g.,* Mitsch, *supra* note 11, at 211; *see* Zöller, *supra* note 35, at 377; *see* N. Gazeas, T. Grosse-Wilde & A. Kießling *Die neuen Tatbestände im Staatsschutzstrafrecht – Versuch einer ersten Auslegung der §§ 89a, 89b und 91 StGB,* NSTZ 593, 604 (2009).

[50] See *Judgment of May 8, 2014, supra* note 2, at para. 3463.

[51] See W. Joecks, *W. Joecks/K. Miebach, Münchener Kommentar zum StGB* § 16 para. 20 (2nd ed. 2011).

[52] See *Judgment of May 8, 2014, supra* note 2, at para. 3463. *But see* Mitsch, *supra* note 11, at 211.

d) Constitutionality of the State Security Provision

In the decision, the *BGH* scrutinized the construction and constitutionality of the state security provision included in § 89a (1) 2 StGB. This provision stipulates that the perpetrator's actions must be capable of impairing the existence or security of a state or of an international organization, or abolishing, robbing of legal effect or undermining constitutional principles of the Federal Republic of Germany. When considering the impairment of state security, those actions which precede the offense are relevant. As to the mens rea, intention thereto is required pursuant to the wording of the law.

In accordance with § 120 (2) 1 *GVG*[53], the *BGH* submits a definition of the term state security—it refers to the internal and external security of the Federal Republic. Internal security means a state of relative invulnerability of its existence and its constitution from violent subversive acts of internal parties. Merely affecting any public feeling of security is not sufficient, but the impairment of state affairs is required. As a rule, the internal security is affected when an action can impair the internal structure of the state. This must be established objectively. Indicators of the requisite impairment of state security are: Public officials as victims, symbolism and publicity of the chosen location, and other circumstances of the offense.

According to the *BGH*, the perpetrator must only have knowledge of the relevant circumstances and accept the consequences hereof (*dolus eventualis*)[54]. This opinion diverges from a part of the legal literature which opines that it is further required that the perpetrator must have certain knowledge of the consequences caused by his act (second-degree *dolus directus*).[55][56] The arguments of the *BGH* therefore include the intent and purpose of the law as well as the pertinent legislative materials.[57]

Although the protected interest of the public feeling of state security is fairly vague, the BGH has no doubt that there is no excessive expansion of criminal prosecution and thus, deems the state security provision constitutional.

[53] Gerichtsverfassungsgesetz [GVB] [German Courts Constitution Act].

[54] Similar to a low level of recklessness.

[55] Similar to the second level of intent.

[56] *See* Sternberg-Lieben, *supra* note 25, at para. 17; *see* Paeffgen, *supra* note 30, at 25.

[57] See also construing the requisite mens rea below under subparagraph (e).

e) Constitutional Interpretation of the Mens Rea

Finally, and equally important, the court elaborates on the question as to whether it is appropriate to convict a perpetrator who has not determined the time, place, and details of the later attack.[58] According to the German Legislature,[59] it shall be sufficient that one who prepares a terrorist attack has the intention to commit an offense against life[60] or encroach upon the right to personal freedom.[61]

The court, however, held that this argumentation does not adhere to the systematic nature of the German criminal law: in order to be liable to criminal prosecution, it shall not suffice that one merely determines the general type of the offense. The conduct must be focused additionally on a severe danger to the existence or security of a state, pursuant to § 89a (1) 2 StGB. Thus, the offense must be definite enough to ascertain whether the state is jeopardized. As a consequence, the perpetrator shall have the intention to commit one of the offenses mentioned in § 89a StGB as well as all further prerequisites.[62] With regards to the time, place, and victims of the crime, neither the wording of § 89a StGB nor the justification of the legislator require a specific intention.[63]

Irrespective of this argumentation, one must consider that the law's scope is excessively broad and encompasses neutral behavior that is far from criminal—pursuant to § 89a StGB, it is sufficient that one obtains or stores *inter alia* objects or substances essential to produce weapons, explosives, poison, or similar substances detrimental to health. Hence, the actus reus would, for instance, be met if one purchases a significant number of flowers, which saps could theoretically be used to create poisonous substances—no matter the reason for which they were originally obtained. The same applies to other neutral conduct, such as the purchase of mobile phones or saving money.[64] Furthermore, a closer look into § 89a (2) No. 3 StGB—which refers to purchases of substances that could be utilized to produce *inter alia* weapons—reveals that the legislator even criminalizes the preparation

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[58] See *Judgment of May 8, 2014, supra* note 2, at para. 3464.

[59] *See* supra note 21, at 14.

[60] *See* Strafgesetzbuch [StGB] [German Penal Code], §§ 211–212, *translation at* http://www.gesetze-im-internet.de/englisch_stgb/index.html (criminalizing the conduct under law).

[61] *See* Strafgesetzbuch [StGB] [German Penal Code], §§ 239a, 239b, *translation at* http://www.gesetze-im-internet.de/englisch_stgb/index.html (criminalizing the conduct under law).

[62] *See* OLG Karlsruhe [OLG], 2 Ws 157/11, StV 348, 350 (2012).

[63] See *Judgment of May 8, 2014, supra* note 2, at para. 3464; *see* Sternberg-Lieben, *supra* note 25, at para. 4.

[64] *See* Gazeas, Grosse-Wilde & Kießling, *supra* note 49, at 597; *see* R. Deckers & J. Heusel *Strafbarkeit terroristischer Vorbereitungshandlungen – rechtsstaatlich nicht tragbar, in ZRP* 169, 171 (2008) (providing further examples of neutral behaviors which fulfill the actus reus).

of the preparation. These examples exemplify that most of the conduct mentioned in § 89a (2) StGB does not recessively feed into a terrorist attack.[65] Many argue that this renders the statute inappropriate and subsequently unconstitutional.[66]

The court held, however, that the broad actus reus does not inevitably render § 89a StGB unconstitutional. The judges utilized the mens rea to curb the scope of the law—pursuant to § 89a *StGB*, the offender must at least approve of the consequences of the crime. The wording does not require the clear intention to commit a terrorist attack; it shall be sufficient that the perpetrator knows about the possibility of injuring people and accepts the effects. Thus, the requisite mens rea is nearly as broad as the actus reus. With regard to the high custodial sentence, this may afflict the individual in an inappropriate and unforeseeable way.[67] To avoid the unconstitutionality of the section, however, the BGH construes the statute in the light of the constitution.[68] According to this restrictive interpretation, the perpetrator must act with the clear intention to conduct a terrorist attack after the preparation (first-degree *dolus directus*)[69]. The intention must be proved at trial by the prosecution service. This restricts the scope of § 89a StGB in a considerable way. According to the judges, the law's wording and the legislature's justification do not contradict the restrictive construal. Furthermore, it is sufficient to render § 89a StGB constitutional.

It has to be honored that the court attempts to sustain the statute and invoke it in the case. With regards to the separation of power, the interpretation in light of the constitution seems generally sensible. According to legal literature, a critical analysis of why the court curtails the broad objective part of the statute by increasing the prerequisites for the subjective part is necessary.[70]

This *BGH* solution might lead to contradictory and absurd results in a trial. First, aside from cases where the defendant confessed his intention, the mens rea has to be determined by examining the objective conduct of the defendant.[71] Second, if the evidence does not approach the necessary standard to prove the defendant's intention to commit a terrorist

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[65] *See* Zöller, *supra* note 35, at 377.

[66] *See* Gazeas, Grosse-Wilde & Kießling, *supra* note 49, at 604; *see* Deckers & Heusel, *supra* note 64, at 171; *see* Zöller, *supra* note 35, at 378.

[67] *See* Paeffgen, *supra* note 30, at 22.

[68] See *Judgment of May 8, 2014, supra* note 2, at para. 3464.

[69] Similar to the first level of intent.

[70] *See* Zöller, *supra* note 35, at 378; *see* Mitsch, *supra* note 11, at 211.

[71] *See* Mitsch, *supra* note 11, at 211.

attack, he may be able to avoid prosecution by alleging that he was not sure whether to commit an attack or not.[72]

Hence, a restrictive interpretation of the broad actus reus in lieu of the mens rea could have been more effective. Notwithstanding, it is highly probable that lower courts will orient themselves towards the decision of the *BGH* and invoke the statute without any concerns in their cases.

II. Application to the Case

1. Actus Reus

To meet the requirements of the actus reus, the defendant would have had to objectively prepare a serious act of violent subversion. According to § 89a StGB, such an act comprises a criminal offense against life[73] or personal liberty[74] that is intended and suitable to impair the existence or security of a state or to subvert the constitutional principles of the Federal Republic of Germany. The *BGH* found that the actus reus was satisfied.

By purchasing metal pipes, fireworks etc., the defendant obtained items and substances necessary for manufacturing pipe bombs, which qualify as contraptions denoted in § 89a (2) No. 1, thus executing a part of the actus reus.

The defendant was determined to build this explosive device and detonate it in order to kill an unascertained number of people. Hence, instrumentalities, method of execution, an outline of circumstances, and the perpetrator's motivation were already definite. Although a specific time and place had not been determined, the act was already adequately substantiated.

Furthermore, the defendant intended the attack to be directed against random victims representing the Western world, at which the defendant's religious hatred was aimed. This attack could have sown seeds of doubt into the general public regarding the capability of the security authorities and therefore would have posed a threat to the domestic security of Germany.

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[72] *See* Zöller, *supra* note 35, at 378.

[73] *See* Strafgesetzbuch [StGB] [German Penal Code], §§ 211, 212, *translation at* http://www.gesetze-im-internet.de/englisch_stgb/index.html.

[74] *See* Strafgesetzbuch [StGB] [German Penal Code], §§ 239a, 239 b *translation at* http://www.gesetze-im-internet.de/englisch_stgb/index.html.

2. Mens Rea

Regarding the requirements of the violent act of subversion as well as the specific act itself, the defendant at least operated with conditional intent (*dolus eventualis*), which is sufficient in these cases.[75]

The explanations of the LG Frankfurt, however, were not adequate to substantiate the means rea concerning the execution of the prepared act. The judgment did not show sufficient grounds to presume the defendant's firm determination to commit the offense. Consequently, the BGH reversed the conviction and relegated the case for a retrial.

III. Voluntary Self-Exclusion of a Judge Due to Conflict of Interest

In German law, § 24 (2) of the Code of Criminal Procedure (StPO)[76] permits parties in criminal cases to challenge and remove a judge assigned to hear the case if it can be established that the judge is biased or has a conflict of interest. In general, the fact that a judge has expressed an opinion on a case is not sufficient cause for a judge's recusal. Although, a judge who has already chosen a final position concerning the decisive issue of the case in question cannot be unbiased. This challenge procedure received considerable attention in the criminal appeal at hand.

The problems associated with the challenge procedure—which is often used as a defense delay tactic—are that it greatly disrupts calendars and defers the commencement of criminal trials. In this particular case, however, it was not the defense, but one of the judges who recused himself—which occurred for the first time at the Federal Court of Justice—and invoked a remarkable justification. The judge stated that he was interested in chemical and physical issues as well as Islam and theological statements of a former member of al-Qaeda. The judge argued that these very interests were sufficient to commit the offense sanctioned by § 89a StGB.[77] Therefore, his personal interest in interpreting this prescription rather restrictively, he believed, made him biased not to the detriment but, on the contrary, to the benefit of the defendant.

This illustrates the controversial nature of § 89a StGB once more, as its broad actus reus is deemed unconstitutional by many voices among jurisprudence.

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[75] *See* Schäfer, *supra* note 26, at 57.

[76] Strafprozessordnung [StPO] [Code of Criminal Procedure].

[77] *See* Bundesgerichtshof [BGH] [Federal Court of Justice] April 2, 2014, 3 StR 243/13 [BeckRS] 05923 para. 2.

D. Conclusion

Even though the constitutionality of § 89a StGB is highly controversial, the *BGH* concluded that the section is constitutional when interpreted in line with constitutional principles. It found that the wording of the section is in line with the principle of legal certainty. Furthermore, § 89a StGB was found to be suitable to serve a legitimate legislative purpose and to be an appropriate measure for it. It is the court's opinion that the rather broad actus reus is curbed by a restrictive interpretation of the mens rea, rendering § 89a StGB constitutional.

While the final word on the constitutionality of § 89a StGB is yet to be spoken by the *Bundesverfassungsgericht*, the German legislature already amended the section by adding subsection 2a.[78] This subsection criminalizes the act of leaving Germany in order to receive instructions for the preparation of a serious violent offense endangering the state in a foreign country. In other words, it criminalizes the "preparation of a preparation"[79] of a serious violent offense. As this shifts the criminal liability to a very early stage, this subsection is even more controversial than the rest of the section.[80] In light of the increasing threat of terrorist attacks in (central) Europe, however, and the global call for a more efficient prosecution of terrorists,[81] it is likely the *Bundesverfassungsgericht* will deem § 89a StGB to be in line with the constitution—including subsection 2a.

[78] *See* Regierungsentwurd [Cabinet Draft] Deutscher Bundestag: Druckashen [BT] 18/4087.

[79] *See* J. Puschke, *Der Ausbau des Terrorismusstrafrechts und die Rechtsprechung des Bundesgerichtshof,* STV 457, 459 (2015).

[80] *See* S. Beukelmann, *Neues im Kampf gegen den Terror,* NJW-SPEZIAL 2015 120f; *see* Puschke, *supra* note 79, at 459; *see* M. Zöller, *Der Terrorist und sein (Straf-)Recht* 90, 103 (GA, 2016); *see* N. Gazeas, *Zu viel des Guten? – Zur Verschärfung im Terrorismusstrafrecht, in* DRIZ 218, 220 (2015).

[81] *See, e.g.,* U.N. Res. 2178 (2014).

Special Section
Network Analysis and Comparative Law Methods

Peek-A-Boo, It's a Case Law System! Comparing the European Court of Justice and the United States Supreme Court from a Network Perspective

By Mattias Derlén & Johan Lindholm[*]

A. Introduction

I. CJEU and Case Law – Throwing Darts in the Dark?

From the moment of its inception the European Union (EU) has included a court that was entrusted to give coherence and integrity to the interpretation and application of the Union's primary and secondary law.[1] That the Court of Justice of the European Union (CJEU) was to play an important role in settling disputes was clear. But few anticipated how instrumental the Court would become in the development of EU law.[2]

No one can dispute that the CJEU's judgments constitute an important source of European Union law. When the Court renders a judgment it settles the case at hand but also sets a precedent for how subsequent cases are to be resolved.[3] Collectively this precedent constitutes case law, sometimes even "settled" or "established" case law, which can serve

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[1] Article 31 of the Treaty establishing the European Coal and Steel Community ("La Cour assure le respect du droit dans l'interprétation et l'application du présent Traité et des règlements d'exécution."), now Article 19 of the Treaty on European Union (TEU).

[2] *See*, *e.g.*, Karen J. Alter, *Who are the 'Masters of the Treaty'?: European Governments and the European Court of Justice*, 52 INT'L ORG. 121 (1998); Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991); PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW 63–66 (5th ed. 2011).

[3] John J. Barceló, *Precedent in European Community Law*, *in* INTERPRETING PRECEDENT 407, 417(D. Neil McCormick et al. eds., 1997). Barceló notes that the Court never explicitly refers to its previous judgments as "precedents". *Id*. However, the Court has acknowledged that the General Court's judgments can "constitute a precedent for future cases". Case C-197/09 RX-II, M v EMEA, EU:C:2009:804, para. 62; Case C-334/12 RX-II, Jaramillo et al. v EIB, EU:C:2013:134, para. 50.

as a legal basis for deciding subsequent cases, occasionally extensively or even exclusively.[4] For example, this is true concerning the principle of state liability, for which the Court now openly refers to its judgment in *Francovich* as the source of law.[5] The importance of such settled case law is demonstrated by how simply arguments going against such case law are rejected by the Court, sometimes by the well-known put-down "suffice it to say".[6]

It is clear that the CJEU's case law constitutes one of the primary sources of European Union law. But that is where the certainty ends. There are many questions about CJEU case law that legal scholars have not yet answered – or about which scholars have not found common ground. This article addresses the fundamental questions of how the CJEU[7] establishes and uses precedent.[8]

The CJEU has frequently been criticized for lacking a clear method for establishing and using precedent. At least five specific (and interrelated) criticisms have been levelled at the Court: First, the Court normally only cites previous judgments in support of its arguments. Judgments pointing in other directions are typically ignored.[9] This approach is still described as a step forward as compared to the traditional approach of the Court, where passages from previous cases were repeated without giving any source.[10] Second, the Court does not

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[4] *See*, *e.g.*, Case C-409/06, Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim, EU:C:2010:503, paras. 36, 39, 53, 33 and 58.

[5] *See*, *e.g.*, Case C-176/12, Association de médiation sociale v Union locale des syndicats CGT et al., EU:C:2014:2, para. 50 ("a party injured as a result of domestic law not being in conformity with European Union law can none the less rely on the judgment in Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357").

[6] See the overview in MITCHEL LASSER, JUDICIAL DELIBERATIONS 107–12 (2004).

[7] The judicial system of the European Union consists of a two-part structure, with the CJEU at the top and the General Court below it. In this article, we only discuss the CJEU, as it is the most important court of the Union. EU legal development by way of case law primarily takes place in the CJEU. This court decides on average 600–700 cases per year. *See* Annual Report of the Court of Justice of the European Union, Luxembourg 2015, 93. Arnull has published a useful general introduction to the Court of Justice. *See* ANTHONY ARNULL, THE EUROPEAN UNION AND ITS COURT OF JUSTICE (2nd ed. 2006). The judicial structure previously also included a Civil Service Tribunal, ruling on disputes between the European Union and its staff, but this organ was dissolved in 2016 and its jurisdiction was transferred to the General Court. For further discussion *see, e.g.*, Alberto Alemanno & Laurent Pech, *Thinking Justice outside the Docket: A Critical Assessment of the Reform of the EU's Court System*, 54 COMMON MKT. L. REV. 129 (2017).

[8] In an earlier article, we explore under what circumstances CJEU case law is an important source of law. *See* Mattias Derlén & Johan Lindholm, *Characteristics of Precedent: European Court of Justice Case Law in Three Dimensions*, 16 GERMAN L.J. 1073 (2015).

[9] *See*, *e.g.*, Anthony Arnull, *Owning Up to Fallibility: Precedent and the Court of Justice*, 30 COMMON MKT. L. REV. 247, 252–53 (1993); L. NEVILLE BROWN & TOM KENNEDY, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 369–70 (5th ed. 2000); ANTHONY ARNULL *ET AL.*, WYATT & DASHWOOD'S EUROPEAN UNION LAW 409 (5th ed., 2006).

[10] *See, e.g.,* Arnull, *supra* note 9, at 252.

explain why a particular judgment is cited, rather than another. As noted by Barceló, the CJEU "does not discuss the facts of the prior case or the *ratio decidendi* to demonstrate that the holding is truly in point".[11] In fact, the common approach of the Court in this regard is described as "selective and superficial".[12] Third, it is claimed that the Court practices "faux infallibility" by rarely openly departing from previous judgments.[13] Express overruling has happened only in a few, well-known cases,[14] and for example not a single time in the 52 Grand Chamber judgments from 2010 studied by Jacob.[15] Fourth, and similar to the issue of overruling, it is argued that the Court rarely distinguishes related cases, making the precedential value of old judgments uncertain.[16] Even scholars who argue that the Court does engage in distinguishing make it clear that the practice of the Court is problematic. The approach of the CJEU to distinguishing includes manipulating judgments to avoid following previous case law.[17] Finally, and most problematically, the Court is accused of simply ignoring the meaning of previous judgments in order to be able to reach a desired conclusion. This can happen as an implicit overruling, deviating from a previous judgment without even discussing it, [18] or as a form of pretend continuity, where a previous judgment is used as an authority for a particular conclusion, despite that obviously not being the case.[19]

These criticisms target practically all aspects of the Court's interaction with previous judgments, giving an overall impression of a bumbling Court, uncomfortable and inexperienced in working with case law, a pale shadow of courts in common law countries. Our conclusion contradicts these assessments. The CJEU is a court with civil law roots but a case law future. Taking the constitutional nature of the CJEU into account, and moving away

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[11] John J. Barceló, *Precedent in European Community Law*, *in* INTERPRETING PRECEDENTS – A COMPARATIVE STUDY 407, 416 (Neil D. MacCormick & Robert S. Summers eds., 1997).

[12] Takis Tridimas, *Precedent and the Court of Justice*, *in* PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 307, 314 (Julie Dickson & Pavlos Eleftheriadis eds., 2012).

[13] MARC JACOB, PRECEDENTS AND CASE-BASED REASONING IN THE EUROPEAN COURT OF JUSTICE – UNFINISHED BUSINESS 159 (2014).

[14] Tridimas, *supra* note 12, at 316–20; BROWN & KENNEDY, *supra* note 9, at 370.

[15] JACOB, *supra* note 13, at 160.

[16] *See, e.g.,* Tridimas, *supra* note 12, at 313–16; BROWN & KENNEDY, *supra* note 9, at 369–75; Ulrich Everling, *Zur Begründung der Urteile des Gerichtshofs der Europäischen Gemeinschaften*, 1994 EUROPARECHT 127, 136–39 (1994).

[17] JACOB, *supra* note 13, at 130–45.

[18] *See, e.g.,* Barceló, *supra* note 11, at 416; Stefano Civitarese, *A European Convergence Towards a Stare Decisis Model?*, REVISTA DIGITAL DE DERECHO ADMINISTRATIVO, No. 14, Julio - Diciembre de 2015, 173, 182.

[19] *See, e.g.,* Tridimas, *supra* note 12, at 315; Arnull, *supra* note 9, at 253.

from the more traditional understanding of precedent, we view the CJEU's approach as an acceptable exercise of judicial authority in a case law system.

II. The Claim – CJEU is a Constitutional, Precedent-Driven Court

We agree that there are grounds for criticizing the CJEU's approach *vis-à-vis* its own case law. For example, the reasoning of many judgments lacks transparency and consistency and the language is often cryptic and overly succinct.[20] But the Court's method is not as deficient as some commentators argue.

Our claim, which this article will support, is that the CJEU is a precedent-driven[21] constitutional court comparable to the Supreme Court of the United States (SCOTUS) and with a comparable approach to precedent. We further argue that this case law approach is acceptable given the nature of the CJEU. Thus, we use the SCOTUS as a yardstick for measuring whether the CJEU takes case law seriously.[22]

From this we conclude that the existing debate regarding how the CJEU establishes and relates to precedent would benefit from a broader (internal and external) comparative perspective. On one hand, criticisms against the CJEU's approach are normally based on a limited number of CJEU decisions.[23] On the other hand, criticisms of the CJEU's approach to case law seldom reflect on the way precedent is deployed in other legal systems. Regarding the former of these points, it is problematic to evaluate a sprawling, extensive, and continuously expanding system of case law—comprising thousands of individual decisions—on the basis of a limited number of well-known judgments.[24] This shortcoming in typical evaluations of the CJEU's practice is not surprising given the limitations of traditional legal

[20] *See also* Mattias Derlén, *Multilingual Interpretation of CJEU Case Law: Rule and Reality*, 39 EUR. L. REV. 295, 296–99 (2014).

[21] The concept of precedent is discussed *infra* Part B.

[22] This choice for comparison is explained and defended immediately *infra*.

[23] This does not prevent scholars from making general claims. *See, e.g.*, TREVOR C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 72 (6th ed. 2007) (claiming that the frequency of citations in CJEU judgments has increased).

[24] *See* Atieh Mirshahvalad *et al.*, *Significant Communities in Large Sparse Networks*, 7 PLOS ONE (2012); Mattias Derlén *et al.*, *Coherence Out of Chaos: Mapping European Union Law by Running Randomly Through the Maze of CJEU Case Law*, 2013 EUROPARÄTTSLIG TIDSKRIFT 517; Mattias Derlén & Johan Lindholm, *Goodbye* van Gend en Loos*, Hello* Bosman*?: Using Network Analysis to Measure the Importance of Individual CJEU Judgments*, 20 EUR. L.J. 667 (2014).

methods.[25] We echo Posner's and Fallon's battle cry, calling for empirical analysis of precedent in the US context.[26] Only by combining quantitative and qualitative methods can we fruitfully discuss and understand the use of case law as a source of European Union law.

For these reasons, this comparison of the CJEU's and USSC's attitudes to precedent takes an empirical approach relying on network analysis.[27] Fowler has pioneered this approach in the American context in two landmark articles.[28] We draw inspiration for our study of the CJEU from existing studies of SCOTUS case law that use network analysis, including Fowler's. We replicate those studies and apply them to a network consisting of the CJEU's judgments,[29] and enrich our analysis by contrasting and comparing our results from those achieved with respect to the SCOTUS.

The discussion below reveals that there are fundamental similarities between how the SCOTUS and the CJEU establish and use precedent. This, in turn, suggests that the latter court in many ways approaches its precedent in the same way as the former and should be judged accordingly. Three main arguments supporting this claim are presented below. The first argument, advanced in Part D, is that similarities in the basic features of the networks of CJEU and SCOTUS judgments negate claims that the CJEU establishes and uses precedent without any form of method. The second argument, presented in Part E, is that previous judgments are an indispensable source of law for both the CJEU and the SCOTUS and that this constitutes clear evidence of a system of precedent.[30] The third and final argument, defended in Part F, is that the CJEU's citation approach has four main components – (i) stages of development, (ii) issue shifting, (iii) a general approach to existing case law and a different approach to important cases, and (iv) overruling and avoiding precedent – and that its approach stands up quite well in a comparison with the SCOTUS's.

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[25] All studies mentioned in Part A.I are examples of such qualitative studies, encompassing a limited number of judgments from the Court of Justice. Even Jacob, who conduct a quantitative study, only discuss 52 judgments. *See* JACOB, *supra* note 13, at 87.

[26] Richard A. Posner, *An Economic Analysis of the Use of Citations in the Law*, 2 AM. L. & ECON. REV. 381, 402 and n. 30 (2000); Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1115 (2008).

[27] The use of network analysis is described in more detail *infra* Part C.II.

[28] James H. Fowler *et al.*, *Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court*, 15 POL. ANALYSIS 324 (2007); James H. Fowler & Sangick Jeon, *The Authority of Supreme Court Precedent*, 30 SOC. NETWORKS 16 (2008).

[29] The dataset used in this study, described further *infra*, was compiled by us as part of a larger research project and previously described and analyzed in sources cited *supra* note 24.

[30] *See also* Derlén & Lindholm, *supra* note 8.

The CJEU is still influenced by its civil law roots. But this article empirically demonstrates that it exhibits key features of a case law based legal system. The CJEU has a systematic approach for deciding when to cite case law and determining which case law to cite. The CJEU regards case law as an indispensable source of law. And, as measured by a number of key metrics, the CJEU uses approaches to case law and precedent that are similar to those used by the SCOTUS. Consequently, while the CJEU deserves much of the criticism it receives, our findings suggest that its approach to precedent is not as poor as some would claim.

B. Setting the Scene – Moving Beyond the Traditional View of Precedent

The importance of precedent[31] is continuously emphasized, including descriptions of precedent as the "life blood of legal systems."[32] Yet, despite all the spilled ink, the discussion of the nature and meaning of precedent has remained surprisingly stagnant. It is traditionally claimed that the common law and civil law traditions approach the doctrine of precedent in fundamentally different ways. This claim is primarily based on differences in the binding effect of previous judgments and, in particular, the absence of *stare decisis* in the civil law tradition.[33] Differing from the common law tradition, where court judgments are seen as a way to develop the law from below,[34] the civil law tradition does not regard earlier decisions as absolutely binding. Instead, previous judgements merely serve as interpretations of statutory law.[35] The binding/non-binding dichotomy is too simplified to capture the attitude towards case law in the civil law and common law traditions. Indeed, the discussion about whether precedent constitutes a binding source of law in civil law has overshadowed the practical importance of case law.[36] Even if judgments are not formally binding, the authority

[31] As will be demonstrated by the discussion below, we here use precedent in a wide sense, encompassing all use of previous judgments, not limited to binding precedent.

[32] C.K. ALLEN, LAW IN THE MAKING 243 (7th ed. 1964).

[33] As famously summarized by David & Brierly: "The place given to judicial decisions as a source of law distinguishes the laws of the Romano-Germanic family from the Common law." RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 133 (3rd ed. 1985).

[34] MATHIAS SIEMS, COMPARATIVE LAW 46 (2014).

[35] Eric Tjong Tijn Tai & Karlijn Teuben, *European Precedent Law*, 16 EUR. REV. PRIV. L. 827, 832 (2008). An alternative theory explains the difference between civil law and common law as the distinction between *jurisprudence constante* and stare decisis, emphasizing that civil law courts are expected to have regard to previous decisions when there is a high level of consistency in case law (settled case law or *jurisprudence constante*). *See* Vincy Fon & Francesco Parisi, *Judicial precedents in civil law systems: A dynamic analysis*, 26 INT'L REV. L. ECON. 519 (2006). However, we remain unconvinced by this argument. The existence of a line of cases, rather than a single decision, matters in common law as well as civil law. *See*, *e.g.*, William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J. L. ECON. 249, 250 (1976).

[36] Stefan Vogenauer, *Sources of Law and Legal Method*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 869, 894–95 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

of decisions of higher courts can be a *de facto* very strong influence on decisions of lower courts.[37] This is sometimes described as "precedent in the broad sense" or "persuasive precedent," as opposed to precedent in the strict sense.[38] The differences between the common law and civil law traditions are more formal than practical.[39]

Concentrating on the issue of binding sources of law is not productive. To move on we have to acknowledge that there are different kinds of precedent, even within the common law paradigm. Two related aspects are of particular importance: constitutional precedent and self-precedent. As to the former a distinction is made between constitutional, statutory, and common law precedent. Out of the three, statutory precedent enjoys a "super-strong presumption of correctness," common law precedent occupies a middle position, and constitutional precedent is given a weaker presumption of correctness.[40] The idea behind the weaker protection for constitutional precedent is the difficulty the legislator faces if it wants to intervene to object to case law. There are only very limited, external checks on the judicial interpretation of the constitution. In this situation a strong form of precedent would create an undesirable lock-in effect. Consequently, the SCOTUS needs to be able to correct the path of the law.[41] This has been confirmed by the SCOTUS itself.[42]

Self-precedent is distinguished from vertical precedent (prior decisions of a higher court) and horizontal precedent (prior decisions issued by a peer court). Self-precedent is a prior decision issued by the same judge or the same court.[43] The distinction is illuminating because the view of precedent changes as these relationships change. Gascón observes that, while

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[37] Tai & Teuben, *supra* note 35, at 833.

[38] *See*, *e.g.*, Richard Bronaugh, *Persuasive Precedent*, *in* PRECEDENT IN LAW 217, 217 (Laurence Goldstein ed., 1987); Tai & Teuben, *supra* note 35, at 828.

[39] Vogenauer, *supra* note 36, at 894–95.

[40] William N. Eskridge, *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 388 (1988).

[41] Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 656 (2001). *See* RUPERT CROSS & J. W. HARRIS, PRECEDENT IN ENGLISH LAW 20 (4th ed. 1991) (finding it unsurprising that the USSC has taken a less rigorous attitude towards precedent given the difficulties in changing the US constitution).

[42] *See*, *e.g.*, Burnet v. Coronado Oil & Gas Co. 285 U.S. 393, 407 (1932); Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[43] Marina Gascón, *Rationality and (Self) Precedent: Brief Considerations Concerning the Grounding and Implications of the Rule of Self Precedent*, *in* ON THE PHILOSOPHY OF PRECEDENT 35, 36 (Thomas Bustamante & Carlos Barnal Pulido eds., 2012). The more traditional approach is to only employ two categories: vertical and horizontal stare decisis. *See*, *e.g.*, Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1712–13 (2013); Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. ST. U. L. REV. 381, 385 (2007). Yet, following Gascón, we find it valuable to distinguish between different courts on the same hierarchical level and the same court, as only the latter is concerned by this study.

important differences exist between the common law and civil law traditions as regards vertical precedent, the same does not hold true for self-precedent.[44] Self-precedent does not require the court to always follow its previous judgments. It only requires the judge to justify departures from his or her previous rulings.[45] The underlying idea of self-precedent is not legal certainty or stability but rationality and the absence of arbitrariness.[46]

Komárek has developed the fundamental plurality of precedent into his theory of reasoning with previous decisions, identifying the legislative model as distinct from the traditional case-bound model.[47] In the legislative model judgments are drafted and interpreted as if they were legislative texts and the authority of the court is derived from its position in the judicial hierarchy. Thus, the wording of the judgment is closely scrutinized in search of a rule-like pronouncement by a higher court.[48]

The use of the legislative model of reasoning with previous decisions is not limited to the civil law tradition. Both the SCOTUS and the CJEU occupy positions that enable the use of the legislative model. The former court selects the cases to decide, delivers a small number of judgments each year, and is widely regarded as a political institution.[49] The latter court was clearly envisioned as a superior authority on the interpretation of EU law. Neither the SCOTUS nor the CJEU are specialized constitutional courts like the ones found in many legal orders that have centralized judicial review,[50] like for example the German *Bundsverfassungsgericht*, but both are constitutional courts in the sense that they by merit of their elevated positions in their respect systems perform constitutional functions in a way and to an extent that distinguish them from lower courts of their respective legal systems.[51]

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[44] Gascón, *supra* note 43, at 37.

[45] *Id*. at 43.

[46] *Id*. at 37–38.

[47] Jan Komárek, *Reasoning with Previous Decisions: Beyond the Doctrine of Precedent*, 61 AM. J. COMP. L. 149 (2013).

[48] *Id.* at 162–63.

[49] *Id*. at 165. *See* Earl M. Maltz, *The Function of Supreme Court Opinions*, 37 HOUSTON L. REV. 1395, 1420 (2000) (underscoring that "[b]y virtue of its position, the [SCOTUS] necessarily provides general legal rules that bind other actors in the system").

[50] *See, e.g.,* Alec Stone Sweet, *Constitutional Courts*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 816, 817-18 (Michel Rosenfeld & András Sajó eds., 2013).

[51] Komárek, *supra* note 47, at 165–66. *But see* David A. O. Edward, *Richterrecht in community law*, *in* RICHTERRECHT UND RECHTSFORTBILDUNG IN DER EUROPÄISCHEN RECHTSGEMEINSCHAFT 75, 80 (Reiner Schulze & Ulrike Seif eds., 2003) (concluding that a CJEU judgment "is not legislation, is not intended to be legislation and it should not be interpreted as if it were").

In conclusion, we have to adjust our expectations when discussing how the CJEU establishes and uses precedent. We cannot expect the Luxembourg court to treat its own case law in the same way as a lower common law court would treat case law from a higher court. The CJEU is a constitutional court and it has a particular assignment in the legal system. It is reasonable that these courts will build upon their own previous cases, but the format is constitutional self-precedent.

C. Methodological Questions

I. Finding a Yardstick – The SCOTUS as an Object of Comparison

This article examines how the CJEU establishes and uses precedent. Our study draws inspiration from a comparison with the SCOTUS. This is a comparative study, with the comparison serving as an instrument to gain a better understanding of the CJEU.

In any comparison both similarities and differences are examined in order to gain the most fruitful results.[52] The differences between the two courts are obvious and include basic structural differences as well as differences in argumentation and style. One noticeable distinction is that the SCOTUS has the power to grant or deny *certiori*, while the CJEU has no similar docket control mechanism. The CJEU court can expedite the process for questions already answered.[53] But it cannot close areas of case law to further discussion and rely on the existing decisions, as the SCOTUS can.[54] There are also clear differences in style between the argumentative reasoning of the SCOTUS and the official, authoritative voice of the CJEU. Though, as pointed out by Lasser, the latter aspect is mitigated by the voice of the Advocate General.[55]

Still, the two courts also have significant similarities, making a comparison viable. It is always problematic to compare the CJEU with any other court, given the peculiarities of the Luxembourg court. While it is unhelpful to fall back on the *sui generis* description,[56] the CJEU certainly occupies an unusual position, being neither a national court nor a traditional, international court. The Luxembourg court has, on its own initiative and using the basic treaties of the Union, taken on the role of a constitutional court, developing EU law into an

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[52] Gerhard Dannemann, *Comparative Law: Study of Similarities or Differences?*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 383 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

[53] *See generally* MORTEN BROBERG & NILS FENGER, PRELIMINARY REFERENCES TO THE EUROPEAN COURT OF JUSTICE 400–03 (2010).

[54] MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 45 (2008).

[55] LASSER, *supra* note 6, at 236–38.

[56] ROBERT SCHÜTZE, EUROPEAN CONSTITUTIONAL LAW 67–68 (2012).

effective legal system. Thus, it is reasonable to treat the CJEU as a constitutional court,[57] making a comparison with another constitutional court such as the SCOTUS both practical and fruitful. In the words of Tridimas, the SCOTUS is an interesting comparison, as it "exercises constitutional jurisdiction in a pluralist judicial system applying an abstract founding law".[58]

Finally, we have chosen the SCOTUS for comparison with the CJEU because of the established position of precedent in the American legal system in general and in the SCOTUS in particular. *Stare decisis*, the binding force of precedent, has been said to be "the defining feature of American courts,"[59] including the SCOTUS. The justices regard the principle as "the heart of the rule of law."[60] Naturally, it could be claimed that the SCOTUS has lost its way and deviated from its common law roots. For example, it is frequently pointed out that the SCOTUS takes a less rigorous attitude towards precedent as compared to English courts.[61] But it is difficult to claim that precedent is not an important part of the American legal system.

II. The Broader Perspective – A Short Introduction to Network Analysis

This study compares the approaches to precedent in the CJEU and the SCOTUS from a network perspective. The main network analysis concepts employed in the article are *nodes*, *links*, *centrality,* and *authority*.[62] The first step when performing network analysis is to

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[57] Takis Tridimas, *The Court of Justice and Judicial Activism*, 21 EUR. L. REV. 199 (1996).

[58] Tridimas, *supra* note 12, at 324. We also believe that a comparison between the two courts is interesting as both are arguably driven by ideas. While this concept cannot be fully explored here, the essential idea is the following: The CJEU is not linked to any country but rather to an abstract idea of Europe, *see e.g.*, Ditlev Tamm, *The History of the Court of Justice of the European Union Since its Origin*, in THE COURT OF JUSTICE AND THE CONSTRUCTION OF EUROPE: ANALYSES AND PERSPECTIVES ON SIXTY YEARS OF CASE-LAW 9 (2013). This very characteristic trait of being linked to an idea rather than the history of an individual nation is absent in most other constitutional courts, but arguably not in the SCOTUS. The American nation is itself built on ideas, as evidenced in the Declaration of Independence and the Constitution, and these ideas still affect the US legal system, *see e.g.*, KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 239 (3rd ed. 1998).

[59] Timothy R. Johnson *et al.*, *The Origin and Development of Stare Decisis at the U.S. Supreme Court*, *in* NEW DIRECTIONS IN JUDICIAL POLITICS 167, 167 (Kevin T. McGuire ed., 2012).

[60] HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL 6 (1999).

[61] *See*, *e.g.*, CROSS & HARRIS, *supra* note 41, at 19–20; NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 123 (2008); SAUL BRENNER & HAROLD SPAETH, STARE INDECISIS 1 (1995); Richard P. Caldarone, *Precedent in Operation: a comparison of the judicial House of Lords and the US Supreme Court*, 2004 PUB. L. 759, 787. The idea is captured elegantly by Moore & Oglebay: "[Stare decisis] does not command unquestioning obedience to the past. It is a friendly and frequently persuasive link with what has gone before." *See* James Wm. Moore & Robert Stephen Oglebay, *The Supreme Court, Stare Decisis and the Law of the Case*, 21 TEX. L. REV. 514, 552 (1943).

[62] *See also* Mirshahvalad *et al.*, *supra* note 24; Derlén *et al.*, *supra* note 24.

arrange the judgments into a network, the raw network. The raw network consists of judgments (*nodes*) and citations between judgments (*links*).[63] As citations can only go backwards in time the network is *directed*, making every link both an out-link (a link from a node) and an in-link (a link to a node).[64] The network is constructed solely from actual citations – the links. This enables us to claim that the network and the resulting patterns are natural, in the sense that they correlate with the perception of the judges of the respective court.

The relative importance of a node (i.e. a judgment) is referred to as its *centrality* in the network. There are several ways of calculating centrality, the most obvious being simply counting the number of links to a node, in this context that would involve determining the number of citations a particular decision generates. The number of links to and from a node is also referred to as the node's *degree*. Thus, when speaking of a node's in-degree centrality we are referring to the number of citations *to* a particular judgment.[65]

In-degree centrality is a straightforward centrality measurement, but it can be misleading when applied to case law. Counting the number of times a decision has been cited is not necessarily the best way of measuring its importance. All citations are not equal; being cited by a case, which is in itself important, should count for more than a citation from an unimportant case. Similarly, the fact that a decision is rarely cited does not conclusively prove that it is relatively unimportant, as a decision can be the basis of other cases and be at the core of an important area.

At the same time, it would be unacceptable to conclude that only old, foundational cases are important and that more recent cases are irrelevant. A balance between the two extremes must be struck. In this regard, measuring cases' importance by using in-degree centrality will invariably favor older cases over newer cases, simply due to the fact that the former has had more time than the latter to accumulate citations.

A better approach is therefore to use a *non-local centrality measurement*,[66] also known as a feedback centrality measurement, thus called because rather than assuming that every

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[63] *See generally* Ulrik Brandes & Thomas Erlebach, *Fundamentals*, *in* NETWORK ANALYSIS – METHODOLOGICAL FOUNDATIONS 7 (Ulrik Brandes & Thomas Erlebach eds., 2005).

[64] The existence of directed links gives added value to the network. *See* Elizabeth A. Leicht & Mark E. J. Newman, *Community Structure in Directed Networks*, 100 PHYS. REV. LETTERS 118703 (2008). It is noteworthy that while citations only can go backwards in time, ideas flow through the network in the opposite direction, from older to newer cases.

[65] *See* Jon M. Kleinberg, *Authoritative Sources in a Hyperlinked Environment*, 64 J. OF THE ACM 604 (1998). Regarding its application in a legal context, *see*, *e.g.*, Daniel M. Katz & Derek K. Stafford, *Hustle and Flow: A Social Network Analysis of the American Federal Judiciary*, 71 OHIO ST. L.J. 457, esp. 491–44 (2010).

[66] Other examples of such measurements, besides the ones discussed below, are Eigenvector and Katz centrality.

citation is equally valuable, a decision's centrality is based on the characteristics of cases that refer to it.[67] Using such measurements, an important node is one that is linked to other important nodes.[68] In the context of a case law network, this conforms to the legally intuitive view that an important decision is a decision cited by other important decisions.

In order to facilitate comparisons we follow Fowler in using *authority score*.[69] Authority is one aspect of the HITS algorithm that was developed by Jon Kleinberg.[70] This algorithm provides two centrality measurements for each node: *hub score* and *authority score*.[71] Authority score is a measurement of the amount of knowledge held by a node and, in a case law network, authority score therefore becomes a measurement of a decision's importance in a traditional sense, calculated by citations from the hubs of the network, discussed below. In case law networks, nodes with a high authority score (*authorities*) are decisions that are important because they say something vital about the content or development of the law. In other words, they are influential cases.[72]

Hubs (nodes with high hub score) are nodes that know how to find information on a given topic in the network. In case law networks, hubs are decisions that cite important decisions. In other words, they are well-grounded decisions.[73] According to Kleinberg, authorities and

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[67] *See* Dirk Koschützki *et al.*, *Centrality Indices*, *in* NETWORK ANALYSIS – METHODOLOGICAL FOUNDATIONS 16, 53 (Ulrik Brandes & Thomas Erlebach eds., 2005).

[68] *See* Renaud Lambiotte & Martin Rosvall, *Ranking and clustering of nodes in networks with smart teleportation,* 1 (2012), available at http://arxiv.org/pdf/1112.5252.pdf (May 12, 2017); Koschützki *et al.*, *supra* note 67, at 53.

[69] *See* Fowler & Jeon, *supra* note 28. We generally favor using the PageRank algorithm that serves as the basis for how Google ranks webpages. *See*, *e.g.*, Mattias Derlén & Johan Lindholm, *The Court of Justice and the Ankara Agreement: Exploring the Empirical Approach*, 2012 EUROPARÄTTSLIG TIDSKRIFT 462 (2012); Derlén & Lindholm, *supra* note 24. Very simplified, PageRank allows a "Random Walker" to explore the structure of the network by randomly following citations and occasionally teleporting to a random link in the network. PageRank, which is expressed as a percentage value, represents the relative probability that the Random Walker will find itself in a certain place and represents, as applied to a case law network, a decision's popularity. *See* Sergey Brin & Lawrence Page, *The anatomy of a large-scale hypertextual Web search engine*, 30 COMPUTER NETWORKS & ISDN SYSTEMS 107 (1998); Lawrence Page *et al.*, *The PageRank Citation Ranking: Bringing Order to the Web* (January 29, 1998), *available at* http://ilpubs.stanford.edu:8090/422/1/1999-66.pdf (March 15, 2015).

[70] Kleinberg, *supra* note 65. HITS stands for Hyperlink-Induced Topic Search. As indicated by the title of his article, Kleinberg developed the algorithm for use on the World Wide Web, but it has been used in the context of case law networks. *See* Fowler *et al.*, *supra* note 28, at 330–32.

[71] The initial step of using the HITS algorithm is to construct a focused subgraph of the network, for which the algorithm is employed. *See* Kleinberg, *supra* note 65, at 608–10. This is necessary in the context of the World Wide Web and other large networks in order to limit computational cost, but not with a network as small as ours. Consequently, we operate the HITS algorithm on the entire CJEU case law network.

[72] Fowler *et al.*, *supra* note 28, at 331.

[73] *Id*.

nodes are mutually reinforcing: a good *authority* is a node pointed to by many good hubs, and a good *hub* is a node that points to many good authorities.[74] This definition is circular, which is why the algorithm must be iterative and take into account the entire network and assume that the sum of the authority-weight and the sum of the hub-weight are equal.[75]

D. First Argument – Basic Features of a Network

I. Introduction – A Non-Random Approach

In order to constitute a case law network, we can reasonably expect judgments to be connected through citations and that those citations are made on the basis of the issues discussed in each case. At least, in case X concerning issue A we expect the court to cite its previous decision in case Y concerning the same issue and we expect it not to cite case Z concerning issue B. When we extrapolate this reasoning to a whole network of case law, we expect certain patterns to emerge.[76]

First, we expect decisions to be connected to each other by citation to a relatively high degree, here referred to as the *connectedness* of the network. If the judgments are very loosely connected to each other, then this suggests that the court is not citing relevant cases, potentially because there are no relevant cases.[77] Second, we expect that citations among cases are not distributed equally or, to use network analysis terminology, the network's *degree distribution* does not follow a flat or normal distribution. Instead, certain precedents where particularly important points of law were established should receive most of the citations and the great majority of judgments should receive relatively few citations.[78]

As explained below, the CJEU's case law network is quite similar to the SCOTUS's in both these regards and distinctly different from a random network. Thus, the first argument in support of our claim is that similarities in these basic features of the CJEU and SCOTUS case law networks negate claims that the CJEU establishes and uses precedent randomly. While

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[74] Kleinberg, *supra* note 65, at 611.

[75] Kleinberg gives the following example, where p denotes page, x authority weight and y hub weight: "If p points to many pages with large x-values, then it should receive a large y-value; and if p is pointed to by many pages with large y-values, then it should receive a large x-value." Kleinberg, *supra* note 65, at 611 (italics omitted). In other words, if a judgment cites many influential cases, it should be considered a well-founded case, and if a judgment is cited by many well-founded cases it should be considered an influential case.

[76] Naturally, this is only a minimum requirement. In reality a court will often interact with judgments that are similar, for example in order to distinguish them.

[77] *See infra* Part D.II.

[78] *See infra* part D.III.

this hopefully surprises no one, it is a necessary first step, considering the extent of the above-described criticism of the CJEU and its approach towards case law.

II. Connectedness

In network analysis, the degree of connectedness between nodes is referred to as the *density* of the network. A network's density is calculated by comparing the actual number of links to the potential number of links in a complete network, i.e. one where every node (i.e. case) is connected to every other. By dividing the former with the latter one derives a measure between 0 and 1 where 1 is the density of a complete network.[79]

While both the CJEU and SCOTUS networks are fairly sparse, they differ significantly from each other. The density of the CJEU's citation network is 0.00096.[80] The density of the SCOTUS network studied by Fowler & Jeon is, by comparison, only 0.00048.[81] Thus, the SCOTUS network's density is only half that of the CJEU's. This may at first appear surprising considering that, on average, a recent SCOTUS judgment contains roughly twice as many citations as a CJEU judgment.[82] The explanation is very simple: network size.

The CJEU case law network analyzed here consists of all 8,879 judgments issued by the Court since its first case in 1954 until the middle of May 2011. The CJEU network is significantly smaller than the 30,288 judgments included in the SCOTUS network studied by Fowler & Jeon, including all majority opinions between 1754 and 2002.[83] The fact that the CJEU's case law network is much smaller than the SCOTUS's is in no way surprising. The latter institution is more than four times older than the former.[84] Still, this fact affect density. If the average number of references remains the same, then density will decrease almost exponentially as the size of the network increases.[85] Although the average number of references has

[79] JOHN SCOTT, SOCIAL NETWORK ANALYSIS 81 (4th ed. 2017).

[80] It should be noted that density is quite different than simply measuring average number of citations.

[81] Calculated on the basis of Fowler & Jeon, *supra* note 28, at 18 (220,500 citations between 30,288 cases).

[82] *Compare* Figures 5 *and* 6 *infra*.

[83] Fowler & Jeon, *supra* note 28, at 17. The study by Fowler & Jeon includes all judgments in the U.S. Supreme Court Reporter. The latter includes judgments decided by the Supreme Court of Pennsylvania, before the establishment of the SCOTUS. See id at 17, footnote 1. It should be noted that Fowler et al., *supra* note 28, studies a slightly different data set consisting of all decisions between 1791 and 2005. *Id.* at 326.

[84] In fact, the CJEU network is growing about five times as fast as the USSC network and will surpass it in size around the year 2085 if the current trend continues.

[85] SCOTT, *supra* note 79, at 85–87. *See also infra* Figure 1.

historically increased in both networks,[86] there is a very real, practical limit to how many citations can be included in a single judgment.

Considering this, it is necessary to use an alternative measurement for network connectedness. One such alternative is *inclusiveness*, which "is the total number of points minus the number of isolated points."[87] In this context, an "isolated point" is a case that neither cites nor is cited by at least one other case. Networks can be usefully compared by measuring "the number of connected points expressed as a proportion of the total number of points."[88]

When we use inclusiveness instead of density a very different picture emerges. In the CJEU case law network 89% of all CJEU decisions are connected by citation, inward or outward, to at least one other case. That is, 11% of all cases are unconnected, i.e. do not cite any other case and are not cited by any other case. This finding alone suggests that the CJEU has a method when it cites case law, for if citations were actually distributed randomly the network's inclusiveness would be much higher, nearly complete.

The inclusiveness among CJEU decisions is quite similar to that of SCOTUS judgments: the SCOTUS network has an only slightly lower inclusiveness of 84%.[89] Thus, we see that the CJEU not only has a method but that the CJEU's method and the SCOTUS's method produce networks with very similar degrees of inclusiveness. This does not necessarily mean that they are the same or even similar methods, but it indicates that the CJEU approaches previous judgments in a consistent matter.

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[86] *See infra* Part E.III.

[87] SCOTT, *supra* note 79, at 81.

[88] *Id*.

[89] Yonatan Lupu & Erik Voeten, *Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights*, 42 BRITISH J. POL. SCI. 413, 424 n. 54 (2012).

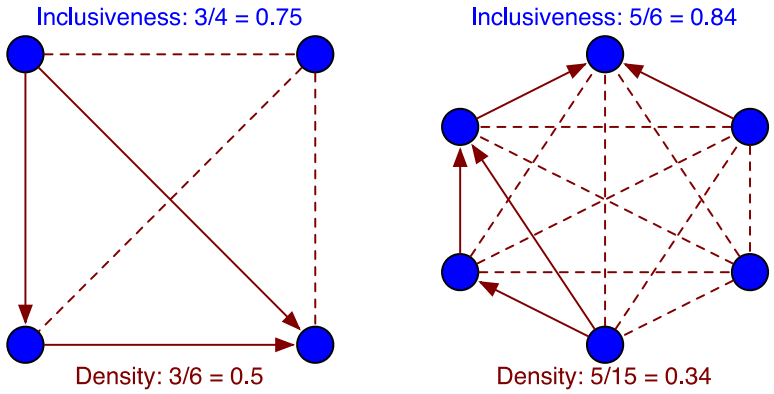

Figure 1. Density & Inclusiveness

III. Degree Distribution

Another way of proving that the CJEU approaches previous judgments in a consistent way is to consider the *degree distribution* of the CJEU case law network. Degree distribution is the variation in total number of inward and outward citations, or more generally, the number of links per node.[90] In a random network, where links are placed randomly between nodes, most nodes will have the same number of links.[91] But, as pointed out by Albert & Barabasi, most complex networks are not random and links are not distributed randomly. Instead, complex networks in general and citation networks in particular tend to follow a *power law distribution* where most nodes will have few links and a small group of nodes will have a great number of links.[92]

Translated to the case law networks studied here, most judgments can be expected to have few inward and outward citations, and citations will instead gather in a small group of judgments with a great number of inward and outward citations. Fowler *et al.* demonstrate that the network of SCOTUS judgments follows a power law distribution, both regarding inward and outward citations (see figure 3 *infra*).[93] Similarly, we find that the CJEU case law network is a power-law network. Figure 3 below demonstrates that this holds true both

[90] Fowler et al., *supra* note 28, at 332; Réka Albert & Albert-László Barabási, *Statistical Mechanics of Complex Networks*, 74 REV. MOD. PHYS. 47, 49 (2002).

[91] Albert & Barabasi, *supra* note 90, at 49.

[92] Mark E.J. Newman, *Random graphs as models of networks*, 99 PNAS 2566 (2002).

[93] Fowler *et al.*, *supra* note 28, at 332; Fowler & Jeon, *supra* note 28, at 18. *See* also Lupu & Voeten, *supra* note 89, at 425–26 (concluding that the same is true for the European Court of Human Rights in Strasbourg).

regarding inward and outward citations. This demonstrates, first, that the CJEU case law network is not random but follows established patterns and, second, that there is no significant difference between the CJEU and the SCOTUS networks in their basic degree distribution.

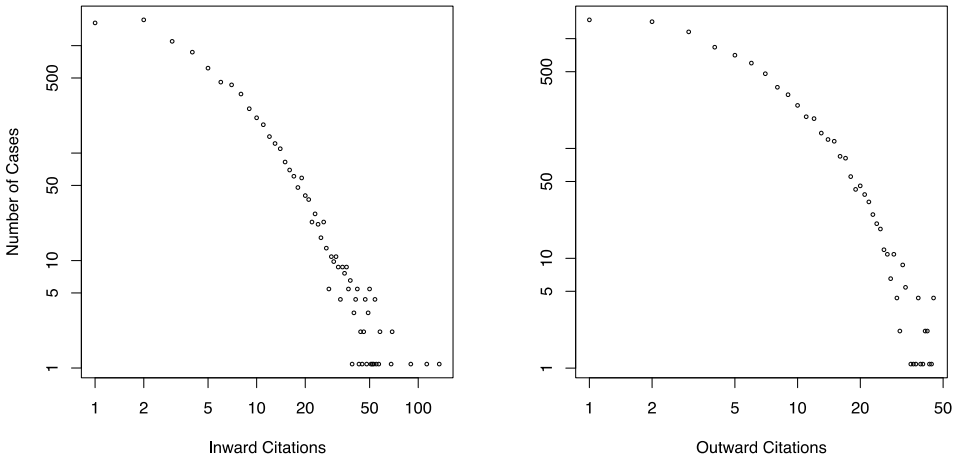

Figure 2. CJEU, Degree Distribution

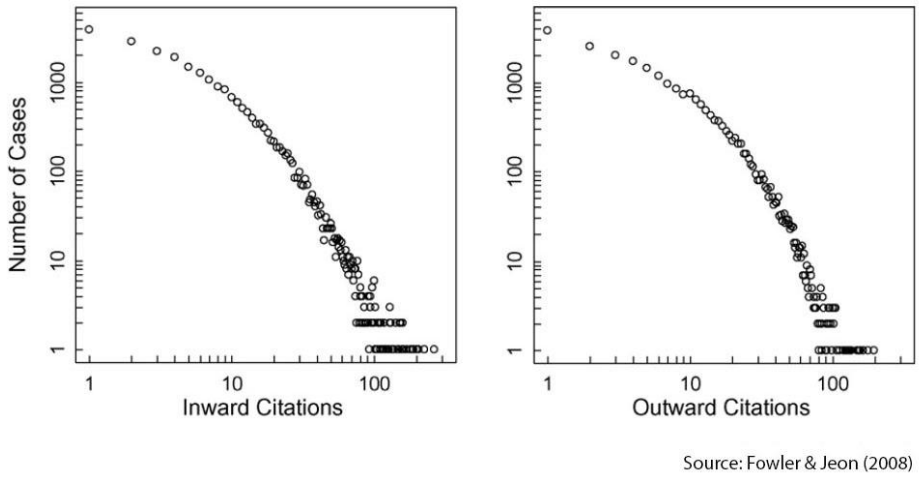

Figure 3. SCOTUS, Degree Distribution

IV. Interim Conclusions

The CJEU's case law is connected largely in the same way as the constitutional, precedent-driven American court: relatively sparse (i.e. few links as compared to other types of networks) but few cases are entirely disconnected. Furthermore, in both networks, citations clearly follow a power law distribution.

This constitutes a first argument in favor of a conscious approach *vis-à-vis* case law at the CJEU. The CJEU network is not random, but it also displays patterns that indicate some form of method.

These similarities between the two courts are only a first step. Next we turn our attention to empirical measurement of the development of the networks over time.

E. Second Argument – Case Law as an Indispensable Source of Law

I. Introduction – Humble Beginnings

No legal system can start out with a strong, established system of precedent and this includes the systems studied here. The explanation is partly practical: a minimum core of judgments is needed before a court can develop a systematic citation practice. There are also cultural explanations why neither court started out with a strong, established system of precedent. For the CJEU the cultural explanation can be found in its civil law heritage. The Luxembourg court was created by six continental civil law nations,[94] and modeled mainly on the French system.[95] In such a context, with heavy emphasis on legislation and a relatively limited role for the judiciary, there are clear cultural limits on the Court's capacity to act as a lawmaker. The absence of a system of precedent is hardly surprising. The SCOTUS, by comparison, also lacked a strong system of precedent early on; it hesitated to refer to and build upon its previous decisions prior to the nineteenth century.[96] In this regard it essentially followed the pattern of English courts, where the strengthening of precedent, culminating in the 1898 *London Tramways* case,[97] started during the nineteenth century.[98]

Thus, time is a relevant factor when considering how the SCOTUS and the CJEU established and use precedent. In this section, we present existing research on how the SCOTUS's use of

[94] Belgium, France, Germany, Italy, Luxembourg, and the Netherlands.

[95] Tamm, *supra* note 58, at 9.

[96] Fowler & Jeon, *supra* note 28, at 18.

[97] London Tramways v. London County Council [1898] AC 375.

[98] DUXBURY, *supra* note 61, at 125–26.

precedent developed over time and replicate these studies for the CJEU. In so doing we find that there are fundamental similarities between the SCOTUS and the CJEU in their gradual development towards a position where case law is now an indispensable source of law. The similarities in the development and current state of their approach constitute clear evidence of the CJEU having a system of precedent where new judgments are well embedded in existing case law.

II. The SCOTUS – Development Towards Binding Precedent

There are primarily two network analysis studies of how the SCOTUS's use of precedent has developed over time. The first study, conducted by Fowler & Jeon, investigated how the SCOTUS's citation practice has changed over time using primarily two measurements. The first measurement is average number of citations, i.e. *average out-degree*. The second measurement, which is a slight modification of the first, is the *percentage* of SCOTUS decisions each year that contain at least one outward citation.[99] Both measurements illustrate a clear development, with average out-degree and percentage of cases citing at least one previous case increasing during the nineteenth century and continuing to expand during the twentieth century.

The second study, carried out by Johnson *et al.*, came to the same conclusion after finding a steady increase in average out-degree. Out-degree increased from an average of 1.1 citations during the Court's first fifty years to 18.7 citations in the last fifty years. The authors regard this increase as observable evidence of the institutionalization of the norm of precedent at the SCOTUS.[100]

Fowler & Jeon furthermore sought to empirically verify the claim made in legal literature that the principle of *stare decisis* was firmly established in the SCOTUS by the year 1900. There is significant agreement on the correlation between increasing references to precedent and the establishment of the principle of *stare decisis*,[101] but different perspectives prevail as to when *stare decisis* was established in the SCOTUS. Fowler & Jeon primarily confirm the 1900 claim on the ground that the increase in the percentage of cases citing at least one previous case levels-off after 1900 at about 90%.[102] Fowler & Jeon do not conclude that 90% of cases citing older decisions is a clear threshold for a system of precedent, only that it was true that 90% of SCOTUS cases cited older cases at the time when

[99] Fowler & Jeon, *supra* note 28, at 19. They also discuss average in-degree, but we will return to that measurement below.

[100] Johnson *et al.*, *supra* note 59, at 172–73.

[101] Frank B. Cross *et al.*, *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 528–29 (2010).

[102] Fowler & Jeon, *supra* note 28, at 19.

traditional legal doctrine claims that *stare decisis* had been firmly established. Thus, 90% should not be regarded as a requirement for *stare decisis*, only an indication, and a lower percentage does not rule out the existence of a system of precedent.

Johnson *et al.* arrive at a seemingly quite different conclusion, claiming that the SCOTUS began to base its decisions on its own precedents by the early 1800s and that the norm of *stare decisis* was firmly entrenched by 1815.[103] The quite significant difference between the two studies is explained by a difference of perspective. Fowler & Jeon take an absolute perspective, concentrating on outward citations to previous SCOTUS judgments. Johnson *et al.* take a relative perspective, concentrating on the SCOTUS's transition from using English common law to its own precedent. This development is very clear, with references to English common law decreasing from 75.8% of all citations in 1791–1800 to only 10.9% during 1806–1815.[104]

Fowler & Jeon observe a variation in the outward citation pattern by the SCOTUS. The trend is clearly increasing, sharply during the nineteenth century and more modestly during the twentieth century. A clear dip in this trend can be observed—regarding average out-degree (average number of citations in a case to a previous case) and the percentage of cases citing at least one previous judgment—during the so-called Warren Court (1953–1969).[105] According to Fowler & Jeon this quantitatively confirms legal theory, in the sense that the famously activist Warren Court had less need for precedent due to their focus on creating new law.[106] This makes some intuitive sense. The Warren Court is famous for revolutionizing many aspects of US constitutional law,[107] including cases such as *Brown v. Board* and *Miranda v. Arizona*.[108] If the importance of precedent is connected to evolution, its relevance in a revolutionary context is limited.[109]

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[103] Johnson *et al.*, *supra* note 59, at 169.

[104] *Id*. at 169–72.

[105] Fowler & Jeon, *supra* note 28, at 19; *infra* Figure 5.

[106] *Id*.

[107] Kurland has written an overview of the history and importance of the Warren Court. *See* P B KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT (1970).

[108] Brown v. Board of Education, 347 U.S. 483 (1954); Miranda v. State of Arizona, 384 U.S. 436 (1966); SPAETH & SEGAL, *supra* note 60, at 163.

[109] Yet, as discussed further below, this is a complicated issue. *See* SPAETH & SEGAL, *supra* note 60, at 207 (arguing that the Warren court does not deviate significantly from the view of precedent as compared to other courts, claiming that "the Warren Court neither invented nor perfected preferential decision making.").

III. The CJEU – From Zero to a Hundred in Thirty-Five Years

The CJEU's use of previous decisions has developed over time. First and most obviously, the total body of CJEU case law has increased steadily over the years. This is of course unavoidable as new decisions are constantly added. But the CJEU's body of case law is growing much faster as it steadily increases the number of cases it settles each year.[110] It is not only the number of CJEU judgments that has increased over time; the same is true for its citation practice. The CJEU has steadily increased the average number of citations it makes to its own case law: from less than 0.5 until 1977 to 8.4 in 2011 (see figure 4 *infra*).

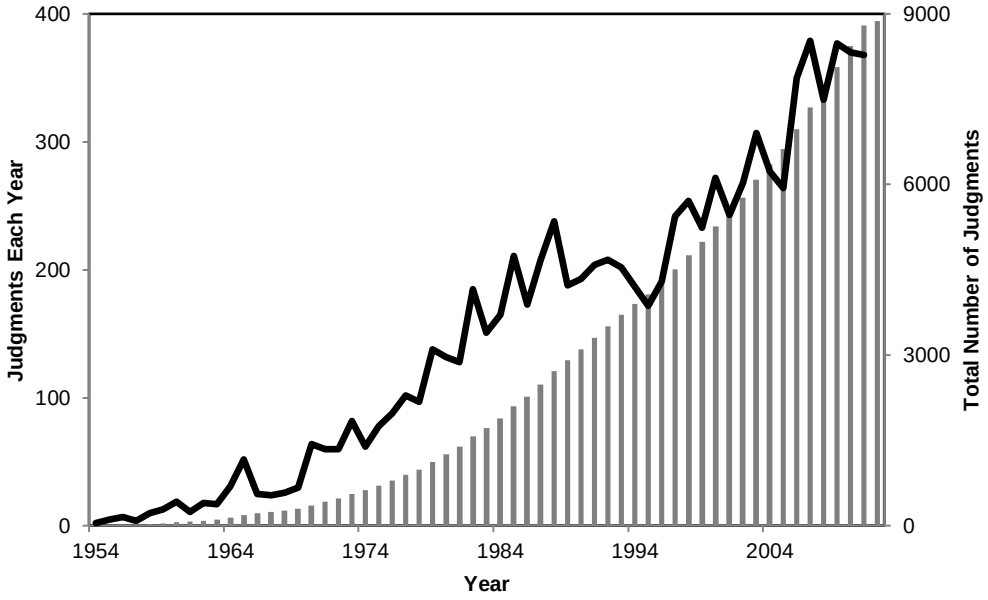

Figure 4. CJEU, Number of Cases

[110] *See* figure 4 *infra*.

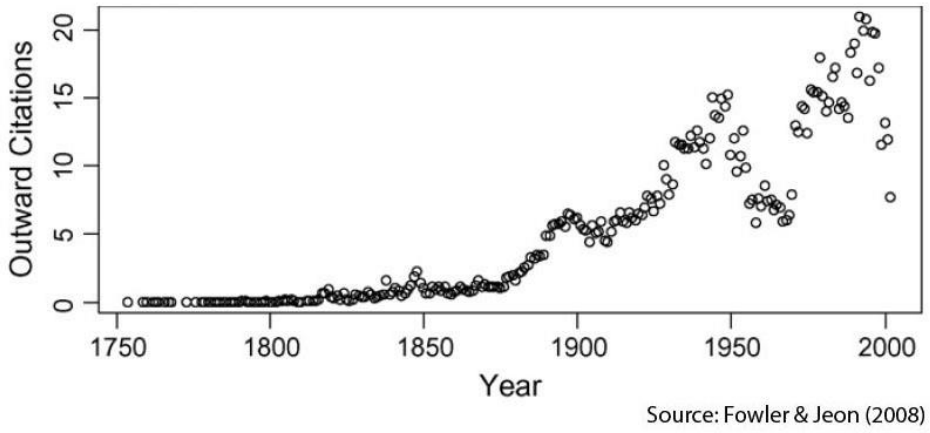

Figure 5. SCOTUS, Avg. Out-degree over Time

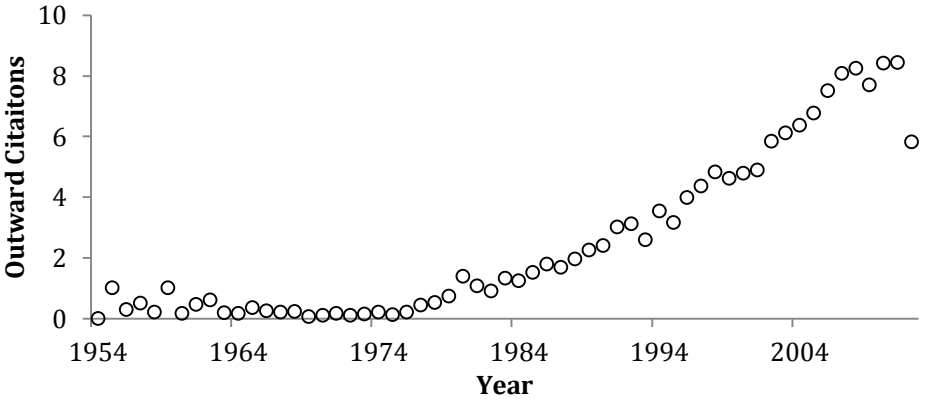

Figure 6. CJEU, Avg. Out-degree over Time

It may appear as if average out-degree follows the number of judgments decided each year. But there is an important difference. The increase in out-degree roughly corresponds with the increase in decisions after 1977. Still, it does not explain why it took the CJEU twenty-three years to properly start citing its own case law. The obvious fact that citations require something to cite cannot explain this discrepancy. In 1977 the CJEU had 788 judgments to choose from but only made 44 citations. By comparison, in 1980, the number of previous decisions had increased to 1,125 (a 42% increase) but the number of citations even more to 184 (a 318% increase). Thus, claims made by other scholars that the CJEU initially avoided

citing its own cases appear to be supported by our data.[111] This cannot be (entirely) attributed to the CJEU being bound by its French heritage or inexperience with case law. After all, it took the SCOTUS almost a century to properly start citing its own case law. The comparison suggests that case law-based systems must reach a "critical mass" before courts will start to cite their own case law.

Average out-degree is a straightforward and intuitive measurement for how the CJEU's use of precedent has developed, but it is rather blunt. For example, a high average out-degree might be explained by more cases being available to cite[112] and a few judgments with many citations can have a disproportionately large effect on the yearly average. The latter is particularly true for the early years, when the CJEU decided a very limited number of judgments per year.[113]

Given the limitations of average out-degree we follow Fowler & Jeon in considering what percentage of all judgments decided each year involve citations to at least one previous decision. This is, in our opinion, a good measurement of the importance of case law as a source of law: if the CJEU decides few cases without citing precedent, then that suggests that it is in practice an indispensable source of law. Using this measurement, we find a trend similar to that seen by using average out-degree, as the relative portion of judgments citing at least one precedent has increased from (i) around 10% in the early 1970s, to (ii) around 60% in the 1980s, to (iii) around 90% in the last two decades.[114] The trend of three distinct periods of development at the CJEU follows the pattern identified by Fowler & Jeon in the SCOTUS's case law: lack, growth, and finally establishment of case-law use.[115]

[111] Arnull, *supra* note 9, at 252; Tridimas, *supra* note 12, at 309.

[112] Fowler & Jeon, *supra* note 28, at 19.

[113] This might explain the relatively high average out-degree in 1955 and 1959.

[114] *See infra* Figure 8. *See also* Tridimas, *supra* note 12, at 309 (describing the development in a similar way).

[115] Fowler & Jeon, *supra* note 28, at 19; *infra* Figure 7.

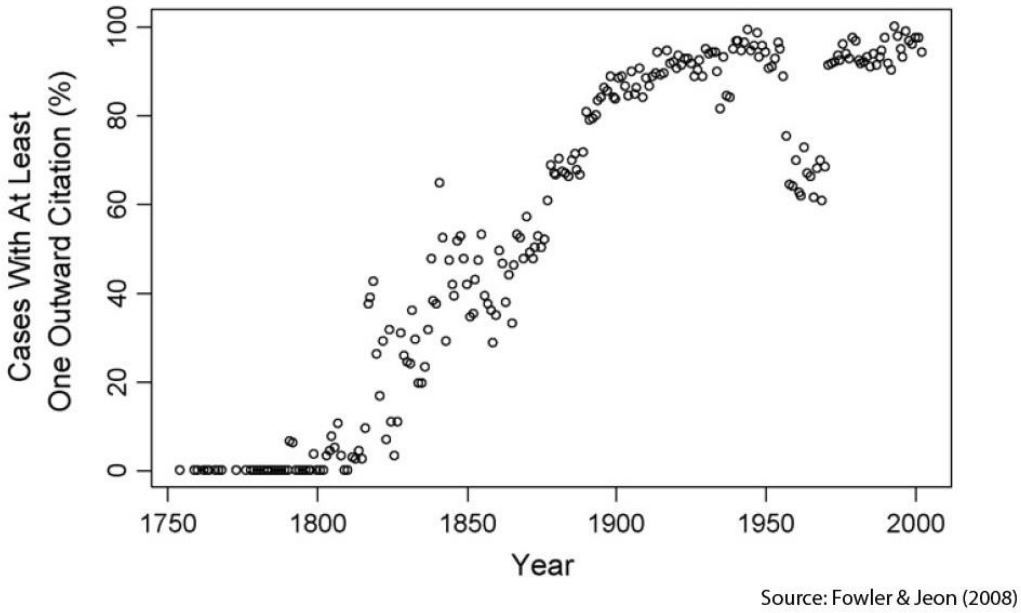

Figure 7. SCOTUS, Cases With At Least One Outward Citation

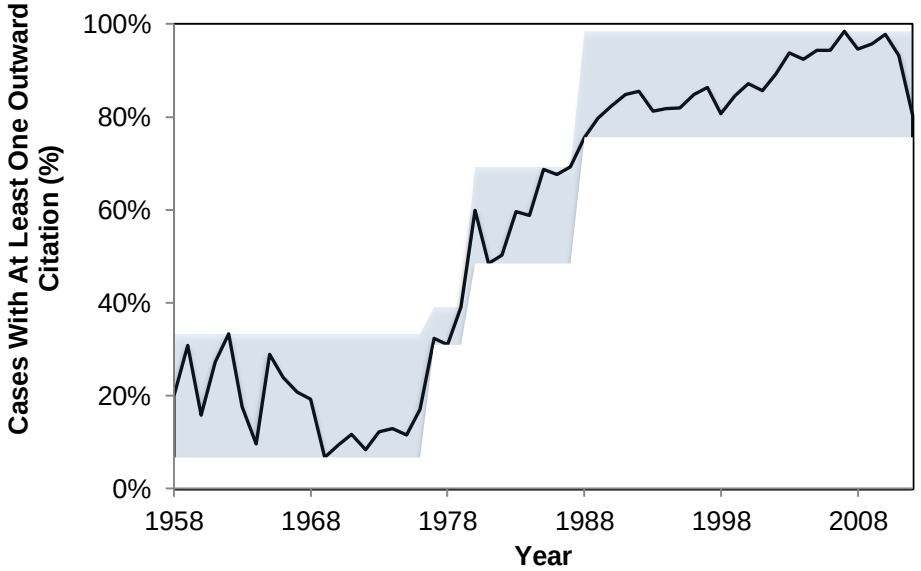

Figure 8. CJEU, Cases With At Least One Outward Citation

IV. Interim Conclusions

The discussion in the sections above leads us to a number of conclusions. First, it is significant that the CJEU follows the same development as the SCOTUS, with a steady increase in the use of previous decisions. Along with Fowler & Jeon and Johnson *et al.*,[116] we argue that a steady increase in average out-degree and the number of cases citing at least one precedent is a good indicator of case law's increasingly important role as a source of law in the EU framework. Fowler & Jeon come to the conclusion that a high tendency to cite case law suggests the establishment of a norm of *stare decisis.*[117] We are a little more cautious. Rather than being formally required as a norm of *stare decisis*, a high frequency could be explained by the court's interest in the legitimacy of its rulings and belief that embedding a decision in previous case law gives it the desired legitimacy.

This is supported by our second conclusion, which concerns judicial activism. An interesting difference between the SCOTUS and the CJEU is that the CJEU's trend towards increased reliance on existing case law has largely been continuous and without any significant deviation. If judicial activism leads to a more relaxed attitude *vis-à-vis* precedent, as suggested by Fowler & Jeon, then the CJEU should demonstrate similar deviations during some "revolutionary" periods identified by other scholars.[118] The consistent development towards ever more extensive use of case law indicates that judicial activism at the CJEU does *not* exclude reliance on precedent. This is vividly demonstrated by the *Francovich* decision in which the CJEU established the principle of state liability.[119] Although the case is arguably one of the Luxembourg court's most far-reaching and innovative judgments – or, in Hartley's words, a "confusion of 'ought' and 'is' that no ordinary lawyer would make"[120] – it is one of the CJEU network's foremost hubs. This indicates that it contains references to many important CJEU judgments.[121] Thus, despite being entirely novel, *Francovich* is firmly connected to previous judgments.

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[116] Fowler & Jeon, *supra* note 28, at 19; Johnson *et al.*, *supra* note 59, at 172–73.

[117] Fowler & Jeon, *supra* note 28, at 19.

[118] Regarding judicial activism in the CJEU, *see*, *e.g.*, TREVOR HARTLEY, CONSTITUTIONAL PROBLEMS OF THE EUROPEAN UNION (1999); Hjalte Rasmussen, *Between Self-Restraint and Activism: A Judicial Policy for the European Court*, 1988 EUR. L. REV. 28; Takis Tridimas, *The Court of Justice and Judicial Activism*, 1996 EUR. L. REV. 199.

[119] Joined Cases C-6/90 and C-9/90, Andrea Francovich and Danila Bonifaci and others v Italy, EU:C:1991:428.

[120] HARTLEY, *supra* note 118, at 60.

[121] Derlén & Lindholm, *supra* note 24, at 685. *Francovich* is the sixth best hub of the network, only surpassed by *Bosman*, *Preussen Elektra*, *Gebhard*, *Schumacker,* and *Becker*.

This follows the basic idea that the use and rhetoric of precedent is a response from the courts to their natural and unavoidable discretion. Unfettered discretion would ultimately threaten the position of the courts, which is why they have voluntarily limited their discretion by following past cases.[122] Following this logic, the greater the novelty of the holdings, then the greater the need to entrench the decision in previous case law in order to achieve legitimacy. This arguably explains the use of previous case law in *Francovich*. The Court attempts to demonstrate that the legal principle established in the case, while novel, is fundamentally related to other principles and thereby to previous judgments.

Third, development at the CJEU is taking place with remarkable speed compared to the SCOTUS. While the latter court took more than a century to reach a point where case law was firmly established as a source of law, the CJEU achieved the same in about thirty-five years. We argue that by 1989 the CJEU had reached a clear habit of connecting decisions to previous judgments. By 1989 the average out-degree had reached 2.25, exceeding 2 for the first time and only increasing thereafter. Even more importantly, the yearly percentage of cases citing at least one previous case reached 80% by 1989 and never dipped below that threshold again for the time included in the study, but rather increasing to close to 100% in recent years.

Finally, the reasons for the development should be discussed. As noted above the CJEU began referring to its previous decisions in the late 1970s and early 1980s, starting from a very low level. Why did we see this development? Some have speculated that the CJEU's increased tendency to cite its previous judgments can at least partly be explained by the accession of Ireland and Great Britain in 1973. The idea is that this represented an influx from the common law tradition.[123] Although the "common law thesis" may appear plausible, it is not obvious from our data. On the one hand, almost a decade passed between these countries' accession and the increased trend in citations, and once started, that trend has remained largely unbroken for thirty years, during which fifteen "civil law countries" were admitted as Member States. On the other hand, if viewed from a longer perspective, it cannot be ruled out that the 1973 accession started a process that eventually lead to a new view of precedent in the CJEU, in particular given the very low levels of citation before 1973.

However, while the accession of the common law countries might be a factor, the development must be viewed from a broader perspective, where the move to precedent is part of an effort to legitimize the law-making efforts of the CJEU. This hypothesis is

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[122] Alec Stone Sweet & Margaret McCown, *Discretion and Precedent in European Law*, *in* JUDICIAL DISCRETION IN EUROPEAN PERSPECTIVE 84, 96–97 (Ola Wiklund ed. 2003).

[123] For different views of the accession of the common law countries as an explanation for the change in attitude at the CJEU vis-à-vis case law, *compare* HENRY G. SCHERMERS & DENIS F. WAELBROECK, JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES para. 171 (4th ed. 1987) *and* Thijmen Koopmans, *Stare decisis in European Law*, in ESSAYS IN EUROPEAN LAW AND INTEGRATION 11, 17 (David O. O'Keeffe & Henry G. Schermers eds., 1982).

supported by the fact that the SCOTUS, which has undisputedly been part of the common law tradition since its very inception, follows largely the same development as the CJEU.[124]

F. Third Argument – The Anatomy of a Method

I. Introduction

We have argued that the CJEU has a conscious approach to case law (Part D) and that it treats case law as an indispensable source of law (Part E). In this final part, we will discuss the substance of that approach.

We do not claim that the CJEU's approach to its own case law is beyond reproach, but as elaborated below we believe that it can to a large extent be described as the combined result of four components: (i) stages of development, (ii) issue shifting, (iii) a general approach to existing case law, including a specific approach to important cases, and (iv) overruling and avoiding precedent. This not only shows that the CJEU's approach has substance. A comparison with the SCOTUS's approach and how it has developed over time suggests that the CJEU's approach represents a credible exercise of judicial authority in a case law system.

II. Stages of Development

One way of capturing how the CJEU establishes and uses precedent is to consider how its approach to case law has developed over time. This issue lies at the heart of the Court's supposedly poor and inexperienced approach to case law.[125] A first way of measuring this is to consider how citations to case law, i.e. in-degree centrality, are distributed over time by looking at average yearly inward citations. This provides us with a rough map of when CJEU precedents were established (*see* figure 9 *infra*) and permits several observations.

[124] Fowler & Jeon, *supra* note 28, at 19, fig. 3.

[125] *See supra* Part A.I.

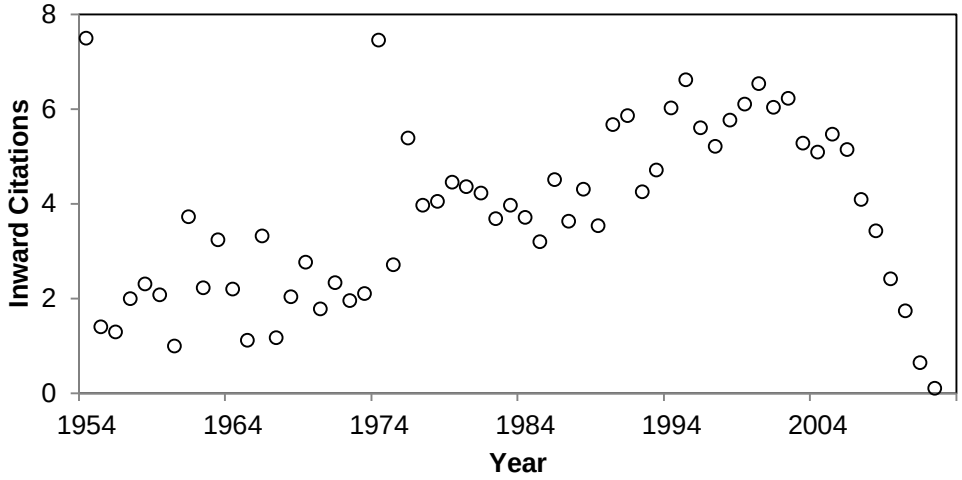

Figure 9. CJEU, Avg. In-degree over Time

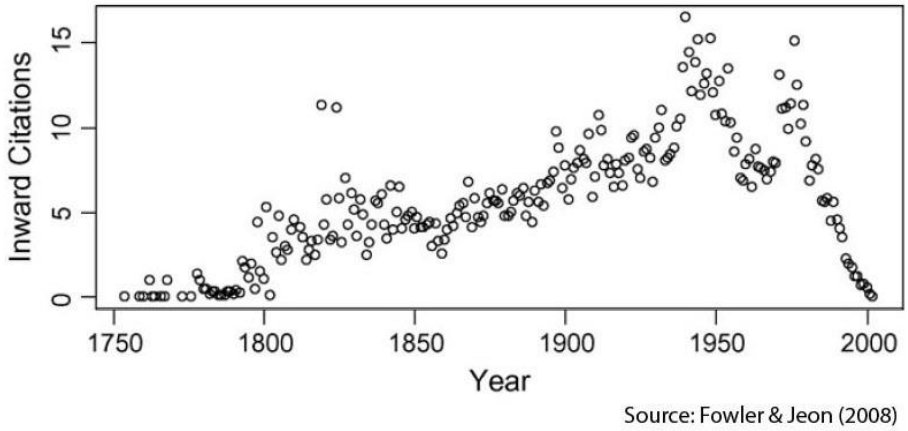

Figure 10. SCOTUS, Avg. Indegree over Time

First, we see that inward citations are not distributed evenly over time, but that, generally speaking, they are increasing over time and then decreasing for the most recent years. In both these regards, the CJEU's citation practice mirrors that of the SCOTUS and makes theoretical sense. The fact that the average number of inward citations increases over time is natural given that (i) the number of decisions made increases every year,[126] (ii) the average

[126] *See supra* Figure 4.

number of outward citations increases every year,[127] and (iii) when it comes to citing non-leading cases, the CJEU has a tendency to cite fairly recent cases.[128] Thus, the observed tendency is the product, and confirmation, of various aspects of the CJEU's approach. That recent decisions have been cited fewer times is unavoidable because they simply have not had the same chances to be cited.[129]

Second, although the overall development is an increase in inward citations over time, this development is not as steady and constant as the development in outward citations and while early variations can be attributed to a small sample size, the same is not true for later years. In fact, the CJEU data clearly illustrates that the mid- to late-1970s was a golden era of case law.[130]

The same can also be said about the SCOTUS and is consistent with the thesis of the CJEU as a constitutional, precedent-driven court. For a court that takes developing case law seriously there should be an overall increase in average inward citations that illustrates the continuous development of law, but unless the court has a mechanical approach there will also be outliers. Since citations tend to concentrate in a few, central decisions,[131] average inward citations will increase considerably in years when those central decisions are decided. For example, the high average number of inward citations in 1974 is largely attributable to the CJEU's decision in *Dassonville*,[132] the second most cited decision ever.[133]

Third, related to the discussion above, deviations from the observed trends during more extended periods can indicate a historically anomalous period of case law development.[134] Fowler & Jeon identify a sharp drop in mean inward citations during the judicially-active Warren Court (1953–1969)[135] that mirrors the below-average outward citations during the

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[127] *See supra* Figure 6.

[128] *See infra* Part F.IV.

[129] The length of the "tail" suggests that it on average takes seven years for a case to reach its peak citation potential. However, we return to this issue in Part F.IV *infra*.

[130] See figure 9 *supra*.

[131] See *supra* Part D.III and figure 2.

[132] Case 8/74, Procureur du Roi v. Benoít and Gustave Dassonville, EU:C:1974:82.

[133] Derlén & Lindholm, *supra* note 24, at 673. *Dassonville* has been cited 112 times in our dataset. Other frequently cited judgments rendered in 1974 include Case 2/74, Reyners v. Belgium, EU:C:1974:68 (35 citations) and Case 41/74, van Duyn v. Home Office, EU:C:1974:133 (23 citations). The impact of these cases on the average increases as the court only decided 62 cases that year.

[134] *See supra* Part E.II.

[135] Fowler & Jeon, *supra* note 28, at 19.

same period.[136] Fowler & Jeon present two possible explanations for this trend: either that the Warren Court's judgments had a weak legal basis and were therefore of less interest to subsequent compositions of the court, or that the court subsequently shifted to a more conservative policy.[137] The absence of any similar periods regarding CJEU case law indicates a more stable, homogenous court, continuing to build on the achievements of previous compositions.

III. Issue Shifting

We expect that a constitutional, precedent-driven court will not continuously deliver decisions on the same legal issue but to shift focus over time, first developing law in one area and when it is "done" moving on to another. Mature constitutional courts tend to engage in this type of strategic issue shifting. For example, in their study of the SCOTUS, Fowler & Jeon demonstrated that the Court shifted focus from commercial issues to civil rights in the 1960s by tracing the authority score of key cases over time (*see* Figure 11 *infra*). Because of how an authority score is calculated,[138] a rise in authority score over time occurs because new, well-grounded cases (hubs) citing that case are added to the network. Similarly, a decline in authority score means that the new cases added to the area do not cite the case. This, in turn, could indicate that the court has turned its attention to other issues.[139]

[136] *See supra* Part E.II.

[137] Fowler & Jeon, *supra* note 28, at 19–20.

[138] *See supra* Part C.II.

[139] If we are studying a single case an alternative explanation is that the case has been overruled and is no longer good law. *See further infra* Part F.V. A third, possible explanation is that the Court instead cites another case in support of the same point of law.

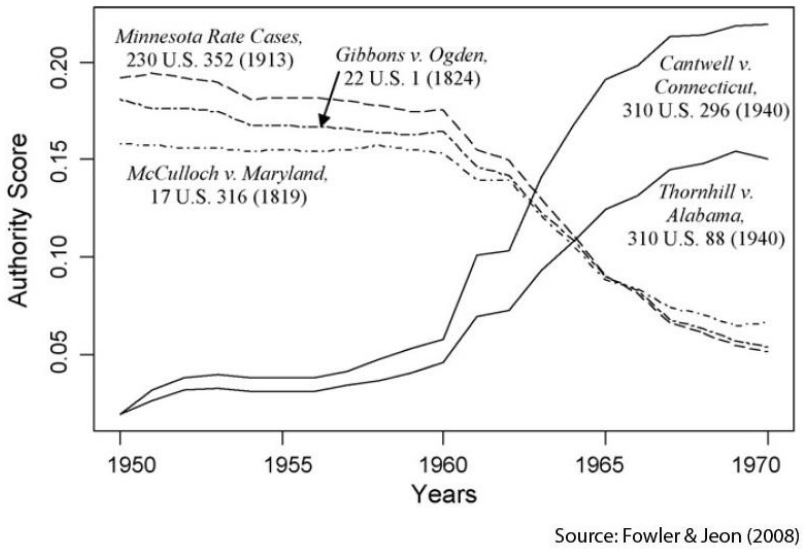

Figure 11. SCOTUS, Issue Shifting

To study issue shifting in the CJEU we use the same approach as Fowler & Jeon but with some modifications. First, rather than studying individual cases, we have tracked the mean authority score of key decisions in the areas of free movement of goods,[140] competition law,[141] and constitutional law.[142] To ensure a fair comparison, the decisions studied are all from the 1960s and 1970s represent still-binding law, and the tracking begins more than eight years after the most recent decisions were decided.[143] Second, it is difficult to compare how much attention the CJEU pays to a particular group of cases using their total absolute authority score since the numbers differ greatly. Instead, we track the group's authority score relative to its own peak score over time.[144] Third, instead of using a yearly average, we calculate each group's authority score after each new citation is added to the network (*see* Figure 12 *infra*).

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[140] Case 8/74, Dassonville, EU:C:1974:82; Case 120/78, Cassis de Dijon, EU:C:1979:42.

[141] Case 85/76, Hoffmann-La Roche, EU:C:1979:36; Case 27/76, United Brands, EU:C:1978:22.

[142] Case 26/62, Van Gend en Loos, EU:C:1963:1; Case 6/64, Costa v. ENEL, EU:C:1964:66; Case 29/69, Stauder, EU:C:1969:57; Case 41/74, Van Duyn, EU:C:1974:133; Case 43/75, Defrenne II, EU:C:1976:56; Case 106/77, Simmenthal II, EU:C:1978:49.

[143] This ensures that all studied decisions have had an opportunity to be cited. *See further infra* Part F.IV.

[144] *Compare infra* Part F.IV.

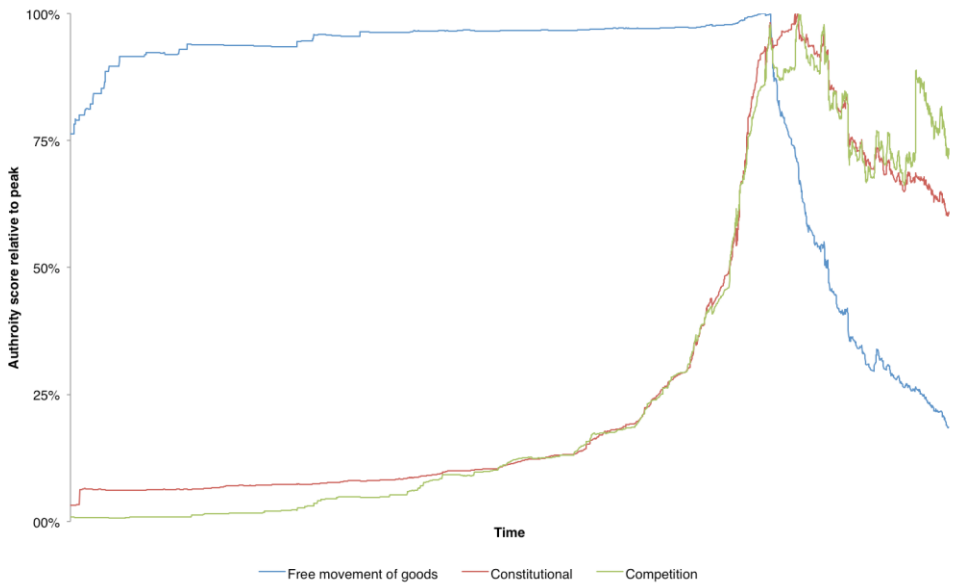

Figure 12. CJEU, Issue Shifting

This reveals that the amount of attention the CJEU has paid to free movement of goods, competition law, and constitutional law has shifted a lot over time. Early, and for a long time, the CJEU paid much attention to the free movement of goods. During this era, key cases in that area were the best authorities in the network. Over time the court shifted focus to other issues, such as constitutional law and competition law. This is evident in the gradual increase in authority scores of key cases in these areas, many of which had been around for a longer time than the key decisions regarding free movement of goods. Towards the end of the period studied the decisions on free movement of goods had lost more than 75% of their peak authority scores.

This illustrates how the CJEU's relative attention to various areas has shifted over time. The observed trends are also consistent with the Court spreading its attention between more areas of law as the breadth of EU law gradually expanded beyond its historical focus on the free movement of goods. This would explain, for example, why the development of decisions in constitutional law and competition law for a long time closely mirrored each other and why they more recently declined. The Court is again shifting its attention to new areas. In this regard one of the more interesting phenomena is the more recent increase in authority score for competition law cases. If our explanation for the overall trends is correct, then this

suggests that the CJEU has returned to the issue of competition law despite other, newer areas demanding its attention.

Given the fact that the CJEU has only been active for about sixty years—compared to the SCOTUS's more than two hundred and fifty years—the relative lack of evidence of more significant shifts in issue priorities is understandable. Furthermore, given the relatively limited amount of data not all priority shifts can be easily detected empirically.

IV. The Half-Life of Important and Non-Important Cases

It was discussed above that citations follow an unequal distribution, where a small group of important cases receive the large majority of all citations and most cases are very rarely cited.[145] Along similar lines, we expect the CJEU to treat important and non-important cases differently in other respects as well. We would expect the average judgment's usefulness as a precedent to initially and gradually increase, as it is cited for the information it holds on a particular issue, up to a peak, and then decline as newer cases on the same issue are decided or the issue becomes settled.[146] In comparison, it is axiomatically true that important cases will age better than unimportant cases.

Fowler & Jeon's study shows that the SCOTUS behaves in this manner. They observe that the average time to peak authority score is somewhat shorter for important SCOTUS judgments than for unimportant judgments.[147] Also, unimportant cases' authority scores decline more quickly than important cases'.[148]

When examining how the CJEU's judgments' authority scores develop over time (*see* Figure 13 *infra*), we find interesting similarities and differences when compared to the SCOTUS. The CJEU's judgments' authority scores generally follow the same development as the SCOTUS's, building gradually to a peak and then steadily declining in importance. We will refer to this as the "Banana index," in the sense that judgments go through three phases: green (still developing), yellow (peak), and brown (declining).

The most obvious difference between the two courts in this regard is that it takes a CJEU decision significantly less time to reach peak authority. CJEU judgments reach peak authority score after an average of eight years, compared to circa twenty-seven years for SCOTUS

[145] *See supra* Part D.III.

[146] Fowler & Jeon, *supra* note 28, at 25.

[147] *Id*. (25.5 years compared to 27.2 years).

[148] *Id*. (as expected, important cases reaches a higher average authority at peak as compared to other cases).

judgments.[149] Interestingly, there is no similar difference in decline rate. An average SCOTUS case will have lost 25% of its authority about five years after peak and 50% after about seventeen years;[150] the comparable time for an average CJEU case is eight years and thirteen years. Thus, the CJEU is quick to cite new cases and they become settled after a short time. The judgments also stay relevant for a surprisingly long time, as compared to time to peak and in comparison with the SCOTUS.

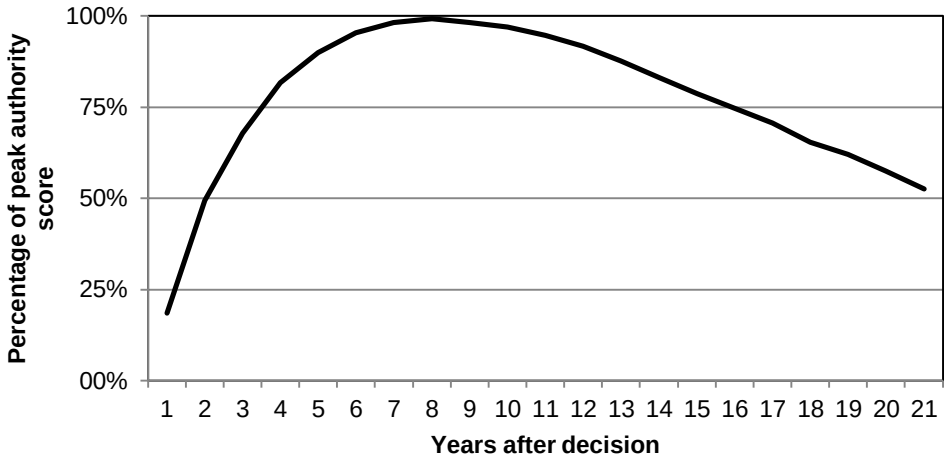

Figure 13. CJEU, Authority Score Development (1991–2001)

Much like Fowler & Jeon, we observe that important CJEU decisions[151] follow a different development as compared to average decisions (*see* Figure 14 *infra*). First, important CJEU decisions seem to take less time to peak than the average decision, within four to six years. The almost instant impact of cases like *Keck* and *PreussenElektra* is obvious from the almost vertical rise in authority. Some cases have a more staggered development. The *Marleasing* decision, for example, eventually reached a high authority score than *Francovich* or *Keck*, but it took twice as long to get there. This suggests that the CJEU only gradually warmed to the use of *Marleasing* in later cases. *Factortame* is even more controversial, initially rising fast but then the development breaks and the case continues a troubled up-and-down existence at a lower level of authority.[152]

[149] This is also supported by the length of the inward citation "tail", *see supra* Part F.II.

[150] Fowler & Jeon, *supra* note 28, at 25.

[151] *See* Derlén & Lindholm, *supra* note 24 (regarding what constitutes an important case).

[152] The interesting development of *Torfaen* is discussed further *infra* Part F.V.

Second, some important decisions, for example *Bosman* and *PreussenElektra,* experience a second wind, continuing their upward climb after the initial peak. The development of the *Bosman* case is explosive, even when compared to other important decisions.

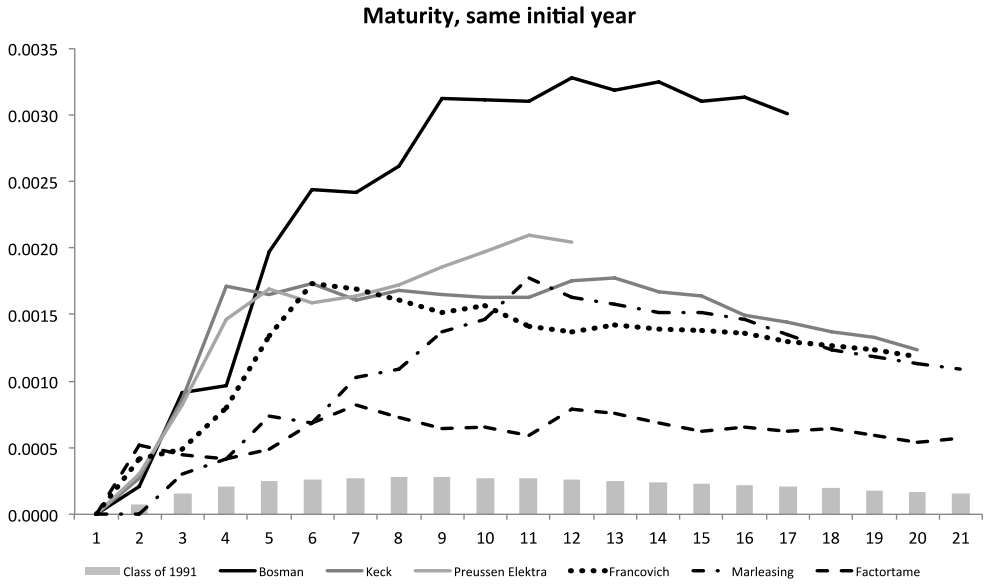

Figure 14. CJEU, Authority Score Development of Important Decisions

V. Overruling and Avoiding Precedent

In any legal system where judgments constitute an important source of law, overruling and otherwise avoiding previous cases becomes relevant, the most obvious form being formal overruling, traditionally the prerogative of a court higher up in the judicial hierarchy.[153] With an express overruling the authority of the previous decision is wiped clean, replaced by the new judgment.[154] But there are less dramatic ways of avoiding a troublesome judgment. Overruling can be implied when the later court regards the previous judgments as wrongly decided. Furthermore, a previous ruling can be undermined if a later court concludes that a

[153] CROSS & HARRIS, *supra* note 41, at 127.

[154] *Id*. at 127–28.

previous court misunderstood the law.[155] The rise and fall of judgments as they are overturned or otherwise avoided can be traced in the networks of the courts' precedent.

The academic opinion on overturning precedent in the SCOTUS is split. It is sometimes claimed that the tendency to overturn previous decisions is the main difference between the English and American doctrine of precedent.[156] On the other hand, Gerhardt claims that overruling constitutional precedents "constitutes a tiny fraction of what the [SCOTUS] does."[157] Fowler & Jeon concur, classifying overruling at the SCOTUS as "extremely rare," with only 252 overturned judgments.[158] The network analysis demonstrates that overruled cases have higher than average authority, indicating that the SCOTUS is more likely to overturn judgments that could influence later decisions.[159] Naturally, once a judgment has been overruled its importance will gradually decrease, while the importance of the overruling judgment will increase. Thus, the development of the judgments will intersect, with the overruling judgment surpassing the overruled decision after about ten years. The overruling judgment will then continue to increase in importance for almost thirty additional years.[160]

Similarly, it is reasonable to assume that the overruling cases are grounded in previous case law to a degree above average. This is confirmed for the SCOTUS network, with overruling cases having about five times higher hub scores than other cases. More specifically, the hub score of an overruling case appears to be closely connected to the authority score of the overruled case. In other words, the more important the overruled case is, the more well–grounded the overruling case will be.[161] This makes intuitive sense. When overruling a well-established old case the court has an interest in "anchoring" the new judgment in other cases, thus demonstrating that the overruling is not arbitrary or political.

The CJEU is frequently accused of not being explicit about overturning precedent.[162] Examples of the CJEU changing its case law radically without acknowledging the fact can be

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[155] *Id*. at 129–30.

[156] Cross & Harris claim that "[t]here are many instances, some American lawyers would say too many, in which the Supreme Court has overruled a previous decision." *Id*. at 19. No source is given as to who these "American lawyers" are.

[157] GERHARDT, *supra* note 54, at 34.

[158] Fowler & Jeon, *supra* note 28, at 25.

[159] *Id*.

[160] *Id*. at 25–26.

[161] *Id*. at 26.

[162] *See*, *e.g.*, Tridimas, *supra* note 12, at 316.

found, including the famous *Stauder* case in which the CJEU made a complete turnabout concerning the protection of fundamental rights in EU law.[163] But it is hardly surprising that the CJEU was not explicit about its overruling in *Stauder*, given that the open use of previous decisions had not been established at that point in time.

Furthermore, we have no classification of CJEU overruling with which to compute average authority scores for overruling cases as compared to other cases. If we want to understand overruling in the CJEU we should choose examples from the 1990–2011 period, when the Luxembourg court routinely made use of previous decisions.[164] Conveniently, the most famous[165] example of explicit overruling at the CJEU occurred at this time with the Court's *Keck* decision.[166] The CJEU was unusually clear in *Keck* about the change made to case law, concluding that it was "necessary to re-examine and clarify its case law."[167] The problem is that the CJEU does not specify which old cases are overturned and which remain good law.[168] Still, following the method of Fowler & Jeon, we can study the rise and fall of decisions' authority score following *Keck*. *Torfaen* is an obvious example of bad law following *Keck*, as the CJEU treated selling arrangements as *prima facie* violations of what is now Article 34 TFEU.[169] Comparing how the two decisions' authority scores have developed demonstrates that *Torfaen* is no longer good law following *Keck* (*see* Figure 15 *infra*). *Torfaen* was initially regarded as an important authority in the area, but its prominence immediately fell with the arrival of *Keck,* whose authority score increased explosively, remaining a top authority until the start of its decline more than a decade later.

[163] Case 29/69, Stauder v. Ulm, EU:C:1969:57.

[164] *See supra* Part E.III.

[165] Tridimas, *supra* note 12, at 317 (according to whom *Keck* constitutes "the most spectacular departure from precedent in the Court's history").

[166] Joined Cases C-267/91 and C-268/91, Criminal Proceedings against Keck and Mithouard, EU:C:1993:905.

[167] *Id*. at para. 14.

[168] The case law of the Court of Justice regarding so-called selling arrangements (rules regarding when, where and how goods are sold) before the *Keck* judgment was complex and contradictory, with the Court taking different approaches to the issue. *See also* Mattias Derlén & Johan Lindholm, *Article 28 E.C. and Rules on Use: A Step Towards a Workable Doctrine on Measures Having Equivalent Effect to Quantitative Restrictions*, 16 COL. J. EUR. L. 191 (2010).

[169] Case C-145/88, Torfaen Borough Council v B & Q plc, EU:C:1989:593.

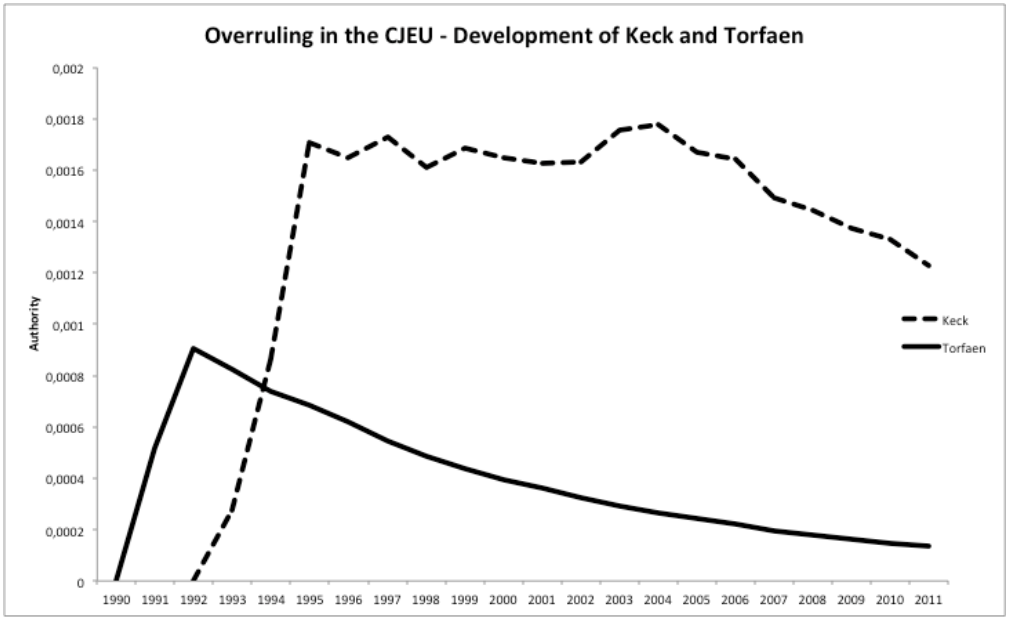

Figure 15. Overruling in the CJEU – Development of Keck and Torfaen.

In line with the American findings that cases overturning important authorities are important hubs, *Keck* is one of the foremost hubs of the entire network of CJEU cases.[170]

Finally, the fact that the CJEU appears to be have been somewhat reluctant to expressly overrule previous decisions is not wholly surprising. Similar patterns can be identified with regard to the SCOTUS. The positive treatment of precedent, i.e. citing cases in support, developed faster than negative treatment of precedent, i.e. citing a case in order to limit its future status wholly or partly.[171] This discrepancy can be explained by the core idea of precedent. Since the main emphasis is on following relevant previous decisions the routine of citing cases in order to do the opposite (i.e. to distinguish potentially discordant precedents) may take longer to develop.[172] If we apply this reasoning to the CJEU it appears reasonable that a firm routine of express overruling is still in development, given that the positive treatment of precedent was established as late the early 1990s.

[170] *Keck* is tied for seventh place as the best hubs of the CJEU network. *See* Derlén & Lindholm, *supra* note 24, at 685.

[171] Johnson et al., *supra* note 59, at 172–75.

[172] *Id*. at 175.

VI. Interim Conclusions

This part has described four key components of the CJEU's approach to case law: how its development of case law follows certain stages, how the Court over time has shifted focus between different issues, that it has one approach for citing average decisions and a different approach to important cases, and that it engages in overruling.

Our findings show that the CJEU has developed an approach to its own case law that is not only fairly predictable, and therefore *prima facie* credible as an exercise of judicial authority in a case law system, but in many regards its methods are similar to the SCOTUS's approach. While the style and manner of the CJEU is quite different from the SCOTUS, the two courts' overall approaches to case law with regard to the studied key components are not as different as might be expected. We find important differences between the two courts. But overall the empirically-observable elements of the CJEU's approach are consistent with that of a constitutional, precedent-driven court such as the SCOTUS.

G. Conclusions – Re-evaluating the CJEU's Approach to Precedent

The CJEU is a court with civil law roots but a case law future. Created in the model of continental European courts, the CJEU was naturally hesitant to develop a strong model of precedent.[173] But, seeing the need for judicial legitimacy, the Court began developing a system where previous judgments play a central role.

This is demonstrated in our three-part examination. The judgments of the CJEU constitute a traditional citation network. They are not chaotic or random. Furthermore, after a period of development, the Luxembourg court has clearly learned how to cite. It has established a clear system of relying on previous cases. Finally, the CJEU has a method for handling cases in all phases of their development.

The phrase "case law future" makes an important point. Above all, it is high-time that we separate the concepts case law and common law.[174] The CJEU is, for all intents and purposes, a constitutional court[175] that produces case law for the guidance of national courts against the background of EU primary and secondary law. This is far removed from the traditional picture of common law, where the legislator has remained silent and precedent is the sole source of law.[176] Constitutional precedent, as used by the SCOTUS and the CJEU, takes a less strict approach to precedent. There is good reason for this. While case law is an important

[173] Arnull, *supra* note 9, at 265.

[174] *See supra* Part B.

[175] Tridimas, *supra* note 118.

[176] GERHARDT, *supra* note 54, at 97.

source of law, we should not expect a development towards strict adherence to previous judgments in the EU system. Just as the external, political check on the SCOTUS is limited,[177] the Member States have de facto limited possibilities to correct a line of CJEU case law,[178] and the Luxembourg court must therefore retain enough flexibility to be able to change a line of case law gone awry.[179] Thus, there is indeed a case law system hiding below the surface of EU law, but the idea of case law has developed beyond its strictest traditional common law roots.

[177] Hathaway, *supra* note 41, at 656.

[178] HARTLEY, *supra* note 118, at 57.

[179] Tridimas, *supra* note 12, at 323–24.

Special Section
Network Analysis and Comparative Law Methods

Network Analysis and the Use of Precedent in the Case Law of the CJEU – A Reply to Derlén and Lindholm

By Jens Frankenreiter[*]

A. Introduction

During the last decades, social network analysis has been established as a key technique in a number of disciplines in social science. Its main promise is that it provides tools for researchers to take into account the social context of individual entities or actors.[1] Legal scholars, by contrast, have only recently started to make use of these tools. Nowadays, one particularly prominent application is the use of network analysis to analyze the citation networks of different national and international courts.[2] The contribution by Derlén and Lindholm published in this issue of the *German Law Journal* forms part of this trend. It is the latest in a series of papers studying citations in the case law of the Court of Justice of the European Union (CJEU).[3] Unlike the authors' previous contributions, the paper specifically addresses the use of precedent by the CJEU and assesses the merits of criticism in the

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[1] Evelien Otte and Ronald Rousseau, *Social network analysis: a powerful strategy, also for the information sciences*, 28 JOURNAL OF INFORMATION SCIENCE 442 (2002).

[2] Ryan Whalen, *Legal Networks: The Promises and Challenges of Legal Network Analysis*, 2016 MICHIGAN STATE LAW REVIEW 539, 547 (2016) (providing an overview on previous work in this area and other applications in legal research). There are other examples of research using a similar approach to the one in the present paper. *See* James H. Fowler *et al.*, *Network Analysis and the Law: Measuring the Legal Importance of Precedent at the U.S. Supreme Court*, 15 POLITICAL ANALYSIS 324 (2007) (in the context of the Supreme Court of the United States); Jonathan Lupu and Erik Voeten, *Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights*, 42 BRITISH JOURNAL OF POLITICAL SCIENCE 413 (2011) (in the context of the European Court of Human Rights).

[3] *See* Mattias Derlén & Johan Lindholm, *Characteristics of Precedent: The Case Law of the European Court of Justice in Three Dimensions*, 16 GERMAN LAW JOURNAL 1073 (2015); Mattias Derlén and Johan Lindholm, *Goodbye van Gend en Loos, Hello Bosman? Using Network Analysis to Measure the Importance of Individual CJEU Judgments*, 20 EUROPEAN LAW JOURNAL *667* (2014); Mattias Derlén *et al.*, *Coherence out of Chaos: Mapping European Union Law by Running Randomly Through the Maze of CJEU Case Law*, 2013 EUROPARÄTTSLIG TIDSKRIFT 517 (2013).

literature arguing that the citation practice of the CJEU lacks an acceptable method.[4] The paper provides novel insights into the use of precedent by the CJEU and thus makes an interesting contribution to the emerging scholarship investigating the decision-making of the CJEU by means of quantitative analysis. At the same time, the design of the research raises severe doubts about whether the authors succeed in providing a conclusive response to the critics of the CJEU's citation practice.

B. A Critical Appraisal of Derlén and Lindholm's Analysis

The analysis of Derlén and Lindholm is motivated by their observation that, while the case law of the CJEU now constitutes an important source of the law, the use of references to prior case law in the decisions of the CJEU has been subject to severe criticism (Derlén and Lindholm, pp. 648–649).[5] By investigating the network comprised of decisions from the CJEU and cross-citations between these decisions, they intend to resolve the question whether the use of precedent by the CJEU constitutes "an acceptable exercise of judicial authority in a case law system" (Derlén and Lindholm, p. 650). While they do not explicitly say so, they seem to imply that evidence in favor of an "acceptable exercise of judicial authority" would mean that at least some of the criticism voiced against the use of precedent by the CJEU is unfounded.

In order to support their hypothesis, the authors look for similarities in the citation networks of the CJEU[6] and the Supreme Court of the United States (SCOTUS). By choosing a professedly empirical approach, they hope to avoid one central limitation of traditional legal analysis, namely the focus on just "a limited number of well-known judgments" (Derlén and Lindholm, p. 650). The analysis reveals a number of similarities and differences between the citation networks of both courts. In sum, the authors conclude that the use of precedent by the CJEU is "an acceptable exercise of judicial authority" and that it conforms to a "case law system" (Derlén and Lindholm, pp. 649–650, 685).

Derlén and Lindholm deserve recognition for their endeavor to use quantitative methods to study the decision-making of the CJEU. As they correctly note, quantitative methods have the potential to serve as an important complement to traditional doctrinal or qualitative analyses of the decisions of the Court. A significant stream of literature has demonstrated that the analysis of citations can be used to test various hypotheses about judicial decision-

[4] *See, e.g.*, Anthony Arnull, *Owning up to Fallibility: Precedent and the European Court of Justice*, 30 COMMON MARKET LAW REVIEW *253* (1993); John J. Barceló, *Precedent in European Community Law*, *in* INTERPRETING PRECEDENTS – A COMPARATIVE STUDY 407, 416 (D. Neil MacCormick & Robert S. Summers eds., 1997).

[5] For example, Arnull accused the Court of ignoring and obscuring the meaning of prior judgments in contradiction with the Court's argument. *See* Arnull, *supra* note 4.

[6] More precisely, the authors seem to use only judgments issued between 1954 and May 2011 by the highest branch of the CJEU, the Court of Justice.

making and the behavior of judges in general,[7] and network analysis techniques show great promise to exploit the rich information available in such networks to a higher degree than other quantitative methods.[8] Besides, the paper presents a number of interesting findings. It is fascinating to see that common notions about the citation behavior of the CJEU are reflected in statistical properties of its citation network. Also, the authors' finding that the use of references to prior judgments in the decision-making of both the CJEU and the SCOTUS follows roughly similar patterns deserves attention.

The paper, therefore, achieves quite a lot. But the research is not designed in a way that allows for conclusions about the "acceptability" of the CJEU's citation practice or the designation of EU law as a "case law system." It is possible to identify two particular and partly overlapping concerns with the project in this respect. On the one hand, the authors do not adequately develop the theory required to connect certain aspects of the use of precedent with particular features of citation networks. On the other hand, the authors do not make use of formal hypothesis testing. Rather, their analysis is limited to informally comparing various descriptive statistics and plots derived from the application of methods developed in network analysis to the network of citations of both courts. As a result, despite the authors' pledge to improve the study of precedent use through quantitative methods (Derlén and Lindholm, p. 651), their findings appear rather subjective.

I. First Problem – Lack of Theory

First, the paper suffers from a lack of theory. The authors do not offer a clear definition of what constitutes "acceptable" citation behavior and what they mean by a "case law system." Most importantly, this failure to define central concepts of the paper prevents a sound operationalization of these concepts and therefore also the development of a convincing test whether the data in fact support the hypotheses put forward in the paper.

For example, in order to devise a test for the acceptable use of precedent, one would first have to develop a theory about how different uses of precedent would play out in the data. While the paper does not itself develop such a theory, it uses the citation practice of the SCOTUS as an example of an acceptable citation practice. Put very simply, the argument of

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[7] *See* Stephen J. Choi & G. Mitu Gulati, *Bias in Judicial Citations: A Window into the Behavior of Judges?*, 37 JOURNAL OF LEGAL STUDIES 87 (2008); Stephen J. Choi & G. Mitu Gulati, *Ranking Judges According to Citation Bias (as a Means to Reduce Bias)*, 82 NOTRE DAME LAW REVIEW 1279 (2007); Tom S. Clark & Benjamin Lauderdale, *Locating Supreme Court Opinions in Doctrine Space*, 54 AMERICAN JOURNAL OF POLITICAL SCIENCE 871 (2010); Frank B. Cross, *The Ideology of Supreme Court Opinions and Citations*, 97 IOWA LAW REVIEW 693 (2012); William M. Landes, Lawrence Lessig, and Michael E. Solimine, *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 JOURNAL OF LEGAL STUDIES 271 (1998); William M. Landes & Richard A. Posner, *Citations, Age, Fame, and the Web*, 29 THE JOURNAL OF LEGAL STUDIES 319 (2000); Anthony Niblett & Albert H. Yoon, *Judicial Disharmony: A Study of Dissent*, 42 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 60 (2015).

[8] *See also* Whalen, *supra* note 2, at 543, 549.

the authors is that, if the citation network of the CJEU resembles that of the SCOTUS (the acceptability of which is taken as granted), then the CJEU must be considered to use citations in an acceptable way as well. Yet, in order to provide evidence for acceptable citation behavior, one would also have to describe what it would mean for a court to act unacceptable in this regard, and how such an unacceptable use of precedent would play out in the data. Derlén and Lindholm do not do this. This is more than a mere technicality. In order to infer from the statistics and plots provided in the paper that the citation practice is acceptable, one would have to form an expectation that an unacceptable citation practice would only with a very low probability generate data akin to those observed in the CJEU citation network. If, by contrast, both an acceptable and an unacceptable citation practice potentially yield data similar to those observed, the respective statistical parameter or plot may help us understand whether the citation networks of the CJEU and the SCOTUS resemble each other, but it contributes nothing to answering the question whether the citation practice of the Court is "acceptable."

To further illustrate this point, consider an example from Section D.-III. of the paper. The authors analyze the distribution of the numbers of links (citations) to and from individual nodes (judgments). They argue that, "[i]n a random network, where links are placed randomly between nodes, most nodes will have the same number of links" (Derlén and Lindholm, p. 662). Instead, similar to a prior study on the SCOTUS's citation network, they find that the distribution of the number of links follows a so-called power law, with many nodes showing few links, and only a small number of nodes showing many links. From that, Derlén and Lindholm conclude that "the CJEU case law network is not random but follows established patterns" (Derlén and Lindholm, p. 663). They interpret this finding as evidence "in favor of a conscious approach *vis-à-vis* case law at the CJEU" and as an indication that "some form of method" is at work (Derlén and Lindholm, p. 664).

It is certainly intuitive to assume that the distribution observed could not be the result of a network in which links are placed randomly between nodes. Still, the finding that the distribution of the number of links follows a power law is neither surprising, nor does it allow for any meaningful conclusion about the acceptability of the use of precedent by the CJEU. This is because not even the harshest critics of the CJEU's citations practice seem to suggest that the judges and their *référendaires* (judicial clerks) randomly pick the judgments they refer to from a list of all judgments available at a certain point in time. Instead, it seems more reasonable to assume that an "unconscious" approach to citing prior case law relies on echoing citations from previous cases on a similar topic, without considering whether the judgments cited contain any meaningful information for the case at hand. Such a citation practice, however, could very well result in a network in which the distribution of the number of links per node follows a power law distribution.[9]

[9] Note that it has long been established in other disciplines which dealt with power law distributions that these distributions can be the result of random growth processes. *See* Xavier Gabaix, *Zipf's Law for Cities: An Explanation*, 114 THE QUARTERLY JOURNAL OF ECONOMICS 739 (1999).

II. Second Problem – No Formal Hypothesis Testing

Second, the authors do not attempt to devise formal tests for their hypotheses. Rather, they base their conclusions on subjective comparisons of statistics and plots depicting certain aspects of the citation networks of the SCOTUS and the CJEU. For example, analyzing the development of the numbers of citations to judgments by the CJEU and the SCOTUS over time, Derlén and Lindholm observe similarities as well as differences between both courts. Without further explanation they go on to conclude that the similarities observed are sufficient to warrant the assessment that "overall the empirically-observable elements of the CJEU's approach are consistent with that of a constitutional, precedent-driven court" (Derlén and Lindholm, p. 685). At no point in the paper do the authors attempt to define a "critical region"[10] of results that would allow them to distinguish findings that support the hypothesis of an acceptable use of precedent from findings that do not support this hypothesis. Again, whether to use formal hypothesis testing is not merely a question of style. Arguably, one of the greatest advantages of quantitative research as compared to traditional legal analysis is its greater degree of objectivity.[11] In the absence of formal tests, in contrast, the authors' findings appear rather subjective.

This problem is exacerbated by the fact that the authors give little weight to features that potentially point to fundamental differences in the use of precedent by the CJEU and the SCOTUS. For example, as the authors rightly note, the data seem to imply that the use of references to precedent in decisions of the CJEU does not decrease when the Court establishes new case law (Derlén and Lindholm, p. 671). By contrast, this is potentially different for the SCOTUS. Fowler and Jeon report that the number of links to and from judgments issued by the activist Warren Court is substantially lower than the number of links to judgments issued before and after this period.[12] This has been interpreted as showing that, when the SCOTUS creates new law, it gains less from citing precedent.[13] Against this background, a finding that the CJEU uses references at least at the same rate when creating new case law seems to suggest that the motivation of both courts for citing precedent differs at least to some degree. The authors acknowledge this difference and speculate that the CJEU, in these cases, uses references as a means to increase the legitimacy of a decision (Derlén and Lindholm, p. 671). But they do not discuss how this finding affects the appraisal of their hypothesis that the CJEU is a "precedent-driven constitutional court comparable the

[10] In statistics the term "critical region" denotes the hypothetical set of results that allow for a rejection of a null hypothesis. In the present context, critical area would comprise those results that are incompatible with the hypothesis that the use of citations by the CJEU is unacceptable or incompatible with a case-law system.

[11] *See also* Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIFORNIA LAW REVIEW 63, 78 (2008).

[12] James H. Fowler & Sangick Jeon, *The Authority of Supreme Court Precedent*, 30 SOCIAL NETWORKS 16, 19 (2008).

[13] *Id*.

[SCOTUS]" (Derlén and Lindholm, p. 650). To the contrary, data suggesting that the use of citations by the CJEU in such cases serves at least partly rhetorical goals arguably is at odds with this hypothesis.[14]

C. General Reflections on the Use of Network Analysis in Empirical Legal Research

It should be noted that the challenges the authors encountered in using network analysis are not unique to this paper. In fact, as has been noted before, legal research using these tools has generally "remain[ed] descriptive in nature," often limiting itself to identifying the judgments that are classified as central by the respective tools.[15] It seems reasonable to assume that one of the main causes for this state of the literature is the absence of a clear theory describing how certain aspects of the legal system affect the structure of legal (citation) networks. Only when such a theory is available will results obtained from network analysis reveal, without more, features of legal systems. That is the point at which it will also be insightful to use these techniques in comparative studies like the one conducted by Derlén and Lindholm.[16]

There is, however, a second potential way for network analysis to make substantial contributions to empirical legal research, an approach that does not necessarily require the development of a theory explaining how features of the legal system affect the shape of (citation) networks. Even in the absence of such a theory, network analysis can be used to generate variables for use in other empirical studies. Quantitative studies, as a matter of principle, require numeric variables representing the outcome and potential causes that are being investigated. Currently, one limitation of large-scale empirical investigations of judicial decision-making is that, for many characteristics of judgments (for example, their perceived importance), there are no measures readily available. While manual coding can solve this problem, it is expensive and entails potential problems regarding the replicability of the study.

Network analysis can help solve this problem. For example, if we knew that the authority score[17] of a judgment showed a strong correlation with its perceived importance as

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[14] The question whether precedent effectively constrains the justices of the SCOTUS is controversial. *See* Jeffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices*, 40 AMERICAN JOURNAL OF POLITICAL SCIENCE 971 (1996).

[15] Whalen, *supra* note 2, at 556.

[16] More precisely, such a theory would allow the development of reasoned expectations about how the presence of certain features of a legal system affects the citations network, which in turn would allow for the drawing of inferences from the data by means of hypothesis testing.

[17] Authority score is a measure of the centrality of a node in a network based on the number and centrality of nodes linking to this node.

established by other means (e.g., by manually coding a random subset of cases)[18] we could use this score as a proxy for the importance of a case. This, in turn, would make it possible to conduct large-scale investigations of the factors that predict the importance of a judgment. Potential examples include studies of whether the perceived importance is correlated with the individual judge authoring the opinion, and whether the importance of a judgment changes once its author leaves the Court.[19] Derlén and Lindholm's paper—together with their previous work on related topics—helps understand the general shape of the CJEU's citation network and could therefore serve as an important first step in the development of such measures.

D. Conclusion

Network analysis techniques potentially offer great promise for legal research, and Derlén and Lindholm's paper demonstrates both the strengths and the potential pitfalls of using such techniques in the context of judicial behavior. On the one hand, their analysis provides interesting novel insights into the use of precedent by the CJEU. In particular, it reveals remarkable similarities between the citation networks of the CJEU and the SCOTUS. By using network analysis techniques, the authors are able to include in their analysis references to prior case law in the universe of decisions by the CJEU instead of just a small number of landmark cases. On the other hand, the study suffers from both a lack of theory about how a specific type of precedent use is reflected in a citation network, and from the authors' failure to test their hypotheses in a more rigorous way. These shortcomings reflect central challenges for the use of network analysis in legal research in general, and it stands to reason that the significance of these techniques will be limited as long as these challenges cannot be overcome.

[18] Derlén & Lindholm, along with others, have also conducted research on the potential of authority scores to serve as a proxy for the importance of a decision in the context of the CJEU and the SCOTUS. *See, e.g.,* Derlén & Lindholm, *supra* note 3; Fowler *et al.*, *supra* note 2.

[19] Some studies have used measures derived from network analysis as the dependent variable in statistical analyses. *See* Yonatan Lupu & James H. Fowler, *Strategic Citations to Precedent on the U.S. Supreme Court*, 42 THE JOURNAL OF LEGAL STUDIES 151 (2013); Lupu & Voeten, *supra* note 2.

Special Section
Network Analysis and Comparative Law Methods

Network Analysis and Legal Scholarship

By Niels Petersen & Emanuel V. Towfigh[*]

A. Introduction

In their contribution in this issue Mattias Derlén and Johan Lindholm use social network analysis to show that the European Court of Justice is a precedent-driven constitutional court that is comparable to the US Supreme Court with regard to the citation of precedents.[1] The article and its use of network analysis as a method provoked a lively debate on the editorial board of the *German Law Journal* about comparative law theory and methods generally and the place of empirical (including network) analyses in the comparative law discipline. For this reason, the editorial board commissioned this "special section" of contributions dedicated broadly to approaches to comparative law. In his essay in this section, for example, Jens Frankenreiter offers a detailed assessment of Derlén's and Lindholm's analysis.[2] In this piece, we take a broader perspective and look at the utility and the limits of network analysis for legal scholarship generally.

In the first part we will give a brief introduction to network analysis and its value for legal scholarship. The second part deals with possible objections to the employment of network analysis as a methodological tool of legal scholarship. This discussion will reflect some general concerns that legal scholars often raise when it comes to empirical legal scholarship. This assessment highlights, in particular, that methods of empirical research primarily have a descriptive purpose. They do not necessarily have normative implications.

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[1] *See* Derlén & Lindholm in this issue.

[2] *See* Frankenreiter in this issue.

B. Network Analysis and Its Use for Legal Scholarship

Social network analysis is an empirical tool that has spread from mathematics and computer science to the social sciences.[3] At first it was adopted in modern, empirical sociology and then passed on to other disciplines, such as economics and political science. Social network analysis describes the links between different nodes of a network. Depending on the network, these nodes can represent different actors or things, such as individuals, organizations, states, courts or – as in the case of Derlén and Lindholm – the judgments of apex courts such as the Court of Justice of the European Union and the U.S. Supreme Court. The links can also represent many forms of relationships, e.g. personal interaction, shared characteristics, formal contracts or citations. The network that is represented in a network analysis does not need to be static. It can also be dynamic and measure the flow of information between nodes and changes in the network structure.

In legal scholarship network analysis has, as of yet, only been used sparingly.[4] The existing studies using social network analysis have – as with the Derlén and Lindholm studies – most prominently focused on citations.[5] Such citations can either be citations of the court's own precedents or of decisions of other (mostly foreign) courts. For example, an influential study of James Fowler and colleagues analyzed the importance of individual precedents of the U.S. Supreme Court using social network analysis.[6] Yonatan Lupu and Erik Voeten use social network analysis to show that the European Court of Human Rights uses references to its own case law in order to increase the legitimacy of its judgments.[7] With regard to the citations of foreign court decisions, Martin Gelter and Mathias Siems analyze citation patterns of European supreme courts in private law matters.[8] Finally, Sergio Puig has analyzed the interconnectedness of international arbitrators and sparked a vivid debate both on substantive and methodological grounds.[9]

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[3] Nicola Lettieri *et al.*, *A Computational Approach for the Experimental Study of Eu Case Law: Analysis and Implementation*, 6:56 SOCIAL NETWORK ANALYSIS AND MINING 1 (2016).

[4] *See* Ryan Whalen, *Legal Networks: The Promises and Challenges of Legal Network Analysis*, 2016 MICHIGAN STATE LAW REVIEW 539 (2016).

[5] *See id*. at 547.

[6] James H. Fowler *et al.*, *Network Analysis and the Law: Measuring the Legal Importance of Precedents At the U.S. Supreme Court*, 15 POLITICAL ANALYSIS 324 (2007).

[7] Yonatan Lupu & Erik Voeten, *Precedent in International Courts: A Network Analysis of Case Citations By the European Court of Human Rights*, 42 BRITISH JOURNAL OF POLITICAL SCIENCE 413 (2012).

[8] Martin Gelter & Mathias M. Siems, *Language, Legal Origins, and Culture Before the Courts: Cross-Citations Between Supreme Courts in Europe*, 21 SUPREME COURT ECONOMIC REVIEW 215 (2013).

[9] Sergio Puig, *Social Capital in the Arbitration Market*, 25 EJIL 387 (2014). This text was accompanied by a small review symposium on *EJIL: Talk!* (HTTPS://WWW.EJILTALK.ORG/DISCUSSION-OF-SERGIO-PUIGS-SOCIAL-CAPITAL-IN-THE-ARBITRATION-MARKET/, last accessed 23 April 2017).

The existing studies only scratch the surface of the potential of social network analysis for legal research. Network analysis may be particularly useful to study informal networks of courts and other legal actors in areas where formal hierarchies do not exist, or where the formal hierarchies do not represent the actual relationship of these actors. For example, the relationship between the European Court of Human Rights, the European Court of Justice and domestic constitutional courts of EU member states escapes traditional descriptions of hierarchy. While there are many qualitative accounts analyzing these relationships, a network analysis can shed further light on the interaction between these courts. Network analysis may thus be used to add further *external perspectives* to the law. It might also be employed to find additional doctrinal arguments, from an *internal perspective*, in what may be considered an empirically founded, sophisticated hermeneutical analysis. On one hand, it may be used to analyze and inform us about the interconnectedness of normative concepts in terms of textual analysis.[10] On the other hand, it might help us better understand the application of the law by the administration and court system when seeing which meaning they actually attribute to the legal texts. This exercise may also provide an empirical basis for one of the "pet arguments" commonly invoked by German legal scholarship, namely the identification of the "*herrschende Meinung*" (predominant opinion). For such approaches, lawyers may turn to research in empirical linguistics.

C. Objections to the Use of Network Analysis and Empirical Methods

One common point of misunderstanding between legal scholars and social scientists is the difference in perspective. Lawyers usually have a normative focus. They want to know how the world *ought to be*, according to the norms of law.[11] In contrast, social scientists have an empirical perspective. They want to describe how the world *is* and to explain why things are as they are. A social science study may thus be the basis for an informed normative argument.[12] But a normative argument does not automatically follow from the results of an empirical study.

When studying how the CJEU deals with precedent, for example, we can take a normative and an empirical perspective. The normative question is whether precedent *should* have a

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[10] *See* Emanuel V. Towfigh, *Komplexität und Normenklarheit — oder: Gesetze sind für Juristen gemacht*, 48 DER STAAT 29 (2009).

[11] In this instance "normative" is used in the sense prevailing in continental European legal scholarship (following the somewhat descriptive Latin undertone), rather than in the sense U.S. lawyers tend to use it, referring to value judgments (in line with the ubiquitous English meaning).

[12] *See* Niels Petersen, *Avoiding the Common Wisdom Fallacy: The Role of Social Sciences in Constitutional Adjudication*, 11 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 294 (2013); Emanuel Towfigh, *Empirical Arguments in Public Law Doctrine*, 12 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 670 (2014).

binding effect on subsequent decisions of the court.[13] In contrast, an empirical perspective asks whether the Court *actually* refers to its own precedents in its jurisprudence and to what extent these – in fact – have a binding effect. These questions have to be separated. In one legal system precedent might be normatively binding but have little effect on the court's actual jurisprudence. In another jurisdiction precedent can have considerable influence on the subsequent jurisprudence even though it is not binding. When Derlén and Lindholm argue that the CJEU's case law amounts to a case law system,[14] the argument is an empirical one. It does not suggest that the Court's decisions are normatively binding. Certainly, one can argue that the concept of a case law system is not well defined, as Jens Frankenreiter has observed in his comment.[15] However, this is an empirical claim, challenging the description, not a normative one.

There are a number of "typical" objections that are raised against empirical legal research, and also against network approaches. Each of them points both to a virtue and to a limitation to this type of argument in the realm of law.

First, to be able to appraise a phenomenon empirically, one needs some sort of representation, or model, of that phenomenon. Obviously, this model cannot be a perfect representation of reality: It is for the very reason that we cannot fully gauge "reality" in the first place that we turn to empirical methods. In empirical research, data is aggregated and some information is not taken into account by design. Therefore, empirical models can only represent a certain perspective of "reality". The perspective should be chosen according to the aim that a researcher pursues. This choice is necessarily subjective, even though methodological scrutiny proscribes certain choices. Yet, while we have to consider that our empirical insights are necessarily imbued by this subjectivity, the possibility of testing them against "reality" adds an additional layer of scrutiny and thus an enriched understanding of the phenomenon. For example, a city map may be a good device to orient oneself in a town — but if you want to assess the color of the roofs of the houses in that region it is certainly a bad choice. We assume that the color of the roofs is not a relevant information for navigating through a city and therefore simplify our model of reality neglecting this bit of information. As we can never appreciate the world in its entire complexity, we use simplification to actually enhance our understanding. We can also test that choice: If a city map with correct roof colors helps us move around a city significantly better, we should reconsider the choice to mask roof colors out. Criticism vis-à-vis models therefore cannot be leveled at the model not properly representing "reality" but must claim that the specific model is unfit to assess the particular research question. Without claiming that an "objective reality" exists, empiricists act "as if" there was one that they could approximate, at least

[13] Jacob has undertaken an illuminating discussion of the question. *See* MARC JACOB, PRECEDENTS AND CASE-BASED REASONING IN THE EUROPEAN COURT OF JUSTICE 219-74 (2014).

[14] *See* Derlén & Lindholm in this issue.

[15] *See* Frankenreiter in this issue.

some sort of "best understanding". Without this assumption we should not enter airplanes, and we could not make cell phone calls or use GPS.

Related to this issue is a *second* line of criticism against empirical research. Sound empirical research, if it is not merely explorative, is based on theories about nexuses and relationships of observable, and testable, patterns and causal relationships. Again, these theories are necessarily less complex than the "real world" or than sophisticated (but untestable) narratives. These theories, and the evidence generated when empirically testing them, may therefore seem minimalist or even banal; but if we want to empirically "identify" patterns and causal relationships, there is no other path. Of course, there is no *need* to identify patterns and causal relationships, and to be very clear: not everybody *should* to it. But understanding how legal texts impact behavior (and empirical questions in the broader context of this question) seems to be an interesting and worthwhile line of research that will enhance our understanding of the law.

The problem is amplified by the fact that the human brain is extremely talented in developing sophisticated narratives to accommodate any kind of empirical results; empiricists laconically call this the "*I've known it all along*"-bias.[16] It is thus as important to value the contribution of incremental insights, as it is to remain modest in sight of such insights and not to oversell them.

A third problem may occur on the basis of terminology. For example, an empirical researcher may refer to "randomness" when they cannot establish a certain pattern in their data; or scholars in law and economics may coin a specific form of behavior as "non-rational" when all they mean is that some observed behavior does not conform to a certain model of behavior. Such labels may seem like harsh criticism and put-off scholars not conversant with the particular theoretical or empirical models and methods.

D. Conclusion

New methodological approaches always pose a challenge to established standards of scientific research. This is not different in legal scholarship. In legal scholarship, integrating new perspectives is a particularly intricate (but rewarding) exercise, as the law departs from a normative basis, and assesses, an event in "reality" in order ultimately to take a decision. It seems straightforward to assume that network analysis can provide us with important insights both in doctrinal and functionalist approaches to the law. But these insights come from a very specific angle and can only complement insights gained through other — normative and empirical — methods. Integrating a multitude of incremental theoretical and empirical insights, rich hermeneutic arguments, all of which follow strict methodological

[16] *See* Petersen, *supra* note 12. *See also* D. J. WATTS, EVERYTHING IS OBVIOUS (2012); P.F. Lazarsfeld, *The American Soldier: An Expository Review*, 13 PUBL. OPINION QUART. 377, 380 (1949).

scrutiny, and employing grand (and therefore obviously less rigorous) narratives as a framework to combine them into a broader understanding of the law, its meaning and function, may lead us to an "emergent" appreciation of the phenomenon of law.

Special Section
Network Analysis and Comparative Law Methods

Law, Comparatism, and Epistemic Governance: There Is Critique and Critique

A review of Günter Frankenberg, *Comparative Law as Critique* (Elgar 2016) [281 pp, ISBN: 978-1-78536-393-1]

By Simone Glanert & Pierre Legrand[*]

How many scholarly fields have experienced the disappointing fate of comparative law and continued in the grip of a demonstrably indigent epistemology for decades on end? After the early postmodernity witnessed their protracted servitude to *Les Grands systèmes*'s jejune classifications, facile correspondences, and meagre interpretive return — a predicament which, implausibly, endures in countries as diverse as Brazil, France, and Russia — law's comparatists began taking their epistemic orders from Hamburg and the Hamburgher diaspora. For fifty years or so, they have been gorged on a diet of *Rechtsdogmatik*, scientism, objectivity, neutrality, truth, and assorted shibboleths. As if these epistemic delusions were not problematic enough, the earlier, obsolete model was eventually revived although tweaked to focus on traditions instead of systems (or families).[1] While critics were occasionally moved to chastise threadbare Hanseatic knowledge-claims — some expressing their concern in conspicuous venues, others harnessing prestigious institutional affiliations[2] — comparative law's orthodoxy, somewhat

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[1] René David's 1950 *Traité élémentaire de droit civil comparé* was rebranded as *Les Grands systèmes de droit contemporains* in 1964. The new version has persisted through successive editions in French and, less regularly, in other languages. The most recent English edition was released in 1985 as *Major Legal Systems of the World Today*. Meanwhile, Konrad Zweigert and Hein Kötz's 1969 *Einführung in die Rechtsvergleichung*, a product of the Max-Planck Institute in Hamburg, became available to an Anglophone readership as *An Introduction to Comparative Law* in 1977 due to Tony Weir's acclaimed translation. In 2000, Patrick Glenn startlingly sought to breathe new life into David's primer by releasing his *Legal Traditions of the World*. In one of the more charitable reactions to Glenn's work, a commentator remarked that it was "as if one ha[d] been upgraded from an ordinary package tour to a luxury cruise ship with a more sophisticated guide to the standard sights." William Twining, *Glenn on Tradition: An Overview*, 1 JOURNAL OF COMPARATIVE LAW 107, 108 (2006).

[2] *See, e.g.,* Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARVARD INTERNATIONAL LAW JOURNAL 411 (1985); George P. Fletcher, *The Universal and the Particular in Legal Discourse*, 1987 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 335 (1987).

extraordinarily, has hitherto been able to operate unencumbered by any epistemic challenge whose monographic exposition would have proved decidedly pre-eminent. It is the great merit of Günter Frankenberg's *Comparative Law As Critique*, in crucial respects an account at once capital and extensive, that it interrupts, finally, the longstanding deployment of comparative law's mainstream imposture.[3] Frankenberg's refutation is thus well worth restating, and the first part of this review wishes loyally to apply itself to this important re-presentative task not least by affording the author much latitude to express himself in his own voice. Yet, Frankenberg's considerable critical integrity notwithstanding, this essay holds that his epistemic transgression remains too diffident. Specifically, five key concerns at least warranted more subversive epistemic commitments than Frankenberg allows. In the wake of *Comparative Law As Critique*, the second part of this commentary addresses these contentions with a view to making a case both for comparative law as *strong* critique and for the paradigmatic epistemic turn that has been persistently deferred within the field.

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Frankenberg's disquisition begins with a detailed theoretical statement which, by the author's own admission, is meant to adopt the form neither of a "treatise" nor of a "textbook" on comparative law, not even of a "comprehensive introduction" to the subject-matter.[4] Frankenberg also contributes a meticulous application of his manifesto through a chapter on religious attire, while adding two essays on human rights and access to justice — "[all] experiment[s] in how [critique] can be done,"[5] critique involving "non-scientistic theorizing; non-traditional theory; oppositional spirit; and, if possible, transformative vision,"[6] that is, "mean[ing] more than the random and vague expression of doubt, dissent or discontent."[7]

While the book does not expressly fashion its argument around a ternary structure, the epistemic claim it propounds — its strategy to "creat[e] an anarchic moment in knowledge production by disrupting the established routines and, in particular, what is considered 'good comparative practice'" or "'good disciplinary practice'"[8] — discernibly features three recurring counterpoints.

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[3] GÜNTER FRANKENBERG, COMPARATIVE LAW AS CRITIQUE (2016).

[4] *Id.* at x.

[5] *Id.* at 22.

[6] *Id.* at 31.

[7] *Id.*

[8] *Id.* at 33, 17.

First, Frankenberg castigates comparative law's "Anglo-Eurocentrism" and maintains the correlative need to "provincialize Western law."[9] While one may express surprise that comparatists should stand accused of falling prey to unwarrantable ethnocentrism, to a vestrydom going beyond that with which one is arguably inevitably burdened, it bears recalling Jacques Derrida's warning to the effect that "[o]ne [is] apparently avoiding ethnocentrism at the very point when it will have already operated in depth, silently imposing its ongoing concepts of speech and writing."[10]

Secondly, the author chastises law's comparatists for hiding "the relations between knowledge and power."[11] In particular, Frankenberg attacks what he styles comparative law's "posture of innocence" and its obsession with "cognitive control."[12] Frankenberg thus decries comparatists for "comfortably accept[ing] the traditional object-subject conception of comparison,"[13] for pursuing "what they believ[e] to be an 'objective' access to the reality of foreign law,"[14] for being "bent on determining what the law *is* in another country, *the law* as contained in statutes and court decisions and accompanied by scholarly commentary,"[15] therefore excluding "all extralegal incursions — notably politics, ethics, culture and the economy — on law-making and law-deciding."[16] Frankenberg rejects this "[b]oundary-work" and the ensuing "reduc[tion] [of comparative law] to a mere technicality,"[17] not unlike engineering,[18] holding that "a discipline defined by its techniques is almost invariably complemented by tales of its *scientific* nature"[19] — as is indeed the case with comparative law, long marked by the "ambition to promote [itself] to a science."[20] Moreover, Frankenberg contradicts the comparatists' "similarity disposition"

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[9] *Id*. at x.

[10] JACQUES DERRIDA, DE LA GRAMMATOLOGIE 178 (1967).

[11] FRANKENBERG, *supra* note 3, at 41.

[12] *Id*. at ix, 13.

[13] *Id*. at 6.

[14] *Id*.

[15] *Id*. at 15 (emphasis original).

[16] *Id*. at 6.

[17] *Id*. at 8, 40.

[18] *See id*. at 40.

[19] *Id*. at 38.

[20] *Id*. at 46.

and objects to "the moral deficit that comes with the routine management of similarities."[21] In this regard, he percipiently notes, directing his attention to comparative law's typical "unitary projects,"[22] that "the universal does not exist independently from the particular perspective from which it is seen."[23] In sum, the author attacks comparative law's "logocentric, positivist […] course,"[24] its understanding of "the legal vocabulary and grammar as an autonomous body of rules and decisions, arguments and doctrines,"[25] as a "narrow cognitive operation" marred by an "astonishing aloofness from methodological and epistemological battles."[26]

Thirdly, Frankenberg, adamantly set to move beyond comparative law's "unbearable formalism, barrenness and mechanistic style,"[27] attends to "the ethical and political implications of locating, studying and comparing the foreign."[28] He thus propounds a strategy "for recognizing the other — foreign legal systems, cultures, institutions — in its own right,"[29] which he articulates around "the twin operations of *distancing* and *differencing*,"[30] each motion an occurrence of performativity,[31] of constructivism also.[32] For Frankenberg, "*distancing/differencing* calls on the comparatist to decenter her worldview and to consciously establish subjectivity and context in the comparative space, that is, to take into account the observer's perspective."[33] In other terms, "comparatists operate and observe within the boundaries of a *particular* context and interpret what they see within a *particular* matrix provided by a specific cultural context that constitutes law and is also constituted by law."[34] According to Frankenberg, "[b]oth operations encompass the

[21] *Id*. at ix, 88.

[22] *Id*. at 44.

[23] *Id*. at 98.

[24] *Id*. p. 14.

[25] *Id*. p. 5.

[26] *Id*. at 37, 78.

[27] *Id*. at 288.

[28] *Id*. at 41.

[29] *Id*. at 6.

[30] *Id*. at 42 (emphasis original).

[31] *See id*. at ix, 111.

[32] *See id*. at ix, x.

[33] *Id*. at 74 (emphasis original).

[34] *Id*. at 72 (emphasis original).

willingness and capability to cope with preconceptions and stereotypes, biases and rationalist assumptions that fall within the analytical framework and normative matrix of one's own (legal) education and experience."[35]

As he proceeds to enunciate his theoretical engagement, Frankenberg entwines his claims with a historical panorama of the discourses having successively dominated the field's epistemic scene over the years. Specifically, the author identifies four principal (and overlapping) phases, which he styles "universalism"[36] — the 1900 Paris conference, the quest for a *droit commun législatif*, and the configuration of law as a *science universelle*, both uniformizing pursuits driven by "a rhetoric of truth and objectivity";[37] "taxonomy" — the age of legal systems (or families);[38] "functionalism"[39] — "the categorical imperative of comparative reason,"[40] effectively "an analytical device introduced […] [for] the narrow purpose of comparative legal problem-solving,"[41] but a practice "not likely to either recognize or respect, let alone relish, significant differences" across laws;[42] and "factualism"[43] — the self-indulgent, rambling, untheorized, and insignificant "common core" initiative hailing from Trento and having developed under two tutelary deities, Rodolfo Sacco and Rudolf Schlesinger, the former committed to "structuralist positivism,"[44] the latter to comparison "in terms of precise and narrow rules" that would "carry the same meaning to lawyers brought up in various legal systems."[45] Bringing together what he identifies as the four current epistemic strands within comparative law,[46] contributing his own distancing/differencing rejoinder, Frankenberg produces a master grid where the

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[35] *Id*. at 83.

[36] *See id*. at 42–47.

[37] *Id*. at 45.

[38] *See id*. at 47–52.

[39] *See id*. at 52–59.

[40] *Id*. at 52.

[41] *Id*. at 54–55.

[42] *Id.*, at 57.

[43] *See id*. at 59–70, 94–95.

[44] *Id*. at 63.

[45] Rudolf B. Schlesinger, *Introduction*, *in* 1 FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS 9 (Rudolf B. Schlesinger ed., 1968); Rudolf B. Schlesinger, *The Common Core of Legal Systems: An Emerging Subject of Comparative Study*, *in* TWENTIETH CENTURY COMPARATIVE AND CONFLICTS LAW: LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA 78 (Kurt H. Nadelmann, Arthur T. von Mehren & John N. Hazard eds., 1961).

[46] *See* FRANKENBERG, *supra* note 3, at 85–112.

diverse positions are correlated and contrasted through cursory inscriptions in the various quadrants.[47] (Interestingly, Frankenberg's diagram heeds neither of two insistent modes of configuration of comparative legal knowledge, both revealing a peculiar understanding of the world as "flat" and both disclosing unalloyed faith in numbers: econometric research as it depends on crude indicators and "empirical" surveys epigrammatically collecting foreign laws — 14, 26, 79, 134, or . . . 180 countries.)

Frankenberg's theoretical critique finds its most detailed exemplification by way of a study relative to religious attire.[48] This inquiry features an iteration of the master grid with specific reference to the range of opinions on "Muslim veiling."[49] In particular, Frankenberg discusses the 2004 French statute that prohibits attire (the untranslatable French word is "*tenues*") "conspicuously" ("*ostensiblement*") displaying religious allegiance in public primary and secondary schools. While the author introduces the law in force in Germany, the United Kingdom, or the United States and also refers to various European Court of Human Rights decisions, French legislation remains his principal focus. In effect, Frankenberg contrasts "the French brand of […] militant Republican secularism"[50] — an exercise in "social-cultural hygiene" allowing no room for any "displace[ment] [of] the power of the hegemonic culture, its beauty criteria and loyalty claims"[51] — with the recognition of something like a "human right to veiling."[52]

Although many approach the issue of religious attire by readily mobilizing an ethnocentric, controlling, assimilationist, imperialist, crusading, proselytizing, or universalizing frame of mind — not unlike comparative law's "similarizers" — others, like Frankenberg, defy a "reductionist understanding of […] practices of dress."[53] Channelling a distancing/differencing standpoint, Frankenberg withstands "the denial of Muslim women and their complex identity construction."[54] As he stigmatizes "the colonial obsession with unveiling, uncovering and unmasking,"[55] the refusal to respect the fact that "the covered

[47] *See id*. at 84.

[48] *See id*. at 117–64.

[49] *Id*. at 118.

[50] *Id*. at 130.

[51] *Id*. at 150, 142.

[52] *Id*. at 138.

[53] *Id*. at 143–44.

[54] *Id*. at 143.

[55] *Id*. at 148.

Muslim woman chooses to be sexually unavailable,"[56] Frankenberg, allying himself with politist Wendy Brown, whom he quotes,[57] disputes the unexamined Western view that assumes "the liberatory meaning of skin showing."[58] He thus defends a robust comparative practice which would embrace "[the] [e]thics and [p]olitics of [s]kepticism,"[59] which would challenge the view that "legislative bans or administrative measures (by school principals) will help to find answers to the complex problems of integration in immigration societies."[60] It is, as Frankenberg explains, about "accept[ing] the otherness of the 'other' without *othering* it,"[61] that is, safeguarding foreignness and saving foreignness from marginalization or effacement or "cannibaliz[ation]" by "the […] power of the sovereign self."[62]

The chapters on human rights and access to justice — the latter an institutional framework on which "the very effectiveness of human rights law hinges"[63] — offer instances of Frankenberg's ambition, as befits a comparatist, "to unsettle the political routines of […] policies and put into perspective the moral high ground of normativist projects."[64] With respect to human rights, Frankenberg invites his readership to "re-imagin[e] [human rights law] as a point of departure for the resistance to normalization and ideology."[65] Indeed, the romantic ubiquity of human-rights discourse means that one is liable to forget how it features "mechanisms that re-present, re-construct and transform reality in a specific way."[66] Even as "[h]uman rights have the reputation of incarnating the core component of

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[56] *Id*. Frankenberg repeatedly quotes Fanon, a psychiatrist and philosopher having settled in Algeria from his native Martinique. *See id*. at 150–51. Fanon is best known for his analysis of colonialism and decolonization, which established him as a leading anti-colonial thinker. On the subject of veiling, Fanon wrote as follows: "This [Algerian] woman who sees without being seen frustrates the colonizer. There is no reciprocity. She does not surrender herself, does not give herself, does not offer herself. […] The European man facing the Algerian woman wants to see. He reacts in an aggressive way before this limitation to his perception." FRANTZ FANON, L'AN V DE LA RÉVOLUTION ALGÉRIENNE 26 (2011).

[57] WENDY BROWN, REGULATING AVERSION 189 (2006) ("What makes choices 'freer' when they are constrained by secular and market organizations of femininity and fashion rather than by state or religious law?").

[58] FRANKENBERG, *supra* note 3, at 62.

[59] *Id*. at 159.

[60] *Id*. at 161.

[61] *Id*. at 71 (emphasis original).

[62] *Id*. at 225, 71.

[63] *Id*. at 217.

[64] *Id*. at 167.

[65] *Id*. at 204.

[66] *Id*. at 176.

[a] humanist ethics,"[67] they engender alienation, namely the "relegat[ion] of rights-holders to the role of intimidated and rather ignorant bystanders who observe the automatic functioning of a well-oiled, complex legal machinery."[68] Further limitations coincident with the normalization of human rights include justification (to account for organized state violence), selectivity (or the preferencing of certain rights), routinization (or institutional ritualization), and de-politicization.[69]

Frankenberg's theme is analogous as regards access to justice: "While modernist, romantic narratives stress the empowering and liberating effects law and access to courts may have, one has to add that law-rule comes at a cost."[70] And the price is that "[c]onflicts [have to be] shifted from the everyday location where they arise — home, street, school, workplace — and transferred to official institutions and handed over to professional bodies specialized in dealing with legal conflicts."[71] In other words, "everyday conflicts are forced into the format of a case."[72] But this displacement entails that "the political-social dimension of a conflict, the personal drama also ten[d] to get lost or obscured in translation."[73] Frankenberg emphasizes how this inevitably simplificatory process of normalization breeds disempowerment and alienation,[74] therefore questioning the very "justice" that one is meant to be accessing.

Drawing on contemporary ethnography, Frankenberg's bracing conclusive remarks enter a plea for "thick" comparison, for narrativized comparative work that is "open to local knowledge and context sensitive,"[75] "interested in restoring and rehabilitating law's detail,"[76] keen to "transmit the richness of law's events […] with their cultural background as well as their political, economic and social ramifications."[77] And the "thickness" that

[67] *Id*. at 179.

[68] *Id*. at 180.

[69] *See id*. at 171–86.

[70] *Id*. at 218.

[71] *Id*.

[72] *Id*. at 219.

[73] *Id*.

[74] *See id*. at 220–22.

[75] *Id*. at 227.

[76] *Id*. at 228.

[77] *Id*.

Frankenberg advocates supposes an acute awareness that "the comparatist is *always already* anchored in a specific, particular legal tradition, culture and experience."[78]

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Eruditely invigorating, Frankenberg's critical aspirations are nonetheless incompletely radical, his oppositional edge insufficiently sharp, to operate as comparative law's governing epistemic practice. Frankenberg's critical reticence is apparent in at least five respects.

***There is no meaningful foreign law other than as culture*.** Without wanting to reduce complex works of scholarship to their abstracts or titles, publishers' law lists and journals' tables of contents obstinately offer a plethora of evidence that comparative law's orthodoxy remains in thrall to a Kelsenian mindset whereby "[t]he law counts only as positive law."[79] Now, positivists are primarily preoccupied with analytics, that is, with legal technique and with the rationalization of legal technique. They foster "legal dogmatics," to transpose the well-rehearsed German phrase, in as much as they purport to arrange the law in orderly, coherent, and systematic fashion. Throughout, their investigations remain squarely set on rules — on what has been posited by authorized officials as "what the law is" — and on the formulation of rehearsals of these rules, whether judicial or academic, that are readily offered as veritistic. In Frederick Schauer's terms, "the description of law" stands "at the heart of the positivist outlook."[80] Indeed, this understanding of the legal appears so uncontroversial within mainstream comparative law that one finds oneself encountering a cavalier dismissal to the effect that any re-consideration of the matter would prove "largely sterile and boring."[81] Such unhelpful presumption notwithstanding, a marginal view has emerged to claim that foreign law ought to be studied in context. In other words, an examination of the 2004 French statute on religious attire at school (to track one of Frankenberg's leading illustrations) should favour a contextual analysis so as to embrace, say, historical, social, political, and ideological — that is, cultural — considerations pertaining to the legislative text. *But this argument must be deemed unacceptable*. As it confines culture to the periphery of the legal, it leaves unchallenged the dominant view of law-as-law, of law as consisting of the legal only — of the legal understood as unsullied or uncontaminated by other discourses. To relegate culture to the circumference of the law means, in effect, that comparative law's orthodoxy can easily

[78] *Id*. at 230 (emphasis original).

[79] HANS KELSEN, REINE RECHTSLEHRE 64 (§28) (1934).

[80] FREDERICK SCHAUER, THE FORCE OF LAW 12 (2015).

[81] Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AMERICAN JOURNAL OF COMPARATIVE LAW 5, 13 n.37 (1997).

continue to dismiss it as being irrelevant. In order to counter this positivism which, even on a most generous reading of what it is able to achieve, can only ever allow one to *identify* the foreign law in force rather than *explain* it in depth, comparatists, who require to ascribe meaning to another law, to address the question "why?," resolutely need to argue that "law is thoroughly a cultural construct,"[82] that "law is culture-specific."[83] Only if they undertake such a re-signification of the legal can comparatists begin to produce meaningful reports concerning foreign law.

It is not, then, that an examination of the French statute on religious attire at school should feature social or ideological considerations which would be situated beyond the law, but that it should include these *as law*. Indeed, when reckoning the ideology that informs the French statute, for example, one has not left the law. Rather, one is dismantling the text of the law to peruse what it has been concealing. In effect, *one is reading between the lines* — which means that one is still reading the law-text itself. If you will, it is as if the French statute was being subjected to a spectroscope which would photograph the ideological phantoms constitutively haunting it. If, as Frankenberg convincingly suggests, the French statute is Islamophobic (that is, if it inscribes a fear of Islam), such Islamophobia forms an inherent part of the statute's textual fabric and semantic reach so that the legislative text can legitimately be said to exist *as* an Islamophobic statement. In the process, law — indeed, legislated law, the very hallmark of positivism — is seen to feature an ideological mark or trace which lives on *as* the statute and which a close reading relying on a sound knowledge of French culture can meaningfully disclose. This affirmation is well worth emphasizing: Islamophobia is not to be regarded as contextual vis-à-vis the law or as external to it or as some sort of parergon belonging to the realm of non-law. Islamophobia concerns the very texture of the law-text: it informs the making or fabrication of the text; it lurks within the law-text *as* the law-text now exists, it remains as a textual survivancy. To trace the French statute on religious attire at school to the Islamophobic threads that constitute it is therefore not to leave the law for the land of the extra-legal. Rather, it is to probe the law — to excavate it[84] — to disassemble the legal that was once assembled in the form of a statute, a complex and multi-dimensional construct, with a view to eliciting — to bringing to light — the law-text's discursive "building blocks" and to making sense of this singular textual composition.

Although much could aptly be written about culture, suffice it to acknowledge the noticeable fact that any cultural analysis calls to be approached in terms of an infinite process of quarrying. No anamnesis can therefore account interpretively for the full extent of law's cultural markers. It follows that there are never exhaustive comparisons, only

[82] BRIAN Z. TAMANAHA, REALISTIC SOCIO-LEGAL THEORY 128 (1997).

[83] George P. Fletcher, *What Law Is Like*, 50 SOUTHERN METHODIST UNIVERSITY LAW REVIEW 1599, 1610 (1997).

[84] Derrida mentions "*le travail en creux de l'interrogation.*" JACQUES DERRIDA, L'ECRITURE ET LA DIFFÉRENCE 49 (1967).

exhausted comparatists (ascription of meaning to law-as-culture thus falling prey to the body and being ultimately interrupted by it).

***There is no meaningful foreign law other than as unforeign law*.** When a German comparatist enters a Paris library to ascribe meaning to the French statute on religious attire at school so as to articulate a (forced) negotiation between French and German laws, the French law-text stands *before* her, twice: it is in front of her, on the statute book, as she sits at her desk, and it has come into legal being in advance of her arrival. Still, the statute cannot mean on its own. As the legislative text uses terms like "*tenues*" ("attire"/"garb"/"apparel"), "*manifestent*" ("attest to"/"express") or "*ostensiblement*" ("conspicuously"), the semantic extension of these words is not fixated in self-evidence. Any foreign law-text therefore demands an interpreter in order to accede to signification.

The meaning that the German comparatist assigns to the French statute should be based on a sound appreciation of French culture, French legal culture, and French law. Moreover, it should rest on thorough and thoroughly interdisciplinary research. Crucially, however, the German comparatist we assume dwells in the German culture or language to which she belongs, operates under the influence of the German legal education that institutionalized her into the law, and works pursuant to the influence of her dissertation supervisor, a leading comparatist from Berlin who socialized her into comparative law (himself the pupil of a famed Heidelberg comparatist). (Note that for the German comparatist's heteronomous engagement with the French statute to be possible at all, it is necessary that her thought should be embedded within such pre-understanding. Otherwise, how could she even begin to recognize the French statute as legislation rather than as a poem?) In addition, the reading of the French statute that the German comparatist produces foregrounds her substantive and stylistic emphases, choice of references, selection of quotations, formulation of headings, adoption of certain words or expressions, and assumption of a precise tone. The statute thus assumes the interpretive appearance that the comparatist fashions for it: *as reader of the statute, on the basis of "her" reading of the text, the interpreter becomes its author*.

Even as the French statute exists independently of the German comparatist, it cannot exist meaningfully without her or without alternate interpreters. Strictly speaking, the law-text cannot exist meaningfully, but as *interpreted words*. In other terms, "the meaning of a text is not to be found in it like a stone and hel[d] up for display."[85] Without the decisive intervention of an interpreter and an interpreter's language, the statute is destined to remain meaningless. For the meaningfulness of the statute to emerge, interpretation — in effect, speculation — must act constitutively; it must enable or emancipate the text into meaning. As regards the French statute on religious attire at school, the German comparatist will thus proceed to interpret or speculate until she feels confident that she

[85] JAMES B. WHITE, HERACLES' BOW 80 (1985).

has framed a textual interpretation of the law-text amenable to adhesion (any reception of her proposed reading being subordinated not to some algorithm, but to an extraordinarily intricate interlapping of complex regimes of disclosure and appreciation).[86]

Since, within a comparative dynamics, the French statute on religious attire at school only exists meaningfully as German — or as Italian or Canadian — commentary, it follows that the French statute's meaningful existence is, say, as the German comparatist's German analysis in the German language. This epistemic fact implies that when the German comparatist writes on the French statute, she is addressing foreign law in a limited sense of the word "foreign" only. The so-called "foreign" finds itself being always already de-Frenchified/Germanized, the *Verfremdungseffekt* instantaneously compromised. As the French statute is performed by the German comparatist, it is always already no longer the French statute. No hearkening — not even a further reading which would "begin again now with rather less force, because [one] want[s] to let [French law-texts] speak"[87] — can avoid an inevitable appropriation of the archive as narrative, interpretation as transformation, inscription as iteration.

On close examination, the German comparatist's account of French law is therefore not a report *relating* to foreign law. Rather, it configures a *disrelation* as it conveys French-law-through-German-eyes-and-words instead of anything that would be French law as such — even supposing such "as-suchness" to be fathomable. Again, the only French law that our hypothetical comparatist can have in mind is a French law that is present to her as always already Germanized French law, as *unforeign* law. It is in this sense also that foreign law cannot exist meaningfully except as the comparatist's constitutive interpretation or speculation. No matter how rigorous one's economy of application, the journey *to* cannot be achieved, the journey *from* cannot be escaped. While the comparatist may be *after* the foreign, earnestly, the comparative incursion stands in effect as an exercise in introspection. Implacably, "it is always [one]self that [one] choose[s]."[88]

***There is no foreign law-text other than as playground*.** (Encultured and unforeign) law-texts are necessarily fashioned out of language whose intrinsic ductility generates an uncircumventable semantic lee-way or *play* — as in "room for action," "scope for activity" (*Oxford English Dictionary*) — which pertains to the very texture of textuality. In other words, textuality's basal condition is as semantic heterogeneity, which means that the

[86] *See* SAMUEL BECKETT, THE UNNAMABLE 85 (Steven Connor ed., 2010) ("What can one do but speculate, speculate, until one hits on the happy speculation?").

[87] SARAH WOOD, WITHOUT MASTERY: READING AND OTHER FORCES 1 (2014).

[88] Letter from Samuel Beckett to Marthe Arnaud (10 June 1940), *in* 1 THE LETTERS OF SAMUEL BECKETT 684 (Martha D. Fehsenfeld & Lois M. Overbeck eds., 2009).

text's presencing exists as incessant semantic movement. Because "the text itself *plays*,"[89] since it must follow that "meaning *depends* on play,"[90] no original, fixed, or ultimate meaning can be extracted from a text. Rather, the making of textuality is such that every text structurally holds the possibility of disseminating an infinity of meanings. This is an irrepressible fact pertaining to textual architectonics which every interpreter must confront. Even as the interpreter projects himself towards the text with a view to making sense of it, to assigning salience to aspects of it, the text, in some sort of counteracting drive, has always already undertaken to dominate the interpreter's doing. In particular, the text unceasingly plays through the interpreter no matter how determined she is to arrest its motion.

While the interpreter purports to achieve the unconcealment of the text, the playing text withdraws from any attempt to stabilize it across any self/other line. Addressing this resistance to disclosure, Heidegger refers to "the primal conflict between clearing and concealing."[91] Instead of a consensus between *interpretandum* and *interpretans*, there is insurmountable strife. And it is because of such discord that Heidegger rejects "the structure of an agreement between knowing and the object in the sense of the adjustment of one being (subject) to another (object)."[92] As the text's presencing takes the form of an obtrusion,[93] textual play operates agonistically. The inherence of play to textuality thus denies every archaeological tentative to seize the totality of the text's meaning, to capture the entire text. No matter how sophisticatedly the interpreter responds to the play of the text, this failure of isomorphism means that textuality will preserve an interpretive remainder, a "singularity forever encrypted,"[94] a secret which interpretation simply cannot peer.

Nothwithstanding the unreflective assumption on the part of law's comparatists that a law-text can only comprise a set of noncontradictory properties — either the French statute on religious attire at school is Islamophobic or it is not — the structure of textuality commands that no text can answer to one and only one admissible interpretation, awkward as this insight may prove from the standpoint of law's normativity. The circumstance that two interpretations are contradictory does not exclude that they can both prove convincing at the same time from the vantage-place of various interpreters or

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[89] ROLAND BARTHES, LE BRUISSEMENT DE LA LANGUE 78 (1984).

[90] DERRIDA, *supra* note 84, at 382 (emphasis original).

[91] MARTIN HEIDEGGER, HOLZWEGE 42 (2015).

[92] MARTIN HEIDEGGER, SEIN UND ZEIT 218–19 (2006 [1927]).

[93] *See* WHITE, *supra* note 85, at 80 (referring to "the independent force of the text").

[94] JACQUES DERRIDA, BÉLIERS 41 (2003).

of different interpretive constituencies for whom the play of the text generates specific (and incompatible) interpretive outcomes. Although incongruent interpretations — one that imputes Islamophobia to French legislation, the other that makes the case for the religious disinterestedness of the statute — cannot both be true, the notion of truth is irrelevant to the pertinence of interpretive assertions since the play of the text entails that it cannot mean as an interpretation-independent entity. While the French statute itself cannot adjudicate between the multiplicity of interpretive or speculative accounts that are applicable to it, the play of the text ensures that every interpretation, necessarily mediated and implicitly denying other possible re-presentations, intervenes as an ever-defeasible narrative proposal which, in the absence of any unbiased readerly criterion, is destined to be validated or disconfirmed on the basis of its (perceived) persuasive merit or demerit rather than because of any intrinsic idea of rightness or exactness. Note that it is not that there is more than one legislative text, and that it is not either that the statute was drafted ambiguously. Rather, it is that the text is, densely, *textual*.

***There is no translation of foreign law other than as impossibility*.** Foreign law-texts typically demand translation. Consider our German comparatist actively writing/producing her account of the French statute on religious attire at school and transposing the expression "*les écoles, les collèges et les lycées publics*" as "*öffentliche Grundschulen, Mittelschulen und Gymnasien*." While seemingly agreeable, this German translation in fact raises insurmountable problems. Ultimately, it reveals how each langage unfolds *monologically*.[95]

Within translation studies, an essay of Walter Benjamin's has become a *locus classicus* on the undialectizable dynamics across languages. Evoking Saussure's later distinction between "signifier" and "signified," Benjamin separates "the intended object" ("*das Gemeinte*") from "the mode of intention" ("*die Art des Meinens*").[96] The intended object is the material entity to which a word refers. It is the *meant*. Consider the "San Diego High School." Now, that material entity, there, is the self-same object — the self-same *meant* — to which the French syntagm "*lycée public*" and the German words "*öffentliches Gymnasium*" both refer as these terms both purport to designate the "San Diego High School" either in French or German. Meanwhile, the "mode of intention" — the manner in which the intended object shows itself to the world by way of language — differs according to whether the manifestation takes place through the words "*lycée public*" or "*öffentliches Gymnasium*." Every language operates within the bounds of a singular cultural horizon. This enculturation fashions a language's "mode of intention," so that the self-same material entity or *meant*, the "San Diego High School," will not signify identically within the French language or French horizon, where it manifests itself as "*lycée public*," and within

[95] *See* MARTIN HEIDEGGER, UNTERWEGS ZUR SPRACHE 265 (1959). *See also* JACQUES DERRIDA, LE MONOLINGUISME DE L'AUTRE (1996).

[96] WALTER BENJAMIN, *Die Aufgabe des Übersetzers*, *in* ILLUMINATIONEN 54–55 (1977 [1923]).

the German language or German horizon, where it manifests itself as "*öffentliches Gymnasium*."[97] Imagine Dorothy observing that "The book is on the shelf" as Greta approves by saying either "*Ja, das Buch steht im Regal*" or "*Ja, das Buch liegt im Regal*," depending on whether the book is standing or lying. While the book is materially where it is, the way in which it occupies space differs across the English and German languages. Meaning therefore does not exhaust itself in the *meant* (the "what"). As meaning comes towards us from out of the words, it is also bound to the way of meaning (the "how") — which entails that the move across languages will, perforce, produce "deficiencies" or "exuberances."[98] If there is more than one language, there must be difference in meaning across languages.

Derrida's insight that there can never be translation but only transformation,[99] that "[w]hat [must] guid[e] [one] is always untranslatability,"[100] has paramount normative implications for law.[101] Given the empirical fact of linguistic impassability, how can Canada or the European Union ever deem legislative texts official in two or twenty-four languages? And how can a comparatist ever work beyond one language, as she must, when translation constitutes "a practice producing difference out of incommensurability (rather than equivalence out of difference),"[102] when to use the German "*öffentliches Gymnasium*" to discuss, in German, the French "*lycée public*" is indeed to import, to domesticate, to indigenize, and therefore to *angle* French law? How to translate the untranslatable, to possibilize the impossible? As they involve a dynamics of expropriation-and-appropriation, these questions recall our argument about foreign law's unforeignness because of foreignness's inevitable enmeshment with the interpretive self's epistemic accoutrements, whose unfurling also prevents any enactment of the other's law that would partake of settledness rather than ambulation.[103]

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[97] *See* PAUL DE MAN, THE RESISTANCE TO THEORY 73–105 (1986).

[98] José Ortega y Gasset, *La reviviscencia de los cuadros*, *in* 8 OBRAS COMPLETAS 493 (2d ed. 1994 [1946]).

[99] JACQUES DERRIDA, POSITIONS 31 (1972).

[100] Jacques Derrida, *Du mot à la vie*, MAGAZINE LITTÉRAIRE (April 2004), at 26.

[101] Simone Glanert & Pierre Legrand, *Foreign Law in Translation: If Truth Be Told…*, *in* LAW AND LANGUAGE 513–32 (Michael Freeman & Fiona Smith eds., 2013).

[102] Meaghan Morris, *Foreword*, *in* NAOKI SAKAI, TRANSLATION AND SUBJECTIVITY xiii (1997).

[103] Observe that for a postcolonial sensibility, untranslatability salutarily "exposes the limits of what the dominant language can handle." Judith Butler, *Restaging the Universal: Hegemony and the Limits of Formalism*, *in* CONTINGENCY, HEGEMONY, UNIVERSALITY 37 (Judith Butler, Ernesto Laclau & Slavoj Žižek eds., 2000).

There is no method other than as distortion of foreign law. "It is important to recognise that comparison is not a method or even an academic technique; rather, it is a discursive strategy."[104] Indeed, "[t]here is no empirical methodology for learning how to disclose a world,"[105] no systematic or "scientific" path allowing to make the other othery in the way the artist seeks to make the flower flowery. Also, method — always *someone's* method — unescapably reveals a committed ethical or political perspective as regards the investigation of the matter under scrutiny.[106] If you will, the claim to a method is necessarily a claim to the valorization of a certain way of knowing. The idea that method would afford a depersonalization of the comparative enterprise and accordingly allow for the production of an impartial or objective account — that it would serenize (or scientificize?) the study of foreign law and thus act as an "anxiety reducing device"[107] — is but "false comfort."[108] Within comparative law, the (long-standing) commitment to method effectively legitimates the distortive arraignment of information as "data" being collected, consciously or not, with a view to fitting a preconceived ideological framework. Not only, then, can method not guarantee anything like epistemic neutrality (an illusive goal in any event), but it entails "an actual deformation of knowledge."[109]

Making sense of foreign law depends on experience and experimentation (the French "*experience*" conveys both ideas), which imply nomadic errancy and "flair."[110] Heidegger reminds us that an experience is not banal: "To undergo an experience with something, whether it be a thing, a human being, or a god, means that we let it befall us, strike us, come down on us, jostle us, and transform us."[111] For Heidegger, the "way" (*Weg*) thus had to replace method, "[method] abid[ing] by the extreme perversion and degeneration of what is a way."[112] Evoking the Heideggerian *Denkweg*, Derrida, too, draws a connection between experience and "the trajectory, the way, the crossing."[113] And, like Heidegger,

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[104] Benedict Anderson, *Frameworks of Comparison*, LONDON REVIEW OF BOOKS (21 January 2016), at 18.

[105] NIKOLAS KOMPRIDIS, CRITIQUE AND DISCLOSURE 108 (2006).

[106] *See* Günter Frankenberg, *The Innocence of Method — Unveiled: Comparison As an Ethical and Political Act*, 9 JOURNAL OF COMPARATIVE LAW 222 (2014).

[107] GEORGE DEVEREUX, FROM ANXIETY TO METHOD 97 (1967).

[108] PAUL RABINOW & ANTHONY STAVRIANAKIS, DEMANDS OF THE DAY 110 (2013).

[109] HANS-GEORG GADAMER, WAHRHEIT UND METHODE 306 (5th ed. 1986).

[110] DERRIDA, *supra* note 10, at 233.

[111] HEIDEGGER, *supra* note 92, at 159.

[112] *Id*. at 197.

[113] JACQUES DERRIDA, PAPIER MACHINE 368 (1990).

Derrida distinguishes the "way" from method.[114] Crucially, a way neither begins nor leads anywhere in particular. It has no origin or point of arrival since thought, which must be incessant questioning, shuns firm solutions. The insistence on the way expresses "the fact that thinking is thoroughly and essentially questioning, a questioning not to be stilled or 'solved' by any answer."[115]

Insightfully, Heidegger reveals how he operated free of any methodological strait-jacket: "I would actually be in the greatest embarrassment if I ought to describe my method or even to release a methodology. And I am happy that I am thus far not feeling the fetters of a technique, but rather the coercion of a predicament."[116] (The comparatist-at-law's own "predicament" is to ascribe meaning to the other's law.) But how did the philosopher manage? Consider Heidegger's own explanation: "I actually work factically out of my 'I am' — out of my spiritual, indeed factical origin — my environment — my life connections, from what is, from there, accessible to me as living experience, from that within which I live."[117]

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As Mallarmé had cause to ascertain, "[a]ny comparison is, in advance, defective,"[118] that is, comparative research, no matter how intrinsically excellent, is always already a failure. This is so for the five reasons at least that we have identified: foreign law must meaningfully exist as culture and therefore cannot be completely appreciated through interpretation; a comparatist cannot meaningfully formulate foreign law as culture on its own terms, but must enunciate it according to "her" culture; foreign law cannot generate a fixed or fixable meaning which would exist independently from a comparatist's interpretation; a comparatist cannot transmit foreign law in another language other than transformatively; and foreign law cannot have its integrity warranted through a comparatist's interpretive obedience to a method.

In as much as it eschews a consideration of the primordiality and magnitude of these epistemic hurdles, Frankenberg's critique is not as resolute as ours. It is less *radical* than

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[114] *See* Jacques Derrida, *Et cetera…* (*and so on, und so weiter, and so forth,* et ainsi de suite, *und so überall,* etc.), *in* JACQUES DERRIDA 24 (Marie-Louise Mallet & Ginette Michaud eds., 2004 [2000]).

[115] Joan Stambaugh, *Heidegger, Taoism, and the Question of Metaphysics*, *in* HEIDEGGER AND ASIAN THOUGHT 80 (Graham Parkes ed., 1987).

[116] Letter from Martin Heidegger to Julius Stenzel (31 December 1929), 16 HEIDEGGER STUDIES 11, 19 (2000).

[117] Letter from Martin Heidegger to Karl Löwith (19 August 1921), *in* 2 ZUR PHILOSOPHISCHEN AKTUALITÄT HEIDEGGERS 29 (Dietrich Papenfuss & Otto Pöggeler eds., 1990).

[118] [Stéphane] Mallarmé, *Tennyson vu d'ici*, *in* DIVAGATIONS, *in* 2 ŒUVRES COMPLÈTES 138 (Bertrand Marchal ed., 2003 [1892]).

ours (we use the term etymologically), less anacoluthic. Reading Frankenberg, one may in effect be led to conclude that comparative law would ultimately *work* if only it could escape the epistemic shackles of the orthodoxy by including some consideration of law's context, by showing enhanced awareness of comparatists' ethnocentric bias, or by embracing methodological pluralism. But not even Frankenberg's incisive indictment of mainstream cognitive assumptions addresses the underlying fact that comparative law is epistemically doomed since the comparatist must always already *fail* to access or recount foreign law on its own terms.

Like us, Frankenberg has read Beckett ("Ever tried. Ever failed. No matter. Try again. Fail again. Fail better.")[119] Unlike us, he refuses to follow the playwright to his uncompromisingly dissensual conclusion, to the Derridean view that "[t]here is no world, [that] there are only islands,"[120] that "the worlds in which we live are different to the point of the monstrosity of the unrecognizable, of the un-similar, of the unbelievable, of the non-similar, the non-resembling or resemblable, the non-assimilable, the untransferable."[121] Let us be clear, though, that to assert how one must reckon with comparative law's failure to account for the other law or for the other-in-the-law — how one must pursue the "rhetoric of dissimilation"[122] — is not in the least to disqualify comparatism as a necessary intellectual pursuit. Quite apart from the fact that the very existence of foreign law interpellates one, makes a claim on one, solicits one's recognition and respect, its normative relevance as persuasive authority compellingly prevails over exclusionary national or territorial arguments. And even as any scrutiny of foreign law must accept the presence of an epistemic gap that the comparatist cannot bridge and must acknowledge that the comparatist and the foreign law will therefore never *meet*, comparative law — *la comparaison quand même* — promotes the unravelling of the only brand of interpretation that can prove meaningfully edifying given how the comparatist must abide distant reading.

Because sheer duplication of foreign law is of no interest, interpretive enrichment in fact requires a comparative text that tells foreign law otherwise than on foreign law's own terms. Only by means of the comparatist's attempts, efforts, trials, sallies, shots, goes, and shies at bringing "elsewhere within here,"[123] then, can there be a conversation, a

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[119] SAMUEL BECKETT, WORSTWARD HO, *in* COMPANY/ILL SEEN ILL SAID/WORSTWARD HO/STIRRINGS Still 81 (Dirk Van Hulle ed., 2009 [1983]). For Frankenberg's reference to Beckett, *see* FRANKENBERG, *supra* note 3, at 20.

[120] 2 JACQUES DERRIDA, LA BÊTE ET LE SOUVERAIN 31 (Michel Lisse, Marie-Louise Mallet, & Ginette Michaud eds., 2010 [2002]).

[121] *Id*. at 367.

[122] NATALIE MELAS, ALL THE DIFFERENCE IN THE WORLD 65 (2007).

[123] *See, e.g.,* TRINH T. MINH-HA, ELSEWHERE, WITHIN HERE (2011).

deliberation, or a negotiation of the kind that may allow for an amelioration of what understanding of the other (and of the self) is feasible, for an emergence of "the best way of concerning oneself with the other and of concerning the other with oneself, the most respectful and the most grateful, the most giving also."[124] As it affords a more significant interpretive *yield* — indeed, as it informs the realization that "the *commitment* to [comparative law] means that one can never become a [*comparatist*]"[125] — inadequacy is opportunity.

[124] JACQUES DERRIDA, POINTS DE SUSPENSION 296 (Elisabeth Weber ed., 1992 [1989]).

[125] D.N. RODOWICK, PHILOSOPHY'S ARTFUL CONVERSATION 306 (2015) (emphasis added). We adopt Rodowick's observation regarding "his" discipline and apply it to "ours."

Special Section
Network Analysis and Comparative Law Methods

New Challenges for European Comparative Law: The Judicial Reception of EU Non-Discrimination Law and a turn to a Multi-layered Culturally-informed Comparative Law Method for a better Understanding of the EU Harmonization

By Jule Mulder[*]

Abstract

This article argues that comparative law needs to explore its critical potential when engaging with the European harmonization process and its effects on the law of the Member States. In the first part, the article evaluates existing comparative law methods and their suitability to identify legal and cultural factors that influence the judicial reception of EU harmonized law on a national level. Using EU non-discrimination law as a case study, it questions to what extent traditional methods are suitable to explain differences in the national judicial reception of EU harmonized law, despite the exclusive competence of the Court of Justice of the European Union to interpret EU law. In doing so, it considers the potential of critical comparative law for the development of a deeper understanding of the national courts' reception of EU harmonized law as a key part of the broader legal harmonization process. In the second part, the article develops an original multi-layered culturally informed method to compare EU harmonized law. The proposal goes beyond the existing methods of comparative law by including critical aspects and stressing the relevance of embedding a general normative framework in any comparative critique. It challenges comparatists to reach deeply into national cultural spheres and to identify key influences on the application of EU rules and EU-national legal 'hybrids'. The method creates room for multi-layered narratives of comparison aimed at gaining a deeper understanding of the national legal and non-legal cultural background that can hinder or facilitate harmonization processes. This enriched comparative critique can offer new insights into the process of legal harmonization in the EU, particularly by focusing on the point of application rather than the previous phases of creation of EU law and its reception by Member States.

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I would like to thank Prof Russell A. Miller, Prof Michele Graziadei, Prof Paula Giliker, Dr Albert Sanchez-Graells, Prof Dagmar Schiek, and Prof Katja Ziegler for very very useful comments on previous drafts. The usual disclaimer applies.

A. Introduction

This article argues that comparative law needs to explore its critical potential when engaging with the European harmonization process and its effects on the law of the Member States, in particular within politically contentious areas of law that are heavily influenced by moral views and national values, such as equality or labor law. To develop a deeper understanding of the European harmonization process within these areas of law, comparative law needs to be able to explain existing differences in the national judicial reception of EU harmonized law that occur despite its common European origin and despite the exclusive competence of the Court of Justice of the European Union (hereafter, CJEU) to interpret EU law.[1] Thus, there needs to be room to identify and explore national legal and non-legal factors that affect the national courts' application of EU law.

The Europeanization and harmonization of the law of the Member States have invigorated comparative law research and embolden legal academics, judges and practitioners to abandon inward-looking doctrinal approaches.[2] The "multi-layered" or "multi-polar"[3] European legal order influences and is influenced by the laws and legal systems of the Member States.[4] This has encouraged European law and comparative law scholars to focus on the dialogue between the national courts and the CJEU,[5] on European legal transplants,[6]

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[1] Article 267 TFEU.

[2] MARTIJN W HESSELINK, *The New European Legal Culture*, *in* THE NEW EUROPEAN PRIVATE LAW 11, 51-55 (2002); Mathias Reinmann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 691 (2002); Jen Hendry, *Review Essay:* Contemporary Comparative Law, 9 GERMAN L. J. 2253 (2008); Jaakko Husa, *The Tip of the Iceberg or what lies beneath the surface of comparative law*, 12(1) MAASTRICHT J. 73, 82 (2005).

[3] Karl-Heinz Ladeur, *Methodology and European law*, *in* EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW 100-105, 113 (Mark van Hoecke ed., 2004).

[4] Dagmar Schiek *et al.*, *A Comparative Perspective on Non-Discrimination law*, *in* CASES, MATERIALS AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL NON-DISCRIMINATION LAW 1 (Dagmar Schiek *et al.* eds., 2007).

[5] LABOUR LAW IN THE COURTS: NATIONAL JUDGES AND THE EUROPEAN COURT OF JUSTICE (Silvana Sciarra ed., 2001); KAREN J ALTER, THE EUROPEAN COURT'S POLITICAL POWER (2009); KAREN J ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW (2001); Arthur Dyevre, *Unifying the field of comparative judicial politics*, 2(2) EUR. POLIT. SCI. REV. 297-327 (2010).

[6] Alan Watson, *Legal Transplant and European Private law*, 4 ELECTRONIC J. COMP. L. (2000), *available at* www.ejcl.org/44/art44-2.html; Pierre Legrand, *The Impossibility of "Legal Transplants"*, 4 MAASTRICHT J. 111-24 (1997); T.T. Arvind, *The "Transplant Effect" in Harmonization*, 59 INT'L & COMP. L.Q. 65 (2010); Jan M Smits, *Convergence of Private Law in Europe: Towards a New* Ius Commune*?*, *in* COMPARATIVE LAW 219 (Esin Örücü & David Nelken eds., 2007). Others have written about the use of comparative law within European law making. *See* Rob van Gestel & Hans-Wolfgang Micklitz, *Comparative Law and EU Legislation: Inspiration, Evaluation or Justification?*, *in* THE METHOD AND CULTURE OF COMPARATIVE LAW 301 (Maurice Adams and Dirk Heirbaut eds., 2014); Ladeur, *supra* note 3.

on the effects of Europeanization on national legal systems,[7] and on how more-effective harmonization (and cooperation) can be achieved.[8]

In many ways, the study of European law requires a comparative approach. The CJEU relies on a comparative law method for interpretation and judicial law-making. The CJEU may refer to the legal principles common to the legal traditions of the Member States in areas where the Treaties are silent or to consider what interpretation is the most appropriate by reference to the legal orders of the Member States.[9] National courts may also want to engage in comparisons to ensure the law embodies universal or European principles rather than domestic ones.[10] Moreover, it has been emphasized that comparative law becomes relevant for national courts determining the meaning of EU law and the need to refer questions for a preliminary ruling to the CJEU under *CILFIT*'s[11] *acte clair* doctrine.[12] Comparative law is also relevant for the study of EU law itself. After all, it is primarily national courts that apply and give effect to EU law. The study of their diverging approaches towards applying EU law is thus very much relevant for a fundamental understanding of EU law and its application.

There is also little doubt that traditional approaches to comparative law have contributed to European legal integration.[13] Primary and secondary EU law have long influenced the law of the Member States and challenged both national legislators and courts to implement and

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[7] Jan M Smits, *The Europeanization of National Legal Systems*, *in* EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW 229 (Mark van Hoecke ed., 2004); THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES (Hans-Wolfgang Micklitz & Bruno de Witte eds., 2012); Mads Andenas and Duncan Fairgrieve, *Intent on Making Mischief: Seven Ways of Using Comparative Law*, *in* METHODS OF COMPARATIVE LAW 25-60 (Pier Giuseppe Monateri ed., 2012); Reinhard Zimmermann, *Comparative Law and the Europeanization of Private Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 539-78 (Mathias Reimann and Reinhard Zimmermann eds., 2008); PAULA GILIKER, THE EUROPEANISATION OF ENGLISH TORT LAW (2014).

[8] Hugh Collins, *Why Europe Needs a Civil Code* 21 EUR. REV. PRIV. L. 907-22 (2013); *CESL, Legal Nationalism or a Plea for Appropriate Governance?*, 8 EUR. REV. CONT. L. 241 (2012).

[9] Koen Lenaerts & Kathleen Gutman, *The Comparative Law Method and the Court of Justice of the EU*, *in* COURTS AND COMPARATIVE LAW 139-176 (M Andenas & D Fairgrieve eds., 2015); Koen Lenaerts & José A. Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, 20 COLUM. J. EUR. L. 3-61 (2014); Koen Lenaerts, *Interlocking Legal Orders in the European Union and Comparative Law*, 52 INT'L & COMP. L.Q. 873-906 (2003).

[10] Esin Örücü, *Comparative Law in Practice: The Courts and the Legislator*, *in* COMPARATIVE LAW 432 (Esin Örücü and David Nelken eds., 2007).

[11] Case 283/81, CILFIT v Ministero della Sanità EU:C:1982:335, 1982 E.C.R. 3415.

[12] Koen Lenaerts, *The Unity of European Law and the Overload of the ECJ*, *in* THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE 211-239 (Ingolf Pernice *et al.* eds., 2006).

[13] Many have written detailed discussions of the use of comparative law and the modern functional method. *See* Esin Örücü, *Developing Comparative Law*, *in* COMPARATIVE LAW 43-65 (Esin Örücü & David Nelken eds., 2007); Roger Cotterrell, *Is it so Bad to be Different? Comparative Law and the Appreciation of Diversity*, *in* COMPARATIVE LAW 133-154 (Esin Örücü & David Nelken eds., 2007).

give effect to new, often foreign, legal concepts, either because EU law is directly applicable within the Member States or because the national legislators had to implement EU directives and thus create new national legislation with a European origin. This process presumably harmonizes the law of the Member States and ensures that, for example, employees or consumers have the same rights, or at least a certain common level of protection, everywhere in the European Union. This harmonization process, together with the closer economic integration of the Member States, encourages further convergence of the legal systems. That process, in turn, can be supported by comparative projects exploring the "common core" of the laws of the Member States.[14]

But the converging effects of EU harmonization have long been viewed with skepticism.[15] The legal transplants introduced via secondary EU legislation, for example, often face significant obstacles once they reach the national legal arena. Comparatists who are more aware of cultural and socio-economic diversity suggest that for it to succeed, the EU legal harmonization project needs to be tolerant of differences and to resist unification.[16] This is not contrary to the European idea. Respect for differences and minorities is a key parameter to assess the eligibility of candidate States to join the Union,[17] and the European motto "united in diversity"[18] emphasizes respect for linguistic, cultural, historic, and political differences that can enrich interaction within the Union. Ultimately, complex legal systems always have to reconcile and sustain contradictory principles and rules within one legal tradition.[19] Yet, such respect for diversity sits uncomfortably with harmonization processes that are not sensible to legal-cultural differences. This has often been recognized regarding public law, which is framed by national constitutionalism and the socio-cultural context related to it. However, the respect for national differences can also become important in areas of private law where EU law reaches deeply into private relationships, personal identity, the family, and the political and economic sphere, such as equality or labor law. This article focuses on this area of law, in particular equality law. However, cultural sensitivities seem to extend beyond these intimate spheres and into legal areas more detached from the individual and with closer links to the market, such as commercial law or public procurement, in which there have been recent calls to maximize regulatory freedom

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[14] Mauro Bussani, *Current Trends in European Comparative Law: The Common Core Approach*, 21 HASTINGS INT'L AND COMP. L. REV. 785-801 (1998); KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 27 (Tony Weir trans., 3rd ed. 1998). *See* Örücü, *supra* note 13, at 51; Günter Frankenberg, *How to Do Projects with Comparative Law*, *in* METHODS OF COMPARATIVE LAW 120-43 (Pier Giuseppe Monateri ed., 2012).

[15] Pierre Legrand, *European Legal Systems Are Not Converting*, 45 INT'L & COMP. L.Q. 52-81 (1996).

[16] David Nelken, *Comparative Law and Legal Studies*, *in* COMPARATIVE LAW 31 (Esin Örücü and David Nelken eds., 2007).

[17] *Id*.

[18] The motto was codified in Article I-8 of the failed Constitutional Treaty. The Lisbon Treaty does not refer to any symbols of the European Union.

[19] H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 361-372 (5th ed. 2014).

on a national level.[20] The insights developed in this article may thus be relevant beyond the narrow scope of the case study I conduct with respect to EU equality law.[21]

The critical potential of comparative law would support a harmonization process that is more aware of cultural differences, that allows for more flexibility. This might help to avoid "alienating" large parts of the European populace,[22] which often experience EU harmonization as a top-down process that force them to give up legal concepts and social and commercial conventions that are deeply engrained in their national socio-legal identity and culture. Critical comparative studies can help engage with the national cultural or political differences that limit the success of harmonization via directives and other legal transplants and would support an alternative harmonization agenda that is more aware of legal, cultural, and political differences. While there is a growing number of scholars who propose and engage with critical approaches to comparative law,[23] few have considered the value of critical comparative law in the context of EU harmonization. This is not too surprising given that critical comparison precisely challenges the focus on Western Systems, Western-biased analysis and *legocentrism*,[24] and often rejects European harmonization projects.[25] Still, there is value in considering critical comparative law within the context of real-world phenomena, if only to avoid critical approaches becoming conservative in the sense that they reject or ignore any form of possible change.[26] After all, whether one supports or rejects European harmonization and the convergence of European legal systems, EU directives actually exist, are implemented on a national level, and are subsequently applied and interpreted by national courts. How national legal and non-legal factors influence these processes is of immense practical and theoretical interest.

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[20] Sue Arrowsmith, *The Purpose of the EU Procurement Directives*, 14 CAM. Y.B. EURO. LEGAL. STUD. 1-47 (2012).

[21] JULE MULDER, EU NON-DISCRIMINATION LAW IN THE COURTS: APPROACHES TO SEX AND SEXUALITY DISCRIMINATION IN EU LAW (2017). EU Equality law applies horizontally and primarily focuses on equal treatment within employment and access to good and services. It prohibits discrimination on grounds of specific personal characteristics such as sex, sexuality, race, disability, religion or age. The EU equality directives should thus be distinguished from constitutional equality principles or indeed the EU general principle of equal treatment which have a much broader scope but also often accept justifications.

[22] Dagmar Schiek, *Comparative Law and European Harmonisation*, 21 EUR. BUS. L. REV. 223 (2010).

[23] *See, e.g.,* GÜNTER FRANKENBERG, COMPARATIVE LAW AS CRITIQUE (2016).

[24] Günter Frankenberg, *Critical Comparison: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411-456 (1985). *Legocentrism* puts the law at the center of the analysis, perhaps to the detriment of other cultural factors that are possibly more influential and that determine the de facto outcome of a dispute. It views law as an autonomous, separate and self-contained system. *See* Jaakko Husa, *About the Methodology of Comparative Law – Some Comments Concerning the Wonderland…*, (MAASTRICHT FACULTY OF LAW, Working Paper No. 5, 2007); Husa, *supra* note 2, at 73-94.

[25] Pierre Legrand, *Against a European Civil Code*, 60 MOD. L. REV. 44-63 (1997).

[26] Ugo Mattei and Anna Di Robilant, *The Art and Science of Critical Scholarship*, 10(1) EUR. REV. PRIV. L. 29-59 (2002).

Ultimately, methodological approaches engaging with the EU harmonization process need to incorporate the national cultural influences on the implemented law, which are not always obvious at the point of implementation. This article therefore suggests a focus on the judicial reception of EU harmonized law and national-European legal hybrids because national courts are part of an inter-community group of courts and are embedded in their own cultural context.[27] The relevance of those national factors as well as European influences should thus become particularly obvious once one focuses on the national courts' application of EU harmonized law. Secondly, the comparison has to go beyond the legal and consider the wider cultural and political context of the national Member States. This can be done by, for example, considering the engagement of various stakeholders with the subject matter and the protective standard the harmonized law tries to achieve. These overlapping narratives can then provide indications of the national identity, self-understanding and legal consciousness surrounding the application of harmonized law at the national level. Finally, the comparative analysis needs to be able to recognize feedback effects produced by the national courts' dialogue with the CJEU. For example, the concept of indirect discrimination can be traced back to early international law and was pioneered in the US case *Griggs v. Duke Power*.[28] The legal concept was then picked up by UK law and also inspired the CJEU case law on non-discrimination law. The mutual influence is obvious if one follows the legislative development of the equality law directives and the national laws implementing the directives, and if one looks at the case law that has developed around those directives. Recognizing these influences, does not imply that the concepts mean the same in each jurisdiction. The cases pursue distinct meanings and use the concept of indirect discrimination in distinct ways. Legal concepts and the judicial reception of harmonized law develop over time and can be influenced by other national courts, CJEU judgments, and the broader political and social context. It is thus difficult to accept a narrative of 'socially easy'[29] transplant. This however does not mean that influences should not be recognized. Essentially, adequate consideration of these effects on the application of harmonized law requires a reflective analysis that views law within culture and thus allows for a diverse, potentially contradictory, and functioning of law within different and broader cultural contexts.[30] This article aims to consider how some of the insights of critical comparison can contribute to a culturally-informed comparative law method that uncovers the legal and non-legal factors affecting the application of EU harmonized law and national-European hybrids on a national level. In particular, its turn to culture and political underpinning and power relations can be helpful even if critical comparison has been more successful in systematically identifying the methodological weaknesses of traditional comparative law

[27] SILVANA SCIARRA, *Integration through Courts*, *in* LABOUR LAW IN THE COURTS 1 (2001).

[28] 401 US 424, 91 S Ct 846 (1971).

[29] ALAN WATSON, LEGAL TRANSPLANTS 95 (1974).

[30] David Nelken, *Defining and Using the Concept of Legal Culture*, *in* COMPARATIVE LAW 127 (Esin Örücü and David Nelken eds., 2007).

approaches than in providing practical solutions to overcome these challenges.[31] The article will demonstrate how the insights of critical comparison can enrich the comparison by discussing an original culturally-informed method that creates a framework for feasible comparison and allows space for multi-layered cultural and political narratives to shed light on the harmonization process.

With all this in mind, and to explore the potential of critical comparison in this context, this article first evaluates existing comparative law methods and their suitability to identify national legal and cultural factors that influence the judicial reception of EU harmonized law on a national level. It thus assesses how traditional comparative law methods fall short of providing sound methodological approaches to the complexity challenge posed by harmonized law and how critical comparison can help us understand the EU legal harmonization process. The article then considers the alternative approaches advanced within the field of critical comparative law and their potential to develop a deeper understanding of national courts' reception of EU harmonized law, which forms a key part of the broader legal harmonization process. In the second part, the article develops an original multi-layered culturally-informed comparative law method. The proposal goes beyond the existing methods of comparative law by including critical aspects and stressing the relevance of embedding a general normative framework in any comparative critique. It challenges comparatists to reach deeply into national cultural spheres and to identify key influences on the application of EU rules and EU-national legal "hybrids."[32] The method creates room for multi-layered narratives of comparison aimed at gaining a deeper understanding of national legal and non-legal cultural backgrounds that can hinder or facilitate harmonization processes. This enriched comparative critique can offer new insights into the process of legal harmonization in the EU, particularly by focusing on the point of application rather than on the previous phases of creation of EU law and its reception by Member States. This original method has an explanatory and evaluative component. From the explanatory perspective, it identifies national influences that are either conducive or create obstacles for successful harmonization processes, and it explains why certain directives are implemented more successfully in some Member States than others. Additionally, from the evaluative perspective, the method contributes to a critical evaluation of the achievements of specific harmonization processes and, more generally, of whether harmonization processes can contribute to the general aims of the EU, such as peace and well-being (Article 3 Treaty of the European Union, TEU).[33]

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[31] Vernon Valentine Palmer, *From Lerotholi to Lando: Some Examples of Comparative Law Methodology* 53 AM. J. COMP. L. 261, 265 (2005); Anne Peters & Heiner Schwenke, *Comparative Law Beyond Post-Modernism*, 49 INT'L & COMP. L.Q. 800-834 (2000); Sjef van Erp, *European Private Law*, 3 ELECTRONIC J. COMP. L. (1999), *available at* www.ejcl.org/31/abs31-1.html.

[32] Martijn W Hesselink, *A European Legal Method?*, 15 EUR. L. J. 40 (2009).

[33] This claim may hold only on the meta-sphere. *See* Schiek, *supra* note 22, at 208.

The article is divided in three main sections. After specifying what is encapsulated in the concept of EU harmonized law and national-European legal hybrids, the article will explore how the specific nature of harmonized law and the Member States' duty to implement directives[34] challenge some of the "epistemic foundations"[35] of the law supported by the functional or common law approach. It will then discuss the challenges that arise in the cross-country comparison of the judicial reception of EU harmonized law and will evaluate the adequacy of other methods of comparative law and their critique from the perspective of the comparison of harmonized law. Both sections thus form the first part of the article and engage with the methodological requirements within the context of EU harmonized law, uncover the weaknesses of traditional comparative law methods and consider the potential of critical comparison. The second part of the article will then discuss possible solutions to the methodological conundrum posed by critical comparison and harmonized law by developing a new method that is culturally-informed and leaves room for multi-layered narratives. Throughout the discussion of the proposed method, the article will draw on examples from the area of EU non-discrimination law, which is selected for the case study. This has a practical as well as a conceptual justification. Firstly, and from a reflective perspective, the use of the proposed method to compare harmonized law is based on a comparative project the author has recently been involved in. It thus draws upon experiences with the application of the method in the area of EU and employment non-discrimination law and allows for an extended illustration of the way the method is to be applied in each of its three steps. More importantly, and from a conceptual perspective, this area of EU law is particularly useful for the consideration of the possible contribution of critical comparison because labor and equality laws are often deeply connected with national politics, social roles, labor relations, and the wider legal and non-legal culture. The national factors influencing these areas of law will thus presumably be significant. The article concludes by bringing the main arguments developed in both parts together and identifying how a changed mind-set advocated by critical comparatists can help us develop a deeper understanding of the harmonization process in practice.

[34] Article 288 TFEU.

[35] Jaakko Husa, *Farewell to Functionalism or Methodological Tolerance?*, 67 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABELSZ] 430 (2003).

B. The Comparison of EU Harmonized Law

Multi-level governance theory has long been used to identify how the EU legal order requires entangled and "functionally interdependent"[36] authorities on different national and supranational territorial and jurisdictional levels to negotiate and coordinate their interrelations because of shared competences and dynamic arrangements.[37] Sovereign states may give up power to sub-national authorities, civil-society organizations and supranational or intergovernmental organizations, which then affects policy making.[38] The purpose of this section is not to repeat or engage with the multi-level governance processes that influence decision and policy making on the European and national level. Rather, it aims to clarify what is meant by EU harmonized law throughout this article and why conventional comparative law analysis, such as functionalism, is of limited suitability to uncover the interaction of the EU harmonized law and the broader national context.

Within the national context, primary and secondary EU law may be relevant because both can affect the national legal order and can be applied by national courts. Yet, their integration in the national legal system differs. Primary treaty norms with a direct effect can be directly invoked by individuals in national court,[39] and regulations are generally applicable.[40] There is no need to integrate these rules into national law, which means they can be viewed separately from the national legal order—they are European laws directly applicable within the national context. Directives, on the other hand, have to be implemented into national law.[41] These implemented laws are national laws, since the national legislator and national legislative processes have significant influence on their form, shape and scope. Of course, the level of national discretion depends on the directive's wording and whether it is a minimum or maximum harmonization directive. Either way, they become part of the national legal system and are very often part of wider statutes or codes that go beyond the directives' requirement and/or address a wider scope of issues. Still, the implementation process does not free them from their European tail. The original directive and the CJEU interpretation of it can influence the interpretation and application of the national law. National laws with a European origin are thus both national and European laws.

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[36] Simona Piattoni, *Multi-level Governance: Historic and Conceptual Analysis*, 31 J. EUR. INTEGRATION 163, 172 (2009).

[37] *See* Fabian Amtenbrink, *The Multidimensional Constitutional Legal Order of the European Union*, 29 NETH. Y.B. INT'L L. 3-68 (2008).

[38] *Id*. at 172-176. *See* Liesbet Hooghe & Gary Marks, *Unravelling the Central State, But How? Types of Multi-level Governance*, 97 AM. POLIT. SCI. REV. 233-243 (2003).

[39] Case 26/62, Van Gend en Loos v Administratie der Belastingen EU:C:1963:1, 1963 E.C.R. 3.

[40] Article 288(2) TFEU.

[41] Article 288(3) TFEU.

The word "hybrid" captures this status.[42] The terminology used in the directive and implemented into national law, whether familiar to the national legal order or not, is then subject to national as well as European influences. Hesselink demonstrates this by reference to the Unfair Terms Directive,[43] which foresees a good faith/fairness provision in Article 3. Once implemented, it is questionable whether the term can or should be interpreted depending on the national context or independently as an autonomous European legal concept. On the one hand, determining whether clauses are unfair and contrary to good faith may depend on the national context.[44] On the other hand, there are clear minimum standards set by the directive as interpreted by the CJEU and, in the case of maximum harmonization directives, a maximum standard.[45] This exposes the "hybrid and dynamic multi-level"[46] character of the European legal system, which interacts and harmonizes certain aspects of national law without taking over these areas completely. Throughout this article, any reference to EU harmonized law primarily refers to these laws (that implement directives and are thus embedded in the national context but are also directly connected to the European legal order). This is not to say that directly applicable treaty norms may not also be influenced by the national context when applied by national courts. But, at least in principle, their application could be more separate from the rest of the national legal system even if the principle of equivalence and effectiveness[47] provides for certain inroads into the national system.

The focus on European harmonized law as a hybrid system of norms also demonstrates why traditional approaches towards comparative law are ill-suited to appropriately recognize the interconnection of EU and national law within the multi-layered system. Functionalism, for example, suggests focusing the comparison on functional equivalents.[48] This means that the comparatist should take social conflicts as a starting point, as the common comparative denominator (*tertium comparationis*),[49] and then compare the different national laws that are seen as alternative responses to the same problem.[50] Law is thus seen as reflecting

[42] Hesselink, *supra* note 32, at 40.

[43] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L95/29) as amended by Directive 2011/83/EU of The European Parliament and of the Council of 25 October 2011 (OJ 2011 L304/64).

[44] Case C-237/02, Freiburger Kommunalbauten EU:C:2004:209, 2004 E.C.R. I-3403.

[45] Hesselink, *supra* note 32, at 41-42.

[46] *Id*. at 42; Christian Joerges, *The Impact of European Integration on Private Law*, 3 EUR. L. J. 378-406 (1997).

[47] PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW 239-251 (6th ed., 2015).

[48] ZWEIGERT & KÖTZ, *supra* note 14.

[49] Esin Örücü, *Methodology of Comparative Law*, *in* ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 560, 561 (Jan M Smits ed., 2nd ed. 2012); Antonios Emmanuel Platsas, *The Functional and the Dysfunctional in the Comparative Method of Law* 12 ELECTRONIC J. COMP. L. (2008, *available at* http://www.ejcl.org/123/art123-3.pdf.

[50] Ralf Michaels, *The Functional Method of Comparative Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 369 (Mathias Reimann & Reinhard Zimmermann eds., 2008).

society's needs, although research on legal transplants has demonstrated that laws are often adopted not because of need or suitability, but rather prestige and authority.[51] This is even more significant within the European context, where Member States are obliged to implement directives, and even if the process of transplantation and possible diffusion of the legal concept is controlled by the adopting system,[52] which means that the national context continues to be important. Functionalism's greatest asset is that it provides a seductively simple solution to the difficult question of how to choose the objects of comparison: one should compare the laws or extra-legal rules that address the same social conflict. The use of social problems as objective parameters outside the comparison requires *a priori* assumptions to create an epistemic foundation of law.[53] But this is problematic within the European context, where national legal systems have limited freedom regarding their legal agenda. Functionalism struggles to identify national influences on the application of harmonized law and the political agenda behind the harmonization process because it focuses on legal solutions to social problems. This has been considered to be reductionist and *legocentric*, as it isolates the law from its "socio-economic and politico-cultural environment."[54] It ignores the political background of a legal and historical development, which turned conflicts into legal questions.[55] This is not to say that directives cannot have those functions or aim at solving certain social conflicts from a European perspective. Rather, these functions are not necessarily the only, or even the predominant, reason why the directives are implemented in the national legal systems. Member States also face obligations of specific transposition even if their national courts' practices already achieve the aim of the directive.[56]

For example, if we view EU equal-pay provisions from a functional perspective, we would assume that they are designed to address the gender pay-gap. But Article 119 EEC (now Article 157 Treaty on the Functioning of the European Union, TFEU) was not introduced to remedy the social ill of pay-discrimination. Instead, it sought to address concerns regarding competitive disadvantages of the Member States establishing the European Economic Community, and it ultimately constituted a political compromise between Germany and

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[51] Alan Watson, *Legal Changes*, 131 U. PA. L. REV. 1132, 1134-1146 (1983); Alan Watson, *Legal Transplants and Law Reform*, 92 L. Q. REV. 79, 81 (1976).

[52] Michele Graziadei, *The Functionalist Heritage*, *in* COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 118-122 (Pierre Legrand & Roderick Munday eds., 2003).

[53] Husa, *supra* note 35, at 430.

[54] Frankenberg, *supra* note 24, at 423; Jonathan Hill, *Comparative Law, Law Reform and Legal Theory*, 9 OXFORD J. LEGAL STUD. 101, 108 (1989); Richard Hyland, *Comparative law*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 184, 187-90 (Dennis Patterson ed., 1999); ROGER MERINO ACUÑA, COMPARATIVE LAW FROM BELOW 16 (2012); Pierre Legrand, *Paradoxically, Derrida: For a Comparative Legal Studies*, 27 CARDOZO L. REV. 631, 659 (2005).

[55] Frankenberg, *supra* note 24, at 434-340; Hyland, *supra* note 54, at 189; Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801-932 (1991).

[56] Case 96/81, Commission v Netherlands EU:C:1982:192, 1982 E.C.R. 1792 at ¶ 12. *See also infra* note 69.

France.[57] Pay-discrimination as such was not necessarily considered a social conflict requiring a legal remedy on national level. Even today European involvement in equality and non-discrimination may be fueled by both an interest to protect citizens from bigotry and sexism *and* the fact that there are few competing national concepts intertwined with the national legal traditions. This leaves space for the EU to demonstrate its commitment to social progress and legitimize further European (political) integration.[58] The functions of the equality-directives are thus not necessarily clear and may be seen differently on national and European level. This, in turn, may explain why the equality directives had a limited effect after their implementation and only slowly gained visibility. In Germany, for example, only 112 cases based on the now annulled § 611a of the German Civil Code (which prohibited sex discrimination within employment) were launched between 1982 and 2004.[59] It may also explain the rather slow adoption of the more current equality directives banning discrimination on grounds of sex, sexuality, religion and belief, race and ethnic origin, age and disability,[60] which are indeed deeply intertwined with national legal traditions.[61] The European legal system may encourage developments along similar lines because European integration requires similar and rational legal solutions (natural processes of convergence).[62] But Member States also face clear legal obligations to implement EU law. Similarities between national harmonized laws are not surprising, particularly when directives leave little discretion to the Member States.[63] Functionalism thus seems ill-suited to compare EU legal systems. This is not only because of its *praesumptio similitudinis* and the presumption of similar social conflict despite different social realities.[64] The high level of abstraction, using the social conflicts as a "theoretical tool for comparison, not an empirically existing fact"[65] disguises that the functional problem itself is a matter of normative perspective.

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[57] ANNA VAN DER VLEUTEN, THE PRICE OF GENDER EQUALITY (2007).

[58] FRITZ W SCHARPF, CRISIS AND CHOICE (Ruth Crowley & Fred Thompson trans., Cornell University Press 1991); ALEXANDER SOMEK, ENGINEERING EQUALITY 51 (2011); C. Barnard, *The Principle of Equality in the Community Context*, 57 CAMBRIDGE L. J. 352 (1998); EVELYN ELLIS AND PHILIPPA WATSON, EU ANTI-DISCRIMINATION LAW 25 (2nd ed. 2012).

[59] Heide Pfarr, *Sorgen vor Klageflut sind unbegründet* (BÖCKLER IMPULS No. 2, 2005), available at http://www.boeckler.de/pdf/impuls0502.pdf.

[60] *See, e.g.,* Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000, L180/22); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000, L303/16); Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L204/23).

[61] MULDER, *supra* note 21.

[62] Peters & Schwenke, *supra* note 31, at 801.

[63] *See, e.g.,* Paula Giliker, *The Transposition of the Consumer Rights Directive into UK law: Implementing a Maximum Harmonisation Directive*, 23 EUR. REV. PRIV. L. 5-28 (2015).

[64] Husa, *supra* note 35.

[65] *Id.* at 430.

Consequently, it struggles to identify the hierarchical co-dependencies that exist between the different European and national institutions and that influence legislative agendas within the multi-governmental structure. The aim perused by the norm-giver is not necessarily identical with the abstract function of a given norm. For example, while EU non-discrimination law's abstract function aims at "putting into effect in the Member States the principle of equal treatment"[66], the institutions involved may view the law as a political compromise and a tool to further harmonization, integration, and the peaceful cooperation between nation States.

Similarly, the common core approach,[67] which adopts a factual starting point, has little to add to the comparison of national legislation that implements European directives. It is unsurprising that different Member States provide similar or identical legal solutions within an area that is legally harmonized. After all, Member States would face infringement procedures if they did not implement the directives.[68] The CJEU has often stressed that proper implementation is necessary to ensure certainty and precision.[69] That, however, does not mean that these legal solutions provided in the statute books are ever used or actually mean the same within the national cultural context. Given the different procedural rules or non-legal matters of substance that can lead to major differences in other, slightly different, cases,[70] a common core approach, like functionalism, is likely to overlook relevant divergences because it tends to exclude a large number of facts that are not strictly legal and only considers their meaning in relation to their effects in operational terms.[71] Diversities in the theoretical and philosophical framework can make legal concepts rather different, even if singular results are similar or lead to similar results.[72] Moreover, the question remains whether we can ever understand sterilized, fabricated, abstract factual scenarios removed from their social, economic, and cultural contexts.[73] After all, directives are binding regarding the result to be achieved.[74] The scenarios envisaged by the legislator should thus

[66] *See, e.g.,* Article 1 of Council Directive 2000/78/EC, *supra* note 60.

[67] RUDOLF B SCHLESINGER, COMPARATIVE LAW CASES-TEXT-MATERIALS 32-35 (4th ed. 1980); FORMATION OF CONTRACT (Rudolf B. Schlesinger ed., 1968).

[68] Article 258-260 TFEU.

[69] Adoption of the proper administrative practices (Case 160/82, Commission v Netherlands EU:C:1982:443, 1982 E.C.R. 4637) or settled case-law (Case C-144/99, Commission v Netherlands EU:C:2001:257, 2001 E.C.R. I-3541), which interprets and applies the national provisions in a manner deemed to satisfy the requirements of a directive, is thus usually insufficient.

[70] Rudolf B. Schlesinger, *The Common Core of Legal Systems*, *in* RECHTSVERGLEICHUNG 262-263 (Konrad Zweigert & Hans- Jürgen Puttfarken eds., 1978).

[71] Graziadei, *supra* note 52, at 108-112.

[72] *Id*. at 263.

[73] FRANKENBERG, *supra* note 23, at 67.

[74] Article 288 TFEU.

be covered by the directive and the law implementing it, even if alternative solutions are also available. Real-life life application is often very different from what was envisaged during the drafting process.

C. Challenges for Comparison: The Judicial Reception of Harmonized Law

It is not clear how we might capture the different factors influencing the national application of harmonized law in a meaningful and feasible way. Comparative law has long struggled with its own methodology.[75] Post-modernist approaches, originating from legal realism,[76] have challenged traditional approaches such as functionalism because of its lack of cultural awareness and apolitical approach towards law. Still, the "nagging feeling"[77] that it is difficult, if not impossible, to understand different legal systems, has not stopped the discipline from advancing.[78] Consequently, a paradoxical situation arises.[79] On the one hand, there is a growing practice of substantive comparative work on the law of Member States, including harmonized law and legal transplants. On the other hand, there are highly theoretical debates regarding the shortcomings of current comparative law methods and the need to recognize the cultural diversity within which the law is embedded. The goal of this section is not to repeat this criticism or methodological advances. Instead, the section will discuss the usefulness of the different comparative law methods for the purpose of comparing the application of harmonized law. While there is a large tool set of possible approaches within comparative law,[80] the discussion will focus on three approaches: functionalism, structuralism, and the postmodernist critique of comparative law. These approaches dominate current methodological debates and provide different, but potentially overlapping, solutions on how to compare and to what extent non-legal factors can (or should) be included in the comparison. They will be considered in the light of two key challenges posed by the comparison of harmonized law: the triangular relationship among the national courts of the EU Member States and the CJEU, and the integration of the national legal and non-legal context.

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[75] Rob van Gestel & Hans-Wolfgang Micklitz, *Why Methods Matter in European Legal Scholarship*, 20 EUR. L. J. 292, 309 (2014).

[76] Mattei & Di Robilant, *supra* note 26, at 35.

[77] Husa, *supra* note 2, at 92; Hendry, *supra* note 2, at 2262.

[78] Reinmann, *supra* note 2, at 673.

[79] Maurice Adams & Jacco Bomhoff, *Comparing Law*, *in* PRACTICE AND THEORY OF COMPARATIVE LAW 1 (2012); Palmer, *supra* note 31, at 3.

[80] *See, e.g.,* MATHIAS SIEMS, COMPARATIVE LAW (2014); JAAKKO HUSA, A NEW INTRODUCTION TO COMPARATIVE LAW (2015); GEOFFREY SAMUEL, AN INTRODUCTION TO COMPARATIVE LAW THEORY AND METHOD (2014); THE OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann and Reinhard Zimmermann eds., 2008).

I. The Triangular Relationship of the National Courts and the CJEU

The comparison of EU harmonized law is complicated by the relationship between the CJEU and the national courts,[81] their different roles and functions and their shared responsibility regarding the application and interpretation of EU law. The Treaty authorizes the CJEU to interpret Union law.[82] The national courts are in charge of deciding the merits of the case,[83] and the CJEU leaves discretion to the national courts.[84] The national courts retain a substantial responsibility for ensuring that EU law is properly enforced, and they become "decentralized EU courts"[85] with primary responsibility for the "*effect utile* of EU law."[86] The CJEU depends on the national courts' cooperation to ensure the effectiveness of EU law, while national courts have to consider the case law of the CJEU when they apply EU law. National courts belong to a trans-national and post-national community of courts, as they are linked to the CJEU and the courts of other Member States.[87] A comparison focusing on the application of EU harmonized law must consider the effect of the relationship—and the consequential interconnection and dialogue—between the national courts and the CJEU.

[81] PETER DE CRUZ, COMPARATIVE LAW IN A CHANGING WORLD 164-65 (3rd ed. 2007).

[82] Art 19 TEU and 267 TFEU.

[83] Case 170/84, Bilka v Weber von Hartz EU:C:1986:204, 1986 E.C.R. 1607, at ¶ 36.

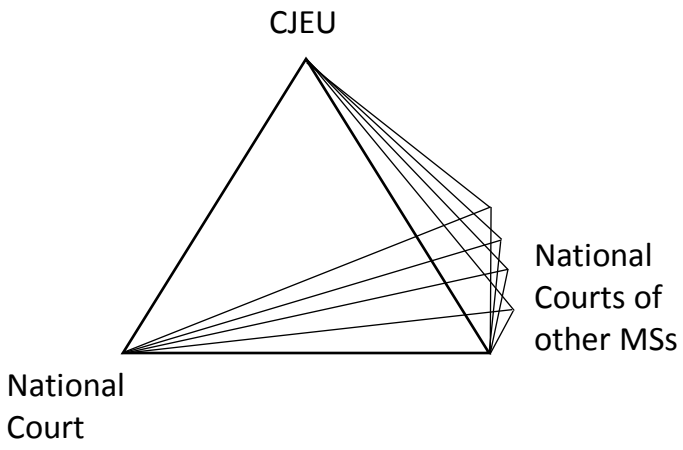
[84] The CJEU's approach towards objective justification within the concept of indirect (sex) discrimination is an example. *See* CHRISTA TOBLER, INDIRECT DISCRIMINATION (2005); Sacha Prechal, *Combating Indirect Discrimination in Community Law Context*, 20 LEGAL ISSUES EUR. INTEGRATION 81, 90 (1993); Philippa Watson, *Equality of Treatment: A Variable Concept?*, 24 INDUSTRIAL L. J. 33, 43-48 (1995); Dagmar Schiek *et al.*, *Indirect Discriminaiton*, *in* CASES, MATERIALS AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL NON-DISCRIMINATION LAW 357 (Dagmar Schiek *et al*. eds., 2007).

[85] Urszula Jaremba, *At the Crossroad of National and European Union Law*, 6 ERASMUS L. REV. 191, 192 (2013); Juan A Mayoral *et al.*, *Creating EU Law Judges*, 21 J. EUR. PUBLIC POLICY 1120-1141 (2014).

[86] *Id*.

[87] SCIARRA, *supra* note 27.

Primarily, the relationship between the national courts and the CJEU is institutionalized via the preliminary reference proceeding.[88] Accordingly, a national court (of last instance) is required to request a ruling from the CJEU on the interpretation of EU law if it considers that a decision on the question is necessary to enable it to give a judgment.[89] In this way there is direct communication between each national court that asks a question and the CJEU. Yet, the preliminary reference procedure is not limited to this scenario. The additional multilevel and intertwining influences become quite obvious if one depicts the dialogue between the national courts and the CJEU as triangular. Its simplified version,[90] reducing the number of national courts to two, can help in visualizing the interconnection of the courts: the CJEU and the national court asking a preliminary question each sit on one vertex, while the second national court, representative of all the other national courts, sits on the third vertex.



The triangular relationship then demonstrates that the CJEU, when issuing a judgment, influences all national courts beyond the court that has directly referred a preliminary question to the CJEU. This is the case because it's the CJEU's ruling is relevant for all courts of the Member States.[91] The relevance of a preliminary judgment is never restricted to the requesting court but extends to other national courts regarding the interpretation of EU law. The effect of the preliminary reference procedure is not limited to top-down influences because the national court asking the question influences not only the CJEU but also other national courts. First, if national courts want to give effect to the CJEU's preliminary rulings that originated from other Member States, they have to engage with the referring court's

[88] David O'Keeffe, *Is the Spirit of Article 177 Under Attack? Preliminary References and Admissibility*, 23 EUR. L. REV. 509-536 (1998).

[89] Article 267 TFEU.

[90] In reality, there are 28 Member States (or once the UK leaves, 27), so the triangle would have 28 vertices plus one vertex for the CJEU, a rather confusing construction.

[91] This is the case when, for example, a national court wants to consider previous preliminary rulings that originated in other Member States in order to determine whether it needs to send a question to the CJEU. Case 283/81, CILFIT v Ministero della Sanità EU:C:1982:335, 1982 E.C.R. 3415, at ¶¶ 8-15.

argument, interpretation and doctrinal problem to understand the original question and the CJEU's ruling. Second, the European harmonization process encourages national courts to abandon purely internal perspectives on law and consider other national approaches, particularly regarding the application of harmonized law.[92] When applying EU law, a national court is encouraged to consider the doctrinal or other legal problems that arise in different European legal orders in relation to their own national approaches. Other national legal systems, whose courts are not directly involved in the preliminary reference, can also influence the CJEU's reasoning for two reasons: first, because all Member States can participate in the preliminary proceedings on EU level,[93] and, second, because the CJEU has to consider national legal paradigms and the doctrines of the different legal systems if it wants to ensure the effectiveness of EU law in all Member States.[94] The influences go both ways along each side of the triangle, and it is difficult to separate top-down influences from cross-country and bottom-up effects. It is a "multi-layered" or "multi-polar" system that encourages national courts to engage with other national courts' judgments and legal systems as well as communication between the national courts and the CJEU.[95]

National courts being connected and engaging in dialogue with courts from other Member States is of course not unique to the EU. National courts were always able, and some became accustomed, to consider case law from other States. They may also be willing to go beyond the European context by considering the decision-making process of courts from non-European jurisdictions and in legal areas outside the scope of EU law.[96] English courts, for example, are often more willing to engage with other common law courts whose rulings are considered persuasive,[97] while an engagement with the judgments of European civil law courts exist mainly, if at all, within the limits of European law.[98] In the UK, for instance, the Judicial Committee of the Privy Council also goes beyond the national sphere, as it considers appeals from different national legal systems.[99] It can be suggested that English courts

[92] HESSELINK, *supra* note 2, at 45-50, 55; Smits, *supra* note 7, at 229-45.

[93] Art 96 Rules of Procedure of the Court of Justice (OJ 2012, L 265/1).

[94] Lenaerts, *supra* note 9.

[95] Ladeur, *supra* note 3 100-5.

[96] Martin Gelter & Mathias M Siems, *Citations to Foreign Courts – Illegitimate and Superfluous, or Unavoidable? Evidence from Europe*, 62 AM. J. COMP. L. 35-86 (2014).

[97] Christophe McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499 (2000).

[98] Paula Giliker, *The Influence of EU and European Human Rights Law on English Private Law*, 64 INT'L & COMP. L.Q. 237-265 (2015); Keith Stanton, *Comparative Law in the House of Lords and Supreme Court*, 42 COMMON L. WORLD REV. 269-296 (2013); Örücü, *supra* note 10. Arnull has written about the UK courts' willingness to consider EU law within the national context. *See* Anthony Arnull, *The Law Lords and the European Union: Swimming in the Incoming Tide*, 35 EUR. L. J. 57-87 (2010).

[99] Paul Mitchell, *The Privy Council and the Difficulty of Distance*, 36 OXFORD J. LEGAL STUD. 26-57 (2016).

already belong to a trans-national community that continues to flourish beyond and besides the European influence. Other international organizations, treaties and courts may encourage a dialogue between different national and international entities in a globalized world. But the preliminary reference procedure, in combination with the supremacy of EU law, further formalizes the process regarding the European context and forces unwilling courts to engage with other national courts' judgments when they apply EU law in the light of the CJEU judgments, even if it is not made explicit in the reasoning of the court. A comparison of the application of EU harmonized law needs to allow space to identify and discuss this, potentially indirect, engagement with other national legal orders of the European Union.

The structural interdependence of the national courts and the CJEU affects the possible framework in which the comparison can take place. Since EU law enjoys primacy over national law,[100] it might be assumed that the CJEU's case law establishes *objective parameters*[101] to which national courts would gradually adapt. Within a comparative analysis the CJEU's case law could then be used as the external common denominator (*tertium comparationis*). As a supranational court the CJEU is supposed to ensure the uniform application and interpretation of Union law. It can do this independent of the political and cultural context of the Member States.[102] The cross-country comparison would then consider how different national courts adopt the CJEU interpretation that is constructed as the best (at least in the European context) solution to a specific problem, to use functionalist terminology. Such an approach presupposes consistency. But the CJEU's interpretation of EU law does not happen in a context-free environment in which the CJEU can objectively pick the "best solution," presuming such a solution exists, which is then gradually adopted by the courts of the Member States. On the contrary, the CJEU's case law is frequently criticized for being incoherent, contradictory, and merely reacting to individual cases.[103] This arises from structural and functional issues.

[100] Case 26/62, Van Gend en Loos v Administratie der Belastingen EU:C:1963:1, 1963 E.C.R. 3.

[101] Usually referred to as *tertium comparationis*, i.e., the common comparative dominator. *See* Örücü, *supra* note 49.

[102] DE CRUZ, *supra* note 81, at 140-1, 151-8, 153; CRAIG & DE BÚRCA, *supra* note 47, at 57-58.

[103] *See* GUNNAR BECK, THE LEGAL REASONING OF THE COURT OF JUSTICE OF THE EU (2013); GERARD CONWAY, THE LIMITS OF LEGAL REASONING AND THE EUROPEAN COURT OF JUSTICE (2012). *See also* Clara MS McGlynn, *Equality, Maternity and Questions of Pay*, 21 EUR. L. REV. 327-32 (1996); Evelyn Ellis, *Recent Development in European Community Sex Equality Law*, 35 COMMON MKT. L. REV. 379-408 (1998). *But see* Annick Masselot, *Pregnancy, Maternity and the Organisation of Family Life*, 26 EUR. L. REV. 239-60 (2001).

The "pre-federal"[104] European structure means that the national courts have to decide how to ask preliminary questions and how much information they provide to the CJEU.[105] In this way national courts can significantly influence the development of EU law and CJEU decision-making processes, particularly if it is in their interest to refuse cooperation or limit the application of EU law at the national level.[106] For example, the German Constitutional Court's threat to uphold national constitutional standards of human rights in defiance of European law forced the CJEU to engage with human rights and the principles underpinning them.[107] This is not necessarily detrimental to the development of EU law. On the contrary, it has been suggested that the recognition of (national) human rights at the EU level has protected the integrity of the European legal order.[108] Still, the significant pressure national courts can use to influence the CJEU demonstrates that there is no clear hierarchy between them. The CJEU is not a Court of Appeal that can review the principles and interpretations adopted by national courts. Consequently, national courts and national legal systems significantly influence the CJEU, even if only indirectly via preliminary questions.[109] Since courts of 28 (or once the UK leaves, 27) Member States can refer questions to the CJEU, these influences are manifold, diverse, and potentially contradictory. This is not to say that CJEU case law is not important for national applications of harmonized law. But these cases cannot be viewed as an external framework or treated as providing one consistent solution to the interpretation of EU law. Instead, CJEU case law needs to be considered alongside other factors within a "complex network of norms and practices."[110] The shared responsibility of the CJEU and national courts means that there are continuous national and non-national influences that affect the application of the national law implementing the directives. This further underlines their hybrid character. Unlike other legal transplants,[111] these laws are not freely adopted and the transplantation process and possible diffusion of the legal concepts is not only dependent on the recipient national legal system.

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[104] SCIARRA, *supra* note 27, at 8; DE CRUZ, *supra* note 81, at 140.

[105] Article 94 Rules of Procedure of the Court of Justice (*supra* note 93); Claire Kilpatrick, *Gender Equality: A Fundamental Dialogue*, *in* LABOUR LAW IN THE COURTS 31-130 (Silvana Sciarra ed., 2001).

[106] Dyevre, for example, analyzes national courts' behavior from a game theory perspective and argues that the "non-compliance threat" can be sufficient to influence CJEU case law. Arthur Dyevre, *The German Federal Constitutional Court and European Judicial Politics*, 34 WEST EUR. POL. 346-361 (2011).

[107] BUNDESVERFASSUNGSGERICHT [BVERFG] [FEDERAL CONSTITUTIONAL COURT] May 29, 1974, 2 BvL 52/71, BVerfGE 37, 271; Oct. 22, 1986, 2 BvR 197/83, BVerfGE 73, 339.

[108] Fabian Amtenbrink, *The European Court of Justice's Approach to Primacy and European Constitutionalism*, *in* THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES 35-63 (Hans-Wolfgang Micklitz & Bruno de Witte eds., 2012).

[109] ANTHONY ARNULL, THE EUROPEAN UNION AND ITS COURT OF JUSTICE 100-101 (2nd ed. 2006).

[110] Husa, *supra* note 2, at 85.

[111] Text accompanying *supra* note 51.

A comparative method that engages with the application of harmonized law needs to mirror the dialogue of structural interdependence between the national courts and the CJEU. How to integrate this multi-layered transnational dialogue between the courts into a traditional cross-country comparison is far from clear, particularly because of the political dimension of the dialogue, which goes beyond simply developing and understanding the "correct" interpretation of European law. Modern functionalists recognize that there are areas of law where "adequate conceptual tools which are both common to the various legal systems and teleologically satisfactory" do not yet exist.[112] Consequently, politically influenced areas of law may not be comparable and the focus of comparatists' efforts should be on private "apolitical" law.[113] Alternatively, comparative labor lawyers have emphasized the need for interdisciplinary cooperation. Accordingly, it is necessary to consider a specific element's interaction with all the other elements of the specific system to discover the true function.[114] The consideration of "extra-legal"[115] elements is not sufficient to properly integrate the political dimension of the courts' dialogue, which often has very little to do with the particular harmonized rule in question and its purpose or function. Regardless of whether law can ever be apolitical,[116] at least the dialogue between the courts, if not EU law in general, is highly politicized.[117]

The CJEU, on the one hand, reflects the general character of the European Union, which is essentially a political project focused on integration.[118] The Court is thus generally recognized to be driven by a pro-integrationist agenda.[119] Additionally, the involvement of the European Commission, the European Parliament, and interest groups (including NGOs) has implications for EU governance.[120] For example, individual activists and interest groups have successfully advanced gender equality via strategic litigation. Because of the direct

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[112] Zimmermann, *supra* note 7, at 578.

[113] ZWEIGERT & KÖTZ, *supra* note 14, at 45; DE CRUZ, *supra* note 81, at 239.

[114] Manfred Weiss, *The Future of Comparative Labour Law as an Academic Discipline and as a Practical Tool*, 25 COMP. LAB. L. & POL'Y J. 169, 172-3 (2003); Paul Davies & Mark Freedland, *The Role of EU Employment Law and Policy in the De-marginalisation of Part-time Work*, *in* EMPLOYMENT POLICY AND THE REGULATION OF PART-TIME WORK IN THE EUROPEAN UNION 63, 67 (Silvana Sciarra *et al.* eds., 2004).

[115] Weiss, *supra* note 114, at 173.

[116] *But see* Legrand, *supra* note 54, at 631, 644; Mark van Hoecke & M Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine*, 47 INT'L & COMP. L. Q. 495, 535 (1997); Alessandro Somma, *At the Patient's Bedside?*, 13 CARDOZO ELECTRONIC L. BULLETIN (2007), *available at* http://www.jus.unitn.it/cardozo/Review/2007/somma2.pdf .

[117] Schiek has written about European human rights, equality and labor law. *See, e.g.,* Schiek *et al., supra* note 4, at 13-14; Dagmar Schiek, *Critical Comparative Law from a Labour Law Perspective*, *in* EUROPEAN COMPARATIVE LAW 197-221 (Dagmar Schiek *et al.* eds., 2003).

[118] Article 3 TEU.

[119] CONWAY, *supra* note 103, at 53-84.

[120] ELLIS & WATSON, *supra* note 58, at 25.

effect of Article 157 TFEU (Article 141 EC), the national courts were forced to refer an increasing number of preliminary questions. This enabled the CJEU to develop its rather broad interpretation of sex equality, including issues related to pregnancy and gender, which in many Member States were part of national social policies and not employment law.[121] The rigidity of the EU treaties does not encourage the CJEU to moderate its jurisprudence, as it does not need to fear amendments regarding its own jurisdiction.[122] The successful implementation of new principles in Member States may also depend on the persuasiveness of the CJEU's reasoning within the broader national context. The CJEU uses various methodological approaches when interpreting Union law,[123] but it also faces several problems different from those at the national level. For instance, it has to negotiate and interpret multilingual legal texts that differ from each other.[124] It also faces different interpretations in the national legal orders of the Member States.[125] If it wishes to create a persuasive coherent legal order and horizontal coherence between the Member States,[126] the Court has to argue purposively and doctrinally.

National courts, on the other hand, may have an interest in giving effect to EU law. Within the system of supremacy national courts are able to follow the CJEU without waiting for their national parliaments or higher national courts to become active. This leads to the paradoxical situation where "lower" national courts or even quasi-judicial bodies gain new powers by sharing their power with a supranational entity.[127] It is not surprising that this

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[121] RACHEL A CICHOWSKI, THE EUROPEAN COURT AND CIVIL SOCIETY 73-118 (2007); Rachel A Cichowski, *Women's Rights, the European Court, and Supranational Constitutionalism*, 38 LAW & SOC'Y REV. 489-512 (2004); Karen J Alter & Jeannette Vargas, *Explaining Variation in the Use of European Litigation Strategies European Community Law and British Gender Equality Policy*, 33 COMP. POL. STUD. 452-82 (2000).

[122] KAREN J. ALTER, *Who are the 'Masters of the Treaty'?: European Governance and the European Court of Justice (1998)*, *in* THE EUROPEAN COURT'S POLITICAL POWER 109, 135 (2009); Geoffrey Garrett *et al.*, *The European Court of Justice, National Governments, and Legal Integration in the European Union* 52 INT'L ORG. 149-76 (1998); Dyevre, *supra* note 5, at 305; ALEC STONE SWEET, THE JUDICIAL CONSTRUCTION OF EUROPE 25-26 (2004).

[123] GILIKER, *supra* note 7, at 18; Reinhard Zimmermann, *Statuta Sunt stricte interpretanda? Statutes and the Common law: a Continental Perspective*, 56 CAMBRIDGE L. J. 315, 320 (1997); Robert Alexy & Ralph Dreier, *Statutory Interpretation in the Federal Republic of Germany*, *in* INTERPRETING STATUTES, A COMPARATIVE STUDY (Neil MacCormick and Robert S. Summer eds., 1991) 73-121; DE CRUZ, *supra* note 81, at 171-72; Albertina Albors Llorens, *The European Court of Justice, More Than a Teleological Court*, *in* 2 THE CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES 374-82 (Alan Dashwood & Angela Ward eds., 2000).

[124] Albors Llorens, *supra* note 123, at 375-9.

[125] Oreste Pollicino, *Legal Reasoning of the Court of Justice in the Context of the Principle of Equality*, 5 GERMAN L. J. 283, 317 (2004); Zimmermann, *supra* note 123; INTERPRETING STATUTES, A COMPARATIVE STUDY (Neil MacCormick & Robert S. Summer eds., 1991).

[126] As opposed to the vertical coherence of the individual Member State. *See* Michael W Schröter, *European Legal Reasoning: A Coherence-based Approach*, 92 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE [ARSP] 82, 86-89 (2006).

[127] JOSEPH H H WEILER, THE CONSTITUTION OF EUROPE 197 (1999); SCIARRA, *supra* note 27, at 3-4; KAREN J. ALTER, *The Europeans Court's Political Power: The Emergence of an Authoritative International Court in the European Union (1996)*, *in* THE EUROPEAN COURT'S POLITICAL POWER, *supra* note 122, at 92-108.

doctrine of supremacy became widely accepted and that many landmark decisions of the CJEU originated from the preliminary questions of the lower national courts.[128] National courts may also be concerned with preserving the integrity of the perceived coherence of the national system. In particular, higher national courts' authoritative role interpreting national law may make them skeptical toward the influence of EU law. Consequently, they are more likely to refuse or limit cooperation with the CJEU. For example, the German Constitutional Court did not refer any preliminary questions to the CJEU until recently,[129] and this has been interpreted by many as a step towards protecting the German prerogative rather than a "surrender of sovereignty."[130] Higher court referrals are often very technical in an attempt to block the CJEU from "judicial activism."[131] Their participation seems generally focused on protecting both their own authority[132] and national influences on European legal developments.[133] These concerns regarding EU law are not only relevant to national courts drafting and sending preliminary questions to the CJEU but also to the national application of EU law and national legislation implementing the directives. These political motivations that accrue out of a desire to ensure influence, power, and effectiveness, and that influence the dialogue between the courts, have to be considered within a comparative analysis of the application of harmonized law. This political dimension has to be considered when analyzing the national judicial reception of EU harmonized law, which goes beyond considering certain terminology or concepts within the "context of its structure and its functioning."[134]

II. The National Legal and Non-legal Context

While national courts are part of a post-national judicial community, they are also embedded in their national legal and non-legal economic, cultural, linguistic and political contexts. These contexts influence the courts' dialogue with the CJEU,[135] and they affect the courts' application of EU harmonized law at the national level. National legal concepts and the cultural background thus remain important even if national courts will often be encouraged

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[128] ALTER, *supra* note 127, at 100-105; ALTER, *supra* note 122, at 122.

[129] BUNDESVERFASSUNGSGERICHT [BVERFG] [FEDERAL CONSTITUTIONAL COURT] January 14, 2014, ECLI:DE:BVerfG:2014:rs20140114.2bvr272813, BVerfGE 134, 366. *See, e.g., Special Issue: The OMT Decision of the German Federal Constitutional Court*, 15 GERMAN. L. J. (2014).

[130] Peter Lindseth, *Barking vs. Biting: Understanding the German Constitutional Court's OMT Reference…And Its Implications for EU Reform*, (Eutopialaw, 03 June 2016), *available at* http://eutopialaw.com/2014/02/10/barking-vs-biting-understanding-the-german-constitutional-courts-omt-reference-and-its-implications-for-eu-reform.

[131] ALTER, *supra* note 127, at 98-99.

[132] WEILER, *supra* note 127, at 32-33.

[133] ARNULL, *supra* note 109, at 100.

[134] Weiss, *supra* note 114, at 174.

[135] Kilpatrick, *supra* note 105.

to adopt the CJEU reasoning rather than the national methods, particularly when directives are implemented rather literally.[136] A method to compare harmonized law needs to recognize the national courts' application of harmonized law within the national sphere. While national laws implementing the directives have the same EU origin and often use similar terminology and wording, and while the CJEU retains responsibility to interpret EU law, it is national courts that primarily apply harmonized law. The national courts' legal approaches and reasoning determine the substantive meaning of the legislation at the national level and can either support or undermine a successful harmonization process. It is also within the application of the law on the national level where national legal, historic, cultural or political factors are particularly influential.

While the dialogue itself is important, special attention has to be drawn to the national factors that influence the dialogue and the reception of the CJEU's interpretation of EU law. This dialogue includes an exchange of messages as well as many "symbolic implications … hidden between the lines of national references and the CJEU decisions."[137] National courts are more likely to integrate the CJEU's approach if its reasoning is persuasive and does not contradict national legal concepts and paradigms.[138] Due to the different socio-political and legal contexts of the Member States, there are variations in the effectiveness of EU law, as national courts choose different approaches when they adopt EU law, even though EU law, including CJEU case law, aims at ensuring a certain degree of harmonization.[139] Yet, the CJEU's persuasiveness is insufficient for the effective implementation and application of EU law at the national level. National courts are likely to hold on to their national approaches, whether focusing on doctrinal and positive law or taking for themselves a more persuasive approach.[140]

Supranational aims are important at the national level. But the effectiveness of the CJEU's case law also depends on the national (legal) background.[141] National courts are less likely to integrate European concepts that are foreign into the national legal system. This can create problems for an effective harmonization process. For example, the EU may be particularly active in non-discrimination law because it faces little competition with national concepts in national legal traditions.[142] The lack of similar legal institutions applying to

[136] Smits, *supra* note 7, at 244.

[137] SCIARRA, *supra* note 27, at 2.

[138] Kilpatrick, *supra* note 105, at 47, 54; SCIARRA, *supra* note 27, at 2-3; Pollicino, *supra* note 125.

[139] Art 288 TFEU; CRAIG & DE BÚRCA, *supra* note 47, at 106.

[140] Hannes Rösler, *Auslegungsgrundsätze des Europäischen Verbraucherprivatrecht in Theorie und Praxis*, 71 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABELSZ] 495, 504-5 (2007); Zimmermann, *supra* note 123.

[141] SCIARRA, *supra* note 27, at 27.

[142] Text surrounding *supra* note 58.

national social or labor law may also hinder the adoption of the approaches developed by the CJEU, as they may be perceived as unnecessary, unconstitutional or poorly reasoned. For example, national legal systems with strong labor law protection often address issues related to equality by other protective measures or address them collectively without creating individual rights.[143] The CJEU is in a dilemma. On the one hand, once asked by a national court to provide a certain interpretation,[144] the CJEU needs to go beyond the classical teleological approach in order to ensure Union law is effective within the Member States.[145] The Court must consider the meaning and development of the legal rules within the different Member States in order to develop persuasive interpretations.[146] This includes cultural developments in Member States and approaches taken by national (constitutional) courts.[147] The structure of and influences on Union legislation combined with the cooperation between national courts and the CJEU[148] may make it difficult for the Court to be less bold and still fulfill its task to provide a dynamic interpretation of EU law and foster harmonization.[149] On the other hand, the Court is criticized for going beyond a teleological interpretation of Union law in a supposed pursuit of legal activism.[150] Progressive interpretations that enhance the rights of citizens but limit the "Member States prerogatives"[151] can lead to the rejection of the ruling at the national level. Whether the CJEU's reasoning is considered persuasive in a particular case still depends on the national context. To ensure a unified application and interpretation of Union law in all Member States, the CJEU needs to find a compromise that takes into account the different national legal systems and social developments in the Member States, as well as the aims of the Union legislation. These compromises will be imperfect, as it is extremely difficult to develop

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[143] KAREN J ALTER, *Explaining Variation in the Use of European Litigation Strategies*, *in* THE EUROPEAN COURT'S POLITICAL POWER, *supra* note 122, at 159, 174 (2009).

[144] ARNULL, *supra* note 109, at 98.

[145] Pollicino, *supra* note 125, at 283, 284-90.

[146] Albors Llorens, *supra* note 123, at 373-9; Alexy & Dreier, *supra* note 123, at 73, 87.

[147] Amtenbrink, *supra* note 108, at 35-63; DE CRUZ, *supra* note 81, at 171-2; Albors Llorens, *supra* note 123, at 373, 380.

[148] Zimmermann, *supra* note 123, at 315, 321; Mauro Cappelletti, *Is the European Court of Justice "Running Wild"?,* 12 EUR. L. REV. 3-17 (1987); Albors Llorens, *supra* note 123, at 373-98; Walter Mattli & Anne-Marie Slaughter, *Law and Politics in the European Union*, 49 INT'L ORG. 183-190 (1995).

[149] Jürgen Basedow, *The Judge's role in European Integration*, *in* THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES 65-79 (Hans-Wolfgang Micklitz & Bruno de Witte eds., 2012).

[150] Hjalte Rasmussen, *Between Self-restraint and Activism: A Judicial Policy for the European Court*, 13 EUR. L. REV. 28-38 (1988); Trevor C. Hartley, *The European Court, Judicial Objectivity and the Constitution of the European Union*, 112 LAW QUARTERLY REV. 95-109 (1996); Anthony Arnull, *Judicial Activism and the Court of Justice: How Should Academics Respond?*, *in* JUDICIAL ACTIVISM AT THE EUROPEAN COURT OF JUSTICE 211 (Mark Dawson *et al.* eds., 2013).

[151] Dagmar Schiek, *Fundamental Rights Jurisprudence between Member States' Prerogatives and Citizens' Autonomy*, *in* THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES 219-43 (Hans-Wolfgang Micklitz & Bruno de Witte eds., 2012).

an approach that will be accepted by all national systems. The CJEU's success regarding the effectiveness of EU law thus varies widely between domestic jurisdictions. Functionalism has, of course, not been blind to cultural influences: Rabel emphasized the need to encompass countries' histories, cultures and religions,[152] to name a few. But the subsequent request to be "realistic"[153] and to strip the solutions from their "conceptual context" and "national doctrinal overtones so they may be seen purely in the light of their functions"[154] begs the question of how important context really is within the functionalist analysis. Thus, functionalism's focus is often on legal concepts that are detached from the wider context of law and subjected to "cognitive control."[155] Overall, the focus on similarities, which is expressed in functionalists' *praesumptio similitudinis* and assumes that legal systems often produce very similar results even if by different means, [156] seems ill-suited to uncover these different national influences that affect the application of EU harmonized law.

III. Methodological Responses to the Complexity

Structuralism, usually associated with Sacco and the "Trento Manifesto,"[157] takes into account various elements that influence legal rules and the interpretations given by national judges in its comparative approach. Borrowing from linguistics,[158] Sacco called these influences *legal formants*. They include visible influences, such as academic writing and the legislator's intent, and less-visible crypto-types (i.e., non-verbalized factors[159]), such as political or philosophical views and legal paradigms. *Legal formants* are thus the elements at work, and the "relationship between these elements […] makes the structure of the system."[160] This approach seems to be useful for a focus on the judicial reception of national rules because it emphasizes the difference between doctrine and operative rules,[161] on the one hand, and analysis of the "elements at work," on the other hand. It also seems to

[152] ERNST RABEL, AUFGABE UND NOTWENDIGKEIT DER RECHTSVERGLEICHUNG 3 (1925).

[153] ZWEIGERT & KÖTZ, *supra* note 14, at 36.

[154] ID. at 37.

[155] FRANKENBERG, *supra* note 23, at 53-54.

[156] ZWEIGERT & KÖTZ, *supra* note 14, at 34

[157] Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Instalment I of II), 3*9 AM. J. COMP. L. 1, 30 (1991); Elisabetta Grande, *Development of Comparative Law in Italy*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 107, 118 (Mathias Reimann & Reinhard Zimmermann eds., 2008).

[158] Ugo Mattei, *The Comparative Jurisprudence of Schlesinger and Sacco*, *in* RETHINKING THE MASTERS OF COMPARATIVE LAW 236, 251 (Annelise Riles ed., 2001).

[159] Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Instalment II of II)*, 39 AM. J. COMP. L.343, 385 (1991).

[160] Mattei, *supra* note 158.

[161] Sacco, *supra* note 157, at 30; Mauro Bussani & Ugo Mattei, *The Common Core Approach to European Private Law*, *available at* www.jus.unitn.it/cardozo/common.core/insearch.html; Hyland, *supra* note 54, at 193.

recognize exactly how jurists deal with "specific rules and general categories."[162] It can expose the creative power of judges to interpret, apply or circumvent legislation[163] and illuminate the limits of legislation in general and the harmonization process in particular. The approach emphasizes that the persuasiveness is not only relevant regarding the CJEU's interpretation of EU law but also regarding the law itself, which needs to be experienced as a "great social breakthrough."[164]

Structuralism draws from linguistics, history, politics, culture, sociology and economic differences in order to reveal how "*legal formants*" are in constant competition with each other. These influences, which may be independent from social needs, are not always obvious, and they usually survive substantive law reforms. They are intrinsic to the legal system.[165] By including such explicit and implicit influences, structuralism provides reasons *why* national legal regimes function differently even though their wording is similar or when, in the case of EU law, they originate from the same set of rules. Its focus on diverse influences on the law is very useful because it challenges the monolithic understanding of law as a unitary structure, without inconsistencies and long-lasting diversions.[166] Still, structuralism poses some challenges. It aims at uncovering those influences, their interdependence, and their different weights. Within the intra-European context, where legal systems are relatively similar at least relative to non-European systems,[167] this means that formants that are specific to each system can be more easily revealed than those that Member States have in common. Once identified, the question is how to analyze, weight, or interpret the formants and connect them in a meaningful way. It has been suggested, for example, that it is extremely difficult to establish a "retraceable relationship" between them.[168] Moreover, diversity is not assumed for all aspects of the law. Sacco suggests that conceptual or descriptive differences between legal systems do not necessarily extend to "operational rules."[169] The questions for comparatists remain: How can these differences and similarities be explained, and are there areas of law that are apolitical? Finally, structuralists assume it is possible to objectively assess foreign legal orders without being biased by their own cultural background. Similar to functionalism, they stress the scientific

[162] Sacco, *supra* note 157, at 25.

[163] Sacco, *supra* note 159, at 344-345.

[164] *Id*. at 345.

[165] Sacco, *supra* note 159, at 385; Hyland, *supra* note 54), at 194-5; Bussani & Mattei, *supra* note 161.

[166] Graziadei, *supra* note 52, at 115-116.

[167] Cotterrell, *supra* note 13, at 144-154; Mathias M Siems, *Variations of Legal Systems*, 12 J. INST'L ECON. 579-602 (2016).

[168] FRANKENBERG, *supra* note 23, at 64.

[169] Rodolfo Sacco, *Diversity and Uniformity*, 49 AM. J. COMP. L. 171, 188 (2001).

nature of the method and its objectivity.[170] This assumption has been challenged by post-modernist or critical comparatists. If structuralism includes unspoken legal rules in its comparative analysis, critical comparison emphasizes the existence of unconscious rules.[171] The post-modernist approach emphasizes the different socio-historic and socio-cultural influences and analysis of the legal system as a whole in order to uncover "epistemological assumptions" and deep differences between the legal systems.[172] It challenges comparative studies to identify "cognitive limitations,"[173] to turn "the gaze of comparison back on itself,"[174] and to abandon familiar legal terms. As such, it aims to challenge both the idea of a politically neutral normative structure of the law and the rational application of doctrines and provisions by judges.[175] It asks us to recognize power structures and consider sociological theories, self-reflection, and critical evaluations to appreciate law as a part of, not separate from, social reality and the national legal *mentalité*.[176] It challenges us to question the way we construct reality to subject it to "cognitive control,"[177] and it suggests that cultural immersion is necessary for a comparison.[178] Eventually, what is needed is "reflexivity"[179] or "reflexive comparison."[180] These insights are not all completely new. Comparatists have long emphasized the relevance of geography, history, religion, language and other aspects of culture and social reality.[181] Yet, a comparison of the judicial reception of European harmonized law needs to engage with differences, rather than reduce or diminish their relevance, if it wants to understand some of the reasons for the perceived diversity. The focus on legal and non-legal cultural contexts advocated by critical comparatists can help alter this mind-set.[182] The emphasis on unspoken and unconscious rules,[183] which encourages reflective comparison, can help detect differences within the

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[170] Mattei & Di Robilant, *supra* note 26, at 49-50; Somma, *supra* note 116, at 8.

[171] BERNHARD GROSSFELD, THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW 9 (Tony Weir trans., 1990).

[172] Pierre Legrand, *How to Compare Now*, 16 LEGAL STUD. 232, 235-6 (1996).

[173] *Id.* at 239; Legrand, *supra* note 6, at 114.

[174] Brenda Cossman, *Turning the Gaze Back on Itself*, 41 UTAH L. REV. 525, 536, 538 (1997); GROSSFELD, *supra* note 171.

[175] Frankenberg, *supra* note 24, at 445-7.

[176] Legrand, *supra* note 172, at 238; Legrand, *supra* note 54, at 707.

[177] FRANKENBERG, *supra* note 23, at 54.

[178] Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U. S. Comparative Law*, 46 AM. J. COMP. L. 43-92 (1998).

[179] Nelken, *supra* note 30.

[180] FRANKENBERG, *supra* note 23, at 229.

[181] ERNST RABEL, AUFGABE UND NOTWENDIGKEIT DER RECHTSVERGLEICHUNG 3 (1925).

[182] Schiek, *supra* note 22, at 208.

[183] GROSSFELD, *supra* note 171.

legal system and encourages culturally-sensitive comparison, thus avoiding the urge to favor unification over differences.

Of course, culture is a broad term. If it describes the "whole way of life"[184] and "occupies a middle ground between what is common to all human beings . . . and what is unique to each individual"[185] it covers a wider range of diverse features. It is doubtful whether culture can be understood as homogeneous and static, something you can immerse into, rather than diverse and dynamic.[186] The heterogenic nature of modern culture is prevalent within every, not just multi-cultural, societies and combines contradictory features that are difficult to comprehend.[187] Moreover, culture changes and develops just like law and legal culture have changed and developed overtime.[188] Studies in legal culture can also cover a wide range of issue including the role of law in culture and law as culture. It looks at how people engage with the law and use it for their own benefit,[189] cultural legal consciousness,[190] as well as the legal system's culture including issues of how law is approached, communicated, and techniques of interpretation.[191] What I am interested in is the "social unconscious"[192] which influences the rapprochement and interpretation of law and written rules. This related to the "collective mental programmes, that is, *Weltanschauungen*, that have formed not on account of the fact that we live on this planet or because of our uniqueness, but as a function of the community to which we belong".[193] This should include linguistic, "cultural, historical,

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[184] Raymond Williams, *Culture is Ordinary [1958]*, *in* THE EVERYDAY LIFE READER 91-100 (Ben Highmore ed., 2002). *See* TERRY EAGLETON, CULTURE 95 (2016) ("Culture can be a model of how to live, a form of self-fashioning or self-realization, the fruit of a coterie or the life-form of a whole people, a critique of the present or an image of the future.").

[185] Pierre Legrand, *European Legal Systems Are Not Converging,* 45 INT'L & COMP. L.Q. 52, 56 (1996).

[186] Graziadei, *supra* note 52, at 115; Franz von Benda-Beckmann & Keebet von Benda-Beckmann, *Why Not Legal Culture*, 5 J. COMP. L. 104–117 (2010); Cotterrell, *supra* note 13; Annelise Riles, *Comparative Law and Socio-legal Studies*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW (Reimann and Zimmermann eds., 2006) 776-804.

[187] H Partick Glenn, *Legal Cultures and Legal Traditions*, *in* EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW 7, 15-16 (Mark Van Hoecke ed., 2004).

[188] Michele Graziadei, *Comparative Law, Legal History and the Holistic Approach to Legal Culture* 7 ZEUP 531-543 (1999).

[189] Erhard Blankenburg, *Civil Litigation rates as Indicators for Legal Culture*, *in* COMPARING LEGAL CULTURES 41-68 (David Nelken ed., 1997).

[190] For example the study how of "legal hegemony, particularly how the law sustains its institutional power despite a persistent gap between the law on the books and the law in action." Susan Silbey, *After Legal Consciousness*, 1 ANN. REV. L. & SOC. SCI. 323, 323 (2005).

[191] David Nelken, *Using Legal Culture: Purposes and Problems* 5 J. COMP. L. 5 (2010).

[192] EAGLETON, *supra* note 184, at viii.

[193] Legrand, *supra* note 185, at 56.

social or economic discourse[s]".[194] These discourses can be contradictory and multilayered within different culture and ensure that the legal traditions differ inter se, even if they possibly not as "irreducible" than the differences between the common and civil law *mentalité*.[195] The following discussion will consider how some of these cultural insights can be integrated in a comparison of the judicial reception of EU harmonized law, with a focus on the area of non-discrimination within employment and equality law.

D. How Should the Judicial Reception of Harmonized Law be Compared?

Critical or post-modernist,[196] comparatists like Frankenberg[197] have emphasized the need to be culturally aware, provide room for multi-layered legal and non-legal influences on the law, and consider the individual biases of the comparatists and the framework in which the comparison takes place. The following will discuss how these insights may be included in a comparison of the judicial reception of harmonized law, with a focus on the area of non-discrimination within employment and equality law. The method proposed here tries to achieve a sound analysis by taking a three-step approach. The first step determines the theoretical and normative framework of the comparative field and identifies the boundaries of the case law analysis. Philosophical and normative considerations are included here. The second step assesses some aspects of the legal, historical and cultural background of the countries under comparison, focusing on those that are relevant to the development and application of the harmonized law at the national level and the European influences upon it. The last step is the case law analysis *itself*, potentially including decisions of quasi-judicial bodies where such is warranted by the judicial and enforcement architecture of the respective legal systems. This analysis of domestic case law incorporates the different influences identified in the earlier steps and the relevant case law of the CJEU in order to provide a comprehensive picture of the application of the harmonized law within the national context. This multi-layered three-step approach makes it possible to draw sound conclusions that recognize normative and political considerations, the national courts' relationship with the CJEU and national influences on case law. These three steps will now be discussed in more detail.

[194] *Id*. at 59

[195] *Id*. At 63.

[196] Nelken, *supra* note 16, at 4.

[197] FRANKENBERG, *supra* note 23.

I. The First Step: The Normative Framework

The first step defines the theoretical and normative framework in which the comparison takes place. Thus, it does not undertake a comparison but defines the focus and the framework for the comparison. As such, it is not neutral but can provide some critical foundation. For example, comparing national approaches toward pregnancy discrimination would require theorizing pregnancy discrimination (as direct or indirect); the concept of formal equality and broader, more-substantive approaches;[198] and sex and gender discrimination and the critical assessment of it within feminist and queer theory. But equality law could also be analyzed, for example, from an economic perspective, which would require a choice of normative standard, such as social welfare, reduction of economic inequality, or redistributive efficiency. Other areas of harmonized law may invite the consideration of other theoretical and normative aspects. Thus, consumer protection law may require the consideration of consumer theory, behavioral economics, or psychology. Specific areas of commercial law and regulation, such as procurement law, may require the consideration of other types of economic theories, such as trade theory or macroeconomic interventions. The choice of theoretical framework ultimately depends on the research focus of the comparison.

The purpose of providing a theoretical framework is twofold. Firstly, it creates an external common comparative denominator (*tertium comparationis*) for the comparison and thus provides an alternative for the functional approach. The great contribution of functionalism is that it challenged comparative law to go beyond black-letter comparison of similar rules that used the same terminology and classification.[199] The focus on rules with the same function is supposed to ensure that one does not miss legal or non-legal mechanisms that are alternative relevant for the comparison simply because they look different. However, as discussed above, this indicated starting point is problematic because of its *a priori* assumptions about law and its functions.[200] Nevertheless, a *tertium comparationis* seems nevertheless necessary as it determines the scope and focus of the comparison. Thus, the legal comparison can be reduced to certain aspects, depending on the comparatist's interest and research question.

A detailed engagement with the theoretical framework makes it also possible to identify trends within the courts' case law. For example, the CJEU has recognized the link between pregnancy and sex discrimination, because only women can become pregnant.[201] This

[198] *See, e.g.,* Hugh Collins, *Discrimination, Equality and Social Inclusion*, 66 MOD. L. REV. 16-43 (2003); Hugh Collins, *Social Inclusion: A Better Approach to Equality Issues?*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 897-18 (2005); SANDRA FREDMAN, DISCRIMINATION LAW 25-33 (2nd ed. 2011).

[199] Graziadei, *supra* note 52, at 104.

[200] *See supra* heading B.

[201] Case C-177/88, Dekker v Stichting Vormingscentrum voor Jong Volwassenen EU:C:1990:383, 1990 E.C.R. I-3941.

demonstrates that EU non-discrimination law is capable of supporting substantive sex equality because it imposes a duty to treat women and men equally or to ensure equal opportunities despite biological differences. But the Court has not been consistent in its approach and has not extended the same logic to pregnancy-related illnesses after childbirth.[202] The focus on special protection for pregnant women thus remains, and it limits the potential substantive value of the law. Pregnancy discrimination can then be conceptualized within the broader issue of gender equality, as it helps theorize the causes of pregnancy discrimination and can be reflected in the national courts' adoption of the CJEU's approach or alternative approaches. After all, women do not just suffer pregnancy discrimination because they may be temporarily absent from or unable to perform certain work during pregnancy, they also suffer discrimination because of their presumed gender role once they are mothers. Theorizing the legal area of comparison (here, pregnancy discrimination) and placing EU law (here, EU sex discrimination law) within that context can provide a critical framework for and limit the scope of further comparison.

Furthermore, the theoretical considerations can possibly be adopted (or rejected) by the courts. It can thus inform the courts' judgments and analysis of the national courts and/or the outcomes of the cases, as it would provide a theoretical underpinning of the harmonized law and the likely substantive aims of the directives. National courts would be able to refer to the theoretical concepts to underpin their understanding of the legislation and its scope even if traditionally a different concept or approach towards equality has been dominant within the national legal context.

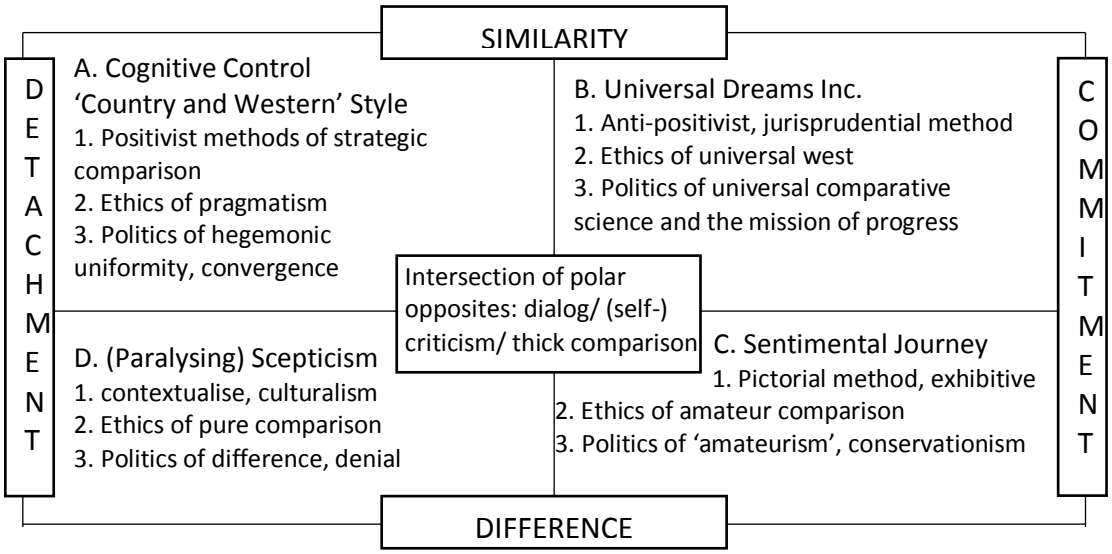
This is also connected to the second reason why the establishment of a theoretical and normative framework is necessary. Critical comparatists have challenged the assumption of neutral or objective comparison; this move places the comparatist at the center of criticism. For example, Frankenberg identifies four different dimensions of comparative law with distinctive ethics, politics, and methods placed on a larger grid. The grid's horizontal axis marks the polar extremes of *detachment* and *commitment*; the vertical axis marks the polar extremes *similarity* and *differences*. Functionalism, for example, falls within the dimension that favors "cognitive control and focuses on Country and Western Styles," which include ideas of detachment and similarity.[203] Functionalism assumes a priori the similarity of social conflicts, legal solutions and the role of law within society. It often engages in positivist methods of comparison that separate the comparatist from the comparison, exercise cognitive control by preventing self-reflection, create global typologies, and absorb limited data. Its western focus favors assimilation and marginalizes the other.[204] Other dimensions he identifies are the following: Universalist approaches, which combine ideas of similarity and commitment; approaches which combine ideas of commitment and difference by

[202] Case C-191/03, McKenna EU:C:2005:513, 2005 E.C.R. I-7631.

[203] FRANKENBERG, *supra* note 23, at 84-85.

[204] *ID*. at 79-96.

engaging into 'sentimental journeys' into the foreign; and skeptical approaches, which combine ideals of difference and detachment.[205] The comparison is thus not "politically agnostic,"[206] and the ethics and ideals of the comparatist color the comparison. Frankenberg then suggests that at the center square of the grid, where the vertical and horizontal axes meet, the usual pitfalls might be avoided by encouraging a dialogue among the different counter-pulls and (legal) ideals and remaining self-critical and self-aware.[207] This posture calls for reflexivity.[208]



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[205] *ID.* at 96-112.

[206] *ID.* at 90.

[207] *ID.* at 225-227.

[208] *ID.* at 229.

Determining the theoretical framework can help in this task. It recognizes that methodological choices are not neutral and it enables the comparatist to reflect on the ethical and political agenda behind the comparatist's own project, which is not necessarily limited to the four key dimensions mentioned above. European harmonization projects strive towards similarity and assimilation. Comparative studies within that field thus often fall within the Western-focused cognitive control dimension. Harmonization through directives separates the legal rules from the socio-economic context and suggests that it can be easily transplanted without recognition of the broader historic and cultural context of the different legal systems. But directives also aim to achieve certain substantive legal standards. These standards have to be the subject of the comparative dialogue. The discussion of a theory underpinning the law and the concepts used exposes the comparatist's own normative point of view, which is the starting point of the comparatist's analysis. For example, if one wants to compare non-discrimination law, it is important to reflect on and disclose how one theorizes group and individual disadvantages linked to the protected characteristics, and what constitutes and includes formal and substantive equality.

II. The Second Step: The National Context

The second step engages with the national context and aims to identify national legal and non-legal cultural factors that potentially influence the judicial reception of EU harmonized law on a national level. It ends with the hypotheses that can be tested in the third step. Structuralism has taught us that there is no black letter rule but that case law is always influenced by visible and crypto-typical "*legal formants*." Any comparative analysis requires an awareness of the different influences on the law and their importance. Structuralism takes a formal approach towards legal formants referring to linguistics to underline the scientific value of structuralism as an empirical method.[209] It does not clearly explain how these *formants* can be identified and structured objectively.[210] References made by critical comparatists to the need for "cultural immersion"[211] and recognition of "legal *mentalité*"[212] emphasize the need to consider the cultural context within which the application of the law takes place. There is thus a need for contextual sensitivity, to go beyond the "surface of law

[209] Somma, *supra* note 116, at 7-8; Mattei & Di Robilant, *supra* note 26, at 50.

[210] There has been similar criticism referring to the Trento project on the Common Core of European Private Law. *See* Nik J. De Boer, *The Theoretical Foundations of the Common Core of European Private Law Project*, 17 EUR. REV. PRIV. L. 841-51 (2009); Frankenberg, *supra* note 14, at 120, 137-41.

[211] Grosswald Curran, *supra* note 178.

[212] Legrand, *supra* note 176.

and court rulings."[213] This is relevant, even if one rejects the idea that national (legal) culture is homogeneous as such and believes instead in cross-cultural influences and developments. But deep engagement with the national cultural context yields a number of difficulties. First, it is unclear what the scope of the cultural investigation should be, conceding that it is probably only possible to be truly "immersed" in a limited number of foreign cultures, if that is possible at all.[214] Second, it is unclear how the sheer endlessness of information should be addressed. Overload can make information meaningless, and a feasible method certainly needs to allow for some limitations. Accordingly, I propose a flexible approach to allow space for dialogue between different cultural narratives and layers influencing the national application of harmonized law.[215] The engagement with the cultures in question should this not be general but only focus on specific features which seem relevant in relation to the harmonized law. Obviously, this will add a certain degree of subjectivity to the comparisons. Still, explicitly highlighting and explaining the choices made can increase the transparency of the comparison and further define its scope and what aspects to consider.

To uncover the relevant cultural, historic and legal differences, it makes sense to engage with a number of parallel narratives on the harmonized law that emerge on a national level. One needs to go beyond the purely legal debate. Historic evidence can expose the number of narratives. The harmonized law in question may have been rejected or favored by the Member State's government, academics or the wider public for specific legal or cultural reasons. The adoption and implementation process of the harmonized law on a national level and the public discourse around it can reveal much about national political and cultural self-understanding and the role of certain legal concepts within that discourse.[216] These diverse perceptions and perspectives should become obvious if one engages with the historic development and commentary on the harmonized law and the implementation process. Evidence for that can be found in newspaper articles, parliamentary debates, and academic commentary, all of which should expose problems and obstacles regarding the legislation in question and shed light on how the harmonized law is conceptualized in the broader national debate.

Once commentary related to the legislation in question is considered, the comparatist should feel invited to go beyond the legal focus and consider the substantive protection aimed at by the harmonized law from a non-legal angle. It could, for example, be relevant to investigate how the wider social movement interprets and supports the aims set out in

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[213] FRANKENBERG, *supra* note 23, at 227.

[214] *See* Günter Frankenberg, *Stranger than Paradise*, 41 UTAH L. REV. 259, 266 (1997); Günter Frankenberg, *Comparative Constitutional Law*, *in* CAMBRIDGE COMPANION TO COMPARATIVE LAW 171, 177 (Mauro Bussani & Ugo Mattei eds., 2012).

[215] Günter Frankenberg, *Constructing Legal Traditions: Introductory Remarks on the Public/Private-distinction as Traditions*, 2 COMP. L. REV. 1-12 (2011); Somma, *supra* note 116, at 36; Mattei & Di Robilant, *supra* note 76, at 48.

[216] Anna van der Vleuten, *Princers and Prestige*, 3 COMP. EUR. POL. 464-488 (2005).

the directives. For that, the substantive standards set by the directive and the theoretical underpinning of the legislation becomes relevant. For example, regarding the sex-equality directives, it is relevant to stress how the feminist movement has engaged with the issue, how much support such legislation enjoyed within groups of different stakeholders and how influential they have been. It matters whether the national feminist movement predominantly considers non-discrimination law as ensuring and protecting women's economic independence or as imposing the male standard on women.[217] Perhaps law has not featured highly in the movement's consciousness at all. Other non-legal solutions, such as collective agreements diverse forms of (legal) protection and special social support, rank highly in the Scandinavian socio-economic and legal system.[218] For this reason employment standards are not always ensured by legislation, and the national discourse regarding the need and the possibility to ensure a certain substantive level of protection may not be a predominantly legal debate. Similarly, it matters whether the social movement acts within the existing legal frameworks and tries to achieve wider access to the available protection or whether there is a dominant interest to challenge the legal institutions. These priorities within the movement can inform us about the status and recognition of the substantive aim the directives try to achieve within the national context. For example, there is a difference in priorities if the LGBT movement predominantly tries to gain access to the institution of marriage to enjoy the special and often constitutional protection afforded the traditional heteronormative family or whether there is a focus on challenging the existence of the institution itself.[219]

Engaging with these different debates can tell us what other legal or non-legal mechanisms that may also tackle the same subject matter rank high in the national consciousness. All of this historical evidence can further expose how a broad number of stakeholders interested in the standards and protection aimed at by the harmonized law view the law itself and the usefulness of law in general or that law in particular for the wider purpose. These narratives can then allow us to draw more-general conclusions about the national identity and consciousness in relation to the legal area in question. They are relevant even if these social movements and stakeholders have indirect or only limited influence on the implementation

[217] Different feminist schools have viewed this differently. While liberal feminist often champion non-discrimination law as ensuring equal treatment of men and women, radical feminists like MacKinnon have criticised liberal approach towards non-discrimination law, because they allow the male standard to define the extent to which women are different, and only grant equal treatment to the extent that women are equal to men. She asks why women can only expect equal rights if they are like men? Alternatively, material feminists often emphasis the need to consider the lived practice as starting point of any critical analysis. Catherine MacKinnon, *Reflections on Sex Equality under Law*, 100 YALE L. J. 1287-1291 (1991); Joanne Conaghan, *Intersectionality and the Feminist Project in Law*, *in* INTERSECTIONALITY AND BEYOND: LAW, POWER AND THE POLITICS OF LOCATION 21-48 (Emily Grabham *et al.* eds., 2008).

[218] Jonas Malmberg, *The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions*, *in* STABILITY AND CHANGE IN NORDIC LABOUR LAW 189-213 (Peter Wahlgren ed., 2002).

[219] MULDER, *supra* note 21, chapter 3.

process or the application of EU harmonized law. In particular, engaging these overlapping and multi-layered narratives can help us understand our own position in relation to the other and may lessen the effect of cultural bias because it helps translate concepts and the role of law within society.[220] The second step should thus engage with the discursive character of law within the broader society. Referring to Derrida,[221] Legrand asks us to engage with the relationship between text and meaning. The use of similarly sounding terminology or concepts in different legal systems does not imply that they actually mean the same thing. Rather, they are incommensurable, because both are embedded within one's own cultural context.[222] For the current purposes, this means that the directives, once they reach the national sphere and are implemented, ultimately adopt a national coloring. While it may not be possible to overcome this cultural subjectivity, a focus on legal culture or *mentalité* is necessary to appreciate each legal system as unique and to uncover differences regarding the role of law, how people think about law and how this may differ from one's own conception of law in general and the harmonized law in particular.[223] But one has to be careful not to reach solutions too quickly. This is also significant because law implementing EU directives is not necessarily congruent with society.[224] *Mentalité* alone may not be sufficient to explain the national application, as different and possibly contradictory forces or formants affect the legal application and interpretation. This step should not be considered a concluding verdict on the different legal cultures but simply the development of a hypothesis regarding the factors influencing the national reception of the harmonized law in question. This hypothesis can then be tested in the third step.

Once a comparative study leaves the doctrinal legal arena and attempts to consider the "richness of law" by considering its cultural context and ramifications,[225] the challenge becomes how to limit the information to keep the analysis feasible. This work proposes a pragmatic approach that accepts that the comparative analysis always engages only a limited number of aspects anyway. It is thus a choice made by the comparatist that needs to be communicated in clear terms. For example, within the comparison of national approaches towards pregnancy discrimination one may want to include national cultural, legal and historical factors linked to the legal area, but exclude other areas such as economic

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[220] As advocated by Frankenberg. *See* Frankenberg, *supra* note 24, at 441.

[221] Legrand, *supra* note 54.

[222] Pierre Legrand, *Citing Foreign Law: How Derrida can help*, 21 DUKE J. COMP. & INT'L L. 595-629, 614-619 (2011).

[223] Legrand, *supra* note 54, at 707.

[224] The implementation of EU directives has often been viewed through the lens of a legal transplant analysis. This is sensible since directives may introduce new, foreign legal concepts into national law. These concepts can than irritate the legal system. Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 MOD. L. REV 11-32 (1998). But there are also clear differences between EU directives and classic legal transplants in the Watsonian sense. *See* WATSON, *supra* note 29. After all, Member States consent to the supranational law making and participate in it.

[225] FRANKENBERG, *supra* note 23, at 228.

factors. The CJEU has identified several purposes with regards to EU non-discrimination law, and it originally stressed its economic and social aims. The economic aim was "to avoid a situation where undertakings established in [Member] States which have […] implemented [non-discrimination law] suffer a disadvantage in the intra-union competition as compared with undertakings established in States which have not yet eliminated discrimination."[226] The field's economic aim would be to prevent the distortion of competition.[227] Contemporary case law views the economic aim as secondary and instead stresses the social rights and the right of equal treatment consonant with the human rights framework.[228] Nevertheless, one may be inclined to consider economic aims because it is difficult to conceptualize European integration without economic considerations.[229] On the national level, the main economic concern related to gender equality and non-discrimination law is that of cost. National legislators may want to reduce protection to ensure that the national market is competitive or has a competitive advantage. Beyond that, national non-discrimination law belongs to social and labor law. It is not implemented because of competiveness *per se*. Therefore, it should thus be possible to consider non-discrimination law without including considerations related to the European aim of economic competitiveness. This is not to suggest that the economic context may not be relevant but rather that limitations can be justified depending on the aims of the comparison. After all, there is value in accepting "responsibility for [the] strategic decisions [taken] rather than reflexively implementing a given methodological agenda."[230]

Beyond that it is helpful to consider the development of national legislation and the academic and public debate on the substantive issues the directives try to achieve and to uncover cultural, legal, or historic factors that influence the debate and possibly the application of the harmonized law. The following will demonstrate how the possibly different narratives can be picked apart and limited using the Dutch and German context in relation to EU non-discrimination law as examples. When sex discrimination law first appeared on the European political and legal agendas neither the Netherlands nor the Germany supported substantive gender equality legally or culturally. Both countries celebrated the breadwinner concept, which presumed the mother's and wife's place to be in the home. But, with the rise of the feminist movement, the question of sex equality was soon conceptualized in rather different terms. While the Dutch movement particularly emphasized the need for equal pay and equal treatment and referred to the Anglo-Saxon approach towards equality, the German movement framed the right to equality within the

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[226] Case 43/75, Defrenne v SABENA EU:C:1976:56, 1976 E.C.R. 455, at ¶ 9.

[227] ELLIS & WATSON, *supra* note 121, at 25.

[228] Case C-270/97, Sievers EU:C:2000:76, 2000 E.C.R. I-929, at ¶¶ 53-57; 149/77, Defrenne v Sabena EU:C:1978:130, 1978 E.C.R. 1365, at ¶¶ 26-27.

[229] PHIL SYRPIS, EU INTERVENTION IN DOMESTIC LABOUR LAW 10-75 (2007).

[230] Simone Glanert, *Method?*, *in* METHODS OF COMPARATIVE LAW 61, 81 (Pier Giuseppe Monateri ed., 2012).

national constitutional sphere and emphasized the need for special protection and equal recognition of "typical female work."[231] This indicates that different national paradigms and cultural understandings of equality influence the debate. Within these debates, repeated references to certain concepts of national identity and consciousness can be identified. Thus, repeated references to constitutional principles and values or the need for tolerance and equal protection despite different life choices can indicate common social and cultural values, which can then be further explored by considering the sociological and historic research on the subject. Once one notices the repeated reference to constitutional values within the German discourse on equality, one may want to consider the role of the constitution within society in more general terms. This will quickly direct the comparatist towards the concept of "constitutional patriotism" usually associated with Habermas,[232] which provides further indication of the German post-war society and identity. Similarly, once it is noted that tolerance and consensus traditionally ranked high in the Dutch political debate, one may start to look at the development of the political system and will quickly identify the political pillarization[233] and the development of the "polder model," as well as the consequent importance of tolerance within the national cultural identity.[234] These concepts can then be analyzed regarding their possible effect on equality law in general and the EU non-discrimination law in particular.

A second strand of inquiry may be the consideration of national and international legal paradigms on equality and non-discrimination that may compete with the European version imposed by the harmonized law and the wider national legal context. This includes

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[231] VAN DER VLEUTEN, *supra* note 57.

[232] Jürgen Habermas, *Citizenship and National Identity 1990*, *in* BETWEEN FACTS AND NORMS 491-515 (William Rehg trans., 1996).

[233] Pillarization (*verzuiling*) is the term used to describe the Dutch political system in beginning of the 20th century. Pillarization describes the cultural segregation of the state, traditionally divided into Catholic, Protestant, Socialist and Liberal pillar. The presumption is that these groups could mainly act freely within their group but needed to reach consensuses at the top-level. Those agreements reached by the elites were then assumed to permeate down to the lower levels of society, who generally accept the elites' compromises. Presumably, the separation of pillars then ensured a great deal of conformity within the groups but also institutionalised pluralism by ensuring unity despite diversity and accommodating different (religious) life-styles. Consequently, Dutch society could integrate diverse life-styles, homosexuality, and new progressive ideologies, despite Christian influences on politics. This understanding of Dutch society is important, because, although the Pillarization Theory has been challenged in recent years it influenced how (political) identity was perceived as self-evident and continues to influence national identity, social consciousness and political processes. MULDER, *supra* note 21; Niek vas Sas, *The Netherlands*, *in* 5 DUTCH CULTURE IN A EUROPEAN PERSPECTIVE 41 (D. Fokkema & F. Grijzenhout eds., 2004); Arend Lijphart, VERZUILING, PACIFICATIE EN KENTERING IN DE NEDERLANDSE POLITIEK 13 (3rd ed. 1979); Kees Schuyt, *Tolerance and Democracy*, *in* 5 DUTCH CULTURE IN A EUROPEAN PERSPECTIVE 113 (D. Fokkema & F. Grijzenhout eds., 2004); Jet Bussemaker, *Gender and the Separation of Spheres in Twentieth Century Dutch Society*, *in* GENDER, PARTICIPATION AND CITIZENSHIP IN THE NETHERLANDS 28-29 (Jet Bussemaker & Rian Voet eds., 1998); PETER VAN DAM, STAAT VAN VERZUILING (2011); Harm Kaal, *Appealing to the Female Vote*, 23 WOMEN'S HIST. REV. 1-33 (2014).

[234] Kees Schuyt, *Tolerance and Democracy*, *in* 5 DUTCH CULTURE IN A EUROPEAN PERSPECTIVE 113 (D. Fokkema & F. Grijzenhout eds., 2004).

constitutional protection, ILO conventions, and other legal concepts. Functionalism can be helpful in choosing the legal concepts for consideration. Thus, one may want to look at other national concepts that also protect equality and prohibit non-discrimination and can thus possibly have a similar function or aim as the harmonized law in question. Other laws that may have a different function but can be affected by the harmonized law are also relevant. For example, German labor law has long recognized a general equal treatment principle within employment law (*arbeitsrechtliche Gleichbehandlungsgrundsatz*), which in some situations achieves the same result as the EU directives but is conceptually rather different because, for example, it accepts economic justifications and does not apply to recruitment.[235] Similarly, Dutch courts have addressed some pay discrepancy via the concept of the "good employer and employee,"[236] which imposes duties of reasonableness, fair dealing, and good faith on employment relationships.[237] Similarly, the constitutional equality principle, along with its scope and effect on private relationships, needs to be considered as well as other dominant legal concepts. For example, the protection of marriage, family, and motherhood also provides some protection to women, particularly regarding maternity and pregnancy, although often in quite different ways than the equality directives.[238] The more general legal attitude towards EU supremacy and the effect of international agreements may be relevant too. For example, German dualism and Dutch monism (regarding the impact of international law, which also colors the application of EU law) can affect the application of EU harmonized law. Moreover, national (doctrinal) paradigms, such as the hierarchy of the law or the distinction between public and private law may also merit consideration.[239] But these concepts should not be considered separately from the cultural discourse. To appreciate the richness of law the concepts need to be linked to the broader social and cultural implications.[240] It is important to recognize what these laws can tell us about the cultural framework and what their social ramifications are. There is a need to go beyond the legal analysis when considering legal concepts.

A third strand of inquiry should be the legal academic discourse on the implemented law and the relevant directives, as this can reveal real obstacles for the application of the harmonized law at the national level as well as the legal consciousness or mentality of the compared countries. Here, legal consciousness does not refer to "legal hegemony …or… how

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[235] Dagmar Schiek, *Gleichberechtigungsrichtlinien der EU-Umsetzung im deutschen Arbeitsrecht*, 21 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 873, 878 (2004).

[236] Article 7:611 Dutch Civil Code.

[237] HOGE RAAD DER NEDERLANDEN [HR] [SUPREME COURT OF THE NETHERLANDS], April 08, 1994, ECLI:NL:HR:1994:ZC1322, JAR 1994, 94, at ¶¶ 3.4-3.5 (*Agfa*-decision).

[238] Article 6 German Constitution.

[239] Schiek *et al., supra* note 4, at 17-19.

[240] FRANKENBERG, *supra* note 23, at 228.

the law sustains its institutional power,"[241] which would be a more general analysis of the legal cultures. Instead, it refers to cultural factors (i.e., cultural identity, which is influenced by national history and common cultural values) that influence the legal reasoning and application of the harmonized law. For example, factors such as the cultural role of the German constitution or the Dutch "culture of tolerance"[242] can clearly affect the application of harmonized non-discrimination law, giving clues to the general mentality of the national (legal) system, cultural self-understanding, and, subsequently, the role of non-discrimination law within it. It can also determine the framework in which national debates on EU non-discrimination law are framed. Thus, unsurprisingly, both supporters and opponents of horizontal equality law in Germany consider themselves defenders of the constitution and its conceived values and concept of equality.[243]

A fourth strand of inquiry could be the *de facto* influence of the social movement and other stakeholders promoting equality in the political discourse and legal development. This includes, for example, the role of trade unions and other parts of civil society and groups of activists. For example, the Dutch feminist movement had significantly more influence on the political agenda than the German political movement because of being included in the political debate via consultations, procedures, and committees.[244] Such factors reveal common cultural values, the overall status of the legislation, and the influences on the implementation process.

Finally, the implemented law itself needs to be considered. In that regard, it is relevant how the law is implemented (e.g., via primary or secondary legislation) and whether it is in a separate statute or integrated in a wider piece of legislation or code. Discrepancies between directives and implemented national legislation as well as the extent to which the national legislator used its discretion in case of minimum harmonization directives need to be considered. This is not to overemphasize the focus on written law or invite a legocentric analysis. A detailed comparison of the implemented law would indeed be meaningless because it tells us little about the judicial application or the status or socio-economic context of the implemented law. Directives can be implemented but never applied or invoked.[245] But legislation cannot be ignored, as national courts, despite their creative power of interpretation and even if they have taken a more flexible approach in earlier decisions, may later return to a literal interpretation of the rules due to a new set of circumstances.[246] Legal definitions matter. For example, the Dutch General Equal Treatment Act (Algemene wet

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[241] Silbey, *supra* note 190.

[242] van der Vleuten, *supra* note 216, at 464-88.

[243] MULDER, *supra* note 21, chapter 4.

[244] *ID*.

[245] See text surrounding *supra* note 59.

[246] Sacco, *supra* note 157, at 23-24.

gelijke behandeling, AWGB) refers to "making a difference" (*onderscheid*) rather than discrimination because the Dutch legislator felt that the term "discrimination" implies a serious moral wrong that would limit the law's effectiveness and it has been argued that this terminology inflates its meaning,[247] taking it beyond the scope of discrimination.[248] On the other hand, one could also argue that the term "discrimination" as such only determines that one has made a distinction based on specific criteria and is thus not a moral wrong *per se*. Rather, only a distinction based on specific criteria, such as race and sex, is socially undesirable. Differences in terminology, definition of legal concepts, and the meaning attached to them may very much be relevant for effective implementation and successful judicial reception. The national legislation to consider is that which implements the directives, but it may also go beyond if the directives' influence goes beyond what had to be implemented. For example, the UK introduced equality law long before it faced EU obligations to do so; nevertheless, the Equality Act 2010 is influenced by the EU equality directives.[249] Similarly, the Dutch AWGB from 1994 already prohibited discrimination on grounds of civil status, sexual orientation and race and thus went beyond the EU scope of protection. Germany, which only implemented the General Equal Treatment Act in 2006 and after significant EU pressure, [250] also provides a broader scope of protection than the EU equality directives by providing protection from discrimination outside employment for all protected characteristics. Nevertheless, the legal development and the legal reasoning regarding the protection of all grounds is influenced by the EU law on sex discrimination even if there was no direct EU obligation.

The national debate regarding the legislation and equality should then be considered for their ethical and political dimensions. Thus, once the different dimensions of the national debate on non-discrimination law are considered, they can be structured by different ethical or political points of view. Frankenberg demonstrates this by considering different arguments concerned with the public use of Muslim veils, which he analyzes within the above-mentioned grid of detachment/commitment (horizontal axis) and

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[247] Kammerstukken II, 2001/2002, 28187, no 1-2; 2002/2003, 28770, nr A, 13; Janneke H. Gerards, *Implementation of the Article 13 Directives in Dutch Equal Treatment Legislation*, 13 MAASTRICHT J. 291, 301-303 (2006).

[248] Rikki Holtmaat, *Stop de inflatie van het discriminatiebegrip!*, 78 NEDERLANDS JURISTENBLAD [NJB] 1266-1276 (2003); Klaus Adomeit, *Diskriminierung - Inflation eines Begriffs*, 55 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1622 (2002).

[249] Bob Hepple, *Race and Law in Fortress Europe*, 67 MOD. L. REV. 1-15 (2004); VAN DER VLEUTEN, *supra* note 57.

[250] Allgemeines Gleichbehandlungsgesetz [AGG] [General Equal Treatment Act], legislative proposal, BT Drs [Papers of the German Parliament]16/1780 (08.06.2006); final bill (2006) BGBl [Federal Gazette] I Nr. 39, 1897, available at: http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/EN/publikationen/agg_in_englischer_Sprache.pdf?__blob=publicationFile; Susanne Hoentzsch, *Discrimination in Individual-Related Employment –A View from Europe and Germany to Canada, analyzing the Requirements and the Background of the European Anti-Discrimination Directives*, 7(10) GERMAN. L. J. 795-864 (2006); Joachim Wiemann, *Obligation to Contract and the German General Acton Equal Treatment (Allgemeines Gleichbehandlungsgesetz)*, 11(10) GERMAN L. J. 1131-1146 (2010).

similarity/difference (vertical axis).[251] Such an analysis can then expose different perspectives and disrupt the "stereotypical image" of Muslim veils, illuminate legal "implications of intervention," and consider how "veiled women are represented in the normative and comparative discourse."[252] An analysis focusing on the pubic use of Muslim veils can certainly deconstruct the Western bias and identity superiority.[253] As a heuristic device, however, the grid and the different forms and arguments that emerge regarding a given, socially contentious and controversial area with legal and cultural implications can also be used in the European context. This is certainly true considering racial and religious discrimination but also regarding other areas where there is not such a clear conflict between what one may call Western and non-Western ideologies and lifestyles. For example, discussion around sex and sexual equality can also be framed in terms of traditional versus modern lifestyles that need to be tolerated; the universal need to protect women from oppression, which can be defined in certain terms; the celebration of different (fe)male choices and traits, which need to be protected; or skepticism regarding the meaning of sex equality, choice and control of these. The second step of the analysis can identify the different arguments emerging within the national discourse on the area of harmonized law. This seems particularly fruitful for areas of harmonized law that are politically contentious and reach deep into the national cultural identity, such as equality and labor law.

Once these different relevant strands of inquiry are followed, the comparatist should be able to develop hypotheses regarding factors that influence the judicial reception of the harmonized law. These hypotheses can then be considered in the last step of the comparison, considering the extent to which these national debates and factors are reflected in judicial reasoning.

III. The Third Step: Case Law Analysis

The final step, focusing on case law (including courts and possibly quasi-judicial bodies' decisions), reveals how different factors influence legal decision-making and remain dominant despite pressure to adopt approaches that conform to European law. Case law analysis demonstrates how courts come to conclusions and the factors they deem relevant.[254] Focusing on the judicial reception of harmonized law, that is, on case law, is one way to consider the effectiveness of harmonized law. Of course, a focus on case law is not new. In fact, functionalism insists that one needs to go beyond the law-in-the-books and instead consider the law-in-action,[255] which then often means a focus on courts' decisions.

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[251] See text around *supra* note 203; FRANKENBERG, *supra* note 23, at 117-161.

[252] *ID.* at 161.

[253] *ID.* at 162.

[254] Legrand, *supra* note 15, at 60-64.

[255] Reinmann, *supra* note 2, at 675.

Critical scholars have suggested that comparative law should go beyond the focus on case structure and methods of legal interpretation employed by the courts.[256] But, within the area of harmonized law, it still makes sense to consider case law because it is one indicator of how EU directives, once implemented, function within the national legal context.

Critical insights may, however, be valuable for the evaluation of case law. In particular, the analysis should go beyond the comparison of the application of specific concepts or legal reasoning in particular situations. After all, given the CJEU's influences on the interpretation of harmonized law, it is not surprising that certain concepts are interpreted and applied in similar fashion. This is particularly true regarding issues where the CJEU has given a clear ruling. For example, it is clear that under EU law, women may keep secret their pregnancy during the job application process[257] because pregnancy discrimination constitutes sex discrimination.[258] National courts ignoring such clear statements of the CJEU would be hard pressed to justify such an open rebellion. However, that does not mean that national courts do not recolor the implemented law and put their national spin on it. To see these national and European influences at work, I propose taking a step back and considering broader court narratives that are not concerned with details of abstract legal concepts or categories.

Case law narratives can, for example, be structured by focusing on case-sagas that involve a number of preliminary rulings on the related legal issues. For example, German courts have repeatedly asked preliminary questions regarding the rights of part-time workers to equal treatment in respect of rules based on the standard full-time employee. This has included issues related to trade union activities that allowed the employee to be absent from work[259] and to what constitutes overtime for the purpose of overtime pay.[260] In addition to cases that have triggered preliminary references, courts on all levels have applied the EU law in question and potentially given effect to the CJEU's interpretation. A critical analysis could consider how the national courts engage with the CJEU via the preliminary rulings to shed light on the triangular relationship[261] as well as how the cultural context and factors identified in the previous step resonate in the courts' reasoning, application and interpretation of national law implementing EU harmonized law. Thus, the analysis would consider how the national courts attempt to reconcile the potentially conflicting national

[256] FRANKENBERG, *supra* note 23, at 228.

[257] Case C-109/00, Tele Danmark EU:C:2001:513, 2001 E.C.R. I-6993; C-438/99, Jiménez Melgar EU:C:2001:509, 2001 E.C.R. I-6915.

[258] Dekker, *supra* note 201.

[259] Kilpatrick, *supra* note 105.

[260] Case C-399/92, Stadt Lengerich and Others v Helmig and Others EU:C:1994:415, 1994 E.C.R. I-5727; C-300/06, Voß EU:C:2007:757, 2007 E.C.R. I-10573; C-285/02, Elsner-Lakeberg EU:C:2004:320, 2004 E.C.R. I-5861.

[261] *See supra* heading C.

and European influence on the judicial reception of EU harmonized law by reference to the courts' dialogue as well as national context.

But the case law does not need to be limited to disputes that involve preliminary references. The CJEU's consideration of pregnancy discrimination under the scope of sex discrimination can be explored within connected national narratives that are played out in court even if there was no direct preliminary reference from that Member State. Dutch courts and quasi-judicial bodies adopted the CJEU logic that pregnancy discrimination constitutes sex discrimination because only women can become pregnant. They then extended the same logic to areas that had not been conclusively decided by the CJEU yet, such as the treatment of women who suffer pregnancy-related illnesses after childbirth. They again modified their approach after the CJEU decision in *McKenna*, where the CJEU deviated from such a logic.[262] The consideration of how these disputes play out over time and potentially invite the national courts to adopt different approaches at different times can reveal the power struggles of the competing influences on the national level as well as the courts' difficulties with the CJEU's interpretation—particularly in cases where it does not follow their expectations of logical or consistent development.

Other dominant case-sagas concerning the application of the national law implementing EU directives can also be considered, even if there is no CJEU judgment on the matter, as it can still reveal something of the status of these directives and how national factors discussed in the previous step resonate in the courts' case law. One example of this is the German case law on the so-called *AGG-Hopper*. This term has been used within German academia and the wider public to describe people who abuse the rights under the German General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, AGG) for financial purposes. A typical example would be a man who replies to a job advertisement for a female secretary even though he is neither qualified for the work nor has any intention of taking the position. As the narrative goes, these people only apply for the work so they can claim compensation once they are rejected, and national courts have repeatedly debunked such claims.[263] Within these cases, national influences on the judicial reception of the harmonized law can become particularly obvious, since there is little CJEU interference. The reasoning and justification for the specific interpretation within the cases should reflect some of the national concerns regarding the law and may further reveal how the previously discussed national factors, such as cultural background, and political or ethical stances, are adopted within the legal reasoning. The previous discussion of the national context in the second step makes it more likely that these factors are considered and identified once the case law is analyzed.

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[262] McKenna, *supra* note 202; Jule Mulder, *Pregnancy Discrimination in the National Courts: Is There a Common EU Framework?*, 31 INT'L COMP. LAB. L. 67-90 (2015).

[263] The Federal German Labor courts only sent a preliminary ruling regarding this interpretation of the equality directives in 2015: Case C-423/15, Kratzer EU:C:2016:604 (31 July 2015).

Overall, the choice of the national case law that should be considered depends on its relevance regarding the harmonized law that is compared. This obviously includes cases that directly apply the harmonized law. But it can go beyond that and consider cases addressing issues that could have been assessed under the scope of the law but instead were dealt with under the scope of related legal instruments. For example, it has been demonstrated that German courts are much more comfortable dealing with cases on religious freedom, while English courts address similar cases under the scope of religious discrimination.[264] This, inter alia, can demonstrate the dominance of the Constitution within the broader discourse around equality and discrimination. It suggests that national courts privilege constitutional values over harmonized law, even if the latter is not contrary to the constitutional principles. Such insights can only be gained once the comparatist broadens the scope of consideration and includes cases that do not directly refer to the law in question. The choice of cases, thus starting with the consideration of the case law on the harmonized law, can still benefit from the learning of functionalism, as it considers cases that may fulfill a similar function but by different means. But it should not be limited to that. After all, it is highly uncertain what functions the harmonized law itself fulfills. Rather, the choice of cases may be better determined by the theoretical and normative framework defined in the first step. Supporters of critical functionalism have suggested that the search for the functionalist equivalent should go beyond the legal and avoid legocentric analyses by considering a multitude of legal and non-legal mechanisms that may all serve a specific aim.[265] Functional equivalents to ensure sex equality could include non-discrimination law and rights to equal treatment, but it could also include related legal protections, such as the right to maternity leave, child care facilities and welfare law, as well as social and cultural programs that foster a more equal society. The methodological approach developed in this article does not aim to identify functional equivalents. Rather, I try to engage the mind-set of critical comparison to identify how the harmonized law is situated within the national context and how it functions under national as well as European influences upon its interpretation and application. The choice of case law to be compared should be determined by what it tells us about the position of harmonized law within the national context. This, of course, does not mean that there are other legal or non-legal mechanisms that may also support the aims stipulated or implied in the directives.

In this third stage, the aim is to identify and address the legal formants that affected the national application of the law as well as critically reveal how non-legal concepts, social reality, power dimensions, and general cultural self-understanding shape the law and how contradictory approaches make alternative conclusions possible. Both questions can only be addressed and answered by a deep understanding of the socio-cultural and socio-political

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[264] Tobias Lock, *Religious Freedom and Belief Discrimination in Germany and the United Kingdom: Towards a Common European Standard?*, 38 EUR. L. REV. 655-676 (2013).

[265] Kirsten Scheiwe, *Was ist ein funktionales Äquivalent in der Rechtsvergleichung?*, 83 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT [KRITV] 30, 33-34 (2000).

context of the legal systems (the second step) and their subsequent identification and modification within the case-law analysis. While most EU Member States' legal orders exist within similar paradigms and parameters or may even belong to the same "folk culture,"[266] the cultural differences that affect the legal consciousness must not be underestimated, despite possible convergence within some areas of Member States' law.[267] I propose identifying some of these national factors by engaging with national cultural and political discourses linked to the harmonized law and a deep engagement with national case law and courts' reasoning to identify whether these factors resonate within the courts' case law. It is a "bottom-up" approach, or an inductive method, that first engages with the national cultural context and then considers how this context influences the legal reasoning and legal application. The separate consideration of both should make it possible to identify implied cultural and political considerations that would not be obvious by the sole consideration of the national case law and implemented legislation. The analysis should go beyond the question of whether and how national courts actually *recognize* the CJEU preliminary rulings[268] by considering what other visible and invisible influences (including non-legal concepts within society) actually determine the judgments, behaviors and attitudes of the judges (toward the legal concepts and the CJEU interpretation) revealed within the case law.

E. Conclusion

There is an old and often repeated saying that one cannot compare apples and oranges,[269] which could be applied to the incommensurability of legal systems[270] and the need to compare like traditions with like. However, for a comparison to be fruitful, there also needs to be some difference between national legal systems.[271] Structuralism is certainly determined to reveal national *legal formants* by comparing different legal systems, but whether a comparison is meaningful depends on the research question. Just as it is possible to compare apples and oranges regarding, for example, their vitamin levels, color or taste, it is possible to compare very different as well as very similar legal systems[272] as long as there is a clear articulation of the aim of the comparison and what personal and extrinsic factors[273] affect it. Ultimately, there is no need to develop one universally applicable method to

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[266] Blankenburg, *supra* note 189.

[267] Mathias Siems, *The End of Comparative Law*, 2(2) J. COMP. L. 133, 145 (2007).

[268] Kilpatrick, *supra* note 105.

[269] *See* CHRISTINE AMMER, THE AMERICAN HERITAGE DICTIONARY OF IDIOMS (1997) (arguing that the metaphor originally referred to "apples and oysters," which much more clearly highlights the problem of dissimilarity).

[270] GLENN, *supra* note 19, at 45 (rejecting the incommensurability).

[271] Siems, *supra* note 267, at 145.

[272] Platsas, *supra* note 49, at 6-7.

[273] Örücü, *supra* note 49, at 571.

compare law. Instead, it is far more important to make strategic decisions regarding the comparison itself[274] and to consider the methodological implications of these decisions and the limitations of the comparatist's own ability to understand the foreign and appreciate the law within each broader cultural context.

The main submission of this article is that it is necessary to focus on domestic contextual influences in the comparison of harmonized law to understand why this law is applied differently by the courts of the Member States even though hybrid legislation has the same European origin and the national courts are required to respect the CJEU's competence in interpreting Union law. As demonstrated below, traditional comparative law methods are incapable of uncovering these differences because of their *a priori* assumptions regarding social problems. This creates an 'epistemic foundation' for the law, and it limits the ability to recognize the national legal and non-legal contexts that influence the judicial reception of EU harmonized law. The method proposed here is helpful not only in revealing the differences concerning the application of harmonized law but also in identifying some of the reasons for those differences. It is thus mainly explanatory. However, the culturally-informed mind-set may also highlight the possibility of a critical evaluation of harmonization processes that allows for diversity within the Member States and recognition of alternative mechanisms that can achieve similar aims but compete or contradict the directives' approach. Current discussion on legal standards within the Member States certainly falls short of such deep and diversity-sensitive comparison by mainly focusing on textual analysis alone.[275] Essentially, the proposed approach encourages a deep engagement with the national legal systems. Similarities between national orders as a result of the harmonization process and the national implementation of the directives can reveal deep, underlying differences between national legal systems that differently affect harmonized law once it reaches the national arena. Once national systems superficially converge because of the harmonization process, comparative studies can focus on these deeper differences underpinning the national legal systems, as there is less distraction because of similar or different legislative approaches.

The multi-layered culturally informed method proposes a cross-country comparison between the Member States by focusing on national influences on the courts' application and their engagement in the triangular relationship. It does so by proposing the consideration of overlapping but diverse cultural, political and legal narratives surrounding the harmonized law. Fundamentally, the method attempts to address three interconnected arguments. Firstly, that to evaluate the successes and limits of European legal transplants, they need to be considered at the (final) point of their interpretation and application within the national context. The comparison of national law implementing EU law (i.e., directives) is of special interest here because these laws create a bridge between the European and the

[274] Glanert, *supra* note 230.

[275] Schiek, *supra* note 22, at 218.

national context.[276] Legislation harmonizing the Member States' legal systems and their implementation process transforms EU law into national law and is, therefore, governed by national paradigms, doctrine and the wider national (legal) culture. At the same time, directives remain part of the European legal framework, and the CJEU is able to provide binding interpretations of the directives.[277] Moreover, directives addressing social issues such as equality, labor law standards or consumer protection often address traditionally separate areas of private and public law. They embody principles recognized by international and national constitutional law as well as primary EU law. The multi-layered influences on the national application are thus particularly obvious. These influences can, however, only transpire at the stage of application. Secondly, a meaningful comparison of the application of harmonized law requires the consideration of the legal and non-legal contexts that can influence the success or failure of the European transplant on a national level. Laws implementing directives, being national *and* European law ('legal hybrids'),[278] are specially situated within the national legal system and face multi-layered national influences and beyond. Meaningful comparison of harmonized law needs to capture these contextual influences on legal application. This goes beyond the considerations of different legal traditions (such as monism and dualism, or common and civil law), but it requires the consideration of social, cultural, historic, economic and political factors. A comparative law method should thus challenge us to go beyond the legal to allow political and cultural narratives to emerge. Thirdly, the comparison needs to be aware of feedback effects. Thus, while concepts are developed in one context, they can influence other contexts and then feedback to the original source of the concepts while simultaneously changing throughout the process. A comparative method to compare harmonized law needs to be able to encapsulate these developments by allowing space for multi-layered narratives and dialogue between the national courts and the CJEU as well as other social partners and stakeholders.

The proposed three-step approach aims at providing room for multi-layered narratives concerning the application of harmonized law, including international, European, and national influences as well as cultural and political dimensions. In the first step, normative and theoretical considerations regarding the chosen area of comparison provide space for considering the possible aims of the harmonized law, as well as the possibility of the accomplishment of these aims within the existing legal frameworks, including the CJEU's. The first step thus primarily focuses on the European vertex of the triangular relationship, but it also provides a general theoretical framework. The second step focuses on the national vertices and looks at what happens to the European law once it reaches the national arena. This includes the consideration of the national legal context and other cultural and historical factors relevant to the application of harmonized law. The third step uses case law analysis to explore the dialogue between the CJEU and the national courts and how this differs

[276] *See supra* heading B.

[277] Art 267 TFEU.

[278] Hesselink, *supra* note 32, at 40.

between the different national systems. The comparison explores which CJEU judgments have been particularly influential at the national level and which national factors have shaped the national courts' interpretation and have potentially overridden European influences.

The proposed method does not aim at reaching *absolute truth*. Nonetheless, it seeks to make a significant contribution based on *workable objectivity* towards a better understanding of EU law and its reception and enforcement at the national level and, thus, to influence the harmonization process. Cultures and traditions are hybrids involving various, often contradictory, 'objective truths'. These different and potentially conflicting views are all elements within one diverse legal culture or tradition.[279] Even when all relevant information is provided for the comparison, a selection needs to be made according to various limitations. Limitations may be temporal (limited time available) or psychological because no human mind is able to remember and consider all relevant factors at once.[280] 'There is just too much diversity to come to any single answer.'[281] This selection is consequently suboptimal and depends on our way of viewing the world.[282] Consequently, it can always be criticized, and there is no single best solution to assess reality.[283] It has thus been argued that comparative studies can 'never be conclusive, but only suggestive.'[284]

However, this does not mean that methodological concerns do not need to be recognized. Contemporary researchers and comparative lawyers have to work within the framework of contemporary discourse and recognize the shortcomings of the used approaches.[285] The comparative process requires the scholar to be self-critical and recognize his or her own cultural context as well as the other.[286] It requires an understanding of the law as an institution with multiple functions and that is affected by a 'deeper culture' underpinning the legal concepts and their applications.[287] Comparison of the judicial reception of harmonized law can be achieved by engaging in overlapping cultural and political narratives that do not focus on the legal alone and in the subsequent investigation of how these

[279] GLENN, *supra* note 19, at 34-35, 361-85.

[280] DANIEL DENNETT, DARWIN'S DANGEROUS IDEA 502-5 (1996); HESSELINK, *supra* note 2, at 32.

[281] GLENN, *supra* note 19, at 361.

[282] BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 139 (1985).

[283] DENNETT, *supra* note 280, at 501-5

[284] Cotterrell, *supra* note 13, at 133,151.

[285] Jaakko Husa, *Research Design of Comparative Law –Methodology or Heuristics?*, *in* THE METHOD AND CULTURE OF COMPARATIVE LAW 53-68 (Maurice Adams & Dirk Heirbaut eds., 2014).

[286] Frankenberg, *supra* note 214, at 260.

[287] Gary Watt, *Comparing as deep appreciation*, *in* METHODS OF COMPARATIVE LAW 82, 84-85 (Pier Giuseppe Monateri ed., 2012).

narratives resonate within the legal reasoning. The result of such critical progression is what one might call *workable objectivity*. It is not absolute. That would only be possible in a theoretical model that disregards parts of reality.[288] Within a theoretical *a priori* determined framework, a model has an inherent logic that makes it possible to receive absolute answers within it. However, once one steps outside this model and into reality, it is impossible to consider all influential factors and reach an 'absolute truth'. Any solution will thus be open to criticism and counter-evidence. This is especially true within social science, in which it is impossible to separate the observer and the object of research, since the object is too complex.[289] In that sense, methodological considerations are not necessary to develop one universal method but to consider the implications of the methodological choices the researcher unavoidably has to make and to ensure the transparency of the comparative analysis.

[288] Geoffrey Samuel, *Taking Methods Seriously (Part One)*, 2 J. COMP. L. 94, 105-8 (2007).

[289] *Id*. at 99.