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AA Law Forum is a joint effort of the faculty and graduates of the John H. Carey II School of Law to enhance studies of English law and comparative law at the Anglo-American University in Prague.

Mission statement

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Editorial

The John H. Carey II School of Law at Anglo-American University is privileged to present the fifth edition of the AA Law Forum, our on-line law review. Our ongoing journal is a unique collaborative project as we accept and publish peer reviewed articles from students, alumni, professors and legal professionals from various legal systems. This edition exemplifies our objective as it contains articles from an alumna, our faculty, both current and past, and from otherwise unaffiliated authors.

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An Overview of the Concept of Good Morals in Czech Codices

Radka MacGregor Pelikánová [1] ***and Jarmila Císařová*** [2]

Introduction

Good morals is a semantically vague legal term of an abstract nature and lacking a clear and well established definition. Nevertheless, or maybe because of it, it is one of the critical instruments bringing into the scenery of the positive law a noticeable influence of natural law. Thus, relationships and decisions technically in compliance with the conventional applicable law are evaluated from the perspective and based on parameters of an ethical provenance. This allows the application of natural (ethical based) law considerations in decision making process according to the applicable (positive) law. This parallel employment of legal standards and natural standards leads can result in finding a breach of law in cases where there is "just" the contradiction to ethical norms, but not a violation of the law per se.[3]

Each and every national law addresses this sensitive and complex issue differently. The Czech national law belongs to the Continental, so called Civil law family, follows the tradition of the Roman law, and relies heavily on codices, and is relatively close to the Austrian national law and German national law.

Good morals are an extremely important and consistently applied criterion in both Continental as well as Common law families. In the Continental law systems good morals are integrated within the legal order via legal principles and/or explicit provisions of codices as interpreted in individual cases by judges, in Common law systems predominantly via court decisions, sometimes reaching the legislative status of precedent.

It is beyond the scope of this article to cover entirely the concept of good morals in the current Czech law. Thus, after a definition of good morals in general, there will be presented only a summary overview with several key observations and comments related to the main sources of Czech Private law in re good morals, namely provisions from the Civil Code, Commercial and the emerging New Civil Code. This overview implies a rather underestimated and potentially troublesome consequence about the increase of the judiciary's role in the operation of good morals in Czech law and in the Czech society.

Good morals as Bonos Mores

The concept of "good morals" can be found as far back as Roman law, according to which certain acts and cases were considered to represent an immoral conduct, the so called Contra Bonos Mores, and were sanctioned by invalidity. For example, in the association and corporation area,

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[3] HAJN, Petr. K nedostatku dobré víry při zápisu ochranné známky. *Právo a podnikání*. 2002, 3, pp. 24-25.

agreements of associates by which some of them would share only the benefits, with others only sharing the losses, were considered as Contra Bonos Mores and thus were stripped of validity.[4]

The first explicit mention of “good morals“ in the text of the modern positive law applicable in the territory of the current Czech Republic appeared in the general Civil Code, i.e. JGS Nr. 946/1811 Allgemeines Bürgerliches Gesetzbuch (ABGB),[5] and since that time this category has become an integral part of Czech legislation, present across various branches and disciplines of the Czech Private law. Naturally, the Czech Public law is by its nature governed by other instruments of natural and ethical categories, including a myriad of constitutional principles, etc. with a logical focus on the distribution and exercise of the state power along with the protection of human rights.

Good morals are and should remain as one of the fundamental principle categories of Private law, a vehicle to bring core values of human society, to reflect historical and cultural foundations and to emphasize the rules of decency. The Czech Constitutional Court in this regard stated that "the rule of law can not function without the assumption of a generally required degree of ethical behavior among people" and believes "that it is in the family, as the foundation of society, which must cultivate good morals and public authorities, courts, particularly, to contribute to their decisions."[6]

The Czech positive law has never included a definition of good morals. Instead, due to the ongoing evolution and even the will of the Czech legislature, good morals have been mentioned by few codices provisions and their discovery and determination is left up to judges and case-law. This reflects the very nature of good morals as well as confusion in the Czech legal doctrine and juridical science with respect to good morals, e.g. some authors determine that the distinction between the objective good faith and good morals is not always observed.[7]

The deferral of good morals, mentioned in these few codices provisons, to judges is fully endorsed by the Czech Constitutional Court which has repeatedly declared that the assessment of compliance with good morals belongs exclusively to the ordinary courts. Namely, according to the jurisprudence of the Constitutional Court "good morals [are a] set of ethics, widely accepted and maintained by the principles whose observance is often provided by legal standards so that any action was in accordance with the general moral principles of a democratic society. This general backdrop, that the development of society develops its moral content in space and time, must be assessed in terms of the particular case."[8]

The Czech Constitutional Court, on the concept of good morals, also states that it "can not be

[4] MATES, Jan, MATESOVÁ KOPECKÁ, Šárka. Pár poznámek k institutu dobrých mravů v NOZ. *Bulletin Advokacie*. 2011, č.7-8, pp. 26-27. ISSN 1210-6348.

[5] "Sittlichkeit" - Erfordernisse einer rechtmäßigen Enterbung § 768 ABGB - Ein Kind kann enterbt werden: 4) wenn es eine gegen die öffentliche Sittlichkeit anstößige Lebensart beharrlich führet.

[6] Constitutional Court I. 643/04 of 6 September 2005.

[7] TÉGL, Petr. Nový občanský zákoník: O dobrých mravech. *Bulletin advokacie.* 2011, 7, pp. 32-33. ISSN 1210-6348.

[8] Constitutional Court II. 249/97 of 26 February 1998.

interpreted only as a set of moral rules used as a corrective or complementary power factor content of rights and obligations, but as a judge to decide in accordance with equity (haec aexuitas suggerit ...), which, in its consequences, means to embark on the journey towards finding justice."[9]

Since Czech law belongs to the Continental legal family, the key source of Private law is codices, traditionally the Civil Code and possibly as well the Commercial Code. Therefore, the above mentioned statements of the Czech Constitutional Court should be understood in the light of the Czech Civil Code from 1964 and the Commercial Code from 1991, and, of course, the new Civil Code which replaced them on 1st January, 2014.[10]

Good morals in the Civil Code

The Austrian ABGB, later the Czech General Civil Code, recognized the concept of good morals and in Art. 879 named two reasons for the invalidity of an agreement - a breach of legal prohibition and also a breach of good morals. The socialist replacement, Act No. 141/1950 Coll., the Middle Civil Code, included only one mention of good morals, i.e. good morals were refered to only in the context of unfair competition. This code lasted less than two decades and was substituted by the Act No. 40/1964 Coll., Civil Code (Civil Code), which was valid until 31st December, 2013 and which was the principal source of the the Private law together with the Act No. 513/1991 Coll., Commercial Code (Commercial Code), which actually subsidiarly referred back to the Civil Code.

Thus the review of the modern Czech Private law scenary regarding the employment of good morals logically starts with the Civil Code, which includes approximately 10 provisions dealing with good morals, and this either in respect to the performance of rights and duties or in respect to particular situations, such as a contractual penalty or the termination of a real estate rental.

The very first mention of good morals is in the provision of Art. 3 (1) of the Civil Code, according to which "the exercise of the rights and duties resulting from civil law relations shall not, without a legal reason, interfere with the rights and legitimate interests of others and must not be contrary to good morals." In other words, subjective rights and duties are to be exercised in compliance with the mandate of good morals. The concept of good morals targets not the rights and duties themselves but their performance and stops otherwise admissible law enforcement, but which is objectively considered to be contrary to good morals. Simply speaking, the legislation of this provision follows the concept of justice. Such fulfillment of justice must not in any case lead to a weakening of the protection of subjective civil rights provided by law.[11] This statement has been challenged by several court decisions which stripped the lawful parties from their right to enforce their claims, e.g. in the case of unpaid rent when the eviction of the debtors-tenants could not be

[9] Constitutional Court I. 643/04 of 6 September 2005.
[10] Plese note, that certain relationships created before 1st January, 2014 are regulated by the Civil Code from 1964 and the Comercial Code from 1991.
[11] JEHLICKA, Oldřich, SVESTKA Jiří, SKAROVA, Marta. *Občanský zákoník*. 6th edition. C.H.BECK, 2001, p. 49.

achieved by a court action due to Art. 3 of the Civil Code.[12]

The next provision of the Civil Code explicitly mentioning good morals is Art. 39, which declares that "void is a legal act which has a content or purpose contrary to law, or which circumvents law, or which is contrary to good morals". Any illegal acts, contra legem, and any immoral acts, contra bones mores, are sanctioned by the absolute nullity which comes directly from the law and the judge must take it into account ex officio, i.e. even if it is not suggested by the parties. The immorality is evaluated based upon the (in)compatibility of the pertinent act with "the fundamental principles of the moral order of a democratic society."[13] A typical example of the nullification of an act based on the mandate of Art. 39 of the Civil Code is a contractual provision setting up an unduly high contractual fine. Abundant case law has developed around the determination of the still allowed v. not allowed moral interests constituting contractual penalty,[14] and to be distinguished from the default interests which are set by law for Civil law cases by Art. 517 (2) and not left to parties for their enumeration.[15]

Regarding contractual penalty interest, it has been established that a contractual penalty calculated as a rate of interest of 100% per annum is immoral and thus invalid based on Art. 39 of the Code Civil.[16] In regard to the contractual penalty, Dr. Čech has conducted several observing and comparative studies of case law, predominantly of the Supreme Court provenance,[17] with the result that interest of 0,5% per day of default is still acceptable (not contrary to good morals) and perhaps even 1% per day, but not more.18 In commercial cases, an excessive contractual penalty can be reduced by the court using its moderation right based on Art. 301 of the Commercial Code. However, in civil law cases, the judges do not have such a right and thus their only choice is to sustain or reject the contractual penalty in its entirety.

The provision of Art. 424 of the Civil Code establishes "the liability for damages caused by a deliberate act against good morals." The text of this section is closely linked to the general obligation to prevent damage.

The provision of Art. 564 of the Civil Code deals with the case of an unclear due date, and states that "if the time of fulfillment is left to the will of the debtor, it will be determined by the court based on the creditor´s request and according to the circumstances of the case so that it is consistent with good morals." This provision serves as a kind of gap filler and the determination of the performance (due) date is set by the court while

[12] See, e.g. Supreme Court 22 Cdo 740/99 of 10 November 2000.
[13] JEHLICKA, Oldřich., SVESTKA Jiří, SKAROVA, Marta. *Občanský zákoník*. 6th edition. C.H.BECK, 2001, p. 250.
[14] See, eg. Regional Court in Hradec Kralove15 Co 126/94 of 24 May 1995.
[15] KOVÁČOVÁ, Ann. Smluvní pokuta v občanských vztazích. *Právní fórum*, 2012, 8, p. 322. ISSN 1214-7966.
[16] See, eg. Regional Court in Ostrava 12 Co 740/95 of 1 February 1996.
[17] See, e.g. Supreme Court decisions - 32 Odo 849/2002 from 26 March 2003 (0,1 % per day), 32 Odo 1299/2006 from 24 July 2007 (0,1 % per day), 33 Odo 588/2003 from 23 June 2004 (0,25 % per day), 32 Odo 574/2004 from 15 February 2005 (0,25 % per day), 33 Odo 1385/2004 from 23 October 2006 (0,33 p% per day), 33 Odo 71/2006 from 22 September 2006 (2,2 % per week), 33 Odo 810/2006 from 27 July 2006 (0,5 % per day), 33 Odo 236/2005 from 27 February 2007 (0,5 % per day), 32 Cdo 2926/2007 from 27 September 2007 (0,5 % per day), 28 Cdo 2807/2006 from 19 December 2007 (0,5 % per day).
[18] ČECH, Petr. Smluvní pokuta v. úrok z prodlení. *Právní Rádce*, 2008, 4, 1, p. 21. ČECH, P. K přiměřenosti smluvní pokuty. *Právní Rádce,* 2008, 5, pp. 24-25. ISSN 1210-4817.

considering honest practices. Thus, the court will proceed in accordance with the specific circumstances of each individual case with regard to good morals.

In addition, the concept of good morals is marginally used as well in relations to other civil law institutions, such as inheritance (Art. 469a, Art. 471, Art. 482) or real estate rentals (Art. 711 and Art. 759). The study of these provisions leads to the conclusions that the current Civil Code distinguishes two types of good morals - (general) good morals referred to by the majority of Civil Code provisions and special good morals, i.e. good morals in the house, referred to by Art. 711 of the Civil Code.[19] Namely, Art. 711 of the Code Civil allows the landlord to give a notice, without a pre-approval from the court, to a tenant who "despite the written warning, grossly breaches the good morals in the house."

Good morals in the Commercial Code

The Commercial Code exhibits a significantly weaker impact of good morals, i.e. the influence of the morality mandate is logically much more pronounced in civil legal relations than in business legal relations. Namely, the Commercial Code includes only two provisions referring to good morals and, in addition, in both cases these are not the general good morals as in the Civil Code, but the special good morals pertinent to competition.

Firstly, good morals are mentioned in Art. 8 of the Commercial Code in relation to the business name of a subject not registered in the Commercial Registry. Such a person can conduct business under his personal name accompanied by an addendum provided this addendum "is not misleading and its use is in compliance with legal regulations and the good morals of the competition." Thus, a fancy or vulgar addendum dishonestly abusing the competition cannot become a part of the business name of an entrepreneur.

Secondly, good morals are specifically referred to by Art. 44 of the Commercial Code with the definition of the Private law branch of competition law, namely unfair competition. The legal definition of the unfair competition is expressly covered by the general clause stated in Art. 44 of the Commercial Code, and includes three elements, one of which is the breach of good morals – "Unfair competition is acting in business competition or in a business connection which is in breach of the good morals of competition and is capable of causing damage to other competitors or customers." There is no doubt that the cumulative fulfillment of all these three conditions is a condition sine qua non for an act which could be classified as unfair competition.[20]

Acts contrary to good morals of competition are difficult to find. However, it is clear that the wording used in the Commercial Code is only about a subgroup of good morals. The Commercial Code term "good morals of the competition" has an emphasis on the so-called "competitive game", unlike the Civil Code, which is primarily used in the

[19] TÉGL, Petr. Nový občanský zákoník: O dobrých mravech. *Bulletin advokacie*. 2011, 7, pp. 32-33.

[20] HORÁČEK, Roman, ČADA, Karel, HAJN, Petr. *Práva k průmyslovému vlastnictví*. 2nd Edition. Prague, C.H. Beck, 2011, p 451. ISBN 978-80-7400-417-9.

assessment of contractual relations, and reflects the competition. The conceptual difference was already noted by the case law developed by Czechoslovak courts between the first and second World Wars, during which time those judges came to the clear conclusion that "It is important to distinguish between good morals and good morals of competition. There are behaviors which are harmless according to the good morals, but they can be harmful from the stricter point of view of good morals of competition. At the same time conduct in competition must always be in compliance with the general civic good morals. It is up to the concrete situation to determine whether to scrutinize only based on the (general) good morals or based on the strict good morals of competition. The means of measuring will be based essentially on moral opinions, customs, habits, usage, etc. that keep everyone fairly, honestly, honorably and conscientiously acting participants in the competitive struggle."[21]

These trends continue even today, and in most cases the good morals of competition are a narrower category than the general morals, i.e., some activities can be understood in general terms as immoral, while those same activities would, in competition, be considered virtuous. 'Good morals' in competition only sometimes coincides with the requirements of general ethics, and their relationship is often expressed as the "intersection of sets."[22]

The Commercial Code governs morals in unfair competition, which takes into account the competitive struggle among entrepreneurs. "The contradiction of competitive practices with good morals competition does not mean that such conduct must be compatible with the more general concepts of ethics. Even ethical conduct is often regarded as unfair competition."[23]

The short overview of Civil Code and Commercial Code provisions regarding good moral suggests that in certain cases good morals can have a significant impact and in a few cases the court decisions can be significantly different than that which would be expected based on the positive law without the good morals correction. Nevertheless, the good morals have been for many years similar to a rather hidden sleeping genie, only occasionally released from the bottle. However, it appears that the cork is about to be removed.

Good morals in the new Civil Code

On 22nd March, 2012, there were officially published, in the Czech Collection of Acts, two critical Acts dramatically changing the scenery of the Private law regulation in the Czech Republic - Act No. 89/2012 Coll., the Civil Code (the New Civil Code) and Act No. 90/2012 Coll., on commercial companies and cooperatives (the

[21] ONDREJOVÁ, Dana. *Právní prostředky ochrany proti nekalé soutěži*. Praha, CZ : Wolters Kluwer, 2010, p. 5. ISBN 978-80-7357-505-2.

[22] HORÁČEK, Roman, ČADA, Karel, HAJN, Petr. *Práva k průmyslovému vlastnictví*. 2nd Edition. Prague, C.H. Beck, 2011, p. 453. ISBN 978-80-7400-417-9

[23] Expert opinion dissertation "The new legislation marks and electronic media". Prof. JUDr. Petr Hajn, DrSc. [online]. [cit. 30 March 2012] Available at <http://is.muni.cz/th/60286/pravf_d/oponenetsky_posudek_Horacek2.pdf>

Commercial Corporations Act). These two acts became valid with their publication and took effect on 1st January, 2014. They replaced the Civil Code from 1964 and Commercial Code from 1991; i.e. the agenda of the Civil Code and one part of the agenda of the Commercial Code (obligations) are covered by the New Civil Code and another part of the agenda by the Commercial Corporations Act. Hence a large section of the Private law sphere is newly regulated by the New Civil Code and this gives a much stronger, noticeable and widely applicable importance to the concept of good morals. As a matter of fact, good morals are becoming automatically an integral part of the public order mandate, i.e. they are a mandatory category which must be observed by private parties across all (and not just particularly specified) situations.

Since the explanatory report of the Czech Government from 2012 states that "the concept of good morals is established in the Czech Private Law, it is sufficiently developed by and in the doctrine and it´s application does not cause any serious issues in the juridical science," it is implied that the fundamental understanding of good morals should be the same under the Civil Code from 1964 and the New Civil Code from 2013[24] and the ongoing change is rather a result of the ongoing evolution. However, is this not an understatement? Is there not happening a rather revolutionary change with a potential for extremely surprising results?

The previous overview of the good morals in the former Civil Code makes it clear that the principal purpose of this concept was to assist with the interpretation and application of law with a particular impact in but a few fields. Their extent in the former Commercial Code was even narrower. However, the New Civil Code is much more ambitious in this respect, and the following list of its critical provisions directly mentioning good morals might mean that good morals are getting a new (much larger!) dimension and their fundamental understanding should be reassessed.

Good morals appears already at the very start of the New Civil Code, in cornerstone provisions about the most fundamental principles of the New Civil Code and the Czech Private Law per se. The very first provision, Art. 1 (2) prohibits agreements "in breach of the good morals, public order, or the status rights of persons."

The following provision, Art. 2 (3) orders that the "interpretation and application of a law provision cannot be in contradiction with good morals." This is not about the mere performance of individual subjective rights and duties, this is about the objective law per se! Thus, it needs to be pointed out that the general criteria of justice (“ratio legis”) must be respected and neither the interpretation nor the application of each and every law provision can violate the concept of good morals.[25] The effects of a legal act are expanded by Art. 545 which states that any legal act does not generate just the expressed effects but also "legal effects

[24] MATES, Jan, MATESOVA KOPECKA, Šárka. Pár poznámek k úpravě institutu dobrých mravů v NOZ. *Bulletin Advokacie*, 2011, No. 7-8, pp. 26-32. ISSN 1210-6348.

[25] ELIÁŠ, Karel, ZUKLÍNOVÁ, Michaela, GAŇO, Jiří, SVATOŠ, Marek, KORBEL, František. *Nový občanský zákoník s aktualizovanou důvodovou zprávou a rejstříkem.* Praha, CZ : Sagit a.s., 2012, p. 63. ISBN 978-80-7208-922-2.

implied by the law (Civil Code), good morals, customs and established praxis of parties." Here again, we do not speak about the mere exercise of individual rights and duties or special instruments such as a contractual penalty, instead we are targeting legal effects of all (!) legal acts.

The legislature is apparently very serious about the issue of good morals and does not leave their enforcement in the hands of parties. As a matter of fact, Art. 588 of the New Civil Code provides that "a court considers any obvious breach of good morals by an act and declares such an act invalid" even if not requested by the parties. A strong opinion stream proposes to even disregard the words "obvious" and make every breach of good morals a cause for an absolute nullity.[26] Therefore, each and every judge has a duty to scrutinize any and all acts in the light of good morals and if not satisfied, the judge should declare such an act null and void. As a matter of fact, the New Civil Code has only 3 foundations for absolute nullity - breach of law, public law, and good morals. Hence, good morals has become one of the three power sticks in the judiciary hands for every law dispute.

Good morals in the Commercial Corporation Act

Even the Act "inheriting" the corporate agenda from the current Commercial Code, the Commercial Corporation Act, does not fail to recognize the importance of the concept of good morals.

The very first mention of good morals is included in Art. 45 of the Commercial Corporation Act and deals with the decisions of corporate organs in breach of good morals.

Following the same trend, Art. 191 (2), Art. 428 (2), and Art. 633 (5) of the Commercial Corporation Act explicitly mention the breach of good morals as a reason for the invalidity of a resolution of a general meeting.

The provisions of Art. 702 of the Commercial Corporation Act adds that even the resolution of delegates is invalid if it is in breach of good morals.

Good morals - a new venue for judiciary activism?

The rule of law and the separation of powers, including the concept of the independence of judges, are key elements of the modern legal system in Western civilization, based on Christianity, including the Czech legal system. Nevertheless, the doctrine of the rule of law is not so easily interpreted and applied to a particular case, and the separation of powers is rather a mechanism of checks and balances, i.e. a scheme of interdependency. Thus it can be suggested that the very independent judges operate within a rather dependent (on other powers) judiciary.[27]

Every judicial system is set and the functions of judges are described in order to facilitate the performance of certain roles by judges. These roles include the Task Performer, the Adjudicator, the Law Interpreter, the Law Maker (especially in Common law systems), the Administrator, the

[26] MATES, Jan, MATESOVA KOPECKA, Šárka. Pár poznámek k úpravě institutu dobrých mravů v NOZ. *Bulletin Advokacie*, 2011, No. 7-8, pp. 26-32. ISSN 1210-6348.

[27] FEREJOHN, John. Independent Judges, Dependent Judiciary: Explaining Judicial Independence. *Southern California Law Review*, 1999, 72, pp. 353-384. ISSN 0038-3910.

Peace Maker, the Constitutional Defender, etc.[28] Obviously, these roles are hardly to be reconciled and often the mandate of efficiency is in contradiction with the request of individual justice. It is even suggested that Common law as well as Continental judges not only make different decisions when they shift their role orientations, but even the basis for their decision shifts.[29]

Thus, it is a very legitimate question to ask about what were the aims, purposes, and goals in the minds of the drafters of the New Civil Code and the legislators sitting in the Czech Parliament in the first months of 2012. Did they really want to significantly modify the role and function of the Private law adjudicators, i.e. did they possess a great desire to make the Private law judge to be a very active player in court proceedings along with parties, actually even instead of parties? Are judges really expected to check each and every case in the light of good morals, are they ready to do so, and are they willing to do so? What does it mean for the classic concept of accusatorial proceedings? Are we not giving the powers of a Common law judge to a Czech judge operating in a Continental law setting? If yes, what does it mean?

Conclusion

The concept of good morals has significant importance in Czech Private law and the current trend is to give it even more influence. The definition of good morals has been traditionally left to the decision-making practice of the courts. The Constitutional Court, in one of its decisions, concluded that this general criterion develops its moral content with the evolution of the society, in space and time, and must be scrutinized in the light of the particular case.[30]

Due to the orientation on individual rights and duties performance and restriction to several fields, and also the traditionally rather reluctant approach of judges, the consideration of good morals has not impacted many cases and has remained rather a corrective of extreme cases.

The ongoing re-codification of the Czech Private law is a large unknown with hardly predictable consequences. One of the potential dramatic impacts can occur with respect to good morals. Neither the judiciary as a system nor the individual judges have asked for such a powerful instrument, nevertheless they now have it. It will be up to them how they will employ it, whether good morals will keep their sleeping beauty function or will they evolve into a massively employed counterbalancing instrument leading to a reevaluation of individual justice with a potential to challenge the consistency and predictability of the law, at least in the immediate future. Is this good or bad? Are the judiciary system and the judges for it? *Tempus omnia fert, sed et aufert omnia tempus.*[31]

Certainly, it is appropriate to endorse and concur with the opinion that good morals belonged, belongs and shall belong to an appreciation of situations in human society and they are not about

[28] HANSON, Roger. The changing role of a Judge and Its Implications. Court Review - The Journal of American Judges Association, 2002, 38, 4, pp. 10-16. ISSN 0011-0647.
[29] HANSON, Roger. The changing role of a Judge and Its Implications. Court Review - The Journal of American Judges Association, 2002, 38, 4, pp. 10-16. ISSN 0011-0647.
[30] Constitutional Court II. US 544/2000 of March 12, 2001.
[31] The time gives you everything as well as takes you everything away.

to lose their attractiveness in the next hundred years.[32] Of course, good morals can and should be an integrating element and the law and ethics complement one another.[33] Certainly, *"Tempora mutantur et nos mutamur in illis."*[34] Nonetheless, should we not first establish a deep and complex dialogue about the good morals concept and the feasibility and extent of its judiciary application, before making radical changes with unforeseeable consequences?

[32] TÉGL, Petr. Nový občanský zákoník: O dobrých mravech. *Bulletin advokacie.* 2011, 7, pp. 32. ISSN 1210-6348.
[33] MORÁVEK, Jakub. Model práva - vztah práva a morálky. *Bulletin advokacie,* 2013, 3, pp. 64. ISSN 1210-6348.
[34] Times change and we change in them.

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The Odd Tort Out: Wrongful Conception, Wrongful Birth, and Relevant Law and Economics Issues

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Introduction[2]

A tort of wrongful conception[3] is an action brought by a parent whose child is conceived as a result of another's negligence. The plaintiff's claim is that if it were not for the defendant's negligence - usually in the form of either conducting sterilization ineffectively, or giving negligent medical advice about the plaintiff's possible inability to conceive children – his or her child would not have been conceived. Taking it one step further, wrongful birth is an action brought by a parent who, due to the defendant's negligence, could not have prevented their already conceived child's birth. It is mostly the outcome of a failed abortion, or negligent genetic testing which fails to detect the fetus' disability and thus does not give the parents a chance to abort such a disabled child.

It is important to differentiate the two aforementioned torts from the action of wrongful life brought by an unwanted child itself. The basis of the child's claim is that if it were not for the defendant's negligence, he or she would not have suffered the injury of being born. This article shall not discuss wrongful life and its controversial premise that one can view their own life as an actionable injury.

One can find wrongful pregnancy and birth suits in almost every western jurisdiction. Rather than being a comprehensive survey of the current law on this tort worldwide, this article aims to focus on the most significant rulings which recently reshaped UK law in this matter, in contrast with the two recent Czech cases which opened up this issue in front of the Czech courts. Finally, it attempts to discuss these recent developments in the light of the key law and economics questions that they provoke.

2. Major Recent Developments

2.1. UK

Actionable damages

In wrongful conception claims, the requested damages generally fall under three heads:

a) damages for physical injuries and pain and suffering connected to the pregnancy and either giving birth, or undergoing an abortion

b) compensation for economic losses, such as medical costs or loss of income, associated with the pregnancy and subsequent abortion or birth of the child

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[2] This article was originally written for Common Law Review, a periodical of the Common Law Society, Prague. It was published in Law and Economics edition, 2012.
[3] Sometimes also referred to as 'wrongful pregnancy', with regards to the argument that the plaintiff may have a valid claim only once the conception leads to pregnancy. Terminology taken from Jackson, Emily. Medical Law, Text, Cases and Materials. Oxford University Press, 2010

c) if the pregnancy results in giving birth,[4] compensation for the economic loss associated with the cost of bringing up the child.

Grounds for compensation

In cases where all the necessary elements of the tort are fulfilled and negligence is proven, the claims for a) and b) above are mostly clear-cut and likely to receive a rather modest award.[5] It is the calculation and justifiability of the third award being claimed, which leaves the court opinions in a grey area. Since 1985, under the *Emeh v. Kensington*[6] authority the plaintiff had a right to recover the costs of bringing up the child under the law of negligence. Yet in 2000, *McFarlane v. Tayside Health Board* [2000][7] (*McFarlane)* overturned *Emeh* and ever since, the courts questioned the grounds for awarding this head of damages based on the principle of whether it was fair, just and reasonable while also considering the notion of distributive justice, and more. This issue has been developed in the next three groundbreaking and notoriously known cases concerning wrongful conception.

McFarlane v. Tayside Health Board [2000]

McFarlane v. Tayside Health Board had a typical scenario of a wrongful conception case - the McFarlanes were negligently assured by a doctor that Mr. McFarlane was infertile after his vasectomy, while the opposite was actually the case, and his wife soon bore a healthy child. The family sought to recover all three aforementioned types of damage. The Court's rationale was that the plaintiffs were entitled to receive damages for a) the pain and suffering of the unwanted pregnancy and b) medical expenses connected with the pregnancy and compensation for the after-birth equipment required for the mother and baby. Yet the Court ruled that the parents of an unwanted, healthy child shall not be entitled to c) compensation for the costs of bringing up a child – since their loss is purely economic, and a healthy child is a blessing[8], not an injury. Yet while the ruling clearly struck out the previous precedent concerning the birth of 'healthy' children, its further un-clarified emphasis on the child's health left the future courts uncertain as to how to face other alternative scenarios.

Parkinson v. St. James & Seacrosft University Hospital [2001] [9]

The *Parkinson'*s case fact pattern of a failed sterilization due to medical malpractice differed very little from *McFarlane'*s in substance, yet this wrongful conception suit involved the birth of a disabled child (the disability being unrelated to the practitioner's negligence). Additionally, the specifics of the case were full of unfortunate details compelling one to feel strongly for the plaintiff. The

[4] Ever since the ruling in Emeh v. Kensington and Chelsea and Westminster Area Health Authority [1985] 1 Q.B. 1012 where the Court of Appeal rejected the lower court's argument that the plaintiff should have got an abortion and should not be able to recover any damages resulting from the continued pregnancy, it has gradually become a standard of the wrongful conception tort in the U.K.. that the plaintiff's ability to recover damages mustn't be reduced by her choice not to get an abortion – as summarized by Lord Steyn in *McFarlane* – "I cannot conceive of any circumstance in which the autonomous decision of the parents not to resort to even a lawful abortion should be questioned"

[5] Jakson, Emily. Medical Law, Text, Cases and Materials. Oxford University Press, 2010.

[6] Emeh v. Kensington and Chelsea and Westminster Area Health Authority [1985] 1 Q.B. 1012

[7] McFarlane v. Tayside Health Board [2000] 2 AC 59.

[8] [2000] 2 AC 59; As Lord Steyn noted, any average person "would consider the law of tort has no business to provide remedies consequent upon the birth of *a healthy child*, which all of us regard as a valuable and a good thing." (emphasis added)

[9] Parkinson v. St. James and Seacroft University Hospital [2001] 3 All ER 97

unexpected pregnancy started a tragic row of events, such as the plaintiff's inability to return to work and earn much needed wages which would have contributed towards moving her family of four children away from their cramped two-bedroom apartment. The distress the pregnancy caused to the family itself also ultimately prompted the break-up of the plaintiff's marriage, and she was left to face the difficulties of having a new disabled baby, who required constant care and special attention.It is precisely this natural sympathy for the plaintiff that many legal commentators, including Dr. Nicolette M. Priaulx[10], regard as having prompted the Court of Appeal to use the fair, just, and reasonable principle to produce a legally inconsistent outcome aimed to at least partially favor the plaintiff; the ratio being that for a wrongful conception of a disabled child, a recovery of the difference between the cost of raising such a child and a healthy one be allowed.[11] Bound by the *McFarlane* authority, the Court upheld its denial to award 'regular' maintenance costs, but borrowed the reasoning from the decision of the Supreme Court of Florida in *Fassoulas v Ramey* which stated that "the financial and emotional drain associated with raising a [*disabled*] child is often overwhelming to the affected parents"[12], and thus an award of compensation [of special costs of upbringing of a] child with a serious disability would be fair, just and reasonable."[13] To support its position, the court called the "principles of distributive justice in aid," and used them as a tool to speak for "ordinary people", presuming that they "would consider that it would be fair for the law to make an award in such a case."[14]

Rees v. Darlington Memorial Hospital NHS Trust [2004] [15]

The resulting controversy of the development of the wrongful conception case law culminated in the House of Lords ruling in *Rees v. Darlington Memorial Hospital NHS Trust*, which was heavily relied on to overturn the highly criticized *McFarlane* and clarify the impact of *Parkinson,* yet instead went to the most surprising lengths of all three rulings.

A severely vision-impaired Mrs. Rees underwent sterilization, since due to her disability, she felt unfit to bring up a child. The sterilization was negligently performed and the plaintiff bore a healthy child. She sued for the entire cost of bringing up the child, asking the court to review the *McFarlane* precedent.

The court on one hand upheld *McFarlane*, denying the compensation for a healthy child. Yet at the same time, it awarded Rees and any future wrongful conception plaintiff with a newly created conventional award of £15,000 serving as compensation for the plaintiff's partial denial to his or her autonomy and freedom. While the Lords did not specifically justify the award with the fair, just and reasonable principle (as it is a factor created to assess duty of care, not to create new types of

[10] Priaulx, Nicolette. Damages for the 'Unwanted' Child: Time for a Rethink? Medico-Legal Journal, Vol. 73, No. 4, December 2005. retrievable at: www.medico-legalsociety.org.uk/articles/ unwanted child.pdf
[11] Parkinson v. St. James and Seacroft University Hospital [2001] 3 All ER 97
[12] Fassoulas v Ramey 450 So 2d 822 (Fla 1984)
[13] Brooke LJ, Parkinson v. St. James and Seacroft University Hospital [2001] 3 All ER 97
[14] Ibid.
[15] Rees v. Darlington Memorial Hospital NHS Trust [2004] UKHL 52

damages), they based their reasoning for the award on the language of what is 'just'.[16]

2.2. Czech Republic

So far, the Czech courts have dealt with a very scarce number of these suits that our German neighbours are so familiar with. Hence the rather modest awards that the so far plaintiffs received in the two highly publicised wrongful conception and birth rulings merely hints the direction Czech courts might take in assessing the damages for these cases.

Actionable Damages

In the cases tried so far by the Czech courts, the plaintiffs claimed for immaterial detriment damages to compensate for the physical and psychological hardships they went through because of their unexpected pregnancies, change of life plans, and worries that the children would be born disabled due to the sterilization/abortion procedures.

Interestingly, none of the plaintiffs attempted to sue for the cost of upbringing of the unwanted child, although this is commonly done e.g. in the civil law jurisdiction of Germany.[17]

Grounds for Compensation

The plaintiff based their claim on § 11 (Protection of Personhood) of the Civil Code[18], since one of the main aspects it protects are a person's right to bodily integrity and right to one's privacy.[19] If the individual's dignity or integrity have been significantly reduced, § 13 (2)[20] gives them a right for penuciary satisfaction of their immaterial detriment.[21]

Accordingly, the plaintiffs had a right to compensation under §420 (General Liability for Damages)[22], and in the Jihlava case (see below), the court also used the staturory compensation of 240,000 Crowns for the death of a child, provided in §444 (3)[23], as a starting point for its assessment of appropriate compensation for an unwanted birth.

As for the unaddressed question of child maintenance compensation, Czech law does not seem to be very open towards this type of liability. In §442,[24] it is specified that the compensation for damages covers the real damage and the lost profits. The upbringing costs would have to fall under the real damage heading, yet the problem is that at the time of the lawsuit, these costs would be predicted as future costs, while the traditional interpretation of real damage is that it must already

[16] E.g., Lord Bingham of Cornhill stated such award "would afford a more ample measure of justice than the pure McFarlane rule"; [2004] UKHL 52

[17] Although this article does not focus on any other European case law on the matter, it considers the German position on the issue noteworthy, because German legal system is one of the relatively closest civil law systems to the Czech one and in controversial tort claims like this, Czech courts could find a lot of inspiration in the German courts' reasoning. Unlike in Czech Republic, Germany has a long line of both wrongful conception and birth case law. German courts approach the wrongful conception and birth claims very consistently. The plaintiffs have for decades been able not only to recover their a) economic losses connected to pregnancy and b) any resulting infliction of plaintiff's health, but also c) compensation for the maintenance of the child. The Federal Constitutional Court received, yet dismissed complaints that awarding damages for child maintenance puts a child into a position of an injury and is thus in violation of Article 1 of the Constitution concerning human dignity, and reasoned that the award only concerns the financial burden the child's upbringing imposes upon the family, which is different from treating its life itself as a burden (BVerfGE 96, 375 = NJW 1998, 519 = JZ 1998, 352). For further details, see Markenisis Basil, Unberath Hannes. The German Law of Torts: A Comparative Treatise. Hart Publishing, Oxford, 4th edition, 2002.

[18] Act of the Czech Republic No. 40/1964 Sb. Civil Code

[19] Švestka Jiří, Dvořák Jan., a kol. Občanské právo hmotné 1. Wolters Kluwer, Czech Republic. 5th edition, 2009.

[20] Act of the Czech Republic No. 40/1964 Sb. Civil Code

[21] Švestka Jiří, Dvořák Jan., a kol., ibid

[22] Act of the Czech Republic No. 40/1964 Sb. Civil Code

[23] ibid

[24] ibid

existent by the time that the claim is filed.[25] However, §445[26] allows for recovery of future damages in case of the loss of income resulting from harm to one's health, and §449a[27] even allows for a written agreement between the plaintiff and defendant to recover such future damages in a one-time installment instead of continuous future payments, so the Czech law is not completely unfamiliar with the possibility of future damages alltogether. Nonetheless, although the prospects for recovery of such damages are not too optimistic, since in the author's findings there has been no case law commenting on the matter of future expenses of this kind, it would have been interesting for the plaintiffs to at least attempt to sue for these damages and get the court's interpretation on the matter.

The interpretation would be valuable for the future, since even the new Civil Code[28] which comes into effect in 2014 unfortunately does not seem to give future plaintiffs any new options in this direction either, as it also does not mention future damages.

Liberec Hospital Case[29]

The plaintiff, a physically disabled mother of three children, underwent sterilization and was incorrectly assured that it would be a 100% efficient contraception method. Yet her fallopian tubes recovered and the plaintiff conceived a child, went through a high risk pregnancy and delivered a child that she could hardly afford to take care of. She sued for 290,000 crowns for immaterial detriment damages and was awarded 40,000 and the compensation for the procedural costs by the Regional Court of Ústí nad Labem. The defendant appealed to the High Court in Prague, but then subsequently withdrew the appeal.[30] The Regional Court's ruling was very straightforward and offered little commentary, aside from the fact that "the court admits the premise that the birth of a child may not always be a desirable event,"[31] and thus there is no reason why the plaintiff shouldn't be able to recover damages.

Jihlava Hospital Case[32]

The young plaintiff, unwilling and feeling unfit for motherhood at her age and social situation, underwent an abortion in a Jihlava hospital. She was never warned that, especially at times when there are more fetuses in the womb, an inadequate procedural technique may not abort all of the fetuses. The doctor failed to notice the multitude of fetuses, and unaware of the risk, the plaintiff skipped the follow up medical exam, her pregnancy continued, and she bore a child. Both the lower and higher courts found her failure to show up to the follow up medical exam as an act of contributory negligence, yet ruled against the defendant hospital on the grounds of medical malpractice and failure to provide accurate information. Remarkably, the lower court also stated that the plaintiff's careless attitude towards her sexual life, having sexual intercourse without protection, was another fact contributing to her situation, and seemed to use it

[25] Jiří Švestka, Jiří Spáčil, Marta Škárová, Milan Hulmák a kolektiv Občanský zákoník I, II, 2. vydání, Praha 2009, 2321 s.; p. 1283
[26] ibid
[27] ibid
[28] Act of the Czech Republic No. 89/2012 Sb. Civil Code
[29] 36 C 22/2008-77
[30] 1 Co 48/2010 - 94
[31] 36 C 22/2008-77
[32] Lower court ruling: 24 C 66/2001-97; Higher court ruling: 1 CO 192/2008-134

as another aspect of contributory negligence in order to lower the recoverable damages for the plaintiff. The plaintiff was awarded 80,000 crowns in damages and the compensation for the cost of the proceedings. Her claim for 320,000 of immaterial detriment damages was rejected on both instances.

3. Law and Economics Perspective

3.1. Choosing the Economic Approach

One can evaluate law either by a positive economic approach, or a normative one, as distinguished by Milton Friedman.[33] While the positive economic analysis constructs theories that help explain observations of the real world, in the normative analysis, theories are construed in order to figure out what the state of the world should be. Both approaches play their invaluable part in the legal economic analysis, yet have a very different angle to offer.

A good example of the debate on what value economics can provide to legal analysis is the exchange of commentaries on the three aforementioned British rulings between Dr. Nicolette Priaulx and Dr. Christopher Bruce. Responding to Priaulx's critique of the rulings based on social justice and legal reasoning,[34] Bruce uses a positive economic analysis to prove that the rulings were in fact efficient.[35]

Using positive analysis, Prof. Bruce first creates a hypothesis predicting economically efficient damage awards based on a set of formulas he designs in a model with variables such as risk of failed sterilization, level of precaution, net social benefit of the sterilization procedure, differences between the utilities parents enjoy if they do not have a child versus the cost of additional child, etc. Then he tests this hypothesis against the three aforementioned rulings and concludes that the courts indeed ruled efficiently.

There are major problems with such analysis. First of all, as Priaulx points out in her response,[36] the whole hypothesis seems to be reverse-engineered from the very court rulings which it is supposed to predict, or just as influenced by the value judgments which formed the courts' decisions[37]. Indeed, given that a good positive economic analysis should go through a proper testing for falsification, the validation of Bruce's theory is very problematic, because his hypothesis is tested against only three cases. Considering what a surprising and unusual development each of these three rulings was, it is not at all clear whether the theory will stand in the future when it faces further legal developments.

Moreover, given the small sample of only three rulings that the hypothesis is tested against, had the rulings been different, it would arguably not have been difficult to design a different model that would deem the different rulings efficient as well.

[33] Friedman, Milton. *The Methodology of Positive Economics.* Essays In Positive Economics. Chicago: Univ. of Chicago Press, 1966, pp. 3-16, 30-43.
[34] Priaulx, Nicolette. Damages for the 'Unwanted' Child : Time for a Rethink? Medico-Legal Journal, Vol. 73, No. 4, December 2005
[35] Bruce, Christopher J. *A Womb with (An)other View: An Economic Analysis of the Wrongful Birth Dotrine.* July 15, 2008. Available at SSRN: http://ssrn.com/abstract=1160440 or doi:10.2139/ssrn.1160440
[36] Priaulx, Nicolette. *"Conflicting Analyses of Wrongful Birth: A Response to Chris Bruce".* Journal of Legal Economics. 64 Volume 16, Number 1, October 2009, pp. 55-68
[37] Pg. 57, ibid

Thus in principle, as Priaulx points out, this kind of positive theory would have been more beneficial had it been applied to put the wrongful conception rulings into the wider context of tort law malpractice claims as a whole.[38] Yet using positive analysis *ad hoc* to prove the efficiency of rulings which were deemed haphazard by many critics in the first place might have a dangerous effect of playing devil's advocate. Theoretically, a positive economic analysis is supposed to be objective and just describing the world as it is. Yet the fact that, based on a theory formally backed up by empirical science, Bruce deems a certain line of court reasoning efficient undeniably carries value judgment of the court's reasoning in question within the analysis, regardless of the positive nature of the theory. It is of course arguable whether efficiency should be the only criterion for court decisions, yet generally one would have a hard time finding an argument for why the courts should avoid at least attempts to make rulings efficient for the society. Therefore, giving such a small and novel sample of rulings a tag of efficiency formulated only after they have been decided by the courts makes such rulings alarmingly self-justified.

Hence while positive science is definitely a very valuable tool for interpreting long-term legal developments, it seems like it would be more beneficial to employ normative economic analysis for issues like wrongful conception in jurisdiction where the law on the subject matter is still in active development, or in a state that many legal commentators still find controversial and inconsistent. Rather than seeking some consistent economic patterns in such a small number of rulings like the three aforementioned UK cases, or the two Czech ones, it seems more beneficial to ask normative questions focusing on how the law should continue developing, and what its ideal state should be.

This article will therefore further concern itself with normative issues: the popular question of what the wrongful conception and birth claims infer about the economic value of life (and whether they do so at all), what incentives the court reasoning and decisions promote in society, and the relevance of these claims to the tort reform movement.

3.2. Value of Life

Wrongful conception and birth claims produce heated debates in every jurisdiction, and always find their diehard opponents. The biggest problem of the critics is usually that the plaintiff demands compensation for bringing up a new life – something naturally viewed as positive. Hence doesn't the awarding of damages inevitably constitute unjust enrichment? If these claims should be in fact viewed as reimbursing the value of life, it would indeed pose a big economic problem, for such a wide concept as life can hardly be expressed in monetary terms. In fact, when the courts do attempt to engage in such an analysis and discuss the value of life of the unwanted child, their rulings tend to stray into the grey area of great subjectivity, as one can observe in the aforementioned British rulings. Because in *McFarlane*, the court ruled that a healthy child is a blessing and therefore denied compensation, awarding some compensation in *Parkinson* due to

[38] Pg. 57, ibid

the disability of the child inevitably carries the problematic implication that the value of life of a disabled child is to some extent smaller. Under this line of reasoning, the objectively calculable financial strain on a family which has to pay for the needs of a new dependent is completely ignored, and instead the subjective value built around the health of the child is the central argument. Therefore this creates a bizarre effect that under these two precedents, parents of one disabled child are entitled to recover damages, yet had a family been 'blessed' with, say, healthy quintuplets as a result of wrongful conception, the extreme financial strain of having five additional family members would have to be ignored and would have no chance for compensation just because of the children's health. The *Rees* ruling additionally demonstrates just how subjective the polemics about the value of a child may get. The court dismissed the disabled's mother claim for compensation due to the difficulties she will have to face while bringing up the child because of her health condition with the argument that "once the child is able to go to school alone and be of some help around the house, his or her presence will to a greater or lesser extent help to alleviate the disadvantages of the parent's disability; and once the child has grown to adulthood, he or she can provide immeasurable help to an ageing and disabled parent."[39]

As commentators such as Priaulx point out, what kind of mother would want to bestow such an existence upon her child?[40] This kind of thinking is rather wayward for our times and very invasive to the plaintiff – for the court should not be the one to invalidate the mother's reasons for why she had not felt fit to become a parent in the first place, or put the child into the position of her assistant.

Going beyond the inconsistencies of the three rulings above, perhaps how to express the value of life itself in monetary terms is simply the wrong question to ask in wrongful conception and birth cases in general. If one takes the approach that the German Constitutional court adopted[41] and rather than constructing the balance sheet of damages on the difference between a human being's existence and nonexistence, they balance it around the difference between the costs of a life as a single and the basic costs of parenthood, the concept of this action is less irreconcilable with the *McFarlane* dictum that a child is inevitably a "valuable and a good thing".[42] After all, if the courts were to follow suggestions like judge Jaromír Jirsa's and award only truly symbolic damages for such a blessing as a child, e.g. one crown,[43] then as Matěj Šuster from the Liberal Institute rightfully points out, why should not an absent father offer equally symbolic alimony, justifying his argument on the notion of good morals[44] and the fact that he had granted his

[39] Rees v. Darlington Memorial Hospital NHS Trust [2004] UKHL 52

[40] Priaulx, Nicolette. Damages for the 'Unwanted' Child: Time for a Rethink?

[41] BVerfGE 96, 375 = NJW 1998, 519 = JZ 1998, 352. Retrieved from p.171 - Markenisis Basil, Unberath Hannes. The German Law of Torts: A Comparative Treatise. Hart Publishing, Oxford, 4th edition, 2002.

[42] *Per* Lord Steyn. McFarlane v. Tayside Health Board [2000] 2 AC 59

[43] http://blog.aktualne.centrum.cz/blogy/jaromir-jirsa.php?itemid=2817

[44] The notion of good morals is often used in the civil law countries as a defense against the wrongful conception and birth claims. The point was raised in the Jihlava case, where court concluded that since the contract of abortion is legal, good morals cannot interfere with the validity of the negligence claim arising from this contract. Generally, the notion of good morals is very a very vague concept largely open to interpretation, so if courts used it too actively, it might cause case law

partner with an infinite blessing of a child?[45] Same way, nobody denies that foster parents have the enjoyment of all the benefits of rearing a child, yet the state does not have a moral problem in compensating them for their parenting.

Libor Dušek from CERGE-EI offers another solution to the controversial issue of determining the price of a child for the purpose of damages. Based on the revealed preference theory, he argues that if a parent chooses to keep the child after its birth, they are revealing that to them, the child is a net benefit.[46] He notes that there are other factors which might make the parent choose to retain the custody of the child, yet that those are so numerous and subjective that to empirically evaluate them is almost impossible, and therefore they have to be omitted.[47]

Indeed, for the purposes of law and economics, such personal factors as a parent's dilemma whether to let their child - albeit unwanted - grow up with strangers and be left to a fate the parent cannot influence, plus the emotional stress connected to this might be too complicated to be incorporated into the economic analysis. Yet these dilemmas are likely to have such a significant effect on the parent's final decision that it seems more sensible to consider the fact that they do not fit into this particular economic analysis as a sign of its inapplicability to the case, instead of using the incomplete analysis as a basis for denying the damages for child's upbringing.

In conclusion, most criticism against awarding compensation for the child's upbringing based on the argument that value of life should not be compensated appears to be based on moral convictions, not on any economic principles which would prove that such damages constitute unjust enrichment. In fact, when one abandons the perspective building the balance sheet around a child's existence or nonexistence, and rather compares the parents' financial situation before and after the unwanted birth of the child clearly caused by the negligent act or advice, the question of value of the child's life becomes obsolete, for that is not what the court attempts to calculate. Of course, then the question of how far such damages should extend arises – should wealthy parents be awarded damages to cover their child's lavish lifestyle consistent with theirs, including expensive vacations and Harvard education? The issue of finding appropriate limitation for this type of damages is surely a pressing one and needs to be carefully addressed in each jurisdiction, yet the fact that hypothetically, such compensation could skyrocket into outlandish monetary figures is not a reason for disregarding this type of damages altogether based on moral arguments such as the impossibility of determining the value of life.

3.3. Looking Forward – Incentives

One of the most essential questions for any rulings under the law and economics perspective is what ex ante effect it has, i.e. what incentives it is likely to promote. The most apparent issue is that there

inconsistencies similar to the latest developments in the UK law. On the other hand, while civil law courts may always refer back to the Constitution for the foundation of what falls under this notion, in common law countries, the (at least in the recent cases) similarly used concept of fair, just and reasonable is much more prone to policy measures.

[45] http://www.libinst.cz/komentare.php?id=457, retrieved April 2012

[46] LEGblog, Law and Economics blog. http://www.leblog.cz/?q=node/176#comment-10343

[47] ibid

has to be some kind of space for compensation of plaintiffs of wrongful conception claims, or else if all the claims were denied, as one of the proponents of the Law and Economics movement in the Czech Republic Petr Kuhn points out, the medical practitioners in this field would be free to mess up.[48] Their motivation to perform would thus decrease, which would very likely lead to a general decline in the standard of quality of such medical care and advising. Yet on the other hand, imposing too high costs on the medical practitioners, or even just letting them face too much legal uncertainty, as it has happened in the past three UK rulings, may promote unhealthy incentives as well. For example, take *Parkinson*'s authority imposing liability for the extra cost of a disabled child. Even the basic Hand Formula[49] evaluating the duty of care based on the variables of probability of loss, gravity of loss, and the cost of taking precautions suggests that since there is no way for the medical staff to take precautions against the potential disability, the *Parkinson* ruling will instead of positive incentives only induce fear and greater uncertainty for the medical staff and institutions. Consequently, the distinction between a healthy and disabled child might even realistically provide the incentive that the court in *Emeh* had already considered from a different side, hypothesizing that "if public policy prevents a recovery of damages, then there might be an incentive on the part of some [*plaintiffs*] to have […] abortions"[50] since they would not be able to afford the subsequent childrearing. Turning the argument the other way around, if disabled children turn out to be that much more expensive for the hospitals, say that a parent undergoes sterilization/fertility testing in the same hospital where they receive pregnancy treatment - could the *Parkinson* authority provide an increasing incentive to give out compelling 'medical advice' to abort disabled children and exaggerate the predictions of the gravity of their disability? This is of course a hypothesis that cannot be easily empirically tested, and certainly not properly developed within the scope of this article. Yet still, it seems like in the *Parkinson* case, the court has really focused on making the ruling efficient ex post in the particular case only, and thus created a precedent with an unclear ex ante potential. In other words, while the ruling may have been a good fix for the case scenario it applied to, only time will show whether it had unintended negative 'side effects' for the approach towards disabled children in future.

Additionally, one has to wonder what incentives will be created not only by the final ruling itself, but also the form of litigation procedure and the way in which the reasoning is rationalized. From the plaintiff's perspective, one who enters any kind of litigation process must be ready to open up about the details of the case and consequently some loss of privacy over the disputed matter and related details. Understandably, any plaintiff filing a claim over such an intimate issue as their sterilization or abortion will have to discuss sensitive details in front of the court. By doing so, the plaintiff has no other choice but to rely on the court to use this information only to an extent necessary for the case. Yet the Czech courts so far seem to have

[48] http://www.leblog.cz/?q=node/176#comment-10374
[49] Robert D. Cooter and Thomas Ulen. Law and Economics. Pearson Series in Economics, 6th edition, 2012; p. 214
[50] Emeh v. Kensington and Chelsea and Westminster Area Health Authority [1985] 1 Q.B. 1012

gone beyond what is necessary in their commentary on intimate details involved.

For example, it is striking that in the Jihlava hospital case, the High Court of Olomouc dedicates a part of its ruling to a discussion of the plaintiff's reckless sex life. On one hand, the court rejects the defendant's argument asserting they should be free of liability since "the plaintiff caused her troubles herself by her irresponsible attitude in sexual life and indiscipline in terms of timely visits to her gynecologist." [51] Still, just the fact that the court needs to state that "the aforementioned consequences of the failed interruption (abortion) are in the outset caused by the irresponsibility of the plaintiff during her sexual life, but later also the negligently performed process of abortion"[52] seems beyond ridiculous and disrespectful to the plaintiff. Even more so is the fact that the High Court affirmed the lower court's assessment of 80,000 crowns worth of damages, and said nothing of the lower court's way of reaching this sum by reducing the original proposal by two thirds due to "contributory fault of the plaintiff by […] irresponsible attitude towards unwanted pregnancy prevention"[53] based on a provision from 1986, which vaguely lists the social and educational precautions that should be taken in order to prevent unwanted pregnancy.[54]

Such reasoning is both legally and economically unsound. The use of proximate causation and the 'but for plaintiff's irresponsible sex life, she would not have ended up having a negligently performed abortion' argument is nothing but a patronizing gesture from the court. Abortion is a legal act in the Czech Republic, so there is no reason why the court should discuss how exactly the plaintiff got into the life situation that made her undergo it. Moreover, including this line of causation in the reasons for reducing the proposed damages for negligently performed abortion creates an economically unreasonable implication that the duty of care for performing an abortion should differ based on the circumstances under which a woman undergoing the procedure got pregnant. These circumstances should have nothing to do with the guaranteed quality of the procedure performance from the provider and the level of precaution he or she takes against performing the abortion negligently. Thus there is no reason why the personal circumstances of the mothers should affect the liability of the providers for abortion procedures completely equal on substantial and contractual level. Such differentiation in fact only creates legal uncertainty for the professionals.

Moreover, this kind of reasoning could severely reduce any future plaintiffs' incentives to come forward. With the courts likely to make judgmental statements about the plaintiff's private life, the media voicing a public outcry about the procedures and questioning the morality of the outcome,[55] and

[51] 1 CO 192/2008-134
[52] Ibid.
[53] 24 C 66/2001-97 "As a guideline for determining the non pecuniary damages, the Court used the 240,000 Czech crowns figure, which it, in consideration of the circumstances of the breach of law, *reduced by two thirds due to plaintiff's contributory fault for the situation* […]. Plaintiff's testimony established that she incurred her unwanted pregnancy herself due to her irresponsible attitude towards unwanted pregnancy prevention."; (author's translation, emphasis added)
[54] § 2, 66/1986 Sb. "Unwanted pregnancy is prevented primarily by educating towards planned and responsible parenting in the family, at schools and in medical institutions, educational activities in social and cultural fields, and using means of contraception." (author's translation)
[55] Both Czech cases received considerable media attention, and often very negative commentary from public. E.g. column

the lengthiness of the lagging litigation in the Czech Republic,[56] a plaintiff could likely let the prospects of stress, pressure, privacy infringement, and the uncertain vision of an award that may not even reach hundred thousand crowns deter her from pursuing a lawsuit in a similar situation.

Hence while it is not up to law to protect the plaintiff from the outside world reaction and media, at least the courts should be careful about the appropriate scope of their commentary and make sure they do not create an unnecessarily hostile environment towards the plaintiff. Since regardless of one's standing of how high the compensation in these cases should or should not reach, it would not be for society's overall benefit if the similarly injured women were discouraged from pursuing their claim despite having been a victim to genuine medical negligence, and thus during the medical procedures in question, liability would effectively become an empty word.

3.4. Possible Tort Reform – Which Path to Take?

Tort claims such as wrongful conception and birth cause so much debate and controversy because they prompt one to reconsider the very purpose of tort law and tort damages awards in the first place. Every society has to deal with the issue of scarcity of resources and decide how to distribute them both efficiently and justly. Thus the question whether the high standards of liability allowing for recovery of the full amount of damages are desirable for society arises, especially in the medical field where the recovery of such damages cuts the resources from the hospitals or public healthcare system. There are many directions of tort reform movements worldwide addressing such concerns and arguing for various reforms, and the analysis of their claims would require another article of its own.[57] Generally, the tort reform efforts often aim for legislative reform allowing for a certain maximum cap on recoverable damages.[58] Alternatively, they also propose various insurance schemes which would serve as a source for recovery of medical malpractice damages, and this way they often turn the question of damages around for the potential plaintiffs in a sense of letting them ask themselves how much they are willing to pay to prevent a given type of injury in the first place. While especially the highly litigious western jurisdictions such as the U.S. face many tort reform efforts aiming to decrease what some view as excessive amount of damages harmful to the state of society, from the purely ethical standpoint it seems that the Czech Republic might on the other hand use some tort reform providing for slightly higher damages than the courts currently tend to award – as one after all sees from the very low awards in the two Czech aforementioned cases. Nonetheless, regardless of the direction of the particular tort reform in question, these kinds of efforts are the ones which should incorporate both a positive and normative economy, for it can offer an invaluable analysis on

http://www.lidovky.cz/zivot-duvod-k-reklamaci-0sd-/ln_nazory.asp?c=A080301_100913_ln_nazory_fho, or even a disapproving column of Jaromír Jirsa, back then still a functioning President of the Czech Union of Judges http://blog.aktualne.centrum.cz/blogy/jaromir-jirsa.php?itemid=2817

[56] The plaintiff filed her lawsuit in November 2001 and received the court of last instance decision in July 2009.

[57] See e.g. Francis P. Hubbard, The Nature and Impact of the "Tort. Reform" Movement, 35 Hosfra Law Review. 437, 457 (2006), or Finley, Lucinda M. The Hidden Victims of Tort Reform: Women, Children, and the Elderly, 53 Emory L.J. 1263 (2004)

[58] Hubbard, ibid

where to set the border between just compensation, and compensation efficient and sustainable for the society.

4. Conclusion

This article has demonstrated that the recent case law in both the UK and Czech Republic has been treating the tort of wrongful conception as a rather odd one out. The British courts gave this tort a more special treatment than the Czech courts, mainly when dealing with an issue which was not even brought up in front of their Czech counterparts: whether to compensate the costs of raising the unwanted child. *McFarlane v. Tayside Health Board* set a new precedent deeming the recovery of maintenance costs of a healthy unwanted child unacceptable. *Parkinson v. St. James & Seacrosft University Hospital* upheld *McFarlane*, yet in cases of disabled children allowed for recovery of the difference between the cost of raising a disabled and a healthy child. *Rees v. Darlington Memorial Hospital NHS Trust* upheld *McFarlane* and refused to compensate a disabled mother for upbringing a healthy child, yet created a conventional award for any wrongful conception plaintiffs serving as compensation for the partial denial to their autonomy and freedom. The Czech courts awarded the plaintiffs with low damages consistent with the Czech standards mostly without engaging in ethical or policy debates, yet in one instance the court partially reduced the damages based on personal actions of the plaintiff which took place even before the medical procedure in question.

After a brief criticism of the positive economic analysis of the British case law by Dr. Bruce, it was concluded that the best way to analyse controversial and currently developing case law for the scope of this article is to approach it from a normative angle. The law and economics analysis attempted to demonstrate that the special treatment of these torts is not necessarily deserved, and the awards of damages in these cases should not be considered as controversial as they often are. While many view the damages for upbringing as unjust enrichment because they find it to be a reflection of the value of the child's life, legally it is not more than the difference between the parent's financial situation with and without the additional dependent whom they must take care of. Thus the arguments against such damages rather fall on the subjective moral level than an economic one. Furthermore, the article claimed that all aforementioned rulings are to some degree problematic in terms of the incentives they promote. The most notable examples are the British precedents creating legal uncertainty among the practitioners unable to take precaution against the birth of a disabled child for whom they are responsible for despite a lack of causal link to the disability, and the Czech courts possibly deterring future plaintiffs by the unnecessary judgmental approach towards the plaintiff's personal and sex life. Finally, the issue of tort reform movement was briefly addressed with the aim to open up the question of whether and how such medical malpractice claims fit into the societal scheme of limited resources, and whether a reform is thus needed.

The legal system of each society should naturally reflect its values. Therefore if a consensus was reached that a society is truly not willing to compensate parents for the damages arising from failed reproductive planning, whether for reasons connected to efficient allocation of resources, or policy and moral standing towards the issue, then this sentiment should be declared publicly by an appropriate legislative body, so that each person undergoing a sterilization or abortion would have a realistic perspective about his or her prospects in case of the procedure's failure, and the medical practitioners would not have to speculate about the liability they are likely to have.[59] Yet until that border is clearly set, there seems to be no reason to even partially deny liability arising out of a perfectly legal contract in cases where all elements of negligence are met. Without a statutory basis, singling these torts out and treating them any differently from the rest of tort actions is not only unethical, but it also undermines legal certainty and the rule of law.

[59] In fact, the medical community voiced the procedures of medical sterilization as potentially fallible, and therefore not a subject to wrongful conception liability. E.g. the excerpt from Male and Female Sterilization report from Royal College of Obstetricians and Gynecologists from 2004 published in the Jackson's E., Medical Law – Texts, Cases, and Materials, Oxford, 2010, suggests that since the lifetime risk of sterilization failure is not something entirely uncommon at one per 200 in tubal occlusion, and one in 2000 for vasectomy, and therefore these risks should be taken into account and fully disclosed to the clients. This would of course change the wrongful conception doctrine and eliminate the majority of the cases, safe for the ones where e.g. negligent professional advice has been given. On another note, some of the U.S. states ban wrongful birth actions statutorily.

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Substantive Review in the Court of Justice of the European Union

Mark Bassett[1] and Paul Bassett[2]

Introduction

Alexander Hamilton wrote in the Federalist Papers No. 78 that under the Constitution of the USA the executive branch holds the sword while the legislative branch holds the purse. The judiciary, he opined, on the contrary has no influence over either. The question of what degree of judicial intervention into executive action is appropriate is one which has been at the very heart of democratic theory for centuries. This question is particularly acute in the context of foreign policy and security.

Unsurprisingly, this controversy also exists at the supranational level. It has taken on added significance in recent times due to the greater role played by the European Union in the field of international relations and the EU Charter of Fundamental Rights becoming legally binding. This tension is at its most acute in the context of sanctions.

The authors seek to use Hamilton's analogy and examine to what extent the EU courts could be described as tugging at the sleeve of the executive while it attempts to wield its sword. In this regard, this article seeks to address three fundamental questions:

(i) What is the current scope of review applied by the EU Courts with respect to decisions taken by the executive branches of EU government to place legal persons under restrictive measures or sanctions;

(ii) What influence, if any, has the CFR had in setting this standard; and

(iii) Does this represent a positive development in the law?

The Nature of Judicial Review

The power of a particular authority to make a decision will often depend on the existence of a particular set of circumstances. Before exercising its legal power, the authority in question must determine if the particular set of facts exists at a definite time. Consequently, an incorrect decision of fact may result in a decision lacking the requisite legal basis. Such decisions are liable to be quashed by the courts.

In the EU context, this power of judicial review is exercised by the Court of Justice of the European Union ("***CJEU***") under the heading of "*infringement of the Treaty or of a rule relating to its application*" under article 263 Treaty on the Functioning of the European Union ("***TFEU***").

Upon review of the CJEU jurisprudence, it is evident that, in many circumstances, what is labeled as a "question of fact" is better understood

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as one of fact *and* of judgment based on facts. Firstly, the decision making authority must establish the primary facts as best it can. Secondly, it must decide (i) whether those facts come within its jurisdiction; and (ii) whether to act and in what manner. There is, therefore, a subjective element present and any judicial review must, by necessity, venture into examining the exercise of discretion.

Whether the correct role of the court is to afford an applicant a "second hearing" and substitute its own decision for that of the original decision maker or merely to perform an "audit of legality" and ensure the original decision is at least rational, is a question which has occupied much space in the law reports without ever being categorically resolved for all circumstances. Rather, it depends on the legal context in which the question is posed. Within the common law world the *Wednesbury* judgment is perhaps the classic example of the former restrained approach while the concept of "strict scrutiny review" in American constitutional law represents the latter and its greater role for judicial activism.

While the *scope* of judicial review has varied from jurisdiction to jurisdiction, the one field where the executive has consistently enjoyed a large degree of deference from the courts is in the area of foreign and security policy.

When examining the subject of judicial deference in this area of executive power, it is important to draw a distinction between two different types of deference. The first approach is termed "Macro Policy Deference" and holds that courts should not set aside the policy choices of other branches of government. The second approach is called "Individual Application Deference" and is characterized by the court effectively (and inappropriately) abdicating its own functions to the executive on the basis that the executive was the institution best placed to decide such matters.

Recently, the CJEU has expanded, *propio motu*, the scope of its powers of substantive review and has demonstrated a very obvious disapproval of "Individual Application Deference". The authors shall argue that the current approach to what constitutes an "error of assessment" has been influenced by the Charter. While it may prove problematic to the institutions of the EU in the implementation of their foreign policy objectives, it represents a robust defence of the rights of the entities affected by such decisions and, on the whole, demonstrates a strong commitment to the rule of law and due process.

Substantive Review in EU Law

Although Article 33 of the European Coal and Steel Community ("***ECSC***") Treaty explicitly restrained the Court of Justice's ability to examine an assessment made by the Commission, the EU Treaties are silent on the intensity of judicial review over the acts of the EU executive.[3] Despite some variation in the standard of review, in general, the Court's approach has remained consistent with that early provision. The Treaties have been interpreted as granting wide discretionary powers to the EU institutions in setting Union objectives and pursuing them. The approach was illustrated in the *Westzucker* case:

[3] Article 263 TFEU

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"When considering the lawfulness of the exercise of such freedom, the courts cannot substitute their own evaluation of the matter for that of the competent authority but must restrict themselves to examining whether the evaluation of the competent authority contains a patent error or constitutes a misuse of power."[4]

Additional grounds of review have been emerged in the years following *Westzucker*. They include proportionality,[5] fundamental rights,[6] legitimate expectation,[7] non-discrimination[8] and the precautionary principle.[9] However, the deferential approach has largely survived the exponential growth in the Union's competences. More recently, it been restated in the context of state aid in *Spain v. Lenzing*[10] and agriculture in *Pfizer*.[11]

It is in the context of fundamental rights that the Court has shown a greater willingness to examine and when appropriate strike down the discretionary choices of those institutions which are tasked under the Treaties with exercising executive power.

Emergence of the CFR

The EU Charter of Fundamental Rights (CFR) followed the Court's reactive recognition of human rights as a general principle of law[12] and its identification of the ECHR as a source of inspiration.[13]

The CFR was first proclaimed and adopted by the Commission, the European Parliament and the Council before its adoption by the Member State governments at Nice in December of 2000. The text was devised, initially at least, as a consolidation and clarification of rights already protected by the Treaties and common to all the legal traditions of its democratic member states rather than an expansion of rights. Its legal status, however, was left undefined at that time. The Charter as a whole was subsequently incorporated into Part II of the Constitutional Treaty but its ambiguous status continued after the non-ratification of the project in 2005. It was only with the Lisbon reforms in 2009 that the place of the Charter within the EU legal order was formally established.

Article 6(1) TEU now lists the Charter as a formal source of EU human rights law. Although the text of the Charter is not incorporated into the EU Treaties, it is granted the same legal status as the Treaties themselves.

The scope of application of the Charter is set out in article 51 CFR. Its provisions are addressed to the institutions and bodies of the Union and, with due regard for the principle of subsidiarity, are also binding on the Member States when they are implementing EU law. Importantly, the Charter also applies to the Union when exercising its competence in the foreign policy field in

[4] Westzucker Gmbh v Einfuhr- und Vorratsstelle für Zucker 57/72 (1973) ECR 321, paragraph 14
[5] Article 5(4) TEU
[6] Initially as a general principle of EU law in International Handelsgesellschaft v. Einfuher and Vorraststelle fur Getreide und Futtermittel (1970) ECR 1125
[7] Firma A Racke vs. Hauptzollant Mainz (1979) ECR 101
[8] This principle is expressly mentioned in a number of Treaty articles and was also held to be a general principle of EU law in *Ruckdeschel v Hauptzollant Hamburg-St Annen (1977) ECR 1753*
[9] UK vs. Commission (1998) ECR I-2265
[10] (2007) ECR I-9947
[11] [1999] E.C.R. II-1961; [1999] 3 C.M.L.R. 79
[12] C-29/69 Stauder v. City of Ulm (1969) ECR 419, paragraph 7
[13] First articulated in C 36/75 Rutili v. Minister for the Interior (1975) ECR 219

accordance with Title V of the Treaty on European Union (TEU).

While the CJEU has consistently adopted an integrationist approach in its free movement rulings, in the years between the creation of the Charter and the Treaty of Lisbon, the Courts adopted a somewhat tentative approach to the document. It appears in the case law primarily as an instrument of confirmation of rights that exist elsewhere in EU law[14] and where the text is expressly referred to in secondary legislation.[15] In her article Sanchez aptly describes this period in which the CFR was soft law as a useful period of "familiarization".[16] It was only after the CFR becomes legally binding that its true significance became apparent.

Sanctions Context

Alongside the development in Union human rights jurisprudence, collectively enforced sanctions, or 'restrictive measures' in the language of EU law, have become an increasingly important means for the member states in pursuing foreign policy objectives. Such measures can be enacted either through implementing UN Security Council ("***UNSC***") Resolutions or at the Union's own initiative based on the common foreign and security policy powers in the Treaties. In this particular context, the Council of the European Union typically acts as the executive, exercising the powers contained in Title V of the TEU and in article 215 of the TFEU.[17]

Restrictive measures typically take the form of prohibitions on trade with identified legal persons or a freeze on their resources within the EU. While the CJEU has recognized that the interests of the international community in promoting peace and security can justify restrictions on property rights or the lawful commercial activities of legal persons, measures aimed at achieving those goals must provide adequate protection to the individuals or entities affected.[18] It is in this context that the CJEU has, perhaps, been most assertive in striking down EU laws which disproportionately violate such rights.

In the case of *Kadi I,* the CJEU overturned a ruling of the General Court of the European Union ("***General Court***") that the EU judiciary had no jurisdiction to question Resolutions of the UNSC, even indirectly, other than for violation of *jus cogens*.[19]

The applicants in *Kadi I* had appeared on a UN list of persons and entities associated with Osama bin Laden, the Al-Qaeda network and the Taliban without an opportunity to present a defence, to obtain information concerning the specific allegations against them or to seek judicial review of their inclusion before any independent court.

[14] C-450/06 Varec SA v. Belgium (2008) CMLR 24; P Kadi & Al Barakaat Intl (2008) 3 CMLR 41
[15] C-540/03 Parliament v. Council (2006) ECR I-5769, paragraph 38
[16] Sanchez, S. "The Court and the Charter: The impact of the entry into force of the Lisbon Treaty in the ECJ's approach to fundamental rights" 49 CMLR 5, pg 1565-1612 at pg 1572
[17] Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF last accessed on 05/04/2013
[18] Bosphorus v. Minister for Transport (1996) ECR I-3953; Dorsch Consult v. Council (1998) ECR II-667; Bank Melli Iran v The Council Case T-390/08, judgment delivered on 14 October 2009, paragraph 66
[19] Joined Cases C-402/05 P and C-415/05 P Kadi and Al Barakaat International Foundation v Council and Commission [2008] ECR I-6351 paragraph 281

The CJEU held that an international agreement cannot affect the autonomy of the Union's legal powers nor can it relieve the Union legislature of its obligation to respect fundamental human rights. The Court held that it did have the competence to review the lawfulness of EU Common Position 2002/402/CFSP and Regulation (EC) No 881/2002 which intended to give effect to the international agreement.[20] To deny the applicants the opportunity to challenge the measures, in so far as they applied in the EU, would constitute, "*a significant derogation from the scheme of judicial protection of fundamental rights*" contained in the Treaties.[21]

Subjected to the scrutiny of human rights law, the contested regulation was found to be an unjustified restriction on the applicants' fundamental rights, specifically the right to be heard and the right to effective judicial review, and was annulled in so far as it concerned them. When the matter returned to the General Court after the applicants were provided with what was considered to be an inadequate opportunity to respond to the allegations, the subsequent Regulation was again annulled as incompatible with the rights of the defence in *Kadi II.*[22]

The judgment of the CJEU refers to article 47 CFR as *reaffirming* the principle of effective judicial protection – a concept which the Court itself describes as a general principle of EU law stemming from the constitutional traditions common to the member states and the due process articles of the ECHR.[23] However, it can be sensibly argued that neither the Strasbourg Court nor any of the national courts would at that point in time have come to the same conclusion as the Grand Chamber. The indirect reference to not yet legally binding CFR should, perhaps, be considered to have contributed something to the question of what effective judicial protection actually means.

Having made sanctions legislation amenable to judicial review on grounds of fundamental rights, the EU Courts then progressively strengthened the protection available to affected persons. It soon came to include a requirement to state intelligible reasons[24] and the availability of protection to legal persons.[25]

The standard of review that was to be applied was also developed by the Court. The correct approach was set out by the Court in *People's Mojahedin Organization of Iran* v *Council:*

"Lastly, it is true that the Council enjoys broad discretion in its assessment of the matters to be taken into consideration for the purpose of adopting economic and financial sanctions on the basis of Articles 60 EC, 301 EC and 308 EC[26], consistent with a common position adopted on the basis of the CFSP. Because the Community Courts may not, in particular, substitute their assessment of the evidence, facts and circumstances justifying the

[20] Ibid paragraph 281, 285
[21] Ibid, paragraph 322
[22] Kadi v The Council and the Commission Case T-315/01, judgment delivered on 21 September 2005.
[23] Joined Cases C-402/05 P and C-415/05 P Kadi and Al Barakaat International Foundation v Council and Commission [2008] ECR I-6351 paragraph 335
[24] Bank Melli Iran v The Council Case T-390/08, judgment delivered on 14 October 2009, paragraph 80
[25] Bank Mellat v Council Case T-496/10, paragraph 41.
[26] The provisions of these Articles are now contained in Articles 75, 215 and 352 of the Treaty on the Functioning of the European Union.

adoption of such measures for that of the Council, the review carried out by the Court of the lawfulness of decisions to freeze funds must be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power. That limited review applies, especially, to the Council's assessment of the factors as to appropriateness on which such decisions are."[27]

This initial "light touch" approach to an assessment of the Council has been subject to considerable change over recent years. It seems to the authors that the Court has moved more deliberately to a substantive review as the Charter has assumed a greater role in the legal landscape of the Union.

In the case of *Bank Melli of Iran v. Council*, the CJEU's Grand Chamber upheld the decision of the General Court that the inclusion of the applicant in a sanctions list was not unlawful.[28] The legislative acts in question were aimed at implementing UNSC Resolution 1736 (2006). It was alleged that the applicant bank had provided financial support to those bodies directly involved in the Iranian nuclear sector. The reasons given by the Council were considered to be sufficiently articulated to conform to the essential EU law requirement to state reasons by both the General Court and the CJEU Grand Chamber on appeal.[29]

Although the General Court had explicitly stated that only a limited review of the Council's assessment of the facts was permissible, that important precept was substantially undermined by the manner in which the same court formulated that supposedly limited review.[30] The General Court, in considering Council Decision 2008/475/EC and Regulation (EC) No 423/2007, said the following:

"… it is for the Court to ascertain whether, having regard to the pleas for annulment raised by the entity concerned or raised by the Court of its own motion, in particular, the case in point corresponds to one of the four situations covered by Article 7(2)(a) to (d) of Regulation No 423/2007. That implies that the judicial review of the lawfulness of the decision in question extends to the assessment of the facts and circumstances relied on as justifying it, and to the evidence and information on which that assessment is based. The Court must likewise ensure that the rights of the defence are observed and that the requirement of a statement of reasons is satisfied and also, where applicable, that the overriding considerations relied on exceptionally by the Council in disregarding those rights are well founded…" [31]

Although the Council had not adduced any evidence of the Bank's participation in the Iranian nuclear sector, its inclusion in the sanctions list was upheld on the rather curious ground that no plea in law had been advanced on that specific point by the applicant.[32] Had the applicant expressly alleged an error of assessment on the part of the Council,

[27] Case T-256/07 *People's Mojahedin Organization of Iran* v *Council* [2008] ECR II-3019,paragraph 159
[28] Bank Melli Iran v The Council Case T-390/08, judgment delivered on 14 October 2009.
[29] Ibid, paragraph 85.
[30] Ibid, paragraph 36
[31] Ibid, paragraph 37
[32] Ibid paragraph 107

the clear implication is that the EU Courts would have been entitled to review the merits of the decision to include *Bank Melli of Iran.*

That situation arose soon after in the case of *Tay Za vs. Council* and is an example of the forceful approach the EU Courts are prepared to take with regard to the Council's assessment of facts.[33] Here, the applicant had been included in the list of persons subject to EU sanctions on the basis that he benefited personally from the economic policies of the government in Burma. The General Court accepted that the EU could target not just a third country for restrictive measures but also individual members of the government and those who benefitted from its policies.[34] The Court held that whether or not there was a sufficiently close connection between the applicant and the third country to justify the restrictive measures was a question of law rather than one of fact.[35]

The General Court's acceptance of the presumption that family members benefitted from the functions exercised by their family was subsequently overruled by the CJEU's Grand Chamber. Instead the Grand Chamber placed the burden of proof firmly on the Council:

"… a measure to freeze funds and economic resources belonging to the appellant could have been adopted within the framework of a regulation intended to impose sanctions on a third country on the basis of article 60 EC and 301 EC only in reliance upon precise, concrete evidence which would have enabled it to be established that the appellant benefits from the economic policies of the leaders of the Republic of Myanmar."[36]

As the Council could not provide any such evidence, the applicant's challenge was successful and the restrictive measures were annulled in so far as they concerned him.

These cases are illustrative of the more exacting standard that the EU Courts are prepared to adopt when fundamental rights are engaged in an era in which the European Union has adopted its own human rights instrument. This can be contrasted with the judgment in *Westzucker.*

Fulman

Soon after the unsuccessful challenge in *Bank Melli*, the judgment in *Fulman & Mahmoudian v The Council* was delivered by the General Court.[37] It is one of the clearest pronouncements on the scope of judicial review that the EU Courts are willing to apply when considering the legality of executive action and bears little resemblance to that set out in *Westzucker*. That decision was reaffirmed by the CJEU late last year.[38]

The applicants in *Fulmen* were included in the sanctions list on the basis of alleged involvement in the disputed Iranian nuclear programme. As the alleged motivation for the inclusion of the applicants was information provided to the Council by an EU Member State, the Council claimed this amounted to confidential information and,

[33] Tay Za v The Council C-376/10 P
[34] Ibid paragraph 55
[35] T-181/08, paragraph 63-81
[36] Tay Za v The Council C-376/10 P, paragraph 70
[37] Joined cases T-439/10 and T-440/10 Fulman and Mahmoudian v The Council.
[38] Council v Fulman and Mahmoudian Case c-280/12

consequently, could not be disclosed. Instead the Council submitted that the review by the Courts must be limited to determining whether the reasons relied on to justify the adoption of the restrictive measures are -at least- "probable".[39]

A reading of the judgment reveals that the supporting arguments of the Council do not even adhere to the institutions own meager standard of review and provided no evidence whatsoever against the applicants. Notwithstanding that significant oversight by the Council, it appears to the authors that the arguments of the Council resemble more closely a classical plea for deference on the part of the judiciary to the executive on the often quoted basis that the executive, having access to confidential information, is the institution of government best equipped to decide such matters.[40]

The Court's subsequent rejection of this argument was a clear message that, with respect to the inclusion of legal persons in the list of restricted entities, the CJEU shall not defer on matters affecting the fundamental principles of European Union law. The judgment is overtly based on the provisions of the Charter. Whereas previously the Court had utilized the Charter to reinforce rights it concluded had existed elsewhere in this judgment articles 41 and 47 CFR are to the fore.

"The first of those rights, which is affirmed in Article 41(2) of the Charter of Fundamental Rights of the European Union ('the Charter'), includes the right to be heard and the right to have access to the file, subject to legitimate interests in maintaining confidentiality (Kadi II, paragraph 99).

The second of those fundamental rights, which is affirmed in Article 47 of the Charter, requires that the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based … so as to make it possible for him to defend his rights in the best possible conditions … (see Case C-300/11 ZZ [2013] ECR I-0000, paragraph 53 and case-law cited, and also Kadi II, paragraph 100).

Article 52(1) of the Charter nevertheless allows limitations on the exercise of the rights enshrined in the Charter, subject to the conditions that the limitation concerned respects the essence of the fundamental right in question and, subject to the principle of proportionality, that it is necessary and genuinely meets objectives of general interest recognised by the European Union (see ZZ, paragraph 51, and Kadi II, paragraph 101).[41]

The burden of proof in cases concerning restrictive measures was also examined in *Fulman*. The Council argued that, given the inherent difficulties associated with obtaining incriminatory evidence of collaboration in nuclear proliferation, it would be unreasonable for the Court to condition the legality of the measure on the submission of factual proof. This would appear inconsistent with the Council's claim regarding the applicable standard of review for the Court.[42] It is difficult to reconcile a

[39] Joined cases T-439/10 and T-440/10 Fulman and Mahmoudian v The Council, paragraph 95
[40] Eric A. Posner & Adrian Vermuele, Terror in the Balance Security, Liberty, and the Court (2007) Oxford University Press, Chapter 1
[41] Council v Fulman and Mahmoudian Case c-280/12, paragraphs 60-61
[42] Joined cases T-439/10 and T-440/10 Fulman and Mahmoudian v The Council, paragraph 95

requirement for the reasons to be probable with a situation where no evidence is provided at all supporting the allegation. While the Court accepted that the standard of proof required could be lessened on account of the difficulty in obtaining incriminating evidence, it stressed that to remove altogether this requirement would, in effect, place the burden of proof on the applicant to establish its innocence of the alleged collaboration.[43] While it is clear that the imposition of restrictive measures by Council does not amount to a criminal sanction, it appears to the authors that to impose such a burden on the applicant would contradict the well established principle of innocent until proven guilty.

In asserting the power of the EU Courts with regard to substantive review, the court rejected the Council's submission that its allegation must be "probable". The manner in which the standard of review is addressed cannot be adequately summarized and is replicated below:

"The effectiveness of the judicial review guaranteed by Article 47 of the Charter also requires that the Courts of the European Union are to ensure that the decision, which affects the person or entity concerned individually, is taken on a sufficiently solid factual basis. That entails a verification of the allegations factored in the summary of reasons underpinning that decision, with the consequence that judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated

To that end, it is for the Courts of the European Union, in order to carry out that examination, to request the competent European Union authority, when necessary, to produce information or evidence, confidential or not, relevant to such an examination

That is because it is the task of the competent European Union authority to establish, in the event of challenge, that the reasons relied on against the person concerned are well founded, and not the task of that person to adduce evidence of the negative, that those reasons are not well founded."[44]

The Court describes its role in disputes of this nature as one of "verification" rather than review. It considers its task to be one of appeal rather than merely an audit of legality. It is a substantive appeal in which the Court must be presented with convincing evidence by the executive authority. Where that evidence is withheld or deemed to be inadequate the court will readily substitute its own view for that of the executive authority and annul the restrictive measures.

Bank Mellat vs. Council[45]

The applicant was an Iranian bank which had first been made subject to restrictive measures in

[43] Ibid, paragraph 101.

[44] Council v Fulman and Mahmoudian Case c-280/12, paragraph 64-66

[45] Bank Mellat vs. Council (Case T-496/10), judgment delivered on 29 January 2013.

Annex II to Council Decision 2010/413/CFSP of 26th July 2010.[46] The precise justification was:

"Bank Mellat engages in a pattern of conduct which supports and facilitates Iran's nuclear and ballistic missile programmes. It has provided banking services to UN and EU listed entities or to entities acting on their behalf or at their direction, or to entities owned or controlled by them. It is the parent bank of First East Export Bank which is designated under UNSC Resolution 1929".[47]

In the annexes to the relevant legislative measures and during the course of the proceedings the Council advanced a number of independent justifications for the imposition of restrictive measures including, inter alia, information provided by the member states, the Bank's inclusion in UNSC Resolution 1929, assumptions given the prominence of the Bank within the Iranian financial sector and the Bank's own admissions of limited interaction with entities clearly involved in the Iranian nuclear sector. Some of these justifications were found to adhere to the obligation to state reasons while others did not and were dismissed.[48] The former category was then examined by the Court under the plea of manifest error of assessment in relation to the adoption of restrictive measures.

At paragraph 111, the Court confirmed that it would undertake a substantive review of the decision of the Council:

"In accordance with the case-law, the judicial review of the lawfulness of a measure whereby restrictive measures are imposed on an entity extends to the assessment of the facts and circumstances relied on as justifying it, and to the evidence and information on which that assessment is based. In the event of challenge, it is for the Council to present that evidence for review by the Courts of the European Union".

During the Court's subsequent review of the justifications relied on by the Council, the crucial issue was whether the applicant's activities could be considered to constitute *support* to nuclear proliferation. The Court placed the burden of proof was squarely on the respondent EU institution. The practical difficulties faced by the Council in obtaining such evidence in the face of denials or obstruction by the applicant appear to be given very little consideration.[49] Although the standard of proof is not expressly stated, a sensible reading of the Court's analysis would suggest that it is a standard commensurate with the interests at stake.[50] In effect, there must be a sufficiently close relationship between the activities of the applicant and the acknowledged risk of nuclear proliferation.

[46] Its subsequent inclusion in Annex V to Council Regulation (EC) No. 423/2007 attracted the application of article 7(2) of that Regulation with the result that the funds and economic resources of *Bank Mellat* were frozen.
Council Decision 2010/644/CFSP of 25th October 2010 amended the earlier Council Decision but the applicant's listing continued. Council Regulation 423/2007 was repealed by Council Regulation (EU) No. 961/2010 of 25th October 2010 which was in turn repealed by Council Regulation (EU) No. 1245/2011 of 1st December 2011.

[47] Entity Nº 4, Annex II B. Council Decision 2010/413/CFSP available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:195:0039:0073:EN:PDF

[48] Bank Mellat vs. Council (Case T-496/10), judgment delivered on 29 January 2013, paragraphs 71-76

[49] Ibid, paragraph 118

[50] Ibid, paragraphs 50, 51 & 100 taken in addition to the general body of previous CJEU & General Court jurisprudence on the subject.

The Court noted that it was not disputed by the applicant that its wholly owned subsidiary had been the subject of UNSC Resolution 1929 (2010). However, as the reasons given by the UNSC for the subsidiary's (First East Export Bank) inclusion in the Annex to the Resolution were articulated in "*imprecise terms*" and were based on allegations of the conduct of the applicant itself rather than that of FEE they were not accepted by the General Court.[51]

Another justification before the Court for the imposition of restrictive measures was the applicant's admission that it had supplied account operations to the Novin Energy Supply Company – a sanctioned entity- both before and after the adoption of Resolution 1929. However, the question of whether or not the services actually provided were of a nature and quality which could constitute "*support to nuclear proliferation*" within the meaning of the relevant legislative acts was a question which the Court reserved for itself.[52] The General Court held that the transactions performed *before* the adoption of Resolution 1929 on 27th March 2007 would not be considered to be support to nuclear proliferation absent "*detailed and specific evidence or information to suggest that the applicant knew or might reasonably have suspected that Novin was involved*" in such activity.[53] As the Council could not produce any such evidence, the General Court held that those transactions could not form the factual basis for the imposition of restrictive measures. As further evidence of this trend, in the case of *IOEC v The Council*, the General Court held that an alleged violation of export restrictions on the part of the applicant could not form the basis for the imposition of restrictive measures.[54]

Perhaps the most clear indications of the direction of EU court jurisprudence is contained in the General Court judgments in *Islamic Republic of Iran Shipping Lines vs The Council*[55] and *Bank Kargoshaei and Others vs The Council*.[56] In both judgments, the General Court expressly reserves for itself the right to consider and adjudicate on the merits of the Council's factual assessment of the actions that allegedly give rise to the imposition of restrictive measures.[57]

In respect of the transactions performed *after* UNSCR 1929 was adopted, in deciding whether or not the actions of the applicant could be considered support for nuclear proliferation, the crucial question for the General Court was:

"…whether the applicant acted without delay to bring to an end the supply of financial services to Novin, taking into account the applicable obligations laid down by Iranian law, as soon as it knew or might reasonably have suspected that Novin was involved in nuclear proliferation".[58]

[51] Ibid, paragraph 117
[52] Ibid paragraph 121
[53] Ibid, paragraph 128
[54] IOEC vs The Council Case T-110/12, judgment delivered on 6 September 2013, paragraph 62.
[55] Islamic Republic of Iran Shipping Lines vs The Council, Case T-489/10, judgment delivered on 16 September 2013.
[56] Kargoshaei and Others vs The Council, Case T-8/11, judgment delivered on 16 September 2013.
[57] Islamic Republic of Iran Shipping Lines vs The Council, paragraph 46 and Kargoshaei and Others vs The Council, Case T-8/11, paragraph 117 & 118
[58] Bank Mellat vs. Council (Case T-496/10), judgment delivered on 29 January 2013, paragraph 127

The General Court acknowledged that the relevant EU Regulations permitted the unfreezing of funds belonging to listed entities in order to make payments under obligations entered into by them prior to their being listed.[59] Transactions that were due but may be linked to nuclear proliferation would not benefit from those provisions.

Since there was no requirement on the applicant to freeze the funds of Novin in Iran, there was no requirement that it apply stricter rules to its client in Iran than would have been the case for a client in the EU.[60] Again the General Court rejected the allegations made by the Council that the applicant had acted in a manner which *could* be considered support to nuclear proliferation within the meaning of the relevant legislative acts. As there were no circumstances before the Court which could justify the adoption of restrictive measures against Bank Mellat, its plea of manifest error was upheld.

The General Court did provide some further guidance as to how it will approach similar sanctions cases in the future[61], it is interesting to note that the General Court is largely silent on the measure of discretion available to the Council, as the voice of the Member State governments in the EU's constitutional architecture, in exercising a fact finding role. The approach set out in *Melli*, in which the Court described itself as being wary of substituting its assessment, is not repeated.[62] Instead, the Court again reserves to itself the task of concluding whether or not Bank Mellat has provided support to nuclear proliferation within the meaning of the relevant legislative acts.[63] It does not restrict itself to determining whether or not the Council's assessment is reasonable or unreasonable.

In considering the judgment in *Bank Mellat*, it would appear that including the applicant on the list of restricted entities on the basis that it had previously provided banking services to Novin was within the band of reasonable responses available to the Council in the circumstances. It appears that this amounted purely to a question of assessing the facts of the case and deciding on whether such activities warranted sanction, a function reserved for the executive under the doctrine of the separation of powers. It seems doubtful whether a national court or the CJEU's sister court in Strasbourg would be quite so willing to conclude that the Council's assessment was unreasonable or disproportionate.

In assessing the action the Council's actions, the Court does not undertake any proportionality exercise in weighing the disadvantage to the applicant against the EU's legitimate foreign policy goal of non-proliferation. This is a substantive review of the merits in all but name, amounting to a full appeal against the Council's decision in which it is that institution, as respondent in the challenge, which is charged with satisfying the Court of the lawfulness, and ultimately the wisdom, of its approach. Just as in the *Fulman* case, the Court expects to be presented with cogent evidence

[59] Ibid paragraph 34
[60] Ibid paragraph 134
[61] Ibid, paragraph 124-125
[62] Bank Melli Iran v The Council Case T-390/08, judgment delivered on 14 October 2009, paragraph 37
[63] Bank Mellat vs. Council (Case T-496/10), judgment delivered on 29 January 2013, paragraph 127 & 128. The General Court referred to Council Decision 2010/413, Council Regulation 423/2007, Council Regulation 961/2010, and Council Regulation 267/2012.

which has been dispassionately and correctly analysed by the Council. Ultimately, that decision must be one the Court concurs with if it is to be judged to be consistent with the fundamental principles of EU law.

While the assertive approach of the Court in *Mellat* is welcome from a civil libertarian perspective, this development can perhaps be criticized as an unnecessary curtailment of the Council's ability to assess what is, and what is not, support for nuclear proliferation. It would appear to the authors that the Decision of the Council was within the band of reasonable responses available to the Council in pursuing its legitimate foreign policy measures.

The fact that the Court was willing to annul the decision, in spite of the evidence advanced by the Council in reaching its decision, demonstrates the extent to which the Court, equipped with the CFR, has expanded its scope for substantive review from the limited approach applied in *Westzucker* case and even in *Kadi I*. Indeed, the fact that the CFR is having an increasingly large impact on the legal order of the EU is beyond doubt. At the time of writing this article, the Council of the European Union has just imposed restrictive measures on a number of individuals due to the situation in Ukraine.[64] In the Council Regulation implementing the decision to impose such restrictive measures, there is an explicit reference to the CFR as being a restraining factor on the Council's actions.[65]

UN Sanctions Regime

The UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Ben Emmerson, recently highlighted the significant shortcomings in the UN Security Council's sanctions regime.[66] In addition, the UN General Assembly as long ago as 2005 called upon the UNSC to "*ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and removing them*".[67] Although the consequences for individuals included on the list are of the upmost severity, including loss of property, privacy, free movement and the ability to work, placement on the list is not subject to any domestic or international judicial review which would satisfy the international minimum standards of due process as outlined in many international agreements. Although referring to domestic courts, Article 8 of the Universal Declaration of Human Rights states that "*Everyone has the right to an effective remedy… for acts violating the fundamental rights granted him by the constitution or by law.*"[68] In 2006, a study commissioned by the UN Office of Legal Affairs Office of Legal Counsel stated that modifications to the sanctions regime, as it then existed, were necessary to safeguard four due process rights: the right to be informed of the measures taken, the right to challenge the measures before the Council or a subsidiary body

[64] Council Regulation (EU) No 208/2014 of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine.
[65] Ibid, L 61 (6)

[66] Report to the UN General Assembly. Available at http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12733&LangID=E
[67] UN General Assembly Resolution 60/288, Annex II paragraph 15
[68] Article 8, Universal Declaration on Human Rights, adopted by the UN General Assembly on 10 December 1948, available at https://www.un.org/en/documents/udhr/index.shtml#a7

thereof within a reasonable amount of time, the right to representation and advice, and the right to an effective remedy.[69]

The sole exception to such shortcomings would seem to be the EU courts. It is interesting to note that there is no process similar to the EU position available to individuals placed under sanctions by the Federal government in the US. In such cases, the only practical avenue open to individuals subject to sanctions is to engage in fact driven advocacy to petition the US State Department and/or Department of the Treasury to remove the individual from the list of restricted entities.

The Security Council, through its Sanctions Committee, is responsible for designating individuals and entities on the sanctions list although the committee itself does not assess the evidence. There is no guarantee that evidence is not obtained through the use of torture. The Office of the Ombudsperson is responsible for investigating de-listing requests but States are under no obligation to disclose information. Those requests originate not from the affected individuals but from States. In making recommendations for de-listing, the Ombudsperson applies a standard of "sufficiency". Where there is a reasonable and credible basis for listing, the Ombudsperson will not recommend de-listing. Even where de-listing is recommended the ultimate decision remains with the Sanctions Committee. Under the revised guidelines, recommendations of the ombudsperson to delist an individual or entity will go into automatic effect after 60 days unless the sanctions committee decides unanimously to maintain the listing.[70]

Assessment

From the *Kadi* cases onwards, the EU courts have declared themselves willing to subject sanctions legislation to review against the principles of European human rights law. This doctrine will be extended to all legal persons regardless of whether they are citizens or registered in an EU Member State.

The protection available in this area has been strengthened by two developments – the first being the obligation for the Council of the EU to provide intelligible if brief reasons[71] and the second being the Court's willingness –armed with the CFR- to test the adequacy of those reasons.[72] Once an entity is included on a list of restricted entities the burden of proof in justifying that inclusion rests with the Council rather than the challenger (*Tay za*). In order to discharge that burden, the General Court has held that the Council must provide specific and detailed evidence for its assessment (*Fulman*). The General Court has additionally held that where that evidence is absent (*Fulman*) or unpersuasive (*Mellat*), the Court will annul the measure in question. The Court has also indicated that where such an entity suspects a third party client is engaging in proliferation activity it can escape

[69] B. Fassbender, Targeted Sanctions and Due Process: The Responsibility of the UN Security Council to Ensure That Fair and Clear Procedures Are Made Available to Individuals and Entities Targeted with Sanctions under Chapter VII of the UN Charter, Study Commissioned by the United Nations Office of Legal Affairs Office of Legal Counsel (20 March 2006), at 8.

[70] UNSC/RES/1989 (2011), annex 2, paragragh. 12.

[71] Bank Melli Iran v The Council Case T-390/08, judgment delivered on 14 October 2009.

[72] Bank Mellat vs. Council (Case T-496/10), judgment delivered on 29 January 2013.

inclusion by bringing its dealings with it to an end as soon as reasonably informed (Mellat).

In the *Fulman* case the CJEU was perhaps more candid than it had been previously in describing its role as one of verification and explicitly attributing that task to the Charter. In *Mellat* the CJEU undertakes that task of verification. It is a through deconstruction of executive arguments. Admittedly the role of the Charter is not afforded the same prominence in the judgment but in the view of the authors its influence cannot be doubted. No evidence (*Fulman*) and insufficiently convincing evidence (*Mellat*) will be treated in the same manner by the Court.

The Court has demonstrated an admirable commitment to rights protection and a willingness to scrutinize the evidence obtained by the Council in a politically sensitive context. Taking the historic approach of the judiciary in common law jurisdictions to judicial review in the area of foreign and security policy, the strong statements in favour of judicial supervision by the General Court in *Melli*, *Fulman* and *Mellat* should be welcomed by those advocating a human rights and civil libertarian point of view.

In particular, the difference in the standard of review applied by the EU Courts to uphold the rights of individual applicants subjected to restrictions on the part of the executive is more in keeping with the intended role of the judiciary under the separation of powers. It is the Charter and its newfound place within the architecture of the EU which has empowered the Courts to assume its rightful role.

This is in contrast to the European Court of Human Rights. That body has itself very often deferred to the judgment of the contracting state's executive through the eloquently named "margin of appreciation". In recent years, the doctrine's scope has been expanded upon by the ECtHR and is now regularly applied in cases concerning Articles 8 (right to privacy), 9 (freedom of thought and religion), 10 (freedom of expression), 11 (freedom of assembly), 14 (freedom from discrimination), 15 (derogations from the Convention in times of emergency) and Article 1 of Protocol 1 (rights to property).[73] This has created a number of problems in the effectiveness of the orversight functions exercised by the ECtHR. MacDonald argues that when the doctrine has been applied, there has often been a complete lack of reasoning beyond the decision not to intervene.[74]

The ECtHR has applied a wide margin when interferences with Articles 8-11, 14 and 15 are claimed to be necessary for the protection of national security, a claim submitted by The Council in *Fulman*. The wide scope of the margin of appreciation in areas of national security is evident in *Leander v Sweden*, where the ECtHR held that in an area such as national security there should be a wide margin of appreciation available to the national authorities.[75] This position was reiterated in *Klass v Germany* were no violation of Articles 8

[73] Article 8: leander v sweden (1987) 9 ehrr 433, paragraph 60; segersted v. Sweden (2007) 44 ehrr 2, paragraph 99-104; Article 10: choherr v austria (1993) 17 ehrr 358; hadjianastassiou v greece (1992) 16 ehrr 219, rekvenyi v. Hungary (& zana v turkey (1997) 27 ehrr 667; and Article 11: refah partisi v turkey

[74] R.St.J.MacDonald, "The Margin of Appreciation" in R.St.J.MacDonald et al Eds. The European System for the Protection of Human Rights. London: M. Nijhoff (1993) p. 85

[75] leander v sweden (1987) 9 ehrr 433, paragraph 60

or 13 where held to have occured.[76] Although Article 15 of the ECHR has rarely been considered by the ECtHR, there is a relatively consistent practice of deference to national autorities on this issue.[77] Experience has shown that states are most likely to derogate from conventional human rights standards when confronted by national security challenges.[78] The executive branch of government has a tendency, initially, to see civil liberties and security as being in competition with each other rather than being complimentary. It is when confronted, often belatedly, by a more activist judiciary that the national authorities formulate security policies which adhere to international human rights standards.[79]

While the principle of effective judicial protection in article 47 CFR may be based on the common constitutional traditions of the Member States and on the due process provisions of Article 6 of the ECHR, it is likely that the principle, as applied by the CJEU, will take on a distinctly EU application. One of the greatest differences between the Strasbourg Court and its counterpart in Luxembourg is that while the former has as its goal a minimum standard of rights protection across the continent, the latter is primarily concerned with the principles of effectiveness and uniformity, as is evident from the Court's development of the principles of direct effect, indirect effect of EU Directives and state liability. This is also the clear purpose behind the system of preliminary references in Article 267 TFEU. The margin of appreciation, it is therefore submitted, can have no place under the Treaties.

In *Fulman*, the General Court clearly demonstrated that the 'sensitive information' factor will not provide a basis for the EU Courts to abdicate their supervisory role with respect to decisions taken by the executive arms of EU government.[80] However, it remains to be seen whether future political or security developments related to the EU's external relations will lead to any increase in *individual application* deference on the part of the EU's judiciary.

It is the view of the authors that such a position is to be preferred to the classical judicial deference that has often been evident in the areas of foreign and security policy. At an international level, the lack of any independent judicial oversight of the UN's sanctions regime may be one of the reasons why the regime has not evolved a more satisfactory review procedure from the sanctioned entity's or civil libertarian point of view. The weaknesses in the UN Sanctions review regime could be redressed, to some extent, through the implementation of Emmerson's recommendations, particularly the introduction of a 'sunset clause' imposing a time limit on all designations[81] or through establishing the clear procedures for

76 (1979-80) 2 EHRR 214

77 R.St.J.MacDonald, "The Margin of Appreciation" in R.St.J.MacDonald et al Eds. The European System for the Protection of Human Rights. London: M. Nijhoff (1993) p85

78 Lawless v. Ireland (1979-80) 1 EHRR 15; Ireland vs. UK (1979-80) 2 EHRR 25; Aksoy v. Turkey (1997) 23 EHRR 553.

79 Ní Aoláin, F. & Gross, O., "A Skeptical View of Deference to the Executive in Times of Crisis" (2008) 41 Israel Law Review 545

80 Joined cases T-439/10 and T-440/10 Fulman and Mahmoudian v The Council, paragraph 100.

81 Report to the UN General Assembly. Available at http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12733&LangID=E

removing individuals from sanctions lists called for in UN General Assembly Resolution 60/288.[82]

There may, however, perhaps be some criticism that the CJEU is yet to strike the correct balance between an effective oversight mechanism, where the rights of applicants are vindicated, and respecting the legitimate use of executive discretionary power.

One of the most common criticisms of such an active approach on the part of the judiciary -in general- is that it is, in effect, usurping the powers that are invested with the executive under the doctrine of the separation of powers.

In response to such a charge, the authors would refer, with approval, to the judgment in *Bank Melli* whereby the General Court correctly stated that, with respect to judicial review, there is a need to distinguish two aspects to reviewing executive power. The first is where the executive, in the proper execution of its powers, has broad discretion when formulating policy and general guidelines to be applied in order to face certain problems. In such instances, the General Court stated that it may not substitute its own assessment of the merits of a decision for that of the executive.[83] The second instance is where the general policy and guidelines are applied to an individual legal person or class or persons. It is in such instances where the role of the judiciary under the separation of powers is properly engaged.

The application of general principles to an individual case is the quintessential basis for judicial review in common law jurisdictions. Were the court to defer to the executive in such instances, it would be failing in its primary duty, to vindicate the rights of the applicants before it. It is for this reason that the more robust scope of substantive review adopted by the General Court in *Melli*, *Fulman*, and *Mellat* does not represent a violation of the doctrine of the separation of powers. The prominence of the Charter in the judgments mean it is likely to be continued in future cases. If we are to return to Alexander Hamilton's analogy, should "restrictive measures" continue to be the weapon of choice for the Union executive in the foreign policy sphere, the Charter requires that it be wielded it with the precision of a rapier swordsman against an opponent.

[82] UN General Assembly Resolution 60/288, Annex II paragraph 15
[83] Bank Melli Iran v The Council Case T-390/08, judgment delivered on 14 October 2009, paragraph 36

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The Human Social-Economic Habitat and the Environment

***David Brown*[1]**

Introduction

Although firmly rooted in the economic theory of market failure,[2] the Tragedy of the Commons[3] has come to stand first and foremost for the quintessential environmental perspective from which so many important environmental concepts flow that its roots in economics can easily become something of an afterthought. It can be said in this respect to represent environmentalism writ large: the proposition that the natural world is subject to abuse because it belongs to everyone and no one at the same time, or in economic terms, a matter of market failure due to non-internalized negative externalities.[4]

The example given by the author of free riders over- grazing cows doing irreparable damage to a shared field (the commons) has provided generations of environmental students an easily comprehendible way of visualizing a complex phenomenon, similar to the way the phrase 'survival of the fittest' serves as shorthand for understanding the complex and sill 'evolving' concept of evolutionary change. From this simple example of unintentional economic exploitation of the commons it is easy to extrapolate to a host of real world environmental problems relating to commons large and small: the factory polluting the air we breathe, the municipal sewage polluting the water we drink, on a larger scale, the oceans that are overfished, and on a larger scale still, the air of the entire planet suffering from carbon choking climate change. In addition to the concept of irreparable harm to the natural environment committed without intention or even, in some cases, negligence, the tangential idea of broad based prescriptive environmental regulation rather than after-the-fact individualized piecemeal judicial actions based on fault firmly took hold as the principle means of tackling environmental problems in the US and around the world. This, in turn, led to the current emphasis on pollution prevention[5] rather than simply amelioration and rehabilitation.

Written at the cusp of the environmental revolution of the late 1960s, The Tragedy of the Commons was one of a handful of publication such as Silent Spring[6], and Should Trees Have Standing?[7] that helped garner the modern environmental movement. It has withstood countless rebuttals and attacks, perhaps most famously by Ronald Coase whose article (widely cited as a rebuttal to Hardin was actually written prior to the Tragedy of the Commons is only slightly less well known than Hardin's[8], and more recently, in a rebuttal

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[2] Defined as the concept within economic theory wherein the allocation of goods and services by a free market is not efficient.
[3] G. Hardin, *The Tragedy of the Commons*. Science 162: 1243-1248 (1968).
[4] An example being a coal powered electricity plant emitting air pollution (negative externality), but non-internalized because the price at which the power is sold does not cover the cost for the damages to the public's health caused by the pollution.
[5] See for example, Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (IPPC).
[6] Rachel Carson, Silent Spring, Houghton Mifflin, Boston 2002.
[7] Christopher D. Stone, Should Trees Have Standing?, Oxford University Press, March 2010.
[8] Ronald H. Coase, *The Problem of Social Cost*, The Journal of Law and Economics, Oct. 1960.

published in the NY Times.[9] As alluded to above, so compelling is Hardin's homily that we sometimes forget that the concept of negative externalities as a form of market failure that Hardin applied to the commons had long been recognized by economists. Cross-fertilization of economic theory not just with environmentalism but with other disciplines has become commonplace, including the broad embrace of cost-benefit and other economic analysis to what's widely known as the Chicago school of legal thought.[10]

Argument

The question is are there environmental concepts and constructs potentially equally applicable to inform extra-environmental affairs, social-political economic affairs in particular, comparable to the economic concepts and constructs that have in recent years been applied to inform non-economic affairs? Green politicians[11] answer the question in the affirmative, and there are a host of others, prominently including what are known as ecological economists.[12] Since economic activity at its most fundamental is the manipulation of land, labor and capital, it stands to reason that environmentalism might be considered a critical component of economics, though, of course, until, the environmental revolution of the late 1960s and early 1970s the only issue concerning land as far as economists was concerned was who owned and controlled it, not how land might be intrinsically valued[13] and stewarded, as is the case now. Applying environmental concepts to economics may very well improve the economic model, by making it more responsive and life-like. Nobel prizes are awarded for such innovations. But there remains the question as to whether or not human behavior, even human economic behavior, can ever be effectively reduced to an economic model.

One of the central tenets of ecological economists is that economics is subservient to the environment. In the sense that if the environment collapses from climate change or some other environmental calamity economic collapse will inevitably follow seems rather obvious, but on the other hand the claim veers toward the tautological**.** Are there not economic activities whose impact on the environment are so defuse that to say it is somehow subservient to the environment is nearly meaningless? After all a religious believer might claim that all life is subordinate to God, which may or may not be true, but how far does it really get one in understanding anything beyond the believer's conviction? Isn't the position of the ecological environmentalist regarding the preeminence of the environment similar? While there can be no question that ecological economics has been a useful and important contribution to the field of economics, this essay argues it's inadequate as a proxy for the breadth of human interaction with the environment for two reasons: 1) economics is too narrow a field to fully explain human behavior; 2) economics, or more broadly,

[9] John Tierney, *Non-Tragedy of the Commons*, New York Times, Oct 15, 2009.
[10] A group of economists and lawyers widely associated with the University of Chicago.
[11] Green politics is a political ideology which attaches great significance on environmental goals, and on achieving these goals through grassroots democracy.
[12] Ecological economics focuses on intergenerational equity, irreversibility of environmental change, uncertainty of long-term outcome and sustainable development.
[13] Modernly economists routinely monetize a whole host of ecosystem services including water purification, pollination, and storm surge protection.

the social-economic milieu or habitat in which humans reside, and the environment would more accurately be described as symbiotic, occasionally simply parallel, one where neither is necessarily subordinate nor dominant over the other.

This second part of the conclusion reached above is based on the supposition that humans are simultaneously a part[14] and apart[15] from nature. As such the human social-economic habitat simultaneously occupies the same space as the natural environment, much like an overlay zoning[16] map overlays and operates simultaneously with other zoning ordinances, neither dominating nor being subservient to them, but both being reigned in one by the other.

The human social-economic habitat is not limited to economic activity, but includes the socio-political. What's more it's universal. It encompasses all economic systems, socialist, laissez-faire, and mixed economies. It includes all political and religious aspirations, whether conservative or liberal, Islamic or Christian. All said systems deal in some shape or manner with what is considered fair and just within their respective societies, the traditional province of religions, philosophers, governments, civil societies and individuals, to name a few.

It stands to reason that the social-economic habitat in which humans reside as a part[17] of nature may answer to some of the same environmental 'rules' as do other aspects of nature; not to suggest such rules should preempt or replace the human role in judging right and wrong in their social-economic dealings with one another, but to be added to the above-mentioned list that already inform what might be considered fair and just in human interactions.[18]

'Sustainability' is one such environmental 'rule' that has recently become fashionable, arguably excessively so. We now speak of sustainable agriculture, sustainable economic growth, sustainable investment strategy, sustainable cities, sustainable architecture, sustainable development, sustainable this and that.[19] Among the many useful environmental concepts that have impacted contemporary culture and become widely recognized such as the precautionary principle, biodiversity, habitat protection, and renewable resources, sustainability is doubtlessly as key and useful as any of them. Such is not to say that the true environmental concept of sustainability hasn't arguably been cheapened with popularity[20] due in part to the randomness of the issues to which it has been attached. A stock broker that considers a 5 year outlook, rather than a 6 month outlook a sustainable one, may be moving in the right direction, but he or she is hardly using the term the same way as an environmentalist speaking of sustaining an endangered species with protected

[14] Rasband, Salzman, Squillace, Federal Natural Resources Law and Policy, Foundation Press, 2004, 12-13
[15] Id. at 16-18.
[16] Juergensmeyer, Conrad, Roberts, Land Use Planning and Development Regulation Law, West, 2003, 102-104.
[17] Rasband ET AL., *supra* note 13.

[18] For example, raising the flag of the environmental precautionary principle does not end the discussion of whether or not a particular kind of genetically modified seed should be planted in a particular location, but rather it informs the decision ultimately reached by scientists, social policy advocates, and the general public weighing and balancing a host of ethical, health, safety, and cost/benefit consideration.
[19] Sustainability was, of course, at the heart of the grazing cow's metaphor from The Tragedy of the Commons.
[20] Austin Williams, "The Enemies of Progress," Societas: Essays in Political and Cultural Criticism 34 (May 2008).

habitat forever. This plus the fact, that unlike endangered species, sustainability is not enough when it comes to humans. There is always the issue of what is just and fair beyond mere survival.

This is where humans being apart[21] from nature come into the equation. For instance 1) humans, unlike, say trees,[22] are apt to be at least partly responsible for their position in their social-economic habitat; and 2) humans potentially can act jointly or separately to improve their lot in life. In addition, though human beings have long been exploited by other human beings and there is no denying the fact that some societies treat their citizens as if they had little to no intrinsic value whatsoever, there also has been a long tradition of poets, philosophers, religious leaders, ethicists,[23] and modernly political scientists to name a few, who have contemplated the intrinsic worth of human beings. This contrasts with the view of nature which was throughout most of history thought to be something to be conquered or exploited, only very occasionally admired, and only in the modern environmental era valued intrinsically for environmental reasons.[24] Consequently, some might argue that the human social-economic habitat arguably need garner less attention these days then the environment. But is this true?

Misbegotten though it may have been, certainly Marxists had high regard for the intrinsic worth of mankind, or at least the intrinsic worth of the worker, in theory, if not always in practice. But judging by their actions they had little regard for the intrinsic worth of nature, as the communist legacy as stewards of the land is easily as sorry if not worse than the capitalists of the same era. Environmentalism as a protest movement became a central means of opposing communism, reluctantly tolerated by the communists due to international pressure reflecting growing prestige of the worldwide environmental movement. Former Czech Prime Minister and later President, Vaclav Klaus, and many of his political supporters oppose environmentalists[25] to this day, because they see environmentalists as neo-Marxists, in that like Marxists they seek to regulate the economy. If one is a laissez-faire capitalist as is Klaus, it is hard to argue with his reasoning, and he is joined by his right wing brethren in the United States who also oppose environmental regulation, not to mention curtail economic regulation at every opportunity. Moderate mixed economy capitalists, however, find in environmentalist regulation little to fear.

Having said this, as Klaus had correctly noted, environmentalists are generally assumed politically left of center, though there are certainly market oriented environmentalists, generally considered right of center, who have made contributions to the environmental movement as well.[26] But, liberal or conservative, there are some environmentalists who seem to feel that in saving the environment,

[21] Rasband ET Al*., supra* note 14.
[22] Christopher D. Stone, *supra* note 6.
[23] It should be pointed out that author of the Tragedy of the Commons has been harshly criticized on ethical grounds from both the left and right when it comes to his positions stemming from his concerns with overpopulation, regarding abortion, eugenics, forced sterilization, and genocide.
[24] Razband, Salzman, Squillace, Federal Natural Law Resources and Policy, Foundation Press, 2004, pp. 28-35.
[25] See, Vaclav Klaus, Blue Planet in Green Shackles, CEI, Washington, D.C. 2008.
[26] The concept of 'cap and trade' which has been adopted by the European Union as part of its strategy to combat climate change is generally credited as originally a market oriented, politically right of center idea.

everything else will take care of itself. If anything these environmentalists resemble Marxists in reverse. Environmentalism may compliment social justice, but can never be a substitute for it.

Of course, besides liberal, over the years environmentalists have obtained the reputation among some as elitist, and fair or unfair, it's not difficult to see how such a reputation has come about. If environmentalists were more prone to cast themselves as not only a part of nature but also apart from nature, this might be less often the case. Such is not to say that environmental law students need necessarily study medieval literature and 19th century poetry alongside Natural Resource Law and Environmental Procedure Law, but there is something about the American environmental law curriculum with a course here and there on Environmental Justice and Environment, and Environment and Human Rights that seems incomplete. Ironically environmentalists might be more politically successful if they strived to speak simultaneously for people as well as for trees. As it now stands, like it or not, environmental interests are routinely 'balanced' by politicians with the perceived economic interests of their constituents, and in this balancing environmentalism has a tendency to come out on the short end. Rather than being balanced with economic interests by another party, environmental interests would be better and more accurately served by encompassing the full panoply of human social-economic interests from the start. The situation for too many environmentalists is analogous to that of Silicon Valley enthusiasts who believe that more and faster information via the internet is more than a convenience, but a self-regulating means for a more egalitarian and democratic life, despite there being little evidence to support this contention. But like it or not, the internet is simply a tool and environmentalism the modern scientific and legal iteration of what ancient philosophers have long intuited. Neither guarantees desirable results in a vacuum.

Although largely supportive of the goals of environmentalism in the abstract, the fact is many Americans initially viewed environmental regulation fundamentally differently than economic regulation.[27] In part this may have been because they didn't yet think of themselves as a part[28] of nature. So that, in the United States, when a restaurant, or other small business, goes out of business, rarely does anyone think it's particularly tragic. This, despite the fact is that if the owner could have lowered his or her costs by paying workers below the minimum wage he or she might have been able to stay in business. Capitalism is recognized as a dynamic process, and thus it is considered natural for a certain percentage of businesses to fail. Few except the most extreme would argue for the elimination of any kind of regulation of the labor market whatsoever; most reasonable people don't think it's a problem that the owner isn't allowed to hire children to wash the dishes. So long as all the restaurants have to comply with the same rules as everyone else, it's a level playing field on which to compete.

[27] Although now it's difficult to imagine, economic regulation, including regulations prohibiting child labor, was, of course, controversial when first introduced in the 1930's under President Franklin D Roosevelt.
[28] Rasband ET AL., *supra* note 13.

On the other hand, in the early years of the environmental movement if a logger lost a job "because of environmental regulations" more than just the individual logger was apt to complain that it was unfair.[29] Whether this was because people tended to believe that environmental protections were not worth losing jobs for under any circumstances, or whether it was just a matter of adjusting to the relatively new world of environmental consciousness, or some combination of both, it's difficult to say.

The fact is economic and environmental regulations are simply two sides of the same coin, and there is growing awareness that this is the case.[30] Consider the American workplace prior to workman's compensation. The worker had to take the risk of injury on his or her own shoulders. If the worker was injured and had to take leave or lose his or her job, the worker would at the very least temporarily lose his or her means of support. This is a classic negative externality. Worker's compensation is an example of the internalizing for a negative externality, an effort to make the worker whole, the very same logic as implementing a carbon tax to cover the negative health externalities caused by pollution. An example of the growing awareness of the fact that economic and environmental regulation are two sides of the same coin is the fact that contemporary American political science texts have begun to place economics and environmental regulation in the same chapter.[31]

Thus, in the US it no longer seems like much of a stretch to argue that social-economic matters might have an environmental aspect. Take for example the economic disparity that has recently garnered so much attention,[32] the fact that in the US some employers make over 400 times as much as their employees.[33] What is the environmental metaphor for such imbalance? One word that comes to mind is eutrophication.[34] Any gardener knows that nitrogen and phosphorous are essential soil nutrients, yet too much nitrogen and phosphorous in a body of water will cut off oxygen supply and choke off life, even causing dead zones in the middle of the ocean.[35] Essentially eutrophication can be said to be a concentration of too much of a good thing. A bit of nitrogen and phosphorous interacts in the soil to support life, just like an egalitarian distribution of money supports a vibrant economy. But a person who makes 400 times what someone else makes has basically removed himself or herself from the world of everyday commerce. In sum concentrated wealth is toxic to the social economic habitat. It will choke off the social-economic ecosystem, as surely as

[29] There were a myriad of early cases pitting workers against endangered species, including the spotted owl in America's Northwest; generally the less appealing the species being protected, the more sympathy for the person losing his or her job.
[30] Today American is divided between those who often want to roll back both economic and environmental regulation, and those who don't.
[31] Thomas E. Patterson, We the People: A Concise Introduction to American Politics, McGraw-Hill. 9th Ed., 2009.
[32] This was an important talking point of President Obama's recent 2012 re-election campaign.
[33] This is a widely accepted pay ratio between Chief Executive Officers of major corporations and their employees. In some cases the disparity is higher. For instance, according to Fortune Magazine in 2012 the Chief Executive Officer of Wal-Mart made over a 1000 times that of his average employee.
[34] Eutrophication takes place when excessive nutrients in a lake or other body of water promotes a proliferation of plant life, particularly algae, which reduces the dissolved oxygen content and often causes the extinction of other organisms.
[35] As of 2008 there are over 400 ocean dead zones according to an article published in Scientific American, notoriously including an 8, 500 square mile dead zone in the Gulf of Mexico not far from where the nutrient-loaded Mississippi River drains.

concentrated phosphorous and nitrogen will choke off a previously thriving natural ecosystem. Just take a hard look at the nation-states with the greatest disparity between rich and poor and imagine reaching any other conclusion.

Viewing wealth discrepancy from a lens apart[36] from nature, the following can be observed: The extreme wealth of the top 1% offends some people on a visceral level, others it does not. The recent protest movement known as 'Occupy Wall Street' railed against disparate wealth patterns in the United States, and there were a significant number of economists, academics and individuals who agreed. Others argue that there can be no such thing as too much concentrated wealth, as wealth is not a zero sum game[37], and can be created basically out of thin air; thin air being a bit of an exaggeration, more accurately, proponents for this line of thought are actually pointing out that wealth can spring, without net loss to anyone else, from such things as trade, scientific discovery, entrepreneurship, and productivity improvements. Such proponents might argue that the problem with an employer making 400 times his employees is not that the employer makes too much, but that the employees make too little. Even the Chinese Communists these days have concluded that accumulation of private wealth is a good thing.

But the fact that wealth may not always be a zero sum game is not to say that it never is. The usage of the personal computer explodes exponentially, the typewriter goes of business. One person gains vis-à-vis another's loss, one company vis-a-vis another's loss; or even one nation vis-à-vis another's loss. Although during times of expansion a rising tide is said to lift all boats, is not the recession that follows expansion as natural as a draught following a flood? The prosperous liberal state in the US that seemingly reached its recent highpoint in the 1990s did not occur in a vacuum; at the very same time the economies of Eastern Europe and the former Soviet Union were in free fall. Some wealth drained out of the east directly to the west, in other respects the mere fact that the east was perceived to be in decline while the west was perceived to be in ascendancy added fuel to the flames creating its own virtuous business cycle for the west, and redoubling the east's decline.

It would probably be impossible to demonstrate that the closing of a steel plant in the Czech Republic led directly to the opening of a steel plant in Kentucky. The rules of cause and effect do not apply so neatly. But if a rising tide lifts all boats, why were some Americans so terrified of Japanese economic power in the 1980's and why are some seemingly frightened by a rising Chinese ascendancy today? Is this fear just based on xenophobia and ignorance, or does it reflect some rational understanding of the fact that one nation's ascendency may very well lead to another's decline? All this is to say that economic well-being is always a political question, and wealth always has been and always will be concerned with its redistribution, and what is fair and just in the process.

[36] Rasband ET AL., *supra* note 14.
[37] A situation in which one person's or entity's economic gain is another person's or entity's loss.

What about the other 99%? Considering the 99% apart[38] from nature, the argument is just the flipside of the arguments made above for the 1%. But considering the problem from the perspective of the 99% as a part[39] of nature the argument is different. The problem facing the 99% is, in fact, directly analogous to that of The Tragedy of the Commons; in this case it is not too many cows feeding at the water trove, but too many people feeding at the economic trove for everyone to prosper. In some nation-states there are too many people feeding at the economic trove for everyone even to survive. To make an analogy to the American Endangered Species Act (ESA), in some countries then the very lives of the poor are endangered, in a wealthy country like the US it's probably more accurate to say the poor are merely threatened, but as with the ESA, the difference is only a matter of degree, not of kind.

What about the often unstated, but seemingly immutable policy in the United States that the answer to underemployment is always re-training and higher education. If humans are part[40] of nature does this degree of specialization make sense for an entire population? As commendable as higher education may be the notion that a college education is the only means by which a nation's entire populace can prosper is not only preposterous at face value, it's the equivalent of clear cutting a natural forest and replacing it with monoculture.[41] The result is susceptibility to disease in the form of a criminally-inclined underclass for those who fall short, the social-economic equivalent of monoculture's susceptibility to being wiped out by a single pest. Biodiversity is not only an inter-species issue it is an intra-species issue as well. The population of a given nation-state is and should be diverse, people with different abilities and talents deserve to survive and prosper.

Considering the problem from the perspective apart[42] from nature it is neither fair nor just. A nation that lacks a strong small agricultural and manufacturing base is engaged in slow motion genocide against its working class. The notion that in the US any child can grow up to be President may feed American mythology, but in practice it leaves many unprepared to earn an honest living. In Europe where the working class is still valued, young people are segregated by abilities at an early age such that those on one track are unlikely to view themselves as future heads of state, but by compensation they may well gain training that will serve them far better for the rest of their lives than what their counterparts receive in the United States.

Conclusion

The above examples of American social-economic issues to which environmental analysis to a limited degree might be applied are certainly not intended to be exhaustive. Not only are there seemingly an infinite number of such issues in America, but in every country there are similarly a multitude of specific social-economic issues to which environmental analysis might be applied. As with the issue of sustainability, some such applications

[38] Rasband ET AL., *supra* note 14.
[39] Rasband ET AL., *supra* note 13.
[40] Id.
[41] The cultivation of a single crop in a given area.
[42] Rasband ET AL., *supra* note 14.

might prove at best merely glib; others may resonate with an aura of inevitability. Only through the iteration process will we know which metaphors should be discarded and which might have the lasting power of Hardin's metaphor of grazing cows on the commons. But in doing so it should always be kept in mind that environmental analysis is only half the equation; an environmentally sustainable planet means little, if it's not also egalitarian, just and free.

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Values of Court Justice in the Hebrew Bible

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The Lisbon Treaty of 2007, in its Preamble, explicitly recognizes the roots of the European Union's values of rights, law, freedom and democracy in the cultural, religious and humanist inheritance of Europe.[2] Law and justice have been crucial values of the European inheritance. Various elements of modern procedural law and justice can be identified in ancient Greek, Jewish, Roman law and medieval canon law. The Hebrew Bible originated as a sacred text of the ancient people of Israel; it was later accepted as the Old Testament of the Christian Bible and it influenced immensely the history of Europe, not only in religious matters, but also in various areas of human culture, including law and justice. This article studies the roots of the values of contemporary European court justice in the Hebrew Bible. First, the article identifies and examines two crucial values: the instrumental and intrinsic values of procedural justice as they are respected and enhanced in the course of court proceedings. Second, it explores the Hebrew Bible to reveal the roots of the values of contemporary procedural justice in the ancient Hebrew court justice.

Procedural Justice and the Right of Defense

The right to court protection of rights and the right of defense are included into the modern and contemporary lists of fundamental rights. The court protection of persons stems from the elementary conviction that it is better to redress injuries and resolve contentions among people by recourse to legal procedures and authorities than by using physical force and violence or superstition and witchcraft. The court protection is achieved through procedural norms and formalities that have developed into a system of procedural law. The right to court protection involves and guarantees the use of judicial means to vindicate rights in society. It guarantees every human the right to vindicate and defend the rights they enjoy in society before the competent forum.[3] It also guarantees those who are summoned to judgment by competent authority that they be judged in accord with the prescriptions of law and equity without any semblance of paternalism or arbitrariness. The norms of law must insure the objectivity of the trial. However, because the circumstance of human actions are sometimes too particular and complicated to be covered satisfactorily by laws that are by rule general, equity should temper the application of the law in so far as it is defective on account of its generality.[4] Legal protection also guarantees the right not to be

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[2] Cf. The Preamble of the Lisbon Treaty on European Union (December 3, 2007): „Resolved to mark a new stage in the process of European integration undertaken with the establishment of the European Communities, drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law, …, confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law, …"

[3] Cf. Universal Declaration of Human Rights (United Nations, 1948), art. 8 and 10.

[4] Equity is called „mater iustitiae" by a famous medieval magister Gratian in Bologna (1140), author of the first part of the *Corpus Juris Canonici*. Cf. Gratian, *Decretum,* secunda pars, causa XXV, queastio I, c. XVI, § 4.

punished with penalties except in accord with the norm of law.[5]

Justice at court is deeply connected with the right of defense. The principal purpose of the right of defense is to insure equality and participation in procedural matters. It guarantees each party to a dispute the right to be heard by the decision-maker, to introduce evidence that will be given due consideration, and to be assisted by an advocate. It also guarantees each party an opportunity to be informed of and have an opportunity to contest the petitions, proof, and deductions proposed by the opposing party or by the judge. Although the right of defense entails procedural rights, it is not just a set of procedural formalities. By exercising the right of defense parties are transformed from passive objects of legal procedures to active subjects who participate in them. The right of defense guarantees that the parties to a dispute will not be treated as things to be disposed of without their personal involvement, but as persons to be afforded the opportunity to participate actively and intelligently in procedures whose outcomes will affect their lives in important ways.

The Instrumental and Intrinsic Values in Procedural Law

The right of defense has an essential role in the course of court proceedings. Like all rights based in natural law, the right of defense acquired positive content in procedural law from the historic, social, and legal contexts in which it has been exercised. If procedural law is a system of positive norms governing fact-finding and decision-making processes, then the purpose of procedural law in connection with the right of defense is twofold: It aims at accurate fact-finding and decision-making, which is its instrumental end; it also aims at respecting the human dignity of the parties in the course of the procedures, which is its intrinsic end.

The instrumental end of procedural law is accurate decision-making or reaching the objective truth about the issues in dispute. Procedural regularity that promotes accurate fact-finding is indispensable to the search for truth. To achieve the instrumental end, procedural law structures an orderly way to collect, test and weigh evidence and to sift out the facts needed to reach the truth about the issue in dispute. In service of this end, the right of defense guarantees the parties to a dispute the opportunity to participate in this gathering and weighing of evidence. Without their participation the evidence collected is likely to be incomplete, the weighing of evidence inadequate or one-sided, and flaws in decision-making unchallenged. Through their exercise of the right of defense, the parties have an opportunity to contribute to the discovery of the truth about the issue in the dispute, that is, in achieving the instrumental end of procedural law. However, the purpose of the right of defense is not exhausted by the achievement of the instrumental end of procedural law.

Participation in a formal process is a value that extends beyond its instrumental utility for reaching the truth about the matters in dispute. The involvement of the parties during the court

[5] Historically, the principle of legality in the application of penalties, *nulla poena sine previa lege,* can be traced to Digest, 50, 16, 131, 1 (the second volume of *Corpus Juris Civilis* by Justinian, 530-533): "Poena non irrogatur, nisi quae quoque lege vel quo alio iure specialiter huic delicto imposita est." Cf. also *Magna Charta Libertatum* (1215), art. 39.

procedures also serves the intrinsic end of procedural law. The protection of human dignity and rights is not left to the paternalistic care of the public authority alone. Procedural law does not leave the responsibility for resolving dispute to the court authority alone, while relegating the parties to the role of objects of the process. Those whose rights are at stake in court disputes also have a meaningful opportunity to participate in the vindication of their own rights. To say that the parties have a right to participate in court proceedings expresses the elementary idea that to be a person, rather than a thing, is at least to be consulted about what is done with one. Since the right of defense guarantees this opportunity for participation, this right is operative throughout the course of procedure even when this participation does not necessarily advance the goal of accurate decision-making. Whatever the outcome of the process, the participation of the parties represents a valued human interaction in which the affected persons experience at least the satisfaction of participating in a decision that critically concerns their lives. On the contrary, when parties are treated as if they had nothing to say about their dispute, they are treated as things and not as persons. When their participation is suppressed, their human dignity is denied and their right of defense is violated. By respecting the human dignity of the parties, the right of defense serves an intrinsic value of procedural law.

The right of defense bears on both the instrumental and the intrinsic ends of procedural law. Consequently, evaluations of the adequacy of procedural law must consider how specific norms as well as concrete adaptations of these norms serve not only the instrumental end of accurate fact-finding but also the intrinsic end of respecting the parties' human dignity during the decision-making processes.[6]

Stages of Court Proceedings

Court procedures consist of a series of juridical and formal acts conducted before a competent authority with the aim of resolving conflicts through a decision that is a binding declaration of the rights or status of the petitioner or that dismisses the respondent as absolved from the accusation. Procedural law acquires positive content from the historic, social, and legal contexts in which it has been exercised. The roots of the essential elements of the court procedural law in European legal traditions can be traced back to Greek, Jewish, and Roman law that influenced medieval canon law court procedure. A classical canon law procedure was stabilized by the end the 12th century in central and west Europe as a result of the experience of local diocesan tribunals and the influence of Justinian's compilations that were studied at universities. Canon law court norms were eventually compiled under the guidance of Raymond of Penafort and promulgated in the Book Two of the Decretals by Gregory IX in 1234.[7] The procedural norms in the Decretals were very influential since they were used as a study text of procedural law at medieval and early modern university canon law schools until the beginning of the twentieth century and they influenced the

[6] Cf. John Beal, „Making Connections: Procedural Law and Substantive Justice," in *The Jurist* 54 (1994) 113-182.
[7] *Corpus Juris Canonici*, Decretals by Gregory IX (1234), Liber secundus – De iudiciis.

development of procedural norms in secular courts.[8]

Various particular norms throughout the court procedure serve for pursuing both instrumental and intrinsic ends of procedural justice, in searching for the truth and for guaranteeing participation of the parties in the court process. The introductory stage of the procedure includes the submission of a petition to a judge, its acceptance by the judge, the citation of the respondent, and the joinder of the issue on which the case will be investigated and decided. The probatory stage consists of the actual gathering of proofs at court at the request of the parties or ex officio, the publication of acts gathered in this investigation, and the formal conclusion of the probatory stage of the process. The discussion stage consists of the presentation of defense briefs and observations and a debate between the parties in the presence of the judge. Finally, the decision stage includes the pronouncement of the definitive sentence by the judge, its publication and, possibly, challenges to the sentence by the parties. This simple outline of the court procedure stages will serve as a framework to examine the appreciation of instrumental and intrinsic values of court procedural law as it is rooted in procedural justice in Hebrew Bible.

Procedural Justice in the Torah

The second part of this article will examine procedural justice in the three parts of the Hebrew Bible – the Torah, the Prophets (Nevi'im), and the Writings (Kethuvim). It searches for particular applications of the instrumental and intrinsic values in various stages of court procedures to reveal the roots of the values of procedural justice in the ancient Jewish court justice.

There are two concepts – *rib* and *mišpat* – in the Hebrew Bible that denote procedural ways to solve legal controversies and lead to justice. The *rib* corresponds to a controversy that takes place between two parties on questions of law. It develops in private mode and it includes three essential procedural stages: the accusation by the injured one, the response of the defendant party, and the conclusion of the dispute in some kind of reconciliation and re-establishing mutual justice. Should it happen that the parties to the controversy are not capable to solve it on their own, the *rib* is carried over into a *mišpat* (trial). The trial develops in a formal, public way. Among the essential stages it includes the opening of the trial at court, the debate of the accuser and the accused one, the presentation and evaluation of proofs at court, and eventually the judgment of the court. For the purpose of this article the differentiation between *rib* and *mišpat* is not critical because both of these legal proceedings include the parallel essential stages to enhance instrumental and intrinsic values of procedural justice.[9]

The redaction of the Torah as we read it today was completed by 400 B.C. However, the narratives and law in the Torah refer to the various epochs back in the history of the people of Israel. The closest texts to the closure of the canon of the

[8] Cf. Jean Gaudemet, *Storia del diritto canonico. Ecclesia et Civitas* (Milano: Edizioni San Paolo, 1998) 589-596.

[9] Cf. Pietro Bovati, Re-Establishing Justice. Legal Terms, Concepts and Proceedings in the Hebrew Bible (Sheffield: JSOT Press, 1994).

Torah were compiled in the era before, during and after Babylonian exile. Other texts of the Torah refer to the era of the prophet Moses. Still other texts reflect on the epoch of the patriarchs Abraham, Isaac, and Jacob. The opening chapters of the Book of Genesis meditate over the stories of the origin. Historical narratives and legal passages in the Torah are not clearly distinct, rather both of these main genres are harmonically connected. Thus, the elements of court procedural justice are clearly seen in some cases, but must be attentively excavated from the narratives at other times.[10]

Court procedural order in the Book of Deuteronomy includes the norms of substantial and procedural justice. The court system was well established in towns throughout the country to make justice available: "You shall appoint magistrates and officials for your tribes, in all the settlements that the Lord your God is giving you" (Dt 16,18). The gate of the town was a place where the elders met to exercise justice. The city gate was the place where the individuals who might have suffered injustice brought the injurer to seek for redress.[11] Court order ruled that the judges must administer justice (Dt 25,1). They were further instructed: "Hear out your fellow men, and decide justly between any man and a fellow Israelite or a stranger. You shall not be partial in judgment: hear out low and high alike. Fear no man, for judgment is God's" (Dt 1,16-17). According to court procedure, the judges examined a case in the following way: They listened to the petition, or the accusation. When the defendant was informed about the accusation the elders listened to the defendant's side of the story. They also listened to at least two or three witnesses before they pronounced a decision.[12] They were forbidden to take a bribe, "for bribes blind the eyes of the discerning and upset the plea of the just" (Dt 16,19).

Court procedural order also includes the norms on the parties and the witnesses in the case. "A single witness may not validate against a person any guilt or blame for any offense that may be committed; a case can be valid only on the testimony of two witnesses or more" (Dt 19,15). Those speaking at court were required to be truthful and courageous: "You must not carry false rumors; you shall not join hands with the guilty to act as a malicious witness. You shall neither side with the mighty to do wrong – you shall not give perverse testimony in a dispute so as to pervert it in favor of the mighty – nor shall you show deference to a poor man in his dispute" (Ex 23,1-3). False testimony was forbidden by apodictic law of the eighth commandment of the Decalogue: "You shall not bear false witness against your neighbor" (Ex 20,13 and Dt 5,17). The court had to examine seriously any suspicion of a false testimony: "The magistrates shall make a thorough investigation. If the man who testified is a false witness, if he has testified falsely against his fellow, you shall do to him as he schemed to do to his fellow. Thus you will sweep out evil from your midst" (Dt 19,18-19).

[10] Narrative and law parts are analyzed and commented in Viktor Ber, *Vyprávění a právo v knize Exodus* (Jihlava: Mlýn, 2009).
[11] E.g., Dt 25,7 and Ps 127,5. The biblical quotes are taken from the *Tanakh. A New Translation of the Holy Scriptures According to the Traditional Hebrew Text* (New York: The Jewish Publication Society, 1985). N.B. Reading this part of the article presupposes a continuous consultation of the proper biblical passages.
[12] Cf. Dt 16,18-20; 19,15 and 25,1; Lv 19,15.

The Stories of the Patriarchs

The narratives on the Patriarchs in Genesis 11,27-50,26 reveal that justice was appreciated as a key value in the tribal society of that time on both levels, i.e. between the tribes as well as inside a tribe. Negotiations, treaties and wars were instruments to solve conflicts among the tribes. The authority of the patriarch was the source of power to resolve the conflicts between the members of one tribe. The narrative in Gn 16,1-16 describes a conflict between Sarai and Hagar, two of Abraham's wives. It includes not only a dramatic story but also some juridical elements. Abraham is clearly one with the authority to hear and decide the conflict. Both of the parties have an opportunity to tell their side of the truth not to the listener of the story but to the authority to enable him to make an informed decision. Similarly the story in the Gn 38 is not only a dramatic narrative that attracts the attention of the reader. It also follows a form of procedural justice that includes the possibility of hearing and defense in the presence of the competent authority and eventually an informed decision based in laws and facts that came to light during the process.

The Stories of the Origin

The stories of the origin in Genesis 1-11 include thoughts on the fundamental human questions. It is made of narrative as well as legal elements. Man and woman are introduced as individual and relational beings not absolutely separate without any mutual connection. Their relation is characterized by freedom, responsibility and mutual interdependence.[13] These anthropological and theological foundations of human beings enable men and women to solve disagreements and conflicts through rational communication and mutual dialogue and not just through physical force. Freedom and responsibility are anthropological presuppositions of court procedural justice.

The narrative on Cain and Abel is written according to narrative as well as legal formula.[14] After the crime was committed the accusation is presented to the competent authority, the accused one is given an opportunity to defend himself (instrumental as well as intrinsic values) and the verdict regarding the guilt and punishment concludes the drama. The legal, procedural form of describing the story allows for a succinct and complete presentation of the crime scene from the dramatic point of view. Then, procedural form enables the reader to get involved in the fact-finding and decision-making dynamics, understand the evaluation of the facts and eventually accept the judgment.

Procedural Justice in the Prophets

The text of the Books of Prophets (Nevi'im) as we read it today was completed by 200 B.C. However, the narrative and law parts in the Prophets refer to the various epochs back in the history of the people of Israel. The Prophets are divided into two parts. Jewish tradition calls Former Prophets the era of the judges and the kings. The Latter Prophets include a more heterogeneous collection whose

[13] Gn 2,18-24.
[14] Gn 4,1-16.

individual books were composed between 750 and 300 B.C.

The Former Prophets

The judges of the era from 1200 B.C. to 1020 B.C. led the tribes of Israel to settle in a promised land. The judges were charismatic persons charged with specific tasks. The authority of judges included primarily executive tasks. The kings were the leaders of the monarchy since 1020 B.C.: "David reigned over all Israel, and David executed true justice among all his people" (2 Sm 8,15). The kings exercised executive and judicial tasks but they did not enjoy legislative power.

Solomon's wisdom is characteristic of intuitive justice and he became a model of a wise and fair judge. The story of Solomon's judgment is well known: One day two women came to King Solomon with a dispute. Both of them lived in the same house and recently both had babies. Unfortunately one night while they were asleep one of the women rolled over on her baby and he died. In the morning she switched the dead son for the live son of the other woman and, thus, the argument started over whose the live child is. The King ordered a sword to be brought to cut the live baby in half to give an equal part to each woman and waited for the reactions of the women. One was immediately ready to give up her claim in order to save the life of the baby. The other woman said to go ahead and cut the baby in half. The King made the conclusion: The first woman was the mother of the live baby. The King's decision was not based on the procedural examination and testimony of the witnesses because there were none, the decision was not based on superstition and witchcraft. The verdict was based on the examination of all available information and on the King's intuition.[15]

The Latter Prophets

The latter prophets experienced firsthand persecution, trial and condemnation or liberation. The story of the prophet Jeremiah being threatened with death is very instructive. It records the court process in the city gate. The religious conflict is tried according to the usual proceedings. It opens with a formal accusation: "This man deserves the death penalty, for he has prophesied against this city, as you yourselves have heard" (Jer 26,11). The accusation includes blasphemy that is punished with the death penalty and the accusers appeal to a testimony of the attending people who have heard the prophet's preaching. Then, Jeremiah is given an opportunity to answer the accusation and defend his cause. He takes it as an opportunity to repeat his preaching once again. Then, some of the elders speak up and refer to a precedent case of the prophet Micah that took place about one hundred years prior. All the people eventually pronounce a liberating judgment: "This man does not deserve the death penalty, for he spoke to us in the name of the Lord" (Jer 26,16).

The prophets speak very often about justice and law. They criticize wrongdoings and injustice committed against individual people especially the poor and the weak: "Devote yourselves to justice; aid the wronged, uphold the rights of the orphan; defend the cause of the widow" (Is 1,17). They do

[15] Cf. 1 King 3, 16-27.

not separate substantial and procedural justice; in fact, they do not separate individual justice and social order because these two are inseparable. Thus, they also criticize a distorted social order and claim that justice and order are essential characteristics of the (social) world as it was intended be the Creator: "He did not create it a wasteland, but formed it for habitation" (Iz 45,18).[16]

Procedural Justice in the Writings

The redaction of the Writings (Kethuvim) as we read it today in the Hebrew Bible was completed most probably by 150 B.C. However, wisdom and justice that are crucial issues of the Writings originate back in the history of the people of Israel. This article examines only some of these books to give examples of understanding of justice.

Justice is one of the key topics of the Book of Psalms. Justice is a required standard of the individual's behavior; it is an essential characteristic of the social order as well as a required standard and goal of the court trial in the gate. Psalms deal with justice in a very balanced way. On the one hand justice is a continuous struggle human beings can never give up; on the other hand justice is a gift of the Lord.[17] Injustice and wrongdoing whether it took place in the life of an individual or a community are never taken as something inevitable and fated but as a challenge to restore order and renew fairness.[18] Pursuing justice requires not only human effort and strength but also modesty.[19]

The Book of Proverbs includes a number of sayings that originate in procedural justice. A proverb requires the judges to administer justice not only on behalf of the strong and wealthy but also on behalf of the voiceless: "Speak up for the dumb, for the rights of all the unfortunate. Speak up, judge righteously, champion the poor and the needy" (Prv 31,8-9). The exchange of the arguments in the dispute is not just a form of expressing public courtesies and formalities but also a very effective instrument to sift the claims and allegations in order to uncover the truth: "The first to plead his case seems right till the other party examines him" (Prv 18,17). A reliable witness helps uncover the truth while a lying witness promotes decay.[20] Justice is contained not only in a verdict (*verum dicere*) of the court but it is also a fruit of lifelong effort: "I walk on the way of righteousness, on the path of justice" (Prv 8,20).

The Chronicles confirm the importance of pursuing and administering justice in the community of Israel and stress it even more with a theological argument: "Consider what you are doing, for you judge not on behalf of man, but on behalf of the Lord, and He is with you when you pass judgment" (2 Chr 19,6).

Conclusions

The article studies the roots of contemporary European court justice in the Hebrew Bible. More concretely, it examines the instrumental and intrinsic values of European court procedure law in the court procedures of the Hebrew Bible. The study has required specific methodological

[16] Cf. Iz 45,18-19.
[17] Cf. Psalm 127,1-2
[18] Cf. Psalm 72,1.
[19] Cf. Psalm 127.
[20] Cf. Prv 6,19 and 12,17.

consideration. Contemporary court norms are found in the formal legal sources that are clearly distinguished from other texts in accord with the modern approach of organizing human knowledge according to various methods and disciplines. The Hebrew Bible contains and mixes narrative and legal texts that both make rather an organic whole. Then, it is up to the reader to read properly a narrative as narrative and laws as law.

The Hebrew Bible values justice and law very much. It contains rather a sophisticated and rational court procedural law. An instrumental value of court procedure is clearly appreciated in the Hebrew Bible. Public courts with competent judges were established in every town throughout the Land of Israel in such a way that the right to court protection was not just an empty ideal but this right was open to a ready vindication. Procedural law also guaranteed persons who suffered injustice public hearing that included a possibility to submit a petition and proofs, to introduce witnesses, to hear the argument of the opponent and eventually hear the public judgment. All of these procedural steps express the instrumental value of court procedural justice.

Court justice also serves as an instrument of protecting and promoting the social order in local communities to make the land habitable. Justice is a standard of an individual human action as well as a quality of mutual relations in a community because the land without justice becomes an inhabitable desert.

Court justice in the Hebrew Bible also appreciates the intrinsic value of the proceedings. All the particular steps that were named in connection with the instrumental end aim at appreciating the human dignity of both of the parties to the dispute. Both of them enjoy a possibility of presenting their side of the truth, hearing the accusation and the proofs that support it and defending themselves. Neither party is treated just as an object of justice but the possibility of both parties' participation in the procedure guarantees the intrinsic value of court procedure.

The Hebrew court justice recognizes common experience of the limits and imperfection of every human action including the limits of court proceedings and court judgments. Although court procedure aims at restoring justice, it is an imperfect human institution that does not reach perfect results at every time. The relative value of court justice in the Hebrew Bible does not result in pessimism or a give up mentality. Court justice in the Hebrew Bible considers justice as historical as well as transcendent phenomenon and seeks for justice that is both a result of an untiring yet limited human effort as well as the Lord's gift.

In sum, the instrumental and intrinsic values as well as the social and relative characteristics of the European court justice are rooted in the Hebrew Bible.