Juridicum Anthology 2019
School of Law, Örebro University
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In strict alphabetic order, I would like to thank each of the authors individually: Adam Croon, Senem Eken, Anna-Maria Hambre, Katalin Kelemen, Jan Kellgren, Eleonor Kristoffersson, Joakim Nergelius, and Aljosa Noga. I apologize for sending you far too many emails, reminding you of deadlines, templates, and the number of words we were able to fit in.

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Eleonor Kristoffersson, Head of Legal Research at Juridicum, deserves a special thank you for being the original instigator behind the idea of a publication as a durable testimony of scholarly conversations at the School of Law.

I was but a humble caretaker, and only for a short while. Here is to the next one, and many more.

Cristina Trenta, Editor

Örebro, November 24 2019
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Foreword

This is the first anthology published by Juridicum, the School of Law at Örebro University, as two separate books: this one, in English, and its companion volume in Swedish. This choice is the product of circumstances, a sign of the attention that the School of Law is paying to international debate and of its presence in such debate, as well as a direct reflection of the increasing weight that Swedish higher education institutions place on the importance of scholarly participation in the global conversations that are shaping our future.

The Swedish Higher Education Act requires that Swedish universities and colleges promote an understanding of other countries and of international conditions; Örebro University has made these principles a core part of its international strategy. Making this year’s School of Law’s contributions to the current legal discourse available as a separate English volume is a step towards broadening the outreach of the research in law conducted in Örebro.

This simultaneous desire and necessity for outreach is not limited to making research a more international endeavour, nor is it anything new to many fields of scientific inquiry, law most certainly included. Back in 1872, Edward L. Youmans, founder of Popular Science Monthly, wrote that the magazine was filling a gap since “the work of diffusing science is (...) very imperfectly organized, although it is clearly the next great task of civilization.”

Illustrating what science was accomplishing to the layperson was an extremely important job in Youmans’ opinion; you might say one too serious to be left to the scientists alone, often accused of using obscure lofty language meant for the initiated only. This accusation of obscurity is something the field of law has experienced first hand, at least if you look at the mainstream media.

We might agree or disagree on whether or not this is an accusation the field deserves, but we cannot ignore the fact that doctrine has repeatedly pointed out that “there exists a convenient fiction which allows the as-

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1Högskolelag (1992:1434), 1 kap, 5 §.
The promulgation of the law in itself is just one step, albeit arguably the foundational one, in a legislative process that necessarily requires that the content of the law is critically discussed, understood, communicated, and thoroughly disseminated inside and outside of academia.

As mentioned above, the Swedish Higher Education Act contains a specific provision directed at Swedish universities and colleges prescribing that they be present in the social, public arena outside of academia, the so-called *tredje uppgiften* or “third task”. Swedish higher education institutions should disseminate and discuss their activities and their results outside the “ivory tower” and beyond traditional scholarly venues. This process requires a certain degree of reformulation, implying a redrafting of the way scientific knowledge is presented, and of recontextualization, to better suit non-scholarly discourse, and different ways of turning legal matters into valuable propositions.

This is the conversation this anthology wishes to participate in, with whatever humble contribution it might have to offer, all while maintaining its scientific robustness. It is also the primary reason why the book is being distributed under an open access license and made available in both hardcopy and via the online academic repository at Örebro University.

There is one additional angle that this book considers besides the long-standing necessity to break down the barriers between civil society and academia. The Swedish Higher Education Act maintains that universities and colleges should, in their activities, promote sustainable development: the fourth goal in the United Nation’s Agenda 2030 prescribes the need to ensure “inclusive and equitable quality education and promote lifelong learning opportunities for all”.

This is something Örebro University has embraced fully, and this book is a tentative stepping stone towards communicating the educational side of research in law, in its broadest sense, in such a way that its value can be made visible to more than just legal scholars or the engaged legal practitioner and hence, more inclusive and ultimately more sustainable.

More stepping stones will be needed on this long path towards reconciling the entangled relationship between academia, and law specifically, and society. But then again, all journeys begin with the simple decision to walk out the door and see what the world looks like outside the house.

*Cristina Trenta*

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Besides this brief foreword, the book contains nine individual contributions that cover the different threads of research at Juridicum, from legal history to tax law and from constitutional to international law. 

*Adam Croon* addresses the topic of the Swedish legal education reforms of the 19th century.

*Joakim Nergelius* examines the fairly new concept of EU citizenship, focusing in particular on the rights of persons who have been denied citizenship or who have had their citizenship revoked.

*Senem Eken* investigates annulment actions as an essential legal instrument for judicial review, focusing on the limitations of the institute itself.

*Cristina Trenta* discusses current EU legislation in respect to the realization of the EU Digital Single Market.

*Anna-Maria Hambre* examines Swedish tax procedures from a European perspective and in the light of the dispositions laid out in the EU Charter of Fundamental Rights.

*Eleonor Kristoffersson* investigates the protection of whistleblowers in the area of tax law and how the issue is handled in different jurisdictions around the world.

*Jan Kellgren* explores the concepts of reciprocity and pricing, and their impact on the neutrality of income taxation.

*Katalin Kelemen* analyses the issues of dissenting opinions and judicial independence.

*Aljosa Noga* discusses the tragedy of the global commons in international law.

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6Högskolelag (1992:1434), 1 kap, 5 §.

Adam Croon

Swedish legal education reform in the 19th century and the German historical school of jurisprudence

Abstract

In the nineteenth century, Sweden took its first steps on the road to industrialization and parliamentarism. Society in general, and especially the new-born capitalist market, required legal certainty, defined as stability, predictability and speed. This in turn led to the professionalization of judges and civil servants. The main idea was that a doctrine of legal sources (but not a codification), combined with the knowledge of legal methodology among judges would secure a flexible, but not arbitrary, application of law. The professionalization process fuelled a simultaneous need for a reform of legal education.

Introduction

In the nineteenth century, Sweden took its first steps on the road to industrialization and parliamentarism. Both society in general — and the new-born capitalist market in particular — were in need of legal certainty, defined as stability, predictability and speed. Reforms to legal education were therefore mainly aimed at creating a legal profession capable of reliable and predictable adjudication and decision-making.

This formative change still forms an important part of the professional identity of Swedish judges and civil servants. A mere national perspective is insufficient to gain a more thorough understanding of the transformation that Swedish legal education underwent during this time. Instead, Swedish educational reforms should be understood in the light of ideas stemming from one of the leading schools of thought in continental Europe: the German historical school of jurisprudence.

The challenges of the era

The nineteenth century is the doorway to modern Swedish society. In the middle of the century, constitutional reforms were made that laid the

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1 This text is a paper, presented at the conference XVe Congrès international de l’Association internationale de méthodologie juridique, Les écoles de pensée en droit, 11–13 octobre 2018 at Université Laval (Québec). The paper will be published in the Éditions de la Revue de Droit at the Université de Sherbrooke.

foundation of parliamentarism. Likewise, reforms aimed at facilitating local government were made in 1862. In the economic sphere, the liberalization of various markets eventually led to the abolition of the guild system, which was replaced by a system of freedom of establishment and competition.

Shifts in society as a whole affected its legal sphere, as it brought the need for new legislation to the fore. However, financial resources were scarce, and more costly legal and political reforms were thus not prioritized. Change proved to be especially challenging for the judiciary. The transformation of the economy brought a steady increase of commercial litigation, which courts at first found difficult to manage. As the Swedish lawyer Carl Livijn stated in an article from 1869,

the steady and speedy growth of the population, in combination with an expanding industrial market, leads to a number of new cases, with which the district court judges are at present unable to cope. The resolution of the cases requires more time than they have at their disposal [my translation].

Complicating matters even further, the case law produced by the courts was unclear and contradictory. Carl Olof Delldén, Professor of private law at Uppsala University, stated in 1848: “the case law does not seem to have coherence and reliability without which the law must be described as unclear [my translation].” The courts’ legal application lacked stability, predictability and speed. These were three problems which, left unresolved, would hinder social and economic development.

**Legislative efforts**

The crisis in the judiciary could be traced back to Swedish legislation, which had not been subject to major reform since the first half of the eighteenth century — and was therefore not adapted to the dawn of industrial society. In the year 1686, King Charles the XI had appointed a committee with the task of revising the Swedish mediaeval code of private, public and penal law, which at the time was still in force. After many years of work and parliamentary deliberations a new code was enacted in 1734. The Code of 1734, however, was in many ways already outdated at its entry into force. The King had not wanted his subjects to believe that he was really changing the law, which would have been alien both to the traditions of the people and to the scientific understanding of the legislative mandate at the time.

Hence, the new code imitated its mediaeval predecessors both in terms of structure and linguistic style. The linguistic style of the provisions was strongly casuistic, describing a number of specific and isolated situations where the law was applicable. This style caused problems, especially since more abstract legal concepts were non-existent or underdeveloped. This led, in turn, to a situation where it was often impossible to apply the provisions because the letter of the law did not seem to fit the given facts. Furthermore, no guidance was to be found as to how a judge should proceed in such cases.

In order to solve this problem, the legislator appointed a new committee in 1811. Its task was in many ways the same as it had been in 1686: to suggest necessary changes without actually redrafting the law as a whole. This plan, however, was soon challenged when a young and ambitious lawyer, Johan Gabriel Richert, sought to use the redrafting of the Swedish code to carry out a political agenda. A liberal, republican, and firm believer in the French Revolution and its ideas, Richert had taken it upon himself to reform Swedish society based on the ideals of the Enlightenment.

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1 See Kongl. Maj:t:s nådiga Förordning om kommunalstyrelse på landet; Gifven Stockholms slott den 21 Mars 1862.
2 Livijn, Carl, Om fullständig reorganisation av vårt rättegångsväsende, Tidskrift för lagstiftning, lagsskippning och förvaltning, 1869, pp. 159–180, pp. 174–175. See also Croon, Adam, Jura Novit Curia. En rättssgenetisk undersökning av den juridiska metodlärans utveckling under 1800-talet, Stockholm, 2018, p. 22.
One essential component in the philosophy of this period was the notion that law should be understandable to every rational citizen. This demanded that legislation should be clear, exhaustive and abstract enough to form a complete regulation of a given area of law. The legislator became responsible for developing the infrastructure of the code in the form of legal concepts and legal definitions. With this job done, the need for interpretation was supposedly minimal. According to Richert, the model for Swedish reform should be the French codification of private law of 1804. Richert thought that its abstract, synthetic legal style offered a way out of the Swedish legislative tradition. With more abstract legal concepts to choose from, the judge would be freer to adapt legal reasoning to the facts of each case. The legislator would hence be able to kill two birds with one stone.

A complete redrafting of Swedish private law along the lines of the Code civil would mean a real and serious modernization of legal content, and the structure of a proper code would provide for a more flexible yet coherent case law. However, plans for the codification of Swedish private law à la française did not receive the warm welcome Richert had hoped for. The drafting was slow, and, in the end, a final draft was in fact never submitted to parliament. The project resulted in a few amendments to various existing statutes, as well as the enactment of a few new ones, but a coherent codification was never achieved.

The critique reaches universities

In the second half of the nineteenth century, plans for the codification of Swedish private law had largely been abandoned. The problems in the judiciary, however, remained unsolved. Eyes therefore turned to the judiciary itself. It was argued that judges themselves should reform the legal system through case law and thereby, step-by-step, adapt the ancient wording of statutes to social needs. Swedish judges, however, seemed poorly equipped to fulfil this task. The reason, it was widely understood, was an outdated university legal education. The general opinion was that (such education) it mainly consisted of a relentless stream of facts provided by law professors, which students were forced to memorize and regurgitate in their exams.

More importantly, the content of lectures, though substantial, was not connected to the students’ future working conditions. The opinion was therefore that academic legal studies led students astray and alienated them from the straight-and-narrow path of sound judgement and common sense – the true foundation of any legislation or precedent. As a result, students could not solve cases they were adjudicating, as they often struggled with the task of adapting their judgments to practical realities. Longer academic legal studies were thus deemed counterproductive or even harmful.

In the mid-1800s, two main programmes for legal education existed in Sweden. The first programme was the so-called examen till rättegångsverken, also named Hovrättesexamen, or “Court of Appeal Exam”. This academic degree had existed since the eighteenth century and was completed after three years of study. The second and more advanced programme was the juris utriusque kandidatexamen, which required four and a half years of study. Although both these exams provided the necessary qualifications for a judicial career, only the advanced degree involved deeper studies of theoretical subjects such as legal history and jurisprudence. Not surprisingly, the shorter programme of three years was favoured by students.

The demoralizing effects of law on society had been pointed out by Johan Gabriel Richert in the 1820s during a debate at Uppsala University. His opinion was that a legalistic society undermined and harmed popular common sense. Therefore, the transformation of society in this direction must be stopped. Richert also suspected that universities were to blame for this development:

History shows us how the educated class tries to make legal knowledge exclusively a question of science and by doing so it seeks to alienate the people and diminish its influence over the application of the law. It will subsequently unlawfully act as its guardian [my translation].

According to Richert, the law, originally a common commodity, had been made technical by academia, and its representatives now ruled through the education of judges and civil servants. In his opinion, law

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14 This idea is expressed in the Articles 4 and 5 of the Code civil.
15 Sandström, The Swedish model, p. 299 and Croon, Jura Novit Curia, p. 86.
16 Peterson, Debatten om 1826 års förslag till en allmän civillag, p. 262.
17 Sandström, The Swedish model, p. 299.
had its own “clergy” – law professors. University, not surprisingly, made no effort to reduce the effects of outdated legislation. On the contrary, legal scholars were self-servingly opposed to any legislative reforms:

Even today, books are written to prove that there is no need for initiatives from the legislator, as law should develop exclusively in the hands of the legal profession, through interpretation and application [my translation].

A similar sceptical view was held by the former Parliamentary Ombudsman Sven Lorens Theorell. He complained about the unnecessary amount of time that law students spent at university, claiming that it was a waste of both their and tax-payers’ money. The virtues of a good judge, according to Theorell, were sound judgement and common sense:

It has almost never been said that book knowledge alone creates a skilful judge. Many times it has been shown that this kind of knowledge counts for nothing in reality and that it is completely fruitless. There may, however, be many examples where academic qualifications were slim or non-existent. There are even cases where a skilful and resourceful judge started out as illiterate – an autodidact. (...) What other conclusion may therefore be drawn, albeit not a completely dispensable one, than that academic studies may never make up for natural talent? This, together with practical experience of adjudication, is what makes a man an ac-

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22 Richert, Ett och annat, p. 52 and Croon, Jura Novit Curia, p. 168.

23 “Ännu idag skrifver man här och der böcker för att bevisa den ädla läran, att lagstiftning bör göra ingenting till lagarnas förbättring, eremedan (...) de böra utbilda sig endast under juristernas händer, genom en fortlöpende utläggning och tillämpning.” Richert, Ett och annat, p. 52.

24 Theorell, Sven Lorens, Ideer till en Universitets-reform I en helt annan rigtning, än som för den juridiska fakultetens ombildning blifvit å bane bragt, Stockholm, 1859, p. 28.

25 Theorell regarded the application of the law as a craft, which meant that it must be learnt through practice, or at least that the gap between theory and practice made judging impossible without proper training. According to Theorell, therefore, it was important that steps were taken to shorten students’ time at university and that a young man aspiring to become a judge was given a position as soon as possible “so that he may from that position eventually gain the highest level of practical and professional skill.

Since it is through practice that the best knowledge of detail can be gained.” It was therefore important that universities were sure not to scare off young men who possessed a natural talent for adjudication by promoting tedious and challenging theoretical studies:

The purpose of studies is to find among the students those who will make good judges; and in order to achieve this, nothing is more vital, than to find those who are natural talents, but in this selection process, it is very important that the challenging studies single out the naturally talented and scare off the less talented and not vice versa.

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27 Theorell, Ideer, p. 31.

28 “[D]et stora problemet, till hvars lösende dessa studier skola syfta, är ju att finna telyniga ämnit till goda domare; och för att finna sådana är ingenting angelegnare, än att tilllegna sig dem, som af naturen äro utrustade med nödiga förmögenheter, framför dem som sakna sådana; men tillika måste iakttagas, att medlet till dessas aflägsnande icke sökes i ett sådant belastande med studier, hvilket lika mycket skulle afskracka de af naturen bäst lottade.” Theorell, Ideer, p. 27.
education functioned.\textsuperscript{28} He also suggested a few reforms, most importantly the abolition of the *Hovrättsexamen*. As opposed to those who criticized legal education, Olivecrona wished to extend legal education to 4.5/four and a half years, thus making the *juris kandidatexamen* the only option for students wishing to pursue a judicial career.\textsuperscript{29} Olivecrona repeated this suggestion in 1886.\textsuperscript{30}

Olivecrona admitted that the didactic techniques used in academic legal education were in many ways outdated and that they had for a long time merely consisted of lectures on specific legal rules without an analysis of their underlying principles. This model clearly did not benefit the students.

However, already in the 1840s this particular method of teaching, called “the commentative method” (*den kommentatoriska metoden*), had largely been abandoned.\textsuperscript{31} When the method was used, it meant that each chapter and paragraph in a statute was commented on by the professor during a series of lectures. This way of structuring lectures stood in harmony with the casuistic style of Swedish legislation and, furthermore, it gave students an in-depth knowledge of the problems associated with the application of each paragraph.\textsuperscript{32} Students should have been well prepared for their future practical tasks as civil servants—at least in theory. However, this proved not to be the case.

According to Olivecrona, the commentative method did not provide students with a systematic perspective on law because the relationship between various paragraphs, statutes and legal topics was ignored. The absence of this relational perspective could be attributed to a lack of practical understanding of law among university professors.\textsuperscript{33} In legal practice, the qualification of facts generally involved more than one single rule at a time. In fact, solving a single case could involve provisions from public, private and criminal law at the same time. The judge needed to be familiar with all these areas and the leading principles associated with each one to qualify facts and make adequate delimitations.

A horizontal understanding of the legal system was necessary, but it also had to be combined with a vertical one for the judge to be able to take general principles and constitutional matters into account. This legal *dogmatic* or *systematic* perspective needed to be implemented as soon as possible. “The dogmatic method,” Olivecrona stated, “which does not exclude the commentative one, is, in my opinion, the only choice. With the former, the students will gain a full understanding of the leading principles of private law, and only through a dogmatic approach may a young student learn private law as a science and thereby understand the connection between the specific parts as aspects of the bigger whole.”\textsuperscript{34}

Due to the casuistic style of Swedish legislation and the “scattered” case law, it was vital that each lawyer gained a systematic legal understanding. The dogmatic perspective forced the jurist to assume that various statutes, precedents and doctrinal statements formed a coherent legal system, without gaps, overlaps or contradictions. Through this pretence, the “prophesy” would compensate for the actual gaps that arose out of the casuistic style of legislation.

By failing to assume that the legal system was complete, the judge could, on the other hand, easily be led to believe that his case was not covered by law when the facts did not match the letter of the statute or precedent. If the wording were overemphasized in the judging process, gaps would inevitably occur. Left to his own devices, the judge trying to bridge gaps in legislation and case law would risk complicating matters by creating a precedent that was incoherent or contradictory to the system. The commentative method used in legal education in this context added to the problem instead of compensating for it. In addition, it would have taken a long time for a judge to establish whether his case was covered by the law or not if he did not have a general knowledge of the system as a whole.

Contrary to more Enlightenment-oriented advocates, who viewed the discretion of the judge as a way of modernizing the law, Olivecrona and other scholars instead treated discretion as a potential problem. Lacking a method to adapt the wording of the statute to the specific case, the judge would be left to use his own moral judgement, which would inevitably lead to different interpretations based on the individual opinion as to what the law should be. Legal discretion, exercised in this way, was not

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\begin{itemize}
\item \textsuperscript{28} Sandström, Slaget om juristutbildningen, p. 584.\textsuperscript{28}
\item Olivecrona, 1859, p. 53–54.\textsuperscript{29}
\item Olivecrona, Knut, Om en reform i afseende på de juridiska studierna och examina vid universitetet I Upsala, Stockholm, 1886, p. 5 and Croon, Jura Novit Curia, p. 152.\textsuperscript{31}
\item Olivecrona, 1859, p. 19.\textsuperscript{31}
\item Olivecrona, 1859, p. 20–21.\textsuperscript{32}
\item Olivecrona, 1859, p. 15 and Croon, Jura Novit Curia, p. 151.\textsuperscript{32}
\item Olivecrona, 1859, p. 5–54.\textsuperscript{33}
\item Olivecrona, 1859, p. 20–21.\textsuperscript{33}
\item Olivecrona, 1859, p. 15 and Croon, Jura Novit Curia, p. 151.\textsuperscript{33}
\item “Den dogmatiska läromethoden, hvilken icke utesluter begagnandet af den kommentatoriska, anser jag vara den enda rätta. Genom den förra användande kan säkerligen en klar kunskap i de ledande principer, hvarpå Civil-Rätten är byggd, bäst meddela; endast genom denna kan lärjungen bibringas begrepp om Civil-Rätten såsom vetenskap, endast genom denna kan han lära sig inse sambandet mellan de särskilda delarne af lagfarhanheten såsom delar af ett organiskt helt.” Olivecrona, 1859, p. 21.\textsuperscript{34}
\end{itemize}
\end{footnotesize}
deemed to be at the heart of the problem of inconsistency and incoherence.

In contrast to Theorell, Carl Olof Delldén had made it clear that the task of judging a case could never be reduced to “a mere routine or a craft [my translation].” Only if the judge were equipped with the tools to help him bridge the gap between the letter of the law and the variation of facts, could the law be applied in a controlled, uniform and therefore predictable way. It was therefore necessary for a judge to have a reliable knowledge, not only of the specific provision applicable (…), but also insight into the ratio and meaning of the law, that which is the result of scientific studies aiming at the abstract and looking at the reasoning behind legal concepts from different perspectives [my translation].

What Delldén described was legal dogmatics, or what he called “the studies of what is commonly referred to as the legal system [my translation].” Delldén held that theoretical knowledge, and especially methodological knowledge, “idealizes the (judge’s) practical abilities”. How would then the future lawyer or judge acquire these skills and abilities? In a codified system, the legislator, through the code, would provide a set system of legal concepts and definitions, which would guide the judge. But the idea of codifying Swedish private and criminal law was no longer an option in the 1860s. Contrary to Richert, Olivecrona regarded it as natural for legal science to fill the gaps in the legislation. The structure which the legal concepts provided, combined with dogmatic legal methodology, would make the foundation of a sound legal practice, characterized by uniformity, predictability and speed.

From this view it was only natural to argue in favour of theoretical academic law studies, claiming that they were not only meaningful, but also necessary to make legal application comply with the needs of modern society. A dogmatic teaching method, however, consisting of descriptions of legal concepts and training in abstract legal reasoning, mixed with detailed examinations of practical legal questions, seemed to presuppose that students were taught legal methodology, legal theory and legal history as part of their curriculum.

The historical perspective would help the students to understand the practical and theoretical needs behind the development of a certain legal rule or institution. This would facilitate their evaluation of the current legal situation and help them to decide whether or not, based on the historical purpose, law-making was necessary or not. The feeling of continuity that the historical perspective would provide was therefore, along with the systematic overview, calculated to result in a more stable and unified case law. Olivecrona pointed out that

> When using the dogmatic method in my teaching, I have not neglected to refer to the legal sources in order to point out how, from a historical point of view, the legal institutions have developed from older times and gained their modern structure and content [my translation].

Predicting these results, Olivecrona argued for the abolition of the shorter Hovrättsexamen to make room for a legal education consisting of historical, theoretical and dogmatic topics. Olivecrona had made a virtue of the scientific stance in legal teaching which had been so heavily criticized by Theorell. The academic perspective was, however, not self-sufficient; instead it formed a vital point of departure. The ultimate goal was to educate “competent civil servants [my translation].”

**The inspiration of a school of thought?**

As has been pointed out, certain specific circumstances may have contributed to the fact that the debate about legal education became so important in Sweden in the mid-1800s. The lack of updated legislation and a coherent system of legal concepts in the form of a codification made it necessary for lawyers to seek guidance elsewhere. It was therefore only natural that they turned to legal science and hence to universities.

Where the legislator had failed, these institutions provided suggestions for reform. If the debate had initially been dominated by a legalistic ap-
proach with its roots in the late Enlightenment, the ideas underpinning the academic perspective came from elsewhere. Some extra light on the Swedish debate, exemplified by the texts of Olivecrona and Delldén, could arguably be shed by turning to the German historical school of jurisprudence and its outlook on law and judging/adjudication.

First, the difference in opinion about law between enlightened liberals and the historical school is clear. To professors like Delldén, the much-criticized “juridification” or formalization of law by academia did not have its roots in the universities. Formalization by legal science was not the cause of this development, but rather a response to developments in society in general. Law became technical when the rest of society demanded specialization. This, however, did not contradict the fact that law ultimately was a social phenomenon as the fact that at a certain state of cultural development, the division of tasks will take place both in the immaterial and the material or industrial sphere of society is quite clear, but from that we cannot conclude that any deeper rupture or break should take place in the net of society [my translation].

This thought was also held by the founder of the historical school, Friedrich Carl von Savigny, who had stated that, “Bey steigender Cultur (…) sondern alle Thätigkeiten des Volkes immer mehr, und was sonst gemeinschaftlich betrieben wurde, fällt jetzt einzelnen Ständen anheim.”

The need and demand for a professionalization and “academization” of the judiciary must therefore be regarded as a consequence of the same trend and not as a conscious act by legal science, calculated to outmanoeuvre the people from the creation and application of the law. The relationship between cause and action was hence the opposite of what Richert had proposed. The legal development from rational common sense to technical legal knowledge had gone faster during the nineteenth century than ever before/than at any previous point in history. Savigny pointed out that the understanding of the law had “ein künstlicher geworden” and that this had affected the role of the judge.

In earlier times, Savigny concluded, judges solved cases in accordance with “dem im Volk lebenden Recht, dessen unmittelbares Bewußtseyn ihnen bewohnte wie allen Übrigen”. In modern society, this was no longer the case. The task of adjudication had become “eine ganz andere als die der alten Schöffen war.” Therefore, the concept of legal knowledge had to be redefined and the technical knowledge of the content of the legal sources regarded as a duty: “Das gesetzliche und wissenschaftliche Recht kann und soll er (the judge) kennen und es verletzt seine Amtspflicht, wenn er aus Unkenntniß desselben unrichtig urteilt.” In addition, the judge must secure a reasonable level of uniformity and predictability in legal application.

This goal was pointed out not only by Swedish scholars, but also by the representatives of the historical school. Friedrich Julius Stahl had, for example, written that

(die (…) wenigen Gesetze sind (…) bindend, und sollen in ihrem wahren Sinn und Zusammenhang und in einer gleichmäßigen Weise für alle Fälle angewendet werden.

Stahl, of course, understood the practical need to adapt a legal solution to the facts of the case. A free judicial discretion, however, was not an option in order to meet this need, as it would undermine the goal of legal certainty. To Stahl, “common sense” could be nothing other than an individual opinion. A common popular legal opinion hence was “ein bloßer Schein.” The true consequence of an exercised discretion was that der Richter folgt doch überall nur seinem individuellen Ermessen (…), und dann ist das im Volke lebende wahre Recht wieder überbaut und getrübt.

Ideally, the judge should be able to adapt his application of the law to the needs of the parties without interfering with the coherence of the system:

Zur Vollkommenheit der richterlichen Entscheidung gehört gewiß die völlige Anpassung an das Individuelle des Falles; aber es gehört dazu nicht minder die völlige Harmonie der einzelnen

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41 Delldén, Vederläggning, p. 573 and Croon, Jura Novit Curia, p. 34.
Entscheidungen mit allen anderen Entscheidungen also mit dem Ganzen des Rechtzustandes.\textsuperscript{50}

In a situation where both these goals could not be achieved at the same time, the judge should prioritize the formal correctness of the judgment over fairness and thereby favour coherence and predictability. Otherwise, “der Ungerechtigkeit, welche in der Ungleichmäßigkeit der Entscheidungen liegt”\textsuperscript{51}, would in the long run result in “eine völlige Unsicherheit aller Rechtsverhältnisse und alles Rechtsverkehrs.”\textsuperscript{52}

Legal science, according to the historical school, would safeguard the unity of legal application:

Ein ausgebildetes positives Recht und seine gleichmäßige bewußte Handhabung mittelst der Rechtwissenschaft ist eine große That der Nation als Einheit, und ist eine Ehre der Nation.\textsuperscript{53}

As noted, Savigny had argued that legal science, and more specifically its dogmatic branch, was an independent source of law and the judge must therefore know its content. Already the general redefinition of legal knowledge pointed in a direction of the professionalization of judges. In addition, Savigny, like Delldén, had pointed out that a common doctrine of legal sources in itself was not enough to secure a uniform and predictable case law. Only if all lawyers used the sources in a similar manner could this be achieved.

Consequently, legal methodology also needed to be harmonized. The scientific method of legal dogmatics had to serve as a role model for practical legal method. It was therefore clear that only universities could provide a legal education that met these requirements and that a student wishing to pursue a judicial career had to undergo certain pre-established academic tests: “Wir fordern von dem Richter ein wissenschaftlich Rechtswissenschaft, über welches er sich durch bestimmte Präfungen ausweisen muss”.\textsuperscript{54}

This argument was also stressed by the Swedish scholar Fredrik Schrevelius, Professor of private law at Lund University, who was himself inspired by Savigny:

Nowadays, we demand from our judge an education based on science and he must have undergone certain tests prescribed by law to pass. But we do not ask of him that he shall have knowledge of popular common sense, as he is nowadays much less one of the people than before.\textsuperscript{55}

\textbf{Epilogue}

In 1904, after several more years of debate, Swedish legal education was finally reformed. The statute regulating university degrees had been drafted by a committee in favour of more substantial and longer legal education. Its conclusions echoed the suggestions of Swedish private law professors of the nineteenth century, such as Carl Olof Delldén, Knut Olivecrona and Ernst Victor Nordling. The old and outdated Hovrättsexamen was finally abolished and from the beginning of the twentieth century a minimum of four years of study was required for a judicial career.\textsuperscript{56}

In accordance with the suggestions of Olivecrona, the committee had also prescribed that a fixed \textit{curriculum} for legal education should be established. The law clarified that the universities were bound by this curriculum and also that the courses should be given in a specific order. In this way, a sound interaction between legal theory and practice would be guaranteed.\textsuperscript{57} The committee acknowledged that its conclusions marked the end of an era of discussion:

All suggestions regarding a reformation of the Swedish legal education system that have been discussed during the past 30 years have had one thing in common – the opinion that a \textit{juris kandidatexamen} should be a set requirement for the pursuit of an administrative or judicial career. This opinion is based on the belief that there is such a lack of general legal knowledge in our country that it is only if the state demands better qualifications and strengthens the very core of the legal education system that this problem can be resolved. Mandatory studies in Roman Law and Economics

\textsuperscript{50} Stahl, Rechtswissenschaft oder, p. 19.
\textsuperscript{51} Stahl, Rechtswissenschaft oder, p. 22.
\textsuperscript{52} Stahl, Rechtswissenschaft oder, ibid.
\textsuperscript{53} Stahl Rechtswissenschaft oder, ibid and Croon, Jura Novit Curia, p. 143.
\textsuperscript{54} Savigny, System, 1, p. 189.
\textsuperscript{55} "Vi fordra nu för tiden af en Domare vetenskapligt rättsstudium och detta måste han genom i Lagen föreskrifna pröfningar komumentera; dermot är han nu mindre än fordom en af folket; man fordrar derföre icke heller af honom, att han skall genom sin erfarenhet i folklivet hafta kommit till omedelbar kunskap om den hos folket rådande rättsövertygelse." Schrevelius, Fredrik, Civilrätt, del 1, Lund, 1851 p 52 and Croon Jura Novit Curia, p. 144.
\textsuperscript{56} Kongl. Majts nådiga stadga angående juridiska examina gifven Stockholms slott den 29 april 1904, paragraph 1.
\textsuperscript{57} Paragraphs 4 and 5.
have been highlighted as a necessary part of the curriculum as a way of achieving this goal, and the possibility of making these courses compulsory must be regarded as the main benefit of the creation of one unified system of legal education which would provide a more complete legal competence [my translation].

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58 Universitetskommitténs betänkande 1. Examina samt undervisnings och studieväsendet inom de juridiska fakulteterna vid rikets universitet, Stockholm 1903, p. 90.
The legal situation and rights of former EU citizens

Abstract
The purpose of this article is to discuss certain aspects of the fairly new concept of EU citizenship. Here we will focus on the rights of people who have, for one reason or another, lost or been deprived of their EU citizenship (which may actually happen, as shown below). The article will start by briefly analysing this growth historically, going back to the introduction of EU citizenship through the Maastricht Treaty in the early 1990s. Thereafter it will focus on the current legal situation.

Introduction and background
The idea of EU citizenship was introduced into EU law through the Maastricht Treaty, i.e. twenty-five years ago. The rules on this topic are now, including also rules on non-discrimination, to be found in Articles 18–25 of the so-called Functional Treaty (TFEU, the Treaty on the Functioning of the EU). Certain important rules are also to be found in the TEU, the Treaty on European Union, as well as in the Charter of Fundamental Rights (CFR), which are now an integrated part of the Lisbon Treaty.

However, the formal regulations are only one aspect. Of greater importance, and in order to grasp the growth of the concept, is probably an understanding of the legal developments through the case-law of the European Court of Justice (ECJ). In that respect, the case Martinez Sala from 1998 is one of the cornerstones of the early jurisprudence of the ECJ. In that case, the refusal of German authorities to grant Mrs Martinez Sala, a Spanish citizen who had resided in Germany since 1968, certain social benefits that were provided to German nationals (namely a

1 This article is an updated version of Former EU Citizen, published in in A. Bartolini/R. Cipritani/V. Colcelli (eds.), Dictionary of Statuses within EU Law – The Individual Statuses as Pillar of European Integration, Dordrecht (Springer) 2019 p. 273–279.
3 The Maastricht Treaty was adopted in December 1991 and entered into force on 1 November, 1993, having been ratified by all the then 12 Member States.
country was definitely clarified by the important ways obliged to pay social benefits for EU citizens residing in their EU.10

This case was subsequently followed by other important judgments stating for instance that the status of EU citizenship “is destined to be the fundamental status of nationals of the Member States”9 and also, in the well-known Baumbast case concerning a Colombian woman married to a German citizen living in the UK (and wishing to stay there permanently with their children while he worked abroad), that the former Article 18 of the EC Treaty (now Article 21 TFEU) has direct effect, i.e. that it may be invoked before national courts and other public authorities in the Member States.1 At the same time, the fact that Member States are not always obliged to pay social benefits for EU citizens residing in their country was definitely clarified by the important Dano case in 2014.8

Another important judgment was rendered in 2008, in the well-known Metock case that was politically very controversial (at least in some Member States).9 Although it actually consists of four cases that have been joined together, the issue in all four concerned the right of an EU citizen to live in another Member State with a non-EU national spouse, that the former Article 18 of the EC Treaty (now Article 21 TFEU) has direct effect, i.e. that it may be invoked before national courts and other public authorities in the Member States.1 At the same time, the fact that Member States are not always obliged to pay social benefits for EU citizens residing in their country was definitely clarified by the important Dano case in 2014.8

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9 See on the case Damian Chalmers, The Secret Delivery of Justice, European Law Re-

10 In this particular case, C-127/08, ECR 2008 I P. 6241, two British nationals, a German and a Polish citizen who all wished to live and work in Ireland with spouses who had been refused asylum in the EU were parties, which serves to underline the controversial nature of the case, as well as the multi-national dimension that the rules on EU citizenship may entail in specific cases.

Here, in contrast to its earlier jurisprudence,11 the ECJ found that (the Citizenship Directive 2004/38 prevents the adoption of national legislation in a Member State according to which a non-EU citizen who is married to an EU citizen living in a Member State other than his or her own “home state” – i.e. the one where he or she is a citizen – must have resided lawfully in another Member State before arriving in the Member State where he or she may wish to settle down with the spouse (of “EU nationality”). This applies regardless of when or where the marriage took place. The ECJ stressed that securing the possibility for EU citizens to lead a normal family life was central to realising and protecting the free movement of EU citizens between the Member States.12

In these cases, we can also clearly see how the protection of the family (cfr Article 8 of the European Convention of Human Rights, the ECHR) is given a value of its own, emphasising and strengthening the value of EU citizenship in situations where the outcome of the case in favour of letting citizenship determine certain rights would otherwise be less evident.13 This tendency was also clear in another very crucial judgment in this area, namely the Ruiz Zambrano case of 2011.14

This case, which is perhaps the most dramatic so far in terms of revealing the profound human rights dimension of EU citizens’ rights, concerned a Colombian couple, Mr and Mrs Ruiz-Zambrano, who had lived with their child in Belgium as political refugees since 2000. While living there, Mrs Ruiz-Zambrano gave birth to a second child in 2003 and subsequently a third one in 2005. The Belgian authorities wanted to expel them, since their reasons for being considered as refugees were not deemed to be sufficient. However, it transpired that while Colombia does not recognise children born abroad as state citizens unless the parents make a special request for this, children who are born in Belgium are automatically considered as Belgian citizens.

In its judgment, the ECJ also took the fact that Mr and Mrs Ruiz-Zambrano and their children had never left Belgium into account. However, as also indicated by some of the previous judgments mentioned above, not exercising free movement and the rights that may subsequently fol-


10 In particular Akrich, C-109/01, ECR 2003 I p. 9607.

11 In particular Akrich, C-109/01, ECR 2003 I p. 9607.


13 See also the case Garcia Avello, C-148/02, ECR 2003 I p. 11613.

14 C-34/09, Judgment 8 March 2011.
low (cfr Article 21 Section 1 TFEU), was not considered as preventing the use of the concept of citizenship as such, to the surprise of some Member States which intervened in the case in support of the Belgian Government. On the contrary, as Mr Ruiz-Zambrano argued, their children, being Belgian citizens, were also automatically considered as EU citizens, in spite of the fact that they had never left Belgium.

This was considered as being part of the “core” of the right to citizenship, but what was undoubtedly even more surprising was that, with regard to the protection of family life in Article 8 as well as Article 3 of Protocol 4 ECHR, also the parents and in fact all family members were considered to be EU citizens, which in this specific case meant that they were entitled to stay and reside in Belgium (or move to some other Member State, of course). The judgment also shows how the concept may affect the lives of third-nation citizens, particularly in family situations.

However, in this situation we should also observe the recent judgment (March 2019) of the ECJ, residing in the Grand Chamber in the Tjebbes case. Here, the Court partly departed from its earlier case-law by tolerating the annulment of EU citizenship for EU citizens (who were citizens of the Netherlands) residing abroad, due to their failure to renew their Dutch passports. However, they had not been reminded by the Dutch authorities of their obligation to apply for a renewal. The case is likely to be frequently commented and perhaps criticised in future EU law doctrine.

The current regulation of EU citizenship

It follows from Article 9 TEU and Article 20 TFEU that EU citizenship complements national citizenship without replacing it, which is of course entirely logical. Still, the introduction of the concept of EU citizenship in the EU Treaty may be said to symbolise or encapsulate a move away from a purely economic integration towards a more all-encompassing union of peoples, focused also on promoting important human and cultural values.

Of greater practical importance, however, are the rules in Articles 18–25 TFEU. First, there is the general non-discrimination rule in Article 18, which is now supported by Article 19 that empowers the EU to enact further, appropriate measures in order to combat any kind of discrimination. Citizenship as such is mentioned in Article 20 listing specific rights, and stipulates the right to move freely and reside within the territories of the Member States, as well as the right to vote and be elected to the European Parliament and also in municipal elections (although not in national ones) in the state where the citizen resides, on the same conditions as the nation’s own citizens. In addition, the right to consular protection in a third country, outside the EU, by official representatives of other EU nations than the person’s own home state is included (see Article 20 p. C, as well as Article 23 TFEU and Article 46 of CFR).

Article 21 TFEU, perhaps the most important rule in practice in view of the jurisprudence mentioned above, lays down the basic right to move and reside freely in the EU. As we have seen, this right may now be seen as an extension of the original right to free movement for economically active persons and now encompasses the right to be accompanied by family members even if they are third-country nationals, which is of course a significant change. More in-depth rules on many of the practical issues involved in relation to the application of the citizenship rules can also be found in the crucial directive number 2004/38.

According to Article 25 TFEU, further action may be brought in order to strengthen the rights that ensue from EU citizenship, although this requires unanimity in the Council and subsequent approval by the Member States.

However, in view of the frequent recent treaty amendments, new legal acts and case-law in this area in recent years, a few important delimitations may also be made. Although this development represents one of the most important changes in EU law in recent years, we must nevertheless be aware of the fact that the rights emanating from EU citizenship are not unlimited.

First of all, the 1992 judgment of the ECJ, residing in the Grand Chamber in the Tjebbes case, lays down the basic right to move and reside freely in the EU. As we have seen, this right may now be seen as an extension of the original right to free movement for economically active persons and now encompasses the right to be accompanied by family members even if they are third-country nationals, which is of course a significant change. More in-depth rules on many of the practical issues involved in relation to the application of the citizenship rules can also be found in the crucial directive number 2004/38.

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First of all, the 1992 judgment of the ECJ, residing in the Grand Chamber in the Tjebbes case, lays down the basic right to move and reside freely in the EU. As we have seen, this right may now be seen as an extension of the original right to free movement for economically active persons and now encompasses the right to be accompanied by family members even if they are third-country nationals, which is of course a significant change. More in-depth rules on many of the practical issues involved in relation to the application of the citizenship rules can also be found in the crucial directive number 2004/38.
area that may thus differ considerably between the 27 Member States. Member States, such as for instance the UK with its rather complicated citizenship rules (that are mainly due to its colonial past), may even be allowed to classify which of its nationals that are to be considered as national citizens and thus also EU citizens. At the same time, however, it may be underlined that no Member State may deny the status of EU citizenship to a person who has been duly classified as such by another Member State. To sum it up, this means that all EU citizens are also citizens of a Member State, while the reverse is normally, but not necessarily always the case.

An important aspect to keep in mind is that citizenship once gained is normally valid permanently and it is impossible for a state to revoke it. At least one exception to this rule may be noted, however, namely when a person has obtained citizenship on false grounds, by misleading the authorities. That was what happened in 2010 in the important Rottmann case where the ECJ found it reasonable that a person who had acquired German citizenship on false grounds and thereby lost his original Austrian citizenship would also, as a consequence, lose his German citizenship, thus becoming stateless and no longer an EU citizen. “A decision withdrawing naturalisation because of deception corresponds to a reason relating to the public interest.” Even in that situation, however, the consequences for the person in question and possibly his family members must be taken into account (see para 56 of the case).

There are quite a few conclusions to be drawn from this case. Obviously, it shows that someone who loses his or her national citizenship of a Member State for one reason or another may also lose his or her EU citizenship. Thus, in other words, there is no automatic right to maintain an acquired status as an EU citizen.

At the same time, issues like the ones occurring in the Rottmann case should also have repercussions in the Member States, although they may be quite different, depending on the circumstances. In Sweden, the constitutional protection of citizenship in Chapter 2, Article 7 of the Instrument of Government (IG, i.e. Regeringsformen of 1974, the main consitutional act), was markedly strengthened by a judgment from the Supreme Court in April 2014, when a person who had been wrongly deprived of his Swedish citizenship was awarded financial compensation amounting to SEK 100,000, since the way he was treated was deemed unconstitutional. The Supreme Court ruled in the same way in a similar case in 2018 (NJA 2018 p. 103).

In view of the forthcoming or at least likely Brexit situation, the question arises regarding what the legal position of UK citizens who are not also citizens of another EU country will be. At the time of writing, in August 2019, this is in fact totally impossible to determine, since we do not know what the future relationship between the EU and UK will be. However, it is clear that if or when the UK really leaves the EU, these people will no longer be EU citizens, regardless of the kind of relationship that will subsequently arise.

Article 20 TFEU makes it very clear that EU citizenship only exists for citizens of Member States. Thus, citizens of the EEA states Iceland, Liechtenstein and Norway are not EU citizens and should the UK in the end opt for what is called the Norwegian model, UK citizens will enjoy free movement in all the EU’s four (familiar) models, but not EU citizenship. With closed British borders, the difference will of course be that they will not enjoy the four freedoms either – a solution which most of them will probably be unhappy with.

According to Directive 2004/38, every EU citizen has an unconditional right to stay, live and reside in other Member States for more than three months. Once that period has expired, economically non-active citizens who wish to stay longer must, according to Article 7 (1)(b) of the Directive, have “sufficient resources for themselves and their fam-

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26 NJA 2014 p. 323. In this case, the claimant had a British mother and Swedish father. When the parents divorced, it turned out during a trial that his father was after all not his biological father. As a consequence, Swedish authorities wrongly deprived him of his Swedish citizenship.

27 A factor that may be revealing here and that has to be solved before the real negotiations on the future relationship between UK and the EU can start concerns the control of the border between Ireland and Northern Ireland (that is as we know a part of the UK). Since neither UK nor Ireland want to reintroduce those border controls, that were abolished in 1998, a possible solution may be to give Northern Ireland a special kind of EEA status. However, Scotland will then immediately ask for a similar status, which will make things difficult for the UK government. Given those facts, UK may after all have to accept a kind of Norwegian solution, but this is of course purely speculative.

28 Having this in mind, the legality of actions taken by French and Swedish authorities against Roma people in the summer of 2010 must be put into question.
ily members not to become a burden on the social assistance system of the host state during their period of residence”. In other words, the right to stay in another EU state for longer than three months depends on certain economic criteria being met,29 as also stressed in the above-mentioned Dano case from 2014, but, on the other hand, it is important to stress that every EU citizen who has resided legally in the host Member State for a period of five years receives a permanent right to residence (cfr Article 16 of the Directive), which is another example of the dynamic character of the citizenship rules.

In the same way, EU citizens who have once used the right to move to another Member State may invoke the right to equal treatment, should they be disadvantaged, when returning to their home states or moving to a third EU state compared to other nationals or residents who have not exercised their right to free movement.30 Furthermore, it follows from the case-law of the ECJ that an EU citizen who travels from a third country to a Member State other than his “own” may rely on his rights as an EU citizen even if he has in fact never visited his country of nationality.31

Conclusions

To sum up this analysis, we find that EU citizenship today entails a general right to move around, live and reside in all the Member States, with the notable exception or rather limitation that once a period of three months has expired, and until the person in question has managed to stay in another Member State for five years, he or she may be refused to stay unless he is able to support himself financially. It is also worth noting that each Member State may establish its own rules concerning who is a national citizen and that national legislation in fact differs a great deal, from generous legislation such as in Belgium to restrictive and varied legislation like in the UK.

However, on the other hand, once a person has been recognised as a national citizen in one Member State, he is also at the same time an EU citizen in all the 27 Member States. This is, in the words of the ECJ in the Grzelczyk case, “the fundamental status of nationals of the Member States”.32 But once a person loses his national citizenship in one Member State, he may also lose his status as an EU citizen. In addition, for citizens of a state that chooses to leave the EU under Article 50 TEU, there seems to be no hope at all of maintaining EU citizenship.

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29 It may be noted, however, that these rules do not apply to students.
30 See e.g., C-365/02, Lindfors, ECR 2004 I p. 7183.
32 C-184/99, ECR 2001 P. 6193, para. 31. See also Joined Cases C-482/01 and 493/01, Orfanopoulos and Oliveri, ECR 2004 I p. 5257, para 64.
Annulment Actions and Locus Standi of Non-privileged Applicants after the Lisbon Treaty

Abstract
This article analyses the problems related to locus standi of natural and legal persons in the post-Lisbon regime. In section 1, annulment actions, a judicial mechanism in the European Union (EU) legal order, and the requirements for locus standi are presented. In section 2, regulatory acts, a new category of act introduced by the Lisbon Treaty (the Treaty of Lisbon) for the purpose of annulment actions, are examined. Finally, some conclusions are drawn in section 3.

Annulment Actions
Annulment actions are actions that can be brought directly before the Court of Justice (CJ) or the General Court (GC) to challenge the validity of EU acts. The Member States (MS), the institutions, bodies, offices and agencies of the EU as well as natural and legal persons may bring such actions. There are four issues that the EU Courts will examine in an annulment action: (i) the existence of a reviewable act, (ii) locus standi for natural and legal persons, (iii) time limits, and (iv) grounds for annulment. The first three issues are related to the admissibility, while the last issue is related to the substance.

Article 263 TFEU categorizes the applicants, depending on who they are, as privileged applicants, semi-privileged applicants and non-privileged applicants. This categorization relates to the requirement of prov-
ing locus standi (having standing). Non-privileged applicants are non-privileged because they must have standing to be heard by the EU Courts. To have standing they must satisfy the tests (conditions) for direct concern and/or individual concern where the challenged act does not directly address them.

As regards the importance of annulment actions, they enable judicial review of EU acts. There is no policy area that EU law does not touch upon and some policy areas are significantly regulated by EU law. The Treaties and EU acts impose obligations not only on the MS but also on persons. Moreover, the EU has arguably been suffering from a democratic deficit and the democratic legitimacy of EU acts can be called into question. Thus, it is crucial to have in place an effective judicial mechanism guaranteeing judicial review.

Within the EU judicial order, in addition to annulment actions, the plea of illegality and the preliminary ruling (reference) procedure enable judicial review of EU acts. However, in contrast to annulment actions which are brought to directly challenge the validity of EU acts, these two mechanisms allow judicial review of EU acts indirectly and they are not as efficient (adequate) as annulment actions, as will be presented below. Consequently, annulment actions are essential for judicial review. However, access to judicial review of EU acts through annulment actions is quite limited for persons for three reasons. Firstly, the test for individual concern is so strict that persons will rarely satisfy it. Secondly, the concept of a regulatory act, introduced in Article 263(4) TFEU by the Lisbon Treaty with the aim of facilitating access to judicial review by persons, has been defined narrowly by the EU Courts. Thirdly, the “no-implementation requirement” for regulatory acts has been interpreted broadly by the EU Courts. The latter two problems have resulted in persons challenging the validity of EU acts of general application having to prove individual concern, which takes us back to the first problem. In the subsections below, these three issues are analysed after a very brief overview of what qualifies as a reviewable act for the purpose of Article 263 TFEU.

The Existence of a Reviewable Act for the Purpose of Article 263 TFEU
Binding EU acts, by virtue of Article 263(1) TFEU, can be the subject matter of annulment actions. Article 288 TFEU lists five types of acts. Regulations, directives and decisions are binding, while recommendations and opinions are not binding. Moreover, apart from the five acts

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1 Privileged applicants have automatic standing meaning that they do not need to prove their locus standi, and semi-privileged applicants have automatic locus standi if they bring such an action in order to protect their prerogatives. The standing of these two categories of applicants will not be examined in this paper.

2 A natural person is an individual. Legal persons are entities having legal personality such as companies. However, the concept of legal person for the purpose of annulment actions is not so strict.

3 Natural and legal persons will be referred to as persons or applicants in this paper.

4 Art. 263 (4) TFEU. For the assessment of the tests for direct concern and individual concern, see respectively subsections on “direct concern” and “individual concern”.

5 International agreements, the areas that are excluded from the scope of judicial review and standing of the NGOs will not be examined in this paper.

6 Needless to say, the validity of the Treaties cannot be questioned.


listed in Article 288 TFEU, there are other types of acts, some of which are “atypical” acts.21 Such acts are either provided for in specific provisions in the Lisbon Treaty such as guidelines (e.g., Art. 5 TFEU), inter-institutional agreements (e.g., Art. 295 TFEU), or have been developed through practice such as communications (e.g., Protocol No 1, Art. 1) and conclusions (e.g., Art. 148 (1) TFEU). Such acts can be both binding and (mostly) non-binding (soft law).22 Accordingly, such other binding acts intended to produce legal effects vis-à-vis third parties (creating rights and especially obligations) can also be the subject matter of annulment actions.23

As regards non-binding EU acts, the EU Courts apply a substantial test based on the content (nature) of the act. According to this test, some non-binding acts can be considered as reviewable acts for the purpose of Article 263 TFEU as long as they are intended to produce legal effects vis-à-vis third parties and emanate from an institution, body, office or agency of the EU.24 In one case, a Commission communication was considered as a reviewable act as it created obligations for the MS concerned.25 In another case, the GC dealt with a statement published as a press release on the European Council’s website and did not, as a starting point, disqualify it as being non-reviewable.26

To conclude, binding acts can be the subject matter of annulment actions. Non-binding acts can also be the subject matter of Article 263 TFEU as long as they intend to produce legal effects vis-à-vis third parties and emanate from an institution, body, office or agency of the EU.

Non-privileged Applicants and Locus Standi

As stated above, applicants must have locus standi to be heard by the EU Courts where the challenged act does not directly address them. The applicant must satisfy in order to have standing depends on the type of the act. If the act is a legislative act,27 the applicant must prove both direct concern and individual concern (general standing). If the act is a regulatory act, an act of general application apart from legislative acts,28 and does not entail implementation,29 the applicant will only need to prove direct concern. Thus, as regards regulatory acts which do not entail implementation, persons will benefit from the relaxed admissibility requirements when compared to the requirements for general standing. Where the regulatory act is not of general application30 or entails implementation, the applicant will need to satisfy the requirements for general standing. An act has general application when “it applies to objectively determined situations and produces legal effects with respect to categories of persons envisaged generally and in the abstract”31.

If the applicant does not have standing, the consequence is grave. The case will be dismissed and the substantial assessment of whether the act in question may be invalid or not will not be made. In the subsections below, the conditions for locus standi are presented.

Direct Concern

The EU Courts have confirmed that direct concern employs the same interpretation for the purpose of Article 263 TFEU that applied before the Lisbon Treaty.32 Thus, in order for the applicant to be directly concerned by the act in question, two cumulative conditions must be satisfied.33 Firstly, the act in question must directly (and adversely) affect the legal situation of the applicant. Secondly, the act in question may not be subject to implementation either at the national or EU level.34 The rationale behind this “no-implementation requirement” is to establish a direct

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22 For more information on atypical acts, see Ruse-Khan, Jaeger & Kordic (n 21), 905–910.
23 Inuit Appeal (n 16), para 52.
26 The GC made an assessment regarding whether the press release could be attributed to the European Council and it was found not to be attributable to the European Council [Press Release (n 24), paras 46, 62–72].
27 For the definitions of legislative acts and non-legislative acts, see subsection on “legislative acts and non-legislative acts”.
28 Inuit (n 16), para 56. For the definition and the assessment of regulatory acts, see subsection on “the definition of regulatory acts”.
29 For the assessment of the “no-implementation requirement” for regulatory acts, see subsection “the concept of ‘does not entail implementation’”.
30 Where another person who is not the addressee of an individual act wants to challenge its validity, that person must, in principle, prove the requirements for general standing as such an individual act is not of general application.
31 Inuit (n 16), para 63.
33 Microban (n 32), para 27.
34 “[…] such implementation being purely automatic and resulting from [Union] rules alone without the application of other intermediate rules” [Microban (n 32), para 27]. Also see Inuit (n 16), paras 71–73.
causal link between the act in question and the negative effect on the legal position of the applicant. However, the “no-implementation requirement” should not be understood so strictly as meaning that whenever implementation is required, direct concern will not be satisfied.

Firstly, where implementation is required, the degree of discretion left to the addressee who is responsible for the implementation is decisive. Where the addressee has no discretion regarding how to implement the act in question, this condition of direct concern can be met. The “no-discretion requirement” is understandable as the adverse effect on the legal position of the applicant may emanate from how the addressee has implemented the act, rather than the act itself, which breaks the causal link between the act in question and the negative effect on the legal position of the applicant. Attention should be drawn to the following issue. A link between the act in question and the negative effect on the legal position of the applicant should be shown to the following issue. A distinction must be made between two situations. The first situation is where the addressee is free to exercise its discretion, which must lead to the absence of direct concern. For example, where a regulation allows the MS to introduce production quotas on sugar producers operating in their territories due to overproduction of sugar in the EU, but without obliging the MS to do so, it is not certain that a particular MS will introduce such a quota. Thus, the effect on a person in a situation where a MS chooses to impose such a quota is due to that MS’s decision to use its discretion, not the regulation itself. The second situation is where the addressee has a certain degree of discretion, for example, on how to achieve a certain result prescribed in the EU act. In such situations, a certain degree of discretion left to the addressee should not pose any problem as long as the adverse effect on the legal position of the applicant directly emanates from the EU act in question irrespective of the (future) implementing measures.

Secondly, when deciding on the issue of implementation and the effect of the implementing measure(s), the assessment is not made in abstract. Rather, the position of a particular applicant is considered in relation to the implementing measure(s). Thus, even where implementation is required, a particular applicant can still satisfy direct concern, while another applicant may not.

The GC’s judgment in Inuit, subsequently upheld by the CJ, dealt with a regulation that provided for a general prohibition of placing seal products in the EU except “where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence”. The regulation was subject to implementation to the extent that it was not considered a complete set of rules and that the MS were not even able to apply it without the implementing measures. The GC nonetheless ruled that some applicants were affected by the general prohibition without the possibility for any exception and they were thus directly concerned by the regulation. Those applicants did not need to wait for the implementing measures, since the adverse effect on their legal position could be derived from the regulation.

In Microban, the applicant was considered to be directly concerned by the Commission implementing decision prohibiting the use of a chemical in the EU that the applicant had bought and used to manufacture another product. Notably, the decision set a transitional period which gave the MS the option (discretion) to allow the use of that chemical until a certain date in order to facilitate the implementation of the prohibition. On the question of whether this option amounted to implementation, the GC ruled that even though the MS had that option, the implementation of the prohibition on the use of the chemical had already been discharged.
set by the act in question and it was automatic and mandatory as of the expiry of that date. Accordingly, this option did not amount to implementation.49

Individual Concern

The test for individual concern has been introduced by the CJ in Plaumann (the so-called Plaumann test). Like the test for direct concern, the EU Courts have confirmed that individual concern employs the same interpretation for the purpose of Article 263 TFEU that applied before the Lisbon Treaty.50 As will be seen from a few examples given below, it is an extremely strict test. Accordingly, the test almost blocks access to judicial review by persons through annulment actions.

Plaumann relates to an EU decision that prohibited the German Government from abolishing the customs duties on clementines imported from third countries. Plaumann, an importer of clementines from third countries, challenged the validity of this decision. The CJ held that “persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed”.51 Thus, the CJ considered Plaumann generally but not individually concerned with regard to the decision on the grounds that the commercial activity that Plaumann was conducting could be practised by any person at any time, and current and even future importers of clementines would be affected by the decision just like Plaumann. All in all, nothing distinguished Plaumann from the others affected by the decision.52 Thus, in the light of the Plaumann test, to be individually concerned by an EU act, the applicant must be affected by an EU act differently as if the applicant were specifically addressed in that act. In other words, this test requires that the applicant must belong to a closed group that is composed of persons who were identified or identifiable by reason of criteria specific to them when the act was adopted.53 It should not be possible to enter into such a closed group after the act has been adopted.54

A good example of a closed group can be seen in Sofrimport. Sofrimport was an importer of Chilean dessert apples that had applied for an import licence from the French authorities. While the imported goods of Sofrimport were in transit, the Commission adopted a set of regulations which suspended the granting of import licences for dessert apples with immediate effect (Regulation 2). However, the basic (parent) Council regulation that gave the Commission the power to adopt those regulations required the Commission to consider goods in transit (Regulation 1), which the Commission failed to do. Subsequently, Sofrimport’s licence application was rejected due to Regulation 2, which would, in turn, prevent Sofrimport from receiving its goods upon their arrival. In this case, Sofrimport was found to be individually concerned55 as belonging to a closed group “which is sufficiently well defined in relation to any other importer of Chilean apples and cannot be extended after the [...] measures in question take effect”.56 Thus, Sofrimport belonged to a closed group composed of importers whose goods were in transit when Regulation 2 took effect.57

Although there are certain special and rare cases where the CJ seems to have departed from the Plaumann test,58 it still constitutes the predominant test that applies for the assessment of individual concern.59

The extreme strictness of the test as well as for several Advocates General. In UPA, Advocate General (AG) Jacobs suggested to relax the test which has resulted in annulment actions brought by persons being barely

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50 Microban (n 32), paras 29–30.
51 The applicant could benefit from the relaxed admissibility requirements by satisfying only direct concern as the GC ruled that the decision also did not entail implementation of the prohibition imposed by that decision [Microban (n 32), paras 32–38].
52 Inuit (n 16), para 41; Inuit Appeal (n 16), paras 69–71.
54 Plaumann (n 51), section I.
55 Case C-519/07 P Commission v Koninklijke FrieslandCampina NV, EU:C:2009:556 (KFC), paras 53–56. The group may be composed of more than one person. Thus, the applicant does not need to be the only person in order to belong to a closed group.
58 Sofrimport (n 55), para 11.
59 For another good example of a closed group, see KFC (n 53).
60 For example, see Codorniu (n 17); Case C-358/89 Extramat Industrie SA v Council, EU:C:1983:124; Case 294/83 Parti écologiste ‘Les Verts’ v European Parliament (Les Verts), EU:C:1986:166.
61 Albors-Llorens - Standing (n 35), 78–81; Albors-Llorens (n 37), 278–280.
62 Case C-30/00 P Unión de Pequeños Agricultores v Council, EU:C:2002:462 (UPA).

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52 I Cristina Trenta (ed.) Anthology 2019
53 Juridicum Anthology 2019
found admissible. In particular, this would have prevented the situation where persons were required to infringe the law in order to gain access to the preliminary ruling procedure due to lack of implementing measure at the national level.61 Moreover, the preliminary ruling procedure has various problems62 and annulment actions before the EU Courts are “more appropriate for determining issues of validity” than the preliminary ruling procedure.63 Thus, the extremely strict test for granting persons access to judicial review of acts of general application may undermine the principle of effective judicial protection as protected by Article 47 of the Charter of Fundamental Rights of the EU (Charter).64

Despite the fact that AG Jacob’s arguments, which are mainly presented above, were very convincing, the CJ refused to relax the test in UPA and followed another line of argumentation.65 According to this line of argumentation of the CJ, which has become the standard argument repeatedly referred to by the EU Courts in some cases, effective judicial protection is guaranteed as the Treaty provides for “a complete system of legal remedies and procedures designed to ensure judicial review” of EU acts by persons through the plea of illegality and the preliminary ruling procedure, in addition to annulment actions.66 Whether a person may have recourse to the preliminary ruling procedure or not is not a matter for the EU Courts. Rather, it is the responsibility of the MS to have a system of legal remedies and national procedural rules that will ensure effective judicial protection for persons and enable them to have access to judicial review of EU acts before the national courts.67 Thus, according to this argument, firstly, the EU judicial order includes two additional mechanisms, the preliminary ruling procedure and the plea of illegality, which enable judicial review of EU acts by persons, and therefore the system is “complete”. Secondly, it is the responsibility of the MS to guarantee judicial review of EU acts by persons before the national courts.

Many comments can be made concerning the argument. At the core, it seems that the CJ ignores the problems related to the preliminary ruling procedure and the plea of illegality. Moreover, the responsibility of ensuring effective judicial protection regarding judicial review of EU acts by persons has shifted on to the MS, which seems difficult to accept, as explained below.

In Jégo-Quéré, the GC relaxed the test for individual concern by relying on AG Jacob’s Opinion in UPA, which reflects a concern about the extreme strictness of the test.68 The GC stated that “[…] the strict interpretation, applied until now, of the notion of a person individually concerned according to the fourth paragraph of Article [263 TFEU] must be reconsidered”.69 However, in the appeal, the judgment of the GC was, not surprisingly, set aside by the CJ based on the argument that relaxing the test for individual concern would have “[…] the effect of removing all meaning from the requirement of individual concern set out in the fourth paragraph of Article [263 TFEU]”.70 It is difficult to agree with this argument. The Treaties have never provided a definition for the concept of individual concern and the concept has therefore always been open to interpretation by the CJ. No provision in the Treaties would even implicitly mandate such an extremely strict test. Moreover, it has been suggested that the absence of a limit on the standing71 may lead to an increase of cases brought by persons before the EU Courts.72 In my opinion, it is difficult to agree with this argument because there has already been an increase of the preliminary ruling requests from the national courts before the CJ and the preliminary ruling requests on the validity of EU acts is part of this increase.73 Furthermore, it has also been suggested that annulment actions have not intended to be actio popularis.74 This

63 Opinion of AG Jacobs (n 61), paras 37, 45–49.
64 Opinion of AG Jacobs (n 61), paras 37–48.
65 UPA (n 60), paras 38–44.
67 UPA (n 60), paras 41–43. Also see Jégo-Quéré Appeal (n 66), paras 31–36; Inuit Appeal (n 16), paras 97–104; T&L Sugar (n 66), paras 49–50; EU Task Force (n 66), paras 116–117.
69 Jégo-Quéré (n 68), para 50.
70 Jégo-Quéré Appeal (n 66), para 38. Also see paras 36–37 of the same judgment.
71 From my point of view, the other admissibility conditions (existence of a reviewable act and time limit) do not limit access for persons to annulment actions to a great extent.
72 Albors-Llorens - Standing (n 35), 73.
73 Moreover, AG Jacobs has suggested certain solutions for a possible increase of annulment actions brought by persons [Opinion of AG Jacobs (n 61), paras 79–81].
74 Arnul (n 13), 387.
argument seems to base itself on the national systems where it is quite difficult to challenge the acts adopted by the democratically elected national legislators. However, a comparison between acts adopted by the democratically elected national legislators and acts adopted by the EU legislators is hard to make. Arguably, the EU legislators cannot be compared to the democratically elected national legislators.  

Thus, it is essential for persons to question the validity of EU acts adopted by the EU legislators before the EU Courts. Even if the above-mentioned arguments related to the increase of cases and actio popularis are accepted, these arguments will still neither require nor justify the concept of individual concern to function almost as a block. Instead, a reasonable well-balanced test for individual concern could have been adopted. As stated by AG Jacobs in UPA:

[…] However, I do not accept the proposition that the wording of the fourth paragraph of Article [263 TFEU] excludes the Court from re-considering its case-law on individual concern. It is clear, and cannot be stressed too strongly, that the notion of individual concern is capable of carrying a number of different interpretations, and that when choosing between those interpretations the Court may take account of the purpose of Article [263 TFEU] and the principle of effective judicial protection for individual applicants.  

Nonetheless, as stated above, the CJ chose to disregard the view of AG Jacobs and set aside the judgment of the GC which relaxed the test.

**The Problems Related to the Plea of Illegality and the Preliminary Ruling Procedure**

It is important to briefly explain why the plea of illegality and the preliminary ruling procedure are not effective alternatives to annulment actions.

As regards the plea of illegality, it is a mechanism that provides for indirect review of EU acts. The plea of illegality is not an independent action and it may be raised in another action (in a proceeding) before the EU Courts. Under this mechanism, in relation to annulment actions, the applicant brings an action against an act (second act) which is based on another act (parent or basic act) and pleads the illegality of the parent act. In order to succeed, the parent act must be of general application and there must be a direct legal connection between the second act and the parent act. Moreover, the applicant must satisfy locus standi and observe the time limit under Article 263 TFEU. Furthermore, an applicant who had an earlier opportunity to challenge the validity of the parent act via an annulment action but failed to do so within the time limit cannot benefit from the plea of illegality. More importantly, if the applicant succeeds, the parent act will, in principle, be declared inapplicable and the declaration of inapplicability will have the force only with regard to the applicant.  

Thus, the main problems can be summarized as follow. Firstly, recourse to the plea of illegality is not limitless. For example, the plea of illegality cannot be relied upon if there is no second act or if the parent act is not of general application. Moreover, if a direct legal connection between the parent act and the second act cannot be established, the applicant cannot benefit from the plea of illegality. Secondly, unlike annulment actions, the success with a plea of illegality, in principle, does not result in invalidation of the parent act.

**Inuit II** provides a good example of the plea of illegality in practice. The persons brought an action for the annulment of an implementing act, while challenging the validity of the regulation on which this implementing act was based with the plea of illegality.


76 Opinion of AG Jacobs (n 61), para 75.

77 Les Verts (n 58), para 23.


79 Case T-518/16 Francisco Carreras Sequeiros v Commission, EU:T:2018:873, para 30. “[…] In that regard, the existence of such a connection may be inferred, inter alia, from the finding that the act against which the main action has been brought is essentially based on a provision of an act whose legality is contested” [ECB (n 78), para 44].

80 In other words, the action for annulment in which the plea of illegality is raised must be admissible [ECB (n 78), para 46].


82 ECB (n 78), paras 45–46. Thus, the declaration of inapplicability does not have eras omnes effect.


Regarding the preliminary ruling procedure, which also provides for indirect review of EU acts, the arguments submitted by AG Jacob in UPA point out all the problems. The arguments are mainly related to the following three issues. The national courts may not be as competent as the EU Courts, access to the preliminary ruling procedure may be very difficult and the preliminary ruling procedure is a long, costly and burdensome process.

Firstly, the national courts must refer the questions on the validity of EU acts to the CJ since the national courts cannot declare EU acts invalid. The national courts must have a serious doubt about the validity of the EU act in question if they are to refer to the CJ. If a national court does not have such a doubt, it may reject the invalidity claim put forward by the applicant. In this context, there is a potential risk that a national court may not be as competent as the EU Courts to correctly decide whether there is such a doubt about the validity of the EU act in question. Moreover, although the national court may raise the question on the validity of the EU act concerned on its own motion, the problem related to the knowledge of EU law of the national courts still remain, which may, in practice, lead to the fact that a national court will not raise such a question on its own motion. Where the national court that has rejected the invalidity claim is not a court of last instance, the applicant can ultimately raise the issue of invalidity before a court of last instance that is under obligation to refer to the CJ. However, such an avenue may be quite burdensome for the applicant. Furthermore, if the court of last instance does not refer the question on the validity of the EU act concerned to the CJ, the applicant is limited to bringing a liability action against the MS (state liability) and ask for damages. However, it is highly unlikely that the applicant will succeed with such a claim due to the strict conditions for state liability, as particularly the second condition, the sufficiently serious breach, is difficult to meet. In particular, there is a higher threshold for finding a sufficiently serious breach committed by the judiciary when compared to the standard applied to the legislator and the executive of a MS.

Secondly, where the national court decides to refer the question on the validity to the CJ, the formulation of the question(s) may “[…] limit the range of [Union] measures which an applicant has sought to challenge or the grounds of invalidity on which he has sought to rely”69. For example, the formulation of the question(s) may (wrongly) redefine the claims on the invalidity or may not provide all the claims on the invalidity. In turn, this may affect the ruling of the CJ on the validity of the EU act in question. Such a situation may occur due to the problem related to the knowledge of EU law of the referring national court.

Thirdly, if there is no implementing measure at the national level, it is almost impossible for persons to benefit from the preliminary ruling procedure. In such a situation, a person may have to breach the law in order to have the possibility to raise the issue of invalidity of the relevant EU act (as a defence) in a proceeding directed against this person. This surely does not offer an adequate means of judicial protection.

66 Opinion of AG Jacobs (n 61), paras 41–45, 47; Opinion of AG Wathelet (n 36), paras 58–63.
68 Peers & Costa (n 85), 101; Lacchi (n 85), 687.
69 “[…] if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid” [Foto-Frost (n 87), para 14].
70 Opinion of AG Jacobs (n 61), para 41.
71 Inuit Appeal (n 16), para 96; T&L Sugar (n 66), para 48.
72 Art. 267 (3) TFEU. The questions on the validity of EU acts are not covered by acte clair doctrine [Case C-461/03 Gaston Schult Douane-expéditeur BV v Minister van Landbouw, Natuur en Voedselkwaliteit, EU:C:2005:742 (Gaston), paras 19–25]. Therefore, the court of last instance must still request “[…] a ruling from the Court of Justice on a question relating to the validity of the provisions of a regulation even where the Court has already declared invalid analogous provisions of another comparable regulation” (Gaston, para 25).
75 Opinion of AG Jacob (n 61), para 42.
76 “[…] individuals clearly cannot be required to breach the law in order to gain access to justice” [Opinion of AG Jacob (n 61), para 43].
Fourthly, where the applicant, without any doubt, would have had standing if the applicant had brought an annulment action within the time limit, it is not possible for the applicant to have recourse to the preliminary ruling procedure.\textsuperscript{97} Even though such a situation generally occurs where a person is informed of the relevant EU act,\textsuperscript{98} it may be very difficult for a person to decide if the person would have standing “without any doubt” in an annulment action. In cases when a person is not informed of the relevant EU act has been adopted, it becomes even more difficult for the person to raise an annulment action.

Finally, the preliminary ruling procedure is a long and costly process,\textsuperscript{99} as follows from the problems presented above.

Consequently, considering the problems related to the plea of illegality and the preliminary ruling procedure that are described above, it is difficult to understand how these two mechanisms can be considered by the EU Courts as effective alternatives to annulment actions. Moreover, the strategy of the EU Courts seems to shift the responsibility on to the MS. While it is true that the national procedural autonomy of the MS has been limited by the CJ by requiring that national procedural rules of the MS must respect the principles of equivalence and effectiveness,\textsuperscript{100} there must be a limit to what the MS should do. Guaranteeing access to judicial review by persons via annulment actions is a responsibility and a task for the EU Courts, as well as to ensure effective judicial protection for persons. It should also be noted that the second subparagraph of Article 19(1) TEU\textsuperscript{101}, introduced by the Lisbon Treaty, is repeatedly referred to by the EU Courts in some cases post-Lisbon. However, this provision

\textsuperscript{97} Case C-188/92 TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland, EU:C:1994:90, paras 21–26.
\textsuperscript{98} Such situations may emerge in the area of state aid, for example, when the Commission addresses decisions to the MS.
\textsuperscript{99} Opinion of AG Jacobs (n 61), para 44. The other problem, which may, in my opinion, not be regarded as very important, is related to interim relief. Where the national court suspends the application of the EU act in question temporarily until the CJ gives its ruling, the effect of the suspension will be limited to the territory of the MS concerned. During or before an annulment action, it is possible to request suspension of the application of the EU act in question before the EU Courts. If suspension is granted, its effect will cover all MS (Joined Cases C-143/88 and C-92/89 Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn, EU:C:1991:65, paras 27–33). For the conditions and assessment of such an interim relief, see Peers & Costa (n 85), 101; Albors-Llorens (n 37), 301–302; Opinion of AG Jacobs (n 61), paras 44, 46.
\textsuperscript{100} Case C-432/05 Unibet (London) Ltd, Unibet (International) Ltd v Justitiekanslern, EU:C:2007:163, paras 42–44, 47, 54.

Regulatory Acts Which Do Not Entail Implementation

As stated above, with the Lisbon Treaty, a new category of act was introduced in Article 263(4) TFEU. without any definition: regulatory acts which do not entail implementation. Importantly, a person is only required to prove direct concern when challenging the validity of a regulatory act which does not entail implementation. Thus, the revised provision in Article 263(4) TFEU was supposed to relax the admissibility requirements for persons who want to challenge all acts of general application.

For a person to benefit from the relaxed admissibility requirements, the act in question must firstly qualify as a regulatory act, and secondly, this act may not entail implementation. Before assessing these two issues, the distinction between legislative acts and non-legislative acts is briefly presented as it is relevant to the discussions made in the subsections below.

Legislative Acts and Non-legislative Acts

The distinction between legislative acts and non-legislative acts coincides with the procedure used to adopt the act in question, meaning that it has nothing to do with the content of the act. By virtue of Article 289(3) TFEU, legislative acts are acts that are adopted through a legislative procedure. There are two categories of legislative procedures, the or-

\textsuperscript{101} Before the introduction of this provision, the EU Courts often referred to the principle of sincere cooperation, which is expressed in Art. 4 (3) TEU.
\textsuperscript{102} Kalėda (n 40), 295, at note 39; Opinion of AG Wathelet (n 36), paras 60–63. For an assessment of the second subparagraph of Art. 19(1) TEU, see Peers & Costa (n 85), 99–103; Arnulf (n 13), 398–400.
inary legislative procedure\(^{103}\) and special legislative procedures.\(^{104}\) The procedure that must be followed is dictated by the legal basis of the particular act. The important aspect of the ordinary legislative procedure is that the European Parliament and the Council, the legislative branches of the EU that represent the MS and the citizens,\(^{105}\) are on an equal footing. Thus, the equal voice of both legislators (more importantly the voice of the European Parliament) in the legislative process increases the democratic legitimacy of an EU act adopted through this procedure. The special legislative procedures are not clearly defined. Rather, only an indication is provided in Article 289(2) TFEU. It follows from different Treaty provisions that special legislative procedures include procedures that provide for adoption of an act by the Council after obtaining the consent of the European Parliament (e.g., Art. 312(2) TFEU) or after consulting (consultation) the European Parliament (e.g., Art. 64(3) TFEU) or vice versa.\(^{106}\) It also follows from the Treaty provisions that most special legislative procedures require adoption of an act by the Council after consulting the European Parliament (e.g., Art. 21(3) TFEU, Art. 77(3) TFEU).

Regarding non-legislative acts, they are acts that are adopted according to special rules provided for in specific provisions in the Treaty,\(^{107}\) so they are not adopted through a legislative procedure. There are a variety of non-legislative acts. For example, they may be adopted by the Council (e.g., Art. 95(3) TFEU), the Commission (e.g., Art. 106(3) TFEU) and the European Central Bank (e.g., Art. 132 TFEU). Finally, it is also pertinent to briefly address delegated and implementing acts, which are non-legislative acts. Delegated acts are adopted by the Commission based on a power conferred on it in a legislative act.\(^{108}\) Delegated acts aim to amend or supplement certain non-essential elements of the legislative act and must be of general application. Regarding implementing acts, they constitute an exception to the rule that implementation is done by the MS.\(^{109}\) These acts are adopted by the Commission, or exceptionally by the Council, based on a power conferred in any act (not limited to legislative acts) “where uniform conditions for implementing legally binding Union acts are needed”\(^{110}\).

The Definition of Regulatory Acts

The GC and the CJ have both agreed on the definition of regulatory acts as all acts of general application apart from legislative acts.\(^{111}\) Thus, all non-legislative acts of general application are regulatory acts, but not legislative acts.\(^{112}\) When reaching such a narrow definition, the EU Courts used a literal and a historical interpretation, giving weight to the historical interpretation which seems to be uncommon in the judgments of the EU Courts.\(^{113}\) Such a narrow definition has been subject to criticism for various reasons and there are also different approaches in the doctrine on how regulatory acts should have been defined.\(^{114}\)

The common approach seems to be that regulatory acts should have been defined as all acts of general application, also including legislative acts.\(^{115}\) There are different arguments made in support of this approach.\(^{116}\) In my opinion, one of the strongest arguments relates to the questionable legitimacy of EU acts. According to this argument, a comparison between the EU legislators and the democratically elected national legis-

\(^{103}\) The ordinary legislative procedure is defined in Art. 294 TFEU.

\(^{104}\) On legislative procedures, see Chalmers et al. (n 13), 119–132. On legislative acts, see Curtin & Manucharyan (n 20), 108–110.

\(^{105}\) Art. 10 TEU.

\(^{106}\) In some cases, in addition to the European Parliament, consultation of other bodies such as the Economic and Social Committee is required. For example, see Art. 113 TFEU.

\(^{107}\) For an overview of non-legislative acts adopted directly on the basis of the Treaty, see Curtin & Manucharyan (n 20), 119–121.


\(^{109}\) Art. 291 (1) TFEU. On implementing acts, see Türk (n 108), 77–79; Curtin & Manucharyan (n 20), 117–120.

\(^{110}\) Art. 291 (2) TFEU. The distinction between delegated acts and implementing acts, which will not be examined in this paper, poses some problems. On this issue, see D Ritieng, ‘The Dividing Line Between Delegated and Implementing Acts: The Court of Justice Sidesteps the Difficulty in Commission v. Parliament and Council (Biocides)’ (2015) 52 Common Market Law Review 243.

\(^{111}\) Inuit (n 16), para 56; Inuit Appeal (n 16), para 12.

\(^{112}\) Categorization of an act as regulatory act or legislative act is based on the procedure which led to its adoption [Inuit (n 16), para 65; Case T-381/11 Eurofer ASBL v Commission, EU:T:2012:273 (Eurofer), para 44].

\(^{113}\) Kaléda (n 40), 300.

\(^{114}\) Peers & Costa (n 85), 90–95; Kaléda (n 40), 300–304; Dougan (n 75), 675–679; J Bast, ‘New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law’ (2012) 49 Common Market Law Review 885 (Bast), 898–907; Arnulf (n 13), 390–400. The narrow definition of a regulatory act was claimed to be in breach of Art. 47 of the Charter. However, the EU Courts have rejected the claim mainly by relying on the standard argument. See Inuit Appeal (n 16), paras 89–93, 96–106.

\(^{115}\) Opinion of AG Wathelet (n 36), paras 53–54, 56–65; Dougan (n 75), 679; Bast (n 114), 900; Arnulf (n 13), 393–394.

\(^{116}\) Dougan (n 75), 676–679; Bast (n 114), 898–900, 904–907; Arnulf (n 13), 393–395.
The concept of regulatory acts has been established and it seems unlikely that the EU Courts will reconsider their definition.

The Concept of “Does Not Entail Implementation”

The last issue to be examined is what “does not entail implementation” means as regards regulatory acts. As previously explained, the “no-implementation requirement” is also a test for direct concern and therefore there is a duality. Thus, this has raised the question of whether the “no-implementation requirement” for direct concern and regulatory acts should be interpreted in the same manner. The EU Courts have answered this question in the negative. As regards the question of how the EU Courts have interpreted this requirement, they have opted for too broad an interpretation in my opinion. While the “no-implementation requirement” for regulatory acts is assessed in relation to a particular applicant, its assessment has nothing to do with the degree of discretion of the body or institution that adopts the implementing act. Rather, it is based on a formalistic approach which qualifies any “measures” taken at the national level, including those that can be considered as measures adopted to enforce (apply) an EU act.

122 “[…] the question of whether or not the contested decision leaves a degree of discretion to the authorities responsible for the implementing measures is irrelevant. It is true that lack of discretion is a criterion which must be examined in order to determine whether the applicant is directly concerned […]. However, the requirement of an act which does not entail implementing measures laid down in the fourth paragraph of Article 263 TFEU constitutes a different condition than the requirement that the act be of direct concern to the applicant”. [Eurofer (n 112), para 59].

123 On the “no-implementation requirement” for regulatory acts, see Kalėda (n 40), 304–309; Peers & Costa (n 85), 95–97. For an overall assessment of effective judicial protection, see Kalėda (n 40), 308–317; Lacchi (n 85), 703–707; Peers & Costa (n 85), 97–103.

124 Telefónica (n 66), para 30.

125 See note 122 above.
As some Advocates General have pointed out, the concept of “entailing implementing measures” should involve measures that require the exercise of a certain degree of discretion by the MS, rather than involving measures that are “purely administrative activity [...] carried out by the national authorities” or that are “simple formalities” such as notification. Thus, measures which do not seem to be implementation in a true or strict sense qualify as implementing measures. This means that such cases will be a matter for the preliminary ruling procedure where the applicant cannot prove the requirements for general standing. Moreover, where the regulatory act in question entails an implementing measure at the EU level, the person may have recourse to the plea of illegality if the conditions are met.

Furthermore, the EU Courts have repeatedly referred to the standard argument in some cases to “justify” such a broad interpretation of the “no-implementation requirement” for regulatory acts. Instead, as discussed above, the EU Courts should recognize and deal with the flaws created by their restrictive approaches to the possibility for persons to gain access to judicial review via annulment actions.

Stichting Woonpunt is a good example to exemplify the broad interpretation of the “no-implementation requirement” for the purpose of regulatory acts. The case concerned a state aid scheme which was amended by the Dutch authorities following an investigation by the Commission to render it compatible with EU state aid rules. The revised aid scheme was accepted and became binding through a Commission decision addressed to the Netherlands (MS).

The applicants, who were the beneficiaries, challenged this decision as

126 Opinion of Advocate General Cruz Villalón, Case C-456/13 P T&L Sugars Ltd and Sidul Açúcares, Unipessoal Lda v Commission, EU:C:2014:2283, para 34. For a further assessment, see paras 30–35 of the same Opinion.
127 Opinion of AG Wathelet (n 36), paras 72–76.
128 Eurofer (n 112), para 60; Telefonica (n 66), paras 58–59.
129 Telefonica (n 66), para 29; EU Task Force (n 66), para 120.
130 For the problems related to the plea of illegality and the main conditions that must be met to have recourse to the plea of illegality, see subsection on “the problems related to the plea of illegality and the preliminary ruling procedure”.
131 The broad interpretation of the “no-implementation requirement” for regulatory acts was claimed to be in breach of Art. 47 of the Charter. However, the EU Courts have rejected the claim mainly by relying on the standard argument. See T&L Sugar (n 66), paras 17, 20–21, 41–47; 49–50.
including those that are adopted at the national level to apply, for example, a regulation, which are not implementation in a true sense, the applicant will need to satisfy the requirements for general standing.

Firstly, such a broad interpretation of “entail implementation” may be seen as a response to the criticism that a person must breach the law in order have access to judicial review before a national court. As any measure taken at the national level will suffice as “implementing measure”, a person will not need to breach the law anymore. Therefore, an argument that recourse to judicial review through the national court in the individual case is not a relevant problem anymore based on the broad interpretation of the “no-implementation requirement” is questionable as it undermines the purpose behind the introduction of the relaxed admissibility requirements.

Secondly, as any measure adopted at the national level is considered as “implementation”, the applicant cannot benefit from the relaxed admissibility requirements and must satisfy the requirements for general standing (both direct concern and individual concern). This takes us back to the problem of the extremely strict test for individual concern. A narrower interpretation of the “no-implementation requirement” for regulatory acts would require an assessment of the existence of a certain degree of discretion, which in practice would conflate the test for direct concern. In such a case, whenever the link between the regulatory act in question and the adverse effect on the applicant is broken due to a certain degree of discretion, the applicant will not satisfy the test for direct concern. However, a narrower test would have been better, considering that the extremely strict test for individual concern leads to the inadmissibility of many cases brought by persons before the EU Courts. In this context, it must be remembered that regulatory acts, as defined as non-legislative acts, lack the degree of democratic legitimacy attributable to legislative acts, especially those adopted through the ordinary legislative procedure. While there is a risk that tests for regulatory acts entailing implementation and direct concern would become one test, at least persons that are directly concerned by the regulatory act in question would be able to benefit from the relaxed admissibility requirements.

Moreover, in principle, regulations are not subject to implementation in a true sense. However, such a broad interpretation of the “no-implementation requirement” that makes regulations the subject of (artificial) implementation may be seen as undermining the nature of regulations.

Furthermore, it seems that non-legislative directives will never be subject to the relaxed admissibility requirements, as directives are, in principle, actually implemented and the MS are generally given a certain degree of discretion.

As a final point, in any case, the interpretation of the “no-implementation requirement” for regulatory acts seems to have been established and the EU Courts are unlikely to reconsider their interpretation.

Conclusions
From the above it may be concluded that access to judicial review by persons via annulment actions still seems to be quite limited for persons, even after the Lisbon Treaty. Because of the narrow definition of the concept of a regulatory act and the broad interpretation of the “no-implementation requirement” for regulatory acts, the relaxed admissibility requirements may not have had the impact on the post-Lisbon regime to the extent that many would have expected.

While legislative acts adopted through the ordinary legislative procedure have the highest degree of democratic legitimacy, the democratic legitimacy of all legislative acts could still be debated. In any case, the comparison between the legitimacy of such acts with those adopted by a democratically elected national legislator is doubtful. While it could possibly be argued that annulment actions were never intended to be actio popularis, the CJ could have opted for a more well-balanced softer test for individual concern as, for example, argued by AG Jacobs. Instead, the CJ has refused to relax the test that almost blocks access to judicial review by persons via annulment actions and thereby provides almost full “immunity” for legislative acts, which seems difficult to justify.

As regards non-legislative acts, it is obvious that they lack the same degree of democratic legitimacy as legislative acts. It was therefore meant to be easier to challenge their validity post-Lisbon. However, the broad interpretation of the “no-implementation requirement” for regulatory acts has resulted in persons being required to prove the requirements

139 The preliminary ruling procedure has some other problems, in addition to this problem. On this issue, see subsection on “the problems related to the plea of illegality and the preliminary ruling procedure”.
140 For the assessment of the test for individual concern, see subsection on “individual concern”.
141 AG Wathelet seems to have considered that the “no-implementation requirement” for the purpose of regulatory acts and the test for direct concern are the same [Opinion of AG Wathelet (n 36), paras 75–76]. On this issue, see Peers & Costa (n 85), 96.
142 Albord-Llorens (n 37), 286.
for general standing which, in turn, prevents persons from benefiting from the relaxed admissibility requirements and also brings the problem of the extremely strict test for individual concern.

All in all, the narrow definition of regulatory acts and the broad interpretation of the “no-implementation requirement” for regulatory acts have, in practice, to a great extent undermined the aim of the relaxed admissibility requirements introduced by the Lisbon Treaty.

Moreover, as discussed above, the EU Courts have regularly resorted to the standard argument that the EU judicial order provides a complete system of legal remedies and procedures in order to justify their restrictive approaches to the admissibility requirements for persons. However, for a judicial mechanism to be considered as an equivalent alternative to annulment actions, it must be as effective as annulment actions. As argued above, it is quite doubtful whether the preliminary ruling procedure and the plea of illegality may be considered as truly effective alternatives to annulment actions. Thus, annulment actions must be considered as essential for judicial review. Consequently, the refusal of the CJ to relax the test for individual concern undermines both the purpose of annulment actions and the right of persons to have access to effective judicial review. In addition, when a case is dismissed by the EU Courts due to lack of standing, whether the EU act in question may be invalid or not will not be examined. This poses the danger that such an EU act which may be invalid will continue to apply.

Furthermore, ensuring access to judicial review is undoubtedly an obligation for the MS. Thus, the MS must have national procedures in place that enable persons to have access to judicial review, which follows from principles such as effectiveness and equivalence. However, as discussed above, shifting the responsibility on to the MS seems difficult to justify.

Additionally, it could be suggested that if the access to judicial review of EU acts by persons through annulment actions will not be facilitated by the EU Courts, the preliminary ruling procedure should be subject to a revision to the extent that it will constitute a truly effective alternative to annulment actions. In my opinion, such a revision is possible since certain aspects of the preliminary ruling procedure are open to interpretation by the CJ as will be seen from Article 267 TFEU and it is therefore the CJ that has set the rules applicable to the preliminary ruling procedure through its case-law. However, in any case, such a revision seems almost impossible.

Finally, it could be argued that the problems with the effective judicial protection for persons stems from the EU system of judicial review seen as a whole, in particular the EU Courts’ restrictive approaches that almost block access for persons to annulment actions. It should therefore primarily be the task of the EU Courts to ensure and facilitate access to judicial review by persons through annulment actions, which are essential for judicial review of EU acts.
Cristina Trenta

The EU Digital Single Market: An Overview

Abstract
This essay addresses a few core aspects of the current EU legal framework concerning the internet and the digitalization process, and provides initial reflections on the newly issued legislation regulating internet-based or internet-related activities, the primary aim being that of raising awareness of both the opportunities that a more cohesive and consistent integration of internet technologies into social processes allows, and of the various legislative or legislation-related pitfalls and gray areas that need to be acknowledged, evaluated, and in some cases amended.

Introduction
More than 30 years separate today from the infancy of commercial business-to-consumer online transactions and Mrs. Snowball’s momentous order of “margarine, cornflakes and eggs” from her local Tesco in Gateshead, Great Britain. Current online sales giant Amazon was still ten years in the future.

While organizations in the mid-1990s adopted or developed for their early electronic commerce ventures business models that were largely compatible with the existing international and European law regulations, the 2000s and 2010s have seen the adoption of new and disruptive models introducing unprecedented patterns of production, consumption, and co-production: from the Amazon Kindle ecosystem to Uber, from Etsy and Ebay to Netflix, peer-to-peer (P2P) and consumer participation have radically altered, in one form or another, the production and distribution chain of digital content. At the same time, digital has become a ubiquitous occurrence in everybody’s life, with the implications of this momentous change for society, in education, healthcare, governance, civil participation, remaining largely unexplored territory.

In the areas of law and policing, the development of information technology as a pervasive and always accessible layer has resulted in both national and international opportunities and challenges. The pace at which digital transformation is impacting the way society works and the way companies do business is outstanding. From mass-accessible free online courses to mobile payments to bitcoins, from telemedicine to electronic ballots, the diffusive nature of internet-based processes is drastic-

ally changing the landscape as we speak.

Several critical areas of law are affected by these changes, with taxation, copyright, privacy, and human rights being the ones at the center of it all and whose adjustments, or lack thereof, produce cascading effects on all other fields. Here, regulations and policies very often walk a thin line, oscillating between fostering and hindering progress. A relatively commonsense approach surely cannot but remark that legislation works and must work at a slower pace, and that “a slower pace” does not mean misunderstand, ignore, or just plain sabotage.

While it might be that the future is here, albeit not evenly distributed, concerns are aplenty when it comes to the societal consequences of this transformation process, the possible new inequalities it may induce countered by the overarching need to ensure that everyone participates, be it a company creating a new and successful sustainable business environment or an individual exercising their rights. This concern is indivisible from the acknowledgment that digital and physical are becoming one seamless environment, an “on-life” where “the distinction between reality and virtuality” is thoroughly “blurred”.

This essay addresses a few core aspects of the current EU legal framework concerning the internet and the digitalization process, and provides initial reflections on the newly issued legislation regulating internet-based or internet-related activities. Its primary aim is that of raising awareness of the opportunities that a more cohesive and consistent integration of internet technologies into social processes allows, and of the various legislative or legislation-related pitfalls and gray areas that need to be acknowledged, evaluated, and in some cases amended. This is especially true in respect to how customer or citizen involvement in the production cycle (crowd-sourcing, user-as-producer, cooperation of autonomous agents) and in the reproduction and distribution of content is framed in terms of ownership, representation, and taxation.

The Digital Single Market

In May 2015, the European Commission issued a communication detailing its Digital Single Market (DSM) strategy. In the document, the Commission defines the DSM as a market where

(t)he free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence.

It also describes the creation of the DSM as one of the top priorities on its agenda. In the view of the Commission, the creation, consolidation, and growth of the DSM is inextricably linked to the implementation of the EU fundamental rights, and it is necessary to ensure that Europe as a whole maintains a primary role in the global digital economy and to support the digital transformation of European companies so that they can flourish and compete internationally.

Member States have also individually been taking steps in line with these goals, sometimes anticipating European policy. Sweden, for example, has been one of the countries at the forefront of the long process of integrating information and communication technology into its societal and governance processes.

As recently as 2018, the Swedish government confirmed that one of its primary concerns in relation to EU policies was that “(t)he proposals in the EU’s Digital Single Market strategy are implemented.” Interestingly, over the years, Sweden has specifically insisted on addressing the problems related to the upholding of human rights in digital environments and over the internet, working to ensure that they are implemented and guaranteed online as they are offline.

This has resulted in a number of resolutions especially dealing with


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respecting human rights on the internet in the context of business environments,\(^9\) which does not come as a surprise when we consider that 96% of all Swedish companies rely on digital tools, information technology, and the internet for their day-to-day activities.\(^1\)

In 2017, the European Commission released a Mid-Term Review on the Implementation of the DSM stating that it was time to act and “turn political commitments into reality”.\(\)\(^12\) As of February 2019, 30 legislative initiatives have been presented by the European Commission since 2015, 28 of which have been agreed upon by the Commission, the European Parliament, and the Council of the European Union.\(\)\(^13\)

These include EU Directives regulating the internet in its various most sensitive fields, such as the amendments to the VAT Directive\(\)\(^4\) that regulate e-commerce,\(\)\(^15\) the Directive on copyright and related rights in the information society,\(\)\(^16\) the Directive on copyright and related rights in the Digital Single Market,\(\)\(^17\) the EU General Data Protection Regulation (GDPR),\(\)\(^18\) and the revised Audiovisual Media Services Directive (AVMS Directive).\(\)\(^19\)

The EU is also in the process of regulating the DSM so as to extend its own jurisdiction beyond its borders, as the recent GDPR clearly illustrates\(\)\(^20\) in Article 3, which details the extraterritoriality implications of the instrument and how it “applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not”.

### The Outcome

Proposing and adopting new legislation does not automatically imply that the outcomes of such processes result in good legislation. The implications for business operators and the duties that derive from the EU legislative framework in place today form a complex, intricate web of work. While, on the one hand, the EU’s legislative production has been remarkable, on the other, its results are questionable. Dozens of laws have been proposed and passed in the last five years, entirely changing or deeply transforming the legal framework within which enterprises move.\(\)\(^21\)

The DSM suffers from both the continuous upheaval, with new regulations taking the place of previous still unsettled ones, and the resulting fragmentation that renders policies “difficult to read, diluted and downright contradictory”;\(\)\(^22\) EU-level enterprises suffer because of the high regulatory burdens and the segmentation of domestic legislation in the Member States.\(\)\(^2\)

For example, doctrine expressed concerns in respect of the extraterritoriality of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10–19.\(\)\(^2\)

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Extraterritoriality of the GDPR. The provision brings into its the sphere of application a multitude of internet operators and service providers from all over the world, as they process the data of persons residing within the EU. From the operators’ perspective, the interpretation and application of the law in the context of extraterritoriality may quickly become difficult if not impossible to manage, with regulations belonging to disparate jurisdictions engendering conflict when applied. Besides the obvious negative impact on the DSM, it is important to note that individual rights can be affected in the process, such as the right to legal certainty, the right to freedom of movement, the right to due process, and the right descending from the ne bis in idem principle.

It is the role of the Court of Justice of the European Union (CJEU) to interpret and clarify existing legislation, but it is not uncommon for case law to fail to do so and render unclear outcomes. This is, for example, what happened in the Skatteverket v. David Hedqvist case. In its resolution of the case, the CJEU defined bitcoin as a virtual currency, falling within the scope of Article 135(1)(e) of the VAT Directive. Nonetheless, and just a few years later, Article 2(2)(d) of the Directive on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing maintains that virtual currencies, including bitcoin, are not currencies but a “digital representation of value that is not issued or guaranteed by a central bank or a public authority”. This definition follows an Opinion of the European Central Bank issued in 2016, stating that “virtual currencies” do not qualify as currencies from a Union perspective.

In the areas connected to the digital economy, the bitcoin example is not an isolated case. An unclear interpretation of the law emerges also from the Uber System case. Here the CJEU maintained that services provided by Uber via electronic platforms did not qualify as an information society service (a digital service), but as a transport service, since Uber provided intermediation with the main purpose of connecting “by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys”.

Therefore, Uber services “must be regarded as being inherently linked to a transport service”. This resolution notwithstanding, Advocate-General Szpunar (AG) stated in his April 2019 Opinion on the Airbnb Ireland case, another case involving intermediation and the classification of services provided via electronic platforms, that such services constituted indeed an information society service (digital service).

### Conclusions

The aim of the DSM is to create a borderless digital space where organizations, companies, citizens, and consumers from all over Europe have access to digital goods and services as producers, consumers, or co-producers. This digital space and the regulatory framework that defines it are expected to enable innovation, competitiveness, and stimulate growth in all areas of the digital economy. In order for them to be successful, a coherent legislative landscape is necessary. As the European Commission has stated, the process has slowed down somewhat, and EU legislation is increasingly becoming an issue for online business operators. Further action is needed.

The EU legal framework on ICT and ICT-related issues is very often inconsistent and at times it does not shy away from defending consoli...
dated interests over the uncertainty of new enterprises. This situation is not without societal consequences: for example, established players have an easy hand at denouncing P2P as tout court illegal. But P2P is a technology: it can be used to infringe the law or to abide the law, to illegally download copyrighted content or to share valuable and perfectly legal knowledge.

While this might seem to be a secondary issue, or one that does not sit at the center of the idea of a better, more equal society through technological means, it is probably sufficient to consider how much of the future of the internet as a viable platform for progress and inclusion rests on the principles of net neutrality, directly challenged by any such ad hoc regulations.

Policy-making and legislative efforts in the areas connected to the DSM and the digital economy are affected by a high degree of ambivalence, complexity, and contradiction. As it stands today, the DSM remains an ambitious goal rather than an established reality, for both EU citizens and business operators.

The EU and its Member States will have to rethink their efforts if that goal is to be realized. While the pace of technological change is clearly a factor, so is the current approach to the legislative process, producing new legislation that further fragments, destabilizes, or simply contradicts previous texts. A change of direction or a correction is needed, first and foremost as to how consistency and coordination among the different fields that have a stake in the broad landscape of the digital economy are handled.

Anna-Maria Hambre

Swedish Tax Procedures from a European Perspective

Abstract

This paper concerns the right to good administration in Article 41 of the Charter of Fundamental Rights of the European Union in relation to Swedish administrative law, that is, the Administrative Procedure Act and the Tax Procedure Act. More precisely, the discussion concerns the Swedish rules on the obligation to investigate, communicate and justify decisions that in a variety of ways can be said to express different principles encapsulated in Article 41 of the Charter.

Introduction

In early June 2019, the European Association of Tax Law Professors (EATLP) held its annual Congress, this time at the Carlos III University of Madrid, Spain. The general topic of the Congress was tax procedures. I had the privilege of writing the Swedish national report on this topic. My contribution to Örebro University School of Law’s annual book concerns some of the issues addressed in the national report and discussed during the Congress.

In order to discuss tax procedures and the rules governing tax procedures, the concept of tax procedure needs to be defined. Studying the national reports written for the EATLP Congress on tax procedures, the definition is usually derived not from one specific legal provision, but from the interpretation of several different provisions. Greece, however, is a country that has an official definition. In 2013, Greece enacted its first Tax Procedure Code.1 This Code includes a definition of tax procedures through the determination of the scope of the act as “the procedure to determine and collect State revenues, as well as the administrative sanctions for non-compliance with the applicable legislation regulating such revenues”.2

Sweden has no official definition of tax procedures. In my national report, I described procedural rules governing how tax is established and collected (as opposed to rules on substantive tax law governing the basis for and the size of the tax).3 In the Dutch report, procedural tax law is described as covering “all rules regarding the establishment of a tax liability, the enforcement and collection of tax and refers to the continuous

2 Article 1 of the Tax Procedure Code 4174/2013. (See Theocharopoulou & Koutnatzis, (draft) National Report Greece, pp. 1–2.)
balance between law enforcement and the legal protection of taxpayers”. 4

Though not captured in the definition of tax procedures I offered in the Swedish report, it is my opinion that Swedish rules on tax procedures reflect the legal protection for taxpayers explicitly mentioned in the Dutch definition. I elaborate further on this in this paper. More particularly, I discuss the right to good administration in Article 41 of the Charter of Fundamental Rights of the European Union (the Charter) in relation to Swedish administrative law, that is, the Administrative Procedure Act (Sw. förvaltningslagen5, abbreviated FL) and the Tax Procedure Act (Sw. skatteförafandelenagen6, abbreviated SFL).

Regulating Tax Procedures in Sweden

Swedish tax procedures are regulated partly through general administrative law (allmän förvaltningsrätt) and partly through special administrative law (speciell förvaltningsrätt). The most prominent act concerning general administrative law is the FL. The FL contains 49 sections that provide a minimum standard for government agency procedures.1

The rules concern for instance the service duties of the agencies, the right to have an interpreter, the filing of documents, rules on disqualification, rules on how decisions shall be notified and other provisions. These are all meant to guarantee a high level of legal certainty for individuals in their interactions with public agencies.2

The most prominent act concerning special administrative tax law is the SFL, enacted in 2012 succeeding inter alia the Taxation Act3, the Tax Payment Act4 and the Act on Tax Returns and Income Statements5. This act contains 71 chapters stretching from rules on the registration of taxpayers to rules on enforcement.

The reason for bringing rules on tax procedures into one act, the SFL that entered into force on 1 January 2012, was that the prevailing structure led to certain problems. For example, tax procedural rules were scattered, there were too many provisions and cross-references, demarca-

5 Förvaltningslag (2017:900)
6 Skatteförafandelenagen (2011:1244)
3 Taxeringslagen (1990:324)
4 Skattebetalningslagen (1997:483)
5 Lag (2001:1227) om självdeklarationer och kontroluppgifter

8 See Article 6(1) of the Treaty of the European Union.
9 Article 47 of the Charter.
10 Article 21 of the Charter.
11 Article 8 of the Charter.
12 Article 51(1) of the Charter. See also judgment of the Court of 26 February 2013, Åk- lagaren v. Hans Åkerberg Fransson, C-617/10, ECLI:EU:C:2013:105, paras. 20–21.
However, as held in the preparatory works preceding the FL of 2017, the principles expressed in the Charter, including Article 41, provide a general picture of what could be said to constitute a European minimum standard, which should not be undermined at national level either. It is therefore of value to study whether and how these principles are reflected in Swedish administrative law and as held above, in this paper, Article 41 of the Charter is studied in relation to Swedish administrative (tax) law, that is, the FL and the SFL.

Article 41 of the Charter governs the right to good administration. According to paragraph 1, every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time period. According to the second paragraph, the right includes (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken, (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy, and (c) the obligation of the administration to give reasons for its decisions.

Article 41 is based on case law that enshrines different principles of good administration. The Article and the meaning of the concept good administration has been elaborated in the Ombudsman’s Code of Good Administrative Behaviour, adopted by the European Parliament in 2001.

The Code is a non-binding document that rather serves as an instrument for putting the principle of good administration into practice, helping individual citizens to understand and obtain their rights, and promotes the public interest in an open, efficient, and independent European administration.

The discussion is narrowed down to the Swedish rules on the obligation to investigate, communicate and justify decisions that in different ways can be said to express different principles encapsulated in Article 41 of the Charter.

The Investigation Obligation

The Court of Justice of the European Union (CJEU) case law shows that an important part of the concept of good administration consists of the principle of care. The core of the principle of care holds an obligation to conduct an investigation that, both in terms of quality and scope, fulfills reasonable requirements. In C-269/90 Technische Universität München v. Hauptzollamt München-Mitte the Court expressed the principle as a duty to “examine carefully and impartially all the relevant aspects of the individual case”.

The principle of care could be said to be reflected in general administrative law through Section 23 of the FL that contains a rule on the so-called obligation to investigate (utredningsskyldighet). This provision holds that a public agency shall ensure that a case is investigated to the extent that its nature requires. Previously, the FL did not contain an explicit obligation to investigate, but such an obligation was held to apply through case law and to a certain extent through different provisions of the FL, for instance, the obligation to provide a service in Section 6 of the FL. However, since 2017, there is a new Section 23 of the FL which includes this obligation to investigate. In the preparatory works to the FL, it is underlined that the fact that the principle of public agencies’ obligation to investigate was not more clearly and fully expressed in the

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8 A list of cases that underlie the article, see Draft Charter of Fundamental Rights of the European Union. Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/90 CONVENT 50, Brussels, 11 October 2000, p. 36.
14 See for instance RA 2006 ref. 15.
15 Section 4 of the FL of 1986.
fl was considered unsatisfactory. 17

An obligation to investigate has, on the other hand, been included in special administrative law in the field of taxation for quite some time, stipulating that the Tax Agency shall ensure that cases are sufficiently investigated. It is currently found in Chapter 40 Section 1 of the SFL. 18 In the preparatory works preceding the SFL, on the obligation to investigate in special administrative tax law, it is highlighted that the FL at that time did not contain an explicit rule on such an obligation. When enacting the SFL, the law regulating the Tax Agency’s obligation to investigate ceased and it was considered important to explicitly regulate this obligation in the area of taxation. 19

The obligation to investigate rests on the principle that investigations and decision-making shall take place as far down in the hierarchy of instances as possible. In other words, a case shall be fully investigated by the Tax Agency before reaching the courts. 20 How far the obligation stretches, according to the preparatory works, is to be decided in each individual case. Some further guidance as to the scope of the obligation to investigate is provided. If the taxpayer makes a deduction, it is held that much of the responsibility for the investigation rests on the taxpayer. However, in cases of an administrative review of a decision to the tax payer’s disadvantage, higher demands are placed on the Tax Agency to investigate the case before a decision is made. 21

Apart from Chapter 40 Section 1 of the SFL, there are other rules in the SFL that to a certain extent, in certain situations, specify the Tax Agency’s obligation to investigate further. Under Chapter 49 Section 5 paragraph 2, the Tax Agency has a responsibility to initiate an investigation if it is obvious that submitted tax data cannot be accepted. 22 The Tax Agency calls this the “specific obligation to investigate” (Sw. särskild utredningsskyldighet). 23

As seen above, the principle of care part of Article 41 of the Charter is reflected both in general administrative law as well as special administrative (tax) law, through the obligation to investigate regulated in Section 23 of the FL and Chapter 40 Section 1 and also Chapter 49 Section 5 of the SFL, the latter constituting what the Tax Agency calls its specific investigation obligation.

The Obligation to Communicate

Under Article 41(2)(a) of the Charter, every person has the right to be heard, before any individual measure, which would affect him or her adversely, is taken. The right to be heard includes, according to CJEU case law, an obligation to provide an individual with the relevant material pertaining to the case and allow the individual to comment on it before taking any action against him or her. 24 In the European Code of Good Administrative Behaviour, this obligation is found in Article 16, stating that

c (e)very member of the public shall have the right, in cases where a decision affecting his or her rights or interests has to be taken, to submit written comments and, when needed, to present oral observations before the decision is taken.

This obligation can be found in Swedish administrative law, in general as well as special administrative (tax) law.

In the FL of 1986, the provision regulating the obligation to communicate 25 only applied to information submitted in the case by a third person. The rules on communication in the SFL, on the other hand, included – and includes – the obligation for the Tax Agency to communicate an intended disadvantageous decision and provide the taxpayer concerned the opportunity to comment on the decision and the reasons the Tax Agency gives as the basis for the decision. This follows from Chapter 40 Section 2 of the SFL. The rules in the SFL were thus considered to go

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17 SOU 2010:29 p. 79.
18 An obligation to investigate was previously found in Section 65 of the Taxation Act of 1956 (Sw. taxeringslagen (1965:623)), thereafter in Chapter 3 Section 1 of the Taxation Act of 1990 (Sw. taxeringslagen (1990:324)).
22 See also RA 2002 ref. 20.
24 See the judgment of the Court of 21 November 1991, Teschnische Universität München v. Hauptzollamt München-Mitte, C-269/90, ECLI:EU:C:1991:438, para. 25; judgment of the Court of 21 September 2000, Mediocurso-Estabelecimento de Ensino Particular Ld. v. Commission of the European Communities, C-462/98 P, ECLI:EU:C:2000:480, para. 36. See also Article 16(2) in the European Code of Good Administrative Behaviour, stating that every member of the public shall have the right, in cases where a decision affecting his or her rights or interests has to be taken, to submit written comments and, when needed, to present oral observations before the decision is taken.
25 Section 17 of the FL of 1986.
further than the rules in the FL.\textsuperscript{26} However, with the enactment of a new FL in 2017, the rule on communication was amended.

In the FL of 2017, the obligation to communicate is regulated in Section 25. Under this provision, public agencies have an obligation, prior to a decision, to inform the party of all material that is of importance to the decision and give the party the opportunity to comment on it. This main rule includes all decisions that may occur during a case, that is, it is not limited to the final decision of a case.\textsuperscript{27} Chapter 40 Section 2 of the SFL, on the other hand, applies to final decisions, which follows from the wording “ett ärende får inte avgöras”, that is, “a case may not be decided”. In this regard, the FL may be held to go further than the SFL and hence, be more favourable to the taxpayer.

The principle of \textit{lex specialis} in Section 4 of the FL stipulates that if a rule in another law or regulation contains a provision that deviates from the FL, the provision in that law or regulation applies. This means that the rule in Chapter 40 Section 2 of the SFL prevails over Section 25 in the FL. Before the amendments to the obligation to communicate in the FL of 1986, this did not give rise to any concern since the rules in the SFL at that time were more favourable to the taxpayer. With the new Section 25 of the FL of 2017, this could, however, be seen as problematic, since Chapter 40 Section 2 of the SFL has a more limited scope in this regard than Section 25 of the FL.

The \textit{lex specialis} provision in Section 4 of the FL does not stipulate that rules in other laws and regulations apply only when they are more favourable in relation to the rules in the FL. Nor is this held to be the case in preparatory works preceding the FL. It is on the contrary held that you have to expect that certain types of cases may need to be dealt with in an order that deviates from the FL and that this in some cases means that rules in special administrative law impose higher demands on the public agency but also that such rules in other cases may be more limited.\textsuperscript{28}

However, according to the statements in the preparatory works, this relates to situations where the FL goes beyond what is appropriate with regard to the nature of the case.\textsuperscript{29} As an example, the rapporteur argues that the requirement to justify a public agency decision (dealt with in the next subsection) should not always be fully maintained in cases of the discharge from closed psychiatric care.\textsuperscript{30} It is furthermore held that exemptions should only occur if it can be justified through actual/substantive and functional reasons.\textsuperscript{31}

The opportunity to restrict a provision in the FL through a rule in special administrative law therefore appears to be limited. Considering this, the discrepancy between Section 25 of the FL and Chapter 40 Section 2 of the SFL may be put into question. However, there are no rules preventing the Tax Agency from communicating with the taxpayer in a similar manner as stipulated in Section 25 of the FL. In fact, according to the Tax Agency’s website, if it can be assumed that the basis for the decision will be improved if the taxpayer is heard, this should form part of the obligation to communicate.\textsuperscript{32}

On the other hand, the provision in Chapter 40 Section 2 of the SFL appears to be in line with the principle in Article 41 of the Charter, since under Article 41(2)(a) of the Charter every person has the right to be heard, before any individual measure, which would affect him or her adversely, is taken.

In an additional provision, Chapter 40 Section 3 of the SFL, the Tax Agency has an obligation to obtain an opinion from the taxpayer on information added to the case by third persons. This implies an obligation on the Tax Agency to communicate information added to the case by a third person and provide the opportunity to comment on the information.

If it is considered obviously unnecessary, communication may be waived. This applies both under Section 25 of the FL as well as under Chapter 40 Sections 2 and 3 of the SFL. This should, however, be interpreted narrowly and is applicable only in cases where the need for communication – seen objectively from the individual’s perspective – is less prominent or completely missing.\textsuperscript{33}

To highlight how important the obligation to communicate is in Swedish public administration, in RÅ 1995 ref. 27 the Supreme Admin-


\textsuperscript{27} Government Bill - Prop. 2016/17:180 p. 310.

\textsuperscript{28} Government Bill - Prop. 1971:30 p. 318.

\textsuperscript{29} Government Bill - Prop. 1971:30 p. 318.

\textsuperscript{30} Government Bill - Prop. 1971:30 p. 318.

\textsuperscript{31} Government Bill - Prop. 1971:30 p. 318.


\textsuperscript{33} Government Bill - Prop. 2016/17:180 p. 311.
istrative Court found that the obligation to communicate with the taxpayer was breached by the Tax Agency. The decision at hand was therefore considered lacking legal force.34

The Obligation to Give Reasons for a Decision

Article 41(2)(c) of the Charter holds an obligation for an administration to give reasons for its decisions. As held above, Article 41 of the Charter is a codification of CJEU case law. Concerning this paragraph the most prominent case is C-222/86 Heylens, in which the Court ruled that the competent national authority was under a duty to justify its decisions.

The Court held that this was important concerning securing the effective protection of fundamental rights under EU law and concerning an individual’s possibility to decide, with full knowledge of the relevant facts, whether there is any reason to appeal a decision to the court.35 In the judgment, the Court furthermore stated that the duty to state reasons was limited only to final decisions and did not extend to opinions and other measures occurring at the preparation and inquiry stage.36

The obligation to give reasons for decisions are further explained in Article 18 of the European Code of Good Administrative Behaviour that states that

(e)very decision of the institution which may adversely affect the rights or interests of a private person shall state the grounds on which it is based by indicating clearly the relevant facts and the legal basis of the decision.

As regards Swedish administrative law, Section 32 of the FL contains a rule stipulating that a decision that can be expected to affect someone’s situation in a not insignificant way must include a clarifying justification (unless including a justification is considered clearly indispensable37). Such a justification must contain information on the rules applied and the circumstances that have been decisive for the outcome of the decision. The SFL does not contain a corresponding rule, which is why the rule in

34 The Supreme Administrative Court has repeatedly taken this position and regularly sets aside public agency decisions in cases where the obligation to communicate has been breached, RÅ 1992 ref. 20 and RÅ 2008 ref. 37.

the FL applies.

In early preparatory works concerning the FL, the obligation to give reasons for decisions is held to be an indispensable element of a general procedural law aimed at strengthening the individual’s legal certainty in public administration.38 The requirement to state reasons is in the preparatory works held to be of great importance in order for public confidence in the authorities’ competence and objectivity to be maintained.39 It is furthermore stated that the knowledge that a justification must be given also promotes a careful, substantive and uniform examination of the cases.40

Under Section 32 of the FL, the reasons must be presented in such a way that they become understandable to the individual. The requirement also stipulates that the authorities in their decisions must use language that is simple, correct and worded in such a way that the decisions can be understood by the recipients.41

The expression “can be expected to affect someone’s situation in a not insignificant way” means that it is the actual effects of the decision for the individual that are decisive for the scope of the requirement to provide reasons.42 This means that in practice the obligation to state reasons for the decision applies to all decisions that may be appealed. However, the obligation to provide reasons also applies in cases where the public agency is the first and last instance.43 The wording also implies an expansion of the scope of the obligation to provide reasons for decisions in relation to how this obligation was worded in the FL of 1986.

The former provision, Section 20 of the FL of 1986, applied only to final decisions44, whereas no such limitation applies under Section 32 of the FL of 2017. It applies to all decisions during the procedures that have

37 This shall according to the preparatory works be interpreted narrowly, in that it shall be obvious from an objective point of view that a justification is unnecessary, Government Bill - prop. 2916/17:180 p. 321. An example is when a public agency has notified a decision that fully meets the individual’s claims based solely on the individual’s data and where there is no counterpart that may have an interest in a justification in order to consider an appeal, Government Bill - prop. 2016/17:180 p. 321.
44 Section 20 of the FL of 1986 was worded in such a way that it applied only to final decisions, see Government Bill - Prop. 1971:30 p. 492.
Swedish tax procedures are regulated both through general administrative law – the FL – and special administrative law – the SFL. Their relationship is regulated in Section 4 of the FL, meaning that where the SFL contains a rule that is inconsistent with the FL, the rule in the SFL applies. As regards the obligations to investigate and to communicate, there are rules both in the FL as well as the SFL, whereas the rules on the obligation to give reasons for decisions are only found in the FL.

Article 41(1) of the Charter expresses the so-called principle of care. Under CJEU case law, this includes the obligation to carefully and impartially examine all the relevant aspects of an individual case. This obligation is found in Section 23 of the FL and Chapter 40 Section 1. The wording of the obligation to communicate in these two provisions is not identical, but the content is practically the same – the Tax Agency must ensure that a case is fully investigated, which corresponds to the obligation under Article 41(1) of the Charter.

Under Article 41(2)(a) of the Charter, every person has the right to be heard, before any individual measure which would affect him or her adversely is taken. The right to be heard includes the obligation to provide the individual with relevant material pertaining to the case and allow the individual to comment on it before taking any action against him or her. This corresponds to the obligation to communicate laid down in Swedish general administrative law – Section 25 of the FL – as well as special administrative (tax) law – Chapter 40 Section 2 (and 3) of the SFL. Chapter 40 Section 2, stating that a case may not be decided to the disadvantage of the taxpayer without the Tax Agency communicating the intended decision and providing the taxpayer with the opportunity to comment on the decision and the reasons the Tax Agency gives as a basis for the decision.

This appears to correspond to the obligation under Article 41(2)(a) of the Charter. However, in comparison to the obligation to communicate as it is worded in Section 25 of the FL, the provision in the FL is more favourable to the one in the SFL. This is because the FL is not, unlike the provision in the SFL, limited to final decisions.

Article 41(2)(c) of the Charter includes an obligation for administrations to give reasons for their decisions. According to CJEU case law, the duty to state reasons is limited only to final decisions. In Swedish administrative law, the obligation to give reasons for decisions is regulated in Section 32 of the FL. The SFL does not contain any provision on this obligation, which is why the rule in the FL applies.
In the FL of 1986, the obligation to provide reasons for decisions was limited to final decisions, as is the obligation under Article 41(2)(c) of the Charter. However, the wording changed with the FL of 2017. The current provision – Section 32 of the FL of 2017 – is not limited to final decisions, but to decisions with an actual impact on the individual. In relation to Article 41(2)(c) of the Charter, which is limited only to final decisions, the current obligation to give reasons for decisions in the FL is thus more favourable.

Eleonor Kristoffersson

**Protection for Whistleblowers in Relation to Taxes**

**Abstract**

This chapter concerns protection for whistleblowers when they report on irregularities at the company where they are employed. In the US, you may receive a reward from the IRS amounting to 10–30 % of the withdrawn taxes and penalties. However, it takes a long time until you receive your reward, at least eight years. There is of course also the uncertainty regarding whether the company will actually have to pay the tax in the end. When the company eventually becomes liable to pay the tax, the reward may be quite substantial. In China, there is also this kind of whistleblowing system. The reward is lower, 0.1–1 %. Furthermore, if the accusation turns out not to be true, the whistleblower may have to pay. In Sweden, no reward is paid, but whistleblowers who are subjected to reprisals from their employer have the right to damages. The same applies to South Africa. If, however, the whistleblowing turns out to be successful, the employer might not survive financially, meaning that the right to damages is worthless. This chapter constitutes an overview of tax whistleblowing in China, South Africa, Sweden, UK and the US.

**Introduction**

Whistleblowing is the exposure of information or activities that are deemed illegal, unethical or not correct. The saying “one man’s whistleblower, is another man’s traitor” illustrates the complexity of whistleblowing. On the one hand, whistleblowers are important sources of information that need protection. On the other, if they report their employer, the employer will consider them disloyal, especially if the whistleblowing in the end turns out not to be true.

This chapter deals with the protection for whistleblowers in relation to taxation. There are two different aspects on the topic; when tax agency employees report irregularities at the agency and when company employees report tax evasion to the tax agency. This chapter focuses on the latter (aspect), since it directly affects the collection of taxes.

The first aspect is also important, but the effect of revealing irregularities at the tax agency may be that the taxpayers in the short run lose trust in the tax agency, which may have a negative impact on tax morale. In the long run, however, reduced corruption has a positive impact on tax morale. This chapter proceeds as follows. First, the protection for whistleblowers in Sweden is discussed, followed by China, South Africa, UK and US. The chapter ends with some conclusions. The EU Directive on the protection of persons reporting on breaches of Union law (the Whis-
Protection for Whistleblowers in Sweden

The Swedish Whistleblowing Act, Visselblåsarlagen (2016:749), SWA, entered into force on 1 January 2017. It applies to employees who report serious misconduct in an employer’s activities. Serious misconduct constitutes a suspicion of a criminal offence that would lead to a prison sentence, or similar circumstances. The Swedish Whistleblowing Act, Visselblåsarlagen (2016:749), SWA, entered into force on 1 January 2017. It applies to employees who report serious misconduct in an employer’s activities. Serious misconduct constitutes a suspicion of a criminal offence that would lead to a prison sentence, or similar circumstances.1 Similar circumstances are, for example, when a serious public interest is set aside, even in cases where this is not a criminal act.2 Any agreement which is in conflict with the SWA is void.3 There are several ways to report serious misconduct, which are all protected by the law. The employee may inform:

- the employer;
- the union;
- the media or an external public authority, but only if the employer in question has not taken the necessary action to deal with the misconduct, or if it is justified for some other reason.4

An employee who commits a crime by whistleblowing is not protected by the law.5 An employer who issues reprisals against an employee who has reported serious misconduct shall pay damages for any violation the reprisals cause. If it is reasonable, however, the liability to pay damages may be set aside or adjusted.6 A reprisal constitutes any interference from the part of the employer which involves unfavourable treatment or adverse consequences for the employee.7 As soon as the employee has put forward proof that gives reason to assume that the employer has acted in conflict with the SWA, the burden of proof is transferred to the employer. In the preparatory works of the SWA, it is assumed that employers shall have a procedure in place for receiving reports of serious misconduct.8

One of the fundamental rights in the Freedom of the Press Act (1949:105) (FPA) is to communicate information and intelligence on any subject whatsoever, for the purpose of publication in print, to an author or other person who may be deemed to be the originator of material contained in such printed matter, the editor or special editorial office, if any, of the printed matter, or an enterprise which professionally provides news or other information to periodical publications.9

This right was codified in the Freedom of Press Act in 1949.10 However, already in the 19th century, when daily newspapers became common in Sweden, both case law and administrative practice which expressed a right to pass on information for the purpose of publication or print started to appear.

When the Freedom of Speech Act (FSA) was introduced in 1991, a corresponding protection for oral media was introduced. Every Swedish citizen is guaranteed the right to communicate information on any subject whatsoever to authors and other originators, as well as to editors, editorial offices, news agencies and enterprises for the production of technical recordings for publication in radio programmes or such recordings. He or she also has the right to procure information on any subject whatsoever for such communication or publication. No restrictions of these rights are permitted other than what follows from the FSA.11 Just like the FPA, the FSA is one of the fundamental laws in Sweden.

A person who passes information on to the media has the right to be anonymous.12 It is also prohibited to seek the source of the information that is disclosed. This is, however, not the case for anyone who breaches secrecy.13 Doing so is also a criminal offence.14 In relation to newspapers, you may always choose to send information without stating your name or providing any other contact information.15 In practice, it is hence easy to also pass on secret information to the press. However, if an

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2 Section 1 SWA.
4 Section. 3 SWA.
5 Section. 5–7 SWA.
6 Section. 8 SWA.
7 Section. 9 SWA.
11 Chap. 1 Sec. 2 FSA.
12 Chap. 3 FPA and Chap. 2 FSA.
13 Chap. 3 Sec. 4 FPA and Chap. 2 Sec. 4 FSA.
14 Chap. 7 Sec. 3 FPA and Chap. 5 Sec. 3 FSA.
editor publishes secret information, the editor is committing a crime.\textsuperscript{16}

The Swedish Tax Agency has a web-based form, where tax evasion can be reported. The Tax Agency provides the opportunity to report anonymously. Interestingly, the Tax Agency states on the one hand, that if reporting persons are able to provide the Tax Agency with their contact details, only the Tax Agency will see them. On the other, the Tax Agency states that what they receive is an official document.\textsuperscript{17} All official documents may be disclosed to everybody under Swedish law, unless they are subject to confidentiality. There are no secrecy rules that apply to information from a whistleblower. Thus, if you do not report anonymously, there is a risk that your name will be disclosed if somebody asks for it.

**Whistleblower protection in China, South Africa, the US and the UK**

The People’s Republic of China is a socialist republic run by a single party. China has one of the largest tax whistleblowing systems in the world. At a Constitutional level, Article 41 of the Chinese Constitution provides for whistleblower protection and gives citizens the right to report unlawful conduct and forbids retaliation. The English translation of this article reads as follows:

> Citizens of the People’s Republic of China have the right to criticize and make suggestions to any state organ or functionary. Citizens have the right to make to relevant state organs complaints and charges against, or exposures of, violation of the law or dereliction of duty by any state organ or functionary; but fabrication or distortion of facts with the intention of libel or frame-up is prohibited. In case of complaints, charges or exposures made by citizens, the state organ concerned must deal with them in a responsible manner after ascertaining the facts. No one may suppress such complaints, charges and exposures, or retaliate against the citizens making them. Citizens who have suffered losses through infringement of their civil rights by any state organ or functionary have the right to compensation in accordance with the law.\textsuperscript{18}

China has hundreds of tax whistleblowing centres around the country. In the last ten years, these whistleblowing centres have received 30 000 to 50 000 whistleblowing cases a year. The whistleblower protection consists of the confidentiality of the whistleblowers as well of a reward system. Each year, thousands of whistleblowers receive rewards.

A reward amounts to 0.1 to 1 % of the tax collected. In the 1990s, whistleblowing was a key lead for tax auditing in China. Due to technical changes, the auditing capacity has increased. Thus, the prediction is that the role of whistleblowers for tax auditing purposes will decrease in the years to come.\textsuperscript{19}

In South Africa, whistleblowing is considered an important mechanism to prevent and detect improper conduct, fraud and corruption. Whistleblowers are protected by the Protected Disclosures Act 26 of 2000 (PDA). Under the PDA, employees in both the public and private sectors who disclose information of unlawful or corrupt conduct by their employers or fellow employees are protected from “occupational detriment”. Occupational detriment is widely defined by the PDA and includes harassment, dismissal, transfer against the will of the employee, non-promotion, a denial of appointment, or otherwise adverse effects.

People who are victimised in breach of the PDA may refer a dispute to the Commission for Conciliation, Mediation and Arbitration for conciliation and thereafter to the Labour Court. They may claim either compensation, up to a maximum amount of two years’ salary, or reinstatement. The PDA contains the idea that it is in the common interest of both the employer and the employee to blow the whistle internally – within the department – rather than externally, to, for example, the media. Hence, an employee is protected by the PDA only where:

- the disclosure contains information about impropriety and;
- the disclosure has been made to the right person, according to the scheme established by the PDA.

The persons to whom an employee is allowed to whistleblow to are:

- a legal advisor;
- internally at the employer, who is supposed to have a whistleblowers’ policy;
- the office of the Public Protector;

\textsuperscript{16} Chap. 7 Sec. 5 No. 3 FPA.
\textsuperscript{17} Skatteverket, Tipsa om misstänkt skattefusk, https://www.skatteverket.se/omoss/kontaktaoss/mejla/tipsaommisstanktfusk.4.7afdf8a313d3421.e9a9561.html, accessed Aug 18 2019.
\textsuperscript{19} Cui, Wei, Abstract for The National Taxpayer Advocate of the U.S. Internal Revenue Service is convening the 4th International Conference on Taxpayer Rights, Minneapolis, MN USA, May 23–24, 2019.
4. the office of the Auditor-General.

Under certain circumstances, whistleblowers in South Africa may turn to the police, MPs, and even the media. This applies if the concern was raised internally or with a prescribed regulator, but was not properly addressed, if the concern was not raised internally or with a prescribed regulator because the whistleblower reasonably believed he or she would be victimized, if the concern was not raised internally because the whistleblower reasonably believed a cover-up was likely and there was no prescribed regulator, or if the concern was exceptionally serious.20

There is a certain form on the South African Tax Agency’s webpage where you can report tax and customs crimes.21 South Africa does not have a system of rewards for people reporting tax evasion.

The UK has both a comprehensive law protecting whistleblowers, like South Africa, and applies rewards, like China. The web-based form for reporting tax evasion on the webpage of HM Revenue and Customs (HMRC) warns the people who report with the words “Don’t try to find out more about the tax evasion or let anyone know you’re making a report”.22

In 2015, the money paid to tax whistleblowers from Her Majesty’s Revenue and Customs (HMRC) amounted to £605 000. HMRC was not, however, able to estimate how much additional revenue was collected because of informants. The awards are discretionary based on factors including the amount of tax recovered and the time saved in investigations.23

In the US, rewards are used in a transparent and outspoken way in order to make people whistleblower on taxes. The Inland Revenue Service (IRS) has a whistleblowing programme that each year reports its activities to the Congress. In the report from 2018, it says that rewards that were paid to whistleblowers amounted to $312 million, whereas collected taxes amounted to $1 441 billion. The average reward amounts to 27% of collected taxes. Even though the US system benefits the whistleblowers in economic terms, it has its disadvantages.

One is that the IRS does not pay the reward until at least eight years after the whistleblower filed a claim because a payment cannot be made until there is a final determination of proceeds. Another disadvantage is that the law lacks any statutory protection from retaliation for whistleblowers providing information to the IRS. Thus, there is no protection for individuals who suffer reprisals for providing truthful information to the IRS.24

Conclusions

From the comparative survey above, three different systems for the protection of whistleblowers’ rights can be identified. The Swedish and South African systems, where there is protection for whistleblowing as such, but where there is no reward. The incentive for the whistleblowers is their own conscience, revenge or other reasons. Ex spouses and former employees are examples of people voluntarily providing tips-offs.25

The second system is the mixed one, where there is both a protection against reprisals from the employer, and where the national tax agency pays a reward. A disadvantage with the reward system in the UK, however, is that it is not transparent. At least in 2015, the Tax Agency was not able to answer the question regarding how much money the rewarded tips had resulted in.26 The fact that information from whistleblowers helps collect otherwise unpaid tax may lead to a greater trust in the tax administration. If, however, money is paid to informants, without anybody knowing whether the information actually results in any collection of tax at all, it may reduce the level of trust in the tax agency, which may have a negative impact on tax morale in the end.

The third system is the one represented by China and the US, where there is no specific protection for whistleblowers in the law, but where tax whistleblowers receive a reward. The reward is substantially higher than in China. The US system is transparent. The major problem with the Chinese and US systems, however, is that there is a time lag between when the employee is fired and the employee – possibly – receives the reward. In the US, this takes at least eight years. To whistle-Member 2018, Annual Report to Congress, https://www.irs.gov/pub/whistleblower/fy18_wo_annual_report_final.pdf, accessed Aug 18 2019.

21 Topham, Gwyn, Ibid.
22 Topham, Gwyn, Ibid.
Whistleblowing under these circumstances is very risky. You may well both lose your job and never receive a reward, since being right and being proved right are two different things. Maybe a tax agency is not able to prove that tax evasion has taken place, even if it has.

Both the Swedish and the South Africans systems are based on the idea that internal whistleblowing takes precedence over external whistleblowing. Since the freedom of the press and the freedom of information are subject to solid protection in Sweden, and the media is not obliged to reveal its informants, it is relatively easy to report to the press without the employer knowing who actually did the reporting.

However, employees are protected by the law, and hence, covered by the prohibition of reprisals, if they inform the media or an external public authority, where the employer has not taken the necessary action to deal with the misconduct, or if it is justified for some other reason. In South Africa, the legal grounds for external whistleblowing are more precisely defined, but also here, external whistleblowing is allowed when the employer has not taken necessary action.

A reward system for tax whistleblowing has certain advantages. One is that it encourages non-anonymous reporting, which speaks for a level of seriousness in the information. With anonymous information, there is always a risk that there is very little truth in it, which is of course resource consuming. Another advantage is that there is an economic incentive for reporting tax evasion. If the rewards are calculated on the basis of the tax collected, the reward may, however, not be paid immediately. In order to achieve whistleblower protection in tax matters, rewards do not seem to be sufficient. Also, a prohibition against reprisals from the part of the employer is needed.

**Analyzing Income Tax Neutrality**

*On the Importance of Reciprocity and Pricing*

**Abstract**

Tax law neutrality is an important goal for many tax policy issues, not least in Sweden. When evaluating current or possible future income tax rules from a neutrality perspective it is important to consider reciprocity and pricing issues. The purpose of this paper is to illustrate why that is so and to give some reflections on how this should or could be done.

**Preface**

When evaluating current or possible future income tax rules, it is, at least on a general level, more or less inevitable to relate to the concept of tax neutrality. According to the principle of neutrality, tax laws should be designed so that the taxpayers’ choices between different options are not affected by tax aspects.\(^1\)\(^2\) Certainly, there are many other qualities that a tax law may, and probably should, have. It should, for example, be interpretable in a predictable but still reasonably flexible way, conform with EU law, rest on morally sound principles and generally be perceived as legitimate.

However, the principle of neutrality is definitely attractive, and for good reason, as neutrality often supports effectivity in the economy.\(^3\)\(^4\) Tax law neutrality may of course prevail together with other qualities, such as those just mentioned. However, this is not always the case. For example, a far-reaching ambition to achieve tax neutrality may, in some

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1 See further, for example, Kahn 1990.

2 You might, however, quite easily argue that referring to the taxpayers’ choice is too narrow a definition of the subjects whose choices should not be affected by tax aspects. Instead, due to pricing mechanisms, it is of relevance to look at the situation and to seek any kind of economic actor whose choices are or might be affected by tax aspects, regardless of whether their own taxation is actually affected in each case or indeed if they are subject to tax at all. See Kellgren 2017, pp. 170–173.

3 Tontsch 2002 explains and expresses this well: “The argument is that only when resources within an economy are allocated by free market forces, according to their best commercial effect, is there optimal performance and growth of the economy and subsequently the highest possible collective taxing capacity”.

4 According to Schön 2015, neutrality is also a concept of EU law: “The Internal Market should, according to Article 26 of the TFEU, ‘comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured’. This basic definition is rooted in the same efficiency-oriented thinking as the concept of tax neutrality (…) Neutrality, we can, therefore, conclude, is a concept of EU law”.
cases, necessitate complex legislation which might be difficult to overview and interpret. In any case, the theme for the analysis carried out below is primarily neutrality, more particularly the concept of income tax neutrality in relation to reciprocity and pricing. In Sweden, the principle of neutrality holds a strong position, although there are many, more or less deliberate, deviations from it.

The principle of reciprocity is less clear, both in terms of content and political importance. However, the core of the essence of the term reciprocity (in income taxation) may be said to be that if a cost is deductible for the payer, the corresponding income should also be taxable for the payee and if the cost is not deductible, the corresponding income should be tax-free for the recipient. However, there is good reason to use the term reciprocity also in other tax law contexts.5

What pricing is, as such, is probably unproblematic, although understanding its mechanisms is a highly complex matter. Pricing is of great importance for many kinds of tax analyses, not least when classifying transactions. But to narrow it down, the distribution between the parties of various goods and other advantages and disadvantages in connection with a transaction is of course of fundamental importance for the price the parties agree on when goods or services are sold.

This should also be the case when alternative forms of a transaction (for example, the renting or selling of a machine) give rise to different tax advantages and disadvantages (see further below) for the respective parties of the transaction. For example, if a given tax advantage, depending on how the deal is set up, can be placed6 either on the seller or the buyer, the buyer, all other things being equal, will be ready to pay more if the deal is set up so that he receives the tax advantage.

The purpose of this paper is to illustrate why it is important to consider reciprocity and pricing when analyzing neutrality in income taxation and to provide some thoughts on how this should or could be done. The method used below is primarily based on logic-oriented reasoning regarding pricing and tax law principles, not on any comprehensive source material in the form of, for example, case law. The analysis takes

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6 Needless to say, this is far from always possible. For example, it may be made impossible due to the use of the substance over form economic approach (see Laukkanen, Antti. Taxation of investment derivatives. Vol. 13. IBFD, 2007, p. 62). However, there are de facto many cases where such choices are indeed possible (due to the courts’ use of a slightly more formal approach or simply due to different tax rules for different kinds of transactions) and the reasoning below focuses on such cases.

7 See, for example, Furman 2008.

8 “Tax optimization” is here used as an expression for the logical analysis of a financial situation or plan from a tax perspective to align financial goals with tax-efficiency planning.
Reciprocity and neutrality: what is the relationship?

Reciprocity, or lack of reciprocity, in taxation comes in many shapes and sizes and the term reciprocity, is therefore in itself not sufficiently precise. Below, reciprocity is used in the basic sense that if a cost is deductible for the payer, the income is taxable for the payee, and if the cost is not deductible, the income is tax free for the recipient (and that the tax rates and taxation time for the two parties are the same).

Is reciprocity a desirable goal for income taxation, perhaps as a tool for achieving neutrality? That is a tricky question. On the one hand, full reciprocity seems to lead to very little tax coming in, since each tax liability would be matched by a corresponding deduction (alternatively that no tax would be levied, and no deduction allowed). Total reciprocity in every situation is therefore not desirable, even in theory. Reciprocity can, however, be both rational and fiscally neutral in some situations.

This is, for example, the case when tax liabilities must be passed on so to speak (roughly as in the value added tax), via deductions and tax liabilities, until they reach the right taxpayer, where they are eventually taxed without any (fully) corresponding deduction. Generally, however, if you regard the two parties in a transaction as a group (N.B. not a company group in the traditional sense, as in, for example, group accounting, rather just two parties to a contract being brought together in this specific context), a lack of reciprocity would give rise to a tax advantage or a tax disadvantage, compared to a perfect reciprocity alternative and also compared to many other options. If the payer is not given a deduction, but the one who is paid is taxed, it may be a disadvantageous situation for the “group”. If, instead, the person who pays receives a deduction, but the one who receives the payment is not taxed, then it is advantageous.

Thus, it is evident that a lack of reciprocity often results in a lack of neutrality, but also that full reciprocity will not generate tax income. A lack of reciprocity may, however, prevail in a manner that is fiscally neutral between, for example, two alternative actions, namely if the two alternatives are equally attractive from a tax perspective. Thus, analyzing the tax neutrality in situations where more than one alternative method (for example buying vs. renting or business loans vs. venture capital) are considered, involves examining the tax effects the different methods would entail for the respective parties of the transaction.

However, it is important to keep in mind that a taxpayer may do similar business with different parties where the transaction gives rise to different effects, for example, because one conceivable counterparty is a (fully taxed) business company and the other is a tax-exempt foundation. Therefore, at least for a proper examination of tax reciprocity and tax neutrality, it is important to take into account the, sometimes, rich plethora of differently taxed possible business contract partners – or at the very least not to oversee such aspects.

Furthermore, the tax situation for the said respective alternative counterparties must be viewed in a broad sense, covering, for example, not only the tax effect of receiving a payment, but also the tax effect on the measures necessary to deliver the supply the payment concerned ("following the chain"). For example, a payment made to a tax-exempt non-profit sports association may not be taxed, but perhaps the cost for deliv-

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Note that what is thus distributed is the positive/negative value of a tax effect, but that this distributive effect is not achieved through the tax system as such – rather the opposite, as it is a kind of adjustment of how the tax system distributes its benefits and drawbacks.

Needless to say, regardless of this there may still be good reasons for a deal, namely if the seller needs or wants the gold ingot less than the buyer.

See Kellgren 2005.
designs that can give correct results and within the context of the rich plethora of possible, acceptable choices this entails, it can be argued that research should be oriented towards what can be expected to yield the most important (as well as correct and scientific) results – for example, not least when it comes to neutrality, to provide relevant input to the tax policy debate.

What characterizes such a choice cannot, of course, be answered a priori and in general, but rather greatly depends on the question or field to be studied. It appears that, if neutrality and reciprocity is to be examined, it must be decided which business models and scenarios (which kinds of taxpayers, how far to “follow the chain” of further transactions etc.) are the most relevant objects of comparison.

I would like to point out two tools that might be useful. First, the proactive method, i.e. the forward-looking (when business models and transactions are still hypothetical) perspective significant for business management, will give the researcher a hint of what business models and other choices that might be seen as comparable and therefore would be especially relevant to compare. Secondly, empirical data, giving the researcher an idea regarding what behavior in economic life is common, and therefore relevant. Other factors might also be relevant when setting up such a research design, for example, ideas regarding the desirability of the outcomes of the rules in play.

What could be learnt from this is that to the extent you examine the level of neutrality in income taxation, you should be aware of the importance of considering reciprocity and pricing. Thoroughly thought through delimitations regarding such aspects should be carefully communicated to the readers, in order to reduce the risk of incorrect conclusions.

References


Should judges reveal their disagreement in a case?

The ambiguous relationship between dissenting opinions and judicial independence

Abstract

In Europe, an increasing number of jurisdictions allow their judges to publicly reveal their disagreement by writing a separate opinion when deciding in panel. One of the recurring questions in the debates surrounding this trend is whether making disagreements between judges public threatens or, to the contrary, strengthens their independence. The answer is far from straightforward. If, on the one hand, dissenting opinions allow us to hear the alternative arguments that emerged during the court’s deliberative process, they, on the other, turn the judges into public figures and expose them to external pressure. The possibility of writing separate opinions provides greater liberty to the judge, but at the same time it also offers the judge the opportunity to take sides politically. This short essay reflects on the various factors that may make the publication of dissenting opinions detrimental or, to the contrary, beneficial for the independence of judges.

Introduction

In Europe, an increasing number of jurisdictions allow their judges, or a certain group of judges, to reveal their disagreement publicly by writing a separate opinion when deciding in panel. This is a clear trend especially in the field of constitutional justice. There are only five constitutional courts in Europe which do not allow the publication of dissenting opinions. Even in these countries, however, there has been a discussion concerning the introduction of such a possibility. One of the recurring questions in this debate is whether making disagreement between judges public threatens or, to the contrary, strengthens their independence.¹

The question is complex for a number of reasons. Firstly, judicial independence is a two-pronged principle. Do we speak about the independence of the courts or of the individual judges that compose the courts? The first aspect needs to be discussed in relation to the principle of separation of powers, while the second one brings us to a broader discussion on the role of a judge in a given legal tradition. Secondly, independence does not mean being untouched, since there must be a balance with ju-

¹ I also discussed this question in my book Judicial Dissent in European Constitutional Courts: A Comparative and Legal Perspective (Routledge 2018). This short essay further develops some of the arguments presented in the book and rewrites them for a broader public.
What is judicial independence?
In a nutshell, judicial independence means that judges should make their decisions independently of the political branches of government: from the legislative and executive branches. This is based on the idea of the separation of powers, consolidated during the Enlightenment in the eighteenth century, which requires that those who make the law are not those who implement and apply it in concrete cases.

The goal is to ensure that public powers are not abused and that legal or political decisions are not made arbitrarily. In democratic systems, laws are made by a freely elected body, usually called a parliament or assembly, while the body or person that holds executive power depends on the form of government in the given political system. 3

Unlike the legislative and executive branches, the judicial power, the third branch of government, should be non-political. Judges are not elected and they are not directly accountable to the people. As a result, they should not represent any particular political ideology, but their decisions should only be based on the law. They cannot be instructed by politicians (members of the legislative and executive branches) on how to decide a concrete case before them. The principle of judicial independence, a cornerstone of democracy, requires that judges make independent decisions.

Easy as it may seem, in reality, judicial independence may be threatened in various ways, and is a problematic issue even in the most democratic of countries. The key issues to be taken into account when assessing the independence of judges are the ways in which they are appointed, the length of their term of office, the possibilities of removing them from office or applying other sanctions against them, and the possibility of appointing them once again when their term expires.

Even though viewed as a cornerstone of democracy, there is no consensus regarding the exact content of judicial independence. 4 Is it the independence of the court as an institution or the independence of the judge as an individual legal professional that is to be protected? Is it possible to ensure both at the same time? As we will see, these two sides sometimes clash with each other.

A further problem is that, in a democracy, it is also important that judges are kept accountable for their mistakes. Although you may argue that it is ensured through the appeal system, judicial accountability is certainly strengthened by individual judicial opinions. While both judicial independence and judicial accountability are necessary for legitimacy, 5 there is a clear tension between these two values.

Legal tradition also plays a role in how judicial independence is conceived. The two main legal traditions in the Western world, the civil law and common law traditions, view the role of a judge differently. In the common law tradition of England and its former colonies, judges play a central role and they are seen as knowledgeable individuals chosen from a group of experienced legal professionals. They are entitled to develop the law where needed, and they have to respect previous judicial decisions (precedents) made by other judges. In such a context, judicial independence means the independence of the individual judges just as much as it means the independence of the court as an institution.

In the civil law tradition, covering continental Europe and Latin America, on the other hand, the judge has been considered to be a civil servant, a representative of the state who applies the law in concrete cases almost mechanically, based on clearly written laws enacted by the legislature, which are abstract enough to cover virtually any legal controversy that might emerge, so that civil law judges do not need to be creative and do not need to pay attention to previously decided cases either. 6

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3 In a parliamentary system – such as Sweden, Germany or the United Kingdom – it is a council of ministers, while in a presidential system – such as the United States or Russia – it is the President.


5 Legitimacy, in the sense of social legitimacy, is not a legal concept but a sociological phenomenon. An institution enjoys social legitimacy when it is able to engender the belief in people that it deserves obedience and respect. In this sense, social legitimacy implies moral authority and social acceptance. See Michael J Trebilcock and Ronald J Daniels, Rule of Law Reform and Development (Edward Elgar 2008) 33.

6 The reasons behind this difference of attitude towards judges are of procedural origin. English procedure was based on trial by jury. Juries were composed of ordinary people, therefore the procedure was immediate, quick (as a rule, each case had to be tried in one day), oral and public. The procedure revolved around this ‘day in court’, during which it was for the parties to furnish evidence and to define the facts and the law. In such a context, a “great judge” was needed, a judge who could arrive at the trial with sufficient knowledge and experience to decide the case in one day. See Vincenzo Varano, Organizzazione e garanzie della giustizia civile nell’Inghilterra moderna (Giuffrè 1973) 253.
Even though, in practice, civil law judges also need to be creative sometimes, and they do follow precedents, the different approach to the judicial role can still be detected in a number of rules and practices.

One good example is the civil law systems’ reluctance to allow their judges to write dissenting opinions. Even if a new trend is emerging, most of the ordinary courts in continental Europe still cannot make their dissent public.

Moreover, from the point of view of judicial independence, in the civil law tradition, the emphasis is on the independence of the court as an institution, rather than on the individual judges, whose independence is considered to be ensured by other factors such as being appointed in a non-political way and it not being possible for the political branches to remove judges from office.

What is a dissenting opinion?

By ‘dissenting opinion’ we mean an opinion that diverges from the opinion of the majority of a group. Naturally, dissent can only exist if a decision has been made by multiple actors. It means that in a court it can only exist if there is a judicial panel that decides the case. Dissent cannot occur if the judgment is delivered by one single judge, which is the rule at the courts of first instance. Appeal courts, supreme courts and constitutional courts, on the other hand, typically decide cases in panels composed of three or more judges.

In the context of judicial decisions, the expression ‘dissenting opinion’ can be used in a broad or a strict sense. In the broad sense, a dissenting opinion is any separate opinion of a member of a judicial panel. A dissenter, however, may disagree with the majority only in part. He may ‘concur’ in the outcome of the case but indicate different reasons for reaching such a conclusion. In this case, the separate opinion is called, in more technical terms, a ‘concurring opinion’.

A dissenting opinion in the strict sense disagrees with the majority also as regards the outcome. A dissenting judge would have decided the case completely differently.

Conversely, a concurring judge would have simply written the judgment differently, without changing the outcome of the case. Thus, a concurring opinion generally offers an alternative reasoning to the decision, but it may also simply add further arguments or aim to explain better the opinion of the court. The broader term ‘separate opinion’ encompasses both dissenting and concurring opinions.

The term ‘judicial dissent’ can instead be used in an even broader sense, including a divergence of opinion between judges who are not members of the same panel. Judicial dissent may well emerge between different chambers of the same court or between different courts. This kind of disagreement is not at all uncommon. Especially in large jurisdictions, such as the United States, courts of appeal do contradict each other, and it is the job of a supreme court to solve these contradictions and to ensure a uniform interpretation of the law.

The system of appeals itself, inherent to any modern court system, provides for the possibility of disagreement. When the reversal of a lower court’s judgment is not based on new factual evidence submitted during the appeal procedure, but solely on legal interpretation, the nature of disagreement between the superior court and the inferior one does not differ substantially from the other forms of judicial dissent. In this short essay, however, judicial dissent is examined only in the context of judicial panels, so in a more limited sense, as a synonym for ‘dissenting opinion’ and ‘separate opinion’.

The ambiguous relationship between dissenting opinions and judicial independence

There is an ambiguous relationship between judicial dissent and judicial independence. If dissenting opinions allow us, on the one hand, to know the alternative arguments that emerged during the court’s deliberative process, they turn the judges into public figures and expose them to external pressures, as judges are now more likely to face the consequences of their opinions. If they can be overturned, or reversed, or even removed from office, the independence of the court is thus at stake.

Moreover, from the point of view of judicial independence, in the civil law tradition, the emphasis is on the independence of the court as an institution, rather than on the individual judges, whose independence is considered to be ensured by other factors such as being appointed in a non-political way and it not being possible for the political branches to remove judges from office.

In the case of Gas and Dubois v. France (Appl. No. 25951/97, Fifth Section, Judgment of 15 March 2012), three judges of the European Court of Human Rights expressed their view (in two concurring opinions) that even though the challenged French law, which did not allow same-sex couples to have access to second-parent adoption, did not violate the European Convention of Human Rights, the French legislature needed to revisit the wording of the contested provision of the civil code in order to bring it in line with contemporary social reality.

As Karl Llewellyn put it, “[t]he very fact that there is an appeal usually proves that doubts exist among professionals, unless the attorney is using the appeal merely as a dilatory tactic”. Karl N Llewellyn and Paul Gewirtz, ‘The Case Law System in America’ (1988) 88 Columbia Law Review 989, 992.
ternal pressure on the other. The possibility of writing a separate opinion provides the judge with greater liberty, but at the same time it also offers the judge the opportunity to take sides politically. In fact, the independency argument has been used both in favour of and against the disclosure of dissent.10

A careful assessment of the influence of dissenting opinions on judicial independence requires taking both internal and external factors into consideration. The internal factors to be taken into account are various elements of the court’s decision-making process. These include the role of the court’s president, the way in which cases are assigned to a judge or the system of voting used by the judges. In the practice of the US Supreme Court, for example, the opinion-writer is chosen by the Chief Justice from among the Justices in the majority, after the voting.11 However, it is the Chief Justice who assigns the opinion of the court only if s/he is part of the majority. When s/he is not, the decision on case assignment is made by the senior associate justice in the majority.12 This rule opens the door to tactical voting by the Chief Justice who might join the position that seems to prevail just in order to be able to decide on who will write the opinion of the court.13

This is, however, a peculiarity of the US Supreme Court. No European supreme or constitutional court has adopted a similar practice. The prevailing practice in Europe is that cases are assigned either randomly or according to pre-established criteria (which may include the judges’ specialisation and workload), and before the case is discussed by the court, so when a majority has not yet been formed.14 In European courts, therefore, there are no incentives for the president to vote tactically. There is, however, still room for strategic behaviour if the judges are allowed to write a separate opinion. In this respect, the external factors come into play.

11 By ‘opinion-writer’ we mean the judge who writes the reasoning for the decision of the majority. The majority’s opinion is called ‘opinion of the court’ in the US.
14 The presidents of many European constitutional courts have the power to assign every case to a rapporteur judge (as this position is called in European jurisdictions), but they rarely have complete discretion. See Kelemen (n 1) 35.

The external factors to be taken into consideration when assessing the relationship between dissenting opinions and judicial independence are the legal and political context in which we are making such assessments. An essential part of this context is the way in which judges are appointed and the length of their term of office. It is quite clear that in a system where judges are appointed by political bodies for a limited period of time the possibility of writing a separate opinion represents a higher risk for the judges’ independence, especially if they can be re-appointed for a second term, than in a system where they are nominated for life. Re-eligible judges could use separate opinions to show their loyalty towards the government and thus ensure their re-appointment to the court for a second term. Therefore, disclosure of dissent and re-eligibility are a dangerous combination.

The trend in Europe is not to ban dissenting opinions, which are allowed in an increasing number of jurisdictions, but rather to abolish re-eligibility.15 This demonstrates that it is the latter that is perceived as a threat to judicial independence rather than dissenting opinions. This is also confirmed by the opinions of the renowned Venice Commission, an advisory body of the Council of Europe, which already in 1997 recommended a prohibition against re-election,16 while in a recent report it supported the right of judges to disclose their dissenting opinion.17 An exception to the trend is represented by the Court of Justice of the European Union (CJEU), which has re-eligible judges, but does not allow the publication of dissenting opinions. There is no shortage of voices supporting the inversion of this practice, and those advocating the abolition of the ban on dissenting opinions in the CJEU are at the same time calling for the abolition of re-eligibility.18

It is also true, however, that even non re-eligible judges’ independence...
may be threatened by the publication of dissenting opinions if their term of office is short and if they are appointed at a relatively young age. For example, if the judges are appointed for a period of ten years, a judge who enters into office at the age of 45, is still relatively young when his or her term expires. At the age of 55, most people still have professional ambitions and may aspire to positions where they may be appointed by the political branches. It is actually not uncommon that a minimum age requirement is established for nominees for a position at a supreme or constitutional court, even if the primary function is to ensure that the appointee has sufficient professional experience.

Conclusion: Is there a best option?
Thus, how can dissenting opinions be reconciled with judicial independence? As we have seen above, the answer to this question is very context-dependent. Different legal systems view the role of judges differently, and therefore they establish different rules for their appointment, term of office, and decision-making process. For some systems, banning dissenting opinions is a way to ensure that judges remain invisible to the public and are protected from external pressure. This solution is, however, bad for transparency, which may damage the social acceptance of the courts.

When setting up their Federal Constitutional Court shortly after the end of the Second World War, the Germans discussed the possibility of allowing the publication of dissenting opinions. They initially rejected the idea on the grounds that for such a new institution as the constitutional court, which had not existed before in the German legal system, it was better to speak with one voice to establish its legitimacy. Indeed, once the German Federal Constitutional Court consolidated its prestige and social acceptance, the German legislature allowed the publication of dissenting opinions. This – not unique – historical example shows that there are concerns that dissenting opinions may compromise a newly established court’s legitimacy.

Another concern is that the judges may exploit separate opinions for personal gain, as explained above. Separate opinions, however, may also be published anonymously, so that the public cannot identify their author. It is an uncommon solution, adopted, for example, in the constitutional court of the state of Bavaria in Germany and in the Greek Special Highest Court. Although judges are in this way not able to exploit the separate opinions for personal gain, this solution does not allow them to protect their personal integrity and spare their conscience. In fact, dissenting opinions can also be seen in the light of freedom of conscience and the judges’ freedom of expression. While the conscience of judges in the civil law tradition has traditionally been considered to be sufficiently protected by the right to vote freely for or against a certain decision, in the common law systems there seems to be a constitutional right to make disagreement public, at least in the form of having it publicly noted in the judgment. On the other hand, from the perspective of the court’s audience, simply noting dissent is of little value if the reasons are not explained.

If dissenting opinions are allowed and they are signed by their author, it is the context that must be reviewed in order to make sure that judicial independence is not endangered. A generally important requirement is that judges shall not be re-eligible. Establishing a minimum age requirement may be a good idea. A long term of office can also help. A combination of the two is even better. The greatest danger for judicial independence is, however, represented by a politicised appointment system, in which judges are elected by political bodies on the basis of their political ambitions and may aspire to positions where they may be appointed by the political branches.

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19 As was the case of the Italian Antonio Baldassarre whose term at the Italian Constitutional Court ended when he was 55. Afterwards, he filled important public positions, appointed by the Berlusconi government. He first became the President of the Italian gambling joint-stock company (SISAL S.p.A.), and was later appointed as President of the Italian state television and radio (RAI).

20 For example, the minimum age requirement at the German Federal Constitutional Court is 40 (see § 3(1) of the German Act on the Federal Constitutional Court [BVerfGG] of 12 March 1951), while at the Hungarian Constitutional Court it is 45 (see Art. 6(1)(b) of Act no. CLI of 2011 on the Constitutional Court [Abv.]).

21 Dissenting opinions were introduced by legislative reform in 1970, 19 years after the establishment of the Federal Constitutional Court. See Kelemen (n 1) 84.

22 It is true even in a common law context. Chief Justice John Marshall had similar concerns at the beginning of the 19th century when the U.S. Supreme Court was still a very young institution. To make a long story short, it led to the discontinuation of the practice of seriatim opinions followed in England, in which every judge announced her opinion separately, and gave rise to the practice of the opinion of the majority. See Kelemen (n 1) 58–62.

23 Rules of Court of 23 May 1968, Arts 7a and 8, in Bay GV Bl., 125.

24 See Kelemen (n 1) 91.


26 See Kelemen (n 1) 179.
ical convictions. In such a politicised system, the presence or absence of dissenting opinions will not make much of a difference. If, however, a non-politicised appointment system is in place, the aforementioned requirements play an important role in ensuring that judges are free to express their disagreement, but they may not exploit this possibility for personal gain.

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A long term of office or an indefinite term of office with a compulsory retirement age is probably a better option than life tenure, which has other drawbacks, such as mental decrepitude of the elderly judges. See David J Garrow, ‘Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment’ (2000) 67 *University of Chicago Law Review* 995.
Aljosa Noga

The Tragedy of the Global Commons in International Law

Pessimistic and Realistic Perspectives

Abstract

The theory of the tragedy of the commons is routinely referred to in international law scholarship. In short, the theory serves to show how the cumulative effects of using our shared resource domains leads them to ruin. The theory is sometimes referred to as a way of critiquing the liberal legal order upon which the system of public international law rests. Although research and scholarship subsequent to the emergence of the tragedy of the commons has shown several flaws and irregularities in the initial theory, including a potential disdain of international law by the original creator, the theory is still widely applied by scholars in international law. That being noted, the initial precept of the theory – the freedom of use – is still prevalent in our global resource domains (the global commons), and the status of those resource domains is far from satisfactory.

Introduction

Attempting to address the societal value of law by merely looking at the sources of law is a fruitless endeavor. The same applies to public international law, i.e. the system of law that primarily seeks to regulate the interactions between States. Providing you do not wish to regurgitate the views of the politicians, diplomats and others who had a say in creating the law in question, the path to examining the societal value of law is then through an interdisciplinary outlook on law.

In this sense, the theory of the tragedy of the commons has often been used as a way of critiquing international law. Specifically, critiquing the law that applies to our shared global resource domains, also known as the global commons (the oceans, the atmosphere and outer space).1 The theory emerged, or rather solidified, with Garrett Hardin’s article The Tragedy of the Commons in 1968.2 The essential concept of the theory is that individuals, whilst using our shared resources, seek to maximize gain despite being aware of the detrimental impact on the surrounding

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2 Garrett Hardin, The Tragedy of the Commons, 162 Science (n.s.), no. 3859, at 1243 (1968).
use of the tragedy of the commons in international law

Previous use of the theory of the tragedy of the commons in international law raises, at least, two considerations: the use in scholarship and the use in case law. In scholarship, the use is mostly consequentialist. Scholars primarily proceed with the view that the tragedy of the commons is a certain outcome. The consequence of the tragedy of the commons is presumed and hence, consequentialist.

Case law, in turn, has seen a more pragmatic use of the tragedy of the commons in legal argumentation before, *inter alia*, the International Court of Justice (the ICJ, i.e. the World Court, one of the principal bodies of the United Nations). For instance, in the Whaling in the Antarctic case, concerning Japan’s whaling industry, New Zealand intervened in the proceedings and argued that the *International Convention for the Regulation of Whaling* sought to put an end to the tragedy of the commons for whales. In another case before the ICJ, the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case, both the USA and Canada referred to the theory of the tragedy of the commons before the Court. The USA argued that if Canada gained more access to the Gulf of Maine, the result would be competition between their fishermen, leading to a tragedy of the commons. Canada naturally contested this assertion. The Court did not find it necessary to consider what it de-

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1. Hardin, supra note 2.
2. Hardin, supra note 2, at 1245.
3. Ibid. at 1244.
5. Ibid. at 1244.
scribed as the consequences of the competition for resources between fishermen (i.e. tragedy). According to the Court, because the area in question was no longer in international waters, in which such competition occurs, the outcome of the case would in any event not change that fact.14

What these cases show is that the tragedy of the commons has a function going far beyond its mere doctrinal use; it has direct practical use in legal argumentation, which is a use the ICJ has not ignored. In other words, there is a recognition of the fact that the competition for resources occurring throughout our planet will lead to ruin unless international law develops so as to restrain the consequences of such competition.

**Survival of the Tragedy of the Commons**

That being noted, the hypothesis of ruin and the overzealous pessimism represented by the tragedy of the commons has not in itself survived without criticism. In fact, others before Hardin had already argued for how a lax approach to how we use our surrounding wealth is foolish.15

For instance, John Maynard Keynes argued for the end of *laissez faire* in 1926.16 Later on in the 1950s, economists argued against open-access approaches to ocean resources and for the need to adhere to sustainability yields.17

Eventually, Elinor Ostrom, in 1990, even managed to empirically refute the absolute nature of the tragedy of the commons.18 Ostrom showed how local commons do not always succumb to the tragedy of the commons as people, at times, manage to govern them successfully. Ostrom did not manage to disprove the theory of the tragedy of the commons, only the underlying peremptory self-interest.19 Economic research, such as that of Ostrom, has thus, at most, only been able to further qualify the theory of the tragedy of the commons.

Hardin himself also eventually recognized the overarching pessimism and, perhaps, the unscientific hypothesis he had managed to formulate in 1968:

Now the once unlimited resources of marine fishes have become scarce and nations are coming to limit the freedom of their fishers in the commons. From here onward, complete freedom leads to tragedy. (And still the shibboleth, “the freedom of the seas,” interferes with rational judgment.) (...) On the global scale, nations are abandoning not only the freedom of the seas, but the freedom of the atmosphere, which acts as a common sink for aerial garbage.20

Furthermore, already in 1968 there was extensive regulation of the oceans through the law of the sea, including the *Convention on the High Seas* and the *Convention on Fishing and Conservation of the Living Resources of the High Seas*.21 Both treaties entered into force (became binding law) prior to the publication of *The Tragedy of the Commons*.22 In hindsight, it might therefore have seemed foolish to use the seas as an example of commons subjected to “complete freedom.”

Lastly, it is also worthwhile mentioning that Hardin’s pessimistic outlook could very well be attributed to his negative attitude towards international law. In his initial paper, Hardin criticized the *Universal Declaration of Human Rights* for supporting the right of people to found a family and make their own determinations in that regard.23 This critique is essentially in line with his views on the dangers of exponential population growth.

In other writings, Hardin also criticized genocide. That is, not the act of genocide, but the actual criminalization of the act.24 According to Hardin, the reference in the *Convention on the Prevention and Punishment of Crimes against Humanity and International Peace and Security* was defunct.25

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16 John Maynard Keynes, *The End of Laissez Faire* (1926); Ranganathan, supra note.
18 Ostrom, supra note 6.
19 See, e.g., Ostrom et al., supra note 4, at 281.
ment of the Crime of Genocide to acts intending to prevent births within a group, prevents States from taking action to regulate population growth.\(^{25}\) The use of the freedom of the seas as a construct to illustrate the freedom of the commons is rational in itself, but these other points made by Hardin show a potential unprofessional disdain of international law as a whole.

Despite the criticism the theory has received over the years and despite the creator’s views on international law, the tragedy of the commons has still survived. There are probably many reasons for its survival. Perhaps the overarching nature of the theory, although not uncommon in scientific research, has lent the theory certain parameters that cannot be entirely scientifically disproven. The theory will perhaps also survive until humanity evolves into a creature of whom the description of tragedy becomes inapt.

**Tragic Freedoms in the Global Commons**

Numerous issues have to be examined in order to conclude whether or not international law favors or disfavors tragedy. This short paper will not be able to come to such a conclusion. It is still worth considering certain primordial tenets of international law still applicable in our global commons.

**Ocean Commons**

In the law of the sea (the body of law applicable to our oceans and seas), the ocean global commons consist of the maritime zones referred to as the high seas and the international seabed area.\(^{26}\) The high seas are, in common parlance, usually considered as international waters, while the international seabed area is more or less the deep seabed situated beneath the waters of the high seas.\(^{27}\) Several treaties are of relevance for the ocean commons, but of primary importance is the *United Nations Convention on the Law of the Sea* (UNCLOS).\(^{28}\) The Convention was a result of a so-called codification effort. Which is why in many parts reflects law that was already binding for the international community even before its entry into force.\(^{29}\) The UNCLOS expresses the following in regard to the status of the high seas:

> The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States: (a) freedom of navigation; (b) freedom of overflight; (c) freedom to lay submarine cables and pipelines (…); (d) freedom to construct artificial islands and other installations permitted under international law (…); (e) freedom of fishing (…); (f) freedom of scientific research\(^{30}\).

The essential concept embedded in this provision is the freedom of use of the seas, or free seas (*mare liberum*).\(^{31}\) The terms provide that the high seas are open to all, that the freedom is open-ended in the sense that there are more freedoms than those enumerated, that there is a freedom granted to all States of the international community, and that all States enjoy that freedom on an equal basis. Comparing the freedom to the tragedy of the commons, at least at first sight, makes it seem to be in conformity with the theory.

The same can be seen from both older and contemporary case law. In the so-called first Behring Sea arbitration from 1893, a case often cited even today, the USA had arrested sealers of another State on the high seas for the sake of conservation.\(^{32}\) Even if the conduct officially concerned the conservation of marine living resources, i.e. a somewhat noble cause, the arbitrators found that the USA did not have the right to take such action against ships of other States.\(^{33}\) This same sentiment of the freedom of the seas repeats itself in other cases.\(^{34}\) In other words, if a State makes use of the global commons, it has the right to do so and may enjoy that freedom on an equal basis. Comparing the freedom to the...
not be excluded from the commons by any other State. An open freedom available to all. The fact that States are allowed to freely make use of the ocean commons without interference even when the environment is at stake, is thus the result of firmly rooted law.

**Atmosphere Commons**

The atmosphere differentiates itself from the other global commons as a much greater proportion of it is not subject to a similar freedom. Discussing the atmosphere commons, one must distinguish between national and international airspace. It is the latter that constitutes the atmosphere commons. 36

The airspace above the territories of States is not automatically open to every other State unless the State in question has agreed to open its airspace to, for example, civil commercial aircraft. The *Convention on International Civil Aviation* reinforces the right that “every State has complete and exclusive sovereignty over the airspace above its territory.” 37 This is said to be equated with the maxim of *cuius est solum, eius est usque ad coelum et ad inferos* (to whomsoever it belongs, it is his all the way to the heavens and all the way to hell). 38 In other words, States exercise sovereignty in the form of a cone, narrowing down to the Earth’s core and extending upwards. The atmosphere above States’ territories is not held in common; it is therefore not a global commons. 39

International airspace, on the other hand, is open to all States. The status of international airspace is, unlike the other global commons, not explicitly clarified in any treaty. The UNCLOS is the only treaty that to a certain extent elucidates the freedom of the atmosphere. As is shown above, the freedom of the seas includes a freedom of overflight. 40 In other words, the freedom of the seas includes a freedom of the airspace above the high seas. 41 And as the list of freedoms is non-exhaustive, other freedoms of the air have been recognized as well, such as using international airspace for reconnaissance or military exercises. 42 It is therefore the freedom of the seas that allows for the same tragic freedom to extend above the high seas into the atmosphere commons.

Cases addressing this freedom of the atmosphere commons are sparse, but some recourse to the atmosphere freedom has been made in legal argumentation. For instance, the *Nuclear Tests* cases from the ICJ show how France, when it had undertaken the testing of nuclear weapons in the Pacific Ocean during the Cold War, forcibly excluded ships and aircraft of other States from entering parts of the high seas by closing off certain areas, the airspace included. 43 Which is why Australia and New Zealand complained before the Court and invoked the freedom of the high seas, including the freedom of navigation and overflight. 44

Although the testing of nuclear weapons is regarded as deplorable by many, and arguments in favor of freedom from such testing as a reasonable position, the arguments still highlight the nature of the freedom in our atmosphere commons. 44 The States essentially complained that being prevented from using the freedom of the atmosphere was contrary to international law.


47 Hailbronner, supra note, at 503.


Outer Space Commons
In comparison to the ocean and atmosphere commons, not only is outer space fairly young as a commons domain under international law, its natural characteristics differ tremendously as it includes a span of various resources that is difficult to even conceive.

Nevertheless, the international community has not found any difficulty in regulating it as a resource domain. A primary instrument of importance for outer space is the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (also known as the Outer Space Treaty). The Treaty largely reflects so-called general international law, i.e. law that binds the international community as a whole. There is also seemingly no spatial limitation to the Outer Space Treaty’s scope of application, which is why it can be considered applicable to the entirety of outer space, including the Moon and celestial bodies, except the Earth.

The Outer Space Treaty expresses the following as far as freedom is concerned: “Outer space, including the Moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies.” A similar wording is also included in prominent resolutions from the United Nations General Assembly, as well as in the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (also known as the Moon Treaty).

International space law thereby seemingly upholds a freedom similar to that which applies to the oceans and the atmosphere in the sense that it is for all States equally, with a language that demands an undiscriminating freedom for all, including the free use of resources. In other words, it bears the markings of a tragic freedom.

Environmental Law and Other Developments
Does all what has been shown above prove that tragic freedoms, such as those argued by Hardin and others, apply to our global commons? No. Strictly speaking, there are no unhindered freedoms in the global commons that parallel the tragedy of the commons. In other words, the freedoms are not complete freedoms, or some type of laissez faire concepts in practice. This was clearly evidenced by the ICJ in, for example, the Fisheries Jurisdiction cases. Although the Court chose to uphold the freedom of the seas, it also made clear that “the former laissez faire treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all.”

Similar obligations of due regard apply to all global commons. That is, next to the large amount of other obligations regarding resources that bind States. Specific obligations include those relating to fisheries, the marine environment as a whole, the international seabed area, emissions, climate change, the environmental balance of celestial bodies, and many more. General obligations applicable to all global commons include those requiring a precautionary approach and sustainable development. To say therefore that the freedoms in the global commons can be exercised like “complete freedoms” tantamount to the original tragedy of the commons.
commons is ludicrous.\textsuperscript{56}

However, that does not mean that international law, through the freedoms and as a whole, does not reflect the components necessary for the tragedy of the commons, as the theory has been expounded since Hardin’s initial paper. Put differently, the fact that international law does not necessarily reflect the original theory of the tragedy of the commons does not mean that international law does not enable tragedy. Even if the current state of the system of public international law does not reflect the original theory of tragedy, tragic freedoms may still be the underlying reason for the continual demise of our global commons. After all, that same system of law rests on the notion of a liberal legal order.\textsuperscript{57}

If you tend to the facts at hand, the picture of our global commons is actually quite grim. Human influence on the climate system is substantial and the main cause for global warming.\textsuperscript{58} Almost a third of all fish stocks are fished at biologically unsustainable levels.\textsuperscript{59} Sustainability in outer space and the near-Earth environment is already threatened by space debris, affecting humanity’s future access to outer space.\textsuperscript{60} It is therefore not surprising that the theory of the tragedy of the commons is still widely applied by scholars to criticize public international law in the global commons. One might question the use of Hardin’s description and his initial paper separately from the mountain of research published in the subsequent years, but, so far, the hypothesis of tragedy has not been disproven. The reliance on the tragedy of the commons is therefore still understandable despite the emergence of other obligations.

\textsuperscript{56} Cf., e.g., Ranganathan, supra note 15; Schrijver, supra note 1.

\textsuperscript{57} Martii Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (2005) (discussing, inter alia, the liberal order underlying the system of public international law).

\textsuperscript{58} E.g., Intergovernmental Panel on Climate Change, Climate Change 2014: Synthesis Report 2, 4 (Core Writing Team et al. eds., 2015).

\textsuperscript{59} E.g., Food and Agric. Org. of the United Nations, The State of World Fisheries and Aquaculture: Contributing to Food Security and Nutrition for All 5–6, 38, 44 (2016).
