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On the Review

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The *Review* may be cited as *Hel. L. Rev*.

From the Editors

Dear Readers of the *Helsinki Law Review*:

We are honored to introduce the *Helsinki Law Review* 2014/1 issue. We are also pleased to inform you that we have been making great strides and significant changes in the work of the *Law Review*. We have, inter alia, started an alumni network, rethought the distribution of the *Law Review*, and decided to launch the *Article of the Year Award*, which has also shown to be a great way of deepening our collaboration with our *Academic Council*. We would like to take this opportunity to congratulate once more the winner of the 2013 *Article of the Year Award*, namely *Tapio Rasila* whose article about states as clients of private military and security companies has also received attention from the media. Regarding the distribution of the *Law Review*, the hard copy of the *Law Review* will be distributed in new locations and the online version will now be available on *SSRN* and hopefully in other online databases as well.

The editors of *Helsinki Law Review* have worked hard throughout the spring and I would like to thank them all for having shown such enthusiasm and openness to new ideas and bettering our *Review*. Their ideas have been innovative and fresh, forcing the *Review* to develop in a quick pace. It has been my privilege to be a part of the *Law Review* for such a long time. I have no doubt that *Helsinki Law Review* will continue to evolve into an even greater journal.

Finally and most importantly, we welcome all suggestions, thoughts, and comments from our readers. We are also welcoming editor applications in the fall of 2014, and hope to get more great and enthusiastic editors to be a part of our team.

I wish you all a great summer. Kippis!

Mirjam Supponen
Editor-in-Chief

Helsinki Law Review 2014/1 p. 5–29

The Effects of Public Enforcement of Competition Law in Arbitration

Keywords: competition law, arbitration, private enforcement

Harri Puskala[1]

English Abstract

Issues related to competition law are traditionally resolved through public enforcement in administrative authorities. This article discusses the fairly recent development of competition law issues being raised in private arbitration proceedings. More specifically, the article aims to outline the effects of public enforcement of competition law in arbitration. The article also discusses if arbitrators who are independent by nature are required to take into consideration decisions and statements given by the competition authorities. The applicability of competition law rules in arbitration proceedings was confirmed by the Court of Justice of the European Union in the seminal Eco Swiss case. The Court provided that national courts are required to take account of EU competition rules when considering annulment of an arbitral award, thus resulting in an indirect obligation for arbitrators to take the competition rules into consideration as well. Additionally, it can be concluded that arbitrators are required to consider decisions given by the competition authorities as part of the evidence of the matter before the arbitral tribunal. As the private enforcement of competition law continues to have more significance in competition law enforcement, it is presumable that also the use of arbitration in resolving competition law issues will only increase in the future.

1 The author is a student of law at the University of Helsinki and is currently writing his Master's Thesis on competition law. During his studies he has worked as a trainee in EU & competition law and dispute resolution practices of a Helsinki-based law firm. This article is based on the author's Bachelor's Thesis.

Full Article in Finnish

Kilpailuoikeuden julkisen täytäntöönpanon vaikutukset välimiesmenettelyssä

Asiasanat: kilpailuoikeus, välimiesmenettely, yksityisoikeudellinen täytäntöönpano

1 Johdanto

Kilpailuoikeudelliset asiat on ratkaistu Suomessa perinteisesti hallintolainkäytössä, julkisoikeudellisen täytäntöönpanon keinoin. Viime aikoina on ollut havaittavissa yksityisoikeudellisen täytäntöönpanon käytön lisääntymistä kilpailuoikeusasioissa, erityisesti yleisissä tuomioistuimissa nostettavien vahingonkorvauskanteiden muodossa.[2] Näiden kahden prosessivaihtoehdon lisäksi kilpailuoikeudellisia riitoja voidaan nykyisin ratkaista myös osapuolten väliseen sopimukseen perustuvassa välimiesmenettelyssä, jossa voidaan tarkastella esimerkiksi kielletyn kilpailua rajoittavan sopimusehdon vaikutusta sopimuskokonaisuuteen tai EU:n kilpailusääntöjen vaikutusta yritysten välisiin vertikaalisiin sopimuksiin sekä määrätä toiselle osapuolelle suoritettavasta vahingonkorvauksesta.[3]

Kun kansallisessa kilpailuviranomaisessa tai komissiossa on tutkittavana menettely, jossa epäillään syyllistytyn kilpailulainsäädännön vastaiseen kilpailua rajoittavaan toimintaan, saattaa samanaikaisesti välimiesmenettelyssä olla vireillä yksityisoikeudellinen sopimuskiista, jossa kyseinen kilpailusääntöjen vastainen menettely tulee myös esille. Tällöin joudutaan pohtimaan, voiko erillinen julkisoikeudellinen viranomaisprosessi vaikuttaa yksityisen

2 Julkisoikeudellisesta kilpailuoikeuden täytäntöönpanosta vastaavat Suomessa Kilpailu- ja kuluttajavirasto, markkinaoikeus ja korkein hallinto-oikeus. Yksityisoikeudellisesta täytäntöönpanosta puolestaan vastaavat yleiset tuomioistuimet eli käräjäoikeudet, hovioikeudet ja korkein oikeus sekä välimiesmenettely. Ks. tarkemmin kilpailuoikeuden täytäntöönpanojärjestelmästä Alkio – Wik 2009, s. 622–630. Ks. myös Savola 2007, s. 483 ja Aine 2012, s. 440.

3 Kilpailuoikeuden yksityisoikeudellisen täytäntöönpanon mahdollisuus perustuu SEUT 101 ja 102 artiklan välittömään oikeusvaikutukseen. EU-tuomioistuin vahvisti EU:n perussopimusten välittömän vaikutuksen asiassa 26/62 *Van Gend en Loos* ja nimenomaisesti SEUT 101 ja 102 artiklan välittömän vaikutuksen asiassa 127/73 *BRT v. SABAM*.

välimiesmenettelyn kulkuun ja voiko välimiehillä olla velvollisuus huomioida kilpailuviranomaisen asiassa omaksuma tulkinta. Jos velvollisuuden katsotaan syntyvän, kuinka laajalti se voi lähtökohtaisesti riippumattomia välimiehiä käytännössä sitoa?

Kilpailuoikeuden sovellettavuus välimiesmenettelyssä selkiytyi varsinaisesti vasta Euroopan unionin tuomioistuimen[4] niin sanotun *Eco Swiss* -ratkaisun myötä.[5] Vaikka kilpailuoikeuskysymyksiä on välimiesmenettelyissä saatettu käsitellä jo paljon aikaisemminkin, oli kilpailuoikeuden asema menettelyssä aikaisemmin epäselvä ja tulkinnanvarainen. Mainittu ennakkoratkaisu ei sanamuotonsa perusteella asettanut välimiehille välitöntä velvollisuutta ottaa huomioon EU:n kilpailuoikeutta, mutta velvollisuuden on voitu katsoa syntyvän välillisesti kansallisten tuomioistuinten välitystuomioihin kohdistaman kontrollin kautta.

Artikkelin keskeisimpänä tarkoituksena on tutkia kilpailuoikeuden julkisen täytäntöönpanon merkitystä vahvasti yksityisoikeudellisessa ja osapuolten sopimukseen perustuvassa välimiesmenettelyssä. Erityisen tarkastelun kohteena on välimiesten potentiaalinen velvollisuus ottaa huomioon julkisen kilpailuviranomaisen samassa asiassa antama ratkaisu ja mainitun huomioimisvelvollisuuden sitovuus ja laajuus. Artikkelissa pyritään hahmottelemaan myös sitä, miten kilpailuoikeuden ja sen julkisen täytäntöönpanon pakottava luonne ja toisaalta välimiesmenettelyn leimallisesti nimenomaan sopimukseen perustuvat kaupalliset intressit ovat sovitettavissa yhteen, vai ovatko ne käytännössä sitä lainkaan.

Johdatuksena edellä mainittuun tulkintakysymykseen julkisen täytäntöönpanon vaikutuksista välimiesmenettelyssä tarkastellaan aluksi myös sitä, mihin kilpailuoikeuden soveltamiskelpoisuus välimiesmenettelyssä ylipäätään perustuu. Lähtökohtaisestihan välimiesmenettely tulee kysymykseen dispositiivisissa riita-asioissa. Riita ei kuitenkaan ole välityskelvoton, vaikka siinä jouduttaisiinkin ottamaan huomioon julkiseen sääntelyyn perustuvia

4 Ratkaisua annettaessa Euroopan unionin tuomioistuimen nimi oli Euroopan yhteisöjen tuomioistuin. Tässä kirjoituksessa tuomioistuimesta käytetään kauttaaltaan sen nykyistä nimeä, 'Euroopan unionin tuomioistuin' ratkaisun antoajankohdasta riippumatta.

5 Ks. esim. Ojanen 2005, s. 559.

pakottavia kilpailuoikeusnormeja.[6] Artikkelin lopussa luodaan vielä katsaus EU:n kilpailuoikeuden täytäntöönpanojärjestelmän yleiseen kehityssuuntaan ja erityisesti siihen, mikä välimiesmenettelyn asema täytäntöönpanojärjestelmässä tulee jatkossa olemaan.

2 Kilpailuoikeuden sovellettavuus välimiesmenettelyssä

2.1 Yleistä

Välimiesmenettelystä annetun lain (967/1992, VML) 2 §:n mukaan yksityisoikeudelliset riitakysymykset, joissa sovinto on sallittu, saadaan määrätä asianosaisten välisin sopimuksin välimiesten lopullisesti ratkaistavaksi.[7] Välimiesmenettelyssä riitakysymys voidaan saada ratkaistuksi kokonaan yksityisin voimin ilman, että julkisoikeudelliset viranomaiset puuttuvat varsinaiseen riidanratkaisumenettelyyn ollenkaan.[8] Lähtökohtaisesti välimiesmenettelyä käytetään erityisesti elinkeinoelämän sopimuksissa. Muun muassa osakas-, lisenssi- ja *joint venture* -sopimukset sekä lukuisat horisontaaliset tai vertikaaliset yritysten väliset sopimukset sisältävät tyypillisesti välityslausekkeen, jolloin sopimukseen liittyvät riidat käsitellään välimiesmenettelyssä.[9] Luonnollisesti osapuolten etuna on saada myös sopimuksesta aiheutuvat kilpailuoikeudelliset ongelmat käsitellyksi välimiesmenettelyn keinoin.

EU:n kilpailuoikeuden yhtenä keskeisimmistä tavoitteista voidaan pitää tehokkaan kilpailun turvaamista kuluttajien hyvinvoinnin lisäämiseksi.[10] Kilpailuoikeuden yleisinä tavoitteina pidetään myös markkinoiden toimivuuden edistämistä ja taloudellisen tehokkuuden ylläpitämistä. Mainittujen tavoitteiden lisäksi EU:n kilpailuoikeus pyrkii yhdentämään unionin alueen

6 Möller 1997, s. 16–17.
7 Välimiesmenettely voi perustua myös lakiin, jolloin menettelystä käytetään nimeä *legaalinen välimiesmenettely*. Ks. legaalisesta välimiesmenettelystä esim. Möller 1997, s. 3–4 ja Ovaska 2007, s. 136–146.
8 Ovaska 2007, s. 25.
9 Nazzini 2004a, s. 326–327.
10 Leivo ym. 2012, s. 39.

sisämarkkinoita Euroopan unionista tehdyn sopimuksen (jäljempänä SEU) 3 artiklan tarkoittamalla tavalla.[11] Myös EU-tuomioistuin vahvisti tavoitteen tehokkaan kilpailun säilyttämisestä yhteismarkkinoilla jo vuonna 1973 antamassaan ennakkoratkaisussa *Continental Can*.[12]

Välimiesmenettelyn on aikaisemmin katsottu soveltuvan varsin huonosti kilpailuoikeusriitoihin, joissa julkiset intressit ja yleinen etu ovat tavallisesti keskeisessä asemassa. Tämä kanta kävi ilmeiseksi myös EU-tuomioistuimen ratkaisussa *Nordsee*[13]. Kyseisessä ennakkoratkaisussa EU-tuomioistuin katsoi, että välimiesoikeutta ei voida pitää Euroopan unionin toiminnasta tehdyn sopimuksen (jäljempänä SEUT) 267 artiklassa tarkoitettuna *jäsenvaltion tuomioistuimena*, eikä sillä tämän vuoksi ole oikeutta pyytää EU-tuomioistuimelta ennakkoratkaisua EU:n kilpailuoikeuden tulkinnasta. Tulkintaansa tuomioistuin perusteli sillä, että välimiesoikeus on luonteeltaan yksityinen ja se saa auktoriteettinsa yksinomaan osapuolten sopimuksesta. SEUT 267 artiklassa nimenomaisesti todetaan, että EU-tuomioistuin voi antaa *jäsenvaltion tuomioistuimelle* ennakkoratkaisun. Välimiesoikeudella oikeutta ennakkoratkaisun pyytämiseen ei siis ole.[14]

Ennen EU-tuomioistuimen *Eco Swiss* -ratkaisua[15] välimiesten kilpailuoikeuden soveltamiseen voitiin puuttua lähinnä tilanteissa, joissa kilpailuoikeuden soveltamisen tai soveltamatta jättämisen voitiin katsoa johtavan lopputulokseen, joka on ristiriidassa oikeusjärjestyksen perusteiden kanssa.[16] VML 40 §:n mukaanhan välitystuomio on mitätön siltä osin, kuin sen on katsottava olevan ristiriidassa Suomen oikeusjärjestyksen perusteiden kanssa.[17] Säädöksen esitöissä todetaan, että mikä tahansa pakottavan oikeusohjeen noudatta-

11 Ks. Alkio – Wik 2009, s. 12–14 sekä Hemmo 2006, s. 1135.
12 Asia 6/72 *Continental Can*, kohta 25. Ks. myös asia C-453/99 *Courage*, kohdat 26 –27. EU-tuomioistuin viittasi kilpailun toimivuuden ylläpitämisen merkitykseen vahvistaessaan kilpailuoikeudellisen vahingonkorvauksen mahdollisuuden EU:n kilpailuoikeuden loukkauksesta.
13 Asia 102/81 *Nordsee*.
14 *Nordsee*, kohdat 7 ja 10. Ks. *Nordsee*-tapauksen tulkinnasta ja jäsenvaltion tuomioistuimen määritelmästä Ojanen 1996, s. 53–55.
15 Asia C-126/97 *Eco Swiss*.
16 Ks. oikeusjärjestyksen perusteiden vastaisuudesta Koulu 2007, s. 247–257. Käsitteestä käytetään vakiintuneesti myös ranskankielestä peräisin olevaa ilmaisua *ordre public*.
17 Ks. myös Möller 1997, s. 17.

matta jättäminen ei merkitse oikeusjärjestyksen perusteiden vastaisuutta.[18] Pelkkä kilpailuoikeuden puutteellinen soveltaminen välimiesmenettelyssä johtaa lähtökohtaisesti harvoin sellaiseen tulkintaan, että oikeusjärjestyksen perusteiden katsottaisiin olevan vaarassa jäädä toteutumatta.

2.2 Välimiesten velvollisuus soveltaa kilpailuoikeussääntöjä

2.2.1 Eco Swiss -ratkaisu suunnannäyttäjänä

Kun EU-tuomioistuin antoi 1.6.1999 ennakkoratkaisun asiassa *Eco Swiss* muuttui käsitys kilpailuoikeuden sovellettavuudesta välimiesmenettelyssä perustavanlaatuisesti. Kyseisessä tapauksessa Alankomaiden korkein oikeus pyysi EU-tuomioistuimelta ennakkoratkaisua EU-oikeuden tulkinnasta tilanteessa, jossa välitystuomiota vastaan on nostettu mitättömyyskanne. Korkein oikeus halusi erityisesti tietää, onko kansallisen tuomioistuimen hyväksyttävä kanne, jossa vaaditaan välitystuomion kumoamista perusteenaan ainoastaan se, että tuomio on SEUT 101 artiklan[19] vastainen. Korkein oikeus antoi samalla ymmärtää, että Alankomaiden oikeudessa kilpailunrajoitussäännön laiminlyöntiä ei tavallisesti pidetä sellaisena rikkeenä, että se katsottaisiin oikeusjärjestyksen perusteiden vastaiseksi.[20] Lisäksi korkein oikeus totesi, että Alankomaissa välitystuomio voidaan kumota sillä perusteella, että sen katsotaan olevan oikeusjärjestyksen perusteiden vastainen.[21]

EU-tuomioistuin katsoi ensinnäkin, että välitystuomion pätevyyttä tutkiessaan kansalliset tuomioistuimet voivat samalla tutkia SEUT 101 artiklan kilpailunrajoituskieltojen tulkintaan liittyviä kysymyksiä ja esittää tarvittaessa niitä koskevan ennakkoratkaisupyynnön. Tämän katsottiin olevan välttämätöntä muun muassa sen vuoksi, että välimiesoikeus ei itse lähtökohtaisesti ole oikeutettu pyytämään ennakkoratkaisua.[22]

Eco Swiss -ratkaisun tärkeimpänä sisältönä voidaan pitää sitä, että EU-tuomioistuin katsoi SEUT 101 artiklaa voitavan pitää sellaisena "oikeusjärjes-

18 HE 202/1991 vp, s. 25.
19 Ratkaisua annettaessa nykyiset SEUT 101 ja 102 artikla olivat EY:n perustamissopimuksen 81 ja 82 artikla.
20 *Eco Swiss*, kohdat 24 ja 31.
21 *Eco Swiss*, kohta 7.
22 Ks. *Nordsee*, kohta 10.

tyksen perusteisiin kuuluvana määräyksenä", jota tarkoitetaan New Yorkin yleissopimuksessa välitystuomioiden tunnustamisesta ja täytäntöönpanosta (SopS 7–8/1962).[23] Myös VML 40 §:n mukaan välitystuomio on mitätön siltä osin kuin välitystuomion on katsottava olevan ristiriidassa Suomen oikeusjärjestyksen perusteiden kanssa. EU-tuomioistuin kuvaili SEUT 101 artiklaa määräykseksi, joka on välttämätön unionille annettujen tehtävien täyttämiseksi ja erityisesti sisämarkkinoiden toimivuuden varmistamiseksi, ja jolla taataan, ettei kilpailu sisämarkkinoilla vääristy.[24]

Eco Swiss -ratkaisun mukaan kansallisen tuomioistuimen on kumottava välitystuomio, joka on ristiriidassa SEUT 101 artiklan kanssa.[25] Edellytyksenä on kuitenkin, että tuomioistuimella olisi kansallisen oikeuden nojalla toimivalta kumota välitystuomio oikeusjärjestyksen perusteiden kanssa ristiriidassa olevana.[26] Ratkaisun voidaan katsoa noudattavan myös EU-oikeudellista tehokkuusperiaatetta, sillä EU-tuomioistuin pyrki ratkaisullaan aktiivisesti varmistamaan EU-oikeuden täyden tehokkuuden toteutumisen.[27]

Eco Swiss -ratkaisu ei suoraan sanamuotonsa perusteella velvoittanut välimiesoikeutta soveltamaan kilpailuoikeudellisia normeja. Tällaisen velvollisuuden on kuitenkin katsottu syntyvän välillisesti, koska ratkaisun mukaan kansalliset tuomioistuimet ovat velvollisia kumoamaan sellaiset välitystuomiot, jotka ovat ristiriidassa SEUT 101 ja 102 artiklan kanssa.[28] Kansainvälisen kauppakamarin välimiesmenettelyä koskevien sääntöjen 41 artiklassa todetaan, että välimiesten tulee tehdä kaikkensa sen eteen, että välitystuomio olisi laillisesti täytäntöön pantavissa. Näitä sääntöjä mukaillen voidaan tulla johtopäätökseen, että välimiehet eivät voi käytännössä jättää huomioimatta SEUT 101 ja 102 artiklaa, koska muuten he vaarantaisivat samalla välitystuomion täytäntöönpanokelpoisuuden.

23 *Eco Swiss*, kohdat 36, 38 ja 39.
24 *Eco Swiss*, kohta 36.
25 *Eco* Swiss -ratkaisussa todetaan, että kansallisen tuomioistuimen on *kumottava* oikeusjärjestyksen perusteiden kanssa ristiriidassa oleva välitystuomio. Suomen järjestelmässä kyse on kuitenkin välitystuomion *mitätöimisestä*, eikä kumoamisesta. VML 40 §:n mukaan tuomio on mitätön, jos se on ristiriidassa oikeusjärjestyksen perusteiden kanssa.
26 *Eco Swiss*, kohta 37.
27 Ks. myös Haapaniemi 1999, s. 1291. Ks. tehokkuusperiaatteesta esim. Schütze 2012, s. 387–396.
28 Ks. esim. D'Arcy – Furse, s. 394.

Eco Swiss -ratkaisusta huolimatta pelkkä lievä kilpailuoikeudellisten sääntöjen laiminlyöminen tuskin voi johtaa välitystuomion mitättömyyteen. *Ojasen* mukaan kilpailuoikeuden vastaisuudelta voitaisiin edellyttää olennaisuutta ja ilmeisyyttä, eikä esimerkiksi ristiriitaisuus pelkän EU:n toimielimen kanssa johtaisi tuomion mitätöimiseen.[29] Välimiesmenettelyn ollessa kyseessä tulee myös muistaa, että välimiehillä on ensisijaisesti velvollisuus noudattaa välityssopimusta ja osapuolten toiveita, jotka eivät välttämättä aina ole pakottavan kilpailuoikeussääntelyn kanssa yhdessä linjassa.

2.2.2 Välitystuomioiden tuomioistuinkontrolli

Välitystuomion laillisuus voidaan tutkia yleisessä tuomioistuimessa. Tuomioistuin voi mitätöidä välitystuomion, joka on SEUT 101 ja 102 artiklan vastainen tai joka on muuten ristiriidassa oikeusjärjestyksen perusteiden kanssa. *Eco Swiss* -ratkaisun perusteella voidaan katsoa, että EU-tuomioistuin on asettanut kansallisille tuomioistuimille nimenomaisen velvollisuuden valvoa välimiesmenettelyssä tapahtuvaa kilpailuoikeuden soveltamista tai sen soveltamatta jättämistä. Tuomioistuinkontrollia pidetään takeena siitä, että kilpailuoikeuden vaatimukset toteutuisivat myös välimiesmenettelyssä.[30]

Tuomioistuinkontrolli ei kuitenkaan tarkoita sitä, että kilpailuoikeuskysymykset käsiteltäisiin tuomioistuimissa uudelleen. Jos tuomioistuin katsoo, että kilpailunormeja ei ole asianmukaisesti sovellettu, välitystuomio mitätöidään ja asia palautetaan välimiesoikeuteen.[31] Välitystuomion mitättömyyskannetta tutkivalla kansallisella tuomioistuimella on myös mahdollisuus pyytää EU-tuomioistuimelta ennakkoratkaisua EU:n kilpailuoikeuden tulkintakysymyksistä SEUT 267 artiklan mukaisella tavalla.

Myös Yhdysvaltain oikeudessa on omaksuttu vastaavanlainen kansallisten tuomioistuinten kontrolliin perustuva järjestelmä välitystuomioiden laillisuusvalvonnassa. Järjestelmästä on Yhdysvaltain oikeudessa käytetty osu-

29 Ojanen 2005, s.572.
30 Ojanen 2005, s. 568.
31 Ks. välitystuomion mitättömyydestä Ovaska 2007, s. 253–255.

vasti nimitystä *second look* -doktriini.[32] Doktriinin mukaan riidat, joihin sisältyy julkisoikeudellisia intressejä, voidaan hyväksyä välimiesmenettelyn kohteeksi sillä ehdolla, että kansallisille tuomioistuimille on jätetty toimivalta valvoa välitystuomioiden laillisuutta.[33]

Eco Swiss -ratkaisun mukaan kansallisella tuomioistuimella voi tiettyjen edellytysten täyttyessä olla velvollisuus ottaa viran puolesta huomioon EU:n kilpailuoikeus välitystuomion laillisuutta tutkiessaan.[34] Kansallisen tuomioistuimen velvollisuus ottaa EU:n kilpailuoikeus huomioon *ex officio* vahvistettiin vuonna 1993 EU-tuomioistuimen ratkaisussa *van Schijndel*[35]. Ennakkoratkaisussaan EU-tuomioistuin katsoi, että kansallinen tuomioistuin on velvollinen ottamaan EU:n kilpailuoikeuden huomioon viran puolesta sellaisten seikkojen osalta, joista osapuolilla ei ole oikeutta disponoida.[36] Lienee selvää, että SEUT 101 ja 102 artikla ovat luonteeltaan sellaisia pakottavia normeja, joista asianosaiset eivät voi sopia toisin.[37]

Voidaan katsoa, että EU-tuomioistuin on halunnut tällä tavalla taata, että EU:n oikeus toteutuu tehokkaasti kaikkien jäsenvaltioiden alueella. Koska välimiesoikeus ei ole jäsenvaltion tuomioistuin SEUT 267 artiklan tarkoittamalla tavalla, ei sillä ole oikeutta pyytää ennakkoratkaisua, toisin kuin tuomioistuinkontrollia toteuttavalla kansallisella tuomioistuimella on. Tämän vuoksi kansallisilla tuomioistuimilla on merkittävä rooli EU-oikeuden soveltamisen valvonnassa.[38]

2.3 Välimiesten harkintavalta kilpailuoikeuden soveltamisessa

Välimiesmenettely on lähtökohtaisesti yksityistä, suljettujen ovien takana tapahtuvaa ei-julkista prosessointia.[39] Vaikka kansallisilla tuomioistuimil-

32 Yhdysvaltain korkein oikeus omaksui second look -doktriinin tapauksessa *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth Inc*, jossa korkein oikeus katsoi, että kansallisella oikeudella on oikeus kumota välitystuomio siltä osin, kuin sen täytäntöön paneminen tai tunnustaminen olisi ristiriidassa maan oikeusjärjestyksen (ratkaisussa public policy) kanssa.
33 Nazzini 2004a, s.351–355 ja Ojanen 2005, s. 557.
34 *Eco Swiss*, kohta 41.
35 Yhdistetyt asiat C-430/93 ja C-431/93 *van Schijndel*.
36 *van Schijndel*, erityisesti kohdat 13 ja 22.
37 Ks. *van Schijndel* -ratkaisun tulkinnasta tarkemmin esim. van Leyenhorst – van den Nieuwendijik 2007, s. 30–32.
38 Ojanen 2005, s. 570.
39 Ks. luottamuksellisuudesta välimiesmenettelyssä Ovaska 2007, s. 175.

la on valta kumota SEUT 101 ja 102 artiklan kanssa ristiriidassa olevat välitystuomiot, on kuitenkin pitkälti julkisen vallan luottamuksen varassa, että välimiehet soveltavat heille uskottua valtaa oikein ja lainmukaisesti. Tavallisestihan välitystuomio päätyy valvontaa toteuttavan tuomioistuimen tarkasteltavaksi vain, jos toinen osapuolista nostaa asiassa välitystuomion mitättömyyskanteen. Kilpailuoikeudellinen kysymys saattaa nousta välimiesmenettelyssä esille esimerkiksi osapuolten lausuntojen kautta, suoraan tai epäsuorasti, jolloin välimiehet voivat reagoida asiassa ilmenneisiin kilpailuoikeudellisiin ongelmakohtiin.

Välimiesmenettelyssä noudatetaan niin sanottua *määräämisvallan eli autonomian periaatetta*[40], jonka seurauksena asianosaiset saavat pitkälti määritellä menettelyn kulun tahtonsa mukaiseksi. Periaate on omaksuttu myös VML 23 §:ssä, jonka mukaan ”asian käsittelyssä on noudatettava, mitä asianosaiset ovat menettelystä sopineet”. Osapuolet voivat vapaasti valita myös menettelyyn sovellettavan lain.[41] Tämä käy ilmi esimerkiksi VML 31 §:n 2 momentista ja YK:n kansainvälisen kauppaoikeuden toimikunnan (UNCITRAL) mallilain 19 artiklasta. Ei olisi esimerkiksi mitään estettä sille, että kokonaan suomalaisessa välimiesmenettelyssä sovellettaisiin vaikkapa Ranskan lakia. Valinnanvapaus on kokonaan osapuolilla.

Käsillä voi esimerkiksi olla tilanne, jossa osapuolet eivät haluaisi ottaa kilpailuoikeussääntöjä menettelyssä lainkaan huomioon. Osapuolet saattavat ajatella, että menettelyssä saavutettaisiin liiketaloudellisesti parempi lopputulos, jos kilpailuoikeus jätettäisiin huomiotta. Pakottavan kilpailuoikeuden noudattaminen merkitsee harvoin taloudellisia voittoja yritykselle ja tämän vuoksi välimiesmenettelyissä usein priorisoidaankin liiketaloudellista menestystä, joskus jopa lakien noudattamisen kustannuksella.[42] Innokkuutta kilpailuoikeuden soveltamiseen välimiesmenettelyssä saattaa toisinaan hillitä myös se, että välimiehillä ei ole käytössään samanlaisia resursseja tutkia laajoja kilpailuoikeudellisia kysymyksiä kuin esimerkiksi kilpailuviranomaisilla on.[43]

40 Ks. määräämisvallan eli autonomian periaatteesta Koulu 2007, s. 73–99.
41 Välimiesmenettelyyn sovellettavasta laista käytetään vakiintuneesti nimitystä *lex arbitri*.
42 Ks. esim. Landolt 2006, s. 110–111 ja Shelkoplyas 2003, s. 264–265.
43 Ks. myös Landolt 2006, s. 110.

On vaikea antaa yksiselitteistä vastausta siihen, miten välimiesten tulisi toimia tilanteessa, jossa osapuolet vaikuttavat haluttomilta ottamaan huomioon kilpailuoikeussääntöjä. Välimiehet ovat ensisijaisesti velvollisia noudattamaan osapuolten välistä sopimusta. Erityisesti silloin, kun kilpailuoikeuden laiminlyömistarkoitus ei ole aivan ilmeinen, saattaisivat välimiehet alistua osapuolten tahtoon. Tällainen menettely ei kuitenkaan ole toivottavaa ja välimiesten kannattaisikin aktiivisen prosessinjohdon kautta pyrkiä saamaan asianosaiset vakuuttuneeksi siitä, että kilpailuoikeussääntöjä tulisi soveltaa. Välimiesten varsin haasteelliseksi tehtäväksi jääkin osapuolten toiveiden ja pakottavan kilpailuoikeuden sääntöjen yhteensovittaminen parhaalla mahdollisella tavalla.[44]

3 Julkisen täytäntöönpanon vaikutukset välimiesmenettelyssä

3.1 Neuvoston täytäntöönpanoasetus 1/2003

EU:n kilpailuoikeuden täytäntöönpanojärjestelmä koki muodonmuutoksen, kun neuvoston asetusta (EY) N:o 1/2003 perustamissopimuksen 81 ja 82 artiklassa vahvistettujen kilpailusääntöjen täytäntöönpanosta (jäljempänä neuvoston täytäntöönpanoasetus) alettiin soveltamaan 1.5.2004 alkaen. Vaikka kilpailuoikeuden aineellinen sisältö pysyi neuvoston täytäntöönpanoasetuksen myötä ennallaan, muuttui EU:n kilpailuoikeuden täytäntöönpanomenettely merkittävästi. SEUT 101 ja 102 artiklan vastainen menettely tuli asetuksella suoraan kielletyksi.[45] EU:n kilpailuoikeuden valvonta perustuu asetuksen mukaan jälkikäteiskontrolliin, josta vastaavat komissio, kansalliset kilpailuviranomaiset ja jäsenvaltioiden tuomioistuimet.[46] Täytäntöönpanouudistuksessa pyrittiin erityisesti selventämään yhteistyömekanismeja komission ja kansallisten tuomioistuinten välillä. Tämä tavoite ilmenee esimerkiksi asetuksen 3 artiklassa, jossa todetaan, että kansallisilla kilpailuviranomaisilla ja tuomioistuimilla on velvollisuus soveltaa kansal-

44 Ks. lisäksi sopimusoikeuden yleisten oppien ja kilpailuoikeuden suhteesta Hemmo 2006, s. 1134–1157.

45 Alkio – Wik 2009, s. 622. Tämän ns. *per se* -kieltoperiaatteen mukaan 101 ja 102 artiklan vastainen menettely on suoraan asetuksella kielletty, eikä kielto vaadi erillistä viranomaispäätöstä.

46 Ks. täytäntöönpanojärjestelmän uudistuksesta tarkemmin Alkio – Wik 2009, s. 622–627.

lisen kilpailulainsäädännön rinnalla myös SEUT 101 ja 102 artiklaa, jos kyseessä on 101 artiklan tarkoittama yritysten välinen sopimus, päätös tai yhdenmukaistettu menettelytapa tai vaihtoehtoisesti 102 artiklan tarkoittama määräävän markkina-aseman väärinkäyttö.

Täytäntöönpanoasetus ei lausu suoranaisesti mitään välimiesmenettelystä. Uudistuksella voidaan kuitenkin katsoa olevan vaikutuksia myös välimiesmenettelyyn, sillä SEUT 101 artiklan 3 kohdasta tuli asetuksen myötä suoraan kansallisella tasolla sovellettavaa oikeutta. SEUT 101(3) artikla perustui aikaisemmin ennakkoilmoitus- ja poikkeuslupajärjestelmään, jossa komissiolla oli yksinomainen toimivalta päättää kohdan soveltamisesta, eikä kansallisella tasolla kohtaa voitu soveltaa oma-aloitteisesti lainkaan. Asetuksen myötä lupajärjestelmästä luovuttiin ja myös SEUT 101 artiklan 3 kohta on nykyisin suoraan sovellettavaa oikeutta myös välimiesmenettelyssä.[47] Kohtaa sovelletaan niin sanotun *legaalipoikkeusperiaatteen* mukaisesti, eli jos kohdan edellytyksien katsotaan täyttyvän, katsotaan sopimus välittömästi sallituksi asetuksen nojalla.[48]

3.2 Kilpailuviranomaisten päätösten velvoittavuus välimiesmenettelyssä

3.2.1 Viranomaispäätöksen sitovuus

Kansallinen kilpailuviranomainen tai komissio saattaa antaa päätöksen asiassa, josta on samanaikaisesti vireillä sopimukseen perustuva riita välimiesmenettelyssä. Vaikka välimiehillä on tosiasiallisesti oikeus ja velvollisuus ottaa aineelliset kilpailuoikeussäännöt välimiesmenettelyssä huomioon, on toinen kysymys, vaikuttaako kilpailuviranomaisen samassa asiassa antama päätös välimiesten toimivaltaan jollain tavalla.

Komissio voi tehdä kilpailusääntöjen rikkomista koskevia päätöksiä neuvoston täytäntöönpanoasetuksen 7–10 artiklan nojalla. 16 artiklassa puolestaan säädetään kansallisten tuomioistuinten velvollisuudesta välttää anta-

47 Ojanen 2005, s. 564–565.
48 Ks. legaalipoikkeusperiaatteesta Alkio – Wik 2009, s. 622 ja Steinle – Beutelmann 2007, s. 61–63.

masta päätöksiä, jotka saattavat olla ristiriidassa komission asiassa aiemmin antaman päätöksen tai vasta hahmotteluvaiheessa olevan menettelylinjan kanssa. Koska asetuksessa ei mainita välimiesmenettelyä, ei välimiesoikeudella lähtökohtaisesti voida katsoa olevan samanlaista velvollisuutta.[49]

Vaikka asiasta ei ole säädetty laissa, indikoi välimiesten velvollisuus aineellisen kilpailuoikeuden soveltamiseen kuitenkin sitä, että myös komission kyseisessä asiassa antamalla päätöksellä olisi välimiesmenettelyä tosiasiallisesti sitova vaikutus. Tuntuisi epätarkoituksenmukaiselta, että välimiesten tulisi soveltaa samaan tosiseikastoon perustuvaan riitaan samaa aineellista kilpailuoikeutta kuin mitä komissio on soveltanut, mutta prosessuaalisen sääntelyn puuttuessa komission päätös voitaisiin jättää kokonaan vaille merkitystä.[50] Voidaan siis ajatella, että jos välitystuomio on ristiriidassa komission päätöksen kanssa, on tuomio luonteeltaan sellainen, että se on vaarassa tulla kumotuksi tuomioistuinten välitystuomioihin kohdistamassa kontrollissa mitättömyyskanteen seurauksena. Välimiehillä on puolestaan kansainvälisen kauppakamarin välimiesmenettelysääntöjen 41 artiklan mukaisesti velvollisuus antaa välitystuomio, joka voidaan panna täytäntöön lainmukaisessa järjestyksessä. Komission päätös on usein hyvä esimerkki siitä, miten kilpailuoikeutta kyseisessä yksittäistapauksessa tulisi soveltaa.

Jäsenvaltioiden tuomioistuimet ovat neuvoston täytäntöönpanoasetuksen 16 artiklan nojalla velvollisia ottamaan huomioon komission asiassa antaman päätöksen. Velvollisuus päätösten huomioimiseen välimiesmenettelyssä on kuitenkin sääntelyn puuttuessa pitkälti oikeuskäytännön ja tarkoituksenmukaisuussyiden varassa. Onkin hieman epäselvää, että missä laajuudessa komission päätös tulisi huomioida välimiesmenettelyssä. Ei ole mitään lainsäädännöllistä perustaa sille, että välimiesoikeus olisi samalla tavalla velvollinen ottamaan komission päätöksen suoraan sellaisenaan menettelyn perustaksi huomioon, kuten jäsenvaltioiden tuomioistuimet ovat.[51]

Myös Kilpailu- ja kuluttajavirasto (jäljempänä KKV) voi antaa määräyksen, josta käy ilmi, että kilpailuoikeusnormeja on rikottu.[52] KKV:n asiassa

49 Ks. esim. Savola 2007, s. 504.
50 Nazzini 2004a, s. 369–370.
51 Nazzini 2004b, s. 161.
52 Ks. KKV:n määräyksistä kilpailulain 8–10 §.

antamiin määräyksiin voitaisiin käsitykseni mukaan soveltaa samoja periaatteita kuin komission antamiin päätöksiin, eikä välitöntä velvollisuutta määräyksen soveltamiseen välimiesmenettelyssä sääntelyn puuttuessa olisi olemassa. Laillisen tuomioistuimen tai toisen välimiesoikeuden samaa asiaa koskeva ratkaisu luonnollisesti estää asian käsittelyn välimiesmenettelyssä *res judicata* -säännön[53] vaikutuksesta. Tällöin välimiehet ottavat viran puolesta huomioon asiassa jo annetun lainvoimaisen ratkaisun, eikä menettelyn jatkaminen voi olla mahdollista.[54]

3.2.2 Viranomaispäätöksen todistusarvo

On varsin tulkinnanvaraista, missä laajuudessa viranomaispäätökset käytännössä tulisi ottaa huomioon välimiesmenettelyssä. Voidaan kuitenkin katsoa, että komission tai kansallisten kilpailuviranomaisten päätökset voitaisiin ottaa välimiesmenettelyssä huomioon todisteina.[55] Välimiehet voivat lähtökohtaisesti antaa harkintavaltansa perusteella viranomaisten päätöksille niille sopivaksi katsomansa todistusarvon.[56] VML ei lausu välimiesmenettelyssä järjestettävästä todistelusta paljoakaan, joten asianosaisilla on pitkälti valta määrätä, miten todistelu välimiesmenettelyssä tapahtuu. Päätösten painoarvoon todisteina vaikuttaa siis se, mitä asianosaiset ovat todisteiden esittämisestä sopineet, mutta samalla myös se, minkälaisen prosessinjohdollisen roolin välimiehet ovat omaksuneet.[57] Välimiehet voivat kannustaa osapuolia hyvinkin aktiivisesti tiettyjen näyttökysymysten huomioimiseen. Asianosaiset saattaisivat kuitenkin pätevästi sopia esimerkiksi siitä, että tiettyä todistuskeinoa ei saa käyttää lainkaan välimiesmenettelyssä.[58]

Jos asianosaiset eivät ole sopimuksessa määränneet todisteluun liittyvästä menettelystä, voivat välimiehet UNCITRALin välimiesmenettelyä koskevan mallilain 19 artiklan mukaisesti itse määritellä varsin pitkälle sen, miten

53 *Res judicata* tarkoittaa lainvoiman saaneen tuomion sitovuutta tulevaisuuteen nähden. Lainvoimaisella tuomiolla ratkaistua asiaa ei voi saattaa enää uudestaan tuomioistuimen käsiteltäväksi.
54 Ks. esim. Ovaska 2007, s. 189–190.
55 Nazzini 2004b, s. 161.
56 Ks. todistelusta välimiesmenettelyssä Ovaska 2007, s. 207–220.
57 Ks. myös IBA:n todisteiden vastaanottamista koskevien sääntöjen artikla 3.
58 Möller 1997, s. 60.

ja missä laajuudessa todistelu tapahtuu.[59] Myös VML 23 §:ssä todetaan, että jos asianosaiset eivät muuta ole sopineet, on välimiehillä oikeus päättää asian käsittelyssä noudatettavasta menettelystä. Jos asianosaiset eivät siis vetoa viranomaispäätökseen, saattaa se hyvinkin jäädä huomiotta, etenkin jos välimiehet ovat omaksuneet passiivisen roolin prosessinjohdossa.[60] Vaikka välimiehet voivatkin kannustaa osapuolia huomioimaan tietyn viranomaispäätöksen todisteena, ei välimiehillä kuitenkaan ole oikeutta ottaa päätöstä oma-aloitteisesti, osapuolia informoimatta, menettelyssä huomioon.[61]

Teoriassa komission tai kansallisen kilpailuviranomaisen päätöksen huomioiminen osana todistusaineistoa voisi johtaa samaan lopputulokseen kuin mihin oltaisiin päädytty, jos päätös olisi otettu huomioon suoraan ratkaisun perustaksi. Välimiehet saattaisivat katsoa, että asiassa jo annettu päätös on niin kattava, ettei juttua ole tarkoituksenmukaista selvitellä enää pidemmälle.[62] Harvoin tilanne on luonteeltaan kuitenkaan sellainen, että välimiesmenettelyssä käsiteltävänä olevat kysymykset olisivat identtisiä komissiossa tai kansallisessa kilpailuviranomaisessa käsiteltävänä olleiden kysymysten kanssa. Lähtökohtaisesti välimiesten tulee kokonaisharkintaa noudattaen ottaa huomioon kaikki näyttö, joka välimiesmenettelyssä on tullut esille.[63]

3.3 Mahdollisuus pyytää kilpailuviranomaisen lausuntoa

Kilpailuoikeudellisia riita-asioita voidaan siis tutkia niin välimiesmenettelyssä kuin kansallisissa kilpailuviranomaisissa ja tuomioistuimissakin. Kilpailuoikeuden soveltamiseen ja tulkintaan liittyviä aineellisia kysymyksiä voidaan käsitellä samalla tavalla foorumista riippumatta. Kansallisella tuomioistuimella on kuitenkin eräs prosessuaalinen etulyöntiasema välimiesoi-

59 UNCITRALin mallilakia on käytetty useassa valtiossa kansallisen välimiesmenettelyä koskevan lain esikuvana. Vaikka VML ei nimenomaisesti perustu kyseiseen mallilakiin, viitataan VML:ää koskevan hallituksen esityksen (HE 202/1992 vp.) usean eri säännöksen yksityiskohtaisissa perusteluissa mallilakiin.
60 Ovaska 2007, s. 194–195.
61 Ks. esim. Savola 2007, s. 504 ja Landolt 2006, s. 289–294.
62 Nazzini 2004b, s.161.
63 Ks. myös IBA:n todisteiden vastaanottamista koskevien sääntöjen artikla 9.

keuteen nähden, sillä se voi pyytää EU-tuomioistuimelta ennakkoratkaisua kilpailuoikeuden soveltamiseen liittyvissä kysymyksissä. Koska välimiesoikeus ei ole SEUT:n tarkoittama *jäsenvaltion tuomioistuin*, ei se ole oikeutettu pyytämään EU-tuomioistuimen lausuntoa kilpailuoikeusasioissa.[64]

Neuvoston täytäntöönpanoasetuksen 15 artiklan nojalla kansallisella tuomioistuimella on oikeus pyytää komissiolta sen hallussa olevia tietoja tai lausuntoa kilpailusääntöjen soveltamiseen liittyvissä kysymyksissä.[65] Koska asetuksessa ei mainita välimiesmenettelyä, ei siinä luonnollisestikaan oteta kantaa myöskään siihen, voisiko myös välimiesoikeudella olla oikeus tällaisen lausunnon pyytämiseen komissiolta. Myöskään komission niin sanotussa yhteistyötiedonannossa ei ole mainintaa välimiesten oikeudesta pyytää tällaista lausuntoa.[66] Lähtökohtaisesti voisi olettaa, että välimiesoikeudella ei tällaista oikeutta ole olemassa, sillä todetaanhan täytäntöönpanoasetuksessa, että ainoastaan *jäsenvaltion tuomioistuin* voi pyytää lausuntoa komissiolta. Oikeuskirjallisuudessa on kuitenkin esitetty, että kansainvälisissä, erityisen merkittävissä välimiesmenettelyissä tällaista lausuntoa voitaisiin komissiolta pyytää, ja että komissio olisi lausunnon joskus myös antanut.[67]

Kansallisella tasolla tuomioistuin voi pyytää lausuntoa myös KKV:lta siten kuin kilpailulain (KL, 948/2011) 49 §:ssä säädetään. Lausunnossa olisi kyse KKV:n käsityksestä siitä, onko kyseessä kilpailulain vastainen menettely vai ei.[68] Lausunnolla ei ole sitovaa vaikutusta. Välimiesten oikeudesta pyytää tällaista lausuntoa ei ole säädetty laissa, joten on epäselvää, voiko välimiesoikeus tosiasiallisesti sitä pyytää. Velvollisuutta lausunnon pyytämiseen välimiesoikeudella ei voi sääntelyn puuttuessa olla, eikä KKV:lla toisaalta mitä ilmeisimmin ole velvollisuutta tällaisen lausunnon antamiseen.[69]

64 Nordsee, kohdat 7 ja 10.
65 Ks. esim. Havu – Kalliokoski – Wikberg 2010, s. 161–163.
66 Komission tiedonanto EY:n perustamissopimuksen 81 ja 82 artiklan soveltamiseen liittyvästä yhteistyöstä komission ja EU:n jäsenvaltioiden tuomioistuinten välillä. Tiedonannossa pyritään selkiyttämään täytäntöönpanoasetuksen määrittelemää rinnakkaisen toimivallan järjestelmää, jossa komissio, kansalliset kilpailuviranomaiset ja tuomioistuimet soveltavat SEUT 101 ja 102 artiklaa yhtäaikaisesti.
67 Savola 2007, s. 502, Landolt 2006, s. 284 ja Nazzini 2004b, s. 159.
68 HE 88/2010 vp., s 83.
69 Savola 2007, s. 504.

Koska välimiesmenettelyssä noudatetaan asianosaisten määräämisvallan periaatetta, on välimiesten toimivalta tutkia osapuolten asiakirjoja ja muita todisteita välimiesmenettelyssä aina enemmän tai vähemmän osapuolten tahdon varassa. Varsinaista velvollisuutta osapuolilla ei esimerkiksi asiakirjojen esittämisen suhteen ole.[70] Potentiaalisen KKV:n lausunnon pyytäminen olisi aina viime kädessä kiinni asianosaisista. Jos osapuolet eivät halua, että kilpailuviranomainen puuttuu asiaan, ei välimiesoikeudella voida katsoa olevan oikeutta tällaista lausuntoa pyytää. Asianosaiset eivät välttämättä halua asian päätyvän julkisen kilpailuviranomaisen tutkintaan, jonka kyseinen viranomainen saattaisi käynnistää havaitessaan pakottavien kilpailuoikeusnormien tulleen rikotuksi.[71] Koska asianosaisten määräämisvallan periaate on välimiesmenettelyssä niin keskeisessä asemassa, voidaan pitää selvänä, että välimiesten tulisi aina ensin kysyä osapuolten mielipidettä, jos he pitäisivät lausunnon pyytämistä aiheellisena.[72]

Välimiehet voivat VML 25 §:ssä tarkoitetulla tavalla kehottaa asianosaisia antamaan välimiehille kaikki ne asiakirjat, joilla voi olla merkitystä asiassa. Välimiehet eivät kuitenkaan voi velvoittaa muita kuin osapuolia luovuttamaan kyseistä informaatiota. Osapuoli on kuitenkin saattanut joutua toimittamaan hallussaan olleita asian kannalta relevantteja asiakirjoja komissiolle tai kansalliselle kilpailuviranomaiselle näiden suorittamaa tutkintaa varten. Jos osapuolet soveltavat välimiesmenettelyssä IBA:n todistelun vastaanottamisesta annettuja sääntöjä, voisi toinen osapuoli vaatia sääntöjen 3 artiklan nojalla välimiesoikeutta kehottamaan tutkinnan kohteena ollutta osapuolta toimittamaan kaikki sellaiset asiakirjat välimiesoikeudelle, jotka kilpailuviranomainen on tutkintansa kautta saanut tietoonsa.[73]

Vaikka välimiesoikeudella ei luultavasti olisi ollut mahdollisuutta saada mainitunkaltaisia toiseen osapuoleen liittyviä asiakirjoja ilman kilpailuvi-

70 Möller 1997, s. 60.
71 Ks. esim. Landolt 2006, s. 289–294.
72 Ks. esim. Savola 2007, s. 504 ja Landolt 2006, s. 289–290.
73 Sääntöjen johdantokappaleen mukaan IBA:n todistelun vastaanottamisesta kansainvälisessä välimiesmenettelyssä vuonna 1999 annettuja sääntöjä käytetään yli 90 maassa. Ks. myös Nazzini 2004b, s. 160.

ranomaisen tai komission asiassa suorittamaa tutkintaa, ei tällä voida katsoa olevan vaikutusta niiden todistusarvoon.[74] Näin haltuun saadut todisteet muodostavat osan näyttöä, johon välimiehet perustavat kokonaisharkintansa normaalilla tavalla.

4 Kilpailuoikeudellisen täytäntöönpanojärjestelmän suunta ja kehitys

Unionin kilpailuoikeudella on katsottu olevan kaksi pääasiallista tavoitetta: edistää talouden toimivuutta unionin alueella tehokkaan kilpailun avulla sekä vauhdittaa EU:n sisämarkkinoiden integraatiota.[75] Kilpailuoikeutta on toteutettu unionin alueella pääasiassa julkisoikeudellisten täytäntöönpanotoimien keinoin. Komissiolla on toimivalta määrätä sakkoja kilpailuoikeusrikkomuksista sekä myös kansallisilla kilpailuviranomaisilla ja tuomioistuimilla on käytössään laaja valikoima erilaisia seuraamuksia.[76]

Kilpailuoikeusrikkomusten julkisoikeudellinen seuraamusjärjestelmä on ollut varsin kehittynyt jo ensimmäisen täytäntöönpanoasetuksen[77] voimaantulosta saakka, kun taas yksityisoikeudelliset seuraamukset ovat olleet pitkään – vaikkakin laillisesti täytäntöön pantavissa – alisteisessa asemassa verrattuna julkisoikeudelliseen täytäntöönpanojärjestelmään. Kilpailuoikeuden yksityistä täytäntöönpanoa on tehostettu, mistä merkittävämpänä esimerkkinä on neuvoston täytäntöönpanoasetus 1/2003. Muutoksella on haluttu muun muassa vähentää kilpailuviranomaisten jutturuuhkaa ja saattaa entistä enemmän kilpailuoikeusasioita yleisten tuomioistuinten ja välimiesmenettelyjen käsiteltäväksi.

Yksityisoikeudellisessa käsittelyssä kilpailuoikeusriidat tulisivat kyseeseen ennen kaikkea sopimusperusteisina vahingonkorvauskanteina, mutta myös sopimuksen pätemättömyyteen tähtäävinä oikeustoimina. Jutturuuhkan vähentäminen ja prosessikustannukselliset säästöt eivät ole olleet ainoat syyt halulle kasvattaa kilpailuoikeuden yksityisoikeudellisen täytäntöönpanon

74 Nazzini 2004b, s. 160.
75 Ks. esim. Landolt 2006, s. 22 ja Alkio – Wik 2009, s. 16.
76 Ks. esim. neuvoston täytäntöönpanoasetuksen 4–10 artikla.
77 Asetus N:o 17/62, perustamissopimuksen 85 ja 86 artiklan ensimmäinen täytäntöönpanoasetus.

asemaa. On myös katsottu, että sopimusperusteisen vahingonkorvauksen käyttömahdollisuus lisää kilpailuoikeuden tehokasta toteutumista. Tätä tavoitetta ilmentää muun muassa EU-tuomioistuimen ratkaisu *Courage Ltd. v Bernard Cohen*, jossa tuomioistuin katsoi, että ”SEUT 101 artiklan täysi tehokkuus ja erityisesti tämän määräyksen 1 kohdassa esitetyn kiellon tehokas vaikutus vaarantuisivat, jos kaikki henkilöt eivät voisi vaatia sellaisen vahingon korvaamista, joka on aiheutunut kilpailua rajoittavasta tai vääristävästä sopimuksesta tai menettelytavasta”.[78]

Yksityisoikeudellista soveltamista onkin viime aikoina pyritty edistämään EU:n tasolla varsin aktiivisinkin toimin.[79] Komissio on esimerkiksi antanut virallisen suosituksen ryhmäkanteiden sallimisesta yksityisten oikeussubjektien oikeussuojan parantamiseksi. Komissio kehottaa suosituksessaan jäsenvaltioita huolehtimaan siitä, että niillä olisi käytössään kollektiivisia oikeussuojakeinoja koskeva kansallinen järjestelmä. Kollektiivisten oikeussuojakeinojen järjestelmä perustuisi yhteisiin eurooppalaisiin periaatteisiin, joita komissio tarkemmin suosituksessaan määrittelee. Suosituksen tavoitteena on yhdenmukaistaa jäsenvaltioiden lähestymistavat yhdenmukaisen kollektiivisten oikeussuojakeinojen järjestelmän implementoimiseen kansallisella tasolla, kuitenkin ilman varsinaisia harmonisointitoimia.[80]

Lisäksi komissio antoi vuoden 2013 kesäkuussa kauan odotetun ja valmistellun ehdotuksensa Euroopan parlamentin ja neuvoston direktiiviksi tietyistä säännöistä, joita sovelletaan jäsenvaltioiden ja Euroopan unionin kilpailuoikeuden säännösten rikkomisen johdosta kansallisen lainsäädännön nojalla nostettuihin vahingonkorvauskanteisiin (jäljempänä vahingonkorvausdirektiivi). Vahingonkorvausdirektiivin julkilausuttuna tarkoituksena on ”EU:n kilpailusääntöjen tehokas täytäntöönpano optimoimalla kilpailuoikeuden julkisoikeudellisen ja yksityisoikeudellisen täytäntöönpanon välinen vuorovaikutus; ja varmistamalla, että EU:n kilpailusääntöjen rik-

78 *Courage*, kohta 26.
79 Ks. kilpailuoikeuden yksityisoikeudellisen soveltamisen kehityksestä myös Aine 2012.
80 C(2013) 3539/3, 11.6.2013: Commission recommendation ”on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law”.

komisen uhrit voivat saada täyden korvauksen kärsimästään vahingosta". Euroopan parlamentin ja neuvoston hyväksyttyä ehdotuksen jäsenvaltioilla on kaksi vuotta aikaa implementoida direktiivi osaksi kansallisia oikeusjärjestelmiään.[81]

Kehityksestä huolimatta kilpailuoikeuden voidaan yhä katsoa toteutuvan pääasiassa julkisoikeudellisen täytäntöönpanon kautta ja vaikka yksityisoikeudellinen täytäntöönpano onkin saamassa yhä enemmän jalansijaa kilpailuoikeuden soveltamisessa, on se edelleen toissijainen suhteessa julkisoikeudelliseen täytäntöönpanoon. Yksityisoikeudellisen täytäntöönpanon merkityksen kasvaminen tarkoittaisi kilpailuoikeusjuttujen lisääntymistä niille tuomioistuimille, jotka ovat toimivaltaisia käsittelemään sopimus- ja vahingonkorvausasioita. On mahdollista, että Suomessa uusi sääntely lisäisi nimenomaan yleisten tuomioistuinten työmäärää. *Ojanen* on kuitenkin esittänyt, että lisääntynyt yksityisoikeudellinen täytäntöönpano ei niinkään tulisi välttämättä näkymään yleisissä tuomioistuimissa, vaan nimenomaan välimiesmenettelyissä. Perusteluna tähän on se, että välityslauseke sisältyy tavallisesti juuri sellaisten merkittävien yritysten välisiin sopimuksiin, joiden toiminta voi potentiaalisesti vaikuttaa unionin sisämarkkinoihin ja jotka ylipäätään täyttävät kilpailumääräysten soveltamiskriteerit.[82]

Syyt, jotka perinteisesti esitetään välimiesmenettelyn suosiolle vaihtoehtoisena riidanratkaisukeinona tavallisen tuomioistuinprosessin sijasta pätevät myös kilpailuoikeusasioissa. Näitä ovat muun muassa menettelyn joustavuus, ripeys ja luottamuksellisuus. Kyky nimittää alan asiantuntijoita välimiehiksi ei välttämättä konkretisoidu eduksi samalla tavalla kilpailuoikeudellisissa kysymyksissä, koska kilpailuviranomaiset ovat nimenomaan kilpailuoikeudellisten kysymysten erityisasiantuntijoita. Kansainvälisissä sopimuksissa välimiesmenettelyn etuna on myös se, että se on lähtökohtaisesti helpompi panna vieraassa valtiossa täytäntöön kuin tavallinen tuomio.[83]

81 COM(2013) 404, 11.6.2013: Ehdotus Euroopan parlamentin ja neuvoston direktiiviksi tietyistä säännöistä, joita sovelletaan jäsenvaltioiden ja Euroopan unionin kilpailuoikeuden säännösten rikkomisen johdosta kansallisen lainsäädännön nojalla nostettuihin vahingonkorvauskanteisiin.

82 Ojanen 2005, s. 567. Ks. myös Aine 2012, s. 440, alaviite 7.

83 Ulkomaisen välitystuomion täytäntöönpano perustuu New Yorkin yleissopimukseen ulkomaisten välitystuomioiden tunnustamisesta ja täytäntöönpanosta (SopS 7–8/1962). Sopimus on hyväksytty yli 130 maassa, joihin myös Suomi kuuluu. Ks. myös Ovaska 2007, s. 266–269.

5 Lopuksi

Kilpailuoikeus on välimiesmenettelyssä suoraan sovellettavaa oikeutta ja välimiehet ovat toimivaltaisia antamaan kilpailuoikeusasiassa täytäntöönpanokelpoisen välitystuomion. Velvollisuus perustuu toisaalta *Eco Swiss* -ratkaisussa omaksuttuun tuomioistuinkontrolliin ja toisaalta neuvoston täytäntöönpanoasetuksen 3 artiklaan, jonka mukaan EU:n kilpailunrajoitussäännökset ovat jäsenvaltioissa suoraan sovellettavaa oikeutta.

Koska välimiesoikeutta ei katsota EU-tuomioistuimen oikeuskäytännössä niin sanotuksi *jäsenvaltion tuomioistuimeksi*, on välimiesmenettely monessa suhteessa erityisessä asemassa tavanomaisiin kansallisiin tuomioistuimiin nähden. Se ei voi pyytää ennakkoratkaisua EU-tuomioistuimelta, eikä se voi määrätä julkisoikeudellisia seuraamuksia, jotka luetellaan neuvoston täytäntöönpanoasetuksen 5 artiklassa. Yksityisoikeudellisen luonteensa vuoksi välimiesmenettelyn asema EU:n kilpailuoikeusjärjestelmässä on monin paikoin edelleenkin varsin epäselvä. Välimiesmenettelyyn liittyvien kysymysten tutkiminen on jo yleisellä tasolla varsin haasteellista, sillä lähtökohtaisesti kaikki välimiesmenettelyt käydään luottamuksellisesti suljettujen ovien takana, eikä varsinaista oikeuskäytäntöä ole.

Vaikka välimiesoikeudella ei olekaan samanlaisia resursseja käsitellä kilpailuoikeudellisia kysymyksiä kuin esimerkiksi KKV:lla, voi välimiesoikeus joissakin tapauksissa hyötyä kilpailuviranomaisen erityisasiantuntemuksesta. On esitetty, että välimiesoikeudella olisi oikeus pyytää KKV:n lausuntoa kilpailunrajoitusta koskevassa tulkintaongelmassa. Tämän lisäksi oikeuskirjallisuudessa on esiintynyt kannanottoja, joiden mukaan välimiesoikeus voisi joissakin tapauksissa pyytää myös komission lausuntoa kiperästä EU:n kilpailuoikeuden tulkintaongelmasta. Kun kyseessä kuitenkin on yksityisoikeudelliseen sopimukseen perustuva välimiesmenettely, ovat välimiehet kuitenkin lähes aina viime kädessä sidottuja osapuolten tahtoon. Jos osapuolet päättävät, että lausuntoa kilpailuoikeuden tulkinnasta ei pyydetä, ei välimiehillä oikeutta lausunnon pyytämiseen silloin ole.

Käsillä voi olla myös tilanne, jossa välimiesmenettelyssä käsiteltävänä olevaan asiaan liittyen on vireillä rinnakkainen prosessi, esimerkiksi KKV:ssa.

KKV voi välimiesmenettelyn aikana antaa päätöksen, jossa todetaan, että toinen välimiesmenettelyn osapuolista on syyllistynyt pakottavan kilpailuoikeusnormin laiminlyöntiin. Koska asiasta ei ole säädetty lailla, voidaan katsoa, että välimiesoikeudella ei voi olla velvollisuutta asettaa viranomaisen päätöstä oman ratkaisunsa perustaksi. Kilpailuviranomaisen päätös toimii välimiesmenettelyssä ennemminkin osana todistusaineistoa. Voidaan katsoa, että päätös kannattaa ottaa välimiesmenettelyssä huomioon, sillä jos välitystuomio on ristiriidassa pakottavan kilpailuoikeussääntelyn kanssa, on se vaarassa tulla mitätöidyksi tuomioistuinkontrollin keinoin.

Kilpailuoikeuden katsottiin EU:ssa pitkään kuuluvan yksinomaan julkisen täytäntöönpanon piiriin. Uuden sääntelyn myötä yksityisoikeudellisen täytäntöönpanon merkitystä on selvästi pyritty kasvattamaan. Myös sääntelyaukkojen määrä yksityisoikeudellisessa täytäntöönpanossa on vähenemässä. Kilpailuoikeusriidat ovat taloudellisesta näkökulmasta katsottuna usein merkittäviä, ja välimiesmenettely on perinteisesti ollut nimenomaan elinkeinoelämän suurten yritysten välisten sopimusriitojen ratkaisumenettely. Onkin oletettavaa, että välimiesmenettelyissä käsiteltävien kilpailuoikeusriitojen määrä jatkaa yhä kasvuaan.

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The Scope of Application of the Charter of Fundamental Rights of the European Union – Quo Vadimus?

Jonna Genberg[1]

Keywords: EU Charter, European Union Law, Åkerberg Fransson, Melloni, Court of Justice of the European Union, Fundamental Rights, Human Rights, Direct Effect

Abstract

The Lisbon Treaty has brought about fundamental changes to the structure of the EU. One of the most important changes is the conversion of the Charter into a legally binding "bill of rights" for the EU. Since the Charter has become legally binding, discussion has arisen concerning the Charter's scope of application. In 2013, the European Court of Justice gave its ruling in case C-617/10 Åkerberg Fransson, which concerned the clarification of Article 51(1) of the Charter. The standpoint of the CJEU was that the article must be interpreted as meaning that the Charter is addressed to the Member States when they are acting "within the scope of European Union law". In dealing with Åkerberg in a coordinated way, the CJEU took a conscious first step towards developing a general theory on how to apply the Charter. Through its recent preliminary rulings, the CJEU has attempted to close the gap by interpreting the notion of "implementing Union law" broadly, thereby clarifying the mixture of different wordings, making it possible to more easily predict the Charter's scope of application in a particular case. The Charter may be a powerful tool when integrating fundamental rights into new EU legislation. However, whether it can be considered to have been successful in practice leaves some room for doubt.

1 The author holds a Master of Laws degree from the University of Helsinki. At the time of writing, the author was a student, and this article is based on a seminar paper on European Union law.

Full Article

> *"As you can see, at EU level, the Charter has evolved into a powerful tool. Evidently, not all is perfect yet. Even the best fundamental rights assessment may come to incorrect conclusions. However, it can certainly no longer be said that the EU institutions do not take fundamental rights seriously. The Charter and a very active approach from the Commission to promote its application have made sure that today fundamental rights play a key role in the development of new EU policies and proposals."*
>
> Viviane Reading
> Vice-President, European Commission
> Commissioner of Justice, Fundamental Rights and Citizenship[2]

1 Introduction

1.1 The Purpose of this Article

The application of EU law according to Article 4(3) TEU is a principle that the national courts have accepted, but which also poses difficulties when applied by national courts and administrative bodies. This article focuses on the implementation and application of the Charter on Fundamental Rights of the European Union[3], in other words what Article 51 regulating the scope of application of the Charter signifies in practice, and the role of the CJEU.

This article includes an examination of the background of the Charter, in particular Article 51 (Chapter 2), followed by a presentation of important case law of the CJEU, and finally an analysis of theoretical problems concerning e.g. terminology when interpreting the Charter and the role of the CJEU (Chapter 3). The article finishes with brief conclusions (Chapter 4).

1.2 A Description of the Question at Issue

The Lisbon Treaty has brought about fundamental changes to the structure of the EU. One of the most important changes is the conversion of the Charter into a legally binding bill of rights for the EU[4], and the official

2 Speech delivered in Tallinn, 31 May 2012.
3 The Charter of Fundamental Rights of the European Union, 2010/C 83/02 ("the Charter").
4 Article 6(1) TEU.

mandate for the EU to accede to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[5]. It is thus affirmed that fundamental rights constitute general principles of EU law as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States. These advances have given the Union a strengthened fundamental rights mandate that has provided the basis for the emergence of a new "fundamental rights architecture"[6], and contributes to the visibility and better protection of fundamental rights within the EU.[7]

Although the Charter has become part of primary EU law, the scope of application of the Charter is limited in a significant way, viz. the Charter becomes applicable on a national level only when EU law is in question. Given the importance of being able to run Charter arguments, the most important issue will be determining whether the Charter applies in certain situations on national level.[8] In other words, the question arises on whether an EU norm is applicable in a particular case or not.

The scope of application is regulated in Article 51(1) of the Charter. According to the article the Charter applies to the institutions, bodies, offices and agencies of the Union and to Member States, but it applies to Member States "*only* where they are *implementing* European Union law" (author's emphasis). This means that only when Member States are acting pursuant to directives or regulations they must act in accordance with the Charter. However, the borderline between EU law and national law is not always easy to establish in a case *in concreto*. According to the recent case Åkerberg *Fransson*[9], the notion of the implementation of EU law seems to correspond with the scope of application of EU law. Another recent case, *Melloni*[10], has also brought about some further precisions. When Åkerberg *Fransson* ap-

5 Article 6(3) TEU.
6 Carrera *et al.*, p. 2.
7 Skouris, p. 7.
8 The Commission does not have the power to intervene as guardian of the Treaties, and it is left to the Member States to apply their own systems to protect and ensure compliance with fundamental rights through their national court systems (COM (2010) 573 final).
9 Judgment of 26 February 2013 Åklagaren *vs* Åkerberg *Fransson*, case C-617/10 (2013).
10 Judgment of 26 February 2013, *Stefano Melloni vs Ministerio Fiscal* (*Melloni*), case C-399/11.

pears to confirm a fairly broad but still limited conception of the Charter's scope of application on national level, case *Melloni* brought some interesting clarifications concerning the coexistence of European and national standards on the protection of fundamental rights and the scope of application of the Charter. These two decisions shed some light on the notion of application on a national level, as well as clarify the mixed wordings in the Article 51 of the Charter and the explanations behind them.[11]

The upholding of fundamental rights by Member States when they implement EU law is in the common interest of all the Member States because it is essential to the mutual trust necessary for the smooth operation of the EU. This principle is particularly important in view of the expansion of the EU *acquis* in areas where fundamental rights are especially relevant, such as the area of freedom, security and justice, non-discrimination, EU citizenship, the information society and the environment.[12] The CJEU has been placed at the heart of the new architecture on fundamental rights, and can be regarded as one of its key guarantors.

The adoption of the draft Charter was a major achievement as neither agreeing on the scope of *ratione materiae* of the instrument, nor reaching a compromise on the most central horizontal questions, was easy.[13] The issue now lies in the definition of to what extent the Charter should bind the Member States. This task was a politically challenging exercise. Among other issues, the relation between the Charter and other sources of fundamental rights (including the ECHR[14] and the Member States' Constitutions), the level of protection to be ensured, as well as the possibility of providing for limitations to the rights to be codified by the instrument, were extensively de-

11 Platon, p.1.
12 COM (2010) 573 final, p. 9.
13 The draft Charter was adopted in less than one year, in October 2000. See Kaila, p. 294.
14 On the structure and background of the ECHR, see e.g. Mowbray, A. Cases, Materials, and Commentary on the European Convention on Human Rights (3rd ed. 2011). The book, however, does not touch on the subject of the relationship between the Charter and the ECHR.

bated. The provisions of the Charter governing its scope of application are thus the result of a delicate compromise. The formulation of Article 51(1) has resulted in different interpretations, and the academic opinions are undoubtedly divided.[15]

2 The Scope of Application of the EU Charter

2.1 An EU Bill of Rights?

The question on whether the Charter constitutes a kind of bill of rights for the European Union has been thrown around with the background in a federalist association. This would essentially signify that the Charter constitutes a roof of fundamental rights over all Member States, and would make national fundamental rights legislation superfluous. This line of thought has been criticized, since the Charter, as pointed out many a time in legal literature, is not meant to replace national fundamental rights. The Charter in the sense of a true bill of rights in the EU would also mean an extensive workload for the Commission, acting as the central authority for fundamental rights cases for all Member States. After all, the EU of today is not a European federal state.[16]

However, to reach the European citizens on a national level it may be a positive thing to 'market' the Charter and its complementing purpose in a way that is historically relatable, and to strengthen a collective European identity. The CJEU's role as a "constitutional court" has been secured as the authoritative interpreter of the Charter rights. As a result, the Court will occupy (and has already occupied) a very strong place within the rights-based constitutionalism in Europe.[17] In any case, the term has been used in legal literature describing the Charter, and seems to be rather accepted among commentators in the sense that it symbolizes the change from the Charter as a non-binding document to a legally binding bill of rights.[18]

15 Kaila, p. 293. On the debate regarding the EU as a centre for human rights and the role of the CJEU prior to the adoption of the Charter, see e.g. von Bogdandy, pp. 1307–1338.
16 Vivane Reading for one has criticised the comparison of the Charter with a U.S style federal bill of rights.
17 Sweet, p. 153.
18 See e.g. Skouris, p. 7.

2.1.1 The Background of the Charter

The position of the fundamental and human rights was in the beginning open and unclear in the European integration process. In the 1957 TEC there was not even a wind of wording of any fundamental or human rights, not to mention inclusion in any register in the national constitutions. This omission can best be attributed to the drafters' vision of the nature of the institution being created, one of limited competence and economic purposes.[19] Human rights were to be protected by the Member States' national constitutions and laws. However, some of the regulations in the Treaty had some obvious connecting links with the fundamental rights, e.g. the articles on the prohibition against discrimination based on nationality and the right to equal wages for men and women.[20]

In the end of the 1950s and in the beginning of the 1960s, the CJEU ruled in a few cases that projected an exceedingly restrictive attitude towards fundamental rights, which in turn led to a discussion concerning the role of fundamental rights in the European integration.[21] The priority of EC law in situations of conflict however caused some anxiety especially in Germany[22] and Italy, concerning e.g. the effect this would have on the constitutional fundamental rights in the Member States.[23] The 1970s witnessed a focus on the ECHR, which was referred to by the CJEU for the very first time in 1975.[24]

The introduction of a fundamental rights regime into EU law is essentially a story of judge-made law, and has been characterized as an exercise of bold

19 Defeis, p. 1107.
20 Ojanen, p. 82.
21 The breakthrough came with the case *Costa vs Enel* in 1964, when the ECJ for the first time laid down the priority of EC law in situations of conflict.
22 The German doubt concerned the lack of a written register of fundamental rights that was characteristic for the Member States' constitutions. Thus the German constitutional court initiated the discussion concerning the question whether a separate catalogue of fundamental rights should be incorporated into the EC Treaties.
23 Ojanen, p. 82.
24 Ojanen, p. 83. Noteworthy is also that the ECJ did not refer to the case law of the ECtHR until the end of the 1990s, although the content of the ECHR often does not become clear until examining the case law of ECtHR.

judicial activism.[25] This largely means that the recognition of fundamental rights has become binding EU law through judgments given by the CJEU. The fundamental and human rights clauses have gradually been incorporated in the TEU and the TEC, and consequently, development has shown a gradual conjunction between EU law and the ECHR.[26] Some commentators have suggested that the fundamental rights doctrine of the CJEU was primarily motivated by the court's desire to protect the supremacy doctrine expressed by the court from being rejected at the national level.[27]

The developments in case law as well as Treaty law initiated a need to codify the main fundamental rights that stem from the constitutional traditions and international conventions common to the EU. The codification was aspired in order to ensure effectiveness and provide a true bill of rights for the authorities and citizens instead of having to search through thousands of pages of court decisions and a variety of legal and political texts.[28] With the Charter, the EU has equipped itself with quite a wide range of fundamental rights on different levels, updated in accordance with changes in society, and scientific and technological developments.

2.1.2 Scope of Application of the Implementation Stipulation

The Charter applies primarily to the institutions and bodies of the EU. It therefore concerns in particular the legislative and decision-making work of the Commission, Parliament and the Council. The legal acts of these institutions and bodies must be in full conformity with the Charter. The scope of application of the Charter is stipulated in Article 51(1), which reads as follows:

> 1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

25 Weiler, p. 1005. For criticism on the CJEU's judicial activism, see *e.g.* de Waele, Henri: 'The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment', *Hanse Law Review,* 6(1) (2010), pp. 18–22.
26 Rosas (2012), p. 1271.
27 Weiler, p. 1137.
28 *Ibid*.

> 2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

The scope (or field) of application has been deliberately limited. According to the article, the first and primary addressees of the Charter are the Union institutions themselves, as national fundamental rights law does not bind them. The Charter applies to the Member States *only* when they are implementing EU law. This wording is very restrictive. In other words, it does not apply in situations where there is no link to EU law.[29] It should, however, be noted that the earlier case law of the CJEU as well as the Explanations[30] relating to the Charter refer to both "implementing" EU law and acting within "the scope of" EU law.[31] As Article 51(1) of the Charter refers to a situation of "implementing" Union law, there has been much discussion on whether this expression is more restrictive than the "scope" or "field of application" of EU law.[32] Noteworthy is also the dissimilarity in the different language versions of the Charter and the use of the verb "implement"; e.g. in Swedish "*tillämpa*", in Finnish "*soveltaa*" in comparison with "implement" in English and *"mise en oeuvre*" in French.

If a certain question does not fall under the scope of application of EU law, the EU fundamental rights are not binding for the authorities and courts of a Member State, and these are expected to follow both the fundamental rights in the constitution, and the international fundamental rights regulations. In these cases the CJEU is not competent to examine the question whether a Member State's constitutional law is consistent with the fundamental rights of the EU or not, if the case does not fall under the scope of application of EU law.

29 Rosas 2012, p. 1277.
30 OJ [2007] C 303/17.
31 In the Explanations relating to the Charter, reference is made both to the case law of the ECJ stating that the requirement to respect fundamental rights is binding on the Member States "when they act in the scope of Union law" and to cases using the notion of "implementation". In any event, the reference to implementation was not meant to exclude situations where Member States apply Union legal norms directly, including situations where they invoke derogations from such norms, in other words including situation where there is no separate national implementing act (COM (2010) 543 final).
32 Rosas 2012, p. 1276.

Article 51(2) of the Charter states that it does not extend the field of application of EU law beyond the powers of the EU or establish any new power or task for the EU, or modify powers and tasks as defined in the Treaties. Before the Charter, implementing EU law referred to an "agency situation"[33]: the EU confers a power onto a Member State to introduce EU secondary legislation into national law. Implementing was the giving of "hands and feet" to EU law in order for it to become effective.[34] The classic reasoning in the field of protection of fundamental rights has therefore changed[35], and from now on, the CJEU uses a starting point in the Charter itself, no longer the common constitutional traditions, and the ECHR.[36]

Direct effect refers to whether individuals can rely on the EU law in domestic courts.[37] The doctrine of direct effect applies in principle to all binding EU law including the Treaties, secondary legislation, and international agreements.[38] The meaning of direct effect remains contested. In a broad sense it means that provisions of binding EU law which are sufficiently clear, precise, and unconditional to be considered justiciable can be invoked and relied on by individuals before national courts. There is also a narrower concept of direct effect, which is defined in terms of the capacity of a provision of EU law to confer rights on individuals.[39] The notion of direct effect should be kept apart from the notion of direct applicability, which explains whether an EU law needs a national parliament to enact legislation to make it law in a Member State. Treaties and regulations are vertically and horizontally directly effective. Either a Treaty or a Regulation can be used as a piece of law in a Member State court against the state or another individual.

Thus, the Treaty of Lisbon has introduced some major procedural reforms, the most important of which is said to be an easing of the conditions for the admissibility of actions brought by individuals against regulatory acts of

33 See e.g. Groussot *et al.*, pp. 3–5.
34 Besselink (2001), p. 77.
35 The ECHR constituted until the entry into force of the Lisbon Treaty the primary source of reference. See e.g. the EUI working paper of Kokott-Sobotta.
36 Compare e.g. Case C-555/07 *Kücükdeveci* (2010) ECR I-365 (para. 22) and Case C-144/04 *Mangold* (2005) ECR I-9981 (para. 74).
37 Vertical direct effect means that you can use EU legislation against a Member State. Horizontal direct effect means that you can use EU legislation against another individual.
38 Craig - de Burca, p. 180.
39 *Ibid.*

the institutions, bodies, offices and agencies of the EU, as natural or legal persons can bring proceedings against a regulatory act if they are *directly* affected by it and if it does not entail implementing measures.[40] National courts are bound to ensure respect for Charter rights and must accordingly review national legislation in the light thereof, thereby setting it aside in case of conflict, even in horizontal settings. This negates the fact that in practice such an "indirect horizontal effect" of fundamental rights contained in the Charter effectively amounts to making them binding on private individuals.[41] The competences of the EU are very wide and they allow for legislation that interferes deeply into horizontal relationships.[42]

2.1.3 Clarifying Case Law

When a Member State fails to fulfill the fundamental rights expressed in the Charter when implementing EU law, the Commission, as guardian of the Treaties, has powers of its own to try to put an end to the infringement and may, if necessary, take the matter to the CJEU. The Commission may only intervene if the situation in question relates to EU law.[43] The factor connecting it with EU law will depend on an evaluation *in casu*.[44] For example, a connecting factor exists when national legislation implements an EU directive in a way contrary to fundamental rights, when a public authority applies EU law in a manner contrary to fundamental rights or when a final decision of a national court applies or interprets EU law in a way contrary to the fundamental rights.[45]

Regarding the application of the Charter, the CJEU has issued several judgments clarifying the Charter's purpose and objectives. For example, it was established in the 1980s, in the landmark case of *Wachauf,* that Member States – when implementing EU law – are bound to respect EU fundamen-

40 Skouris, p. 10. See also Art. 263(4) TFEU.
41 Claes, Monica. *The European Union, its Member States and their Citizens* in Leczykiewicz & Weatherhill, p. 50.
42 *Ibid*, p. 51.
43 See Article 51(1) of the Charter.
44 COM (2010) 573 final, p. 10.
45 Those infringement proceedings which raise issues of principle or which have particularly far-reaching negative impact for citizens will be given priority. See COM (2010) 573 final, p. 10.

tal rights.[46] The CJEU continued to stake out the path and later held that Member States were also to respect EU fundamental rights when derogating from EU law[47] and potentially when acting 'within the scope of EU law.'[48] In the *ERT* case[49], the court went further by holding that it could also review a national rule which may restrict a fundamental freedom on grounds of public order, public security or public health, adding that such a rule must be interpreted in the light of the general principles of law and in particular of fundamental rights whose efficacy is ensured by the CJEU.

A few years after the entry into force of the Lisbon Treaty, in 26 February 2013, the CJEU issued two important decisions, Åkerberg *Fransson* and *Melloni*[50] that brought some interesting and expected (but also criticized) precisions on the application of the Charter on a national level, especially concerning the terminology and the consequences of the notion of implementing EU law in the sense of Article 51(1) of the Charter.

2.2 Pre-Lisbon Case Law

In the pre-Lisbon case law two main situations can be distinguished: when implementing or applying EU law through national measures and when derogating from EU law through national measures.[51] Two central cases that represent these lines are *Wachauf*[52] and *ERT*[53]. Conversely, where EU law imposes no obligation on the Member States, the Charter simply does not apply, as the example of *Annibaldi*[54] demonstrates. In other words, there

46 5/88 *Wachauf* [1989] ECR 2609 at para. 19.
47 C-368/95 *Vereinigte Familiapress Zeitungsverlags-und Vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689 C-260/89 *Elliniki Radiophonia Tileorassi* [1993] ECR I-2925.
48 C-309/96 *Annibaldi* [1997] ECR I-7493.
49 Judgment of 18 June 1991, *Elliniki Radiophonia Tileorassi ('ERT')*, case C-260/89, ECR I-2925.
50 Judgment of 26 February 2013, *Stefano Melloni vs Ministerio Fiscal* (*Melloni*), case C-399/11.
51 See Groussot *et al.*: "The Scope of Application of Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication". The article has equated the scope of application of EU fundamental rights with the scope of application of EU law.
52 Judgment of 13 July 1989, Wachauf, case C-5/88, ECR 2609.
53 Case C-260/89 *Elliniki Radiophonia Tileorassi*.
54 See *supra* note 44.

can be said to exist two different types of obligations that EU law imposes on the Member States; EU obligations that require a Member State to take action (*Wachauf*), and EU obligations that must be complied with when a Member State derogates from EU law (*ERT*).[55]

2.2.1 Case Wachauf

The CJEU's case law reflects the reality that the Charter has to be observed also by the Member States. Such an obligation is crucial as implementation and application of EU law relies essentially upon national legal orders. The central question in the landmark case *Wachauf* was the issue of the implementation of EU secondary legislation, and that Member States when implementing EU law are bound to respect EU fundamental rights as far as possible. In other words, the Charter applies to the Member States when they are acting as part of the decentralized administration of the Union and applying or implementing a regulation, transposing a directive or executing a decision of the Union or a judgment of the CJEU.[56]

It was observed in the decision that EC rules would be incompatible with the requirements of the protection of fundamental rights in the EC legal order. Since those requirements are also binding on the Member States when they implement EU rules, the Member States must apply those rules in accordance with those requirements.[57]

2.2.2 Case ERT

In 1991, in the wake of *Wachauf,* the CJEU finally clarified in *ERT* that it had the jurisdiction to review any national measure that negatively affects any of the individual rights guaranteed by EU law, in particular the EU citizen's free movement rights.[58] In the case, the test was formulated as a requirement that the national measures 'fall within the scope of Community law'.

55 See Arestis, pp. 6–9.
56 See Arestis, p. 6.
57 C-5/88, ECR 2609, para. 19.
58 Groussot *et al.*, p. 7.

In the *ERT* judgment, the CJEU accepted to follow what Advocate-General Slynn stated in case *Cinétèque*.[59] Advocate-General Slynn held that the Court had indeed jurisdiction to review a national measure derogating from a fundamental freedom in the case in question, the freedom to provide services for compliance with EU fundamental rights:

> In particular, where a Member State relies on the combined provisions of Articles 56 and 66 [now 52 and 62 TFEU] in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights. Thus the national rules in question can fall under the exceptions provided for by the combined provisions of Articles 56 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the Court.[60]

Before reaching this conclusion, the Court, citing *Wachauf,* recalled that the Union obviously cannot accept national measures that are not compatible with EU fundamental rights, provided that these measures do not fall outside the scope of EU law, as provided in *Cinétèque*.[61] However, where the CJEU holds that the national rules at issue do fall within the scope of EU law and reference is made to the Court for a preliminary ruling, it provides all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the efficacy of which the Court safeguards and which derive in particular from the ECHR.[62] This meant in the *ERT* case that the Greek Government needed to prove that the national legislation at issue was not in breach of the general principle of freedom of expression in order to be able to rely on the Treaty provisions that allow each Member State to justify national measures 'providing for special treatment for foreign nationals on grounds of public policy, public security or public health'.[63]

According to *Wachauf*, the requirements for the protection of fundamental rights are binding on the Member States when they implement Community rules. The CJEU widened the scope of this obligation in *ERT*, ruling that fundamental rights have to be respected when a Member State derogates

59 Cases 60/84 and 61/84 [1985] ECR 2605.
60 Case C-260/89 *Elliniki Radiophonia Tileorassi*, para. 43.
61 *Ibid*, para. 41.
62 *Ibid*, para 42.
63 Groussot *et al.*, p. 9–10.

from a fundamental economic freedom guaranteed by the Treaties.[64] In its subsequent jurisdiction, the CJEU has required Member States to respect fundamental rights as general principles of EU law also in some other situations having a *sufficient* connection to EU law. However, the exact scope of this obligation is subject to controversy. This case law takes EU fundamental law protection into the sphere of each Member State where it coexists with the standards of fundamental rights protection enshrined in national law or in the ECHR.

The Explanations[65] relating to Article 51(1) of the Charter recalled that the obligation to respect fundamental rights defined in the framework of the EU is only binding on Member States "when acting in the scope of Union law". Instead of limiting itself to *Wachauf*, the document also refers to *ERT* corresponding to the "Derogation situation" and to *Annibaldi* where the formulation "within the scope of Community law" is used.[66] According to Rosas, for example, the CJEU did not unveil any radical new principles in cases *Wachauf* and *ERT*, but simply stated the obvious.[67]

2.3 Post-Lisbon Case Law

Since the Charter has become legally binding, discussion has arisen concerning the Charter's potential "federalizing effect" and the horizontal application of the Charter.[68] Article 51(1) of the Charter would, however, appear to prohibit such power for the CJEU outside the application of EU law, and an "American evolution" through judicial activism is said to be more or less impossible.[69]

64 E.g. Kaila refers to the 'Agency situation' and the 'Derogation situation', see Kaila p. 293.
65 Explanations Relating to the Charter of Fundamental Rights OJ [2007] C 303/17. See also commentary on Article 51(1) of the Charter in Mock – Demuro, pp. 315–322.
66 Kaila, p. 297.
67 Rosas (2012), p. 1274.
68 Groussot et al. p. 16. See also Mock-Demuro, p. 320–321.
69 *Ibid*, p. 18.

2.3.1 Case Melloni

In *Melloni*[70], the Court touched on the important issue of the relationship between national fundamental rights and EU fundamental rights. The *Melloni* case is important for the interpretation of Article 53 of the Charter. Article 53 reads as follows:

> Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the [European] Union or all the Member States are party, including the [ECHR] and by the Member States' constitutions.

The CJEU rejected the interpretation according to which Article 53 authorizes Member States to apply their standard of protection of fundamental rights guaranteed in the constitution when that standard is higher than the one based on the Charter, and thus giving priority to it over the application of EU law.[71] The CJEU reaffirmed that EU law is superior to national law, including national constitutions. Consequently, based on Article 53, the question is whether a Member State could invoke its constitution and constitutional protection of fundamental rights and refuse to apply a provision of EU law. Here the issue is not merely about the scope of Article 53 but, interestingly, it turns into an issue of the relation between national constitutional law and EU law, more specifically the nature and limits of the principle of primacy of EU law.

The approach taken by the CJEU is hardly surprising, with regard to the principle of primacy: the unconditional primacy of EU law over national

70 *Melloni* case C-399/11.

71 The Court stated that "That interpretation of Article 53 of the Charter would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution". It then went on by saying that "by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order... rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State." See paras. 55–57.

law is confirmed. Moreover, Member States may apply their standard of protection of fundamental rights when implementing EU law, with the condition that primacy of EU law is secured and the level of protection of the Charter is not compromised.[72]

The significance of the *Melloni* judgment should not be underestimated. While its immediate effects could be restricted to the particular EU legislative act in question, the judgment sends a worrying message about the way in which the CJEU sees its role as a "constitutional review court".[73] The starting assumption of the Court is not only that the EU legislator has respected fundamental rights but also that the scope of protection of fundamental rights, including those recognized in the Charter, should be determined on the basis of an act of secondary law. If this method was applied more broadly, an EU act could never be found invalid for breaching fundamental rights. The judgment in *Melloni* is also a step towards the centralization of standards of fundamental rights protection in the EU, at least in areas where Member States' authorities are implementing EU acts.

2.3.2 Case Åkerberg Fransson

In case Åkerberg *Fransson*[74] we get to the core of this article. Behind the case, which *prima facie* appears to be simple, lie two extremely complicated problems. The first problem concerns whether the CJEU can try a question of interpretation whatsoever when the case concerns a situation on a national level. The other problem regards the application of the principle of *ne bis in idem* in Article 50 of the Charter.[75]

One of the elements of this case was the CJEU's attempt to clarify Article 51(1), and how the sentence according to which the Charter is addressed

72 See para. 60.
73 See D. Leczykiewicz: *Melloni* and the future of constitutional conflict in the EU U.K. Const. L. Blog (22nd May 2013) (available at http://ukconstitutionallaw.org).
74 Judgment of 26 February 2013 Åkerberg *Fransson*, case C-617/10 (2013).
75 According to General-Advocate Cruz Villalón the confusion in this case arises in connection to the district court's first question of interpretation, where the problem in itself is perceived to be easier than the previous. The question has to do with the dimension of the principle of primacy in relation to a demand that has been stated by the Swedish Supreme Court. The confusion is caused by the fact that the sufficient link (see also para. 33) to EU law is stated in the case law of the ECtHR, which makes the question about the dimension of *ne bis in idem* in EU law even more complicated.

"to the Member States only when they are implementing Union law" is to be interpreted. The Court addressed the question of implementation to establish its jurisdiction, not because the referring court put it forward as a preliminary question itself. This caused some alarm in the Advocate-General's office.[76] The most important element of this case concerns the clarification that Article 51(1) is to be interpreted as meaning that the Charter is addressed to the Member States when they are acting "within the scope of European Union law". The Charter can be invoked not only in situations when Member States are transposing an EU directive or executing a Regulation, but more broadly when the situation at issue falls "within the scope of EU law", which also covers for example situations when Member States are derogating from the free movement provisions of the internal market.[77]

The reference to the Explanations[78] via Article 52(7) the Charter and Article 6(1) TEU, allow the conclusion that the wording "when implementing EU law" in Article 51(1) is to be equated with the phrasing "within the scope of EU law", which is used in the Explanations.

The CJEU takes a uniform approach to the question in which case fundamental rights are guaranteed in the EU legal order. Fundamental rights guaranteed as general principles of EU law apply "within the scope of EU law" and so do fundamental rights as enshrined in the Charter. A different scope of application of the two sources of EU fundamental rights would lead to considerable confusion and inconsistencies, given that they exist next to each other, and given that many of the fundamental rights contained in the Charter had already been recognized as constituting general principles of EU law before the Charter became legally binding.

The CJEU allows the applicability of the national fundamental rights standard "in a situation where action of the Member States is not entire deter-

76 See para 56.
77 As far as the issue of admissibility is concerned Advocate-General Cruz Villalón proposed that the Court of Justice should find that it lacks jurisdiction, since the Member State concerned is not implementing Union law within the meaning of Article 51(1) of the Charter. The Advocate-General believed that a careful examination of the circumstances of the case militates in favour of reaching that conclusion. See para. 5.
78 OJ [2007] C 303/17.

mined by European Union law", yet the fact that there is a connection with EU law means that the Charter level of protection applies as a minimum guarantee. It also means that the national standard can only apply if it does not compromise the primacy, unity and effectiveness of EU law.

In dealing with *Åkerberg* and *Melloni* in a coordinated way, the CJEU took a conscious first step towards developing a general theory on how to apply the Charter. First, it engaged with a long running debate about the Charter's scope of application with regard to Member States' actions, interpreting the article 51(1) wording of "only when implementing Union law". Second, it interpreted article 53, which states, "Nothing in the Charter shall be interpreted as restricting or adversely affecting human rights … as recognized by the ECHR and by the Member States' constitutions".

2.4 To Apply, or Not to Apply: That is the Question

The pre-Lisbon case law does not pose any greater problems at first glance, but the essential question that needs a clear answer is whether the relevant national measure in a case falls within or outside the scope of EU law. Article 51(1) of the Charter is clear, but the application test is easy to criticize. EU law is a constantly evolving set of rules, which makes it virtually impossible to create a predictable test or a clear definition for when the Charter becomes applicable, that is to say, when EU law is at hand. And as already mentioned, there is no clear line drawn between national rules that fall within the scope of EU law, and national measures that fall outside the scope. As we have seen in the recent case law presented, there have been clear disagreements between Advocates-General and the CJEU on the in-

terpretation of Article 51(1).[79] In practice, the key question is the level of connection to EU law, and whether one is able to identify any cross-border elements that would link the case in question with an EU norm in a *sufficient* extent.[80]

Of course, the CJEU insists in its case law on the fundamental principle of the primacy of EU law over national law. The primacy is absolute and unconditional, and EU law overrides even national constitutional law.[81] However, in practice, the CJEU does not really have the power to enforce this principle because of the fact that it is not hierarchically superior to national courts. This means that, in reality, the enforcement of EU law in and by Member States essentially depends on the readiness of national courts to give full effect to the principle of primacy, and not on coercion. In practice, most national courts appear to have no difficulty in accepting the primacy of EU law.

However, national courts function within a specific constitutional context, which must be taken into account. EU law might sometimes require them to step outside of that context. This is a huge request especially for constitutional courts the primary responsibility of which is to protect and uphold the constitution. A constitutional court could consider that too much. The dilemma the constitutional court faces, if following the principle of primacy would force it to derogate from what it regards as core principles of the Constitution, more particularly where national fundamental rights are concerned.[82] E.g. Timmermans finds it fascinating how the national supreme courts and the CJEU have handled this dilemma. According to Timmermans they have mostly succeeded in neutralising it over the past 50

79 See e.g. Opinion of Advocate-General Cruz Villalón in case C-617/10 Åkerberg *Fransson*.

80 The Explanations for Article 51(1) has also caused some puzzlement among commentators; the view of Groussot-Pech-Petursson accentuates a need for clarification: "One swift look at the so-called explanations seems to suggest that the drafting deficiency thesis is accurate but also suggests that those who drafted Article 51(1) did not fully understand the arguably opaque case law of the Court as regards its jurisdiction to review national acts for their conformity with EU fundamental rights". Besselink (2001) refers to a "concoction of formulation" because of the mixed wordings in the case law of the Court.

81 See e.g. case C-11/70 *Internationale Handelsgesellschaft* (1970) ECR 1125 and case C-409/06 *Winner Wetten* (2010) ECR I-8015.

82 Timmermans, p. 16.

years thanks to the co-operation that has developed between them through the European judicial dialogue.[83] However, after the cases Åkerberg *Fransson* and *Melloni*, critical voices have been raised. Åkerberg in particular has been criticised for being based on a "too far-fetched understanding of the CJEU's competences"[84]. The CJEU has not only been criticised by academic commentators, but now also by the German *Bundesverfassungsgericht*. This negative feedback has been interpreted as a warning for the CJEU.[85] One can think of this situation as two sides of a coin: the danger of a too broad and "intrusive" scope and the incredibility of an ineffective Charter of fundamental rights.

3 Reflections on the Application of the Charter and the Role of the CJEU

Before the Lisbon treaty, which entered into force on 1 December 2009, the Charter did not have legal effect (although it has been around in a somewhat different form since December 2000). The EU's accession to the ECHR was made obligatory by Article 6(2) TEU, as amended by the Lisbon Treaty, and thereby complements the system to protect fundamental rights by making the ECtHR competent to review EU acts. The guarantees enshrined in the ECHR are a minimum standard. While signatory parties must not afford a level of human rights protection lower than that required by the Convention, they are free to exceed it. If the level of protection within a member state is higher than the protection provided by the ECHR, the Convention must not be construed as limiting any of the rights entrenched in the domestic legal framework of a member state.[86] In January 2010, in the *Kücükdeveci case*, the Court underlined for the first time the new legal status of the Charter, simply stating "the Charter of Fundamental Rights of the European Union is to have the same legal value as the Treaties".[87]

83 For more on formal and informal judicial dialogue, see e.g. Timmermans, pp. 16–19.
84 See opinion of Leijten, Ingrid. The Applicability of the EU Fundamental Rights Charter: A Matter of Who Has the Last Word? Leiden Law Blog. Posted on 21 May 2013 in Public Law.
85 *Ibid.* See also para. 2 in the press release no. 31/2013 of 24 April 2013. Available at http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg13-031en.html (last visited 2.3.2014).
86 Article 53 ECHR.
87 *Kücükdeveci* case C-555/07, ECR I-365 (para. 22).

3.1 What is the Problem?

Speaking of the application of the Charter, EU Justice Commissioner Reading raises the problem of the "knocking on the wrong door" effect. It is stated that every day, the Commission receives hundreds of letters from citizens who want to enforce their fundamental rights *vis-à-vis* this or that Member State. This has convinced the Commission that informing citizens about when the Charter applies and where to go to when their rights are violated requires further effort.[88] However, when looking at recent case law by the CJEU, it seems that the problem of the scope of application is more complex than the mere lack of information flow to Member State citizens. In fact, there seems to be more than one perception of what the problem of "the application of the Charter on a national level" really means. When reading the Commission's official reports and statements, the problem addressed is the problem of citizens' misinterpretation of the Charter's scope of application, rather than the Member States' criticism of the *extent* of the Charter's scope of application. The main problem that needs to be solved for the smooth function of the Charter is the relationship between the defense of fundamental rights and the limitation of the EU's powers.[89]

In line with the principle of subsidiarity, Article 51(1) of the Charter states that its provisions are firstly addressed to the institutions, bodies, offices and agencies of the Union, which are required to respect the provisions of the Charter when performing their tasks and whose authority is limited accordingly. A judgment of the Court of 19 July 2012, *Parliament v. Council*, in which the European Parliament asked the Court to annul a Council Regulation referred to this duty imposed on *all* the institutions to respect fundamental rights.[90]

Drafting Article 51(1) of the Charter was indeed a difficult task. While there was no doubt that, according to Article 6 TEU and to the case law of the CJEU, the Member States have to respect fundamental rights as general principles of EU law, the fact remains the relation between those principles

88 COM (2012) 169 final, p. 8.
89 Mock-Demuro, p. 315.
90 Judgment of 19 July 2012, *Parliament v. Council*, case C-130/10, not yet published, (para. 83).

and the fundamental rights and principles reaffirmed by the Charter is not clear-cut. On the one hand, it could be argued that fundamental rights are a subset of general principles of EU law. On the other, the Charter comprises rights, which might not necessarily qualify as such principles.[91] Furthermore, the general principles of law are often unwritten, rather vague and have to be adapted through case law, whereas the Charter establishes a written, sharply defined framework for the protection of fundamental rights. Therefore, a simple parallelization between the fields of application of these two systems of fundamental rights protection did not seem to be a realistic option.[92]

The Charter can be subjected to quite vast criticism, for instance the distinction between rights and principles, which is likely to create new uncertainties and lead to the relegation of the social and economic rights as mere inspirational principles lacking capacity to be enforced. According to Doğan, if the Charter is to serve well the objective of the promotion and protection of human rights, especially by empowering the CJEU to provide coherent, adequate and effective safeguarding for the rights in question, it is crucial that the aforementioned distinction is removed and the provision restricting the jurisdiction of the Court be amended.[93]

The problematic situation of when to apply the Charter may also perhaps be due to the fact that there is no specific test in order to assess with predictability whether national law falls within the scope of application of the Charter. Whether it is possible to create an instrument for the Member States to test with security whether a certain case falls in the scope of the Charter is however rather unlikely, since the area of law in question constantly lives and changes along with the social and economic structures of the Union.

3.2 A New EU Fundamental Rights Architecture: the Role of the CJEU

Among the changes that the Lisbon Treaty brought about, the most significant one has been the conversion of the Charter into a legally binding docu-

91 For more information on general principles of EU law, see e.g. Raitio (2003), pp. 101–123.
92 Kaila, p. 295.
93 Doğan, p. 79.

ment for the EU. The challenge consists, among other things, of turning what is merely an architectural design into an effective institutional, policy and legal apparatus that ensures the *practical* delivery of fundamental rights to individuals. The role of the CJEU is essential in this regard, especially when it comes to guaranteeing access to justice for every person whose fundamental rights have been allegedly violated as envisaged in Article 47 of the EU Charter[94], and to ensure future transparency.

Whether we choose a broader or a narrower interpretation of Article 51 of the Charter, this does not change the fact that it does not replace national constitutions, but merely complements them. Citizens thus have to get used to the fact that they are faced with a multi-layered system of fundamental rights protection: the CJEU, the ECtHR and the national courts. According to the Treaty, the Court has three main sources of inspiration as regards the protection of fundamental rights within the EU legal order: the Charter, the Convention and the Constitutional traditions common to the Member States. Unavoidably, this reach of jurisdiction, the clash of interests in a complex modern society, and the need for a central final judge of fundamental issues has over time led to the CJEU becoming a constitutional federal court capable of handling fundamental rights issues, much like the United States' Supreme Court, and it has done so in the absence of a unifying document granting it that authority or embodying the fundamental rights principles.[95] One of the Charter's *raisons d'être* is to provide this unifying document and the foundational authority for the CJEU.

The CJEU has through recent case law attempted to close the gap by interpreting the notion of "implementing Union law" broadly, thereby clarifying the mixture of different wordings, making it possible to more easily predict the Charter's scope of application in a particular case. The Court had the choice to maintain its existing fundamental rights case law as a relatively autonomous body, which might have allowed for more flexibility and legitimacy when dealing with references from the national courts that concern sensitive Member State measures falling "within the scope of EU law". The

94 Article 47 of the Charter states that "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article".

95 See the forewords to Mock – Demuro for an overview of the development.

Court is now in possession of a key role regarding the future of the Charter. Future actions of the CJEU in "developing" the scope of the Charter is quite crucial for the Court in order to maintain certain Member States' trust (Germany for one is known for its skepticism). The CJEU may have to prove through future case law that the Charter is not a failure, but in fact, a diamond in the rough.

3.3 Quo Vadimus?

The question regarding the scope of application of Article 51 of the Charter and what the scope of application means in practice on a national level are nuanced issues. Rosas debates a need to "de-dramatize the question [of the field of application of the Charter] and also show that the real problem is not so much the applicability of the Charter as such but rather the applicability of *another* norm of Union law"[96].

The CJEU's terminology also causes difficulties. For instance, regarding the wordings "the capacity to invoke" or "to rely on" a provision of EU law, is not entirely satisfactory, because the wordings are rather vague. Therefore, direct effect really boils down, as far as courts are concerned, to a test of justifiability; is the norm "sufficiently operational in itself to be applied by a court" in a given case.[97] The existence of direct effect is a matter of interpretation of EU law to be settled by the CJEU, rather than by the national courts separately, and national courts still regularly ask the CJEU to decide on the direct effect of a norm of EU law in terms of "whether or not".[98] In the EU context, administrative authorities are put under a duty to enforce directly effective norms of EU law, and to set aside conflicting national legislation, even though they cannot use the mechanism of Article 177 EC Treaty to ask the CJEU for guidance on whether the EU norm has direct effect and on whether there is a conflict with national law. Therefore, those authorities are liable to apply EU law in the wrong way.[99]

96 Rosas (2012), p. 1270.
97 *Ibid.*
98 In Case 103/88 *Costanzo* (1989) ECR 1839, 30–32 the Court of Justice stated that 'when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration including decentralized authorities such as municipalities, are obliged to apply those provisions.
99 De Witte (2011), p. 333.

The disappearance of EC law through the Lisbon Treaty and its absorption within the new and broader regime of EU law creates new questions about the scope of the principle of primacy. The crucial element for the effective application of the principles of primacy and direct effect indicated by the CJEU is the *attitude* of national courts and authorities.[100] The competences of the EU are very wide and they allow for legislation that interferes deeply into horizontal relationships. Whether this is considered legitimate and desirable ultimately depends on whether we accept that the EU is more than an internal market and includes a community of values. The CJEU finds itself in the middle of an inter-judicial structure – the triangle of national courts, the ECtHR and the CJEU. The CJEU will find itself under increasing pressure from below (the national courts) and above (the ECtHR), and these pressures will require it to intrude ever more deeply into EU-level policy-making. More judicialisation will most likely be the result of this course of action.[101]

4 Conclusion

The Charter may be a powerful tool when integrating fundamental rights into new EU legislation. However, whether it can be considered to have been successful in practice leaves some room for doubt. The application of the Charter lacks transparency, although lawyers and judges may be more comfortable using the Charter as the codified tool it was aimed to be in their work, rather than unwritten general principles scattered around in case law.

The development in case law has witnessed an expansionist streak in the CJEU's approach in the case *Åkerberg Fransson*, to equate "implementing Union law" to "acting within its scope". For EU insiders and human rights practitioners the situation may appear in different lights regarding the question on when the now binding Charter and its sometimes higher human rights standards apply, and the CJEU may have done little more than reformulate the dilemma. In case *Melloni*, in an effort to protect the Court's understanding of EU law, the CJEU turned the wording of article 53 of the Charter completely on its head, practically positioning the Charter as

100 Kaila, pp. 346–347.
101 Sweet, pp. 152–153.

a maximum rather than a minimum standard of human rights protection. Both cases seem to leave room for interpretation, however, allowing details of the general theory to modified in future cases. At this moment, one could say that the Charter indeed has strengthened the legal certainty when it comes to effective fundamental rights, but the question of transparency in the process leaves room for improvement.

If the CJEU does no more than create new case law through references to earlier case law, it can be difficult to derive clear guiding principles for the interpretation of the Charter. When looking at recent case law it also seems that the Court may deliberately create new competence to attempt to clarify the rationale behind a particular norm, as it appears to have happened in Åkerberg *Fransson*. This question is, however, debatable. It would perhaps be better to solve a question of interpretation by defining clear guiding principles as a result of case law that are in accordance with the wordings and Explanations of the Charter. One of the *raisons d'être* of the Charter was, as we have seen when looking at the background, the codification of the fundamental rights of the EU to facilitate the process and increase transparency on a national level, and to create a stronger protection for the effectiveness of fundamental rights. Then on the other hand, fundamental rights constitute a dynamic body of rights, and an exhaustive codification probably would not remain up to date for very long. However, the main question for the future to come is whether the CJEU is much more than "*la bouche de la loi*", and whether it has gone too far in carving out the way for the Charter.

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List of Abbreviations

CJEU	Court of Justice of the European Union (European Court of Justice)
EC	European Community
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
OJ	Official Journal of the European Union
TEC	Treaty Establishing the European Union
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

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Elihu Root and International Legalism: Legalist Remarks on Collective Security and American Realism

Keywords: Charter of the United Nations, collective security, Covenant of the League of Nations, Elihu Root, international law, legalism, realism

Tuomas Lihr[1]

Abstract

Elihu Root was the paragon of the legalist era in American foreign policy, which saw the strengthening of international law and institutions as the keys to world peace. In the battle over the Versailles Treaty in US Senate, Root denounced the newfound collective security system because of the political nature of the process. Legalists deemed law and courts as best suited to settle the conflicts arising from irrational power politics in world affairs.

This article examines the League of Nations and UN collective security systems, as well as American standpoints on them, from a Rootist perspective. A legalist might argue that the UN inherited the fundamental flaws of the League because the institutional balances of the organizations are very similar. Prevailing American realist approaches to collective security and international law, in turn, have come a long way from Root's time.

While recognizing the inevitable taking out of context such a study entails, I am going to propose that through legalist eyes, the UN could benefit from a more balanced structure. Welcomed developments could include restraining the dominance of the Council in decision-making. In US foreign policy, legalists might advocate an American commitment to the UN collective security system and international court projects.

1 A third year law student at the University of Helsinki. The article is based on my Bachelor's Thesis. I would like to thank my supervisor Paolo Amorosa, as well as my editors Heini Tuura and Elisa Suokko, for their comments and other contributions to the article.

Full Article

1 Introduction

When President Obama made the case for a military strike against the Assad government in Syria last fall, he did not lean on legal arguments in order to justify possible military action. Instead, the President stressed that the United States must act because "our ideals and principles, as well as our national security, are at stake".[2] The statement was preceded by other permanent members of the Security Council vetoing a stronger presence of the international community in the conflict. Although the Americans changed their mind on the use of armed force in the last minute, the Syrian civil war remains a showpiece of an international crisis, where the US government turns to unilateral actions in the face of a deadlock in the UN collective security system. President Obama's rhetoric above embodies the contemporary American realist approach to world politics, in which ideals and interests prevail over formal international legal rules.

This curious union between ethics and power has not, however, always been the predominant starting point in American approaches to collective security or other international legal questions. In this article, I intend to examine the League of Nations and United Nations collective security systems as well as American standpoints on them from a radically different perspective, the legalism of former Secretary of State Elihu Root. By assessing the two systems through legalist eyes, I hope to highlight some controversial areas of both collective security and American foreign policy today. In the process, the study serves as an illustration of the influence ideologies and political projects have had in shaping the American relationship with the wider world.

Root was the paragon of the legalist era in American foreign policy, which saw the strengthening of international law and institutions as the keys to world peace. I find his thinking particularly topical because of his deter-

2 "Remarks by the President in Address to the Nation on Syria", 10 September 2013. Available at http://www.whitehouse.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria.

mination to separate morals and politics entirely from law, as it provides a stark contrast with present practices in both the US and the UN. Moreover, many of the issues Root and the international community faced during the drafting of the League are still sources of heated debate to this day. Therefore, to me, the legalism of Root provides an excellent perspective for reflecting upon the current state of affairs. While recognizing the context of Root's framework, as well as its possible shortfalls to the contemporary reader, legalism provides interesting ideas that still resonate in present-day discussions.

The article will start off by introducing Root's background in classical legal thought, which formulated the foundation of his criticism against the League's collective security system. Next, I will make brief notions on the battle over the Versailles Treaty in US Senate, focusing on elaborating the central roles of legalism and partisan politics in the events that resulted in the US rejecting League membership. Root denounced President Wilson's League because of the political nature of the institution. While a political body essentially controlled the League's arsenal, he believed that international conflicts were primarily caused by legal disputes, which ought to be resolved apolitically via arbitration and adjudication. After presenting Root's thoughts, I am going to take a look at the UN collective security system and American standpoints on it through Rootist eyes. As Root's criticism over the League culminated in the weakness of courts and law in world affairs, such issues as judicial review will also be touched. The article will be concluded by considerations on what Root has to offer to contemporary international legal and American foreign policy debates. Respect for legal procedures and restraining power with rules and responsibility emerge as perhaps his most timely legacy.

2 Root's Roots in Classical Legal Thought

From the point of view of international legal history, Root stands out first and foremost as a keen proponent of strong international courts and international law. Today, Root's assurance on international law's capacity to resolve conflicts may seem excessive or even naïve. Such a commitment to legality and stability in foreign affairs was, however, the rule rather than the

exception in early 20th century America.[3] The legalistic nature of the era is manifested for instance in the US Department of State, which was headed by a lawyer from 1889 to 1945. It should not come as a surprise, then, that the beliefs and assumptions of lawyers profoundly influenced the nation's foreign policy.[4] Root was arguably the paragon of these diplomat-lawyers, and one of the most influential American politicians of his time especially in the field of foreign affairs. Among other prestigious positions, he served in the Cabinets of McKinley and Roosevelt, co-founded and chaired the American Society of International Law, and was awarded the Nobel Peace Prize in 1912.[5]

Root and other diplomat-lawyers of the time were imbued with classical legal ideology, which was implanted through legal education to practically all elite lawyers in the US.[6] The ideology's premises on the nature of society were instrumental in formulating the legalist worldview.[7] Most importantly, classical legal thought held that law was capable of resolving disputes through its neutral expertise and apolitical character. Applied to the international context, this indicated that international conflicts were solvable through the application of objective and determinant legal rules, and thus international law and institutions could effectively regulate the international arena.[8] Characteristically for common law thought, courts – and thereby lawyers – instead of governments or codification were the central players in defining these rules.[9] Due to these outlooks legalists saw international law as something inherently different from international politics, which enabled it

3 Landauer Carl (2007), *The Ambivalences of Power: Launching the American Journal of International Law in an Era of Empire and Globalization,* Leiden Journal of International Law 20, at 354.
4 See Zasloff Jonathan (2003), *Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era*, NYU Law Review 78:239, especially at 4.
5 For a comprehensive illustration of Root's career, see Leopold Richard (1954), *Elihu Root and the Conservative Tradition*.
6 Zasloff 2003, at 13.
7 For an extensive review of classical legal thought and its influence on foreign policy, see *ibid.,* at 9-45.
8 *ibid*., at 18-19.
9 Koskenniemi Martti (2007), *The Ideology of International Adjudication,* at 16-17.

and the international lawyer to arise above conflicts and neutrally mediate them without controversy. Many lawyers do not share this view today, as international law is often rather seen merely as a continuation of international politics.[10]

Moreover, classical legal thought presupposed similar interests between different groups in society. The state was seen as a factionless entity where no fundamental conflicts of interest existed, and therefore the task of governments was to remain neutral *vis-à-vis* social groups and promote general welfare instead. In the global context, this led to legalism rejecting the anarchical Hobbesian worldview with fundamental conflicts of interests and a constant threat of war between nations.[11] By contrast, the legalist starting point was that no such conflicts existed, and international confrontations were in fact irrational and false in nature.[12] A peaceful symbiosis between states was attainable because conflicts originated in principle from misunderstandings and irrational nationalistic ambitions. Were states to act rationally, global stability and world peace could be reached. Consequently, it would fall upon neutral legal institutions to resolve the apparent conflicts arising in international affairs.

These two key classical legal premises, namely the irrationality of conflicts and the potential of law to resolve them via courts, form the basis for understanding Root's criticism against the League. A third important element of classical legal thought to be mentioned here is its insistence on the importance of public opinion in creating law. Quite interestingly, Root held in a legal peripheralist spirit that should law and public opinion "point different ways, the latter is inevitably stronger".[13] Therefore, laws were "capable of enforcement only so far as they are in agreement with the opinions of the community".[14] Peripheralism emphasized, *inter alia*, customs and social norms as sources of law instead of codification.[15] Despite seeing public

10 See e.g. Koskenniemi Martti (1990), *The Politics of International Law*, European Journal of International Law 1.
11 See e.g. Hobbes Thomas (2012), *Leviathan*.
12 Zasloff 2003, at 19.
13 Root Elihu (1908), *The Sanction of International Law* in The American Journal of International Law, Vol. 2:3, at 452.
14 *ibid*., at 453.
15 Zasloff 2003., at 19-25.

opinion as the ultimate source of law, Root, however, was generally deeply skeptical of the power of the people and advocated a strong professionalized administration in order to restrain the people.[16] He believed, for instance, that governments were often irrationally "driven into war against their will by the pressure of strong popular feeling."[17] Consequently, Root argued that for democracy to work, public opinion must be "educated" and the government headed by "competent leaders".[18]

While Root did underline the importance of democratic governments as a foundation of a durable law between nations especially during the War,[19] his conservative ethos led him to focus more on pursuing a system of checks and balances in government and restricting the man in the mass throughout his career.[20] Portraying legalism generally as a cosmopolitan idealism would also be fallacious, since, in spite of its language, it served through various people and forms to promote US national interests as well.[21]

3 A Foreign Policy Guru in a Stormy Political Scene

Before moving on to Root's views on the League of Nations Covenant and its collective security system, brief remarks will be made on the political context in which the Treaty of Versailles entered the US Senate for ratification. Keeping in mind the purpose of this paper, some of the more important political components of the Treaty fight were Root's immensely influential position in the Republican Party and a tumultuous political situation. One could argue that, excluding President Wilson, Root was the single most important person in the political battle resulting in the fall of the Treaty in the Senate.

16 Landauer 2007, at 332-335.
17 Root Elihu (1907), *The Need for Popular Understanding of International Law* in the American Journal of International law I, at 1.
18 Dubin Martin David (1979), *The Carnegie Endowment for International Peace and the Advocacy of a League of Nations 1914-1918* in Proceedings of the American Philosophical Society 123:6, at 346.
19 See e.g. Root Elihu (1917), *The Effect of Democracy on International Law* in Proceedings of the American Society of International Law at Its Annual Meeting (1907-1917), Vol. 11.
20 Leopold 1954, at 8-9.
21 See Coates Benjamin (2010), *Transatlantic Advocates: American International Law and U.S. Foreign Relations, 1898-1919*, especially at 7-8.

It would be an understatement to refer to the political scene of the time as meddled. Wilson's Republican rivals had achieved a narrow Senate majority in the 1918 midterm elections, which did not bode well for any Wilsonian policies entering the Senate, let alone a proposal as controversial as the Versailles Treaty. Politics were characterized by hostile personal relations, as the Republican leaders cordially loathed Wilson, and these feelings were mutually returned by the President.[22] In addition to hostile relations between the left and right, party unity was also remote. The fundamental issue arousing ideological disagreement was the role the US should play in the postwar world. Senators were divided from League enthusiast international activists to isolationists, while the majority was positioned somewhere in between with more or less reserved or receptive feelings toward League membership.[23] Crucially, Republicans were particularly divided into factions and unable to agree on any alternative postwar plan to Wilson's Treaty.[24] This is where the prestige of Root stepped in, as the leaderships of both parties looked to him as the determining person in formulating the Republican postwar program.[25]

As far as Root's influence in the political scene is concerned, one can hardly overemphasize his extraordinary political leverage. Root's career had been one of spectacular success ranging from a lucrative corporate law business into the front row of American politics. At the time of the Treaty fight, he was widely regarded as the pre-eminent Republican foreign policy guru. His influence can be illuminated for instance by his relationship with the future Secretary of State Frank B. Kellogg, who sought Root's advice on a daily basis in office, and was in general hesitant to act at all without conciliating

22 Cooper John Milton (2001), *Breaking the Heart of the World: Woodrow Wilson and the Fight for the League of Nations*, at 7. The degree of contempt between the key players can be illustrated in Wilson's response to a proposal of appointing Root as legal adviser to the League Council. While others endorsed Root's candidacy, Wilson stated: "I have absolutely no faith in Mr. Elihu Root and feel sure that he would do something to prove his falseness if we delegated him to act." Wilson quoted in Leopold 1954, at 35.
23 Cooper 2011, at 4-5.
24 Zasloff 2003, at 99.
25 Cooper 2011, at 77.

Root first.[26] It was no coincidence, then, that in the midst of one of the great political debates of the century, the Republicans would turn to Root in an attempt to draft a program the entire disunited party could stand by, and to mediate between the party wings.[27]

Due to this framework in Washington, Root's position was so strong during the Treaty fight that, in practice, he ended up formulating the Republican policy.[28] The legalist approach proved to be the ideal middle ground between the interests of the party factions.[29] Hence Root's policy was to serve the purpose of ensuring party unity, which gave the Republicans the final word in the vote because of its narrow majority in Senate seats. Root was a sophisticated political player, and while he truly held a strong faith in legalist foreign policy, he was not ignorant of its deficiencies, either.[30] One would do well to keep Root's political projects in mind when reading his criticism against the League. Even though he delivered the rival program to Wilson's Treaty, Root did not rule out the US membership in the League. While clearly not perfect, he stated that "it remains that there is in the Covenant a great deal of very high value which the world ought not to lose".[31]

Another noteworthy remark on the political nature of shaping the American relationship with the larger world is a common dissatisfaction with the result of the Senate sessions. In the end, the majorities of both parties saw that there was more to win than lose in joining the League. While Democrats stood by Wilson's original Treaty, the Republican – that is Root's – proposal was to ratify the Treaty with certain reservations for example with respect to the collective security system.[32] Even though a partially satisfying bipartisan

26 Zasloff 2003, at 117.
27 See Cooper 2011, at 77-78.
28 Zasloff., at 109.
29 See Cooper 2011, at 106-108.
30 Zasloff 2003, at 124, 128.
31 Root quoted in *ibid.*, at 108.
32 Republicans were typically more concerned with the League's impact on American sovereignty, and insisted i.a. on an absolute right to withdraw from the League, and the affirmation of the Monroe doctrine. *ibid.*, at 106.

compromise in the subject matter was attainable many times during the Senate debates, the hostile parties were not able to cooperate.[33] As a result, the US would not join the League, since neither party's stand received the required votes to enter the Treaty into force.

4 League of Nations Covenant and Root

Turning now to the Covenant of the League of Nations and Root's vision of the postwar world order, Root saw the need to strengthen international law and courts as the self-evident lesson to be learnt from World War I. He believed that the lessons of history affirmed law as the ultimate, and quite frankly, the only effective tool in restraining such independent players as nations in the international society.[34]

As law was at the heart of Root's world view, he unsurprisingly felt troubled by the inherently political nature of the Covenant of the League of Nations, and especially its collective security system under Article X. Article X proved to be the most controversial part of Treaty in the Senate debates. It provided that member states "undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all States members of the League". Combined with a rule that any threat of war anywhere in the world was deemed "a matter of concern to the whole League"[35], many Americans felt that adapting the Covenant and its ambiguous obligations to wage war around the globe would endanger the nation's sovereignty and in effect turn the US into "the world's policeman".[36] Whether or not these fears were justifiable is debatable, because the binding legal nature of the collective security system can be seen as somewhat vague, at least in comparison with the UN Charter. While the actual legal effects of Article X remain debated, the Covenant certainly introduced the principle of collective security to the international community, even if the system proved to be quite unsuccessful in practice.

33 Cooper 2011, at 2.
34 Root Elihu (1916), *Outlook for International Law* in Addresses on International Subjects, at 393-395.
35 Article XI, League of Nations Covenant.
36 Zasloff 2003, at 109.

When a dispute likely to lead to a conflict between member states emerged, the Covenant imposed an obligation to submit the matter either to arbitration, judicial settlement or to the Council of the League.[37] However, few flattering words can be said of the efficiency of the system. No compulsory jurisdiction for adjudication or arbitration was set, and member states retained the final discretion in determining whether they recognize the case to be suitable for submission under the Covenant.[38] As for the Council's procedure, the Covenant urged the Council to attempt to settle the dispute first, but should this fall through, the procedure led formally only to a publication of a report of the dispute's facts and the Council's recommendations to the parties.[39] The nature of these recommendations varied theoretically between unanimous and majority reports, granting a sort of right to veto to Council members.[40]

The Covenant did not absolutely prohibit non-defensive unilateral use of force, but if a member state waged war in breach of its obligations, it declared that the aggressor shall "be deemed to have committed an act of war against all other members", which triggered various sanction resorts from financial sanctions to military force prescribed in Article XVI. However, the Covenant remained silent on which organ of the League was to take action and what sorts of measures could be taken in given circumstances. The decentralized nature of the process resulted in a system where, in the end, the individual members instead of the League decided whether or not to resort to sanctions.[41] This sort of a system obviously could not work very well in the world of international relations, especially when a strict application of even the few obligations deriving from the Covenant was not in fashion

37 Article XII, League of Nations Covenant.
38 *ibid*., Article XIII.
39 *ibid*., Article XV.
40 A unanimous report prohibited member states to go to war with a party "which complies with the recommendations of the report", while member states preserved "the right to take such action as they shall consider necessary" in face of a report backed by merely a majority of Council members.
41 Shaw Malcolm N. (2008), *International Law*, at 1217.

during the interwar years.[42] The informal practices of key League members eroded the already vague procedure even further. It did not help, either, that withdrawing from the League was made relatively easy, as Japan and Germany illustrated before the outbreak of World War II.[43]

Some go as far as claiming that the great powers never took the League quite seriously in any disputes of importance and kept all matters of significance out of it.[44] The League's role has been portrayed as "a debating society" while key players sought solutions to conflicts themselves.[45] There is some evidence that bear out this skeptical view on the League, a typical case in point being the Second Italo-Abyssinian war. This was one of the few times the League actually decided on imposing sanctions on a member state, but the enforcement of the sanctions was half-hearted because the great powers were more concerned with securing their national interests in the tensed international scene.[46] Alternatively, some deny the inherent weaknesses of the League and defend its potential, blaming disloyal national political leaders for its collapse. The more optimistic view tends to emphasize the relatively steady and successful functioning of the League in its earlier stages before the hardships it faced in the 1930's.[47]

To Root, the fundamental flaw in the League was the organization's political structure. He summarized its problems in resting "the hope of the whole world for future peace in a government of men, and not of laws".[48] Root was generally deeply skeptical of governments, which he thought were tempted to pursue power and wealth in international affairs.[49] Under the Covenant, the League Council – a political body formed mainly of the victor states of the war – operated as the executive of the organization.[50] Furthermore, the Covenant did not provide any meaningful restraint on the Council's discretion on when and how to act. From Root's legalist framework, an arrange-

42 For a case in point, see e.g. the handling of the Corfu incident in the Council in 1931 in Scott George (1973), *The Rise and Fall of the League of Nations*, especially at 216.
43 Klabbers Jan (2013), *International Law*, at 171.
44 See Scott 1973, especially at 166.
45 Carr Edward Hallett (1939), *The Twenty Years Crisis 1919-1939*, especially at 133-134.
46 For a detailed description of the events, see e.g. Scott 1973, at 339-368.
47 See Walters F.P. (1952), *A History of the League of Nations*, especially at 467.
48 Root quoted in Coates 2010, at 420.
49 Root 1916, at 394.
50 See Article IV, League of Nations Covenant.

ment where political consideration between Council members with no judicial control whatsoever determined the outcome of critical debates was plainly inadequate. He referred to the system as "an attempt to preserve for all time unchanged the distribution of power" and "an alliance of one half of the active world against or for control of the other half".[51] In sum, Root saw the system as extremely risky, and as far as Article X goes, he thought that the "whole article should be stricken out".[52]

Since irrational government endeavors caused the cracks in the international order, Root advocated shifting decision-making from political bodies to such impartial institutions as courts as a way to limit state power.[53] True to his legalist worldview, Root distinguished law and politics entirely from one another in international affairs. He held that all causes of war were either political or legal by nature, and significantly, legal disputes "cover[ed] by far the greater number of question upon which controversies between nations rise".[54] If the disputes between states were usually legal by nature, the emphasis in drafting the postwar order should have been in fortifying legal institutions, not placing a political body like the Council in the driver's seat in conflict resolution. Consequently, Root criticized the Covenant for throwing aside "all effort to promote or maintain anything like a system of international law, or a system of arbitration, or of judicial settlement, through which a nation can assert its legal rights in lieu of war".[55] This argument was in a sense justified, since, for example, the newfound Permanent Court of International Justice was rather weak, and international arbitration with the Permanent Court of Arbitration as its flagship rested on the agreement of the parties to function.

In Root's eyes, then, apolitical and impartial arbitration and adjudication institutions were the keys to world order and peace. While Root admitted that the War had exhibited the inadequacy of the international law of the time, he hoped that the trauma caused by the War would be strong enough to raise a common desire to subject nations to the rule of law – to "overcome

51 Root quoted in Cooper 2011, at 79.
52 Root quoted in *ibid.*
53 Koskenniemi 2007, at 12.
54 Root quoted in Zasloff 2003, at 100.
55 Root quoted in *ibid.*, at 101.

the determination of each nation to have the law suited to its own special circumstances".[56] At the heart of this legally regulated international system would be an international court with general and compulsory jurisdiction. The role of the judiciary was to be molded on the example of the Supreme Court in the US. Like the independent states in America had submitted to the jurisdiction of a court to settle disputes for the greater good, the nations of the world ought to do the same, and this would in fact also serve their self-interests.[57] Arbitration under objective and neutral rules was the definitive means of conflict resolution because a rational nation had little need for conflict with others in world affairs. Once again classical legal thought rears its head in Root's rhetoric.

In the light of the recent rise of undisguised realism and moralism in international relations, another topical aspect in Root's stance was his insistence on separating law from morals. President Wilson outraged Root by regarding in a moralist tone often linked to Wilsonian internationalism that the Covenant constituted moral obligations to act in international conflicts.[58] As a political scientist, Wilson saw international legal rules more as loose suggestions than binding law, and his liberal internationalism was based on political thought in contrast with Root's legalism. The President's belief in an evolutionary theory of political development and a teleological faith in historic progress toward democratization and corporate unity led him to believe that laws and institutions were susceptible of strangling "the spontaneous growth of society".[59] Because of the contradictory starting points of the two men, the President preferred an organization consisting of loose, evolving moral norms over the law-led proposal of Root, which the President deemed too mechanistic and rule-based.[60]

Root, in turn, saw Wilson's distinction between moral and legal obligations as disastrous for the entire system of international law. Obligations deriving from international law had to be binding even if the sanction system was not correspondingly enforceable as the national one. Root did not accept

56 Root 1916, at 402.
57 Zasloff 2003, at 82.
58 *ibid.*, at 110.
59 Wertheim Stephen (2011), *The Wilsonian Chimera: Why Debating Wilson's Vision Hasn't Saved American Foreign Relations* in White House Studies 10:4, at 344-345.
60 *ibid.*, at 352-354.

the classical Austinian argument of the nature of international law as merely positive morality because of a lack of commands enforced by a sovereign power between Westphalian states.[61] He did, however, insist that in order to impose real obligations, international law had to be backed by sanctions of a superior power.[62] Classical legal thought provided Root's answer to this dilemma as well, since in a peripheralist ethos, the general public opinion of the collective civilization held the right to exercise punishment on sovereign nations.[63]

To Root, the real sanction of international law was in the public condemnation and disgrace that followed from breaking the standards of the community. Retaining international goodwill was fundamentally important for nations, since "nonconformity to the standard of nations mean[t] condemnation and isolation".[64] In Root's words, the punishment of international law was in the "terrible consequences which come upon a nation that finds itself without respect or honor in the world and deprived of the confidence and goodwill necessary to the maintenance of intercourse".[65] Root's views on the sanction of international law, public opinion and possible coercive sanctions were complex at times, and he also left some key parts unclear.[66] His conviction of the superiority of public opinion over coercive sanctions as the core of international law was, however, unwavering: "[t]here is but one power on earth that can preserve the law for the protection of the poor, the weak and the humble … and that is … the mighty power of the public opinion of mankind".[67] But how could such an abstract concept as global public opinion be formed in complicated international disputes? Keeping

61 On Austin's theory of legal positivism, see e.g. Austin John (1832), *The Province of Jurisprudence Determined*.
62 Root 1916, at 393-394.
63 *ibid*., at 394.
64 Root 1908, at 455.
65 Root 1916, at 396.
66 See Dubin 1979, especially at 352 and 368.
67 Root Elihu (1918), *Political Addresses by Elihu Root*, collected and edited by Bacon Robert and Scott James Brown, at 6.

Root's legalism in mind, it is hardly surprising that it would fall upon courts to define it on a case-by-case basis.[68] This illustrates Root's deep trust and faith in the ability of lawyers to resolve disputes reasonably and impartially.[69]

As mentioned above, Root's criticism served to block Wilson's League by uniting the divided Republicans. Legalism had a much more far-reaching influence in American internationalist thinking as well, as it would maintain its weight for the greater part of the interwar years and direct the foreign policy endeavors of the Republican administrations. These goals included strengthening international institutions and creating a system of law in international affairs.[70] The US ended up promoting quite progressive court systems after the War, including a court for the prosecution under international criminal law, which was a radical proposal at the time.[71] The American stance on the League, however, would remain somewhat reserved throughout its existence. At times the US co-operated successfully with the League,[72] but generally it all but backed out of an active role in international politics. In the words of President Harding, America should not be involved with the political affairs of other nations, "which do not concern us".[73] The US would more or less maintain this approach until World War II, which would rearrange the board once more.

5 Anti-Legalism under the UN Charter

After the League collapsed as a result of World War II, the world got a second chance in drafting an organization to pursue world peace with the establishment of the United Nations. As Root passed away before the outbreak of the War, there is no knowing how the failures of the interwar legalist foreign policy would have affected his stance on the drafting of the premier international organization this time. While recognizing the inevitable taking out

68 *Supra note* 62.
69 See Koskenniemi 2007, at 17.
70 Zasloff 2003, at 125-126.
71 Jescheck Hans-Heinrich (2004), *The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute* in 2 Journal of International Criminal Justice, at 54.
72 For a case in point, see e.g. the handling of the embargo on Bolivia and Paraguay in Scott 1973, at 246-247.
73 Harding quoted in Zasloff 2003, at 125.

of context such a study entails, the article will now take a look at the UN Charter and its collective security system from a Rootist perspective. The purpose of this study is to attempt to highlight some of its controversial aspects. One may argue that from a legalist perspective, the UN inherited the fundamental flaws of the League, since its institutions were cast in a fairly similar mold as the League's respective bodies with more or less significant revisions based on the lessons learnt from the League's fall.[74]

The Charter constitutes in principle significantly more explicit and comprehensive rules on the use of armed force in international affairs in comparison with the Covenant. The specific purpose and premise of the Charter is to limit the right of states to resort to warfare, or even use the threat of military force, in international disputes.[75] Its key starting point is to centralize the use of armed force in the hands of the Security Council in an attempt to limit the use of force exclusively to projects pursued in the common interest. Apart from action authorized by the Council, the only other exception to the prohibition of the use of force is the "inherent right of individual or collective self-defense" in the face of an armed attack.[76] Despite this change of premise, the political nature of collective security remained relatively unchanged, leaving little room for legal consideration endorsed by Root.

Similarly as under the Covenant, the process under the Charter is spearheaded by a political body, the Security Council.[77] Moreover, the victorious powers of the war would again form the core of the body, awaking Root's criticism of an attempt to preserve the distribution of power. The composition of the body is particularly vital because of the Council-led character of the UN. Under Chapter VII of the Charter, the Council has a monopoly to identify a threat to peace, a breach of peace or an act of aggression in international affairs. The collective security system is activated only if the Council determines that one of these situations is present. As none of the notions are defined in international law, the system characteristically offers great latitude to the Council in deciding whether and how to act.[78] Once

74 See Shaw 2008, at 1216.
75 Article 2, Charter of the United Nations.
76 *ibid*., Article 51.
77 *ibid*., Article 24.
78 See Klabbers 2013, at 174-176.

the system is activated by such a statement, the Council can order measures to be taken in order "to maintain or restore international peace and security". Under Articles 40-41 of the Charter, the Council should generally first take provisional measures and use sanctions without armed force. If it deems the sanctions and measures inadequate, Article 42 ultimately allows the use of military force.

Whether or not the Council is legally restrained in its consideration constitutes a point of controversy amongst international lawyers today. The supporters of an unlimited Security Council discretion tend to highlight the undefined language of the Charter with ambiguous key provisions as "a threat to peace".[79] In addition, they emphasize that determining if such a situation has occurred cannot be measured by legal criteria, as well as that no obligation can be placed on the Council to act if it does not want to.[80] Finally, the veto right granted in Article 27 to the permanent members can be abused to further national political interests.[81] In fact, the veto privileges can be depicted as the ultimate proof of the Charter's drafters' realist offset. By the provision, the drafters have been claimed to have abandoned any attempt to establish a general collective security system, and instead delimit it only to conflicts of minor importance where key players are of one mind.[82]

Alternatively, opponents of the unlimited discretion tend to emphasize that concretizing vague terms is a general feature of law.[83] Moreover, the international community aimed at crafting a careful balance of competencies between the bodies when drafting the Charter - not giving general power to adopt measures that bind everyone to an unrepresentative organ.[84] At the very least, norms of *ius cogens*, core human rights and elements of state sovereignty have been claimed to limit the Security Council in its actions.[85] The International Court of Justice has backed up this latter view by stating that

79 De Wet Erika (2004), *The Chapter VII Powers of the United Nations Security Council*, at 135.
80 *ibid.*, at 135-136.
81 *ibid.*, at 135.
82 See e.g. Claude Inis L. Jr. (1961), *The Containment and Resolution of Disputes* in Wilcox Francis O. and Haviland H. Field Jr. (eds), *The United States and the United Nations*, at 114.
83 De Wet 2004, at 136-137.
84 *ibid.*
85 See *ibid.*, at 369-372.

while "the purposes of the Organization are broad … neither they nor the powers conferred to effectuate them are unlimited".[86] All the same, the system can hardly be portrayed as the kind of comprehensive system of checks and balances embraced by Root. Nor does the distinction between law and politics that Root cherished exist in the organization's decision-making process, since the institutional balance of the organization can be seen as somewhat crooked – the executive organ has attained a hybrid role, holding also adjudicative powers.[87] Article 25 of the Charter grants the Council a right to make binding decisions on all member states. As a result, consideration by political criteria between Council members can lead to judicial outcomes for everyone.

Keeping Root's criticism against the League in mind, the subsequent question to ask is: what sort of role should courts play in all this? It is pretty safe to say that through Rootist eyes, their general status in the UN regime seems deficient. The Charter provides a principled obligation and a procedure for peaceful settlement of disputes under Chapter VI. The ICJ serves as the principal judicial organ of the UN[88], and its jurisdiction can be based either on contentious case or advisory opinion jurisdiction.[89] Still, as the Charter does not, for instance, provide any truly compulsory jurisdiction to the Court, one can hardly claim that adjudication or arbitration would conclusively limit the politics of international affairs today.[90] With respect to the Council's dominance in collective security, judicial review by the ICJ over Council resolutions has been proposed as a potential way to limit the

86 *Certain Expenses of the United Nations,* Advisory Opinion, ICJ Reports 151, 1962, at 168.
87 See Cronin-Furman K.R. (2006), *The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship* in 106 Columbia Law Review 435, at 438-439.
88 Article 92, Charter of the United Nations.
89 Articles 36 and 65, Statute of the International Court of Justice.
90 For a general discussion of the role international courts and tribunals play in the international sphere today, see e.g. Klabbers 2013, at 140-164.

Security Council's virtually unlimited latitude to run plays under the Charter. Such legal review, however, is far from unproblematic in the international sphere. A paradox between law and politics exists also at the heart of any system of judicial review.[91]

The question of the ICJ's competence to judicial review has been hotly debated especially because of certain ICJ cases, most notably *Lockerbie*[92]. In the Court proceedings, controversy arose on the possibility of the ICJ to constrain the Council's discretion to determine if a particular situation constitutes "a threat to peace".[93] In other words, the debate circulated around the Court's right to review the Council's binding decisions on a legal basis. For better or for worse, the appropriateness and legality of judicial review was left open in the case, as has been done in subsequent ones, too.[94] The matter has recently been brought up quite regularly, but the institutions have been reluctant to take a final stand on the problematic interpretation of the interaction between the Council and the Court.[95]

Were the UN to accept judicial review over Security Council resolutions, the system could be developed in the context of ICJ's advisory opinions.[96] As the name itself suggests, these advisory opinions are formally non-binding, but their legal precept can in fact be seen as highly authoritative.[97] A criti-

91 While maintaining basic legal guarantees in political decision-making is often deemed desirable, leaving politics to democratically elected politicians without courts engaging actively in the process is considered preferable at the same time. See Klabbers Jan (2005), *Straddling Law and Politics: Judicial Review in International Law* in MacDonald Ronald & Johnston Douglas (eds.), *Towards World Constitutionalism,* at 809.

92 In the case, Libya contested the legality of the actions the Council took in order to extradite Libyan nationals for their alleged involvement in an explosion of a flight. See *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. USA)*, Order, ICJ Reports 114, 1992, *Questions of Interpretation and Application of the 1971 Montreal Convevtion Arising from the Aerial Incident at Lockerbie (Libya v. USA),* Preliminary Objections, Judgment, ICJ Reports 9, 1998 and *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. USA)*, Order, ICJ Reports 152, 2003.

93 De Wet 2004, at 15.

94 Klabbers 2013, at 163.

95 Disagreements usually come down to different interpretations of the Charter. For a general review of the relationship between the powers of the ICJ and the Council, as well the case law touching the question of judicial review with an emphasis on *Wall Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 136, 2004), see Cronin-Furman 2006.

96 See De Wet 2004, Chapter 2.

97 Klabbers 2013, at 162.

cal voice might point out that the opinions would, nevertheless, in practice lead to no consequences even if the ICJ found a Security Council resolution illegal. Furthermore, some reject judicial review as too risky an enterprise: should the Council disregard the Court's judgments, the international legal system would be put to "far greater jeopardy than if the question of the lawfulness of Security Council action remained unresolved."[98] Supporters, in turn, highlight the undermining effect such an opinion would have on a resolution's legitimacy, as well as the justification for non-compliance this sort of a finding entails.[99] Calls for judicial review in the UN are also in a more general sense usually linked to concerns with the rule of law in the organization, Council resolutions being a textbook example of problematic areas from a rule of law perspective.[100]

All in all, one may argue that judicial review could contribute to developing the legal standards of Council resolutions.[101] While a review might not be suitable for situations that require subtle political valuation and are very much open to interpretation, it could provide basic legal guarantees to the process and constrain the Security Council from abusing its powers flagrantly.[102] From a legalist perspective, giving the power of review to the Court would probably be a welcomed development, since Root endorsed the equivalent right of the Supreme Court under the US Constitution.[103] Hence judicial review might answer some of the legalist concerns on the arguably unrestricted politics of collective security. In sum, however, the present collective security system under the Charter is far from the legally restrained, balanced international system advocated by Root.

98 Nolte Georg (2000), *The Limits of the Security Council's Powers and its Functions in the International Legal System: Some Reflections* in Byers Michael, *The Role of Law in International Politics*, at 318.

99 De Wet 2004, at 58.

100 This is because resolutions can impose sanctions without comprehensive procedural requirements, and provide few mechanisms for their subjects to fight the impositions. See Klabbers 2005, 816-818.

101 In fact, some claim that the Court already does review the decisions of other institutions with some regularity even without clear authorization, and the key question is, instead, how and when this power should be used. Klabbers 2013, at 163.

102 Instead of testing "the wisdom behind a certain policy", the review would merely have the power to "test whether that policy is applied in accordance with certain requirements. With respect to the judicial review's problems of mixing law and politics, a marginal, procedural review has been put forward as possibly the most acceptable version of review. See Klabbers 2005.

103 Leopold 1954, at 75-76.

6 American Realist Standpoints on the Charter

Keeping this general discussion on the anti-legalist structure of the UN in mind, the article turns next to examining American standpoints on the Charter. One of the biggest differences between the first steps of the League and the UN was the American involvement in the projects. After World War II, the US took the driver's seat in the UN, completing a 180 degree turn in its approach to world politics in contrast with the aftermath of World War I. How does one explain this turn from political isolationism to activist international co-operation? A different political scene as well as the leadership's changed ideas on international affairs can shed some light on the question. After discussing the reasons for the relative ease of ratifying the treaty, this part will explore the prevailing American position on collective security, which has come a long way from the legalist era in US foreign policy.

The Roosevelt administration had already before the Second World War gradually attempted to abandon the US retreat tactics in foreign policy.[104] While realist concerns were on the rise in US foreign policy thought as the threat of another global war grew more imminent, traditional American isolationism was still too strong for the government to get actively involved in the international situation in the late 1930's.[105] The change of pace in the US movement to international political activism can obviously be accredited to the outbreak of World War II. This time, as war was raging on a global realm, there was early accord between American leaders that the US must be actively involved in securing the postwar peace.[106] Involving the USSR in organizing the postwar world was an equally fundamental preoccupation for American officials as the War was drawing to a close.[107] This illustrates the realist ethos of the early US standpoint on the UN – maintaining peace would only be possible if the great powers co-operated.[108] Hence, for instance, the rebuilt collective security system was only to be implemented in

104 For a case in point, see e.g. Scott 1973, at 384.
105 Russell Ruth B. (1958), *A History of the United Nations Charter: The Role of the United States 1940-1945*, at 1.
106 *ibid.*
107 *ibid.*, at 949.
108 *ibid.*, at 960-961.

conflicts where the major powers were of one mind.[109] Moreover, the importance of maintaining adequate national military strength and a balance of power were recognized as basic factors in preserving international security in addition to collective security.[110] Such starting points stand in stark contrast with Root's legalism.

President Truman faced also a very different political scene when bringing the Charter to the Senate for ratification from the one President Wilson had to deal with. World War II had finally convinced the clear majority of both parties that isolating from world politics was no longer an option for the US. Similarly as with the Covenant, many deemed the Charter a far from perfect document. This time, though, the widespread concern to avoid repeating the fate of the League ensured a bipartisan support for its ratification, as the parties were more prepared to make compromises.[111] Although many were divided on the final document, the usual doubts being that it was either too strong or weak, there was general consensus that the Charter was "better than no agreement and, in any event, the best that could be got at the moment".[112] During the Senate debates, minor controversies arose for instance on the limitations UN membership would bring on the action of US armed forces, and the jurisdiction of the ICJ.[113] In the end, however, ratifying the treaty got almost absolute bipartisan support, with only two Senators voting against joining the UN.

In the early decades of the organization, the Americans defended the strict application of the Charter and its restrictions on resorting to armed force quite vigorously at times.[114] In general, however, US policy in the UN during the Cold War has been described as a record of attempts to enhance its "usability as a Western instrument" in the midst of the contest for power with the Soviet Union.[115] After the collapse of the USSR, the US perception on the UN collective security system has been characteristically realist and

109 This was realized by the right to veto granted to all permanent members in the Council. See *supra note* 82.
110 Russell 1958, at 961.
111 For a comprehensive review of the ratification by the US, see *ibid.*, at 935-948.
112 *ibid.* at 942.
113 *ibid.*, at 942-947.
114 See Gazzini Tarcissio (2005), *The Changing Rules on the Use of Force in International Law,* at 103.
115 Claude 1961, at 122.

flexible. In the scale of this article, it is not possible to review post-Cold War American foreign policy operations extensively. One should note that the US has also operated with uncontroversial Council granted mandate, as was the case in Afghanistan after 9/11.[116] Yet the common feature in many of the heterogeneous American realist operations of late has been the undermining of international law and institutions.[117]

Explanations to the recent tendencies have been placed, among other things, on the unprecedented hegemony of the US in the international community.[118] An interesting approach to the analysis is the stressing of ideology, as prevailing American foreign policy can be seen as inherently moralist and realist in tone. Dubbed as American realism, contemporary US foreign policy doctrine makes pursuing idealist ends by realist means possible. It enables talking simultaneously in the languages of "muscular national power politics" and "activist universal moralism", and has attained a predominant position in American internationalist thinking especially after 9/11.[119] Also official American national security strategy recognizes this starting point to its approach to world politics readily.[120] The foundation of the ideology lays in the Puritan legacy of seeing the US as an exceptional City upon a Hill in the world with a special mission and responsibilities.[121] Such exceptionalist thinking is still very much alive in American internationalism.[122] In respect of collective security, American realism has paved the way to the US challenging the Security Council's authority by using armed force unilaterally without, or with controversial, Council authorization, when a deadlock in the Council has ruled out action through the UN.[123]

116 See Security Council Resolutions 1368 and 1373.
117 Gazzini 2005, at 97.
118 *Supra note* 114.
119 Tjalve Vibeke Schou (2008), *Realist Strategies of Republican Peace: Niebuhr, Morgenthau, and the Politics of Patriotic Dissent*, at 138-139.
120 See The National Security Strategy of the United States of America (16 March 2006), available at http://www.whitehouse.gov/nsc/nss/2006/intro.html.
121 See *ibid.*, at 23-26, xi-xv. Tjalve separates from one other two distinct puritan legacies in America. First, puritanism serves as the foundation of an exceptional American destiny equipped with an absolute certainty of its causes. It serves, however, also as the foundation to a more humble, self-reflective and skeptical but simultaneously optimistic attitude toward an American project as a design of its people.
122 For an illustration of exceptionalist narrative, see e.g. "Remarks by the President on the Way Forward in Afghanistan", 22 June 2011, available at http://www.whitehouse.gov/the-press-office/2011/06/22/remarks-president-way-forward-afghanistan.
123 See Gazzini 2005, Chapter III.

In addition to the Syria rhetoric cited in the introduction chapter, an obvious example of American realist policy is President Bush's *Operation Iraqi Freedom*. When the US could not obtain the Security Council's support to authorize the use of force against the Hussein government, it ended up intervening in the country anyway with rather controversial legal argumentation. The mandate for the operation was based on the argument that Iraq had breached the ceasefire conditions set out by the Council in 1991, and thus the Council's authorization in Resolution 678 to use all necessary means in the Gulf crisis authorized the use of military force against Hussein a decade later.[124] On a more realist note, President Bush justified the actions also on ideals and the need of self-defense, as the Iraqis would "achieve a united, stable and free country", and the world would be "defended from grave danger" by an American intervention.[125] The intervention stirred strong opposition in the international community, with nations demanding the respect of the Council's authorization as the exclusive procedure when resorting to war non-defensively.[126]

Apart from self-defense claims, humanitarian causes for military intervention have recently sparked controversy in respect of the Security Council's authority in collective security.[127] A representative case in point is Kosovo, where NATO forces led by the UK and US intervened in the crisis without an authorization by the Council.[128] Here the reasoning to turning a blind eye to the Charter was moralist in nature, as preventing a humanitarian disaster served as grounds to override the Council. Such rhetoric can also be seen as a manifestation of a recent general turn to ethics in international law, where formally illegal measures are justified by moral obligations to act.[129] In the case of Kosovo, many international lawyers deemed the Zagreb bomb-

124 See *ibid.*, at 78-81.
125 See "Operation Iraqi Freedom: President Bush Addresses the Nation", 19 March 2003, available at http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030319-17.html.
126 Gazzini 2005, at 80.
127 For a general presentation on the "purely humanitarian intervention", see e.g. Franck Thomas M. (2009), *Recourse to Force, State Action Against Threats and Armed Attacks*, Chapter 9.
128 Other members would have vetoed the action had the Council been included. See *ibid.*, at 163.
129 For a presentation of the turn to ethics in international law with an emphasis on the moralistic legal reasoning in the context of the NATO bombings in Serbia in 1999, see Koskenniemi Martti (2002), *'The Lady Doth Protest Too Much': Kosovo, and the Turn to Ethics in International Law*.

ings illegal under the Charter, but simultaneously "morally necessary".[130] To allow such humane exceptions to the collective security system is to accept that political consideration might in exceptional cases dismiss the monopoly of the Council and allow unilateral non-defensive use of force. While this might at times help further desirable goals, such as preventing a humanitarian crisis or a terrorist attack, it is important to be aware that the approach also inevitably embodies the mixing of law and morals denounced by Root. The dangers of such bendy approaches to international law in foreign policy include a crusading moral absolutism and overextension.[131]

Finally, the anti-legalist ethos in American internationalist thinking is not exclusively confined to collective security, either. It has affected the American views on other international legal issues as well, including the courts cherished by Root. While promoting international courts was chiefly "an American project"[132] in Root's time, the situation has all but turned around today. US governments have lately been very reserved toward international legal institutions. This undermining agenda peaked in the US withdrawing its acceptance of ICJ jurisdiction in the face of an unwelcomed judgment in *Nicaragua v. USA* case.[133] Another recent example of these tendencies is her backing out of the ICC despite being one of the most active drafters of the Court. In the end, the Americans opted out of the project chiefly because the Security Council did not get the final word in determining the Court's jurisdiction.[134] Consequently, permanent members did not receive the veto privileges the US had sought.

130 *ibid.*, at 5.
131 Tjalve 2008, at 140-144.
132 Koskenniemi 2007, at 3.
133 In the ruling, the court held that the US had, *inter alia,* breached its obligations under customary international law not to use force against or violate the sovereignty of other states. See *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. USA)*, ICJ Reports 14, 1986.
134 Mundis Daryl (2004), *United States of America and International Justice – Has Lady Liberty Lost Her Way*, at 3-4.

7 Conclusion: Looking Forward through Rootist Eyes

While it would naïve to expect past thought to provide ready solutions to present problems[135], it can serve as inspiration in contemplating them. By studying prevailing practices in the UN and US in the light of Root's thinking, I hope to have highlighted some controversial areas of collective security and US foreign policy. The foregoing discussion has also aimed at illustrating the complexity of shaping US approaches to world politics. Seeing the policies of the administration in the light of both ascendant ideologies and their political contexts usually helps in understanding the actions of the government. Today, probably no one would desire a return to the legalist era in American foreign policy. Rejecting the influence of balance of power and rule of force has been highlighted as the doom of Root's framework.[136] His belief in a world of law and courts may also appear to some as a somewhat naïve formalism, which ignores the cultural and political in law. [alaviite: In contrast with Root's views, international law is these days often portrayed more as conversation than trial. For instance, the modern law of force has been depicted to serve merely as a vocabulary for argument about force as players seek to build "a large stockpile of legitimacy", the key to power in contemporary world politics.[137] Nonetheless, legalism maintains interesting thoughts on some of the issues generating controversy in the international community to this day. Root's respect for legal procedures and insistence on restraining power with checks and balances are some of the aspects that still resonate in present-day discussions.

The dominance of the political Security Council in UN decision-making is one consistent point of controversy. For a legalist, restraining the discretion of the Council could be a welcomed development, and judicial review by the ICJ over Council resolutions an apt option to do this. Legalists would also probably opt for strengthening the role of international courts in world politics, contrary to the recent opposite trend. In respect of American foreign policy,

135 Glenn Tinder, for instance, has argued that the purpose of studying past political thought for current use is rather to "learn consider questions with clarity and determination and an open mind". See Tinder Glenn (1997), *Political Thinking: The Perennial Problems*, at 21.

136 Zasloff Jonathan (2006), Commentary on Slaughter Anne-Marie, *Rereading Root* in Proceedings of the 100th Annual Meeting of the American Journal of International Law, 203-216.

137 See Kennedy David F. (2004), The Dark Sides of Virtue: Reassessing International Humanitarianism, at 266-275.

this might mean advocating an American commitment to international court projects such as the ICJ and ICC. Furthermore, Root's guiding principle of balancing power with responsibility could serve as a timely reminder to US foreign policy from a legalist perspective. The nation's pre-eminent power status has led in some ways to the fulfillment of its exceptionalist vision, since the actions of the US carry far-reaching impact for the entire world. If you will, great power is accompanied with great responsibility, as the American comic book superhero Spider-Man discovers while struggling to find his place in the world.[138] Consequently, the US has both a particularly weighty say and responsibility in the evolution of the international community of tomorrow.

A legalist would probably not approve the undermining impact American realist foreign policy has had on the UN and its collective security system. The lessons of the League's fall demonstrate that an organization can only be as strong as its members decide. Departures from the present use of force doctrine can also lead to the changing of international legal rules in the long run.[139] At stake here is, ultimately, the fundamental idea of the UN collective security system – a centralized control over the use of military force.[140] Pressure for adopting new practices has arisen from novel complications in the international sphere, such as terrorism and humanitarian intervention. Nevertheless, some argue that there is no trade-off between the Charter and the national interests of the US. These arguments include that power alone does not provide safety, and by playing by the common rules, the US strengthens her legitimacy to act, makes the world more receptive towards her causes, and can expect more in return from other players in the long run.[141]

To conclude, restraining and holding powerful players accountable is ever more challenging in an era of Security Council dominance, ethical international law and realist foreign policy. Through Rootist eyes, however, this is an objective both international law and America should strive for.

138 See the motion picture "Spider-Man" (2002), Columbia Pictures.
139 Gazzini 2005, at 82.
140 *ibid.*, at 104.
141 See e.g. Slaughter Anne-Marie (2007), *The Idea That Is America: Keeping Faith with Our Values in a Dangerous World*, 2007, at 37-40.

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Legal Education and the Reproduction of the Profession

Critical scholarly responses to the crises of legal education in the United States in the 1930s and 1960s–1970s, and in Finland in the 1960s–1970s

Keywords: legal education, jurisprudence, lawyers, legal history, comparative law

Juhana Salojärvi[1]

Abstract

This article examines the criticism that legal education faced in the United States in the 1920s and 1930s and again in the 1960s and 1970s, and in Finland in the 1960s and 1970s. The purpose is to demonstrate that the criticism of legal education reflects broader social currents as well as changes in scholarship in general. Although no fundamental change ever occurred, the criticism, when it is as widespread as it was during the periods under examination, always pushes forward some ideas and contributes to the changes in legal education. Thus, persistent critical analysis of legal education as well as its relationship with society is important in order to reveal problems in law and society and to keep legal education up to date.

Full Article

1 Introduction

Legal education is an essential part of the making of the legal profession. Sometimes it comes under heavy criticism and pressure for reform, which usually reflects some deeper problems in society and the position of the legal profession within it. This essay examines critical the perspectives of legal scholars on legal education in the United States in the 1930s and the

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1960s and 1970s, and in Finland in the 1960s and 1970s. The purpose of this article is to consider the critical potential for reform of legal education, and historical analysis is used as a lesson for modern legal scholarship. I will point out that the times and places analyzed in the article produced relatively similar ideas about reforming legal education. Despite the criticism, however, education has not changed much even though some reforms have occurred.[2] Thus, the simple task of the article is to investigate and compare the responses in order to provide sketches of the relationship between legal education, legal scholarship, and society.

The United States and Finland belong to very different legal cultures and have different legal education structures.[3] However, the fact that the countries are different only makes the comparison more interesting, as it allows us a perspective on similar ideas in different contexts. Moreover, despite the difference in methods, the purpose of legal education is to train students in the legal profession, and the fundamental aspects of education are similar. I will point out that, in spite of the cultural differences, the opinions of the critical scholars with respect to legal education were very close to each other, or, in rough terms, even the same.

The structure of the article is as follows. First, I examine the critical insights on legal education of the American legal realists of the 1930s. Legal realism was a movement that criticized legal formalism and sought to bring elements of empirical social science into legal scholarship. Its ideas on legal education thus conformed to the wider picture, emphasizing the position of the social sciences, a functional approach, and practical skills in legal education. Second, I will analyze the critical perspectives on legal education in the United States in the 1960s and 1970s. The sixties registered a revitalization of sociological jurisprudence, which was also apparent in the criticism of

2 See e.g. Attanasio 2002, pp. 473–475 (2002). It seems that legal education has been modified both in the United States and Finland during the twentieth century but the fundamental elements have remained the same.

3 Roughly speaking, the United States is a common law country whereas Finland belongs to the Scandinavian legal area, which is closer to the continental civil law system, but also has its unique characteristics. With respect to legal education, the American system is based on the case method in which legal cases are discussed in class through the Socratic method, and the purpose is to concentrate on legal process and reasoning. In Finland, legal education is based on lectures and textbooks, the emphasis being on the legal rules and principles, i.e., more on the substance than on the process.

legal education. Legal scholars of the 1960s and 1970s once again emphasized the importance of the social sciences, the functional approach, practical skills, and policy analysis in legal education. After examining the two American periods, I will explore the criticism of legal education in Finland in the 1960s and 1970s. I will not analyze the Finnish situation in the 1930s in much detail, because there was no intense discussion on legal education at that time. Thus, a brief remark in this regard must suffice. The later decades, on the other hand, were in general a time of social turbulence and reform in legal and social policy, and legal scholarship and education were also under pressure to reform. With respect to legal education, the Finnish critical legal scholars emphasized the importance of the social sciences, a functional approach, and ideological aspects.

As will be seen, the three periods exhibit similar approaches to legal education. Since the purpose of this article is to examine the critical responses to the "crises" of legal education, I will not explore the actual reforms, but will simply concentrate on the critical responses of legal scholars. Nor will I conduct a thorough historical analysis of the critique. Since my purpose is to provide general accounts of the critique, the context of the debates will inevitably be covered only on a rather general level. I believe that such a general analysis can provide a useful perspective on the inner dynamic and problems of legal education as well as the critical potential to reform it. Duncan Kennedy has argued that legal education reproduces hierarchy.[4] My purposes are far more modest. I will merely point out that the fact that fundamental changes in legal education are virtually impossible is because of its function in producing lawyers for society. Fundamental changes in education would therefore first require fundamental changes in society.

2 American Legal Realism and the Critique of Legal Education in the 1930s

The interwar years in the United States were marked by two very different periods. The 1920s was a time of economic growth, increasing democracy and civil rights and a need for social reform, but also a time of strikes and la-

4 Kennedy 2004.

bor unrest. The legal profession and the law firms also expanded. The stock market crash of 1929, however, changed the social picture, and the 1930s was the time of the great depression. While the depression meant unemployment, poverty, and lack of finance, it also meant New Deal politics, market regulation and governmental measures to revive the economy, which meant new kinds of social planning and regulation. The 1930s was also a time of rising Nazism and fascism in Europe, which provoked powerful democratic and anti-communist sentiments in the United States. The thirties ended in the war in Europe into which the United States entered in 1941.[5]

The 1920s and 1930s were also the heyday of legal realism. Its roots date back to the sociological jurisprudence of earlier decades, but the interwar years are usually considered as its most important period.[6] Realism was not a unified "school" or "movement"[7], but at the fundamental level its basic tenets could be summarized as follows. The realists criticized legal reasoning and judicial decision-making for their claimed formality. According to the realists, judicial decision-making was not neutral or logical but always affected by the personal biases of the judge and therefore irrational to an extent. Furthermore, law was not natural or absolute, but a positive, man-made enterprise that served certain social functions. Therefore, the realists argued, legal scholarship should focus on the social functions and effects of the law.[8]

Legal realism developed in the 1920s, first at Columbia and later at Yale, as an effort to integrate social science into legal research,[9] and legal education was an important part of the endeavor to reform the tradition of legal schol-

5 Parrish 1992; Morison, Commager, Leuchtenburg 1983, pp. 577–631; Leuchtenburg, 2009; Sobel 1968.

6 See e.g. Tamanaha, 2010, p. 1. Tamanaha's thesis that realism was not anything radically new at the period is of no interest here. Realist notions were not an invention of the 1920s, but that is not the concern of this paper.

7 According to Neil Duxbury, "Realism was more a mood than a movement." (Duxbury 1995, p. 69.)

8 Duxbury 1995, pp. 93–135; Horwitz 1992, pp. 172–212; Singer 1988, pp. 470–503. For realism as an academic movement, see Kalman 2001. On the relationship between realism and empirical social science, see Schlegel 1995. On realism in general, see Fisher, Horwitz, Reed (eds.) 1993.

9 Duxbury 1995, pp. 83–89; Kalman 2001, pp. 68–78; Schlegel 1995, pp. 81–146; Stevens 1983, pp. 137–141; Twining 1985, pp. 26–60.

arship.[10] To the realists, research was an essential part of legal scholarship and of legal education, and they often considered it important that research be both conducted within the universities and applied in education.[11] Three elementary issues in legal education concerned students, teaching methods, and teaching material. Students should be pre-educated in the social sciences before entering law school, legal education should focus on social problems, and the curriculum ought to be reorganized accordingly.[12]

Besides reorganizing the structure of education to correspond with the social functions of law, the realists disliked the case method as a method of teaching. A pivotal vice was the conceptualist belief that law consisted of abstract principles that could be applied deductively to legal problems in order to achieve uniformity and certainty in law,[13] and the case method represented the conceptualism that inculcated the idea of legal certainty into the minds of law students. Thomas Reed Powell thus voiced the self-criticism of the realists when he wrote that "[e]ver since we hit upon the success of the mechanical device of the case method, we seem to have forgotten the possibilities of flexibility in teaching methods."[14] In his opinion, the case method not only conceptualized legal education, but also stultified it.

The problem of the case method, however, related to the larger problems of legal education, which the realists wanted to concentrate on in actual social problems. According to Felix Cohen, "[l]aw is a social process, a complex of human activities, and an adequate legal science must deal with human activity, with cause and effect, with the past and the future."[15] Max Radin wrote that the case method was often criticized, "when what [was] objected to [was] really the group of propositions in which that method is exercised."[16] However, "[l]aw [was] not a matter of propositions at all but a part of the

10 For comprehensive accounts of the relationship between the realists and legal education, see Stevens 1983, pp. 131–171; Kalman 2001.
11 Oliphant & Bordwell 1924, pp. 295–297; Frankfurter, Llewellyn, Sunderland 1930, pp. 669–670.
12 Oliphant 1928, pp. 329, 331–335; Stone 1924, p. 33; Hutchins, Powell, Cook 1929, pp. 405–406.
13 Frank 1949, pp. 48–56, 206–217; Llewellyn 1930, pp. 444, 453–454; Llewellyn 1931, pp. 1238–1246.
14 Powell 1927, p. 74.
15 Cohen 1935, p. 844.
16 Radin 1937, p. 680.

living order of society and must be taught as such."[17] According to the realists, law was to be taught in accordance with the social problems it dealt with, not detached from them.[18] The general idea of the realists was that law was a social phenomenon and that was to be taken into account in educating legal professionals.

In emphasizing the practical skills of the lawyers, some realists stressed another approach. For instance, Jerome Frank observed that "[w]here the Langdellian atmosphere is thickest, teaching is weakest; where that atmosphere is thinnest teaching is strongest."[19] Hence, legal education ought to be reformed to resemble a legal clinic where students could participate in actual legal practice and study trial court records instead of appellate court decisions.[20] Frank departed from other realists in endorsing a very practical legal education, but his fundamental thesis was nonetheless concerned with bringing education closer to real problems and familiarizing law students with real-life circumstances.

Realists did not simply criticize legal education but also brought new insights into it, such as social material in education, a more critical perspective on cases, new kinds of textbooks, and seminars.[21] The critics of realism, however, were not convinced of the usefulness of the social sciences in legal education.[22] The realists could therefore not change the curriculum

17 Ibid. pp. 683–684.
18 Frank 1933, pp. 723–725; Frankfurter, Llewellyn, Sunderland 1930, p. 673; Llewellyn 1930(a), pp. 93–100; Oliphant 1928(a), pp. 75–76, 159–160; Radin 1937, pp. 683–685; Yntema 1928, pp. 477–478.
19 Frank 1933, p. 726.
20 Frank 1933(a), pp. 907–923.
21 For Yale and Columbia, see Reed 1930, p. 771; for Yale, see Hutchins, Powell, Cook 1929, pp. 404–406, 408–409; Clark 1933, pp. 167–169; for Northwestern, see Green 1931, p. 300; Green 1933, pp. 821–825. On the realist reforms of legal education in general, see Kalman 2001, pp. 68–119; Stevens 1983, pp. 156–163.
22 Keyserling 1933, pp. 454–455; Hutchins 1934, pp. 512–516. While working as the Dean of Yale in 1927–1928, Hutchins contributed remarkably to the realism of Yale. However, he resigned to accept the presidency of the University of Chicago. (Kalman 2001, pp. 107–115.) While Hutchins was acting as the president, Thurman Arnold accused him of promoting the symbolic part which law plays in society. (Arnold 1935, p. 734.)

markedly,[23] and in 1935 Karl Llewellyn argued that legal education was still "blind, inept, factory-ridden, wasteful, defective, and empty,"[24] and that there was still a need to integrate social sciences into legal education to make it correspond with the social reality.[25]

The realists struggled with traditional education for at least a decade without achieving any fundamental changes or reforms. Many of the realists were aware that it was difficult to change the training because of its importance to the profession. Thus, John Hanna could write that lawyers were mostly very tolerant, but the question of education caused disturbance. "Whatever concerns the training of the legal profession or admission to it is basically important to our political and social structure."[26] Reed also noted that "[t]he initial attitude of many practitioners was that some of the scholarly specialists were in danger of restating the law in unusual language that would hardly be serviceable for actual use in the court room,"[27] and Arnold wrote that "[s]ince the role of the law school is to justify faith in an abstract science of law, it is natural that when this role is abandoned, social pressure appears which compels a return to it. Therefore law schools are for the most part conservative and conceptual in their thinking."[28]

Realists endeavored to integrate the social sciences into legal scholarship, reorganize the curriculum in accordance with social problems rather than legal subjects, increase the amount of empirical data in legal education, widen the perspectives of education, and bring it closer to practice. Their goals in education would have prepared students for a legal profession of their conceiving. As radical reforms, their plans failed, although they achieved certain changes. All in all, it seems to have been the practicability of the reforms, opposition of the profession and the faculties, and financial, social and educational factors which suppressed the efforts of the realists. In any event, the realists did leave a lasting legacy in American legal thought, even though they were not completely successful in their endeavors, a legacy seen in the critical legal insights of the following decades.

23 Kalman 2001, pp. 82–96; Stevens 1983, pp. 139–141.
24 Llewellyn 1935, p. 653.
25 Ibid. pp. 653–656, 660–663, 667–671.
26 Hanna 1930, p. 745.
27 Reed 1930, p. 767.
28 Arnold 1935, p. 733.

3 The "Crisis" of American Legal Education in the 1960s and 1970s

The legal realists made serious efforts to reform legal education in the 1920s and 1930s, but they did not achieve any fundamental changes. In addition to the opposition of the faculty and the fact that the realists faced difficulties in putting their theories into practice, realism in the law schools was also weakened by the economic downturn and the political atmosphere that followed the Second World War.[29] However, efforts to reform legal education continued in the 1940s and 1950s, the post-realists, for example, seeking to adapt policy analysis into legal education,[30] and the postwar decades witnessed several reforms.[31] Nonetheless, even if "the Yale Law School of the late 1940s was a far more 'realistic' institution than it had been in the previous decade,"[32] case method survived as the dominant teaching method.[33]

The debates on and the criticism of legal education continued through the decades following legal realism and the Second World War,[34] and in the latter part of the 1960s they only intensified. In general, the 1960s was a time of social turbulence. Civil rights movements rose to prominence, and government sought to deal with the problems of poverty, crime, and discrimination against minorities. In addition, students rebelled at the university and the New Left was born as a reformist social ideology.[35] The decade was also a time of a resurgence of sociological jurisprudence in various forms, and an increased interest in applying social, political, and behavioral sciences in legal research.[36]

As the interest in alternative methods of legal scholarship increased, some legal scholars became concerned about the conservative status of legal education. For instance, Charles Reich advocated an education that would pay

29 Kalman 2001, pp. 121–144. Because of its leftist sympathies, realism was often labelled as a fascist ideology supporting an idea of a strong government.
30 Lasswell & McDougal 1943, pp. 204 206, 242 245, 256.
31 Kalman 2001, pp. 188–228; Stevens 1983, pp. 205–231.
32 Kalman 2001, p. 164.
33 Stevens 1983, pp. 268–270.
34 See Notes 1964, pp. 710–734.
35 Isserman & Kazin 2000; Morgan 1991.
36 See e.g. Friedman & Macaulay 1969. The book gathers the essential aspects of the sociology of law and other forms of alternative legal scholarship of the 1960s.

more attention to substance instead of process and also apply the methods of the social sciences,[37] Lester Mazor argued that the study materials should consider the social functions and consequences of law more and not simply legal cases,[38] and Arthur Miller wrote that education ought to pay attention to the realities of judicial decision-making.[39] Reformist scholars thought that traditional education could not provide adequate information about law in action because a simple focus on cases and legal methods distanced students from legal reality.

Much like the realists a couple of decades before, legal scholars once again argued for a fundamental reform of legal education. The critical scholars criticized the traditional division of the curriculum, demanded a functional approach[40] and argued for interdisciplinary methods in education.[41] They opined that there ought to be more history,[42] philosophy,[43] social science[44] and empirical data[45] in legal education because these would help the would-be lawyers to understand the purposes, functions and effects of law in society and thus make them better professionals. Just like the realists, the alternative legal scholars of the 1960s did not believe that lawyers could serve their function properly without knowledge of the society in which they worked.

Indeed, the reformist legal scholars thought that it required more to be a lawyer in modern society than to be simply able to solve legal cases. They argued that law students should be educated to deal with contemporary social problems,[46] to use law as a tool of social reform,[47] and to specialize in particular fields in order to have special skills for particular problems.[48]

37 Reich 1965, pp. 1402–1408.
38 Mazor 1965, pp. 1202–1211.
39 Miller 1965, pp. 1094–1101.
40 Yegge 1967, pp. 21–22.
41 Friedman 1968, pp. 459–460.
42 Friedman 1967, pp. 45–46.
43 Wallace 1967, pp. 26–27, 34.
44 Moore 1967, pp. 50–54.
45 Macaulay 1968, pp. 467–468.
46 Cavers 1968, pp. 143–148; Johnstone 1970, pp. 255–258; Leleiko 1971, pp. 503–506.
47 Reich 1965, p. 1405; Yegge 1967, pp. 13, 16–17; Moore 1967, p. 53; Macaulay 1968(a), p. 635.
48 Goldstein 1968, pp. 164–165.

Some even thought that law schools should focus on policy analysis.[49] As society was becoming more complex, legal problems and their solutions were also becoming harder. In addition, lawyers were not to serve only the elite interests, but were supposed to understand law in a broader social context.

The late 1960s also brought student radicalism into law schools.[50] Student discontent with legal education and awareness of it among the teachers of law increased during the decade,[51] which also intensified the willingness to reform the training. Studies revealed that students felt the Socratic method was very stressful.[52] The case method was thus again seen as a major vice in legal education, and the scholars who wanted to reform it so as to respond to the needs of the society and be more hospitable to students wanted to abolish it. Paul Savoy wrote that a real interaction between teachers and students would "never happen until we remove our academic masks and put an end to those degrading ceremonies we politely call the 'Socratic method.'"[53] Students found the case method offensive and critical teachers considered it unrealistic and impractical, and various alternatives were suggested. In addition to interdisciplinary education and a functional approach, clinical education also received support.[54] Dissatisfaction with the mechanical application of the traditional case method was considerable, and scholars were figuring out ways to improve and modernize education.

The problem was, however, much deeper than simply in the form of the law school curriculum. Because of the rapid change in the atmosphere of the law school in the late 1960s, radical scholars began to talk about a profound crisis in legal education that related to a more fundamental crisis in the legal profession in modern society.[55] Critical lawyers argued that since legal education merely served the interests of the rich,[56] the curriculum ought to be fundamentally revised so that lawyers in the future would understand all of the problems of contemporary society.[57]

49 Miller 1970, pp. 587–608.
50 Kalman 2005, pp. 28–31, 84–105, 122–135, 145–157.
51 Silver 1968; Kennedy, 1970; Borosage, 1970.
52 Watson 1968, p. 124.
53 Savoy 1970, pp. 456–457.
54 Leleiko 1971, pp. 511–513.
55 Kinoy 1969.
56 Nader 1970, pp. 493–496.
57 Kinoy 1969, pp. 2–6.

As can be seen, not much had changed during the decades between the realist era and the 1960s. Although the law school curriculum was reformed to an extent, scholars favoring alternative approaches to legal scholarship still lamented the dominance of the case method and endorsed interdisciplinary education, a functional approach, and policy analysis. The society was in a transforming phase in the 1920s and 1930s when the realists were at the peak of their endeavor, and society was again in turmoil in the 1960s when the desire to reform legal education became more intense. Although the times were different, the approaches to reform were basically the same. The critical legal scholars of the 1960s sought to increase social analysis in legal education so that law students could understand the relationship between law and society. In addition to the changes in legal scholarship, the critics of education followed the changes in society, which encouraged understanding the various social functions of law. It seems that the realist ideas were simply adapted to the different social and academic circumstances. Similar arguments were also advanced in Finland in the 1960s, and a brief analysis of the events there will provide another perspective on the adaptation of the realist ideology in a different context.

4 Radical Responses to the Reform of Legal Education in Finland in the 1960s and 1970s

Finnish legal education did not face fierce criticism until the 1960s. Until then, the basic ideas of legal education had prevailed since Finland gained its independence in 1917, and since the decree on legal education in 1921.[58] In general, the 1920s and 1930s represent a period when legal education was poor and legal scholarship was reactionary. Thus, nothing that could be called a debate emerged.[59] A brief look at these decades will help to understand the later period.

58 Asetus Helsingin yliopiston lainopillisessa tiedekunnassa suoritettavista tutkinnoista, 30.12.1921; Kangas 1998, pp. 37–46, 70; Korpiola 2010, pp. 34–37, 65–68.

59 Legal scholars did not debate about the curriculum publically. Pressing problems in the 1920s and 1930s were law school admissions and the problem concerning the language of education. Because of the Swedish heritage, Swedish was dominating language in the 1920s although students were mostly Finnish speaking. (Kangas 1998, pp. 48–51, Korpiola 2010, pp. 22–24.) A general concern was also how to shorten the time and lower the costs of legal studies while producing skilled jurists and officials. (See Hermanson 1927, pp. 306–307).

Both legal scholarship and legal education remained untouched by radical currents in Finland during the interwar years. Although realism established a strong position in Scandinavia, and although some Finnish scholars endorsed some realist elements, no considerable change occurred in Finnish legal scholarship.[60] Because of the Civil War of 1918, the political right dominated Finnish society until the 1950s. The legal profession conformed to the social ideology, and scholars with leftist sympathies had poor chances of success.[61] Furthermore, Finnish legal scholars in general rejected, and often misunderstood, realist arguments in the 1930s.[62] Thus the Finnish legal establishment remained conservative in scholarly as well as in political sense.[63] With respect to education, the circumstances did not encourage change. Legal education was poor in Finland in the 1920s.[64] There were very few professors, as well as young scholars, and the shortage of textbooks was considerable.[65] Thus, discussion on legal education among legal scholars remained virtually non-existent. The very few scholars who wrote about education contemplated merely the appropriateness of the structure of education without considering any fundamental issues.[66]

The social situation and the poor state of the faculty of law explain the absence of scholarly criticism of legal education. In the 1920s, legal education was just taking its first steps and the circumstances for that were in general poor. Quite obviously, then, since even the basis was weak, there was no urge to make any radical revisions. And since there was a considerable shortage of professors, there were no young or any other scholars to argue for radical reforms. The reasons for the failures of reforming legal education in a realist or more socially-oriented direction in the 1930s, on the other hand, are the same reasons for which realism in Finnish jurisprudence failed. Finnish society in the 1930s was conservative and dominated by the political right. Since the legal and political elite were closely tied, the legal

60 Pihlajamäki 1997, pp. 64–66; Pihlajamäki 2000, pp. 344–350; Helin 1988, pp. 265–276.
61 Malminen 2003, pp. 85–87.
62 Helin 1988, pp. 276–283.
63 Malminen 2003, pp. 83–84.
64 Kangas 1998, p. 37.
65 Serlachius 1923, pp. 179–184; Caselius 1924, pp. 47–48, 50.
66 Serlachius 1921; Hermanson 1927; Kaira 1937. A common opinion was that philosophy and history, which were included in the preliminary studies, should be replaced with economics. (Serlachius 1921, p. 17; Kaira 1937, p. 175.)

profession was conservative. And since realism related to social reformism and leftism, it did not have a chance under such circumstances. Because of the conservative society and the shortage of alternative scholars, there was no evident need for reform. Nor were there scholars with the willingness or ability to make change happen.

The 1960s in Finland was a time of rapid social change. Finnish society transformed from a relatively backward agricultural society into a modern industrial one. The 1960s was also a time of economic expansion and urbanization, accelerated by rapid population growth and migration from the countryside to the cities. In addition, it was a time of nascent welfare state politics, rising working class ideology, a bull market in higher education, and student protests. The radicalism of the period challenged traditional values, and leftism became the dominant reformist ideology in the society as well as in the universities.[67]

The 1960s and 1970s were also times of transformation in law and legal scholarship. There were intense discussions on legal politics, and the time in general was marked by optimism in social planning and regulation as well as liberation in legal politics. Thus, these decades witnessed a serious amount of social legislation.[68] In addition, legal scholarship was placed under serious threat for the first time when critical young legal scholars argued that legal scholarship was political and biased, and called for sociological jurisprudence and the bringing of social sciences into legal scholarship.[69] Although the change was not dramatic, the times marked a general shift toward methodological pluralism and social scientific orientation in legal scholarship.[70]

The turbulence extended also to legal education. The social transformation and the growth of the student population also called for a reform of higher

67 Riihinen 1993, pp. 1–20; Soikkanen 1997; Suomen historian pikkujättiläinen 2003, pp. 850–860; Tuominen 1991; Virtanen 2002, pp. 269–350.
68 Kekkonen 1998, pp. 103–119.
69 As a short, though not comprehensive, excursus on the debate one may look at the following literature (in alphabetical order according to author). Aarnio 1970; Aarnio 1970(a); Backman 1972; Blom 1970; Eriksson 1969; Jyränki 1969; Kivivuori 1970; Klami 1970; Tolonen 1970.
70 See Kekkonen 1998, pp. 119–123.

education, including legal education.[71] Discussion about reforming legal education was heated in the late 1960s,[72] and radical law students often felt that legal education was conservative.[73] The interview with the President of Finland on his 70th birthday in September 1970 brought an interesting addition to the debate. The President, who was an authoritative figure, had been in office for fourteen years, and often took a strong stand on public issues, criticized legal education for its conservative nature, blind faith in traditional authority, and the lack of social data and a realistic approach.[74] Because he supported the agenda of the critical legal scholars of the 1960s,[75] the interview gave a significant impetus to the discussion on legal education.

There was a general consensus on the need for legal education reform,[76] but the opinions as to the course of the reform differed. Critical scholars argued that values and ideologies underlying the law should be analyzed in education,[77] more social data ought to be included,[78] the students should be educated on the relationship between law and social structures,[79] and that the social data should be integrated with an analysis of the social role of the legal profession.[80] Critical legal scholars followed their jurisprudential notions in their concerns on education and wanted to reform it to correspond with modern needs.

71 Kangas 1998, pp. 110–111; Häikiö 1977, pp. 13–14. Generally on the reform of higher education in Finland in the 1960s and 1970s, see Häikiö et al. 1977.
72 Andersson 1971, pp. 4–8.
73 Lehtinen 1969, pp. 24–25; Vikatmaa 1969, pp. 34–35; Lammi 1969, pp. 26–28; Backman 1970, pp. 14–19; Uomola 1970, pp. 22–23. The majority of law students were probably not radical. Moreover, to think of legal education as conservative did not necessarily imply to similar ideas about reforms or similar political ideologies, as can be seen, for example, in the writings of Vikatmaa. (Vikatmaa, 1970.)
74 Kekkonen 1970, pp. xii–xiv.
75 The interview followed precisely the issues the critical legal scholars brought up in the 1960s and 1970s. This is entirely understandable because certain young legal scholars put the questions and others talked with the President before the interview was conducted. All of the scholars involved in the interview participated in the legal debates of the time on the critical side. (Jyränki 1990, pp. 258–265.) Although the actual impact of the "preparation" on the outcome of the interview is doubtful, it obviously had some influence on it. It is possible that the interview served different purposes for its part and was thus beneficial for both the President and the legal scholars. For the President, it was an opportunity to score points off his political opposition. On the other hand, the critical legal scholars gained an authoritative voice for their cause.
76 Pöyhönen 1970, pp. 5–8; Andersson 1971; Ylöstalo 1971, pp. 10–14; Muukkonen 1971, pp. 8–9.
77 Zilliacus 1970, pp. 20–23.
78 Louekoski 1970, p. 13.
79 Ojanen 1971, pp. 19–21.
80 Aarnio 1971, pp. 31–35.

When the details of the reforms are put aside, the question was whether legal education ought to provide the would-be lawyers with more general knowledge on law and legal matters, or whether it ought to provide better knowledge of the context in which the law functioned. The most radical views also linked law and legal education to social ideologies and wanted to emphasize this explicitly in education. The critical scholars argued that since law was an elementary part of society, it was important to pay attention to the social circumstances and ideologies underlying the law, in order to provide more thorough understanding of the law in its social context.

As can be seen, the criticism of legal education and the suggested reforms resembled the notions of the American legal scholars of the 1930s and 1960s. Finnish legal scholars also endorsed social sciences and philosophy in legal education and the idea of analyzing law as a means of social change. American scholars of the 1960s emphasized policy analysis and the various social roles of lawyers, and so did the Finnish legal scholars who also stressed the ideological function of law more. The emphasis on ideology followed the social structure of Finland and the position of Marxism in the leftist thought of the 1960s. In any event, the critical insights were seen in the reform of legal education of the 1970s.

In 1973, the legal education reform committee published a memorandum in which it proposed increasing materials on social sciences, history, and philosophy.[81] Most legal scholars as well as the practical legal profession opined that the proposed reform was impractical and too sweeping, arguing that the emphasis in legal education should be on legal materials and practical legal problems.[82] The radical or reformist scholars either supported

81 Oikeustieteellisten opintojen uudistuskomitean mietintö, 1973:30.

82 Tirkkonen 1973, pp. 637–654; Kilpi 1974, pp. 661–671; Helminen 1974, pp. 672–679; Piepponen 1974, pp. 680–686; Korkeimman oikeuden lausunto oikeustieteellisten opintojen uudistamiskomitean mietinnöstä 1974, pp. 692–697; Korkeimman hallinto-oikeuden lausunto oikeustieteellisten opintojen uudistamiskomitean mietinnöstä 1974, pp. 697–703; Suomalaisen lakimiesyhdistyksen lausunto oikeustieteellisten opintojen uudistamiskomitean mietinnöstä 1974, pp. 703–711.

the memorandum or thought that it did not go far enough.[83] The critical opinion was that the law reflected social relations and power structures, and was therefore to be taught accordingly and the study subjects ought to be divided functionally, not according to legal disciplines.[84]

In the end, the reform was a compromise between the two extremes; the amount of the social sciences in the curriculum did increase, but the fundamental basis of legal education did not change.[85] The idea of a legal education as a training for the profession prevailed, but some of the contemporaneous concerns were taken into account. The difficulty of transforming the basis of education was obvious, even if there was a strong support for a more radical reform.

The critical response to the legal education reform in Finland in the 1970s greatly resembled the ideas of the American legal scholars of the 1930s and 1960s. The Finnish scholars were probably not aware of the details of the American situation in the 1960s. They knew the fundamental notions of realism in general,[86] but it seems that they were not as much influenced by other scholarship as simply reflecting the social currents of the time. Despite the differences in cultures, similar arguments were adapted to the different contexts. On each occasion, the central arguments were that legal education should focus on social problems, include empirical data and social sciences, and that it should be structured according to the social functions of law. Whenever legal education has been in need of reform, legal scholars had appealed to social science and problems to resolve the situation. In addition, on all of the occasions dealt with above, the need to reform education has emanated from deeper problems of society or of legal scholarship, and legal scholarship has also been under pressure of change. The criticism of education has always followed the responses to these pressures on legal scholarship.

83 Mäenpää 1973, pp. 6–9; Bruun 1975, pp. 35–40; Oikeus- ja yhteiskuntatieteellisen yhdistyksen lausunto 1976, pp. 137–139.
84 See Aarnio, Heinonen, Tuori 1975. This book was meant for law school admission tests but it was never accepted as such. Nevertheless, the content and the disposition of the book followed the concepts of the critical scholars in that the social and ideological functions of law were emphasized and the book was functionally structured.
85 See Korpiola 2010, p. 222.
86 See Eriksson 1966, pp. 476–479.

5 Conclusions

The three periods analyzed above show that the responses to the problems of legal education have been quite similar at different times and in different places. Even a superficial analysis like this demonstrates that legal education and its criticism conforms to the general trends in society and jurisprudence. In the realist era, the growth of the 1920s and the depression of the 1930s called for sociological jurisprudence. The legal realists were young legal scholars, eager for an academic position and willing to transform legal scholarship. They undertook the task of reform and lobbied for their cause in various ways. In Finland, on the other hand, social and political circumstances prevented the impact of realism in both legal scholarship and legal education. In the 1960s, postwar society was in a state of change, social problems became more pronounced, and student radicalism rocked the campuses. Once again, there was a serious need to transform legal education, and once again those legal scholars who were not pleased with the traditional legal scholarship wanted to change the training to respond to the new trends in legal scholarship as well as to social problems and student discomfort. In the United States as well as in Finland, the overall picture was the same, and the differences in detail were due to the jurisprudential, social, and cultural differences. Without regard to culture or the constitution of the legal system, the responses to the crises of legal education followed the same pattern.

Two of the most strikingly similar elements in the criticism were the willingness to increase the amount of the social sciences in legal scholarship and education and the urge to create a functional structure for the curriculum of the legal studies. In these respects, the arguments of the American realists were restated, although in a modified sense, in the 1960s and 1970s in the United States as well as in Finland. The idea behind these propositions was to improve the social awareness of the legal profession. The scholars who supported change challenged the autonomy of law and legal scholarship in favour of the social sciences and sought to bring them closer to social problems. It seems, then, that these arguments were a means to add the social significance of the legal profession, challenge traditional authority, and support a change in the legal culture. Obviously, the social sciences and

social participation are the most influential ways to do these. Despite the differences in the American and Finnish legal tradition, fundamentally the law serves the same purposes, and thus also the efforts to change the law in times of crisis are fundamentally the same.

Radical thoughts always changed the education to a certain extent and added additional social science aspects to it, but fundamental changes never occurred. The amount of social studies did increase and the traditional training had to make way for the alternative approaches, but the structure of the education always remained more or less traditional because education has to produce lawyers and remain within the margins of the tradition of the scholarship. Even during turbulent times, the majority of society and of the various professions remain true to the tradition and change only to a very minimal extent. There are always people willing to take a step further and aim at a greater transformation, but they often belong to the noisy minority and will have to make compromises between their endeavors and tradition. A historical analysis of the dynamic of the epochs of change and of the people who jumped on the radical bandwagon would be both important and interesting, but is unfortunately beyond the scope of this article.

The fact, however, that a similar critique emerged shows at least one point. Whenever legal scholars feel that there is a crisis of legal education, they seem to argue for legal scholarship and education that go beyond the traditional style and conform to contemporary social problems. The critique seems to emanate from critical social thought that is widely accepted but which, nevertheless, represents the critical and, hence, the opposing view. Changes, as noted, are mostly compromises between the critical thought and the tradition, and can occur only to the extent that the basis of the tradition is preserved. Critical legal scholars often argue for fundamental change, but because of the relationship between the tradition and society this is hardly possible. Therefore, in order to realize the critical potential to change the education, critical scholars need to analyze the relationship between the legal tradition and the society on the one hand, and between

law and social problems on the other. Critical legal scholarship is needed to distinguish these relationships, lest law failed to contribute to solving the problems. Fundamental changes can hardly be made, but even minor corrections are always steps forward.

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