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Structural Instability: Strasbourg Case Law on Children's Family Reunion

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Abstract

In this article, the case law of the European Court of Human Rights on children's family reunion is examined. The argument is that the Court's case law is necessarily inconsistent. This is so in part as a consequence of the structure of international legal argument, and partly as a consequence of the seeming normative conflict about the legitimacy of migration control. On both points, the Court is torn between two equally legitimate and equally untenable extremes, which forces the Court to take a centrist position and to acknowledge both the legitimacy and the untenable nature of any position. The main part of the article analyses how this takes shape in the legal technicalities in the judgements under review.

Keywords

family reunion; family life; Article 8 ECHR; critical legal theory

Introduction

This article concerns Strasbourg judgments about children who seek admission to a European country in order to be reunited with parents. As many have noted, case law of the European Court of Human Rights on this point is inconsistent. Instead of suggesting ways to make case law more consistent, I will try to elucidate why the Court's case law is inconsistent. The argument is that the Court is confronted with two tensions: communitarian *versus* cosmopolitan views on the regulation of migration, and ascending *versus* descending perspectives on international law. Each extreme represents a legitimate position which can be criticised from the other side. This makes the Court's case law structurally unstable. The main part of this article will outline how, at the level of legal technicalities, the Court copes with the structural instability of its case law. If this analysis is correct, this has implications beyond merely Strasbourg case law. The European Court of Human Rights is not just any court. It is a prominent court, staffed by prominent judges and its judgments are of high impact and quality. The idea behind this

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article is not that the European Court of Human Rights is not doing a proper job (which may or may not be the case), but that legal reasoning as such is problematic, of which Strasbourg case law is an example.

I will restrict my analysis to European Court of Human Rights judgments about the family reunion of children. I am aware of admissibility decisions of both the Commission and the Court, some of which contain passages which are relevant for the issues dealt with in this article. However, dealing with all of them would result in an impractical number of cases. Dealing with only some of them would force me to make a selection which would be open to criticism that the selection was biased. This leaves four judgments concerning two Turkish children: *Ersin Gül* and *Sinem Sen*; a Moroccan child: *Souffiane Ahmut*; and an Eritrean child, *Mehret Ghedlay Subhatu.* Two cases were asylum related, two cases concerned 'ordinary' migrants. Crucially, in two cases the refusal of a residence permit was held not to be a violation of Article 8, while in two cases the refusal was considered to be a violation.

One might be inclined to consider that the Court's case law is not inconsistent but has developed in a liberal direction. The two 1996 judgments, *Gül* and *Ahmut,* were decided against the immigrants, while the 2001 and 2005 judgments were decided in favour of the immigrants. Although I just said I would not look at admissibility decisions, it should be pointed out that the *Gül/Ahmut* position is well represented in contemporary admissibility decisions of the Court, so one cannot conclude that it has been replaced by the *Sen/Tuquabo-Tekle* position.

For appreciating the Court's reasoning in family reunion cases, it is important to be aware of its standard reasoning. The general structure of the Court's reasoning in cases concerning both family life and immigration is the following. Evidence is led to ascertain:

I. whether the ties between the adult and the children amount to family life;
II. whether the State action under scrutiny constitutes an interference. Generally, an interference is assumed to have taken place when the authorities have taken away a right of residence enabling someone to have family life with, in our cases, a child. The court establishes whether
    i. the interference is based on the law; thereafter
    ii. the interference has a legitimate aim: and finally
    iii. the interference is necessary in a democratic society, i.e. whether the interference is proportional in relation to the aims it seeks to pursue;
III. if there has been no interference, the question is whether the State had a positive obligation, i.e. an obligation to act in order to ensure respect for family life. This is applied to situations where someone applies for a new residence right in order to enable him/her to enjoy family life on the ter-

ritory of the State. The central issue here is the proportionality test applied also under II, iii.

1. Four Stories

In order to understand the analysis of the judgments, the facts of the cases are detailed below.

1.1. *Ersin Gül*[1]

In 1983 Mr. Gül, a Turkish national, left Turkey and applied for asylum. He left behind his wife and their two sons, Tuncay (born in 1971) and Ersin (born in 1983). In 1987, Mrs. Gül suffered injury brought on by her epilepsy. Finding it impossible to obtain proper treatment, she joined her husband in Switzerland, where she applied for asylum.[2] She was taken into hospital as an emergency. Two fingers were amputated. A hospital specialist wrote a statement declaring that a return to Turkey would be impossible for her and might prove fatal, on account of her serious medical condition. In 1988, Mrs. Gül gave birth to her third child, a girl called Nursal. As she still suffered from epilepsy, she could not take care of the baby who was placed in a Swiss children's home.

In 1989, asylum was refused, on the ground that Mr. and Mrs. *Gül* had no well-founded fear of being persecuted. After an appeal, the Swiss authorities granted a residence permit on humanitarian grounds, on account of the length of Mr. Gül's stay in Switzerland and Mrs. Gül's precarious health. They subsequently withdrew the appeal concerning the refusal of asylum.

In 1990, Mr. Gül asked for permission to bring his two sons to Switzerland. This was refused, on three grounds. First, family reunification was only possible for aliens possessing a settlement permit, while the Gül family merely had a residence permit. Second, the Gül family was dependent on social security, hence did not have sufficient means to support themselves. Mr. Gül had worked in a restaurant from 1983 until 1990, but became an invalid in 1990. Third, Mrs. Gül was incapable of taking care of her children, as evidenced by Nursal's stay in a children's home. For Tuncay, the oldest son, the Swiss authorities argued furthermore that he was an adult at the moment at which Mr. Gül applied for family reunification. The procedure in Strasbourg was limited to Ersin.

[1] ECtHR 29 February 1996, *Gül v Switzerland*, appl nr 23218/94, Reports 1996-I.

[2] The majority opinion does not mention that Mrs. Gül applied for asylum. I get this information from Martens' dissenting opinion. Disregarding asylum applications by women whenever they can be related to a male relative is typical, see Thomas Spijkerboer, *Gender and Refugee Status*, Aldershot: Ashgate, 2000, pp. 88–89.

The Swiss Government claimed that Ersin and his grandfather lived with the family of his elder brother Tuncay. They claimed Esrin had been visited several times by his father, and at least once by his parents together. Mr. Gül however stated that Ersin frequently moved from one home to another and spent two or three days staying with various Kurdish families in his native village. Owing to limited financial resources and the distance between the homes of some of these families and the school Ersin did not attend school on a regular basis.

By seven votes to two, the Court held that the denial of a residence permit to Ersin did not violate Article 8.

1.2. *Souffiane Ahmut*[3]

In 1986, a Moroccan national, Salah Ahmut, migrated to the Netherlands and received a residence permit on the basis of his – childless – marriage with a Dutch woman. Ahmut left behind his ex-wife (referred to in the judgment as Ms F.A.; they divorced in 1984) and their five children, the youngest of whom was born in 1980. Ms. F.A. died in a traffic accident in 1987 and thereafter the five children were cared for by their paternal grandmother. Since his move to the Netherlands, Ahmut had continued to support his children financially. In 1990, Ahmut and his second wife divorced. In 1991, he married a Moroccan woman, who was subsequently granted a residence permit on the basis of their marriage. Ahmut's fourth son, Souffiane, had visited his father about four times between 1986 and 1990, each time for one month. According to a statement of a Moroccan physician, Soufiane's grandmother was eighty year old, was suffering from respiratory problems and kidney failure, and was receiving treatment as an out-patient.

In 1990, Souffiane came to the Netherlands and applied for a residence permit. This was rejected. The grounds for this were threefold. First, Souffiane had never belonged to the family which Ahmut had established in the Netherlands with his second wife. Second, an older sister could take care of Souffiane. To the extent that Souffiane needed additional care, this could be supplied by either the grandmother, or by the eldest brother, or by two paternal uncles, all of whom lived in Morocco. Ahmut could continue to provide financial support, as previously.

Souffiane left the Netherlands in 1991. Since his departure, he had been living in a boarding school in Tangier. He visited his father frequently in the Netherlands, and his father visited him in Morocco.

By five votes to four, the Court held that the refusal to grant Souffiane a residence permit had not been a violation of Article 8.

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[3] ECtHR 28 November 1996, *Ahmut v Netherlands*, app. no. 21702/93, Reports 1996-VI.

1.3. *Sinem Sen*[4]

A twelve year old Turkish boy, Zeki Sen, moved to the Netherlands in 1977, joining his father who was already living there. In 1982, he married in Turkey and his new wife Gülden went on living there. In 1983, their daughter Sinem was born. In 1986, Gülden moved to the Netherlands in order to join her husband. Sinem remained behind with her aunt and uncle. In 1992, reunification with Sinem was applied for. Marital problems had earlier prevented the application. The Dutch authorities refused the application. This refusal was based on the ground that Sinem was in effect not a member of the family of Zeki and Gülden any more. This argument was based not on Article 8 ECHR, but on the Dutch family reunification policy, which at that time required 'effective family ties'. The argument was that Sinem had become a member of the family of Gülden's sister. Zeki and Gülden had not established that it was their intention to leave Sinem behind only temporarily, while they also had not intervened in her education, nor had they established that they had supported her financially.[5] In the context of Article 8 ECHR, the argument was that, although there was family life, there was no positive obligation to allow Sinem to enter the Netherlands.

Unanimously, the Court found the refusal of a residence permit to Sinem Sen to be a violation of Article 8.

1.4. *Mehret Ghedlay Subhatu*[6]

This case concerns a family with a complicated structure, therefore an illustration is necessary (Fig. 1).

In 1989, after the death of her husband, Mr. Ghedlay Subhatu, in the civil war, Mrs. Tuquabo-Tekle fled from Eritrea to Norway. She left her child Adhanom with a friend of hers in Addis Ababa (Ethiopia), while Michael and Mehret stayed with an uncle and their grandmother in what was to become the independent state of Eritrea. In Norway, Mrs. Tuquabo-Tekle was denied asylum, but she was granted a residence permit on humanitarian grounds. The Norwegian authorities granted permission for the children to reside with her, and with the assistance of the authorities and UNHCR, Adhanom entered Norway from Addis Ababa (Ethiopia) in 1991. It was not possible to procure the departure of the other two children from Eritrea, but it was Mrs. Tuquabo-Tekle's intention to bring them to Norway later. In 1992, she married Mr. Tuquabo, who was living in the Netherlands with a refugee status. She and Adhanom were granted a residence permit on the basis of family reunion in 1993.

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[4] ECtHR 21 December 2001, *Sen v the Netherlands*, app. no. 31465/96.

[5] See on the, now abandoned, Dutch policy on effective family ties, Sarah van Walsum: *The Family and the Nation*, Newcastle upon Tyne: Cambridge Scholars Publishing, 2008, pp. 156–157, 172, 230–232.

[6] ECtHR 1 December 2005, *Tuquabo-Tekle v the Netherlands*, app. no. 60665/00

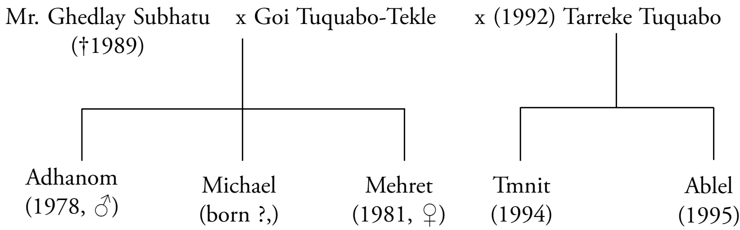

Figure 1. Tuquabo-Tekle Family tree

In 1997, Mrs. Tuquabo-Tekle and Mr. Tuquabo applied for a visa for Mehret, who at that moment was 15 years old. The application was rejected. The reason was that Mehret has ceased to belong effectively to her mother's family, while she has never been a member of Mr. Tuquabo's family. She had become part of the family of her grandmother. According to the Dutch authorities, the grandparents had custody over Mehret, and Mrs. Tuquabo-Tekle had not shown that she had been sufficiently involved in her upbringing, either by taking decisions about her education or by financially supporting her. The counter-argument that the effective family ties had not been broken because it was impossible to be reunited with Mehret at an earlier moment was rejected because it had not been made plausible. In addition, it had not been sufficiently shown that Mehret could not remain with her grandmother, if necessary supported financially by her family from the Netherlands.

Unanimously, the Court found the refusal of a residence permit to be contrary to Article 8.

2. Inconsistent Case Law

At a general level, one can see that four cases which look similar led to different outcomes. However, arguably the different outcomes can be explained by the fact that, upon closer inspection, the cases are different. Looking at the three questions that are central to the Court's approach of the cases it can be asked: how did the separation between parents and children come about? Why do they want to be reunited at this particular moment? And why do they want to be reunited in the European country concerned instead of in the country of origin of the family?

2.1. *Why Separate?*

An initial issue in the Court's reasoning concerns whether the parents are responsible for the separation from their child.

In *Gül*, the Court held that the departure and continued presence in Switzerland of both Mr. and Mrs. Gül was voluntary. Mr. Gül "caused the separation from his son" by leaving Turkey (par. 41), for which he had no compelling reason,

as was clear from the rejection of his asylum application. Mrs. Gül might have had no possibilities of medical treatment in Turkey in 1987, but could have received it later on in Turkey. In any case, they visited their son Ersin in the 1990's, indicating that whatever compelling reasons they might have had for not being in Turkey were no longer present. (par. 41).

Similarly, the Court considers Mr. *Ahmut's* move to the Netherlands as voluntary. The fact of the applicants living apart "is the result of Salah Ahmut's conscious decision to settle in the Netherlands rather than remain in Morocco" (par. 70).

In the *Sen* Judgment, the Court admits that, as in *Ahmut*, the separation between the parents in Sinem was the result of a deliberate choice of the parents (par. 39). Then, however, the reasoning takes a different turn. The Court states that Mrs. Sen's choice to leave Sinem behind after having cared for her for three years "cannot be considered as an irrevocable decision to establish her place of residence forever in (Turkey) and to enjoy with her only intermittent and loose ties, definitively renouncing her company and thereby abandoning every idea of reunification of their family." (para. 40). The Court goes even further, and argues that the Netherlands has not struck a fair balance between the interests of the Sen family and the Dutch national interests by forcing the Sens to "choose between abandoning the situation they had acquired in the Netherlands, or to renounce the company of their oldest daughter." (para. 41). So the choice the parents made when leaving their child behind is not held against them, while contrastingly, the choice the Dutch authorities force upon them *is* held against the authorities.

In *Tuquabo-Tekle*, the Court repeats the passage from *Sen* holding that the fact that a parent has left a child behind does not in itself indicate that this was intended to be a permanent arrangement (par. 45). But in addition, it questions whether Mrs. Tuquabo-Tekle left Mehret behind of her own free will, as the government had argued. The Court points out that Mrs. Tuquabo-Tekle fled Eritrea during a civil war in order to seek asylum abroad following the death of her husband (par. 47). In addition, the Court points out that the length of the separation between Mrs. Tuquabo-Tekle and her daughter is not a result of her own choices, but occurred against her will. She took steps to be reunited as soon as she had acquired a residence right in Norway. In Mehret's case, she did not succeed (par. 45). The delay was caused partly by the problems in acquiring an Eritrean passport for Mehret, and by Mr. and Mrs. Tuquabo's (according to the Dutch government: erroneous) belief that they needed suitable housing, which took time to get in the Netherlands (par. 46).

In the *Gül* case, the denial of asylum is taken to mean that Mr. Gül had no good reason to leave Turkey. The possibility that he did have good reasons in 1983, which had disappeared in 1989, is not taken into account;[7] nor is the

[7] Martens hints at this possibility in his dissent.

possibility that he had good reasons to leave which, however, were not serious enough to entitle him to asylum. The denial of asylum to Mrs. Tuquabo-Tekle is not held to imply that she had no good reasons to flee. It is unclear why the departure of one failed asylum seeker is considered voluntary, while that of another is held to be involuntary.

In the case of Mr. Ahmut his move to the Netherlands in order to join his second wife is considered voluntary; the Court found he could have remained in Morocco but does not enquire whether his second wife could have joined him there. There is a subtle difference with the parallel passage in *Sen*; there, the Court holds that to leave Sinem behind was a conscious decision of Gülden; Zeki was already living in the Netherlands from the age of twelve. One may have expected the Court to hold that Mr. Ahmut should not have been forced to choose between joining his second wife in the Netherlands and remaining with his son in Morocco. The Sens could have evaded the moral dilemma, because Sinem could have come to the Netherlands if she had come at the same time as her mother. Yet, it was held against Mr. Ahmut that he came to the Netherlands leaving behind his son, while the same decision is not held against Mrs. Sen. The Court labels Mr. Ahmut's departure, who had to choose between family life with his son or with second wife, as voluntary, while in *Sen* the Court adds that this does not imply an irrevocable decision to live apart.

2.2. *Why Reunite Now?*

In the *Gül* and *Tuquabo-Tekle* cases, the parents seek family reunion as soon as they have a residence permit. As indicated above, an application for Mehret took so long in coming because it was difficult to arrange for travel documents, and because Mr. and Mrs. Tuquabo-Tekle mistakenly thought that adequate housing was required for a successful application for family reunion. In addition, it is argued that Mehret's grandmother had stopped her education in anticipation of an arranged marriage but the Court did not find that decisive (par. 50). In the *Tuquabo-Tekle* judgment the Court emphasises that the mother sought family reunion as soon as she had a residence right, arguing that she never made the choice to live separately from her child: this point is not raised in *Gül.*

In the *Sen* case, the parents argued that Sinem initially remained behind because Mr. Sen did not want Sinem to join him in the Netherlands. Only in 1992 could his wife convince him to apply. In this way, the Court suggested that Mrs. Sen always wanted Sinem to join her, started working on this straight away, but encountered an obstacle in the form of her husband even before she ran into Dutch family reunion policy. Souffiane Ahmut remained with his mother after his parents' divorce. His mother died in a traffic accident, after which he was taken care of by his paternal grandmother. The argument was that the grandmother had become unable to care for Souffiane, who was living in a boarding school in Tangier at the moment of the Court's judgment.

It can be seen that in the two asylum cases, the fact that both applicants sought reunion as soon as they had a residence right is referred to by the Court in favour of Mrs. Tuquabo-Tekle, and disregarded in *Gül.* Contrastingly, the choice to leave Sinem behind with relatives is not held against the applicants in *Sen*, while the logical decision to leave Souffiane with Mr. Ahmut's ex wife (who had custody over Souffiane) is interpreted as a voluntary decision to leave the child behind.

2.3. *Why Reunite Here?*

In all four cases, the children had strong and almost exclusive "cultural and linguistic ties" with the country where they were living. Souffiane Ahmut was the only one to have lived for one year in the Netherlands.

In three of the four cases, children had been born to the parents in their new country. Nursal Gül was born in 1988 in Switzerland, and was residing in a children's home; her mother could not care for her on account of her medical situation (the possibility that Mr. Gül could care for her is not raised). Sinem Sen had two brothers who were born in the Netherlands, and Mehret had two half brothers born in the Netherlands. Souffiane Ahmut only had older siblings who were living in Morocco. In *Gül*, the fact that one child is legally residing in Switzerland and 'belongs' there is not mentioned, while in *Sen* and *Tuqabo-Tekle* this weighs heavily in favour of the applicants.

Mr. Tuquabo-Tekle had been recognised as a refugee in the Netherlands, and as we saw above Mrs. Tuquabo-Tekle is implicitly taken to be an involuntary migrant as well. Therefore, suggesting that they might as well move to Eritrea does not seem obvious, and the issue is not raised. However, the civil war was over, Eritrea had become independent; the Court might have argued therefore that the family could move there. The Court does rely on that argument in *Gül.* In both *Sen* and *Tuquabo-Tekle*, the Court argues that the settled status of the parents in the Netherlands is a factor against expecting the family to move abroad. Gül had been residing in Switzerland for a considerable time as well, but that is not considered decisive.

Again, we see that the presence of siblings born in Europe is referred to in favour of the applicants in *Sen* and *Tuquablo-Tekle*, and ignored in *Gül*. Also, the issue of whether the parents could have joined the child in the country of origin is dealt with in an inconsistent way.

2.4. *Conclusion*

I am not alone in finding the Court's case law on this point inconsistent. We have seen that the Court both interprets the (in)voluntary nature of the separation between parents and children, *and* considers it not to be decisive. The Court focuses on the speed with which parents seek reunion, *and* considers it not to be

decisive. The Court addresses whether the family can move to the country of origin, *and* considers it not to be decisive. So although the Court relies on legal arguments in each of its judgments, the judgments read as a whole are inconclusive. Identical or comparable factors may turn up on each side of the scale, facts are reframed so as to fits the Court's arguments. In the next section, I will argue that this could not be other than inconsistent.

3. Two Axes of Legal Argument

The Court is confronted with two tensions, in each of which it has to find a middle position. One tension concerns the nature of human rights law; the other concerns the legitimacy of migration control.

3.1. *Ascending/Descending*

The judiciary is confronted with interpreting and developing the nature of human rights law, in this article, specifically the right to respect for family life. Are States bound by Article 8 because they have agreed to be bound by it when they ratified the European Convention of Human Rights? This is certainly true. If they would not have signed the Convention, they would not be bound by Article 8. But does this imply that the Convention should be interpreted in such a way that States are *only* obliged to act in ways they have agreed with in 1950? (or later, viz. Article 31 par. 3 Vienna Convention on the Law of Treaties.) If this view is taken, then a progressive ("dynamic") interpretation of the right to family life is only possible if it has been accepted by at least a majority of the States, party to the Convention. The progressive interpretation can only be forced upon States lagging behind. This is the ascending, apologetic view identified by Koskenniemi.[8] In this view, international law is positive and concrete – a matter of fact, so to speak – which can be "found" by a proper study of the relevant sources. The other view, however, holds that the right to respect for family life has meaning independently from the will of the States party to the European Convention on Human Rights. In this view, the Convention enshrines the fundamental values of European States. They have been codified after the fall of Nazism and Fascism, and during Communism. This supreme legislative act only has tangible value if it is taken to mean that the rights laid down in the Convention are not at the free disposal of party States. The essence of human rights is that they can be *held against* States. This is Koskenniemi's descending, utopian view. International law in this view is a normative phenomenon, which therefore cannot be reduced to the acts of the entities it is

[8] His argument concerns international law in general, Martti Koskenniemi, *From Apology to Utopia. The Structure of International legal Argument*, Cambridge: Cambridge University Press, 2005.

supposed to regulate. Human rights law must be autonomous *vis-à-vis* States if it is to be meaningful.

As Koskenniemi has argued, each view can be subjected to criticism, holding that it is too subjective, too political. In the ascending view, human rights express States views on what human rights are. States can decide what they mean; the political status quo is decisive. Consequently, law adds little to State practice. This criticism may be softened somewhat by arguing that once a particular position has been agreed as following from a basic right that is taken to be a minimum position. So States can agree to expand human rights, not to restrict them; once States have agreed to a right, they cannot get rid of it. This is a tenable argument, but it does not do away with the core criticism. If States act carefully and do not easily agree on expanding human rights, they can prevent a dynamic interpretation. The descending view, however, also can be subjected to the criticism that it is too subjective and political. If we do not stick by the literal meaning of the words of the Convention as intended by the signatory States, what is the objective basis for deciding what the right to family life implies? Important positions of the Court (on the equal value of extra-marital relationships, on migrant's rights) do not reflect the law as it was made by the States party to the Convention, but merely the subjective views of the judges on the Court.

As Koskenniemi has argued in the context of international law in general, neither position can be taken in its pure form. Human rights argumentation is always uneasily negotiating an ever unstable compromise in between the two positions, referring to both. The Convention is seen as legislation (ascending) by which States have submitted themselves to fundamental rules which must be interpreted in a dynamic way (descending).

3.2. *Cosmopolitanism/Communitarianism*

In family reunion cases, however, legal argument has to deal with another tension, concerning the legitimacy of migration control. One view on this (mostly referred to as "communitarian") takes as its basic presumption, that fundamental values such as freedom and solidarity require that people are organized in groups. A crucial thing for such groups is that they have the right to decide about membership. Usually, this right is subsequently limited, but the starting position remains important. In this view, the maintenance of State sovereignty is crucial. This is not a matter of nationalism; it is a universalist position, because universal State sovereignty is seen as crucial for liberty and solidarity. Others take the rights of individuals as their starting point (the cosmopolitan or libertarian view). Their presumption is that individual rights are the basis of any legitimate political system, including the right of people to move for purposes of family life, enjoying the ownership of property, or fleeing violence. Usually, this right to free movement is subsequently limited, but the rights rhetoric remains a crucial part of this view.

Elsewhere I have argued extensively that these two views overlap.[9] If they are applied to concrete migration law disputes, they lead to results which are hard to tell apart. No one would assert that there is a right to absolute group egoism, regardless of the consequences; and no one would assert that there is a right to absolute individual egoism, even if all world citizens decide to settle on Malta. Both egoisms are considered as simultaneously legitimate and subject to restrictions. The end of the affair is that the *status quo* of migration control is considered basically legitimate and largely in conformity with human rights law.

3.3. *Conclusion*

One tension should not be confused with the other. The descending view of human rights law does not coincide with the cosmopolitan view on migration control, nor does the ascending view correspond to the communitarian view. The descending view can either take State sovereignty as its starting point, or individual rights. The *Statist descending view* holds that States are under the obligation to protect human rights; and that the existence of the community precedes the State. In legal terms, this takes the form of the plenary power doctrine.[10] The more expansive the view of human rights, the more precious is membership in the national community. Consequently, human rights protection would be undermined if membership was open to anyone. The *individual rights descending view* will hold that the right to respect for family life is a fundamental value. Crucial for family life is the freedom of choice of spouse, whether to have children, and raising the children according to one's own social view. Likewise, the ascending view can take either States' explicit desire to control migration as its starting point or their factual acceptance of a trans-national population. The *statist ascending view* holds that States never agreed to subject their migration control to human rights scrutiny, therefore this should not happen. The *individual rights ascending view* holds that States have consciously admitted large numbers of aliens to their territory, and are bound to guarantee the human rights of these individuals within their jurisdiction. That is what they signed up for – even if that implies a right to immigration of dependent relatives for example.

Both on the ascending/descending axis and on the communitarian/cosmopolitan axis, the extreme positions cannot be adopted because they are clearly vulnerable to criticism. In the crowded centre of debate, there is considerable fuzziness. We all try to make our points by making tiny movements on both axes, but never

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[9] T. Spijkerboer, A Distributive Approach to Migration Law. Or: The Convergence of Communitarianism, Libertarianism and the Status Quo, to be published in: R. Pierik and W. Werner (eds.): *Cosmopolitanism in Context*, Cambridge: Cambridge University Press, 2009.

[10] See for this doctrine i.a. Linda Bosniak, *The Citizen and the Alien. Dilemmas of Contemporary Citizenship*, Princeton University Press, 2006, pp. 50–51; US Supreme Court 21 June 1993, *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993).

too much because that would make us an easy target of criticism. We try to reformulate the positions of people we disagree with in such a way that they become easy targets for our criticism. Seen from this perspective, it is not surprising that conceptual clarity is lacking. Arguments have to be formulated in such a way that they seem neither purely ascending nor purely descending; and as neither purely communitarian nor purely cosmopolitan. If we veer too much to one side of either axis, the one-sidedness of our arguments become vulnerable to attacks. The European Court of Human Rights – like other courts – continually has to navigate a course between these tensions. Coherent legal argumentation seems impossible. The next section takes a closer look at the technical details of the Court's argumentation.

4. The Technicalities of Inconclusiveness

Above, first, the general structure of the Court's argumentation in family reunion cases was analysed. Then the inconsistency of the Court's position was addressed, reflecting the frustration of decision makers, judges and lawyers. Finally, a deconstructive analysis of the Court's case law was presented. The aim of this section is to demonstrate how large ideological tensions (about law in general, and the regulation of migration in particular) operate in a technical legal context. This approach makes the analysis three-dimensional. We will see how this local technical context fuses with the cosmopolitanism/communitarianism tension as well as with the ascending/descending tension. On each axis, the Court must evade a position considered as extreme. How can this be done in a language that presents itself as technical?

4.1. *The Rule/Exception Structure*

In *Gül* and *Ahmut*, the Court in several ways indicates that it is exceptional if a State is obliged to allow a child to enter its territory for the purpose family reunification. First, it states that "the essential object of Article 8 is to protect the individual against arbitrary action by public authorities. There may in addition be positive obligations inherent in effective 'respect' for family life."[11] It seems to minimise the relevance of this difference by admitting that the boundaries between positive and negative obligations do not lend themselves to precise definition, and that the applicable principles are similar. "In both contexts regard must be had to a fair balance that has to be struck between the competing interests of the individual and of the community as whole; and in both contexts the State enjoys a certain margin of appreciation."[12] Notwithstanding, the idea remains, that a

[11] *Gül*, par. 38; *Ahmut*, par. 63; *Tuquabo-Tekle*, par. 42.
[12] *Gül*, par. 38 ; *Ahmut*, par. 63 ; *Sen*, par. 31; *Tuquabo-Tekle*, par. 42.

positive obligation (i.e. an obligation to allow a child to join its parents on the State's territory) is something more exceptional than a negative one. In this way, the whole issue of family reunion is located under the exception to the rule.[13]

Second, the Court rules that, as a matter of well-established international law, a State has the right to control the entry of non-nationals into its territory, adding that this is "subject to its treaty obligations".[14] This mitigates State sovereignty, but again this indicates that sovereignty is the rule, and any subjective right that goes against that principle is the exception.

Third, it states that, regarding immigration, Article 8 does not impose on States a general obligation to respect married couples' choice of country of matrimonial residence and to allow family reunion on its territory.[15] The rule is that States have no obligation on this point, but that there may be exceptions.

Fourth, in *Gül* the exception is formulated in a very narrow way: is the child's move to the country where its parents live "the only way to develop family life."[16] In *Ahmut* this formulation is absent. In *Sen* and *Tuquablo-Tekle*, it formulates a different criterion. At stake is not whether the child's move to the country where the parents are residing is "the only way to develop family life", but whether that would be "the most adequate means of developing family life"[17] – a less stringent criterion.

Finally, regarding the relationship between immigration and family aspects of the cases in *Gül* the Court emphasises that "the present case concerns not only family life but also immigration."[18] In *Sen* and *Tuquablo-Tekle*, it reverses the terms it uses on this point. It states that the question at stake in these cases should not be analysed solely from an immigration point of view. It involved an alien who left behind a family when they left their country of origin, which distinguishes the case from those who have only created family ties once established in the host country. It does not go on to say that States have a right to control immigration.[19] Whereas in *Gül*, the Court indicates that the migration aspect of the case is primary, in *Sen* and *Tuquablo-Tekle* the family life aspect of the case gets more emphasis.

On all five points, it is easy to see that the Court is dealing with the tension between a cosmopolitan and a communitarian position. Both positions are acknowledged, and the Court is signalling that it finds them both legitimate. A

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13) In *Gül* the Court leaves undecided whether the case concerns a positive or a negative obligation; in the other judgments, it explicitly states the case concerns a positive obligation, *Ahmut*, par. 63; *Sen*, par. 31–32; *Tuquabo-Tekle*, par. 42.

14) *Gül*, par. 38; *Ahmut*, par. 67 (b); *Sen*, par. 36 (b); *Tuquabo-Tekle*, par. 43 (b).

15) *Gül*, par. 38; *Ahmut*, par. 67 (c); *Sen*, par. 36 (c); *Tuquabo-Tekle*, par. 43 (c).

16) *Gül*, par. 39. In *Ahmut* the point is not dealt with.

17) *Sen*, par. 40; *Tuquabo-Tekle*, par. 47.

18) *Gül*, par. 37

19) *Sen*, par. 37; *Tuquabo-Tekle*, par. 44.

"fair balance" has to be struck between them, in the context of the particularities of each case. Notice, however, that sometimes State sovereignty is seen from a descending position. This happens in the standard passage stating that States have the right to control the entry of non-nationals, subject to their treaty obligations. Here, State sovereignty is taken to be a natural phenomenon preceding positive law ("as a matter of well-established international law" – no source is given; this is simply the case), while the limits to State sovereignty are a matter of positive law which has been created by States ("subject to its treaty obligations"). State sovereignty represents the descending position, while rights are the ascending position. On other points, however, this is reversed. The argument that States enjoy a certain margin of appreciation in striking a fair balance, and that Article 8 does not impose on States an obligation to respect the choice of residence of couples, does the reverse. Here, the right to respect for family life is represented as the right not originating from the will of States but from an external system of rules which should not be overstretched to infringe upon State prerogatives.

In sum: the Court, working within a formally unchanged overarching rule/exception structure can either emphasise or de-emphasise the rule in order to make minimal shifts on the cosmopolitanism/communitarianism as well as on the ascending/descending axis. The only explicit way in which the rule is de-emphasised in *Sen* and *Tuquablo-Tekle* is the wording of the exception. However, by *sotto voce* questioning State sovereignty, as the Court does by reversing the order in which it mentions family life and immigration, it prepares the ground for this reversal, just as it prepares the ground for the strict wording in *Gül* by presenting State sovereignty as fundamental in immigration matters. Both State sovereignty and individual rights are represented as resulting from positive law created by States (ascending), *and* as a matter of pre-existing entitlements which have to be taken into account when interpreting the black letters of the Convention (descending).

4.2. *The Field of Law*

The Court's perception of the field of law of the case is crucial. If the case is seen as an immigration case, State sovereignty is the primary consideration, while the rights of individuals carry more weight in a family law context.

In a general passage about the applicable standard, the Court states:

- the extent of a State's obligations to admit to its territory relatives of settled migrants will vary according to the particular circumstances of the persons involved and the general interest;
- as a matter of well-established law and subject to its treaty obligations, a State has the right to control the entry of non-nationals to its territory;

– where immigration is concerned, Article 8 does not impose on a State a general obligation to respect the by married couples' choice of country of their matrimonial residence, and to authorise family reunion in its territory.[20]

Although there is a difference between these indents in the extent to which they emphasise State sovereignty (especially the second and third do so, while the first stresses State obligations), they all are based on the presumption that the issue at stake is whether or not the State should admit an alien. The case is not perceived as being primarily about family life – in fact, in none of the indents that crucial term is used. In all four judgments, the – identical – general paragraphs reflect the perception that the immigration aspect of the case (hence: the communitarian perspective) is primary. This is remarkable, as the Convention does not guarantee States' rights to control immigration but individual rights of persons within the jurisdiction of States. But, in the absence of black letter law to the contrary, State sovereignty is considered as the default option; if there is no limitation, there is freedom – for the State, that is.

However, when we look at the Court's considerations about the individual aspects of these cases, we do see a shift. In *Gül* and *Ahmut*, the Court answers the question whether admission of the child is the *only* way of maintaining *some* form of family life between the parents and the child. The immigration aspect of the case, which implies State sovereignty, is the lens through which the case is seen. State sovereignty will only have to yield of there is no other way for the family to enjoy family life; sovereignty is seen as the default option. In *Sen* and *Tuquabo-Tekle*, however, the Court answers the question what is the *most adequate* way of developing family life. This terminology puts family sovereignty (hence: the cosmopolitan perspective) first, suggesting that the choices of the family members only carry less weight than those of the State if there are factors of overriding importance against admission of the child. In *Gül*, the impossibility of maintaining the child financially was the only individual factor against admission. In the other three cases, there were no individual factors against admission; the only arguments of the State were general immigration control arguments. In *Sen* and *Tuquabo-Tekle*, the presumption is that rights of individuals function as the default option; if there is no legitimate limitation, there is freedom for the family members.

Although the general considerations of the Court are identical in the four judgments, we see State freedom and individual freedom trading places on the ascending/descending axis.

[20] *Gül*, par. 38; *Ahmut*, par. 67; *Sen*, para. 36; *Tuquablo-Tekle*, par. 43.

4.3. *The Object of Scrutiny*

The issue under scrutiny in all four cases is whether the refusal to grant a residence permit could be a violation of the right to respect for family life. As the Court shows in its four judgments, nothing follows from this object of scrutiny. However, the way this formal object of scrutiny was employed differs from case to case. In the *Gül* case, the issue was whether admitting Ersin to Switzerland was *the only way* of developing family life. In *Ahmut*, the issue was whether the refusal prevented Salah Ahmut from having the family life with Souffiane in the form it had when they were living in different countries. These substantive objects of scrutiny are formulated in such a way that the absence of an obligation to admit the child is given, and lead to an enquiry whether there is a right in the Convention which can trump State sovereignty. This is the communitarian descending position, seeing State sovereignty as the natural situation: looking for limitations of State sovereignty in the Convention's codification of human rights. Contrarily, in *Sen* and *Tuquablo-Tekle*, the Court enquired whether the child's move to the Netherlands was *the most adequate* way of developing family life and whether there was a major obstacle to moving the family to Turkey and Eritrea respectively. This shift in the substantive object of scrutiny represents a shift towards the cosmopolitan descending perspective. It takes the rights of the family as the natural situation, and looks at the Convention for finding out whether the State can legitimately limit this right.

4.4. *The Intensity of Judicial Review*

In a standard passage in all four judgments, the Court states that, in deciding whether a fair balance has been struck between the competing interests of the individual and of the community as a whole, the State enjoys a certain margin of appreciation. However, in *Gül* and *Ahmut* the Court takes a more distanced attitude, allowing the State more discretion in whether or not it will admit the foreign child. The Court enquires whether the refusal of family reunification makes family life impossible. In *Ahmut*, it states that "Article 8 does not guarantee a right to choose the most *suitable* place to develop family life." (para. 71, emphasis added). This way of framing the issue allows the State a wider margin of appreciation than the way in which the issue is framed in *Sen* and *Tuquablo-Tekle* where the Court addressed the issue of what was the most *adequate* way of developing family life. The Court formulates its own view on this point, and decides the case on the basis of that view.

In fact, the Court takes the State's assessment as a starting point in *Gül* and *Ahmut*, and enquires whether it is evident that a fair balance has not been struck. In *Gül* the Court states that "it would admittedly not be easy for (Mr. and Mrs. Gül) to return to Turkey, but there are, strictly speaking, no obstacles preventing them from developing family life in Turkey." (para. 42). So the Court

emphasises that it is aware of the harshness of non-admission of Ersin, and concludes that *strictly speaking* there are no obstacles. In this sentence, the marginality of the Court's scrutiny is clear. In *Sen* and *Tuquablo-Tekle* however, the Court makes its own assessment, and decides for itself whether a fair balance has been struck. The arguments of the State are important, but they are not above those of the applicant, as in *Gül* and *Ahmut*.

The intensity of the Court's review is directly related to its more communitarian or more cosmopolitan position. The fact that the Court allows the State an area of discretion is illustrative of its ascending position. However, it has to draw a line somewhere, and this cannot be done in a determinate way. When does a State overstep its margin of appreciation? When there are major obstacles to continuing family life? Or when there are major obstacles to the entire family moving to another country? Or is there an already excess of discretion when the State refuses to facilitate the most adequate way of developing family life? Whatever the Court decides, the limits to the margin of appreciation cannot be based on State behaviour, and must be based on the Court's own norms. Not specified in the Convention, the Court has to "make them up".

4.5. *The Relevant Moment in Time*

From the formal object of scrutiny, it is clear that in all cases the issue is whether the refusal of a residence permit entailed a violation of Article 8. From this, it does not follow that events which have taken place after that moment must be disregarded. However, the Court has not taken a clear position as to which moment is relevant for assessing the issues at stake in a case.

Gül is very unclear. The court finds it relevant that Mr. Gül "caused" the separation from his son, suggesting that he had no valid asylum-related reasons for leaving Turkey long *before* the Swiss authorities refused a residence permit to Ersin. In addition, it states the visits paid to Ersin in recent years (i.e. long *after* the moment at which the Swiss authorities refused the residence permit) "tend to show" (para. 41) that Gül's reasons for leaving Turkey are no longer valid. Mrs. Gül left Turkey in 1987 for urgent medical reasons, but it was not proven that she could not receive appropriate medical treatment in Turkey at the moment of the Court's judgment (para. 41).

In the *Ahmut* case, the conscious decision to settle in the Netherlands, leaving a son behind was considered relevant (para. 70). This happened *before* the refusal of a residence permit to Souffiane. Also, the visits Salah and Souffiane paid each other, *after* the refusal and Souffiane's subsequent return to Morocco, were taken into account (par. 71).

Yet in *Sen*, however, the choice of a wife to go to the Netherlands in order to join her husband without her daughter is not considered abandoning every idea of family reunification (par. 40). On the basis of substantive arguments, the Court

gets rid of a factor which weighed heavily to the disadvantage of *Gül* and *Ahmut*. In *Tuquablo-Tekle*, the Court repeats the passage from *Sen*, but goes further and denies that Mrs. Tuquablo-Tekle decided to live separated from her daughter. It held that "it appears clearly from the facts of the present case that Mrs. Tuquablo-Tekle always intended for Mehret to join her." (para. 45). She tried to arrange for reunification as soon as she had a residence right in Norway; the delay in the request for family reunion was not her choice .

In *Sen* and *Tuquablo-Tekle* siblings born and bred in the Netherlands after the refusal of a residence permit are considered relevant, whereas in *Gül* the sister is largely ignored. But when assessing the relevance of the age of Sinem and Mehret, the Court refers to the moment at which the application for family reunion was lodged (*Tuquablo-Tekle*, para. 50), while in *Sen* the Court refers to the young age of Sinem (par. 40), who was 18 when the Court gave its judgment – hence it must refer here to the moment the application for family reunion was made, or when it was turned down. Sinem was nine when the application was made and twelve when the court rejected her appeal.

While there are no signs that the Court consciously "shops" for facts that best suit its conclusions, the judgments are inconsistent on this point. Especially, in one and the same judgment looking *ex tunc* (i.e. at the moment of the administrative decision) in some respects, and *ex nunc* in others seems flatly inconsistent. Note that an earlier or a later moment is not in itself a sign of a more communitarian or cosmopolitan position, or of a descending or ascending perspective. The conceptual foundations as well as the consequences of the moment in time the Court looks at are entirely contextual.

4.6. *Formalities*

There are two formal issues on which the Court has taken an explicit position in the cases under discussion here.

Firstly, whether the relation between the applicants amounts to family life. In *Berrehab*,[21] the Court dismissed any suggestion that the relationship between a child and its parents has insufficient substance to amount to family life. States do not succeed in keeping cases outside the scope of Article 8 in this way, which would definitely decide the case in their favour. In *Gül*, Stwitzerland had first argued that *Gül* had left Turkey when Ersin was three years old and never attempted to develop family life in Turkey. Second, the focus of Ersin's family life was in Turkey since he had been incorporated in the family of an older brother. Third, Nursal's residence in a children's home showed that the parents were incapable of parenting. Characteristically, the Court responded by reiterating

[21] ECtHR 21 June 1988, *Berrehab v Netherlands*, app. no. 10730/84, Series A, 138.

that a child born from a marital union is *ipso facto* part of a family relationship and this creates a strong bond broken only in exceptional circumstances. Such circumstances were held to be absent in the *Gül* case (para. 32–33). In migration cases, the Court has always taken the position that the intensity of the ties between relatives is an element to be taken into account in the balance of interests. It has never accepted that the issue of balancing could be evaded because the ties are so minimal that they do not count as family life. In effect, the Court has taken a position which always allows it to manoeuvre; it will never be forced to dismiss a case because a State can establish there was no family life. This represents a naturalist, descending view of the family – it cannot be caught in narrow rules; it exists *ipso facto*. Positive law may regulate it, but cannot define it away. This unusual and extreme descending position ensures that family reunion issues are always within the scope of review of the Court. The Court is able to take a position that is cosmopolitan, viewed from the immigration context because the position is communitarian if viewed from the family context. The family is a community which is considered even more primordial than the national community. The Court's very inclusive position, ensuring its capacity to supervise the regulation of family life, is an indication of the centrality of the family to European (legal) culture.

A second formal issue is the distinction between infringements (or 'negative' obligations) and positive obligations. The classical notion of human rights holds that – in the words of the Court – human rights protect against arbitrary interference by States. This implies a duty of States *not* to act. However, in some cases a State may be required to act in order to protect a human right. This may imply a duty to protect children against abusive relatives, or to adopt legislation ensuring that children born out of wedlock have equal rights to children born from a marriage. Human rights have clearer cut consequences for negative obligations than for positive obligations, as States should be able to decide which means they will use in order to realise the human right at stake. Consequently, it makes a difference for the intensity of judicial scrutiny whether an issue is conceptualised as concerning an infringement or a positive obligation.

However, the difference between a negative and a positive obligation is often a matter of perspective. In cases where a relative is already in the respondent State, should the refusal to allow family reunion be labelled as concerning a positive obligation (refusal to grant a residence permit) or as a negative obligation (the intended deportation)? And even if the relative is still abroad, should the issue be formulated as concerning the refusal of a residence permit (positive obligation) or as one of putting in place a restrictive policy which is an obstacle to the free enjoyment of family life (negative obligation)?

In *Gül*, the Court has bracketed the difference between negative and positive obligations. It held that the boundaries between the two under Article 8 do not lend themselves to precise definition. According to the Court, the applicable

principles are similar: in both contexts a fair balance must be struck between the competing interests of the individual and of the community and in both contexts the State enjoys a certain margin of appreciation (para. 38). The Court addresses the facts of the case without indicating whether it is doing so under the label of infringement or positive obligation. However, the Court ends with confusion. Having concluded that family Gül can return to Turkey to live with Ersin, it states that "Switzerland has not failed to fulfil the obligations arising under Article 8 para. 1, and there has been no interference in the applicant's family life within the meaning of that Article." (para. 43). This is odd, since if there had been no interference, there would have been no need to assess whether it was reasonable to expect the Gül parents to move to Turkey. If the case is considered as being about interference, the question is whether the interference was justified under the second paragraph of Article 8. Alternatively, if the case is about a positive obligation, the conclusion of no interference should be followed by the conclusion that Switzerland was not under a positive obligation to admit Ersin.

In later judgments, the Court explicitly addresses the issue under the heading of a positive obligation, because, as it states in *Ahmut*, they hinge on the question whether the State was under a duty to allow the child to reside with its parents, thus enabling the relatives to maintain and develop family life on the territory of the respondent State. The effect of the Court's approximation of negative and positive obligations is that the Court does not get caught in clear cut criteria which it has to apply. Also, it steers free from the choice between negative and positive obligations. The result of this anti-formal attitude is that the Court can assess the facts of each case separately, and minimises the precedent value of its judgments.

4.7. *Conclusion*

Every judicial decision will have to deal with a number of technical issues such as the ones described above, which can be dealt with in two or more ways which display sufficient craftsmanship. The combination of these options gives courts enormous freedom, even though they are constrained by legal technique. It would, for example, not be appropriate for a court to write that it deeply feels that the case should be decided in this or that way. It requires considerable methodical expertise to deal with the technicalities appropriately – but this does not mean that there is only one way of doing so.

5. Building Blocks for a Conclusion

In my analysis, legal argumentation – even in its most technical form – is inconclusive. It cannot be separated from the outcome; the outcome of the

argumentation is crucial in steering technical argument. The outcome is not only outcome, but input as well. This would suggest that legal argument is not restrained and entirely free. That is at odds with the experience of almost any lawyer, including my own. But because the restraints on legal argumentation are not legal (as we have just seen), the next plausible option is that they are social. We will leave that for another occasion. By way of conclusion, I will limit myself to two observations.

I. The European Convention of Human Rights gives rights to persons *vis-à-vis* States, indicating that in some situations States may legitimately limit these rights. Reading Strasbourg case law on migration, however, one would be inclined to think that it concerns the European Convention of State Rights, giving rights to States against persons, indicating that in some situations individual rights can trump State rights. This is an overstatement, but it is clear that the Court can plausibly rely on the notion of primordial State sovereignty if it feels an application is to be dismissed, and can exceptionally rely on its normal argumentation pattern (which puts individual rights first) if it finds a violation of Article 8.

A plausible argument can be made that the Court should end its exceptional attitude in cases concerning immigration. There is no reason why the Court should emphasise the special nature of immigration cases any more than that it should emphasise the special nature of State prerogatives in criminal cases, or environmental cases. The structure of the argument could be that individuals have the right to respect for family life, which clearly includes the right to choose where to enjoy it, unless there is a legitimate reason to stop them from doing so.

I do not claim that this way of approaching migration cases is less problematic than that presently adopted by the Court. The change would be from State sovereignty as the default option to family sovereignty as the default option. Just like the Court could give the *Sen* and *Tuquablo-Tekle* judgments in the present context, so it could give judgments replicating *Gül* and *Ahmut* in the context suggested here. But this approach would put litigating migrants in a slightly more favourable starting position. On the basis of the Convention, this new approach is just as plausible and legitimate as the present one.

II. If legal argument is as flexible as I have suggested here; and if legal argument has a centrist tendency; then it is plausible that, for example, social movements can influence legal argument. If a social movement succeeds in establishing a relatively radical view as credible, the centre of the debate shifts, possibly taking courts along. All the courts need is an innovative way of dealing with the technical issues that allows for shifting to the new centre. Law and lawyers may be a

crucial part of a social movement, as was the case in the American Civil Rights movement. A lack of belief in legal argument does not imply that legal argument is worthless, but may be part of an effort to find more credible way of going about it.