III. Principles of Scientific Method and Case Analysis

The aim in Part III is to assess and critique decisions reached by the European Court of Human Rights with regard to their fact-assessment. As explained in Part I, there are not many clear rules on how the Court ought to contend with the facts of a given case. I propose here to use principles of scientific method to read and critique decisions by the ECtHR because such an approach allows us to critically assess decisions from a new perspective.

Nine cases from the ECtHR's case-law will be analysed in depth. Three cases will be assessed using the principle of simplicity, three cases will be analysed using the principles of explanatory power and external validity and the last three cases will be critiqued based on the principle of falsifiability. The discussion will then turn to the implications of these new categories and how they change the critique of the ECtHR's jurisprudence.

1. Principles of Scientific Method

It is controversial whether or not there exists a general set of principles that guide any inquiry that is claimed to be 'scientific'.[534] In his book *Scientific Method in Brief*, Hugh G. Gauch claims 'that science has general principles that must be mastered to increase productivity and enhance perspective, not that these principles provide a simple and automated sequence of steps to follow'.[535] It can, thus, be said that there is 'no such thing as a distinctly scientific method'.[536] However, scientific inquiries do have a certain common core, and draw on similar modes of inference and inquiry-procedures.[537] Thus, although there is no one single scientific method that can guide procedures of inquiry, there are certain principles that can help us refine our assessment-processes. Susan Haack believes

534 Hugh G Gauch Jr, *Scientific Method in Brief* (Cambridge University Press 2012) 6.
535 ibid 5.
536 Dwyer (n 194) 104.
537 See, e.g., Susan Haack, *Defending Science - Within Reason: Between Scientism and Cynicism* (Prometheus Books 2003) ch 4.

that scientific method is merely a refinement of our thinking processes in everyday life.[538] Thus, if such investigative methods can be used to inform our everyday thinking processes, they can also help us read and assess decisions reached by the European Court of Human Rights.

In her paper on 'Law and Scientific Method' from 1989,[539] Nancy Levit defined scientific method in the context of law and analysed the application of scientific method to jurisprudence.[540] She used principles of scientific method to analyse and criticise both theories of jurisprudence and judicial decisions. Levit observed that the use of scientific method in the legal realm had been limited, up to that point, 'by the prevailing assumption that principles of scientific inquiry must be abandoned when law faces value choices'.[541] However, Levit argued that the criteria of validation on which scientific method relies can be applied to decision-making about both facts and values.[542] If one considers the goal of law to be rationality, the analysis of jurisprudence should follow scientific method.[543] The set of principles for scientific theory-building that Levit applies to the legal sphere encompasses, among others, simplicity, explanatory power, depth or constructivity, fertility and extensibility, external validity, internal consistency and logic, and falsifiability.[544] These criteria are not always distinct from each other. In many instances, they are interlinked and complement each other. They all aim at advancing inquiry and knowledge and at promoting the open exchange of thought-processes and ideas.[545] There are many other criteria that go into sound theory-building or decision-making; the list above is not exhaustive. Criteria such as public verifiability, transparency, clarity, originality, and creativity also play into the analysis.[546] Most of these criteria are deeply intertwined, sometimes they conflict, and sometimes they require more or less the same things. There are no clear rules as to what constitutes a 'good theory' or a 'good decision'; rather, the aim of any theory or method of inquiry should always be the improvement of objectivity and rationality.[547] This general aim also implies certain

538 ibid 95.
539 Levit (n 358).
540 ibid 265.
541 ibid.
542 ibid.
543 ibid 266.
544 ibid 268–272.
545 ibid 303, fn 248.
546 ibid 271–272.
547 ibid 272.

values that should underlie any factual inquiry. Levit holds that 'openness, humility and non-chauvinism inhere in the criteria of theory validation'.[548]

The following case analysis is divided into three sections. Within each of them, three cases from the ECtHR's case-law will be discussed in light of one particular principle. The first principle that will be applied to three cases adjudicated by the ECtHR is the principle of simplicity, whereas the second section will pertain to the principles of explanatory power and external validity, and the third group of cases will be considered in light of the principle of falsifiability. These three sections aim at exemplifying the use of employing principles of scientific method to assess the fact-assessment conducted in judicial decisions.

2. *Analysis of the ECtHR's Case-Law Using Principles of Scientific Method*

What I argue in what follows is that the principles of scientific method can be used to analyse and critique judicial fact-assessment in legal decision-making, including but not limited to the decisions of the ECtHR. It must be noted at the outset that there is no 'scientific roadmap' that will guide decision-makers to 'the right' decision. The view is taken here that abstract concepts such as the principles of scientific method cannot guide all decisions, as contexts and factual underpinnings vary from case to case.[549] However, the abstract principles of scientific inquiry can help us tackle and approach the decisions and their underlying arguments from a different perspective; they will allow us to analyse how arguments are used and whether statements stand when they are tested against the criteria of confirmation. Applying these principles can thus serve as a method of testing the reliability of a given factual analysis.

Arguably, lawyers reading a decision by the ECtHR will quickly shift their focus to 'the law' section of a judgment. What is potentially problematic with this approach is that gaps in the handling of the factual claims may thereby be overlooked. As will be shown in what follows, the ECtHR overlooks some claims put forward by applicants. This leads to gaps in the factual basis of the normative assessment, which, in turn, also calls the normative conclusion into question because it is not based on a sufficient or sound factual assessment.

548 ibid 265.
549 ibid 297.

Whilst the above-mentioned principles are interrelated – and relying on only one principle can lead to poor results –, they are not fully compatible. For instance, a decision that succeeds in terms of its explanatory power will most likely not fulfil the criterion of simplicity simultaneously.[550] In what follows, the selected principles will be explained in more detail, and it will be demonstrated how the case-law of the ECtHR can be criticised on the basis of these new categories.

The ECtHR's case-law was searched via the HUDOC database[551] using different search terms, including 'scientific principles', 'scientific method', 'scientific facts', 'social science', 'data', and 'sufficient evidence'. All principles Nancy Levit refers to in her paper were applied as individual search terms as well. I decided to focus my analysis on three of the principles listed in Levit's paper. The HUDOC search revealed that the principle of simplicity and the principle of falsifiability had been explicitly invoked by judges of the ECtHR to critique the majority's reasoning. Thus, given that these two principles have already been employed to critique the ECtHR's jurisprudence, I decided to select these two principles for my own analysis as well.

The principles of depth and constructivity and of fertility and extensibility turned out to be more suited for critiquing legal theories and schools of thought rather than judgments.[552] However, the focus of this thesis is on scrutinising judicial decisions rather than legal theories. Thus, these principles were discarded for the case analysis. The principle of internal consistency and logic was omitted as well, as it opens up an entirely new field of criticism and would require a theoretical underpinning of its own. Furthermore, the use and limits of logic in legal reasoning have already been discussed by several legal scholars.[553] Thus, the principles of explanatory power and external validity were chosen as the third starting point of analysis; they were combined because there is considerable overlap between them.

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550 ibid 267.

551 See Human Rights Documentation database, available at <https://hudoc.echr.coe.int/eng#{"documentcollectionid2":["GRANDCHAMBER","CHAMBER"]}>, last accessed on 12 July 2021.

552 See, e.g., Nancy Levit in her analysis, ibid 275ss.

553 See, e.g. Wilson Ray Huhn, 'The Use and Limits of Deductive Logic in Legal Reasoning' (2002) 42 Santa Clara Law Review 813; Robert H. Schmidt, 'The Influence of the Legal Paradigm on the Development of Logic', (1999) 40 Texas Law Review; Douglas Lind, 'Logic, Intuition, and the Positivist Legacy of H.L.A. Hart 135, 136 (1999)' (1999) 52 SMU Law Review.

In a sense, there was a back-and-forth between the selection of the cases and the selection of the scientific principles that were to be applied as assessment criteria. My gaze wandered between looking for cases where facts played an important role (which were detected via the search terms in HUDOC) and choosing the principles that would be most useful for analysing cases. Thus, the choice of principles influenced which cases were chosen, and the cases had an impact on the selection of the principles.

a. Simplicity

i. The Principle

The principle of simplicity, also known as the principle of parsimony or efficiency or as Ockham's razor,[554] recommends that if there are multiple theories that fit the data equally well, the simplest theory should be chosen.[555] For a theory to fulfil the principle of simplicity implies that it has the 'ability to explain all of the relevant phenomena in a single set of ideas'.[556] In short, this principle prefers the least complicated explanation.[557]

Ironically, the principle of simplicity is not so simple itself as it encompasses numerous sub-principles, 'including syntactical simplicity (economy of the structure of the theory), semantic simplicity (limitation on the number of presuppositions), epistemological simplicity (economy of concepts with transcendent or generalized components) and pragmatic simplicity (ease of testability).'[558] Simplicity aims at the integration and unification of knowledge, and it warns against the protection of favoured theories by resorting to *ad hoc* explanations.[559] Any explanation for a phenomenon that does not provide a coherent answer to all aspects of that phenomenon will run counter to the principle of simplicity because this principle requires

554 Named after William of Ockham, see 'William of Ockham' (*Stanford Encyclopedia of Philosophy*, 2019) <https://plato.stanford.edu/entries/ockham/>. Last accessed on 12 July 2021.
555 Gauch Jr (n 534) 174.
556 Levit (n 358) 268.
557 ibid.
558 ibid.
559 ibid.

the explanation to be neat. Any requirement for exceptions or adaptations of the main theory will be a red flag.[560]

Gauch explains this principle as demanding that everyone must provide sufficient reason for a statement's truth.[561] What can be deemed a sufficient reason is 'either the observation of a fact, or an immediate logical insight, or divine revelation, or a deduction from these'.[562]

Apart from being an epistemological principle that calls for the preference of the simplest theory that fits the facts, simplicity is also an ontological principle that expects nature to be simple.[563]

Interestingly, in his partly dissenting opinion in *Muršić v. Croatia*, Judge Pinto de Albuquerque criticises the majority's decision using Ockham's razor.[564] The question, which will be discussed in greater detail below, related to the issue of prison overcrowding and the normal conditions that can be expected of prison cells. In Judge Pinto de Albuquerque's opinion, the majority's criteria for assessing the conditions of the prison facilities did not withstand Ockham's razor.[565] It is, thus, not entirely uncommon to criticise the Strasbourg Court on the basis of this principle.

560 ibid.

561 Gauch Jr (n 534) 176. See also chapter 10 on parsimony.

562 ibid 176; Gauch quotes (Boehner 1957:xxi).

563 ibid 193.

564 ECtHR, *Muršić v. Croatia*, App no 7334/13, Judgment of 20 October 2016, Partly Dissenting Opinion of Judge Pinto de Albuquerque, para. 53.

565 ibid: 'Furthermore, the offsetting factors referred to by the majority should already be part of the normal conditions within a prison, such as "sufficient freedom of movement outside the cell and adequate out-of-cell activities", and even very broadly speaking the existence of "an appropriate detention facility". There is a serious logical flaw in this reasoning. Here the majority's criteria can hardly withstand Ockham's razor. *Pluralitas non est ponenda sine necessitate.* In an absolutely redundant way, the majority make use of what should be ordinary features of a prison facility in order to justify an extraordinarily low level of personal space for individuals in detention. For the majority, normal living conditions justify abnormal space conditions. Logic would require that extraordinary negative circumstances be offset only by extraordinary positive counter-circumstances. This is not the case in the majority's logic. No extraordinary positive features of prison life are required by the majority to compensate for the deprivation of each prisoner's right to adequate accommodation in detention.'

ii. Case Analysis

Jalloh v. Germany. The case of *Jalloh v. Germany* of 11 July 2006 concerns the use of emetics on a person who was suspected of dealing with drugs.[566]

On 29 October 1993, policemen observed the applicant, on more than one occasion, taking a plastic bag out of his mouth and handing it over to another person in exchange for money. The policemen believed these bags to contain drugs. When they went to arrest the applicant, he swallowed another plastic bag that had still been in his mouth.[567] The applicant was then taken to a hospital where emetics were administered to him forcibly and against his will. This resulted in the applicant regurgitating one plastic bag, containing 0.2182g of cocaine. He was then declared fit for detention by the doctor.[568] The applicant maintained that he suffered from health repercussions of the forced administration of emetics, including stomach troubles and a nose bleed.[569]

The main question in this case was whether forced administration of emetics violated art. 3 of the Convention and therefore evidence obtained in this manner had to be considered illegal and could not be used in court due to being 'fruit of the poisoned tree'. The applicant and the Government disagreed on whether or not the use of emetics amounted to a violation of art. 3 ECHR. The Court assessed approaches of other Member States with regard to emetics and considered the different positions of experts regarding the question of the dangerousness of the use of emetics.[570] After taking into account the different arguments, the Court decided that the forced use of emetics in this case did amount to inhumane and degrading treatment under art. 3 ECHR.[571] There is one paragraph in the judgment that reflects a problematic line of reasoning by the Court. In that paragraph, the Court notes that drug trafficking is a serious offence and that it is aware of the Member States' efforts in addressing this issue, which causes harm to societies. The problematic part of the paragraph reads as follows:

566 ECtHR, *Jalloh v. Germany*, App no 54810/00, Judgment of 11 July 2006.
567 ibid, para. 11.
568 ibid, para. 13.
569 ibid, paras. 16–18.
570 ECtHR, *Jalloh v. Germany*, App no 54810/00, Judgment of 11 July 2006, paras. 41–44.
571 ibid, para. 83.

> 'However, in the present case it was clear before the impugned measure was ordered and implemented that the street dealer on whom it was imposed had been storing the drugs in his mouth and could not, therefore, have been offering drugs for sale on a large scale. […]'[572]

The Court considers this to be reflected in the sentence that the applicant had received, which was at the lower end of the possible range of sentences. It considered it 'vital for the investigators to be able to determine the exact amount and quality of the drugs that were being offered for sale'.[573] The Court was 'not satisfied that the forcible administration of emetics was indispensable' in the present case in order to obtain the evidence, and it pointed out that the authorities could have waited for the drugs to pass through the applicant's system naturally, as was the practice in other States of the Council of Europe in such cases. [574]

Here the majority considers the fact that the applicant had only sold drugs on a small scale as decisive in determining whether or not the forcible administration of emetics was justified. It implies that the lives of small-scale drug dealers have a different weight in the proportionality analysis than those of large-scale drug dealers. In other words, this reasoning implies that had the applicant been a large-scale drug dealer, the forced administration of emetics may have been justified.

This paragraph is also highlighted by Judge Bratza in his concurring opinion. He rightly notes that he cannot accept the implication of this paragraph '[…] that, even where no medical necessity can be shown to exist, the gravity of the suspected offence and the urgent need to obtain evidence of the offence, should be regarded as relevant factors in determining whether a particular form of treatment violates Article 3.'[575]

Similarly, in their dissenting opinion, Judges Wildhaber and Caflisch criticise this paragraph as implying that the majority values 'the health of large dealers less than that of small dealers'.[576]

From the perspective of simplicity, this line of reasoning is untenable. It reduces the arguments regarding the dangerousness of forced administration of emetics to a limited area. The principle of simplicity requires that the conclusions regarding the procedure in question apply to all drug

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572 ibid, para. 77.
573 ibid.
574 ibid.
575 ECtHR, *Jalloh v. Germany*, App no 54810/00, Judgment of 11 July 2006, Concurring Opinion of Judge Bratza.
576 ibid, Dissenting Opinion of Judges Wildhaber and Caflisch, para. 4.

dealers, no matter if they are selling drugs on a large or a small scale. However, this reasoning implies that the factual conclusions regarding the dangerousness of the forced administration of emetics are not valid for all lives. The principle of simplicity calls for omitting exceptions and *ad hoc* explanations. Here, it seems that the Court built in a caveat for potential future cases where the facts may be interpreted in a different manner because the drug dealer operates on a larger scale.

Muršić v. Croatia. Another case that can be criticised on the basis of principles of scientific method, and the principle of simplicity in particular, is that of *Muršić v. Croatia*.[577] In this case, concerning overcrowding in Bjelovar Prison in Croatia, the question was whether a violation of art. 3 ECHR had taken place due to the amount of personal space available to the applicant. There were different incidents that had to be decided separately. It was concluded unanimously that a violation had occurred in the period the applicant spent in the prison between 18 July and 13 August 2010, during which his personal space had been less than 3 sq. m. By ten votes to seven, it was held that no violation had taken place in the other periods of detention during which the applicant had less than 3 sq. m of personal space, because these periods were non-consecutive. Finally, by thirteen votes to four, non-violation of art. 3 was also found with regard to periods during which the applicant had between 3 and 4 sq. m of personal space.

There is a table enclosed to this case that reflects the cell numbers, the periods of detention, the total number of inmates, the overall surface area in sq. m, the personal space in sq. m, the surface minus sanitary facility in sq. m, and the personal space in sq. m.[578] It was decided that the minimum requirement for personal space in a multi-occupancy cell was 3 sq. m. This was a confirmation of previous cases, where this had been decided to be the applicable standard.[579] If the surface per detainee in such a cell fell below 3 sq. m, there was a strong presumption of art. 3 ECHR being violated. This presumption could be rebutted if mitigating factors could compensate for the lack of personal space.[580] It is clarified that the assessment, i.e. the calculation of the minimum space that should be available to

577 ECtHR, *Muršić v. Croatia*, App no 7334/13, Judgment of 20 October 2016.

578 ECtHR, *Muršić v. Croatia*, App no 7334/13, Judgment of 20 October 2016, para. 17.

579 ibid, para. 107.

580 On presumptions in international human rights adjudication, see Tilmann Altwicker and Alexandra E Hansen 'Presumptions in International Human Rights Adjudication' (forthcoming, on file with author).

a prisoner in their cell, is to take into account the in-cell sanitary facilities, the furniture, and the possibility of moving around 'normally' within the cell.[581] However, the (exact) meaning of 'normally' is not clarified in the judgment.

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) held in its report that its basic 'rule of thumb' for personal living space in prison establishments is 4 sq. m, this being a minimum standard.[582] The CPT clarified that this standard was not an absolute one, as mitigating factors such as outside-cell activities (workshops, classes, etc.) could influence the assessment. However, even then, the minimum standard was recommended.[583]

The ICRC report on 'Water, Sanitation, Hygiene and Habitat in Prisons' observed that there is no universal standard, but that different countries adopt different standards, ranging from 4 sq. m in Albania to 12 sq. m in Switzerland.[584] The ICRC recommends 3.4 sq. m per person, including beds and facilities in multi-occupancy cells.[585] Because this is a recommendation rather than an absolute standard, the space requirement has to be (factually) assessed on a case by case basis, taking into account, for instance, the individual needs of the person related to their age, gender, and potential disabilities, the physical conditions of the detention facility, outside-of-cell activities, and other factors.[586] The more time a person spent in the cell, the higher the space requirement would be.[587]

In a similar vein to the CPT and to the ICRC, the Court stated that it could not specify 'once and for all' an amount of prison cell space that would in any case comply with the Convention. Rather, relevant factors must be taken into account.[588] In this regard, the Grand Chamber refers to the three-fold test that was established in the case of *Ananyev and Others v. Russia*:[589]

> '(1) each detainee must have an individual sleeping place in the cell;

581 ibid, para. 114.
582 ibid, para. 51.
583 ibid.
584 ibid, para. 61.
585 ibid, para. 62.
586 ibid, para. 63.
587 ibid, para. 64.
588 ECtHR, *Muršić v. Croatia*, App no 7334/13, Judgment of 20 October 2016, para. 103.
589 ECtHR, *Ananyev and Others v. Russia*, App nos 42525/07 and 60800/08, Judgment of 10 January 2012, para. 148.

> (2) each detainee must dispose of at least 3 sq. m of floor space; and
> (3) the overall surface of the cell must be such as to allow detainees to move freely between furniture. The absence of any of these elements created a strong presumption that the conditions of an applicant's detention were inadequate.'[590]

Although the Grand Chamber refers to cases where the Court had used 3 sq. m as its threshold as well as others where the CPT recommendation of 4 sq. m had been used as a standard,[591] it quickly goes on to state that it sees no reason for departing from its 3 sq. m standard.[592] The Court explains that its reluctance to take the CPT standard as a decisive argument for its finding under art. 3 ECHR 'relates to its duty to take into account all relevant circumstances of a particular case before it when making an assessment under Article 3', whereas the CPT's aim is one of future prevention.[593] However, this does not explain why the Court deems 3 sq. m to be an adequate square footage when it comes to personal space. Without referring to any psychological studies or other empirical evidence that would explain or justify the Court's decision to deviate from the recommendations by the CPT and the ICRC, or to some standard applied by any European country, the Court decides to use a different threshold.[594] In other words, the Court does not choose the simplest solution, but rather decides to create its own threshold without proper explanation as to why. The simplest solution would have been to adopt the qualified recommendations from the CPT and the ICRC as a minimum standard. In any case, deviating from a higher standard recommended by specialised bodies should require more explanation and evidentiary support to justify employing a lower threshold that setting a higher standard would. However, the Court merely states that it will remain 'attentive' to the CPT's recommendations.[595]

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590 ECtHR, *Muršić v. Croatia*, App no 7334/13, Judgment of 20 October 2016, para. 75.

591 ibid, para. 108, referring to see, inter alia, ECtHR, *Cotleț v. Romania (No. 2)*, App no 49549/11, Judgment of 1 October 2013, paras. 34 and 36; and ECtHR, *Apostu v. Romania*, App no 22765/12, Judgment of 3 February 2013, para. 79.

592 ECtHR, *Muršić v. Croatia*, App no 7334/13, Judgment of 20 October 2016, paras. 109–110.

593 ibid, para. 112.

594 This point can also be criticised from the perspective of the principles of external validity and explanatory power.

595 ECtHR, *Muršić v. Croatia*, App no 7334/13, Judgment of 20 October 2016, para. 141.

Furthermore, the Court states that, although all the facts have to be taken into account with regard to the prison, the cell, and the out-of-cell activities:

> 'Nevertheless, having analysed its case-law and in view of the importance attaching to the space factor in the overall assessment of prison conditions, the Court considers that a strong presumption of a violation of Article 3 arises when the personal space available to a detainee falls below 3 sq. m in multi-occupancy accommodation.'[596]

This 'strong' presumption that the Court employs here can be rebutted by the Government if it can show that the periods of deprivation were short and minor.[597] The problem here is that it is entirely unclear what exactly may be considered 'short and minor'.[598] If the presumption of an art. 3 violation is easily rebutted, the absolute nature of art. 3 ECHR is watered down considerably.[599] The caveat with regard to 'short and minor' periods of deprivation of personal space adds another layer of complexity. The simplest solution here would have been to adhere to the 3 sq. m standard without adding caveats and exceptions.

The next problematic aspect in the reasoning of the Grand Chamber is that even less than 3 sq. m of personal space can be compensated for if mitigating factors are in place to alleviate the lack of cell space. This is where Judge Pinto de Albuquerque himself in his partly dissenting opinion draws upon the principle of simplicity to criticise the majority's reasoning:

> 'Furthermore, the offsetting factors referred to by the majority should already be part of the normal conditions within a prison, such as "sufficient freedom of movement outside the cell and adequate out-of-cell activities", and even very broadly speaking the existence of "an appropriate detention facility". There is a serious logical flaw in this reasoning. Here the majority's criteria can hardly withstand Ockham's razor. *Pluralitas non est ponenda sine necessitate*.'[600]

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596 ibid, para. 124.
597 ibid, para. 169.
598 Notions such as 'short and minor' can also be criticised under the principle of falsifiability for their vagueness.
599 ECtHR, *Muršić v. Croatia*, App no 7334/13, Judgment of 20 October 2016, Partly Dissenting Opinion of Judge Pinto de Albuquerque, paras. 51–52.
600 ibid, para. 53.

The majority can, thus, be criticised for using ordinary features every prison facility should have to justify extraordinarily little cell space for detainees. This runs counter to the principle of simplicity as stated in the Latin phrase quoted above, which can be translated as meaning 'the essential things should not be multiplied unless necessary'.[601] In the words of Judge Pinto de Albuquerque, 'normal living conditions justify abnormal space conditions' in the reasoning of the majority. However, logic requires matters to be the other way around: if some circumstances are extraordinarily negative, they can only be offset or compensated for by extraordinarily positive circumstances that act as a counter-balance.[602] In the case of *Muršić*, however, this was not fulfilled. There were no extraordinary compensatory features that allowed for the extraordinarily low amount of space to be justified.

The principle of simplicity aims at integrating and unifying knowledge and warns against creating protective caveats to reach a favoured outcome.[603] In this case, the majority did not add to the unification of knowledge, rather, it added more confusion regarding prison cell space. The downward deviation from the CPT minimum standard was not based on any psychological or other empirical evidence, and the mitigating factors that may justify even less cell space should have been interpreted more narrowly, as many of these factors should be considered normal features that ought to be part of any humane living conditions. Furthermore, the possibility for the Government to rebut the presumption of an art. 3 ECHR violation when the prison cell space is less than 3 sq. m is also unclear as the majority failed to provide clear definitions regarding what is meant by short and minor periods of deprivation. These statements provide caveats, exceptions, and the possibility of *ad hoc* explanations that run counter to the principle of simplicity.

Khamtokhu and Aksenchik v. Russia. This delicate Grand Chamber case of 2017 concerns questions surrounding life imprisonment and discrimination on the basis of gender and age. At issue was a Russian law that exempted women in general and males aged under 18 or over 65 from life sentences.[604] The majority of the Grand Chamber ruled by 16 votes to one

601 Translation by Benjamin Vargas-Quesada and Félix de Moya-Anegon, *Visualizing the Structure of Science* (Springer 2007) 2.

602 ECtHR, *Muršić v. Croatia*, App no 7334/13, Judgment of 20 October 2016, Partly Dissenting Opinion of Judge Pinto de Albuquerque, para. 53.

603 Levit (n 358) 268.

604 ECtHR, *Khamtokhu and Aksenchik v. Russia*, App nos 60367/08 and 961/11, Judgment of 24 January 2017.

that this constituted no discrimination due to the differential treatment on account of age, and by ten votes to seven that there had been no such violation on account of sex.

The delicateness arose from the potential consequences and repercussions of the decision. The applicants, two men serving life sentences, claimed that men should also be exempted from life sentences, and that the law constituted an unjustified difference in treatment based on gender and age. They pointed out that they were not seeking universal application of life imprisonment to all offenders, i.e. females and males younger than 18 or older than 65 as well. 'Rather, they claimed that, having decided that imprisonment for life was unjust and inhuman with respect to those groups, the Russian authorities should likewise refrain from subjecting men aged 18 to 65 to life imprisonment.'[605] They argued that the difference in treatment between men and women was outdated and stereotypical and was not based on any scientific evidence or statistical data.[606] In the applicants' opinion, women may be treated differently when they are, e.g., pregnant, breastfeeding or child-rearing because in such circumstances there would be justification for difference of treatment.[607] This is, essentially, an argument based on the principle of simplicity: if the argument for exempting specific groups is that life imprisonment is unjust and inhumane, this argument should be applied to people in general, not only to certain groups of people.

What made this case so unique and complex is that the Court was faced with a dilemma: life imprisonment is not as such contrary to the Convention and, thus far, there exists no European consensus for an abolition of life sentences.[608] Russia treats women and males under 18 and over 65 preferentially, in the sense that only men between 18 and 65 can be sentenced to life imprisonment. The consequence of finding a violation on the basis of discrimination would be either A) that everyone, i.e. males under 18 and over 65 and all females as well, would be viable for life sentences, or B) that everyone would be freed from life imprisonment. Russia can either be praised for making a step in the 'right direction', the latter being the abolition of life sentences altogether, or criticised for discriminatory treatment on the base of gender and age.

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605 ECtHR, *Khamtokhu and Aksenchik v. Russia*, App nos 60367/08 and 961/11, Judgment of 24 January 2017, para. 34.
606 ibid, para. 34.
607 ibid, para. 36.
608 ibid, para. 79.

The Government's position is summarised as follows:

> 'In sum, the Government believed that, given the biological, psychological, sociological and other particular features of female offenders, young offenders and offenders aged 65 or over, sentencing them to life imprisonment and their incarceration in harsh conditions would undermine the penological objective of their rehabilitation. Besides, the exception concerned in reality a small number of convicted persons. In Russia, as of 1 November 2011, only 1,802 offenders had been sentenced to life imprisonment. Of the total number of 533,024 prisoners, only 42,511 were female.'[609]

Thus, the Government's arguments in favour of the legislation can be considered two-fold. One line of reasoning is that women and the exempted age groups are particularly vulnerable and thus need special protection. The Government argues that the legislation was designed 'to make up, by legal means, for the naturally vulnerable position' of the social groups that were exempted from life sentences.[610] The second line of argument is that there is statistical data that supports the difference in treatment.[611]

The Court, on the one hand, mentions its own progressive stance where it 'has repeatedly held that differences based on sex require particularly serious reasons by way of justification and that references to traditions, general assumptions or prevailing social attitudes in a particular country cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation'.[612] However, it does not condemn the Russian argument for being based on stereotypes and paternalistic reasoning. The majority simply holds that there is a margin of appreciation awarded to Member States to decide on the appropriateness

609 ibid, para. 48.

610 ibid, para. 46.

611 A famous case where arguments were put forth on the basis of statistical evidence is ECtHR, *D.H. and Others v. the Czech Republic*, App no 57325/00, Judgment of 13 November 2017.

612 ECtHR, *Khamtokhu and Aksenchik v. Russia*, App nos 60367/08 and 961/11, Judgment of 24 January 2017, para. 78, with reference to ECtHR, *Konstantin Markin v. Switzerland*, App no 30078/06, Judgment of 22 March 2012, para. 127; ECtHR, *X. and Others v. Austria*, App no 19010/07, Judgment of 19 February 2013, para. 99; ECtHR, *Vallianatos and Others v. Greece*, App nos 29381/09 and 32684/09, Judgment of 7 November 2013, para. 77; ECtHR, *Hämäläinen v. Finland*, App no 37359/09, Judgment of 16 July 2014, para. 109.

of detention schemes.[613] Furthermore, this margin is extended in the case at hand by the absence of a European consensus on life imprisonment.[614] The Court then briefly states that the difference in treatment of female offenders seems justified under 'various European and international instruments addressing the needs of women for protection against gender-based violence, abuse and sexual harassment in the prison environment, as well as the needs for protection of pregnancy and motherhood'.[615] It then points to the statistical data that the Government presented, which show the difference between the total numbers of male and female prisoners and the relatively small number of persons who were sentenced to life imprisonment.[616] The data and the circumstances of the case are then considered by the Court's majority as a sufficient basis for the differential treatment of female offenders to be justified by public interest.[617]

The Court enters a slippery slope in that it accepts the Government's two-fold line of reasoning without addressing the stereotypical and paternalistic undertones of the arguments.[618] The Court can be criticised for two reasons: firstly, for not condemning the stereotypical and paternalistic line of reasoning the Government put forward, and secondly, for accepting the statistical data and the circumstances of the case, which were not really addressed in the instant case by the majority, as a sufficient basis for the difference in treatment.

In terms of simplicity, it is unclear why the penological objective of rehabilitation is not undermined by life imprisonment of men between 18 and 65. The harsh conditions that are mentioned by the Government apply to everyone who is imprisoned. This argument is selective and fails to show why the penological objective of rehabilitation is not jeopardised for all people who are imprisoned for life. This flaw should have been pointed out by the majority. The simplest form of proof that should have been required would have been (for the Government) to demonstrate

613 ECtHR, *Khamtokhu and Aksenchik v. Russia*, App nos 60367/08 and 961/11, Judgment of 24 January 2017, para. 78.
614 ibid, para. 79.
615 ibid, para. 82, with reference to paras. 27–30.
616 ibid, para. 82, with reference to para. 48.
617 ibid, para. 82.
618 See also Marion Vannier, 'Caught between a Rock and a Hard Place – Human Rights, Life Imprisonment and Gender Stereotyping: A Critical Analysis of Khamtokhu and Aksenchik v. Russia (2017)' in Sandra Walklate and others (eds), *The Emerald Handbook of Feminism, Criminology and Social Change* (Emerald Publishing Limited 2020).

why the negative repercussions of life imprisonment are that much more pronounced for females and for males of a certain age than for people in general. The factual basis used by the Russian Government to justify the difference in treatment merely consists of references to paternalistic and stereotypical ideas. By not addressing these lines of reasoning, the Court is sending a problematic signal, essentially endorsing these ideas.

The question must also be raised as to the relationship between the numbers that the Government provides regarding males and females imprisoned in Russia and the small number of offenders who have been sentenced to life imprisonment; what is the link between the small number of female prisoners (42,511) versus male prisoners (490,513) and the justification of the law exempting females from life imprisonment? These numbers are quoted 'besides' the stereotypical and paternalistic arguments and their relevance is not sufficiently explained. As is rightly pointed out in the joint partly dissenting opinion by various judges, the statistical data provided concern purely quantitative aspects and 'say nothing about women committing particularly serious crimes'.[619] Moreover, it is pointed out that

> 'the two main trends illustrated by the above-mentioned statistical data – the disproportionate male/female ratio in the prison population and the low number of convicted offenders sentenced to life imprisonment – are not peculiar to Russia. Indeed the Council of Europe's most recent penal statistics show that these two trends can be observed in all the member States.'[620]

There is a complete lack of engagement with the statistical data by the majority and no investigation as to what the situation is in other European countries. It was even pointed out by the dissenters that '[…] the disproportionate ratio referred to by the Government is actually greater at pan-European level than in Russia'.[621] It is this type of inquiry into the factual arguments that is lacking in the majority's reasoning. The assessment of the statistical data in this joint partly dissenting opinion is what would have been required of the majority.

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619 ECtHR, *Khamtokhu and Aksenchik v. Russia*, App nos 60367/08 and 961/11, Judgment of 24 January 2017, Joint Partly Dissenting Opinion of Judges Sicilianos, Möse, Lubarda, Mourou-Vikström and Kucksko-Stadlmayer, para. 15.

620 ibid, Joint Partly Dissenting Opinion of Judges Sicilianos, Möse, Lubarda, Mourou-Vikström and Kucksko-Stadlmayer, para. 15.

621 ibid, Joint Partly Dissenting Opinion of Judges Sicilianos, Möse, Lubarda, Mourou-Vikström and Kucksko-Stadlmayer, para. 15.

In her concurring opinion, Judge Turković discusses the danger of levelling down, i.e. of life imprisonment being extended to female and male offenders of all ages. In such situations it may 'be preferable to choose a state in which some are better off and none are worse off than under the best feasible equality'.[622] Although this is a valid point, as Judge Turković and other Judges[623] state in their opinions, the majority must still be criticised for their scant analysis with regard to issues of equality and gender and for neglecting to clearly address the stereotypes that underlie the Russian Government's position.[624]

> '[…] the Court should not refrain from naming different forms of stereotyping and should always assess their invidiousness. It is impossible to change reality without naming it. For this reason, in the present case it should be acknowledged that the respondent State's reasoning regarding the legislation exempting women from life imprisonment portrays women as a naturally vulnerable social group […] and is therefore one that reflects judicial paternalism.'[625]

Although Judge Turković did vote with the majority due to the issue of levelling down, she pointed out the importance of a broader contextual analysis including the discussion of 'criminological and penological literature on gender and sentencing' as well as of potential remedies for addressing the alleged discrimination.[626] As these reflections indicate, the case of *Khamtokhu and Aksenchik v. Russia* can also be criticised from the perspective of other principles of scientific method, including explanatory power and external validity, and for not conforming to core values of scientific inquiry such as avoiding paternalistic and chauvinist stances. Allowing a Government to draw on gender stereotypes in order to limit life imprisonment for women may be well-meant by the majority; however,

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622 ibid, Concurring Opinion of Judge Turković, para. 10.

623 See, e.g. ibid, Joint Partly Dissenting Opinion of Judges Sicilianos, Möse, Lubarda, Mourou-Vikström and Kucksko-Stadlmayer, para. 8; Dissenting Opinion of Judg Pinto de Albuquerque, paras. 8–11.

624 ibid, Concurring Opinion of Judge Turković, para. 3; refers to paras. 45–48 of the judgment.

625 ibid, Concurring Opinion of Judge Turković, para. 3.

626 ibid, Concurring Opinion of Judge Turković, para. 3. This lack of discussion of evidence and literature from other disciplines links to the principle of external validity, another principle of scientific method that could be used to criticise this case. For interesting analyses, see e.g. Milica Novaković, 'Men in the Age of (Formal) Equality: The Curious Case of Khamtokhu and Aksenchik' (2019) 67 Belgrade Law Review 216.

this well-intended stance may have 'unintended and perverse consequences for the broader landscape of punishment' and by perpetuating the influence of stereotypical lines of argumentation.[627]

Arguably, the majority could have circumvented the issue of levelling down by focusing on the lack of a factual basis and on pointing to the non-conformity with the principle of simplicity at the core of the Russian Government's reasoning, i.e. that the penological objective of rehabilitation is (likely to be) undermined by life imprisonment in general rather than only by life imprisonment of women and of males younger than 18 and older than 65. There is of course a real risk of levelling down in the sense of the scope of life imprisonment being widened to previously protected groups in Russia. However, it is unclear which price is higher: allowing life sentences to be applied to more people than currently lawful or allowing paternalism and stereotypes to enter judicial reasoning.

iii. Summary and Comment

The three cases above were assessed using the principle of simplicity. The above analysis has shown that in cases where the principle of simplicity plays a role, more is needed in terms of a sufficient factual basis to explain why a more complicated solution or line of reasoning is chosen rather than the simplest one available. The principle of simplicity can help detect flaws in the factual basis of an argument by shining a light on complicated explanations or deviations from 'the usual'. It requires more explanation and a more rigid factual analysis if the explanation or justification for a certain approach seems more complicated rather than simple. For instance, in the case of *Jalloh*, the principle of simplicity sounds an alarm bell as soon as the reasoning differentiates between small-scale drug dealers and large-scale ones. In *Muršić*, an alarm bell goes off where less prison cell space than specified in any standard is used as the norm, and another one sounds where ordinary features that should be in place in all prison facilities to guarantee humane living conditions are adduced to justify extraordinary little cell space. In *Khamtokhu and Aksenchik* the difference in treatment between males between 18 and 65 and females with regard to life imprisonment also rings an alarm bell because the simplest approach would be to treat all people equally with regard to life sentences. Once these alarms go off, the Court should engage in a thorough fact-assessment, analysing

627 Vannier (n 618) 274.

whether the arguments in the individual case that do not conform with the principle of simplicity have a sound basis. In a sense, the principle of simplicity can help detect the aspects of an argument that require the Court to conduct a particularly thorough fact-assessment for unusual lines of reasoning.

Ockham's razor has played a role in American law.[628] It has even been discussed, albeit hesitantly, whether Ockham's razor may substitute for the burden of proof and instead require the parties to offer the simplest explanation for the events at hand.[629] In this case, the principle of simplicity would operate as a legal principle, which is not the focus of this study. However, in (the context of) assessing the adequacy of a factual statement and the reliability of an analysis, the principle of simplicity can help detect flaws in the factual arguments presented by the parties and by the Court. It can be used to unify and integrate knowledge rather than create protective caveats for favoured outcomes.

It could be argued that one step in the direction of using the principle of simplicity as a legal principle has already been taken: Judge Pinto de Albuquerque, by referring to it in criticising the majority's line of reasoning in one of his opinions, has contributed to translating this scientific principle into the code of the legal realm (using Luhmann's terms).[630] This could be interpreted as a first step in the communication between the different systems; if judges of the European Court of Human Rights use principles of scientific method as criteria to assess the reliability of a decision, then these principles are produced within the system itself and become operatable in the legal realm. If different judges within the same court disagree on a ruling, irritation occurs within the system, amounting to self-irritation within this system. This self-irritation allows for insights from another system to have an effect on a judicial decision, but in order for that effect to occur, an insight from outside the legal system must be translated into the logic and code of the legal realm.[631] It could be, then, that the process of translation is set in motion by judges in their opinions, and if that is the case, using principles of scientific method and translating them into legal principles may not be that far-fetched after all.

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628 See Richard Helmholz, 'Ockham's Razor in American Law' (2006) 21 Tulane European and Civil Law Forum 109.
629 ibid 122.
630 See above, II.3.
631 See above, II.3.

b. Explanatory Power and External Validity

i. The Principles

A theory must have sufficient explanatory force to pass as sufficiently scientific. This principle requires that the phenomena under study must be accurately explained by the proposed theory. At the least, this principle requires that the explanation or theory advances understanding.[632] Since Hempel and Oppenheim's 1948 'Studies in the Logic of Explanation',[633] much research has been done on the nature of explanation.[634] In the context of this thesis it suffices to note that in order for an argument with regard to the selection of the relevant facts or the interpretation of the facts to pass the threshold of explanatory power, it must promote inquiry rather than bring it to a halt. Any explanation should make for more understanding and less confusion rather than the other way around.

Wild hypotheses should be abandoned as they can 'undo science'.[635] In order to meet the requirement of explanatory power, the factual underpinnings for any argument or conclusion must avoid being selective or persuasive, because the danger here is that the conclusion is reached due to the existence of a pre-defined goal that can be reached by considering only the selected factual information and data that leads to the desired conclusion.[636] Rather, any argument must be fully disclosed; all the different arguments must be weighed against each other and the reasoning behind reaching a certain conclusion must be transparent and clear.[637]

This principle is highly relevant in the legal context considering the discussion above regarding norms being self-fulfilling prophecies.[638] If we consider norms as having a pre-defined goal that is either 'violation' (applicant's perspective) or 'non-violation' (Government's perspective), then the facts can be constructed or selected in order to reach that goal. Thus, it is of pivotal importance to analyse the arguments that are presented in terms of the existence or non-existence of sufficient explanatory power.

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632 Levit (n 358) 269.
633 Carl G Hempel and Paul Oppenheim, 'Studies in the Logic of Explanation' (1948) 15 Philosophy of Science 135.
634 Jonah N Schupbach and Jan Sprenger, 'The Logic of Explanatory Power' (2011) 78 Philosophy of Science 105.
635 Gauch Jr (n 534) ch 81.
636 Levit (n 358) ch 299.
637 Gauch Jr (n 534) ch 83.
638 II.4.c.

Merely providing selected information that will allow for the preferred legal conclusion will not constitute a reliable solution to a case.

The principle of external validity requires a theory to 'be consistent with the generally accepted body of knowledge, both within its own discipline and in other areas'.[639] Whilst the above-mentioned principles often push for 'more', this principle puts some restraint on new ideas in the sense of a 'healthy scepticism'.[640] The idea behind this scepticism is that positions and arguments must be tested and validated. They must be compatible with conclusions that are reached by other means and in other areas of inquiry. Any idea or theory that is based on (factual) evidence from other disciplines as well will seem more reliable and will more likely be valid.[641] Thus, ideas and arguments must be externally valid, in the sense that they must be tested and validated against existing knowledge, both within the legal discipline and beyond. This principle calls for the promotion of validation, e.g., of facts that are presented by the parties or by third parties, the validation of expert opinions, and validation of reports that are discussed within a case. The question must be asked as to whether the information that is presented provides a sound and reliable basis for the normative conclusion that is drawn.

ii. Case Analysis

Fernandes de Oliveira v. Portugal. The case of *Fernandes de Oliveira v. Portugal* of 31 January 2019 concerns the question of medical negligence with regard to a patient's suicide during voluntary hospitalisation in a Portuguese State psychiatric institution. The question referred to the potential violation of positive obligations under art. 2 of the Convention (right to life) due to the State's duty to protect the lives of voluntary psychiatric patients.[642] What is of interest in the context of this thesis is the scope of facts that can call for positive obligations under art. 2 ECHR.

The applicant in this case was the mother of the patient A.J. who committed suicide on 27 April 2000 during his voluntary hospitalisation in the Sobra Cid Psychiatric Hospital (HSC) in Coimbra, Portugal. A.J.

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639 Levit (n 358) 270.
640 ibid.
641 ibid.
642 ECtHR, *Fernandes de Oliveira v. Portugal*, App no 78103/14, Judgment of 31 January 2019.

had been hospitalised in the HSC on eight occasions between 1984 and 2000.[643] A.J. was diagnosed with alcohol dependence and several other diagnoses were considered, including 'dependent personality […]; delirious outbreaks […]; schizophrenia; manic-depressive psychosis'.[644] All of these symptomologies that were mentioned in A.J.'s medical records were considered by a psychiatrist appointed by the Medical Association in a report as predictive of future suicidal behaviour, thus what happened in this case was not deemed unusual by the appointed psychiatrist.[645]

In the domestic proceedings, the facts were established by the Coimbra Administrative Court as follows:

> 'On 7 January 2010 the court held a hearing at which it adopted a decision concerning the facts. The court considered, inter alia, that it should not explicitly define A.J.'s pathology. Regarding the episode on 25 April 2000, the court decided to view it simply as an abuse of alcohol, taking into account his underlying chronic alcoholism and the fact that the drinking had taken place in the afternoon and mainly at a café.'[646]

The incident on 25 April 2000 that is referred to here took place two days prior to A.J.'s suicide. On this occasion, A.J. had been committed to the emergency services due to an alcohol intoxication episode.[647] Thus, according to the domestic authorities, it was not necessary to explicitly define A.J.'s pathology, and the incident just two days prior to his suicide was not considered a factor that warranted special attention in the assessment of the present case.

The applicant argued that the factual and legal analysis of the court had been wrong, and appealed against the findings.

The Deputy Attorney-General provided an opinion which, inter alia, discussed A.J.'s medical report and the risk of him committing suicide. He recommended that the first-instance judgment should be reversed because it had failed to conduct a proper assessment of the level of monitoring that should have been required in A.J.'s particular case.[648] However, the

643 ibid, para. 12.
644 ibid, para. 33.
645 ibid.
646 ibid, para. 37.
647 ibid, para. 33.
648 ibid, para. 42.

Administrative Supreme Court upheld the factual findings of the Coimbra Administrative Court and dismissed the applicant's appeal.[649]

This factual assessment in the domestic proceedings should have been criticised by the ECtHR with regard to its explanatory power and external validity. A.J.'s pathology was a crucial factor regarding the risk of him committing suicide. From the perspective of external validity, the lack of a proper diagnosis of A.J.'s pathology prevented a clear assessment of the level of monitoring that was required from a medical perspective. Furthermore, the reason for not diagnosing A.J. properly was never provided by the domestic authorities, which points to a lack of explanatory power for the fact-assessment conducted in the national proceedings. If this pathology is not defined explicitly, then the factual ground for reaching the normative conclusion is nonexistent. In order for the fact-assessment to be externally valid, there should have been a proper diagnosis in the domestic proceedings. Furthermore, the episode on 25 April, two days prior to the suicide, seems to be of pivotal importance with regard to assessing the stability of A.J.'s condition. If this episode were to be interpreted as reflective of his unstable condition, or even as an attempt to commit suicide, this would have to be taken into account in assessing the risk that A.J. was posing to himself.

The question that is most relevant here is whether there existed a real and imminent risk of A.J. committing suicide, and whether that should have led the hospital staff to monitor A.J. more closely and to follow the 'emergency plan'. Under normal circumstances, the patients were free to move around, and their presence was controlled only during the mealtimes.[650] The applicant, A.J.'s mother, argued that this level of monitoring was not sufficient. However, closer monitoring of the patients was only provided for in certain circumstances, and the Government argued that A.J.'s condition had been stable and that he did not fall under the emergency standard.[651] Thus, there was disagreement on whether the authorities ought to have known that A.J. was at risk of committing suicide.

The Court provided a list of relevant factors that are to be taken into account 'to establish whether the authorities knew or ought to have known' there was a real or imminent risk of suicide, triggering a 'duty to take appropriate preventive measures', which include:[652]

649 ibid, para. 45.
650 ibid, para. 50.
651 ibid, paras. 40 and 128.
652 ibid, para. 115.

'i) a history of mental health problems […]
ii) the gravity of the mental condition […]
iii) previous attempts to commit suicide or self-harm […]
iv) suicidal thoughts or threats […]
v) signs of physical or mental distress.'

The disagreement in this case arose with regard to this list: the applicant's argument essentially is that the criteria listed are fulfilled, meaning that the facts match the factors in the list and that thus, the normative conclusion is that the authorities should have taken measures to prevent A.J.'s death. The Government's argument is that the facts of the case do not fulfill the requirements in the list and that, thus, it had no duty to protect A.J. in any special manner. Thus, whether or not the facts are interpreted as fulfilling the requirements in the list will have normative implications.

The majority discusses the points in its list and states that there was agreement among the parties that A.J. had suffered from mental health problems.[653] However, regarding the principles of explanatory power and external validity, the majority too quickly accepts the domestic courts' reasoning with regard to A.J.'s pathology and his behaviour prior to his suicide. The majority accepts the Government's assessment that A.J.'s excessive alcohol consumption just two days before he ended his own life had been due to his addiction to alcohol. There is no sufficient engagement with the applicant's argument and with the statements made by A.J.'s sister . Here, the majority simply follows the Government's line of reasoning without properly engaging with the counterarguments, i.e., that the drinking episode should have been interpreted as indicating that A.J. required a higher level of monitoring, and that a correct assessment of his pathology would have been necessary. There is a lack of explanation as to why the Court did not call into question the domestic authorities' decision not clearly define A.J.'s pathology.[654] This can also be criticised from the perspective of external validity, in the sense that A.J.'s pathology was not validated using the body of medical or psychological knowledge.

One point that should be emphasised is point iii) concerning previous attempts to commit suicide. Here, the majority pointed to the case *Renolde v. France*.[655] What the majority fails to point out is that in *Renolde*, the

653 ibid, para. 127.
654 ibid, para. 128 and para. 50 of Judge Pinto de Albuquerque joined by Judge Harutyunyan's Opinion.
655 ECtHR, *Renolde v. France*, App no 5608/05, Judgment of 16 October 2008, para. 85.

person had already attempted suicide 18 days prior to the suicide attempt in question. In the case of A.J., the time lapse had been 26 days.[656] The majority does not address the question as to how many days need to have passed since a previous suicide attempt, for special protective measures to be allowed to cease, and why the case of *Fernandes de Oliveira* is treated differently from the case of *Renolde*, where a duty to take measures had been accepted.[657] In terms of external validity and explanatory power, for this case as well as for the purpose of clarification for potential future cases, it should have been explained why these two cases were treated differently, and evidence from psychology or medical science should have been discussed with regard to this time lapse, providing external validity for using a certain amount of days as a threshold requirement.[658]

The domestic proceedings were not conducted thoroughly, yet the ECtHR accepted most of the factual assessments from the domestic proceedings without validating them properly or engaging with the factual accounts made by the applicant. There is a complete lack of explanatory power, and it seems that the majority simply followed the domestic court's assessment. Of course, sometimes domestic authorities are better placed than the ECtHR to assess the facts of a case; however, if the facts of a case are disputed, the ECtHR cannot simply state that it finds no reason for deviating from the fact-assessment conducted in the national proceedings. The ECtHR ought to validate the statements and conduct its own inquiry, by weighing the different arguments against each other, not by easily dismissing one side of the argument. This is also pointed out by Judge Pinto de Albuquerque as a Catch-22 issue: the lack of adequate assessment of the facts, and the lack of a correct diagnosis of A.J. by the State in particular, cannot be used as an excuse for the State to not foresee the risk of suicide. In other words, the State cannot use 'its own faulty omission to excuse itself for the resulting harm'.[659]

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656 This can also be criticised from the perspective of falsifiability with regard to vague concepts and definitions.

657 ECtHR, *Renolde v. France*, App no 5608/05, Judgment of 16 October 2008, para. 86; see also ECtHR, *Fernandes de Oliveira v. Portugal*, App no 78103/14, Judgment of 31 January 2019, Partly Concurring, Partly Dissenting Opinion of Judge Pinto de Albuquerque joined by Judge Harutyunyan, para. 22.

658 This also links closely to the *Muršić* case with regard to using certain figures as the basis for a normative conclusion.

659 ECtHR, *Fernandes de Oliveira v. Portugal*, App no 78103/14, Judgment of 31 January 2019, Partly Concurring, Partly Dissenting Opinion of Judge Pinto de Albuquerque joined by Judge Harutyunyan, para. 24.

In this case, the Court missed the mark with regard to the external validity of its fact-assessment because it failed to validate the factual arguments provided by the Government. It did not engage with the applicant's point of view but rather accepted the facts as provided by the domestic courts. As a result, there is a lack of explanatory power in the reasoning that led to the conclusion, which seems to have been a pre-defined goal.

N. v. the United Kingdom. The case of *N. v. the UK* of 27 May 2008 concerns the forced return of a Ugandan woman who was HIV positive to her country of origin.[660] The Court has been criticised, by academic commentators and by members of the Court in their opinions, for this decision, and has been seen as being complicit in sending severely ill people 'toward their (near) certain death in unacceptable circumstances'.[661]

The applicant, N., arrived in the UK in 1998. She was seriously ill and was admitted to hospital where she received the diagnosis of being HIV positive with 'considerable immunosuppression and […] disseminated mycobacterium TB'.[662] A few days later, solicitors submitted an asylum application on N.'s behalf, claiming that she had faced ill-treatment and that on returning to Uganda her life would be in danger.[663] While her application was pending, N. developed a second Aids-related illness, Kaposi's sarcoma. This resulted in her CD4 count being extremely low (hers was down to 10, that of healthy people is above 500). Under treatment with antiretroviral drugs and frequent monitoring, her condition stabilised. By the time the House of Lords began to examine her case, her CD4 count was at 414.[664] The applicant's solicitor requested an expert report by a consultant physician, which stated that without regular antiretroviral treatment and frequent monitoring for the correct use and combination of drugs, the CD4 count could again drop rapidly and N.'s life expectancy would be less than a year. The medications that N. needed would be available in her hometown, Masaka, but only at considerable cost and in limited supply. It

660 ECtHR, *N. v. the United Kingdom*, App no 26565/05, Judgment of 27 May 2008.

661 Eva Brems, 'Moving Away from N v UK – Interesting Tracks in a Dissenting Opinion (Tatar v Switzerland)' (*Strasbourg Observers*) <https://strasbourgobservers.com/2015/05/04/moving-away-from-n-v-uk-interesting-tracks-in-a-dissenting-opinion-tatar-v-switzerland/>. See also Serge Slama and Karine Parrot, 'Étrangers Malades: L'Attitude de Ponce Pilate de La Cour Européenne Des Droits de L'Homme' (2014) 101 Plein Droit I.

662 ECtHR, *N. v. the United Kingdom*, App no 26565/05, Judgment of 27 May 2008, para. 9.

663 ibid, para. 10.

664 ibid, para. 11.

was also pointed out in the report that 'in Uganda there was no provision for publicly funded blood monitoring, basic nursing care, social security, food or housing'.[665]

The domestic proceedings ended in 2005, with the House of Lords unanimously dismissing N.'s complaint.[666] N. appealed to the ECtHR and claimed that if she were forced to return to Uganda, she would not have sufficient access to the medical treatment she needed for her illness, and that this would result in her rights under art. 3 and art. 8 of the Convention being violated.[667]

The case of *N. v. the UK* is interesting from the perspective of external validity because it can be debated whether the factual conclusion reached by the ECtHR conforms with the body of knowledge available regarding the medical treatment that N. would require and the actual situation in Uganda. It is a case where a factual situation regarding the medical condition of an applicant and the availability of health care may lead to an inclusion under the scope of art. 3 ECHR.

The factual analysis in *N. v. the UK* that was conducted by the ECtHR includes certain positive aspects, but it is also flawed. In terms of the principles of explanatory power and external validity, it is commendable that the ECtHR, in this case, gathered information on the situation with regard to the medical treatment of HIV/Aids patients in the UK and in Uganda *proprio motu*. This was also something that one Lord had asked for in the domestic proceedings in the UK. He argued that more information should have been sought in the domestic proceedings because in his opinion it was not possible to clearly state that art. 3 ECHR was not applicable, given that N. would face a completely different situation with regard to a health support system in Uganda as opposed to the treatment she was receiving in the UK.[668] Furthermore, the information that was presented in the domestic proceedings in the expert report by N.'s doctor showed that N.'s medical condition was stable only as long as N. received the

665 ibid, para. 12.
666 ibid, para. 16.
667 ibid, para. 20.
668 Lord Justice Carnwath had dissented because he 'was unable to say that the facts of the case were so clear that the only reasonable conclusion was that Article 3 did not apply. Given the stark contrast between the applicant's position in the United Kingdom and the practical certainty of a dramatically reduced life expectancy if returned to Uganda with no effective family support, he would have remitted the case to the fact-finding body in the case, the Immigration Appeal Tribunal.' ibid, para. 16.

necessary drugs and monitoring via the so called HAART (highly active antiretroviral medication treatment). Without this treatment, the doctor held that N.'s prognosis would be 'appalling'. The doctor's report was summarised by one Lord as follows:

> 'she will suffer ill health, discomfort, pain and death within a year or two. […] The cruel reality is that if the [applicant] returns to Uganda her ability to obtain the necessary medication is problematic. So if she returns to Uganda and cannot obtain the medical assistance she needs to keep her illness under control, her position will be similar to having a life-support machine turned off.'[669]

Thus, without the treatment and necessary monitoring (i.e. availability of regular blood monitoring and of doctors who can closely and regularly monitor N.'s health), N. would not survive her illness. Deciding whether or not sending N. back to her hometown would amount to inhumane or degrading treatment under art. 3 ECHR involves determining the medical situation (i.e. the external validity with regard to medical knowledge) that she would find upon her arrival and whether the required treatment and monitoring were available.

The ECtHR did gather more information on the HAART treatment and referred to reports and research which had been conducted by the World Health Organization (WHO) and the Joint United Nations Programme on HIV/Aids (UNAIDS) in the judgment.[670] However, what is problematic is that neither the information from the WHO and UNAIDS reports nor the medical information with regard to the HAART treatment are engaged with in a thorough manner. The ECtHR only refers to this information in one paragraph:

> 'According to information collated by WHO […], antiretroviral medication is available in Uganda, although through lack of resources it is received by only half of those in need. The applicant claims that she would be unable to afford the treatment and that it would not be available to her in the rural area from which she comes. It appears that she has family members in Uganda, although she claims that they would not be willing or able to care for her if she were seriously ill.'[671]

669 ibid, para. 17.
670 ibid, paras. 18–19.
671 ibid, para. 48.

The Court continues by stating that N. was, at the time of the decision, not critically ill and that the rapidity in which her condition would deteriorate and the extent to which she would be able to obtain medical treatment and support, including from relatives, 'must involve a certain degree of speculation, particularly in view of the constantly evolving situation as regards the treatment of HIV and Aids worldwide'.[672] There is no further information or explanation as to what is meant by 'a certain degree of speculation'. Thus, although information was gathered, which can be interpreted as an attempt to externally validate the argument with regard to the medical situation in Uganda, there is a lack of engagement with this information. It is not explained why and regarding which particular circumstance a 'degree of speculation' must be involved.[673]

N. in her factual arguments shows that her individual case and the medical context that she would be moved back into in her hometown Masaka would amount to the exceptional circumstances that are required in the Court's case-law for critically ill people to have rights derived from art. 3 ECHR.[674] This shows again how facts and law are intertwined: the scope of art. 3 may be broadened by factual circumstances that arrive. For instance, the question of whether and under what circumstances critically ill people may have rights under art. 3 ECHR is only a question if critical illnesses (factually) exist and if the way people with such illnesses are treated can be seen as inhuman or degrading treatment by a country.

In *D. v. the UK*,[675] which is discussed in the *N. v. the UK* judgment, the applicant, who was at the time of his application suffering from an advanced stage of Aids and appeared the be 'close to death', had been deemed to fall under the 'exceptional circumstances' protection of art. 3 ECHR and could not be expelled from the UK.[676] Since that judgment, the Court has never again found a removal of an alien to amount to a violation of art. 3 ECHR on grounds of a serious illness.[677] The determining factors in *D. v. the UK* that led the Court to find that sending D. to his country

672 ibid, para. 50.
673 Vague phrases and notions such as 'degree of speculation' can also be criticised from the perspective of falsifiability, discussed below.
674 As was the case in ECtHR, *D. v. the United Kingdom*, App no 30240/96, Judgment of 2 May 1997.
675 ECtHR, *D. v. the United Kingdom*, App no 30240/96, Judgment of 2 May 1997, paras. 53–54.
676 ECtHR, *N. v. the United Kingdom*, App no 26565/05, Judgment of 27 May 2008, para. 33.
677 ibid, para. 34. See also Brems (n 661).

of origin would amount to inhuman and degrading treatment were that he was 'in the final stages of a terminal illness, Aids, and had no prospect of medical care or family support on expulsion to St Kitts'.[678] Other cases had been dismissed because, e.g., the applicant had family support upon return[679] or the illness was not terminal.[680] However, in the case of N., the particularity of the situation with regard to available medical treatment in her rural hometown of Masaka was not taken into account; N.'s claim of not having any family who would support her was not taken seriously either. All of these points were subsumed by the ECtHR under the necessary 'degree of speculation' without providing an explanation as to why a degree of speculation is warranted given the accounts provided by the WHO, UNAIDS, and the applicant herself. The lack of engagement with this body of knowledge is problematic from the perspective of external validity. In their joint dissenting opinion, Judges Tulkens, Bonello, and Spielmann pointed out that the majority should have found a case of potential violation of art. 3 ECHR 'precisely because there are substantial grounds to believe that the applicant faces a real risk of prohibited treatment in the country of proposed removal'.[681] Furthermore, they pointed to there being 'no doubt that in the event of removal to Uganda the applicant will face an early death after a period of acute physical and mental suffering' and that this certainty was also acknowledged almost unanimously by the judicial authorities in the UK.[682] The opinion thus rightly points to the limited area in which there is any room for any degree of speculation left. The approach by the ECtHR of employing a degree of speculation is misplaced under the principle of external validity.

Thus, the main issue here is that although information was sought, it was not engaged with, and N.'s individual factual context was not taken into account properly. It seems here that the fear that Lord Hope

678 ECtHR, *N. v. the United Kingdom*, App no 26565/05, Judgment of 27 May 2008, para. 38; with a reference to ECtHR, *D. v. the United Kingdom*, App no 30240/96, Judgment of 2 May 1997, para. 40.

679 See, e.g. *Arcila Henao v. the Netherlands*, App no 13669/03, Judgment of 24 June 2003.

680 See, e.g. *Bensaid v. the United Kingdom*, App no 44599/98, Judgment of 6 February 2001 and *Amegnigan v. the Netherlands*, App no 25629/04, Judgment of 25 November 2004.

681 ECtHR, *N. v. the United Kingdom*, App no 26565/05, Judgment of 27 May 2008, Joint Dissenting Opinion of Judges Tulkens, Bonello and Speilmann, para. 22.

682 ibid, Joint Dissenting Opinion of Judges Tulkens, Bonello and Speilmann, para. 23.

expressed in the domestic proceedings regarding the UK being 'flooded' with HIV-related asylum applications was weighed more heavily than N.'s dire medical situation. Lord Hope had observed:

> '[Any extension of the principles in D. v. the United Kingdom] would have the effect of affording all those in the [applicant's] condition a right of asylum in this country until such time as the standard of medical facilities available in their home countries for the treatment of HIV/Aids had reached that which is available in Europe. It would risk drawing into the United Kingdom large numbers of people already suffering from HIV in the hope that they too could remain here indefinitely so that they could take the benefit of the medical resources that are available in this country. […]'[683]

The majority does balance the applicant's suffering against the financial burden that a State would have to carry with regard to health care costs.[684] While it may be considered as commendable that the majority is transparent (i.e. adding to the explanatory power of its own approach) in revealing 'the real reasons behind their finding of non-violation', this line of reasoning runs counter to the absolute nature of art. 3.[685] The dissenters criticise the majority for implicitly accepting the allegation that finding a breach of art. 3 ECHR in the present case 'would open up the floodgates to medical immigration and make Europe vulnerable to becoming the "sickbay" of the world'.[686] They state that a comparison of the total number of requests to the number of HIV cases according to 'the Court's Rule 39 statistics

683 ECtHR, *N. v. the United Kingdom*, App no 26565/05, Judgment of 27 May 2008, para. 17.

684 ibid, para. 44: '[…] Advances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the Contracting State and the country of origin may vary considerably. While it is necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States.'

685 Eva Brems, 'Thank You, Justice Tulkens: A Comment on the Dissent in N v UK' (*Strasbourg Observers*) <https://strasbourgobservers.com/2012/08/14/thank-you-justice-tulkens-a-comment-on-the-dissent-in-n-v-uk/#more-1685>.

686 ECtHR, *N. v. the United Kingdom*, App no 26565/05, Judgment of 27 May 2008, Joint Dissenting Opinion of Judges Tulkens, Bonello and Speilmann, para. 8.

concerning the United Kingdom' shows this argument to be 'totally misconceived'.[687]

Clarity (in the form of explanatory power) as to which factual situation amounts to the standard of 'exceptional circumstances' is required. This was also asked for by the intervening party, the NGO Helsinki Foundation. Essentially what they are asking for is a clarification of which factual circumstances will fall under the ambit of art. 3 ECHR. This must be a standard that is externally valid in the sense that it conforms with knowledge regarding the medical treatment required for the individual person and the availability of that medical treatment in the country of origin. The argument of speculation that the ECtHR uses is entirely misplaced in this context because the information provided by the WHO and UNAIDS, the information provided by the doctor in the domestic proceedings, and the account provided by N., which was not proven to be wrong, all point to the certainty of the critical situation that N. would face upon return.[688]

What can be drawn from this case is that although it is necessary for concepts to be indeterminate to some extent in order to allow different but similar factual circumstances to be subsumable under a provision, it is all the more necessary for the factual analysis to be conducted thoroughly and for the factual conclusion that is reached to take into account and engage with all the relevant information that is available; the fact-assessment procedure must validate the arguments presented and explain why the Court chose to follow one account rather than the other. In this case, it seems that the concept of employing a 'degree of speculation' was used to avoid a proper explanation of the Court's own account of the facts. The argument of speculation is misplaced here because the knowledge and information provided by the WHO and UNAIDS reports and by the applicant's account of her rural hometown do not allow for any speculation. It seems to be used solely for the purpose of preventing the opening of the 'floodgates to medical immigration' to Europe. In terms of explanatory power, it seems that a pre-defined goal, i.e. non-violation of art. 3 ECHR, was aimed at, and in order to reach this pre-defined goal, the body of knowledge available from the reports and the applicant's account was subsumed under the idea of there being a necessary 'degree of speculation' for the case at hand. However, this body of knowledge does not allow

687 ibid.

688 Vague concepts like these can also be criticised in terms of falsifiability, which will be discussed below.

for much speculation and there is, thus, a lack of external validity for the Court's conclusion.

Garib v. the Netherlands. The case of *Garib v. the Netherlands* of 6 November 2017 concerns the refusal of a housing permit to the applicant, a single mother who was dependent on social-security benefits. Legislation in Rotterdam imposed a minimum income requirement for receiving a permit to live in certain hotspot areas, which the applicant did not fulfil.[689] In the critical words of Judge Pinto de Albuquerque, joined in his dissenting opinion by Judge Vehabović, the refusal was based on legislation which 'introduced a policy of urban gentrification' to promote 'deghettoisation'.[690] The Grand Chamber held by twelve votes to five that the applicant's right to freely choose her residence under art. 2 of Protocol No. 4 ECHR was not violated in this case.[691] A second complaint which the applicant submitted before the Grand Chamber pointed to the discriminatory nature of the legislation under art. 14 ECHR. In the Grand Chamber's opinion, the complaint based on art. 14 ECHR was 'a new one, made for the first time before the Grand Chamber', and therefore, the Court could not 'now consider it'.[692]

The table of contents at the beginning of this judgment reflects a long list of facts, including 'I. The Circumstances of the Case', 'II. Relevant Domestic Law', and 'III. Other Facts' – which include evaluation reports on the designated areas in Rotterdam, legislative developments, and subsequent events concerning the applicant –, 'IV. Drafting History of Article 2 of Protocol No. 4', 'Practice Elsewhere', and 'Relevant International Law'.[693] In cases where so many facts are listed, it is important to reflect on how/where the focus is set and whether the Court aimed at incorporating different perspectives on the issue at hand or whether information was gathered in order to allow a pre-defined conclusion to be reached. The principle of explanatory power requires the Court not to be selective or

689 ECtHR, *Garib v. the Netherlands*, App no 43494/09, Judgment of 6 November 2017, paras. 9–12.

690 ECtHR, *Garib v. the Netherlands*, App no 43494/09, Judgment of 6 November 2017, Dissenting Opinion of Judge Pinto de Albuquerque, joined by Judge Vehabović, para. 4.

691 ibid, para. 167.

692 ibid, paras. 95 and 102. This aspect of the case will be further discussed below in the summary and comments. See also the discussion above with the Court being 'master of characterisation to be given in law to the facts of a case', at II.4.c

693 ibid, table of contents.

persuasive in its collection of information because the danger in such an approach is that only that information is gathered and reproduced which allows a pre-defined conclusion to be reached.[694] Rather, the different positions must be weighed against each other and the conclusion for allowing one side of an argument to win over the other must be fully disclosed.[695]

From the perspective of explanatory power, the Grand Chamber judgment can be criticised for different reasons, inter alia, what other authors have criticised as a practice of 'cherry-picking'.[696]

For example, reading the title 'Practice Elsewhere' raises hopes that the Court takes into account various other countries' practices with regard to housing legislation and provides examples that are similar to the policies in Rotterdam as well as examples of different approaches, and then engages with this information, allowing conclusions to be reached with regard to the case at hand. However, the relevant paragraphs only discuss the Social Housing Act in Denmark.[697] This legislation actually is very different from the legislation in Rotterdam, but this fact is not pointed out by the Grand Chamber and there is no explanation of what implications can be drawn from the Danish legislation with regard to the one in Rotterdam. There is no discussion of other countries than Denmark. As Judges Pinto de Albuquerque and Vehabović point out in their dissenting opinion, '[i]n Denmark, the restrictions applicable to "residents out of work" concern only candidates for social housing. That has nothing to do with the applicant's situation in the present case. The specialised literature confirms the uniqueness of the Dutch legislation'.[698] The policy in question in *Garib* is, thus, not reflective of a European consensus or common practice, which is a reason for restricting the margin of appreciation of the Member State in question; however, this point is not touched upon by the Grand Chamber.[699] The lack of a European consensus on the matter can be translated into scientific terminology a implying a lack of external validity for the Dutch position. In such a situation, the margin of appreciation should be narrower and the Court should reflect on whether the Government's position, which is not externally valid, is justified. For instance, the Court

694 Levit (n 358) ch 299.
695 Gauch Jr (n 534) ch 83.
696 David and Ganty (n 526). Last accessed on 12 July 2021.
697 ECtHR, *Garib v. the Netherlands*, App no 43494/09, Judgment of 6 November 2017, paras. 87–92.
698 ibid, Dissenting Opinion of Judge Pinto de Albuquerque joined by Judge Vehabović, para. 20, n 43.
699 David and Ganty (n 526).

could have assessed the Government's position in the same manner as the dissenting judges did, by reflecting on the various reports and positions included in the judgment that discuss the legislation, by consulting literature about the Dutch legislation in question, and by contextualising these arguments with other housing legislation.[700] The reports and the literature that are pointed to by dissenting judges show that there is a problem with regard to the external validity of the Government's position, which could have been addressed by the majority using a narrow margin of appreciation based on the non-existence of a European consensus. As Judge Pinto de Albuquerque states, the majority simply ignored the concerns raised by a number of international bodies with regard to the Dutch housing policy.[701]

Another issue in the Grand Chamber's judgment concerning the principle of external validity is the question that was raised by the applicant and by third-party interveners regarding vulnerability. Whether or not an applicant is considered vulnerable (factually) has implications on a normative level in terms of special protection and a narrowing of the margin of appreciation of a Member State.[702] Thus, a correct assessment of the applicant's factual situation would have been necessary in order to assess whether or not she should be deemed 'vulnerable'. The Grand Chamber did not address this question at any point in the judgment. The lack of external validity with regard to the body of knowledge within the ECtHR's own case-law was pointed out by Judges Tsotsoria and de Gaetano. They argue that the applicant's situation should have been discussed with a view of whether or not her situation fell under the ECtHR's case-law regarding 'disproportionate burdens'.[703] This case shows that the Court has the power to form rules; the facts of a case can be interpreted as falling under a normative standard that has been created via case-law, and thus receive a normative colouring, due to the assessment of whether a factual situation matches the normatively coloured idea of, e.g., 'disproportionate burdens'.

The case of *Garib* raises questions regarding the thoroughness of the majority's fact-assessment procedure. It seems here that the majority pursued

700 ibid, Dissenting Opinion of Judge Pinto de Albuquerque joined by Judge Vehabović, e.g. n 4 and 5, and paras. 24–30.

701 ibid, Dissenting Opinion of Judge Pinto de Albuquerque joined by Judge Vehabović, para. 28.

702 See, e.g., ECtHR, *Alajos Kiss v. Hungary*, App no 38832/06, Judgment of 20 May 2010, para. 42.

703 ECtHR, *Garib v. the Netherlands*, App no 43494/09, Judgment of 6 November 2017, joint Dissenting Opinion of Judges Tsotsoria and de Gaetano, para. 3.

a pre-defined goal and cherry-picked the facts that allowed for that conclusion to be reached. Such selectiveness runs counter to the principle of explanatory power. Moreover, the Dutch legislation differed from policies in other European countries and runs counter to recommendations by human-rights bodies. This lack of external validity should have impacted the Court's reflections regarding the margin of appreciation granted to the Government.

iii. Summary and Comment

The three cases discussed in light of the principles of explanatory power and external validity all link to an underlying issue in the domestic fact-assessment procedures that were not addressed by the Court. In *Garib*, the factual situation regarding housing policies in the Netherlands (e.g., as opposed to other European countries) and the applicant's claim regarding her vulnerability were not considered properly. In *Fernandes de Oliveira*, the assessment of the patient's medical condition and a clear diagnosis were missing, and in *N. v. the UK*, the assessment of the applicant's medical condition and the specific possibilities for treatment in the place she was being sent to were not assessed properly. A thorough assessment and external validation of a person's vulnerability, of the existence or non-existence of a European consensus and the broad or narrow margin of appreciation this implies, of the existence and correct determination of pathologies, and of the medical situation in a specific place is pivotal to the outcome of a case: if the facts reflect that there is a vulnerability in a given case, this will influence the normative conclusion that is drawn; similarly, the medical assessment will influence the normative implications with regard to a duty to implement protective measures; and lastly, whether or not the hospital and the staff in the applicant's hometown can provide the necessary treatment is pivotal to answering on a normative level whether the refoulement of a person can be deemed a non-violation of the Convention. The answer as to whether there exists a European consensus on a matter, or whether someone is deemed vulnerable or deemed to fall under a specific diagnosis, is usually not a clear-cut yes or no. Any answer that is provided must have explanatory power and show why the conclusion was reached and what data this conclusion is based on.

The principles of explanatory power and external validity require the ECtHR to be transparent in its factual assessments. The facts of a case can be interpreted differently on a normative level; however, the reasons

for choosing one factual conclusion over another must be made clear, the Court ought to properly explain how it interprets the facts and which normative conclusions it derives from the factual basis. Here, Dewey can again be quoted with regard to the use of scientific method: 'the consequences of adopting a particular solution must be thought through':[704] the reasons for not deeming Ms. Garib to be in a vulnerable position must be explained; the reasons for not considering it important for A.J. to be properly diagnosed by the domestic authorities must be explained; and the reasons for considering health care provision in Masaka sufficient despite the reports and information provided by the doctor in the domestic proceedings and by the applicant herself pointing to another conclusion must be explained. Furthermore, because answering any of these questions requires knowledge from other fields, the conclusion reached must also conform with the body of knowledge in the areas that are of concern in a specific case.

The principles of explanatory power and external validity are also relevant to the relationship between the domestic proceedings and the proceedings before the ECtHR. As shown in Part I, although it is the responsibility of the parties to a case to substantiate their claims, it is up to the Court to assess the facts.[705] Art. 38 ECHR provides the Court with the competence of examining the case with the representatives of the parties and with the power to conduct its own investigation if the need arises.[706] Due to the subsidiary nature of the ECtHR's fact-assessment, the Court is usually reluctant to depart from the national authorities' fact-assessment. It was held in *Sadkov v. Ukraine* that the Court would only depart from the domestic authorities' fact-assessment if this were 'unavoidable by the circumstances of the case'.[707] It is unclear what exactly is meant by this formulation; however, Judge Pinto de Albuquerque and Judge Sajó pointed out in their dissenting opinion in the case of *Correia de Matos v. Portugal*[708] that the Court should not employ the concept of considering the national authorities 'better placed' as a 'carte blanche to rubber-stamp any policy adopted or decision taken by national authorities'.[709] In other

704 See above, II.2.b.
705 I.6.c.
706 Art. 38 ECHR.
707 ECtHR, *Sadkov v. Ukraine*, App no 21987/05, Judgment of 6 July 2017, para. 90.
708 See also above, I.6.d.
709 ECtHR, *Correia de Matos v. Portugal,* App no 54602/12, Judgment of 4 May 2018, Dissenting Opinion of Judge Pinto de Albuquerque, joined by Judge Sajó, para. 7.

words, although the national authorities will be better placed in some cases to conduct the fact-assessment, this does not alleviate the Court from cohering with the principles of explanatory power and external validity with regard to why it considers the domestic authorities better placed. In all three cases discussed in this section, the fact-assessment in the domestic procedures were flawed in some way or another, and the Court failed to point out and address those flaws. These are cases where the Court can be criticised for using the loophole of subsidiary fact-assessment as a 'carte blanche to rubber-stamp any policy adopted or decision taken by national authorities'.[710] The approach taken by a Portuguese State psychiatric institution, the Dutch housing law, and the UK's asylum policy were all rubber-stamped.

c. Falsifiability

i. The Principle

This Popperian[711] requirement means that 'theories must be testable and refutable'.[712] Non-falsifiable theories and hypotheses are considered unscientific and of no value.[713] For instance, a hypothesis regarding supernatural beings that avoids testability is unscientific, as are vague theories, theories that try to explain everything, and theories that are unconditional.[714] Falsifiability is considered a key feature of science because without testing explanations and rejecting those that do not pass the test, there can be no progress in scientific activity.[715]

Levit holds that the criterion of falsifiability entails that definitions must be explicit and unambiguous. Terms that are vague and self-protected do not fulfill the requirement of falsifiability. The example she discussed in

710 ECtHR, *Correia de Matos v. Portugal,* App no 54602/12, Judgment of 4 May 2018, Dissenting Opinion of Judge Pinto de Albuquerque, joined by Judge Sajó, para. 7.
711 Karl Popper, *The Logic of Scientific Discovery* (Hutchinson & Co 1959) ch iv.
712 Levit (n 358) 271.
713 Michael BW Sinclair, 'The Use of Evolution Theory in Law' (1987) 64 University of Detroit Law Review 451, 471.
714 Levit (n 358) 271.
715 Jonathan Potter, 'Testability, Flexibility: Kuhnian Values in Scientists' Discourse Concerning Theory Choice' (1984) 14 Philosophy of the Social Sciences 303, 309.

her analysis is the definition of pornography in the Indiana anti-pornography ordinance of 1984, which includes vague terms such as 'who enjoy […] humiliation; […] presented in scenarios of degradation; […] shown […] as inferior; […] presented […] for […] conquest […] through postures or positions of servility or submission or display'.[716]

A search of the ECtHR's case-law database HUDOC revealed references to the principle of falsifiability in three judgments. The reference was never made in the majority ruling, it was only used by judges of the ECtHR in their opinions. The earliest reference was made by Judge Zupančič in his concurring opinion in the case of *Kyprianou v. Cyprus*, which concerned impartiality.[717] In his opinion, he points to the differences and similarities between legal and scientific procedure and that a legitimate result can only be reached if the correct procedure is followed. In scientific experiments, falsifiability ensures the correctness of a procedure in the sense that there must exist a possibility to disprove a hypothesis, otherwise the hypothesis cannot be deemed correct.

> 'In legal matters, because it is impossible to ascertain a past historical event, the so-called "truth" can easily, as it did in witch trials, become a self-referential and non-falsifiable myth.'[718]

According to Zupančič, in law, it is a fair trial that ensures the correctness of an outcome of a case, rather than its falsifiability, because in his opinion, law contends with historical events and these 'cannot be experimentally tested as to their objective veracity.[719] However, in the Chamber judgment of *J.K. and Others v. Sweden* of 4 June 2015,[720] it was again Judge Zupančič who referred to the principle of falsifiability. His partly dissenting opinion links closely to his opinion in the *Kyprianou* case. He again states that legal judgments about historical events are not falsifiable because, 'with rare exceptions', they 'are not adapted to the negative feedback from reality'.[721] However, he develops his position further in this

716 Levit (n 358) 302.
717 ECtHR, *Kyprianou v. Cyprus*, App no 73797/01, Judgment of 15 December 2005, Concurring Opinion of Judge Zupančič.
718 ibid.
719 ibid.
720 ECtHR, *J.K. and Others v. Sweden*, App no 59166/23, Judgment of 4 June 2015. (The case was referred to the Grand Chamber which delivered the judgment on 23 August 2016.)
721 ECtHR, *J.K. and Others v. Sweden*, App no 59166/23, Judgment of 4 June 2015, Partly Dissenting Opinion of Judge Zupančič.

opinion, and states that this does not hold true for predictions with regard to what will happen to a person upon refoulement to their country of origin.

> 'Such judgments *are* falsifiable. The person so expelled, extradited or returned in fact will, or will not, suffer the consequences this Court had speculated about. The question remains whether this Court will ever be apprised of them (most likely not). Here, as opposed to most other legal cases, the negative feedback would be made available only if there was a legal instrument in place enabling the Court to verify the consequences of its conjecture concerning the future events.'[722]

The third reference to falsifiability was made in the case of *Nicolae Virgiliu Tănase v. Romania*, by Judge Kūris, who links the Court's departure from its existing case-law to the idea of falsifiability.

> 'Whenever the Grand Chamber endeavours […] to depart from part of its existing case-law as "incorrect", it should measure twice, thrice, fourfold. […] There may also be a number of other requirements, but the one mentioned here is a *conditio sine qua non* for not disqualifying the Grand Chamber's own conclusions – not as regards their legally binding character (because whatever the Grand Chamber rules cannot be overruled, except by the Grand Chamber itself), but as regards their falsifiability and reliability.'[723]

Thus, Judge Kūris suggests that the Court should depart from its own case-law only after testing the departure from current practice over and over again; any departure should be tested, so as to allow for falsification, before it is completed. Whether and how this idea is operable seems questionable. Falsifiability means that falsification must be possible. However, if something is actually falsified, it means that this has actually happened, that it has therefore been found to be 'incorrect'. And if that has occurred, one will hardly want to implement the deviation.

722 ibid.

723 ECtHR, *Nicolae Virgiliu Tănase v. Romania*, App no 41720/13, Judgment of 25 June 2019, Partly Dissenting Opinion of Judge Kūris, para. 11.

ii. Case Analysis

S.M. v. Croatia. The case of *S.M. v. Croatia* concerns the complaint of a young woman, S.M., against a young man, T.M., regarding human trafficking and forced prostitution. It was the Grand Chamber's first art. 4 ECHR-judgment concerning inter-personal harm and is part of the 'definitional quagmire' with regard to questions surrounding human trafficking and forced prostitution and how these notions relate to the prohibition of slavery and forced labour under art. 4 ECHR.[724]

As mentioned above, Levit criticised a US law that included a vague and self-protected definition of pornography as not fulfilling the principle of falsifiability, which 'requires an explicit, unambiguous definition'.[725] The same criticism can be raised with regard to the unclear scope of art. 4 ECHR (prohibition of slavery and forced labour) regarding questions of human trafficking and forced prostitution, which has led to confusion in various judgments as to which facts actually fit under the scope of this Convention article. The confusion started in the judgment of *Rantsev v. Cyprus and Russia*,[726] where the Court placed 'human trafficking' as defined under art. 3(a) of the Palermo Protocol[727] and art. 4(a) of the Council of Europe's Anti-Trafficking Convention[728] under the scope of art. 4 ECHR but did not clarify why exactly the facts of the specific case were considered 'human trafficking' and how vague terms such as 'sexual exploitation' and 'exploitation of the prostitution of others' should be

724 Vladislava Stoyanova, 'The Grand Chamber Judgment in S.M. v Croatia: Human Trafficking, Prostitution and the Definitional Scope of Article 4 ECHR' (*Strasbourg Observers*) <https://strasbourgobservers.com/2020/07/03/the-grand-chamber-judgment-in-s-m-v-croatia-human-trafficking-prostitution-and-the-definitional-scope-of-article-4-echr/>. Last accessed on 12 July 2021.

725 Levit (n 358) 302.

726 ECtHR, *Rantsev v. Cyprus and Russia*, App no 25965/04, Judgment of 7 January 2010.

727 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000.

728 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, entered into force 1 February 2008.

understood in the context of art. 4 ECHR.[729] This confusion continued[730] to the more recent case of *S.M. v. Croatia* of 25 June 2020, where the Grand Chamber addressed some of the questions surrounding human trafficking, forced prostitution, and the definitional scope of art. 4 ECHR[731] after Judge Koskelo wrote a powerful dissenting opinion on the scope of art. 4 in the Chamber judgment of *S.M. v. Croatia*.[732]

The case concerned a woman, S.M., who filed a criminal complaint against T.M. in September 2012. She alleged that T.M. had physically and psychologically forced her into prostitution in 2011.[733] The police conducted a criminal investigation in which they searched T.M.'s premises and his car. They found condoms, two automatic rifles with ammunition, a hand grenade, and various mobile phones. It was also established that T.M. had a police record with regard to procuring prostitution and rape and had previously been sentenced to six and a half years' imprisonment.[734] T.M. denied S.M.'s allegations. In the course of the investigations, T.M., the applicant, and a friend of the applicant were questioned and T.M. was eventually acquitted by the domestic courts, which concluded that force could not be proven.[735]

Before the Grand Chamber, the applicant complained that the national courts had failed to reclassify her complaint from procurement of forced prostitution, which would not be proven, to procurement of prostitution, which was a lesser charge. The application was based on art. 3 and art. 8 ECHR whereas Art. 4 was not mentioned. The Croatian Government made a preliminary objection against the assessment of the case under

729 ECtHR, *Rantsev v. Cyprus and Russia*, App no 25965/04, Judgment of 7 January 2010, para. 282. On the ambiguity of the definition of 'human trafficking', see Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered* (Cambridge University Press 2017). See also Vladislava Stoyanova, 'Dancing on the Borders of Article 4 Human Trafficking and the European Court of Human Rights in the Rantsev Case' (2012) 30 Netherlands Quarterly of Human Rights 163; Stoyanova, 'The Grand Chamber Judgment in S.M. v Croatia: Human Trafficking, Prostitution and the Definitional Scope of Article 4 ECHR' (n 714).

730 See, e.g., ECtHR, *Chowdury and Others v. Greece*, App no 21884/15, Judgment of 30 March 2017. For a discussion of the Chowdury case see Vladislava Stoyanova, 'Sweet Taste with Bitter Roots: Forced Labour and Chowdury and Others v Greece' (2018) 1 European Human Rights Law Review 67.

731 ECtHR, *S.M. v. Croatia*, App no 60561/14, Judgment of 25 June 2020.

732 ECtHR, *S.M. v. Croatia*, App no 60561/14, Judgment of 19 July 2018, Dissenting Opinion of Judge Koskelo, paras. 15–23.

733 ECtHR, *S.M. v. Croatia*, App no 60561/14, Judgment of 25 June 2020, para. 11.

734 ibid, paras. 18–20.

735 ibid, para. 78.

art. 4 ECHR, but this objection was dismissed by the Grand Chamber, which held that following the principle of *iura novit curia*, and in the view of its case-law, the Court 'could seek to determine whether it fell to be characterised under Article 4 of the Convention'.[736] The Court held that

> 'As to the factual scope of the case, the Court notes that the applicant's complaint raises issues of alleged impunity for human trafficking, forced or alternatively non-forced prostitution relating to a deficient application of the relevant criminal-law mechanisms. It is thus essentially of a procedural nature. This finding, as already stressed above, is without prejudice to the further assessment and conclusion as to the actual applicability and scope of protection guaranteed under the Convention for the acts complained of by the applicant.'[737]

The Court further held that although the nature of the applicant's complaint may also raise issues under art. 3 and art. 8 of the Convention, the Court 'has tended to apply Article 4 to issues related to human trafficking',[738] and addressing the case from the perspective of art. 4 'allows it to put the possible issues of ill-treatment (under Article 3) and abuse of the applicant's physical and psychological integrity (under Article 8) into their general context'.[739] Thus, the Grand Chamber, 'being master of the characterisation to be given in law to the facts of a case', decided to examine the case under art. 4 ECHR.[740]

In the Grand Chamber judgment, the Court clarified what it means for 'human trafficking' and 'exploitation of prostitution' to be included under Article 4 ECHR. In order for a situation to be considered a case of human trafficking, it had to fulfill 'the criteria for the phenomenon in international law'.[741] In *Rantsev* and in the Chamber Judgment on *S.M.*, the formulations by the Court had been confusing with regard to what 'exploitation' might mean because there was no engagement with the requirements of the international-law definition of human trafficking,

736 ibid, para. 224.
737 ibid, para. 229.
738 ibid, para. 241.
739 ibid, para. 242.
740 ibid, para. 243. See also the discussion above with the Court being 'master of characterisation to be given in law to the facts of a case', at II.4.c
741 ibid, para. 290.

where exploitation is linked to certain 'means', 'actions', and 'purpose', and how the facts of the case reflected those requirements.[742]

Although the Court reiterated that these concepts now fall under the ambit of article 4 ECHR, how exactly human trafficking and exploitation of prostitution relate to slavery and forced labour is still not clear, and the level of severity required of an abuse is not clear either.[743] With regard to 'exploitation of prostitution' and 'sexual exploitation', which both fall under the ambit of the definition of human trafficking under the Palermo Protocol and the Anti-Trafficking Convention, the Grand Chamber correctly pointed out that their inclusion opens up 'some very sensitive issues relating to the approach to prostitution in general'.[744] With regard to the Anti-Trafficking Convention, the Explanatory Report to that Convention holds that the terms 'exploitation of the prostitution of others' and 'other forms of sexual exploitation' are not defined by the Convention itself, rather, it is up to the States Parties to deal with prostitution in their domestic laws, allowing different Council of Europe States to address the matter in their own way.[745] With regard to art. 4 ECHR, the Grand Chamber held that

> 'the notion of 'forced or compulsory labour' under Article 4 of the Convention aims to protect against instances of serious exploitation, such as forced prostitution, irrespective of whether, in the particular circumstances of a case, they are related to the specific human trafficking context. Moreover, any such conduct may have elements qualifying it as 'servitude' or 'slavery' under Article 4, or may raise an issue under another provision of the Convention.'[746]

Thus, only forced prostitution falls under the scope of art. 4 ECHR; however, it can fall under the Convention even if it is not linked to human trafficking. What remains unclear is what exactly is meant by 'forced'. The Grand Chamber held that '"force" may encompass the subtle forms of coercive conduct identified in the Court's case-law on Article 4, as well as

742 ECtHR, *Rantsev v. Cyprus and Russia*, App no 25965/04, Judgment of 7 January 2010, para. 296.
743 Stoyanova, 'The Grand Chamber Judgment in S.M. v Croatia: Human Trafficking, Prostitution and the Definitional Scope of Article 4 ECHR' (n 714).
744 ECtHR, *S.M. v. Croatia*, App no 60561/14, Judgment of 25 June 2020, para. 298.
745 Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, para. 88.
746 ECtHR, *S.M. v. Croatia*, App no 60561/14, Judgment of 25 June 2020, para. 300.

by the ILO and in other international materials';[747] however, in the case of *S.M. v. Croatia*, there is no assessment as to whether the Court deemed the applicant to have been forced into prostitution or not. The conclusion that the Croatian Government did violate art. 4 ECHR only referred to the lack of investigation as to whether S.M. had been forced into prostitution or not in the domestic proceedings.[748]

In this case, the majority went, on the one hand, beyond S.M.'s complaint in that it examined the case under an article that was not invoked and discusses the concept of human trafficking over more than a hundred paragraphs, referring to international law etc. On the other hand, however, the majority failed to assess the specific circumstances of the case and to provide a clear answer to the question as to whether the authorities should have been investigating human trafficking, forced prostitution, or sexual exploitation.[749] Although some clarifications were provided, the line between forced prostitution and human trafficking is more blurred than ever and this poses a problem under the principle of falsifiability because the definition of these concepts is extremely vague. In the words of Judges O'Leary and Ravarani

> '[…] The solution to the conceptual vagueness thus developed is to refer vaguely to "treatment contrary to Article 4 […] and to state that irrespective of whether the Court is (or more importantly the domestic authorities were) in the presence of human trafficking or forced prostitution, the core procedural obligation, namely the duty to investigate effectively, is the same.'[750]

They further note that rather than bringing clarity into this case and into the scope of art. 4, the Grand Chamber 'unnecessarily inflated' the case in that it insisted on making it about human trafficking. This was all the more unnecessary since the Grand Chamber was only ever going to decide whether the procedural rather than the substantive limb of art. 4 had been violated.[751]

The majority hides behind allegedly defining and further developing the concept of human trafficking, but what it actually does here is generating more confusion. From the perspective of falsifiability, the claims brought

747 ibid, para. 301.
748 ibid, paras. 345–347.
749 ibid, Joint Concurring Opinion of Judges O'Leary and Ravarani.
750 ibid.
751 ibid.

forward by the applicant S.M. were neither tested nor refuted, nor can they really be tested or refuted, because it is unclear what 'forced' entails. This was exactly the question that should have been addressed, but the Grand Chamber decided to duck behind requiring the domestic authorities to (procedurally) conduct a proper investigation, avoiding an answer to the question as to whether the facts of the present case did fall under the newly developed ambit of art. 4 ECHR.

In sum, the Grand Chamber did clarify certain aspects regarding the concepts of human trafficking and forced prostitution; however, from the perspective of scientific inquiry, the definition can still be criticised for being unfalsifiable. The idea of 'forced prostitution' remains extremely vague, and it would have been enlightening if the Grand Chamber had elaborated on the factual scope of 'force'. A clear definition of what is meant by 'force' is required under the principle of falsifiability. Only if there is a definition or notion against which a factual situation can be tested is it possible to prove or disprove that a factual situation falls under the ambit of a norm, which will in turn have normative implications.

Ilnseher v. Germany. The case of *Ilnseher v. Germany* concerns questions surrounding preventive detention and 'dangerousness' of a person. Here, the principle of falsifiability can be used to critique the vagueness of certain terms that played a pivotal role with regard to the justification of preventive detention under art. 5(1)(e) and art. 7(1) of the Convention.

The applicant, Mr. Ilnseher, was born in 1978. At the age of 19, he murdered a woman and was sentenced to ten years' imprisonment by a Regional Court in Germany. The crime was considered to be sexually motivated. Due to his age at the time of his offence, Ilnseher was subject to the German Juvenile Courts Act that exempted juveniles and young offenders from preventive detention. This Act was amended on 8 July 2008 to allow for retrospective preventive detention for juveniles and young adults. Based on this amended Act, the applicant's preventive detention was subsequently extended by domestic court orders, based on psychiatric assessments of the applicant that reported a high risk of him committing similar sexual and violent crimes if he were to be released. Thus, his prison sentence was subsequently extended under various judicial decisions. After a series of appeals, it was ultimately decided by the domestic courts that preventive detention had been necessary due to the high risk of Mr. Ilnseher committing a similar serious crime if he were to be released.[752]

752 ECtHR, *Ilnseher v. Germany*, App nos 10211/12 and 27505/14, Judgment of 4 December 2018, paras. 10–47.

The applicant claimed before a Chamber of the ECtHR that with regard to his retrospective preventive detention, his rights under art. 5(1) and under art. 7(1) had been violated because a heavier penalty had been imposed than the one applicable at the time when he had committed the offence in 1997. The Chamber unanimously held that the applicant's retrospectively ordered preventive detention from 20 June 2013 onwards had not violated the Convention because the German authorities' finding that his mental disorder warranted compulsory confinement was justified under art. 5(1)(e) of the Convention, which justifies the detention of 'persons of unsound mind'. Furthermore, because the preventive detention had been ordered due to the applicant's mental condition, the retrospective detention could not be considered a 'penalty' for the purpose of art. 7 ECHR.[753] Mr. Ilnseher requested the case to be referred to the Grand Chamber on 15 March 2017, which was accepted.[754]

The focus of the current analysis will be on two aspects of the Grand Chamber's ruling. Firstly, the Grand Chamber (as opposed to the Chamber) held that art. 7(1) ECHR was not applicable in this case because the applicant's preventive detention could not be considered a 'penalty' but rather constituted a therapeutic measure, to which art. 7 ECHR did not apply, and that it was, thus, lawful for the German courts to impose a heavier penalty onto the applicant than the one that was applicable at the time of the criminal offence. Secondly, the analysis will pertain to the notion of 'persons of unsound mind', which is one exception where the detention of a person can be lawful under art. 5(1)(e) of the Convention.

The first aspect refers to the applicant's claim under art. 7 ECHR of receiving a heavier penalty than the one applicable at the time he committed an offence. The majority of the Grand Chamber argued that the jailing of the applicant was not a 'penalty' as required by art. 7 ECHR because of the therapeutic purposes of the detention. Thus, in the case of Mr. Ilnseher's preventive detention, the protection of art. 7 ECHR did not apply due to the labelling of Mr. Ilnseher as – in the words of Judge Pinto de Albu-

753 ECtHR, *Ilnseher v. Germany*, App nos 10211/12 and 27505/14, Judgment of 2 February 2017. For a discussion of the Chamber ruling, see Emilie Rebsomen, Méryl Recotillet and Caroline Teuma, 'Preventive Detention as a "Penalty" in the Case of Ilnseher v. Germany' (*Strasbourg Observers*) <https://strasbourgobservers.com/2017/11/10/preventive-detention-as-a-penalty-in-the-case-of-ilnseher-v-germany/#more-4026>. Last acccessed 1 June 2021.

754 ECtHR, *Ilnseher v. Germany*, App nos 10211/12 and 27505/14, Judgment of 4 December 2018, para. 6.

querque – 'mad' rather than 'bad'.[755] Although the preventive detention order was imposed by the criminal justice system,[756] the Grand Chamber used factual arguments with regard to the detention facilities, 'the nature and the purpose of his preventive detention', the cell space, the kitchen unit in the cell, and the separate bathroom as factors indicating that the punitive element of the detention had been erased, and that thus the detention was not a 'penalty' as in the meaning of art. 7 ECHR but rather a 'therapeutic measure'.[757] The arguments for characterising the measure as 'therapeutic' rather than 'punitive' referred to material conditions in the institutions, i.e. to factual considerations. In essence, the Grand Chamber uses factual circumstances of the detention facility to relabel the character of the detention, which then has normative consequences: if the detention is labelled 'punitive', the applicant is protected under art. 7(1) ECHR. If it is labelled 'therapeutic', the applicant is not protected under art. 7(1) ECHR, which means that changing the factual label from someone being 'bad' to someone being 'mad' has legal implications in terms of legal protection. The retrospective change of the label regarding the 'nature' or 'purpose' of the detention is criticised by Judge Pinto de Albuquerque:

> '[…] how many kitchen units, how many separate bathrooms, how many TV sets or body-building machines, how many doctors and nurses, how many visiting hours or phone calls should there be for a preventive detention unit to change nature and for detention therein to change its 'purpose'? […]'[758]

This, essentially, is a critique based on the principle of falsifiability. The vagueness of what exactly the nature and purpose of the detention must (factually) entail to justify its (legal) relabelling is highly problematic.

The second step, then, is to assess whether the preventive detention, which was considered not to violate art. 7(1) ECHR, was justified under art. 5(1)(e) ECHR. This article justifies the deprivation of liberty in cases of lawful detention of 'persons of unsound mind'. The Grand Chamber

755 For a scathing criticism of the 'erasure' of the autonomous meaning of 'penalty', see paras. 95–107 of the Dissenting Opinion of Judge Pinto de Albuquerque joined by Judge Dedov, ECtHR, *Ilnseher v. Germany*, App nos 10211/12 and 27505/14, Judgment of 4 December 2018.

756 ECtHR, *Ilnseher v. Germany*, App nos 10211/12 and 27505/14, Judgment of 4 December 2018, para. 229.

757 ibid, para. 236.

758 ibid, Dissenting Opinion of Judge Pinto de Albuquerque joined by Judge Dedov, paras. 108–110.

held that in order for the applicant's preventive detention to be justified under art. 5(1)(e) of the Convention, three minimum conditions had to be satisfied:

> 'firstly, he must reliably be shown to be of unsound mind, that is, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder.'[759]

The questions that are of interest from the perspective of scientific inquiry, and especially from the perspective of falsifiability, are: how do the notions of 'true mental disorder', 'mental disorder', and being of 'unsound mind' relate to each other? And what can be deemed 'objective medical expertise'?

Two of the applicant's lines of argument pointed to these issues. Firstly, he argued that his preventive detention was not justified under art. 5(1)(e) of the Convention as it had not been shown in a reliable manner that he was of unsound mind. More than half of the experts who had examined the applicant since 1999, including expert F., who had been consulted as one of the experts in the proceedings at issue, had not found the applicant to suffer from a true mental disorder, and none of the experts who had examined him had the specific qualifications to examine young people.[760] Secondly, the notion of 'mental disorder' under the German Therapy Detention Act might be less restrictive than the notion of 'unsound mind' under art. 5 of the Convention, and might therefore not warrant compulsory confinement.[761]

The Government argued that the conditions established in the Court's case-law for detaining a person of unsound mind had been satisfied and that the applicant had been found by the Regional Court relying on 'two renowned external psychiatric experts to suffer from a true mental disorder, namely from a serious form of sexual sadism, at the relevant time'.[762] The domestic authorities referred to the case of *Glien v. Germany*,[763] where

759 ECtHR, *Ilnseher v. Germany*, App nos 10211/12 and 27505/14, Judgment of 4 December 2018, para. 127.
760 ibid, para. 111.
761 ibid, para. 112.
762 ibid, para. 118.
763 ECtHR, *Glien v. Germany*, App no 7345/12, Judgment of 28 November 2013, paras. 84 and 87.

a person was considered as a person of unsound mind under art. 5(1)(e) of the Convention despite not having suffered from a condition that ruled out or diminished their criminal responsibility at the time of the offence.[764]

The European Prison Litigation Network (EPLN) acted as a third party and submitted that the Chamber's interpretation of 'persons of unsound mind' was 'too broad and imprecise'.[765] In terms of the principle of falsifiability, what the intervening party argued is that the terminology used is vague and non-refutable. The EPLN noted that the Federal Constitutional Court of Germany used a broad understanding of 'mental disorder', which under German law covered non-pathological disorders as well.[766] However, the notion should only apply to persons with severe pathological disorders whose capacity to understand the wrongfulness of their acts at the time when they did commit them was 'non-existent or at least diminished'.[767] The notion of 'persons of unsound mind' should not be assimilated to or confused with a person being considered dangerous.[768] In other words, the 'bad' should not be labelled 'mad' simply for the purpose of keeping them incarcerated.

Thus, the Grand Chamber's assessment of the facts of the case must be assessed keeping in mind the question of how the concept of 'mental disorder' under the German procedure relates to the notion of 'unsound mind' under art. 5 ECHR. Judge Pinto de Albuquerque in his dissenting opinion, joined by Judge Dedov, criticises the notion of 'person of unsound mind' as a 'catch-all construction'.[769]

> 'The majority in the present judgment are undecided: on the one hand, they say that the notion of 'unsound mind' 'might be more restrictive' than that of 'mental disorder', but on the other hand they say that the notion of 'unsound mind' does not warrant a mental condition that excludes or even diminishes criminal responsibility. With this convenient ambiguity, the door is wide open to establish 'a disorder which can be said to amount to a true mental disorder' and

764 ECtHR, *Ilnseher v. Germany*, App nos 10211/12 and 27505/14, Judgment of 4 December 2018, para. 119.
765 ibid. 124.
766 ibid.
767 ibid.
768 ibid, para. 125.
769 ibid, Dissenting Opinion of Judge Pinto de Albuquerque joined by Judge Dedov, paras. 108–110.

> 'treat' dangerous offenders as 'mentally ill' or 'mentally disordered' persons and keep them detained for the rest of their lives, even on the basis of a detention regime that did not exist at the time of the commission of the offence.'[770]

The Grand Chamber interprets the notion of 'unsound mind' expansively and thereby opens up the possibility of more easily categorising someone as being of 'unsound mind', allowing the preventive detention of that person to be lawful under art. 5(1)(e) of the Convention. The applicant argued that he was neither suffering from a true mental disorder nor that he was a 'person of unsound mind'. He claimed that the requirement of 'objective medical expertise' was not fulfilled. The two experts the Government relied on were K. and F. However, throughout the time that the applicant had been examined, more than half of the experts, including F., had not found the applicant to suffer from a mental disorder, and sexual sadism in particular; a true mental disorder could, thus, not be proven.[771]

The Grand Chamber argued that domestic courts have 'certain discretion' with regard to the clinical diagnoses;[772] however, as Judge Pinto de Albuquerque points out, 'there are limits to this hands-off approach'.[773] In May 2017, the contact between the applicant and his psychologist at the time, M.K., were discontinued because there were no signs of any 'hidden sadistic undercurrent'.[774] Judge Pinto de Albuquerque criticises the 'scientific quality' of the diagnosis and points to the fact that the alleged mental illness of sexual sadism had been diagnosed fifteen years after the criminal act had taken place. The majority had also wrongly held that the applicant had 'a history of offences',[775] even though the offence in 1997 had been his first one.[776]

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770 ibid, Dissenting Opinion of Judge Pinto de Albuquerque joined by Judge Dedov, para. 109. References to paragraphs omitted.

771 ECtHR, *Ilnseher v. Germany*, App nos 10211/12 and 27505/14, Judgment of 4 December 2018, para. 111.

772 ibid, para. 155.

773 ibid, Dissenting Opinion of Judge Pinto de Albuquerque joined by Judge Dedov, para. 112.

774 ibid, Dissenting Opinion of Judge Pinto de Albuquerque joined by Judge Dedov, para. 112. The Opinion refers to 'Enclosures 10 and 11 joined to the applicant's observations of 10 August 2017' in n 295.

775 ECtHR, *Ilnseher v. Germany*, App nos 10211/12 and 27505/14, Judgment of 4 December 2018, para. 157.

776 ibid, Dissenting Opinion of Judge Pinto de Albuquerque joined by Judge Dedov, para. 113.

These points show that there are serious flaws in the majority's fact-assessment in the present case. As the factual labels have a normative effect, their use should be clear and transparent. However, in this case, the labels did not conform with the requirements of falsifiability because they were vague and self-protective. The first element of vagueness can be seen in the weakening of (the protective effect of) art. 7(1) of the Convention because this article can be circumvented by labelling detention 'therapeutic' rather than 'punitive'. The second vagueness is that the notion of 'person of unsound mind' is interpreted so broadly, and the fact-assessment as to whether a person really suffers from a 'true mental disorder' was conducted so poorly, that the possibility of labelling someone who is considered 'dangerous' by the domestic authorities as 'mad' is opened up, allowing for that person to be held in detention for the rest of their life.

S.H. and Others v. Austria. In ethically and morally sensitive cases, the principles of scientific method can be used to analyse arguments and decisions in a manner that increases analytic utility and helps avoid emotional responses to the sensitiveness of a case. If we consider, for instance, the question of artificial procreation, the reading of a case with the help of scientific principles will help focus on the question that is at stake in the individual case rather than getting lost in the sensitive and often emotional debates over questions of life and death and family relations. The case of *S.H. and Others v. Austria*[777] that came before the Grand Chamber is replete with highly 'emotional sentences'. For instance, the Italian Government as a third-party intervener stated that 'to call maternal filiation into question by splitting motherhood would lead to a weakening of the entire structure of society'.[778]

The case concerns the legality of artificial procreation. Two infertile couples brought claims before the European Court of Human Rights against prohibitions they were facing by Austrian legislation of 1992 that banned sperm donation for the purpose of IVF (in vitro fertilisation) and all forms of egg donation. The first couple could only conceive with the help of donor spermatozoa and IVF, whereas the second couple required egg donation. They claimed violations of their rights under art. 8 ECHR and under art. 14 ECHR. The claim that is of interest here is their complaint of unjustified discrimination due to the incoherence in which techniques were allowed versus prohibited. Ovum donation was generally prohibited

777 ECtHR, *S.H. and Others v. Austria*, App no 57813/00, Judgment of 3 November 2011.

778 ibid, para. 73.

whereas sperm donation was permitted only if the semen is placed directly into the womb of a woman. The First Section held in 2010, with a 6–1 vote for the first couple and a 5–2 vote for the second, that art. 14 in conjunction with art. 8 of the Convention had been violated by the Austrian Government.[779] The case was then referred to the Grand Chamber, which reversed the decision in 2011 with a 13–4 vote, concluding that the Austrian laws on assisted reproduction did not violate Convention rights. The majority reached this decision because they deemed the Austrian Government to have a wide margin of appreciation on this ethically and morally sensitive topic.[780]

One issue that arises with the discussion of 'ethically and morally sensitive questions' is that it is not entirely clear what this moral sensitivity is based on and who is to decide what is considered 'ethically and morally sensitive' and how. What is of interest here is the use of social and moral sensitivity as an argument in a case. It is an 'easy' argument to make; however, as Alexandra Timmer rightly notes, such arguments are 'hardly ever concretely substantiated with statistics or other evidence'.[781] Thus arguments based on social and moral sensitivity are easy in the sense that they are not falsifiable because it is unclear what can be tested in order to refute an argument that is based on a vague concept such as 'moral sensitivity'.

Austria appealed to the notion of public interest to justify the ban on sperm donation for in vitro fertilisation and the general ban on egg donation.[782] However, the arguments are not persuasive and the vague concepts invoked by the Government are unfalsifiable.

Firstly, the Government argued that the difference in treatment between sperm and ovum donation was justified in order to protect women. It observed that economically disadvantaged women in particular may be exploited and humiliated.[783] This is a paternalistic line of argument that should have been criticised by the majority. It was not clarified what exactly was meant by the danger of women being exploited and humiliated, nor

779 ibid.
780 ibid, paras. 94 and 97.
781 Alexandra Timmer, 'S.H. and Others v Austria: Margin of Appreciation and IVF' (*Strasbourg Observers*) <https://strasbourgobservers.com/2011/11/09/s-h-and-others-v-austria-margin-of-appreciation-and-ivf/#more-1268>.
782 ECtHR, *S.H. and Others v. Austria*, App no 57813/00, Judgment of 3 November 2011, see especially paras. 64–67.
783 ibid, para. 66.

why such dangers do not affect men as well.[784] In order to be falsifiable, the statements would have to be refutable. Here, however, the paternalistic stance remains vague and self-protected.

Secondly, the Government argued that fears regarding split motherhood justified the legislation. The Government argued that IVF 'raised the question of unusual family relationships in which the social circumstances deviated from the biological ones, namely, the division of motherhood into a biological aspect and an aspect of "carrying the child", and perhaps also a social aspect.'[785] The terminology in this line of reasoning is problematic as it reflects the idea that there exist 'usual' and 'unusual' families. The majority acknowledged that the Austrian Government was guided by 'the basic principle of law – *mater semper certa est*' and that

> '[i]n doing so, the legislature tried to reconcile the wish to make medically assisted procreation available and the existing unease among large sections of society as to the role and possibilities of modern reproductive medicine, which raises issues of a morally and ethically sensitive nature.'[786]

This observation by the majority, which implies that preventing 'unusual family relations' from developing is a legitimate goal, is a step backwards from the Court's case-law where it acknowledged the diversity of familial and other human relationships.[787] The issue here, again, is that gender roles are being enforced where the biological mother ought to raise the child and biological and social motherhood must not be separated. This line of reasoning should have been unpacked and condemned by the majority.[788] From the perspective of falsifiability, it is unclear what is meant by 'usual' and 'unusual' family relations and what the 'social aspect' is that the Government refers to.

Thirdly, it was argued that there was a need to protect the child's welfare. It was also argued that split motherhood might jeopardise the child's wellbeing and 'the child's legitimate interest' to know their actual descent, which was considered impossible in most cases where a child

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784 This can also be criticised under the principle of simplicity.

785 ECtHR, *S.H. and Others v. Austria*, App no 57813/00, Judgment of 3 November 2011, para. 67.

786 ibid, para. 104.

787 See, e.g. ECtHR, *Marckx v. Belgium*, App no 6833/74, Judgment of 13 June 1979; ECtHR, *Schalk and Kopf v. Austria*, App no 30141/04, Judgment of 24 June 2010.

788 See also Timmer (n 781); Michele Bratcher Goodwin (ed), *Baby Markets - Money and the New Politics of Creating Families* (Cambridge University Press 2010).

was conceived using donated sperm or ova.[789] Again, there is no evidence provided for these claims, which seem to solely reflect the Government's own convictions regarding what 'normal' family relationships should look like. The only basis for this argument seems to be 'the unease existing among large sections of society as to the role and possibilities of modern reproductive medicine'.[790] However, no evidence is provided to substantiate this statement. It is unclear what a 'large section of society' means and how many people have to feel uneasy – and indeed how such uneasiness should be expressed – for a law prohibiting certain forms of artificial procreation to be justified on these grounds. Such statements are scientifically unfounded and fail under the principle of falsifiability because there is no possibility of testing or refuting this claim as there is no factual basis to support it. Thus the argument provided by the Austrian Government is vague, and this vagueness is not adequately addressed by the Grand Chamber.

The last aspect of the argument is the fear of selective reproduction, of 'Zuchtauswahl'. Although this fear can be considered legitimate, the Government did not specify why addressing it requires an absolute ban on ova donation and on sperm donation for IVF.[791]

The Grand Chamber decided to award the Austrian Government a margin of appreciation due to the moral and ethical sensitivity on the issue. It can be criticised on the basis of the principle of falsifiability for allowing vague notions to be used as the basis of the Government's argument and for not rejecting the paternalistic and stereotypical lines of reasoning the Austrian Government employs with regard to notions of family relations and women's need for protection. It can also be criticised for accepting unfounded lines of reasoning by the Austrian Government. No empirical evidence is provided by the Austrian Government for its arguments. Concrete, falsifiable arguments are lacking as to why exactly 'split motherhood' should endanger the best interest of the child.

Moreover, there is a back-and-forth in the Grand Chamber's position with regard to the existence or non-existence of a European consensus with regard to artificial procreation. Three documents, dating from 1998

789 ECtHR, *S.H. and Others v. Austria*, App no 57813/00, Judgment of 3 November 2011, para. 67.

790 ECtHR, *S.H. and Others v. Austria*, App no 57813/00, Judgment of 3 November 2011, para. 99.

791 Timmer (n 781).

to 2007,[792] are compared and deemed by the Court to show that the legal provisions in the field of medically assisted procreation were developing quickly.[793] The Court also states that 'there is now a clear trend' in the laws in the Member States towards allowing gamete donation for IVF.[794] This is seen as reflecting an emerging European consensus. However, the Court then takes a step back and holds that this consensus is not 'based on settled and long-standing principles established in the law of the member States'[795] but is only one stage in the development of this highly dynamic and fast-evolving field that does not lead to a narrowing of the margin of appreciation.[796] This is highly contradictory: the Court first holds that 'a clear trend' exists, but then deems this trend not established enough, or not sufficiently reflected in the field of law, to narrow the margin of appreciation of the Austrian Government (or any other member State). The idea here seems to be that this field of law is, at the moment, still too dynamic for there to be a clear position that can be used as a 'European stance' and enforced as a standard for all States. Here, it seems quite confusing what, then, a trend entails. In its conclusion, the Court does warn the Austrian Government to pay attention to the future developments in this field, reiterating

> 'that the Convention has always been interpreted and applied in the light of current circumstances […]. Even if it finds no breach of Article 8 in the present case, the Court considers that this area, in which the law appears to be continuously evolving and which is subject to a particularly dynamic development in science and law, needs to be kept under review by the Contracting States […]'.[797]

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792 ECtHR, *S.H. and Others v. Austria*, App no 57813/00, Judgment of 3 November 2011, para. 35: 'Medically Assisted Procreation and the Protection of the Human Embryo: Comparative Study on the Situation in 39 States" (Council of Europe, 1998); the replies by the member States of the Council of Europe to the Steering Committee on Bioethics' "Questionnaire on access to medically assisted procreation (MAP) and on right to know about their origin for children born after MAP" (Council of Europe, 2005); and a survey carried out in 2007 by the International Federation of Fertility Societies'.

793 ECtHR, *S.H. and Others v.* Austria, App no 57813/00, Judgment of 3 November 2011, para. 40.

794 ibid, para. 96.

795 ibid, para. 96.

796 ibid para. 96.

797 ibid, para. 118.

This shows that the factual situation with regard to artificial reproduction can influence the scope of art. 8 ECHR. The gaze of the Court will continue to wander between the facts of the cases that are presented before it and the Convention articles.

In conclusion to this analysis, even if we agree that there is no European consensus yet that would be strong enough to call for the narrowing of the Austrian Government's margin of appreciation and, thus, a change in the Austrian laws, this still should not prevent the Court from condemning highly paternalistic lines of argumentation and requiring a sound factual basis for the vague and self-protective arguments presented by the Government, which run counter to the principle of falsifiability. Especially in cases that concern ethically and morally sensitive issues, it is important for the arguments that are presented by the parties to be based on factual evidence. One's own moral approach to a sensitive question may all too easily influence the selection of information that is chosen to build an argument. However, the assessment of the arguments must be rigorous and must not allow the data and information to be cherry-picked in order to lead to a pre-defined conclusion.

iii. Summary and Comment

The three cases discussed above all fell short when analysed against the background of the principle of falsifiability. The principle of falsifiability shines a critical light on vague terms and over-inclusive definitions. In all three cases, vague terms or labels were used as the basis for key normative conclusions. It was not clarified what is required on a factual level for specific normative consequence to come into play. In *S.M.*, it was never clarified what is required for a factual circumstance to amount to 'force'; in *Ilnseher*, there was confusion regarding the assessment of Mr. Ilnseher as 'bad', as 'mad', or as 'dangerous', where these labels have different consequences on a normative level; and in *S.H.*, the Austrian Government used stereotypical lines of arguments and the vague concept of 'moral sensitivity' with regard to artificial procreation.

In cases where terms have to be interpreted in order to determine their effect, the underlying factual situation warrants special attention. If the factual basis on which the normative conclusion rests is vague, and this vague situation is considered to fall under the ambit of the vague term that is employed, the reliability of the solution is diminished. In the cases analysed above, vague and self-protective terms were used as criteria with-

out proper analysis or explanation as to what the criteria require or entail (factually) in a specific case in order to reach a (normative) conclusion. If vague notions are used, of which it is unclear what they require from the facts, it is all the easier to cherry-pick those facts that do fit under the vague concept in order to fill the legal bill.

Harking back to the opinions by Judges Zupančič and Kūris, who invoked the principle of falsifiability with regard to shifts in case-law,[798] Judge Zupančič expresses the opinion that usually, decisions reached by the Court 'are not adapted to the negative feedback they receive from reality'.[799] This holds true for the specific case that was decided: because the ECtHR's decision is final, the decision will not be adapted if, e.g., the principle of falsifiability calls for its refutation. However, with regard to future decisions, this does not hold true. Looking at the 'bigger picture' of adjudication, negative feedback from reality – e.g., in the form of judges' dissenting opinions, disagreement voiced in academic commentaries, criticism in newspaper articles, or reactions from NGOs – may have an influence with regard to factually similar cases. In that sense, there is a back-and-forth – a wandering gaze – between case-law and feedback from reality. Although the principle of falsifiability does not require the actual physical testing of theories, of arguments, or of conclusions to a case, this principle does require their 'conceptual refinement'.[800] There must be a back-and-forth, a testing process, and this testing process might influence the Court towards changing its case-law.

A back-and-forth – a wandering gaze – also occurs between factual occurrences and labels they can receive. These labels can have normative implications, and they change as changes happen in society. However, if the labels are too vague and self-protective, the danger is that the facts can easily be interpreted in order to fit a vague label, thus the facts may be 'constructed'[801] in a manner that will allow a pre-defined goal, with or without normative implications, to be reached. For instance, as shown in the cases discussed above, the labels 'morally sensitive', 'dangerous', or 'forced' have normative implications. However, the existence or non-existence of moral sensitivity, of danger, and of force must be interpreted on

798 III.2.c.i.

799 ECtHR, *J.K. and Others v. Sweden*, App no 59166/23, Judgment of 4 June 2015, Partly Dissenting Opinion by Judge Zupančič.

800 Levit (n 358) 305.

801 See, e.g., Ana Luisa Bernardino, 'The Discursive Construction of Facts in International Adjudication' [2020] Journal of International Dispute Settlement 175.

a case-by-case basis and depending on the facts of a given case. Whether or not artificial procreation is 'morally sensitive' and how society 'feels' about IVF treatment becomes a relevant question only if this form of procreation exists (factually). Again, this is linked to the idea of the wandering gaze discussed in Part II. This does not imply that there is a requirement for courts to rapidly adapt to changes in society. Such changes take time, and adaptations to conventions must be thought through, refined, and be based on and supported by a wealth of evidence. In this sense, principles of scientific inquiry suggest a cautious attitude towards novel ideas.[802] However, courts must remain attentive to changes in society. In this sense, the ECtHR pointing a warning finger at the Austrian Government to keep under review the fast-evolving situation with regard to artificial procreation can be interpreted as meaning that in the present case, the Austrian Government was deemed not to have violated the Convention, however, in future cases, this may be different. Thus the Austrian Government must remain attentive to the changes that are taking place in society and in the science of reproduction, and might have to adapt its legal rules to the needs of society, and to reality.

3. Implications of these New Categories

Above, the question was addressed as to how the case-law of the ECtHR can be criticised on the basis of principles of scientific inquiry. The question that is of interest now is what implications these new categories have, and how they change the critique of jurisprudence.

a. Focusing on the Quality of the Fact-Assessment Procedure

A first implication can be seen in the way using these new categories to critique jurisprudence puts a spotlight on the quality of the process of inquiry, i.e., the process of fact-assessment, rather than on the labels that are applied to statements. For instance, it is easy to label something (explicitly or implicitly) a 'fact' or 'proven'; however, the difficulty lies in assessing whether the label is actually warranted. For instance, whether prostitution was 'forced' in a given case must be assessed by looking at the facts in the particular case. The facts and the underlying assumptions, generalisations,

802 Levit (n 358) 305.

and inferences they are based on, and the quality of the process of inquiry with regard to this assessment procedure will show whether the label 'forced' is warranted or not. The correctness of this label is essential to the normative conclusion that will be drawn. The same holds true for the question of whether some practice or policy of a Government relates to a 'morally sensitive issue'. If the answer is in the affirmative, this will have an implication on a normative level with regard to how broad or narrow the country's margin of appreciation will be. Thus, it is necessary for the Court to show why in the case at hand, the facts can be subsumed under a particular normative concept. This requires a thorough and transparent assessment of the facts.

At the beginning of this thesis, it was stated that labelling something a 'fact' usually implies that this product receives special importance within a debate, and that this label gives a statement a certain authority.[803] The label implies that the person who is making the utterance can provide proof for the statement in some way or another. One can try to distinguish between facts and opinions by testing a statement's reliability, although the line between facts and opinion is often not clear-cut. In cases where there are different interpretations and points of view with regard to an observation or a subject matter, HLA Hart requires that the utterer must be of 'superior knowledge, intelligence, or wisdom which makes it reasonable to believe' what that person utters and that this perspective is 'more likely to be true than the results reached by others through their independent investigations'.[804] Norwood Russell Hanson's example of two people who observe the same thing but may interpret the same visual data in different ways, and thus construe the evidence differently, comes to mind again here. It must be shown, then, 'how these data are moulded by different theories or interpretations or intellectual constructions'.[805]

Applying these ideas to the case analysis above, the parties to a case usually have different accounts of the events, and the Court is then required to decide how the facts should be assessed. The Court has to assess the reliability of the factual accounts provided in a given case, it has to assess the parties' submissions, the expert reports, and all other relevant information submitted in a case. The Court itself must conduct its fact-assessment in a reliable manner. Applying the Norwood Russell Hanson's statement with regard to observations by different people to the sphere of

803 See above, I.1.
804 Hart (n 11) 261–262.
805 Hanson (n 12) 5.

legal decision-making, in a first step, the different parties are required to show how the facts, i.e. the data, statistical data, and other information, fits their theory of how the case should be decided. In a second step, the Court is required to do the same thing: the presented data, the different accounts of the facts, i.e. the different observations must be discussed and weighed against each other, and it must be shown how the evidence can be construed differently. The Court's account and interpretation of the facts of the case at hand must then be shown in a clear and transparent manner, and it must be explained why the outcome of the case was based on observation A rather than observation B (or C, or D, …).

In the case-law of the ECtHR, facts and opinions cannot always easily be held apart, and it is not always clear who carries the burden of proof for what. Usually, there are only very few clear labels, or none at all, regarding what is deemed a 'fact' and what is deemed an 'opinion'. In other words, it is rarely entirely clear who bears the burden of proving (or disproving) that something is to be considered a 'fact'. Arguably, it is not the labels that are most important in the process of fact-assessment. Dwyer even states that it is not really useful to approach the analysis of 'evidence of facts' versus 'evidence of opinions' differently.[806] If we consider facts here to include basic sense data and inferences we draw from them, then all of these, including the social and legal significance of those facts, can carry the label of 'fact'.[807] Any statement or observation or perception that is made within judicial decisions can be labelled a 'fact'; categorising these into different entities does not bear on the present discussion. The present discussion aims at showing that all of these 'facts', or factual statements, must be assessed by the Court in order to determine their reliability. The manner in which their reliability can be tested is using the principles of scientific method as guiding principles or framework. When we want to assess and scrutinise how the ECtHR contends with facts, the distinction between facts, opinions, etc. does not assist us in answering this question. In Dwyer's words:

> 'This is because the underlying question, of how inferences have been drawn from basic experiences and generalizations, is structurally the same for questions of both fact and opinion. Therefore when we say 'facts' we are usually referring to a set of propositions which have been inferred through the application of generalizations to other inferences.

806 Dwyer (n 194) 75.
807 ibid 93–94.

> We may choose to draw the line somewhere and say that some of these inferences should be classified as 'brute facts', but the inferential chain properly goes back to basic experiences.'[808]

The manner in which inferences should be drawn, it is argued here, is by following the principles of scientific inquiry. For instance, the Court may listen to an expert's opinion during a process. Here, the specialist advice refers to how appropriate generalisations should be applied to the set of facts in the given case. However, whether and how this advice is applied and integrated into the final conclusion of a case is still in the Court's power. The Court is not obliged to follow a particular assessment of the facts. What it should be required to do, however, is to conduct its own fact-assessment in a manner that produces a fair, reliable, coherent, and transparent conclusion. For the purpose of this paper, the label 'fact' is not what is of greatest importance. Rather, it is argued here that the focus should not be on the labels but rather on the importance that is given to different statements, whatever label they may carry, and how and why the labels influenced the statements being or not being a determining feature for the conclusion that was reached. Labels are not central to the present discussion because they can be instrumentalised. This holds particularly true for labels such as 'fact', which entails a certain authority. Thus, it is essential to keep in mind what it means to refer to something as a fact, and to analyse and assess, by (scientifically) inquiring the underlying processes behind the decision on whether the statement is indeed a fact.

b. How Do These Categories Change the Critique of Jurisprudence?

The case analysis above showed that facts and law are intertwined. If the fact-assessment by the Court does not conform with the principles of scientific inquiry, it will provide an unsound basis for the normative conclusions that rest on this factual basis. In Part I of this thesis, it was shown that not many rules exist on how the ECtHR ought to conduct fact-assessment. Moreover, the case analysis showed that certain approaches that have developed via its case-law, such as the Court being the master of characterisation to be given in law to the facts, are not applied consistently. Using the principles of scientific method as a framework for analysing the fact-assessment in jurisprudence enables the reader to bring some order

808 ibid 77–78.

into the sometimes chaotic and untransparent lines of factual reasoning by the ECtHR. Using these principles for orientation will allow the reader of a case to detect flaws in the Court's fact-assessment and helps shine a light onto inconsistencies or unclear lines of inference and factual reasoning. Many of the principles of scientific method might seem trivial and appear not to add much to the critique of jurisprudence. For instance, it seems self-explanatory that any decision or conclusion should be properly explained and be based on sufficient evidence (drawing on, and consistent with, (the body of) knowledge within the legal realm as well as from other disciplines). However, as was shown in the case analysis, the principle of explanatory power is not always adhered to in practice and can therefore serve as a tool to detect flaws in the analysis by the Court. Thus, the scientific principles can help structure the way in which lawyers and academics, or any reader of the Court's case-law, can critique the Court's decisions in this regard. They shift the gaze from the legal to the factual, and in doing so, they provide a sound basis for arguments which otherwise may have been overlooked.

The principles provide analytic utility with regard to the decision-making process. They can be used as guiding principles when assessing the way the facts are contended with. They require an assessment procedure and conclusion to be transparent, clear, and – using Dewey's terminology – thought through.[809] They also require the assessors to be self-critical and to examine their own assessment procedure.

The use of statistical evidence, reports, and expert opinions in a decision does not automatically mean that the decision is based on a sound factual basis and that methods of scientific inquiry were adhered to. Reliance on empirical or other forms of evidence does not in itself ensure that the decision is externally valid and has explanatory power. The question to be asked is whether the statistical evidence does provide proof for the statement that is made, whether it is reliable, and even whether it has anything to do with the question at stake. The entire line of argument must be evaluated, and it must be asked what objective the statistical or other form of evidence is being put to and whether that objective has been reached. Using the principles of scientific method 'can offer one means of assessing the rationality of alternative decisional possibilities'.[810]

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809 II.2.b.

810 For Levit's assessment of 'unscientific use of empirical evidence, see Levit (n 358) 304–305.

The principles of scientific method do not require judicial decisions to incorporate, or rapidly adapt to, (the most) recent empirical studies. Rather, these principles require that before new ideas are adopted and judicial decisions are adapted accordingly, they should be supported by a wealth of evidence. For instance, the principle of external validity requires a new idea to conform with a large body of pre-existing knowledge, and the principle of falsifiability calls for the careful conceptual refinement of theories.[811]

This can be linked to the pragmatist approach where inquiry is, in the words of Peirce, 'not standing upon the bedrock of fact. It is walking upon a bog, and one can only say, this ground seems to hold for the present. Here I will stay till it begins to give way'.[812] In other words, the bedrock of fact that we stand upon now is the current legal practice or the approach to questions that has been developed through long-standing case-law. If changes occur, e.g., due to scientific or technological progress or (factual) changes in society, and sufficient relevant data is collected, then the current approach may give way and a new course of action may be called for. This does not mean that the entire system of adjudication collapses or that it has to adapt rapidly to changes; rather, this shift takes place slowly. What is important is that these changes are acknowledged and taken into account in our processes of inquiry. As the famous philosopher of science Imre Lakatos noted, 'scientific theories are rarely abandoned upon the first observation that purports to refute them'.[813] If one observation was proven right at one point in time, it might be proven wrong at another. If it is proven wrong at a later point, our beliefs and reflections must be adapted to the new situation we find ourselves in.[814] This does not mean that we are in a constant flux and must react quickly to the latest insights from other disciplines. However, insights from other disciplines may be used as guidance for future decisions. This is already done in opinions by judges of the ECtHR.

The principles change the critique of jurisprudence in that certain assumptions that are taken for granted are reconsidered: for instance, it has been shown that why one line of reasoning, or of assessing the facts,

811 ibid 305.

812 See above, II.2.a. Peirce (n 377) n 5.589. See also Misak, *Cambridge Pragmatism: From Peirce and James to Ramsey and Wittgenstein* (n 377) 18.

813 Christopher T Wonnell, 'Truth and the Marketplace of Ideas' 19 UC Davis Law Review 712.

814 II.2.a., p. 59.

is chosen over another is not always properly explained. Employing the principles of scientific inquiry when analysing jurisprudence requires the reader to be self-analytical and self-aware and read the case-law with a view to the precision of the factual assessments conducted by the court. It entails for the reader of jurisprudence to pay more attention to the method of inquiry, to the way an assessment or conclusion is reached, and to whether the conclusion conforms to principles of rationality. The aim here is not to transplant science into the legal domain; rather, the idea is to assimilate certain lines of thinking and reasoning by using principles of scientific method, and to invite judges, parties to a case, and academics to employ a different way of thinking and of reading case-law and critically reflecting upon it.

An analogy can even be drawn to proofreading or any form of critical assessment of texts or lines of argument. A proofreader can assess the logic and the underlying arguments made in a thesis without having to be an expert on the subject matter. Neither we nor the judges need to understand the inner workings of the clock – to use James Williams' clock metaphor[815] – in order to assess whether an explanation provided for the inner workings of a clock was done well or not.

As Nancy Levit rightly points out, the principles of scientific method cannot guide all decisions, and there is no universal scientific roadmap that will guide all factual analyses to 'the right' outcome.[816] However, what these principles can do is promote more precise understanding of underlying arguments and greater attention to how lines of reasoning are justified and inferences are drawn (in cases). This can increase rationality, predictability, and certainty in the process of fact-assessment and decision-making. The goal here is to encourage judges, lawyers, parties to a case, and theorists to read jurisprudence more critically and systematically, to reflect on theories, arguments, and conclusions, and to pay attention to areas of ignorance. Using principles of scientific method to assess judgments can pave the way to improving the rationality of fact-assessment procedures.[817]

Judicial fact-assessment must be falsifiable. If the process of fact-assessment is not conducted in a manner that conforms with the principles of scientific inquiry, then the normative conclusions reached can be criticised as having been pre-determined, and the information on which the normative conclusion is based can be criticised as having been cherry-picked.

815 II.2.a.
816 Levit (n 358) 297.
817 ibid 266.

Norms can become self-fulfilling prophecies if the process of inquiry is not sound. The quality of the inquiry behind a conclusion is of pivotal importance for the reliability of the conclusion itself. A conclusion is reliable if it is based on a sound factual basis, and a factual basis is sound if it is based on a sound method of inquiry.

It is not entirely uncommon for decisions by the ECtHR to be criticised using principles of scientific method. As shown above, various judges of the European Court of Human Rights have referred to such principles, explicitly or implicitly, in their opinions on majority judgments. In these opinions, language from other disciplines is brought into the legal sphere to criticise the majority's ruling, and this can be interpreted as a first step in the process of translating the principles of scientific method into the legal code.[818] If judges continue to use these principles in their opinions, these references to the criteria of validation may cause so much self-irritation within the system of the ECtHR's decision-making that they will be made operable and even become legal principles.

818 See discussion of Luhmann with regard to the principle of simplicity above, III.2.a.iii.