II. Facts, Law and Interdisciplinarity

This section provides the theoretical ground that will allow for principles of scientific method to be used to analyse the fact-assessment conducted by the European Court of Human Rights in its case-law. In a first step, it will be shown why an interdisciplinary approach is permissible in the (international) legal realm. For this purpose, two contrary positions will be discussed. Pragmatism will be presented as a school of thought with an optimistic stand towards interdisciplinarity. As a counter position, positivism will be presented, which is sceptical about interdisciplinary approaches in law. A middle-ground pragmatist position will be defended here that allows for the application of principles of scientific method as modes for critiquing the fact-assessment conducted by the ECtHR in its case-law. This section will also demonstrate that the line between facts and law, or factual and legal analysis, is sometimes blurred.

1. Interdisciplinarity and International Legal Theory

Any new approach or methodology that is applied to the legal domain will present a challenge to prevailing formalist traditions.[354] Although 'traditional' legal scholarship does embrace a variety of approaches such as legal philosophy and legal history, the predominant methodology is doctrinal.[355] This traditional, or 'black-letter' approach to law 'aims to understand the law from no more than a thorough examination of a finite and relatively fixed universe of authoritative texts', such as case-law and legal statutes, and it gains its importance from within the legal tradition itself.[356] There is no room for interdisciplinarity in such traditional approaches to law.

Oliver Wendell Holmes once famously stated that 'for the rational study of law the black-letter man may be the man of the present, but the man

354 Andrea Bianchi, *International Law Theories* (Oxford University Press 2016) 9.
355 Douglas W Vick, 'Interdisciplinarity and the Discipline of Law' (2004) 31 Journal of Law and Society 163, 177.
356 ibid 178.

of the future is the man of statistics and the master of economics'.[357] The twentieth century saw this expectation come true: the realist movement grew as a reaction to the dominant formalist conception of law and drew on insights from psychology, economics, and other branches of the social sciences to address normative questions in law.[358] Although realists did not form a cohesive group, they collectively condemned the rigidity and inadaptability of the formalist interpretation of legal rules and criticised classical analysis for its failure to account for the indeterminacy of legal rules and legal reasoning being manipulable.[359] The realist movement paid attention to the role of values in legal decision-making, an aspect absent from classical legal theory. Traditional approaches viewed law as being autonomous from other disciplines; such autonomy was considered necessary for the law to be neutral and objective. This prerequisite of neutrality implies denying any relevance of substantive values to law-processes such as legal adjudication.[360]

Through American legal realism, pragmatism, and various 'International Law & […] Movements',[361] interdisciplinary approaches have entered legal education, while political upheavals have eroded the (dominant) position of legal positivism, resulting in legal thinking becoming more and more policy-oriented.[362] The idea of progress entered the international legal discourse.[363] However, intellectual tensions persist between 'black-letter' academic lawyers and interdisciplinary scholars. Traditional approaches are criticised as being inflexible and 'intellectually rigid', whereas interdisciplinary approaches are deemed amateurish by their critics because their practitioners are seen as 'dabbling with theories and methods' they do not fully master.[364] This thesis aims at applying principles of scientific method to the fact-analysis in legal adjudication. Thus, this thesis is interdisciplinary in that it aims at incorporating principles from another

357 Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harvard Law Review 469.
358 Nancy Levit, 'Listening To Tribal Legends: An Essay on Law and the Scientific Method' (1989) 58 Fordham Law Review 263, 277.
359 ibid.
360 Bianchi (n 354) 27.
361 ibid 11.
362 Hans W Baade, 'Social Science Evidence and the Federal Constitutional Court of West Germany' (1961) 23 The Journal of Politics 421, 422.
363 Tilmann Altwicker and Oliver Diggelmann, 'How is Progress Constructed in International Legal Scholarship?' (2014) 25 European Journal of International Law 425.
364 Vick (n 355) 164.

discipline for the purpose of gaining insights in the legal domain. The integration of these principles can be seen as a partial integration of discrete elements from another discipline.[365]

Whether or not interdisciplinary approaches should or even can be used to gain insights in the legal realm can be discussed by presenting two contrary positions: pragmatism, which argues in favour of interdisciplinarity, and positivism, which points to the limitations of such approaches.[366] Thus, in what follows, these two extremes will be presented and a decision will be made as to which school of thought is used here to embed the idea of using insights from the principles of scientific method to scrutinise the fact-analysis in legal decision-making.

2. *Pragmatist Optimism towards Interdisciplinarity*

a. Pragmatism

Pragmatism has been criticised for being an empty theory that has nothing of substance to contribute to legal theory.[367] The consequentialist and problem-oriented approach adopted in pragmatist accounts may be inappropriate for the context of the legal discipline. It has been argued that legal pragmatism reduces law to being an instrument for achieving political goals and that it is useless in the realm of law.[368] However, as will be shown in the following, there are strands of pragmatism that take into account a broad range of consequences without narrowing them down to any 'ultimate goal'. Pragmatism thus differs from the utilitarian version of consequentialism that specifies the 'ultimate goal' as the maximisation of the satisfaction of the preferences of the largest group. Whereas utilitar-

365 Moti Nissani, 'Fruits , Salads , and Smoothies: A Working Definition of Interdisciplinarity' (1995) 29 The Journal of Educational Thought 121, 124.

366 There are of course many alternative points of discussion, e.g. Jürgen Habermas, *Faktizität und Geltung* (Suhrkamp 1998); Martti Koskenniemi, *From Apology to Utopia* (Cambridge University Press 2009).

367 See, e.g. Richard Posner, *Law, Pragmatism, and Democracy* (Harvard University Press 2003) 41; Ronald Dworkin, 'Pragmatism, Right Answers and True Banality' in Michael Brint and William Weaver (eds), *Pragmatism in Law and Society* (Westview Press 1991) 370; Brian Z Tamanaha, *Realistic Socio-Legal Theory: Pragmatisam and a Social Theory of Law* (Claredon Press 1997) 34.

368 Sanne Taekema, 'Beyond Common Sense: Philosophical Pragmatism's Relevance to Law' [2006] The Tilburg Working Paper Series on Jurisprudence and Legal History. Working Paper 06-02 2.

ian conceptions focus on a single criterion, more differentiated forms of pragmatism take into account a plethora of influences and actors and pay great attention to the legal context.[369] Sanne Taekema has opted for such a differentiated pragmatist approach that sees law as 'both a means and end in itself', serving 'a plurality of ends, which cannot easily be measured on a single scale', and having 'value in itself through the way it upholds ideals of justice and certainty in its application'.[370]

As Taekema puts it, '[p]ragmatist philosophy aims at developing a theory of meaning and truth that does not define truth in terms of correspondence to reality but rather looks at the practical effects.'[371] Louis Menand describes pragmatism as being 'an account of the way people think – the way they come up with ideas, form beliefs, and reach decisions. What makes us decide to do one thing when we might do another thing instead?'[372]

Pragmatist accounts of truth often have their basis in the Peircean account where 'truth is the end of inquiry'; or 'truth is satisfactory to believe'.[373] Charles Sanders Peirce is considered the founder of pragmatism.[374] William James, another influential figure in pragmatism, used a clock-metaphor in his explanation of pragmatism's conception of truth. He asks readers to close their eyes and imagine a clock on a wall. The picture in our heads will be of a clock. However, the closer we look, the more detailed our imagination of the clock needs to be, the more difficult it will get. Unless we are clockmakers, it will be quite difficult for us to imagine and reproduce the inner workings and mechanics of a clock. Thus, James asks: '[w]here our ideas cannot copy definitely their object, what does agreement with that object mean?'[375] Or, translated to the sphere of international adjudication: what does it mean for us to agree with a decision reached by an international court where we cannot definitely understand and replicate all the relevant aspects of a case by ourselves? What does agreement between judges mean if they are deciding

369 ibid 10.
370 ibid 15–16.
371 ibid 4.
372 Robert Danisch, *Pragmatism, Democracy, and the Necessity of Rhetoric* (University of South Carolina Press 2007) 13.
373 Michael Glanzberg, 'Truth' (*Stanford Encyclopedia of Philosophy*, 2018) <https://plato.stanford.edu/entries/truth/> accessed 1 September 2020.
374 Cheryl Misak, *Truth and the End of Inquiry* (Oxford University Press 2004) 3.
375 Williams James, 'Pragmatism's Conception of Truth' in Simon Blackburn and Keith Simmons (eds), *Truth* (Oxford Readings in Philosophy 2010) 54.

a factually highly complex case where they themselves will not be able to explain in great detail every scientific aspect that plays a pivotal role in the decision-process?

Where some theories require truth to be a static property in the sense that once you have your 'true idea', you have fulfilled your epistemic duties, pragmatism asks: '[g]rant an idea or belief to be true, […] what concrete difference will its being true make in any one's actual life? How will the truth be realized? What experiences will be different from those which would obtain if the belief were false? What, in short, is the truth's cash-value in experiential terms?' William James defined true ideas as follows: 'True ideas are those that we can assimilate, validate corroborate and verify. False ideas are those we can not.'[376]

Pragmatism does not require us to verify everything. The overwhelming majority of our beliefs can pass for true without us ever attempting to verify them. We believe something to be a clock without taking it apart and analysing its inner workings. We assume a country to exist even though we have never visited it. William James explained that indirect verification can pass muster, that '[w]here circumstantial evidence is sufficient, we can go without eyewitnessing. […] Verifi*ability* of wheels and weights and pendulum is as good as verification.'[377] Our thoughts and beliefs 'pass' as long as they have not been challenged; we rely on each other's accounts and accept others' verifications without ourselves verifying. 'But beliefs verified concretely by somebody are the posts of the whole superstructure.'[378]

In the context of international adjudication, granting a decision to be true is important from the perspective of reaching a justified belief.[379] Of course it is important to analyse and scrutinise judgments after they have been made. But if we start from the premise that a judgment must reflect 'the truth', then any criticism raised against a decision, or any diverging or dissenting opinion by a judge, will chip away at 'the superstructure' of international adjudication and may cause it to collapse. However, if we take a pragmatist stance, changes in law due to, e.g., societal changes, are accommodated, as is the acknowledgement that mistakes are part of any human decision-making process. It also allows the judges to consult experts who help them reach conclusions in areas where the judges themselves will not be epistemically capable of fully comprehending the 'inner

376 ibid.
377 ibid 56–57. Emphasis in the original.
378 ibid 57.
379 For a thorough discussion of justified legal belief, see, e.g. Dwyer (n 194) 40ss.

workings' of the issue at hand. It also allows different opinions to be uttered without this implying that the entire superstructure must be called into question. Such diverging opinions may, rather, suggest a different approach to a similar problem that may arise in the future.

Pragmatist approaches acknowledge that inquiry 'is 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'.[380] Cheryil Misak explains this Peircean quote and clarifies that when the 'bedrock of fact' does shift, it only gives way rather than collapsing. What she means by this is that this shift only pertains to a certain belief; an instability in one area will not lead our entire belief system to collapse. As Misak puts it: '[s]ome things have to be held constant.'[381] John Dewey makes a similar point in his piece on *Context and Thought*. In the process of inquiry, there need to be some things that can be considered constant. 'If everything were literally unsettled at once, there would be nothing to which to tie those factors that, being unsettled, are in process of discovery and determination.'[382] We all make considerations and reflections based upon some background conditions. What might be right today may be proven to be wrong tomorrow. If it is proven to be wrong tomorrow, we will inevitably have to adapt our beliefs and reflections to the new situation we find ourselves in.

b. The First Step to Interdisciplinarity: Pragmatist Wariness of Dichotomies

Pragmatist thinkers are generally wary of dichotomies; distinctions should only be drawn, and entities only held apart, if doing so is useful. According to John Dewey, distinguishing 'thinking' from 'doing' does make sense, however, turning every category into a separate entity is not something we should aim for because in reality, categories are interconnected in complex manners. A separation of categories (e.g. of facts vs. values, or

380 Charles Sanders Peirce, *Collected Papers of Charles Sanders Peirce, Vol. V: Pragmatism and Practicism* (Charles Hartshorne and Paul Weiss eds, Harvard University Press 1934) n 5.589. See also Cheryl Misak, *Cambridge Pragmatism: From Peirce and James to Ramsey and Wittgenstein* (Oxford University Press 2016) 18.

381 Misak, *Cambridge Pragmatism: From Peirce and James to Ramsey and Wittgenstein* (n 380) 18.

382 John Dewey, 'Context and Thought' (1931) 12 University of California Publications in Philosophy 203, 213.

of different scientific disciplines) is, thus, only useful from a pragmatist perspective if this separation improves or clarifies our reasoning.[383]

One dichotomy that pragmatists are especially wary of is the distinction between facts and values. In his work on the collapse of the fact/value dichotomy, Hilary Putnam understands law as a profoundly value-oriented practice.[384] Facts in the law must thus be interpreted in an interdisciplinary manner that allows the connections between law and moral philosophy to come to the fore. Any interpretation of facts in the legal sphere is connected to social and moral values.[385] This pragmatist account can be traced back to William James and John Dewey, who also rejected the clear categorisations of fact/value and fact/theory that positivism is based on because human experience cannot be categorised into such dichotomies. Rather than as 'outside observers', they viewed human beings as parts of the world who cannot take a detached point of view.[386] This pragmatist perspective influenced legal realists. Pragmatism inspired 'the view of law as a social practice in a social and historical context'.[387] Putnam's general claim is that any knowledge of facts presumes knowledge of values, and vice versa.[388] He argued that, e.g., the classification of behaviour into categories such as 'good' or 'bad' cannot be clearly separated from factual judgments. This distinction is mistaken because the factual judgment that 'your behaviour was rude' and the (value) assessment that 'being rude is bad' are entangled.[389] This can be illustrated by the way criticism of the judgment works: if someone denies that a certain behaviour was rude, the denial involves appealing to facts that allow for challenging the judgment of the circumstances at hand: '[m]y behaviour may have seemed rude, but

383 Bart Van Klink and Sanne Taekema, 'A Dynamic Model of Interdisciplinarity. Limits and Possibilities of Interdisciplinary Research into Law' (2008) 8 Tilburg Working Paper Series on Jurisprudence and Legal History 3.

384 Hilary Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays* (2nd edn, Harvard University Press 2003).

385 Jaap Hage, 'Facts, Values and Norms' in Sanne Taekema, Bart van Klink and Wouter de Been (eds), *Facts and Norms in Law: Interdisciplinary Reflections on Legal Method* (2016) 14.

386 Wouter de Been, Sanne Taekema and Bart van Klink, 'Introduction: Facts, Norms and Interdisciplinary Research' in Wouter de Been, Sanne Taekema and Bart van Klink (eds), *Facts and Norms in Law - Interdisciplinary Reflections on Legal Method* (Edward Elgar 2016) 13.

387 ibid 14.

388 Hilary Putnam, *Pragmatism: An Open Question* (Blackwell 1995) 14.

389 Putnam (n 384) 36.

I could not stop and talk to you because I was late for a meeting.'[390] It is possible to distinguish between factual and value judgments in principle, but they are entwined in complex manners.[391] In the context of legal judgments, if a defendant wants to deny that a violation of a legal rule has occurred, the argument will be based on the facts and it will be argued that the facts do not fulfil the legal bill. In other words, criticising the argument of the accuser, who seeks to demonstrate that a violation has occurred, will involve an appeal to the facts that will allow the defendant to challenge the accuser's assessment of the situation.

Regarding the separation of disciplines, in Dewey's opinion, scientific method should be applied more generally, not only to physical science but also to the normative realm, and even to farming and mathematics. His argument is that the scientific method of inquiry is much more advanced and has progressed enormously, whereas more normatively coloured forms of inquiry (e.g. morals and religion) are still determined by fixed rules; thus, other (more static) fields of inquiry can benefit from the knowledge that has been gained in the realm of scientific method and inquiry.[392]

With regard to law, the question is whether the legal discipline allows for testing like in the sciences. John Dewey's pragmatism calls for values and rules to be both treated as provisional hypotheses that must be tested like scientific hypotheses.[393] Both legal realism and pragmatism share a belief in scientific method and the view that law ought to be changeable. Formalism is criticised because it is incompatible with the pragmatist requirement that concepts be linked to experience and practice. Pragmatist explanations reflect the natural, they consider real examples and aim for philosophy to remain connected to real-life expertise.[394] However, applying scientific method to the legal domain does not amount to 'genuine experimenting' as known in scientific contexts. What it means instead is that 'the consequences of adopting a particular solution must be thought through'.[395]

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390 Klink and Taekema (n 383) 4.
391 ibid.
392 John Dewey, 'The Quest for Certainty' in Jo Ann Boydston (ed), *The Later Works, 1925-1953, Volume 4* (Southern Illinois University Press 1984) 200.
393 Taekema (n 368) 3.
394 Cheryl Misak, 'The Pragmatist Theory of Truth' in Michael Glanzberg (ed), *The Oxford Handbook of Truth* (Oxford University Press 2018) 283.
395 Taekema (n 368) 5.

Despite pragmatist approaches advocating the application of scientific methods of inquiry across all disciplines, pragmatists pay great attention to the context of the given inquiry.

c. The Second Step to Interdisciplinarity: the Importance of Context to Inquiry

> '[…] neglect of context is the greatest single disaster which philosophic thinking can incur.'[396]

This is a statement made by pragmatist John Dewey in his piece on *Context and Thought*. That context is important to any inquiry may seem trivial. However, underestimating the level of its importance can be detrimental to any analysis. Dewey even went as far as stating that the neglect of context constitutes a fallacy in philosophical thought.[397] What exactly, then, does context mean (here)?

David Kennedy stated in his Julius Stone Memorial Address on 'Challenging Expert Rule: The Politics of Global Governance' that '[w]e have context in mind whenever we extract an ought from an is'.[398] What does he mean by this? He distinguishes between foreground, context, and background. According to him, context is made up of impersonal forces; in the legal realm, the context is factual, the background is legal, and the foreground is political. Kennedy opts for a focus on background rather than on context because focusing on the background allows us to put a spotlight on the actors and to hold them responsible.

> 'It is the expert who stands between the foreground *prince* and the lay *context*, advising and informing the prince, implementing and interpreting his decisions for laymen. It is the scientist, the pollster, who interprets *facts* for the *politician*, and it is the lawyer, the administrator, who translates political decisions back into facts on the ground. Both the assertion that something is the context, and the interpretation of its consequences are the acts of experts.'[399]

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396 Dewey (n 382) 212.
397 ibid 206.
398 David Kennedy, 'Challenging Expert Rule: The Politics of Global Governance' (2005) 27 Sydney Law Review 1, 4.
399 ibid 5.

Dewey's account of context includes 'background' and 'selective interest'. When using the term 'background', he means to include everything (both temporal and spatial) that 'does not come into explicit purview'.[400] Every time we start our thought or reflection process, there are things that come into our minds; things that we have experienced previously (temporal and spatial); we are influenced by tradition and culture. What Dewey means by this is that depending on the time and space we find ourselves in when we start to think about something, we do not start from scratch. There are certain things that are held constant. We are influenced by what great minds have decided and what is generally accepted. Our background knowledge is influenced, for instance, by Darwin and by Newton. Had we been born in medieval times instead, our inherent starting point for any reflection would be different. We cannot escape these underlying 'mental habits' because they are part of who we are.[401]

Dewey's account of 'selective interest' refers to the motivation that influences us when we embark on any thinking process. This specific attitude influences the way we select while thinking. Every thought results in a selection of something and rejection of other things. Even diligent and critical thinkers who take much care not to discard a thought too quickly will have to perform a selection process at some point.[402] Selective interest has a subjective tone to it. Dewey contends that in any thinking process, everyone has 'a unique manner of entering into interaction with other things'.[403] This is not to say that this is a bad thing. It is just a way of expressing that it is not possible to start a reflection with a clean slate. It is more about individuality than about subjectivity. And in Dewey's approach to context, it is important to keep in mind that we all approach, and interact with, other things in our individual manner, with our inherent backgrounds, our prior knowledge, our experiences, etc.

Applying this to the idea of approaching a topic from an interdisciplinary angle, one can hold that any researcher who embarks on a research project selects, consciously and unconsciously, contextual elements they deem relevant and excludes others they deem irrelevant. This selection process is influenced by the researcher's background and disciplinary perspectives.[404] Putting emphasis on the context of any process of inquiry allows

400 Dewey (n 382) 212–213.
401 ibid 214.
402 ibid 215.
403 ibid 217.
404 ibid 99–101.

the thinking or research process to duly take into account the disciplinary context that is of interest; and paying attention to the selective interest of the researcher and, thus, the disciplinary background that led the researcher into the direction of choice paves the way for interdisciplinary approaches. Researchers' different disciplinary backgrounds lead them to embark on their inquiry from different perspectives, with a particular focus, and as long as they pay due attention to the context at hand and are aware of their inherent backgrounds and selective interests, there are no real obstacles to taking an interdisciplinary approach from a pragmatist perspective.[405]

The question is, whether principles of scientific method 'fit' into the legal realm. The question comes to the fore because the legal context differs from the scientific context, and the principles of scientific method were developed for the scientific context, not the legal one. In an essay on law and scientific method, Nancy Levit uses principles of scientific method to critique legal decisions and shows that fruitful insights into legal decision-making can be drawn when analysing jurisprudence through the lens of scientific principles.[406] Thus, she paves the way to show that scientific principles do fit into the legal realm. Using the pragmatist terminology from above, the consequence of chosing one possible solution over another must be 'thought through'.[407] This holds true for legal decision-making and scientific decision-making. What principles of scientific method call for is 'careful conceptual refinement'.[408] This holds true for both the scientific and the legal realm. Levit also points out that the values that are promoted in law and in science are similar: 'certainty, predictability, rationality and self-awareness'.[409]

In sum, thus, pragmatism can be seen to be optimistic about interdisciplinary approaches because, firstly, the scientific method of inquiry is considered to be applicable across all disciplines, and secondly, paying attention to context and selective interest allows researchers to be critical of their own background and to pay due attention to the context they are focusing on and at the same time to combine insights from different disciplines in order to arrive at a reliable outcome to their inquiry.

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405 Klink and Taekema (n 383) 7.
406 Levit (n 358).
407 Taekema (n 368) 5.
408 Levit (n 358) 305.
409 Levit (n 358) 306. See also below, discussion in Part III, pp. 88ss.

3. Positivism's Arguments against Interdisciplinarity

The most powerful arguments against the interdisciplinarity of international law are put forward by authors who assert that 'the law constitutes a self-contained and self-reliant system'.[410] Hans Kelsen's *Pure Theory of Law*, and to a lesser extent Niklas Luhmann's *System Theory*, posit problems for interdisciplinary approaches in law.[411] Kelsen's intention was to construct a foundation for the science of law that would secure its position as a science alongside other sciences, especially the natural sciences. In his opinion, law is unique as a science in that it can be studied from two different perspectives: it can be analysed from either the perspective of the discipline of empirical sociology or that of the normative science of law. From the perspective of explanatory sociology, law can be seen 'as a part of social reality, as a fact or an occurrence that takes place regularly'.[412] Here, the law can be seen as an 'Is' or *Sein* with regard to human behaviour, in the sense that something does or does not occur, or an action is or is not taken.[413] From the perspective of law itself, law can be understood as a norm. According to Kelsen, 'by "norm" we mean that something ought to be or ought to happen, especially that a human being ought to have behaved in a specific way.'[414] The science of law is, thus, a normative science, whereas the sociology of law is a science of reality. Law can be studied from both perspectives, but this cannot be done at the same time because 'an object cannot be construed as something that is done or happens regularly and that ought to be done or happen simultaneously.'[415]

Kelsen held the view that combining perspectives and methodologies from different disciplines is inadmissible. Because an object (e.g., law) and the method of inquiry for that object are correlated, applying different methods will generate different objects. Mixing methods to study law would threaten the unity of knowledge because it would allow contradictory claims about the same object to emerge. If a given norm is studied from a legal perspective, it may be considered valid because of a high-

410 Sergio Dellavalle, 'International Law and Interdisciplinarity' [2020] MPIL Research Paper Series 19.
411 Niklas Luhmann, *Systemtheorie der Gesellschaft* (2nd edn, Suhrkamp 2017); Hans Kelsen, *Reine Rechtslehre* (Matthias Jestaedt ed, Studienaus, Mohr Siebeck 2008).
412 Klink and Taekema (n 383) 9.
413 ibid.
414 Hans Kelsen, *Pure Theory of Law (Max Knight Trans.)* (University of California Press 1967) 4.
415 Klink and Taekema (n 383) 9.

er legal norm (basic norm, or *Grundnorm*) having created the norm in question;[416] however, from an empirical viewpoint, a legal norm may be considered invalid because it has no effects on social reality, e.g. because it is not complied with in real life. Mixing the two approaches would lead to contradictory outcomes because from the legal perspective, the legal norm would be valid, whereas from the sociological perspective, it would be invalid. 'Law cannot be valid and not-valid at the same time, so apparently we are dealing with different senses of validity.'[417]

Niklas Luhmann's position in *Ausdifferenzierung des Rechts* (1981) is less radical than Kelsen's. He rejected the dichotomy of Is/Ought Kelsen based his *Pure Theory of Law* on as being impracticable for sociology, which has humans and their actions as its topic.[418] Luhmann saw legal science as having existed in 'disciplinary isolation' since the downfall of natural law. Thus, his system theory aimed at re-connecting law to other disciplines, and he wanted to address the question of the capacity of legal scholarship for interdisciplinary contact ('interdisziplinäre Kontaktfähigkeit der Rechtswissenschaft').[419] Given the extent and complexity of law, Luhmann considered interdisciplinary perspectives pivotal for adding to the understanding of law; to this end, law in his view should develop a steering system that transcends legal dogmatics and allows for interdisciplinary insights to be drawn.[420] Luhmann held that the necessary decisions in law cannot be arrived at by purely logical means of deduction from legal propositions; rather, the case at hand provides assistance in decision-making ('Der Fall leistet Entscheidungshilfe').[421] Luhmann pointed to Josef Esser, who showed how case-orientation guides judicial decisions, makes 'reaching through' ('Durchgriff') to extra-legal evaluations possible by lim-

416 On the idea of the basic norm (*Grundnorm*) and Kelsen's hierarchical account of legal systems, see, e.g. Dhananjai Shivakumar, 'The Pure Theory as Ideal Type: Defending Kelsen on the Basis of Weberian Methodology' (1996) 105 Yale Law Journal 1383, 1388. With regard to the question of the validity of (international) legal norms, see Tilmann Altwicker, 'Völkerrecht und Rechtspositivismus - Eine Annäherung mit Kelsen und Hart' (2012) 10 Zeitschrift für Rechtsphilosophie 54.

417 Klink and Taekema (n 383) 10.

418 Niklas Luhmann, *Ausdifferenzierung des Rechts. Beiträge zur Rechtssoziologie und Rechtstheorie* (Suhrkamp 1981) 288–289.

419 Niklas Luhmann, *Kontingenz und Recht. Rechtstheorie im interdisziplinären Zusammenhang* (Johannes FK Schmidt ed, Suhrkamp 2013) 7.

420 ibid 8.

421 ibid 163.

iting its risks, and keeps even strongly dogmatised systems flexible.[422] Law can thus be seen as a 'science of decision' where the legislature decides which legal norms are issued and courts decide how these norms are applied in a given case. Legal theory assists the 'science of decision' in the sense that it functionally analyses, identifies, and helps clarify issues in the different (sub)systems of society and makes suggestions as to how they can be legally solved. As other authors have interpreted Luhmann's position, 'legal theory acts as a kind of portal through which insights from other disciplines are channeled to the science of law; it establishes "meaningful relations" that enable the "transfer of problem awareness, concepts and knowledge achievements"'.[423] According to Luhmann, system theories and decision theories still need to be distinguished. This is where Luhmann's position sets limits to pragmatist optimism about interdisciplinarity. In his opinion, insights from, e.g., sociology can assist the legislature by providing a functional analysis of existing norms or norms that are to be created; however, such methods of clarification do not result in a decision. A sociological analysis mainly focuses on existing legal norms and is, thus, only of limited use for the decision-making task of a court that has to apply a legal norm to a case at hand.[424] However, this position does not amount to asserting that the insights from a sociological analysis cannot have any effect whatsoever on judicial decision-making.

In Luhmann's *System Theory*, communication between systems exists.[425] However, according to Luhmann, systems are autopoietic, meaning that the specifications of a system's structures must be derived from within the system itself, and cannot be imported.[426] This does not entail that systems are entirely self-sufficient. Autopoiesis does not mean that a system exists in isolation with no contribution from the outside. Rather, it refers to the unity of a system and that all of its constitutive elements are produced within the system itself.[427] Thus, this entails a special type of independence which concerns only the mode of operation; systems are operatively closed, but in their existence, they still depend on inputs from the outside. For instance, a system cannot exist in an environment that is physically

422 ibid.
423 Klink and Taekema (n 383) 10.
424 ibid 11–12.
425 On the term 'communication', see Niklas Luhmann, *Soziale Systeme* (Suhrkamp 1984) ch 4.
426 Niklas Luhmann, *Die Gesellschaft der Gesellschaft* (Suhrkamp 1997) 86.
427 Niklas Luhmann, *Die Wissenschaft der Gesellschaft* (Suhrkamp 1990) 30.

not functioning.[428] A system that is autopoietic, or organisationally closed, communicates within itself. Thus, there is a back-and-forth within a system between communication and resistance to communication.[429] Whether, or to what extent, the communication between systems, e.g., between society and the environment, is independent can be debated.[430] Luhmann himself acknowledged that the operative independence or closedness of a system is only one aspect of the autopoietic system. He did not deny that social systems depend on inputs from outside, e.g. that the social system is dependent upon inputs from the environment. The question is how this relationship is established if there is no operative contact between the two.[431] This is where the idea of structural coupling comes into play. One system is never determined by another; however, one system can cause irritations in another system.[432] Examples for structural couplings between law and economics are, e.g., property and contracts, whereas universities are structural couplings between education and science. Such structural couplings can illuminate the similarities and the differences between systems. Universities have a different meaning from a scientific perspective than they have from an educational perspective; the same holds true for property or contracts from an economic versus legal perspective. The different systems use universities, or contracts, or property according to their own logic and their own code; this leads to a coupling of the systems where the different understandings of these entities lead to self-irritation within a system.[433] The different meanings thus allow for leeway in the systems' own self-reference.[434]

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428 Roland Lippuner, 'Die Abhängigkeit unabhängiger Systeme: Zum Begriff der Strukturellen Kopplung in Luhmanns Theorie Sozialer Systeme' [2010] http://www.uni-jena.de/Roland_Lippuner.html 2.

429 Luhmann, *Die Gesellschaft der Gesellschaft* (n 419) 95. In the original: 'Alles, was als Realität erfahren wird, ergibt sich aus dem Widerstand von Kommunikation gegen Kommunikation, und nicht als seinem Sichaufdrängen der irgendwie geordnet vorhandenen Aussenwelt.'

430 See, e.g. Marina Fischer-Kowalski and Karlheinz Erb, 'Epistemologische und konzeptuelle Grundlagen der Sozialen Ökologie' (2006) 148 Mitteilungen der Österreichischen Geographischen Gesellschaft 33, 37.

431 Lippuner (n 428) 3.

432 Niklas Luhmann, *Einführung in die Systemtheorie* (Dirk Baecker ed, Carl-Auer Verlag 2002) 124; Lippuner (n 426) 4.

433 Tania Lieckweg, 'Recht und Wirtschaft: Strukturelle Kopplung', *Das Recht der Weltgesellschaft* (de Gruyter 2003) 33.

434 Luhmann, *Die Gesellschaft der Gesellschaft* (n 426) 782ss.

Information can thus flow between, e.g., sociology and law in the sense that sociological insights can be taken into account in judicial decision-making; however, before the insights from another discipline can have an effect on a judicial decision, these insights must be translated into the logic and code of the legal system and be adapted to its methods and framework of reference.

Luhmann's concept of structural couplings between systems can be taken as meaning that although each system can only communicate on the basis of its own codes (i.e. legal decisions are always self-referential), communication can also occur between systems, i.e. something that happens in one system irritates another system, within which this irritation is then processed according to this system's logic. Interdisciplinarity can expand the structural couplings (e.g. between science and law), but interdisciplinarity will never become the code of the legal system itself, i.e. a legal decision will always have to translate facts into the logic of law.

Thus, Luhmann can be read here as setting limits to pragmatist optimism about interdisciplinary communication between law and science, in the sense that insights from science will not automatically affect or lead to a legal decision. But Luhmann is not entirely opposed to interdisciplinarity. Rather, insights from science can have an effect in the legal realm, but they first have to be translated into the legal code and be adapted to the methods and framework that operate in the legal system.

In a sense, Luhmann occupies a middle ground between Dewey's optimism towards interdisciplinarity and Kelsen's skepticism towards it.[435] The view taken here can also be considered middle-ground, in the sense that it does argue in favour of interdisciplinarity but does not aim at transplanting scientific method to the legal realm in order to arrive at legal decisions. It aims to apply principles of scientific method to assess or critique the fact-assessment in the ECtHR's case-law. The principles of scientific method are not intended to be used as legal principles, nor are they to be used to assess the legal analysis in the cases.

In what follows, it will be shown that the line between facts and law, or factual and legal analysis, is not clear-cut. This will pave the way for the incorporation of scientific principles to the fact-assessment part of the ECtHR's decision-making.

435 See also, for a suggestion of a middle-ground solution, the dynamic model suggested by Klink and Taekema (n 380).

4. The Blurred Line between the Factual and the Normative

a. The Chicken or the Egg? – or the Wandering Gaze

There is no 'one-way road' to reaching a legal conclusion. Rather, there is a link between the factual and the normative, which Karl Engisch has famously described as the gaze that wanders back-and-forth between the factual and the legal, '*das Hin- und Herwandern des Blickes zwischen Obersatz und Lebenssachverhalt*'.[436] This back-and-forth between legal and factual allows us to put the legal analysis on par with the facts of a given case; and, thus, to draw a legal conclusion based on the facts.[437] The application of any legal norm presupposes the realisation of its constituent elements by a specific factual situation.[438] In other words, the basis of the application of the law is the determination of those facts that are relevant to the legal assessment of the facts in question.[439] By equalising the facts of the case with the legal norm, Engisch means that the facts 'are equated in their entirety, or at least in their "essential characteristics", with those cases that are undoubtedly meant and affected by the statutory facts'.[440] The equation does not proceed via 'abstract' cases.[441] The fact-norm-synthesis or equation takes place via 'types of cases' ('Falltypen'),[442] i.e. via facts that have already been decided to fulfil the legal bill and with which the facts of a new case also correspond.[443] This can be seen as an equation between statutory facts and the facts of a given case. In Engisch's words: '[e]quality is therefore not logically based on identity, but conversely identity on equality.'[444] Engisch's 'wandering gaze' takes into account the elements that influence legal decision-making and acknowledges that these elements influence each other. However, this insight was rather implied than fully

436 Engisch (n 2) 15.
437 Marijan Pavčnik, 'Das „Hin- und Herwandern des Blickes" (Über die Natur der Gesetzesanwendung)' in Shing-I Liu and Ulfrid Neumann (eds), *Gerechtigkeit - Theorie und Praxis. Justice - Theory and Practice* (1st edn, Nomos Verlagsgesellschaft mbH & Co KG 2011) 559.
438 Reinhold Zippelius, *Juristische Methodenlehre* (10th edn, Beck 2006) 91.
439 Aemisegger Heinz and Robert Florence Michèle, 'Sachverhaltsfeststellung und Sachverhaltsüberprüfung', (2015) 9 Aktuelle Juristische Praxis 1223, 1223ss.
440 Engisch (n 2) 26.
441 Pavčnik (n 437) 559.
442 Engisch (n 2) 26.
443 ibid.
444 ibid 36. In the original: 'Gleichheit gründet sich also logisch nicht auf Identität, sondern umgekehrt Identität auf Gleichheit', [translation by the author].

developed by Engisch. He did not explain or analyse how the facts of life and the legal norms lead to the emergence of the concrete facts in a given case and the emergence of the legal norm that is applicable in a given case. The wandering gaze remains an action that is formally and logically required to reach a legal decision, without Engisch problematising or addressing it in terms of content.[445] In other words, it is not clear what came first, the chicken or the egg. Does a norm exist because there are facts that led to the creation or expansion of a norm? Or does the norm always pre-determine which facts can become relevant in a given case?

According to Martin Kriele, the wandering of the gaze takes place in two stages: the first ensures that the decision has a rational framework, and the second stage makes this framework more dynamic and entails looking for the basis on which a legal decision is reached. The rationality of the framework is determined by the legal norms and the facts of a given case. The legal gaze is influenced by the factual gaze, because only those legal norms come into consideration that correspond to the legally relevant facts. The factual gaze is, in turn, influenced by the legal gaze because the determination as to which facts are relevant depends on the deductions made possible by the legal norms.[446] The first stage of the wandering gaze commences with an analysis as to which 'facts of life' or *Lebenswirklichkeiten* are legally relevant and which ones are not.[447] This categorisation of facts into relevant and irrelevant has an influence on what possible legal conclusions can be reached. In the second stage, the lawyer looks at the legal norms and whether the factual circumstances fit a legal bill. Usually, this is not clear-cut because legal norms are necessarily indeterminate in order to fit different but similar factual circumstances. Here, case-law, commentaries, and interpretations are required to determine whether or not a certain factual occurrence fits into an existing legal norm. It may be, then, that a new factual occurrence can influence the scope of a legal norm for future cases.[448]

For instance, the principle of evolution or evolutive interpretation has allowed the European Court of Human Rights to widen and adapt the scope of the Convention gradually.[449] Evolutive interpretation allows the

445 Pavčnik (n 437) 559.
446 Martin Kriele, 'Theorie der Rechtsgewinnung' (1976) 41 Schriften zum Öffentlichen Recht 367, 197.
447 Pavčnik (n 437) 559.
448 ibid 560.
449 Janneke Gerards, *General Principles of the European Convention on Human Rights* (Cambridge University Press 2019) 56.

ECHR to be seen as an 'instrument of development and improvement', rather than being frozen to the time when the Convention was called into existence 60 years ago.[450] Over the years, the emergence of new factual circumstances has led the Court to read new rights and obligations into the ECHR. Janneke Gerards mentions the examples of 'public watchdogs', such as journalists and NGOs, who have received the right of access to information,[451] and the duty to legally recognise same-sex partnerships.[452] There are of course limitations to this type of interpretation, and the Court is not always prone to apply an evolutive approach and read new rights into the ECHR.[453] However, the fact that in certain cases new rights are read into the Convention shows that the gaze of the Court itself wanders. New factual situations can impact the scope of a legal norm. The emergence of new technologies or changes in social norms are factual occurrences that, if they result in a case that is brought before the Court, will impact its assessment and may lead to the broadening of the legal scope of a Convention article.[454] These examples all imply that there is no clear answer to the question of whether the chicken or the egg came first. Rather, facts and norms seem to influence each other in complex manners.

However, the categorisation of facts into legally relevant and irrelevant ones, and the claim that there is an inherent indeterminacy of legal norms, are views that are not shared by all legal scholars. The American legal realist and fact-sceptic Jerome Frank, for instance, held the view that there is no such thing as legally relevant or irrelevant facts.[455] His scepticism was rooted in the perception that testimony given by witnesses 'is notoriously fallible', e.g. because witnesses lie or remember something wrongly, and that the trial judges and juries may be wrong in their assessment of the reliability of the presented facts.[456] Frank's analysis of the fallibility of

450 Kanstantsin Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights' (2011) 12 German Law Journal 1730, 1730.

451 See, e.g., *Animal Defenders International v. the United Kingdom*, App no 48876/08, Judgment of 22 May 2013.

452 Gerards (n 449) 56. See ECtHR, *Schalk and Kopf v. Austria*, App no 30141/04, Judgment of 24 June 2010.

453 ibid.

454 See, e.g., Factsheet on New Technologies, <https://www.echr.coe.int/Documents/FS_New_technologies_ENG.pdf>, last accessed on 12 July 2021.

455 Julius Paul, *The Legal Realism of Jerome N. Frank: A Study of Fact-Skepticism and the Judicial Process* (Martinus Nijhoff 1959) 81–91.

456 Jerome Frank, '"Short of Sickness and Death": A Study of Moral Responsibility in Legal Criticism' (1951) 26 New York University Law Review 545, 547.

trial courts in America raised awareness among lawyers of the potential inadequacies in the process of fact-finding and fact-assessment.[457]

The idea that facts in the legal domain are judicially constructed can also be traced back to Hans Kelsen. Kelsen argued that in the legal realm, facts are not something that is out in the world, waiting to be found; rather, facts in the world of law are created by judicial organs.[458] Thus, in his opinion, the question of whether the chicken or the egg came first can be answered: norms come before facts. Facts only come into existence within the legal sphere if they are assessed within or through a legal procedure. Facts are created through the institution that conducts the fact-assessment procedure.[459] Martti Koskenniemi agrees that facts cannot simply be found. Rather, the context within which they are assessed plays a pivotal role. He holds 'the view of international law as an argumentative practice'.[460] Thus, the distinction between relevant and irrelevant facts is the outcome of an argument within international legal practice, it is the result of a debate within an interpretative community.[461] Facts only count as relevant in the sphere of international adjudication if they are deemed important and their importance is assessed 'within the relevant context of argument'.[462]

These accounts imply some form of fact-scepticism in the sense that facts are not seen as objective entities but as constructions, i.e. facts are not objectively true, they are only perceived as such.[463] However, even extreme fact-sceptics such as Jerome Frank do not hold the view that facts are entirely meaningless. As a generally accepted starting point, it can be said that facts play a role in judicial decision-making in that they

457 Roger J Traynor, 'Fact Skepticism and the Judicial Process' (1958) 106 University of Pennsylvania Law Review 635, 635.

458 Hans Kelsen, *General Theory of Law and State* (3rd ed, The Lawbook Exchange Ltd 2009) 136; Hans Kelsen, 'Legal Technique in International Law' (1939) 10 Geneva Studies 12.

459 Kelsen, *General Theory of Law and State* (n 458) 136; Kelsen, 'Legal Technique in International Law' (n 458) 12.

460 Martti Koskenniemi, 'Law, Teleology and International Relations: An Essay in Counterdisciplinarity' (2011) 26 International Relations 3, 3.

461 Ingo Venzke, 'International Law as an Argumentative Practice: On Wohlrapp's The Concept of Argument' (2016) 7 Transnational Legal Theory 9, 9.

462 Koskenniemi, 'Law, Teleology and International Relations: An Essay in Counterdisciplinarity' (n 453) 20.

463 Thomas M Franck and Laurence D Cherkis, 'The Problem of Fact-Finding in International Disputes' (1967) 18 Western Reserve Law Review 1483.

are weighed and interpreted.[464] As Andrea Bianchi holds: '[t]he physical world of reality and data in general does not speak for itself'.[465] Bianchi explains this using John Searle's example of American football where he distinguishes between 'brute facts' and 'institutional facts'.[466] If a group of people were asked to observe a game of American football, they would be able to describe the clustering, the movements, and the outfits of the players (brute facts). However, no matter how long the observers go on describing what they see, or how much data and information is collected, without concepts such as 'touchdown', 'offside', or 'points' (institutional facts), i.e. without concepts surrounding the rules of the game, they would be insufficient to describe American football.[467] Thus the institutional setting, with its concepts and rules, has an influence on our understanding of what is described. Information and data receive importance in the domain of international adjudication because a judicial organ conducts a fact-assessment within the process of legal decision-making.

This section has shown that in the context of law, the gaze does indeed wander between the facts and the law. A clear separation of facts and norms, as Kelsen suggests, is not always possible. As Sanne Taekema rightly notes, 'interpretation of facts in legal cases is always coloured by the legal framework'.[468] As soon as a legal case is analysed, the facts pertaining to that case acquire a 'legal taste'. The factual side of the analysis is influenced by the circumstance that the analysis is taking place 'against a background of legal normativity'.[469] And the legal analysis is influenced by the facts of life that can have an influence on the scope of a legal norm. There is, thus, no clear answer as to what came first – the chicken or the egg.

b. Adjudicative Facts and Legislative Facts

The distinction between adjudicative facts and legislative facts was first made by Kenneth Culp Davis in his 1942 paper 'An Approach to Problems

464 Jean D'Aspremont and Makane Moïse Mbengue, 'Strategies of Engagement with Scientific Fact-Finding in International Adjudication' (2013) 05 Amsterdam Center for International Law Research Paper 244.
465 Bianchi (n 354) 8.
466 John Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge University Press 1969) 52.
467 Bianchi (n 354) 8.
468 Taekema (n 368) 12.
469 ibid 4.

of Evidence in the Administrative Process'.[470] He referred to the facts that concern the immediate parties to a case (e.g. what the parties did, the circumstances and the background of the given case) as adjudicative facts, because the agency that finds these facts is performing an adjudicative function. Legislative facts, in contrast, concern questions pertaining to law or policy. Facts of this type inform the legislative judgment. Here, the fact-finders or fact-assessors perform a legislative function.[471] Davis deemed this distinction important because 'the traditional rules of evidence are designed for adjudicative facts, and unnecessary confusion results from attempting to apply the traditional rules to legislative facts'.[472] Thus, adjudicative facts must follow the rules of evidence that provide the framework for the admissibility of evidence and the procedure concerning witness testimony and expert evidence etc., but the framework for legislative facts is much less formal.

Ann Woolhandler defined an adjudicative fact as 'a description of a past, individual physical or mental phenomenon, the proof of which is in the record'.[473] Examples of adjudicative facts are, e.g., that someone failed to stop at a red light or that the defendant shot the victim. The question addressed here is value-neutral, it is about determining events and actions, one wants to find out what happened.[474] Existing laws are then applied to these facts; and, necessarily, these laws are normative, they attach consequences to the facts.[475]

Legislative facts do not presume such pre-existing laws because this type of facts is used to create new law. They show what effect a legal rule may have,[476] they bear on the desirability of law-making and/or legislative change.[477] Legislative facts often take the form of predictions of what consequences a regulatory alternative may entail.[478]

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470 Kenneth Culp Davis, 'An Approach to Problems of Evidence in the Administrative Process' (1942) 55 Harvard Law Review 364.
471 ibid 402.
472 ibid 402–403.
473 Ann Woolhandler, 'Rethinking the Judicial Reception of Legislative Facts' (1988) 41 Vanderbilt Law Review 111, 113.
474 Mirjan Damaška, 'Truth in Adjudication' (1998) 49 Hastings Law Journal 289, 300.
475 Woolhandler (n 473) 114.
476 ibid.
477 Damaška (n 474) 303.
478 ibid.

A common example used to explain legislative facts, for instance, are the opinions recited by Louis Brandeis in this brief in the 1908 case *Muller v. State of Oregon*, which called for special protection of female workers.[479] Another example is the social science used in *Brown v. Board of Education* on the effects of racial segregation.[480]

The analysis by Davis seems to indicate that it is possible to distinguish between facts that are more easily determinable, value-neutral, and 'out there to be found', and facts that are less easily determinable, where there is a link to policy considerations. However, the distinction between the two is not so easily made. Hans Baade uses Davis' analysis as a basis for his definitions of legislative and adjudicative facts. Baade's analysis pertains to what he calls 'sociological jurisprudence';[481] he distinguishes between adjudicative social facts and legislative social facts. The adjudicative social facts have to be established for the purpose of the case that is being decided, and for no other purpose. Attempting to prove an adjudicative social fact entails, according to Baade, 'the adjustment of the law of evidence to novel scientific methods of fact-finding'.[482] This does not hold true for legislative social facts. These are facts that 'form the basis for the creation of law and the determination of policy'. If a court decides to determine such a legislative social fact, this implies that the court makes a conscious decision e.g. to shape a new rule or to adapt a policy due to changes in the social fact situation.[483] Adjudicative social facts, according to Baade, are not intrinsically different from other facts, other than that adjudicative social facts can be difficult to prove.[484] In his opinion, '[j]ust like the state of a man's mind is a fact, the state of a community's mind is a fact, too. But the latter is far more difficult to determine than the former'.[485] This statement of Baade resembles the fallibility claim that Jerome Frank made with regard to witness testimony and judicial assessment of the reliability of claims.[486]

The distinguishing factor between adjudicative facts and legislative facts is not that the former are particular facts while the latter are general facts, but rather that adjudicative facts are facts that pose as 'evidence whose

479 USSC, *Muller v. Oregon*, 208 U.S. 412, 419 (1908).
480 USSC, *Brown v. Board of Education,* 483, 494 n 11 (1954).
481 Baade (n 362) 424.
482 ibid 425.
483 ibid 426.
484 ibid 425.
485 ibid 422.
486 Frank (n 456).

proof has a more established place' and whose effect is more predictable within the existing legal framework whereas legislative facts pose as evidence that is 'more manifestly designed to create the rules'.[487] However, the line between these two types of facts is often not easily drawn.

This is because decision-makers use both particularised and general facts to make legal rules.[488] The starting point of a discussion that will lead to something being perceived as a problem that is relevant to others in society may initially be an individual problem. In other words, adjudicative facts may become legislative facts in the sense that a fact that is initially only relevant to the individual, 'what happened' part of the analysis in a given case may come to be treated as exemplary of determining the effect of a legal rule.[489] Ann Woolhandler uses the case of *Gideon v. Wainwright* as an example: here, it was held that if one indigent defendant is unable to defend himself without the help of a court-appointed lawyer, this means that others face the same plight, and it was concluded that due process requires indigent defendants to be represented by court-appointed lawyers.[490]

Another way in which the gaze wanders between the general and the individual is in cases where, e.g., the statistics of a particular case can be used as a general statement for future cases and, as such, have precedential effect.[491]

Fritz Jost rightly notes that there is a *Deskriptionsproblem*; the important role that the judiciary plays shows that its law-making and decision-making function can often not easily be held apart.[492] Acknowledging the existence of legislative facts implies the recognition that courts have a law-making function.[493] And this function, according to a realist pragmatic stance, should be fulfilled in a manner that has a desirable social end. In other words, a court should make use of its law-making function and create and/or adapt legal rules so as to cause a desirable social result; the

487 Woolhandler (n 473) 114.
488 ibid.
489 ibid.
490 USSC, *Gideon v. Wainwright*, 372 U.S. 335, 337 (1963).
491 Woolhandler (n 473) 115.
492 Fritz Jost, 'Soziologische Feststellungen in der Rechtsprechung des Bundesgerichtshofs in Zivilsachen', *Schriften zur Rechtstheorie, Bd. 84* (Duncker & Humboldt 1978) 159.
493 Woolhandler (n 473) 115.

court's balancing act should reflect social needs.[494] Thus, according to Alexander Aleinikoff, pragmatic balancing should result in a change in a legal rule if it can be empirically shown that the rule's initial purpose, i.e. the one it was initially created for, is not advanced, or that another rule, i.e. a change to the existing rule, would better advance the social ends.[495]

Along similar lines, Jost hypothesises that legal judgments make statements that can be proven via social scientific methods. An empirical-analytical approach, as advocated, e.g., in the methodologies of Popper, Albert, Opp, and Stegmüller, is used in the social sciences to analyse factual relationships.[496] Jost mentions the importance of legal norms being open in the sense that a norm will have to be adaptable to a specific context. Any norm that is too 'precise' is too narrow because it is only useful for one specific case. However, social realities change, and thus norms are usually open and adaptable. If the norms themselves are open to interpretation, the focus shifts onto the factual circumstances of a specific case.[497] *The gaze wanders.* When the assessor of the relationship between legal norm and factual circumstances makes a judgment, it is not only the facts of a given case that will influence their decision. Rather, the social background in which the case is embedded will also be taken into account. The social realities play a role in the legal assessment.[498] Any factuality that is relevant and that influences a judgment receives, in a sense, a 'special characterisation'.[499] Thus, the openness of a norm, or the inherent indeterminacy of legal norms, is necessary and useful because a given context will complete the act and allow the norm to fulfil its purpose in that context.[500]

The factual situation provides the background against which a statement can be deemed true or false. As Tilmann Altwicker notes, having a sound factual basis that underlies legal rules is essential from a legitimacy perspective. If a legal decision is not based on a sound factual basis, one can presume that the rule will less likely be followed by its addressees and,

494 Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 Yale Law Journal 952, 958.
495 ibid 958.
496 Jost (n 492) 14.
497 ibid 18–20.
498 ibid 21.
499 ibid 22.
500 ibid 21.

its general effectiveness may be called into question.[501] If the factual situation is not correctly represented in a judgment, this will be problematic because the 'reality' is not reflected in it. Normativity and factuality are interlinked in highly complex manners. It is a given factual context that provides the starting point for any legal analysis. It is not only the specific facts of a given case that influence the legal assessment; rather, for instance, social realities and scientific standards also play into judgments. However, at the same time, the legal framework is also what pre-determines which facts will be relevant and which ones will not. In legal decision-making the facts have to fit the 'legal bill' in order for the court to be able to decide whether a violation has taken place or not. Necessarily, the focus will be on the facts that fit that bill and the question then becomes whether we are faced with self-fulfilling prophecies if the legal norms pre-determine or at least highly influence the facts that the assessors are interested in.

In what follows, it will be shown that the European Court of Human Rights itself explicitly acknowledges that facts and law are intrinsically linked. This demonstration will complete the argument for the introduction of principles of scientific method to analyse the fact-assessment in cases decided by the ECtHR.

c. The Intrinsic Link between Facts and Law before the ECtHR

The ECtHR itself has acknowledged that facts and law cannot always easily be held apart. For instance, in *Radomilja and Others v. Croatia*, the question that was brought before the Court pertained to the acquisition of ownership of socially owned immovable property by adverse possession.[502] In this case, the Grand Chamber had to decide whether or not a property had been acquired by the applicants in good faith by adverse possession. In order for this to be the case, a certain amount of time needed to have passed. Here, the length of time for which someone had been in possession of a property as factual basis brought with it the legal consequence of ownership. The complication in this case was that the applicants had, in their case before the Chamber, not specified a certain period of time. The Grand Chamber held that because of this omission, that period of

501 Tilmann Altwicker, 'Evidenzbasiertes Recht und Verfassungsrecht' [2019] Zeitschrift für Schweizerisches Recht 181, 181.

502 ECtHR, *Radomilja and Others v. Croatia*, App nos 37685/10 and 22768/12, Judgment of 20 March 2018.

time as factual basis had to be excluded from the applicants' complaint. The Chamber had included the period and was considered by the Grand Chamber to have decided beyond the scope of the case. According to the Grand Chamber, 'claim' as written in art. 34 ECHR comprises of, firstly, factual allegations and, secondly, legal arguments underpinning the factual allegations. The example the ECtHR used here was the case of *Eckle v. Germany*,[503] where the factual allegation related to the claimant being the 'victim' of an act or omission and the legal argument comprised of this act or omission amounting to a 'violation' under the Convention. The Grand Chamber held:

> 'These two elements are intertwined because the facts complained of ought to be seen in the light of the legal arguments adduced and vice versa.'[504]

The ECtHR even refers to this link between facts and law as being 'intrinsic'.[505] This link is explicitly referred to in the Rules of Court. Thus, Rule 47(1)(e)–(f) of the Rules of Court requires applications to contain 'a concise and legible statements of the facts'[506] and 'of the alleged violation(s) of the Convention and the relevant arguments'[507]. Failure to comply with these requirements can result in the Court not examining an application, by virtue of Rule 47(5.1).[508]

In the case of *Guerra and Others v. Italy* of 1998, the Court referred to itself as being

> 'master of the characterisation to be given in law to the facts of the case, it does not consider itself bound by the characterisation given by an applicant, a government or the Commission. […] A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on. […]'[509]

503 ECtHR, *Eckle v. Germany*, App no 8130/78, Judgment of 15 July 1982.
504 ECtHR, *Radomilja and Others v. Croatia*, App nos 37685/10 and 22768/12, Judgment of 20 March 2018, para. 110. Reference also to ECtHR, *Eckle v. Germany*, App no 8130/78, Judgment of 15 July 1982, para. 66.
505 ECtHR, *Radomilja and Others v. Croatia*, App nos 37685/10 and 22768/12, Judgment of 20 March 2018, para. 111.
506 Rule 47(1)(e) of the Rules of Court.
507 Rule 47(1)(f) of the Rules of Court.
508 Rule 47(5.1) of the Rules of Court.
509 ECtHR, *Guerra and Others v. Italy*, App no 14967/89, Judgment of 19 February 1998, para. 44.

The majority in the *Radomilja* case held that art. 35(2)(b) ECHR, which refers to the exhaustion of domestic remedies, ties the Court to base its decision on the factual complaint as presented by the applicant.[510] In other words, while the Court may 'view the facts in a different manner',[511] 'it is nevertheless limited by the facts presented by the applicants in the light of national law'.[512] However, this point was taken up by the dissenters in various manners. It was criticised, for instance, that the period of time should have been taken into account because, although a complaint is always characterised by the facts that are alleged, there is no clear case-law that shows which facts are relevant to the determination of the scope of a case.[513] Thus there was discussion as to the 'legal weight' of facts in this case, and the dissenters considered that the facts that were excluded from the decision should have been included.[514]

In the partly dissenting, partly concurring opinion of Judges Yudkivska, Vehebovic and Kūris, the point was made that while the Court can, indeed, be considered 'master of characterisation to be given in law to the facts of the case',

> 'What raises concerns (in particular, but not only, in the instant case) is that this may be seen as a *carte blanche*. It should not be. In order to attain legitimacy, the Court's "mastering" must be consistent in choosing a narrower or broader, a stricter or more lenient approach. In order to come to a correct and just outcome, judges should look at the facts of the case (as well as the applicable law) through a magnifying glass – but it should not be so that each of their eyes uses its own magnifying glass, only for one to be pink and the other grimy.'[515]

Thus, the issue here was that there is no clear rule or case-law with regard to how the Court characterises the facts of a case, and this could lead to the Court using facts in a manner that allows it to reach a certain pre-defined conclusion. If facts are selected in such a manner, they become

510 ECtHR, *Radomilja and Others v. Croatia*, App nos 37685/10 and 22768/12, Judgment of 20 March 2018, para. 123.
511 See ECtHR, *Foti and Others v. Italy*, App nos 7604/76, 7719/76, 7781/77, 7913/77, Judgment of 10 December 1982, para. 44.
512 ECtHR, *Radomilja and Others v. Croatia*, App nos 37685/10 and 22768/12, Judgment of 20 March 2018, para. 121.
513 ibid, paras. 20–21.
514 ibid, para. 22.
515 ibid, Partly Dissenting, Partly Concurring Opinion of Judges Yudkivska, Vehebovic and Kūris, para., I. 3.

self-fulfilling prophecies, as the focus can be placed on those facts that allow a pre-defined normative conclusion to be reached.

Two cases that will be discussed in detail in Part III show that the Court, indeed, is not consistent in its approach to being master of characterisation. The case of *Garib v. the Netherlands*[516] concerns social housing legislation in Rotterdam and the case of *S.M. v. Croatia*[517] concerns forced prostitution and human trafficking.

In the case of *Garib*, the applicant was a single mother who had been refused a housing permit due to housing legislation which based minimum income requirements on persons wanting to reside in certain parts of Rotterdam. The applicant who did not meet the minimum income requirement, filed a complaint against the legislation. However, she had not submitted a complaint under art. 14 ECHR (prohibition of discrimination) before the Chamber but had only relied on art. 2 of Protocol No. 4 (right to choose one's residence).[518] The Human Rights Centre of Ghent University and the Equality Law Clinic of the Université libre de Bruxelles acted as a third party intervener and urged the Court to consider the case under art. 14 ECHR taken together with art. 2 of Protocol No. 4 ECHR.[519] It was argued that the Dutch legislation against which the applicant had raised her complaint especially impacted 'persons living in poverty or who [were] socioeconomically disadvantaged, such as people with a non-European background and single parents living on social security, like the applicant'; this led to stigmatisation based on income requirement and resulted in discrimination 'based on poverty or "social position"'; although the interveners did acknowledge that the applicant had not submitted a complaint under art. 14 ECHR before the Chamber, they urged the Grand Chamber to examine the case under art. 14 ECHR, relying on the principle of the Court being 'master of the characterisation to be given in law to the facts of the case' and the principle of *iura novit curia*.[520] The Grand Chamber did agree that it is not bound to 'the characterisation given in law to the facts of the case' by an applicant or a Government, however, in its opinion it does not follow that 'it is free to entertain a complaint

516 ECtHR, *Garib v. the Netherlands*, App no 43494/09, Judgment of 6 November 2017.
517 ECtHR, *S.M. v. Croatia*, App no 60561/14, Judgment of 25 June 2020.
518 ECtHR, *Garib v. the Netherlands*, App no 43494/09, Judgment of 23 February 2016.
519 ECtHR, *Garib v. the Netherlands*, App no 43494/09, Judgment of 6 November 2017, para. 96.
520 ibid, para. 96.

regardless of the procedural context in which it is made'.[521] Thus, in the Grand Chamber's opinion, the fact that the applicant had omitted to put forward a claim explicitly referring to art. 14 ECHR in the earlier proceedings, this claim was a new one which the Court did not want to consider.[522] In the domestic proceedings, the applicant had advanced a discrimination-argument based on art. 26 of the International Covenant on Civil and Political Rights (ICCPR), which had been addressed and rejected at both levels of domestic jurisdiction.[523] According to the Court's standing case-law, the Chamber's decision on admissibility determines the scope of a case that is referred to the Grand Chamber under art. 43 ECHR.[524] It then holds the following:

> 'Consequently, while it is true that a complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on, this does not mean that it is open to an applicant, in particular one who has been represented throughout, to change before the Grand Chamber the characterisation he or she gave to the facts complained of before the Chamber and by reference to which the Chamber declared the complaint admissible and, where applicable, reached its judgment on the merits.'[525]

What is confusing here is that the Court acknowledges that 'a complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on', yet it restricts its own possibilities with regard to being master of characterisation of the facts by requiring that the applicant should have brought forward a claim under art. 14 ECHR before the Chamber. The Court does acknowledge that the applicant did make a discrimination-argument under the ICCPR, but nevertheless, it required an explicit reference to the Convention article in the instant case. It can also be observed that the material before the Chamber included 'domestic bodies' opinions alerting about discrimination and domestic courts dealing with this issue'.[526] It seems that if the Court is indeed master

521 ibid, para. 98.
522 ECtHR, *Garib v. the Netherlands*, App no 43494/09, Judgment of 6 November 2017, para. 102.
523 ibid, para. 99.
524 ibid, para. 100.
525 ibid, para. 101.
526 Valeska David and Sarah Ganty, 'Strasbourg Fails to Protect the Rights of People Living in or at Risk of Poverty: The Disappointing Grand Chamber Judgment in Garib v the Netherlands' (*Strasbourg Observers*) <https://strasbourgo

of characterisation of the facts, the facts in this case should have been characterised as requiring a thorough analysis as to whether or not they fulfil the legal bill under art. 14 ECHR. This is also reflected in the joint dissenting opinion to the Chamber judgment, by Judges Lopez de Guerra and Keller who expressed that in the case of *Garib*, 'the applicable principles concerning discrimination should have been considered relevant'.[527]

There seems to be a tension between the legal and the factual characterisation of a given complaint. On the one hand, the Court considers itself master of characterisation and holds that a complaint 'is not merely determined by the legal grounds', but that rather the legal characterisation much depends on the facts as well,[528] but on the other hand, it restricts itself to the legal labelling of the facts provided by the applicant in this case. Moreover, the legal label seems to be considered particularly relevant here because the applicant was represented by a lawyer throughout the proceedings.[529] In this case, the relationship between legal and factual characterisation and the role of the Court as master of this characterisation seems unclear and warrants further explanation.

In the case of *S.M. v. Croatia*, a young woman filed a complaint against a young man, accusing him of having forced her into prostitution.[530] In this case, the Court did decide to change the legal characterisation of the facts in a case of its own account. The questions that were addressed here related to the scope of art. 4 ECHR (prohibition of slavery and forced labour) and whether and how forced prostitution and human trafficking fit under this article. What is particularly interesting with regard to the Grand Chamber ruling in *S.M. v. Croatia* is that in this case, the applicant made a complaint under art. 3 and 8 ECHR, not under art. 4 ECHR. How-

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bservers.com/2017/11/16/strasbourg-fails-to-protect-the-rights-of-people-living-in-or-at-risk-of-poverty-the-disappointing-grand-chamber-judgment-in-garib-v-the-netherlands/#more-4046>.

527 ECtHR, *Garib v. the Netherlands*, App no 43494/09, Judgment of 23 February 2016, Joint Dissenting Opinion of Judges Lopez Guerra and Keller, para. 14.

528 ECtHR, *Garib v. the Netherlands*, App no 43494/09, Judgment of 6 November 2017, para. 101.

529 ibid, which reads as follows: 'Consequently, while it is true that a complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on, this does not mean that it is open to an applicant, in particular one who has been represented throughout, to change before the Grand Chamber the characterisation he or she gave to the facts complained of before the Chamber and by reference to which the Chamber declared the complaint admissible and, where applicable, reached its judgment on the merits.'

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

ever, the Grand Chamber decided to rule the case on the basis of art. 4 and to take this chance to clarify the definitional scope of the norm. Here, the Court referred to the principle of *iura novit curia* and being 'master of characterisation to be given in law to the facts' to justify deviating from the applicant's legal complaint.

Judge Koskelo wrote a powerful dissenting opinion in the Chamber ruling, in which she criticised the majority for the confusion caused with regard to the scope of application of art. 4 ECHR and questions surrounding forced prostitution and human trafficking. This criticism of the Chamber judgment may have led the Grand Chamber to clarify the definitional scope of art. 4 ECHR more generally, which would show how important such opinions of judges can be in influencing the future course of case-law.[531] In the case of *S.M.*, the idea that factual occurrences can lead to a reconsideration of the legal scope of a norm becomes apparent. The factual existence of the issue of human trafficking and exploitation of prostitution has an impact on a normative level because only if these circumstances exist in reality, and are presented to the Court as facts of a given case, will the Court have to consider whether these factual circumstances provoke a normative response. As soon as they are considered as falling into the scope of a Convention article that does not expressly include the factual occurrence, the norm's applicability is widened to more cases. This type of norm-creation or norm-development via the Court's case-law is, in the case of *S.M*., only possible via fact-assessment. Thus, although art. 4 ECHR was not invoked by the applicant, the facts of the case led the Court to decide the case under art. 4 ECHR and take this opportunity to clarify the scope of said article more generally with regard to the concept of human trafficking.

The concept of the Court being 'master of characterisation' seems more and more ominous, and it remains to be seen how and when the Court decides to master the characterisation of the facts in law, and when it does not. This can be seen when comparing the approach in *S.M.* to the approach in *Garib*. In *S.M.*, the Court played its mastering card, in the sense that it re-characterised the facts of the case legally, even though the applicant had not asked for that specific characterisation, whereas in *Garib*, the Court refrained from mastering and did not re-characterise the facts of the case legally, despite the applicant asking the Court to do so.

531 ECtHR, *S.M. v. Croatia*, App no 60561/14, Judgment of 19 July 2018, Dissenting Opinion of Judge Koskelo.

In his dissenting opinion in *Hermi v. Italy*, Judge Zupančič underlined the importance of acknowledging the relationship between fact and law and that the two cannot be easily distinguished. In his opinion, an abstract differentiation may be possible, but in any given case, the choice of legal characterisation will influence the facts that come to the fore, or at least the legal characterisation will influence the interpretation of the same facts. He uses an example from Dostoyevsky's novel *Crime and Punishment* to elaborate: 'the killing of the pawnbroker woman […] can only be called "murder" because there was a pre-existing norm of substantive criminal law that described and punished such conduct as "murder".'[532] He further states that criminal courts in Continental jurisdictions usually are not bound by the prosecutor's legal characterisation of the facts under *iura novit curia*. Here, the prosecutor advances one legal characterisation of a chosen fact-pattern and the defence will attempt to have it rejected. It is, then, up to the court to settle for one of the two sides or to find its own solution.

> 'It is thus fair to say that this dialectic operates through the mutual conversion of the facts into normative choice and normative choice into the selection of the relevant facts. Thus, which norm will initially be selected depends on the primary perception of the facts. Thereafter and conversely, the perception of the relevant facts may in turn determine the choice of (a different) norm. This mental loop will often be repeated several times in order to arrive at the optimal characterisation of the fact pattern. This mental process is silent, that is to say, it is not usually reflected in the final reasoning (grounds) of the judgment. It is nevertheless real and decisive. […]'[533]

The above has shown that the ECtHR's factual analyses are not always conducted in a consistent manner and that the characterisation of facts is not always transparent and conclusive. Thus, it is important to pay attention to the fact-assessment procedures in the ECtHR's case law and to detect potential flaws in the Court's factual analyses. It is suggested here that a methodology to detect such flaws is to use principles of scientific method as assessment criteria.

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532 ECtHR, *Hermi v. Italy*, App no 18114/02, Judgment of 18 October 2006, Dissenting Opinion of Judge Zupančič.

533 ibid.

5. Conclusion

It was argued above that facts vs. norms, as well as the judiciary's decision-making vs. law-making function, cannot always be easily held apart. The examples from the ECtHR cases showed how it is a practical reality that facts and law are intertwined. The middle-ground pragmatist position, which is adopted here, acknowledges these specificities of the realm of legal decision-making and allows for interdisciplinary approaches to enter the legal realm. Thus, in what follows in the case analysis in Part III below, principles of scientific method will be introduced as methodological principles to assess and critique the factual assessments conducted by the European Court of Human Rights in its case-law. By incorporating these principles to *assess* the factual analyses conducted within legal decisions, and not to *reach* a decision, this approach occupies a middle ground, similar to Luhmann, between Dewey's optimism towards interdisciplinary approaches in law and Kelsen's scepticism towards them. The idea is to use principles that are well established in scientific disciplines to gain a new perspective on how a judgment can be read, which pays greater attention to the factual side of the case assessment.

The analysis below starts from the premise that the fact-assessment side in judicial decision-making does not receive as much scholarly attention as it should. Arguably, many lawyers quickly skip to 'the law' section in the ECtHR's judgments and only skim 'the facts' section. However, given that the determination as to whether a certain fact was established or not can affect the (entire) conclusion, it seems highly important to pay great attention to the factual arguments that the parties to a case bring to the fore, and to how a court contends with those factual arguments. As will be shown below, there are cases where certain claims with regard to facts are not addressed in a convincing manner, or where a conclusion with regard to the facts is drawn without proper explanation. It is suggested here that using principles of scientific method provides a methodological framework that will detect such flaws in the fact-assessment of the ECtHR. The claim here is not that this is the one and only 'right way' to assess the ECtHR's case-law with regard to its factual analyses; rather, it is presented as one way to shine a new light onto fact-assessments and to pay greater attention to the fact-part of the analysis in a case.