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The margin of appreciation, domestic irregularity and domestic court rulings in ECHR environmental jurisprudence: Global legal pluralism in action

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Abstract: Global legal pluralism is concerned, *inter alia*, with the growing multiplicity of normative legal orders and the ways in which these different orders intersect and are accommodated with one another. The different means used for accommodation will have a critical bearing on how individuals fare within them. This article examines the recent environmental jurisprudence of the European Court of Human Rights to explore some of the means of reaching an accommodation between national legal orders and the European Convention. Certain types of accommodation – such as the margin of appreciation given to states by the Court – are well known. In essence, such mechanisms of legal pluralism raise a presumptive barrier which generally works for the state and against the individual rights-bearer. However, the principal focus of the current article is on a less well-known, recent set of pluralistic devices employed by the Court, which typically operate presumptively in the other direction, in favour of the individual. First, the Court looks to instances of breaches of domestic environmental law (albeit not in isolation); and second, it places an emphasis on whether domestic courts have ruled against the relevant activity. Where domestic standards have been breached or national courts have ruled against the state, then, presumptive weight is typically shifted towards the individual.

Keywords: domestic court rulings; domestic irregularity; ECHR; environment; global legal pluralism; margin of appreciation; rights

Introduction

Global legal pluralism is not a unified school of thought, with several authors having used the term in various different ways and in different contexts. Some have examined the growing role of non-state based norms

such as the *lex mercatoria* in international law.[1] Others have analysed the deployment of multiple legal orders (international, state, sub-state and non-state) by social movements, looking into how these numerous sites have helped to enlarge political and legal opportunities.[2] And some are more concerned with the relationship between legal orders such as the national and the supranational or international, and how this relationship is managed.[3]

While not seeking to provide a comprehensive exploration of global legal pluralism, the current article can be situated within the last of the above approaches. The relationship between the EU and domestic legal orders has been one fruitful area of study for legal pluralists,[4] and the relationship between the European Convention on Human Rights (ECHR) and its contracting states another.[5] Combining both of these, Berman, for example, has examined mechanisms or doctrines which help to manage these relationships, including the doctrine of subsidiarity (in the context principally of EU law[6]) and the margin of appreciation (in relation to the ECHR[7]).[8]

The article seeks to explore some of these key doctrines in the context of the environmental case law of the European Court of Human Rights (ECtHR). It begins with an examination of how the Court has employed the margin of appreciation (MoA) in its environmental jurisprudence before proceeding to outline two emerging doctrines or principles – domestic irregularity and domestic court rulings – which can be said to play a similar pluralist, systems relationship role.

Although the current article adopts the terminology of pluralism – regarding it as a useful means of describing mechanisms such as the MoA and how they play a mediating role between what are typically regarded

[1] G Teubner, '"Global Bukowina": Legal Pluralism in the World Society' in G Teubner (ed), *Global Law Without a State* (Dartmouth, Aldershot, 1997) 3.

[2] B Rajagopal, 'The Role of Law in Counter-Hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India' (2005) 18 *Leiden Journal of International Law* 345.

[3] P Berman, 'Global Legal Pluralism' (2007) 80 *Southern California Law Review* 1155.

[4] Where it is typically known as 'constitutional pluralism'. See further e.g. N Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317; N MacCormick, *Questioning Sovereignty* (OUP, Oxford, 1999).

[5] See e.g. N Krisch, 'The Open Architecture of European Human Rights Law' (2008) 71 *Modern Law Review* 183.

[6] Though also relevant to the ECHR because of the 'subsidiary' role of the Court vis-à-vis the member states under art 1.

[7] Though cf J Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2010) 17 *European Law Journal* 80, who has suggested that the MoA could also helpfully be used in an EU context.

[8] Berman (n 3) 1201, 1207.

as competing systems – it does not seek to align itself with any particular normative claims made within the wider literature on global legal or constitutional pluralism.[9] Instead, the argument put forward here is that the current and emerging pluralist mechanisms or doctrines used by the ECtHR are best seen through a judicial review lens.

Mahoney has characterized the MoA as being fundamentally about judicial review of the democratic discretion enjoyed by contracting states.[10] Article 1 of the Convention sets up a dual role, with the states bearing primary responsibility for implementing Convention rights within their territories and the Court enjoying a 'subsidiary' role as reviewers of the states. The Court's emerging principles of domestic irregularity and domestic court rulings likewise involve review of contracting states: however here, the ECtHR's job is made easier by the fact that the state's actions (in breaching their own domestic environmental standards or acting in breach of domestic court rulings) themselves clearly point to a breach of their own democratic preferences.

The article's principal argument is that, in common with many pluralist instruments, the doctrines under consideration here have the potential to point both ways. This is certainly true of the EU law doctrine of subsidiarity, which Golub for example refers to as a 'Janus-faced' concept, capable of supporting both state-level action and action at supranational level.[11] It is also true of the margin of appreciation doctrine and the emerging doctrines of domestic irregularity and domestic court rulings, which are the focus of this article. In the case of the MoA, this is not how the doctrine is typically viewed. It tends to be seen as an instrument of judicial self-restraint which is pro-state and against the individual rights-holder. However, in reality, the MoA is better viewed as a discretion review mechanism which can also work in the opposite way: where, for example, the individual interests at stake are especially sensitive (such as sexuality, as in *Dudgeon*),[12] then the MoA for states will be particularly narrow and not broad.

Similarly, when one examines the ECtHR's case law on domestic irregularity and domestic court rulings, although one finds a leaning towards a pro-individual and anti-state stance, the doctrines can also face

[9] Except perhaps in the limited, procedural sense adopted by Berman, who normatively advocates mediating devices like the MoA as being useful mechanisms for managing hybridity (n 3) 1164.

[10] P Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin' (1990) 11 *Human Rights Law Journal* 57; and, especially, P Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism?' (1998) 19 *Human Rights Law Journal* 1, 4.

[11] J Golub, 'Sovereignty and Subsidiarity in EU Environmental Policy' (1996) 44 *Political Studies* 686, 692.

[12] *Dudgeon v UK*, No 7525/76, 22 October 1981, Series A No 45.

the other way: where there has been no domestic illegality or no domestic court ruling, that may equally be taken by the Court as an indication in favour of the state and against the individual rights-holder.

Margin of appreciation

If one accepts the MoA as a potentially two-sided doctrine, where the Court can either describe the margin as narrow and thus easily find the state in breach, or else as broad, in which case a breach is less likely, then it becomes important to determine the principles or factors which the Court uses, if any, to allocate a case to one or other of these.

Although the Court, across its case law as a whole (i.e., not just environmental cases), has been criticized for its lack of clear principles in this regard,[13] commentators have singled out a number of relevant (sometimes overlapping) factors which seem to influence the Court's choice.[14] Without claiming to be exhaustive, these include: the existence of consensus across contracting states (if there is wide consensus, then the MoA is likely to be narrow); the nature of the right concerned (the right to property, for example, is more associated with a broad MoA than other, more personal, rights); the nature of the individual interest at stake (where it relates to a particularly significant aspect of an individual's identity or self-determination, the MoA is unlikely to be broad); the nature of the activity at issue (intimate activities such as sexuality typically give rise to a narrow MoA); the positive or negative nature of the duty imposed on the state (positive duties, which will typically involve more explicit public spending, are more likely to attract a broad MoA); the emergency nature of the state action (emergencies generally producing a broad MoA); and finally, the nature of the counterbalancing public interest or aim pursued by the state (where, for example, this is particularly high, as with national security, or complex, as in technical areas, then a broad MoA is more likely).

A useful statement by the Court which encompasses many of the above can be found in the *Connors* case:

> [The] margin will vary according to the nature of the Convention right in issue, its importance for the individual and the nature of the activities restricted, as well as the nature of the aim pursued by the restrictions.[15]

[13] See e.g. Mahoney (1990) (n 10) 83.

[14] See e.g. Mahoney (1998) (n 10) 5; C Ovey, 'The Margin of Appreciation and Article 8 of the Convention' (1998) 19 *Human Rights Law Journal* 10.

[15] *Connors v UK*, No 66746/01, s 82, 27 August 2004. See also eg *Buckley v UK*, 26 September 1996, s 74, *Reports of Judgments and Decisions* 1996-IV.

If one proceeds to examine the Court's environmental case law in particular, then one finds that while the Court occasionally uses the MoA rather indiscriminately, there are often signs of many of the above principles at work. Although the UK Government raised the lack of consensus in *Hatton* – pointing towards variation in state practice across Member States in relation to night flights[16] – the Court did not pick up this issue in its own reasoning in the case and neither has it found a foothold in other environmental cases. In many ways this is not surprising: leaving aside harmonized EU standards, the environment is an area in which standards will typically vary across states. Were this to be singled out as a significant factor, then the MoA in environmental human rights cases would very often be broad. It would not, in other words, leave the Court with much room for manoeuvre.

In relation to the nature of the right, in *Budayeva*,[17] which involved state inaction against risks from mudslides, the Court held that the MoA for states was larger in relation to property under Article 1 of Protocol 1 than under Article 2 of the Convention relating to life.[18]

As for the importance of the right and activities restricted, in *Hatton*, the applicants claimed that loss of sleep was an activity of a similarly intimate nature to that in *Dudgeon*[19] and thus deserving a narrow MoA. However, the Grand Chamber rejected this,[20] preferring to stress instead the nature of the state's aim. In doing so, it took the opportunity to explicitly reject the initial Chamber's view that environmental protection was a 'particularly sensitive field'. While acknowledging that '[e]nvironmental protection should be taken into consideration by States in acting within their margin of appreciation and by the Court in its review of that margin', the Grand Chamber stated that it was not appropriate to adopt a favoured approach to the margin issue 'by reference to a special status of environmental human rights'.[21] Far from the environment leading to a *narrow* MoA for the state as the initial Chamber had wanted, the Grand Chamber drew parallels with its case law on land use planning[22] and emphasized the need

[16] *Hatton and Others v UK* [GC], No 36022/97, s 88, ECHR 2003-VIII.

[17] *Budayeva and Others v Russia*, Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008.

[18] s 175.

[19] (n 12).

[20] s 123: 'However, the sleep disturbances relied on by the applicants did not intrude into an aspect of private life in a manner comparable to that of the criminal measures considered in *Dudgeon* to call for an especially narrow scope for the State's margin of appreciation.'

[21] s 122.

[22] s 101.

for a *wide* MoA in relation to general policy decisions involving social and economic policy.[23]

Nevertheless, in considering the nature of the aim being pursued by the state, one needs to distinguish, as the Court did in *Fadeyeva*,[24] between two different classes of environmental margin of appreciation case. First, there are cases involving a positive duty to act on the part of the state, where it has *failed* to take action against pollution or risks and thus allegedly breached that duty. *Hatton* is a good example of that type of case, involving as it did the issue of the UK state's positive duty to take appropriate measures to secure the applicants' rights under Article 8 of the Convention (private and family life),[25] although in the end, the Court there decided that the UK authorities had not overstepped their margin of appreciation and that there was, therefore, no breach of Article 8.[26]

The second type of environmental margin of appreciation case identified by the Court in *Fadeyeva*, relates to the other side of the coin – where states *have* taken *pro*-environmental regulatory action, but this action is then alleged to breach the rights of property owners under Article 1 of Protocol 1 of the Convention. Noting that 'in recent decades environmental pollution has become a matter of growing public concern', the Court in *Fadeyeva* observed that states were increasingly adopting a variety of measures to reduce environmental harm from industry and that, in assessing such measures under Article 1, 'the Court has, as a rule, accepted that the States have a wide margin of appreciation'.[27] In *Fredin v Sweden (No. 1)*,[28] for example, the Court held that the revocation by the state, on nature conservation grounds, of the applicant's gravel extraction licence, did not breach Article 1. In doing so, it stated that 'in today's society the

[23] Citing its previous decision in *James and Others v UK*, No 8793/79, 21 February 1986. Its reading of that case was that the domestic policy-maker's role should be given special weight in relation to 'matters of general policy, on which opinions within a democratic society may reasonably differ widely' (s 97). It also (s 100) cited its previous airport noise decision in *Powell and Rayner v UK*, 1 February 1990, s 44, Series A No 172, with approval, where it had stated that it was 'certainly not for the Commission or the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this difficult social and technical sphere' and that 'this is an area where the Contracting States are to be recognised as enjoying a wide margin of appreciation'.

[24] *Fadeyeva v Russia*, No 55723/00, s 104, ECHR 2005-IV.

[25] Art 8 states that '1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except as such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the well-being of the country, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

[26] ss 129–30.

[27] s 103.

[28] 18 February 1991, Series A No 192.

protection of the environment is an increasingly important consideration'.[29] We thus have a somewhat curious situation whereby the environment, as an aim, is not special in relation to positive duty cases such as *Hatton* so as to narrow the MoA, but is important or special in relation to negative non-interference cases like *Fredin* so as to widen the MoA.

While on the subject of positive versus negative duties, it is also worth mentioning *Öneryildiz v Turkey*,[30] which involved death and property destruction caused by a landfill gas explosion. The Court mentioned the MoA in relation to difficult social and technical areas and yet ruled that installation of a gas extraction system would not have imposed a disproportionate burden on the authorities in terms of discharging its positive obligations.[31] In other words, the case seems to hint that if positive obligations are obviously not too expensive given the scale of the risks, then the Court will have little hesitation in adopting what seems closer to an appellate than a review-based jurisdiction (leaving little discretion to the state, with the Court dictating its own preferred choice of pollution measure).

Finally, the *Budayeva* case mentioned earlier[32] introduces a new, specifically environmental MoA principle or factor which is not found in the list presented earlier. The case involved positive obligations owed by the state in relation to natural risks from mudslides. The Court emphasized that the state has a MoA in its adoption of specific practical, preventive measures,[33] including a choice as to whether to take active physical steps to reduce the risk or to provide information instead.[34] It also emphasized that in difficult social and technical spheres involving priority-setting and resource allocation, states enjoy a wide margin of appreciation, with an even wider margin for activities associated with natural risks[35] than with dangerous activities of a man-made nature (with the latter, of course, covering most of the Court's previous, pollution-related case law).[36] It is this emphasis on a wider MoA in relation to natural risks which is novel.[37]

[29] See also *Pine Valley Developments Ltd and Others v Ireland*, 29 November 1991, Series A No 222, which the Court in *Fadeyeva* regarded as confirming this approach.

[30] [GC], No 48939/99, ECHR 2004-XII.

[31] s 107.

[32] (n 17).

[33] s 134.

[34] ss 154–56.

[35] E.g. those, as in the case itself, involving a meteorological event (mudslide caused by excessive rainfall) – s 135.

[36] s 135. E.g. *López Ostra v Spain,* 9 December 1994, Series A No 303-C; and *Guerra and Others v Italy,* 19 February 1998, *Reports of Judgments and Decisions* 1998-I.

[37] In the event, the Court ruled that Russia was in breach, *inter alia*, of its art 2 substantive obligation, due to its failure to provide information to the public about the risks from mudslides, which it identified as one of the 'essential practical measures needed to ensure effective protection of the citizens concerned' (s 152).

Although that completes discussion of the principles or factors in environmental cases which influence the Court in determining the scope of the MoA, it is worth mentioning an additional important issue relating to the MoA in this area, which relates to the role of procedure. In *Hatton*, the Court drew a distinction in environmental cases between, on the one hand, an assessment of the *substantive* merits of the government's decision, to ensure its compatibility with Article 8 and, on the other, *procedural* scrutiny of the decision-making process to ensure that due weight had been given to the interests of the individual.[38] The margin of appreciation accorded to the state was said to fall in relation to the substantive element.[39] However, in later cases, the connection of the MoA only with substance seems to disappear, with the MoA also concerning the latter procedural element.

Thus in *Giacomelli v Italy*,[40] the Lombardy Regional Council had granted permission for a hazardous waste treatment plant just 30 metres from the applicant's home. The Court drew attention to the wide *substantive* margin of appreciation enjoyed by states in relation to environmental issues, stating that

> It is for the national authorities to make the initial assessment of the 'necessity' for an interference. They are in principle better placed than an international court to assess the requirements relating to the treatment of industrial waste in a particular local context and to determine the most appropriate environmental policies and individual measures while taking into account the needs of the local community.[41]

However, the Court then went on to rule that, in determining the scope of the margin of appreciation, it was necessary to examine whether due weight was given to the applicant's interests and whether sufficient *procedural* safeguards were available to her.[42] Here, the Court pointed to a long-standing failure to uphold the procedural machinery for the protection of individual rights provided by domestic law via a legal requirement for a prior environmental impact assessment and also applicant involvement in the licensing process.[43] The state had failed to comply with its own environmental legislation and had refused to enforce domestic judicial decisions ruling the plant's activities unlawful.[44] For this reason, the Court held that the state, notwithstanding its margin of appreciation, had not

[38] s 99.
[39] s 100.
[40] No 59909/00, ECHR 2006-XII; see also *Fadeyeva* (n 24) s 128.
[41] s 80.
[42] s 84.
[43] s 94.
[44] s 93.

drawn a fair balance between the interests of the community in having a waste treatment plant and the applicant's enjoyment of her right to her home, private and family life.[45]

Subsequent cases have fastened upon this importance, in determining the margin of appreciation, of ensuring a balance – which procedure can provide – between the competing interests of the individual against the community as a whole.[46] In assessing this balance, the Court will consider, *inter alia*, the question of domestic legality,[47] which is addressed further in the next section.

Domestic irregularity

Reaction to the Heathrow *Hatton* night flights case by many environmental lawyers was one of alarm – it was regarded as an extremely negative environmental decision which potentially set back the strong individual rights position that the Court had developed thus far in its environmentally-related Article 8 case law in cases such as *López Ostra*[48] and *Guerra*.[49] Hart and Wheeler, for example, refer to it as having been seen as 'a body blow to environmental campaigners'.[50] One aspect of the case that was particularly singled out by commentators for opprobrium was the attempt made by the Court to distinguish the facts of *Hatton* from that previous case law. It is worth quoting the Court's judgment at length at this stage:

> The Court notes at the outset that in previous cases in which environmental questions gave rise to violations of the Convention, the violation was

[45] s 97.

[46] *Mileva and Others v Bulgaria*, Nos 43449/02 and 21475/04, s 98, 25 November 2010; and *Connors* (n 15), a non-environmental art 8 case, at s 83. See also *Grimkovskaya v Ukraine,* No 38182/03, s 66, 21 July 2011, where the Court states: '[w]hile the Court finds no reason to reassess the substance of the Government's decision to allow the use of K. Street as a through road, in examining the procedural aspect of relevant policymaking, the Court is not convinced that minimal safeguards to ensure a fair balance between the applicant's and the community's interests were put in place'.

[47] See *Giacomelli*, main text above at n 44. See also *Dubetska and Others v Ukraine*, No 30499/03, s 141, 10 February 2011; and *Mileva* (n 46): 'in view of the margin of appreciation enjoyed by the national authorities … it is not in the Court's remit to determine what exactly should have been done to stop or reduce the disturbance. However, the Court can assess whether the authorities approached the matter with due diligence and gave consideration to all competing interests … In carrying out that assessment, it will have regard to, among other things, whether the national authorities acted in conformity with domestic law' [98].

[48] (n 36).

[49] (n 36).

[50] D Hart and M Wheeler, 'Night Flights and Strasbourg's Retreat from Environmental Human Rights' (2004) 16 *Journal of Environmental Law* 100, 139. They were, however, more cautious in their own assessment of the ruling.

> predicated on a failure by the national authorities to comply with some aspect of the domestic regime. Thus, in *López Ostra*, the waste-treatment plant at issue was illegal in that it operated without the necessary licence, and was eventually closed down. In *Guerra and Others*, the violation was also founded on an irregular position at the domestic level, as the applicants had been unable to obtain information that the State was under a statutory obligation to provide. This element of domestic irregularity is wholly absent in the present case. The policy on night flights which was set up in 1993 was challenged by the local authorities, and was found, after a certain amount of amendment, to be compatible with domestic law. The applicants do not suggest that the policy (as amended) was in any way unlawful at a domestic level, and indeed they have not exhausted domestic remedies in respect of any such claim. Further, they do not claim that any of the night flights which disturbed their sleep violated the relevant regulations, and again any such claim could have been pursued in the domestic courts under section 76(1) of the Civil Aviation Act 1982.[51]

However, far from turning out to be a necessarily negative development from the point of view of the individual to be criticized by those of an environmentalist persuasion,[52] this reference in *Hatton* to whether there have been breaches of domestic law – or, as the Court put it, 'domestic irregularity' – has also proved capable of being a positive development for the interests of individuals and the environment.

This positive direction becomes apparent on examination of some of the post-*Hatton* case law, including *Fadeyeva*.[53] In that case, the Court stated that the principles regarding the balance between the rights of the individual and the interests of the community under Article 8(2) were broadly similar regardless of whether the case involved a direct interference by the state or (more common in pollution cases), the breach of a positive duty by the state.[54] However, in cases of direct interference, state action could only be justified if 'in accordance with the law' as required by paragraph 2. In such cases, a breach of domestic law 'would necessarily lead to a finding of a violation of the Convention'.[55] With positive duties on the other hand, states enjoy a margin of appreciation, with the Court observing of the choice of means available that '[t]here are different avenues to ensure

[51] s 120, references omitted.

[52] See e.g. Hart and Wheeler (n 50) 133–4; and M Stallworthy, 'Whither Environmental Human Rights?' (2005) 7 *Environmental Law Review* 12, 20, who criticize this aspect of the judgment.

[53] (n 24).

[54] Ibid, s 94.

[55] Ibid, s 95.

"respect for private life", and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means'.[56] This meant that the 'in accordance with the law' aspect of the paragraph 2 justification test could not be applied in the same way as with cases of direct interference by the state.[57]

In practice, however, what the Court gave to the state with one hand, it then took away with the other: in an almost direct quotation of the *Hatton* judgment (though without explicitly mentioning that case), it went on to note that 'at the same time … in all previous cases in which environmental questions gave rise to violations of the Convention, the violation was predicated on a failure by the national authorities to comply with some aspect of the domestic legal regime'.[58] It then cited the cases that had been cited in *Hatton* to this effect – viz. *López Ostra* and *Guerra* – and added one more, *S v France*[59] (considered further below) before concluding that 'in cases where an applicant complains about the State's failure to protect his or her Convention rights, domestic legality should be approached not as a separate and conclusive test, but rather as one of many aspects which should be taken into account in assessing whether the State has struck a "fair balance" in accordance with [Article 8(2)]'.[60]

Applying these general principles to the facts of the case, the Court in *Fadeyeva* found that the state had licensed a polluting plant in the heart of a densely populated town and that toxic emissions from this plant 'exceeded the safe limits established by the domestic legislation'.[61] In response, the state had introduced legislation establishing a sanitary zone around the plant which should have been free of dwellings. However, it had failed to implement this legislation in practice.[62] It had failed to take any appropriate measures (the choice of which lay within its discretion) – whether that be relocating residents from inside the zone including the applicant, or taking action against the plant to reduce pollution to acceptable levels.[63] The Court therefore concluded that there had been a breach of Article 8 because, despite the wide margin of appreciation left to it, the state had failed to strike a fair balance between the interests of the community and the applicant's right to respect for her home and her private life.[64]

[56] Ibid, s 96.
[57] Ibid.
[58] Ibid, s 97.
[59] No 13728/88, Commission decision of 17 May 1990, DR 65, 250.
[60] s 98.
[61] s 132.
[62] Ibid.
[63] s 133.
[64] s 134.

S v France, which was cited in *Fadeyeva*, involved a (severe) Article 8 amenity nuisance complaint arising from the construction of a French nuclear power station right on the applicant's doorstep. The Court in *Fadeyeva* refers to it as a case where 'the internal legality was also taken into consideration'. However, it is not entirely clear whether, by that, the ECtHR was referring to *S v France* as a *Hatton*-type case (involving domestic legality rather than illegality), or if it was intending to place it in precisely the same category as *López Ostra* and *Guerra* (with domestic illegality involved). One might be tempted to support the former view by reference to the Commission's statement that it was 'not in dispute that the nuclear power station was lawfully built and brought into service'. In addition, the applicant in *S v France* lost her case before the Commission, just as the applicants in *Hatton* had lost theirs before the ECtHR. However, the better view, it is submitted, is that *S v France* did involve domestic illegality because there had been a domestic court ruling awarding damages for noise nuisance to the applicant. Admittedly this was a breach of civil law obligations (of a nuisance type) rather than a breach of regulatory-type criminal or administrative standards: nevertheless, it was domestic illegality.

Another case, which is squarely of the *Hatton* legality type, that the Court in *Fadeyeva* might also have mentioned is *Ashworth*.[65] This involved noise nuisance from an aerodrome, which the applicants contended breached their rights under Article 8. The Court rejected the applicants' case, ruling that it had not been shown that the Government had exceeded its margin of appreciation or failed to take appropriate measures to achieve an appropriate balance between the interests of the individual residents and the wider community interest (leisure and economic) in the operation of the aerodrome. One of the factors considered in reaching this conclusion was the absence of a domestic irregularity:

> The Court notes at the outset that, as in the *Hatton* case and in contrast to the case of *Lopez Ostra*, there was no failure of compliance with the requirements of domestic law. The applicants do not claim that the national authorities or those responsible for managing Denham aerodrome or the individual pilots violated any relevant regulations. Had they done so, remedies would have been available to the applicants in the domestic courts, including under Section 76(1) of the Civil Aviation Act.[66]

[65] *Ashworth and Others v the United Kingdom* (dec), No 39561/98, 20 January 2004. Cited by D Shelton, 'Developing Substantive Environmental Rights' (2010) 1 *Journal of Human Rights and the Environment* 89, 110.

[66] *Ashworth* (n 65). As a decision, there are no para numbers.

Had it wanted to identify other cases more positive for individuals like *López Ostra* or *Guerra*, involving the presence rather than the absence of domestic irregularities, then the Court in *Fadeyeva* might have cited its previous decisions in *Moreno Gómez v Spain*[67] and *Öneryildiz*.[68] *Gómez* was a noise nuisance case where the fact that the noise from nightclubs was 'beyond the permitted levels' under the relevant domestic Spanish law seems to have influenced the Court's finding of a breach of Article 8 on the part of the state.[69] The Valencian authorities had passed relevant laws to control the noise but had failed to enforce them, leading to a breach of its positive obligations to the applicant to safeguard her home and private life.[70] Similarly, in *Öneryildiz*, the landfill gas explosion case mentioned earlier, in finding a breach of the right to life in Article 2, the Court drew attention to the breach of domestic technical standards on waste management.[71]

Developments post-Fadeyeva

Since the *Fadeyeva* case, the Court's case law on domestic irregularity has taken a somewhat confusing turn. On the one hand, there has been a series of cases where the Court has ruled that domestic illegality alone is insufficient to ground a breach of Article 8. In doing so, it has pointed to the additional need for the relevant pollution to have reached a minimum level of severity in terms of impact on the applicant. However, on the other hand, there are some cases where the Court has adverted to the breach of domestic standards in finding that the minimum level of severity condition is satisfied.

The origins of the minimum severity requirement can be traced to the *Fadeyeva* case itself, though at that stage this requirement was not explicitly linked with the domestic irregularity aspect of the case:

> the adverse effects of environmental pollution must attain a certain minimum level if they are to fall within the scope of Article 8 … The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects.[72]

[67] No 4143/02, ECHR 2004-X. Also cited by Shelton (n 65). See also R White and C Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (5th edn, OUP, Oxford, 2010) 397.

[68] (n 30).

[69] s 60.

[70] ss 61–2.

[71] ss 109–110. See also ss 97–8 and 102.

[72] s 69.

What had happened in relation to domestic irregularity, post-*Fadeyeva*, is that the Court was confronted with a series of cases where applicants were pointing to domestic illegality as a basis for finding a breach of Article 8. A typical situation involved the lack of domestic planning permission, building or other type of permit for particular operations or installations – for example, for a dentist surgery (*Galev*),[73] a car repair garage (*Furlepa*),[74] a central heating boiler (*Darkowska and Darkowski*)[75] or a computer club, electronic games club and office (*Mileva*).[76] The Court ruled that this illegality is not, in itself, sufficient to ground a breach of Article 8. The applicant is also required to show that pollution from such operations has reached a minimum level of severity by, for example, exceeding safe levels set by applicable domestic regulations.[77] In *Galev*, *Furlepa*, and *Darkowska and Darkowski*, the applicants were unable to show such a level; in *Mileva*, the applicant was unable to do so in relation to the office and an electronic games club, but with the computer club, the Court was prepared to accept that the disturbance was of a sufficient level of severity to require the authorities to take action.[78]

Not all of the relevant post-*Fadeyeva* cases involve the breach of a permit. Some, like *Ivan Atanasov*[79] involve a similar 'technical' breach of domestic law. That case concerned a tailings pond from a former copper mine containing hazardous waste. Domestic regulations said such ponds should be further than 2km from urban areas.[80] The applicant's house was, in apparent breach of this, 1km away (although land he cultivated was 4km away and thus not so).[81] Nevertheless, the Court held that a mere breach of domestic rules was not sufficient. There would also need to be an interference with the applicant's private sphere at a sufficient level of severity which was absent here: according to the Court, the breach did not really affect his home and private life sufficiently in order to trigger Article 8.[82]

[73] *Galev and Others v Bulgaria* (dec), No 18324/04, 29 September 2009.

[74] *Furlepa v Poland* (dec), No 62101/00, 18 March 2008.

[75] *Darkowska and Darkowski v Poland* (dec), No 31339/04, 15 November 2011.

[76] (n 46).

[77] E.g. *Furlepa*: 'the mere fact that the construction works had been conducted illegally is not enough to justify the applicant's assertion that she is the victim of a violation of the Convention … The Court accepts that the applicant could have been affected by the pollution and noise emitted by the garage. However, the Court must determine whether the nuisance attained the minimum level of severity required for it to constitute a violation of Article 8.' Similar wording can be found in *Galev*, *Darkowska and Darkowski*, and *Mileva*.

[78] ss 95–7.

[79] *Ivan Atanasov v Bulgaria*, No 12853/03, 2 December 2010.

[80] s 51.

[81] s 76.

[82] ss 75–6.

In other cases, not surprisingly, an *absence* of illegality, in the sense of an inability to show a breach of relevant domestic (or international) standards, has been read by the Court as a failure to demonstrate the required minimum level of severity, leading to no triggering of Article 8. Thus, in *Borysiewicz v Poland*,[83] no evidence had been put forward by the applicants that noise from a tailoring workshop in the house next door had breached domestic or international standards and thus that a minimum level of severity had been reached.[84] Similarly, in *Leon and Agnieszka Kania v Poland*,[85] which concerned noise from a lorry maintenance and metal-cutting and grinding workshop, there was no evidence of a breach of relevant domestic noise standards and thus the Court ruled that the requisite level of severity had not been established.[86] Finally, in *Fägerskiöld v Sweden*,[87] a case involving wind turbines, noise levels had been measured by the Swedish authorities, and were not in breach of domestic (or international) standards. The Court therefore found that although the applicants were affected by sound from the wind turbine, the 'noise levels and light reflections in the present case were not so serious as to reach the high threshold established in cases dealing with environmental issues'.[88]

The potential confusion comes with the next line of cases, which represent the reverse side of the coin to those in the paragraph above. Here, we find the *presence* of a breach of relevant domestic standards which leads the Court to find that the minimum level of severity required under Article 8 has been attained. Some confusion may arise because in the various permit and *Ivan Atanasov* cases above, the Court states that domestic illegality is not enough – one also needs a minimum level of severity. In this next line of cases, however, domestic illegality is apparently capable of constituting this minimum level.

Thus, in *Oluić v Croatia*,[89] the Court drew attention *inter alia*, to the breach of domestic[90] noise standards set out in bylaws in finding that the level of disturbance had reached the minimum level of severity which required the authorities to take action.[91] Similarly, in *Dubetska and Others v Ukraine*,[92]

[83] No 71146/01, 1 October 2008.
[84] ss 51–3.
[85] No 12605/03, 21 July 2009.
[86] ss 101–4.
[87] (dec), No 37664/04, 26 February 2008.
[88] Ibid. As an admissibility case, there are no para numbers.
[89] No 61260/08, 20 May 2010.
[90] As well as international WHO standards and those operated in most other European countries (s 60).
[91] See ss 49, 52–62.
[92] No 30499/03, 10 February 2011.

the Court pointed to breaches of domestic legislation regarding buffer zones around a coal spoil heap in establishing that the required minimum level of severity had been met.[93] Next, in *Grimkovskaya v Ukraine*,[94] the fact that more than half of the vehicles examined had emissions in breach of applicable domestic safety standards was one factor which led the Court to conclude that the minimum level of severity to engage Article 8 had been established.[95] And finally, in *Apanasewicz v Poland*,[96] which involved noise and other polluting nuisances coming from a concrete factory, in finding that the requisite level of severity under Article 8 had been reached, the Court adverted to the fact that the nuisances were in breach of, for example, domestic (and international) noise standards.[97]

So how then does one reconcile the above case law so as to avoid the potential confusion mentioned earlier? Suffice it to say that a mere breach of domestic law is insufficient – it must be a sufficiently severe or serious breach; and it seems that some breaches of domestic law will be regarded as sufficiently serious (where the breach squares directly with nuisance affecting the applicant) and some will not (where the breach is more incidental, as in the various permit cases and *Ivan Atanasov*). If there is *no* breach of domestic law, then this is likely to militate against a finding of sufficient severity.

Domestic court rulings

Most instances of rulings by domestic courts that one finds in the Convention jurisprudence will involve those that find *against* the individual applicant's interests, which explains in part why the individual has ended up bringing proceedings in Strasbourg in the first place.[98] And the existence of a domestic court ruling can of course have legal relevance under the Convention. Thus, for example, in assessing state action under one of the limitation clauses found in Articles 8–11, it must typically be established that it was 'in accordance with' or 'prescribed by' the law (as well as being necessary in a democratic society). And the *Demir* case, for example, illustrates that

[93] ss 118–19.

[94] (n 46).

[95] ss 58–62.

[96] No 6854/07, 3 May 2011. See ss 95–102.

[97] It also mentioned the large-scale breaches of planning permission by the operator. The scale of the permit breach here seems to mark this aspect of the case apart from the earlier, 'technical' permit breach cases considered above.

[98] Though as we shall see, the *S v France* case illustrates that an applicant may also bring proceedings in Strasbourg because they are dissatisfied with a domestic ruling which has found in their favour (which they believe does not go far enough).

domestic court rulings can satisfy the 'prescribed by law' element (in other words, the law need not be legislative in nature).[99]

However, in this section, the analysis will largely be of rulings by domestic courts which find *in favour* of the individual applicant. These, I suggest, represent an additional emerging pluralistic principle to domestic irregularity considered above, though the two will often be connected. There are two senses in which a connection might be said to exist. First, a court ruling might simply be the form in which a domestic irregularity – in other words a breach of domestic law – is formally declared to exist (though such a ruling is of course not necessary for such a finding, at least as regards breaches of regulatory legislative standards – a regulatory agency discovering, through monitoring, that there has been a breach would suffice there). Second, one might argue that if a breach of domestic standards has occurred, then the fact that a domestic court has also declared such a breach to exist might add (limited) extra weight to any 'domestic irregularity' case against the state.

While the focus of this article is the environmental case law of the ECtHR, it is worth pointing out that the Court has also drawn attention to domestic court rulings favourable to an applicant's cause in other types of Article 8 cases. Thus, for example, in the 2011 *A, B and C v Ireland* case involving a challenge to Irish abortion laws, in finding a procedural breach of Article 8 in relation to one of the applicants, the ECtHR stated that:

> Contrary to the Government's submission, McCarthy J. in the *X* case clearly referred to prior judicial expressions of regret that Article 40.3.3 had not been implemented by legislation and went on to state that, while the want of that legislation would not inhibit the courts from exercising their functions, it was reasonable to find that, when enacting that Amendment, the people were entitled to believe that legislation would be introduced so as to regulate the manner in which the right to life of the unborn and the right to life of the mother could be reconciled. In the view of McCarthy J., the failure to legislate was no longer just unfortunate, but it was 'inexcusable' … The High Court in the 'C' case … referred to the same issue more succinctly, finding that it would be wrong to turn the High Court into a 'licensing authority' for abortions.[100]

In essence, abortion in Ireland was theoretically available to a woman under the Constitution on grounds of a risk to her life. However, lack of legislative implementation meant that women were unable to access an appropriate procedure for determining whether they met this ground.[101] The fact that

[99] *Demir and Baykara v Turkey* [GC], No 34503/97, s 160, 12 November 2008.
[100] [GC], No 25579/05, s 258, ECHR 2010.
[101] ss 263–4.

the Irish courts, in the domestic *X* and *C* cases cited, had themselves condemned such a lack, seems to have had some bearing on the ECtHR's ruling that the Irish authorities had thereby failed to fulfil their positive obligation to respect the applicant's private life under Article 8.[102]

Returning to the environmental case law, *S v France* is potentially a problematic case because, as we saw earlier, it is difficult to be absolutely sure whether it is strictly a domestic irregularity case or not. If the Court in *Fadeyeva* meant to refer to the *S* case as a *Hatton*-type one involving domestic legality, then one might argue (somewhat implausibly) that a domestic court liability ruling can, where appropriate, effectively be legally sanctioned by the ECtHR via a retrospective style application of what appears something like an English common law tort, 'statutory authority' defence (the nuclear power station was lawfully built and brought into service) so as to end up with no relevant breach of Convention rights. If, on the other hand, the ECtHR meant to refer to it in precisely the same breath as *López Ostra* and *Guerra* (involving domestic *il*legality), then *S v France* seems like an example of the first type set out in the earlier paragraph above – in other words, one where the domestic court ruling simply evidences the domestic illegality. It is in some senses an unusual case because, unlike for example *Taşkin* and *Okyay* explored below, the applicant *lost* in Strasbourg because she had a domestic court ruling in her favour – the Court's view being, in essence, that the domestic award of 250,000 francs was enough to compensate her for the nuisance she had suffered, which meant that there was no breach of Article 1 of Protocol 1 or Article 8. By contrast, in the latter cases as we shall see, the applicants *won* in Strasbourg, in part because they had domestic court rulings in their favour.

In *Taşkin*,[103] the applicants were complaining, *inter alia*, about cyanide risks from a local gold mine, claiming a breach of their rights under both Articles 6 and 8. The Turkish Government argued that Article 6 was not applicable because the alleged risk was hypothetical and 'not at all imminent', meaning that the complaints did not involve 'civil rights and obligations' as required under the article.[104] However, the Court ruled that the applicants' right to protection of their physical integrity was directly at stake because the Turkish Supreme Administrative Court had itself held that there was a risk from the mine.[105] Furthermore, the applicants had brought proceedings in the Turkish administrative courts, the outcome of

[102] ss 267–8.
[103] *Taşkin and Others v Turkey* No 46117/99, ECHR 2004-X.
[104] s 128.
[105] s 133.

which did directly relate to their civil rights.[106] Having found that Article 6 was applicable, by reference to domestic court rulings in their favour, the ECtHR subsequently went on to find that Article 6 had been breached because the Turkish government had effectively made an order which attempted to bypass the judgment of the Turkish courts.[107] In other words, the presence of favourable domestic court rulings that had been ignored was germane here to the finding of a breach.

In relation to Article 8, the ECtHR, following *Hatton*,[108] drew a distinction (discussed earlier in the article in the section on the MoA) between the substantive and procedural aspects of the article, with the first involving consideration of the substantive merits and the second, scrutiny by the Court of the state's decision-making process to ensure due regard had been taken of the applicant's interests.[109] Beginning with the substantive aspect, the Court commented on the need to allow states a wide margin of appreciation in environmental cases. However, it then noted that the authorities' decision to grant a licence for the gold mine was annulled by the Turkish Supreme Administrative Court after it had weighed the applicants' rights against the public interest and come down in favour of the former.[110] The ECtHR crucially went on to state that, '[i]n view of that conclusion, no other examination of the material aspect of the case with regard to the margin of appreciation generally allowed to the national authorities in this area is necessary'. Thus, much like the domestic irregularity case, *Fadeyeva*, considered in the previous section, the Court here gives with one hand (observing the margin of appreciation theoretically available) but then takes away with the other (finding no scope for applying it, given the domestic court's rights-balancing ruling in favour of the applicants).

In finding that Turkey was similarly in breach of the procedural aspect of Article 8, the ECtHR drew attention to the fact that the Turkish government had, contrary to the rule of law, effectively authorized the bypassing of Turkish court judgments in favour of the applicants. As the Court observed, by doing this, the Turkish authorities had deprived

[106] Ibid.

[107] ss 135–38.

[108] See (n 4).

[109] s 115. C Hilson, 'Risk and the European Convention on Human Rights: Towards a New Approach' (2008–2009) 11 *Cambridge Yearbook of European Legal Studies* 353, has described this development of a procedural side to art 8 in terms of a 'proceduralisation' or procedural turn, which may be linked to the influence of the Aarhus Convention on the Court's environmental case law. On the influence of Aarhus, see also A Boyle, 'Human Rights or Environmental Rights? A Reassessment' (2007) 18 *Fordham Environmental Law Review* 471.

[110] s 117.

the procedural safeguards available to the applicants during the judicial phase of the proceedings, of any useful effect.[111] The outcome was therefore effectively the same for Article 8 and Article 6, with the Turkish executive's overriding of domestic court judgments giving rise to a breach of both articles.

Okyay[112] involved three (lawyer) applicants who were resident around 250 kilometres from three coal-fired power stations which lacked the required licence and were causing significant air pollution. As in *Taşkin*, the Turkish executive argued that the applicants had not demonstrated that the plants exposed them to a serious, specific and imminent danger for the purposes of Article 6.[113] However, the ECtHR similarly pointed to the findings of the relevant Turkish administrative court, which had found that there was a risk to public health, including the applicants, because the hazardous gas emitted by the plant could extend over an area which included their town.[114] The applicants' right to the protection of their physical integrity was therefore involved.[115] The Court then proceeded to find that Article 6 was applicable and had been breached, for much the same reasons as the earlier *Taşkin* judgment, related to the domestic court rulings.[116]

More recently, there has been a number of cases in which the ECtHR has drawn attention to, *inter alia*, the existence of a domestic court ruling in favour of the applicants, in reaching its conclusion that the required minimum level of severity under Article 8 had been met. Thus, in *Dubetska*, the fact that domestic court rulings had confirmed the need for action to be taken against the relevant pollution including, for example, housing resettlement of the applicants, was a factor which led the Court to regard the pollution as being of a sufficient level of severity to engage Article 8.[117] The fact that the domestic resettlement judgments had remained unenforced was also a factor which the court considered in eventually finding that Article 8 had been breached.[118]

Similarly, in *Apanasewicz*, the Court distinguished the case from previous Article 8 decisions such as *Furlepa*[119]and *Borysiewicz*[120] in which the minimum level of severity was not made out, in part on the basis that here,

[111] ss 124–25.
[112] *Okyay and Others v Turkey*, No 36220/97, ECHR 2005-VII.
[113] s 61.
[114] s 66.
[115] Ibid.
[116] ss 67–75.
[117] (n 92) ss 116–17.
[118] s 149.
[119] (n 74).
[120] (n 83).

the domestic civil court had ordered operations at the plant to cease because they went beyond the extent of normal neighbourhood nuisance.[121]

However, just as the Court is willing to draw attention to the *presence* of a favourable domestic court ruling in finding the engagement or breach of Article 6 or 8, so too might it draw attention to the *absence* of one in finding the lack of engagement or breach. Hence, in *Ivan Atanasov*,[122] in holding that there had been *no* breach of Article 6, the ECtHR, *inter alia*, specifically noted that there had been no equivalent ruling on risks by the relevant domestic Supreme Administrative Court to those found in *Taşkın* and *Okyay*.[123]

Alternatively, but also negative from the applicant's point of view, the ECtHR may advert to the presence of an unfavourable domestic court ruling. Thus, in *Morcuenda*,[124] which involved radiation and vibrations from an electrical transformer, the Court held that although the applicant's living conditions were disturbed, the nuisance was not at a sufficient level of severity to amount to a violation of Article 8. There was no separate, explicit reference to domestic standards. However, the ECtHR did advert to the presence of unfavourable domestic court rulings:

> the domestic courts took the view, with decisions sufficiently motivated and devoid of arbitrariness, based on several examinations carried out by specialists, the levels of contamination in the applicant's home were lower than those considered harmful to health.[125]

Nevertheless, it should be noted that the absence of domestic court rulings will not automatically go against an applicant. In *Tătar v Romania*,[126] for example, despite the absence of, *inter alia*,[127] domestic court rulings finding the activities dangerous, the ECtHR was prepared to concede that pollution from the gold plant could potentially affect the applicants so as to engage Article 8.[128]

Finally, how then does one reconcile, on the one hand, cases such as *Taşkin* and *Okyay*, where domestic court rulings in the applicants' favour seem to point presumptively towards the individual and against the state and, on the other, *S v France*, where a similarly favourable domestic court

[121] (n 96) ss 96–8.
[122] (n 79).
[123] Ibid s 93.
[124] *Ruano Morcuende v Spain* (dec), No 75287/01, 6 September 2005.
[125] Ibid. As an admissibility decision, there are no para numbers.
[126] No 67021/01, 27 January 2009.
[127] The *inter alia* here including also domestic administrative decisions finding the activities in breach of standards, or publicly available reports indicating a certain level of pollution – both of which were also absent.
[128] ss 93–7.

judgment pointed against the individual's Convention rights claim? The answer is that the domestic judgment in favour of the applicant in *S v France* was properly enforced and compensation (of a reasonable amount) had already been paid out. In contrast, the Turkish domestic court judgments in both *Taşkin* and *Okyay* had not been enforced, having been thwarted by executive pressure. In the end then, one can perhaps say that a domestic court ruling in favour of an applicant *which has not been enforced*, will lead the ECtHR to adopt a presumptive view in favour of the individual under both Articles 6 and 8.[129]

Global legal pluralism in action?

In considering whether domestic irregularity and the often connected issue of favourable domestic court rulings can be considered as examples of global legal pluralism in action, it needs to be pointed out that they cannot be regarded as wholly independent principles or tests. As the Court has stated of domestic legality in *Fadeyeva*, for example, it is not a separate and conclusive test but is, rather, one of a number of aspects to be taken into account in assessing the balance struck between the interests of the individual and the broader community.[130]

With that caveat in mind, one can, however, legitimately argue that domestic irregularity and domestic court rulings do appear to play a similar role to that played by the MoA doctrine, with which they are also intimately connected. While the margin of appreciation serves as a pluralistic device which typically allows the ECtHR to defer to states in sensitive or difficult policy areas, domestic irregularity and domestic court rulings prove equally useful devices which typically support the Court intervening against states and in favour of the individual rights-holder.

However, the 'typically' above is important in both cases. As discussed towards the start of this article, in common with many global legal pluralist instruments, they in fact have the potential to point both ways. Thus, one can have a narrow MoA as well as a broad one (though admittedly in the environmental sphere, it is almost invariably broad). Similarly, with domestic irregularity, there are occasions when the issue of domestic legality is raised by the Court and it works against the individual (e.g. *Hatton*). And again, with domestic court rulings, there may be occasions (e.g. *Ivan Atanasov*) when the absence of a domestic court ruling will work against an applicant's interests. This Janus-faced quality is precisely what, in global legal pluralist terms, makes them such useful devices to be employed

[129] And presumably also art 1 of protocol 1.
[130] (n 24) s 98. See also *Dubetska* (n 92) s 141.

in reaching accommodation between competing legal orders: they can be applied sensitively by the Court in whichever direction is relevant to the particular facts of the case.

If one considers the pluralistic devices here in terms of judicial review by one system of another, then their dual-facing nature becomes more understandable. In the end, the MoA is perhaps better seen as a doctrine which is equivalent to the idea of intensity of review. Where individual rights are particularly sensitive and important, then one would expect a high intensity of review by the ECtHR or, in other words, a low MoA. Where, in contrast, the rights are of a lesser nature or the counter-weighing democratic public interest greater, then low-intensity review, or a high MoA, becomes more appropriate.

With domestic irregularity and domestic court rulings, the judicial review analogy here is more like simple 'illegality' as a ground of review. In essence, the ECtHR is policing not so much democratic discretion (which is more apt for the MoA), but rather the legality of action taken by contracting states, with that legality measured against their own domestic legislative choices. Where there has been illegality, the ECtHR typically intervenes; where there has been no domestic illegality or court ruling, the European Court is more likely to steer clear.

In addition, in common with many judicial review jurisdictions, the ECtHR is not, for the most part, a primary *fact*-finding tribunal. Although it does have some primary fact-finding powers, it tends to rely on secondary sources[131] such as, here, findings by national authorities of pollution levels having been breached. Finally, in relation to questions of *law*, the Court has consistently held that the interpretation and application of domestic law (including findings of its breach therefore), are primarily matters for the national authorities (and in particular the courts).[132] Again, this area of legal 'jurisdiction' (whether, for example, a reviewing court should substitute or respect the original court or tribunal's decisions on questions of law) is a common feature of judicial review.[133] Given that, in the present context, domestic court rulings are typically heavily fact-dependent, the ECtHR's approach to questions of domestic law very much ties in with its approach to fact finding: to take a more aggressive approach to querying domestic law would lead it to having to undertake more of a primary fact-finding role.

[131] See e.g. KC Sadeghi, 'The European Court of Human Rights: The Problematic Nature of the Court's Reliance on Secondary Sources for Factfinding' (2009) 25 *Connecticut Journal of International Law* 127.

[132] See e.g. *López Ostra* (n 36) s 55.

[133] See e.g. P Craig, 'Judicial Review of Questions of Law: A Comparative Perspective' in S Rose-Ackerman and PL Lindseth (eds), *Comparative Administrative Law* (Edward Elgar, Cheltenham, 2010) 449.

Conclusion

In the end then, this article has adopted what might be regarded as a light version of global legal pluralism, adopting the valuable insights which the theory offers on devices for managing competing legal orders, but without necessarily signing up to any additional normative aspects. The article began by examining the contours of the margin of appreciation principle as it has been used in the environmental case law of the ECtHR. While the *Hatton* case tends to dominate the landscape there, with the margin of appreciation clearly operating in favour of the state and against the environmental interests of the individual applicants, the *Budayeva* landslide case, to take one example, demonstrates that this need not always be so. In that case, the margin of appreciation enjoyed by Russia, although wide, did not in the end prevent it from being found in breach of Article 2. In addition, the *Fredin* case reveals that the margin of appreciation (though still broad in that case) can work in favour of the state and the environment, but against property-owning individuals, where those individuals are themselves engaged in environmentally harmful economic behaviour which the state is seeking to regulate.

In other words, the MoA, while typically viewed as a principle which lets states off the hook or leads to negative environmental outcomes (as in *Hatton*), does not always do so. Admittedly, in the environmental field, states have not been caught by an expressly narrow margin of appreciation (with the exception of the initial chamber attempt in *Hatton*); nevertheless, environmental interests have occasionally won through despite (*Budayeva*) or because of (*Fredin*) a broad MoA.

With the more recent principles of domestic irregularity and domestic court rulings, the former started out in *Hatton* in a way (stressing lack of domestic illegality) which led some commentators to fear its potential impact on the interests of individuals and the environment – perhaps not surprisingly given the defeat for such interests in *Hatton*. However, subsequent cases saw applicants viewing it as an opportunity rather than a threat, seizing on examples of domestic illegality. This in turn led the ECtHR to introduce a need for a sufficiently severe or serious rather than a mere breach. Like the case law on the MoA, the current state of the case law involving the domestic irregularity principle and the related principle of domestic court rulings, reveals a mixture of environmental wins and losses.

With the MoA, the Court's environmental jurisprudence has arguably been a latecomer to the party: until relatively recently, there were few cases to analyse. With the domestic irregularity principle and principle of domestic court rulings in contrast, the environmental case law has been at the

forefront and it will be interesting to see whether these doctrines could be applied by the Court in other areas. The Irish abortion case suggests that this is possible. However, it would certainly seem worthy of further academic research.

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