Case Notes

Towards EU Sexual Risk Regulation: Restrictions on Blood Donation as Infringement of Active Citizenship

*Uladzislau Belavusau**

Case C-528/13, Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes; Établissement français du sang [2015] ECLI: EU:C:2015:288 (Fourth Chamber).

In the case of Léger commented on, the Court of Justice of the European Union dealt with a blanket ban on blood donation for men who had sexual relations with other men (MSM) in France. The Court found that such restrictions can be justified in light of specific epidemiological context and scientific knowledge available in Member States. The judgment, therefore, sheds lights on the boundaries of public health justifications, discrimination of gay and bisexual individuals, as well as the rising scope of EU sexual risk regulation. The present annotation argues that the Court has undermined the principle of non-discrimination and shows how the matter of blood donations should have been treated instead as a prerequisite of active sexual citizenship.

> *"[T]he sanguine substance is intimately tied to both identity and public culture. Blood is a metaphor of life and of death; it fosters insider and outsider relations; it has economic clout and emblematic significance; these primal fluids are far from natural, organic, or self-evident, being imbued with cultural connotations reflecting imagined connectedness, tentative securities and demonstrable anxieties."*
>
> Jefrey A. Bennet[1]

I. Background

In April 2015, the EU Court of Justice delivered its judgment in *Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes; Établissement français du sang*.[2] The case addressed the compatibility with EU law of national measures – here the French 2009 Ministerial Decree[3] – permanently banning blood donations by men who had or have sexual relations with other men (henceforth "MSM"). The Court found that these health policies could be justified in some circumstances, in light of the specific context prevailing in the Member State and the scientific knowledge and techniques available for detecting HIV in the early stages of contamination.

* Senior Researcher in European Law at the T.M.C. Asser Institute (The Hague) – University of Amsterdam. The author is grateful to Ivana Isailović and Maria Weimer. This article incorporates bits of the initial overview of the judgment, from U. Belavusau & I. Isailović, "Gay Blood: Bad Blood? A Brief Analysis of the Léger Case [2015] C-528/13", *European Law Blog*, 26 August 2015, available at http://europeanlawblog.eu/?p=2823.

1 Jeffrey A. Bennett, *Banning Queer Blood: Rhetorics of Citizenship, Contagion, and Resistance* (Tuscaloosa: University of Alabama Press, 2009), at p. ix.

2 Case C-528/13, Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes; Établissement français du sang [2015] ECLI: EU:C:2015:288.

3 Arrêté du 12 janvier 2009 fixant les critères de sélection des donneurs de sang, Ministère de la Santé et des Sports, available at:https://www.legifrance.gouv.fr/jo_pdf.do?numJO=0&dateJO=20090118&numTexte=23&pageDebut=01067&pageFin=01076 .

This judgment triggers a myriad of socio-legal questions pertaining to EU multi-level health governance, including the rising area of sexual risk regulation, as well as questions regarding EU sexual citizenship,[4] and more particularly the discrimination of Lesbian Gay Bisexual Trans (henceforth "LGBT") individuals.[5] Moreover, the case sheds light on the role scientific expertise plays in domestic and supranational courts[6] and the interplay between legal discourse, scientific knowledge, rights and identity politics.[7]

Recently the "Orlando shooting" has reinforced interrogation of a similar risk-identity narrative by Western press and transnational LGBT networks in the context of blood donations.[8] After 32 years of a wider ban on blood donations by MSM population, the U.S. has shifted to restricting them to one year after the last sexual contact.[9] In Florida, the ban prevented hundreds of gay volunteers from donating blood to the victims of the notorious shooting – ironically – in a gay bar.[10] Allegedly irrespective of the *Léger* judgment, France has most recently also shifted from the total ban to a one-year restriction on blood donations by its MSM population.[11] Yet even this one-year restriction is of questionable necessity and is clearly discriminatory on the grounds of sexual orientation. Only a man who has not had any sexual contact with another man in the course of a whole year would qualify to give blood donations. In practice, therefore, this shift does not change much for gay individuals, since bisexual and heterosexual men are clearly more likely to satisfy that condition of abstinence. Both blanket and one-year bans resulted from an overabundance of government bureaucracy and caution, rather than science.

The facts and the judgment of the Court will be introduced in the first part of this article. The second part will look into the central matter of blood donation by the MSM population in a wider comparative socio-legal context, unpacking central aspects of the judgment in light of legal history of blood donations and as a matter of active citizenship, medical expression of solidarity vis-à-vis technical consumer-oriented and commercial goals, HIV/AIDS risk–identity narrative and the wider politics of LGBT discrimination. The third part will scrutinise the decision of the Court from the standpoint of EU law, placing the judgment in a broad spectrum of previous case law, progress of EU healthcare and risk regulation, analysis of proportionality and developments in EU sexual citizenship. Finally, the conclusions will summarise the contribution and shortcomings of *Léger* as a matter of both risk regulation and equal citizenship.

II. The Facts and the Judgment

The case was referred to the Court of Justice by a French administrative tribunal, after a physician refused to collect blood from Mr. Geoffrey Léger because of his homosexuality. France banned blood do-

4 Uladzislau Belavusau, "EU Sexual Citizenship: Sex Beyond the Internal Market", in Dimitry Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge: CUP, 2017 – forthcoming), also available as Uladzislau Belavusau, "EU Sexual Citizenship: Sex Beyond the Internal Market", *EUI Law Working Papers* 6, 2015.

5 The scope of other accounts of this case in literature has been limited mostly to the LGBT aspects of *Léger*, see Alina Tryfonidou, "The Leger Ruling As Another Example of the ECJ's Disappointingly Reticent Approach to the Protection of the Rights of LGB Persons under EU Law", 1 *European Law Review* 2016, pp. 91-104; Yehudi Pelosi, "L'exclusion permanente de tout homme homosexuel et bisexuel du don de sang à l'épreuve du droit de l'Union européenne", *Revue des droits de l'homme* 2015 (online journal); Peter Dunne, A Right to Donate Blood? Permanent Deferrals for "Men Who Have Sex with Men" (MSM): Léger, 52 *Common Market Law Review* 2015, pp. 1661-1678.

6 For a wider account, see Alberto Alemanno, "Science and EU Risk Regulation: The Role of Experts in Decision-Making and Judicial Review", in Ellen Vos (ed.), *European Risk Governance: Its Science, Its Inclusiveness and Its Effectiveness*, Connex Report Series, 2008; Maria Weimer and Gaia Pisani, "Expertise as Justification – the Contested Legitimation of the EU Risk Administration", in Maria Weimer and Anniek De Ruijter (eds.), *Regulating Risks in the European Union – The Co-Production of Expert and Executive Power* (Oxford: Hard, 2017 – forthcoming).

7 Austin Sarat and Thomas Kearn (eds.), *Identities, Politics, and Rights: A Reevaluation of How Rights Liberate and Constrain Human Behavior* (Ann Arbor: University of Michigan Press, 1996).

8 On 12 June 2016, a 29-year old security guard, Omar Mateen, killed 49 and wounded 53 people in a shooting attack inside a gay nightclub in Orlando, Florida. See Sam Levin, "Activists Urge US to End Ban on Gay Men Donating Blood After Orlando Massacre", *The Guardian*, 15 June 2016, available at: https://www.theguardian.com/us-news/2016/jun/14/orlando-pulse-shooting-gay-blood-ban-lgbt-rights.

9 For the current position of the FDA, see *Revised Recommendations for Reducing the Risk of Human Immunodeficiency Virus Transmission by Blood and Blood Products: Questions and Answers*, available at: http://www.fda.gov/BiologicsBloodVaccines/BloodBloodProducts/QuestionsaboutBlood/ucm108186.htm.

10 See Charles Piller Stat, "Blood Donation Restrictions for Gay Men 'Not Supported by Facts'; AIDS Experts Say", 13 June 2006, available at: http://www.pbs.org/newshour/rundown/blood-donation-limits-for-gay-men-not-supported-by-facts-aids-experts-say/.

11 Les conditions de l'ouverture du don de sang aux homosexuels, une « discrimination pure et simple », *Le Monde*, 5 November 2015, available at: http://www.lemonde.fr/sante/article/2015/11/05/les-associations-partagees-sur-les-conditions-de-l-ouverture-du-don-du-sang-aux-homosexuels_4803440_1651302.html.

nations by gay and bisexual men in 1983 in response to the human immunodeficiency virus (HIV) epidemic. In 2009, a Ministerial Decree reaffirmed this ban.[12] It provides for the selection criteria for blood donors and transposes the 2004 EU Directive implementing the Directive 2002/98/EC concerning technical requirements for blood and blood components.[13] The 2004 Directive lists eligibility criteria for blood donors and for permanent and temporary deferral from blood donations. One of these permanent criteria concerns *sexual behaviour*. The Directive refers to "persons whose sexual behaviour puts them at *a high risk* of acquiring serious infectious diseases that can be transmitted by blood".[14] In the *Léger* case, the Court was asked whether the permanent exclusion of MSM from blood donation is justifiable in light of the *high risk* of infectious diseases.

According to the Court, this question requires a two-tier analysis. In order to perform the risk assessment, the domestic court needs to determine the epidemiological situation in France, and in particular to ascertain "in light of current medical, scientific and epidemiological knowledge" whether data on the high number of HIV transmissions among MSM population is reliable and relevant.[15] Should this be the case, the domestic court needs to then examine if the permanent deferral is compatible with fundamental rights protected by the EU Charter and in particular with the equality principle.[16] In this respect, the Court notes that the domestic measure essentially determines permanent deferral from blood donations based on the homosexuality of the potential male donor. It may therefore discriminate against homosexuals. It follows that it is for the domestic court to ascertain whether this measure was adopted in order to pursue a legitimate aim – namely the protection of health – and whether it is proportionate.[17]

The Court stresses two elements central to the proportionality test: first, it is for the domestic court to ascertain whether there are effective techniques for detecting HIV in blood donations. This addresses one of France's arguments according to which the total ban on blood donations serves to ensure a maximum level of health protection. The reason behind the ban is that there is a "window period" after the first infection during which the virus cannot be detected in the blood. To this, the Court replies that it is for the domestic court to determine whether systematic quarantining of blood donations or screening for HIV of all blood donations is less burdensome than a permanent ban.[18] Second, should these techniques be not available, the French ban does not pass the proportionality test if there are other less onerous effective techniques for detecting HIV.[19] In particular, it is for the domestic court to verify whether an individual questionnaire – focusing on each donor's sexual behaviour by looking at the "period which has elapsed since (his) most recent sexual relations [...], the stability of the relationship of the person concerned, or whether sexual relations were protected"[20] – can allow health practitioners to asses whether the individual has a high risk of HIV infection.

III. Comment

1. Contextual Analysis of the Judgment as a Risk–Identity Narrative of Citizenship

Since Karl Landsteiner discovered distinct human blood groups in 1901, blood transfusion has been transformed into a scientifically validated procedure and has manifested itself in two different forms: as a commercial transaction and as a voluntary act based on solidarity.[21] World War II has shaped a specific

12 "Arrêté du 12 janvier 2009 fixant les critères de sélection des donneurs de sang, Ministère de la Santé et des Sports", available at:https://www.legifrance.gouv.fr/jo_pdf.do?numJO=0&dateJO=20090118&numTexte=23&pageDebut=01067&pageFin=01076.

13 Commission Directive 2004/33/EC of 22 March 2004 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components.

14 Point 2.1 of Annex III to Directive 2004/33/EC. In the French version of this Annex, both permanent deferral (point 2.1.) and temporary deferral (point 2.2.2.) apply to persons whose sexual behaviour puts them at "risk" of acquiring diseases transmitted by blood. However, in some language versions of this instrument, while temporary deferral requires the presence of "risk", permanent deferral requires a "high risk". That is the case, in particular, in the Danish (*stor risiko*), English (*high risk*), Italian (*alto risico*), Dutch (*groot risico*) and Polish (*wysokie ryzyko*) versions of those provisions. Yet in other language versions, points 2.1. and 2.2.2. both refer to "high risk", as in Spanish (*alto resgo*) and German (*hohes Risiko*). The Court found it logical that applicable criteria to permanent and temporary deferral must be different, despite the discrepancy amongst language versions (para. 36 in the Judgment).

15 Case C-528/13 Léger, *supra* note 2, at para. 44.

16 Case C-528/13 Léger, *supra* note 2, at para. 45.

17 Case C-528/13 Léger, *supra* note 2, at para. 52.

18 Case C-528/13 Léger, *supra* note 2, at para. 64.

19 Case C-528/13 Léger, *supra* note 2, at para. 65.

20 Case C-528/13 Léger, *supra* note 2, at para. 66.

21 Hans Peter Schwarz and Friedrich Dorner, "Karl Landsteiner and His Major Contributions to Haematology", *British Journal of Haematology* 121(4), 2003, pp. 556–565.

outlook on blood donation as a virtue of active citizens, the "patriots". In particular, the French *Résistance* spawned an enthusiastic mass culture of voluntary blood donations. Within this culture, a volunteer blood donor, a *bénévole*, has been praised for the medical expression of solidarity, when injured partisans from the anti-Nazi Resistance would receive the free blood collected in secret places under the threat of arrest.[22] In contrast, the Vichy government issued blood donors a special pass, an *Auswies*, allowing them extra food, telephones, gas rations, and other concessions. This juxtaposition has led to the emotional equation "benevolent donors = resisters, paid donors = collaborators".[23] The *Code du Donneur du Sang* written in 1944 by donor associations, specified that donors should commit to answering any call, including emergencies, whether they are compensated or not.[24]

In July 1952, a special provision was adopted to institute the rule of unprofitable – that is, voluntary and unremunerated – blood donation for the therapeutic use of human blood, plasma, and other products derived from them.[25] Likewise, a law adopted in 1993 has mandated a voluntary and anonymous model of donation without profit. Yet the blood segment alone of the French healthcare system has caused by now the greatest medical scandal in France. The judgment in the *Léger* does not specifically mention this *affaire du sang contaminé*, which has fostered a new concept in public policy: health security, *securité sanitaire*.[26] Yet the Court's stunning reliance on the national epidemiological context may well be attributed to the specificity of health battles in the French politics of the 1980–1990s, when France became one of the leading countries in the number of blood transfusions contaminated with the HIV and the hepatitis C virus (HCV).[27] The crisis has led not only to well-highlighted criminal proceedings against a number of politicians,[28] but also to a profound reform in the system of blood transfusion and to surveillance of pharmaceutical products and the plasma sector in France.[29] A Higher Committee for Public Health has been created and entrusted with regular reporting to the government on public health issues.[30]

As a consequence of this crisis, the attitude towards blood donation has changed drastically in the eyes of the public. From a noble expression of social solidarity, the blood sector has come to be viewed rather as a technical, consumer-oriented domain. From being categorised as a "part of the human body", blood has descended to the level of just another pharmaceutical product.[31]

A somewhat similar transformation of the views on blood donation has occurred in the United States, where the HIV virus was first identified in the early 1980s. In the time of uncertainty and the seeming prevalence of the HIV, the U.S. Food and Drug Administration (FDA) issued a ban on blood donation by MSM.[32] France followed the U.S. with a similar restriction almost immediately. These bans appeared

22 Sophie Chauveau, "The Contaminated Blood Affair in France: A Turning Point in Blood Donation", in Johanne Charbonneau and André Smith (eds.), *Giving Blood: The Institutional Making of Altruism* (London: Routledge, 2016), pp. 71–88.

23 Paul Rabinow, *French DNA: Trouble in Purgetory*, (Chicago: The Union of Chicago Press, 1999), at p. 84.

24 Sophie Chauveau, "The Contaminated Blood Affair in France: A Turning Point in Blood Donation", in Johanne Charbonneau and André Smith (eds.), *Giving Blood: The Institutional Making of Altruism* (London: Routledge, 2016), pp. 71–88. (at p. 77).

25 Sophie Chauveau, "The Contaminated Blood Affair in France: A Turning Point in Blood Donation", in Johanne Charbonneau and André Smith (eds.), *Giving Blood: The Institutional Making of Altruism* (London: Routledge, 2016), pp. 71–88. (at p. 77).

26 See Steve Wharton, "AIDS", in Alexandra Hughes and Keith Reader (eds.), *Encyclopedia of Contemporary French Culture* (London: Routledge, 1998), pp. 9–10.

27 The incidence rate of HIV and AIDS in France was several times greater than that of Germany and the U.K.

28 Three former ministers, including the Prime Minister, were accused of manslaughter (*homicide involontaire*) for their decisions and non-decisions during 1985. More than 30 experts, doctors and government advisors have been under legal inquiry since 1995, most of them for poisoning. See Philippe Froguel and Catherine Smajda, "Les dessous de l'affair du sang contaminé", *Le Monde Diplomatique* (1999), pp. 27 *et sqq*.

29 Steve Wharton, "AIDS", in Alexandra Hughes and Keith Reader (eds.), *Encyclopedia of Contemporary French Culture* (London: Routledge, 1998), pp. 9–10.

30 Sophie Chauveau, "The Contaminated Blood Affair in France: A Turning Point in Blood Donation", in Johanne Charbonneau and André Smith (eds.), *Giving Blood: The Institutional Making of Altruism* (London: Routledge, 2016), pp. 71–88 (at pp. 77–78).

31 Monika Steffen, "Risk and Crisis Management in France: The HIV/Blood Case", contribution to the ECPR Workshop in Mannheim (March 1999), p. 3, available at: https://ecpr.eu/Filestore/PaperProposal/3e29504d-669b-4a57-8261-22785b08d809.pdf. See also Jane Kramer, "Bad Blood", *The New Yorker* (11 October 1993); Eric A. Feldman and Ronald Bayer (eds.), *Blood Feuds: AIDS, Blood and the Politics of Medical Disaster* (Oxford: OUP, 1999).

32 Just in the past 10 years, the FDA has changed its recommendations for donor deferral several times. The latest changes came in November 2014. According to this latest version, the 12-month deferral since the most recent sexual contact with another man is prescribed, *inter alia*, for MSM. Likewise, a recommendation is made to defer for 12 months since the most recent contact a female who has had sex in the past 12 months with a man who has had sex with another man in the past 12 months. For summary, seehttp://www.fda.gov/BiologicsBloodVaccines/BloodBloodProducts/QuestionsaboutBlood/ucm108186.htm.

before blood screening techniques had been developed. Although all blood is now tested for a range of diseases, including HIV/AIDS, there is a window period (ranging from one to three months, depending on the research data) during which the disease can escape detection. This window period poses a discrimination dilemma, as it can be used as a pretext to exclude substantial groups of citizens from blood donation. While other "unsuspected" groups (e.g. heterosexuals with no history of STDs or sex work) can also remain unknowingly infected during this window period, the exclusion of MSM is based on a suspicion that they are at a higher risk of being infected in general, and thus also during the window period, in particular. To a certain extent, this attitude echoes the early – and largely erroneous – epidemiological designations of HIV, which referred to it as Gay Related Immunity Disorder (GRID) and Gay Compromise Syndrome.[33]

By the mid-1980s the link between AIDS and "immoral" homosexual sex had been set in stone.[34] The policy of excluding MSM from blood donation has been seen as a part of medical heteronormativity and triggered an impressive array of LGBT activism in the 1980–1990s, which – together with other social demands for medical justice (e.g. the fight for HIV medications free of charge)[35] – has been one of the major catalysts for wider advocacy of LGBT rights, exposing social stigmas of gay identity and demanding decriminalisation of gay relations, marriage equality and protection in employment, to name but a few examples.[36] In this respect, epidemiology and human rights activism have been co-producing ideas on identity and risk (the *identity–risk narrative*), which largely explains contemporary allocation of funding and resources by international organisations.[37] The dilemma of blood donation seen as a virtue of active and equal citizenship has thus stimulated the impressive mobilisation of LGBT cause championing civil rights.

Interestingly enough, the exclusion of certain groups of population from blood donation in Western countries has never spread to racial minorities, despite certain statistical data showing that HIV – for various social and economic reasons – is more often encountered amongst specific ethnic groups.[38] The exclusion was therefore largely based on *sexual* rather than *racial* identity, targeting gays, along with sex workers and people with a recent history of STDs (sexually transmitted diseases). According to current scientific data, the vulnerability for HIV infection associated with various forms of unprotected sexual activities breaks down as follows (from high risk to lower risk):

1. Receptive anal sex (1.4%).
2. Receptive vaginal sex (0.008%).
3. Insertive anal sex (0.06-0.624%).
4. Insertive vaginal sex (0.04).[39]

This data refers to unprotected sexual contacts, i.e. intercourse without use of condoms. Neither in the United States nor in France does the 12-month deferral requirement for MSM regard condom usage as

33 Aziza Ahmed, "'Rugged Vaginas' and 'Vulnerable Rectums': The Sexual Identity, Epidemiology, and Law of the Global HIV Epidemic", *Columbia Journal of Gender and Law* 26(1), 2013, at p. 25. At the time epidemiologists isolated and promoted anal sex as the key mode of transmission of HIV amongst gay men. The vagina, to the contrary, was seen as a much stronger barrier for HIV infection to enter the body.

34 Eric Berkowitz, *The Boundaries of Desire: A Century of Bad Laws, Good Sex, and Changing Identities* (Berkeley: Counerpoint, 2015), at p. 101.

35 Ilan H. Meyer and Mary E. Northridge, *The Health of Sexual Minorities: Public Health Perspectives on LGBT Populations* (New York: Springer, 2007).

36 About emancipation of various LGBT causes via EU law, see Uladzislau Belavusau and Dimitry Kochenov, "Federalizing Legal Opportunities for LGBT Movements", in Koen Slootmaeckers et al. (eds.), *The EU Enlargement and Gay Politics* (Palgrave, 2016), pp. 69-96.

37 Aziza Ahmed, "'Rugged Vaginas' and 'Vulnerable Rectums': The Sexual Identity, Epidemiology, and Law of the Global HIV Epidemic", *Columbia Journal of Gender and Law* 26(1), 2013, p. 1–57. According to Ahmed, this attitude, *inter alia*, masks our understanding of HIV transmission, excludes individuals who do not fit neatly into identity-demarcated territory, and deradicalises HIV activism (p. 6). She refers to the continued engagement with rights claiming and epidemiological ideas on vulnerability, through which identity categories reproduce themselves – *identity/risk narrative*.

38 E.g. in the United States 44% (19,540) of estimated new HIV diagnoses in 2014 were among African Americans, who comprise only 12% of the US population. See Center for Disease Control and Protection, HIV Surveillance Report, 26, 2014, available at:http://www.cdc.gov/hiv/pdf/library/reports/surveillance/cdc-hiv-surveillance-report-us.pdf. See also Donna Hubbard McCree, Kenneth Terrill Jones, Ann O'Leary (eds.), *African Americans and HIV/AIDS: Understanding and Addressing the Epidemic* (New York: Springer, 2010).

39 Rebecca Baggaley, Richard White and Marie-Claude Boily, "HIV Transmission Risk Through Anal Intercouse: Systematic Review, Meta-Analysis and Implications for HIV Prevention", *International Journal of Epidemiology*, 39(4), 2010, pp. 1048–63; Janson F. Jon et al., "Per-Contact Probability of HIV Transmission in Homosexual Men in Sydney", *AIDS*, 24(6) 2010, pp. 207–13. The factors that can increase risk include higher viral load, SSTIs, some vaginal conditions, tearing and abrasions, menstruation and other bleeding. Factors that can decrease risk include, *inter alia*, lower viral load, PEP (post-exposure therapy) and PrEP (pre-exposure therapy), circumcision and lubrification.

possible grounds for exemption from the ban on blood donation, nor does it position those MSM practising "topping" (anal sex in the active role) as being at lower risk than "bottoming", while statistics show that the difference in risk between insertive anal sex and insertive vaginal sex is rather minimal.

The judgment in *Léger* was delivered in a divisive domestic and global social context. In France, the ruling came only a year after the country finally legalised same sex marriages,[40] shedding light on other remaining legal exclusions faced by the gay population. During his presidential campaign François Hollande promised to lift the ban, as some LGBT associations have argued that it constitutes a discriminatory practice on the grounds of sexual orientation.[41]

Moreover, two recent French studies have come to opposite conclusions: the "Véran Report" (referred to by the Court of Justice)[42] recommends improving the individual questionnaire, which would allow health practitioners to evaluate whether the sexual behaviour of an individual male donor who had or has sex with men exposes him to a high risk of HIV infection, while the *Comité Consultatif National d'Éthique pour les Sciences de la Vie et de la Santé* suggested that the ban should be maintained.[43] The Committee stressed three factors explaining this decision: insufficient current scientific knowledge, lack of efficient information campaigns targeting the MSM population and the format of the individual questionnaire. The Committee suggested that the state needs to organise a wider public debate with all the stakeholders before introducing any legal changes.[44]

Outside of France, total bans are also being called into question with a clear tendency within the EU to abolish them. In Europe, Spain, Italy and the U.K. have adopted temporary deferrals for up to a year, in attempt to address the supposedly higher risk of HIV amongst MSM during the window period. Independently of the judgment in *Léger*, France has most recently adopted a model similar to the one administered by the Food and Drug Administration in the United States. It does not fully exclude the MSM population (as was the case in *Léger*), yet it maintains the rule on deferral for MSM who had a sexual contact with men in the past 12 months.[45] In practice, therefore, it does not change much for the ability of gay men to exercise their active citizenship.

2. Critical Assessment in Terms of EU Law

Léger is not the first case where the Court of Justice has engaged with the matters of blood transfusion. In fact, the wide engagement of EU law in matters concerning blood and its derivatives both as a medical and commercial issue demonstrates the growing concern about EU sexual risk regulation.[46] At the European level, numerous initiatives related to the blood and plasma sectors have been undertaken since 1989.[47] Directives on standards were developed with regard to the quality and safety of the collection, testing, processing, storage and distribution of human blood and blood components, and traceability requirements and notification of serious adverse reactions and events were also addressed.[48] It appears that the precautionary principle has been central in these European guidelines.[49] Moral panic about

40 Scott Sayare, "Amid Much Tumult, France Approves 'Marriage for All'", *The New York Times* (23 April 2013), available at: http://www.nytimes.com/2013/04/24/world/europe/france-approves-same-sex-marriage.html?_r=0.

41 Henry Samuel, "France to Lift Blood Donation for Gay Men", *Telegraph* (4 November 2015), available at: http://www.telegraph.co.uk/news/worldnews/europe/france/11974746/France-to-lift-blood-donation-ban-on-gay-men.html.

42 Oliver Véran, *Rapport: La filière du sang en France*, (July 2013) available at: http://social-sante.gouv.fr/IMG/pdf/Rapport_Veran_filiere-sang.pdf.

43 *Avis no. 123, Questionnement éthique et observations concernant la contre-indication permanente du don de sang pour tout homme déclarant avoir eu une ou des relation(s) sexuelle(s) avec un ou plusieurs homme(s)* (2002), available at: http://www.ccne-ethique.fr/sites/default/files/publications/avis_ndeg123.pdf.

44 Ibid.

45 "Les conditions de l'ouverture du don de sang aux homosexuels, une « discrimination pure et simple »", *Le Monde*, 5 November 2015, available at: http://www.lemonde.fr/sante/article/2015/11/05/les-associations-partagees-sur-les-conditions-de-l-ouverture-du-don-du-sang-aux-homosexuels_4803440_1651302.html.

46 On the general rise of risk regulation in EU law, see Alberto Alemanno, *EU Risk Regulation: Towards a European Government of Health, Safety and Environmental Risks* (Oxford: Hart, 2017). Risk regulation is becoming a new lens through which to analyse the European integration process.

47 Initially Directive 89/38/EEC.

48 Directive 2002/98/EC and the relevant implementing Directives 2004/33/EC, 2005/6/EC and 2005/62/EC.

49 For recent critique, see Wim De Kort et al., "Blood Donor Selection in European Union Directives: Room for Improvement", *Blood Transfus*, 14(2), 2016, pp. 101–108. For a wide overview of the EU instruments in the area, see C-C/EAHC-EU Commission-EU Overview of the Landscape of Blood and Plasma / Creative Ceutical Executive Report Revised by the Commission to Include the Stakeholders' comments, 2015, available at:http://ec.europa.eu/health/blood_tissues_organs/docs/20150408_cc_report_en.pdf.

health risk regulation was partially linked to the fear that the quality of blood donated on a commercial basis is more susceptible to the risk of infection. Relevant EU legislation encourages, but does not require unpaid donation, as was made abundantly clear in the jurisprudence of the Court of Justice.

In 2010, the CJEU ruled that prohibition on the importation of blood products acquired for payment in Austria[50] was in breach of EU law on free movement of goods.[51] The Court has analysed the need to protect public health as a possible justification and came to the conclusion that free movement and competition are the rule, while health protection are rather the exception.[52] Interestingly enough, in *Léger* – in a wholly internal, non-commercial situation within a Member State – the Court seems to adopt a somewhat different logic, placing health protection as a rule and anti-discrimination as exception.

The 2009 Commission Communication on Combatting HIV/AIDS in the EU and neighbouring countries identifies policies to help reduce the number of new infections and improve the quality of life for people living with HIV/AIDS.[53] A 2015–2016 Action Plan extending the 2009–2013 Action Plan explains how the EU, civil society, international organisations and stakeholders will achieve this.[54] The plan makes clear that the main HIV transmission mechanism differs depending on the region. It indicates that in the EU/EEA HIV is predominantly transmitted by the MSM, although HIV transmission via heterosexual contacts also plays a significant role. By contrast, in neighbouring countries the main transmission mode is heterosexual contact, followed by injection drug use (IDU). Besides MSM and injection drug users, other vulnerable groups at high risk of HIV include migrants, sex workers and prisoners. The strategy developed in the action plan seems to be essentially based on nudging the MSM population to adopt safer sexual practices, along with fighting stigma and discrimination. In August 2016, the European Commission announced its plan to promote PReP as a new method to combat the rise of HIV infection.[55] Unlike condoms, PrEP is a pre-exposure prophylaxis for HIV.[56] The medical regime recommended in Europe is based on approval of Truvada as the primary medication that individuals practicing unprotected sex should be advised to take.

In 2015, the European Commission authorised an advanced emergency contraceptive, ellaOne® ("morning pill"), to be available in pharmacies without a doctor's prescription.[57] Together with EU involvement with regulation of sexual health and other sexual risks, including sexual harassment and trafficking, this decision regarding contraceptive products signals the emergence of EU sexual risk regulation as a domain that extends beyond mere HIV/STD prevention, drawing analogies with earlier examples of obesity, tobacco and alcohol regulation.[58] A common usage of "responsible reproductive choices" refers to increasing knowledge in the area of genetics and its influence on appropriate reproductive choices by citizens.[59]

Two aspects of reasoning in the *Léger* judgment – related to the discrimination analysis and the broader politics of the Court's decision – appear particularly troublesome.

First, in its discrimination analysis, the Court only makes reference to the Charter of Fundamental Rights, neglecting other EU law instruments that prohibit discrimination on the grounds of sexual orientation. Unlike Advocate General Mengozzi,[60] the Court does not mention the Article 19 TFEU, which gives the EU power to tackle discrimination on the grounds of sexuality. Neither does it refer to – even

50 *Blutsicherheitsgesetz*, 1999, para. 8(9).

51 C-421/09, Humanplasma [2010] ECLI:EU:C:2010:760.

52 Tamara K. Hervey and Jean V. McHale, *European Union Health Law: Themes and Implications* (Cambridge: CUP, 2015), at p. 115. In its reasoning, the CJEU relied in part on the fact that blood safety Directive 2002/98/EC permits reimbursement of donors' expenses and other small tokens of payment.

53 "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Combating HIV/AIDS in the European Union and neighbouring countries, 2009–2013", COM(2009)569, available at: http://ec.europa.eu/health/ph_threats/com/aids/docs/com2009_en.pdf.

54 "Action Plan on HIV/AIDS in the EU and Neighbouring Countries 2014–2016", SWD(2014) 106, available at: http://ec.europa.eu/health/sti_prevention/docs/ec_hiv_actionplan_2014_en.pdf.

55 Megan Brooks, "EU Commission Clears Truvada for HIV PrEP", *Medscape* (August 2016), available at: http://www.medscape.com/viewarticle/867828.

56 Jason Potter Burda, "PrEP and Our Youth: Implications in Law and Politics", *Columbia Journal of Gender and Law* 30(2), 2015, pp. 295-363.

57 HRA Farma Press Release (January 2015), available at:http://www.hra-pharma.com/userfiles/file/CP/European_commission_release_08012015.pdf.

58 For a major *œuvre* in this area, see Alberto Alemanno and Amandine Garde (eds.), *Regulating Lifestyle Risks: The EU, Alcohol, Tobacco and Unhealthy Diets* (Cambridge: CUP, 2015).

59 John R. Spencer and Ant du Bois-Pedain (eds.), *Freedom and Responsibility in Reproductive Choices* (Oxford: Hart, 2006).

60 Opinion of AG Mengozzi in Case C-528/13 Léger [17 July 2014] ECLI:EU:C:2014:2112, at para. 15.

en passant – to the Equal Treatment Directive 2000/78,[61] which incorporated prohibition of discrimination on the grounds of sexual orientation into EU secondary law. This narrow understanding of the EU discrimination regime suggests that the Court is unwilling to stretch the material scope of the Equality Directive beyond the employment market and labour relations. The decision therefore calls into question the very existence of a general principle of non-discrimination on the grounds of sexual orientation. For a different understanding of the material scope of discrimination, see the opinions of AG Jääskinen in *Römer* Case C-147/08[62] and AG Mengozzi in the present case.[63]

Second, the Court's analysis of discrimination is extremely narrow: the broader social patterns of scientific knowledge and health policies are excluded from the inquiry. In addition, *bisexuals* are left aside as a subject of sexual discrimination. This is striking, as the French measure targets both homosexuals and bisexual men, as well as the whole range of fluid identities including straight-men-occasionally-engaging-in-gay-sex. In this context, it is hard to understand why the Court decided to leave this category unaddressed. This type of reasoning reinforces the straight–gay binary and a dichotomist vision of sexuality. It contradicts the broader vision of EU sexual citizenship, which – as I have argued elsewhere[64] – needs to be seen as a *continuum* rather than a set of clearly defined categories. It also brings us back to the broader issue of the invisibility of bisexuals, or as Kenji Yoshino described it in the U.S. context, "the epistemic contract of bisexual erasure".[65]

The second point of criticism relates to the normative consequences of the decision. Despite its progressive tone, this case actually reinforces the idea that HIV is a "gay disease". This may seem particularly surprising in light of the Court's willingness to fight homophobia as a matter of direct discrimination in the labour context.[66]

The Court engages extensively in the proportionality analysis, suggesting that in some cases the permanent ban may be compatible with EU law including its prohibition of discrimination. However, the reasoning seems confusing, as techniques such as quarantining of the blood and the systematic screening of blood donations are already available and implemented by some countries. It therefore seems that a Member State can hardly satisfy the first part of the proportionality test.

Moreover, if the window period amounts to twenty-two days – as claimed by the French Government[67] – the Court does not explain why all instances of MSM intercourse, including those occurring, for example, four months before the blood donation, should necessarily exclude this category of people from donation? Likewise, the Court seems to back the French ban's focus on *sexuality* while the Directive specifically mentions *sexual behaviour*. According to the French law, a man or a woman having frequent unprotected heterosexual intercourse – including with an HIV-infected partner – will be, at best, temporally excluded from donation, while a man in a committed homosexual relationship is permanently excluded. It is hard to see how this disparate treatment can be scientifically justified.

IV. Conclusions: *Jus Sanguinis* and Sexual Risk Regulation in EU Law

Blood seems to be an omnipresent trope in our culture.[68] From the practice of the Eucharist – where believers drink wine symbolising the blood of Jesus – to the ideas of belonging to a certain "bloodline" and being of pure blood, the religious dogmas about menstruation period and the blood of animals, this bodily liquid has acquired a quasi-mystical significance

61 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *Official Journal* L 303, 02/12/2000 P. 0016 – 0022.

62 Opinion of Advocate General Jääskinen in C-147/98, Jürgen Römerv. Freie und Hansestadt Hamburg [15 July 2010] ECLI:EU:C:2010:425, para. 80, 146, 147.

63 Opinion of AG Mengozzi in Case C-528/13 Léger [17 July 2014] ECLI:EU:C:2014:2112, para. 62

64 Uladzislau Belavusau, "EU Sexual Citizenship: Sex Beyond the Internal Market", in Dimitry Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge: CUP, 2017 – forthcoming), also available as Uladzislau Belavusau, "EU Sexual Citizenship: Sex Beyond the Internal Market", *EUI Law Working Papers* 6, 2015.

65 Kenji Yoshino, "The Epistemic Contract of Bisexual Erasure", *Stanford Law Review*, 2000.

66 See my analysis in the case of C-81/12, *Asociația ACCEPT* [2013], in Uladzislau Belavusau, "A Penalty Card for Homophobia from EU Non-Discrimination Law", *Columbia Journal of European Law* 21(2), 2015, pp. 237–259.

67 See also para. 50 in the Opinion of AG Mengozzi in Case C-528/13 Léger [17 July 2014] ECLI:EU:C:2014:211.

68 Christopher H. Johnson et al. (eds.), *Blood and Kinship: Matter for Metaphor from Ancient Rome to the Present* (Bergham Books, 2013).

in popular cultures.[69] The major route to gaining citizenship remains the *jus sanguinis* – that is, citizenship by birth – literally "via blood".[70] As was exposed by Carl Schmidt, the narrative of capitalism is based on the rhetoric of liquid circulation, "whereby the blood of Christ became the flow of capital".[71] Such a haematological and largely haemapoetic vision is equally embodied in the culture of active citizenship. This paper has demonstrated that voluntary blood donation has for a long time been a major indicator of active citizenship in liberal democracies. In this respect, the judgment in *Léger* is more than just a matter of epidemiological restrictions in light of medical risks. Access to blood donation is indispensable for equal citizenship and non-discrimination.

The judgment shows a very cautious engagement on the part of the Court in matters regarding EU sexual risk regulation, a domain that these days includes a number of EU-generated policies aiming to foster reproductive health and contraception, as well as the prevention of STDs and HIV. The cautious approach adopted by the Court seems even more problematic considering that specifically targeting the MSM population relies on cultural demeaning representations of gay and bisexual sexualities connected to promiscuity.[72] This reinforces the division between "virtuous straights" and "contagious gays", and supports the perception of gays as "dangerous" or as social outcasts. Overall, the EU Court seems to have missed a timely occasion to explain why – both legally and politically – such health policies are discriminatory and humiliating.

69 Gil Anidjar, *Blood: A Critique of Christianity* (New York: Columbia University Press, 2014).

70 Rainer Bauböck et al. (eds.), *Acquisition and Loss of Nationality: Comparative Analysis* (Amsterdam: Amsterdam University Press, 2006).

71 Carl Schmitt, *The Concept of the Political*, as cited in Gil Anidjar, *Blood: A Critique of Christianity* (New York: Columbia University Press, 2014), at p. VIII.

72 Christian Klesse, *The Spectre of Promiscuity: Gay Male and Bisexual Non-Monogamies and Polyamories* (London: Routledge, 2007).