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The Role of Member State Governments in Migration Litigation before the ECJ

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Abstract

It is habitually presumed that Member State governments primarily articulate themselves in litigation before the Court of Justice for the purpose of voicing opposition to an overly activist court. This view is especially pronounced in migration law. Although the presumption is invigorated by several high-profile judgments, it provides only a glimpse into the diversity of motives that Member State governments may pursue in court. Based on a comprehensive collection of judgments in the field of migration law, this article revisits the role of Member State governments in migration litigation before the Court of Justice. It advances a nuanced understanding of national governments' litigation activity, highlighting the variety of motives and patterns of argument.

Keywords

ECJ – Member State governments – Charter of Fundamental Rights – administrative discretion – public security

1 Introduction

Member State governments routinely articulate themselves before the Court of Justice of the EU (ECJ). Eloquence in court is a prerequisite to propose one's preferred interpretation of Union law. In this context, governments are often portrayed as antagonists to an overly activist Court in Luxemburg, willing to

draw red lines to integration through law.[1] If an interpretation of Union law threatens to bridle Member States' latitude, governments will be inclined to voice their opposition in court and may oftentimes rigorously do so.

This perception of Member State governments' role is particularly pronounced in the field of migration law.[2] It is empirically borne out by a number of high-profile litigations,[3] in the course of which a large number of governments submitted observations for the purpose of maintaining a degree of political manoeuvrability.[4] This specimen, however, may gloss over the variety to which Member State governments' interaction with the Court is home. As Garrett et al. have warned, the 'selective citation of illustrative cases' may provide an incomplete portray of governments' role in litigation before European courts.[5] It may lead to the hasty conclusion that Member State governments express themselves primarily to rally against an unduly activist European court, and too often unsuccessfully so. With a view to the field of migration law, this would be a misapprehension.

The following investigation will expand on the motive of political manoeuvrability and propose a nuanced view on Member State governments' interaction with the ECJ. In this regard, it will revisit forms of advocacy that Member States utilise for the purpose of attaining a degree of political agency. Moreover, it ferrets out litigation strategies that aim at other motives than safeguarding Member States' manoeuvrability. For this purpose, the following examination considers Member State governments' articulations in litigation before the ECJ, based on a collection of 171 judgments relating to the field of migration law.[6] In substance, the investigation will analyse rulings that refer to EU

1 See Bulterman, M. and Wissels, C. (2013). Strategies developed by—and between—national governments to interact with the ECJ, in: B. d. Witte, E. Muir and M. Dawson (Eds.), *Judicial activism at the European Court of Justice*. pp. 264–278, Edward Elgar Publishing, Cheltenham.

2 See Granger, M.-P. (2013). From the Margins of the European Legal Field: The Governments' Agents and their Influence on the Development of European Union Law, in: A. Vauchez and B. d. Witte (Eds.), *Lawyering Europe: European Law as a Transnational Social Field*. Modern Studies in European Law, Vol. 37, pp. 55–72, at 69, Hart Publishing, Oxford.

3 The litigations in ECJ, C-411/10 and C493/10, *N.S. and Others*, EU:C:2011:865 or *X & X*, C-638/16 *PPU*, EU:C:2017:173 may illustrate that effect. Similarly, see Bulterman and Wissels (n 1), who make reference to Member State governments' observations in C-34/09, *Zambrano*, EU:C:2011:124 and C-127/08, *Metock*, EU:C:2008:449.

4 Baumgärtel, M. (2018). 'Part of the Game' Government Strategies against European Litigation Concerning Migrant Rights, in: T. Aalberts and T. Gammeltoft-Hansen (Eds.), *The Changing Practices of International Law*. pp. 103–128, Cambridge University Press, Cambridge.

5 Garrett, G. et al. (1998). The European Court of Justice, National Governments, and Legal Integration in the European Union. *International Organization* 52(1), pp. 149–176, at 151.

6 This selection is the product of a research project carried out under the supervision of Professor Dr. Daniel Thym at the Chair of Public, European and International Law at University Konstanz.

measures adopted pursuant to Articles 77 to 79 TFEU, thus dealing with border and visa policies, asylum and regular stays of third-country nationals as well as their extradition.

The following examination intends to verify moreover whether Member State governments partake actively in migration litigation before the ECJ and examines the way they do so. It will propose a categorisation of submissions, specifying and complementing the assumption that national governments submit observations for the purpose of warranting national sovereignty. The investigation does not intend to shame 'wrong' arguments, i.e. those that were rejected by the ECJ. Rather, it regards Member State governments' and the ECJ's interaction in process.[7] By doing so, the examination will shed light on national governments' role in litigation and to acquire a substantiated understanding of motives to articulate oneself in Luxemburg on matters of migration law.

In order to do so, it will consider the perception of Member State governments' role in European litigation as advocates of national sovereignty (2). On that basis, the investigation will quantitatively relate the frequency of governmental submissions in migration law to their activity in other substantive fields of law, thus fleshing out the assumption that Member State governments partake actively in migration litigations (3). It will be shown that, in doing so, they advance discernible legal arguments for the purpose of maintaining a degree of political manoeuvrability (4.) and that they may equally pursue other objectives in court (5). The investigation concludes by revisiting the role of Member State governments in migration litigation (6).

The following investigation will rest on empirical findings derived from a multiple-case study, comprising 171 litigations in the field of migration law. For this purpose, it will consider the documents published by the ECJ, which, in this field of law, arise foremostly from preliminary reference procedures, and opinions by the Court's Advocate Generals. In doing so, it operates against the background of an appreciable limitation, namely the acquisition of relevant information relating to the substance of arguments put forward by national governments in ECJ litigation. The ECJ treats submissions by national governments as property of the latter.[8] As such, the desk-research relies on explicit references of governmental observations in the documents of the Court. Whereas this indubitably leaves an analytical blind spot, the analysis may nevertheless

7 For this reason, the following investigation will refer to 'litigation' rather than 'judgment' or 'ruling', whenever reference should be made to arguments raised before judgment was rendered.

8 Cf. Cramér, P. et al. (2016). *See You in Luxembourg? EU Governments' Observations Under the Preliminary Reference Procedure*, Swedish Institute for European Policy Studies, Stockholm, p. 16.

allow for the drawing of conclusions, namely regarding arguments that the ECJ or the Advocate Generals included in their considerations. A second limitation results from the investigation's focus on legal arguments to attain certain policy preferences. As Baumgärtel already demonstrated, there are other means of maintaining national manoeuvrability in migration law.[9] These strategies, however, take effects outside court, and are therefore excluded from the scope of this study on Member State governments' role in migration litigation before the ECJ.

2 National Governments as Advocates of National Sovereignty

Member State governments may articulate themselves on several occasions in proceedings before the ECJ. First and foremost, they may do so as plaintiff or defending party,[10] or in support of one or another party to the litigation, without having to demonstrate an interest in the result of the case as such.[11] Moreover, Member States routinely express their views in the context of the preliminary reference procedure. Pursuant to Article 23 ECJ Statute, they may submit 'statements' to outline their preferred interpretation of Union law.[12] Unlike the pleas in defence of an action in infringement procedures, which are primarily of a defensive nature, observations in preliminary reference procedures may lend themselves to rather general remarks. In quantitative terms, most judgments rendered by the ECJ in the field of migration law arose against the background of preliminary reference procedures, outnumbering by far all other types of procedure.[13] Member State governments use this opportunity actively,[14] and their submissions may, in principle, be welcomed by the Court.

Organisationally, national governments articulate themselves in Luxemburg through agents. These representatives prepare and produce the observations

9 See Baumgärtel (n 4).

10 Article 21 & 41 Statute of the Court of Justice of the European Union.

11 Article 40 Statute of the Court of Justice of the European Union. See also Wägenbaur, B. (2013). *Court of Justice of the European Union. Commentary on statute and rules of procedure*, Beck, München, p. 108.

12 The following sections will use the broad terms 'observations' or 'submissions' to refer to both 'interventions' in direct actions and to 'statements' in preliminary references procedures.

13 See Thym, D. (2019). A Bird's Eye View on ECJ Judgments on Immigration, Asylum and Border Control Cases. *European Journal of Migration* 21, pp. 166–193, at 173 et seq.

14 See Dederke, J. and Naurin, D. (2018). Friends of the Court? Why EU governments file observations before the Court of Justice. *European Journal of Political Research* 57, pp. 867–882, at 869 et seq.

that national governments wish to submit and harmonise internally divergent positions to that end.[15] Agents' portfolios are heavily influenced by the institutional context in which they operate. They are usually teamed up in litigation units of different structure and size, receiving notifications and exchanging views with respective ministerial departments. However, in some Member States, the decision to file an observation with the ECJ must be authorised by high-rank political bodies, often at ministerial level.[16] This may effectively aggravate their capacity to meet strict deadlines for submission, especially if matters are highly politicised. Larger Member States tend to submit observations more often than smaller ones.[17] This will not come as a surprise, given the divergence in resources awarded to the respective entities.[18]

All the same, funding or staffing alone cannot explain national governments' activity in ECJ litigation. Rather, the principal incentive for Member State governments to articulate themselves in Luxemburg lies in influencing 'the ECJ to deliver judgments that are in line with [their respective] legal and political interests'.[19] Accordingly, litigation is not simply a venue for jurists to talk shop. It is a means to mediate societal interests, political preferences and power through the lenses of legal arguments.[20] Once a specific legal argument coincides with the political interests or preferences of Member State governments, submitting an observation to the Court may be particularly promising.

2.1 *In Pursuit of National Manoeuvrability*

Political scientists tend to agree that governments articulate themselves before European courts broadly for the purpose of maintaining a degree of agency.[21] Garrett et al. indicate in this regard that national governments 'typically value

15 See Granger (n 2), at 60 et seq. Equally, Granger, M.-P. (2009). Les stratégies contentieuses des États devant la Cour de justice, in: A. Vauchez (Ed.), *Dans la fabrique du droit européen: Scènes, acteurs et publics de la Cour de justice des Communautés européennes*. Collection droit de l'Union Européenne Colloque, Vol. 9, pp. 54–104, Bruylant, Bruxelles. See also the insightful explications of Bulterman and Wissels (n 1), at 265 et seq.

16 See Granger (n 2), at 60–61.

17 See Dederke and Naurin (n 14), at 871.

18 See Cramér et al. (n 8), at 21.

19 Bulterman and Wissels (n 1), at 265.

20 See Dederke and Naurin (n 14), at 869. The ECJ's jurisprudence by no means merely rephrases or reverberates Member States' interests, see only Azoulai, L. and Dehousse, R. (2012). The European Court of Justice and the Legal Dynamics of Integration, in: E. Jones, A. Menon and S. Weatherill (Eds.), *The Oxford Handbook of the European Union*. pp. 350–364, Oxford University Press, at 355.

21 See Granger, M.-P. (2006). States as Successful Litigants before the European Court of Justice: Lessons from the 'Repeat Players' of European Litigation. *Croatian Yearbook of European Law and Policy* 2(2), pp. 27–49, at 39.

sovereignty because they consider it a pre-requisite for winning in domestic politics.'[22] This view paints governments' interests with a broad brush, portraying them as the principal advocates of national sovereignty who would not tire to flag red lines to integration through law.[23] Governments' active stance in litigation before European courts may thus be perceived of as a means to pursue policy outcomes, notably, the maintenance of national agency.

In the literature, this view is especially pronounced with a view to litigation concerning migration matters. It is acknowledged that Member States share a common interest in preserving agency in this field of law, as a rule, for the purpose of restricting immigration to levels acceptable for their electorates.[24] Along these lines, Baumgärtel argues that Member State governments aspire to maintain a degree of 'sovereign manoeuvrability' in European courts.[25] This is furthermore consistent with the findings of Granger, who stipulates that Member State governments often attempt to prevent the ECJ from impinging upon competences that they had previously failed to preserve in Treaty negotiations.[26] Whereas these claims may be substantiated empirically by a number of high-profile ECJ judgments, it may be necessary to sound a note of caution on two accounts.

First, while the attainment of national manoeuvrability may constitute a salient motive of national governments' activity in European courts, it is not limited thereto. Governments may pursue policy preferences other than those ensuring national manoeuvrability *vis-á-vis* Union law. Indeed, Member State governments may prefer an interpretation of Union law that effectively limits their agency.[27] Especially in the field of migration law, the Council routinely strives to reach political agreement before adopting legislation. Member State

22 Garrett, Kelemen and Schulz (n 5), at 159.

23 See Carruba, C. et al. (2008). Judicial Behaviour under Political Constraints: Evidence from the European Court of Justice. *American Political Science Review* 102(4), pp. 435–452, at 438 et seq.

24 See, for instance, Börzel, T. and Risse, T. 2018. *A Litmus Test for European Integration Theories: Explaining Crises and Comparing Regionalisms*. KFG Working Paper 85, pp. 1–24, at 10, Freie Universität, Berlin, with further references. Similarly, see Moravcsik, A. and Schimmelfennig, F. (2019). Liberal Intergovernmentalism, in: A. Wiener, T. Börzel and T. Risse (Eds.), *European Integration Theory*. pp. 64–84, at 75, 3rd ed., Oxford University Press, Oxford.

25 Baumgärtel (n 4), at 103, 110 et seq.

26 Granger (n 2), at 69; similarly, see Gammeltoft-Hansen, T. and Aalberts, T. (2019). *The Politics of Transnational Law*. iCourts Working Paper Series no. 152, pp. 1–17, at 12, University of Copenhagen, Copenhagen, with further references.

27 See Börzel and Risse (n 24), at 10, who develop an argument of divergent political preferences in the context of the Dublin system.

governments may often ensure that their preferences are reflected therein. It would be misplaced, therefore, to presume that national governments share a coherent preference of interpretation that would limit the effects thereof. They do not always speak with one voice. Rather, governments may take special interest in an interpretation of Union law, even if that would threaten to limit national manoeuvrability.[28]

Second, litigation in European courts is marked by the specific nature of legal argumentation and the constraints that it imposes on actors in court.[29] Although quantitative research suggests that the ECJ broadly leans towards the expressed preferences of national governments,[30] litigation in Luxemburg differs in format to negotiations in non-juridical international fora and adheres to rules (and limits) of legal interpretation. In order to exert influence on the Court's reasoning, governments must coin their political preferences in sound legal terms.[31] Accordingly, it is important to analytically discern strategies of judicial litigation from those of non-judicial negotiations. Member State governments may express themselves in court to maintain a degree of manoeuvrability, but the suitability of doing so will depend on the specific case at hand and must, in any case, respect accepted means of legal interpretation.

2.2 *Legal Manifestations of Political Manoeuvrability*

Regarding the notion of manoeuvrability, there are always wheels within wheels. In legal terms, it may feature in several discernible ways. Political manoeuvrability may result from sovereignty caveats, reiterating a sphere of Member States' residual autonomy *vis-à-vis* Union law. In the Treaty provisions relating to migration, such a caveat can be found *inter alia* in Article 72

28 See Bulterman and Wissels (n 1), at 273.

29 This phenomenon has been explored in depth with a view to the allegation of 'judicial activism', see *inter alia* Horsley, T. (2013). Reflections on the Role of the Court of Justice as the 'Motor' of European Integration: Legal Limits to Judicial Lawmaking. *Common Market Law Review* 50, pp. 931–964, at 948 et seq. Similarly, Grimmel, A. (2011). *Politics in robes? The European Court of Justice and the myth of judicial activism* (Discussion Paper, Europa-Kolleg Hamburg 2/2011).

30 See Dederke and Naurin (n 14); see equally, Carrubba, C. and Gabel, M. (2015). *International Courts and the Performance of International Agreements. A General Theory with Evidence from the European Union*. Cambridge University Press, New York/Cambridge. It is important to note, however, that the indicative value of the findings of Carrubba and Gabel have been questioned by Stone Sweet, A. (2010). The European Court of Justice and the judicialization of EU governance. *Living Review in European Governance* 5(2), pp. 1–50, at 22. See also the meta-study by Blauberger, M. and Schmidt, S. (2017). The European Court of Justice and its political impact. *West European Politics* 40, pp. 907–918, at 908 et seq.

31 See Granger (n 15), at 54. Equally, Azoulai and Dehousse (n 20), at 355, 'cast in the rigid mould of legal argument'.

TFEU, which stipulates that EU migration law 'shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'. In this regard, 'sovereign manoeuvrability'[32] is fashioned outside the scope of Union law, merely corroborating a national competence.

Besides, Member State governments benefit from political manoeuvrability *by virtue of* Union law.[33] Margins of manoeuvre may transpire if Union law provides for derogations from a rule[34] or where Member States 'may' adopt certain measures.[35] These situations do not embody national sovereignty, but rather arise in the application of Union law. It must be borne in mind, in this regard, that political manoeuvrability is not limited to optional provisions of Union law but may equally pertain to the application of mandatory EU law provisions. By way of example, national authorities have 'wide discretion' in determining whether a visa 'shall be refused [on grounds of public policy]'.[36] The concept of political manoeuvrability may therefore encompass legal arrangements of national sovereignty and Member States leeway in the application of Union law alike.

3 Governments' Activism in ECJ Litigation

The following investigation rests on the presumption that migration law—as a highly politicised and contested field of law—instigates Member State governments to take an active stance in litigation before the ECJ.[37] As Granger has noted, the desire 'to keep a grasp on policy-making' has inspired considerable activism on the side of Member State governments to articulate themselves in court.[38] If verified, this hypothesis would complement the perception of Member State governments' interaction with the Court: it would corroborate that they do not merely express themselves for the purpose of sending threats

32 See for this wording, Baumgärtel (n 4), at 103, 110 et seq.

33 See, for instance, the distinction drawn by van den Brink, T. (2017). Refining the Division of Competences in the EU: National Discretion in EU Legislation, in: S. Garben and I. Govaere (Eds.), *The Division of Competences between the EU and the Member States. Reflections on the Past, the Present and the Future*. pp. 251–275, Hart Publishing, Portland, at 256 et seq.

34 See, for instance, ECJ, C-578/08, *Chakroun*, EU:C:2010:117, para. 48.

35 See, for example, ECJ, C-338/13, *Noorzia*, EU:C:2014:2092, para. 14.

36 ECJ, C-84/12, *Koushkaki*, EU:2013:862, paras. 56–60; similarly, ECJ, C-380/17, *E.P.*, EU:C:2019:1071, para. 33.

37 For that presumption, see *inter alia* Granger (n 2), at 69.

38 Granger (n 21), at 36 et seq.

of disloyalty or legislative override to Luxemburg,[39] but that they consider litigation in Luxemburg as a viable avenue to exert influence on the development of migration law more broadly.

3.1 *Governmental Activism in Migration Litigation*

Empirically, the hypothesis that Member State governments articulate themselves actively in migration litigation may be tested by way of comparison to quantitative findings that consider national governments' activity before the ECJ comprehensively, i.e. regarding all fields of Union law. Should the average of observations per case in migration law exceed the average in litigation generally, this presumption would be corroborated. In this case, it would be possible to confirm governmental activism in migration litigation.

It must be noted that existing analyses focus on Member State governments' submissions of observations in the context of preliminary reference procedures.[40] For the purpose of comparability, it may therefore be advisable to align the data sets, so as to merely include preliminary reference procedures to investigate the activity of Member State governments in the field of migration law.[41] Since this type of procedure outnumbers by a wide margin any other type of proceeding in migration law before the ECJ,[42] the data set may still allow for conclusions as to the activity of Member State governments in migration litigation before the ECJ, comprising 154 preliminary reference procedures.

The quantitative research is limited by diverging time periods of the comparator case selection and the data set used for the present research. Existing literature evaluates the Court's jurisprudence in the period of 1997–2008. A comparison with Member State governments' observations in migration law in 2005–2020 may downplay trends that may have since occurred in the activity of national governments in litigation before the ECJ. Indeed, Cramér et al. indicate that there was a peak and general increase in the submissions before the Court after the accession of ten Member States in 2004.[43] A higher number

39 See Carruba, Gabel and Hankla (n 23), at 438 et seq.

40 Cf. Cramér et al. (n 8), at 20 et seq.; equally, Dederke and Naurin (n 14), at 869 et seq.

41 Admittedly, it is accurate that interventions in direct actions could equally account for national governments' activity before the ECJ. However, motives and considerations for filing an observation before the court in the course of the preliminary reference procedure and intervening in support of a litigant party may often differ, to the end that national governments may feel readily inclined to engage in preliminary reference procedures, whereas the opposite may be true for direct actions.

42 See, Thym (n 13), at 173.

43 See Cramér et al. (n 8), at 24 et seq.

of national governments being able to submit observations to the Court may evidently produce a higher average number of submissions. This must be borne in mind in comparatively assessing data sets of different time periods.

On the basis of the sample gathered by Dederke and Naurin, the number of observations filed with the ECJ, regardless of the respective field of law, amounted to 3.6 on average.[44] A comparable investigation for the field of migration law, comprised of national governments' observations in 154 preliminary reference procedures, produces a ratio of 3.9, thus exceeding the average of national governments observations in general.[45] From a broad angle, this corroborates the assumption that Member State governments file observations with the ECJ in matters of migration law more often than they do on average. In the field of migration law, Member State governments appear to actively engage in migration litigation.

3.2 *Selective Activism and Diverging Interests*

In general terms, it can therefore be presumed that Member State governments express themselves eagerly in litigation concerning migration law. However, their activity is selective rather than ubiquitous. Accordingly, the general finding of their active engagement in migration litigation must be subjected to at least three caveats; activity in some high-profile cases, divergence among Member State governments and the subject-relatedness of their activity.

First, in the field of migration law, Member State governments' observations in preliminary reference procedures vary notably with regard to several high-profile litigations or other, less prominent litigations. Accordingly, some litigations are marked by a high number of governmental observations in court. In this regard, the judgments in *N.S. et al.* and *X & X* stand out, with each 14 governments submitting observations. The litigation in *X & X* may be a showcase for governments' intensified peer-coordination.[46] The litigation concerned the question whether the Charter of Fundamental Rights would oblige Member States to issue so-called humanitarian visas at the premises of their embassies. Rallying *en bloc* against such an obligation, thirteen governments submitted observations in support of Belgium's claims. Their success in this litigation speaks for itself. The ECJ declared that the Charter was not applicable

44 See Dederke and Naurin (n 14), at 870.

45 This figure represents the (rounded) quotient of the aggregated numbers of government submissions and the total of 154 preliminary reference procedures.

46 ECJ, C-638/16 PPU, *X & X*, EU:C:2017:173. See to this effect, Granger (n 2), at 69; equally, to the effect of peer mobilisation, see Baumgärtel (n 4), at 119 et seq. and Bulterman and Wissels (n 1), at 268 et seq.

to a situation of a Syrian family applying for visas in the Belgium embassy in Lebanon.[47]

It must be noted, however, that Member State governments do not always share an aversion to a specific interpretation of Union law, and that they may pursue divergent interests in migration litigation. Member State governments are not birds of a feather. It is therefore necessary to draw close attention to the arguments put forward by individual governments. Whereas four governments in *N.S. et al.* argued that the term 'sovereignty' or 'discretionary' clause in the Dublin Regulation implied that measures would not fall within the scope of Union law,[48] four governments held exactly the opposite view, arguing that the Charter applied in this regard.[49] The ECJ endorsed the latter view. As Börzel and Risse already postulated, instances of conflicting interests are more common to the field of migration policy than conventional theoretical assumptions of Member State governments' activities in European courts may have it.[50]

Besides these instances, various judgments are marked by a high number of governmental observations, such as the litigations in *Puid* and *Koushkaki*, in which nine national governments filed observations with the Court.[51] Although a high number of national governments' observation is a recurrent phenomenon in the context of litigation in the field of migration law, this may not be unusual in other substantive fields of Union law.[52] In this regard, Member State governments' activity in the field of migration law marks no exception.

Second, national governments' activity before the ECJ varies notably among Member States, with the governments of the Netherlands and Germany leading

47 It is interesting to note the Belgian government's line of defence in the follow-up litigation in the ECtHR in Strasbourg, where it explicitly pointed to Member State governments' firm opposition in *X & X* as a type of bully-boy tactics, drawing the Strasburg court's attention to the potential dismay it would cause among State parties. The Court sided with the Belgian government in this case, see ECtHR, (Grand Chamber) Decision of 5 March 2020, *M.N. et al. v Belgium*, appl. No. 3599/18. The sequel of the oral hearing can be accessed via: https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=359918_24042019&language=en&c=&py=2019 (last: 15.05.2020).

48 ECJ, C-411/10 & C-493/10, *N.S. et al.*, EU:C:2011:865, para. 61.

49 *Ibid.*, para. 56. This opposing view was posited by the French, Dutch, Austrian and Finish government representatives. For a different assessment of Member State government's submissions in this litigation, see Baumgärtel (n 4), at 111.

50 See Börzel and Risse (n 24), at 10.

51 ECJ, C-4/11, *Puid*, EU:C:2013:740, concerning the application of the Dublin-II-Regulation in light of the Charter of Fundamental Rights; ECJ, C-84/12, *Koushkaki*, EU:C:2013:862 concerned the ground for refusing to issue a visa to a third-country national by virtue of the Visa Code.

52 Cf. Dederke and Naurin (n 14), at 869 et seq.

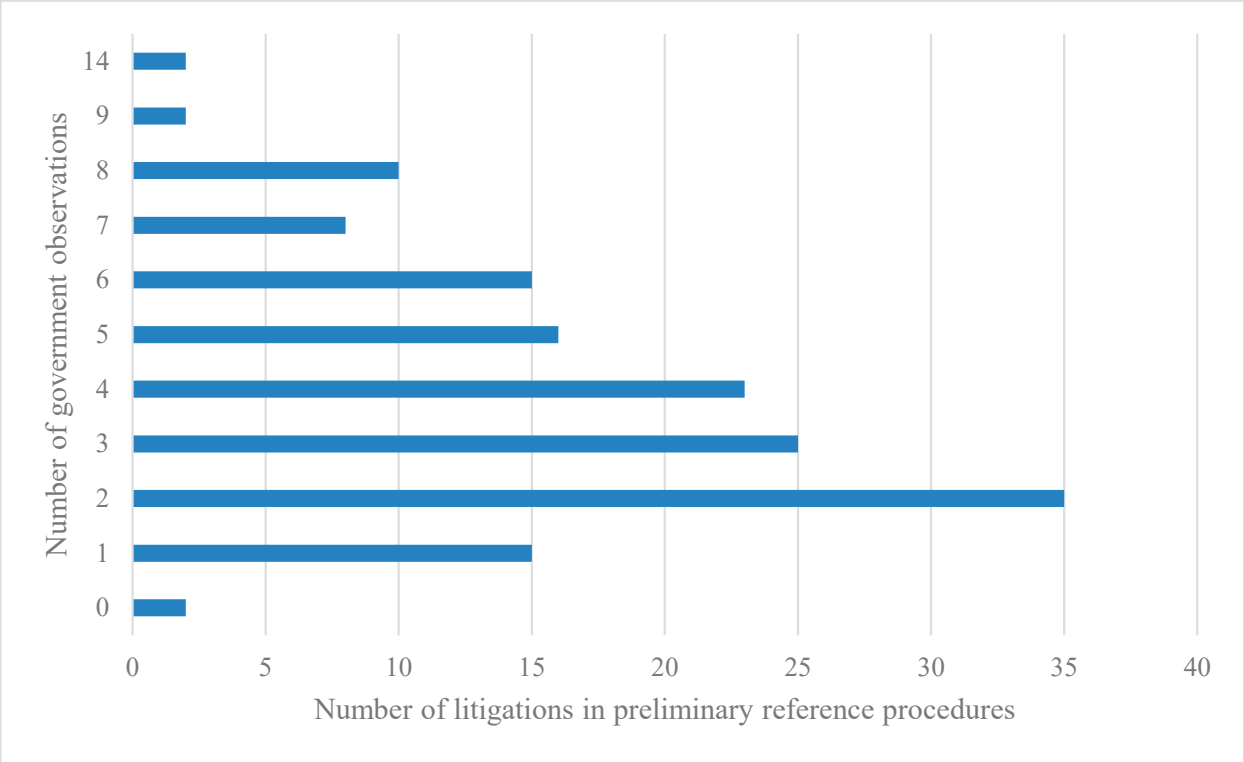

TABLE 1 National government observations in preliminary reference procedures in the field of migration law

by a clear margin.[53] However, it is notable that a group of other national governments appears to actively engage in migration litigation as well. Belgium, Greece, Poland, Czech Republic and Hungary belong to that group. This indicates that some Member State governments take special interest in litigation relating to migration law.

It should be added that national governments routinely submit observations in preliminary reference procedures filed by one of their national courts, and that, in the field of migration law, Dutch and German courts are the most active in this regard.[54] Thus, the outstanding activity of these two governments may be partly explained by the activity of their national courts in migration matters by virtue of the preliminary reference procedure. Nonetheless, it is not a foregone conclusion that Member State governments submit observations in preliminary reference procedures emanating from their respective national

53 For this purpose, the entire data set has been taken into account, thus comprising 171 litigations, preliminary reference procedures and direct actions alike.

54 See Thym (n 13), at 173 et seq.

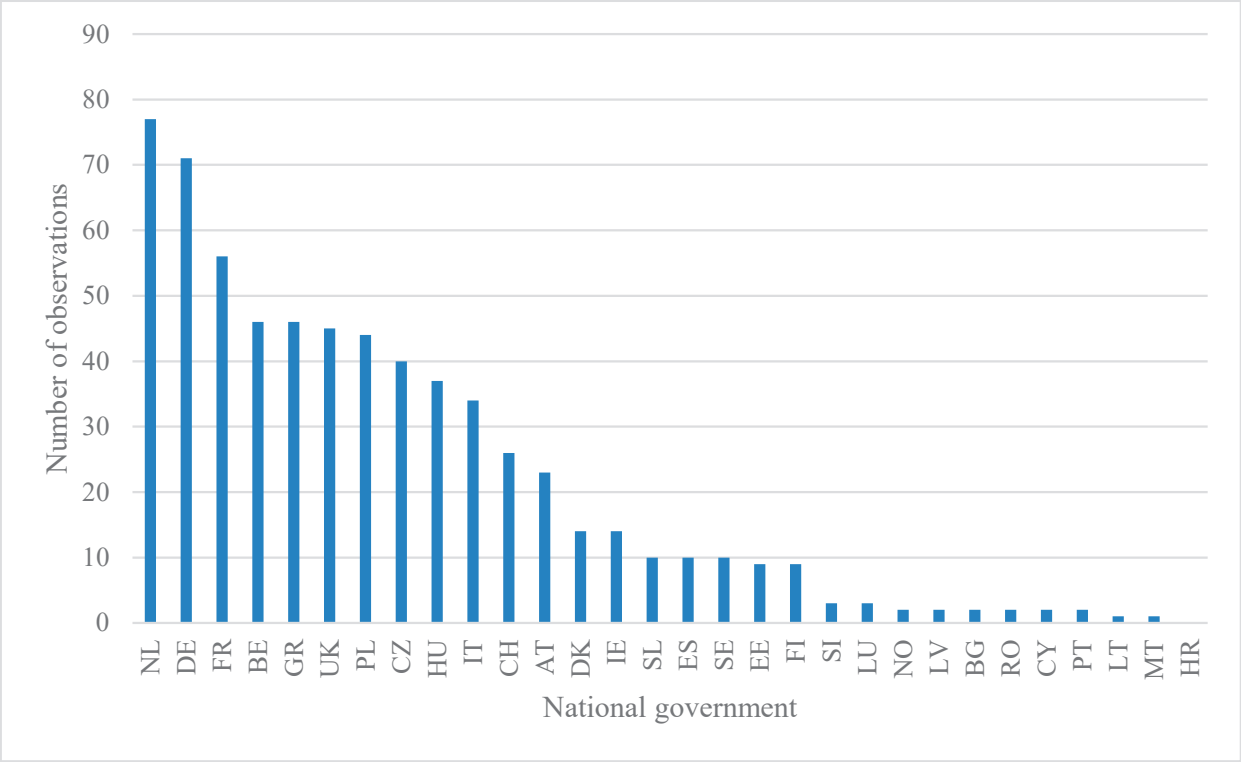

TABLE 2 Number of observations per government. Country abbreviations correspond to internet top level-domains

courts. Although this may be the rule,[55] there are exceptions. In *Fathi*, a preliminary reference was filed with the ECJ by the Administrative Court in Sofia, but the Bulgarian government did not submit observations for the purpose of the litigation.[56] The same was true for the Swedish government in *Kastrati*, in which five other governments submitted observations instead.[57]

National governments may have good reasons not to express themselves before the ECJ in all matters emanating from their domestic legal order. Granger points out that the French policy of 'having something to say on every question' compromised the government's effort of highlighting priorities.[58] Occasionally, a Member State government refused to file observations with the Court, although this would have been perceived of as helpful for the litigation. In his opinion in *X*, Advocate General Bot highlighted—not without frustration—that '[r]egrettably, the Italian Government failed to participate,

55 Cf. Granger (n 21), at 38, who argues that national governments feel compelled to articulate themselves on their domestic law.

56 ECJ, C-56/17, *Fathi*, EU:C:2018:803.

57 ECJ, C-620/10, *Kastrati*, EU:C:2012:265.

58 Granger (n 21), at 38.

having lodged no written observation and having also failed to attend the hearing'.[59]

Third, it is necessary to highlight the divergence in Member State governments' activity in litigation with respect to the substantive fields of migration law. On the basis of the 154 preliminary reference procedures analysed, national governments are most active in the fields of Visa and Asylum law.[60] In these contexts, the average of submitted observations amounts to 5.7 and 4.6 respectively.[61] In contrast, in the field of border control, there are, on average, 2.8 observations per case. This raises doubts regarding the presumption that Member State governments take a particularly active stance in litigation on migration matters broadly. The quantitative findings above rather suggest that certain sub-fields of migration law have attracted the large part of Member State government's activity in litigation, and that there are notable differences in national governments' activity depending on the substantive aspects of litigation.

Generalised findings about Member State governments activity in EU migration litigation must therefore be met with caution. This calls into question the assumption that a matter's proximity to sovereignty would *per se* cater to a high degree of activity in litigation before the ECJ.[62] The hypothesis fails to explain why Member State governments are rather reticent in the field of control of state borders, whereas, in contrast, the field of asylum law is marked by a high degree of activity on their part. Evidently, both substantive fields may reasonably be considered as being closely related to national sovereignty. Nonetheless, governmental activity differs markedly among these substantive sub-fields of migration law. In order to understand the motivations of national governments to actively engage in EU migration litigation, it may therefore be useful to qualitatively scrutinise the merits of their submissions and the litigations concerned.

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59 Opinion of Advocate General Yves Bot in ECJ, C-213/17, *X*, EU:C:2018:434, para. 48.

60 In this context, direct actions were excluded to allow for a comparison with the findings of Dederke and Naurin (n 14), at 870, who considered preliminary reference procedures exclusively.

61 Again, these numbers represent the approximated quotient of aggravated number of submissions and the number of litigations in the respective substantive field of law. In asylum law, for instance, the count was 336 governmental observations per 74 litigations. The ratio of observations per litigation thus amounts to approximately 4.5. It must be highlighted that the figure for Visa law is of limited explanatory value insofar as it rests on a low sample number n=7 and included the high-profile case in ECJ, C-638/16 PPU, *X & X*, EU:C:2017:173 with 14 governmental submissions.

62 For that presumption, see *inter alia* Granger (n 2), at 69.

4 Governmental Arguments of Political Manoeuvrability

In order to characterise the role of Member State governments in EU migration litigation, prominent judgments, marked by a high number of submissions, have attracted the large part of academic interest. Against this background, national governments advocate for national sovereignty by maintaining a degree of leeway *vis-á vis* Union law. How do they attain this objective? What strategies may national governments employ to this end? The following investigation proposes a categorisation of arguments endorsed by Member State governments for the purpose of safeguarding political manoeuvrability. In order to highlight these forms of advocacy, a selective portray of litigations appears to be inevitable, since any comprehensive discussion of a sample of 171 litigations would exceed the volume of the present chapter.

4.1 *Contesting the Scope of the Charter of Fundamental Rights*

Member States advocate for national manoeuvrability within Union law by calling into question the scope of application of protective provisions, most pertinently, the Charter of Fundamental Rights.[63] This effect is borne out by the seminal judgments in *N.S. et al.* and *X and X*.[64] As highlighted above,[65] the two rulings stand out in terms of number of governmental submissions, and centre on the question whether the Charter effectively imposes limitations on Member States in the context of migration law. Against the background of the Charter, the main ambiguity results from pinning down situations in which the Member States are 'implementing Union law' pursuant to Article 51 thereof. For the field of migration law, the litigation in *Jawo* may serve as a case in point.[66]

The ECJ had to rule on the question whether the Charter would apply to a third-country national's transfer from Germany to Italy under the Dublin system, where that person would be exposed, after the transfer has taken place, to precarious living conditions as a beneficiary of subsidiary protection. In that context, the German government's argument centred on an interpretation of Article 29 of the Qualification Directive,[67] which authorises—by way

63 See Baumgärtel (n 4), at 111.

64 ECJ, C-411/10 & C-493/10, *N.S. et al.*, EU:C:2011:865; C-638/16 PPU, *X & X*, EU:C:2017:173.

65 See *supra*, at 3.2. Selective Activism and Diverging Interests.

66 ECJ, C-163/17, *Jawo*, EU:C:2019:218.

67 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

of exception—that social assistance may be limited insofar as it is provided at the same level and under the same conditions as for nationals. Based on a reference to that provision, the government representatives pointed out that in applying such an exception, 'Member States act under their own powers [which] do not fall within the scope of the Charter'.[68]

The ECJ rejected that view. It focussed on the Dublin III Regulation to find that the Charter applies, irrespective of 'whether it is at the very moment of the transfer, during the asylum procedure or following it that the person concerned would be exposed [...] to a substantial risk of suffering inhuman or degrading treatment.'[69] However, the Court added that the alleged violation of Article 4 of the Charter requires a 'particularly high level of severity', in line with the jurisprudence of the ECtHR.[70] Whereas the Court therefore reiterates that the situation comes within the substantive scope of the Charter in general, the specific case at hand does not account for the degree of severity required to amount to a violation of Article 4 of the Charter.[71]

4.2 *Advancing a Generous Interpretation of Derogations*

Member State governments may conversely propose expansive interpretations to derogations in EU migration law in order to maintain a degree of manoeuvrability within the framework of Union law. In *B & D*, all Member State governments who had filed observations with the Court stipulated that membership of a terrorist organisation, and the commission of terrorist acts in the course of that membership, should qualify as a ground for excluding a third-country national from being a refugee, and that the person need not to constitute a threat at present.[72] These arguments were intended to effectively give Member States plenty of rope to exclude third-country nationals from protection. Whilst the Court explicitly endorsed that governmental view,

68 Cited from Opinion of Advocate General Wathelet delivered on 25 July 2018, Case C-163/17, *Jawo*, EU:C:2018:613, para. 94.

69 ECJ, C-163/17, *Jawo*, EU:C:2019:218, para. 88.

70 See Wendel, M. (2019). Die Pflicht zur Berücksichtigung der Lebensumstände von anerkannt Schutzberechtigten im EU-Ausland, *JuristenZeitung* 74(20), pp. 983–989, at 987 et seq.

71 The French and Polish governments argued in this vein, holding that, although the Charter applied, violations of Article 4 thereof should be limited to extremely exceptional cases, see Opinion of Advocate General Wathelet, delivered on 25 July 2018, C-297/17 & C-318/17, C-319/17 & C-438/17, *Ibrahim et al.*, EU:C:2018:617, paras. 105 et seq.

72 ECJ, C-57/09 & C-101/09, *B & D*, EU:C:2010:661, para. 84, 103. Later jurisprudence clarified that mere membership of a terrorist organisation may not in itself constitute a compelling reason to revoke a residence permit; see ECJ, C-373/13, *H. T.*, EU:C:2015:413, paras. 84 et seq.

it added that reliance on such an exclusion clause must rest on an individual assessment of the specific facts of the case and that membership of an organisation listed as a terrorist organisation cannot automatically trigger the exclusion of a person from being a refugee.[73]

Member State governments have similarly rallied for an expansive interpretation of the grounds for exclusion from subsidiary protection. However, they have done so by stipulating that it was incumbent upon them to define vague terms of Union law. In *Ahmed*, the Czech and Hungarian governments argued that it was for the legislature of the Member States to determine under which conditions a third-country national may be considered to have committed a 'serious crime'. This would have awarded Member States ample leeway to advance an expansive reading of that norm, and to effectively exclude third-country nationals from subsidiary protection.[74] The ECJ refused, in line with the observations of the French and Dutch governments as well as the Commission, reiterating that undetermined terms of Union law call for an 'autonomous and uniform interpretation', given they make no express reference to the law of the Member States, which was not the case here.[75] With a reference to the judgment in *B & D*, the Court once more emphasised the need to conduct an individual assessment of the case before excluding a person from subsidiary protection.[76]

Another example of an expansive interpretation of a derogation, albeit with reference to primary law, may be witnessed in the infringement procedure against Poland, Hungary and Czech Republic concerning the refugee relocation mechanism. As defendant party, the government of Poland pronouncedly argued that Article 72 TFEU would allow Member States to disapply any measure of EU secondary law 'each time it considers that there is a risk, even a potential risk, for the maintenance of law and order and the safeguarding of internal security'.[77] This argument was rejected by the Court. Whereas Article 72 TFEU may indeed benefit Member States if they can 'prove that it is necessary to have recourse to that derogation', the ECJ adds that this necessity must be assessed in strict terms and does not apply in the case at hand.[78]

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73 ECJ, C-57/09 & C-101/09, *B & D*, EU:C:2010:661, paras. 84 et seq.

74 ECJ, C-369/17, *Ahmed*, EU:C:2018:713, para. 35.

75 *Ibid.*, para. 36.

76 *Ibid.*, paras. 49 et seq.

77 ECJ, C-715/17, C-718/17 & C-719/17, *Commission v Republic of Poland, Commission v Hungary, Commission v Czech Republic*, EU:C:2020:257, para. 137.

78 *Ibid.*, paras. 145 et seq.

4.3 *Benefitting from the Interplay of Measures*

Member State governments may advocate for national agency in the context of the interplay of several EU measures.[79] This may be a particularly promising strategy once it is questionable which legislative regime may be applicable to a situation at hand. In this context, Member State governments submit observations for the purpose of outlining their preferred course of bringing two EU measures to systematic concordance. Insightful examples to that effect arose in the context of the scope of the Return Directive and its interrelation with, first, the EU asylum acquis, and, second, the Schengen Borders Code.

In *Arslan*, Member State governments' efforts of aligning the Return Directive with the EU asylum acquis may be demonstrated.[80] The litigation concerned the detention of a third-country national, originally apprehended on the basis of the Return Directive for the purpose of return,[81] who then applied for international protection from within detention. In this context, the question arose whether Mr. Arslan could consequently be kept in detention based on the EU asylum acquis. All Member States who submitted observations in this regard considered that this would be the case. The ECJ decidedly agreed with them,[82] endorsing the argument put forward by some of the Member State governments that the objective of the Return Directive would be undermined if a third-country national could automatically secure release by applying for asylum.[83]

This finding had to be confirmed by a clarification of the respective scopes of application of the Return Directive, on the one hand, and the EU asylum *acquis*, on the other. Accordingly, the Court corroborated that the Return Directive did not apply to applicants for international protection.[84] Nonetheless, the filing of such an application 'does not mean that the return procedure is thereby definitely terminated, as it may continue if the application for asylum is rejected.'[85] At the time of the judgment, as the German government pointed out, the EU asylum acquis did not harmonise the grounds for which asylum seekers may be detained.[86] For that reason, the Court ruled

79 See to this effect in the context of fundamental rights' obligations of Union law and ECHR law, Baumgärtel (n 4), at 112.

80 ECJ, C-534/11, *Arslan*, EU:C:2013:343.

81 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

82 ECJ, C-534/11, *Arslan*, EU:C:2013:343, para. 51.

83 *Ibid.*, para. 60.

84 *Ibid.*, para. 48.

85 *Ibid.*, para. 60.

86 *Ibid.*, para. 55.

that 'it is for the Member States to establish […] the grounds on which an asylum seeker may be detained or kept in detention'. Effectively, this allowed the Member States to keep in detention an asylum seeker who had previously been detained for the purpose of return. Although the Court therefore awarded the Member States considerable manoeuvrability, that leeway was confined by the need for an individual assessment. To that end, the Court obliged national authorities to determine whether the application was solely filed to frustrate the enforcement of the return decision and whether detention would be proportionate in order to keep her or him in detention.[87]

In *Arib*, the French and German governments attempted to benefit from the interplay of the Return Directive with the Schengen Borders Code. The situation concerned an illegally staying third-country national who was apprehended near the French-Spanish border during a time in which temporary border control was reintroduced.[88] This situation raised the question whether such border control would effectively transform an internal border—i.e. one between two Schengen States—into an external border for the purpose of Article 2 (2) (a) of the Return Directive, allowing the situation to be exempted from the scope thereof.[89] This would have stripped Mr. Arib from the safeguards in the Return Directive, particularly with a view to detention.

In this context, the French and German governments stipulated that reintroduced internal border control should permit Member States to disapply the Return Directive.[90] This argument was based on Article 32 of the Schengen Border Code, which specifies that the 'relevant provisions [on external borders] shall apply *mutatis mutandis*' to reintroduced controls at internal borders. The ECJ disagreed, unravelling the interplay of the Return Directive with the Schengen Borders Code. It held that Article 2 (2) (a) of the Return Directive, as a derogation, should be interpreted strictly. Member States could therefore not rely on that provision to return a third-country national more swiftly at an internal border.[91] According to the Court, the wording of the Schengen Borders Code makes it very clear that external borders are distinct from internal borders.[92] For this reason, Member States cannot evade the procedural

87 *Ibid.*, para. 62. These precepts were codified by Article 8 (3) (d) Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

88 ECJ, C-444/17, *Arib*, EU:C:2019:220, para. 37.

89 *Ibid.*, para. 48.

90 Opinion of Advocate General Szpunar, delivered on 17 October 2018, Case-444/17, *Arib*, EU:C:2018:836, para. 48.

91 ECJ, C-444/17, *Arib*, EU:C:2019:220, para. 56.

92 *Ibid.*, para. 62.

safeguards entailed in the Return Directive if border control was reintroduced at an internal border.

4.4 *Arguments of Administrative Manoeuvrability*

National governments may not necessarily argue in favour of Member States' manoeuvrability *in toto* but often rally for administrative leeway in individualised decision-making. This may not come as a surprise, given the fact that EU migration law is largely executed by national administrative authorities. In principle, it is for the Member States' *autonomie institutionnelle et procédurale* to determine which national authority is responsible to execute Union law and under which conditions. In migration law, however, several provisions of secondary and primary Union law affect these domestic arrangements, readjusting the role of administrations *vis-à-vis* other domestic institutions. In this regard, the jurisprudence of the ECJ may develop standards that guide or limit national administrative authorities.[93] For this reason, Member State governments have recurrently centred their activity before the ECJ on their national administrations' leeway to maintain a degree of manoeuvrability.

This phenomenon may be illustrated with regard to three substantive aspects: persecution on account of sexual orientation (4.4.1.), threats to public security (4.4.2.) and attempts to throw off judicial oversight (4.4.3.). For each of those aspects, Member State governments filed observations with the Court to maintain a degree of manoeuvrability benefitting domestic administrations.

4.4.1 Persecution on Account of Sexual Orientation

Member State governments have advanced arguments of administrative manoeuvrability in the context of the determination of sexual orientation for the purpose of qualifying as a refugee.[94] This effect can be witnessed with regard to governmental observations concerning the criminalisation of homosexual activities as a reason for persecution as well as the manner in which sexual orientation may be verified by national authorities.

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93 This is already exemplified *supra*, at 4.2—Advancing a generous interpretation of derogations and 4.3—Benefitting from the interplay of measures. See equally, Wendel, M. (2019). *Verwaltungsermessen als Mehrebenenproblem. Zur Verbundstruktur administrativer Entscheidungsspielräume am Beispiel des Migrations- und Regulierungsrechts*, Mohr Siebeck, Tübingen, at 85 et seq.

94 Article 10 (1) (d) second paragraph, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

In *X, Y and Z*, all Member States (as well as the Commission and UNHCR) contended that the criminalisation of homosexual activities in itself cannot qualify as an act of persecution.[95] The Court agreed with them, which was seen by Member State governments as an indication for the success of their intervention.[96] In this regard, the Court added, however, that a term of imprisonment punishing homosexual acts may well be capable of constituting in itself an act of persecution.[97] National authorities are therefore obliged to undertake an individual examination of all relevant facts concerning the country of origin, including its laws and their application in fact.[98] If, in practice, prison sentences are executed for the purpose of punishing homosexual acts, national authorities would be compelled to consider those verdicts acts of persecution, with no margin of manoeuvre. It could therefore be questionable whether Member State governments indeed successfully maintained a degree of manoeuvrability in this litigation.

In *A, B & C*, the Dutch government had advocated for administrative leeway in the determination of techniques for verifying a person's sexual orientation. It pointed out that the Qualification Directive did not specify the manner in which an applicant's declaration of her or his sexual preference should be examined, and thus concluded that it was for Member States themselves to determine such aspects under national rules.[99] The Court partially agreed, ruling that 'it is for the competent authorities to modify their methods of assessing […] evidence' to the specificities of each category of application for asylum.[100] Nonetheless, it reiterated that the conduct of Member State authorities must be made on an individual basis and in line with the procedural safeguards laid down in EU secondary law and those that follow from the Charter of Fundamental Rights.[101] Accordingly, the Court found that stereotyped tests could not in themselves account for an 'individualised' assessment. Besides, detailed interrogations questioning sexual practices or performing of sexual acts as evidence are incompatible with the Charter.[102]

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95 See Opinion of Advocate General Sharpston, delivered on 11 July 2013, C-199/12 to C-201/12, *X, Y and Z*, para. 40.

96 See Baumgärtel (n 4), at 111.

97 ECJ, C-199/12 to C-201/12, *X, Y and Z*, paras. 55 et seq.

98 *Ibid.*, para. 58.

99 Opinion of Advocate General Sharpston, delivered on 17 July 2014, C-148–150/13, *A, B & C*, EU:C:2014:2111, para. 53.

100 ECJ, C-148/13 to C-150/13, *A, B & C*, EU:C:2014:2406, para. 54.

101 *Ibid.*, paras. 53 et seq., 57.

102 *Ibid.*, paras. 58–65.

The vigour and meaning of those safeguards were applied in *F.* It concerned a practice in which a Hungarian administrative authority relied on an expert report in order to verify the credibility of F.'s sexual orientation. The expert conducted a variety of psychological tests to conclude that it was impossible to confirm the applicant's assertion relating to his sexual orientation.[103] In this context, Advocate General Wahl noted that the Hungarian government 'was at pains' to contest the stereotyped nature of these tests.[104] The French and Dutch governments, although accepting that expert reports may be used in the assessment, raised fierce doubts with regards to the scientific valour of the said psychological tests.[105] The Court sided with the latter governments on this matter. Although the recourse to an expert opinion, as a matter of evidence, falls within the jurisdiction of the domestic court, Union law precludes the use of psychological tests such as the one in the case at hand.

It is interesting to note that the Belgian government had already argued in *A, B, and C* that it was 'not necessary to verify clinically or scientifically an applicant's sexual orientation.'[106] Although the ECJ did not endorse that argument at that time, the reasoning re-surfaced in *F.*, in which the Court held that an applicant does not have to substantiate by documentary evidence her or his sexual orientation. This may be an example of Member State governments' influence over time, where an observation did not have immediate repercussions for the Court's jurisprudence but influenced its reasoning later.[107]

4.4.2 Threats to Public Security

Member State governments equally advocate for wide administrative leeway in the context of perceived threats to public security. And quite successfully so. The judgments in *E.P.* and in *G.S. & V.G.* may serve as cases in point.[108] In these litigations, the Dutch *Staatssecretaris*, as a party to the litigations, disputed that a third-country national may only be perceived as a threat to public security if (s)he constituted 'a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society', as ordained in free movement law.[109] The *Staatssecretaris* argued that national authorities would

103 ECJ, C-473/16, *F.*, EU:C:2018:36, para. 22.

104 Opinion of Advocate General Wahl, delivered on 5 October 2017, C.473/16, *F.*, para. 37.

105 ECJ, C-473/16, *F.*, EU:C:2018:36, para. 38, 58.

106 Opinion of Advocate General Sharpston, delivered on 17 July 2014, C-148/13 to C-150/13, *A, B and C*, EU:C:2014:2111, para. 53.

107 See for this effect, Bulterman and Wissels (n 1), at 274, with further references.

108 ECJ, C-380/18, *E.P.*, EU:C:2019:1071; ECJ, C-381/18, C-382/18, *G.S. & V.S.*, EU:C:2019:1072.

109 Opinion of Advocate General Pitruzella, delivered on 11 July 2019, C-380/18, *E.P.*, EU:C:2019:609, para. 8.

be under no obligation to apply the same standards as those developed in the context of free movement law affecting EU citizens as well as their family members. Rather, competent authorities should have a wide margin of appreciation to determine whether third-country nationals should be considered threats to public security.

The Member States who submitted observations in *E.P.* consolidated the *Staatssecretaris'* view. They did so by pointing to practical considerations that would substantiate the existence (and need) for wide administrative discretion in the determination of threats to public security.[110] In a situation in which a third-country national stays in the EU for a short period of time, the information that a national authority may be able to retrieve concerning that person is limited. Since a binding decision needs to be taken, nonetheless, the Court accepted that this speaks in favour of awarding a wide margin of discretion to competent national authorities. Similarly, in *G.S. & V.G.*, national authorities were authorised to solely rely on a criminal conviction to refuse a third-country national the right to family reunification, given the criminal offence was serious in nature.[111]

Against this background, Member State governments did not tire to throw into sharp relief the law of free movement of Union citizens and their family members to migration law of third-country nationals. This may have proved a successful strategy for them to maintain a wide margin of administrative manoeuvrability, as opposed to the strict standards pertinent in free movement law. Although the ECJ rooted the finding of administrative manoeuvrability in the normative structure of secondary law provisions, it may have been convinced by governmental observations and their endorsement by Advocate General Pitruzella, who openly stated that he had 'some sympathy' for that view.[112]

4.4.3 Throwing Off the Yoke of Judicial Oversight

Arguments of administrative manoeuvrability have equally surfaced in the interaction of administrative authorities with national courts entrusted with the task of reviewing the former. Hungary, amid the so-called refugee crisis, had introduced a legal regime that limited the power of Hungarian courts *vis-à-vis* national asylum authorities. Whereas the judiciary in Hungary was previously competent to alter and replace an administrative asylum decision, the

110 See *ibid.*, para. 28.

111 ECJ, C-381/18, C-382/18, *G.S. & V.S.*, EU:C:2019:1072, para. 63, 66.

112 Opinion of Advocate General Pitruzella, delivered on 11 July 2019, C-380/18, *E.P.*, EU:C:2019:609, para. 28.

then-introduced legislative framework merely provides for a judicial competence to annul and remit. In the case of *Torubarov*, the result of that legislative reform was an institutional game of ping-pong.[113] Mr. Torubarov's application for international protection was rejected twice by the Hungarian administrative authorities, and consequently annulled by the domestic court. After the administrative authority rejected his claim for the third time, the reviewing court had enough. It sent a preliminary reference to the ECJ to clarify its competence under the Procedures Directive, read in light of Article 47 of the Charter of Fundamental Rights.

In this context, the Hungarian government justified the national legal arrangement by stipulating that asylum was a complex matter and that, as such, it could only be mastered by a high level of expertise, which—according to that argument—was prevalent only in specialised immigration authorities.[114] It may reasonably be assumed that this constitutes an attempt to cater to administrative manoeuvrability by virtue of throwing off judicial control. Although the introduction of a 'cassation model' of judicial control does not *per se* violate the requirements of full and *ex nunc* control as stipulated by Article 46 (3) of the Procedures Directive,[115] the Court rejected the Hungarian government's argument, nonetheless. A practice, such as the one unfolding among Hungarian asylum authorities and the reviewing courts, would effectively give administrative authorities the upper hand over the latter and deprive judicial control of its effect.

In that light, the Court concluded that a judicial decision confirming the need for international protection of an asylum applicant may bind the administrative asylum authorities, if it succeeds a full and *ex nunc* assessment conducted by the domestic court. The ECJ found that, in such situations, the administrative authority 'no longer has a discretionary power as to the decision to grant or refuse the protection sought'.[116] Accordingly, the national court may substitute its assessment for that of the Immigration Office and vary the latter's decision if need be.

4.5 *Floodgate Arguments*

A prominent strategy employed by Member State governments is to point to the severe repercussions that an interpretation of Union law may produce.

113 For that apt depiction, see Opinion of Advocate General Bobek, delivered on 30 April 2019, C-556/17, *Torubarov*, EU:C:2019:339, paras. 1 et seq., 79.

114 See *ibid.*, para. 79.

115 ECJ, C-585/16, *Alheto*, EU:C:2018:584, para. 147.

116 ECJ, C-566/17, *Torubarov*, EU:C:2019:626, para. 66.

Such observations are usually cast in terms of teleogical arguments. In this vein, governments point out that the effectiveness of an EU measure would be compromised if it was interpreted in one way or another. This was already visible in the judgment in *Arslan*. In this litigation, Member State governments argued that the effectiveness of the Return Directive would be hampered if a person detained for the purpose of return could, by filing an asylum application, automatically acquire her release.[117]

In the context of the Dublin Regulation, such arguments have been a common phenomenon. Although the Dublin system pursues several objectives, Member State governments have selectively focussed on the objective of facilitating a rapid determination of the Member State responsible to assess an asylum claim. In *Abdullahi*, Member State governments utilised that argument to strip asylum applicants from the possibility to challenge such a responsibility decision in court. In essence, they claimed that judicial review of the correct application of the list of criteria would hamper the attainment of that objective.[118] In the context of the Dublin II Regulation, the Court agreed with them, holding that an asylum applicant could only invoke systemic deficiencies in the Member State to which (s)he would be transferred in order to impede the transfer.

The same argument re-surfaced in the context of the Dublin III Regulation in *Ghezelbash*.[119] Unlike its predecessors, this Regulation explicitly entailed an unconditional right to an effective remedy. Nonetheless, based on the ruling in *Abdullahi*, the Dutch government reiterated that an asylum applicant should not be able to contest the manner in which Member States reach a decision as to which Member State may be responsible for the assessment of an asylum application.[120] In this regard, the ECJ admitted that bringing an action against a transfer decision may postpone the definitive determination of the Member State responsible. It may thus hamper the objective of a rapid determination of the Member State responsible. The Court clarified, however, that 'the judicial protection enjoyed by asylum seekers should [not] be sacrificed to the requirement of expedition in processing asylum applications'.[121] In other words, the fact that judicial remedies may frustrate the objective of rapid

117 ECJ, C-534/11, *Arslan*, EU:C:2013:343, para. 60. The same argument was already articulated in ECJ, C-329/11, *Achughbabian*, EU:C:2011:807, para. 30.

118 ECJ, C-394/12, *Abdullahi*, EU:C:2013:813, para. 46.

119 Opinion of Advocate General Sharpston, delivered on 17 March 2016, C-63/15, *Ghezelbash*, EU:C:2016:186, para. 45.

120 *Ibid.*, para. 47.

121 ECJ, C-63/15, *Ghezelbash*, EU:C:2016:409, paras. 56 et seq, relying on ECJ, C-19/08, *Petrosian*, EU:C:2009:41, para. 48.

asylum procedures cannot be used to render impractical the rights of asylum seekers, as they are laid down in the Dublin III Regulation. For that reason, Advocate General Sharpston acknowledged in her Opinion in *Ghezelbash* that a floodgates argument, such as the one put forward by the Dutch government, deliberately overestimates the consequences of judicial review for the purpose of limiting the rights of asylum seekers.[122]

5 A Broadened Perspective on Governments' Motives

Member State governments' activity in migration litigation is not limited to advocacy in favour of their national sovereignty. On the basis of the litigations analysed, it can be confirmed that national governments submit observations 'to make a contribution to the further development of an area of EU law in which [they take] specific interest'.[123] To be sure, such activity need not be a self-less effort. By proposing refinements to EU law, Member State governments may articulate aspects that are of value to them.[124] They can do so by drawing attention to legislative choices (5.1.), by assisting the Court (5.2.) or by using litigation in Luxemburg as a forum to express political preferences *vis-á-vis* a European audience (5.3.).

5.1 *Drawing Attention to Legislative Choices*

Governments may highlight deliberate choices of the Union legislature that were endorsed by Member State representatives in the Council. The German government's intervention in an action of annulment concerning the Family Reunification Directive may illustrate this point. The European Parliament had challenged several provisions of the Directive which permitted Member States to maintain certain derogations from the right to respect for family life.[125] The German government forcefully argued that these provisions were key during political negotiations. They were the result of the compromise that had unlocked the adoption of the Family Reunification Directive in the first place, which required unanimity in the Council.

For that purpose, the German government warned against annulment and severing of precisely those provisions that had enabled the adoption of the

122 Opinion of Advocate General Sharpston, delivered on 17 March 2016, C-63/15, *Ghezelbash*, EU:C:2016:186, para. 73.

123 Bulterman and Wissels (n 1), at 273.

124 See Adam, C. (2016). *The Politics of Judicial Review. Supranational Administrative Acts and Judicialized Compliance Conflict in the EU*, Palgrave Macmillan, London, at 53.

125 ECJ, C-540/03, *European Parliament v Council*, EU:C:2006:429.

Directive altogether. This would have effectively reversed the political compromise reached.[126] After considering the merits of the litigation, the ECJ dismissed the action altogether; thus, it was not necessary to consider whether these provisions were severable from the rest of the Directive. Nonetheless, the German governments' submission may serve as an example of how governments can draw the Court's attention to the legislative intention underlying certain provisions, and their importance in the structure of the legislative measure as a whole.

5.2 *Assisting Judicial Deliberation*

Member State governments engage in migration litigation by providing assisting information in court. It is common practice that they express themselves before the ECJ to explicate complicated domestic legal arrangement, usually with a view to demonstrate compatibility with Union law.[127] As a case in point, the Dutch government emphasised time and time again in *G.S. & V.S.* that prison sentences would not trigger 'automatic' withdrawal of a residence permit for the purpose of family reunification. Rather, under domestic law, a system of 'sliding slopes' was devised for that purpose, which would in any case allow for a genuine assessment.[128] In another litigation, *Jawo*, the UK government presented a domestic legal arrangements—assumedly as best practice—to master the difficulty of establishing whether a third-country national may be at risk of absconding.[129] In this vein, it was pointed out that, in its domestic law, an applicant for international protection must report weekly to the competent immigration authorities. If (s)he fails to do so three times, authorities assume that that (s)he has absconded.[130] Since the litigation concerned a legal arrangement in Germany, the governmental observation may be understood as an attempt to demonstrate how an admittedly difficult matter may be solved practically in domestic law.

Member State governments may equally assist the Court by drawing attention to legal documents that aid the Court's reading of Union law. The

126 *Ibid.*, para. 25.

127 See Cramér et al. (n 8), at 15.

128 See Opinion of Advocate General Pitruzella, delivered on 11 July 2019, C-381/18, C-382/18, *G.S. & V.S.*, EU:C:2019:608, para. 61.

129 Pursuant to Article 28 (2) Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

130 Opinion of Advocate General Wathelet delivered on 25 July 2018, Case C-163/17, *Jawo*, EU:C:2018:613, para. 27.

governmental submissions in litigations concerning the determination of sexual orientation demonstrate this. In *A, B and C*, four of the six governments that had submitted observations endorsed an intervention by UNHCR, which drew the Court's attention to the Yogyakarta principles. They argued that these principles informed an interpretation of the Geneva Refugee Convention and should therefore pervade an interpretation of the Qualification Directive.[131] Whereas the Dutch government, in defence of its domestic authorities, argued that this would not be the case, several years later, the Dutch agents themselves reminded the Court of the Yogyakarta principles, namely in the litigation in *F.*[132] This suggests that the Dutch government drew lessons from the litigation in *A, B and C*. Even if it had to learn the hard way, being forced to amend the domestic legal framework to that end, it did not hesitate to remind another Member State of these principles.

5.3 *Migration Litigation and Its European Audience*

Member State governments may be active in European courts to express themselves *vis-á-vis* a European audience. In this context, Granger suggests that the activism of governments can be explained by the pressures to which they are exposed domestically, with electorates expecting governments to 'do something' to preserve important national values or interests at EU level.[133] As a result, Member State governments may use litigation in the ECJ to express themselves broadly to make their voices heard. Certainly, these arguments must be drafted in legal terms. However, in the course of litigation, it may be possible for governments to articulate themselves in such a way as to compel the ECJ to respond.

This effect may be illustrated by the Polish government's intervention in an action for annulment brought by Slovakia and Hungary against the Council's refugee relocation decisions. The Polish government endorsed a general argument in the context of a proportionality assessment, stipulating that refugee relocation would affect Poland disproportionately, since it was 'virtually [an] ethnically homogeneous' state.[134] The ECJ rejected the claim due to the fact that it exceeded the arguments put forward by Hungary as a party to the litigation. However, the Court felt compelled to explicitly dismantle the argument in substance. It considered that such an argument would compromise the

131 Opinion of Advocate General Sharpston, delivered on 17 July 2014, C-148/13 to C-150/13, *A, B & C*, EU:C:2014:2111, at footnote 47.

132 ECJ, C-473/16, *F.*, EU:C:2018:36, para. 62.

133 Granger (n 21), at 36.

134 ECJ, C-643/15 & C-647/15, *Slovak Republic & Hungary v Council*, EU:C:2017:631, para. 303.

principle of solidarity and equal burden sharing by virtue of Article 80 TFEU, and would be clearly contrary to Union law, particularly the principle of non-discrimination in Article 21 of the Charter of Fundamental Rights.[135]

Evidently, it remains unclear whether such an intervention was genuinely devised to convince the Court. However, it allowed the Polish government to articulate its view in court.[136] Although the ECJ answered in the negative, the explicit refusal of the Polish government's argument made it known to a wider European audience.

6 Accepting Nuances. Empirical Findings on the Role of Governments in EU Litigation

The preceding investigation revisited the role of Member State governments in migration litigation before the ECJ. For that purpose, it carried out an analysis of governmental litigation strategies and explored quantitative and qualitative patterns thereof. Empirically, the investigation highlighted that Member State governments routinely rally for a degree of national manoeuvrability and that litigation strategies to that end may take various distinct forms. Manoeuvrability by virtue of national 'sovereignty' may result from a restrictive interpretation of the Charter of Fundamental Rights, which was the subject of the high-profile judgments in *N.S. et al.* and *X and X*.[137] Besides, Member State governments may adopt other strategies to ensure a degree of manoeuvrability by virtue of Union law. These include arguments that specifically advocate for administrative leeway in the context of individual decision-making or those that tap into teleological floodgate arguments in order to dissuade the Court from adopting a specific interpretation.

There are, moreover, patterns of governmental activity that cannot be explained by the desire to maintain a degree of national leeway. The preceding examination illustrates that Member State governments may take interest in the development of specific policies and legislative measures, and for that reason endorse an interpretation that may effectively limit national manoeuvrability. Similarly, national governments express themselves in court for purposes other than attaining a specific outcome. They may wish to explain to

135 *Ibid.*, paras. 304 et seq.

136 For an analysis of the substance of that position, Narkowicz, K. (2018). 'Refugees Not Welcome Here': State, Church and Civil Society Responses to the Refugee Crisis in Poland. *International Journal of Politics, Culture, and Society* 31, pp. 357–373, including an insightful historical account of the ethnic diversity in Poland, at 359 et seq.

137 ECJ, C-411/10 & C-493/10, *N.S. et al.*, EU:C:2011:865; C-638/16 PPU, *X & X*, EU:C:2017:173.

the Court certain domestic legal or factual arrangements, or simply express themselves in front of a European audience.

All this suggests that governmental litigation strategies are subject to various nuances, which aggravate the drawing of sweeping conclusions regarding the role of national governments in EU litigation. Whereas Member State governments may feel compelled to speak out against an 'activist' interpretation of Union law in some instances, motives for intervening in court are diverse. An analytical portray of Member State government's role in EU litigation should not soft-pedal that versatility. The strategies and patterns of argument explored in the preceding investigation may, however, cater to an empirically rooted portray of the role of Member State governments in migration litigation before the ECJ.