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## From the “Judicialization of Politics” to the “Politicization of Justice” in the UK and Switzerland

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### Abstract

*Not very long ago, scholars saw it fit to name a new and quite widespread phenomenon they had observed developing over the years as the “judicialization” of politics, meaning by it the expanding control of the judiciary at the expenses of the other powers of the State. Things seem yet to have begun to change, especially in Migration Law. Generally, quite a marginal branch of the State's corpus iuris, this latter has already lent itself to different forms of experimentations which then, spilling over into other legislative disciplines, end up by becoming the new general rule. The new interaction between the judiciary and the executive in this specific field as it is unfolding in such countries as the UK and Switzerland may prove to be yet another example of these dynamics.*

**Keywords:** *Migration; immigration; migration law; UK; Switzerland; migration policy*

### Introduction

By the mid of the 1990's it was argued that politics were undergoing a process of judicialization<sup>1</sup>. Such development was broadly intended as «the expansion of the province of the Courts at the expense of politicians and/or administrators». According to scholars such an evolution, grounded in the changes that during the XX century had involved the economies and the political structures of the Western world, would express its full potential through the growing importance and influence of the European Court of Human Rights: the ever wider reach of the ECHR jurisprudence would have thus implied profound changes in the balance between the judiciary (national, and supranational) on the one hand, and the domestic legislative/executive powers on the other<sup>2</sup>. After twenty years it is before any body's eyes that the evolution and growing influence of the European jurisprudence, especially the one of the European Court of Human Rights, has been testing the boundaries

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1 Vallinder (1994).

2 «However, more important is the European Convention for the Protection of human Rights. Primarily through the European Court, it has been provided with fairly strong legal teeth, which have made their mark in a number of countries where the rule of law was supposed to be firmly established, as in Britain and in Sweden. Thus, the parliaments of those countries have been forced to amend legislation pertaining to the rights of citizens – judicialization from abroad, that is» (Vallinder, 1994: 97); See also Sunkin (1994).



both between the States and the international community and, within the States themselves, the balance of powers between the judiciary and its legislative and especially executive counterparts.

A field where the interaction between the ECHR and the Member States – and, within the latter, between the judiciary and the other powers – has proved to be particularly sensitive is migration regulation<sup>3</sup>. The sovereign right of the Member States to control their borders, combined with the need to protect national workforces in times of economic uncertainty and to defuse a highly inflammable public opinion often come at odds with the guarantees and constraints judicially introduced by the reasonings of the European Courts of Human Rights, and also with the decisions of the National Courts, sometimes perceived as Strasbourg's *porte parole*. Such tension, though present within other European states<sup>4</sup>, is particularly appreciable in two countries that, despite their many differences, are clearly united by a general sense of “uneasiness” with regards to the work of the ECHR, namely the UK and Switzerland.

Drawing inspiration from one of the most controversial cases in recent British judiciary history, the paper therefore aims at analyzing in depth the strategies that the British Government has envisaged to regain some of what has been perceived as a lost, or at least severely questioned, sovereignty in internal matters – specifically in migration regulation. Rather than focusing, though, on the most obvious and publicized example of these strategies, and

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3 Migration regulation (and one of the ECHR's articles most connected to it – ie Art. 8) is not, though, the field that requires most of the ECHR's attention, and it is not the only one where the boundaries between the judiciary and the executive tend to overlap – giving rise to politicization of justice or judicialization of politics. In the first sense, one can but remember that «in the Judgments delivered by the Court in 2015, a fourth of the violations concerned article 6 (right to a fair hearing), weather on account of the fairness or the length of the proceedings. Furthermore, nearly 23% of the violations found by the Court concerned the prohibition of torture and inhuman or degrading treatment [...] it should be noted that 30% of the findings of a violation concerned a serious breach of the Convention, namely the right to life or the prohibition of torture and inhuman or degrading treatment» (ECHR, 2016). In the second sense, a very sensitive field is for example the one represented by art. 5 (Right to liberty and security), which has been put under a lot of strain due to the ever-increasing terrorist threat after the 9/11 attacks. It is important to note, though, that this field has significantly overlapped with migration management, to the point of giving rise to a new, hybridized form of public law, known as “criminal law of the enemy” - on this point, also for bibliographical reference – see further below.

4 See for instance: «The FPÖ (Austria Freedom Party) [...] does not greatly welcome the ECHR's judgments in support of the rights of immigrants and asylum seekers, and they have been implemented in a rather cautious way in order not to trigger too much attention or reaction from the populist parties» (Anagnostou, 2013). See also, in the Netherlands, MP Joost Taverne's Proposal to introduce a bill to change the constitutional provisions on the incorporation of international law into national law. Less “structural” but not less “intense” are sometimes the sporadic reactions of national politicians to ECHR's decisions they don't agree with. See for instance the reaction of politician La Russa to the 2009 ECHR's decision regarding the presence of the crucifix in the Italian Schools: <https://blog.uaar.it/2009/11/05/ancora-crocifisso-russa-augura-morte-chi-vorrebbe-togliere-dalle-aule/>

namely the Tory's proposal for a British Bill of rights, we will zoom our attention on another device that has already been passed and implemented much less publicly and that, very overtly, seeks to reverse the balance of powers between the judiciary and the executive in the immigration law field, i.e. the New Immigration rules and the Explanatory Guidelines. We then suggest that the attempt to reduce the margin of appreciation of the Courts and to “de-judicialize” the politics related to the control of the immigration phenomenon is the *fil rouge* that links the British experience with the Swiss one. In the month of February this year, the Helvetic country had to decide whether to pass a reform in the Constitution that precisely sought to block the margin of appreciation of the Courts in some criminal hypothesis, linked, though, yet again to immigration cases.

The fact that, even though it did not pass, the Referendum was proposed and passionately discussed, confirms the sensitivity of the matter and its relevance. Also, by placing the political reasoning behind the Referendum in comparison with the British experience the Swiss example acquires further heuristic value: the differences between the two cases only seem, in fact, to give even more weight to what is certainly shared, namely a shift in the balance of the powers within the Nation State, at least in migration matters. Some reflections on what further impact this may have will be presented at the end of the paper.

## **The United Kingdom**

### **The case of A and others**

A and others were 11 suspected foreign terrorists who had been detained under the Anti-terrorism, Crime and Security Act. The Act, passed in 2001, allowed for the indefinite pre trial detention, pending deportation, of people who, as certified by the Secretary of State, were suspected of involvement in terrorist activities. These provisions were, nevertheless, only applicable to foreign nationals. It was precisely in compliance with these provisions that the suspected foreign terrorists were detained for more than three years, whilst challenges against their detention were being pursued. The House of Lords finally granted a quashing order in respect of the Derogation order of 2001, finding that, despite evidence of there being a threat against the security of the Nation, the detention regime was not an adequate response to that threat, and that it was also irrational, because it was unjustifiably discriminatory against foreigners<sup>5</sup>. The British government challenged the decision before the ECHR,

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<sup>5</sup> House of Lords, *A and others v. Secretary of State for the Home Department*, [2004] UKHL 56: «Article 15 requires any derogating measures to go no further than is strictly required by the exigencies of the situation and the prohibition of discrimination on grounds of nationality or immigration status has not been the subject of derogation. Article 14 remains in full force. Any discriminatory measure inevitably affects a smaller rather than a larger group, but cannot be justified on the ground that more people would be adversely affected if the measure were applied

claiming that it was for the Government to decide whether there was a terrorist threat to national security and how to respond to that<sup>6</sup>. The ECHR upheld the House of Lord's decision by finding that, despite the fact that each national authority was certainly better placed to assess the presence of a terrorist threat than Strasbourg, the National Courts were also better placed than the European ones to decide whether the measures to counter such terrorist threats were to be considered proportionate or not. Whilst the elbow room for the Member States was, in case of threats to national security, very wide indeed, domestic Courts had the power of intervening where Strasbourg couldn't, because it was for them to carry out the proportionality test<sup>7</sup> between the measures envisaged and the rights impacted by them.

The case of A and others is useful to set the conceptual frame within which we are structuring our analysis, and to plastically locate the British case against such backdrop.

In the first sense, the decision clarifies that the elbow margin that Member States enjoy with regards to the ECHR does not mean that hat a “second grade” or “inverse” Spielraum exists<sup>8</sup>, within the single State, between the judiciary and the executive power: whilst general evaluations (for example related to a possible state of emergency) belong to Parliaments and Governments of the Member States, the evaluation regarding their proportionality and adequateness to the individual rights only belongs to the judiciary. To take it away from the Judges would mean to bring the whole structure of democracy into question, and to expose individuals to the risk of arbitrary and unscrupulous decisions. By emphasizing their roles and responsibilities, this decision consequently brings the delicate position of the national Courts to the foreground. It is easy, in this context, to see how domestic Courts can find themselves to be stuck between a rock and a hard place: their main duty of protecting individual rights from possible violations coming from public bodies can sometimes put them in collision with the executive and legislative powers of their own State. At the same time, since in performing their function they also have to take the ECHR's jurisprudence to take into account, they risk of being perceived as Strasbourg's *porte-paroles*, or even bridgeheads, within the State members' own jurisdictions. Thirdly, the decision is relevant to the present work because it confirms that one of the fields in which the tensions between the various actors become more

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generally. What has to be justified is not the measure in issue but the difference in treatment between one person or group and another. What cannot be justified here is the decision to detain one group of suspected international terrorists, defined by nationality or immigration status, and not another. To do so was a violation of article 14. It was also a violation of article 26 of the ICCPR and so inconsistent with the United Kingdom's other obligations under international law within the meaning of article 15 of the European Convention».

6 A and others v. Secretary of State for the Home Department, para 150.

7 European Court of Human Rights, A and others v. the United Kingdom, [2009] ECHR 301: 74 -75.

8 Spielmann (2012).

patent is the one related to the discipline of the migratory phenomenon. Indeed, although the main theme of the decision is the existence or not of a terrorist threat to the UK and the adequacy the response to such threat, the cross-cutting and underlying theme is how it is managed, within the national territory, the migrant presence.

The decision sparked a lot of debate within the UK, showing how the margin of appreciation doctrine cannot always prevent Strasbourg from sometimes entering in collision with sensitive positions taken by the Member States' Governments on difficult matters. The judgment favored amongst the British ECHR's critics the impression that the Court was mingling excessively with the UK's internal affairs and own balance of powers. On the other hand, the arguments of the detractors of the decision were double-headed, addressing not only the perceived invasion of the State's margin of appreciation from the outside (i.e. by the European Court) but also from the inside (i.e. by the national Courts)<sup>9</sup>.

The difficult role of the British judiciary has quite dramatically emerged along the recent years due, amongst other reasons, to the fact that the ECHR has an immediate effect within domestic legislation<sup>10</sup>: and, as anticipated, it is precisely in the migration field that the implementation of the Convention by the National Judges and the guidance given by Strasbourg are (or at least are perceived to be) particularly intense and sometimes even intrusive of the other power's prerogatives. One of the articles of the ECHR which has brought the relationship with the European Judges especially high within the British Government's political agenda is Art. 8, which, by protecting private and family life against unjustified/undue/unbalanced interferences of the State<sup>11</sup>, can be a

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9 Hale (2012): «In his Kingsland Memorial Lecture on Wednesday, 23 November 2011, Michael Howard, the former leader of the Conservative party, attacked the Strasbourg Court for descending into the minutiae of the Convention rights and denying member states their proper margin of appreciation to interpret and apply the Convention in the light of local conditions. But he also attacked the United Kingdom Courts for going beyond the Strasbourg case law in extending the interpretation of the Convention»

10 Although the United Kingdom ratified the European Convention on Human Rights in 1951, the Convention did not for some years exert any significant influence on British law and practice in the immigration field. The passing of the Human Rights Act in 1998, though, changed this state of things completely. By way of the Act, the Parliament required the Convention rights to be given effect as a matter of domestic law in the country. Courts or Tribunals determining a question which had arisen in connection with a Convention right had therefore to take into account any relevant Strasbourg jurisprudence and all public authorities would act unlawfully if they did not act compatibly with a person's Convention rights. See Huang -v- The Secretary of State for the Home Department [2005] EWCA Civ 105.

11 Art. 8 ECHR: «1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others». But art. 8 ECHR was not the only one to spark controversy

very effective tool in overcoming domestic legislation's restrictions on the entry and stay of non-nationals<sup>12</sup>. It is therefore around this article and its implementation by the British Judges that we will now focus our analysis.

### **British Courts and art. 8 EHCR**

Immediately after the enactment of the Human Rights Act, and for fear of overstepping their boundaries, the British Judges self restrained themselves to the bare guardianship of the legal formality of the Administration's acts, the underlying assumption being that the margin of discretion for the Executive in immigration matters had to be as wide as possible, whilst the only task for the judiciary was to apply “most anxious scrutiny” to the exercise of such discretion: Tribunals and Courts should only content themselves with reviewing, in a “secondary fashion”, if the exercise of the political discretion had perhaps been diverted by irrationality, or was guilty of procedural impropriety, or had misdirected itself.

For what concerned art. 8 ECHR cases, this line of analysis implied that the evaluation “outside the rules” (i.e. within the art 8 ECHR's framework) of the claimants' cases should only be carried out when the disregard, by the UK Border Agency, for the content of the article had been severe. This implied that the threshold for considering a breach of article 8 right to family and private life was set very high: according to the so called “insurmountable obstacles” test, set out in the “Mahmood case”<sup>13</sup>, there would be no violation of article 8 ECHR whenever the family of the non-admitted/refused foreign national was able to relocate in the alien's country of origin, «even where this involves a degree of hardship for some or all members of the family». Such a test, preventing the Judge from considering the foreigner's case against the backdrop of art. 8 ECHR except for the most compelling circumstances, «tipped the balance firmly in favor of immigration control over the right to family life»<sup>14</sup>.

The early years 00's saw a change in this scenario, the case that set the whole jurisprudence on art. 8 in motion being the one of R (on the application of

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within the British politics. Another case that raised significant debate (and critics against the ECHR) was the one of *Hirst v the United Kingdom (No 2)* [2005] ECHR 681, whereby the ECHR held that that Section 3 of the Representation of the People Act of 1983, which prevents prisoners from voting, is in breach of the electoral right under Article 1 of Protocol 3 of the European Convention on Human Rights. Reputedly, Mr. David Cameron said that the idea of giving prisoners the right to vote made him “physically sick”: <http://www.telegraph.co.uk/news/uknews/law-and-order/11911057/David-Cameron-I-will-ignore-Europes-top-court-on-prisoner-voting.html>

12 See for instance, Thym (2008).

13 R (on the application of Mahmood) v. Secretary of State for the Home Department [2000] EWCA Civ 315 para 55 (3).

14 Stevens (2010). See also, Wray (2011). A good example of this reasoning is R. (on the application of Ala) v Secretary of State for the Home Department [2003] EWCA 521 (Admin).

Razgar)<sup>15</sup>. Deciding on the issue Lord Bingham clarified that, further to the introduction of the Human rights act into the British *corpus iuris*, it was for the judiciary not only to assess the mere formal adequacy of the Secretary of State's decisions but also to check whether, in carrying these decisions out, the Administration had gotten the facts wrong. If the Judges had found it to be so, it was for them to then try and set the record straight by carrying out the balancing exercise themselves<sup>16</sup>: for the first time since the introduction of the Human Rights Act it was established that, at least in some specific occasions, it was for the Judiciary and not only for the Secretary of State to carry out the balancing exercise between the rights of the migrant and the rights of the State. This approach was confirmed in the case of Huang<sup>17</sup>, where the Court of Appeal also took it upon itself to overcome the last part of the Mahmood reasoning, namely the one related to the “unsurmountable obstacles' test”. According to the High Judges, in order for an art. 8 ECHR claim to succeed it would be enough that the refusal of leave to enter or to remain prejudiced the life of the family in a sufficiently serious manner. The one related to exceptionality was not a probative rule but, rather, just an expectation, «that the number of claimants not covered by the Rules and supplementary directions but entitled to succeed under article 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test»<sup>18</sup>. Once again the balancing exercise the judiciary power is called upon is brought to the forefront: Judges cannot content themselves (and the executive power cannot

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15 R. (on the application of Razgar) v. Secretary of State for the Home Department [2002] EWHC 2554 (Admin).

16 Lord Bingham was careful to clarify that: «even in such a case, when it comes to deciding how much weight to give to the policy of maintaining an effective immigration policy, the adjudicator should pay very considerable deference to the view of the Secretary of State as to the importance of maintaining such a policy» (para 41).

17 See Huang -v- The Secretary of State for the Home Department [2007] UKHL 11 which, differently from the Razgar case mentioned above, was upheld on the same reasoning both by the Court of Appeal and by the House of Lords. Another, very similar case that was decided on the same occasion is the case of Kashmiri v. Secretary of State for the Home Department.

18 Huang (FC) v. SSHD [2007] UKHL 11, para 20: «In an article 8 case [...] the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere [...] prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality. The suggestion that it should is based on [...] an expectation, that the number of claimants not covered by the Rules and supplementary directions but entitled to succeed under article 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test». In other words, «their Lordships found that, in imposing such condition (i.e. in requesting an exceptionality test) lower Courts and tribunals had confused a prediction – that it would be relatively rare for the demands of immigration control to be trumped by art. 8 considerations – with a precondition» (Wray, 2011: 180).

ask them to) of simply “ticking boxes”, mechanically assessing the presence or the absence of static requirements and then summing them up arithmetically to arrive to a decision. On the contrary, the specific circumstances of each case always have to be checked attentively and wherever, on the basis of this overall assessment, the onus on the relocating a family should seem to be too burdensome, the balance should be struck in favor of the individuals, and not of the State.

It's easy to see how, with the decisions of Razgar and Huang, the balance between the Judges and the SSHD (more generally, the balance between the judiciary and the executive power) shifted significantly. From the initial resistance to the application art. 8 principles within the domestic jurisprudence, to the very cautious approach adopted further to the introduction within the British legal framework of the Human Rights Act, the Kingdom's highest Courts finally adopted a much more active approach, which entailed a “two stages approach”: firstly, a review of the national framework and of the standing of the contested administrative decision against it; and, secondly, an evaluation of the impact of the same administrative decision on the claimants' article 8 rights, assessed on the basis of the content and scope of such an article as understood and elaborated by both the European Judges and by the domestic Courts. The Government's power to fix the main objectives of the immigration agenda should not prevent the Tribunals and the Courts from assessing whether the decisions of the public officials were (not only respectful of the law, but also) in keeping with the content and aims of article 8; and, if the decisions were found to be in contrast with such and article they should be considered unlawful and should, as such, be quashed<sup>19</sup>.

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19 According to some scholars the one described was an actual Copernican revolution which was based on «a system of fundamental values, liberty democracy and equality» and which suggested that «the highest judiciary, while not unsympathetic to the dilemmas faced by the government, were not willing to permit any means possible for them to be resolved»; «that does not mean that the legitimacy and importance of immigration control were questioned in these cases. However, they were not given unquestioning priority». (Wray, 2011). This revolution was so deep that it actually brought the British Courts ahead of the Court of Strasbourg. As a matter of fact, while in the UK the legal tests for infringement of art. 8 were now reasonableness tests, the Strasbourg Court continued to use (at least for what concerns the wording) the insurmountable obstacles tests. In the view of the scholars: «it could be claimed that the House of Lords is ahead of Strasbourg Court. Cases such as Rodrigues da Silva and Konstantinov v Netherlands have confirmed that where family life is created when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would be precarious from the outset, it is likely only to be in the most exceptional circumstances that the removal of the non national family member will constitute a violation of art. 8» (Stevens, 2010: 17). It is important to note that, when assessing an art. 8 claim, National Judges also have to take “public security elements” into account («[There shall be no interference by a public authority with the exercise of this right except in case of] national security, public safety or [...] for the prevention of disorder or crime»). This is why assessments of art. 8 claims are particularly complex when the claimants have a criminal/deviant background – and the ECHR has provided national Courts with extensive guidance in such cases (See for instance:



As anticipated above, the UK is a very good example to highlight the difficult position of the domestic Courts within what is a three lateral relationship between the member States and the ECHR: The European Convention of Human Rights is, by way of the Human Rights Act of 1998, a part of the British corpus iuris and this clearly marks the importance of Strasbourg's guidance on the interpretation and application of the Convention itself. For those who already thought that Strasbourg's interference in national matters was too pervasive, this very strict dialogue between the British judiciary and their European counterparts was perceived as particularly suspicious. Therefore, whilst measures were discussed to try and emancipate the UK from the ECHR's scrutiny in Human Rights matters in general, other reforms were also in the meantime envisaged so as to limit the judiciary's activism in art. 8 ECHR matters, which were considered to be Strasbourg's bridgehead within Britain's domestic affairs.

### **The New Immigration Rules and the quest for the lost margin**

The Tory party has in recent years made the quest for more independence from the European Judges its political manifesto<sup>20</sup>, and has advocated for the drafting of a new British bill of rights, which should shelter Britain from undue influence and interference from the European Court of Human Rights. Much less controversially and with much more speed, though, another reform has in the meantime been enacted, which has already started to profoundly alter the balance of powers between the executive and the judiciary within, possibly not by chance, the immigration field. The reference is to the 2012 and 2014 new Immigration Rules which were presented as a new set of rules with the main goal of reducing the possibilities, for those willing to go to the UK, to qualify for entrance or for leave to remain. This was certainly true, as new schemes within the so called Tier system were introduced whilst other venues for entrance or for stay were at the same time closed<sup>21</sup>. But what is more interesting to our perspective now is that the new rules were also specifically passed with the goal of reducing the possibilities for the Judges to “interpret” or rather to “deviate” the scope and content of article 8.

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Maslov v. Austria, or Bouchelkia v. France). Since this would thus bring us too far in the analysis of the implementation of art. 8 ECHR cases within the British jurisprudence, we did not take this element into account.

<sup>20</sup> See the speech given by David Cameron as far back as 2006, at the Centre for policy studies <http://www.theguardian.com/politics/2006/jun/26/conservatives.constitution>

<sup>21</sup> As for entry channels, for example, the Tier 1 (General) immigration VISA was closed in spring 2015, and replaced by Tier 2: whilst the previous one did not require the presence of a sponsor in the UK, the present one now does. Again for the Tier system, the requirements to qualify under Tier 4 (Students) have been tightened significantly with the reform (see for example: <https://www.freemovement.org.uk/genuine-students-and-eco-interviews/>) As per regularization measures, the previous 14 years rule, which was a form of a case by case regularization mechanism based on residency, has also been closed and substituted with the now 20 years rule.

That this was the Secretary of State's main goal became immediately apparent after the publication of the new Immigration guidelines, that set out in detail how article 8 had to be understood and applied from that moment on<sup>22</sup>. The tool that was used to reduce the margins of interpretation for the Judges was to contend that the new Immigration Rules “incorporated” article 8 ECHR, and that, therefore, by applying the rules themselves, the Judges were already applying article 8 ECHR<sup>23</sup>. As a consequence of this new approach, the Judges were invited to restrain their evaluation only to the presence or absence of specific sets of requirements that, in the view of the Secretary of State, summed up the possibilities in which the claimants' art. 8 rights could be taken into account, and to venture outside of this path only in very exceptional cases: the hope of the promoters was that substantive law relating to article 8

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22 See for example: «The Home Secretary, Theresa May is bringing in new immigration rules to end the "abuse" of the right to family life – as enshrined in the European convention on human rights – which allows foreign nationals to stay in the UK despite having committed crimes or breaches rules» <http://www.theguardian.com/uk/2012/apr/08/may-immigrant-abuse-family-life>; or <http://www.theguardian.com/uk/2012/jun/08/immigration-rules-couples-stark-choice>. See also, from a more scholarly perspective: <http://ukconstitutionallaw.org/2012/10/04/robert-thomas-the-new-immigration-rules-and-the-right-to-family-life/>; <https://www.freemovement.org.uk/can-article-8-be-overridden/>; <https://www.freemovement.org.uk/theresa-may-qualifies-a-qualified-right/>

23 The Home Office statement entitled “Immigration Rules on family and private life: Grounds of compatibility with article 8 of the European Convention on Human Rights” stated, at para 67: «Bringing art. 8 within the Rules will ensure consistency, fairness and transparency in decision-making. We will retain discretion to grant leave outside the Rules in genuinely exceptional cases where it is considered that the rules will produce a disproportionate result. However, it is considered that those cases will be rare since the new Rules reflect the Government's view of how the balance should be struck between individual rights under art. 8 and the public interests in safeguarding the UK's economic well-being in controlling immigration and in protecting the public from foreign criminals». With specific regards to criminal cases and connected decisions of deportation, the «criminality guidance for Art. 8 ECHR cases» specified that: «In determining whether a case is exceptional, decision makers must consider all relevant factors that weigh in favor and against deportation [...] exceptional does not mean “unique” or “unusual”. Decision makers should be mindful that whilst all cases are to an extent unique, those unique factors do not generally render them exceptional. For these purposes, exceptional cases should be numerically rare. Furthermore, a case is not exceptional just because the exceptions to deportation have been missed by a small margin. Instead, “exceptional” means circumstances in which deportation would result in unjustifiably hard consequences for the individual or their family such that deportation would not be proportionate. That is likely to be the case only very rarely». Statement available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/286879/echr-fam-mig.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/286879/echr-fam-mig.pdf). As the Court of Appeal noted in the case of MF: «the picture that emerges is by no means clear. The statement of 13 June 2012 says that in most cases the rules produce a proportionate result, but in those “genuinely exceptional cases where the result is disproportionate the discretion to grant leave outside the rules will be retained to ensure that art. 8 rights are respected”. On the other hand, the document issued in March 2013 defines exceptional circumstances and states that, in determining whether a case is exceptional, all relevant factors in favor of and against deportation are to be considered under the new rules. On this approach, it is difficult to see what scope there is for any consideration outside the new rules: ie they provide a complete code».

proportionality would thus have to be reinvented, and a legal test of exceptionality (for succeeding where the Rules are not met) would have to be re-introduced.

Despite an initial, quite fierce resistance from the Senior Courts<sup>24</sup>, that were trying to argue that the two stages approach had to be maintained and that no exceptionality test had to be reinstated, it became clear that the Government's intervention and guidelines had begun to sink in when, in the case of MF, the Court of Appeal found that «the new rules are a complete code», and that the second part of the two stage approach (ie the evaluation related to the Claimant's art. 8 rights) had been incorporated into them<sup>25</sup>. This, in the Court's opinion, meant that it was no longer necessary for the Tribunals to carry out an “outside the rules” evaluation, because the same factors that would make the expulsion of a person disproportionate on a traditional Art. 8 analysis were now those circumstances that the Immigration Rules defined as exceptional, even though the test for meeting them was not an exceptionality one<sup>26</sup>.

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24 In the case of Izuazu, for example, the Court stated that: «there can be no presumption that the Rules will normally be conclusive of the Article 8 assessment or that a fact sensitive inquiry is not normally needed [...] if there is no presumption that the provisions of the rules reflect and apply the balance between the competing considerations, exceptional circumstances cannot be the test to be applied under the law». *Izuazu v. Secretary of State for the Home Department*, [2013] UKUT 00045 (IAC) para. 67. In MF, the Upper Tribunal also stated that: «our conclusion is that the need for a two-stage approach in most article 8 cases remains imperative, because the new rules do not fully reflect Strasbourg jurisprudence as interpreted by our higher Courts». *MF v. Secretary of State for the Home Department*, [2012] UKUT 00393 (IAC), para. 41.

25 *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192, para. 44: «[...] the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence. We accordingly respectfully do not agree with the UT that the decision maker is not “mandated or directed” to take all the relevant article 8 criteria into account»

26 *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 119, para. 42-43: «At para 40, Sales J referred to a statement in the case law that, in “precarious” cases, “it is likely to be only in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of art 8”. This has been repeated and adopted by the ECtHR in near identical terms in many cases. At paras 41 and 42, he said that in a “precarious” family life case, it is only in “exceptional” or “the most exceptional circumstances” that removal of the non-national family member will constitute a violation of article 8. In our view, that is not to say that a test of exceptionality is being applied. Rather it is that, in approaching the question of whether removal is a proportionate interference with an individual's article 8 rights, the scales are heavily weighted in favor of deportation and something very compelling (which will be “exceptional”) is required to outweigh the public interest in removal. In our view, it is no coincidence that the phrase “exceptional circumstances” is used in the new rules in the context of weighing the competing factors for and against deportation of foreign criminals. The word “exceptional” is often used to denote a departure from a general rule. The general rule in the present context is that, in the case of a foreign prisoner to whom paras 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the “exceptional circumstances”»

This and similar judgments seem to have paved the way for a very peculiar interpretation of the New Immigration rules, especially by the lower Courts<sup>27</sup>: what seems to be the standard procedure now is that Tribunals only tend to consider whether the claimants comply or not with the new Rules and if they do not, they are not very keen to engage in an “art. 8 ECHR” evaluation (outside the rules), because they consider that the threshold for moving on to such an evaluation is again represented by “exceptional circumstances”. The threshold that the Huang case had thrown out of the front door seems therefore now to be coming back through the window and, given the British’s peculiar funding system<sup>28</sup> it is getting all the more difficult for art. 8 ECHR cases to

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27 It is found that lower Courts tend to have a more deferential approach towards the Executive and the Secretary of State than the higher ones: this is also why, when a specific line of interpretation has been implemented, and especially if it is more in line with the Executive’s guidances or expectations, it is very difficult for change to come from the bottom – up, and it is rather the Highest Courts that have always taken it upon themselves to introduce new, and sometimes even daring lines of interpretation within the judicial framework. See, for example: «This article demonstrates that this context has permitted the court to identify a relatively narrow but nonetheless positively asserted area of authority which it has used to considerable effect to protect the interests of migrants and their UK-resident family members. This is in contrast to the position adopted in the lower Courts and tribunals, which, with some exceptions, sought to reproduce the certainties associated with earlier hard-edged categories and the priority awarded to government, rendering human rights values almost ineffective in the process.» The same scholar also talks about the «restrained, over-technical and excessively deferential attitude by the judiciary on immigration matters (which) has long been the subject of critical commentary and survived in the lower Courts, well into the post HRA era» (Both quotations are from Wray (2013). During a fact finding mission to the United Kingdom I have had the opportunity of exchanging with immigration solicitors, caseworkers and advocates, on the new Immigration Rules and on the impact that these, and such decisions as MF (Court of Appeal) were having on their work. Many of them found that the decision of MF at the CoA was a difficult one, as it had blurred the lines which had been clearly set out by the decision of the Upper Tribunal in the same case. It was found that the decision in question was being misinterpreted by the lower Courts, which would use a circular logic which is in contrast with the approach that had been recommended by the Upper Tribunal. As a consequence of the above caseworkers considered it was wiser and safer to try and squeeze the cases inside the rules rather than to argue the cases outside them, especially because in this way the chances of success increase and at the same time the Secretary of State was less inclined to appeal the decisions. Whilst the cases which fell squarely within the Rules were according to practitioners now more likely to succeed, at the same time those diverging from them were at high risk of dismissal. This also can be seen as a confirmation of the shrinking evaluation margin of the Tribunals with respect to the balance of interests already assessed by the Executive, as in most cases Judges content themselves with ratifying the decisions of the UK Border Agency.

28 The Legal Aid Funding system currently in place in the United Kingdom covers asylum claims and claims based on art. 2 and 3 of the ECHR up to the First-Tier Tribunal’s decision. Further on along the judicial structure, the legal merits of each case and the economic means of the claimants are thoroughly assessed before further financial covering is granted. As per art. 8 ECHR cases, since the introduction of the New rules of 2012 they are no longer, at any stage, covered by public fundings: this means that those who want to argue an art. 8 claim have to have the financial means of doing so. This can clearly be extremely burdensome, and thus the lack of means prevents many from pursuing their cases at the highest level of the judicial hierarchy, thus making any change in the overall judicial framework very difficult.

make it through all the ladders to the highest Courts, which is where most of the British judicial practice is shaped and oriented. The judicial everyday practice of the lower Courts seems therefore to confirm that the initial goals pursued by the reform have been accomplished, and that the evaluation margin of the judiciary has somewhat shrunk.

### Switzerland

As well as the UK, Switzerland has known, along the most recent years, a significant spark of anti-european sentiments, mainly directed against Strasbourg and the ECHR, which have been repeatedly accused of interfering with the Swiss' state of affairs and with the will of the Swiss people<sup>29</sup>. As also happened in the UK, such political standings have been supported by at least part of the press, and have proved to be particularly successful in the field of immigration, where they have also been backed by a general unease against foreign nationals and families, perceived often as “bogus” or “fraudulent” and threatening of the Swiss lifestyle. Unlike what has happened in the UK, though, such claims have only partially involved the national judiciary which, for historic reasons, has always been much more cautious and careful in the application of such articles as art. 8 ECHR than its British counterpart<sup>30</sup>. Despite this, the most

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29 See for instance the Initiative for the primacy of the National Law over the European one (“Le droit suisse au lieu de juges étrangers” - “Swiss law instead of foreign Judges” - launched in 2015, according to which: «the independence and auto determination of the Swiss people are though threatened: 1) by those politicians, bureaucrats and professors that do not want the People to have the last word – they are trying to reduce (our) democratic rights; 2) these people are more and more frequently adopting the perspective according to which foreign law – belonging to foreign Tribunals and Judges – should prevail over Swiss law, approved and voted by Swiss people and Cantons; 3) the Federal Council, the other political parties and the Federal Tribunal put the provisions of international law above Swiss law»: <http://www.udc.ch/actualites/conferences-de-presse/debut-de-la-recolte-de-signatures-pour-le28099initiative-populaire-c2able-droit-suisse-au-lieu-de-juges-etrangers-initiative-pour-le28099autodeterminationc2bb/> (All the texts quoted in this section were originally in French – translation by the Author).

30 Oddly, one of the fields of immigration law where the Swiss jurisprudence has been traditionally more prudent and cautious is precisely the one related to art. 8 ECHR: «Under the Federal Supreme Court’s case-law, a foreigner living in Switzerland could only rely on the right to respect for his private and family life to prevent his family being separated if he had a permanent residence permit. This case-law was based on the idea that a person who did not have the permanent right to reside in Switzerland himself could not provide such a right to another person», ECHR, case of M.P. E.V and others v. Switzerland, July 2014, para. 45. As noted by some scholars, «The Swiss practice can be particularly hard for people that have been living in Switzerland for years – and can no longer go back to their countries. We refer in particular to provisionally admitted people, to foreigners with humanitarian permits that, though, do not comply with the requirements for family reunion, or to asylum seekers whose claim has been put on hold for several years. Such people may see their right to family life severely curtailed for a very long time» (Amarelle, 2012). Furthermore: «With very constant jurisprudence the Federal Tribunal interprets art. 8 ECHR on family life very strictly. In contrast with the ECHR, the Federal Tribunal considers that art. 8 ECHR can only be applied to claimants that have a strict and effective relationship with family members that already have a firm right to remain in

recent example of the ongoing anti-european campaign again seeks to reduce the perceived undue influence of Strasbourg precisely by curtailing some of the domestic Courts' powers and prerogatives – thus lending itself to some interesting comparisons with the British Reform of the Immigration Rules and its subsequent reshaping of the State's balance of powers

The popular initiative on the expulsion of foreign criminals<sup>31</sup> was approved by the Swiss people in 2010. As a consequence, paragraphs from 3 to 6 were added to art. 121 of the Constitution. They state that those foreign nationals who have been definitively sentenced for some specific crimes lose their right to remain in Switzerland and have to be deported, and that a ban to their reentry in the Country also has to be issued<sup>32</sup>. According to the transitory provisions, contained in art. 197 n.8 of the Swiss Constitution, detailed norms for the enactment of the above article had to be discussed and approved within 5 years from the popular initiative<sup>33</sup>. The party which had already campaigned for and promoted the first initiative was nevertheless of the opinion that the competent authorities were taking too long to approve the required legislative provisions; furthermore, whilst the project for the enactment of the popular initiative was being discussed at the legislative level, some concerns as to the content of the initiative itself were raised, and the projects for its execution took these concerns into account<sup>34</sup>. To try and counter what they perceived as an undue

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Switzerland, ie Swiss nationals, Indefinite Leave to Remain Permit's holders and people with clear right to the grant of a permit in Switzerland» (Petry, 2013:186).

31 On the 28th of November 2010 the popular initiative “Pour le renvoi des étrangers criminels” (For the removal of criminal foreigners) was approved by a majority of 52.3%, of the population and by 20 Cantons.

32 New Art. 121, para 3 to 6, as introduced by the 2010 referendum: «3.Irrespective of their status under the law on foreign nationals, foreign nationals shall lose their right of residence and all other legal rights to remain in Switzerland if they: ) a. are convicted with legal binding effect of an offense of intentional homicide, rape or any other serious sexual offense, any other violent offense such as robbery, the offenses of trafficking in human beings or in drugs, or a burglary offense; or b) have improperly claimed social insurance or social assistance benefits. 4 The legislature shall define the offenses covered by paragraph 3 in more detail. It may add additional offenses. 5. Foreign nationals who lose their right of residence and all other legal rights to remain in Switzerland in accordance with paragraphs 3 and 4 must be deported from Switzerland by the competent authority and must be made subject to a ban on entry of from 5-15 years. In the event of re-offending, the ban on entry is for 20 years. 6. Any person who fails to comply with the ban on entry or otherwise enters Switzerland illegally commits an offense. The legislature shall issue the relevant provisions».

33 «8. Transitional provision to Art. 121 (Residence and Permanent Settlement of Foreign Nationals) The legislature must define and add to the offenses covered by Article 121 paragraph 3 and issue the criminal provisions relating to illegal entry in accordance with Article 121 paragraph 6 within five years of the adoption of Article 121 paragraphs 3-6 by the People and the Cantons».

34 See for example the Message du Conseil Federal Suisse, Concernant l'initiative populaire «Pour le renvoi effectif des étrangers criminels (initiative de mise en oeuvre), 20 Novembre 2013, p. 8510 ss, according to which «On 22 December 2010 the Head of the Federal Justice and Police Department (DJP) commissioned a working group to develop normative proposals for the

interference in the popular will which had clearly been expressed in 2010, this same party has therefore proposed another popular initiative which this time aimed at being immediately effective, without requiring further deliberation processes by the Parliament: on this second initiative the Swiss people were asked to vote at the end of the month of February 2016. Had the approval rate reached the required majority, the text of the initiative would have directly changed the Constitution and become immediately executive<sup>35</sup>.

According to the new proposal, foreign nationals convicted of some specific crimes would have had to be deported automatically, with a ban on reentry spanning from 5 to 20 years. The apical point of the proposal was that the expulsion would have had to be disposed automatically, regardless of the specific sentence inflicted and without any possibility for the single judge to ascertain whether such measure was adequate with regards to the specific circumstances of the case<sup>36</sup>. As pointed out by almost all the Law scholars and Professors in Switzerland and by the Federal council itself, such provision would have thus altered one the main principles of the Swiss Constitution, i.e. the one of proportionality. By forcing the Judges to order the deportation of the foreign criminals in an automatic way, i.e. without the least consideration for the specific circumstances of the case, such a reform would have annihilated

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implementation of the new provisions and to present their legal consequences [...] Option 1, which is preferred by the Federal Council, represents a compromise between the automation of the expulsion provided for in the new constitutional provisions on the one hand, and, on the other, the constitutional principles in force and international law. It is supported by the majority of those who participated in the consultation, although some raised serious reservations. Variant 245 emanates from the members of the working group that represent the initiative. It received the support of a minority of participants in the consultation. On 26 June 2013 the Federal Council adopted a message and a draft implementing the new constitutional provisions. The content is inspired essentially by the compromise proposed in option 1.

35 «The committee for the initiative states that «Bern refuses to apply the initiative for the automatic deportation». It considers that the first option, elaborated in detail by the Federal Council and clearly preferred by it, draws inspiration from another project, which has already been rejected by the people and by the Cantons. According to the committee, the Federal Council [...] does not have the intention to respect the popular will. The Initiative for the practical implementation should therefore allow the people and the Cantons to show to the Federal Council how the popular initiative for the automatic deportation should be applied», Message du Conseil Federal Suisse, Concernant l'initiative populaire «Pour le renvoi effectif des étrangers criminels (initiative de mise en oeuvre), 20 Novembre 2013, p. 8510 ss. For the position of the proponents, see for instance: <http://www.udc.ch/campagnes/apercu/initiative-populaire-c2abpour-le-renvoi-effectif-des-etrangers-criminels-initiative-de-mise-en-c593uvrec2bb/de-quoi-sagit-il/>

36 «In order to harden the practice of the Tribunaux, the Initiative for the practical implementation foresees the (almost completely) automatic expulsion of sentenced foreigners [...] Such an automatic mechanism would on the other hand result in the impossibility, for the authorities charged with the elaboration and application of the law, to take the proportionality principle into account. Switzerland would thus no longer be able to comply with the non-imperative international law provisions to which it has already subscribed», Message du Conseil Federal Suisse, Concernant l'initiative populaire «Pour le renvoi effectif des étrangers criminels (initiative de mise en oeuvre), 20 Novembre 2013, p. 8526.

the margin of maneuver of the judiciary within criminal cases involving foreign citizens<sup>37</sup>.

Switzerland and the UK could not be more diverse, for historical, political and also “constitutional” reasons. Despite this, in both countries the popular and political unease with regards to the leadership of Strasbourg in the field of human rights has been mounting over the past years and has inevitably ended up by putting the domestic Tribunals under a lot of pressure and strain. Whilst preparing for possibly bailing out of the European Convention, it is not therefore by chance that both countries have in the meantime tried to regain part of their perceived lost sovereignty by addressing the issue from an internal perspective, i.e. trying to curtail the powers and the mandate of the judiciary, considered to be the “right hand” or the bridgehead of the foreign Judges’ interference within matters of internal political relevance.

### New perspectives

From the perspective of migration management it thus seems that the tendency characterized as “*judicialization of politics*” has been met by a resistance which has made it evolve into its exact opposite: the politics are now trying to reduce the main trait of the judiciary, i.e. its interpretative and discretionary power, and to contain it within predetermined schemes of analysis and of judgment, hence bringing it closer to a mere exercise of ratification of decisions that have already been taken elsewhere. Where will this tendency lead is yet unclear, but it would not be the first time that experiments and hybridizations carried out in marginal fields of the law – and especially in migration law – spilled over on to the general population.

Criminologists and criminal scholars have already focused, for example, on the so called “criminalization of immigration regulation”, by that mainly meaning the blurring of boundaries between immigration and crime control that, already started at the beginning of the 1980s, was further increased in the wake of the 9/11 attacks<sup>38</sup>. The main traits of such phenomenon have been found in the transformation undergone by the criminal law and procedures which, for some specific categories of individuals (mostly non – citizens) have been “hybridized” with administrative tools and categories, thus turning into a

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37 «By fixing the automatism of the expulsion as a rule, the proposed provision allows some limitations to the proportionality principle, which is inscribed in the Constitution (art. 5, al. 2, et 36, al. 3, Cst.). This principle imposes to verify that the expulsion represents an adequate and necessary measure, which can be reasonably imposed on the sentenced foreigner – the Initiative for the practical implementation does not provides for such an evaluation of the proportionality of the expulsion [...] it only allows the Judges to renounce to the expulsion if the act has been committed in self defence, or in a state of necessity», Message du Conseil Federal Suisse, Concernant l'initiative populaire «Pour le renvoi effectif des étrangers criminels (initiative de mise en oeuvre)», 20 Novembre 2013, p. 8528. On this point, see also: <http://pda.ch/2016/01/ein-appell-der-professorinnen-und-professoren-der-rechtswissenschaftlichen-fakultaeten/>.

38 Aliverti (2012); Chacon (2009); Garland (2001) and (1996); Sklansky (2012).



new legislative model specifically tailored to enforce security and control. The main traits of this “criminal law of the enemy” have been found in the militarization of borders, the increased enforcement of expulsions and in the institute of administrative detention which, by combining the limitation of personal freedom with procedures and schemes belonging to the administrative field, has become the epitome of this new field of the public law.

Despite the fact that most (and the most spectacular ones) of these measures were initially only enforced on migrants, because they represent a “marginal” population often perceived as deviant and dangerous, some of the same tools, less perspicuous but not less invasive, have, in time, spilled over and been addressed to the general population: the ever growing digital surveillance developing within all the Western Countries is one example of such a phenomenon<sup>39</sup>. Another one is the increasing use of administrative tools to tackle social deviance: ASBOs, an originally<sup>40</sup> British product, stand out as an interesting paradigm in this sense.

The line of channeling and flattening the discretion of the judiciary is now being tested, within the immigration field, in two such different countries as the UK and Switzerland. This points to the relevance of the experiment and makes it an interesting angle from which to investigate the way in which the migration phenomenon and its management are re-shaping the balance of powers within the Nation State. But it is also important to monitor these new developments because their reach can go well beyond the scopes initially envisaged: once certain balances are altered, or certain practices are introduced, getting back to the status quo may prove difficult - even for individuals who are, generally, not amongst those “that are taken away”<sup>41</sup>.

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39 See for instance, Anderson (2015). According to the Report, «RIPA (Regulation of Investigatory Powers Act), obscure since its inception, has been patched up so many times as to make it incomprehensible to all but a tiny band of initiates. A multitude of alternative powers, some of them without statutory safeguards, confuse the picture further. This state of affairs is undemocratic, unnecessary and – in the long run - intolerable»: 13

40 ASBO – Antisocial Behaviour Orders, are civil orders made against people that had engaged in “anti-social” behaviors. The breach of the order would trigger the response of the penal system. The mechanisms of ASBOs, the way they were enforced and their effectiveness were strongly criticized: see for instance the opinion of the European Commissioner for Human Rights, Mr. Alvaro Gil – Robles, on the use of ASBOs in the UK, available at: <https://wcd.coe.int/ViewDoc.jsp?p=&id=865235&direct=true>

41 «First of all, they came to take the gypsies/ and I was happy because they pilfered./ Then they came to take the Jews and I said nothing,/ because they were unpleasant to me./ Then they came to take homosexuals,/ and I was relieved, because they were annoying me./ Then they came to take the Communists,/ and I said nothing because I was not a Communist./ One day they came to take me,/ and there was nobody left to protest» B. Brecht, inspired by Emil Gustav Friedrich Martin Niemöller

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