

INTERVIEW

A Political Decision Disguised as Legal Argument? Opinion 2/13 and European Union Accession to the European Convention on Human Rights

Interview with David Thór Björgvinsson, Professor of Law, Centre of Excellence for International Courts (iCourts), Faculty of Law, University of Copenhagen, Denmark, and former Judge of the European Court of Human Rights

Graham Butler*

David Thór Björgvinsson was a judge of the European Court of Human Rights between 2004 and 2013. During this period, he was involved in many important judgments, including *Scoppola v Italy (No. 3)*,¹ *Eweida and others v United Kingdom*,² and *Al-Jedda v the United Kingdom*,³ amongst others, and went on to serve as Vice-President of the Fourth Section. He has degrees from the University of Iceland, Duke University School of Law, and the University of Strasbourg, and is currently a Professor of Law at the Centre of Excellence for International Courts (iCourts) at the Faculty of Law, University of Copenhagen, Denmark. In this interview, carried out in June 2015 for the Utrecht Journal of International and European Law, David Thór Björgvinsson outlined his views to Graham Butler on Opinion 2/13 from the Court of Justice of the European Union on the Union's accession to the European Convention on Human Rights,⁴ the workings of the European Court of Human Rights, and what the future may have in store for this Court.

Keywords: European Union law; Court of Justice of the European Union; Human rights law; European Convention on Human Rights; European Court of Human Rights

1. You were an academic in Iceland, as well as someone who had spent some time working in an international court before being elected a judge of the European Court of Human Rights. You're now settled back into academia as a Professor of Law at the University of Copenhagen. With this blend of both academic and practical experience, tell us about your journey, and how these different experiences have shaped your views on the law.

My whole career has been a mixture of practical and academic work. A long time ago now, I was working at the EFTA Court in Geneva when it was established there. Then it was five countries, but was subsequently reduced after some states became Member States of the European Union. I was there for three years working as a référendaire for the then Icelandic judge Thór Vilhjálmsón, who at the same time was also a judge in Strasbourg. The role of a judge at the EFTA Court in Geneva was a full-time position, but his position as a judge in Strasbourg was part-time, as it was before the ratification of Protocol 11 of the Convention in 1998 which reconstructed the whole Strasbourg system. Following my first period at the EFTA Court, I went back to the University of Iceland as a Professor, before then going back to EFTA Court (which had since been relocated to Luxembourg) for a stretch of four years to work as a lawyer. I then returned to my native

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¹ *Scoppola v Italy (No. 3)* (2013) 56 EHRR 19.

² *Eweida and others v United Kingdom* (2013) 57 EHRR 8.

³ *Al-Jedda v the United Kingdom* (2011) 53 EHRR 23.

⁴ Opinion 2/13 (2014) Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, (not yet reported).

Iceland briefly, before being elected by the Parliamentary Assembly at the Council of Europe as a judge of the European Court of Human Rights. The privilege of being on that Court was that it is like a microscope, where you have the opportunity to really understand the very serious implications that historical and political events can have for individuals.

Life in academia is very different from these more practical aspects. Being located physically at the Court in Strasbourg naturally puts limitations on ones activities elsewhere. Given my early work in the Court, and my position in academia, it can sometimes lead to developing a taste for more practical work – I have to make that confession! When you're working for a court, any court, be it as an assistant, lawyer, or a judge, you do your best to get your head around the issues, and attempt to try and find a solution. You have to come together and find some sort of conclusion with your colleagues, and then you move onto the next case. In academia on the other hand, it is more ongoing and long-term work with one project. Sometimes projects can go quite well, and other times there can be struggles with some of the larger ventures, as well as editors and publishers always trying to put deadlines on you. In academia you are more in control of your life, but it takes more discipline to stay concentrated and do your work. In a court, you are under constant pressure, as you need to deliver, and you don't have any other choice.

Both trades are very different, with each having their own benefits. On the positive side, teaching in an area I have worked in means I have some good stories to tell students. I believe this can add a lot to the discussion, engaging the students in ways that isn't possible in a lot of subjects. In that way, it is nice to be able to contribute to their knowledge and understanding of particular issues. I can sense that the students tend to like this because you are able to bring the situation closer to the students than would otherwise be possible. I think that is an advantage, and it could also be useful for research, but then again, the requirements for research are different, and you cannot just do your writing on the basis of your practical experience. Whilst one may know a lot of things on a given issue, you have to be able to substantiate them in order to transpose this into academic output.

It is true that one of the things that make the job as a judge of the European Court of Human Rights interesting is that you are working with people who have many different backgrounds. First of all, there are judges from each Member State of the Council of Europe, and each brings with them their experience from the domestic level. But also you have people coming from public service like ambassadors, and so forth. Sometimes you also have practically-minded people coming from the bench in their respective home country, many of whom may have never written an academic paper in their life. But on the other hand, on the Court, you might be sitting next to another judge who was a Professor and has never done anything *but* write academic papers. The mind-set can vary greatly between judges.

I can only hope that with my mixture of practical and academic experience I was able to find the middle ground. In my personal experience, some practical work puts you in the best possible place for being a judge, and is helpful for identifying the core issues in each and every case and understanding the practical implications. I guess, in a court like the European Court of Human Rights, maybe the best-case scenario is to have exactly this sort of situation, where you have people with different backgrounds.

2. You spent a full nine-year term on the European Court of Human Rights, during which time the Draft Accession Agreement for the European Union was reached. This agreement allowed for the European Union to accede to the European Convention on Human Rights. Then, in December 2014, the Court of Justice of the European Union (CJEU) published Opinion 2/13, which effectively blocked accession for the time being. What were your initial thoughts?

From a strictly legal point of view, this is not something you could necessarily have predicted. However, from a political point of view, I was not very surprised.

Let me give explain why I felt this way. In 2013 I attended an event at the University of Strasbourg when a judge from the CJEU was giving a speech which touched upon accession. Whilst I do not recall the judge's exact words, the judge conveyed the message that the CJEU in Luxembourg did not really need the European Court of Human Rights in Strasbourg, and that when it comes to defining human rights standards within the European Union in the future, the European Court of Human Rights would be marginalised.

The vocabulary being used during the expression gave me the sense that, even though judges from both Courts regularly meet and are on friendly terms, there is a certain degree of rivalry between the Courts. My insight was that there was a certain resistance among the judges at the CJEU when it came to the question of accession, so from their perspective, I was not surprised they found a way to hold the Draft Accession Agreement incompatible with the Treaties of the European Union.

3. There is a theory about Opinion 2/13 that posits the CJEU did not want accession to take place, and that upon being presented with the opportunity to review the legal dimension of the agreement, the Court sought a legal argument to suit a political decision. Accordingly, the Court dissected the agreement, piece-by-piece, finding a number of incompatibilities with the Treaties, using a backward reasoning method. Was the outcome a *fait accompli*?

Two weeks ago I was in Reykjavík speaking to a number of barristers visiting from England and Wales, where I was presented with the opportunity to discuss the accession issue. In my short presentation, which was not very academic I have to admit, and was taken from a much more practical view (making it more interesting for those who were present); I said that the CJEU's decision was actually a political decision disguised in legal arguments. The details of the Court's Opinion are quite technical, but as I said, this is what it actually is.

It represents resistance to the idea that somehow, the European Court of Human Rights is the frontrunner when it comes to defining the standards of human rights protection within the European Union. If the CJEU becomes the leader in defining human rights in relation to the implementation and application of European Union legislation, this will bring forward a new set of challenges for the European Court of Human Rights. You cannot have one set of standards derived from the European Court of Human Rights, and another one derived from the CJEU. If I was a judge on a national court in one of the EU Member States, regardless of whether I was dealing with European Union legislation or purely national legislation (if there is such a thing), naturally, I would naturally first and foremost look to the jurisprudence of the CJEU.

4. One of the ideas that can now be put forward is that delaying accession further (whether it takes place in the end or not) would provide the CJEU the time to build up more case law using its own Charter of Fundamental Rights, potentially leading to two human rights frameworks.⁵ Do you share this view?

There is of course a form of friendly competition between the two Courts. However, the appropriateness of this competition is questionable, because when talking about human rights, the end aim should be to protect and defend these rights. Therefore, it shouldn't really matter whether it is the European Court of Human Rights or the CJEU who are enforcing these rights.

Whether Opinion 2/13 in this regard is deliberate, I do not know, but certainly with time, the CJEU will be given an opportunity to strengthen its position with regard to the case law on the Charter of Fundamental Rights. I think this will not only be relevant when it comes to the implementation and interpretation of the compatibility of European Union with human rights, but for the protection of fundamental rights in general in EU Member States as well. Consequently, both will have less need for the European Court of Human Rights.

Just like you cannot have two standards, you don't need three standards either; a national standard, a CJEU standard, and a European Court of Human Rights standard – it doesn't really make much sense. I think with time, when it comes to protection of fundamental rights within the European Union, the European Court of Human Rights will be marginalised as the CJEU asserts its role in the field of human rights based on the Charter. That is my prediction.

5. If the European Court of Human Rights is going to be marginalised within the European Union, what effect do you think future European Court of Human Rights judgments will have on non-EU Member States who are a party to the European Convention on Human Rights?⁶

This is also an interesting scenario because, as you know, the European Court of Human Rights has a particular way of approaching the European Union. The Bosphorus doctrine with its presumption of convention compliance is a telling example. This is the present case law of the European Court of Human Rights.⁷ The European Court of Human Rights could not accept a situation when there is one standard for the European Union, and another for non-EU Member States within its jurisdiction. There has to be some sort of common ground. The case law suggests that the European Court of Human Rights will be inspired by the CJEU, even when they are defining the minimum standards of fundamental rights for non-EU Member States. These are only predictions of the future, which can always be difficult to envisage.

⁵ Adam Lazowski and Ramses A Wessel, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR' (2015) 16 German Law Journal 179.

⁶ Of which there are nineteen: Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Iceland, Liechtenstein, Moldova, Monaco, Montenegro, Norway, Russia, San Marino, Serbia, Switzerland, Turkey, Ukraine, and the former Yugoslav Republic of Macedonia.

⁷ *Bosphorus Hava Yollari Turizm v Ireland*, App. No. 45036/98 (2005).

6. The European Union consistently promotes its values, particularly in regard to speaking with one voice, and attempting to solidify its external representation. Many neighbouring states directly on the European Union's doorstep are a party to the European Convention on Human Rights. If Opinion 2/13 has weakened the European Court of Human Rights' standing in non-EU Member States, do you think that potential consequence poses a greater challenge for the Union?

Many of the contracting states to the Council of Europe and the entire Strasbourg system can also be seen as future Member States of the European Union. In their choices of foreign policy and external relations, what will have more importance for them from their point of view – what the European Union is doing; or what the Strasbourg system is doing? Even when the European Court of Human Rights makes a decision against non-EU Member States, in theory it also has implications in EU Member States because this is the case law that will be referred to when defining human rights standards in these countries. That was one of the problems identified by the CJEU in Opinion 2/13, and one of the reasons that the Draft Accession Agreement was rejected, because it doesn't work the other way around.

What I am trying to say is that the best way to look at this, in my opinion, is from the view of a judge in an EU Member State. What will be their authority? I think it is there that the European Court of Human Rights may have some difficulty being accepted as the highest authority, and even within states that are not Member States of the European Union, because many of them want to be Member States of the EU. One of the conditions of EU membership is human rights protection, and if you want to fulfil that, do you follow the European Court of Human Rights' standards, or do you follow that of the CJEU? Maybe some states will begin to see the Convention as redundant, and instead look to the European Union's Charter on Fundamental Rights and the case law of the CJEU for guidance on human rights issues. Either way, it looks like the CJEU will now seriously begin to assert itself as a human rights court, on top of everything else.

7. I know when we last spoke in Reykjavík earlier this year; you said accession of the European Union to the European Convention on Human Rights was 'dead', for now. With several months having passed since then, do you still hold the same view?

I believe at the very least that it will be dormant for some time. Perhaps several more years are needed before all the issues can be adequately addressed. To me, the requirements that transpired from this Opinion will be very difficult to achieve, legally, and not least politically. During the negotiation process, there was already some resentment about the concessions given to the European Union in the Draft Accession Agreement as it stood upon the negotiating rounds concluding in April 2013.

I am not a politician, and it is difficult to predict the reaction in some states, but my suspicion is that there are some parties to the Council of Europe, particularly larger ones who are non-EU Member States, who under present political circumstances might not be so eager to give in to any special concessions to the European Union if negotiations were to be reopened. They might even be tempted to say, "*they are just going to have to follow the Strasbourg rules just like anyone else.*" That's a card to be played in the much larger political game that is ongoing between the East and the West in Europe.

8. Life continues at the European Court of Human Rights, of course. What action do you think the European Court of Human Rights will take, if any, in response to Opinion 2/13 from the CJEU? Will it start to look at its Bosphorus doctrine again, and say, maybe we got this wrong? Or will the European Court of Human Rights have some other response? Perhaps it might do nothing at all, and pretend that Opinion 2/13 never occurred.

That is an interesting question. Undoubtedly some people will be upset by Opinion 2/13 but when it comes to the practical solution, people will be more careful. When we talk about two systems, they are more-or-less based on the same values when it comes to fundamental rights. This is more of a power struggle where there are slight differences, but the two Courts are roughly on the same page in this respect.

I suppose firstly you have to keep in mind that there are forty-seven judges at the European Court of Human Rights. They are all very different, and their interests naturally vary. Some of them see their function as being judges deciding cases to the best of their knowledge, without getting involved in political issues such as the accession of the European Union. They may say that if one day they have a judge in respect of the European Union sitting next to them, it will not change anything; they will continue with their work, and not be intimidated by the fact that their colleague represents the European Union.

Others, of course, are interested in the broader political game being played here. Whilst the topic of discussion can arise, it does not affect their daily work, except that you can see from the Bosphorus case and several other cases that the presumption of compliance with the Convention is confirmed in very clear terms. At the same time, I think that many of the judges will now be scratching their head over this presumption idea, and I am one of those who have written articles about this Bosphorus case in which I have been rather critical. I wrote an article in a Festschrift for a friend of mine who was a judge at the EFTA Court, Sven Norberg, where I outlined some criticism on the Bosphorus doctrine very shortly after the judgment was given.⁸

You could say from a political perspective that the doctrine was a practical solution to a potential problem, and you have to accept the fact that you have EU Member States who are contracting parties to the Strasbourg system who all have their international obligations. The overall idea is to try to find a way where the human rights standards are not that different from one system to another, but rather you have to see the international obligations of a state as a coherent whole. I think it was a friendly gesture by the European Court of Human Rights not to confuse things too much and try to come up with some common standards that are acceptable. This is the underlying philosophy behind Bosphorus, but now after Opinion 2/13 from the CJEU, I think many judges at the European Court of Human Rights will be concerned about this inclination. At the same time, many others will not even think about it as they continue to decide cases, and will cross that bridge when they come to it.

Undoubtedly some judges at the European Court of Human Rights will be very tempted to overturn the Bosphorus decision. It won't happen overnight, and will have to wait until the correct opportunity arises. As is the case in many courts, if you have some subjective political preferences, ways can be found to accommodate that within legal reasoning. The Court might be inclined to move away from Bosphorus slowly but surely, and be more assertive when it comes to defining the standards of human rights on the implementation and application of European Union standards in its Member States. After all, the states are responsible for upholding Convention rights regardless of its origin, and this is clear in Bosphorus. Even though Ireland in the case was following its international obligations, it still fell under the jurisdiction of the Irish state from the point of view of the European Court of Human Rights.

It is unlikely that the European Court of Human Rights will make a large 'U-turn' from Bosphorus, but there are ways to move back from it. I wouldn't be surprised to see that happen.

9. Moving on to the workings more generally at the European Court of Human Rights, tell me a bit about judicial co-operation, particularly with regard to your colleagues at the Luxembourg Court at the CJEU.

It is true that there is a lot of interaction between the CJEU and the European Court of Human Rights in the sense that they have annual meetings and there is interaction amongst the permanent staff of the two Courts in the Registry. The aim of this interaction is to learn from each other and to keep track of what the other Court is doing. In the European Court of Human Rights at least, everyone follows very closely what is happening with regard to human rights in the European Union. Of course, this is a good thing as there should be as much consistency as possible in way the Courts approach human rights.

These dialogues contribute to a better atmosphere if you have people who have been in both Courts and can thus provide insight into the other Court's workings. You also have an example of a judge who has served in the two systems. It may be desirable that a judge at an international court comes from another international environment, but on the other hand, others may prefer to see someone who is coming from his own national system. Of the two, I would think that there are merits to having people come from their home countries, where they have been working and therefore know exactly how it works. I think that this is the best scenario to have judges at the European Court of Human Rights who come directly from their domestic system. Picking someone from another international organisation, even though they may have international experience, may not necessarily be the best thing. I think were you have a system where persons are moving from one international institution to another, or within institutions from being a bureaucrat to being a judge, you end up with institutions that are detached from their constituencies. This cannot be good in the long term.

⁸ David Thór Björgvinsson, 'On the Interplay between EC Law, EEA Law and the European Convention on Human Rights' in Martin Johansson, Nils Wahl and Ulf Bernitz (eds), *Liber Amicorum in Honour of Sven Norberg: A European for All Seasons* (Bruylant 2006).

10. When you have the European Court of Human Rights made up of forty-seven people, who come and go, I suppose you're always going to get a round mix of people.

What happens in the European Court of Human Rights is that when you come there, regardless of whether you are an expert in particular areas of international human rights or otherwise; you enter into an institution filled with hundreds of people who, at least some of them, have been working there for decades. These are the people in the Registry. They have all the institutional knowledge, so you are very much dependent on them when it comes to the way in which the European Court of Human Rights operates on a daily basis. This is not just with regard to practical matters, but also on technical expertise, and even judicial decision-making.

It is a very sensitive issue to talk about the influence of the Registry on judicial decision-making. Some judges have very strong views on this and on their judicial independence, not only externally but also internally within the institution. They are inclined to exert their authority, while others are less concerned about the role of the Registry and its influence of the judicial decision-making. This has caused some tensions within the Court, and is an issue which academics have failed to address from a theoretical point of view, mainly for lack of practical understanding of how things work in reality. To put this in context, let me remind you that the judges at the Court are on occasion criticised for a lack of democratic legitimacy, although, they are elected by the Parliamentary Assembly of the Council of Europe. From that point of view, it would seem that they have a clear democratic mandate, which individuals in the Registry do not have at all. The most senior and influential members of the Registry are career bureaucrats appointed for life who have spent most of their professional life within the Court with no meaningful legal experience from their home front. Still these professional bureaucrats command huge influence on judicial decision-making, and in many instances, run the whole show.

This is not always a bad thing, because in an institution, be it at the European Court of Human Rights, or on a domestic level, you need to have some form of consistency and stability, but it certainly is a factor that deserves attention on the overall discussion of the Court's legitimacy.

11. Over the duration of your time on Court, did you see or notice any particular trends through the judgments about what direction the Court would be going more generally? Do you think the Court's vision for where it should go in the future has altered or changed along the way?

You have to look at the overall history of the Court. I think institutions like the European Court of Human Rights, other international institutions, and other institutions generally on a domestic level – they each have a way of adapting to the more general political environment within which they are operating. During my tenure from 2004 to 2013, the dominating factor was the issues with the United Kingdom on for example prison voting rights.

One year after I arrived, the Court delivered the *Hirst* judgment.⁹ Although all the Contracting states do not have any problem with accepting the principles upon which it is based, it caused a huge controversy in the United Kingdom. My impression is that ever since the day it was delivered, it became a major issue during my term. There was also *Scoppola v Italy (No. 3)*.¹⁰ By all means, these were not the only cases which were controversial. There had also been a controversial ruling against Germany in the *Von Hannover* case,¹¹ a freedom of expression case where the European Court of Human Rights in the Grand Chamber overruled the Federal Constitutional Court of Germany ('Bundesverfassungsgericht'). There were also other cases involving terror suspects and other controversial issues.

During my tenure, I think what began to change was that the Court started to try to mitigate the effects of adversarial criticism these controversial rulings were subject to. In a working paper that I just recently finished,¹² I wrote that the biggest change is that the Court is changing its judicial policy from assertively protecting human rights to becoming more timid. Many people have argued that the Court has been very progressive in its approach to the protection of human rights issues, and have extended the protection that is provided for under the Convention by way of interpretation. Such an example would be that judges are adopting a living instrument approach, a kind of a moral reading of the Convention.

⁹ *Hirst v United Kingdom* (No. 2) (2006) 42 EHHR 41.

¹⁰ *Scoppola* (n 1).

¹¹ *Von Hannover v Germany* (2005) 40 EHRR 1.

¹² David Thór Björgvinsson, 'The Role of Judges of the ECtHR as Guardians of Fundamental Rights of the Individual' [2015] iCourts Working Paper Series <<http://papers.ssrn.com/abstract=2601291>> accessed 24 June 2015.

I think we see a slight shift from the more assertive approach as the Court has begun to more often rely on the concepts of margin of appreciation and subsidiarity. There are cases, for example, *Scoppola v Italy (No. 3)*,¹³ *S.A.S. v France*,¹⁴ and some other cases when the Court is very reluctant to step in and take a clear standing on politically sensitive and controversial issues, meaning there has been a change in judicial policy. It doesn't necessarily mean that I am criticising the Court for this, but I think you have to look at it from the historical perspective – institutions adapt to the political environment in which they are operating. You may criticise this and say it is politics, and the Court should be more assertive, but on the other hand, it is about the survival of an institution. If you believe the institution in an historical context is doing more good than bad, and it is actually contributing to the protection of human rights, then you will take the view that it is better to have it, rather than having all the Member States, particularly larger ones, leaving the system because they cannot live with it. It is not necessarily conscious in the minds of judges, but this is a trend that I believe I saw there. Maybe I am not reading it correctly, but in my opinion, the Court is being less assertive than it has been in the past.

12. Is that because the Court wants to uphold its own legitimacy and would prefer to have an approach that is easier on the larger Member States?

If you are an international court, where the issues can be somewhat different to those on the domestic level, the issue of legitimacy is one you have to deal with. I don't see the European Court of Human Rights as having any objective problem with legitimacy, viewed from the perspective of the judiciary or the citizens. You have a Convention that has been implemented through legislation in contracting states to the Council of Europe where it is a part of their national systems in one way or another. So from that point of view, it is totally legitimate on a judicial level, and it depends on the acceptance of the case law of the Court by the judiciary in the domestic courts. Cases of the Strasbourg Court are of course cited to a different degree, but I think that there cannot be any doubt that the Court is judicially legitimate, and is mostly well received.

Moreover, the European Court of Human Rights allows citizens to go directly to an international institution to have their issues sorted out. The Court can thus be perceived as a remedy for citizens who have not had an issue adequately addressed at the national level. By rendering judgements in favour of the individual, and finding violations of the Convention by its Member States, the Court increased its legitimacy with people. It has built up a 'moral capital' in the minds of the public in Europe.

The danger is that the Court might be withdrawing from the position that it has built for itself. By increasing its reliance on the margin of appreciation and referring more to the democratic process in the Member States, in other words by beginning to try to appease the Court's most prolific critics, be they political or judicial on a national level, the Court runs the risk of losing its moral capital. This is certainly a dilemma. Whether the Court is doing the right or wrong thing, it is not for me to say, but this is a trend I experienced myself.

13. And finally, tell us a little about your current research, and what publications you have forthcoming?

Since coming to the Faculty of Law here in Copenhagen, I had the opportunity to finish a book that has been in the pipeline for some time. It is called '*The Intersection of International Law and Domestic Law: A Theoretical and Practical Analysis*',¹⁵ and will be published in the coming months. In this book, I look at the way non-implemented international law has been applied, especially in the Nordic countries. I've also been working on different papers relating to my experiences as a judge at the European Court of Human Rights. I've just completed another paper on the shifting centre of gravity when it comes to the protection of fundamental rights that I presented at the European University Institute in Florence in late 2014 that will be published as a book chapter next year.

When I'm not here writing or teaching, I have been doing a lot of travelling all over Europe. For example, I recently gave seminars on human rights in Ukraine and Romania in cooperation with the Council of Europe, as well as some events in Brussels and in Reykjavík. I'm back in Strasbourg on occasion still. All in all, my hands are full, and there is still plenty more to do. There certainly is a life after the Court!

¹³ *Scoppola* (n 1).

¹⁴ *S.A.S. v France* (2014) (not yet reported).

¹⁵ David Thór Björgvinsson, *The Intersection of International Law and Domestic Law: A Theoretical and Practical Analysis* (Edward Elgar 2015).

Competing Interests

The author declares that they have no competing interests.

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