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THE FABRIC OF INTERNATIONAL JURISPRUDENCE
AN INTERDISCIPLINARY ENCOUNTER

Edited by Antoine Vauchez

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES
GLOBAL GOVERNANCE PROGRAMME

The Fabric of International Jurisprudence
An Interdisciplinary Encounter

ANTOINE VAUCHEZ (ED)

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Abstract

Bringing together a variety of outlooks from comparative law, legal theory, organizational sociology, socio-legal studies or political science, this Joint Working Papers explores the cognitive equipment through which international judges perform their role. The notion of ‘fabric’, borrowed from the Science and technology studies, and Bruno Latour in particular, is used here as a common entrypoint enabling to consider altogether the (legal and non-legal, formal and informal) tools and templates that contribute to shape international judicial decision-making: ‘best practices’, judicial compendia, routinized legal repertoires, legal methodologies, standard operational modes, etc...

Keywords

European Law; International courts; Court of Justice of the European Union; European Court of Human Rights; Judicial Decision-Making; Sociology of Law

Table of Contents

Antoine Vauchez, <i>Introduction</i>	1
Part 1. Actors and Know-How	3
Antoine Vauchez, <i>The European Themis and its Social Fabric. Review, Reflections and New Directions for Studies of the European Court of Justice</i>	5
Iyiola Solanké, <i>The Advocate General and the Practices of International Jurisprudence</i>	15
Cristina Dallara, <i>The Definition of 'Best Judicial Practices' by Judicial and Legal Expert Networks and Commissions</i>	21
Part 2. Methods and Tools	33
Bilyana Petkova, <i>The Role of Majoritarian Activism in Precedent Formation at the European Court of Human Rights</i>	35
Jérôme Porta, <i>La formulation des interprétations par la Cour de Justice de l'Union européenne</i>	45
Bas van Bockel, <i>The Realisation of the ne bis in idem Principle in the European Union</i>	53

Introduction

Antoine Vauchez*

This working paper is part of a series of research initiatives that have taken place within the framework of the Global Governance Program with a view to open a new research agenda on international courts and lawyering¹. A first workshop had been organized on the 17th and 18th of May 2011 entitled ‘A Transnational Inquiry into the Disputed Field of Global Justice: A Renewed Research Agenda’. Its main focus had been on the role of transnational legal entrepreneurs and networks in line with a number of recently published research, particularly in the field of European law². A second Workshop took place on the 15th and 16th of March 2012 with the intent to complement such actor-centered approach with an exploration of the more institutionalized façade of courts, that is of the cognitive and material frames that constitute a court’s idiosyncratic ‘judicial style’.

Strangely enough, indeed, we still think too often about international jurisprudence as the outcome of a free deliberation among individual judges, regardless of the highly institutionalized setting in which they are delivering justice³. For a variety of reasons: political scientists rarely dare ‘entering’ the court’s universe, most often studying judicial decision-making from the outside; legal scholars have oft kept their focus essentially on *legal* categories, therefore remaining quite oblivious of the many non-legal forms with which judging is performed. As a result, elements such as internal organizational standards, legal compendia, keywords indexes, computer softwares, etc... are often considered unimportant and, as such, have remained unexplored. The objective of the Workshop was precisely to widen our perspective in this regard mixing legal theory, organizational sociology, socio-legal studies and political science. To this aim, the participants all accepted to work with the notion of ‘fabric’, borrowed from the Science and technology studies, and Bruno Latour in particular, as a way to seize altogether the (legal and non-legal, formal and unformal) tools and templates that shape judicial decision-making. By this, we do not mean to indicate that judges (international or not) are caught in a sort Weberian judicial ‘iron cage’ progressively losing their margins of maneuvering under the pressure of an overall rationalization process. Rather, we would like to suggest that judicial decision-making does not happen on a *tabula rasa*. Each court has its own set of instruments and techniques with which judges perform their office: standard operational modes, established arguments, routinized legal grammars, standardized references to precedents, translation devices or even computers’ software, etc... Studying these forms and templates sheds a new light on how international judging is generated.

The value of such research line is also to offer a common ground for interdisciplinary research putting together legal scholars interested in studying the ‘grammar’ or ‘repertoire’ of international /

* Research Professor at the Centre européen de sociologie et science politique (CNRS, Université Paris 1-Sorbonne) and at the Global Governance Program. I am grateful to Cristina Dallara for having helped me at various moments of this project. I would also like to thank Bruno de Witte, Stéphanie Hennette-Vauchez, Miguel Maduro, Frédéric Mégret and Alec Stone for their insights and comments during the workshop.

¹ See also the corresponding High Level Policy Seminar organized by Adriana Dreyzin, Miguel Maduro, Antoine Vauchez (eds.), *Courts, Social Change and Judicial Independence*, Working Paper series, RSCAS PP 2012/07.

² Cf. the various volumes or symposia edited by members of the Polilexes research group: Cohen, A. and Vauchez, A. (eds) ‘Law, Lawyers, Transnational Politics and the Production of Europe’ (2007) *Law and Social Inquiry*, Vol. 32, No 1, 75-82 ; Mbongo, P. and Vauchez, A. (eds) *Dans la fabrique du droit européen. Scènes, acteurs et publics de la Cour de justice des Communautés européennes* (Brussels, Bruylant, 2009) ; Christoffersen, J. and Madsen, M. (eds), *The European Court of Human Rights between Law and Politics* (Oxford, Oxford University Press, 2011) ; and, last but not least, see de Witte, B. and Vauchez, A. (eds) *Lawyering Europe. European Law as a Social Field* (Oxford, Hart publishing, 2012, to be published).

³ But see Alec Stone who has interesting pages on judicial path dependency: cf. Stone, A. *The Judicial Construction of Europe* (Oxford, Oxford University Press, 2004) 30-41.

European law, on the one hand, and sociologists careful about how “courts” exist through a number of institutions, roles and codes, on the other. While the latter may actually further their understanding of the bricks, methods and templates with which international case-law is been produced, the former may get additional purchase as to how coordination emerges among judges who most often come from a wide diversity of national and professional backgrounds. Such research programme is still exploratory and, at this stage, the papers cover essentially European courts. While this is certainly a limit to the scope of these analyses⁴, one should however point at the leading role European courts have acquired over the past decades in the field of international/regional justice as *the* ‘success stories’ to be followed⁵.

This Joint Working paper is divided in two parts. The first part considers “Actors and Know-how”. Antoine Vauchez questions the heuristic potential of a number of central political science concepts such as ‘legal entrepreneurship’, ‘transnational esprit de corps’, ‘social legitimacy’ when applied to the study of the European Court of Justice; Iyiola Solanke empirically explores in particular the role of ECJ *référéndaires* in the circulation of information, ideas and arguments within the Court; and Cristina Dallara inquires into the Council of Europe tracing the formation of judicial ‘best practices’ in the Venice Commission. The second part of the Working paper, entitled ‘Methods and Tools’, considers how European courts have tailor *ad hoc* interpretative tools, methods and key concepts, thereby progressively constituting their own specific ‘judicial style’. Bilyana Petkova compares the operational modes with which the European Court of Human Rights and the European Court of Justice deal with diversity among Member States; Jérôme Porta analyses the translation methodology of the CJUE; and Bastiaan van Bockel shows how a specifically European understanding of ‘*ne bis in idem*’ principle emerged in the Court’s case-law.

⁴ For a research programme covering all international courts, see the recently open research center at the University of Copenhagen: <http://jura.ku.dk/icourts/>.

⁵ Cf. Karen Alter, ‘The Global Spread of European Style International Courts’, *West European Politics*, Vol. 35, No 1, 2012, 135-154.

Part 1. Actors and Know-How

The European Themis and its Social Fabric

Review, Reflections and New Directions for Studies of the European Court of Justice

Antoine Vauchez*

There is nowadays a general agreement among EU studies' scholars to consider that the Court of Luxembourg played a critical role in market and political integration¹. Political scientists have extensively exemplified its decisive influence in pushing EU polity way beyond what Member States have been prepared to (Europeanization), while legal scholars have shown in great details how the Court contributed to gradually transform EU treaties into one constitutional charter of Europe (Constitutionalization). As a result of such vibrant streams of research, it is hardly possible to think of "Europe" without considering the role of its judicial branch. And yet, after decades of intensive research, the ECJ remains surprisingly unknown. While EU studies routinely scrutinize every single move of the European Commission and describes extensively its many internal divisions and administrative cultures, scholars have remained so far strikingly silent about the judicial branch of EU government: even though the Court's verdicts are scrutinized in specialized journals and conferences, the institution itself, its specific 'judicial style', its distinct internal cleavages, its professional roles and models of excellency, the concrete persons whose task it is to manipulate and interpret EC law have remained in large part unexplored². All in all, while scholarly writing has extensively dealt with the role of law in EU integration, it has remained strikingly oblivious of the Court itself. The reason for such state of academic affairs partly lies in the lenses that have been used so far when looking at the *plateau de Kirchberg* in Luxembourg. Both mainstream law and political science approaches to the ECJ have indeed converged in viewing the Court in an anthropomorphic manner as if it was one unitary actor granted with intentions and acting in a strategic manner³. While law professors assess the underlying legal rationality of the Court's case-law, and political scientists consider its strategies in pursuing pre-existing interests (prestige, independence, etc...) in front of a variety of constraints and interlocutors, both parts view the ECJ as one reified collective. Here is not the place to detail how heuristic such approach may have proved⁴, in particular in pointing out the salient position acquired by the Court throughout the course of European integration. Yet, most often than not, "the Court" is therefore taken as a sort of a-historical "given", independent from the contexts in which it operates and the actors that populates it⁵. Research-wise, such convergence of legal positivism and political science

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¹ For recent reviews, see Conant, L. (2007) 'Review Article. The Politics of European Legal Integration'. *Journal of Common Market Studies*, Vol. 45, No. 1, pp. 45-66 ; Stone, A. (2010) *The European Court of Justice and the Judicialization of EU Governance*, <http://europeangovernance.livingreviews.org/> ;

² There are few well-known exceptions: Schepel, H. and Wessering, R. 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe' (1997) *European Law Journal*, Vol. 3, No2, 165-188 ; see Kenney, S. 'The Members of the Court of the European Communities' (1998-99) *Columbia Journal of European Law*, Vol. 5, No 1, 101-133 ; and the various volumes or symposia edited by members of the Polilex research group: Cohen, A. and Vauchez, A. (eds) 'Law, Lawyers, Transnational Politics and the Production of Europe' (2007) *Law and Social Inquiry*, Vol. 32, No 1, 75-82 ; Mbongo, P. and Vauchez, A. (eds) *Dans la fabrique du droit européen. Scènes, acteurs et publics de la Cour de justice des Communautés européennes* (Brussels, Bruylant, 2009) ; Christoffersen, J. and Madsen, M. (eds), *The European Court of Human Rights between Law and Politics* (Oxford, Oxford University Press, 2011) ; and, last but not least, see de Witte, B. and Vauchez, A. (eds) *Lawyering Europe. European Law as a Social Field* (Oxford, Hart publishing, 2012, to be published).

³ For a critique of such rationalism, see Andreas Grimm (2012) 'Judicial Interpretation of Judicial Activism: The Legacy of Rationalism in the Studies of the European Court of Justice', *European Law Journal*, 18 (4), pp. 518-535.

⁴ The central reference here is Stone, A. (2004) *The Judicial Construction of Europe* (Oxford, Oxford University Press).

⁵ But see Kenney, S. (1998-99) 'The Members of the Court of the European Communities', *Columbia Journal of European Law*. Vol. 5, No. 1, pp. 101-133, and, more recently, Cohen, A. 'Ten Majestic Figures in Long Amaranth Robes'. The Formation of the Court of Justice of the European Communities' in de Witte, B. and Vauchez, A. (eds) *Lawyering*

rationalism means that there has been so far little, if any, empirical interest in opening the Court's black-box. As a result, most studies provide a disembodied narrative of legalization or constitutionalization processes with the Court standing as a foreseeing actor pursuing abstract goals and institutional interests⁶. Because of the blindspots these disciplinary perspectives actually share, they are now producing decreasing outputs. One first reason simply lies in the fact that such representation of a disincarnated and a-historical Court consistently maximizing its interests lacks realism. Do we seriously think that what we refer to as "the Court" in 1952, when it was composed of 9 members and 30 employees dealing with a sectoral policy (coal and steel) is in any sort of way similar to what we refer to as "the Court" in 2010, that is the complex organization made of 67 judges, 3 jurisdictions, 27 nationalities, 200 law clerks, 1000 employees? Similarly: can we assume "the Court" acts in a similar fashion when it is issuing verdict in the context of a semi-public EU polity hardly raising any interest among national social and political actors, and when its rulings are put under continuous scrutiny by a diverse set of interest groups, multinational companies, Member States, Ngos, etc... The primarily goal of the social fabric approach consists in providing a more comprehensive and historically accurate account of the processes through which the European Court of Justice (its institutional identity, its jurisprudence) has been formed and transformed over the past decades. Yet, it is not just a matter of "knowing more" or accumulating details, needless to say gossips, on the nitty-gritty of ECJ circles... It is not even a matter of unveiling a hidden secret on the "true" motivations that the Court would have kept secret in "fairylend Duchy of Luxembourg"⁷. More importantly, such research path allows to answer some of the key questions regarding the Court that legal positivists and political science rationalists have left unaddressed as they were not equipped to raise them. Among them: i) how does legal change (in particular, new jurisprudential developments) happen in a Court that neo-institutionalists describe as taken into a path-dependent whirl?; ii) how does such a complex and heterogeneous institution with so little control over the recruitment of its members actually manages to keep its integrationist jurisprudence constant over time?; iii) how does the Court secure its legitimacy in EU polity in a context where its decisions are scrutinized and often criticized by an increasing variety of social and political actors?

In order to address such research puzzles, there is a need to break open a renewed conceptual and empirical tool-kit better equipped to go track the *social fabric* of "the Court". Drawing from deep-seated *acquis* from the field of political sociology and sociology of professions, the overall claim of this paper is that researchers now need to unpack "the Court" and consider the social mechanisms that structure it. To put it differently, "the Court" is not simply a source of explanation, it is simultaneously a 'result' of a variety of social processes. To this aim, one needs to look at Courts in a different manner: courts, it is argued hereafter, are not free-floating entities with abstract interests, nor do they hold by themselves or survive merely by routine or self-perpetuation. Just like there is no artist without the "network of cooperation" that make up the "art world" famously studied by Howard Becker⁸, there is no jurisdiction without a "world" of professionals that has historically emerged and solidified (judges, their law clerks, private legal practitioners, law professors⁹); and a related set of shared beliefs and commonly-agreed upon legal principles. In other words, Courts are not just formal

(Contd.)

Europe. European Law as a Social Field, op. cit.; and Cohen, A. and Vauchez A. (2011) 'The Social Construction of Law: The European Court of Justice and Its Legal Revolution Revisited', *Annual Review and Law and Social Sciences*, vol. 7, 2011, pp. 417-432.

⁶ But see de Búrca, G. (2005) 'Rethinking Law in Neofunctionalist Theory' *Journal of European Public Policy*, Vol. 12, No 2, 310-36; and Shaw, J. (2003) 'The European Union: Discipline Building Meets Polity Building', in Cane, P. and Tushnet, M. (eds) *Oxford Handbook of Legal Studies* (Oxford, Oxford University Press), 325-352.

⁷ Stein, E. (1981) 'Lawyers, Judges and the Making of a Transnational Constitution'. *American Journal of International Law*, Vol. 75, No. 1, 1-27.

⁸ Becker, H. (1982) *The Art Worlds* (Berkeley, University of California Press).

⁹ Shapiro, M. (2002) 'The Success of Judicial Review and Democracy', in Stone, A. and Shapiro, M. (eds), *On Law, Politics and Judicialization* (Oxford, Oxford University Press) 159-183, at 181.

institutions whose nature is defined in the black letter of the treaties, but they are at one and the same time a social setting (a specific constellation of actors) and a system of meaning (norms and worldviews). Such “social world” is a site of contention where a number of legal professionals, but also a variety of EU-implicated actors contend over the definition of the nature and future of the Court, including the most convenient direction for its jurisprudence, the most relevant type of know-how and credentials to persuasively perform EU judicial office, the priorities for its future organizational reforms, etc... In other words, the social fabric approach does not take “the Court” -its “interests”, “mandates”, or “institutional design”- as the premise and starting point of the analysis; rather it takes the social process through which they are produced and re-produced as the core of the inquiry itself. With such perspective, the focus is not so much on the interaction between “the Court” taken as one entity and its interlocutors (national courts, Member States, EU institutions, etc...), but rather on the variety of social processes that cut across institutional lines with concrete and living actors connected in a variety of ways within and outside the Court¹⁰: how are the norms about appropriate conduct as a member of the Court defined? how does the Court concretely manage its increasing heterogeneity? How do new comers are turned into ‘believers’ or, at least, ‘perpetuators’ of the Court’s legal tradition?, etc... Such research path compels the researcher to find new methodological tools. In particular, the extensive recourse to large-N statistical analyses of the Court that has dominated the political science literature during the last decades now produces contradictory results. It should be complemented with a new research strategy based on fine-grained qualitative inquiries through which the researcher would step into in the Court, look from close-up at the variety of actors, groups and strategies that populate it. In carrying such research program, the researcher has to confront with the fact that the Court has remained reluctant to provide with information not only on the judicial documentation of the cases (non-publication of the report for the hearing and limited access to pleadings, etc...), but also more simply on its inner functioning. Most European courts share such sense of discretion and secrecy although some recent unexpected examples should be mentioned¹¹. Yet, such tendency is particularly acute in Luxembourg not only for the well-known fact that there are no dissenting opinions, but more generally for the non-disclosure of institutional archives¹². The paper however explores various ways of circumventing such empirical difficulty: gathering judges and law clerks biographical data, considering each judge’s personal entrepreneurship with the realm of EC law doctrine, looking at the various commemorative venues from eulogies to *Festschriften* or jubilees, etc...

In the remainder of this article, I suggest to open the conceptual and analytical toolbox to three classic concepts of political sociology –Entrepreneurship, Esprit de corps and Legitimacy- only rarely used when studying the European Court of Justice. In the following sections, I consider the added value and empirical potential of each of these three tools.

I. Accounting for Legal Change: the Politics of Judicial Entrepreneurship

As a result of the here above mentioned anthropomorphic bias in studying the Court, judges’ agency and agenda has been essentially written out from most accounts of the constitutionalization narrative. My overall contention is that introducing the notion of judicial entrepreneurship, here defined as the

¹⁰ Vauchez, A. (2008) ‘The Force of a Weak Field. Law, Lawyers, and the Production of EU Government’, *International Political Sociology*, Vol. 3, No 1, 124-148.

¹¹ See the case of the French *Conseil d’Etat* which opened its deliberations to a prominent French sociologist Bruno Latour: see Latour, B. (2009) *The Making of Law. An Ethnography of the Conseil d’Etat* (New York: Polity Press) ; see also the opening of the archives of the French *Conseil constitutionnel* up to 1982, including its deliberations (bill n°2008-695 of the 15th July 2008 concerning the Archives of the Conseil).

¹² A legal framework for such disclosure actually exists since a February 1983 Regulation (n°354/83) and a December 1984 Contract foreseeing the depositing of the Court’s archives to the Historical Archives of the European Communities (see <http://www.eui.eu/Research/HistoricalArchivesOfEU>).

innovative investment of one or more judges in the intellectual contests over the definition of the nature and future of EU legal order¹³, allows for a revised version of the constitutionalization of Europe thanks to a more refined understanding of the politics of legal change. Granted, there is a traditional reluctance to consider judges, and in particular ECJ judges, as “entrepreneurs”. Since Courts are supposed to be purely reactive institutions driven by legal principles, the innovative part of legal interpretation as well as its “disequilibrating force” (Schumpeter) are often underestimated, if not entirely omitted¹⁴. It is well known the legal milieu values references to the “legal tradition” and tends to frame judicial decisions within the boundaries of precedents (be they called *stare decisis* or *jurisprudence constante*, depending on the specifics of one’s national legal culture). Yet, judges *can* be entrepreneurs too. They certainly constitute a very specific blend of entrepreneurs, profoundly different from the political or business ones. In a professional realm –that of law- best defined as a ‘static market’¹⁵, judicial entrepreneurs are bound by many shared yet oft unspoken norms as to how one ought to promote new legal ideas. For instance, it could easily be argued that the most successful entrepreneurs in the realm of law are the ones who manage to prove that their interpretative take is the *least* innovative and the most faithful to the “legal tradition”. Still, the notion proves particularly useful. Its added value lies in the fact that it helps overcome the traditional impasse of the activist vs. restraintist *problématique* which ultimately always implies a normative background concerning where the border between “judge-like” and “unjudge like” attitudes should be drawn. Rather, it considers in an agnostic manner what judges actually do and how they do it.

Such an approach implies to take into account the variety of assets that prove critical in order to successfully promote new conceptions of law. No one would deny that legal skills and in particular the practical mastery of EU law’s technicalities and repertoire of justification are critical elements. Judicial virtuosity, that is the ability to produce new and convincing legal combinations within the realm of EU law is certainly critical in peddling new legal ideas. In order to frame one given legal claim authoritatively before or within the ECJ, one needs to draw from a limited set of previously established legal sentences that form the commonly-accepted bricks of EU law reasoning¹⁶. Walter van Gerven does not say otherwise when explaining how he “convinced the Court to overrule its earlier judgment” (the *Comitology* decision): “the A. G. (as I then was) used another line of reasoning, namely that the distribution of competences between the institutions is not only a matter of institutional balance but that it has also a protection of legal rights dimension (...) The Court followed that reasoning. The distinction may seem to be a thin distinct but it is not”¹⁷. Even though legal arguments matter, judges are not purely legal animals and their extra-legal skills are equally critical in successfully pursuing specific legal agendas. When it comes to convincing its peers, a lot of judge’s valued skills are not based on pure technical legal knowledge. They involve an important dose of craftsmanship (organizational know-how, wisdom about personal relations, “inside” knowledge about the Court, etc...). Such insider’s know-how refers to judges’ “practical sense” of the judicial game, defined by Pierre Bourdieu as the pre-reflexive ability to do things the way they are expected to be done and to anticipate peers’ reactions (colleagues at the Court, but also legal academics and legal

¹³ McIntosh, W., Kates, C. (1997) *Judicial Entrepreneurship. The Role of Judges in the Marketplace of Ideas* (Westport: Greenwood Press).

¹⁴ But see the various narratives of ECJ case-law changes put together in Azoulay, L., Maduro, M. (eds) (2010), *Introduction to The Past and Future of EU Law The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (London: Hart Publishing).

¹⁵ Ibid.

¹⁶ On the ECJ ‘judicial style’, see Azoulay, L. (2009) ‘La Fabrication de la Jurisprudence Communautaire’, in Mbongo, P. and Vauchez, A. (eds), *Dans la Fabrique du Droit Européen* (Brussels, Bruylant) ; Bengoetxea, J. (1993) *The Legal Reasoning of the European Court of Justice* (Oxford, Clarendon Press).

¹⁷ Van Gerven, W. (2008), ‘*Politics, Ethics & the Law. Legal practice & Scholarship*’, LSE working papers, Department of Law, London School of Economics and Political Science, London.

practitioners)¹⁸. In an interesting inquiry based on interviews with ECJ advocate generals, Iyiola Solanké has documented such shared albeit unspoken norms of what constitute a worthy legal argumentation. It includes drafting skills, clarity of the style, ability to keep a distance from ordinary legal scholarship, but also -one could add- self-restraint, mediating abilities, swiftness in designing alternative wording, etc¹⁹... In addition to this practical sense, one should consider also the various channels of mobilization through which judges actually ‘campaign’²⁰. To be sure, judicial entrepreneurs certainly never openly publicize their undertaking, nor would they march or rally to promote them ! They rather disseminate their legal ideas through more discrete channels within the realm of the legal community: opinion-writing²¹, legal scholarship²², speeches in academic or bar’s conferences²³, commemorations and *Festschriften*²⁴, etc...

Inserting such living, acting and purposeful people into the study of the ECJ is not just a matter of knowing more about its general “context” or “background” and bringing a more colourful picture of the Court. I argue it provides with a sociological explanation for how specific interpretations of EU treaties made their way to the European Court of Justice and how they eventually managed (or not) to solidify into the Court’s jurisprudence. I have analysed in such manner how the *Van Gend en Loos* decision granting direct effect to article 12 of the Rome treaties (standstill) has been gradually transformed into a lasting jurisprudence providing *the* key to interpret not only the entire Rome treaties but, more generally, EU legal order²⁵. Contrarily to what is ritually indicated in many EC law textbooks, such constitutional doctrine did not just come out of the Court *ex nihilo* as one full-fledged doctrine by the mere fact of having granted to a Dutch transportation firm (Van Gend en Loos Algemeine) a right to freely export its goods across borders. It has been crafted, tested, refined and eventually solidified by a number of legal entrepreneurs within and outside the Court, before and after the verdict. Judges such as Robert Lecourt or Antonio Trabucchi, law clerks such as Roger-Michel Chevallier and Paolo Gori literally started a mobilization campaign in their academic writing, lawyering, judging, etc... in order to progressively extend the scope of the decision into one judicial theory of Europe profoundly different from the traditional conception of international treaties. They toured the conferences of the emerging community of Euro-lawyers (FIDE Congress in The Hague, April 1963; Cologne Conference, October 1963, etc...) peddling such new conceptions of international law in the European marketplace legal ideas. Such bold “legal revolution” gradually gained social credit thanks to these judges’ multiple positioning which allowed them to reach out a variety of a (national and European) bureaucratic, academic, judicial, and political *fora*. In other words, I argue that the brokering capacities of these judicial entrepreneurs have been key to the successful transformation of their new “legal products” from mere trial balloons and floating ideas into consolidated jurisprudence. All in all, the *Van Gend en Loos* doctrine is the product of an

¹⁸ Bourdieu, P. (1998), *The Practical Reason. On the Theory of Action* (Stanford: Stanford University Press).

¹⁹ Solanke, I. (2008) ‘Diversity and Independence in the European Court of Justice’. *Columbia Journal of European Law*, Vol. 15, 89-121.

²⁰ On the mobilizations of ECJ legal community, see Alter, K. (2009) ‘*Jurist Advocacy Movements in Europe*’. In Alter K. (ed.) *The European Court’s Political Power. Selected Essays* (Oxford, Oxford, University Press).

²¹ See on the role of advocate generals: Burrows, N. and Greaves, R. (2007) (eds) *The Advocate General and EC Law* (Oxford, Oxford University Press) ; Clement-Wilz, L. (2011) *La fonction de l’avocat général près la Cour de justice des Communautés européennes* (Brussels, Bruylant).

²² See, for example, Bailleux, J. ‘How Europe became law. The first international academic congress on the ECSC (Milan-Stresa 1957)’ (2010) *Revue française de science politique*, Vol. 60, No 2, 67-90.

²³ Scheeck, L. (2009) ‘The Diplomacy of European Judicial Networks in Times of Constitutional Crisis’. In Snyder F., Maher I. (eds), *The Evolution of the European Courts: Change and Continuity* (Brussels: Bruylant).

²⁴ Vauchez, A. (2012) ‘Keeping the Dream Alive. The Transnational Fabric of Integrationist Jurisprudence’, *European Political Science Review*, Vol. 5, No 1, 51-71.

²⁵ Vauchez, A. (2010) ‘The Transnational Politics of Judicialization. *Van Gend en Loos* and the Making of EU polity’, *European Law Journal*, Vol. 16, No 1, 1-28.

uninterrupted flow of ECJ decisions, academic studies, pan-European mobilizations to which these judicial entrepreneurs have taken part very actively.

II. Explaining Judicial Consistency: the Making of a Transnational *Esprit de corps*

Few studies actually take the consistency of the Court's jurisprudence over time and across policy domains as a research puzzle. Yet, it is quite safe to hypothesize that, in absence of a supranational judicial professional able to train and instill core values and beliefs to the incoming judges, the Court's members would not spontaneously converge on what actually is in the Court's "best interest" or on how its prestige and independence is best promoted. In particular, the dominant rationalist explanatory framework fails to account for why the European Court of Justice has maintained and even pushed further its constitutional and pan-European jurisprudence in a number of groundbreaking decisions – from *Kadi* to *Laval* and *Viking*- while at the same time nearly doubling the number of its members following the last waves of EU enlargement²⁶. Neo-institutionnalists do offer some plausible explanation by pointing at the particular relevance of path dependent mechanisms in the realm of judicial decision-making. Alec Stone has authored important pages on the development of precedent-based practices in the case of the ECJ with *Van Gend en Loos* (1963) standing as the critical juncture and the EU litigation arena being the site of a long-term self-reinforcing process²⁷. However, the fact that EC lawyers do not work in an unpredictable and chaotic manner is not enough an explanation when it comes to understanding why and how "the Court" has maintained and repeatedly revived its pro-integrationist agenda over time. By insisting essentially on the *endogeneous* dynamics of EC judicial decision-making, this neo-institutionnalist account therefore over-estimates the inherent stability of institutions themselves. Institutions and professional roles do not hold by themselves, nor have a life of their own, unless their underlying creeds and credos are perpetuated and revitalized through continuous social and political *mobilizations*. This is particularly true in the case of a Court, the ECJ, whose social world has changed so drastically over the decades, moving away from the small, stable and cohesive milieu that had coalesced in the mid-1960s with ECJ founding decisions²⁸. Ever since the departure of a small group of judges and *référéndaires* who had been closely linked with the consolidation of the "*Van Gend en Loos-Costa doctrine*"²⁹, such stability gave way to an increasingly mobile and diverse community of practitioners. Over the years, the European Court of Justice has experienced an on-going process of internal differentiation that has transformed it into a complex organization made up of a number of institutions (the Court of Justice, the Court of First Instance created in 1991 and the Civil Service Tribunal), judges (from a group of 13 from 9 Member States in the mid-1970s to a group of 70 from 27 Member States today), associations (the *Amicale des référéndaires et anciens référéndaires* created in 1991, the permanent delegation to the Court of Justice of the Council of European Bar associations and Law societies, etc...), and specialized professional groups³⁰. Such transformation came along with an increasing turn-over: while there was

²⁶ Grass, R. (2006) 'Les ressources humaines à la Cour de justice des Communautés européennes'. In *Mélanges en l'honneur de Philippe Léger. Le droit à la mesure de l'homme* (Paris: Pedone).

²⁷ Stone, A. (2004) *The Judicial Construction of Europe* (Oxford, Oxford University Press) 30-41.

²⁸ Andreas Donner (Dutch) stayed 21 years; Karl Roemer (German), 20 years; Pierre Pescatore (Lux), 16 years; Antonio Trabucchi (Italian), 14 years, etc...

²⁹ The mid-1970s are critical in this regard. Within three years, four of the judges from the "revolutionary period" reached the end of their mandate. The departure of the two Italian judges Roberto Monaco and Antonio Trabucchi was followed by that of both presidents from that period (1958-1976), Andreas Donner and Robert Lecourt, who respectively left the Court in 1976 and 1979.

³⁰ To this picture, one could add the fact that, ever since the Nice Treaty (2000), the ECJ is composed of three five-members Chambers and one Grand Chamber whose presidents are elected every three years, therefore adding to the traditional election of the presidents of the three jurisdictions composing the ECJ. It does not take to be a political scientist to assume that some degree of informal electoral politics is involved. Drawing from the "names and known

only two judges leaving the ECJ every three years during the 1950s-70s period, the average rate of departure rose to two per year in the 1980s and 1990s, and to more than three per year in the past decade. Such instability was made even more obvious by the fact that *référéndaires*, which until then had been regarded as the permanent figures of the institution, not only grew in number up to a group of more than 200 members³¹ but also lost its stability as their time in office drastically fell down to five years on average in the late 1990³².

Starting from such premise that indicates the precariousness of the Court's setting, a "social fabric approach" questions the mechanisms allowing for the maintenance of the "*Van Gen en Loos-Costa doctrine*", in particular the socialization devices where new comers (judges, law clerks) are been inculcated such core beliefs and basic legal principles. As there is no judicial profession where ECJ judges could be trained and selected, one needs to look at how role transmission operates in Luxembourg. Just like for any institution, informal meetings and debates in the corridors and at the canteen certainly constitute an essential form of internal socialization. In particular, the sociability of *référéndaires* across cabinets could be studied in such perspective as it is home to discussions over ongoing judgments and, more importantly, to a general mainstreaming of the cognitive and normative frames used to evaluate legal issues and individual moves³³. Formal instruments –such as internal legal databases or Judicial Compendia- are another essential socialization device. As they include routinized legal formulas, key words, and bureaucratic forms that have been codified over the decades, they are certainly also decisive in channeling the new comers' initiatives in the set of previously established legal alternatives and debates. The systematic codification of ECJ "judicial style" provided by the then ECJ judge Pierre Pescatore (diffused in the Court in the early 1980s and only recently made public)³⁴ gives an idea of the rich potential of such research line³⁵. Yet, given the difficult access to information at the Court of Luxembourg, these research paths are difficult to engage. There is however another covert and so far neglected venue which allows ECJ judges' to gather: commemorations, be they *Festschriften*, tributes, eulogies or Courts' jubilees³⁶. I have argued that these celebrations, even though they have been so far neglected, are not just a mere legitimatory device. One element should lead us to think otherwise: while eulogies and *Festschriften* are of almost no legal value (the latter are best described as "graveyards of scholarship"³⁷) and involve a whole economy of efforts and

(Contd.) _____

judicial orientations and philosophies" of the four elected presidents, Hjalte Rasmussen actually argues that a "federalist coup" occurred during the October 2004 election as three of them were of strict federalist creed, thereby maintaining a strong hold on the Court: see Rasmussen, H. (2007) 'Present and Future European Judicial Problems After Enlargement and the Post-2005 Ideological Revolt' *Common Market Law Review*, Vol. 44, No. 6, 1661-1688.

³¹ Grass, R., art. cit., at 76.

³² Kenney, S. (2000) 'Beyond Principals and Agents. Seeing Courts as Organizations by Comparing *Référéndaires* at the European Court of Justice and Law Clerks at the US Supreme Court', *Comparative Political Studies*. Vol. 33, No. 5, 593-625.

³³ It could be argued for example that the integrative capacity of the Court during the recent two waves of enlargement has been in part related to the role played by experienced *référéndaires* in the cabinet of Eastern and Central European judges. On the enlargement and the European Court of Justice, see the interesting piece by Bilyana Petkova, 'Structural Changes and Decision-Making at the European Court of Justice after the Eastern Enlargement', ECPR Conference in EU Politics, August 2010 (available online).

³⁴ Pierre Pescatore refers to two specific databases that are used by the *rédacteurs d'arrêts*: CANEVAS: *Aide aux citations*, the *Bibliothèque de phrases* which allow the insertion of specific recitals.

³⁵ Although they are essential interesting in courts' strategical use of precedents, the methodology developed by Eric Voeten and Yonatan Lupu on patterns of quotations of precedents in ECHR case-law could be very useful in order to identify the actual consistency of the court's jurisprudence. Cf. Lupu Y., Voeten E., "Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights?", *British Journal of Political Science*, 42 (2), 2012, p. 413-439.

³⁶ Vauchez, A. (2011), art. cit. Similar commemorative strategies can be seen at the European Court of Human Rights, see Hennesse-Vauchez, S. (2012) 'Divided in Diversity. National Legal Scholarship and the European Convention of Human Rights' In B de Witte and A Vauchez (eds) *Lawyering Europe, op. cit.*

³⁷ Melchior Roberts, L. (1963), 'Legal *Festschriften*', *Law Library Journal*, Vol. 56, No 1, 47-60.

investments, there is a general willingness to participate. By their regularity, publicity, and the great deal of attention that is given to the formal respect of the ceremonial rules³⁸, I argue they typically constitute an institutional ritual: praising the timeless ideas of the Court is an essential technology for handling *temporal* issues such as heterogeneity and conflict. As a matter of fact, these commemorative rituals all converge in displaying the unity of ECJ judicial community united around the Court's founding decisions and core legal principles. We are reminded of the "atmosphere of collegiality, one might even say of brotherhood – since, unfortunately, we (the Court) have only had had one sister"³⁹ and of "the link that unites us in the memory and the recognition of our great colleague and unforgettable friend"⁴⁰. Such recurrence of the metaphor of the Court as a "family" and/or as a "community" to which (past, current and would-be) judges are incited to identify, helps revive a transversal solidarity transcending the potential national, professional or ideological divisions among the various judges. United despite their diversity, they are called upon to recognize each other as *insiders* of the Court whose task is to maintain and promote the lasting lessons of the "revolutionary years". Moreover, as it has been extensively exemplified by the sociology of institutional rituals, these do not only maintain a sense of belonging to a "community", they simultaneously contribute to stratify it. As famously shown by Marcel Mauss⁴¹, the position occupied during the ceremony (whether one is member of the honorary committee, co-editor, contributor, reader, etc...) is critical to defining one's position in the institution praised: "founding fathers" authoritatively embodying the Court's "eternal yesterday", current spokesmen in charge of leading the Court in the present, and (putative) "inheritors", most of the time the former *référéndaires* of the departing judge, who are called upon to inherit from such legacy. All in all, studying these commemorations as rituals allows to seize the symbolic *and* social processes through which the Court's ideals are maintained, in particular the socialization devices that help revive and transmit its core beliefs and legal principles.

III. Securing Legitimacy: the Court's Publics and Audiences

The last analytical concept I would like to add to the "social fabric" tool-kit is the notion of legitimacy. As it stands in opposition to the formal study of legality, such notion has been the founding concept of political science as far as the study of institutions is concerned. In its most classic weberian meaning, it points at the social acceptance / recognition by a select number of groups and audiences of one given claim for power⁴². In the case of the Court, such claim brings us back once again to the revolutionary years of 1963-1964 when the emerging community of Euro-lawyers defined the Court's nature (constitutional court) and functionality (an essential lever for integration). The recognition of such claim depends on the support it is able to secure outside of the Court itself, among legal and non-legal actors. Without a support from external audiences, the Court's legal constructions would remain, as indicated by former ECJ president Andreas Donner himself, "une variation de la vieille histoire du baron de Münchhausen qui sortait de la boue en se tirant par ses propres cheveux"⁴³. Here is not the place to trace the complex history through which national legal elites, and in particular, national Supreme Courts, partially and gradually accepted the Court's jurisdiction. There is now a whole literature documenting in great details the many transnational judicial controversies that came

³⁸ For a general index of all international law *Festschriften*, see the very useful volume edited by Macalister-Smith, P., Schwietzke, J. (2005) *Public International Law. Concordance of Festschriften* (Berlin, Berliner Wissenschafts-Verlag).

³⁹ Hoskins, M., Robinson, W. (eds) (2004) *A True European. Essays for judge David Edward* (London: Hart Publishing).

⁴⁰ Iglesias, G., Due, O., Schitgen, R., and Elsen, C. (1999) (eds) *Mélanges en hommage à Fernand Schockweiler*, (Baden Baden: Nomos Verl.) at 18.

⁴¹ Mauss, M. (1897-98), 'Essai sur la Nature et la Fonction du Sacrifice', *L'Année Sociologique*, 35-138.

⁴² Eisenstadt, S. (1968), *Max Weber. On Charisma and Institution Building* (Chicago: University of Chicago Press).

⁴³ Donner, A. (1965) 'Compétence de la CJCE', *Recueil des cours de l'Académie de droit international*, The Hague, 1-61.

along with the emergence of the European Court of Justice⁴⁴. What is more intriguing is how the legitimacy of the Court is secured outside of the legal realm⁴⁵. To this aim, one should consider the dramatic change in the social and political context in which the Court delivers its decisions: the Court does no longer work in front of a semi-public audience of Euro-lawyers such as the *Fédération internationale pour le droit européen* (FIDE) or the few EC-implicated journals. With the expansion of Europe's competences, it operates in front of a fragmented and oft conflictual European public sphere where a whole range of non-legal actors (economists⁴⁶, trade unionists, Ngos⁴⁷, lobbyists, EU-specialized magazines and think tanks, etc...) scrutinize and question the soundness of its decisions. Such enlargement of the Court's audiences implies that it is now criticized or praised from a variety of point of view and rationales: economists (assessing its economic rationality), Eurosceptics (denouncing pan-European judicial activism), left-wing parties and unions (criticizing a neo-liberal bias), Ngos (considering the judicial advancement of their cause), etc... As a result, the legitimacy of the Court's decisions is far from granted: op-eds, trade unions' mobilizations, think tanks' policy papers, and political gatherings now regularly put it into question. Truly enough, ever since the creation of the Court, member states have often harshly criticized its decisions, in particular after they had been defeated before her. This certainly is the unavoidable side-effect of the mere fact of adjudicating. It seems however that the recent waves of criticisms following decisions over the sensitive issue of social rights present some degree of novelty. Several indicators indeed suggest a growing *transnational* suspicion now also coming from traditionally pro-integration factions⁴⁸. Besides, the general trend of politicization of EU issues puts non-majoritarian institutions such as the European Central Bank or the European Court of Justice at risk: their essentially legal/technical form of legitimacy are questioned when it comes to judge in highly political or divisive matters.

All in all, these sketchy remarks are an invitation for new inter-disciplinary encounters between « the Court » and social sciences. Such encounters could be mutually beneficial if they provide ECJ professionals (including legal practitioners, *référendaires*, etc...) with more reflexivity on their own practices on the one hand, and political scientists with a deeper understanding of the 'world' lawyers live in on the other hand.

⁴⁴ Alter, K. (2001) *Establishing the Supremacy of European law* (Oxford, Oxford University Press).

⁴⁵ For a good example of the empirical potential of such research path, see Granger, M.-P. (2005) 'The Future of Europe: Judicial Interference and Preferences'. *Comparative European Politics*, Vol. 3, No. 2, 155-179.

⁴⁶ Sibony, A.-L. (2009) 'La jurisprudence de la Cour au prisme de la science économique'. In Mbongo P., Vauchez, A. (eds.) *Dans la fabrique du droit européen. Acteurs, scènes et publics de la Cour de justice des communautés européennes* (Brussels: Bruylant).

⁴⁷ See Cichowski, R. (2007) *The European Court and Civil Society. Litigation and Governance* (Cambridge: Cambridge University Press).

⁴⁸ See in particular former German president Roman Herzog or German major political scientist Fritz Scharpf: Scharpf, F. (2009) *The Double Asymmetry of European Integration Or: Why the EU cannot be a Social Market Economy*, Max Planck Institute, Working Paper 9/12; Schüssel, W. (2006) 'Interview', *Süddeutsche Zeitung* 31 December ; for an overview of the debate, see Vauchez, A. (2011) 'Justice et politique (européenne). Pour une clause démocratique' in Weil, P. (ed) *80 propositions qui ne coûtent pas 80 milliards*, Paris, Grasset.

The Advocate General and the Practices of International Jurisprudence

Iyiola Solanke*

This paper focuses on the Advocate General (AG) in the European Court of Justice. It discusses the role of the AG as an innovative practice of international jurisprudence and the working practices of the AG to create a coherent fabric of international jurisprudence. These working practices include a search for information; the evaluation of information and crystallisation in the Opinion. The contribution of the *référéndaire* in this process is highlighted.

I. The AG: a ‘Needle’ of International Jurisprudence

In 1957, the Treaty of Rome entrenched the role of Advocate General in the European Court of Justice. From two in 1957, the number of these officers in the main European Union court – the Court of Justice (CJ) – has grown to eight and recent reform to the Lisbon Treaty now allows for further growth. The increase in numbers has moved in tandem with enlargement of the EU: it is less clear why five large older member states have permanent AG seats yet – when Croatia becomes a full member – 25 member states will have to share 3 AG seats on a rotating basis. Only one of the 10 newly-acceding member states made this a public issue in 2004 – Poland argued (unsuccessfully) for its own permanent AG. This may have been for substantive reasons – the AG is seen to be of influence in the CJ – or pure political posturing.

Article 252 TFEU states that

‘The Court of Justice of the European Communities shall be ‘assisted by eight Advocates General...

‘These Advocates General have the duty to act with ‘complete impartiality and independence’ in making ‘in open court, reasoned submissions on cases whichrequire his involvement.’

Article 253 TFEU adds the terms of appointment:

Advocates General shall be ‘appointed by common accord of the governments of the member states for a term of six years.’

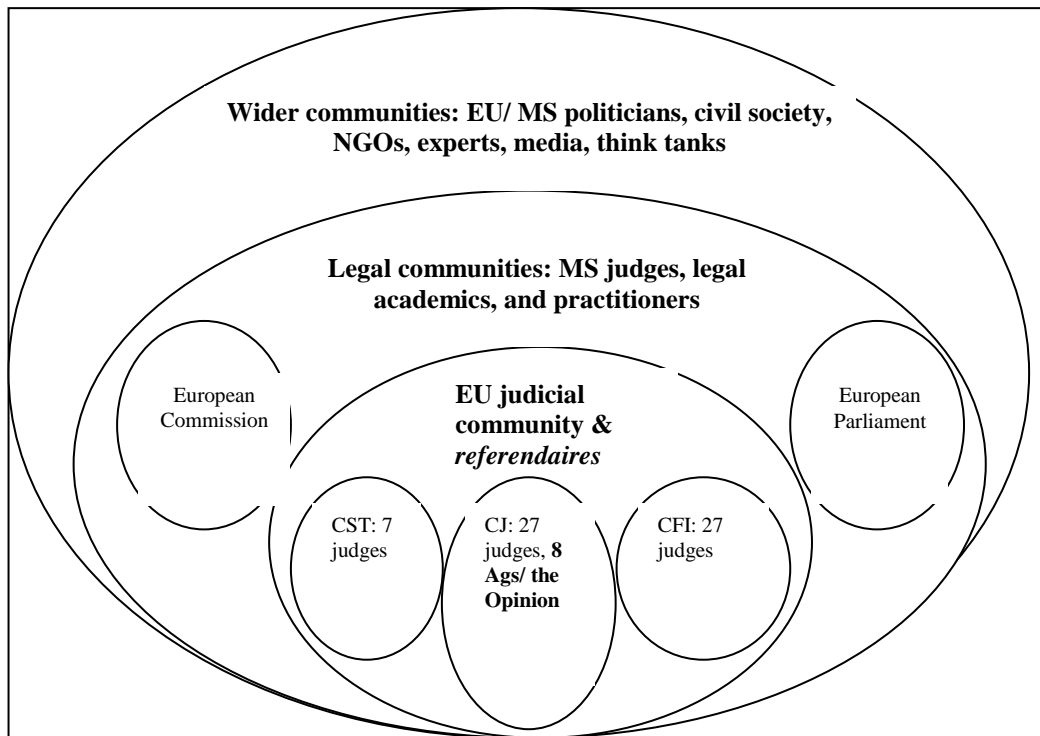
These provisions are somewhat vague and have allowed the AG to devise the scope of their role in the CJ and EU law. The original model may have been the French commissaire du gouvernement, but the AG remains a hybrid legal officer performing a multi-faceted function in the CJ. The absence of this precise role in the legal systems of the member states has facilitated a flexible interpretation. Combined with the ambiguity of the Treaty, this has allowed the occupants of this role to take an individual approach to their duty to ‘assist’ the Court. Hence some use their Opinion to clarify whilst others go further to act as legal entrepreneurs. The AG has thus developed into a unique role in the development of international jurisprudence. Her Opinion is the key instrument by which her contribution is made to EU law. Whilst judges are under no obligation to follow the recommendation of the Advocates-General, she is said to be able to ‘decisively influence the thinking of the judges.’ AGs are described as privileged discussants with the Court. It remains to be seen whether the new obligation upon the Court in Article 13 TEU to ‘serve the interests’ of the EU citizen has any impact upon the way in which the AG provides such assistance.

It is interesting to consider *why* the AGs are influential upon the judges. It could be expected that the relationship be less than constructive: the AGs are mandated by the Treaty to ‘assist’ the court, yet the judges have no say in who these assistants are or the nature of the assistance. AGs are nominated by the member state government, and appointed by the Council of Ministers; they are of equal formal

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status to the judge and determines the scope of the opinion independently. The judges cannot hire or fire, direct or determine the manner or scope of the AG enquiry. The closed nature of judicial decisions makes it difficult to determine exactly how the AG ‘assists’ - what do they do that the judges cannot do for themselves that makes them valued members of the Court? Why does this relationship work? Arguably, this relationship works because the judges find value in the Advocate General Opinion to the jurisprudence of the Court. The AG can be described as being ‘embedded’ within, but operating independently of, a multi-level complex of communities including judges at the EU and national level, as well as legal academics, lawyers and even non-governmental organisations. This double-embeddedness - both within the EU judiciary and within non-judicial communities – identifies their practice and contribution to the fabric of international law. The Opinion is produced by interaction with various ‘communities’ surrounding the AG. It can be understood as legal in form but a product of broader social and political interaction. Figure 1 depicts this embeddedness. In his comparative study of judiciaries in Europe¹, Bell locates the judicial community as a group within the larger legal community which is composed of lawyers and academics. This legal community is not only the ‘primary cognate audience’ for judges, but also partly the source of their authority, status and function. The legal community in turn is surrounded by the wider community of politicians, civil society and public opinion. The use of non-professional judiciary (lay judges), he argues ‘offers an element of popular participation as a corrective to a formal legal rationality.’ These lay judges act as a bridge between the legal community and the wider community. This model can be adapted to depict the composition of the EU judiciary and the location of the AG. The EU judiciary is made up of the members of the ECJ (27 judges, 8 AGs), the members of the CFI (27 judges) and the members of the Civil Service Tribunal (7 judges). The AG is mandated by the Treaty of Rome to assist ECJ judges only, although their Opinions are no doubt read by judges in the other two courts. Although full members of the ECJ, the AGs form a subset of ‘non-decisional’ judges within that court. The two groups of judges have different primary cognate audiences: for ECJ judges this is the parties to the case and the national judges. Whilst the primary cognate audience for the AG is the ECJ judge whom she must assist, the Opinion is also written for the benefit of the national judges and parties, as well as those in the legal community – legal academics and lawyers in the EU member states and beyond. Similar to the lay judges in Bell’s model, the AG also has a ‘bridging’ function, disseminating information from the heart of the EU legal system to the legal community (comprising lawyers and legal academics) and the wider community of citizens, activists, politicians, and journalists. In the section below, the focus will be on the interaction of the AG with their *référéndaires*.

¹ Judiciaries in Europe 2006: 12.



II. The AG Opinion

If the office of the AG is the needle of international jurisprudence, her Opinion is the thread which constitutes the tapestry of EU law. This section will consider the key practices which are used to write the Opinion. Like all decision-makers the AG requires reliable sources of information, time to assess and evaluate this information and finally must compile this information into a coherent form which can be used by the Court to reach and justify a decision. How does the AG do this? As in all cases, the search for information begins with the materials submitted as part of the case. The AG receives the same information as the judges and uses this material in the Opinion. This can focus on internal EU sources or external resources in the MS. Internal resources include colleagues, the case law of the EU and comparative law. External resources include academics, former colleagues in the member states and practitioners. Of the internal resources, the most important is the *référéndaire*. This group, which makes up the largest cohort in the CJEU, plays an important but as yet under-researched role in the CJEU. The relationship between the *référéndaire* and his or her AG is as intimate and close as that between US judges and their clerks. There is a high level of trust and dependence. As the Cabinet represents the only point of dialogue on a case for the AG, within each Cabinet, communication between the AG and legal secretary is open. The AG is very reliant upon their *référéndaires*, especially the more senior ones, who are expected to produce work which will not need to be edited. Their recruitment is therefore of utmost importance. Jarabo Colomer moved his whole secretariat from Madrid to Luxembourg. His *référéndaires* tended to be Spanish judges with experience in EU law. However, not all are comfortable with the key role played by some legal secretaries. CFI judge Hubert Legal, complained in a French legal journal that some judges with limited knowledge of French were being held hostage by legal secretaries whom he described as "ayatollahs of free enterprise" who "regard the public interest as only an abstract idea or even as suspect."²

² Obscure EU court may be ally for business By James Kanter International Herald Tribune, WEDNESDAY, MAY 31, 2006. <http://www.ihrt.com/articles/2006/04/23/business/court.php#> [accessed 23.05.07].

III. The Search for Information

Although the Kirchberg is a fairly compact space, housing three courts and the requisite number of clerks, not all judicial members talk to each other. Some members are of the opinion that their judicial role requires a certain distance to be maintained. This is not due to a lack of collegiality but can be attributed to the desire to avoid an impression of trying to exert influence on ones colleagues. Others are less concerned about the need to use distance to demonstrate independence: they read and refer to each other's Opinions, visit each other's Cabinets and even share expertise: for example, if an AG has a *référéndaire* is a tax specialist and a colleague who requires assistance on a tax case, it might be that the *référéndaire* will be allowed to do provide this. Although cabinets operate independently, there is a further situation when interaction may arise. This involves those situations where a new AG or judge inherits cases from another Cabinet, due to a change in personnel. In these circumstances, the AG may – with the permission of their boss – approach a legal secretary in another Cabinet for assistance. An AG with limited language competence within her own Cabinet may also approach a legal secretary in another Cabinet. Formal assistance of this nature may also be necessary where an AG falls ill, or where a legal secretary in another chamber is an expert on a particular question. Such interaction also helps AGs gain an impression of ideas floating in the corridors of the CJEU – like any institution, informal interaction is as important as formal in the CJEU. Such interaction aids the AGs as they 'assist' the Court. This is not to suggest that Opinions are tailored to suit prevailing moods, but that they may be written so as to speak to them. Informal interaction helps the AG to know what is important and respond to it.

IV. Evaluation of Information

The evaluation of information is also important for all decision makers. This is perhaps the most delicate aspect of any decision making role: how to determine whether information is credible and reliable. For the AG, who bears personal responsibility for the contents of the Opinion, the *référéndaire* is the most important determinant of the credibility of information, not least because in the majority of occasions it is the *référéndaire* who will add flesh to the ideas sketched out by the AG – it is rare for an Opinion to be written by the AG from start to finish. Other trusted sources included the European Parliament reports, colleagues in the Commission and the member states and legal academics. Ultimately it is for the AG to decide who to trust, whether it be a Commissioner or the chauffeur!

A key practice of international jurisprudence, which as yet remains under-researched, is the work of the *référéndaire*. These legal clerks discreetly exchange information in offices, hallways and cafes. The legal clerks dining in the staff café know what is going on in other Cabinets. Over lunch, coffee and dinner, they share and transfer expertise, sensitivities and attitudes about Community law between Cabinets and around the Court. This has some advantages: it can prevent conflict between AG Opinions and promote collegiality. It can also help mistakes to be spotted before they become catastrophes. The legal secretaries generally do not discuss the substance of case but the general direction that may be taken. Some members find this indispensable and encourage such interaction. However, even if it is discouraged it can occur without the knowledge of the AG. Nonetheless there is a limit: whilst the *référéndaires* are important, they cannot take responsibility for the Opinion – only the AG can do this. The space for genuine debate between the *référéndaire* and AG varies: some AGs are more receptive to the convictions of their legal secretaries: in such circumstances the AG may change the direction of the Opinion. The more regular the meetings in the Cabinet, the more editorial control. Many cabinets would circulate a first draft of the Opinion within the Cabinet, so that other *référéndaires* would act as a filter. In reading each others work, ideas are shared, effectively improving all Opinions of the AG. Other Cabinets were more bi-lateral. Regardless of the number of discussions, the ultimate decision rests with the AG. Evaluation of information therefore includes

dialogue within and beyond the Cabinet, and sometimes even beyond the Court. Of course, it goes without saying that the level of dialogue depends upon the character of the individuals concerned. In addition, it depends to some extent upon the legal system with which members are familiar and the working practices they have developed in previous appointments. Whilst the most detailed discussions are intra-cabinet, interaction – both formal and informal - between *référéndaires* across the Court is equally important for the AG. This was needless to say more straightforward in a Court of 15 member states. The amount of informal interaction is arguably now somewhat reduced given the current size of the ECJ and the change which this has wrought in the culture of the Court.

V. Crystallisation of Information

Surprisingly, there is a level of shared practice in relation to the writing of the Opinion. In all cases, it is the AG who sets the direction of the Opinion but procedure differs thereafter. A French member used to the civil law system might, for example, be content to leave all drafting to the *référéndaires*: this would again only be possible if the *référéndaire* were knowledgeable and senior enough to be entrusted with this task. For some members the *référéndaires* are jurists in their own right. Alternatively, a British member might feel more comfortable engaging *référéndaires* at all levels, from the most junior to the most senior, in debate upon the key issues but not trust the final writing of the Opinion to anybody else. The distribution of the workload within the Cabinet is a matter for the AG. This task may be delegated to a Senior Legal Secretary. Alternatively, the Advocate General may decide to assign cases himself. It is questionable whether the former or the latter procedure contributes more to harmony within the Cabinet - some cabinets are more hierarchical than others but a certain level of team-working is necessary in order for the time limits to be met. Case assignment can involve recognition of the interests, strengths and weaknesses of the *référéndaires*. The norm is for the AG to do little of the writing themselves, but give guidance to the legal secretary as to where she wants the Opinion to go, in particular identifying the legal reasoning and allowing the *référéndaire* to write drafts. Very rarely would the AG write a first draft. An AG may choose not write a single paragraph in an Opinion whilst others would take great pains to do a lot of the writing themselves. In a few cases, the AG would write the whole Opinion, leaving the *référéndaire* to do minor edits. If an intricate legal point was being made, the AG could supply the precise wording to be used. Other legal secretaries were left to write the Opinion, which the AG would edit and hand back or make changes herself. Each legal secretary would have her own case to work on; big cases could be worked on by everybody. In all cases – save where the AG wrote the Opinion herself – the work would be checked by the AG. The key to success for a legal secretary, however, lies in the ability to anticipate the direction of thinking of the AG: the fewer changes made by the AG, the more successful the effort of the *référéndaire*. The poorer the pre-draft communication in the Cabinet, the more editing the AG would need to do. Thus it behoves the AG to take the time to discuss the general orientation of the Opinion with the *référéndaires* – decide the way to go, what the issues are and how they should be resolved. Likewise, the more personal the style of the Opinion, the more the AG would need to edit it. Typically, following discussions with the *référéndaires*, a first draft is prepared six weeks before the oral hearing.

VI. Conclusion

The AG contributes to the practice of international jurisprudence in two ways: first, the office itself and secondly in the way in which the AG ‘assists’ the Court via creation of the Opinion. Both the office and the Opinion are embedded in a network of relations. The AG practice of international jurisprudence in a court such as the CJEU is in some respects like that of members in any court – there is a premium upon reliable information, a need for evaluation of this and a phase of crystallisation of information during drafting of the decision. What may differ at the CJEU is that the AG adds a transparency and porosity to the CJEU that is not shared by other courts. However, there is no single practice employed – it changes according to the habits of each member. In particular, the Cabinet is as

closed or porous as desired by its head, the CJEU member. The *référéndaire* plays a crucial role. It is difficult to know the full importance of their interaction in the functioning of the CJEU but overlooking their role may reduce our understanding of the practice of international jurisprudence. They are not only central to the search for information, but as mentioned above, play a key role in its evaluation, its transmission and co-ordination into a coherent form in the Opinion. It may be true to say that whilst there is secrecy vis à vis the outside world, there are few secrets within the CJEU. To some extent members do not need to talk to each other as long as their *référéndaires* do so. The working methods within the Cabinet will be determined by the experience or inexperience of the *référéndaire*, the character and knowledge of the AG and the complexity of the case. The more experienced and mature the *référéndaire*, the greater latitude given by the AG. The more confident the AG that the legal secretary can anticipate what he is thinking, the more autonomy the legal secretary will have. Ultimately, the Advocate General bears responsibility for all statements found in the Opinion. It may be argued that the more porous a Cabinet, the greater the opportunity for diversity of thought and conviction to inform the Opinion and judgment. Diversity is to some extent built into the AG role – each AG writes in her own language to produce what is ultimately an individual statement on EU law. The AG, and in particular her autonomy, is therefore crucial to the practice of international jurisprudence at the CJEU – at present, given the appointment procedures, it is the only source of diversity to inform decision-making at this court.

The Definition of 'Best Judicial Practices' by Judicial and Legal Expert Networks and Commissions

Cristina Dallara*

I. State of the art: the Fashionable Concept of Network in the Judiciary

Over the past decade, there has been a striking blossoming of judicial networks across Europe. From a wide-ranging perspective, judicial networks can be described as groups, conferences, commissions or organizations of legal experts, judges and academics (coming from different countries) established at a transnational level. Overall, the activities of these networks can be summarized as an exchange of ideas and practices, in the production of recommendations, opinions and best practices concerning different fields of law and the functioning of the judicial system and in the organization of seminars, conferences and training of judges and legal experts.

Anne-Marie Slaughter's description of transnational judicial governance as most emblematic of a "new world order" has opened a new research avenue¹. There is now a whole stream of research from political science, law and sociology investigating this emerging worldwide phenomenon². As a side of the multifaceted phenomenon of the Global Governance, transnational judicial governance is characterized by: the participation of public and private actors other than States (such as intergovernmental organizations, non-governmental organizations, multinational corporations, networks of scientists and experts and human rights activists) and the predominance of soft-law³ as mechanism of relationship and co-operation among the actors just mentioned.

In this respect, Slaughter (2004) underlines that in the context of a networked world judges are among the most surprising networkers actively engaged with their counterparts around the world. As she claims "Judges around the world are talking to one another: exchanging opinions, meeting face to face in seminars and judicial organizations, and even negotiating with one another over the outcome of specific cases"⁴. They mostly participate in information and enforcement networks, thus contributing to a gradual construction of a global legal system.

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¹ Slaughter, A.M., *A New World Order*, Princeton, (Princeton, Princeton University Press, 2004).

² Allard, J. and Garapon, A. (2005), *Les juges dans la mondialisation. La nouvelle révolution du droit*. (Seuil, 2005); Scheeck, L., 'La diplomatie commune des cours européennes', in Mbongo, Vauchez, eds, *Dans la fabrique du droit européen, Scènes, acteurs et publics de la Cour de justice des Communautés européennes* (Ed. Bruylant, Bruxelles, 2009); Magrassi, M., 'Reconsidering the principle of separation of powers: judicial networking and institutional balance in the process of European integration' (2011), Paper presented at the *European Union Studies Association Twelfth Biennial International Conference in Boston*, Massachusetts.

³ The significance of soft law in contemporary democracies has been extensively pointed out in an ample array of legal and socio-legal studies, see Abbott, K.W and Snidal, D., 'Hard and Soft Law in International Governance'(2000), in *International Organization*, Vol. 54, No 3, 421-456; Goldstein, J., Miles K., Keohane R. and Slaughter A.M. (2000), 'Legalization and World Politics' (2000), *International Organization*, Vol. 54, No 3, 385-400; Haas, P. (2000), 'Choosing to Comply: Theorizing from International Relations and Comparative Politics' in Shelton D. (ed), *Commitment and Compliance. The Role of Non-Binding Norms in the International Legal Systems* (Oxford, Oxford University Press, 2000). In general, the term soft-law refers to a wide and diverse body of rules that are legally nonbinding. See also the bulk of research produced by research consortium on 'New Modes of Governance in the European Union' and the related book Héritier A. and Rhodes M. (eds), *New Modes of Governance in Europe: Governing in the Shadow of Hierarchy* (Hampshire, Houndsmill, Basingstoke, 2011).

⁴ Slaughter 2004, Op. Cit. at 66

On the same line, Ferrarese (2010)⁵ in a recent inclusive study on governance puts “judicial governance” as one of the main expression of the Global Governance. Judicial governance, acting mainly throughout soft-law instruments, is one of these new institutional settings producing a new form of global law in most different fields. Networks of constitutional, supreme and lower courts, panels and forums of judges and prosecutors, conferences and meetings of judges and legal experts, all are expressions of the judicial governance. Vauchez (2008)⁶, focusing on the European legal space, emphasizes also that lawyers and legal experts throughout multiple networks acting around the European institutions contribute to the construction and the legitimization of a specific political order. Operating in legal and political arenas of mediation at the European level they actively contribute to the creation and to the functioning of a new European legal field. In Europe, during the last decade, not only networks of lawyers gained relevance, but also networks of judges and prosecutors have set new standards of quality of justice and delivered recommendations regarding the implementation of judicial independence principles. Through collaborative works and meetings organized within judicial networks, judges enforce their routines and their ways of interaction. It is well known that these networks have been particularly relevant for judges and prosecutors coming from the newly democratic States in Central and Eastern Europe and the Balkans to discuss changes in their legal systems and spread off new ideas and legal ideologies. However, as Vauchez (2008)⁷ pointed out, so far the legal and political science scholarship has essentially focused on “outcomes” in terms of jurisprudence and judicial decision-making, with a particular interest in cross-referencing between national Supreme courts. This misunderstands what is actually “at stake” in these settings. What circulates among these networks is not just references to judicial decisions (the so-called “cross-fertilization” or “judicial comitology”), but more general opinions, best practices and reports related to shared values and elements of rhetoric, judicial procedural standards and models of professional excellence, etc. Moreover, many of these soft-law documents deal with crucial aspects of the judicial system organization and functioning such as judge status and role or guarantees of judicial independence.

The added value of a socio-political research approach to this topic is that it better allow to open up the black box of “judicial networks”, offering a deeper understanding of this emerging “European community of Courts” through a fine-grained exploration of transnational judicial *fora*⁸. Being they academic conferences, summer schools, training sessions, experts’ commissions, contact points or professional organizations where judges from a variety of countries meet and exchange. With reference to the European context and, more specifically, in the domain of the Area of Freedom, Security and Justice - as designed by the Lisbon Treaty and the Stockholm Program⁹ - my main hypothesis (following Magrassi)¹⁰ is that networks, commissions and associations of the judiciary could to be considered as new actors of the EU policy-making and mediators between supranational institutions and national judiciaries.

⁵ Ferrarese M.R. , *La governance tra politica e diritto* (Bologna, il Mulino, 2010).

⁶ Vauchez A. 2008, Art. Cit.

⁷ Ibidem.

⁸ In accordance with the activity of the project ‘The Disputed Field of Global Justice. A Transnational Inquiry’ coordinated by Vauchez, A., see <http://globalgovernanceprogramme.eu.eu/research-publications-2/research-strands-projects-2011/the-disputed-field-of-global-justice-a-transnational-inquiry/>

⁹ For the relevance of the judicial networks in the framework of the AFSJ see Toniatti, R. ‘Il sistema delle reti giudiziarie nel contesto dello Spazio di libertà, sicurezza e giustizia (SLSG) dell’Unione europea’ in R. Toniatti, M. Magrassi, M. Zenatti (eds), *Le nuove competenze dell’Unione europea in materia di giustizia*, 197-235 (Trento, Centro di Documentazione Europea, 2011).

¹⁰ Magrassi 2011, Op. Cit.

Thus, the specific aim of this paper is to focus at tools and know-how that are elaborated within such networks. In what follows, we will analyse only the judicial networks created within the Council of Europe will be analysed, focusing in particular on best practices and guidelines about the organization of the judicial systems, guarantees of judicial independence, appointments procedures and functioning of the judicial institutions (for example, self-governing bodies of judges, Judicial Commissions, appointment commissions, etc.). Finally, a tentative analysis of the “efficacy” of these tools will be proposed looking in particular at some cases in which judicial networks opinions and reports (in particular those of the Venice Commission) have been embedded and cited in the ECHR ruling or in European Commission official text given them a sort of “hard-law efficacy”.

II. Judicial Networks as a Way to Promote a EU Judicial System Model?

The analysis of the Networks activity regarding the organization of the judicial systems could offer an interesting research perspective. In fact, although, the organization of the judicial system is totally a matter of national sovereignty, as the EU has no competences in this respect, there are attempts of harmonization also in this field. The recent European Justice Portal, elaborated by the European Commission, contains a section focused on “Judicial Systems” expressing that “While the judicial systems of the Member States differ significantly in detail, there is a set of common principles which apply to all of them, as well as to the EU as such. One of these common principles is that the courts must be impartial and independent of the government and the legislator (i.e. the institution(s) passing the law). This principle of independence of the judiciary is one of the values on which the EU is founded: the rule of law and respect for freedom, equality and fundamental rights. It is specifically mentioned in Article 47 of the Charter of Fundamental Rights of the EU, and in Article 6 of the European Convention on Human Rights.” But, this is not the only way through which the harmonization of the judicial systems structure is pursued. In this respect, a key role is played by the multitude of networks and commissions working in this field as consultancy or advisory bodies of European institutions.

The number and the variety of European judicial networks are increasingly growing, for this reason different approaches could be adopted in order to describe this phenomenon. A first categorization divides European judicial networks into two main categories: by one hand, bodies composed by members which cooperate by performing judicial functions and, by the other hand, networks that have been established in order to promote training, cultural exchange and lobby activity aimed at foster the autonomy and the independence of the judiciary. Another categorization takes into account organisational aspects; accordingly, networks can be distinguished into two main typologies, that is institutional networks and technical networks composed by national contact points. A useful classification is the one suggested by Magrassi (2011)¹¹ distinguishing between:

1. instruments for the cooperation in the exercise of the judicial function by national judges and EU judges- such as the *European Judicial Network in criminal matters* (EJN-Criminal) and the *European Judicial Network in civil and commercial matters* (EJN-Civil);
2. other cooperative dynamics involving judicial professions and judicial institutions- such as the *European Networks of the Council for the Judiciary* (ENCJ), the Network of the Presidents of the Supreme Judicial Courts of the European Union and the networks of judges, prosecutors and legal experts the created within the Council of Europe: the Consultative Committee of European Judges – CCJE; the Consultative Committee of European Prosecutors – CCPE; the European Commission for the Efficiency of Justice – CEPEJ; the European Committee on Legal Co-operation (CDCJ) and the European Commission for Democracy through Law - the Venice Commission.

¹¹ *Ibid.*

Other types of networks of experts (in both civil and criminal matters) have been created by EU legislature or by CoE conventions with the aim of promoting the exchange of information and experiences. This category comprises bodies as: and the Networks of contact points to fight against cybercrime, provided for by art. 35 of CoE Convention on cybercrime. Liaison networks aims at supporting the promotion of common policies concerning specific topic.

Table 1 displays a partial mapping of the European networks of judicial professions and judicial institutions. The first five Networks are those established within the Council of Europe, the others are spontaneous Networks created by various judicial institutions or groups of judges around Europe. In this type of Networks the membership is generally nationally based, meaning that the members are the single state or the judicial institutions of a specific state (for example, the Supreme Court of a country), then two (or more) judges, civil servants or legal experts are appointed to represent the state or the judicial institution member of the Network. Focusing specifically on networks of judicial institutions and professionals, it seems that they are more and more affecting the circulation of models of judicial systems organization, especially in the newly democratic countries in Eastern Europe and the Balkans¹², but also among the old member states of the EU. This happens by way of a multitude of tools and instruments, such as conferences, training courses, collaborative projects and, particularly, with the diffusion of not-legally binding documents having the form of reports, opinions, best-practices and guidelines.

Given these tools, one can distinguish two different channels through which models of judicial system organization are diffused. The first one is based on the participation in the Networks and on the activities they organize. By such, judicial best practices are diffused, internally, among the Networks members and/or, outside, among the external participants in their seminars, courses and conferences. In this respect, the list of the seminars and conferences organized by the Networks on the topics such as “judicial independence”, “judicial councils”, “judicial appointment”, “judges’ status”, etc. is impressive. In this case, the diffusion of judicial system models is based on an indirect pressure upon legal culture throughout socialization and persuasion¹³. The second channel is indeed based on standard-settings based on recommendations, opinions and best practices. Here, especially in the documents of the CoE Networks, “minimum standards” of democracy and rule of law are proposed. Without analysing in details this type of documents, it is sufficient to notice that they also propose in a nuanced way also institutional models for the organization of judicial systems and judicial institutions. For example, an opinion, issued by one the Networks listed above (CCJE), suggests the creation of High Councils of the Judiciary as the best way “to safeguard the independence of the judiciary and the rule of law”¹⁴.

¹² Dallara, C. *L'Unione Europea e la promozione della rule of law in Romania, Serbia e Ucraina. Le riforme dei sistemi giudiziari e le politiche anti-corruzione nei tre paesi. [the Eu rule of law promotion in Romania, Serbia and Ukraine. the effects on judicial reforms and anticorruption policies]* (Bologna, Du Press); Coman R. and Dallara C. (eds), *Handbook of judicial politics* (Iasi, Romania, Editura Institutul European).

¹³ Magen A. and Morlino L. (eds), *International actors, democratization and the rule of law: anchoring democracy?* (London, Routledge, 2009).

¹⁴ Opinion no.10 (2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on ‘the council for the judiciary at the service of society’. This Opinion has been adopted by the CCJE at its 8th meeting (Strasbourg, 21-23 November 2007).

Table 1. Provisional list of networks of judicial professionals and judicial institutions in EU¹⁵

European network	Organizational unit (type of judicial institution in the network)	Outputs and Products
European Commission for Democracy through Law - the Venice Commission	Judges or academics representing the member states.	Guidelines for the application of the judicial review, opinions and assistance on constitutional matters.
Consultative Committee of European Judges - CCJE	Ordinary judges	Guidelines and opinions for the organization of the judicial systems
Consultative Committee of European Prosecutors – CCPE	Ordinary Prosecutors	Guidelines and opinions for the administration of penal justice
European Committee on Legal Co-operation - CDCJ	Representatives of all the CoE member states, principally from the ministries of justice.	Standard-setting activities in the field of public and private law
European Commission for the Efficiency of Justice – CEPEJ	Judges and judicial experts	Projects, guidelines and programmes for the administration of justice.
Network of the Presidents of the Supreme Courts	Supreme Courts	Guidelines for the cross-national use of the case law of the high courts.
European Networks of the Council for the Judiciary – ENJC	High Judicial Council	Guidelines for the administration of the High Judicial Councils
European Judicial Training Network - ENJT	Center and schools for Judicial Training	Exchanges of judicial training programmes
Conference of European Constitutional Courts (CECC)	Constitutional Courts	Congresses; exchange of information as regards issues of methods and practice of constitutional review; Opinions in the areas of public law and constitutional jurisdiction.
Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union ACA-Europe	CJEU, Councils of States and other supreme administrative jurisdictions	Detailed information on the administrative jurisdictions in each EU Member State; reports and newsletter; a guide to preliminary ruling proceedings before the CJEU with direct case law, etc.
Association of European Administrative Judges (AEAJ)	National associations of administrative judges and courts	Defending the interests of European administrative judges; Meetings of administrative judges; Newsletter and reports
Association of European Competition Law Judges (AECLJ)	Groups national judges working in the area of European competition law	Promoting knowledge and understanding of competition policy and law issues throughout the respective judiciaries of the EU.
The European Judges and Prosecutors Association (EJPA)	Judges from nine different European countries (France, Spain, Italy, Portugal, Germany, Netherlands, the Czech Republic, Hungary, Romania).	Training, reports and tools to improve the mutual knowledge of judiciary systems. Ex. A chatting list and a Justice phone book.

¹⁵ Source: Updated from Coman R. and Dallara C. (2010), *Handbook on Judicial Politics*, at 299, (Iasi, EuroInst).

Opinions, recommendations and best practices could be requested by the individual countries member of the Networks (concerning specific draft law or amendments or specific problems) or by other European bodies. In the case of the CoE Networks, opinions are requested, as legal adviser activity, by the CoE Parliamentary Assembly, Committee of Ministers and Secretary General and also by the European Union (namely the European Parliament or the European Commission). The minimum standards suggested in the documents remain *non-binding* in their nature. This means that countries can decide whether or not to follow them. Clearly, very often individual states request opinions to gain a sort of international legitimization, thus they follow or they recall the opinions in a strategic way. This is an important aspect that cannot be developed here because of space constraints. But, in spite of the non-legally binding nature of the Networks documents, it is possible to identify a recent trend by which opinions, recommendations and best practices are frequently cited as “Other relevant sources” in the ECHR rulings or even explicitly used by the European Commission to evaluate the compliance of a country with the EU values and criteria. This happened and is still happening not only in the case of the acceding countries involved in the Enlargement process but also with respect to member states. This new role the documents issued by Networks implies also a more “coercitive” form of judicial system models diffusion. Here the point is that, although in the EU the choice of a model of judicial governance remains matter of each state’s sovereignty, it seems that throughout Judicial Network documents EU institutions are pursuing also a goal of “institutional harmonization” of the judicial systems.

De Visser and Claes (2012)¹⁶ in their analysis of transnational judicial Networks already underlined how judicial networks could, potentially, provide the missing link in the European architecture. Thus the Networks become strategic policy arenas for national judges and, at the same time, “back-stage actors” of the EU judicial policy. This hypothesis could be only accurately verified looking at the future development of EU action in the AFJS building. Nevertheless, a tentative picture of this tendency could be drawn examining in details the activity of some Networks.

III. Opinions, Guidelines and Best Practices on Judicial Organization. A Way to Promote a Common European Judicial System?

In this paper I have decided to limit my analysis to the Networks established within the CoE and in particular on the Venice Commission. The reason to look at the CoE Networks is twofold: first of all, these networks are until now less studied in respect to the other networks; secondly, as they are placed within the CoE, more and more the key advisory partner of the EU on legal cooperation and other matters, it is possible to better verify if and how Networks could influence the EU judicial policy. Piana (2010) defines the CoE a “partner for prestige”¹⁷ of the European Commission in the domain of legal and judicial cooperation, highlighting that the CoE with the enlargement towards Central and Eastern Europe was vested of a leading role in setting standards (throughout its Networks) in the justice field. Today, the CoE is increasingly applying its empowered agenda in the justice field both towards current EU member states and other countries. This is also coherent with the conclusions of the Juncker Report (2006)¹⁸ on the relationship between the Council of Europe and the European Commission with suggests that: “to move forward on the path to this pan-European legal and judicial area, the EU and the Council of Europe should also set up a joint platform to assess the feasibility of

¹⁶ De Visser M. and Claes M. ‘Courts United? On European Judicial Networks’ in de Witte B. and Vauchez A. (eds.), *The European Legal Field* (Hart Publishing, 2012)

¹⁷ Piana D. *Judicial accountabilities in new europe: from rule of law to quality of justice*, at 56, (Farnham, Ashgate, 2010).

¹⁸ Juncker J.C., ‘Council of Europe - European Union: A Sole Ambition for the European Continent’. Report by Jean-Claude Juncker, Prime Minister of the Grand Duchy of Luxembourg, to the attention of the Heads of State or Government of the Member States of the Council of Europe, 11 April 2006 http://assembly.coe.int/Sessions/2006/speeches/20060411_report_JCJuncker_EN.pdf

the EU's taking over Council standards, and vice-versa, each in accordance with its own responsibilities." Concerning the CoE Networks, I skip here the description of structure, membership and functions¹⁹ just focusing on the documents they have shaped in the domain of judicial system organization. Concerning the Opinions of the CCJE (Consultative Committee of European Judges) it is interesting to focus the attention on the topics they deal with. They range from "Standards concerning the independence of the judiciary and the irremovability of judges", "Training for judges", "Council for the Judiciary in the service of society", to "Relations between Judges and Prosecutors in a democratic society".²⁰ All are topics related to the organization of the judicial system and concerning the content, as cited above in footnote 69, they propose "best solutions or practices" to organize judicial institutions. For example, as already mentioned, the High Councils of the Judiciary are suggested as the best way "to safeguard the independence of the judiciary and the rule of law".

As for the Opinions of the CCPE (Consultative Committee of European Prosecutors), their content and the type of suggestions they propose is very similar to the ones of the CCJE.²¹ The CDCJ (European Committee on Legal Co-operation) is formed by the representative of the minister of justice; although formally the Network deals with a broad range of topics (family law and children's rights: nationality law and families, administrative law, justice and rule of law, data protection), it issued also some relevant documents related to judicial organization. For example, the Resolution N. 1 (on a modern, transparent and efficient justice), the Recommendation N. R (86) 12 (concerning measures to prevent and reduce the excessive workload in the courts), a draft Recommendation on the role of public prosecutors outside the criminal justice system and finally an important Recommendation on judges independence, efficiency and responsibilities.²² then adopted by the CoE Committee of Ministers and defined as the most authoritative text at European level.²³

The documents elaborated by the CEPEJ (European Commission for the Efficiency of Justice) are instead less focused on the institutional role of the judiciary or on the guarantees of judicial independence and more tailored on the efficient functioning of justice. Thus, they elaborated also more practical tools to be applied in the concrete courts management, such as Handbook for court satisfaction surveys, Compendium of "best practices" on time management of judicial proceedings, Time management checklist, Checklist for promoting the quality of justice and the courts.²⁴

Finally, there is the multitude of Opinions elaborated by the Venice Commission (VC).²⁵ Perhaps the most widely known CoE Commission. Concerning the VC, it is worth to mention that this Network it is not only formed by judges or prosecutors; members are primarily academics, supreme or constitutional court judges or members of national parliaments. Moreover, many of the academics appointed by the national government at the VC are or were judges in the Constitutional or Supreme courts. Although the original mission of the VC was specifically related to the "Constitutional assistance" (as it is the CoE advisory body on constitutional matters)²⁶, during the last ten years, the number and the type of activities performed by this network have been significantly increased, behind

¹⁹ See Coman R. and Dallara C. 2010, Op. Cit.

²⁰ See http://www.coe.int/t/dghl/cooperation/ccje/textes/Avis_en.asp.

²¹ See http://www.coe.int/t/dghl/cooperation/ccpe/opinions/default_en.asp.

²² Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (*Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies*)

²³ See http://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ_documents_en.asp.

²⁴ See http://www.coe.int/t/dghl/cooperation/cepej/textes/default_en.asp.

²⁵ See http://www.venice.coe.int/site/dynamics/N_Opinion_ef.asp?L=E.

²⁶ It was created in 1990 and since its establishment it has played a crucial role in the adoption of constitutions disseminating the European fundamental legal values and providing Constitutional first-aid to individual states. In fact, it was initially conceived as a tool for emergency constitutional engineering, as a partial agreement of 18 member states of the Council of Europe. In February 2002, the Commission allowed non-European states to become full members.

its original function of advisor on constitutional matters: the Commission has played an increasing global role in producing knowledge, documents, opinions and guidelines on various governance issues²⁷. In fact, the subject area covered by the Venice Commission has been categorized in its official annual reports as follow: 1) Democratic development of public institutions and respect for human rights; 2) Constitutional justice, ordinary justice and ombudsman; 3) Democracy through free and fair elections.²⁸ Within these areas, also the topic of judicial system organization finds place. In fact, the VC has produced many Opinions on specific country laws related to the judicial system, judicial appointment, judges status, etc. These Opinions were requested either by individual countries, or by the CoE bodies.

Recently, the VC has further broaden its production elaborating Opinions not only concerning a specific country law, but also on European Standards of judicial independence, on European Standards of the Prosecution Service and on the judicial appointment.²⁹ Focusing on these documents, it is possible to find out relevant information about the “model of judicial system” they propose. Just to summarize it, the VC propose a “Mediterranean model of organization of justice” with a judicial body with members elected by the judges themselves and other members appointed by other powers of the state. This body should be entrusted with the most relevant functions concerning the judges’ career and judges should be the majority in it. This body should be, consequently, in charge of the judges’ appointment. Concerning the prosecution service, the VC requires that the independence of the prosecution office and of its holders is guaranteed in relation with the government. As Magrassi (2011) pointed out, this is clearly a model based on self-government and separation from other legal professions, with a very limited influence of common law and models of judicial governance in place, for example, in the North-European countries.

This model, proposed by the VC, formed in many cases the basis of the judicial reforms adopted in Central and Eastern Europe countries during the EU accession stage. This is still the term of reference for the Balkans countries currently potential candidate for the EU membership.³⁰ Here the VC suggestions were, and are, spontaneously adopted by countries as a way of international legitimization of the national reforms. But what it is most surprising are recent cases in which the VC Opinions and Recommendations, and also the documents of other Networks,³¹ were used as “relevant material” for the judgement in the ECHR rulings or defined as “standards to apply” in some European Commission and European Parliament actions. This is, at this stage, one of the most interesting aspects to analyze in relation to the Networks status and activity in EU.

²⁷ The analysis of the institutional development of the VC, from its origins until today, will be the specific subject of another paper.

²⁸ See, for example, the last available Annual Report 2008 on [http://www.venice.coe.int/docs/2008/CDL-RA\(2008\)001-e.asp](http://www.venice.coe.int/docs/2008/CDL-RA(2008)001-e.asp).

²⁹ CDL-AD(2010)004, Report on the independence of the judicial System Part I: The independence of Judges adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010); CDL-AD(2010)040 Report on European Standards as regards the independence of the judicial System: Part II - the Prosecution Service - Adopted by the Venice Commission - at its 85th plenary session (Venice, 17-18 December 2010); CDL-AD(2007)028 Judicial Appointments - Report adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007).

³⁰ Dallara C. 2010, Op. Cit; Piana 2010, Op. Cit.

³¹ The CEPEJ in its website lists the Judgements of the European Court of Human Rights mentioning the CEPEJ documents.

IV. An Increasing Influence of Judicial Networks? How Soft-law is Embedded in Hard-law Tools

Two recent cases are, in my opinion, remarkable to ascertain how the Networks tools and know-how is gaining relevance. The first one is an ECHR ruling on “Bulanov and Kupchik vs Ukraine” issued on March 2011. The case is quite simple in itself: two Ukrainian citizens (their application were joined due to the common legal background) complained that their cases did not obtain access to appeal due to an apparent conflict of jurisdiction between the Higher Administrative Court and the Supreme Court.³² Here the ECHR, after having cited all the relevant Ukrainian laws for the topic, lists as “Relevant Council of Europe material” the Opinion of the Venice Commission on the Law on Judicial System in Ukraine. The Opinion is cited as follow: “The Supreme Court's jurisdiction should ... reflect[s] its constitutional status as the highest judicial body in the system of courts of general jurisdiction. Recommendations for improvement of the Law include inter alia: The Supreme Court should be allowed to exercise its jurisdiction to resolve conflicts between the high specialised courts also in matters of procedural law and the Court should be able to decide itself on the admissibility of cases involving a conflict in the interpretation of the law. It should also be made competent to resolve conflicts of jurisdiction between the three sorts of jurisdiction (civil and criminal, commercial and administrative).” Then in the decision, the ECHR sentence reports: “The Court does not find it necessary in the circumstances to examine whether the Supreme Court or the Higher Administrative Court had jurisdiction to determine the merits of the applicants' appeals. What is important is that the applicants did not obtain a “determination” of their appeals because the Higher Administrative Court refused to follow the rulings of the Supreme Court determining jurisdiction over their cases. Such refusals not only deprived the applicants of access to court but also undermined the authority of judicial power. [...] The Court further notes that the observations of the Venice Commission and the Council of Europe Directorates are particularly relevant to this aspect of the case.” The Court concludes that there was a violation of the Article 6.1 of the Convention and the right access to court was not secured.

The relevance of the Venice Commission Opinion relies on the fact that it was cited as the standard to follow in order to establish the Supreme Court competences. In this way the VC Recommendation acquires a different status in respect of the non-legally binding document it was supposed to be. Another interesting case is related to the high pitched debate on the Hungarian Constitution. Here, although the process is still under way, the European Commission gave an unprecedented relevance to the Venice Commission documents about the Constitution. Already in June 2011 the Venice Commission released an opinion on the new Hungarian constitution making several recommendations regarding the text. Many of these recommendations were echoed in the EU Parliament's resolution adopted on 2011, July 7. After that, On 17 January 2012 the European Commission started infringement procedures³³ against Hungary with regard to the independence of the central bank, the lowering of the mandatory retirement age of judges from 70 to 62 years old, and the independence of the data protection authority. The Commission also asked the Hungarian authorities for further information on the independence of the judiciary. The EU Parliament repetitively asked to the EU Commission to activate EU Treaty Article 7, which is used in the event of a clear threat of a serious breach of EU common values. On March 7 the EU Commission decided to continue accelerated infringement procedure.³⁴ In two areas Hungary failed to comply with the EU Law: the retirement age

³² They complained that their respective claims for recalculation of a pension and recovery of salary arrears had not been considered at all on appeal as the Supreme Court and Higher Administrative Court had been unable to agree as to who had jurisdiction. They relied in particular on Article 6 § 1 (right of access to a court).

³³ Article 258 of the Treaty on the Functioning of the European Union (TFUE).

³⁴ EU Press release. ‘Hungary: Commission continues accelerated infringement procedure on independence of the data protection supervisor and measures affecting the judiciary and asks additional information on central bank's independence’. (at

of judges – which would lead to the anticipated retirement of 236 judges in Hungary – and the independence of the country's data protection authority. The European Commission therefore decided to send two reasoned opinions – the second stage under EU infringement procedures after which the matter may be referred to the Court of Justice of the European Union. In two other areas, the independence of the central bank and further aspects concerning the independence of the judiciary, the Commission sent two administrative letters demanding further clarifications. In its administrative letter, the Commission is seeking further clarifications about the independence of the country's judiciary. The Commission has asked for explanations relating to the powers attributed to the President of the National Judicial Office, particularly the President's powers to designate a court in a given case and the transfer of judges without consent. The Commission also raised concerns with regard to potentially systemic deficiencies in Hungary's justice system. Hungary is reminded that national courts act as "Union courts" whenever they apply EU law, and therefore need to satisfy minimum standards of independence and effective judicial redress. Without entering here in detail of a complex case for the EU governance, what it is relevant for my purpose is to notice as many of the concerns expressed by the EU Commission in its official communications and documents were drawn by the Opinion on the new Constitution of Hungary adopted by the Venice Commission on 17-18 June 2011.³⁵

Moreover, as regards to judicial independence for instance, the Venice Commission presented a specific Opinion on the Law issued by the Hungarian parliament. The Administrative letter of the EU Commission (described above) was largely based on this document. Looking at the EU Parliament and EU Commission press release on the Hungarian case, one can notice as great relevance is given to the Venice Commission work and expected documents on the Hungarian laws, thus it seems also very likely that the final judgment of the EU Commission will be based, partially or not, on the Venice Commission Opinions. Although, very roughly described, this is another interesting evidence of the increasing role of such judicial and legal-experts Networks also in legally binding procedure. The two cases are here intended to give example of this unofficial trend and allow to advance some conclusion and to propose further research questions.

V. Conclusions

According to the literature on this topic and to the early finding of my research, Networks of judges and legal experts are gaining relevance as new actors of the EU (and beyond the EU) legal space. They are not only a suitable interpretative instrument to describe the current changes affecting legal systems, but also a good tool to regulate the relations between legal actors through flexible but formalised arrangements. Nowadays they represents a key feature of the new global governance. In order to manage new challenges and threats, growing attention was paid on cooperation by networks involving judicial authorities, since it can contribute to build trust among participants by offering technical assistance and professional socialization to members and by focusing on the power of information. The activities of the Networks that I have analyzed are mainly related to the domain of judicial systems (courts and judicial institutions) functioning, judges role and guarantees of impartiality/independence. Here the point is that, although in the EU the organization and the rules concerning judicial systems remains matter of each state' sovereignty, it seems that Judicial Networks are proposing a "quasi-model" of judicial governance, within and outside the EU. This activity supported by the EU institutions is functional to the "institutional and legal harmonization" of the judicial systems that is one of the preconditions of the AFSJ.

(Contd.) _____

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/222&format=HTML&aged=0&language=EN&guiLanguage=en>).

³⁵ Opinion on the new Constitution of Hungary adopted by the Venice Commission on 17-18 June 2011 [http://www.venice.coe.int/docs/2011/CDL-AD\(2011\)016-e.pdf](http://www.venice.coe.int/docs/2011/CDL-AD(2011)016-e.pdf).

As already stated, with reference to the European AFSJ, the main hypothesis is that networks, commissions and associations of the judiciary should be considered as new emerging actors of the EU policy-making related to the Area of Justice and mediators between supranational institutions and national judiciaries. On the basis of the early findings of our analysis, among the actors participating in the complex governance system of EU AFSJ, judicial networks together with other network-based forms of cooperation can be considered as a “sustainable operational tool”³⁶ since, as evidenced by the relevant literature, they involve a low-sacrifice standard for jurisdictional sovereignty of member states. Network, conceived as an organisational mode to exercise certain Union’s competencies by means of plural and decentralised structures, represents a pragmatic and reasonable choice, since in absence of a sufficient level of legal harmonisation, it can be used with instrumental purposes in order to meet both the need to preserve state sovereignty and to guarantee an effective cooperation in judicial matter.

Therefore, network-based system of cooperation within AFSJ may be a particularly appropriate system to ensure coordination and communication between “nodes” and, at the same time, to avoid the risk of an EU vertical direction. With the Stockholm Programme (2010-14) judicial cooperation, mutual trust in legal systems of the Member states and coordination among them became the strategic goals for the functioning of the AFSJ. The Programme stressed specifically the circulation among States of guidelines, best-practices and other operative tools to reach the abovementioned goals. In this window of opportunity Judicial Networks are increasingly playing their game as they already put in place cooperative dynamics among judges and courts; already produced guidelines, best-practices and documents useful for coordination; already organized intensive training programs for EU and non-EU judges and legal professionals. Thus, they are in a position of “competitive advantage” in filling gaps within the construction of an EU area of justice. Moreover, also recent documents issued by the European Commission on the creation of the EU Area of Justice, stressed the relevance of Judicial Networks as actors of the EU judicial policy. On 13 September 2011, the European Commission has adopted the Communication "Building trust in EU-wide justice: a new dimension to European judicial training". Here is explained as “The Commission is encouraging national and European level networks, professional organisations and training structures to work together, exchange best practices on training methods, build consortia, and set up trans-sectoral training activities. Then, in the Proposal for a Regulation of the European Parliament and of the Council on the Justice Programme COM(2011) 759, this Specific action is described: “support for main actors, [...] support for key European level networks whose activities are linked to the implementation of the objectives of the Programme; networking among specialised bodies and organisations, [...]; funding of experts' networks; [...]”. Finally, the EC Justice Programme 2014-2020, with a budget of €416 million, aims to the creation of a European area of justice by promoting judicial cooperation in civil and criminal matters. Specific action to be supported in the Programme will be: “Strengthening EU cooperation on justice and rights issues through networks of legal practitioners, non-governmental organizations and policy-makers”. If Networks (as collective entity) gain relevance as actors of the EU Area of Justice policy making, then they also became strategic policy arenas in which national judges try to impose their national judicial behavior and their models of judicial system organization (mediation between national and international). One can hypothesize for example, that clear preference of many Networks for the so-called Mediterranean model of judicial system could be explained by the high number of judges and legal experts coming from Southern-European countries and by their activism within the Networks. Here, as in other policy field, the rational is the more the national model will be diffused in other countries, the less will be the coordination and the adaptation costs. Further steps and results are needed in order to verify this hypothesis.

³⁶ See Toniatti R. and Magrassi M, 2011, Op. Cit, at 10.

Part 2. Methods and Tools

The Role of Majoritarian Activism in Precedent Formation at the European Court of Human Rights

Bilyana Petkova*

I. Majoritarian Activism in European Constitutional Adjudication

The concept of ‘majoritarian activism’, originally thought of as describing the realities of European economic integration, appears to be a broader characteristic of (European) constitutional adjudication. Miguel Maduro coined the term when reviewing the application of Articles 34 and 36 of the Treaty on the Functioning of the European Union (TFEU). Whereas Article 34 introduces a prohibition on national measures imposing quantitative and equivalent restrictions on imports, Article 36 ‘qualifies’ it by allowing non-discriminatory national restrictions on inter-state trade on the grounds of public policy. In his interpretation of the Court of Justice of the European Union’s (CJEU) case law in this area, Maduro found that when confronted with cases regarding State regulation of traditional national products, the Luxembourg Court adopted majoritarian approach – in other words, if there was a ‘minoritarian interest – one state’s tradition – as opposed to the majoritarian interest, which takes the form of the interests of all other Member States not sharing or conforming to that tradition’, the Court would strike down the national regulation in question,¹ and in many cases establish a precedent. Whereas the CJEU upheld national measures if a majoritarian view was difficult to ascertain, it caught national regulation in the net of Article 34 TFEU when not supported by a majority (but usually not all) of the EU Member States.

The CJEU’s and the ECtHR’s use of majoritarian activism in the area of fundamental rights before the adoption of the Lisbon Treaty was compared with the use of a similar approach in adjudicating rights taken up by a federal judiciary – the U.S. Supreme Court². In view of the recently made binding nature of the EU Charter of Fundamental Rights and pending accession to the European Convention of Human Rights (ECHR)³, the CJEU feels the pressure to start ‘taking rights seriously’.⁴ Procedures and practices adopted by the Strasbourg Court such as the use of majoritarian activism as a mechanism for defining the scope of rights can become all the more relevant in the EU in a post-Lisbon context, yet their very position and effect on the case law of the ECtHR has not been examined with the necessary level of scrutiny.

A keyword in this debate should be the meaning that the ECtHR attaches to ‘facts’. Arguably, rather than being given a strictly positivist expression – existence or not of legal standards to be applied, the state of law and the scope of a certain legal provision in Contracting States as well as internationally, are understood by the Strasbourg Court as facts bearing on the merits of a case. In his classical study on precedent formation in common law, Salmond⁵ holds that in theory:

In the case of questions of fact, ...the presumption of the correctness of judicial decisions results in the creation of new law, not in the declaration and proof of old.

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¹ Maduro, *We the Court: The European Court of Justice and the European Economic Constitution: A Critical Reading of Article 30 of the EC Treaty* (Oxford: Hart Publishing 1998) at 72-3.

² Petkova, ‘The Notion of Consensus as a Route to Democratic Adjudication? The United States Supreme Court, the European Court of Justice and the European Court of Human Rights Compared’ (forthcoming, 2011-2012) 14 *Cambridge Yearbook of European Legal Studies*.

³ Article 6 (2) TFEU.

⁴ Coppel and O’Neill, ‘The European Court of Justice: Taking Rights Seriously?’ 12 *Legal Studies* 227, (1992).

⁵ Salmond, ‘Theory of Judicial Precedents’ 16 *Law Quarterly Review*, 376. (1900) at 386.

Applied to European constitutional adjudication, the understanding of Salmond raises interesting questions: first, what is the role of comparative law facts in unravelling incomplete Treaty provisions, e.g. with regards possible lacunas in the law,⁶ and second, could there be a strict division between facts and merits, especially in borderline human rights cases?⁷

II. The Use of Majoritarian Activism in ECtHR Precedents

In general, majoritarian activism is exemplified by the ECtHR's recourse to 'emerging consensus', 'common European approach', 'common ground', 'tendency' or a 'steady development in the law, a formula that will be referred to for short as Consensus Analysis (CA). As discussed below, the increasingly broad factual basis to which the Court refers and has at its disposition thanks to third parties, dictates that conceptualisation of CA cannot be restricted to merely a discussion on the use of the comparative method.

Majoritarian activism was first discussed in the context of qualified provisions interpreted by the CJEU. I now turn on to examine in further detail the way the ECtHR applies majoritarian activism to qualified rights enshrined in the Convention. In order to avoid bias in case selection, I work with a dataset of 312 cases. The dataset comprises of case law in which the plaintiffs relied on qualified rights – Articles 8-12 – of the Convention in the period after the adoption of Protocol 11 (representing a milestone in the development of the ECtHR since it allowed individuals to petition the Court directly) up to the present day. Qualified rights are also present in the Protocols to the Convention and as subject to proportionality and CA, were also counted in the dataset when evoked in conjunction with Articles 8-12. Each of the discussed qualified rights is subject to a number of restrictions for 'legitimate purposes'. Restrictions vary from protection to 'the rights and freedoms of others' to considerations of 'the economic well-being of the country'. Based on the Court's own statement in the judgement or that of dissenting judges and/or comments found in secondary literature, from the 64 cases in the dataset where the ECtHR uses its CA formula, 6 can be regarded as either establishing or overruling a precedent.

Generally, the practice of the ECtHR has been to shrink the margin of appreciation in an area where there is convergence of national regulatory approaches; au contraire, the Court leaves a broader scope of discretion to the national authorities if there is a lack of regulatory similarities.⁸ However, as rightly pointed out by Dzehtsiarou,⁹ these broad-brush definitions are hardly comprehensive. While it has been convincingly argued that the Court uses CA in order to mediate between the margin of appreciation doctrine and evolutive interpretation¹⁰, it seems that the academic opinion is leaning toward the conclusion that consensus is rather embedded in the margin of appreciation doctrine to an extent that actually stalls the use of evolutive interpretation. At times the search for consensus is

⁶ It has been argued that comparative law fulfils a gap-filling function in the context of the CJEU's case law. Cf. Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law' (2003) 52 *International & Comparative Law Quarterly*, 873.

⁷ It has been argued that such a distinction between facts and merits is ill-suited. Cf. Carrera and Petkova, 'The role and potential of civil society and human rights organizations through third party interventions before the European Courts: the case of the EU Area of Freedom, Security and Justice' in Dawson et al. (eds), *Judicial Activism at the European Court of Justice: Causes, Responses and Solutions* (Edward Elgar, forthcoming 2012).

⁸ Morawa, 'The 'Common European Approach', 'International Trends', and the Evolution of Human Rights Law. A Comment on Goodwin and I v. the United Kingdom' (2002) 3 *German Law Journal*.

⁹ Dzehtsiarou, 'Comparative Law in the Reasoning of the European Court of Human Rights' (2010) 10 *University College Dublin Law Review*, 109.

¹⁰ Morawa, *supra* n 17.

equalised with a minimalist approach advocating a search for a lowest common denominator.¹¹ Furthermore, the use of CA is seen to resemble original intent type of interpretation, coming contrary to the development of autonomous concepts by the Court.¹² Granted, before the adoption of Protocol 11, the Commission adopted a very cautious approach to comparative and evolutive interpretation. However, things have changed a few decades later and as Christoffersen mentions in passing: ‘Comparative interpretation is a Trojan horse in which evolutive interpretation is hidden’.¹³

I argue that a closer and more systematic look at the ECtHR’s use of the method in particular in the area of qualified rights and with regards recent case law reveals a pattern - the ECtHR, acting as a constitutional court, is using CA in order to gradually develop a new area of law in a progressive manner, levelling up the scope of protection. Nowadays the use of majoritarian activism does not imply that the Court should wait before all Contracting States adopt a certain legislative provision or practice – in *Hirst v. UK*¹⁴ the threshold constituted in slightly more than half of the then members of the Council of Europe and in *E.B. v. France*¹⁵ the applicant referred to the practices of barely 10 of the 47 present Council of Europe states. The examined cases show that while the Court has missed several opportunities to ascertain precedents in cases where arguably, consensus could be established, it never came to reverse a precedent in order to level down the protection.

III. The Place of Consensus Analysis vis-à-vis Proportionality and Evolutive Interpretation

First, it is important to note that in the sample of precedents from the dataset the ECtHR engages in CA either in all the different stages of proportionality, or as a factor that weighs in favour of establishing precedent or reversing a previous one on the basis of evolutive interpretation (Table 1, *infra*). In some cases, the ECtHR evokes CA upfront in the judgment in order to define the very scope of an article, for instance, in *Bayatyan v. Armenia*.¹⁶ CA is not dispositive for the outcome of a case; the Court rather uses it to support its proportionality framework or evolutive interpretation. Provided that proportionality is the decisive factor, the CA reasoning of the Court is a complementary feature that most often hinges on the third stage of proportionality¹⁷ where according to settled case law, the Court examines whether the necessity of a measure corresponds to ‘a pressing need’ in ‘a democratic society’. It is in such instances that the defendant government fails to justify the interference with rights in view of an overwhelming majority of other states that the Court demonstrates have practices or legislation that favour the applicant. This is what can be observed in *Bayatyan v. Armenia*, *Demir and Bayakara v. Turkey*¹⁸ and *Kiyutin v. Russia*.¹⁹

The Court has deployed evidence of consensus in order to question the legitimacy of a certain policy objective also in the first phase of proportionality in *Dickson v. UK*.²⁰ In *Hirst v. UK*, the Court

¹¹ Arai-Takahashi, *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR* (Antwerpen: Intersentia, 2002).

¹² Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press 2007). Regan, ‘European Consensus: A Worthy Endeavour for the European Court of Human Rights?’ (2011) 14 *Trinity College Law Review*, 51.

¹³ *Supra* n 16, at 57.

¹⁴ *Hirst v. UK*, App. No. 74025/01 (2005).

¹⁵ *E.B. v France*, App. No. 43546/02 (2008).

¹⁶ *Bayatyan v Armenia*, App. No. 23459/03 (2009).

¹⁷ *Supra* n 32 and n 6.

¹⁸ *Demir and Baykara v Turkey*, App. No. 34503/97 (2006).

¹⁹ *Kiyutin v. Russia*, App. No 2700/10 (2011).

²⁰ *Dickson v UK*, App. No. 44362/04 (2006) para 75.

demonstrated that certain measures did not satisfy the requirement of attaining a reasonable relationship between the means employed and the public objective to be sought (second stage of proportionality) as the British policy of a blanket ban to prisoners' voting rights was in obvious disaccord with the majority of European practices (para 74). To the same effect, in *Kiyutin v. Russia* the Court accepted that while a policy of denying residence permits to HIV-positives might be considered as having a legitimate aim in terms of ensuring the protection of public health, it was disproportionate. Prompted by submissions of the third party, the Court used evidence of both legislative and scientific consensus to show that the means used by the government could therefore not be justified (para 67).

IV. Consensus Analyses and the Role of Organised Civil Society

Once granted the possibility to petition the Court directly, individuals have begun using consensus-based arguments in support of their claims, and so did the national governments. CA can be employed on the Court's own initiative, or is found (usually in support of the plaintiff) in comparative law material submitted by third parties to the proceedings in their amici curiae briefs, or sometimes in reports of the Council of Europe expert organ – the Venice Commission. The examined cases show that transnational NGOs and human rights organisations such as Liberty, Interights, the AIRE centre, Human Rights Watch and Amnesty International have been generally active in litigation as third parties across a wide array of Convention articles, while other representatives of civil society such as the European Region of the International Lesbian and Gay Association (ILGA-Europe), the European Roma Rights Centre or Prison Reform Trust have mobilised support in particular for the development of minority rights.²¹ Non-state interveners have sought to demonstrate the broader implications of a case by supplying contextual and factual information beyond the one presented by the parties. Such contextual information has on a regular basis included the state of law in European states as well as internationally, statistics and other evidence of scientific consensus when relevant to the case²².

Research on NGO involvement before the ECtHR the cases in which organised representatives of civil society chose to intervene were usually of high importance, changing the direction of the Strasbourg Court's case law²³. The extent to which NGOs and human rights organisations, especially when cross-border, can be considered as representative of some segment of the 'public interest' of Europeans constitutes a topic for a different discussion, and possibly a longer one. Suffice to say here that the Court has been responsive to the arguments brought by such non-state third parties, sometimes quoting the CA presented by them directly in precedents – as for instance, the submission of Liberty in *Christine Goodwin v. UK*. Moreover, in the sample of examined cases it appears that the Court is more likely to establish or override its own precedents when transnational actors are also inclined to such developments.²⁴ Conversely, the ECHR has hesitated to do so and has preserved the status quo in cases where the amici briefs significantly diverge.²⁵

²¹ Cf Van Den Eynde 'The Litigation Practices of Non-Governmental Organizations before the European Court of Human Rights: An Overview' (2011) *European Yearbook on Human Rights Law*, at 539-548.

²² Interviews with legal representatives of Amnesty International, the AIRE Centre and the Equality and Human Rights Commission held in February 2011, Brussels.

²³ Cichowski, 'Civil Society and the European Court of Human Rights' in Christoffersen and Madsen (eds), *The European Court of Human Rights Between Law and Politics* (Oxford: Oxford University Press 2011), 77.

²⁴ Cf eg *E.B. v France*; *Bayatyan v Armenia*; *Christine Goodwin v the United Kingdom*; *Hirst v the United Kingdom*, *Kiyutin v. Russia*. In all five cases, NGO's filed amici curiae briefs in support of the plaintiffs.

²⁵ Cf eg *A.B.C. v Ireland*, App.No. 25579/05 (2010); *S.H. v Austria*, App. No. 57813/00 (2010); but also *Lautsi v Italy*, App. No 30814/06 (2001) where the positions submitted in the briefs significantly diverge.

Table 1: The Rule of Reason in CA cases establishing or overruling precedent²⁶

Precedents	CA evoked by applicant (A)	CA evoked by defendant (D)	Support evoked by third parties for (A)	Support evoked by third parties for (D)	CA in reasoning of the Court	Evolutionary interpretation	Proportionality	Number of MS in favour of applicant
E.B. v France	X	X	X	-	-	2	1	10/47
Christine Goodwin v the UK	X	X	X	-	2	1	-	33/43
Hirst v the United Kingdom	X	X	X	X	2	2	1	32/45
Dickson v UK	X	X	-	-	2	-	1	≈25/47*
Bayatyan v Armenia	X	X	X	-	1	1	2	42/47
Kiyutin v Russia	-	-	X	-	2	-	1	37/47
Demir and Bayakara v Turkey	-	-	-	-	1	1	2	≈25/47*

²⁶ Relative weight of CA, evolutionary interpretation and proportionality; 1 – primary role (*ratio decidendi*); 2 – supplementary or persuasive role.

*Unspecified by the Court, referral to a ‘majority of Contracting States’.

V. Consensus Analysis through the Lens of Constitutional Adjudication

The *Goodwin* decision clearly shows the priority given by the Court to its constitutional functions contrasted with its mission to provide individual justice. While the two functions of the Court are inseparable as much as individual petitions activate the judicial machinery of the Convention, the attempt of the Court to develop the law as society progresses can be seen against the backdrop of its endeavours to ensure the smooth functioning of a constitutional system. In a chain of judgments preceding *Christine Goodwin*, the Strasbourg Court interpreted the absence of societal, scientific and legislative consensus with regards the legal recognition of post-operative transgender status to mean that Article 8 did not impose any positive obligations on national authorities in this respect. However, the Court had been signalling to the national governments that in view of changing societal perceptions, domestic changes would be needed. Since the UK did not take any action in this direction, in *Christine Goodwin* the Court reversed its previous case law [para 92].

The case can be contrasted to *Schalk and Kopf v Austria*,²⁷ in which the applicants, a same-sex couple, were denied the possibility to marry or have their relationship otherwise recognised by law. Since the filing of the application in 2010, Austria amended its legislation, adopting the Registered Partnership Act that allowed for the first time same-sex couples to obtain a legal status similar to marriage. Even though, prompted by the fact that gay marriages were still supported by a small minority of states, the Court kept the margin of appreciation in this area wide, it put an emphasis on the evolving nature of the rights to be read under Article 8 and 12, thereby undoubtedly triggering the legislative updates made by the Austrian government.

It is difficult to speculate whether had the Court not heeded the state of consensus, it would have reached the same conclusion – violation of Articles 8 and 12, some fifteen years ago before the *Christine Goodwin* case. It seems fair to say that if a majority of states are yet to be in the vanguard of legislative developments, the approach adopted by the ECtHR – to allow the governments some time for adjustment before changing the direction of case law, gives expression of the Convention as an instrument of constitutional adjudication rather than as a vehicle exclusively conducive to the inducement of individual justice.

VI. Prolegomena to a Normative Conceptualisation of Majoritarian Activism

The case law on qualified rights shows that CA in the reasoning of the Court has been incremental – plaintiffs and defendant governments, as well as intervening in the proceedings civil society organisations have embraced the logic of the ECtHR recurring to the search for consensus more in the past years. However, before considering any procedural deficiencies in the Court's use of CA and reflecting on possible principled modes of application, it is reasonable to first examine the utility of CA as a tool of constitutional adjudication.

In theorising the relation between law and politics, Post is questioning the common conceptualisation of a strict dividing line between the two²⁸. Following Post, 'we invoke law when we believe that we have reached agreement – or when we wish to act *as if* we had reached agreement – and when we wish to implement and entrench our putative agreement'²⁹. The reality is far more complex though as often disagreement in societies persists despite enactment or not of legislation and conflicting judicial interpretations are ultimately resolved only through the institute of the vote. Coming back to the way precedents are formed at the ECtHR, the question is whether putative

²⁷ *Schalk and Kopf v Austria*, App. No. 30141/04 (2010).

²⁸ Post 'Theorizing Disagreement: Reconciling the Relationship between Law and Politics', (2010) 4 *California Law Review* 98.

²⁹ *Ibid* at 1337-1340.

agreement in a majority of European states can be interpreted as a weighty argument in favour of putative agreement on a European scale.

Substantive Aspects

The purpose of majoritarian activism is described by some of the Court's judges as follows: '...one of the Court's tasks is precisely to contribute to harmonising across Europe the rights guaranteed by the Convention...' (*S.H. and others v Austria*, JJ Tulkens, Hirvelä, Lazarova Trajkovska, and Tsotsoria, dissenting, para 10). The Court's harmonising role in the area of fundamental rights is directly linked to its constitutional function and self-understanding as a court whose mission is, in co-operation with the national constitutional courts of European states, the CJEU, as well as with European civil society at large, to participate in an effort dating as far back as the end of the Second World War, and connected to forging a layer of European trans-national constitutional identity. The idea of an overlapping consensus of John Rawls³⁰ is helpful here. For Rawls, 'a class of liberal conceptions that vary within a certain more or less narrow range' and 'compete with one another' form the basis of an overlapping consensus that does not destroy plurality but is necessary to enable governance in highly heterogeneous societies.³¹ The agreement on fundamentals enshrined in the Convention³² is therefore periodically re-examined and recalibrated in light of present-day conditions, allowing for the emergence of (albeit a volatile), shared European constitutional common ground. To borrow Weiler's note on the direct effect and supremacy of EU law in the context of extracting a legally binding character for CA at the ECtHR:

It is a remarkable instance of Constitutional Tolerance to accept to be bound by a decision not by 'my people' but by a majority among peoples which are precisely not mine...³³

The most obvious objection to a conceptualisation of majoritarian activism in a constructivist manner is that the Court is not primarily interested in European (legal) developments. While it is true that often the ECtHR searches for consensus beyond the Contracting Parties, such referrals point to a certain unconditional openness in the approach of the Court to developments beyond Europe. This kind of openness forms part of a properly European understanding of constitutionalism that differs, for instance, from the reluctant or at least highly disputed use of international law sources by the U.S. Supreme Court.³⁴

The harmonising feature of the Strasbourg Court's case law should not be mistaken with an effort to establish value hegemony of sorts. In the judges' words: '...The harmonising role, however, has limits ...the Court may consider that States, owing to the absence of a European consensus, have a (not unlimited) margin of appreciation to themselves balance the rights and interests at stake' (*A.B.C. v Ireland*, JJ Rozakis, Tulkens, Rura, Hirvelä, Malinverni, and Poalelungi, dissenting, para 5). As pointed out by Gertensberg and Sabel, 'authority in the European and international constitutional system involves no formal super-or subordination of legal sources and remains horizontal in character'³⁵. Since there is no subordination of legal sources, 'uploaded' at the supranational level standards become anew sources of law that are later 'downloaded' by the Contracting States in a variety of unrelated ways before (partly) being taken up for 'upload' again in a process of continuous

³⁰ Rawls, *Political Liberalism* (New York: Columbia University Press 1993).

³¹ *Ibid*, at 162-4.

³² Cf Preamble to the Convention.

³³ Weiler, 'On the Power of the Word: Europe's Constitutional Iconography' (2005) 3 *International Journal of Constitutional Law*, at 173.

³⁴ Cf Benvenuto, 'Reevaluating the Debate Surrounding the Supreme Court's Use of Foreign Precedent' (2005) 74 *Fordham Law Review*, 2695.

³⁵ Sabel and Gerstenberg, 'Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order' (2010) 16 *European Law Journal*, at 543.

cross-fertilisation. It is this deliberative aspect of majoritarian activism at the ECtHR that explains the perpetual dialogical node between the Court and the national (legal) constituencies, as well as between the Court and mobilised through third party submissions civil society representatives.

Procedural Aspects

One of the main procedural problems with majoritarian activism is that it needs to be reconciled with legal certainty and the principle of legitimate expectations. For Jeremy Waldron, 'If consensus was to function normatively, it had to be less than complete (so that it guided someone's choices). But incomplete consensus required choices to be made, and those choices would necessarily be guided by a sense of justice.'³⁶ Clearly, the ECtHR does not and should not understand consensus as unanimity, which is why consensus is, in the Strasbourg Court's vernacular, best viewed as a trend. What is the number of states that constitute a trend? Since the CA of the Court is broader than simply applying a comparative method and encompasses legislative, judicial but also scientific and societal trends, a simple count of states looks untenable. Then how to avoid accusations of cherry-picking or to pick up the quote of Justice Scalia's famous dissent in a case of the U.S. Supreme Court – *Roper v Simmons*,³⁷ – how to be sure that CA is not simply when courts 'look over the heads of the crowd and pick out ... friends'? In common law systems, but also increasingly so in international law regimes that to some extent rely on the principle of *stare decisis*, the judiciary needs to decide which is the relevant precedent to be applied to a case and therefore enjoys a certain discretion in 'picking' one precedent over another. When the ECtHR has used CA as argumentation that supports the 'necessity' or sometimes, the 'legitimate aim' phase of proportionality as shown above, it can be accepted that the proportionality framework is Waldron's 'sense of justice' by which the Court is ultimately guided. In this perspective, CA is not determining the outcome of a case but is relevant as additional consideration, and can be viewed as the presentation of best practices and as a springboard for the Court to ascertain its own autonomous interpretation. However, the ECtHR has also used CA to define the ambit of an article and has reversed precedents on the basis of evolutive interpretation, demonstrating consensus to be the main reason for change in the direction of the case law. When the *ratio decidendi* is tilted toward evolutive interpretation, should it be necessary that the Court reverses or establishes a precedent only when faced with a truly overwhelming majority of states whose practices converge? I cannot find any reason why this should be the case. Treating the Convention as a 'living instrument' has made the Court's judgments authoritative in accordance with social mores at the time of delivery implying that a change in science or ethics presupposes a change in case law, precisely for reasons of preserving legal certainty and the continuity of the case law. In this understanding, CA does not equal evolutive interpretation although it often triggers it. If the ECtHR is able to identify and support with factual evidence a trend, the need for evolutive interpretation is activated, and the burden of proof shifts to the government that is in minority. A failure by the government to provide compelling reasons for upholding the policy in question should signify that the Court finds a violation of the Convention. For instance, the Court might identify such compelling reasons in an on-going legislative reform that provides for a certain compromise to be reached, e.g. a temporary ban on voting rights imposed on a limited category of prisoners in limited circumstances that replaces a blanket voting rights prohibition. In the examined precedents in the area of qualified rights, the Court has used this logic with at least some degree of consistency. However, the house of cards falls apart in *S.H. and others v Austria* and in *A.B.C. v Ireland* – despite that the governments in minority did not provide compelling reasons in order to defend the challenged policies, the Court preferred to uphold the *status quo*..

³⁶ Waldron, 'Foreign Law and the Modern IUS Gentium' (2005) 119 *Harvard Law Review*, 129. at 136.

³⁷ *Roper v Simmons*, 543 U.S. 551 (2005).

VII. Conclusion

Recourse to majoritarian activism is most significant in developing a new area of law – where the courts break new ground, often by establishing or overruling a precedent. In the paper a commonly held view is questioned – that CA is but another word for deference and judicial minimalism at the ECtHR. The data corroborate that in the area of qualified rights after the adoption of Protocol 11, the ECtHR, often helped by the submissions of non-state third parties, has used CA as a fact bearing on the merits of a case. The Strasbourg Court has usually deployed CA against Contracting States whose practices stray away from progressive tendencies in the rest of the Contracting States. This has enabled the Strasbourg Court to deal with lacunae in the law that seem inevitable, especially given the especially cumbersome amendment process of the Convention. Perhaps best seen against the backdrop of a process of a continuous cross-fertilisation between diverse judicial legal orders in Europe, majoritarian activism can contribute to a gradual construction of a layer of European constitutional identity beyond the nation state.

Importantly, the very grammar of human rights and CA are in a paradoxical relationship – as known, the point of human rights is to isolate a sphere of private autonomy from political and social majoritarianism. However, the two European supranational courts engage in CA in a collaborative process able to delineate a shared sphere of autonomy granted to Europeans from domestic consensus. Majoritarian activism offers an opportunity for the Strasbourg Court to work out the modalities of a principled implementation of its highly criticised margin of appreciation doctrine. Regrettably, in *A.B.C. v Ireland* and *S.H. and others v Austria* where a clear majority of states have the opposite standard to that of the defendant government and one expects to find the defendant enjoying a narrow margin of discretion, the Strasbourg judges have hidden behind an incomprehensible referral to the margin of appreciation. The ECtHR could be a lot more consistent also when applying CA with regards, in particular, to the criteria and reach of the burden of proof required from a state in a minority position.

La formulation des interprétations par la Cour de Justice de l'Union européenne

Jérôme Porta*

The European legal system is confronted with a typical difficulty: how to guarantee that a legal statement be implemented in a similar way by different authorities in charge of his implementation, and first of all the judges? The difficulty is not unknown by the national legal systems. But the European context of pluralism increases this difficulty. To this difficulty, the European Union legal system has a remedy in a procedure, the reference for a preliminary ruling, allowing the national judge to question the Court about the validity of a text of the European Union or on its interpretation. Through this procedure, it is possible to understand how the European Law deals with this paradoxical command to guarantee the unity of the rule, but to allow the specificity of national applications. Initially, the answer to this question seemed simple. It is the European judge's capacity to give the national judge, the necessary elements in order to solve the disagreement submitted to him. The cooperation between the national judge and the European judge is thus founded on a separation of the tasks between interpretation and application of the European statement.

To understand this evolution of the division of competences between the European Court of Justice and the national judge within this procedure and the needs of the uniform application for the European union legal system, one must be careful about the interpretation practices of the Court of Justice within the frame of the preliminary ruling decisions. How does the Court interpret the European texts? But being successful in carrying on such a research doesn't invite coming back to the question of the justifications by the Court of justice and its interpretation choices, but to further analyze the textual formulation of these interpretations. Therefore, the richness and sophistication of the interpretation techniques of the Court of Justice surprise us. Initially, the interpretations formulated by the Court of Justice appear mainly to have an abstract form.

But the dispute about interpretation has gradually lost its abstraction in front of the Court of justice. From its origins, the difficulty of the division of tasks founded upon the opposition of application and interpretation had been noticed. The segmentation of the judicial decision into two distinct stages, one consisting in the interpretation of the rule, the other in the application with a factual context, misjudges the nature of the judicial act interpretation. Far from being limited to the abstract interpretation formula, founded on the common accepted idea of the role of judicial interpretation, the Court appears to be tempted to go from the general rule to its individual applications by a contextualization of his own interpretations.

I. Introduction

Le système juridique européen est confronté à une difficulté classique: comment garantir qu'un énoncé juridique signifiant une norme soit mis en œuvre de manière équivalente par les différentes autorités en charge de son application, au premier rang desquelles les juges? La difficulté n'est pas inconnue des droits nationaux. Contre de telles divergences dans la mise en œuvre de ses normes, le droit français connaît ainsi une institution habilitée à poser l'interprétation authentique d'un texte juridique et plus largement à sanctionner la rectitude de ses applications par les juges judiciaires: au nom de l'égalité devant la loi, la Cour de cassation est ainsi garante de l'application uniforme.

Toutefois, cette tension inhérente à l'idée même de norme juridique trouve dans le droit de l'Union européenne un lieu d'épreuve exacerbé. En effet, le droit de l'Union européenne se réalise dans un contexte juridique caractérisé par une double contrainte pluraliste. Pluralisme des droits nationaux d'une part. En l'absence de sémantique commune, les textes européens sont écartelés entre les

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différents contextes juridiques nationaux susceptibles de justifier autant de lectures concurrentes du texte censément commun. Pluralisme des ordres juridictionnels d'autre part. Le juge national est le juge de droit commun du droit communautaire. Le droit de l'Union est dépendant des ordres juridictionnels des États membres pour sa propre réalisation. Les effets de cette fragmentation juridictionnelle sont accentués par l'absence de hiérarchie entre la Cour de justice et le juge national¹. A la différence de la Cour de cassation par exemple, la Cour de justice n'a pas la faculté de censurer les décisions des juges nationaux. La seule ressource du juge européen pour garantir l'application uniforme des textes européens est alors celle de l'influence et de la coopération entre juridictions.

A cette difficulté, le droit de l'Union européenne a cherché remède dans la mise en place d'une procédure dite de question préjudicielle qui permet au juge national d'interroger la Cour sur la validité d'un texte de l'Union ou sur son interprétation². En l'absence de lien hiérarchique entre juge national et juge européen, elle ouvre à une procédure coopérative entre les juges pour l'édification du sens commun(autaire)³. A travers cette procédure, il est possible de saisir comment le droit communautaire s'accommode de cet impératif paradoxal: garantir l'uniformité du droit, mais permettre la particularité des applications nationales. Initialement, la réponse à cette question passait pour simple.

Au juge européen incombe la fonction de fournir au juge national les éléments nécessaires pour qu'il puisse trancher le litige qui lui est soumis. La coopération entre juge national et juge européen est ainsi fondée sur un partage des fonctions. D'un côté, le juge européen doit « dire pour droit » en se prononçant sur l'interprétation du texte européen, de l'autre, le juge doit trancher le litige. Ce partage repose ainsi sur un découpage fonctionnel classique, distinguant interprétation et application comme deux opérations successivement en jeu dans l'acte de juger. Implicitement, ce partage prend racine dans une conception classique de l'interprétation, assimilant celle-ci à « la définition du sens d'une disposition lorsque le sens et l'objectif ne sont pas clairs »⁴.

Suivant cette conception, le juge européen ne saurait connaître du litige, mais est seulement compétent pour donner une interprétation générale et abstraite de l'énoncé juridique en jeu dans le procès. C'est donc logiquement que, dans un arrêt Sagoil⁵, la Cour de justice affirmait clairement qu'il ne lui appartenait pas de connaître des faits de l'espèce dans le cadre d'une question préjudicielle.

Toutefois, ce partage a priori évident devait être remis en cause au nom de l'objectif même de la question préjudicielle, garantir l'application uniforme du droit européen. De manière remarquable, le souci de rendre une interprétation « utile » pour l'application du droit communautaire a justifié la progressive subversion de ce partage initial.

Pour saisir cette évolution du partage des fonctions dans la procédure préjudicielle et corrélativement l'affirmation d'une idée de l'application uniforme propre au droit de l'Union, il importe de prêter attention aux pratiques d'interprétation de la Cour de justice dans le cadre des arrêts préjudiciels. Comment la Cour interprète-t-elle les textes européens? Mais mener à bien une telle étude invite non pas à revenir sur la question connue des justifications par la Cour de ses choix

¹ M. Roccati, *Le rôle du juge national dans l'espace judiciaire européen, du marché intérieur à la coopération civile*, Thèse Université Paris Ouest, 2011.

² Article 267 TFUE, ex-article 234 TCE.

³ Ainsi, selon D. Simon, la question préjudicielle « est destinée(e) à résoudre la contradiction existentielle entre la hiérarchie normative qui caractérise les rapports entre les ordres juridiques communautaires et nationaux d'une part, et d'autre part, l'absence de subordination structurelle entre les juridictions communautaires et nationales », D. Simon, *Le système juridique communautaire*, LGDJ, 2001, p. 660.

⁴ Conclusions de l'Avocat général Roemer sous Van Gend en Loos, aff. 26/62.

⁵ CJCE 27 mai 1970, aff. 13/68.

d'interprétation⁶, mais davantage à analyser la formulation de ces interprétations. En effet, la rédaction des énoncés interprétatifs révèle par contraste tout à la fois la marge d'appréciation du juge national et la portée de l'exigence d'application uniforme dans la mise en œuvre des textes européens. Or ici, la richesse et la sophistication des techniques d'interprétation de la Cour de justice surprennent. Loin de se limiter à la formulation d'interprétations abstraites, conformes à l'idée communément admise du rôle de l'interprétation juridique, la Cour paraît bien tenter de rapprocher la norme générale de ses applications particulières, par une contextualisation forte des interprétations qu'elle rend.

II. La formulation des interprétations abstraites

Initialement, les interprétations formulées par la Cour de justice ont paru exclusivement devoir prendre une forme *abstraite*. Deux caractères justifient cette qualification.

D'une part, elles étaient abstraites du litige national. La question préjudicielle doit résoudre un désaccord sur l'interprétation d'un texte européen. A cette fin, la Cour organise l'expression de ce conflit d'interprétations. Toutefois, ce conflit d'interprétations ne se confond pas avec le litige soumis au juge national. Tout d'abord, la procédure préjudicielle est étrangère à l'initiative des parties. Ces dernières sont seulement invitées à se faire entendre. Autrement dit, lors de la question préjudicielle, le principe du contradictoire n'ordonne plus l'intervention des parties. Surtout, l'expression des divergences d'interprétations est ouverte à d'autres parties prenantes: États Membres, institutions européennes, sous la synthèse de l'avocat général peuvent intervenir devant la Cour de justice⁷. D'autre part, l'interprétation consiste à décider du sens général de la norme. Pratiquement, cela revient pour la Cour de justice à procéder à une « reformulation », une « redite » qui ajoute ou retranche à l'énoncé juridique. L'acte d'interprétation est alors tenu pour équivalent de l'énoncé initial. Sa formulation se veut alors « abstraite » de son contexte d'énonciation, prenant une forme analogue à celle d'une règle communautaire. Paradoxe de l'interprétation, l'énoncé interprétatif, censé signifié à l'identique de l'original, n'a évidemment d'intérêt que s'il signifie autrement. Quelles sont les techniques de formulation des énoncés interprétatifs correspondant à cette conception de la question préjudicielle?

Tout d'abord, l'énoncé peut se limiter à décider la solution du conflit d'interprétations en débat dans le procès. Quand – notamment en raison de la diversité des versions linguistiques – plusieurs interprétations sont disputées, le juge européen peut trancher en faveur de l'une d'elles ou même en fonction d'une tierce option encore. Par exemple, la version néerlandaise de « diens echtgenote » visant l'épouse du travailleur dans le règlement européen sur la coordination des régimes de protection sociale s'écartait ici des autres versions nationales qui avaient opté pour le terme non sexo-spécifique de « conjoint ». Dans cette hypothèse, la Cour de justice s'est limitée à reformuler le texte originel en un énoncé non-sexospécifique, substituant au terme sexué un autre sans indication du genre⁸. Cette stratégie de formulation de l'interprétation uniforme présente d'évidentes limites. Elle laisse largement ouverte la possibilité d'autres conflits d'interprétations sur le même texte. Qu'en est-il, par exemple, de la nature du lien entre conjoints? Doit-il nécessairement s'agir d'un lien marital ou d'autres catégories de relations peuvent-elles être accueillies sous ce vocable?

Afin de conjurer plus largement ces divergences et de suppléer l'absence d'un lexique commun, le juge européen peut viser une deuxième stratégie en imposant une définition uniforme⁹. En l'absence de

⁶ On retrouverait ici la question connue de la prévalence des interprétations finalistes en droit communautaire, not., P. Pescatore, Les objectifs de la Communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de justice. Contribution à la doctrine de l'interprétation téléologique des traités internationaux, Mélanges Ganshof van der Meersch, II, p. 325.

⁷ Article 23 du Protocole n° 3 sur le statut de la Cour de justice de l'Union européenne.

⁸ CJCE 12 juillet 1979, Koschniske / Raad van Arbeid, aff. 9/79, Rec. p. 2717 ; P. Braselmann, Über nationales Recht und Mehrsprachigkeit. Linguistische Überlegungen zu Sprachproblemen in EuGH-Urteilen, EuR 1992, p. 55.

⁹ C. Wolmark, La définition prétorienne, LGDJ, 2007.

sémantique commune aux droits nationaux, la formulation de définition – tant par le juge que par le législateur – permet de fixer de manière autonome, c'est-à-dire indépendamment des lexiques nationaux, le sens des termes utilisés dans un texte européen. Le recours à des définitions prétorienne dans les arrêts préjudiciels à d'évidence une double fonction, justificative et prescriptive: justificative, puisque l'énonciation de la définition, s'imposant généralement au nom du sens commun, offre un fondement à la solution du conflit d'interprétations en l'espèce soumis à la Cour; prescriptive, puisqu'elle confère aux conflits d'interprétations à venir sur le même terme un cadre sémantique plus contraint. En énonçant une définition, la Cour peut tenter de dépasser le règlement du seul conflit d'interprétations qui lui est soumis et restreindre les difficultés d'interprétation d'un terme. Pour ce faire, elle déplace en quelque sorte le lieu des conflits à venir sur le sens de la notion. Ceux-ci porteront désormais non plus sur un vocable esseulé, mais sur le texte de la définition. La Cour impose ainsi un cadre textuel au travail d'interprétation, puisque les débats d'interprétation prendront pour support les différents éléments de la définition¹⁰. Ce peut être la stratégie de la Cour de justice par exemple à propos de la notion d'entreprise pour la mise en œuvre de la directive 77/187 relative au maintien des droits des travailleurs en cas de transfert d'entreprise¹¹, ou encore du terme de « travailleur »¹², clé du champ d'application personnelle de la liberté de circulation des travailleurs en posant une définition de ces derniers.

Néanmoins chacune de ces illustrations en témoignent. Les techniques de formulation abstraite ne suffisent pas à satisfaire aux exigences européennes d'application uniforme. Actes de langage, elles demeurent prises dans le cycle des interprétations ouvert à chaque contentieux non seulement en raison de l'indétermination sémantique de l'énoncé juridique, mais aussi de l'indétermination pragmatique a priori des actes de langages: l'application, en tant que passage du général au particulier requiert lui-même de donner une signification contextualisée à l'énoncé abstrait d'une règle. Pour encadrer la marge d'appréciation des juges nationaux lors de ce passage du général au particulier propre à la réalisation de la règle, le juge européen déploie un second genre de stratégies orientées cette fois vers le contexte d'application.

III. La tentation de la contextualisation des interprétations

Le conflit d'interprétation a progressivement perdu de son abstraction devant la Cour de justice. Dès l'origine, la difficulté d'un partage des compétences fondées sur l'opposition de l'application et de l'interprétation avait été relevée¹³. En effet, la segmentation de la décision judiciaire en deux phases distinctes, l'une consistant à dire le droit en l'interprétant, l'autre à l'appliquer à une situation factuelle, méconnaît la nature de l'acte d'interprétation juridique. Hans Kelsen le rappelait en une synthétique formule: « Toutes les normes juridiques appellent une interprétation en tant qu'elles doivent être appliquées »¹⁴. Or, ce constat est riche d'un double enseignement, utile pour comprendre les pratiques d'interprétation mises en œuvre par la Cour de justice. L'interprétation juridique n'a pas seulement une fonction résiduelle de clarification des textes obscurs. D'une part, que telle ait été ou non l'intention du « législateur », l'énoncé juridique laisse une marge d'appréciation à l'autorité

¹⁰ C. Wolmark, La définition prétorienne, préc. p. 122 et 157.

¹¹ CJCE 11 mars 1997, aff. C-13/95, Rec. p. I-1259, Dr. soc. 1997, p. 728.

¹² CJCE 3 juillet 1986, Lawrie Blum, aff. 66/85, Rec. p. 2121.

¹³ Sur ce point, R. Kovar, Recours préjudiciel en interprétation et en appréciation de validité - Examen de la question préjudicielle par la Cour de justice, *Juris-Cl. Europe*, 1991, fasc. 361, § 13-15. L'on exposait fort justement, que « la compétence pour interpréter suppose la compétence pour décider ce qu'est « interpréter » » (Green, *Political integration by jurisprudence. The work of the Court of Justice of the European Communities in European political integration*, Sijthoff Lyden, 1969, p. 104; cité par R. Kovar, préc.).

¹⁴ Hans Kelsen, *Théorie pure du droit*, Paris Bruxelles, LGDJ Bruylant, 1999, trad. par C. Eisenmann, p. 454.

d'application¹⁵. Celle-ci doit nécessairement procéder à l'interprétation, afin de choisir entre les différentes possibilités que laisse ouvertes l'énoncé juridique. D'autre part, l'interprétation juridique ne peut pas être comprise comme une sorte d'acte gratuit. L'interprétation juridique a pour objet d'éclairer la décision d'application. C'est en vue de l'application qu'est mené le travail d'interprétation. Dès lors, indissociable du projet d'application, elle ne peut être abstraite du contexte particulier d'application d'un énoncé juridique. Cette imbrication de l'interprétation et de l'application trouve un clair écho dans la préoccupation constamment manifestée par la Cour de justice d'offrir une « interprétation utile » du droit communautaire¹⁶. A ce titre, elle réclame désormais du juge national de l'informer du contexte juridique et factuel dans lequel se pose ce conflit d'interprétation¹⁷. L'enjeu est alors non pas de donner une interprétation abstraite de la norme européenne, mais une interprétation utile adaptée à l'application particulière que le juge national devra donner de la norme européenne dans le cadre du litige dont il est saisi. Corrélativement, la Cour de justice a rapidement fait évoluer le *style* de ses formulations interprétatives de manière à les contextualiser pour informer les décisions du juge national où se lie nécessairement le passage de la généralité de la règle à son application particulière dans un contentieux. Deux voies peuvent alors être suivies par le juge européen, soit vers l'aval, en informant sur les règles d'usage de la règle en vue de son application, soit vers l'amont, en spécifiant les raisons sensées guider/justifier un choix d'interprétation.

Vers l'aval

L'application par le juge d'une règle juridique dans le cadre du procès est une décision complexe, qui ne se limite pas à la seule mise en œuvre d'un syllogisme¹⁸. Cette décision implique une succession de décisions préalables concernant la mise en rapport de la norme à une situation factuelle: choix de la règle applicable et décision sur ces conditions d'applicabilité, décisions sur son efficacité juridique (effet direct, primauté, etc...), qualification de la situation juridique, etc. Ces différentes décisions, prises en vue de l'application de la règle, requièrent des interprétations spécifiques de la norme européenne¹⁹. Aussi, pour chacune de ces décisions peuvent surgir des divergences entre juges nationaux, peu important l'accord sur la signification abstraite de la norme commune. Deux techniques de formulation des interprétations, parmi d'autres, sont ici aisément repérables.

En premier lieu, le choix de la règle applicable au litige peut devenir un obstacle à l'application uniforme du droit de l'Union. Dès lors qu'un juge national ignore la règle commune, celle-ci risque de voir sa pleine application entravée. Le droit communautaire est ici singulièrement dépendant de la mobilisation de la règle par les plaideurs et/ou de l'aptitude du juge à relever d'office son application. Prises entre ces deux contraintes, la Cour de justice n'hésite toutefois pas à reformuler la question préjudicielle que lui adresse le juge national. Ainsi, l'exigence d'utilité de l'interprétation donnée conduit la Cour de justice à ne pas être le récepteur seulement passif des questionnements du juge national. Les fonctions de cette reformulation sont multiples. Il peut bien évidemment s'agir de simples reprises sous une forme plus synthétique de la question adressée par le juge national. Toutefois, cette œuvre de reformulation embrasse parfois de plus larges enjeux. Le juge européen peut à cette occasion

¹⁵ M. Troper, Philosophie du droit, préc., p. 98 et ss.

¹⁶ CJCE 30 juin 1966, Société Technique Minière / Maschinenbau Ulm, aff. 56/65, Rec. p. 337 ; la Cour souligne en l'espèce « la nécessité de parvenir à une interprétation utile des textes litigieux ».

¹⁷ La Cour estime, par exemple, qu'« à défaut d'informations précises relatives aux objectifs, à la nature et aux modalités de perception de la contribution litigieuse, il y a lieu de préciser que, dans l'exercice des pouvoirs conférés par l'article 177, la Cour devant se borner à donner une interprétation des dispositions en cause du droit communautaire, ne peut apprécier les actes juridiques et les dispositions du droit national, au risque que la réponse ne corresponde qu'imparfaitement aux particularités de l'espèce » (CJCE 19 juin 1973, Capolongo, aff. 77/72, Rec. p. 611).

¹⁸ Le constat est classique, not. H. Motulsky, Principes d'une réalisation méthodique du droit privé. La théorie des éléments générateurs de droits subjectifs, Sirey 1948, Paris, Dalloz, 3e éd., 2002.

¹⁹ Il faut par exemple interpréter les dispositions d'une directive pour déterminer si elle est suffisamment précise et inconditionnel pour se voir reconnaître un effet direct.

« traduire » la question en des termes compatibles avec ses propres compétences afin, dans un esprit de coopération, de ne pas avoir à déclarer irrecevable la question du juge national (tel est le cas par exemple du juge national qui réclame du juge européen décision sur l'application de la norme européenne au cas d'espèce). La Cour n'hésite ainsi pas à « dégager du libellé imparfaitement formulé par une juridiction nationale les seules questions relevant de l'interprétation du traité »²⁰. Mais, plus encore, ce jeu de la reformulation n'a pas pour seul objet le rappel, par la Cour, des limites de sa compétence. Elle peut également, de l'exposé du cadre factuel et légal, faire ressortir une demande d'interprétation, celle-ci n'eût-elle pas été posée sous forme de question précise²¹. Ce pouvoir de correction permet à la Cour, en présence de questions formulées de manière impropre ou dépassant le cadre des fonctions qui lui sont dévolues, d'extraire de l'ensemble des éléments fournis par la juridiction nationale - et notamment de la motivation de l'acte portant renvoi - les éléments de droit communautaire qui appellent une interprétation compte tenu de l'objet du litige²². La pédagogie du procédé mise en œuvre par la Cour de justice oriente nécessairement le juge national. Une telle pratique renforce la possibilité d'une compréhension autonome du droit communautaire, quand la question préjudicielle, telle que posée par le juge national, dénote souvent une lecture nationale de la norme communautaire. C'est souvent avec les mots, les concepts et les problèmes juridiques spécifiques au droit interne que le juge national interroge la Cour de justice. Ainsi la formulation de la question préjudicielle révèle beaucoup des représentations nationales du droit communautaire. La pratique de la reformulation s'apparente à une forme de communautarisation. La Cour traduit dans une perspective communautaire ce questionnement juridique qui préside à l'identification de la règle applicable. En quelque sorte, elle donne une version communautaire de la situation contentieuse. L'enjeu est alors de faire correspondre la difficulté rencontrée par le juge national avec un problème juridique propre au droit de l'Union. Cette activité de reformulation indique alors par contraste le coût, les déplacements d'objet du litige susceptibles d'être imposés par la mobilisation de la norme européenne.

En deuxième lieu, la formulation de l'interprétation préjudicielle peut informer la décision de qualification. Qualifier consiste idéalement « à placer un fait ou un acte juridique sous le concept normatif qui en détermine la nature juridique »²³. Par cette opération, le juge subsume un objet, un fait, un acte ou une situation sous des concepts. Dans le partage communautaire entre interprétation et application qui ordonne les fonctions respectives des juridictions nationales et du juge communautaire dans le cadre d'un renvoi préjudiciel, la décision de qualification est un des éléments de l'application. En principe, elle ne peut être l'objet d'une question préjudicielle. La Cour de justice n'hésite pas à le rappeler lorsque le juge national retient une formulation par trop concrète de sa demande d'interprétation du droit communautaire. La Cour juge, en effet, qu'elle « n'a pas compétence pour appliquer la règle communautaire à une espèce déterminée et, partant, pour qualifier une disposition du droit national »²⁴. De la compétence du juge national, l'opération de qualification semble ainsi échapper à l'emprise de la Cour de justice. Ce constat n'accule toutefois pas la Cour au mutisme. Indiquant la signification de la norme communautaire sur laquelle elle était interrogée, la Cour peut préparer l'opération nationale de qualification²⁵. Certes, la qualification peut parfois s'énoncer comme une évidence, sans autre forme de procès. Tel ou tel comportement sera déclaré ou non de fautif. Pour encadrer la décision nationale, la Cour peut poser une méthode de qualification. En définitive, c'est

²⁰ CJCE 15 juillet 1964, *Costa / ENEL*, aff. 6/64, Rec. p. I-1141.

²¹ CJCE 6 mai 1971, *Cadillon / Höss*, aff. 1/71, rec. p. 723.

²² CJCE 20 mars 1986, *Procureur de la République / Tissier*, aff. 35/85, Rec. p. I-1207, al. 9.

²³ V° « Qualification », *Dictionnaire encyclopédique de théorie et de sociologie du droit*, préc.

²⁴ CJCE 11 avril 1973, *Michel S. / Fonds national de reclassement social des handicapés*, aff. 76/72, Rec. p. 457.

²⁵ Pour une étude analogue des pratiques de la Chambre sociale de la Cour de cassation, C. Wolmark, préc., n°101 et ss ; n°110 et ss.

déjà l'objet d'une définition prétorienne, déjà évoquée, qui détermine les éléments nécessaires à la qualification. Mais le juge européen peut plus encore préciser la valeur de ces différents éléments, indices ou critères, alternatifs ou cumulatifs,... A la définition ou en sus de celle-ci, la Cour opte parfois pour la détermination d'un faisceau d'indices ou encore d'une présomption. A chaque fois, il s'agit d'indiquer au juge national – avec plus ou moins de rigueur – les éléments à prendre en compte pour la décision de qualification. Plus contraignante pour la décision de qualification et rompant davantage encore avec l'abstraction de la norme européenne, la formulation des interprétations donne parfois lieu à l'édification d'une véritable casuistique. Cette casuistique peut alors s'incarner dans une typologie identifiant des situations modèles pour l'application de la règle européenne²⁶. Plus fréquemment, cette casuistique s'apparente à une technique d'interprétation proche d'une simple monstration. De la même manière que la décision sur le sens d'un mot peut se passer d'une définition et se résoudre dans le simple geste de désignation d'un objet du monde, le juge européen peut formuler son interprétation en termes précis visant directement le litige devant le juge national. A cette fin et montrant la fragilité du partage des fonctions fondé sur la distinction entre interprétation et application, la Cour de justice précise le sens du texte européen pour une situation générique analogue à celle soumise au juge national. En ce cas la marge d'appréciation du juge national est fortement réduite et la ligne de partage entre interprétation et application paraît singulièrement approchée du moment de l'application au cas d'espèce par la Cour de justice.

Vers l'amont

La formulation de l'interprétation peut informer les raisons justifiant la décision sur les choix d'interprétation du droit national conformément au droit de l'Union. Cette stratégie d'interprétation est précieuse notamment lorsque l'interprétation du droit national à la lumière d'un acte de droit dérivé laisse une marge d'appréciation importante au juge national. Ici le juge européen peut tenter d'encadrer l'usage national de cette marge d'appréciation en précisant les raisons devant guider le juge national. Deux techniques sont susceptibles d'être sollicitées.

D'une part, la formulation de l'interprétation procède parfois à un « rappel » de l'objectif poursuivi par l'acte européen. Dans les choix d'interprétation et d'application, le juge national pourra alors faire référence à cette norme de surplomb pour justifier sa décision. En effet, selon la Cour, il est de jurisprudence constante « pour l'interprétation d'une disposition de droit communautaire, de tenir compte non seulement des termes de celle-ci, mais également de son contexte et des objectifs poursuivis par la réglementation dont elle fait partie »²⁷. Une telle directive d'interprétation désigne un projet fondateur pour l'interprétation du droit communautaire. Un arrêt du 4 juillet 2006²⁸, relatif à l'interprétation de l'accord-cadre sur le travail à durée déterminée, illustre l'influence de la référence aux objectifs de l'acte dans le travail d'interprétation du juge communautaire. En l'espèce, le droit national n'est pas jugé conforme au droit de l'Union pour sa méconnaissance la finalité de l'acte communautaire, qui est de « protéger les travailleurs contre l'instabilité de l'emploi »²⁹.

D'autre part, le respect des droits fondamentaux dans le cadre de la mise en œuvre du droit de l'Union européenne peut avoir une analogue fonction de raréfaction du sens communautaire. L'obligation d'interprétation conforme implique, de faire prévaloir une interprétation du droit national, adopté pour la transposition d'une directive par exemple, compatible avec les droits fondamentaux. Interrogé par le juge national sur la signification d'une directive, la Cour de justice ne se limite pas à seulement préciser l'interprétation de cette dernière. Elle estime de sa compétence, de « fournir tous

²⁶ On pense par exemple ici la complexe jurisprudence de la Cour de justice relative à la détermination du lieu habituel d'exécution du contrat de travail pour la détermination de la compétence internationale des juridictions en application du Règlement Bruxelles I; par exemple, CJCE 27 février 2002, Herbert Weber, aff. C-37/00.

²⁷ Notamment, CJCE 14 octobre 1999, Adidas, aff. C-223/98, Rec. p. I-7081, pt. 23.

²⁸ CJCE 4 juillet 2006, Adeneler, aff. C-212/04, obs. L. Idot, Revue Europe, Octobre 2006, Comm., n° 276, p. 17-18.

²⁹ Ibid. pt. 72.

les éléments d'interprétation nécessaires à l'appréciation, par la juridiction nationale, de la conformité [de la] réglementation [nationale] avec les droits fondamentaux dont la Cour assure le respect »³⁰.

Conclusion

Pour conclure, quels enseignements tirés d'une telle analyse des stratégies de formulation des interprétations à l'occasion de la question préjudicielle?

Concernant plus généralement, l'interprétation juridique prêter attention à la formulation des énoncés interprétatifs permet de faire justice d'une vision trop restrictive de la fonction interprétative. A l'opposé d'une vision trop communément admise, l'interprétation juridique ne consiste pas seulement à redire l'énoncé juridique dans sa généralité³¹. Elle n'est pas que la décision du sens abstrait de l'énoncé signifiant une norme. Elle accompagne également les opérations d'application de la norme, décidant de la signification et de ses usages possible pour un contexte particulier d'application. Cette dimension pragmatique de l'interprétation juridique est trop souvent occultée. Concernant la coopération entre le juge européen et les juges nationaux, une telle analyse permet une vue plus « réaliste » des contraintes et ressources que peut offrir la procédure préjudicielle au juge national. En l'absence de lien hiérarchique, la Cour de justice a su déployer une riche palette de stratégie d'influence.

Enfin, elle donne à mieux comprendre ce que signifie l'exigence d'application uniforme dans le cadre de l'intégration européenne. Deux idées fausses peuvent ici être écartées. L'application uniforme ne se limite pas à imposer que la signification abstraite de la norme européenne soit commune. Mais elle n'impose pas non plus une inatteignable identité des décisions particulières d'application par les juges nationaux. Entre ces deux visées, les stratégies de formulation des interprétations invitent à repenser l'uniformité attendue du droit de l'Union européenne. Il s'agit alors de mieux saisir comment, dans le droit européen, concilie le général de la norme et le particulier de ses applications. Perdant de son évidence, l'idée d'application uniforme suggère ici la nécessité d'une plus précise étude des conventions d'équivalence implicites par lesquelles il est possible que d'affirmer que, d'un juge national à l'autre, d'un procès à un autre, une norme communautaire a été uniformément appliquée. La richesse des modes de formulation des interprétations découvre la variabilité possible de ces conventions. D'un texte européen à l'autre, l'application uniforme n'exige pas la même rigoureuse mesure de l'équivalence. L'analyse est difficile, mais l'enjeu épistémologique d'importance puisqu'il est alors dévoiler un peu de ce que « faire jurisprudence » signifie dans le contexte de l'intégration européenne.

³⁰ CJCE 1er février 1996, Procédure pénale contre Perfili, aff. C-177/94, Rec. p. I-161, pt. 20.

³¹ P. Pescatore, s'inspirant probablement de son expérience de juge communautaire, estimait que « dans la pratique du droit, on réunit sous le nom de l'interprétation l'ensemble des procédés intellectuels qui servent à déterminer et à préciser, dans une situation donnée, le principe applicable. En ce sens, interpréter veut dire, bien sûr, élucider un texte obscur, mais interpréter veut encore dire: spécifier un texte général (...); rectifier les imperfections des textes et adapter ceux-ci aux exigences actuelles; résoudre les contradictions; étendre les textes de manière à combler les lacunes. En un mot, l'interprétation englobe l'ensemble des opérations nécessaires pour rendre les règles de droit susceptibles d'application dans le concret. La nécessité d'interpréter résulte donc non seulement des imperfections de la loi, mais de la nature intrinsèque des lois comme règles générales » P. Pescatore, Introduction à la science du droit, Luxembourg Office des imprimés de l'État, 1960, p. 326; cité par F. Ost et M. van de Kerchove, Interprétation, Archives de philosophie du droit, 1990, p. 165, spéc. 175.

The Realisation of the *ne bis in idem* Principle in the EU

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I. Introduction

There are several factors which shape the *ne bis in idem* principle in its realization on the European level. One factor is found in the various particularities of national *ne bis in idem* rules which are deeply rooted in national constitutional traditions and in national systems of criminal law. These particularities, which can in some cases be traced as far back as back to the transition from medieval conceptions of the nature of criminal proceedings to the enlightenment and from developments concerning the roles of judges and juries in criminal trials, have led to divergent and sometimes conflicting approaches to the interpretation of the *ne bis in idem* principle. Another factors is formed by the different perspectives the courts of the European Union and the Council of Europe take to the role and function of the principle on the European level. After providing some background on the development of the *ne bis in idem* principle, this paper will discuss two different perceptions of that principle on the European level which are called here the ‘extradition paradigm’ and the ‘constitutional paradigm’, and examine how these perceptions have played out in the case law of the Court of Justice of the EU and the European Court of Human Rights. Both approaches are rooted in notions concerning the role and function of the *ne bis in idem* rule in domestic legal systems. Under the constitutional paradigm, the *ne bis in idem* principle is seen as forming part of an emerging European constitutional order, whereas under the extradition paradigm, the principle is primarily seen as logical consequence of closer cooperation between European States in enforcement matters. Although the European Court of Human Rights (ECtHR) would appear to have fully aligned its interpretation of the element of *idem* (“the same”) with that of the Court of Justice of the EU (CJEU) there are good indications that their approaches actually diverge significantly in the light of these different underlying perceptions of the role of the *ne bis in idem* principle. The paper concludes that the development of the *ne bis in idem* principle on the European level reveals a dichotomy between more state-based and more universalist perceptions of the role of fundamental rights in the process of European integration in the case law of the Luxemburg and Strasburg courts.

II. Background: the *ne bis in idem* principle

The principle of *ne bis in idem* is a fundamental principle of law, which restricts the possibility of a defendant being prosecuted repeatedly on the basis of the same offence, act or facts. The principle has a long history and exists in many forms in national systems of law. The earliest known reference to the *ne bis in idem* principle originates from approximately 355 BC, when Demosthenes reasoned that ‘the laws forbid the same man to be tried twice on the same issue’. In common law the principle is known as “double jeopardy”, and it is believed that the principle is as old as the common law itself.¹ The principle featured prominently in the struggle between King Henry II and St. Thomas Beckett in the 12th century AD. King Henry enacted a series of legislative procedures called The Constitutions of Clarendon which amongst other things allowed convicted former clergy men who had been tried before ecclesial courts to be further tried and punished before a secular court.² The idea that legal proceedings have as their purpose to establish the ‘whole truth’, the so-called the “inquisitory” trial

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¹ J. Hunter, ‘Development of the Rule against Double Jeopardy’, *Journal of Legal History* 5 (1984).

² M. Friedland, ‘Double Jeopardy’ Clarendon Press, Oxford (1969).

was introduced in Europe by the late 12th century.³ The heavy burden of establishing the ‘whole truth’ resulted in final judgments being postponed indefinitely by way of judicial decisions under such headings as ‘*plus amples informes*’, *absolutio ab instantia*, ‘*slaking*’ or ‘*Instanzenbindung*’. This state of limbo was often accompanied by coercive measures imposed on the subject for an indefinite duration. The practice of *absolutio ab instantia* in various forms was widespread in Europe until the second half of the 18th century and led to widespread protests. Amongst other things, the conviction that legal proceedings ought to be finite, and that the prosecution should be barred from bringing further proceedings after a first trial had ended in an acquittal or conviction featured prominently among the ideals of the French Revolution. Thus, a shift in the rules governing the relationship between states and their citizens which emanated from the ideals of the enlightenment propelled the *ne bis in idem* rule to legal and constitutional prominence in most jurisdictions in Europe.

In continental law traditions, a distinction is usually made between the principle’s role as an individual right, and its function as a guarantee for legal certainty by upholding the finality of judicial decisions. In the former sense, the principle protects the individual from possible abuses of the state’s *ius puniendi*. The title of Kafka’s *Der Prozess*⁴ is aptly chosen: Josef K. finds himself at the mercy of a legal procedure which carries on indefinitely, and follows its own impenetrable logic. In the latter sense, that of the function of the principle as a guarantee for legal certainty by upholding the finality of judicial decisions, the principle precisely protects the authority of the judgment as such which forms an important precondition for judicial impartiality. The *rationale* of the principle thus coincide with the principal functions of criminal justice: the protection of the individual, and the enforcement of law. In most legal systems no other rule than that of *ne bis in idem* definitely bars the bringing of new proceedings in respect of the same act or facts. Even if multiple prosecutions are not abusive on the part of the state, additional burdens arising out of the repeated prosecution of a subject ‘include the duplicated costs of legal representation, coercive measures to the person and property, and psychological burdens associated with the extended procedures and the absence of finality’.⁵

III. Elements and Exceptions

Although many differences in the interpretation of the *ne bis in idem* principle have developed over time, the principle generally entails two main substantive elements: *bis* and *idem*. The element *bis* refers to the question when it is that a subject is tried *twice*. This is the case where outcome of the first proceedings has acquired *finality* (*res iudicata*). A judicial decision is final when it is irrevocable, that is to say when no more ordinary remedies are available under the law, where all remedies were exhausted, or where the time limit for those remedies has expired. As for the element of *idem*, it is accepted wisdom that there are two possible approaches to the question what must be understood as “the same” act or facts: by recourse to the objective historical facts in so far as possible, or by recourse to their legal qualification. More factual approaches in practice offer more protection against subsequent prosecutions for the subject, whereas more legal approaches leave scope for the authorities to pursue a second conviction, either under a different legal heading (“murder” instead of “manslaughter”), or by distinguishing between different protected legal interests, or different reproaches of guilt.

The distinction commonly made between “factual” and “legal” approaches to a finding of *idem* is entirely hypothetical. In practice, *ne bis in idem* rules combine more factual and more juridical

³ W.F. van Hattum, ‘Non bis in idem: de ontwikkeling van een beginsel’ (<http://dissertations.ub.rug.nl/FILES/faculties/jur/2012/w.f.van.hattum/Hattum-thesis-unprintable.pdf>)

⁴ Later spelt as: *Der Prozess*.

⁵ M. Fletcher, *The problem of multiple criminal prosecutions: building an effective EU response*, Yearbook of European Law (Glasgow: 2007), 10. www.eprints.gla.ac.uk/3811/

approaches where a finding of *idem* is concerned, and the interplay between the two can be subtle.⁶ There are considerable differences between national *ne bis in idem* rules on this point, and procedural issues such as whether the earlier prosecution ended in an acquittal or conviction may come into play here.⁷ Although in the majority of legal systems which entail a *ne bis in idem* rule the factual circumstances are emphasized in the context of *idem*, considerations which ultimately go back to the legal qualification of the act such as the legal interest at stake or the reproach of guilt often play a role.⁸ A comparative analysis of the interpretation of *idem* in the German, Dutch and French legal systems carried out by Van Hattum⁹ reveals that stronger emphasis on the factual circumstances of the case have developed in those jurisdictions where there are more *formal* possibilities for the authorities to pursue a second conviction (*novum, falsa*, or other formal exceptions to the *ne bis in idem* rule), whereas in jurisdictions where such exceptions are not available, the possibility of securing a second conviction is secured by way of the ‘*solution de dépannage*’ of interpreting the element of *idem* more restrictively. Three categories of interpretations of *idem* can be distinguished in this regard: i.) juridical approaches to the finding of *idem* where a second prosecution is allowed under a different *legal heading*; ii.) approaches in which the *reproach of guilt* is taken into account (for instance distinguishing between negligent, willful, or intentional acts); and: iii.) approaches in which an “*identity of the protected legal interest*” is required. The latter in particular has on occasion produced opaque and seemingly random distinctions between various “legal interests”.¹⁰

National *ne bis in idem* rules do not only play a role situations where both prosecutions originate from within the same system of criminal law, but also in situations which arise in connection with an extradition request. This latter category is in many ways distinct from the former, and is often laid down separately in extradition law. Extradition is a form of cooperation between states, and the conditions and procedures for extradition tend to vary from state to state and depend on the applicable extradition treaty. Extradition as such is procedurally distinct from the actual trial in which the full bill of national procedural and constitutional rights protects the subject, so that a lower level of protection for the subject is considered acceptable.¹¹ *Ne bis in idem* rules in the context of extradition often do not tend to enjoy the same constitutional status as their constitutional counterparts. At the same time however, *ne bis in idem* protection in the context of extradition is not necessarily lower than within the national (constitutional) context. The legal qualification of the act in question is for instance strictly speaking never ‘identical’ in extradition situations, so that the historical facts will tend to prevail. *Ne bis in idem* protection in the extradition context can also entail additional conditions such as the requirement of enforcement which are not always mirrored by a similar requirement in domestic situations.

⁶ It is even questionable whether any such thing as a “purely factual” or “purely juridical” approach can exist in the context of legal proceedings.

⁷ W.B. van Bockel, ‘The *ne bis in idem* principle in EU law’, Kluwer Law International (2010), p. 45

⁸ Van Bockel 2010, p. 44 *et seq.*

⁹ Van Hattum 2011.

¹⁰ An example is the judgment in *Gradinger v. Austria*, 23 Oct. 1995 (Appl. No. 15963/90), *para.* 54 where the interest of “traffic regulation” is distinguished from that of “public safety”. It is however difficult to see how traffic regulation would serve any other interest than that of public safety.

¹¹ Amongst other things, this raises issues where to subject was tried and convicted in *absentia* so that some additional safeguards are found in extradition treaties and national extradition laws on this point.

IV. European *ne bis in idem* Rules

Several *ne bis in idem* provisions exist within the respective frameworks of the EU and the Council of Europe, notably Article 4 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms ('4P7 ECHR'), Article 50 of the Charter of Fundamental Rights of the European Union (the 'Charter'), and art. 54 CISA. *Ne bis in idem* provisions are also found in a number of specific instruments, aimed at establishing judicial cooperation in the field of criminal law within the EU. Article 3, section 2 of the Framework Decision on the European Arrest Warrant ('FDEAW') is a provision in EU secondary law which stipulates that the executing judicial authority shall refuse to execute the European Arrest Warrant ('EAW') if the person in question has been finally judged in a Member State in respect of the same acts, provided that where a sentence has been imposed, the sentence has been served, is being served, or can no longer be served. Article 4 of section 2 of the FDEAW refers to pending criminal proceedings as an optional ground for refusal of an EAW, and section 5 of Article 4 FDEAW allows for optional refusal if the requested person has been finally judged by a third State. The main 'European' provisions will be briefly introduced below in order to provide the necessary background for the analysis of the case law. The provisions read as follows:

Article 4P7 ECHR

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

Article 50 Charter

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

Article 54 CISA

A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.

Article 55 CISA stipulates that the *ne bis in idem* principle of Article 54 CISA does not apply in respect of: i) crimes committed in whole or in part in the territory of the second state to initiate the prosecution, ii) crimes affecting the states' 'essential interests', and iii) crimes which have been committed by the officials of the (second) state, in the exercise of their duties. A prior declaration is however required in order for a Member State to rely on this exception possibility.

There are numerous differences between the provisions. Article 4 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms only offers protection against trial or punishment in one and the same state. Article 50 of the Charter contains the same rule, but expands its geographical scope of application from the national level to the level of the European Union ('... within the Union'). Article 54 CISA is worded somewhat differently than the other three

where it states that it shall apply to any subsequent set of proceedings on the basis of the same facts in any other Member State than the one where the first decision was taken, finally disposing of someone's trial.¹² Article 4P7 ECHR contains an exception to the *ne bis in idem* rule allowing for a second trial where new or newly discovered facts (*novum*) or if there has been a 'fundamental defect in the previous proceedings which could affect the outcome of the case', whereas Article 14(7) ICCPR and Article 50 of the Charter do not. According to the Explanatory Report, this includes evidence of new or newly discovered evidence, including new means of proof relating to the previously existing facts. The Explanatory Report states that Article 4P7 ECHR does not 'prevent the reopening of the proceedings in favor of the convicted person or any changing of the judgment to the benefit of a convicted person.' Unlike art. 54 CISA, article 4P7 ECHR does not require that the penalty imposed has been enforced or is actually being enforced.

In order to understand the relevance of these differences between the provisions it helps to consider them in the context of their place and purpose in the EU legal order. Art. 54 CISA forms part of the Schengen-*acquis*, concluded as an intergovernmental instrument between only five Member States. The Schengen-*acquis* aims to establish free circulation of persons by abolishing border checks, but at the same time implements 'countervailing measures' in the form of the provisions on police cooperation, mutual assistance in criminal matters, extradition, transfer and enforcement of judgments, and the Schengen Information System (SIS).¹³ Although Article 54 CISA forms an important step for the *ne bis in idem* principle in Europe,¹⁴ the logic underlying the CISA as a whole is therefore closely linked to extradition and enforcement cooperation between (sovereign) states (the extradition paradigm). This is not only reflected by the broad exception possibilities laid down in Article 55 CISA and the scope of application of the provision (which applies only between the Schengen-states), but the wording of Article 54 CISA where it refers to "the same acts" could also be interpreted as a logical consequence of this particular function. By contrast, the wording of Articles 4P7 ECHR and 50 of the Charter in particular reveals more constitutional ambitions on the part of the draftsmen.¹⁵ This may be evidenced by the broad and sweeping wording of article 50 of the Charter ("within the Union"), as well as by the fact that Article 4P7 allows for certain exceptions to the *ne bis in idem* rule bringing the provisions in line with exception possibilities to *ne bis in idem* rules in national systems of law.

V. Two Different Perspectives on the Nature and Role of the *ne bis in idem* Principle

From the foregoing it follows that two rather different perspectives can be taken in considering the realization of the *ne bis in idem* principle on the European level. The first approach to an extent reflects the traditional role of *ne bis in idem* rules in national extradition procedures which, due to their particular function in the extradition context, can sometimes differ in their wording and interpretation from constitutional versions of the same rule. There is every reason to assume that such an approach comes close to what the draftsmen of the CISA had in mind, and the question is whether the incorporation of the Schengen-*acquis* into that of the EU (now: Title V, Chapter 4 of the TFEU) and its association with the mutual recognition principle in EU law has changed anything in this regard. This "extradition paradigm" would appeal in particular to lawyers with a background in state prosecution such as the Current Advocate General Yves Bot. The extradition paradigm could also, to some extent be relied on to justify inconsistencies between the interpretation of Article 54 CISA in the case law of the CJEU, and other developments in the case law on *ne bis in idem* before the Luxemburg and Strasburg courts. Under the extradition paradigm, the emphasis is on the more on the practical

¹² For an overview, see: Van Bockel 2010, p. 10 *et seq.*

¹³ The European Arrest Warrant later replaced the extradition provisions of the Schengen-agreements.

¹⁴ Vervaele 2005, p. 109; and: Van Bockel 2010, pp. 19 *et seq.*

¹⁵ This may also go some way in explaining why the 7th Protocol was so poorly ratified, and Article 50 of the Charter so poorly drafted.

need for a clear and unambiguous *ne bis in idem* rule such as Article 54 CISA in the context of judicial cooperation, than on the need to develop a coherent and consistent body of fundamental rights on the European level. After all, the aim of enhanced cooperation in the EU is after all precisely to do away with costly and cumbersome extradition procedures between the Member States. Under the constitutional paradigm however, the emphasis precisely shifts towards the need for uniformity in the interpretation and application of fundamental rights, whereby the various *ne bis in idem* provisions in existence are seen as (imperfect) expressions a single, overriding fundamental general principle of EU law, to be further refined through the case law of the CJEU. As such, Article 54 CISA forms important addition to an emerging European constitutional body of fundamental rights and legal principles rather than a provision with a specific function in the context of enhanced cooperation. In the words of AG Sharpston in her Opinion in the Gasparini case:¹⁶

“For the purposes of EU law, it seems to me almost inevitable that, in consequence, the concept of *ne bis in idem* (which, as the Court noted in *Vinyl Maatschappij*, is a fundamental principle of Community law) is to be understood as a free-standing, or *propriae naturae*, principle. In the absence of further initiatives by way of Treaty amendment or secondary Community legislation, it is therefore to be refined and developed by the Court in the exercise of its ‘hermeneutic monopoly’ on such key concepts of EU law. The specific application of the principle in particular areas (be these competition law or through Article 54 of the CISA) should form part of a core understanding of what that fundamental principle means (or ought to mean) within the Community legal order. The proposition that *ne bis in idem* should be understood as a free-standing principle in the context of the EU is not, I venture to suggest, too adventurous. The EU constitutes a new legal order and the European integration process a unique international construction. For its part, Article 54 of the CISA represents one of the first successful attempts to apply the *ne bis in idem* principle in a multilateral manner in a transnational context. It therefore seems natural that the definition of the principle should be *propriae naturae*, adapted to the particular features of the supranational context in which it is to apply.”

Contrary to the extradition paradigm which implicitly distinguishes Article 54 CISA from other European *ne bis in idem* rules, the constitutional paradigm therefore sets out to draw the various European *ne bis in idem* provisions including Article 4P7 ECHR together in their interpretation and application.¹⁷ It is a small step from there to accepting the most developed of those provisions offering the highest level of protection as a benchmark for the interpretation and application of the *ne bis in idem* in other areas of EU law. Before arriving at conclusions concerning the implications of these two perceptions of the *ne bis in idem* rule on the European level, the main developments in the case law of the CJEU and the ECtHR will be discussed below.

VI. The Case-law of the CJEU and the ECtHR on the *ne bis in idem* Principle

As regards the case law of the CJEU concerning the *ne bis in idem* principle, a distinction must be made between the cases concerning art 54 CISA and those concerning the *ne bis in idem* principle as a general principle of EU law in competition cases. In competition matters, the Court has formulated a “threefold condition” for a finding of *idem*: the “identity of the facts, unity of offender and unity of the legal interest protected”¹⁸ This approach to a finding of *idem* is therefore not only factual, but co-dependes on an additional ‘identity’: that of the ‘legal interest protected’.¹⁹

¹⁶ Opinion in case C-467/04, *Gasparini*, 80&81.

¹⁷ Article 52(3) of the Charter stipulates that the meaning and scope of the rights contained in the Charter shall be “the same” as those of the corresponding rights from the Convention.

¹⁸ Case C-17/10, *Toshiba and others* (judgment of 14 February 2012, n.y.r.), para. 99.

¹⁹ In addition, the Court divides factual conduct up along territorial (or jurisdictional), rather than factual lines: “(w)hether undertakings have adopted conduct having as its object or effect the prevention, restriction or distortion of competition

The Court expressly took the other approach in its case law concerning Article 54 CISA. In its landmark judgment in the Van Esbroeck case the Court held for the first time that ‘the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, *irrespective of the legal classification given to them or the legal interest protected*’ (italics added).²⁰ The Court reiterated and confirmed this in several subsequent judgments.²¹ In its considerations, the Court refers to the wording of the provision and its purpose within the Schengen-framework, but also to the nature of the *ne bis in idem* principle as a fundamental right: “(t)he wording of Article 54 of the CISA, ‘the same acts’, shows that that provision refers only to the nature of the acts in dispute and not to their legal classification’ which confirmed by the nature of Article 54 CISA as a fundamental right and its purpose within the context of the Schengen-acquis and that the central question is whether a situation constitutes a set of facts which are inextricably linked together”. What the Court refers to where it refers to “the same acts” is of course the distinction between the term “acts” in art. 54 CISA and the term “offence” in arts. 50 of the Charter and 4P7 ECHR.²²

As for the question whether this line of case law is more in line with the extradition paradigm or the constitutional paradigm, several observations can be made. The first is that the Court does not appear to depart from a “core understanding” of *ne bis in idem* in EU law (as proposed by AG Sharpston) in its interpretation of Article 54 CISA. The Court emphasizes the wording of the provision which could imply that some differences in interpretation of the various *ne bis in idem* provisions may be acceptable according to their wording and. Perhaps more tellingly, in a recent competition judgment (Toshiba) the Court reiterated its “threefold condition”, confirming the existence of two different approaches to the interpretation of the *ne bis in idem* principle in EU law. Finally, and notwithstanding the fact that the Court also makes mention of the fundamental rights nature of the provision, reference is made in the case law to the purpose of Article 54 CISA within the context of the Schengen-acquis, rather than to the purpose of the *ne bis in idem* principle within the legal order of the EU as a whole. The approach taken by the CJEU to the interpretation of Article 54 CISA therefore appears to be more in line with the extradition paradigm than with the constitutional paradigm.

The case law of the ECtHR developed along different lines. After the initial vying decisions in Gradinger and Oliveira, in which the Court alternated between a legal (Gradinger) and a factual (Oliveira) approach, the Court adopted an autonomous approach to the interpretation of ‘the same offence’ by taking into account the question whether two or more offences share the same *essential elements*. In practice, this approach not only had the effect of lowering the level of protection drastically but also generated much uncertainty.²³ This line of case law can be taken to exemplify the difficulty in establishing a single standard for a *ne bis in idem* rule on the European level which can “break into” national *ne bis in idem* rules by raising the level of protection afforded by them, whilst respecting the diversity of national constitutional *ne bis in idem* rules in the Member States.

A turning point came in the Grand Chamber decision in the Zolotukhin case, when the Court expressly denounced the earlier case law on this point, and considered that ‘the existence of a variety of approaches to ascertaining whether the offence for which an applicant has been prosecuted is

(Contd.) _____

cannot be assessed in the abstract, but must be examined with reference to the territory, within the Union or outside it, in which the conduct in question had such an object or effect, and to the period during which the conduct in question had such an object or effect.”

²⁰ Case C-436/04 Van Esbroeck [2006] ECR I-2333.

²¹ See also: Case C-150/05 Van Straaten [2006] ECR I-9327; and Case C-367/05 Kraaijenbrink [2007] ECR I-6619.

²² It is worth noting that the linguistic difference between “acts” and “offences” is not self-evident in many official language versions of the provision, and does not correspond to any comparable distinctions between national *ne bis in idem* rules in terms of their wording and their interpretation. In practice, the interpretation of national *ne bis in idem* rules on this point often turns on considerations beyond the literal wording of the provisions.

²³ Van Bockel 2010, p. 190.

indeed the same as the one of which he or she was already finally convicted or acquitted engenders legal uncertainty incompatible with a fundamental right'. In the judgment, the Grand Chamber not only takes stock of the case law of the CJEU, both in competition matters as well as in the context of the CISA, but also of the wording of the American Convention on Human Rights and the case law of the U.S Supreme Court. It comes to the conclusion that "the approach which emphasises the legal characterisation of the two offences is too restrictive on the rights of the individual, for if the Court limits itself to finding that the person was prosecuted for offences having a different legal classification it risks undermining the guarantee enshrined in Article 4 of Protocol No. 7 rather than rendering it practical and effective as required by the Convention (...). Accordingly, the Court takes the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same. (...) The Court's inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings."²⁴

In keeping with the case law of the ECJ on Article 54 CISA, and notwithstanding the differences in wording between Article 4P7 ECHR and Article 54 CISA, the Grand Chamber therefore adopted a broad, objective approach to the interpretation of the element of *idem*. The judgment strives to harmonize the various approaches to the interpretation of *idem*, rejecting the differences in wording between the various provisions as a justification for a more restrictive interpretation in the light of the need to arrive at an interpretation of the *ne bis in idem* rule which offers a high level of protection for the subject. Although the Grand Chamber has thus aligned its interpretation of *idem* with the case law on Article 54 CISA, the approach taken by it in doing so is therefore quite different from that taken by the CJEU, and reveals a more constitutional approach to the realization of the *ne bis in idem* principle on the European level. Ironically, it could therefore be said that the judgment precisely highlights the different perspectives of the CJEU and the ECtHR on this point.

VII. Findings

In this paper two perspectives on the role and function of the *ne bis in idem* principle in European law, the extradition paradigm and the constitutional paradigm, have been presented. Under the constitutional paradigm, the *ne bis in idem* principle is primarily seen as forming part of an emerging European constitutional order of fundamental rights, whereas under the extradition paradigm, the principle mainly forms the logical, functional consequence of closer cooperation between European States, along the lines of *ne bis in idem* rules in extradition laws which, due to their function, can sometimes differ somewhat from constitutional versions of the same rule. The extradition paradigm applies in particular in the context of the CISA which is closely linked to extradition and other forms of enforcement cooperation, and this is to a certain extent, taking into consideration the special nature of enhanced cooperation in criminal matters in the context of mutual recognition, reflected by the approach taken by the Court in the interpretation of 54 CISA. In the context of enhanced cooperation which amongst other things aims to do away with cumbersome and time-consuming extradition procedures between the Member States, the need for a clear and straight-forward *ne bis in idem* principle which applies across the board is evident. The constitutional paradigm however presents different challenges. Under the constitutional paradigm need the various *ne bis in idem* provisions in existence are taken as different expressions of a single fundamental legal principle to be further refined through case law. The emphasis is therefore on the need for uniformity and coherence in their realization. By their nature, both Articles 4P7 ECHR and 50 of the Charter belong in this category, and

²⁴ Paras 81-84 of the judgment.

this is reflected in the case law of the ECtHR. Although the Grand Chamber has brought its interpretation of the element of *idem* in line with the case law on Article 54 CISA, it can therefore be said that the Zolotukhin judgment precisely highlights the different perspectives of the CJEU and the ECtHR to the realization of the *ne bis in idem* rule on the European level.

