



Mimetic Evolution.
New Comparative Perspectives on the Court
of Justice of the European Union in its
Federal Judicial Architecture

Leonardo Pierdominici

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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European University Institute
Department of Law

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Summary

The dissertation aims at studying the historical *institutional* evolution of the Court of Justice of the European Union, the judicial arm of the supranational European community. The Court has been largely analysed, in the multidisciplinary field of European studies, particularly because of its central role in the process of continental integration, for the role played *for the evolution* of the European Union legal order.

The perspective I would like to suggest and to develop in this work tries to differentiate itself by taking a somehow reverse standpoint. First, I will focus on the *evolution of the Court itself*, more than on the impressive evolution of the EU legal order and its judge-made nature. Naturally, this last aspect will be the background of my analysis. In this respect, I will not be much concerned with the evolution of case law, jurisprudence or the interpretative activity of the European Court but more on the *structure* and the *organization* of the Court itself, taken as an institution. Finally, I will try to develop this approach by making use of the precious insights provided by the *comparative* analysis of law.

I will select some *specific yet central aspects* of the structural, organizational, institutional development of the Court in the decades since its foundation and will do this with a purpose. My aim is to show, through a comparative analysis, how the development and institutional evolution of the Court of Justice of the European Union can be considered *mimetic* - able to engage and somehow internalize the solicitations which came from EU Member States influences of different legal traditions (with increasing strain as the EU grew dimensionally) and responding to global challenges in relation to the increasing role of the international forms of judicial review and of the international judicial review bodies.

This proved decisive, I argue, for strengthening the authority of the Court of Justice in its federal judicial architecture.

The thesis was submitted for language correction

Mimetic Evolution.
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Bibliography

Introduction

This dissertation aims at studying the historical *institutional* evolution of the Court of Justice of the European Union, the judicial arm of the supranational European community.

As it is well known, the Court of Justice has been largely analysed, in the multidisciplinary field of European studies, particularly because of its central role in the process of continental integration. The amount of relevant literature is so huge that even a reasonable summary would be impossible.¹ However, it is easy to point out how different methodological, disciplinary and even ideological approaches have focused on this institution's important activity.² The large amount of scholarly work typically focused - one is tempted to summarize - on the role of the European Court of Justice and its case law *for the evolution* of the European Union legal order.

The perspective I would like to suggest and to develop in this work tries to differentiate itself by taking a somehow reverse standpoint. First, I will focus on the *evolution of the Court itself*, more than on the impressive evolution of the EU legal order and its judge-made nature. Naturally, this last aspect will be the background of my analysis. In this respect, I will not be much concerned with the evolution of case law, jurisprudence or the interpretative activity of the European Court but more on the *structure* and the *organization* of the Court itself, taken as an institution. Finally, I will try to develop this approach by making use of the precious insights provided by the *comparative*

¹ Paradigmatic influential works in this respect are, *inter alia*: M. Lagrange, The Court of Justice as a Factor in European Integration, in 15 American Journal of Comparative Law, 1966-1967, p. 709; A.W. Green, Political Integration by Jurisprudence, A. W. Sijthoff 1969; H.G. Schermers, The European Court of Justice: Promoter of European Integration, in 22 The American Journal of Comparative Law, 1974, p. 444; R. Lecourt, L'Europe des juges, Bruylant 1976; E. Stein, Lawyers, judges, and the making of a transnational constitution, in 75 American Journal of International Law, 1981, p. 1; H. Rasmussen, On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking, BRILL 1986; A.M. Burley, W. Mattli, Europe Before the Court: A Political Theory of Legal Integration, in 47 International Organization, 1993 p. 41; G. Garrett, The Politics of Legal Integration in the European Union, in 49 International Organization, 1995, p. 171; W. Mattli, A.M. Slaughter, Law and Politics in the European Union: A Reply to Garrett, in 49 International Organization, 1995, p. 183; R. Dehousse, The European Court of Justice. The Politics of Judicial Integration, Macmillan 1998; L.M. Poiras Maduro, We the Court: The European Court of Justice and the European Economic Constitution, Hart 1998; A. Arnall, The European Union and its Court of Justice, 1st edition, Oxford 1999; M. Shapiro, The European Court of Justice, in P. Craig, G. de Búrca (eds.), The Evolution of EU Law, 1st edn, Oxford University Press 1999, p. 321; L. Neville Brown, T. Kennedy, The Court of Justice of the European Communities, 5th edn, Sweet & Maxwell 2000; H.G. Schermers, D.F. Waelbroeck, Judicial Protection in the European Union, 6th edn, Kluwer Law 2001; G. de Búrca, J.H.H. Weiler (eds.), The European Court of Justice, OUP 2001; D. Sarmiento, Poder Judicial e integración europea. La construcción de un modelo jurisdiccional para la Unión, Thomson Civitas 2004; A. Stone Sweet, The European Court of Justice, in P. Craig, G. de Búrca (eds.), The Evolution of EU Law, 2nd edn, OUP 2011, p. 121; M. Adams, H. de Waele, J. Meusen, G. Straetmans (eds.), Judging Europe's Judges: the Legitimacy of the Case Law of the European Court of Justice, Hart 2013; M. Dawson, B. de Witte, E. Muir (eds.), Judicial Activism at the European Court of Justice, Edward Elgar 2013. See also as a reconstruction of the fundamental the recent review article by T. Horsley, Reflections on the Role of the Court of Justice as the 'Motor' of European Integration: Legal Limits to Judicial Lawmaking, in 50 Common Market Law Review, 2013, p. 931.

² For a recent overview, see A. Stone Sweet, The European Court of Justice and the judicialization of EU governance, in 5 Living Reviews in European Governance, 2010, available at the website <http://www.livingreviews.org/lreg-2010-2> (accessed 26 August 2015).

analysis of law.

In this perspective, a couple of definitional remarks are in order. First, one needs to ascertain a basic understanding of what an *institution* is, given the term's polysemy in legal jargon.³ In this respect, the broad description typical of social sciences,⁴ according to which an institution is «any persistent structure or mechanism of social order governing the behaviour of a set of individuals within a given community (...) identified with a social purpose, transcending individuals and intentions by mediating the rules that govern living behaviour», is helpful in determining my approach. In particular, the widespread definition of the philosopher of social science Rom Harré, according to whom an institution is any organized entity «defined as an interlocking double-structure of persons-as-role-holders or office-bearers and the like, and of social practices involving both expressive and practical aims and outcomes»,⁵ aptly describes the idea of a judicial body intended in this sense, in its structural and organizational aspects, and encapsulates the focus I will take in the study of the Court of Justice.

This preamble is also important for stressing the idea that an *institutional* focus is inherently linked to an *evolutionary* one. In fact, social scientists commonly remark that although formal organizations, identified as “institutions”, may be deliberately and intentionally created by people to attain certain functions, the development and function of such institutions in society in general may be regarded as an autonomous instance of emergence: i.e., institutions arise, develop and function in a pattern of social self-organization, which goes beyond the conscious intentions of the individual humans involved.⁶ This is what is also described as the «paradoxical» relationship between «social evolutionary theory and institutional rigidity»:⁷ institutions are social products, they are shaped in all the aspects by social expectations and can change accordingly, but with a rate of rigidity and with peculiar forms given by their acquired *entity*, by their autonomy, by their independence from the seminal force of propulsion that created them. «(I)nstitutions cannot change fluidly with changing needs and changing insights», which are surely the primary drivers of political behaviour and social change but not the only ones; institutions in fact change», but often simply «they adapt»⁸ to the surrounding environment, according to their own «evolutionary mechanisms».⁹

³ See D.W.P. Ruiter, A Basic Classification of Legal Institutions, in 10 Ratio Juris 1997, p. 357.

⁴ Stanford Encyclopaedia: Social Institutions (*ad vocem*), available at the website <http://plato.stanford.edu/entries/social-institutions/> (accessed 26 August 2015).

⁵ H.R. Harré, Social Being. A Theory for Social Psychology, Blackwell 1979, at p. 98.

⁶ I.S. Lustick, Institutional Rigidity and Evolutionary Theory: Trapped on a Local Maximum, in 2(2) Cliodynamics: the Journal of Theoretical and Mathematical History 2011, p. 3.

⁷ *Ivi*.

⁸ *Ibidem*, at p. 3.

⁹ *Ibidem*, at p. 5.

A whole range of legal doctrines and researches has been historically labelled as «evolutionary».¹⁰ Under this category, scholars group those views that, in a more or less intended manner, «propose that the law is shaped by its environment in a way that is analogized explicitly to the theory of evolution in biology: namely, the theory, usually attributed to Charles Darwin, that the forms of living things are shaped by environmental conditions, not by the design choices of a Creator»,¹¹ with uppercase or lowercase letter. This already happened before the emergence of theories of biological evolution in the mid XIX Century, with legal philosophers such as Aristotle, Montesquieu, and Burke;¹² but the trend exploded precisely in parallel with evolutionary theories in hard sciences, with an interesting and rich range of so called *social, doctrinal, economic, and sociobiological* approaches to legal evolution.¹³ If the new pioneer was meant to be Friedrich Karl von Savigny, with his call for «an organically progressive jurisprudence» attentive to law as a product of the «spirit of the people», and not simply of the will of officials,¹⁴ it is also true that the evolutionary readings of the legal phenomenon proliferated in particular - and often with explicit referrals to Herbert Spencer or Charles Darwin - in the tradition of common law, already with influential authors such as Maine,¹⁵ Wigmore¹⁶ or Holmes.¹⁷ Their works already had two features that were accentuated by more modern accounts, like Corbin's,¹⁸ Rubin's¹⁹ or Posner's:²⁰ First, the trend to focus on the inherent specificities of common law, as particularly apt to internalize factors of social evolution (and therefore «efficient»);²¹ second, the consequent, always stronger focus on evolution at the detailed level of specific statements of legal rules and principles - judge made common law doctrines²² - more than, naïvely²³ or instrumentally,²⁴ on societies, or on vast apparatuses of rules.

¹⁰ See E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, in 85:38 *Columbia Law Review*, 1985, p. 38.

¹¹ *Ibidem*, at p. 39.

¹² *Ivi*.

¹³ *Ibidem*, at p. 40 *et seq.*

¹⁴ F. von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, A. Hayward trans. London 1831, Arno Press reprint 1975.

¹⁵ H. Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas*, Beacon Press 1963 (1st ed. London 1861).

¹⁶ J. Wigmore, A. Kocourek (eds.) *Evolution of Law: Select Readings on the Origin and Development of Legal Institutions*, Little Brown 1915-1918.

¹⁷ O. W. Holmes Jr., *The Common Law*, M. Howe ed. 1963.

¹⁸ A. Corbin, *The Law and the Judges*, in 3 *Yale Review*, 1914, p. 234; *Id.*, *Principles of Law and Their Evolution*, in 64 *Yale Law Journal*, 1954, p. 161.

¹⁹ P. Rubin, *Why Is the Common Law Efficient?*, in 6 *Journal of Legal Studies*, 1977, p. 51.

²⁰ R. Posner, *Economic Analysis of Law*, Little Brown, 2d ed. 1977.

²¹ *Ivi*. See also R. Posner, *Utilitarianism, Economics, and Legal Theory*, in 8 *Journal of Legal Studies*, 1979, p. 103; *Id.*, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, in 8 *Hofstra Law Review*, 1980, p. 487.

²² O.A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 *Iowa Law Review*, 2001, p. 101.

²³ C.L. de Secondat Montesquieu, *De l'Esprit des Loix*, Huart 1748, especially in its famous Chapter III.

²⁴ See the reconstruction on the instrumental use of comparative law categories, taxonomies, maps offered by P.G. Monateri, *Geopolitica del diritto: genesi, governo e dissoluzione dei corpi politici*, Laterza 2013.

These narrowed paths of research proved to be successful. However, a brief reconstruction of the social science debate on institutional evolutionary theories suggests that other applications are possible. In fact, my focus will not be constrained to the study of a specific tradition of law, such as Anglo-American common law. Quite the opposite, I will make use of an evolutionary perspective to study a phenomenon of legal *institutional* evolution in the inherently plural European system, naturally open to various cultural influences and to an osmosis of influences upon which the relative institutional organization was built. Moreover, I will not focus on the evolution of particular interpretative doctrines, or single principles or rules. Instead, I will focus on the evolution of an institution intended as an organized entity - and in this sense evolved by legal means - in its natural trajectory shaped by environmental conditions.

In studying the evolution of an institution, it would be impossible to apply a holistic approach to the entire range of aspects critically questioned by scholars about the work of a court, and the Court of Justice in particular. I will select some *specific yet central aspects* of the structural, organizational, institutional development of the Court in the decades since its foundation and will do this with a purpose. My aim is to show, through a comparative analysis, how the development and institutional evolution of the Court of Justice of the European Union can be considered *mimetic* - able to engage and somehow internalize the solicitations which came from EU Member States influences of different legal traditions (with increasing strain as the EU grew dimensionally) and responding to global challenges in relation to the increasing role of the international forms of judicial review and of the international judicial review bodies. In this respect, the objective is to study the way in which an increasingly important and increasingly discussed judicial body like the Court of Justice, traditionally not a priority of EU institutional reform, has changed over time and evolved both through positive law amendments and the will of the *Herren der Verträge*,²⁵ but also, and decisively, through informal and wise recalibrations of institutional characteristics.

I will try to explore both the dynamics, with their endogenous and exogenous influences, and in both *de iure condito* and *de iure condendo* perspectives. This approach has, in my view, the capacity to shed new light on the history of the Court, repeatedly hailed as «arguably the most powerful international court» in the world,²⁶ and often described as the protagonist of a strong

²⁵ The Member States as “Masters of the Treaties”, according to the notorious, iconic Bundesverfassungsgericht's definition.

²⁶ In this sense, very recently, H. Brady, Twelve things everyone should know about the European Court of Justice, paper of the Centre for European Reform, 42/2014, p. 7. It is just one among many possible examples: for similar opinions, see *inter alia* G.A. Caldeira, J.L. Gibson, The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support, in 89 American Political Science Review, 1995, p. 356, at 356 («From arcane commercial and financial practices to commonplace but tremendously salient issues, such as whether people can shop on Sunday and gender equality in the workplace, the Court of Justice has emerged as one of the world's most

dynamic of «self-empowerment».²⁷ Historically, this analysis has been based on doctrinal aspects of the Court's activity: to name a few, the revolutionary use of its procedures,²⁸ the interpretative methods it adopted²⁹ or the substantive detachment it shaped from the loose forms of canonical international law.³⁰ The evolution of the power of the Court has been studied - as we saw, in a typical manner - through an analysis of its great doctrinal choices and of its capacity to shape the evolution of EU law.³¹

However, its success and its «self-empowerment» moves have never been measured against its intrinsic mimetic, adaptive capacity as an organization vis-à-vis the peculiar plural environment in which it acted. «It is widely accepted that the Court of Justice has played – and continues to play – a key role as the motor of European integration»;³² but in adopting such Aristotelian jargon - *per se* closely linked to evolutionary theories of integration as a motion process and of the Court as its *primum movens* - a question spontaneously arises: do we intend to talk, somewhat like in the *Metaphysics*, of the Court as an *unmoved mover* of the motion of integration - from which an initial movement derives, but which is not moved by others, already perfectly done and with no sign of becoming - or of a living institution that made its way not only by fostering, but also by adapting to the different stages of a progressive integration? In other words, metaphors aside: we know that the studies of European integration – which is, in itself, a process – are a *locus amoenus* of evolutionary

powerful transnational courts»); A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*, Oxford University Press 2000, at p. 153 («The most powerful and influential supranational court in world history»); K. Alter, *The European Court's Political Power Across Time and Space*, in 59 *Revue française de science politique*, 2009, p. 1 («I see the ECJ as representing the far end of the continuum of influence for an international court - the ECJ is about the most powerful and influential international court that is realistically possible»).

²⁷ See, in different domains, among the many, the reflections by H. Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking*, *op. cit.*; A.M. Burley, W. Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, *op. cit.*; J.H.H. Weiler, *A Quiet Revolution. The European Court of Justice and its Interlocutors*, in 26 *Comparative Political Studies* 1994, p. 510; G. Garrett, *The Politics of Legal Integration in the European Union*, *op. cit.*; A. Grimmel, *Judicial Interpretation or Judicial Activism? The Legacy of Rationalism in the Studies of the European Court of Justice*, in 18 *European Law Journal*, 2012, p. 518.

²⁸ See on the decisive relationships that the ECJ managed to establish in the construction of the European judicial architecture, authoritatively, A.M. Slaughter, A. Stone Sweet, and J.H.H. Weiler (eds.), *The European Court and National Courts, Doctrine and Jurisprudence. Legal Change in its Social Context*, Hart 1997.

²⁹ And in particular its representative teleological method of interpretation, linked to «une certaine idée de l'Europe»: see on this the early studies by J. Bengoetxea, *The Legal Reasoning of the European Court of Justice*, Clarendon Press 1993 and, from the inside, N. Fennelly, *Legal Interpretation at the European Court of Justice*, in 20 *Fordham International Law Journal*, 1996, p. 656.

³⁰ F.C. Mayer, Van Gend en Loos: *The Foundation of a Community of Law*, in L. Azoulai, L.M. Poiras Maduro (eds.) *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Hart 2010, at p. 21, talks of an early «attempt to get away from the miasma of public international law theory and to create a clean slate, conceptually and methodologically detached from classic public international law constraints». This radical reading is, in any case, not adopted by the whole community of EU lawyers: see among the many B. de Witte, *The European Union as an International Legal Experiment*, in G. de Burca, J.H.H. Weiler (eds.) *The Worlds of European Constitutionalism*, Cambridge University Press 2012, p. 19.

³¹ See the various contributions to L. Azoulai, L.M. Poiras Maduro (eds.) *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, *op. cit.*, precisely as a close inspection of all the great, revolutionary, doctrinal choices of the Court of Justice.

³² T. Horsley, *Reflections on the Role of the Court of Justice as the 'Motor' of European Integration: Legal Limits to Judicial Lawmaking*, *op. cit.*, at 931.

theories (also in the legal perspective) focusing on the transformation of political inter-institutional relationships.³³ But how much of the successful evolution of an institution, of its «self-empowerment», of its gain of authority and legitimacy, is based on the capacity to engage and internalize the solicitations to its structure and its organization? This work aims to provide a tentative answer to this question and highlight this parallel and equally important aspect in the evolution of the European Court of Justice.³⁴

Before starting my analysis, my statements of intention need to be further substantiated. Therefore, in the following pages I will try to situate my project of research in its proper disciplinary, methodological and epistemological boundaries as a kind of justification of its *zeitgeist*.

³³ For an authoritative legal perspective on the point see J.H.H. Weiler, The Transformation of Europe, in 100 Yale Law Journal, 1991, p. 2403.

³⁴ In this sense, by European Court of Justice, CJEU, ECJ, or sometimes just CJ, I will refer to the apical Court within the general institution placed in Luxembourg. I will explicitate when my analysis will also take into account the General Court and the Civil Service Tribunal (whose genesis is described in Chapter six of this dissertation).

Situation for Research and Methodology

II. A situation for the research and its methodology

1. Situation for Research
2. Discovery (or re-discovery) of Historical Studies of European Union Law
3. Discovery (or re-discovery) of Debates on the Legitimacy and the Authority of International Judicial Review Bodies
4. Discovery (or re-discovery) of Debates on the Cultural Diversity in the Supranational Project, and its Role Within the Legal Context
5. A Few Words on the Method and the Basic Idea: *Mimetism* as a link between cultural studies and functionalism in supranational law
6. Work Plan

The proposed research on the institutional evolution of the European Court of Justice finds its premise in the state of the different disciplines involved. Not only, broadly speaking, European legal studies but also the study of constitutional law and international law as «*law for states*»,³⁵ as well as a majority of the new trends in comparative law are increasingly centered on judicial review, focused on the role, the activities and the design of courts and judges.³⁶ There are also important research inclinations that have recently emerged that are open to a discovery (or re-discovery) of historical studies on the European Union and on the establishment of its legal order. Moreover, there are new perspectives in European studies linked to a renewed appreciation of its federal-like nature of *unitas in diversitate* and a broad, ongoing debate on the authority and legitimacy of international and supranational forms of judicial review in addition to the bodies in charge of it.

I will try to elucidate these trends, and how they inspire and situate my research project — before explaining my methodological approach.

II.2 Discovery (or Re-Discovery) of Historical Studies of European Union Law

European studies are, by force of circumstances, a relatively young discipline despite their increasingly specific and problematic variety. Therefore, it is still possible to describe, in the huge

³⁵ In the words of J. Goldsmith, D. Levinson, *Law for States: International Law, Constitutional Law, Public Law*, in 122 *Harvard Law Review*, 2009, p. 1791.

³⁶ For a critical analysis on this doctrinal trend see M. Luciani, *Costituzionalismo irenico e costituzionalismo polemico*, in 2 *Giurisprudenza costituzionale*, 2006, p. 1643.

amount of relevant literature, the genealogical stratification of the scholarship, at least in specific areas as well as, in terms of broad “trends”.

If we focus on European law, on the Court of Justice as well as its activity and role in particular, we can say that after its first years firmly (and traditionally) in the hands of international lawyers,³⁷ the field of research has been invaded (and probably conquered)³⁸ by a so-called *constitutionalist* doctrine. These two - the international and the constitutionalist - were contrasting (or opposite?) scholarly trends but also two different visions of the project of European integration (and of the role of the Court). They implicate, as it has been written, different epistemological dimensions and «a query about what integration stands for (the descriptive dimension), how it is to be explained and construed (the explanatory dimension) and eventually what it should stand for (the normative dimension)».³⁹

In this respect, the shift between the two schools of thought was actually based, as well known, on a different understanding of the premises and consequences of the important founding layers of the European legal construct and in particular of the principles of direct effect and primacy of EU law (to which one is tempted to add, nowadays, the citizenship of the Union). In this sense, the *constitutionalist* doctrine changed the terms of the theoretical discussion (especially since the eighties and prompted by the original inspirations of the Schuman Declaration and the comparative work of Eric Stein)⁴⁰ by putting at its centre certain devices which were direct products of the early, «glorious»⁴¹ days of the European Court of Justice. In turn, this led the social sciences to «discover European constitutionalism»⁴² (and EU constitutional lawyers to discover social sciences) so that a big stream of scholarship based on political science heuristics flourished within the realm of the EU, often with the explicit and specific purpose of exploring (or sometimes by minimizing the importance of)⁴³ «the systemic implications of the doctrines and the dynamics of the constitutional conversation»⁴⁴ mostly about primacy and direct effect. In this sense, political science scholars not

³⁷ See on this, *inter alia*, the reflections of J.H.H. Weiler, Journey to an Unknown Destination. A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration, in 31 Journal of Common Market Studies, 1993, p. 417, at 433 *et seq.*, and A. Grilli, Le origini del diritto dell'Unione europea, Il Mulino 2009, at pp. 63 *et seq.*

³⁸ M. Avbelj, The Pitfalls of (Comparative) Constitutionalism for European Integration, Eric Stein Working Paper 1/2008, available at the website: <http://ssrn.com/abstract=1334216> (accessed 26 August 2015).

³⁹ In the words of M. Avbelj, Questioning EU Constitutionalisms, in 9/1 German Law Journal, 2008, p. 1, at 1.

⁴⁰ J.H.H. Weiler, J. Trachtman, European Constitutionalism and Its Discontents, in 17 Northwestern Journal of International Law & Business, 1997, p. 354, at 361-362.

⁴¹ See C. Lyons, Flexibility and the European Court of Justice, in G. de Búrca, J. Scott (eds.), Constitutional Change in the EU, Hart Publishing 2000, p. 95, at 108.

⁴² J.H.H. Weiler, J. Trachtman, European Constitutionalism and Its Discontents, *op. cit.*, at 363.

⁴³ We refer to the studies of intergovernmentalist inspiration, such as those of S. Hoffman, The European Sisyphus. Essays on Europe, 1964-1994, Boulder: Westview Press 1995; A. Moravcsik, The Choice for Europe: Social Purpose and State Power from Messina to Maastricht, Cornell University Press 1998; P.L. Lindseth, Power and Legitimacy: Reconciling Europe and the Nation-State, Oxford University Press 2010.

⁴⁴ J.H.H. Weiler, J. Trachtman, European Constitutionalism and Its Discontents, *op. cit.*, at 373.

only went on arguing about the possibility of spill-over effects of the integration project from the economic sector to others (the typical foundational discourse)⁴⁵ but started to translate the classic (traditionally *national*) - concerns of federalism's regulatory state, power aggregation and the distributive choices in modern society at the supranational level (not taking constitutionalism as «the object of inquiry but its condition»⁴⁶).

Moreover, «a second and more direct engagement of political science with constitutionalism»⁴⁷ arose by directly taking constitutionalism and dynamics as an object in and of itself worthy of analysis. Through this avenue, the European Court, its doctrines and its interactions with other actors - Community institutions, national courts, the bar, and so on - became a central concern to political science with extraordinarily important results. Of course, it was quite automatic to bring the conceptual and methodological insights developed in judicial studies in national contexts to this inquiry in addition to all of the discipline's conceptual and theoretical tools to analyse the Court of Justice as a "normal" institutional and political actor. From this approach, an acute sensibility emerged of how the Court had managed to empower both itself and the other supranational institutions through its case law but also a hitherto unknown wave of criticism for its supposed departure «from acceptable (normative) and accepted (empirical) interpretative standards».⁴⁸ These critical remarks can be depicted nowadays as a new orthodoxy;⁴⁹ but at the time (and by using social science heuristics) stating that the Court could "get it wrong" or making it meaningful to ask whether the Court's rulings were accepted rather than acceptable, or treating the Court as a political actor and openly introducing the question of judicial politics, or bringing relevance to whom the actual judges were (rather than treatment as a disembodied institutional voice), or highlighting in print the existence of a critical discourse among academics who were not, however, ready to go to print, actually broke «a whole series of taboos».⁵⁰

The new critical wave could also be read, in Kuhn's epistemological terms,⁵¹ as an under-stress test for the constitutional paradigm (as happened with the internationalist paradigm), famously described by Martin Shapiro as the picture of «..the Community as a juristic idea; the written constitution as a sacred text; the professional commentary as a legal truth; the case law as

⁴⁵ And the substance of the debate among the so called neofunctionalist and intergovernmentalist schools of thought: see in this respect, the classic E.B. Haas, *The Uniting of Europe: Political, Social, and Economic Forces, 1950-1957*, Stanford University Press 1958, and S. Hoffman, *The European Sisyphus. Essays on Europe, 1964-1994*, *op.cit.*; A. Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*, *op.cit.*.

⁴⁶ J.H.H. Weiler, J. Trachtman, *European Constitutionalism and Its Discontents*, *op. cit.*, at 365.

⁴⁷ *Ivi.*

⁴⁸ J.H.H. Weiler, J. Trachtman, *European Constitutionalism and Its Discontents*, *op. cit.*, at 366.

⁴⁹ J.H.H. Weiler, Hjalte Rasmussen - *Nemo propheta in patria sua*, in H. Koch, K. Hagel-Sørensen, U. Haltern, J.H.H. Weiler (eds.), *Europe. The New Legal Realism - Essays in Honour of Hjalte Rasmussen*, Djøf Forlag 2010, p. xiii.

⁵⁰ J.H.H. Weiler, J. Trachtman, *European Constitutionalism and Its Discontents*, *op. cit.*, at 366.

⁵¹ T. Kuhn, *The Structure of the Scientific Revolutions*, University of Chicago Press 1962.

the inevitable working out of correct implications of the constitutional text; and the constitutional court as a disembodied voice of right reason and constitutional theology». ⁵² From that turning point, critical studies flourished in the EU's legal studies landscape. A new wave of "reconsideration" «begun by the mid-1990s»⁵³ was championed by legal scholars, «prompted partly by the design of the Maastricht Treaty, which kept the ECJ out of two of the three pillars, and by the famous Maastricht judgment of the German Constitutional Court»,⁵⁴ and led in particular to the new refined pluralist theories.⁵⁵

However, important critical studies not only flourished on the core assumptions, but also by questioning the affirmed empirical conclusions of the new paradigm. For instance, questioning the notion that national judiciaries and member states had accepted the new European rule of law by documenting the extent to which they «contained justice»,⁵⁶ or emphasizing the deeper and more legitimate legal roots of European integration that rest on simple administrative delegation from national institutions,⁵⁷ or with a «new Bourdieu-based sociological» approach⁵⁸ exploring how and to what extent European constitutionalism - including the academic variant - merely constituted an attempt of self-empowerment of jurists and was in fact no more than an ordinary process of *juridification*.⁵⁹

Last among these new avenues of research - while the full explanatory power of the constitutionalist school is still questioned by some renowned scholars in the field⁶⁰ - is one of the most interesting critical approaches to EU legal studies that has just emerged in the last few years. It promises new inspiration and new perspectives of research for the present work as well. In fact, the «new historical analyses of the roots and nature of European public law»⁶¹ are admittedly part of the most recent wave of critical studies.⁶² Also, as (natural) «latecomers to the field»⁶³ and undoubtedly

⁵² M. Shapiro, Comparative Law and Comparative Politics, in 53 Southern California Law Review, 1980, p. 537, at 538.

⁵³ M. Rasmussen, Rewriting the History of European Public Law: The New Contribution of Historians, in 28/5 American University International Law Review, 2013, p. 1187, at 1195.

⁵⁴ *Ibidem*, at 1195.

⁵⁵ *Ibidem*, at 1196.

⁵⁶ L. Conant, Justice Contained: Law and Politics in the European Union, Cornell University Press 2002.

⁵⁷ P.L. Lindseth, Power and Legitimacy: Reconciling Europe and the Nation-State, *op. cit.*.

⁵⁸ M. Rasmussen, Rewriting the History of European Public Law: The New Contribution of Historians, *op. cit.*, at 1196.

⁵⁹ A. Vauchez, The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda), in 2 International Political Sociology, 2008, p. 128; A. Vauchez, B. de Witte (eds.), Lawyering Europe. European Law as a Transnational Social Field, Hart 2013.

⁶⁰ B. De Witte, The European Union as an International Legal Experiment, *op. cit.*.

⁶¹ In the words of M. Rasmussen, Rewriting the History of European Public Law: The New Contribution of Historians, *op. cit.*.

⁶² *Ibidem*, at 1197.

⁶³ *Ivi*.

inspired by theoretical elements in precedent explanations, historians came into play in EU studies with the explicit plan to reflect, through new documentary and oral evidence and a different methodology, on the «constructing and deconstructing» of «'Constitutional' European Law». ⁶⁴

The basic assumption of this “movement” is that «'Constitutional' European law did not flow naturally from the Treaties of Rome». Instead, it was somehow “artificially” (if not ideologically) constructed and chosen over other plausible alternatives. The idea is to use historiographical heuristics not only in the Braudel's *longue durée* tradition of small stories that need to be told to understand a large-scale phenomenon such as European integration but also to generally bring the analysis into such artificial construction and «into the machine room of law», ⁶⁵ to better understand the process through which Europe has been «lawyered». ⁶⁶ In this sense, this emerging trend aims at responding to the classic constitutionalist narrative that - although finely detailed by one of its main proponents in a comparative perspective with the political dimension of the integration process⁶⁷ – is still widely promoted as the story of a key actor: the European Court of Justice. Through its case law, it built a constitutionalized, proto-federal legal order for the continent by successfully managing to persuade national courts to act as European courts⁶⁸. As a result, by the early 1990s, a genuine federalized rule of law existed in the new European Union. In addition to the majority of the aforementioned social science approaches, the “new historians” are first of all offering empirical details for a revisionist interpretation of the nature of the constitutional practice, at least to explain once and for all how this was caused by a combination of historical factors, including the agency of the Legal Service of the Commission, a transnational alliance involving European institutions, and a transnational network of pro-European jurists, academics, national administrations, courts, and legal elites in general (some original resistance notwithstanding).

Enlarging the scope of European constitutional narrative in its institutional terms is likely to be causing the “new historians” to also provide new inspiration and new material to put the European Court of Justice and the European judicial architecture under the spotlight. This happens not only by repeatedly stressing the role of promotion in the so called constitutionalization of the Treaties⁶⁹ but also by reflecting again, as in the first political science wave, on

⁶⁴ M. Rasmussen, Constructing and Deconstructing ‘Constitutional’ European Law: Some Reflections on How to Study the History of European Law, in H. Koch, K. Hageł-Sørensen, U. Haltern, J.H.H. Weiler (eds.), Europe. The New Legal Realism - Essays in Honour of Hjalte Rasmussen, *op. cit.*, p. 639.

⁶⁵ *Ibidem*, at 649.

⁶⁶ In the words of A. Vauchez, B. de Witte (eds.), *Lawyering Europe. European Law as a Transnational Social Field*, *op. cit.*.

⁶⁷ J.H.H. Weiler, *The Transformation of Europe*, *op. cit.*, at 2403.

⁶⁸ See the profound analysis of M. Claes, *The National Courts' Mandate in the European Constitution*, Hart Publishing 2006.

⁶⁹ The «making of a transnational constitution» depicted by E. Stein, *Lawyers, judges, and the making of a*

structural/organizational questions about the Court including its nature and preferences, the independence of its judges coming from the Member States, or the relationship between the Court and its national counterparts.⁷⁰ This can be done by producing new, reliable, and qualitatively rich information about the internal workings of the Court and its interaction with its various interlocutors and by offering at least tentative tests allowing us to adjudicate among competing hypotheses, and propose new hypotheses, inductively informed by the Court's historical practice. All this renewed interest poses again, in diachronic/evolutionary terms, important questions about the legitimacy and the authority of the Court of Justice in relation to its capacity of development and its interactions.⁷¹

This is the first contextual scenario within which I wish to situate my research.

II.3 Discovery (or Re-Discovery) of Debates on the Legitimacy and Authority of International Judicial Review Bodies

The idea of a renewed focus on the everlasting problem of the legitimacy and the authority of the Court of Justice can be also contextualized under the temporal aspect. The European Court can be depicted, after all, as the standard bearer of the global phenomenon of empowerment of international judicial institutions - a phenomenon that is nowadays at the centre of many debates and has been considered as «*one of the dominant features of the international legal order of the past two decades*».⁷²

As it is well known, a common, insightful narrative of the internationalist doctrine in this respect has been to describe an incipient «*fragmentation*» of the international legal order in a archipelago of different legal norms and regimes, often with their own institutional entourages and often, with their own dedicated tribunals.⁷³ However, in view of the increasing importance of such

transnational constitution, *op. cit.*.

⁷⁰ These are the examples made by P. Pollack, *The New EU Legal History: What's New, What's Missing?*, in 28 *American University International Law Review*, 2013, p. 1257.

⁷¹ See, recently, M. Adams, H. de Waele, J. Meeusen, G. Straetmans (eds.), *Judging Europe's Judges: the Legitimacy of the Case Law of the European Court of Justice*, *op. cit.*; M. Dawson, B. de Witte, E. Muir (eds.), *Judicial Activism at the European Court of Justice*, *op. cit.*.

⁷² A. von Bogdandy, I. Venzke, *Beyond Dispute: International Judicial Institutions as Lawmakers*, in 12 *German Law Journal*, 2011, p. 979.

⁷³ In the terms notoriously described by G. Hafner, *Risks Ensuing from Fragmentation of International Law*, in *Official Records of the General Assembly, 55th Session, Supplement No. 10 (A/55/10)*, annex, the Report of the Study Group on Fragmentation of International Law', doc. A/CN.4/L.644, based on the outline prepared by the Chairman of the Study Group, M. Koskenniemi, on *The Function and Scope of the lex specialis Rule and the Question of Self-contained Regimes*', available at the website www.un.org/law/ilc/sessions/55/fragmentation_outline.pdf (accessed 26 August 2015) and the Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law; ON Doc. A/CN.4/L.663/Rev. 1; and by M.

international bodies and international judicial bodies in particular «as lawmakers»,⁷⁴ and beyond a simple prototypical «role of settling disputes»,⁷⁵ a broad debate has been recently raised about their sources and forms of *legitimacy* and *authority*. The discussion on the legitimacy of adjudicatory bodies is far from being new or original. On the contrary, the debates on the courts' role, especially in constitutional legal orders, related process of adjudication and democratic grounds, and the proper balance of power between the judiciary and the political process, have filled libraries for centuries with an overwhelming body of literature on almost every imaginable aspect of the so-called domain of 'judicial policymaking'. Often, these debates focus on concepts which are difficult to grasp or substantiate, such as the "legitimacy" of judicial bodies - recently defined as «one of the most unspecified concepts in political theory and social science»⁷⁶ - or are shaped in very broad, quasi-sociological terms so that it becomes easy to label them far from the real and everyday practice of these institutions. After all, legitimacy crisis are built by taking the typically-proposed sociological approach seriously - a rare if not extraordinary phenomena for today's institutions.

However, the legitimacy argument is still present in the academic discussion on courts and the transposition of these sensitivities at the supranational/international level brings something new and interesting to the debate. First, the canonical lamentation based on the static notion of the "counter-majoritarian difficulty"⁷⁷ is difficult to apply, or at least is not applied automatically beyond the state, since the canonical concepts of the *trias politica* and the division of powers à la Montesquieu (which are the logic bases for such a critical argument) are not applicable either. As it is known, at the supranational/international level, the concept of "institutional balance"⁷⁸ is often preferred as an explanatory tool for the arising institutional frictions and this is particularly true within the context of the European Union. Consequently, the problem of finding a sort of indirect democratic legitimation for the practice of judicial review becomes even more difficult and therefore intriguing. When transferred through its genealogical mythology by a Constitution to its special enforcer (be it a specialized Constitutional Court or an apex Supreme Court), the super-legitimacy is blurred in the realm of international agreements and the similar canonical justification of the ever-present possibility of the political powers to overturn the judicial *dicta* becomes weakened by the different

Koskenniemi, P. Leino, Fragmentation of International Law. Postmodern Anxieties?, in 15 Leiden Journal of International Law, 2002, p. 553.

⁷⁴ A. von Bogdandy, I. Venzke, Beyond Dispute: International Judicial Institutions as Lawmakers, *op cit.*, at 979 and 983.

⁷⁵ *Ibidem*, at 979.

⁷⁶ J.H.H. Weiler, Epilogue: Judging the Judges - Apology and Critique, in M. Adams, H. de Waele, J. Meeusen, G. Straetmans (eds.), Judging Europe's Judges. The Legitimacy of the Case Law of the European Court of Justice, *op. cit.*, at 235.

⁷⁷ Coined, as well known, by A.M. Bickel, The Least Dangerous Branch. The Supreme Court at the Bar of Politics, Yale University Press 1986.

⁷⁸ J.P. Jacqué, The Principle of Institutional Balance, in 41 Common Market Law Review, 2004, p. 383.

decision-making circuits in place.

This also leads to recalibration within the debate and recently leads to strong and persuasive proposals for the substitution of the confused discussions around the concept of *legitimacy* with a more circumstantiated approach based on the concepts of *authority* and *authoritativeness* of (international) judicial bodies. A recent symposium was particularly devoted to the problem of “International Courts and the Quest for Legitimacy”⁷⁹ and focused on how much the «change in quantity» of the activity and importance of international courts and tribunals «has come with a change in quality»,⁸⁰ in addition to the enlargement of significant functions of these bodies beyond the mere «settlement of disputes».⁸¹ This includes, to repeat the original terms employed, the stabilization of normative expectations, the direct production of law, the control as well as the legitimization of the powers exercised by other actors. In this sense, the proposal of the concepts of *authority* and *authoritativeness* as better heuristic devices for the study of the institutional position of contemporary apical judicial bodies — meaning it also goes beyond certain political science approaches which focus simply on the rationality and the opportunity of the delegation of powers within the international realm. Therefore, it studies the creation of international judicial review institutions simply by applying the classic *principal-agent* scheme.

It is true that there are numerous plausible reasons why actors, and especially international actors, create institutions that confer authority and submit to such authority being exercised over them.⁸² As it has been well explained by now affirmed *law and politics* scholars,⁸³ incentives for such a delegation, and even for a toleration of a certain degree of unpredictability or leeway, come with the expectation of certain instrumental gains - particularly «when an agent is expected to undertake specific and possibly repetitive tasks more efficiently or effectively».⁸⁴ But in view of the clear dynamics of empowerment of these institutions, and by considering this as an established phenomenon of the last decades (and primarily with the European Court of Justice), the proposal has been to assess the authority by going beyond the simple, static act of delegation of power and its more or less opportunistic rationality and by trying to consider its establishment in diachronic

⁷⁹ International Courts and the Quest for Legitimacy, Hebrew University of Jerusalem/Tel Aviv University Faculty of Law, Jerusalem-Tel Aviv, 3-4 June 2012, now published in *Theoretical Inquiries in Law*, Volume 14, Issue 2, July 2013.

⁸⁰ I. Venzke, *Understanding the Authority of International Courts and Tribunals: On Delegation and Discursive Construction*, in 14(2) *Theoretical Inquiries in Law*, 2013, p. 382.

⁸¹ *Ivi.*

⁸² *Ibidem*, at 388-389.

⁸³ A.T. Guzman, *International Tribunals: A Rational Choice Analysis*, in 157 *University of Pennsylvania Law Review*, 2008, p. 171; L. H. Helfer, A.M. Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, in 93 *California Law Review*, 2005, p. 899.

⁸⁴ I. Venzke, *Understanding the Authority of International Courts and Tribunals: On Delegation and Discursive Construction*, *op. cit.*, at 382.

terms.

In fact, the idea of *authority* should be defined by following the historical account by Hannah Arendt⁸⁵ «in *contradistinction* to coercion by force and persuasion through arguments», and therefore, in analysing a judicial institution, «in *contradistinction*» to both the simple, obvious legal obligation to justify decisions as well as the only consequent execution moment of these decisions. These two moments - posing a justified decision and then executing it - are natural phenomena where the general authority of a legal order is the ability to posit and have certain decisions respected more than measuring a specific judge's authority. Judicial bodies' special *authority* rests in something different or something further, precisely because it is defined as being based «on a moment of voluntary recognition that separates it from coercion» (a fact for every example of international judicial review). It is also different from persuasion «in the sense that it can prompt conforming behavior even in the absence of substantive agreement»⁸⁶ (the challenge these institutions are forced to face). It has been said that such a notion of authority involves in itself both the vertical element of hierarchy and the horizontal element of voluntary adhesion - building a particular relationship of cognition and recognition between legal subjects.⁸⁷

In this vein, international judicial bodies' authority «grows and is stabilized through the dynamics of discursive construction».⁸⁸ These dynamics surely include the (more or less) rational, «foundational» moment of the delegation of powers but also include a phase of construction, adding a minimal degree «of wanting to obey»⁸⁹ (voluntary recognition) the initial rational calculation.⁹⁰ It also includes a series of «discursive resources» that international courts «can themselves use to further add to their authority».⁹¹ Such a phase of construction concerns what specially distinguishes and sustains authority and therefore «not individual recognition in the specific case of its exercise but its social recognition - social belief in its legitimacy»,⁹² often framed in terms of «culturally and historically conditioned», and stratified, «expectations».⁹³ In contrast to power, authority is said to be «traditional» in character.⁹⁴ It has its roots in the past which it continues to use in order to boost

⁸⁵ H. Arendt, What is Authority?, in Ead., *Between Past and Future: Six Exercises in Political Thought*, Meridian 1963.

⁸⁶ I. Venzke, *Understanding the Authority of International Courts and Tribunals: On Delegation and Discursive Construction*, *op. cit.*, at 383.

⁸⁷ L. Azoulay, *Les fondements de l'autorité de l'Union*, in L. Azoulay, L. Burgorgue-Larsen (eds.) *L'autorité de l'Union européenne*, Burylant 2006, p 5.

⁸⁸ I. Venzke, *Understanding the Authority of International Courts and Tribunals: On Delegation and Discursive Construction*, *op. cit.*, at 383.

⁸⁹ *Ibidem*, at 386.

⁹⁰ In the words of M. Weber, *Economy and Society: An Outline of Interpretive Sociology*, University of California Press 1978.

⁹¹ I. Venzke, *Understanding the Authority of International Courts and Tribunals: On Delegation and Discursive Construction*, *op. cit.*, at 384.

⁹² *Ibidem*, at 397.

⁹³ B. Lincoln, *Authority: Construction and Corrosion*, University of Chicago Press 1994.

⁹⁴ I. Venzke, *Understanding the Authority of International Courts and Tribunals: On Delegation and Discursive*

its claims in the present. It makes reference to past practice but «independently of their content, within bounds»,⁹⁵ but is also «like law, eternally in the state of becoming».⁹⁶ Some scholars conceptualize these questions by describing the existence of «different layers of authority»,⁹⁷ and suggest that a first layer concerns whether an institution is considered functionally necessary in order to achieve common goods and the competence of such an institution to take certain measures. However, a second layer concerns the rightful and socially accepted exercise of such authority.

In this light, we will try to assess a specific aspect of the “social expectations” that the European Court of Justice has been forced and able to confront in its diachronic evolution; and we will assess how and to what extent it was able to shape and feed its authority by using «institutional and discursive resources to induce deference» on all the actors of its special, so called “supranational” environment, in particular by the internalization of national models and comparative challenges. Therefore, we will try to reflect on how the evolution in the structure and the organization of the Court fed its authoritative position in the EU legal space, and therefore on how such evolution is part of its authority's development. As we will see, in doing so we will list and analyse several of the «institutional and discursive resources» scholars described as at the disposal of international courts, and therefore, in particular, «traits» of its human capital, judges, «features of the judicial process», and some specific aspects of «the appeal of the outcome».⁹⁸

Before doing this, we will also go into the last inspiring *situation* of this research: the special, pluralist *supranational* context within which the Court of Justice of the EU operates, and that any meaningful EU legal studies research needs to take into account.

II.4 Discovery (or Re-Discovery) of Debates on the Cultural Diversity in the Supranational Project, and its Role Within the Legal Context

In studying the institutional evolution of the European Court of Justice, we will analyse how influences from other experiences created a decisive impact on the construction of a *sui generis* supranational institution. In particular, we will focus on the challenges and the influences coming

Construction, *op. cit.*, at 399.

⁹⁵ *Ibidem*, at 398.

⁹⁶ *Ibidem*, at 409, with reference to R. von Jhering, *The Struggle for Law*, 2nd edn, Callaghan 1915, p. 13.

⁹⁷ M. Zürn, M. Binder, M. Ecker-Ehrhardt, *International Authority and its Politicization*, in 4 *International Theory* 2012, p. 69, at 83.

⁹⁸ I. Venzke, *Understanding the Authority of International Courts and Tribunals: On Delegation and Discursive Construction*, *op. cit.*, at 404.

from the EU Member States legal orders. In doing so, we will follow a certain trend of the last season of EU scholarship aimed at a discovery (or re-discovery) of debates on the cultural legal diversity in the supranational project and how the inherent diversity from which they stem influences the construction of common supranational institutions.

Like all debates of the kind, this is usually shaped around the phrase *unitas in diversitate*. As it is well known, this was the «fortunate» motto of the «otherwise unfortunate Draft Constitutional Treaty»,⁹⁹ equally notorious for not being replicated in the Lisbon Treaty. This can be said to articulate something very peculiar and foundational about the EU and its aims and principles. In a nutshell, it points to the necessary equilibrium between the competing forces of legal unity and legal diversity within the European Union legal order and at the Union's declared intention to «respect», also in legal terms, «the national and regional diversity [of the Member States] and at the same time bring the common cultural heritage to the fore».¹⁰⁰ The emergence of these cultural concerns, usually developed precisely around the trinomial *unitas – diversity – identity*, is not new. Such an approach, which departs from and complements the prototypical functional understandings of the EU, has been the subject of intellectual debates ever since the early 1950s.¹⁰¹ After all, the traditional puzzle remains between the nature of the European Union as «the most extensive and developed example of supranational political integration based on voluntary cooperation in the world»,¹⁰² fraught with essentially universalistic fundamental values basic to the whole project of integration and the historical differentiation in Europe among political entities with different histories and traditions in which «(t)he territorial nation state has been the predominant political framework and actor with considerable overlap between territorial, political, legal, administrative, economic, social and cultural boundaries».¹⁰³ Therefore, we are talking about a well-stratified debate, coessential to a political-legal definition of Europe and its projection in both the past and the future.¹⁰⁴

But since it is becoming more and more common to state, in academic conversations, that «(t)oday, we find ourselves in a legal, psychological, and discursive universe different from the one 15 years ago»,¹⁰⁵ in another renewed phase of the European integration and of the European

⁹⁹ C. Joerges, Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form, LEQS Paper No. 28/2010, at p. 1.

¹⁰⁰ Treaty on the Functioning of the European Union, Title XIII, Article 167(1), previously in Treaty the European Union, Title XII, Article 151(1).

¹⁰¹ See F. Cerutti, Towards the Political Identity of the Europeans. An Introduction, in F. Cerutti, E. Rudolph (eds.), *A Soul for Europe*. Vol. 1: A Reader, Peeters 2001, p. 1.

¹⁰² J. Olsen, Unity and Diversity - European Style, ARENA Working Paper No. 24/2005, at p. 14.

¹⁰³ *Ivi*.

¹⁰⁴ In these terms P.G. Monateri, Il problema di una definizione di Europa: una questione di teologia politica?, in *1 Rivista critica del diritto privato*, 2005, p. 3.

¹⁰⁵ U. Haltern, On Finality, in A. von Bogdandy, J. Bast (eds.), *Principles of European Constitutional Law*, Hart Publishing 2010, p. 209.

discourse (and the emergence of the multifaceted Eurocrisis cannot but confirm such change), the debate on *unitas* and *diversitas* surely denotes: in its actualized terms *inter alia*, a new or renewed scholarly approach in the field of EU *legal* studies. In my view, it includes new interest on the overlapping of a European legal culture of possible autonomous nature over different national legal cultures and traditions and the will to research the inspiration drawn by the former from the latter. Is the institutional nature of European institutions *sui generis*, as often stated for the substance of its legal fabric? Is it influenced by the examples of the national legal cultures and by their influences on the activity of EU institutions, and by their interrelations? Was the EU legal space influenced by comparative material only in its substantive traits, or also in its institutional ones? And can the institutional evolution of the European Court of Justice be described in these terms?

This perspective is the application in the EU realm of basic lessons of comparative law methodology, and in particular of one of its masters, H. Patrick Glenn, who in his general works devoted to «legal traditions of the world»,¹⁰⁶ repeatedly insisted on the idea of such traditions as «information», and not mere «action».¹⁰⁷ By this maxim, he wanted to stress the idea of an ever «changing presence of the past» in the legal practice¹⁰⁸ and counteract the bias of considering the recall of legal tradition as the link to actions devoid of thought or mindless habits which should be — and ultimately can be — stripped away by the application of choices based on pure reason. On the opposite, he has always argued that legal traditions are arsenals of information available to individuals, institutions or societies as they make choices for themselves, since in these choices both rationality and context are necessarily comprised. No legal setting can be completely rational (or context-neutral) because without context there would be nothing for rationality to act upon. Conversely, no legal setting can be completely irrational (or completely context-specific) because even the act of preserving and transmitting a tradition involves performing rational operations upon it.¹⁰⁹

The usual ground of application of such cultural sensitivities is substantive law. This is true for the classics of comparative law of the last century, shaped by debating private law and its historical origins, its familiarities as well as its developments.¹¹⁰ This is also true in EU scholarship, where refined works have been devoted to the problem of the so called “Europeanisation” of law(s). This phrase was precisely used and known to label a new narrative in EU legal studies: the idea of

¹⁰⁶ H.P. Glenn, *Legal Traditions of the World*, Oxford University Press 2014.

¹⁰⁷ *Ibidem*, at p. 12 *et seq.* in particular. See also *Id.*, *The Capture, Reconstruction and Marginalization of 'Custom'*, in 45 *American Journal of Comparative Law*, 1997, p. 613.

¹⁰⁸ *Ivi.*

¹⁰⁹ *Ibidem*, at p. 17 *et seq.*

¹¹⁰ See in this sense the recent reconstructive reflections in A. Riles (ed.), *Rethinking the Masters of Comparative Law*, Hart Publishing 2001, and P.G. Monateri, *Geopolitica del diritto: genesi, governo e dissoluzione dei corpi politici*, *op cit.*.

looking at the legal phenomenon in the supranational setting as an instrumental unitary *agent* of integration as well as a diverse object of the integrative process.

Obviously, the foundational study that championed the first approach, and notoriously glorified the legal lever as a genuine “engine” for the construction of a “Community of law”, was the *Integration Through Law* project.¹¹¹ In this fundamental work, law was portrayed as an *agent* and therefore as a relatively independent (though artificially constructed) variable that influences other key dimensions of the integration process. In turn this influences the legal orders of the Member States.¹¹² Legal integration denoted in this sense is equivalent to integration *through* law because «even if law is not the main catalyst of change in the integration process, many changes are greatly conditioned by legal and institutional elements» in the EU sphere¹¹³. The *unitas* aspect was also clearly put into action as the cause and the effect of a genuine political model which linked law and politics with judicial adjudication and integration¹¹⁴. This amounted to a genuine «science of government» of EU polity, cross-sector knowledge capable of «both of seizing the 'system' (a 'legal order') of the institutions, positions and groups that make up “Europe”, and of evaluating its functioning with regard to a specifically legal rationality»,¹¹⁵ with tangible effects on ample areas of national substantive law.

On the contrary, new studies on the Europeanisation of law wanted to create «a new narrative»¹¹⁶ by focusing on the dimension of law as an *object* of European integration. In this sense, Law is studied not as an independent variable, but as a dependent one, constituting a relatively autonomous field of integration and cultural explication alongside politics, economics, etc.¹¹⁷ Here, legal integration is particularly studied as the integration *of* laws, that is, the reciprocal adaptation of state legal systems in (relation to) a European legal system that aims at the gradual removal of differential treatment. The privileged perspective is the binary, osmotic process through which the law produced by the European Union and its “autonomous” legal order (agent) has an impact on and changes the law(s) of national legal orders (objects) and is in turn changed by this process of interpretation, application and implementation. Furthermore, the *diversitas* element of

¹¹¹ M. Cappelletti, M. Seccombe, J.H.H. Weiler (eds.), *Integration Through Law. Europe and the American Federal Experience*, vol. 1. Methods, Tools and Institutions, De Gruyter 1986.

¹¹² D. Augenstein, *Identifying the European Union: Legal Integration and European Communities*, in Id. (ed.), *Integration through Law Revisited. The Making of the European Polity*, Ashgate 2012, p. 161.

¹¹³ R. Dehousse, J.H.H. Weiler, *The Legal Dimension*, in *Eid.* (eds.) *The Dynamics of European Integration*, Pinter Publishers 1990, p. 242, at 246.

¹¹⁴ A. Vauchez, *The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)*, *op cit.*, at 134.

¹¹⁵ *Ivi.*

¹¹⁶ See J. Hendry, *The Double Fragmentation of Law: Legal System-Internal Differentiation and the Process of Europeanization*, in D. Augenstein (ed.), *Integration through Law Revisited. The Making of the European Polity*, *op. cit.*, p. 233, in particular at 236 *et seq.*

¹¹⁷ D. Augenstein, *Identifying the European Union: Legal Integration and European Communities*, *op. cit.*, at 161.

our conundrum is put under the spotlight. The different national legal systems of the EU Member States are the *objects* to be integrated, so to be moved closer or harmonised. This idea and *project* necessarily implicates the diversity of legal cultures that these different systems represent. In turn, they also have an effect and an influence on the *agent* in a process that is no longer unidirectional, but mutual.

The concept of *Europeanization* is, in a certain sense, the recognition of the importance of the underlying structures and identities of the Member States for the real success of the project of integration.¹¹⁸ As it has been cleverly highlighted with its «post-ontological character, being concerned with what happens once EU institutions is already in place and produces their effects».¹¹⁹ This includes the complexity of our contemporary understanding of the problems of the European project by bringing «even more to the debate than classical theories of integration do on their own».¹²⁰ Intergovernmentalism¹²¹ and neo-functionalism¹²² simply focus upon «both formal and functional relationship at the EU level» and adopt a «'top-down' approach»,¹²³ Europeanization, considered a layer of «(P)rocesses of (a) construction (b) diffusion and (c) institutionalisation of formal and informal rules, procedures, policy paradigms, styles, 'ways of doing things' and shared beliefs and norms which are first defined and consolidated in the making of EU decisions and then incorporated in the logic of domestic discourse, identities, political structures and public policies».¹²⁴ This brings the national and domestic level into the mix,¹²⁵ and «seeks to problematize the interaction between the levels in a more reflexive, circular way».¹²⁶

Looking not only at substantive law, but also at the institutional dimension as well as an EU institution like the Court of Justice through this prism is particularly interesting since it reminds us that the strong institutionalization of the European communities as an international law experiment¹²⁷ did not occur in a vacuum. Quite the opposite, it occurred by overlapping with pre-existing legal forms in a continent with the oldest legal traditions. In this institutional sense, the

¹¹⁸ See J. Hendry, *Unitas in Diversitate: on Legal Cultures and the Europeanisation of Law*, PhD Thesis (European University Institute 2009), at pp. 40-41.

¹¹⁹ Belonging the concept of integration «to the ontological stage of research»: see on all this C. Radaelli, *Whither Europeanization? Concept Stretching and Substantive Change*, *European Integration online Papers (EIoP)*, 2000, at p. 6.

¹²⁰ *Ivi.*

¹²¹ A. Moravcsik, *Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach*, in 31 *Journal of Common Market Studies*, 1993, p. 473.

¹²² E.B. Haas, *The Uniting of Europe: Political, Social, and Economic Forces, 1950-1957*, *op. cit.*.

¹²³ See J. Hendry, *Unitas in Diversitate: on Legal Cultures and the Europeanisation of Law*, *op. cit.*, at 40-41.

¹²⁴ C. Radaelli, *Whither Europeanization? Concept Stretching and Substantive Change*, *op. cit.*, at 4.

¹²⁵ S.S. Andersen, *The Mosaic of Europeanization. An Organizational Perspective on National Recontextualization*, ARENA Working Papers No. 04/11, in particular at p. 7 *et seq.*

¹²⁶ See J. Hendry, *Unitas in Diversitate: on Legal Cultures and the Europeanisation of Law*, *op. cit.*, at 41.

¹²⁷ As recently famously defined by B. De Witte, *The European Union as an International Legal Experiment*, *op. cit.*.

Integration through law approach looked at the important efforts of uniformity and the potential of construction of a single “political imagination”¹²⁸ through the construction of a «symbolic arsenal of cultural mythology»,¹²⁹ which was not confined in the immediate visible signs and «cultural artefacts» such as «flag, anthem, Europe day, motto and Jean Monnet prizes» but also “embodied” in documents such as «the EU Charter of Fundamental Rights, the Constitutional Treaty and, above all, the jurisprudence of the European Court of Justice»,¹³⁰ and in general in the various cross-sectoral sources of law produced by the European Union and its institutions. But the experience of institutionalization, and search for common European institutional forms was also in itself an experiment of legal *unitas in diversitate*, constantly under stress with the changes and the developments of the European Union in size and in power. The following pages will attempt to analyse this phenomenon.

II.5 A Few Words on the Method and the Basic Idea: *Mimetism* as a link between cultural studies and functionalism in supranational law

In summary, I argue that the current, parallel, insightful debates on the new historical studies on the European Union, the establishment of its legal order and the perspectives linked to a renewed appreciation of the European federal-like nature of *unitas in diversitate* especially applied to the different legal cultures, as well as the broad ongoing discussion on the authority and the legitimacy of international judicial review bodies, all suggest a study like the one I propose. Therefore, it is timely to take a fresh look at the *institutional* evolution of the Court of Justice of the European Union, in terms of its structure and organization, precisely in the light of the new historical material and with attention to the influences from the judicial forms of the Member States as well as their legal cultures and from the comparative conversation of the legitimacy and authority of international judicial review.

Again, my thesis is that through this type of reconstruction, it is possible to highlight a peculiar aspect of how the story of the Court of Justice, in itself an evolutionary story,¹³¹ evolved in a *mimetic* way. The judicial apparatus of the European Union faced the same challenges in terms of legitimacy, functionality, enlargement, resources as the EU as an international organization evolving

¹²⁸ U. Haltern, On Finality, *op cit.*, at 209.

¹²⁹ *Ivi.*

¹³⁰ *Ivi.*

¹³¹ See F.G. Jacobs, The Evolution of the European Legal Order, in 41 *Common Market Law Review*, 2004, p. 303, and *Id.*, The European Court of Justice: Some Thoughts on its Past and its Future, in 2 *The European Advocate*, 1994-1995, p. 2.

and transforming into something more (and maybe something other). We will examine them closely in the following chapters. But what we aim to demonstrate is that one of the “efficient secrets”¹³² of this evolution’s success - since it has become commonplace to talk of the ECJ as a «*victim of its own success*»¹³³ - has been the capacity to progressively internalize the solicitations which came from the influences of the different legal traditions of the Member States of the EU (of course with increasing strain as the EU grew dimensionally) and also able to respond to global challenges in relation to the increasing role of the international forms of judicial review and of the international judicial review bodies.

In my view, this can only be verified through a comparative research, for a variety of reasons. The first reason stipulates that if the *situation* of the research I tried to perform in the previous pages is correct, all the relevant scholarly trends are involved in comparative analysis. The internationalist/constitutionalist diatribe is by definition comparative and in search of a *tertium comparationis* for the European Union. Therefore, the results of the diatribe diverge precisely in finding a sort of «*sui generis*», relatively incomparable nature of the EU, or on the opposite by positioning it, in several respects, in the widening disciplinary field of comparative constitutional law.¹³⁴ In this sense, the *Integration through Law* research project - the first organic study of law as an agent and object of European integration that we analysed previously - focused now more than 25 years ago on the triggered gradual process of *convergence* in the European Member States that was supposed to lie at the heart of an emerging European identity. It also investigated «those legal doctrines, institutions, mechanism and procedures, which could shed light on this dual aspect of the law»,¹³⁵ in a way that was considered instrumental to achieving «a degree of convergence in at least some aspects of human behaviour basic to social life» as «sine qua non for productive and peaceful coexistence of peoples, indeed, for their very survival».¹³⁶ Therefore, it first aimed to demonstrate the functioning and the ultimate attended results of this mutual conditioning of legal structure and political process in which «while law is a product of the polity, the polity is also to some extent the creature of the law».¹³⁷ This led to a powerful use of comparative law science, and in particular

¹³² To echo the historical phrase of W. Bagehot, *The English Constitution*, Oxford University Press 1867, reprinted 2001, at pp. 44 ad 48.

¹³³ T. Koopmans, *La procédure préjudicielle - victime de son succès?*, in F. Capotorti, C. Ehlermann (eds.), *Du droit international au droit de l'intégration - Liber amicorum Pierre Pescatore*, Nomos Verlagsgesellschaft 1987, p. 347.

¹³⁴ M. Avbelj, *The Pitfalls of (Comparative) Constitutionalism for European Integration*, *op cit.*

¹³⁵ M. Cappelletti, M. Seccombe, J.H.H. Weiler (eds.), *Integration Through Law. Europe and the American Federal Experience – A General Introduction*, in *Eid.* (eds.), *Integration Through Law. Europe and the American Federal Experience*, vol. 1. *Methods, Tools and Institutions*, *op cit.*, at p. 15.

¹³⁶ M. Cappelletti, *Foreword to the Florence Integration Project Series*, in M. Cappelletti, M. Seccombe, J.H.H. Weiler (eds.), *Integration Through Law. Europe and the American Federal Experience*, vol. 1. *Methods, Tools and Institutions*, *op cit.*, p. III, at VI.

¹³⁷ D. Augenstein, M. Dawson, *Introduction. What Law for What Polity? 'Integration through law' in the European*

external comparisons with the United States of America and other federal-like systems, intended as a deeper understanding of the *functionalist* power of law.¹³⁸ On the other hand, what we called the recalibration of the literature arguing about the weakness of social foundations, cultural support and political steering mechanisms of European Union law (from the agent-status perspective) and the high degree of interpenetration and problems of reception and contextualisation as well as transformation in the distinct legal systems (from the object-status perspective) were only raised in the academic debate later on.¹³⁹ These were sometimes coupled with a critical approach based on historical and sociological research tools¹⁴⁰ — again comparative in nature. It has not been addressed, in classic *functional* terms as in the old Florentine project, to understand what law could do in a context of increasing integration. Instead, the opposite was done by questioning the functional determinist narratives in a classic way — aiming at a comparative *cultural* study to understand what were the inherent limits of a harmonizing project.

This is also the context of the “New Historians” work. In fact, recent historical research has shown that members of the legal establishment, both at the national and supranational levels, drew not only on public international law, i.e., a treaty between sovereign states, but also upon domestic sources of law to inspire their constitutional innovations — providing new precious insights that we will try to contextualize further. But they also go beyond and by contributing to the comparative law tradition in the Watson's sense.¹⁴¹ In seeking to demonstrate that «legal systems are not hermetically sealed and self-contained and that, in addition to formally recognized sources of law, such as constitutions, statutes, and judicial precedent, it is necessary to include foreign law as a major and constant source of legal decisionmaking»,¹⁴² they also show «which legal networks of scholars, lawyers, and judges have shaped the European constitutional practice»;¹⁴³ they trace the upward transfers of domestic rules that shape EU law as a relatively autonomous legal sphere, in which one «can detect the creation of a European legal consciousness, not a coherent doctrinal apparatus detached from society, but rather competing and conflicting approaches to legal concepts, judicial techniques, and social values that through compromises or unintended consequences shape the

Union, in D. Augenstein (ed.), *Integration through Law Revisited. The Making of the European Polity*, *op. cit.*, p. 1, at 1.

¹³⁸ R. Michaels, *The Functional Method of Comparative Law*, in M. Reimann, R. Zimmerman (eds.), *The Oxford Handbook of Comparative Law*, Oxford University Press 2006, p. 339.

¹³⁹ N. Walker, *Legal Theory and the European Union: A 25th Anniversary Essay*, in *25 Oxford Journal of Legal Studies*, 2005, p. 581.

¹⁴⁰ See, as major recent examples, the works by Antoine Vauchez and Morten Rasmussen cited throughout this dissertation.

¹⁴¹ A. Watson, *Legal Transplants: An Approach to Comparative Law*, University Press of Virginia 1974.

¹⁴² F. Bignami, *Rethinking the Legal Foundations of the European Constitutional Order: The Lessons of the New Historical Research*, in *28 American University International Law Review*, 2013, p. 1311, at 1321.

¹⁴³ F. Nicola, *Critical Legal Histories in EU Law*, in *28 American University International Law Review*, 2013, p. 1173, at 1183.

current European constitutional practice».¹⁴⁴ In this light, they provide different case studies of resistance versus acceptance. Interestingly, the new historical research can be considered as a transposition of the classic comparative transplant literature in the relatively novel domain of supranational law: particularly when it tries to shed some light on the causal question with evidence on the incentives and actors that prompted the transfer of elements of domestic law into supranational law. Actually, most of this classic literature has examined the horizontal transfer of rules and models between national legal systems. When it looks into the impact of international law, it has focused on the *downward* transfer of law into national systems as a consequence of international agreements or other forms of international pressure and the extent to which reception has been successful or unsuccessful.¹⁴⁵

Comparative law - historically but strangely nowadays as well - has generally neglected to analyse the *upward* transfer of domestic rules and models into the legal frameworks of regional and international systems of governance. The new historians can be considered, in this respect: as inspirative multidisciplinary innovators. Their research focuses on such upward transplants and seeks to provide evidence, through their specific methodology, of the importance of domestic legal rules in inspiring the institutional framework of the emerging supranational legal system of European governance. As it has been noted with the globalization of law and politics, this new form of transplantation can be expected to become increasingly common and therefore this new trend launched in Europe can be expected to have relevance for tracing the genesis of the numerous systems of international courts and lawmaking that have come afterwards.¹⁴⁶

Consequently, and finally, there is the broad debate on the new forms of international judicial review, in which the inquiry in the normative basis and the functionality of the relevant institutions is always framed in terms of (1) reconstruction of the different actual forms and (2) creation of optimal, prototypical models. The comparative nature of the discussion is inherent to the method itself. It has also been emphasized by the suggestions of leading scholars to export certain general institutional principles applying to the Court of Justice of the European Union (and according to this view, calling for some reforms in its organization) in all the different forms of international judicial review bodies.¹⁴⁷

Therefore, my project will try to merge these different but interrelated inspirations and their

¹⁴⁴ *Ivi.*

¹⁴⁵ F. Bignami, Rethinking the Legal Foundations of the European Constitutional Order: The Lessons of the New Historical Research, *op. cit.*, at 1323.

¹⁴⁶ *Ivi.*

¹⁴⁷ A. von Bogdandy, The European Lesson for International Democracy. The Significance of Articles 9 to 12 EU Treaty for International Organizations, in 23 *European Journal of International Law*, 2012.

different comparative approaches. The analysis will nourish itself of comparative legal history, reflections on the special sort of legal transplants one can trace at the supranational level and a comparative study of the underlying European legal cultures. In this way, it will also shed light on something peculiar about the supranational institutionalization of the EU, precisely what I intend when I talk of *mimetism* as a syneresis of different comparative analysis.

There are, notoriously, two traditional approaches to comparative law: the *functional* and the *culturalist*. We can consider the first as the traditional methodology of comparative study - the «epicentre of comparative method of law»¹⁴⁸ - postulated by masters such as Zweigert and Kötz.¹⁴⁹ It has always aimed at explaining legal instruments and institutions – in classical Durkheimian terms – through their usefulness for society by highlighting their inherent teleology, their importance for social engineering and their capacity to adapt to different contexts in an adaptive way.¹⁵⁰ The second is a general category used by scholars to indicate all those other approaches that aimed at differentiating from the functional method and in doing so, focused on the decisive importance of «context», and not of the *telos*, for the evolution and the comprehension of law as a social phenomenon.¹⁵¹ In this sense, the category is described precisely as composed of comparative legal history, the study of legal transplants and the comparative study of legal cultures as the «three main current approaches other than functionalism», as the approaches that can be more sensitive to the specificities of the different legal environments.¹⁵²

Usually, these two major schools of thought have been kept separate as antithetical - as describing two different points of departure and two different agendas of research. It is nonetheless interesting to notice, as I will attempt to show, that these two perspectives naturally and meaningfully merge together in the evolutionary studies of supranational legal context. In particular, we will see in the following pages how the capacity of the Court of Justice of the EU, as a supranational institution, to evolve by facing several organizational challenges and by solving them through an internalization of internal and external comparative lessons (coming therefore by the examples of its own Member states and from the international debate) amounts to one of the decisive, resolute features of its own story of success. I argue that this occurred in a *mimetic* fashion. The Court evolved into its institutional structure and organization by selectively internalizing certain forms. This happened with a decisive role of specific comparative influences.

¹⁴⁸ In the words of A.E. Platsas, *The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks*, in 12.3 *Electronic Journal of Comparative Law*, 2008, p. 1, at 1.

¹⁴⁹ See the classic K. Zweigert, H. Kötz, *An Introduction to Comparative Law*, Clarendon Press 1998, at 34: «The basic methodological principle of all comparative law is that of functionality».

¹⁵⁰ See the reflections by R. Michaels, *The Functional Method of Comparative Law*, *op cit.*, at 344-345.

¹⁵¹ See A.E. Platsas, *The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks*, *op. cit.*, at 3.

¹⁵² See R. Michaels, *The Functional Method of Comparative Law*, *op cit.*, at 339-340.

The functional evolution was decisive for the Court to increase its own authority in a increasingly plural setting and happened with a dynamic of self-empowerment, often autonomously from other powers. Such a multi-pronged phenomenon, which we will analyse in a vast series of case-studies, can only be intended as, and read only through a syneresis of the two historical comparative approaches. We will see that by looking at the way in which different comparative influences have faced and internalized by the structure and organization of the Court of Justice, we will understand more of the institution's functional evolution, able to develop and to increase in authority within a dynamic of self-empowerment, often autonomously from other powers. Therefore, we will see - in a slogan - how the institutional development of the CJEU has been *culturally* influenced in order to be *functionally* efficient.

Through the prism of institutional organisation, in this sense, we will try to study what has been already highlighted by some as a peculiar specificity of the European system. In a work dealing with the interaction of supranational and national substantive laws, Azoulaï wrote some years ago that «(L)e système communautaire est non seulement capable de *résister aux pressions exercées de l'extérieur* par les systèmes nationaux, qui réclament la garantie du respect de droits fondamentaux jusque-là méconnus par le système communautaire, mais, bien plus, il est capable de *les utiliser jusqu'à les transformer en facteurs d'organisation*, sous la forme des principes généraux du droit».¹⁵³ Such words describe something peculiar in the nature of the European legal system - notoriously suspended between its birth «at the crossroads of national legal traditions»¹⁵⁴ and its aspiration to an *autonomous* nature, to “self-referentiality»¹⁵⁵. These attributes are openly reminiscent of the work of biophysicist and philosopher Henri Atlan, who studied in particular the processes of natural and social organization and auto-organisation. I argue that these inspirations are even more relevant, actually, when transposed from the realm of substantive laws to the institutional organisation. It was Atlan who described every process of auto-organization as an incessant dynamic of disorganization and reorganization, as a process of condensation of complexity halfway between the *functional* and *structural*, «resulting from a succession of retrieved disorganizations, followed each time by a re-establishment at a level of more variety and less redundancy».¹⁵⁶ In this process of condensation of complexity that is both functional and structural, a decisive role is said to be played by its context. The surrounding environment changes continuously, in a manner

¹⁵³ On file with the Author.

¹⁵⁴See for this definition T. Koopmans, *The Birth of European Law at the Crossroads of Legal Traditions*, in 39 *American Journal of Comparative Law*, 1991, p. 493.

¹⁵⁵In the words of R. Barents, *The Autonomy of Community Law*, Kluwer Law International 2004, who provides a full and rich appraisal of the phenomenon.

¹⁵⁶ H. Atlan, *Entre le cristal et la fumée. Essai sur l'organisation du vivant*, Editions du Seuil 1979, at 63 (personal translation).

«neither predetermined nor magic» The living system which, being able to integrate «the errors» in its own organization, «is able to react in such a way (...) to be modified in a beneficial way, or in a way that at least preserves its further survival».¹⁵⁷ Such process of condensation of complexity, both functional and structural, can be also observed, I will try to show, in the *mimetic* institutional, organizational evolution of a supranational institution, the European Court of Justice, in which specific external forms of institutional structure and organization, often culturally influenced, became functional factors of organization for the development of the institution and the growth of its authority.

After all, «(L)egal orders are actually formed from acts of understanding and interpretation in the process of practical legal life», in which «various systemic legal formations (international, supranational, and national legal systems)» intertwine in a process of «constant interaction and mutual influence». A call for a study of such «dynamic of law», which «cannot be represented as either an isolated immanent process or as a quality of a passive sphere of external influences», has been launched, by referencing to the need to study both the «synchronic and diachronic aspects» of such a dialogical evolution.¹⁵⁸ In this vein, an invitation to expand the boundaries of the comparative research (both methodologically and dimensionally) was also issued, according to which to a classic horizontal comparison, which «compares legal systems or institutions belonging to the same level, both national (e.g. for comparative constitutional law) and international level (e.g. comparing international institutions)»,¹⁵⁹ a vertical comparison should be also be added: a comparison between systems, or legal institutions, which «do not belong to the same level».¹⁶⁰ Such a multi-dimensional approach - as a way to deal with the problem of the «comparative methodology and pluralism in legal comparison in a global age» - would be needed to expand the comparative research in a «top-down» manner in order to study the context of the *internalization* of international norms and regulations by national legal orders, whereby national law is required to incorporate international concepts into the national legal system.¹⁶¹ The same expansion could be also directed in a «bottom-up» vertical comparison to analyse «the transposition of legal concepts, or the ideas behind them, from national to international level»,¹⁶² or the incorporation of national principles by

¹⁵⁷ *Ibidem*, at 72.

¹⁵⁸ See for all these reflections M.A. Damirli, Comparative Law Hermeneutics: Cognitive Possibilities, in 5 Journal of Comparative Law, 2010, p. 65, at 67.

¹⁵⁹ R. Scarciglia, Comparative Methodology and Pluralism in Legal Comparison in a Global Age, in 6 Beijing Law Review, 2015, p. 42, at 45.

¹⁶⁰ *Ivi*.

¹⁶¹ A. Momirov, A. Naudé Fourie, Vertical Comparative Law Methods: Tools for Conceptualizing the International Rule of Law, in 2 Erasmus Law Review, 2003, p. 291, at 295.

¹⁶² *Ibidem*, at 296; R. Scarciglia, Comparative Methodology and Pluralism in Legal Comparison in a Global Age, *op. cit.*, at 45.

international standards.¹⁶³

The processes of globalization or regionalization (primarily as a fundamental paradigm) and the process of Europeanisation are the first potential scopes of application of such multi-dimensional expansion since they are, according to many, «challenging the mechanical understanding of methodology» in legal studies.¹⁶⁴ Our diachronic analysis of the structural and organizational aspects of the European Court of Justice will be a perfect case study for the analysis of a successful, autonomous but culturally influenced legal evolution of a supranational institution and it will try to test all these methodological assumptions. Comparativism is described by its contemporary theorists as not merely the description of «the common and the difference, commensurability and incommensurability, but their proportional correlation»:¹⁶⁵ the analysis of our hypothesised *mimetic* evolution can be precisely seen as an appraisal of such interrelation between *unitas* and *diversitas*, *functional* and *contextual*, within their possible correlation.

A syneresis of the two historical comparative approaches, functional and culturalist, will be needed for such this endeavour. Such syneresis is not only implied in classic reflections which saw the conceptual apparatus of comparative law as «supranational in character»,¹⁶⁶ but also invoked remarks by scholars who recently embarked on reflections on the role of legal culture in the comparative study of the EU system. It has been recently noted,¹⁶⁷ in fact, that although the local specificities and the associated «cultural argument» have been deployed «in the specific European context (...) most often (...) in opposition to the possibility of achieving more legal Europeanisation», and in antithesis to the «edification of a community» and the construction of a «common legal culture», a more refined use of the «legal cultures» sensitivity, applied in the supranational environment, cannot but merge such an approach with a functional evolutionary one. In this respect, a fundamental distinction has been suggested between an external and internal dimension of legal culture, also intended as a distinction between the broad societal and more specific professional ideas of legal culture, linked to the way that legal operators think about the law.¹⁶⁸ In fact, the often idealized societal perception of legal *culturalism* leads to the design of

¹⁶³ H.E. Chodosh, Comparing Comparisons: In Search of Methodology, in 84 Iowa Law Review, 1999, p. 1025, at 1038 in particular.

¹⁶⁴ J. Husa, The Method Is Dead, Long Live the Methods! European Polynomia and Pluralist Methodology, in 5 Legisprudence, 2011, p. 249, at 252; R. Scarciglia, Comparative Methodology and Pluralism in Legal Comparison in a Global Age, *op. cit.*, at 45.

¹⁶⁵ A.D. Tikhomirov, Philosophical Problems of Legal Comparativistics, in 5 Journal of Comparative Law, 2010, p. 159, at 169.

¹⁶⁶ K. Zweigert, H. Kötz, An Introduction to Comparative Law, *op. cit.*, at 73 *et seq.*; see on this also A.V. Tkachenko, Functionalism and the Development of Comparative Law Cognition, in 5 Journal of Comparative Law, 2010, p. 71, at 76-77 in particular.

¹⁶⁷ G. Comparato, New Voices: Challenging Legal Culture, in 7 European Journal of Legal Studies, 2014, p. 5, at 16-17 in particular.

¹⁶⁸ *Ivi*, with reference to L.M. Friedman, The Legal System. A Social Science Perspective, Russell Sage Foundation, 1975, at p. 223.

separated, fractured *families* of legal development¹⁶⁹ with scarce or no permeability, while a more realist appraisal of the higher degree of homogeneity within the professional legal operators,¹⁷⁰ who are also the actual actors of legal development, makes us think about differences as an arsenal or toolkit of solutions that can be used for functional purposes. As the new historiographical and sociological literature on the legal construction of the European Communities has demonstrated,¹⁷¹ such degree of homogeneity was very much present (and still is) in the process of integration and institutionalization, facilitating a functional osmosis of *unitas* and *diversitas*.

II.6 Work Plan

I will undertake the task described by selecting some *specific* but *central* and *paradigmatic aspects* of the structural, organizational and institutional development of the Court in the decades since its foundation.

In the next third chapter, I will propose a historical reconstruction of the genesis of the Court of Justice, since the times of its foundation and later when it was a small tribunal for the litigation among six Member states of the (then) European Coal and Steel Community and Economic Community. In this context, I will highlight how a significant inspiration for the design of the Court and of its powers came about from the well-known and already established judicial forms present in the higher courts of the Member states at that time. After all, these were already important and established comparative models and naturally influenced the first negotiators and players in the field. But I will also emphasize also how there were already other visions at the time which did not prevail: particularly, taking inspiration from the (then) known forms of international judicial review.

After this first essentially historical introduction on the foundation of the Court, I will present my case studies in a kind of technical/logical order of institutionalisation.

In the fourth chapter, I will focus, therefore, on what logically follows in structuring and organizing a court: thus, on the appointment of its members, its human resources. The system of appointment of the European Court of Justice's judges, advocate generals and personnel has been

¹⁶⁹ See on the usual instrumentality of such a design P.G. Monateri, *Geopolitica del diritto: genesi, governo e dissoluzione dei corpi politici*, *op. cit.*.

¹⁷⁰ Often «authoritatively created through legal education»: see G. Comparato, *New Voices: Challenging Legal Culture*, *op. cit.*, at p. 17.

¹⁷¹ See in particular A. Vauchez, *The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)*, *op. cit.*; A. Vauchez, B. de Witte (eds.), *Lawyering Europe. European Law as a Transnational Social Field*, *op. cit.*; and M. Rasmussen, *Constructing and Deconstructing 'Constitutional' European Law: Some reflections on how to study the history of European law*, *op. cit.*.

for several decades a neglected and even mysterious topic, covered by the traditional and taken-for-granted discretion of the States in the selection of international judges. But the situation, as it is well known, has recently changed with a new procedure established pursuant to Article 255 TFEU introduced by the Lisbon Treaty. If it is still beyond a doubt that «from whatever point of view, including that of national courts»,¹⁷² members of the Court enjoy a high degree of recognition and expertise-derived legitimacy, a new discussion on the point is also timely in relation to a comparative analysis of judicial appointments in the different Member States that tell us of rather different systems of selection and composition of judicial bodies - with clear implications on the perception of related epistemic communities. This must be related to an important aspect that is under constant discussion on the CJEU's composition: the recurring theme of disconnection from national judicial practice, also in terms of expertise and understanding of the reality of national adjudication systems.

In the fifth chapter, following again the order of a logic problematization in the structuring of the court, I will analyse the problem of transparency in the works of the CJEU, considered as a «deliberative institution»,¹⁷³ both in the traditional terms of its discussed modalities of internal deliberation and in the new terms of the openness of its judicial activities and proceedings (a theme recently raised by scholars for the first time).¹⁷⁴ In this former sense, a reflection will be attempted on the questions arising from the duty of collegiality of the Court and from the lack of dissenting opinions - a judicial feature present in several Member states, and to which their lawyers are used - and often invoked for the CJEU in academic commentaries. Particular attention will be given to the peculiar role of the Advocate General in this perspective. A comparative law study of the different options in the Member States and in international courts will lead us to some thoughts on how much this is relevant for both the quality of the legal reasoning of the Court and for the direct connection, through full disclosure of all the different arguments and interpretative options on EU law, with the different culturally-influenced epistemic communities of the Member States. We will also see that if the Court has not properly evolved in such a traditional sense, it has placed itself at the forefront of the new mentioned trend of internal openness, albeit with discussed modalities.

In the sixth chapter, the next step will be to investigate the modalities and techniques of docket control and the problems of allocation of judicial activity and resources by the CJEU. These

¹⁷² M Bobek, Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts, in M. Adams, J. Meeusen, G. Straetmans, H. de Waele (eds.) *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice Examined*, *op. cit.*, p. 197, at 227.

¹⁷³ J. Ferejohn, P. Pasquino, Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice, in W. Sadurski (ed.) *Constitutional Justice, East and West*, Kluwer Law International 2002, p. 21.

¹⁷⁴ A. Alemanno, O. Stefan, Openness at the Court of Justice of the European Union: Toppling a Taboo, in *51 Common Market Law Review*, 2014, p. 97.

problems are essential for the actual work of the Court, often considered «victim of its own success»¹⁷⁵ especially in terms of an increasing overload of cases. However, they are often influenced by tensions that originate from the Member States and their legal cultures, on the point of the very conceptualization of what docket control can and should mean; by the different approaches of common law and civil law countries to the question of the abstractness of the preliminary ruling procedure of Article 267 TFEU;¹⁷⁶ or by the different exigencies coming from different contexts with regards to the CJEU's action. Therefore, we will investigate how the different contexts of the single Member states and judges' different backgrounds influence the use of the fundamental preliminary reference procedure. It will be also important to highlight that the very idea of the existence of techniques of docket control and selection of cases, while perfectly accepted in some national legal cultures, is unfamiliar and somehow repudiated for others. After all, this is also becoming a relevant problem for other international judicial bodies, precisely because of their recent growth in role and in size.¹⁷⁷ We will look at how the Court evolved by a selective choice of so-called neutral solutions to the problem of docket control, precisely because of influence in this perspective by the diverse nature of its counterparts.

In the seventh and final chapter, an analysis on the stylistic modalities of the decisions of the CJEU will follow, considering them as the final product, the output, of the structure and organization of the institution, directly influenced by these latter as well as cultural aspects. As it is well known, the Court has been widely criticized for its apodictic, cryptic, Cartesian judgments,¹⁷⁸ of French derivation,¹⁷⁹ which also make large use of formulaic language.¹⁸⁰ I will try to explain how much this has a lot to do with a cultural stratification in the Court's activity, and therefore, to what extent the style of the court is culturally shaped. Furthermore, I will try to show how much this has to do with the success of the Court in its dialogical relationship with Member States courts, which are often speaking a «different language»¹⁸¹ for stratified cultural reasons. It also has deep consequences for the simplicity of these different national courts to undertake relationships with the CJEU, and, indirectly but very importantly, for the successful, coherent and uniform

¹⁷⁵ T. Koopmans, *La procédure préjudicielle - victime de son succès?*, *op. cit.*.

¹⁷⁶ See G. Davies, *Abstractness and Concreteness in the Preliminary Reference Procedure*, in N. Nic Shuibhne (ed.) *Regulating the Internal Market*, Edward Elgar Publishing 2006, p. 210.

¹⁷⁷ See for some reflections on point, generally, K.J. Alter, *Delegation to International Courts and the Limits of Recontracting Political Power*, in D. Hawkins, D.A. Lake, D. Nielson, M.J. Tierney (eds.), *Delegation and Agency in International Organizations*, Cambridge University Press 2006, p. 312.

¹⁷⁸ J.H.H. Weiler, *Epilogue: The Judicial Après Nice*, in J.H.H. Weiler, G. de Burca, *The European Court of Justice*, *op. cit.*, at p. 225.

¹⁷⁹ M. Lasser, *Judicial Deliberations. A Comparative Analysis of Judicial Transparency and Legitimacy*, Oxford University Press 2004.

¹⁸⁰ L. Azoulai, *La fabrication de la jurisprudence communautaire*, in P. Mbongo, A. Vauchez (eds), *Dans la fabrique du droit européen. Scènes, acteurs et publics de la Cour de justice des Communautés européennes*, Bruylant 2009, p. 153.

¹⁸¹ J.H.H. Weiler, *Epilogue: The Judicial Après Nice*, *op. cit.*, at 225.

application of EU law in all the Member States, a matter of classic but increasing concern among scholars.¹⁸² In this sense, we will talk of the style of the Court as shaped by its machinery as *fabrique du droit*,¹⁸³ and inherent plurality and diversification of the EU legal order.

Some final remarks will conclude my work, summing up the results of the analysis, and further reflecting on the idea of *mimetism* as both a phenomenological and methodological concept.

¹⁸² See S. Prechal, National Courts in EU Judicial Structures, in 25 Yearbook of European Law, 2007, p. 429, at 432-433, and M. Bobek, Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts, *op. cit.*, at 200 *et seq.*

¹⁸³ P. Mbongo, A. Vauchez (eds.), Dans la fabrique du droit européen. Scènes, acteurs et publics de la Cour de justice des Communautés européennes, *op. cit.*, inspired by the seminal work of B. Latour, La fabrique du droit. Une ethnographie du Conseil d'Etat, La Découverte & Syros 2002.

The Foundation and Structuring of the Powers of the Court

III. The Foundation and Structuring of the Powers of the Court

1. Choice of Form: the Original Debate on the Creation of a Court for the European Communities
2. Design of Powers of the Court of Justice and National Influences
 - 2.1 The “Administrative” Competences of the Court
 - 2.2 Transformation of the Preliminary Reference Procedure
3. Different Perspective, Same Dynamics: the establishment of the doctrines of primacy and direct effect
4. The Original choices in the Establishment of the Court of Justice as a Form of Improvement of its Authority

As said, to first describe the comparative influences’ potentiality of internalization via the structure and organization of what is nowadays the Court of Justice of the European Union, we will look back at its foundation at the time of the negotiations of the first Communities’ Treaties. In this chapter, we will revise, in light of the new historical legal research and an analysis of the first specialized literature on EU legal affairs, the foundation of the common judicial body. First we will study how some precise choices set the path for its important development, discarding other opposite proposals based on typically - at the time - weak international adjudicative forms. We will also do so by recalling the recent political science and comparative law literature that teaches us how the incentives, actual motivations for creating a court, and assigning certain roles in a federal or international context are both typical and recurring.¹⁸⁴ These were all at the centre of the debate at the time. We will then describe how the actual form of the original Court was not only chosen against different models but also naturally influenced by the already well-known and established judicial forms of its original Member States in its more decisive features. I argue that the internalization of these forms, tools and powers is literally at the basis of the success of the Court in the following years. This is also exemplified by the other phenomenon of internalization relating to the Dutch debate on the direct effect of international norms, which I analyse in the last part.

¹⁸⁴ See for instance G. Maggi, *The Role of Multilateral Institutions in International Trade Cooperation*, in 89 *American Economic Review*, 1999, p. 190; C.J. Carrubba, *Courts and Compliance in International Regulatory Regimes*, in 67 *Journal of Politics*, 2005, p. 669; M. Gilligan, L. Johns, B.P. Rosendorff, *Strengthening International Courts and the Early Settlement of Disputes*, 54 *Journal of Conflict Resolution*, 2010, p. 5; L. Johns, *Strengthening International Courts: The Hidden Costs of Legalization*, University of Michigan Press 2011.

III.1 Choice of Form: the Original Debate on the Creation of a Court for the European Communities

As it is very well known, the actual European Union has its antecedents and historical premises in the old European Communities born in the 1950s with the coagulation of the deep and noble intentions of the original six Member states: Belgium, France, West Germany, Italy, the Netherlands and Luxembourg. The idea of a *direct continuity* between such stratified communitarian projects holds true in terms of the original political inspirations, against the ever common and simplistic narrative depicting, even today, European integration as an original economic project which slowly transformed into a political project.¹⁸⁵

But such an idea of *direct continuity* is also undoubtedly true for the basic institutional design of supranational organizations. In fact, the primitive European Coal and Steel Community, born with the Treaty of Paris of 1951, was run by four institutions: a High Authority composed of independent appointees from the different States, a Common Assembly composed of national parliamentarians, a Special Council composed of national ministers, and a Court of Justice. All these would ultimately and clearly form the blueprint for today's European Commission, European Parliament, the Council of the European Union and our main object of study, the Court of Justice of the European Union (formerly known as European Court of Justice). The European Coal and Steel Community was joined by two other similar organizations in 1957 (along with the Treaty of Rome). These are the European Economic Community and European Atomic Energy Community, with whom it shared its membership and some institutions, particularly the common assembly and the judicial arm still represented by a unified Court of Justice. In 1967, all its institutions were merged

¹⁸⁵ See the direct critical remarks by J.H.H. Weiler, On the Distinction between Values and Virtues in the Process of European Integration, paper of the Institute for International Law and Justice, International Legal Theory Colloquium Spring 2010, available at the website <http://iilj.org/courses/documents/2010Colloquium.Weiler.pdf> (accessed 26 August 2015) at pp. 1-2, with reference to N.D. Jaïbi, W. Landolsi, L'Union européenne: d'une Communauté Economique à une Communauté de Citoyens, in R. Ben Achour, S. Laghmani (eds.), Les droits de l'Homme : une nouvelle cohérence pour le droit international?, Pedone 2008, p. 249, at 250: « *C'est de cette dynamique que procède le passage d'une Communauté économique à une Communauté de citoyens. C'est-à-dire d'une Communauté qui repose sur la réalisation d'un Marché commun, dans lequel la libre circulation des personnes (en tant qu'agents économiques), des marchandises, des services et des capitaux est garantie à une Communauté de citoyens, c'est-à-dire une Communauté d'individus appartenant à une Union politique fondée sur les principes – ou pour reprendre la terminologie retenue par le Traité de Lisbonne – de valeurs de liberté, de démocratie, du respect des droits de l'Homme et des libertés fondamentales, ainsi que l'Etat de droit. Autrement dit, c'est de cette dynamique que procède le passage d'une intégration négative à une intégration positive* ». See also the organic reflections in A.Grilli, Le origini del diritto dell'Unione europea, *op. cit.*, at 37 *et seq.*; A. Williams, The Ethos of Europe. Values, Law and Justice in the EU, Cambridge University Press 2010; J. Dickson, P. Eleftheriadis (eds.), Philosophical Foundations of European Union Law, Oxford University Press 2012; D. Kochenov, G. de Búrca, A. Williams, Europe's Justice Deficit?, Hart Publishing 2015.

with that of the European Economic Community, including both the High Authority (merged with the Commission) and the Councils. In 1973, the progressive enlargements of the Communities began, initiating a continuum that is still in progress and that is now grouping - after the Treaty of Maastricht of 1992, the expiration of the Treaty of Paris in 2002 and the absorption of ECSC activities and resources, and the Treaty of Lisbon of 2007 - 28 Member states under the formally unified framework of an all-encompassing European Union.

In this unique compound of meta-objectives with even spiritual and messianic dimensions,¹⁸⁶ clear and powerful political visions as well as both symbolic and substantive economic tools, and thus two remarkable strands - the functional and the idealist, pragmatism and values - combined, some features have been considered by the scholars as directly comparable with other international or federal regulatory regimes.

First of all, there are certain trends and spill-over effects characterizing every experiment of economic integration, regardless of form and stage, and therefore whatever the nature, according to what we discussed above. Every project of economic integration calls for the unification of economic policies between different states through the partial or full abolition of tariff and non-tariff restrictions on trade taking place among them. In turn, this is meant to lead to lower prices for distributors and consumers with the goal of increasing the combined economic productivity of states. In this sense, as one of the major scientists applied to these studies theorized,¹⁸⁷ as economic integration increases, the barriers of trade between markets diminish, with different degrees categorized in several stages.¹⁸⁸ Supranational common markets, with their free movement of economic factors across national borders, naturally generate demand for further integration, not only economically (via monetary unions) but also politically and somehow socially. Thus, economic communities naturally tend to evolve into political unions over time. This has been studied in depth, focusing particularly on the possible shift of independent power from intergovernmentally negotiated decisions by member states to a more complex system of supranational independent institutions by the various functionalist and intergovernmentalist political scientists.¹⁸⁹ But it has also been the main focus of comparative lawyers exploring the basic double role of law in these contexts of integration, as both an agent and an object, as explained in the introduction. It is worthy

¹⁸⁶ J.H.H. Weiler, *The Political and Legal Culture of European Integration: An Exploratory Essay*, in 9 *International Journal of Constitutional Law*, 2011, p. 678.

¹⁸⁷ B. Balassa, *The Theory of Economic Integration*, Homewood 1961.

¹⁸⁸ The degree of economic integration has been typically categorized by the literature into seven stages: preferential trading area, free trade area, customs union, common market, economic union, economic and monetary union, complete economic integration, differing one with the other in the degree of unification of economic policies, with the highest one being the completed economic integration of the states, which would most likely involve political integration as well.

¹⁸⁹ See above, footnote 45.

to recall that this same field of research was explored from different perspectives: and therefore by explaining, in a classic functionalist sense, how much and to what extent the legal lever could induce, or even force, integration; and on the other hand, how much and to what extent the complex dimensions of the legal phenomenon, taken as inherently and etymologically «traditional», could be irritated, could react and resist to this project of integration. These different approaches, we also explained, needed two different uses and two different methodologies of comparative research.

But there is also another important aspect that led the scholars to draw direct comparisons between the European Communities before, the European Union afterwards and other international or federal regulatory regimes. As anticipated, we are talking about the institutional design problem of these transnational integration projects. In particular, an important literature emphasized how much these projects tend to face the need for *collective action* over some sets of mutually agreed policies among the relevant set of states. Quite typically, whatever the substance of the common regulatory regime (liberalization of trade, environmental standards, promotion of human rights and *a fortiori* an ambitious mixture of each), all the participant entities rationally perceive a benefit from mutual adherence with the proposed regulatory regime's rules. However, at the same time, they have no incentives to unilaterally comply. Quite the opposite, their individual “better-off” situation would consist of freeriding policy while everyone else is following the rules.¹⁹⁰

This obvious but elucidating theorization explains the rational basis for the construction of common institutions. These are usually common *fora* of political nature for the coordination of policies and their implementation, which can also foster the creation of systems of *reputation* record and of *punishment*, in the classic form of retaliation.¹⁹¹ But these are also (and always more, as we said) judicial bodies, considered as the more effective and reliable monitoring compliance systems. The choice for their establishment has been depicted as perfectly rational in terms of comparative constitutional engineering¹⁹² and comparative institutional analysis.¹⁹³ In fact, even though a taxonomy of the various integrative projects vary considerably when considering their systems of «legalization of dispute resolution»,¹⁹⁴ ranging from «least legalistic treaties without independent third-party review, to the most legalistic» agreements «with standing tribunals that can be petitioned by a wide array of litigants and that issue binding decisions with direct effect on national law»,¹⁹⁵ —

¹⁹⁰ C.J. Carrubba, A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems, 71 *Journal of Politics*, 2009, p. 55; C.J. Carrubba, M.J. Gabel, Courts, Compliance, and the Quest for Legitimacy in International Law, in 14 *Theoretical Inquiries in Law*, 2013, p. 505.

¹⁹¹ C.J. Carrubba, M.J. Gabel, Courts, Compliance, and the Quest for Legitimacy in International Law, *op. cit.*, at 516.

¹⁹² G. Sartori, *Comparative Constitutional Engineering. An Inquiry into Structures, Incentives and Outcomes*, New York University Press 1994.

¹⁹³ N. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy*, University of Chicago Press 1994.

¹⁹⁴ C.J. Carrubba, M.J. Gabel, Courts, Compliance, and the Quest for Legitimacy in International Law, *op. cit.*, at 510.

¹⁹⁵ *Ibidem*, at 511.

a certain preference for fully-fledged and stable tribunals can be easily traced with an inclination directly proportional to the complexity of the regulatory system and to the number of the interested parties.

In fact, the principal rational explanation for the establishment of these courts is to build a reliable monitoring system while simultaneously decreasing the costs of compliance for state governments. Once an agreement is signed, every possible change in domestic political, social and economic contexts faced by a government could constitute the incentive to defect from the regime's rules, precisely by presenting an immediate cost in terms of political popularity. Therefore, this undermines the regulatory regime and its necessarily longer-term rationality. In this sense, as it has been said in rather explicative and iconic political jargon, the common judicial bodies come to play a double role. First, they configure and perform a so-called *fire-alarm mechanism* by constituting the institutionalized venue in which a state brings a challenge, making both the challenged state and the third-party one(s) aware of the conflict. Second, they act as an *information clearinghouse* by being a venue in which these states then argue, following certain prototypical forms, over the challenge, thus channelling both the existence and the resolution of conflicts as well as the negotiations and the information exchanged accordingly.¹⁹⁶

All this could also be performed by other kinds of institutions as stated earlier. But the more complex the regulatory system, and the higher the number of the interested entities, the more the existence of an independent, third-party judicial body becomes rational and desirable according to this model. Additionally, it is important to note that the centrality of the common court as an institutionalized venue for contestation and as a deliberative forum, according to the aforementioned two roles, has often been, purposively or not, emphasized by allowing other actors - normally «private individuals, firms, special interests, or subnational governments»¹⁹⁷ - to have standing before it. In turn, this leads to several joint consequences, usually considered in institutional design. It increases the probability of effective monitoring, decreases the cost in time and resources of governments for the identification of possible violations and advance of challenges, and also tends to increase the quantity, variety and quality of the arguments put before the court.

The historical research recently devoted to the negotiations of the European Communities in the 1950s is able to show us how much these models built by political scientists and comparative lawyers hold true in the case of the structuring European integration project since the beginning.

¹⁹⁶ *Ivi.*

¹⁹⁷ *Ibidem*, at 518.

This coincidence could be considered a truism, since these heuristic models are built retrospectively and often use the European Communities as main benchmark. But the important aspect to reflect on is that the historiography on the structuring of the Communities gives us important insights into the original positions taken in negotiations, the positions of opposite nature, and in the rationale of these and final choices. It is possible today, in light of more recent heuristic models, to contextualize these choices by first explaining the original inspirations that shaped the Court as now we know it, and conversely, how the judicial arm of the European Communities and Europe itself, without its actual contribution, might have been if other paths were followed.

The first reference in this respect is to the inspired negotiations that led to the establishment of the European Coal and Steel Community in the very early 1950s. As it well known, the Schuman Declaration of the May 9, 1950, fraught as it was of political visions and clear substantive recipes, barely included one short paragraph directly mentioning the institutional setting considered as apt for the «*mise en œuvre*»¹⁹⁸ of the integration project. The creation of a «common High Authority entrusted with the management of the scheme (...) composed of independent persons appointed by the governments, giving equal representation»,¹⁹⁹ was since the beginning announced as the first and obvious step for the solution of the described *collective action* questions. But the same paragraph of the Declaration, again in perfect coincidence with what we discussed, pointed out a certain agnosticism when it came to the question of the monitoring system. In fact, it simply stated that future «(A)ppropriate measures» would be provided «for means of appeal against the decisions of the Authority».²⁰⁰ The appearance of “incompletely theorized agreement”²⁰¹ of this last clause is not deceptive. Actually, recent historical research²⁰² tells us that the first (four) draft versions of the Schuman Declaration - in which the work of Robert Schuman was supported by Jean Monnet and three influent lawyers: Paul Reuter, Etienne Hirsch and Pierre Uri - did not even contain a reference to the problem of judicial review in the ECSC settlement. In this sense, the perception is that, in the primitive discussion for the project, a unique and simple coordination and monitoring system of political nature, like the High Authority, was considered enough for the complexity of the regulatory system of the ECSC. After all, the Community was at the time “simply” coordinating and liberalizing the market of coal and steel products among only six Member states.

¹⁹⁸ A. Boerger-De Smedt, *La Cour de Justice dans les négociations du traité de Paris instituant la CECA*, in 2 *Journal of European Integration History*, 2008, p. 7, at 10.

¹⁹⁹ R. Schuman, *Declaration of May 9th 1950*, available at the website <http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/> (accessed 26 August 2015).

²⁰⁰ *Ivi.*

²⁰¹ According to the definition given by C.R. Sunstein, *Practical Reason and Incompletely Theorized Agreements*, in 51 *Current Legal Problems*, 1998, p. 267.

²⁰² A. Boerger-De Smedt, *La Cour de Justice dans les négociations du traité de Paris instituant la CECA*, *op. cit.*, at 10.

A reference to a proper system of judicial review only came about with the elaboration - or rather, with the «correction»²⁰³ - of the fifth version of the Declaration. But again, it was simply another proof of the internal debate and particularly the fact that the drafters took several options into account, evaluating pros and cons for the enforcement of the envisaged regulatory regime. Interestingly enough, the provisional amendment which made its appearance in the fifth, sixth and seventh traceable versions of the Schuman Declaration provided that the decisions of the new supranational Authority «*ne seront révisables que par appel devant la Cour permanente de Justice Internationale*».²⁰⁴ Therefore, this hypothesized a direct delegation to the Court of The Hague established some five years before.²⁰⁵ Such a tentative solution can be considered as the temporary emersion of the will to actually prefigure an independent monitoring system while simultaneously externalizing it to an already-established institution that is not simply formed by judges from the member states. The idea was probably aimed at simplifying the organization of the Community while increasing hypothetical costs in terms of reputation for freerider parties. But that solution could have problems too and this is crystal clear for any trained lawyer half a century later. An externalization would have also implied the lack of any control on the role of the judicial body as an *information clearinghouse*, on the deliberative forms as well as the substance of the arguments put before it, on the decisive design of the standing rights and thus on the development of EU law as an “autonomous” legal order.

In any case, this first hypothesis of delegation emerged in early negotiations is nowadays simply the evidence that an internal debate occurred. In fact, it was rapidly discarded and the historical eighth and final version, as we saw, was drafted in the classic open-ended language of compromise, calling for future «(A)ppropriate measures». But the debate on the proper judicial review system to be designed for the ECSC was simply in its infancy. Other important elements recently came, for instance, from the disclosure of internal French negotiations leading to the Conference of Paris of the June 21, 1950, in direct continuity with the works leading to the Declaration of the 9 May. The same aforementioned diplomatic consultants and particularly Paul Reuter and Pierre Uri, worked to refine the position of France, especially on point of the institutional setting. Again, the design of the High Authority and thus the central executive branch and its powers was under the spotlight. But in light of the Declaration, which after all, without clarifying any detail, already called for some kind of «means of appeal against the decisions of the Authority», the discussion was extended to a tentative complete envisaging of such means. In this

²⁰³ *Ivi.*

²⁰⁴ *Ivi.*

²⁰⁵ *Ivi*, making reference to FJM, AMG 2/3/8, Haut-commissariat de la République de France en Allemagne “Exposé de M. Monnet devant le Conseil de la Haute Commission Alliée, Petersbourg, 23 mai 1950”, Godesberg, 24.05.1950.

context, the first proposal was a kind of division in three layers of the grounds for appeal and competent institutions. A first complaint was envisaged as being directly addressable to the High Authority, eventually forced to revise a contested decision and approve it by a majority of two thirds.²⁰⁶ A second, consequent complaint was imagined as addressable, on ground of economic *opportunity*, to a special «*haut collège arbitral*» (or «*collège des médiateurs*»²⁰⁷) of three members, chosen by the then highest personalities of the international legal order.²⁰⁸ A third complaint, on grounds of breach of the law of the Treaty and abuse of power («*contre les excès de pouvoirs*»),²⁰⁹ was still imagined as addressable to the International Court of Justice of The Hague.²¹⁰

This written evidence of internal discussion notwithstanding, the scenery had already changed and was simplified by the Conference of Paris. On the June 21, 1950, Jean Monnet simply spoke of two appeal procedures in his overall presentation for the national delegations.²¹¹ On June 24, 1950, a draft version of the ECSC Treaty, prepared by the French consultants, was circulated among the other representatives describing a mere double track system in its Articles 7 and 8. The involvement of the International Court of Justice was definitely discarded. A first instance of re-examination in front of the High Authority was again foreseen and again asking for a revision and an approval by a majority of two thirds, but with the decisive extension of the standing rights to private firms and companies - at least with regards to decisions and recommendations directly and individually applicable to their cases. An important clarification was also provided about the second foreseen layer of appeals. In fact, the original idea of an «*haut collège arbitral*» evolved in the form of a “*Cour d'arbitrage ad hoc*” to be addressed by States and, in restrictive cases, by private firms and companies on three different grounds ranging from the breach of the law of the Treaties (where judgments would have been binding *inter partes*) to the threats for the full-employment policies and the equilibrium of the balance of trade of single States (in such cases, the Court would have acted simply as a mediator and with recommendations to the High Authority).²¹² It was also clear from

²⁰⁶ A. Boerger-De Smedt, *La Cour de Justice dans les négociations du traité de Paris instituant la CECA*, *op. cit.*, at 11, making reference to FJM, AMG 2/4/4a, [Note concernant la HAUTE AUTORITÉ], sn, sd [mai/juin 1950] ; FJM, AMG 2/4/7, [De Uri à Monnet] "Schéma de traité", 07.06.1950; FJM, AMG 2/4/16, P. Reuter "Observations sur le schéma de traité" (article 6), 14.06.1950.

²⁰⁷ *Ivi*, making reference to FJM, AMG 2/4/3, Reuter à Monnet [Projet d'un schéma de traité, 16.05.1950; FJM, AMG 2/4/4a, [Note concernant la Haute Autorité], sn, sd [mai/juin 1950] ; FJM, AMG 2/4/8, Uri "Schéma de traité. Recours contre les décisions de la Haute Autorité ", 12.06.1950; FJM, AMG 2/4/16, P. Reuter "Observations sur le schéma de traité", 14.06.1950.

²⁰⁸ The secretary general of the United Nations, the president of the International Court of Justice, and the director of the International Labour Organization.

²⁰⁹ A. Boerger-De Smedt, *La Cour de Justice dans les négociations du traité de Paris instituant la CECA*, *op. cit.*, at 10-11.

²¹⁰ *Ibidem*, at 11, making reference to FJM, AMG 2/4/3, Reuter à Monnet [Projet d'un schéma de traité, 16.05.1950; FJM, AMG 2/4/4a, [Note concernant la Haute Autorité], sn, sd [mai/juin 1950] et FJM, AMG 2/4/8, Uri "Schéma de traité. Recours contre les décisions de la Haute Autorité ", 12.06.1950.

²¹¹ *Ivi*.

²¹² *Ivi*.

this text that the French delegation envisaged such *Cour d'arbitrage* not as a permanently sitting body but as conveneable *ad hoc*, if necessary, and without professional components.

In this sense, the French position on the ECSC institutional setting, despite some uncertainties, was clear. The idea was, in coherence with the original inspiration of the French founding fathers, to make of the High Authority the real engine of the integration project, with important but not decisive nor central opportunities for the judicial review of its decisions. It was for the Authority to overcome, at least the physiology and the numerically large part of the possible *collective action* problems of the regulatory regime. An independent monitoring system was considered useful only in extreme, pathological cases. Therefore, the idea was not to establish a permanent Court for the new European Community but to use the two forms of international judicial review already known: and either an externalization to the International Court of Justice or the *ad hoc* creations of arbitral bodies. According to the new documentary research, in this original position there were also direct comparative influences. In particular, it is reported²¹³ that Jean Monnet himself feared for possible obstacles or even a paralysis of the central leading activity of the High Authority coming from the role of «*gouvernement des juges*» of an hypothetical permanent judicial review body. In this, the critical remarks of the French master of comparative law Édouard Lambert were directly echoed: his book of some decades earlier, named «*Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis*»,²¹⁴ precisely denounced the pervasive role of the judicial review of legislation made by the US Supreme Court, and therefore the supposed perils of a stable and powerful judicial institution, in a (at the time) vaguely comparable *federal* system, and had a high resonance in the public debate.

Interestingly enough, the positions of the other national delegations that also convened at the Conference of Paris were influenced by similarly based yet somehow opposite evaluations. In fact, while the French Planning Commissioner Monnet was worried for the possible obstacles to the full executive power of the High Authority, and thus for a dilution of the effective regulatory capacity of the Community, all the other delegations showed concern for a potentially uncontrolled expansion of the common supranational executive branch. In the case of the Belgian, Dutch and Luxembourgish delegations, representing the “small” states of the original Community, the major will was - not by chance - to create some kind of filter for possible pervasive decisions of the High

²¹³ *Ivi*, with reference to FJM, Interview of M. Lagrange by A. Marès, Paris, 23 September 1980.

²¹⁴ E. Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis: l'expérience américaine du contrôle judiciaire de la constitutionnalité des lois*, M. Giard & Cie edition 1921.

Authority threatening the «vital interests»²¹⁵ of a state, or «incompatible with its sovereignty».²¹⁶ Again, the creation of a *Cour d'arbitrage*, composed of ministers of economic affairs of the Member states (and of a judge of the International Court of Justice as president),²¹⁷ was vaguely envisioned by these parties in form of a special monitoring system of clear political (and national) nature.

But the real strong opposition to the original French plan came from the German delegation and, interestingly enough, from the American consultants involved in these preliminary works. Already in the context of a special *Comité des juristes* convened in the mid-July of 1950, composed of the legal experts of each delegation, and leading to the drafting of an important «*Mémorandum sur les institutions*»,²¹⁸ the idea of designing a first layer of appeals simply by entrusting the High Authority of a second reading was definitely discarded. As it has been underlined,²¹⁹ the American consultants of the German delegation explicitly warned that forcing the High Authority to constantly reconsider its own decisions posed a serious threat to its own prestige. A similar argument was used, *a fortiori*, for the proposal of the small states of a *Cour d'arbitrage* of political nature and directly linked to the nation states. Furthermore, the more the negotiations went on, the more the complex and plural institutional setting of the *communauté* was defined - at least in its basic structure and envisaging a *Conseil* and an *Assemblée* along with the supranational common executive - the more the case for a permanent, independent court became stronger. This position for a structured institution was championed, first of all, by Walter Hallstein, the German law professor who was the head of his delegation (and, as it is well known, would then become the president of the European Commission). In the prodromes of the second round of negotiations in Paris, he spoke directly of an expected «considerable edifying function» of a stable judicial body, «guardian of the objectivity of the High Authority».²²⁰ Some years later, he also envisaged how such an institution would foster the necessary «‘organic interpretation’ determined also by the wide-reaching objective of the Common Market»,²²¹ showing a significant dose of foresight. As it has been written, already

²¹⁵ «*Intérêts vitaux*», according to A. Boerger-De Smedt, *La Cour de Justice dans les négociations du traité de Paris instituant la CECA*, *op. cit.*, at 13, with reference to Archives du Ministère des Affaires étrangères belge (AMAE/B), Dos.gén. CECA 5216, *Projet de traité réalisant le Plan Schuman. Principales dispositions à prévoir, s.d.; Réunion du Plan Schuman – 7 juin 1950 (délégations belgo-luxembourgeoise et néerlandaise)*.

²¹⁶ «*Incompatible avec sa souveraineté*»: *ivi*.

²¹⁷ *Ibidem*, at 15.

²¹⁸ AEL/AE, doc. 11349, «Premier avant-projet. Mémorandum sur les institutions de la proposition du 9 mai», 1st August 1950.

²¹⁹ A. Boerger-De Smedt, *La Cour de Justice dans les négociations du traité de Paris instituant la CECA*, *op. cit.*, at 16-17.

²²⁰ *Ibidem*, at 17, with reference to PAAA/Abt.2, SFSP, dos.62, "Protokoll über die Zusammenkunft der deutschen Delegation mit H. Monnet in Houjarray ... 2.7.50".

²²¹ M. Rasmussen, *Constructing and Deconstructing 'Constitutional' European Law: Some reflections on how to study the history of European law*, *op. cit.*, at 644, with reference to Bundesarchiv. (BA) Nachlass Walter Hallstein, Koblenz, Bestand N 1266, 919, *Speech by Walter Hallstein at Haus Rissen, Institut für Wirtschafts- und*

at the time of the negotiations, the German delegation had a clear vision «to create a Federal Court similar to the new German Bundesverfassungsgericht that would ensure the development of a European Rechtsstaat», and of the extent to which this, over time, «would create a European consciousness and thus play a role similar to the American Supreme Court».²²² Two main technical aspects were therefore strongly proposed: the need to prefigure the Court as holding exclusive rights to interpret the Treaty, to develop a uniform jurisprudence; and the opportunity to offer private litigants, originally mainly firms and associations of firms, the option to instigate proceedings before the Court to check the legality of the decisions and acts of the High Authority. This provided the double purpose of giving them a right to appeal against any supranational decision directly addressed to them (and on which national courts were incompetent) and at the same time, through the private action, «spurring the development of a uniform legal system».²²³

An analogue position was taken by the American consultants of the USA High Commissioner in Germany, John McCloy (himself a well-reputed lawyer), Robert Bowie, George Ball and David Bruce. They directly referred to their own federal model, severely criticizing any idea of appeals based on the economic merits or the opportunity of a case. Furthermore, they pleaded for the institution of a strong permanent court, which, as in the explicit example of the US Supreme Court, could surely give the risk «*de voir les juges permanents réinterpréter, au fil des années, le traité et les intentions de ses auteurs*»,²²⁴ yet definitely ensured better benefits, in particular relation to a consistent interpretation of a necessarily evolving common law.²²⁵ On this basis, also given these direct “American” influences on Monnet, with which there was an open and informal dialogue,²²⁶ an agreement was reached during the summer of 1950 by all the delegations. Despite a last tentative of the French delegation (in the Article 25 of the draft version of the ECSC Treaty of the November 8, 1950) to not design the role of the judges of the Court as full-time - with the parallel delegation to future agreements in the Council for an amendment - the final draft version of the November 27, without any further postponement, provided for a permanent and stable Court of Justice for the first European Community.

Sozialpolitik, Hamburg- Rissen, 29 July 1958.

²²² M. Rasmussen, The Origins of a Legal Revolution – The Early History of the European Court of Justice, in 2 Journal of European Integration History, 2008, p. 77, at 83.

²²³ *Ibidem*, at 84.

²²⁴ A. Boerger-De Smedt, La Cour de Justice dans les négociations du traité de Paris instituant la CECA, *op. cit.*, at 17.

²²⁵ *Ivi*, with reference to FJM, AMG 4/6/6, B[all] "Memorandum of suggestions regarding article 8 of proposed working paper", 04.07.1950.

²²⁶ *Ivi*.

III.2 Design of Powers of the Court of Justice and National Influences

Comparative influences were not only clearly visible in the original debate on the creation of the Court and what I called “the choice of the form” of institutionalization. The same phenomenon of internalization was very much present in the design of the powers of the Court.

In fact, in the case of diplomatic negotiations, it is quite typical to use comparative material from national legal forms and international models that are already known. This material is employed as an inspiration for the construction of political positions, and sometimes for the reaffirmation and exportation of national solutions.²²⁷ As we saw, the negotiations leading to the Treaty of Paris made no exception. In any case, we have also tried to show in the previous paragraph how, in the negotiations of the European Coal and Steel Community and of its institutional setting, and in particular in the structuring of its judicial review system, the use of this external inspiration was complicated (and made more interesting in retrospective) by a series of factors. First, we now have both the documental/historiographic evidence to properly trace these debates as well as the political science heuristics to understand and highlight their rationale. Second, it is interesting for our purposes to underline that the inspirational trajectories of the different delegations were mixed and complicated, and ranged from the adherence to their own national experiences (as in the German case) to proposals based on critical visions of different external models (the US federal judicial architecture in particular, feared by Monnet and taken as a basis by the Germans and their American consultants), and of the different kinds of international organizations, with only political bodies or *ad hoc* arbitral tribunals.

But the most interesting part of this retrospective comes when one approaches the actual forms taken by the Court of Justice of the ECSC, as eventually established, and the changes to which it has been subjected with the new negotiations leading to the Treaty of Rome and the new Communities. In fact, in these cases, the comparative conversation did not come simply as an exchange of statements of intent, or in the form of an abstract constitutional engineering. On the contrary, it was directly substantiated in the actual powers exercised by the Court, in its actual forms and in its relationships with other actors and institutions.

²²⁷ See on the typical practical functions of comparative law G. de Vergottini, *Diritto costituzionale comparato*, CEDAM 2013, at p. 34 *et seq.*

III.2.1 The “Administrative” Competences of the Court

It is commonplace in the literature to say that the Court was strongly influenced by the French judicial administrative forms.²²⁸ And despite the fact that the original French position on the opportune nature of the Court was, as we saw, based on rather different premises, this is largely true for several reasons we will see. But it is also commonplace to say that «the birth of European law» occurred «at the crossroads of legal traditions»,²²⁹ and an analysis of the powers conferred to the original versions of the Court of Justice will also substantiate this thesis in this special “architectural” sector.

It has been recently written, precisely by one of the 'new historians' studying the development of European law, that the best way «to characterise the new Court» in its original setting is to consider it «(E)ssentially (...) an innovative mix between at least three legal traditions».²³⁰ In its real forms, it would be possible to identify «several features of a classic international Law, including the downside that there was no effective legal system of addressing the non-compliance of member states»; «important tasks of administrative law (...) (M)odelled on the French *Conseil d'Etat*», essentially in the control of the legality of the actions of the High Authority; and finally, according to «the ambition of Hallstein and the German delegation to create a Federal Court similar to the American Supreme Court or the new *Bundesverfassungsgericht*», only met certain features with limited success of «what could be termed functional constitutionalism».²³¹ It is easy to understand - again retrospectively and therefore being familiar with the evolution that the European Court of Justice and the EU legal order had in the last decades - the basis for such a reconstruction. But apart from a relatively deceptive or non-technical use of the ever-problematic term “legal tradition”,²³² this can only be accepted through a more specific contextualization while taking into account the single legal tools employed as well as their background.

Ironically, one can notice that in seeking the model upon which the Court of the ECSC had

²²⁸ See on the point D. Tamm, The History of the Court of Justice of the European Union Since its Origin, in A. Rosas, E. Levits, Y. Bot (eds.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law - La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence*, T.M.C. Asser Press 2013, p. 9, at 17.

²²⁹ T. Koopmans, *The Birth of European Law at the Crossroads of Legal Traditions*, *op. cit.*, at 493.

²³⁰ M. Rasmussen, *The Origins of a Legal Revolution – The Early History of the European Court of Justice*, *op. cit.*, at 85.

²³¹ *Ivi.*

²³² See, *inter alia*, the reflections by M. Van Hoecke, M. Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, in 47 *The International and Comparative Law Quarterly*, 1998, p. 495.

been based, the various governments and parliaments at the time entered into an interesting and symbolic multiple exercise of chauvinism - described at the time by the scholars as a true «patriotic dispute».²³³ In the French National Assembly, M. Coste-Floret, the *rapporteur* of the Foreign Affairs Commission, stated in a rather direct fashion: «If I wish to define this new organ in a single word, I would say that it is a *Conseil d'Etat*».²³⁴ He based such an apodictic reconstruction on the observations that «(t)he principles of our French public law are the basis of the Protocol that regulates the working of the Court of Justice. The principles that govern the composition and working of the *Conseil d'Etat* have passed into the Treaty (...) The *avocats généraux* are essentially the Government commissaires of the *Conseil d'Etat* (...) In cases to be brought before the Court there is found in express terms in the Treaty the classic distinction in French public law between appeals of annulment and appeals in pleine jurisdiction».²³⁵ This contention was also replicated by speakers in the *Conseil de la République*²³⁶ and by the Report of the French Delegation.²³⁷ Interestingly, a similar reference was made in the debates of the Luxembourgish Parliament, when it was stated that «(t)he Court of Justice is organised upon the model of the French *contentieux administratif* which in principle only controls the legality and not the advisability of a measure».²³⁸ However, in the Belgian *Exposé des Motifs*²³⁹ it was affirmed that the nature and the role of the Court were predominantly administrative (*de haute juridiction administrative*), but it was then described as «similar in many respects to that of our Conseil d'Etat», and also comparable «in so far as it decides certain private interests, to the Mixed Arbitral Tribunals set up by the peace treaties in Belgium after the 1914 war».²⁴⁰ In the Netherlands, we find it stated that many members of the Parliament «believed that the Court of the Coal and Steel Community to be nearly the same in competence as the Supreme Court of the United States»;²⁴¹ an impression coupled nonetheless with the skepticism of other representatives declaring «(t)he Court of Justice» as «considerably less important in the Community than ... the Netherlands' Supreme Court in our country».²⁴²

²³³ D.G. Valentine, *The Court of Justice of the European Coal and Steel Community*, Martinus Nijhoff 1955, at p. 9.

²³⁴ *Assemblée Nationale*, Official Reports, 1951, p. 8855, col. 1.

²³⁵ *Ivi*, also declaring that «it is upon the principles of our public law that this Court will develop its precedents». For critical remarks on these points see D.G. Valentine, *The Court of Justice of the European Coal and Steel Community*, *op. cit.*, at 9.

²³⁶ M. Carcassonne, Official Reports, 1952, p. 715, col. 1.

²³⁷ R.D.F., p. 32, quoted also by D.G. Valentine, *The Court of Justice of the European Coal and Steel Community*, *op. cit.*, at 9.

²³⁸ M. Biever, *Compte rendu*, 1951-1952, col. 1611.

²³⁹ Sénat de Belgique, Session ordinaire, 1950-1951, no. 369, p. 14.

²⁴⁰ By a law dated 25 May, 1928, these Tribunals were empowered to determine certain private Belgian interests: their decisions were executory in Belgium provided that they were stamped by the agent général of the Belgian Government appointed to the Mixed Tribunal.

²⁴¹ *Voorlopig Verslag*, no. 2228, no. 7, 1951-1952, par. 8, p. 69, col. 1.

²⁴² *Eerste Kamer*, Official Reports, 1952, p. 211, col. 1.

Apart from these general depictions, focusing on the question of the Court's powers (we will go through all the other mentioned organizational and structural aspects in the following chapters), we already saw how the logical turn to an administrative-like system of judicial review for the European Court came from the early negotiations after the Schuman Declaration. In particular, it stemmed from the position of the German request to allow private firms to institute proceedings against decisions and acts of the High Authority against the tough opposition, particularly from the Benelux representatives, who used the special argumentation - which will become typical when discussing in some fundamental controversies, a decade after, the primacy and the direct effect of EC law²⁴³ - according to which such a system would have undermined the authority of national courts and was, in any case, «unnecessary because the respective governments could bring the grievances of national firms to the High Authority and the Court». ²⁴⁴ While it is well known that the rise of the worldwide phenomenon of judicial review in the last two centuries was clearly linked to the role of *arbitration* - in a general sense - played by courts in federal contexts,²⁴⁵ in the at-the-time clearly under-defined supranational context of the European Union, the prevalence of a position similar to the Benelux countries' would have meant nothing more than the establishment of a real, technical system of *arbitration*, simply left to pure political will and thus to the political discretion of national governments.

The idea to leave the door open to some kind of private right of standing in front of the Court was therefore clearly and originally based in the ECSC legal setting on the idea of the possibility of a direct contestation (as we said, vaguely proposed also on grounds of *opportunity*) of the High Authority commerce-linked measures. But once such a proposal eventually managed to find its way and its proclamation – for the different reasons and with the various inspirations we already saw – what were the real references for the design of the actual powers of the Court?

At a first glance, the German expansive request fit well with the nature of an administrative system of French derivation and thus with the establishment of specific tools for the defence of the private citizen against abuses of the public entity and of a right for firms to institute proceedings against decisions which the High Authority had directed towards them specifically. But the first

²⁴³ See on this, recently M. Rasmussen, Revolutionizing European law: A History of the Van Gend en Loos Judgment, in 12 International Journal of Constitutional Law 2014, p.136, at 156 *et seq.*; but, already, and authoritatively, P. Pescatore, Van Gend en Loos, 3 February 1963 – A View From Within, in L. Azoulay, L.M. Poiras Maduro (eds.) The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty, *op. cit.*, p. 3.

²⁴⁴ M. Rasmussen, The Origins of a Legal Revolution – The Early History of the European Court of Justice, *op. cit.*, at 84.

²⁴⁵ See recently on this S.G. Calabresi, J. Owens, The Origins of Judicial Review, Northwestern Public Law Research Paper No. 14-05, available at the website <http://ssrn.com/abstract=2391457> (accessed 26 August 2015).

provision defining the competence of the Court was actually Article 31 of the ECSC Treaty. It contained a sort of broad institutional mandate, which is still in place today «to ensure the respect of law in the interpretation and application of the Treaty and the rules laid down for the implementation thereof»: «*La Court assure le respect du droit dans l'interprétation et l'application du présent Traité et des règles d'exécution*». This rule has been famously described, also decades later and in the light of the evolution of the European law, as a «quizzical» one.²⁴⁶ It seems to entrust the Court of Justice, and to have entrusted it already at the time, of that typical 'nomophylactic' function of supreme courts and therefore to depict it a *φυλαξ*, a 'guardian', of the uniform interpretation of the law and coherence of the legal order to which it belongs. But in doing so, as it has been written, «its implication seems to be that the treaty assumes the existence of a Community legal order»,²⁴⁷ It takes it for granted, remaining in any case «silent on the substance of such a legal order», in terms of its «sources of law or (...) legal principles», «relationship between Community rules and national legislation», definition of «any human right or civic liberty».²⁴⁸ Such a detachment between the scope of the institutional mandate and the definition of the field of application of the Court was still striking for a commentator writing in the early 1990s as Tim Koopmans – who, again retrospectively, explained that for «historical reasons», linked to an idea of complete political integration on multiple levels which at the time seemed closer, and feasible in a relatively short time. Therefore, it was simply sketched and suggested in the provisions of the Treaty. But this broad, supreme mandate was probably even odder for commentators in the 1950s since it somehow appeared *ex abrupto* after the negotiations. It can surely be traced back to the positions wondering, for the Luxembourg Court - a leading supervisory role similar to the US Supreme Court. However, it opened the path for some suggestive opposite interpretations in the first academic accounts.

In fact, interestingly enough, the academic conversation soon after the enactment of the provision pointed on the articles' meaning as «open to several interpretations».²⁴⁹ Again, this anticipated a fundamental debate solved only in the following decades in problematizing the question «whether the words “shall ensure the respect of law” are to be taken as meaning that the Court is to be guided by the general principles of international law» or rather «the phrase has a more restricted sense and merely implies that in the interpretation and application of the Treaty, the Court is to be bound by recognised rules of interpretation and that the application of the Treaty shall be subordinate to the law as set out in the Treaty thus interpreted».²⁵⁰ Actually, it is

²⁴⁶ T. Koopmans, *The Birth of European Law at the Crossroads of Legal Traditions*, *op. cit.*, at 495.

²⁴⁷ *Ivi.*

²⁴⁸ *Ivi.*

²⁴⁹ D.G. Valentine, *The Court of Justice of the European Coal and Steel Community*, *op. cit.*, at 56.

²⁵⁰ *Ivi.*

particularly interesting to note that the perspective was seemingly inverted at the time. The use of all canonical rules of interpretation by the Court of Justice - an autonomous and discretionary use of them which would have led, in the following years, to the autonomization of European law itself²⁵¹ - was considered a «*restricted*» option vis-à-vis the subordination of the interpretation and application of Community law to the established general international law principles, even though the solution of leaving the Court free to refer to «“general principles”, or “its own notion of what is right and just”, or “what the authors of a Treaty would have intended”»²⁵² was already presented as «generally accepted».²⁵³

The other option of interpretation, at least generically discussed in this sense, was the possibility to hold the mandate of Art. 31 «either to grant a power to the Court to interfere ex officio» at least in some kind of situation «where it finds one of the organs of the Community interpreting or applying the Treaty unlawfully»,²⁵⁴ or to merely define the Court's own duty in respect of interpretation and application after its jurisdiction had been invoked. This latter option, and the idea of Art. 31 as a mandate for the ordering of the Community only when requested by a litigant, were in any case invoked by the Treaty with little doubt and were after all very much in line with all the provisions following and specifying Art. 31.

After four Articles 32 (32, 32a, 32b, 32c) devoted to the composition of the new Court - in which in any case some direct traces of French influences were clearly found already by the first commentators²⁵⁵ (as said earlier, we will study this aspect in detail in the next chapter) - the ECSC Treaty in fact structured the jurisdiction of the Court in terms of grants of rights of recourse and of prerequisites for appealing to it. As it is well known, these grants of rights were originally acknowledged, following the preparatory works, to the Member States, the Council, the High Authority, in a certain typical *arbitral* vein; but they were also acknowledged to enterprises and their associations and, on certain specific occasions,²⁵⁶ also to individuals.

The first important category, also for the purposes of our research, is the actions of annulment. Article 33, paragraph 1 of the ECSC Treaty allowed the Court to give judgments upon appeals brought by one of the Member States or by the Council seeking to have a decision or recommendation of the High Authority annulled. Moreover, its second sentence, added the power

²⁵¹ See extensively on the point R. Barents, *The Autonomy of Community Law*, *op.cit.*.

²⁵² D.G. Valentine, *The Court of Justice of the European Coal and Steel Community*, *op. cit.*, at 57.

²⁵³ *Ibidem*, at 56.

²⁵⁴ *Ivi.*

²⁵⁵ *Ivi.*

²⁵⁶ Art. 66, par. 5.2 of the Treaty.

of the Court, in certain specific circumstances, to take High Authority's assessment of the situation into consideration, resulting from the economic facts and conditions in the light of which the decision or recommendation was made. Furthermore, Article 33 paragraph 2 allowed enterprises and associations to bring appeals against decisions or recommendations «concerning» or «affecting» them, «under the same conditions» as appeals may be brought under par. 1. What were these conditions? Article 33 can be considered – and has been considered²⁵⁷ - as an incorporation into the ECSC Treaty of the same four grounds of appeal that had for long, already at the time, been recognised as grounds upon which administrative acts may be challenged before the French administrative jurisdictions and particularly before and according to the *Conseil d'Etat*. It was in fact, notoriously, the highest French administrative tribunal to progressively construct, *ex nihilo*, the essential parameters for the judicial control of the administrative activity in civil law countries - inspiring all the other similar jurisdictions of the Continent.²⁵⁸ It was actually in the same year of the first negotiations leading to the Schuman Declaration and the ECSC Treaty that, with the grand arrêt 17 février 1950, n° 86949, *Ministre de l'agriculture c/ Dame Lamotte*,²⁵⁹ the *Conseil* structured the possibility of such a control as a “*principe général du droit*”, a general principle of law. This coincidence is relevant, one can argue, since the definition itself of the possibility of such a control as a “general principle” is based on the traditional, stable definition of the grounds of appeal upon which administrative acts may be challenged, the definition of four relevant grounds in this respect, and the famous distinction between grounds involving the “external legality” of acts – the incompetence of the agent and the vices of form or procedure – and grounds involving the “internal legality” of acts – the violation of the law and the *détournement de pouvoir*.

Article 33 of the ECSC Treaty is the exact transposition of these traditional grounds as specifically defined by the *Conseil d'Etat* in the newborn supranational context. Not only: it is the transcript in supranational positive law of judge-made tools which were not written elsewhere in the positive law of the Member states, not in French law, nor even in other comparable environments like the Italian administrative law where, in any case, the relevant categories were surely inspired by the French prototypes but used to differ (at least in their labels) in several respects.²⁶⁰ Art. 33 provided that «(T)he Court shall have jurisdiction in actions brought by a Member State or by the Council», or by «(U)ndertakings or the associations referred to in Article 48 ... under the same

²⁵⁷ See the coinciding statements by D.G. Valentine, *The Court of Justice of the European Coal and Steel Community*, *op. cit.*, at 71; T. Koopmans, *The Birth of European Law at the Crossroads of Legal Traditions*, *op. cit.*, at 493; J. Rivero, *Le problème de l'influence des droits internes sur la Cour de Justice de la Communauté Européenne du Charbon et de l'Acier*, in 4 *Annuaire français de droit international*, 1958, p. 295.

²⁵⁸ See the reconstruction by D. de Pretis, *La giustizia amministrativa*, in G. Napolitano (ed.), *Diritto amministrativo comparato*, Giuffrè 2007.

²⁵⁹ CE Ass 17 février 1950, *Ministre de l'Agriculture c/Dame Lamotte*.

²⁶⁰ J. Rivero, *Le problème de l'influence des droits internes sur la Cour de Justice*, *op. cit.*, at 303-304.

conditions» to have decisions or recommendations of the High Authority declared «void on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers». The categories forged by the French administrative judges were therefore transposed in their exact wording in the text of the Treaty. But, as typical for such comparative transplants, especially in such an “upward” move to the new supranational context, there were some frictions even noted by early commentators at the time.

In fact, it is to be noted that:

- The category of “*incompetence*”, the term applied to actions performed by an agent outside the defined limits of his legal powers, has been naturally included. But although a notion of clear *ultra vires* action gives rise to no uncertainty, yet as the powers conferred upon the High Authority by the ECSC Treaty were in such wide terms, it was already submitted at the time that difficulties in particular cases may occur,²⁶¹ especially when considering that the Community, according to the original Article 2, was empowered by broad mandates to work for «economic expansion», for the «development of employment», the «raising of the standards of living in member countries».
- The category of “violation of substantial procedural requirements” - consisting of the omission or incomplete or irregular accomplishment of a substantive procedural requirement to which an act of administrative nature is subject, either by the law or by rules, or inherently from its nature - is of course strictly dependent on a definition of what procedural requirements are to be actually held substantial. In a newly-born legal setting, this was questionable and open to developments. It was surely the case, in the original Community setting, of all the articles in which the Treaty required the High Authority to consult either the Council or the at-the-time Consultative Committee before it made a decision or recommendation. A failure to do so would have clearly amounted to grounds for annulment. The same solution was generally agreed, since the beginning,²⁶² for the cases in which the advice had been taken but not been adequately considered. But this aspect is clearly linked to a dimension that is extraneous surely for the French paradigmatic system and also to the majority of the other Member States and legal orders.²⁶³ The transposition of these vices for the scrutiny of all “decisions and recommendations”, also of «general» and therefore normative²⁶⁴ nature, when such acts did not set out the reasons that prompted the High Authority to take them, as required by Art. 15, par. 1 of the Treaty. The motivation of acts of administrative

²⁶¹ D.G. Valentine, *The Court of Justice of the European Coal and Steel Community*, *op. cit.*, at 73.

²⁶² A. Antoine, *La Court de Justice de la C.E.C.A.*, in 6 *Révue Générale de Droit International Public*, 1953, p. 234; D.G. Valentine, *The Court of Justice of the European Coal and Steel Community*, *op. cit.*, at 74.

²⁶³ S. Boccialatte, *La motivazione della legge. Profili teorici e giurisprudenziali*, CEDAM 2008, especially at 191 *et seq.*

²⁶⁴ See for the use of this definition, *ex multis*, T. Hartley, *The Foundations of European Community Law*, 6th ed. Oxford University Press 2007, at p. 368.

nature was clearly the physiology of all the national legal orders of the Community; not so for the motivation of acts of normative nature, that would have become, nonetheless, a specific features of the EC legal order.²⁶⁵

– The “violation of the law” occurs when an administrative decision, although taken according to the legal requirements, is nevertheless in contradiction - entirely or in part - to other provisions of the law. In this respect and in the transposition of this category, a conflict of interpretations arose upon the exact scope of these words once put in context with the ECSC, and therefore on the distinction of two different levels of norms, since the negotiations. The Treaty itself used the words «a violation of the Treaty and of any rule of law concerning its application»: «*violation du Traité ou de toute règle de droit relative à son application*». Accordingly, the Report of the French Delegation made the same expansive vein explicit, stating that «(I)t was necessary to add to the violation of the terms of the Treaty itself, violation of rules made for its application and, if the case should occur, other relevant texts, such as international conventions, as well as the general principles of law. All of these are covered by the wording in article 33».²⁶⁶ But according to some early commentators from a common law background, it was «submitted that the strict wording of sentence 1 in Art. 33 does not appear to support the wide meaning given to it by the French delegation, for reference is made in the sentence only to “the Treaty” and the additional rules of law mentioned are only those concerning the Treaty's application – and thus one must assume that other rules of law are to be excluded»,²⁶⁷ for some others the transposition should have gone so far to design a «Court, following the practice of the French Conseil d'Etat, ... able to annul a decision not only for a violation of the letter of the Treaty, «but equally for a breach of its “spirit»».²⁶⁸

– The “*détournement de pouvoir*” has been historically defined as occurring when an agent performs an act for a purpose other than that which is presupposed when the related power was granted. Therefore, this vice of an administrative act has been historically based in its French judge-made definition on the “turning away” of a necessarily discretionary power from its correct use, not directly violating any provision of the law, but «twisting – *détourner* – a legal power from the purpose for which it has been granted to make it serve ends that were not intended». ²⁶⁹ In fact, this was the line that Prof. Reuter followed when he stated in the aftermath of the approval that «under this definition will fall those acts which aim at a purely personal or national interest, when the

²⁶⁵ See specifically C. Hen, *La motivation des actes des institutions communautaires*, in 13 *Cahiers de Droit Européen*, 1977, p. 54; A. Vidaschi, *Istituzioni europee e tecnica legislativa*, Giuffrè 2001, especially at p. 75 *et seq.* and 133 *et seq.*

²⁶⁶ D.G. Valentine, *The Court of Justice of the European Coal and Steel Community*, *op. cit.*, at 74.

²⁶⁷ *Ibidem*, at 75.

²⁶⁸ A. Antoine, *La Court de Justice de la C.E.C.A.*, *op. cit.*, at p. 236.

²⁶⁹ E. Leferrère, *Traité de la Jurisdiction Administrative et les Recours Contentieux*, Berger-Levrault 1896, II, at p. 548.

Treaty requires that the act must be in the common interest of the Community».²⁷⁰ In its report, the French Delegation also stated that «the notion of *détournement de pouvoir*, in particular, has been clearly understood and willingly – *facilement* – accepted by our foreign partners».²⁷¹ This could be the case, but the practice of the first cases brought at the Court in the first years of activity clearly shows a certain degree of friction in the transposition, and the risk of a category “lost in translation” in the supranational context. In fact, the applicants - especially in the form of private companies and associations - were somehow prompted to expand the conception of “*détournement*”, since only by proving such misuse of powers, they were admitted to oppose regulatory measures. And, not by chance, such an expansive reading particularly came about by Italian plaintiffs. For instance, in the case 2/54,²⁷² the representative of the Italian Government declared that «(I)l y a toujours *détournement de pouvoir* lorsque la Haute Autorité contrevient au Traité dans l'exercice du pouvoir qu'il lui confère» (Rec. 1, p. 21); in the subsequent case 3/54,²⁷³ the Italian plaintiff, the Associazione Industrie Siderurgiche Italiane (ASSIDER), presented the «*injustice manifeste*» and the «*illogisme*» of the opposed decision of the Authority as cases of *détournement* of its *pouvoir*. This was perfectly understandable once noting the different development of the judge-made grounds of administrative litigation in the Italian legal order. The local category of “*sviamento di potere*”, literally corresponding to the *détournement*, is actually nothing more than one of the different modalities of the “*eccesso di potere*”, which includes the “*injustice manifeste*” and the “*incohérence manifeste*” as well. Therefore, within the Italian context, the *eccesso di potere* is an autonomous ground of appeal, including *détournement* and others *species*, alongside the basic “*incompetenza*” and “*violazione di legge*”; in France, it is a general concept including all the four vices transposed in the European context.²⁷⁴

The events of the construction of Article 33 clearly show the phenomenon of upward transfer from national forms to supranational powers, while additionally explaining how the image and the practice of the European Court of Justice as an inherently “comparative” Court – in terms of its activity and its methodology²⁷⁵ – is also firmly based on the original aspects of the structure and

²⁷⁰ D.G. Valentine, The Court of Justice of the European Coal and Steel Community, *op. cit.*, at 75.

²⁷¹ *Ibidem*, at 76.

²⁷² Judgment of 21 December 1954, Italy / ECSC High Authority (2/54, ECR 1954-1956 p. 37).

²⁷³ Judgment of 11 February 1955, Assider / ECSC High Authority (3/54, ECR 1954-1956 p. 63).

²⁷⁴ J. Rivero, Le problème de l'influence des droits internes sur la Cour de Justice, *op. cit.*, at 304.

²⁷⁵ On the idea of the European judge as an quintessentially comparatist judge see the reflections by P. Pescatore, Le recours dans la jurisprudence de la Cour de justice des Communautés européennes, à des normes déduites de la comparaison des droits des Etats membres, in 32 *Revue internationale de droit comparé*, 1980, p. 337; J. Mertens de Wilmars, Le droit comparé dans la jurisprudence de la Cour de Justice des Communautés Européennes, in 110 *Journal des Tribunaux*, 1991, p. 37; C. N. Kakouris, Use of the Comparative Method by the Court of Justice of the European Communities, in 6 *Pace International Law Review*, 1994, p. 267; K. Lenaerts, Interlocking Legal Orders in the European Union and Comparative Law, in 52 *International & Comparative Law Quarterly*, 2003, p. 873; L.M.

the organization of the Court and is often a consequence of them. In this respect, the grounds of appeal of Art. 33 are a perfect example, particularly in the interpretation of the *détournement de pouvoir*. In fact, after the structuring of the powers of the Court, and the design of ground of appeal for the annulment actions perfectly reminiscent of the French paradigm, we saw that the Court had to quickly face an interpretative “attack” to these categories based on different national legal cultural premises. Consequently, the response of the Court was, in the case 3/54 itself, an exhaustive analysis made by the Advocate General Maurice Lagrange of the concept of *détournement de pouvoir* in all six Member States, anticipated by the clear statement of intention according to which «(L)a notion de détournement de pouvoir n'a évidemment pas été inventée par les auteurs du Traité et, pour essayer de se former une opinion sur ce que doit être le détournement de pouvoir dans l'application du Traité, opinion nécessairement révisable d'ailleurs et perfectible au fur et à mesure des développements de la jurisprudence, il faut d'abord savoir ce qui en est dans le droit respectif de nos six pays», and opposing a strict «Franco-Beneluxienne»²⁷⁶ conceptualization to the similar but not overlapping Italian and German interpretations. In the end, that particular case meant the Court had no reason to take the side of the interpretative *querelle*: but, already in the subsequent case 6/54,²⁷⁷ it used the formula «(E)lle aurait usé de ses pouvoirs (...) dans un but autre que celui en vue duquel ceux-ci lui ont été conférés», therefore adhering to the «Franco-Beneluxienne» concept and thus to the opinions according to which «vouloir maintenant, dans le droit de la Communauté, ranger sous la rubrique du détournement de pouvoir des cas qui relèvent en France du moyen de violation de la loi, équivaldrait à écarter délibérément la volonté des auteurs du Traité quant à l'étendue des pouvoirs de contrôle conférés par eux à la Cour»²⁷⁸ (a doctrinal opinion to which Lagrange made explicit reference in its conclusions in the case 3/54). The solution of the specific case of the *détournement* was also confirmed again some years later in the case 15/57;²⁷⁹ but, more importantly, the method of the judicial comparative interpretation, prompted by the original inherently comparatively-influenced structure of powers of the Court, became more and more used also to fill the gaps in the institutional design of the Treaty,²⁸⁰ or to define other

Poiares Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, in 1 *European Journal of Legal Studies*, 2007, p. 1, especially at 5 *et seq.*; J. Bengotxea, *Multilingual and Multicultural Legal Reasoning. The European Court of Justice*, in A.L. Kjør, S. Adamo (eds.) *Linguistic Diversity and European Democracy*, Ashgate 2011, p. 97.

²⁷⁶ J. Rivero, *Le problème de l'influence des droits internes sur la Cour de Justice*, *op. cit.*, at 305.

²⁷⁷ Judgment of 21 March 1955, *Netherlands / ECSC High Authority (6/54)*, ECR 1954-1956 p. 103).

²⁷⁸ In the words of E. Steindorff, *Le recours pour excès de pouvoir dans le droit de la Communauté européenne du charbon et de l'acier*, Klostermann 1952, directly cited by Advocate General Lagrange in its Opinion.

²⁷⁹ Judgment of 12 June 1958, *Compagnie des hauts fourneaux de Chasse / ECSC High Authority (15/57)*, ECR 1957-1958 p. 211).

²⁸⁰ See e.g. Judgment of 17 December 1970, *Einfuhr- und Vorratsstelle für Getreide und Futtermittel / Köster (25/70)*, ECR 1970 p. 1161), «*fondamental pour le système législatif de la Communauté*» according to P. Pescatore, *Le recours dans la jurisprudence de la Cour de justice des Communautés européennes, à des normes déduites de la comparaison des droits des Etats membres*, *op. cit.*, at 340, that decided on the regime of normative execution of

autonomous concepts of European law.²⁸¹

In any case, Article 33 was not the only example of this hybrid genetic nature of the powers of the newborn Court. A further example of the extent to which «French procedural law has been copied»²⁸² was found and stigmatized with such explicit terms by the early commentators in the Treaty's subsequent Article 34. Following an annulment of a decision or recommendation of the High Authority, that Authority is itself required to take the measures to carry out the decision of annulment, «so that its duty is in no way superseded by the Court».²⁸³ Also in here, the Report of the French Delegation pointed out that the solution was directly taken from the formula of the *Conseil d'Etat* so that the High Authority, as any public administration in that legal system, was «put back, as far as possible ... into the situation where it would have been if the annulled decision had not been passed».²⁸⁴ But also the creation of a procedure of plenary appeal - «*de pleine juridiction*» - alongside the actions for annulment in which the European judge would exercise «all his customary judicial powers»,²⁸⁵ and therefore would be free to examine every aspect of the case - whether of “law” or “fact”- and would be competent to rule on the monetary aspects of the litigation (*e.g.*, through an award of damages) was considered to be «borrowed from French administrative law».²⁸⁶ Of course, the reference was to cases in which the Court acts in matters of quasi-contractual (Aquilian) or noncontractual liability, «which in France, when applied to administrative actions, means liability of public authorities (*la responsabilité de la puissance publique*)».²⁸⁷ The same Article 40, in providing for compensation in case of injury caused during the delivery of tasks based on the Treaty by the Community, was based on the distinction rooted in French administrative law between a fault of service - *faute de service* – and personal fault – *faute personnelle* – and therefore to the «*assez tenue, assez délicate à faire*»²⁸⁸ distinction between faults to be imputed to the agent and those to be imputed to the administration. Its two first paragraphs precisely mirrored such a traditional distinction.²⁸⁹ However, these three examples of division of labour between the Court and

Council regulations with explicit reference, at par. 6, to «the legal concepts recognized in all the Member States».

²⁸¹ See the notorious Judgment of 12 July 1957, *Algera and others / Common Assembly (7/56, 3/57 to 7/57, ECR 1957-1958 p. 39)*, that decided on the possibility of annulment or withdrawal of Communitarian individual administrative measures by recognizing the existence «*d'un problème de droit administratif, bien connu dans la jurisprudence et la doctrine de tous les pays de la Communauté*», and explicitly solving it «*en s'inspirant des règles reconnues par les législations, la doctrine et la jurisprudence des pays membres*».

²⁸² D.G. Valentine, *The Court of Justice of the European Coal and Steel Community*, *op. cit.*, at 71.

²⁸³ *Ivi.*

²⁸⁴ D.G. Valentine, *The Court of Justice of the European Coal and Steel Community*, *op. cit.*, at 87.

²⁸⁵ M. Lagrange, *The Court of Justice as a Factor in European Integration*, *op. cit.*, at 712.

²⁸⁶ *Ivi.*

²⁸⁷ *Ivi.*

²⁸⁸ P. Duez, G. Debreyere, *Traité de Droit Administratif*, Dalloz 1952, at p. 694.

²⁸⁹ «Article 40

Subject to the provisions of the first paragraph of Article 34, the Court shall have jurisdiction to assess damages

the administrative authority could still simply be considered the results of the adoption of a system of administrative jurisdiction of every sort. The phenomenon of upward transfer of national judicial forms in the supranational setting is surely clearer when the decisive position of the preliminary reference procedure is taken into account.

III.2.2 Transformation of the Preliminary Reference Procedure

What is more relevant to our purpose is, in fact, the other great example of upward fertilization of the structure of the European Court's powers: the evolution of the preliminary reference procedure.

The fundamental importance of this instrument for the construction of the European legal (and political)²⁹⁰ architecture is well known nowadays. It has been used more and more throughout the years whenever a national court or tribunal refers a question of European law to the European Court of Justice for a preliminary ruling so as to enable the national court, upon receiving that ruling, to decide the case before it. Questions of EU law arise in cases before the courts of different Member States. The function of such a clever procedural tool is to ensure uniform interpretation and validity of EU law across all the Member States. It is well known that already Alexis de Tocqueville, in his magisterial study on the construction of a federal «Democracy in America», highlighted that «The object of the creation of a Federal tribunal was to prevent the courts of the States from deciding questions affecting the national interests in their own department, and so to form a uniform body of jurisprudence for the interpretation of the laws of the Union. This end would not have been accomplished if the courts of the several States had been competent to decide upon cases in their separate capacities from which they were obliged to abstain as Federal tribunals».²⁹¹ In this sense, the European solution for a correct and uniform application of a common

against the Community, at the request of the injured party, in cases where injury results from a fault involved in an official act of the Community in execution of the present Treaty.

It shall also have jurisdiction to assess damages against any official or employee of the Community, in cases where injury results from a personal fault of such official or employee in the performance of his duties. If the injured party is unable to recover such damages from such official or employee, the Court may assess an equitable indemnity against the Community.

All other litigation between the Community and third parties, other than that relating to the application of the provisions of the present Treaty and implementing regulations, shall be brought before the national tribunals.»

²⁹⁰ In the recent iconic words of J.H.H. Weiler, *The political and legal culture of European integration: An exploratory essay*, *op. cit.*, at 690, «(T)he secret of the principle of the rule of law in the legal order of the European Union is that genius process of preliminary references and preliminary rulings». It is after all telling that all the Court of Justice's judgments considered as “classics” and fundamental tenets of the EU legal order in a well-known recent publication, L. Azoulay, L.M. Poiras Maduro (eds.) *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, *op. cit.*, were given under the preliminary reference procedure.

²⁹¹ A. de Tocqueville, *Democracy in America*, Vol. 1, Chapter Eight, available at the website

law has been different, and essentially based on the institute we are discussing: the CJEU itself characterises the preliminary reference procedure as constructed around the cooperation between national courts and Luxembourg.²⁹² However, it is the CJEU that controls this cooperation and sets its terms. In its ‘dialogue’ with national courts, it has the upper hand and has succeeded in co-opting national courts into an EU federal judicial system, at the same time placing the individual, European citizens, in the relevant position of monitors and enforcers of Community obligations vis-à-vis the Member States (so to be labeled as the «Private-Attorney-General Model»²⁹³). In this respect, scholars have written of an «ingenious» construction, leading to a fundamental «habit of obedience» in Member States, normally associated with national law yet through this procedure attached to European law as well.²⁹⁴ In the sixth chapter, we will further discuss the evolution of this mechanism and these features, particularly relating to certain specific structural and organizational aspects of the dialogical relationship it creates between the European Court and national judges.

But the analysis of the preliminary reference procedure is also important in this research in relation to its genetic moment and its infancy. In fact, the procedural tool has been particularly important in strengthening the role of the European Court of Justice as a veritable supreme court of the supranational organization, according to the explicit perspective and political will of certain delegations. However, its original role in the ECSC Treaty was different from what it became in the subsequent Treaty of Rome, and thus in the context of the European Economic Community legal order. Article 41 of the ECSC Treaty laid down that only the newborn European Court was competent («shall have sole jurisdiction») to decide as a preliminary question upon the validity of the «*délibérations*» of the High Authority and of the Council in cases where a controversy brought before a national tribunal had put that validity into issue. Interestingly enough, it is possible to say that it was «not created to satisfy German demands for a uniform interpretation of European law»,²⁹⁵

<https://www.gutenberg.org/files/815/815-h/815-h.htm> (accessed 26 August 2015).

²⁹² See for instance what held in C-393/98 Judgment of 22 February 2001, Gomes Valente (C-393/98, ECR 2001 p. I-1327) ECLI:EU:C:2001:109, at 17: «According to case-law that is well established, that obligation to refer is based on cooperation, with a view to ensuring the proper application and uniform interpretation of Community law in all the Member States, between national courts, in their capacity as courts responsible for the application of Community law, and the Court of Justice [...] and it is particularly designed to prevent a body of national case-law that is not in accordance with the rules of Community law from being established in any Member State...».

²⁹³ Again in the recent authoritative words of J.H.H. Weiler, The political and legal culture of European integration: An exploratory essay, *op. cit.*, at 691, «the preliminary reference procedure is, overwhelmingly, a device for judicial review of member state compliance with their obligations under the treaties. It is ingenious for two reasons: First, it deploys individuals, vindicating their own rights, as the monitors and enforcers of Community obligations vis-à-vis the member states. It has been called the private-attorney-general model. And second, it deploys national courts. The judgment is spoken through the mouths of member state courts. The habit of obedience associated with national law is, thus, attached to European law. The gap between the rule of law and the rule of international law is narrowed, even closed».

²⁹⁴ *Ivi.*

²⁹⁵ M. Rasmussen, The Origins of a Legal Revolution – The Early History of the European Court of Justice, *op. cit.*, at

as the principle of legality of Article 3 and Article 31 itself would have demanded. Instead, proposed again by Maurice Lagrange as head of the French delegation, the article had the simple primary purpose of clarifying the division of labour between national courts and the new European Court in addition to their spaces of jurisdiction.

In fact, what is evident for today's analyst is the «restrictive character»²⁹⁶ of the provision, a character which retrospectively, is considered, retrospectively, «surprising» by scholars.²⁹⁷ In fact, structured an exclusive competence of the Court, «*en vue d'éviter que les juridictions nationales se prononcent dans des questions mettant en cause la Communauté*»,²⁹⁸ on matters of *validity* of acts of the supranational institutions. But it completely omitted, within the «*questions mettant en cause la Communauté*», the problem of the allocation of the competence of *interpretation* of European law. The study of the preliminary works for the ECSC Treaty shows how the provision of Art. 41 was in fact an addition made to its “Chapter IV – The Court” as a completion of Article 40, which - as previously stated - in the context of the discipline for the disputes arising from the fault of the agents of the Community, was all devoted to the allocation of jurisdiction between the European Court and «national courts of tribunal».²⁹⁹

In this vein, Article 40 provided that «the Court shall have jurisdiction to order pecuniary reparation from the Community, on application by the injured party, to make good any injury caused in carrying out this Treaty by a wrongful act or omission on the part of the Community in the performance of its functions» (par. 1); that «(T)he Court shall also have jurisdiction to order the Community to make good any injury caused by a personal wrong by a servant of the Community in the performance of his duties», according to the Staff Regulations or the Conditions of Employment applicable to them (par. 2); and, finally, that «(A)ll other disputes between the Community and persons other than its servants to which the provisions of this Treaty or the rules laid down for the implementation thereof do not apply shall be brought before national courts or tribunals» (par. 3). This precise allocation was entirely based on the principle according to which the European Court «*connaît de tout ce qui concerne l'application du traité et ne connaît que de cela*».³⁰⁰ And that same

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²⁹⁶ A. Boerger-De Smedt, *La Cour de Justice dans les négociations du traité de Paris instituant la CECA*, *op. cit.*, at 29.

²⁹⁷ *Ivi.*

²⁹⁸ *Ivi.*

²⁹⁹ M. Rasmussen, *The Origins of a Legal Revolution – The Early History of the European Court of Justice*, *op. cit.*, at 84: «The predecessor of the famous article 177 of the EEC Treaty, article 41, which introduced a system of preliminary references in the ECSC, allowing the Court to pronounce its judgment on the validity of European law, was interestingly enough not created to satisfy German demands for a uniform interpretation of European law. Proposed instead by Lagrange, it had the sole purpose of clarifying the division of work between national courts and the new European Court». See also, accordingly, A. Boerger-De Smedt, *La Cour de Justice dans les négociations du traité de Paris instituant la CECA*, *op. cit.*, at 29-30.

³⁰⁰ Archives historiques des communautés européennes (Florence), Fonds Uri, dos. 37/2, Lagrange, "Élaboration de l'exposé des motifs", (s.d.), as quoted by A. Boerger-De Smedt, *La Cour de Justice dans les négociations du traité de Paris instituant la CECA*, *op. cit.*, at 29.

rationale - a strict *actio finium regundorum* between the jurisdiction of the European Court and of the national tribunals as well as the need to avoid conflicts of jurisdiction - was at the basis of the prototypical form of preliminary reference procedure. That is, the need was simply to avoid that national courts could take over the task of ruling on the *validity* of supranational measures and therefore to declare these latter void without the possibility of the supranational judicial arm to opine.

Thus, a certain degree of centralization was already present in the ECSC Treaty; but it did not include, and probably it did not need, a centralization of the '*nomophylactic*' function of interpretation of European law to boost its uniformity and the coherence of the legal order. As it is known, this decisive element was added by the Treaty of Rome in the construction of the “new” European Court of Justice of the European Economic Community. But here again, a closer look into to the dynamics of this construction can also give us a new perspective on the relative influences in coherence with the purposes of the present research.

Among the scholars, there is little doubt on the institutional continuity between the Court of the European Coal and Steel Community of the first part of the 1950s and the subsequent common judicial arm of the new Communities born with the Treaties of Rome of 1957. It was explicitly decided, following the creation of the European Economic Community and EURATOM, that a single court would have dealt with legal disputes arising under all three Communities³⁰¹ though the methods of taking legal action differed in each one.³⁰² And it was clearly the same Court, already established in Luxembourg, in the same location and with the same personnel, by force of the Treaty of Paris, to take over the tasks and the powers prescribed by the new intergovernmental agreements.³⁰³ However, such continuity did not come as an obvious result. For the second time in quick succession, it was by no means clear at the beginning of a round of diplomatic negotiations (this time, leading to the Treaties of Rome) how the institutional structure of the two communities would look like and, again, «whether it would include a Court».³⁰⁴

In fact, in its first years, the European Court's activity was surely characterised, as we described, by certain peculiar aspects of scientific interest. But its activity was clearly unremarkable in quantitative terms considering the small caseload - the Court only pronounced 27 judgments and

³⁰¹ M. Rasmussen, *The Origins of a Legal Revolution – The Early History of the European Court of Justice*, *op. cit.*, at 87.

³⁰² R. Dehousse, *The European Court of Justice. The Politics of Judicial Integration*, *op. cit.*, at 5.

³⁰³ See A. Grilli, *Le origini del diritto dell'Unione europea*, *op. cit.*, at Chapter 5; D. Tamm, *The History of the Court of Justice of the European Union Since its Origin*, *op. cit.*, at 17 *et seq.*

³⁰⁴ M. Rasmussen, *The Origins of a Legal Revolution – The Early History of the European Court of Justice*, *op. cit.*, at 86.

almost all concerned the annulment of decisions under article 33 and 35 - and the weakness of article 41, and was not politically visible or «marked by any pronounced activism».³⁰⁵ But it is important to note that - as a constant feature in the history of European integration, made up of a series of developmental stages and setbacks - the negotiations started not many months after the defeat of the European Defence Community Treaty in the French National Assembly, and that again, since a team of renowned lawyers was involved, certain Court's moves to gradually strengthen «some of the constitutional features»³⁰⁶ of the Treaty of Paris did not go unnoticed among the diplomatic parts. This particularly happened in relation to the efforts to make it easier for private litigants to go to Court by blurring the distinction between general decisions and those directed towards a particular firm,³⁰⁷ and in relation to the already clear twist according to which - while it had been expected that the Court should control the High Authority - the weakness of the latter meant that it focused instead on protecting the Community against the transgressions of the member states.³⁰⁸

Therefore, there was common consciousness among the six governments that a new step in the field of European integration would have to use economic leverage again; and diplomats were all wary of unduly ambitious political schemes. But again, there were different perspectives on how to frame the legal and institutional setting. This new irresolution was first of all reflected in the Spaak Report, which said relatively little on the institutional aspects of the project.³⁰⁹ But it was also made clear by the confrontation - well documented by the new historical research³¹⁰ - between within the French delegation, which was not openly able to support «a connection between the ECSC assembly and court, and the two projected Communities»,³¹¹ due to the widespread internal scepticism with regard to supranational institutions in the national legislature, and the other five teams, «dominated by pro-Europeans»,³¹² representing governments that to a varying degree

³⁰⁵ *Ivi.*

³⁰⁶ *Ibidem*, at 85.

³⁰⁷ D.G. Valentine, The Court of Justice of the European Coal and Steel Community, *op. cit.*, at 87.

³⁰⁸ See the reflections by C. Penner, The Beginnings of the Court of Justice and its Role as a Driving Force in European Integration, in 1 Journal of European Integration History, 1995, p. 111, at 118-122; see also, accordingly, H. Rasmussen, On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking, *op. cit.*, at pp. 208-213.

³⁰⁹ See P.H. Spaak, Rapport des chefs de delegation aux Ministres des Affaires Etrangères / Report of the Heads of Delegation to the Ministers of Foreign Affairs (21 April 1956), available at the website http://aei.pitt.edu/996/1/Spaak_report_french.pdf (accessed 26 August 2015).

³¹⁰ M. Rasmussen, The Origins of a Legal Revolution – The Early History of the European Court of Justice, *op. cit.*, at 86; A. Boerger-De Smedt, La Cour de Justice dans les négociations du traité de Paris instituant la CECA, *op. cit.*, at 10.

³¹¹ M. Rasmussen, The Origins of a Legal Revolution – The Early History of the European Court of Justice, *op. cit.*, at 86.

³¹² *Ivi*: for example Carl Friedrich Ophüls, Jean-Charles Snoy, Lambert Schaus, Lodovico Benvenuti (heads of delegation) and Spaak (Belgian Foreign Minister), all of whom had participated in one or more of the intergovernmental negotiations on the European Coal and Steel Community, the European Defence Community and the European Political Community during the 1950s.

wished to maintain a minimum of political coherence amongst the various efforts of European integration and considered the institutional infrastructure as an important way to accomplish this. In a note submitted to the head of delegations on September 11, 1956, the proposal to completely remove the court came onto the table again by the French *Conseiller politique* of the Foreign Minister George Vedel. In his view, most legal cases in the new Communities would have been technical in nature, and were better suited for submission to a Court of Arbitrage constituted by technical experts.³¹³ But a fierce German high-level internal debate has also been reported. According to the new documentary evidence,³¹⁴ the local Ministry of Economics wanted to remove the Court and the Assembly from the European institutional edifice as well, though the Foreign ministry rejected this view and argued that the ECJ was indispensable as a stabiliser of the Communities.

The lack of consensus on the destiny of the ECJ meant that it was removed from the agenda of the meeting of the head of delegations in October 1956 and such disagreement on the institutional system was only overtaken after the meeting between German Chancellor Konrad Adenauer and French Prime Minister Guy Mollet in November 1956. Having been granted important economic concessions and in the spirit of the general Franco-German agreement to bring the negotiations to a successful end, the French government apparently accepted the inclusion of the Court and the Assembly among the institutions of the new communities as long as these were not strengthened by gaining any new competences — thus endangering the ratification of the treaties in the National Assembly.³¹⁵ But here was the point: after the emergence of such common general political will, with France eventually accepting one Assembly and one Court to be shared by all three Communities - also emphasizing in this respect the aspect of continuity - on the condition that the powers of these two institutions were not strengthened, the turn was then for the specialised *Groupe de rédaction*, established in 1956, to draft the Treaties and forge the relative institutional clauses translating into positive commands of supranational law this compromise. In fact, it is reported that, while all of the major institutional questions were decided at the political level and by the heads of delegation, the Committee was given a relatively free hand with regards to the ECJ.³¹⁶ Moreover, we know that it was not only composed of leading jurists from any of the European jurisdictions, with direct and autonomous knowledge in the field resulting from the different background experiences, but also - as we historically learn from the precious Pierre Pescatore's

³¹³ M. Rasmussen, *The Origins of a Legal Revolution – The Early History of the European Court of Justice*, *op. cit.*, at 87.

³¹⁴ *Ivi.*

³¹⁵ *Ivi.*

³¹⁶ M. Rasmussen, *The Origins of a Legal Revolution – The Early History of the European Court of Justice*, *op. cit.*, at 88.

direct written testimony³¹⁷ - composed in such a way to reflect the intergovernmental positions - so that «all members except the French wanted to push as far as they possibly could in the direction of strong European institutions»,³¹⁸ including in this promotion the «constitutional features of the Court».³¹⁹

This precious and peculiar combination resulted in an interesting compromise. In some respects, in delineating the new institutional setting, the Committee even curbed the competences of the ECJ, negating the doctrinal developments of the early 1950s. In particular, the widened access of private litigants that the ECJ had contributed to in its short, previous case-law,³²⁰ was compressed in the new Article 173,³²¹ reaffirming the need for an optimization of the sources of controversies - thus writing a new important chapter of a long story still debated up to recent times.³²² However, it is possible to say that overall, the *Groupe* strengthened the Court's powers by not meeting the conditions agreed with the French delegation for its approval – stressing the *constitutional* features of the supranational judicial competences and being influenced by the decisive example coming from a national legal culture.

In fact, the most important novelty stemming from the new draft was the development of the system of preliminary references from national courts to the European Court of Justice, going well beyond the narrow construction of Article 41 of the Treaty of Paris and the division of labour and jurisdiction in hearing of the *validity* of supranational acts. In fact, Article 177 of the Treaty of Rome of the European Economic Community precisely included the new competence of the Court to rule on the *interpretation* of European law that has proved to be decisive for the construction of the European constitutional architecture in the following decades. As it is well known, Article 177 was not an invitation to the Court of Luxembourg to evaluate whether national law actually

³¹⁷ The great Luxembourgish jurist, and future judge of the Court, was in fact at the time acting as legal advisor of the Foreign Ministry of Luxembourg; and later in time he wrote about his personal experience in P. Pescatore, *Les Travaux du 'Groupe Juridique' dans la négociation des Traités de Rome*, in 34 *Studia Diplomatica*, 1981, p. 159.

³¹⁸ M. Rasmussen, *The Origins of a Legal Revolution – The Early History of the European Court of Justice*, *op. cit.*, at 88.

³¹⁹ *Ivi.*

³²⁰ See on this C.J. Mann, *The Function of Judicial Decision in European Economic Integration*, Brill Academic Publishers 1972, p. 75 *et seq.*

³²¹ The Court of Justice itself referred to the perceived intentions of the authors of the Treaty in this respect, in the case Judgment of 14 December 1962, *Confédération nationale des producteurs de fruits et légumes and others / Council of the EEC (16/62 and 17/62)*, ECR 1962 p. 471, at 478: «the system (...) established by the Treaties of Rome lays down more restrictive conditions than does the ECSC Treaty for the admissibility of applications for annulment by private individuals». See in this respect the reconstruction by H. Rasmussen, *Why is Article 173(2) Interpreted against Private Plaintiffs*, in 5 *European Law Review*, 1980, p. 112.

³²² See for instance, recently, I. Pernice, *The Right to Effective Judicial Protection and Remedies in the EU*, in A. Rosas, E. Levits, Y. Bot (eds.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law - La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence*, *op. cit.*, p. 381.

conflicted with European law, nor was it to evaluate the application of any resulting national or supranational law directly to the facts of a case in front of a judge. How to apply national law was explicitly beyond the jurisdiction of the Court, even if this was exactly how the article would eventually be used.³²³ Instead, Article 177 was designed for the aforementioned '*nomophylactic*' function to make sure that next to a centralization of the competence to rule on its validity, the interpretation of European law could become uniform through a specific tool throughout the Community. This was not achieved and not politically achievable by structuring the European Court as an appellate jurisdiction in hierarchical relationship with the national tribunals (which is the typical position of such '*nomophylactic*' bodies).

However, in historical perspective, the new research reveals to us how a solution and a proper tool was found in the arsenal of the internal legal cultures of the continent. It is reported³²⁴ that the proposal for the enlargement of the scope of Article 177 EEC, in relation to Article 41 ECSC, came in fact from Nicola Catalano, the Italian *Avvocato dello stato*, and later judge at the European Court itself, who was sitting in the *Groupe* representing the Italian Republic together with the President and diplomat Roberto Ducci. This is now commonly and explicitly linked to the fact that he already «knew preliminary references from the Italian Constitutional system»,³²⁵ on which he relied. In fact, a perfect parallelism with a national paradigm can be made, similar to the one made on the grounds of the action of annulment. It is perhaps less explicit, but once we draw attention to the temporal contingencies, we can even argue that there is really a likely convergence of rationales. In fact, the Italian Constitutional Court simply started its functions a few months before the negotiations at the castle of Val Duchesse in 1956; but its structure and powers were already discussed and defined some years before with the Constitutional Law n. 1 of 1948 and with the ordinary Law n. 87 of 1953. With these instruments, in the wake of the explosion of the phenomenon of the constitutional adjudication in the aftermath of Second World War,³²⁶ a so called *mixed* system of constitutional jurisdiction was established, well-debated in the Italian Constitutional Assembly³²⁷ and then in the legal academia since its inception,³²⁸ and therefore well

³²³ See under Chapter six of this study for some more reflections on the point.

³²⁴ See originally A. Trabucchi, L'effet erga omnes des décisions préjudicielles rendues par la Cour de justice des Communautés européennes, in 10 Revue trimestrielle de droit européen, 1974, p. 56; recently, in the historical literature, M. Rasmussen, The Origins of a Legal Revolution – The Early History of the European Court of Justice, *op. cit.*, at 89.

³²⁵ M. Rasmussen, The Origins of a Legal Revolution – The Early History of the European Court of Justice, *op. cit.*, at 89.

³²⁶ See on this M. Cappelletti, Il controllo giudiziario di costituzionalità delle leggi nel diritto comparato, Giuffrè 1968.

³²⁷ See as a recent reconstruction of the rich debate U. de Siervo, L'istituzione della Corte costituzionale in Italia: dall'Assemblea costituente ai primi anni di attività della Corte, in P. Carnevale, C. Colapietro (eds.), La giustizia costituzionale fra memoria e prospettive. A cinquant'anni dalla pubblicazione della prima sentenza della Corte costituzionale, Giappichelli 2008, p. 49.

³²⁸ See *inter alia* C. Mortati, La Corte costituzionale ed i presupposti per la sua vitalità, in *Iustitia*, 1949, p. 69; G.G. Stendardi, La corte costituzionale : il giudizio di legittimità costituzionale delle leggi, Giuffrè 1955; P. Curci, La

known in its procedural shrewdness by Catalano. In fact, the Italian Republic had the willingness to create a system of adjudication in which ordinary national laws could be confronted and censored for their coherence with a hierarchically superior norm of constitutional nature. For doing so, two were the main comparative historical models at the time: the so-called *diffuse* model traditionally evolved in the United States of America already in the 19th century, a context in which every ordinary judge can rule on the constitutionality of a norm brought before her and eventually disapply it (and in which the importance and the prescriptivity of such judgment augment with the importance of the judge, until the final stage of the Supreme Court);³²⁹ and a so called *centralized* model, according to the Kelsenian scheme of the 1920s³³⁰ — a context in which a central, unique and specialised court has the monopoly over the judgments of constitutional adjudication and is directly reached by different categories of claimants according to special rules on their standing rights. But, as it is well known today, Italy as well as Germany - the two prominent examples of the new wave of the judicial review after the war - established so-called *mixed* models, particularly regarding the issue of access to the constitutional adjudicative body. In fact, focusing on the solution offered by the Italian Law n. 87 of 1953, a central, unique and specialised Constitutional Court was set up with the monopoly over the judgments of constitutional adjudication; but every single judge, every jurisdiction, every *court or tribunal* of the Italian legal order was entrusted with the power to hear a question on the constitutionality of a law from the parties of the case or to raise it autonomously, and, after having evaluated on the relevance and the “not manifestly unfoundedness” of the question, to suspend the judgment before itself and send the question to the specialized Court. As it is well known, this system was iconically labeled before its actual implementation by a major jurist who worked directly on the point in the Constituent Assembly as the «service of antechamber» of the Constitutional Court - making every ordinary judge a «porter» of it.³³¹ Therefore and since the beginning, it was directly meant as the construction of an *incidental* system of control on the compatibility between two different layers of norms including an active role of both the ordinary judges – before and after the constitutional judgment – and specialised ones. It is therefore not a surprise that this system has also prompted the construction, by the Italian

Corte costituzionale : composizione, attribuzioni, funzionamento, Giuffrè 1956; and, already with a comparative approach, M. Cappelletti, La giurisdizione costituzionale delle libertà. Primo studio sul ricorso costituzionale (con particolare riguardo agli ordinamenti tedesco, svizzero e austriaco), Giuffrè 1955.

³²⁹ This system is the result of a well-known historical evolution, and of a basic sillogistic interpretation going from the higher value of the constitutional norms to the necessary existence of a power of judicial review based on those, recently summarized by B. Barbisan, Il mito di *Marbury v. Madison* e le origini della giustizia costituzionale negli Stati Uniti, Il Mulino 2008.

³³⁰ See the seminal H. Kelsen, La garantie juridictionnelle de la Constitution (la Justice constitutionnelle), in 35 *Revue du droit public et de la science politique*, 1928, p. 197.

³³¹ P. Calamandrei, La Corte costituzionale e il processo civile, in F. Carnelutti *et al.* (eds.), Studi in onore di Enrico Redenti nel XL anno del suo insegnamento, Giuffrè 1951, at pp. 199 and 203 in particular.

Constitutional Court, of special techniques of interpretation and judgments not simply confined to the binary option of upholding a norm or striking it down for constitutional reasons (according to the Kelsenian paradigm of the “negative legislator”).³³² In fact, it has fed a context of peculiar “dialogue” between the specialised Court of constitutional adjudication and the judges of single, concrete cases, in which, for instance, questions of constitutionality are often discarded if the norms under scrutiny are then interpreted as the Court suggests in the same judgments of dismissal (so called “*sentenze interpretative di rigetto*”).³³³

The transformation of the European preliminary ruling in Article 177 of the Treaty of Rome was actually based on the same dynamics. Catalano himself, in his academic writings of the early 1960s, explicitly recognizes such powerful inspiration drawn from incidental systems of constitutionality control.³³⁴ The national judge, in the original model of the ECSC Treaty in complying with its new «European mandate»³³⁵ was nothing more than a simple *paper-pusher* who necessarily and simply had to strip herself of the competence to rule on the validity of supranational acts in order to prevent conflicts of jurisdiction. In this perspective, the new system of the Treaty of Rome became something different from the pure alternative between the competence of two different bodies (as in the *pure* systems of constitutional adjudication). The judge became involved in a much more complex and fruitful relationship built around the task of *interpretation* of European laws and structuring a *mixed* system for such an interpretative enterprise. The ordinary judge of every national jurisdiction was provided with a direct mandate to hear and interpret questions of European law. Only in cases of serious doubts on the interpretation was the mechanism of centralization to be activated through the procedural tools of a preliminary deliberation on the matter by the judge, a conditioned reference, and an *incidental* judgment issued by the specialized Court. This is precisely the essence of a mixed system of constitutional adjudication such as the Italian model, which today we know was discussed by the drafters of the Treaty following the input of Catalano. The much discussed label of the national ordinary judge as “European judge” *par excellence*, as the natural judge of European law,³³⁶ is therefore derived by the inherent rationale of

³³² H. Kelsen, *General Theory of Law and State*, Harvard University Press 1945, at pp. 268-269.

³³³ See for an updated taxonomy M. Bellocci, T. Giovannetti (eds.), *Il quadro delle tipologie decisorie nelle pronunce della Corte costituzionale*. Quaderno predisposto in occasione dell'incontro di studio con la Corte costituzionale di Ungheria. Palazzo della Consulta, 11 giugno 2010, available at the website http://www.cortecostituzionale.it/documenti/convegni_seminari/STU%20219_Tipologia_decisioni.pdf (accessed 26 August 2015).

³³⁴ N. Catalano, *Manuale di diritto delle Comunità europee*, Giuffrè 1962, pp. 97-98.

³³⁵ See, for a recent reconstruction on the point, M. Claes, *The National Courts' Mandate in the European Constitution*, *op. cit.*.

³³⁶ See Lord Slynn of Hadley, *What is a European Community Law Judge?*, in *52 Cambridge Law Journal*, 1993, p. 234.

such a *mixed* system of adjudication and actually reminiscent of the Calamandrei's idea of a «service of antechamber» for a central Court (actually, it is understandable as a development of that already-established model). It is on this solid basis that the famous dynamics of «self-empowerment» of both national and supranational judge, as described by Weiler,³³⁷ were constructed. As it is well known, the national judges, especially in tribunals of first instance,³³⁸ increasingly sought a direct dialogue with the European Court of Justice over the interpretation of European law - empowering it but simultaneously entrusting themselves with an indirect power of judicial review and power of adjudication of constitutional significance.

III.3 Different Perspective, Same Dynamics: the Establishment of the Doctrines of Primacy and Direct Effect

Apart from all the previously mentioned fundamental procedural devices, another substantial «efficient secret»³³⁹ in the construction of this dialogical relationship was of course the establishment of the judicial doctrines of primacy and direct effect.³⁴⁰ We are not talking here, in strict terms, of the design of conferred powers of the Court or generally of its structure and organization. But we are referring, as it is well known, to principles that are believed to constitute the foundation of the effectiveness of the Community legal order, to play the role of pillars of its constitutional nature, to even embody the actual transfer of constitutional power to Europe.³⁴¹ They were the building blocks on which the powers of the European Court - and particularly the recently discussed preliminary reference power – were firmly constructed. Therefore, in concluding this chapter, it is interesting to note that in the establishment of decisive functional principles such as primacy and direct effect, which shaped European law in the next decades, a tribute was also paid to the decisive interplay between the original constitutional settings of the national Member States and the incipient forms of the supranational architecture. Albeit not in connection to positivized competences of the Court, in this case we can also see how the ECJ's powers have been decisively informed by the constitutional structures of the Member States. Therefore, we will discuss the point

³³⁷ See for instance J.H.H., *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, *op. cit.*, at 518 *et seq.* in particular.

³³⁸ See the analysis by M. Broberg, N. Fenger, *Preliminary References to the European Court of Justice*, 2nd ed. Oxford University Press 2014, Chapter 2 and 3.

³³⁹ See on the phrase footnote 132 above.

³⁴⁰ See on this J.H.H. Weiler, *Journey to an Unknown Destination. A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration*, *op. cit.*, at 425; see also K.J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford University Press 2001, p. 47.

³⁴¹ See J.H.H. Weiler, *In Defense of the Status Quo: Europe's Constitutional Sonderweg*, in Id., M. Wind (eds.), *European Constitutionalism Beyond the State*, Cambridge University Press 2003, p. 7, at 7-8.

in order to illustrate another relevant phenomenon of upward fertilization that is useful for reflecting on our idea of *mimetic* evolution of the supranational setting.

In fact, other historical research in the last years was devoted to the unexplored «complexity and mutuality between national constitutional reform ‘towards’ Europe and the development of European integration in the 1950s».³⁴² In other words, with increasing attention, some scholars focus on how the first constitutional debates internal to the Member States shaped, and produced (through the mentioned upward transfer of forms and problems), the construction of the original European legal system. This is already reflected in the Italian debates on a mixed system of constitutional adjudication, transferred as we saw, *mutatis mutandis*, in the negotiations at the castle of Val Duchesse of 1956 and in the drafting of the new Article 177 of the Treaty of Rome from the basis of Article 41 of the ECSC Treaty.

But according to some authors,³⁴³ it is even more clearly the case of Dutch constitutional reforms discussed and implemented between 1950 and 1956. These were part of the set of constitutional reforms that were put in place, in different degrees, across all the six Member States of the original European Communities to comply with the new challenges of the relationship between legal orders. Provisions on the interaction between the national and international legal orders were to be found in the new constitutions of France, Germany and Italy. For example, the German *Grundgesetz* authorised the federal state to transfer sovereign powers to (similarly democratic) international organisations, whereas the French 1946 constitution and the Italian 1947 constitution stated that national sovereignty could be limited when needed (generally) for the organisation and defence of peace. Separately, Belgium and Luxembourg undertook similar constitutional reforms aimed at preparing their national constitutions for the expansion of international and European co-operation.³⁴⁴

However, in this context, only the Netherlands gave direct importance and authority to cogent international law and did so in light of an interesting, particularly explicit and timely debate. The Dutch 1953 constitutional reform «not only fully authorised the transfer of legislative, administrative and judicial competences to international organisations»,³⁴⁵ as directly or indirectly

³⁴² K. Van Leeuwen, On Democratic Concerns and Legal Traditions: The Dutch 1953 and 1956 Constitutional Reforms ‘Towards’ Europe, in 21 Contemporary European History, 2012, p. 357, at. 358.

³⁴³ *Ivi.*

³⁴⁴ See also on this point, in the recent literature A. Albi, J. Ziller (eds.), The European Constitution and National Constitutions: Ratification and Beyond, Kluwer Law International 2006; M. Claes, The Europeanisation of National Constitutions in the Constitutionalisation of Europe: Some Observations Against the Background of the Constitutional Experience of the EU-15, in 3 Croatian Yearbook of European Law and Policy, 2007, p. 1; F. Hoffmeister, Constitutional Implications of EU Membership: a View from the Commission, in 3 Croatian Yearbook of European Law and Policy, 2007, p. 59.

³⁴⁵ K. Van Leeuwen, On Democratic Concerns and Legal Traditions, *op. cit.*, at 362.

done by all the other Members; but driven by the same reading of the Dutch legal tradition that inspired the discussions on sovereignty and the transfer of competences, the reform also produced provisions on the primacy and direct effect of international law that went far beyond the constitutions of other European countries - so to be considered as the factor which «paved the way for an early wave of preliminary references (Article 177 EEC) to the European Court of Justice».³⁴⁶ This argument is not simply the result, as in other cases, of a deductive analysis of the relevant «formants».³⁴⁷ It is also supported, one could say, by empirical data. In fact, the historical research on the Dutch reform not only tells us how and to what extent - in one of the only six original Member States - the theoretical and practical problems inherent in the recognition of primacy and direct effect of international law were abundantly discussed in a way that was certainly well known years later by the first European Court's judges. It also highlights how debates of the early 1950s shaped the «constitutional practice»³⁴⁸ of the following years, since «eight of the first eleven referrals» to the European Court of Justice came precisely from the Netherlands.

In what terms was this seminal debate undertaken? Essentially, it already ran parallel to the ECSC negotiations and the initiatives for a European Defence Community (EDC) and a European Political Community (EPC) since a first Dutch “Committee concerning the co-operation between government and parliament with regard to foreign affairs” (the so called “Van Eysinga Committee”) was established in The Hague in May 1950, «ten days after the French foreign minister, Robert Schuman, announced his plans for a new European Coal and Steel Community (ECSC)»,³⁴⁹ and presented its report in July 1951. This was the first of three bodies expected to recommend comprehensive constitutional reforms. After a recent debacle over a Benelux treaty in 1949 on the harmonisation of duties, with the Committee's works a clarification of the role of the parliament in Dutch foreign policy formation was sought and eventually found in a modernisation of the relevant constitutional clauses and recalibration of institutional powers.³⁵⁰ A collateral debate went on in a second constitutional committee active in 1950, the “Van Schaik Committee” (presided over by the special minister for constitutional affairs J. R. H. van Schaik), which was responsible for a more general modernisation of the nineteenth-century Dutch constitution. This focused on the proposal of a new constitutional provision on international organisations explicitly stating that certain

³⁴⁶ See M. Rasmussen, *Revolutionizing European law: A history of the Van Gend en Loos judgment*, *op cit.*, at 146-147.

³⁴⁷ In the sense of elements of a dynamic approach to comparative law, focusing on law as a social activity: a formant of the law is, according to the lesson of R. Sacco, *Legal Formants. A Dynamic Approach to Comparative Law*, in 39 *American Journal of Comparative Law*, 1991, p. 1, a group, a type of personnel, or a community, institutionally involved in the activity of creating law.

³⁴⁸ K. Van Leeuwen, *On Democratic Concerns and Legal Traditions*, *op. cit.*, at 372.

³⁴⁹ *Ibidem*, at 359.

³⁵⁰ A tacit approval procedure, very similar in practice to the oversight principle in delegated law-making of France, Germany and Italy, was established, according to which parliament was allowed thirty days to demand a ratification debate before a treaty was ratified tacitly.

competences could be transferred to “organisations of international law”. In particular, the debate was between scholars who argued for the need for such explicit clause and those who, on the contrary and from the perspective of legal precedent, thought that a constitutional clause was not necessary for the transfer of competences to international organisations.

This last position was based on a historical reading of the Dutch legal tradition. Such transfers with no explicit constitutional mandate were found to have already taken place in the early nineteenth century such as in the empowerment of the 1816 Central Commission for the Navigation of the Rhine with judicial authority on a river crucial for Dutch trade, or the installation of the Permanent Court of Arbitration in 1899. In those cases, a constitutional provision was not found to be needed. The same applied to the transfer of often far-reaching decision-making authority to organisations such as the UN Security Council after 1945. This precedent was supported by the fact that earlier proposals for constitutional regulation of such transfers had never found much support. In the early twentieth century, Dutch constitutional committees had discussed the constitutionality of these transfers and although a special constitutional provision had been proposed in 1912, no reform followed. The government eventually included the Van Schaik proposal for a provision on the transfer of competences in its constitutional amendment bill, recognising both the dramatic rise in international co-operation and symbolic value.

But driven by the same aforementioned historical reading of the Dutch legal tradition that inspired the discussions on sovereignty and the transfer of competences, the constitutional reform of 1953 also produced direct provisions on the primacy and direct effect of international law that went far beyond the constitutions of other European countries. Interestingly, in the Van Eysinga Committee, these were merely introduced as a side issue to the main question about the new ratification procedure. Its president - who would first draft the provisions himself - argued in the same vein as the general debate that both primacy and direct effect were already part of Dutch legal practice, pointing to the fact that in 1906 the Hoge Raad (the Supreme Court of the Netherlands) had acknowledged that international law could bind individuals. This step was also taken in other jurisdictions including in Belgium in 1925.³⁵¹ Therefore, having already touched the problem of the “direct effect” of international provisions, the Hoge Raad did not (at the time) settle the question of whether international law had *primacy* over conflicting national law. This question would be in any case explicitly disputed in the inter-war period. For instance, historical research has pointed out how this happened in the 1937 annual meeting of the Dutch lawyers association (Nederlandse

³⁵¹ See H. Bribosia, Report on Belgium, in A.M. Slaughter, A. Stone Sweet, and J.H.H. Weiler (eds.), *The European Court and National Courts, Doctrine and Jurisprudence. Legal Change in its Social Context*, *op. cit.*, p. 3.

Juristenvereniging: NJV) and how «only a small majority of prominent legal scholars voted in favour of the proposition that treaty law ‘binding in the national sphere’ should be given priority over national law whether antecedent or subsequent».³⁵² From its part, the Hoge Raad avoided explicitly adjudicating on the matter and tried to “interpret away” any possible conflict between treaty law and posterior national legislation.³⁵³ However, it is relevant to notice that its «temporary partner», the *High Court on Special Justice Concerning the Second World War (Bijzondere raad van cassatie)*, made a clear move recognising the supremacy of international law in a 1949 ruling.³⁵⁴ Despite the split doctrinal opinion and the uncertain practice, the Van Eysinga Committee, in the person of its President, kept on arguing that the only purpose of its 1950 proposal was to lay down what had already been settled in Dutch doctrine.

After a first round of discussions, the new constitutional provision on primacy still had the support of a large majority of both the Van Eysinga Committee and the Van Schaik Committee, but the government decided to leave the contested clause out of its constitutional amendment bill - fearing that the legislative would be powerless against a judicial interpretation of a treaty which might not always fit the intended results of the original negotiations. Regardless, such a primacy clause was reintroduced in an amendment to the government bill by P. J. S. Serrarens, leader at the time of the Dutch European Movement who would also soon become Dutch judge at the ECJ in Luxembourg; and, labelled precisely as “Serrarens amendment”, defended primarily as a political choice. In fact, Serrarens pointed out the fact that earlier frameworks of international co-operation had failed precisely for the lack of proper enforcement more than for bad intention or bad design. The primacy of treaty law would also apply to the decisions of international organisations; and by this Serrarens and his fellow MPs were open in their desire to prompt, by an explicit national constitutional provision introducing the possibility of enforcing these decisions, a first step in strengthening international regimes and particularly the incipient European communities.³⁵⁵ An explicit debate followed, even pointing to the optimal institutional allocation of powers for a more uniform application of international law. Opponents to the amendment objected to the consequences of the amendment for the balance of powers in the Dutch system and argued that the legislature, not the courts, would be the best guarantee of a consistent application of international law, as it met and co-ordinated regularly with its international counterparts. Serrarens responded with the fear that

³⁵² K. Van Leeuwen, *On Democratic Concerns and Legal Traditions*, *op. cit.*, at 367.

³⁵³ It did so especially in two rulings on the Rhine Navigation Treaty on 17 Dec. 1934: *Nederlandse Jurisprudentie* (1935), 5 and 11; Fleuren, *Een ieder verbindende bepalingen*, 126–7.

³⁵⁴ *Bijzondere Raadvan Cassatie*, 12th January 1949, *NJ*(1949), 87.

³⁵⁵ K. Van Leeuwen, *On Democratic Concerns and Legal Traditions*, *op. cit.*, at 367.

legislatures might still ultimately choose to defend national interests whereas courts were in theory impartial and rejected comparisons with the clause on constitutional review, whereas the legislature was perfectly capable of keeping the Dutch constitution in mind when preparing new law. The vast amount of written and unwritten international law was an entirely different matter and thus new laws might, unintentionally, diverge from previous international arrangements.

Therefore, the problem was incredibly well investigated in several different aspects. Eventually, the pro-Europeans won the vote in the Chamber of Representatives, passing the Serrarens amendment; new open discussions followed in the Senate, where the government chose to defend the new amendment in order to rescue the rest of the bill. By the spring of 1953, the obligatory second reading of the constitutional amendment was finished. Thus, after three years of discussion on Dutch traditions and European ambitions, the provisions on the “anyone binding force” and on primacy of treaty law were fixed in the constitution. Therefore, from 1953 onwards, the Dutch constitution stipulated in its Articles 65³⁵⁶ and 66³⁵⁷ that international law bound Dutch citizens and companies without having to be transformed into national legislation (it was “binding on anyone” or, as it would later be translated, it had “direct effect”) and that it should have primacy over contrary national legislation.

Further proof of the consciousness of the move comes from the fact that the story of Dutch constitutional provisions laying the groundwork for path-breaking ECJ jurisprudence did not even end there, with the formal adoption of these two important constitutional articles. In 1956, a small yet crucially important revision described by the executive as simply technical was still to come. The reforms of 1953 had just come to light when a new debate on possible constitutional amendments came to the fore: in particular, under the form of first problems with the new ratification procedure, and scholarly criticism precisely on «the terminology and consequences of the new provisions on direct effect and primacy».³⁵⁸ A general revision of the constitution was

³⁵⁶ «Artikel 65 : Binnen het Koninkrijk geldende wettelijke voorschriften vinden geen toepassing, wanneer deze niet verenigbaar zou zijn met overeenkomsten, die hetzij vóór, hetzij na de totstandkoming der voorschriften zijn bekend gemaakt overeenkomstig artikel 66».

Translation from H. F. van Panhuys, *The Netherlands Constitution and International Law*, in 47 *American Journal of International Law*, 1953, p. 537, at 540: «Legal provisions in force within the Kingdom shall not apply if the application should be incompatible with agreements which have been published in accordance with article 66 either before or after the enactment of the provisions».

³⁵⁷ «Artikel 66 : De wet geeft regels omtrent de bekendmaking van overeenkomsten. De overeenkomsten verbinden een ieder, voorzover zij zijn bekend gemaakt».

Translation from H. F. van Panhuys, *The Netherlands Constitution and International Law*, *op. cit.*, at 540: «Rules with regard to the publication of agreements shall be laid down in the law. Agreements shall be binding on anyone insofar as they will have been published».

³⁵⁸ K. Van Leeuwen, *On Democratic Concerns and Legal Traditions*, *op. cit.*, at 370, with reference to F.J.F.M.

Duynstee, *Grondwetsherziening 1953: De nieuwe bepalingen omtrent de buitenlandse betrekkingen in de Grondwet*,

already scheduled for 1956, thus the government decided to tackle these “technical” problems by creating a new third committee, led by the professor of constitutional and international law R. Kranenburg. Its mandate precluded a wholesale reconsideration of the 1953 reform, but the Kranenburg Committee eventually limited the 1953 reform by placing a crucial condition on the primacy of international law, again reminiscent of all the technical debates which would then be followed in EC law: namely, they argued that international law only possessed primacy in the Dutch legal order if it were of a *self-executing nature*.

Although the 1956 constitutional amendment limited the primacy of international law in the Netherlands - not without further political ado on the coherence with the traditional openness of the Dutch legal order and the previous Serrarens amendment - this provision would still produce quite considerable consequences for the development of European law.³⁵⁹ In fact, now that the Dutch constitution stipulated the self-executing nature of treaties and decisions of international organisations in order for them to become binding in the national legal order, the question of whether the incipient forms of European law were of self-executing nature became a core question for Dutch courts and was abundantly debated yet again. Therefore, it is impossible to think that jurists and practitioners in the following years, including those of the European Communities' circle, could be unaware of it.

In a creative 1962 ruling, the Hoge Raad would explicitly make a call for references to the European Court of Justice in order to clarify the “intention” behind certain treaty provisions.³⁶⁰ As a consequence of this ruling – and of the initiative of a group of pro-European lawyers who decided to strategically engage in a series of test cases – a «steady stream of Dutch preliminary references to Luxembourg» emerged.³⁶¹ The second of these cases, filed in the name of the Dutch transport company, NV Algemene Van Gend en Loos, provided the Luxembourg judges with what would eventually prove to be a fundamental question in the development of the European legal architecture, but very much in the spirit of the internal debate just described. That is, whether Article 12 of the EEC Treaty, entailing a negative obligation to refrain from introducing new

Kluwer 1954; H. F. van Panhuys, De regeling der buitenlandse betrekkingen, in 28 Preadvies, p. 1.

³⁵⁹ The new article 65 (in 1956 renumbered 66) stated: *Binnen het Koninkrijk geldende wettelijke voorschriften vinden geen toepassing, wanneer deze toepassing niet verenigbaar zou zijn met een ieder verbindende bepalingen van overeenkomsten, die hetzij vóór; hetzij na de totstandkoming der voorschriften zijn aangegaan.*

Translation from H. F. van Panhuys, The Netherlands Constitution and International Law. A Decade of Experience, in 58 American Journal of International Law, 1964, p. 88, at 107: «Legislation in force within the Kingdom shall not apply if this application would be incompatible with provisions of agreements which are binding upon anyone and which have been entered into either before or after the enactment of such legislation».

³⁶⁰ HR, 18 May 1962, NJ (1965), 115.

³⁶¹ K. Van Leeuwen, On Democratic Concerns and Legal Traditions, *op. cit.*, at 372. See also M. Rasmussen, Constructing and Deconstructing 'Constitutional' European Law: Some reflections on how to study the history of European law, *op. cit.*, at 648; A. Vachez, The Transnational Politics of Judicialisation: Van Gend en Loos and the making of EU polity, in 16 European Law Journal, 2010, p. 1.

customs duties, was self-executing. Not by chance, the Dutch and the Belgian governments tried to prevent the Court from making statements by arguing that the questions were purely of internal constitutional law, on which it had no jurisdiction.³⁶² But when the Court of Justice ruled that Article 12 was indeed self-executing, because the Treaties of Rome intended to create a «new legal order in international law», its interpretation not only found a solution for the controversy at hand, but also established the principle of direct effect for all the European member states - even if unlike the Dutch, their national constitutions had not known direct effect in the past.³⁶³ Thus, a cornerstone of European constitutional practice was laid, with essential general scope, but also firmly based on specific internal contingencies.

As already stated, it is relevant to note that statistically, eight of the first eleven referrals were Dutch. Therefore, in the long term, it is possible to argue that the Dutch 1953 and 1956 constitutional reforms would leave a crucial mark on the history of European integration. And they did it in two interrelated ways. For the Netherlands, the constitutional reforms were part of a longer tradition of limited national sovereignty, commonly symbolized by Hugo Grotius or the 1922 constitutional clause on the peaceful settlement of conflicts through international law.³⁶⁴ This tradition in particular was reflected in the far-reaching constitutional reforms on the transfer of competences to international organisations and the ratification of treaties deviating from the constitution. Both reforms were readily accepted by the Dutch political and legal elites, who - explicitly and willingly choosing the European path - reaffirmed the perception of an existing tradition of partial sovereignty. The debate on the Dutch constitutional reforms, or more specifically the second provision of 1956 that limited the primacy of international law to self-executing provisions, prompted Dutch courts to turn to the European Court of Justice asking for interpretation of the 1957 EEC Treaty. Creating the occasion for a wave of preliminary references to Luxembourg, the Dutch constitution reform thus definitively incited the crucial 1963 ruling of the ECJ in *Van Gend en Loos*. So began the constitutional practice of European law, again with a decisive influence shaped by the internal Member States' practice. As stated, it also had a decisive impact on how the powers of the European Court of Justice could be performed throughout the decades.

³⁶² F.C. Mayer, *Van Gend en Loos: The Foundation of a Community of Law*, *op. cit.*, at 18.

³⁶³ Judgment of 5 February 1963, *Van Gend en Loos / Administratie der Belastingen* (26/62, ECR 1963 p. 1).

³⁶⁴ See on this L.F.M. Besselink, *The Constitutional Duty to promote the Development of the International Legal Order*, in 34 *Netherlands Yearbook of International Law*, 2003, p. 89.

III.4 The Original Choices in the Establishment of the Court of Justice as a Form of Improvement of Its Authority

From the analysis conducted throughout this chapter, we can draw our first conclusions on the ability of the Court of Justice to evolve from an institutional point of view. I tried to show how the same idea of the establishment of a permanent European Court of Justice and then the structuring of its specific decisive powers - and even the first functional principles it happened to decisively develop in its early jurisprudence - were all based on the capacity of institutional internalization of specificities coming from external influences. In hindsight, this has been decisive, for the improvement of the Court's authority in several respects. It is self-evident that the supranational legal order as we know it today could not have reached such a level of development without a stable judicial body as eventually decided in the early 1950s by adopting one specific solution and by discarding competing solutions proposed by certain national delegations.

Even more decisively, it is well known that the actual powers eventually conferred to the Court - all based, as we said, on national influences - proved crucial in the evolution of the institution's role in its legal order. This is the case of its “administrative” powers, all modelled after the French public judiciary. This is even more the case for the preliminary reference jurisdiction, based on the Italian mixed system of constitutional adjudication which was notoriously an important instrument for the construction of many of the supranational constitutional principles.³⁶⁵ The same direct link with the authority-building of the ECJ is clear when looking at how internal constitutional debates shaped the first fundamental doctrinal tenets of EU constitutional law. From these decisive choices of the early years, the European Court of Justice directly emerged as a key actor of the supranational legal order.

³⁶⁵ See footnote 290 above.

The Appointment of Members of the Court

IV. The Appointment of Members of the Court

1. Selection of Judges: Comparative Trends at the National and International Level and their rationale
 - 1.2. The Historical Rise of Judicial Selection Models
 - 1.3. Models of Apical Court Selections, in Europe and at the International Level
2. Selection of Judges of the Court of Justice of the EU: Liberal Supranationalism as a Reaction to Pure Intergovernmentalism?
3. The Evolution of Judicial Appointments as a Form of Improvement of the Court's Authority

In exploring the structuring process of every court in a kind of logic succession - once ideally founded the institution and defined, as we saw, its powers - the following step according to our roadmap recalled in Chapter two is an analysis of its composition. In fact, in following this logic order of institutionalization, we will now look at the choice of the European Court of Justice's members. This is another relevant case study in our perspective since in the recent past, clear evidence has emerged on the capacity of the structure and the organization of the Court to change as influenced by the external and internal legal environments.

Actually, the selection of judges for international judicial bodies has been traditionally considered as one of the major examples of completely opaque fields of study. The relative designations have often been made behind closed doors;³⁶⁶ the power of the states to select their nominees is usually depicted as total, inherently *ab-solutus* and free from any legal constraint.³⁶⁷ A sign of this institutional configuration is also the historical lack of academic attention to the point. It is a trend that has in part only changed in recent times.³⁶⁸ Interestingly, this aspect is coupled by an

³⁶⁶ R. Mackenzie, P. Sands, *International Courts and Tribunals and the Independence of the International Judge*, in 44 *Harvard International Law Journal*, 2003, p. 272, at 277-278.

³⁶⁷ *Ivi.*

³⁶⁸ K. Malleon, Introduction, in K. Malleon, Peter H Russell (eds.) *Appointing Judges in an Age of Judicial Power. Critical Perspectives from Around the World*, University of Toronto Press 2007, p 3.

equally rare normally generated political debate.³⁶⁹ Such broad disillusion is also very present in comparative law research: in fact, it has been famously said, that in terms of structure and rules of internal functioning - and particularly focusing on judicial selection - each international court should be considered as «an island»,³⁷⁰ i.e. an independent and self-contained regime with no common traits with the other fragments³⁷¹ of the legal world. As we also will see, at the national level some clearer tendencies have been definable. Also in this respect, it was common in the literature to see the nominations to supreme/constitutional courts as a by-product of a nation's general rules for the appointment of ordinary judges - imbued with the same rationale but also very much influenced and modified by the inherent political traits of the relative choices.³⁷² After all, in this respect, the ultimate goal is different. While in selecting judges for national general courts, especially district and appellate courts, the ability researched is to strictly observe black-letter law, correctly apply it, and provide expert interpretation of highly specific legal provisions, the task of constitutional and international courts as well as their judges is to correct failures and deficiencies in the law and in national practices, by focusing more on the principles and values on which a legal system rests. In this sense, it will also be interesting to notice whether and to what extent the selection of the judges of the Court of Justice of the European Union, sometimes depicted as a supranational constitutional court,³⁷³ evolved in one direction or the other. In fact, all the trends mentioned are going through a process of change at a broad comparative level: essentially, the evolution seems to be in the sense of a capture, through different *legal* means, of the essential *political* dimension inherent in the choices for appointees.

Indeed, there is a strong connection between national sovereignty and international judicial selection. Evidence of this is given by what should be the starting point of any analysis on the topic: that no rules of general application have been promulgated on the functioning of international

³⁶⁹ *Ivi.*

³⁷⁰ R. Mackenzie, P. Sands, Judicial selection for International Court: Towards Common Principles and Practices, in K. Malleson, Peter H Russell (eds.), *Appointing Judges in an Age of Judicial Power. Critical Perspectives from Around the World*, *op. cit.*, p. 216. See in the same sense, and with the same image, D. Terris, C.P.R. Romano, L. Swigart, *The International Judge, An Introduction to the Men and Women Who Decide the World's Cases*, Oxford University Press 2007, p. 104.

³⁷¹ To echo the notorious phrase by M. Koskenniemi, P. Leino, *Fragmentation of International Law? Postmodern Anxieties*, in *Leiden Journal of International Law*, *op. cit.*.

³⁷² G. Gee, *The Persistent Politics of Judicial Selection: A Comparative Analysis*, in A. Seibert-Fohr (ed.), *Judicial Independence in Transition*, Springer 2012, p. 121 *et seq.*; J. Bell, *Judiciaries within Europe: A Comparative Review*, Cambridge University Press 2010, at p. 15 *et seq.*

³⁷³ See among the many, in the literature in English, F.G. Jacobs, *Is the Court of Justice of the European Communities a Constitutional Court?*, in D.M. Curtin, D. O'Keeffe (eds.), *Constitutional Adjudication in European Community and National Law*, Butterworth 1992, p. 25; A. Arnall, *A Constitutional Court for Europe?*, in 6 *Cambridge Yearbook of European Legal Studies*, 2003- 2004, p. 1; B. Vesterdorf, *A Constitutional Court for the EU?*, in 4 *International Journal of Constitutional Law*, 2006, p. 607; L. Azoulay, *The Future Constitutional Role of the European Court of Justice*, in J. Baquero Cruz, C. Closa (eds.), *European Integration From Rome to Berlin*, Peter Lang 2009, p. 229.

courts. This is the first meaning of the idea of these courts as islands, with their own systems of governance and rules, including for the selection of judges. However - and this should be kept in mind - in spite of their differences, these courts do have one point in common. States have always been greatly concerned about the manner in which international judges are appointed because this has been seen as something that affects their national sovereignty. When read within a logic of institutionalization, this field becomes crucial. As we will see the relationship between these two poles (national sovereignty and international judicial selection) will gain different equilibria depending on different approaches to the subject matter of the present chapter.

The aim of these pages is thus to:

- 1- Look back at the rationale behind the rise of judicial selection models by paying particular attention to the United States' example as a laboratory for historical construction. In fact, this will be crucial for recalling a first taxonomy proposed by scholars in this field (meritocratic systems, elective systems and appointive systems) born for certain precise and important reasons;
- 2- Identify patterns of apical courts selections³⁷⁴ as an explanation of the translation of the mentioned systems in different environments and of the adaptive transformation of their rationale;
- 3- Deal with the selection of the CJEU's judges, framing this part of the chapter in light of the dialectic between what Von Bogdandy and Venzke labelled as a «liberal supranational» approach vis-à-vis the alternatives of the historical «pure intergovernmentalism» and the most modern tendencies to a «cosmopolitan» approach.³⁷⁵

In order to do that, a historical/evolutive approach will be followed, consistent with the other chapters. It will be maintained that coherently with what we will see at the national and international levels, the need to reform the appointment process of the CJEU was in fact pushed up in the European agenda from two separate sides: the European Parliament's political initiatives in the 1980s and 90s and the activity of some official judicial Reflection groups. All these channels promoted a reform very much in line with comparative trends and wrote a new chapter of institutional internalization by the European Court of paradigms and pressures coming from external and internal legal environments. The evolution has without a doubt fostered the institution's authority: evidence is also in the influence the supranational changes had in turn in the national settings, as we will see in the last part of our analysis.

³⁷⁴ Intended as top domestic review courts and international courts, which, as I will explain further in the next paragraphs, tend to have similar problems of selection and therefore similar procedures for recruiting their staff.

³⁷⁵ A. Von Bogdandy, I. Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification*, in 23 *European Journal of International Law*, 2012, p. 7.

IV.1 Selection of Judges: comparative trends at the national and international level and their rationale

IV.1.2 The Historical Rise of Judicial Selection Models

It is common in the literature to place the problem of the judicial appointments processes in the context of an institutional balance to be sought between judicial *independence* and *accountability*. This is a common trait of the debates on national selection of ordinary judges, national selection of judges for supreme or constitutional jurisdictions and international judges. As it has been emphasized by scholars, the nature of the institutional balance between independence and accountability differs «according to the particular form of judicialization and the political system in which it occurs».³⁷⁶ these are live issues, subject to change, in all the relevant environments.³⁷⁷ Broadly speaking, we can define the concept of judicial *independence* as the obvious need that in order to perform her functions effectively - and therefore to be considered legitimate and authoritative by the parties of the case - the judge is expected to adjudicate impartially, according to the rules of the legal system, *sine spe ac metu*, without expectation of benefits or fear of reprisals.³⁷⁸ Therefore, judges must be personally and professionally equipped to resolve legal disputes impartially, particularly in terms of a certain detachment from the leverage of political powers: there is a need to shield them from outside influence. At the same time, such independence cannot be considered as absolute, in any legal system. Judges are in any case constrained by, and should follow, existing law, procedures and practices; they are not free to act perversely or for ulterior motives. Inevitably, they find themselves under controls of either a judicial or an administrative nature and therefore subject to some forms of *accountability* in relation to the law, political powers and the public at large. In a nutshell, this is what has been described as the «conundrum of the apparently insoluble tension between judicial independence and judicial accountability».³⁷⁹ It is evident that the institutional settings provided to solve or to manage it can differ. Of course, the problem of the initial selection of adequate candidates for a judicial position

³⁷⁶ K. Malleon, Introduction, *op. cit.*, p 4.

³⁷⁷ M. Andenas, D. Fairgrieve, Judicial Independence and Accountability: National Traditions and International Standards, in G. Canivet, M. Andenas, D. Fairgrieve (eds.) *Independence, Accountability and the Judiciary*, British Institute of International and Comparative Law 2006, p. 3.

³⁷⁸ C. Guarnieri, D.Piana, Judicial Independence and the Rule of Law: Exploring the European Experience, in S. Shetreet, C. Forsyth (eds.), *The Culture of Judicial Independence. Conceptual Foundations and Practical Challenges*, Martinus Nijhoff–Brill Publishers 2012, p. 113.

³⁷⁹ A. Paterson, The Scottish Judicial Appointment Board: New Wine in Old Bottles?, in K. Malleon, Peter H Russell (eds.), *Appointing Judges in an Age of Judicial Power. Critical Perspectives from Around the World*, *op. cit.*, p.13, at 14.

does not exhaust the issues involved in the balance of these two principles. Several other aspects should be considered, including at least their promotion or renewals, the organization of the administration of the court system, the judges' non judicial activities, the working conditions including salary and pensions systems, the complaints and disciplinary sanctions (including protection of the position).³⁸⁰

The initial selection of human resources themselves is nonetheless of fundamental importance. This was already reflected in the first modern theorizations on the definition of a *judiciary branch* as a *third* power opposed to the others. It is well known that the same Alexander Hamilton, in the Federalist paper no. 78 proceeding «to an examination of the judiciary department of the proposed government», emphasized as the first point of his analysis «(T)he mode of appointing the judges», even before icastically defining them as «the least dangerous» branch, with «no influence over either the sword or the purse». He clearly stated that the problem of the selection of judges «is the same with that of appointing the officers of the Union in general (...) According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices during good behavior; which is conformable to the most approved of the State constitutions and among the rest, to that of this State. Its propriety having been drawn into question by the adversaries of that plan, is no light symptom of the rage for objection, which disorders their imaginations and judgments. The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws». In this respect, Hamilton warned that if the periodic power to select judges were given «to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws».

The Hamiltonian reflection, deeply rooted on a historical analysis, can also be considered as a prototypical comparative taxonomy, ranging from the original monarchic forms of state of the old continent to the new republican forms of *trias politica*. Nonetheless, it is well known that in Europe, and in the civil law countries in particular, the traditional conception of the judges as civil servants, as experts and devoted servants of the state has dominated; for a long time, this has not been made

³⁸⁰ M. Andenas, D. Fairgrieve, *Judicial Independence and Accountability: National Traditions and International Standards*, *op. cit.*, at 8.

urgent or justified a developed scholarly reflection on the matter.³⁸¹ In fact, the first doctrinal categorizations came at the national level and from American scholarship by both jurists and political thinkers. They were prompted by the great deal of diversity historically that is verified in the federal structure of the United States, where the existence of a federal layer of courts, and then the legislative autonomy of each State in the internal organization of justice in its own legal order, led to a proliferation of systems of selection, quite often different from one another.

Since the times of the Hamiltonian teachings, a variety of systems of selection were accumulated and stratified, for precise historical reasons. As Hamilton observed, at the birth of the nation, most states provided the appointment of judges. The passage from a purely appointive system, modelled and inherited from the English monarchic tradition, to a proto-typical *elective* system, was advocated at a later stage, particularly by the *Jacksonian* movement in the early XIX century. It was considered the best way for expanding public participation in government and to end its “monopoly” led by social elites according to its general political platform.³⁸² In 1832, Mississippi became the first state to establish an entirely elective judiciary. New York followed in 1846 and many states followed soon thereafter. Every state that joined the Union between 1846 and 1958 adopted constitutions that provided for elective judiciaries. During the same period, Michigan (1850), Pennsylvania (1850), Virginia (1850) and Maryland (1851) amended their constitutions to provide for the election of part or all of their judges. By the time of the Civil War, 22 out of 34 states elected their judges.

On the other hand, the diffusion of so-called *non partisan elections* or of a *merit system* was detectable, at a later moment, as a precise reaction to the distortions led by the first wave of elections. The criticism was particularly aimed at the opportunity of a judiciary directly implicated with political affiliation, with a complex system of electoral campaigns, and with the correlated problems of fundraising.³⁸³ In fact, in American history, it was not long before a backlash occurred. Two factors were considered to motivate the change. First, political parties quickly arrived at complete control over the election of judicial candidates and the retention of judges in partisan elections. In local historiography, early judicial elections are today described as working out «as a

³⁸¹ See the general reflections by J.H. Merryman, *The Civil Law Tradition*, Stanford University Press 2007, p. 34 *et seq.*; R.C. van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History*, Cambridge University Press 1987, p. 131 *et seq.*

³⁸² M. Tushnet, *The Constitution of the United States of America. A Contextual Analysis*, Hart 2009, p. 125. See also C. Nelson, *A Re-evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, in 37 *American Journal of Legal History*, 1993, p. 190, at 191-92 : «Delegates [to state constitutional conventions] branded the appointive system ‘a relic of monarchy’ and the ‘last vestige of aristocracy’; some delegates referred to ‘the immortal Jackson,’ and there was much talk of the need to make the judiciary ‘consonant with our theory of government».

³⁸³ See the historical reconstruction by T.R. Phillips, *The Merits of Merit Selection*, in 32 *Harvard Journal of Law & Public Policy*, 2009, p. 67, at 71 *et seq.*

de facto system of appointment».³⁸⁴ Also, the legal literature of the time was rich with harsh criticism: «It is one of our most absurd bits of political hypocrisy that we actually talk and act as if our judges were elected whenever the method of selection is, in form, by popular election. In a great metropolitan district (...), where we have a typical long ballot and the party machines are well organized and powerful, our judges, while they go through the form of election, are not selected by the people at all. They are appointed. The appointing power is lodged with the leaders of the party machines. These men appoint the nominees».³⁸⁵ Second, a selection system according to which judges are asked to become politicians in order to ascend to the bench actually eroded public confidence in the judiciary. In a notable speech before the American Bar Association in 1906, Roscoe Pound stated that «(p)utting courts into politics and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench».³⁸⁶ New political debates followed, led in particular by the critical bar associations, to restore public confidence in the courts that had been lost in part because of the political nature of judicial elections.

The result of this first early open debate on the proper balance between independence and accountability and of a consequent stratification of institutional solutions, was the definition (and stratification) of three basic models of selection: the *appointive system*, the *elective system*, and the *merit selection system*, also known as *Missouri plan*. These all started to coexist, and still coexist in the United States, before constituting the models which later spread elsewhere in the vast majority of constitutional democracies.

In pure terms, the *appointive* system is nothing more than the traditional system of nomination in which both the candidacies and the final decisions on the appointments are made by political authorities. This is, again in pure terms (although historically occurred), an obvious maximization of the profile of *accountability* of judges vis-à-vis the political powers at the expense of a serious threat to their *independence*. As we saw, the first consequent historical modification was the change for *elective systems* in which the political community - the citizens - directly choose judges through a vote among candidates. In this respect, a first further internal diversification in the category arose on the point of candidacies. The first examples of elective judges were directly

³⁸⁴ J.W. Hurst, *The Growth of American Law: the Law Makers*, Little Brown and Company 1950, at 133, as also quoted by J. Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, in 49 *University of Miami Law Review*, 1994, p. 1, at 6.

³⁸⁵ A.M. Kales, *Methods of Selecting and Retiring Judges*, in 11 *Journal of the American Judicature Society*, 1928, p. 133, 134-35.

³⁸⁶ R. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, in 40 *American Law Review*, 1906, p. 729, at 748.

associated to political parties and held regular campaigns for fundraising and the aggregation of consensus. As said previously, modifications later occurred leading to several examples of so-called *non-partisan elections*, with candidates listed on the ballot with no label designating any party affiliation. In this sense, a tentative shift in the accountability system was clear by linking the judges directly with a broad electorate and not with political authorities. This solution was also clearly addressed to reinvigorate the idea of independence from any other power. The dynamics of “capture” of judges' elections by the political parties eventually frustrated both goals and led to a first form of corrections with tentatively non partisan elections.

A second type of correction within the institutional balance came some decades later with *Missouri Plan* as we previously said. If the turn to judicial elections was originally meant to allow voters to elect judges, in the wake of a political platform for democratization by the end of the 19th century, political corruption became in fact the paramount problem. In coherence with the suggestions of American Judicature Society - a national, non-partisan organization formed by a group of judges and lawyers in 1913 in the US precisely to react to the corruption problems and to push for a qualified, independent judiciary and ensure fairness in the United States justice system - a recalibration of the selection systems was proposed based on merit more than on accountability.³⁸⁷ The idea of choosing judges by using a non-partisan merit selection process as a correction of the elective system was proposed within this context. In 1940, the state of Missouri was the first to adopt what formally went under the name of «Nonpartisan Selection of Judges Court Plan», and it is now often referred to as a “merit selection” system or the «Missouri Plan». It was publicly discussed and approved by the voters in the same years; and in 1945, this method became part of Missouri's State Constitution .

In general terms, the *merit selection system*, combined aspects of both the appointment and election methods to select judges, using a merit-based evaluation system. Under the plan, when a judicial vacancy occurs, applicants meeting the qualifications for the judgeship may apply. An independent, non-partisan judicial selection commission is set to review the applications, to interview the applicants and to compile a list of the most qualified candidates. The commission then forwards a list of suitable names to the political authorities responsible for the final choice. In this sense, the political power is still sovereign in its choice, but restrained by an external evaluation made by a specialized, independent body. In the Missouri's original model, the intention of restraining the political discretion was also very well exemplified by the provision of a term (of sixty days) to appoint a candidate from the list: in the case of the governor not making a selection within the term, the independent commission itself was entrusted with the power to make the

³⁸⁷ See T.R. Phillips, *The Merits of Merit Selection*, *op. cit.*, at 76 *et seq.*

selection, thus countering the danger of instrumental inertias. The most direct borrowed element of the election systems was the provision according to which newly appointed judges must stand for a so called *retention* in the next general election after serving a certain period in office. If a majority of voters opposed retention, the judge was removed from office and the selection process started again.

Of course, this institutional solution presented several advantages once compared to historical predecessors. It confined the direct intervention by political authorities, confirming the need for accountability, in the first and in the last phases of selection; and it entrusted the voters of the final word in the course of action. At the same time, it included clear elements based on merit - the only ones that the European continental systems based on public *concours* evaluate - in the crucial, central phase. Not only were clear qualifications for the candidates set by the political will in advance — after all, this was also possible in the appointive or elective systems. It limited the political discretion of the final phase to a choice among already filtered, shortlisted appointees, again chosen according to their qualifications by an independent, non-partisan, special commission. In this sense, the independency filter of this special body worked as a basis and a guarantee for the independence of the final candidate, leaving its nomination to the political process.

Thus, as the proto-typical discretionary appointive system in continental Europe inherited from the *ancien régime* was simply replaced by a system of public *concours* - in which the merit-based element of the system was based on a selection through exams³⁸⁸ - the American states' «laboratories»³⁸⁹ created a stratification of institutional solutions. The *Missouri plan*, then adopted with some modifications in various other contexts, became famous as a successful mix of all the historical elements previously traceable in the institutional balance: merit, lack of political affiliation, representativity, transparency, link to the final political discretion as well as accountability, and protection of independence.³⁹⁰ Hence, a final taxonomy has been proposed by the scholars in this respect.³⁹¹ Together with pure “*meritocratic*” systems of selection (based on the choice, through a competition, of specialized public officials),³⁹² more or less pure *elective* systems (with direct or indirect political affiliations), more or less pure *appointive* systems (with more or

³⁸⁸ See P.H. Russell, Judicial Recruitment, Training, and Careers, in P. Cane, H. Kritzer, The Oxford Handbook of Empirical Legal Research, Oxford University Press, 2010, p. 522, at 536.

³⁸⁹ According to the definition popularized by Justice Louis Brandeis in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

³⁹⁰ See the reflections of K. Malleon, *The New Judiciary: the Effects of Expansion and Activism*, Ashgate 1999, at pp. 140-151.

³⁹¹ K. Malleon, Introduction, *op. cit.*, pp. 3-4 *et seq.*; see also S.A. Akkas, Appointment of Judges: A Key Issue of Judicial Independence, in 16 *Bond Law Review*, 2004, p. 1.

³⁹² M.L. Volcansek, Appointing Judges the European Way, in 34 *Fordham Urban Law Journal*, 2006, p. 363.

less ample direct discretion of the political authorities), the emergence of a group of so-called mixed, hybrid systems, modelled after the *Missouri plan*, has been historically detected.

IV.1.3 Models of Apical Court Selections, in Europe and at the International Level

The original American historical development created technical solutions widely exported in different systems. Given the taxonomy that we just described (i.e. between the elective, meritocratic and appointive systems), the emergence of a fourth, hybrid category is particularly relevant if we move from the original level of the selection of national ordinary judges to the level of the selection of constitutional and international ones. It also becomes particularly relevant if we analyse these aspects not only taxonomically, but in our usual evolutionary, diachronic terms. In fact, it was soon clear that a different balance needs to be stricken between judicial independence and accountability when talking of ordinary trial courts on the one hand and the highest courts of review on the other. As already mentioned, judges in top review courts - under this category we can make reference to both municipal apical and international bodies - are reaching «decisions that often have far-reaching social and political implications»,³⁹³ and they are *naturaliter* involved in choices of constitutional significance, often implicating failures or inconsistencies in the fabric of the legal order and focusing more on the principles and values on which a legal system rests. Therefore, a greater emphasis has always been placed in their appointment process, precisely on the point of the inherent political sensitivity and accountability. The case for such procedures as public interviews or confirmation hearings for court judges - designed to provide the public with knowledge about the values and attitudes of these powerful decision-makers - became much more important and much more persuasive at every apical court level.

After all, as it has been argued, the potential threat to judicial independence is reduced at this level.³⁹⁴ Judges in top courts have often reached the top of their career and are not looking for promotions, thus they are better able to withstand pressure from their selectors once on the bench. Moreover, where judges are often called upon to decide between competing ideologies, values, or policies which underlie the law, the notion of independence as mere impartiality (as between parties) becomes problematic, if not blurred. Is it realistic to require that the appointment systems select judges who are impartial when judging between one set of values and another, in the same way as they must be impartial when judging between one party on trial and another?

³⁹³ K. Malleson, Introduction, *op. cit.*, p. 5.

³⁹⁴ *Ivi.*

The justification for the participation in some form of the elected branches of government in the appointments process of the highest ranks of the judiciary (or of special forms of judges not officially ranked in the judiciary)³⁹⁵ has thus been historically strong and reasonable. Yet, it is precisely at this level of courts that the highest calibre of judges is needed, and great damage would be done to the legal system if the selection of candidates based on partisan political affiliation rather than skills and abilities undermines the quality and the prestige of the judicial college. The challenge that the appointment processes for top review courts face, more than in ordinary selection procedures, «is to ensure that the democratic legitimacy of the judiciary is maintained without introducing a form of politicization that reduces the quality of the judges appointed and transforms judges into politicians in wigs».³⁹⁶

In this sense, the search for the elusive balance between independence and accountability in top judicial appointment processes has led to substantive reforms in many contexts. And, as the literature has remarked, the adoption of judicial appointment commissions can be considered as a major trend, and even more significantly scholars highlight that it looks «likely to become the most popular selection system of the twenty-first century».³⁹⁷

Throughout common law and civil systems alike, the use of commissions is increasingly being explored as a solution to the difficult problem of achieving a balance between independence and accountability in top judicial selection. Canada, South Africa, Scotland, England and Wales, as well as many civil law systems in Europe now use some form of commission.³⁹⁸ To describe the trend, mention can be made here of the recently established English Judicial Appointments Committee,³⁹⁹ Swedish Judicial Committee,⁴⁰⁰ and Slovenian Judicial Council.⁴⁰¹ For the supreme jurisdictions, as described above, deviating systems can sometimes be used. This includes the restricted selection commission for the UK Supreme Court⁴⁰² or the twelve members of the German

³⁹⁵ This is the formal status, in some legal orders, of constitutional courts' judges.

³⁹⁶ K. Maleson, Introduction, *op. cit.*, p. 6.

³⁹⁷ *Ivi.*

³⁹⁸ See for details already The role of the Judicial Service Commission: proceedings. Multilateral meeting organised by the Council of Europe jointly with the General Council of the Judiciary of Spain, Council of Europe Press 1995.

³⁹⁹ Formally a non-departmental public body which was created on 3 April 2006 through the Constitutional Reform Act 2005: see on its activity, in comparative perspective, J.L. Maute, English Reforms to Judicial Selection: Comparative Lessons for American States, in 34 *Fordham Urban Law Journal*, 2007, p. 387.

⁴⁰⁰ The *Domarnamnden*, an independent committee composed of senior judges and lawyers: the constitutional reforms in force since January 2011 now require candidates for permanent roles to publicly apply to it.

⁴⁰¹ See for details A.M. Mavecic, Guarantees of Independence of the Judiciary: the Slovenian Experience, paper presented at the International Judicial Reform Symposium, 2-3 April 2012, Ankara, Turkey, available at the website http://www.concourts.net/lecture/Ankara%202012_1_.pdf (accessed 26 August 2015).

⁴⁰² See on this S. Turenne, Constitutional Adjudication and Appointments to the UK Supreme Court, in S. Shetreet (ed.), *The Culture of Judicial Independence*, Brill 2014, p. 396, at 406.

Richterwahlausschuss that scrutinise prospective *Bundesverfassungsgericht* judges,⁴⁰³ still confirming the application of the model. Quorums and voting rules are not always evident but appear to vary, with the majority decisions presumably being a recurring feature. For regular judicial functions, they ordinarily invite applications, go through the files, stage interviews with prospective candidates and draw up a list of suitable candidates.⁴⁰⁴ The great strength in the use of judicial appointment commissions is in fact in their adaptability, which allows them to be shaped to meet the particular requirements of each system.⁴⁰⁵

Even more importantly for our analysis, the mentioned adaptability of the mixed/hybrid system based on independent selection commissions, which allows them to be shaped to meet the particular requirements of each system, has also proved decisive in the evolution of the selection of international judiciary. There have been remarkable debates over the last years on the undeniable growing importance of the international judiciary. One of the most widely resonant has been the sharp division between thinkers Eric Posner and John Yoo on the one hand, and Laurence Helfer and Anne-Marie Slaughter on the other, over the appropriate role of judicial independence in the international courts.⁴⁰⁶ Some have characterised this as being a divergence of opinion between two ideal types of international judges - those who act as “trustees” and those who see themselves as “agents”⁴⁰⁷ of the governments, with all the clear institutional consequences these different configurations can hint at. In relation to the international judicial selection process, these alternative positions are relevant to many key questions, including whether and to what extent states should have complete discretion in nominating their candidates, the appropriate selection criteria for international judges and whether the judicial election process should be insulated from the election processes of other political appointments in international organizations. These and other issues are often informed by views as to the correct balance between state and supranational autonomy/sovereignty. And they are, in turn, underpinned by familiar, if sometimes unarticulated, normative assumptions about the appropriate boundaries of the power of judges versus politicians. In this sense, the typical normative discussions on the legitimacy of judicial review vis-à-vis the political process have seen a revival.

⁴⁰³ See for details on the German procedures J. Bell, *Judiciaries within Europe: A Comparative Review*, *op. cit.*, at 127.

⁴⁰⁴ See H. de Waele, *Not Quite the Bed that Procrustes Built? Dissecting the System for Selecting Judges at the Court of Justice of the European Union*, in M. Bobek (ed.), *Selecting Europe's Judges*, Oxford University Press 2015, p. 41.

⁴⁰⁵ K. Malleson, *Introduction*, *op. cit.*, at 7.

⁴⁰⁶ E.A. Posner, J.C. Yoo, *Judicial Independence in International Tribunals*, in 93 *California Law Review*, 2005, p. 1.

⁴⁰⁷ L. R. Helfer, A.M. Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, *op.cit.*.

Here again, the scarcity of academic research on the topic has been often underlined.⁴⁰⁸ Though the limited, often anecdotal evidence that exists about the way judges are appointed to international courts, and their usual personal professional prestige, do not lead to serious concerns about the integrity and ability of selected judges. What is less clear, as synthesized with a witticism, is «whether able and independent judges have been appointed because of, or in spite of, the selection processes»⁴⁰⁹ through which the appointments take place. Empirical research by Erik Voeten on the decision-making of national governments in relation to international judicial appointments has identified a range of various motivations for the selection of different candidates: «(g)overnments are neither simply picking the best qualified candidate nor are they singularly obsessed with limiting sovereignty costs, although both motivations are sometimes important».⁴¹⁰ Voeten's research highlights the importance of factors other than those represented in schematic dichotomy merit/affiliation, such as the desire on the part of states to signal a credible commitment to the international legal order and the role of political patronage.

In going into a more detailed analysis, one cannot but start from the notation that the number of international courts and international judges has risen significantly in the last two or three decades, although it remains obviously low when compared to domestic legal systems. The first international court, the Central American Court of Justice, was established in 1907 but it was short-lived. The next international court was the Permanent Court of International Justice established in 1922 and based in The Hague. The creation of the International Court of Justice then followed in 1946, as the «principal judicial organ of the United Nations».⁴¹¹ Until the late 1950s, the International Court of Justice and its fifteen judges had a virtual monopoly on the judicial resolution of international disputes. The situation today is surely changed. Beyond the ICJ, there is nowadays a so-called fragmented space with a wide range of international and regional courts dealing with a variety of subject matters, including free trade, international criminal law, human rights and law of the sea.⁴¹² Among significant recent developments, in 2002 the International Criminal Court (ICC) was established in The Hague (its eighteen judges were elected in 2003), while at the time of writing new regional courts are being established in the Caribbean area⁴¹³ and in Africa.⁴¹⁴ According to the typical international dispute resolution scheme, the judges of these various courts

⁴⁰⁸ R. Mackenzie, K. Malleson, P. Martin, P. Sands, Introduction, in R. Mackenzie, K. Malleson, P. Martin, P. Sands, *Selecting International Judges. Principle, Process, and Politics*, Oxford University Press 2010, p. 2.

⁴⁰⁹ *Ivi.*

⁴¹⁰ E. Voeten, *The Politics of International Judicial Appointments*, in 9 *Chicago Journal of International Law*, 2009, p. 389.

⁴¹¹ See Chapter XIV of the Charter of the United Nations, available at the website <http://www.un.org/en/documents/charter/chapter14.shtml> (accessed 26 August 2015).

⁴¹² See footnote 73 above for references.

⁴¹³ The Caribbean Court of Justice (CCJ).

⁴¹⁴ Most notably the African Court on Human and Peoples' Rights and the East African Court of Justice.

and tribunals are supplemented by the appointment of *ad hoc* judges whereby, in a number of international courts, a state involved in a case may appoint a judge if it has no national members on the bench⁴¹⁵ - in the same vein as arbitrators sitting on arbitral tribunals established to deal with a particular case. More recently, the Security Council has mandated the establishment of pools of *ad litem* judges for the *ad hoc* criminal tribunals for the former Yugoslavia and for Rwanda in order to assist those tribunals in dealing with their caseload within a reasonable period of time.⁴¹⁶

Such appointments can add complexity to the issues of judicial selection and judicial independence. In any case, the starting point for any analysis on the topic is that no rules of general application have been promulgated on the functioning of international courts. As previously said, it is common to say that, at a certain extent, each body is an island⁴¹⁷ with its own system of governance and rules, including the selection of judges.

However, these courts do have one point in common: states have always been greatly concerned about the manner in which international judges are appointed. This is understandable. As we already noticed in advance, if states set up courts and entrust them with functions over their mutual controversies, they inevitably lose *a degree* of control over what that body does. The kind of control they lose is different from the similar problem faced with delegation to domestic/municipal courts. The legal questions facing the latter are in any case treated, before and after the judicial pronouncement, according to the internal democratic cycle: political decision-making, judicial intervention, possible overturn by a reinforced majority. This is often not the case for international controversies, at least in terms of facility of the overturning. An international court, an independent international court, necessarily extends its independence to relations with the states which created it, and which may then become direct parties in cases before it.

Scholars have pointed two major ways in which, in this peculiar context, governments seek to influence international courts: by controlling the budget of the institution itself and by deciding who will sit in the court as a judge.⁴¹⁸ Financial and human resources: the appointment process and the independence of the court are once again closely connected. State concerns about the judicial selection process, so interrelated in their interests and sovereignty, have been evident from the very beginning of the short history of international courts.

⁴¹⁵ R. Mackenzie, P. Sands, *Judicial Selection for International Courts: Towards Common Principles and Practices*, in K. Malleson, Peter H Russell (eds.) *Appointing Judges in an Age of Judicial Power. Critical Perspectives from Around the World*, *op. cit.*, p. 216.

⁴¹⁶ R. Mackenzie, P. Sands, *International Courts and Tribunals and the Independence of the International Judge*, *op. cit.*, at 274.

⁴¹⁷ See above for the reference to R. Mackenzie, P. Sands, *Judicial Selection for International Courts: Towards Common Principles and Practices*, *op. cit.*, p. 216; and D. Terris, C.P.R. Romano, L. Swigart, *The International Judge, An Introduction to the Men and Women Who Decide the World's Cases*, *op. cit.*, p. 104.

⁴¹⁸ R. Mackenzie, P. Sands, *Judicial Selection for International Courts: Towards Common Principles and Practices*, *op. cit.*, p. 216.

The first efforts to move beyond the model of international adjudication via mere ad hoc arbitration with the establishment of a permanent international court (a movement we also saw replicated in the negotiations for setting up the ECJ) were during the Hague Peace Conference of 1899. It notably failed because states were unable to agree on the modalities of selection for a representative group of judges. At the time, around fifty states participated in the negotiations. The issue did not arise for the Central American Court of Justice in 1907. There were only three state parties, so each could have a judge in a sort of “direct” form of “representation”. In 1922, the Permanent Court of International Justice (PCIJ) became the first international court in which the number of judges was to be smaller than the number of state parties with an evident *caesura* with the principle of direct representation of national sovereignty and national interests. The same situation is also detectable in the International Court of Justice, where fifteen judges sit on a court that is nowadays open to more than 180 states.

Already in the early period of the establishment of international courts and tribunals, it was recognized by commentators that the «proper manning» of the courts, and their successful functioning, could only be assured if careful scrutiny was exercised when the actual selection of judges was made.⁴¹⁹ But states were very clear in their wish to exercise full control and in considering that their freedom should not be limited. An interesting anecdote comes via the story of Manly Hudson, judge and president of the Permanent Court of International Justice. In 1944, he planned to review the relative existing rules. His clear conclusion was the following: «No absolute disqualifications can be said to exist in general international law to restrict the freedom of States, though the literature of the nineteenth century evidenced some disposition to list such qualities as infancy and insanity as barring a person's selection».⁴²⁰

In fact, the typical way in which the constitutive instruments of the various international and regional courts set rules on the judicial selection is essentially by establishing certain criteria to be fulfilled by individual members, while additional considerations or requirements are often imposed as regards the bench as a whole. In relation to the qualifications of individual international judges, recurring but quite neutral criteria include: high moral character/integrity, possession of qualifications required in their respective countries for appointment to highest judicial office, or status of jurisconsults of recognized competence in international law, demonstrated expertise in area of law relevant to the court in question (i.e. trade, human rights, law of the sea etc.).

With regards to considerations to be taken into account in the composition of an international bench

⁴¹⁹ *Ibidem*, at 217.

⁴²⁰ M.O. Hudson, *International Tribunals: Past and Future*, Carnegie Endowment for International Peace and Brookings Institution 1944, at p. 34.

as a whole, while in some contexts geographic representation requirements are unnecessary as the college is composed of one judge nominated or appointed by each participating state, relevant provisions requiring some considerations for representation of different geographic areas and different legal systems or different legal cultures are easy to find.⁴²¹

In this, we find symbolized the first, *ex ante* explanation of the strong connection between national sovereignty and international judicial selections. It is reflected in the initial criteria for the selection and the composition of the judiciary bodies. According to the famous rationalization offered by Christian Tomuschat, these criteria are ultimately linked to the need for international courts to «be able effectively to discharge their functions».⁴²² In fact, if every court entrusted with judicial responsibilities «must be large enough to process all the cases brought before it», it must also keep, on the other hand, «a sufficient degree of internal cohesion». It cannot be blown up to the size of a parliamentary body, losing its unity and messing its jurisprudence in contradictions and inconsistencies. Consequently, «even if it may be desirable at the international level to provide for one judge per each State participating in a scheme of judicial settlement of disputes»,⁴²³ this (disputable) wish can be surely feasible in certain regional organizations but cannot be granted in all circumstances.

According to Tomuschat, this functional analysis is preferable to simple, rough readings based on pure instrumental arguments. «No reasonable government», in fact, would simply «expect that “its” judge on the bench should act as a kind of defence lawyer for the protection of a presumed national interest», if not at the price of a marginalization of the judge herself by her peers and the consequent logical exclusion of any reasonable influence as «forceful champion of the legitimate aspirations»⁴²⁴ of her own country. «Realistically speaking», the national affiliation and representation of the judge would serve two other main functions. First of all, it helps the college in the understanding of the often inevitable national background of the international disputes. If issues arise which are closely connected with the domestic legal system of one of the parties concerned, no one else can better offer a proper understanding of the national backdrop than a qualified professional grown from the system concerned (with no incontrovertible results, but certainly with great persuasive force). Secondly but consequently, once we consider, as we said, that international judicial bodies as rational monitoring system decreasing the costs of compliance to mutual

⁴²¹ Paradigmatic in this respect is the Statute of the International Court of Justice, which mandates, under articles 3 and 9, that the ICJ judges should represent «the main forms of civilization and (...) the principal legal systems of the world».

⁴²² C. Tomuschat, National Representation of Judges and Legitimacy of International Jurisdictions: Lessons from ICJ to ECJ?, in I. Pernice, J. Kokott, C. Saunders (eds.) *The Future of the European Judicial System in a Comparative Perspective*, Nomo Verlag 2006, p. 183, at 183.

⁴²³ *Ivi.*

⁴²⁴ *Ivi.*

regulatory schemes for states' governments, it is also rational that «states – which means governments and their peoples – must be able to trust that their legitimate concerns are taken into account with the requisite care». In this sense, the presence of one's “own” judge simply enhances each state's confidence in the scheme. «If justice were meted out exclusively by foreigners, the perception would spread that the relevant scheme had a discriminatory character», or even «as some kind of neo-colonial usurpation of the basic political rights of the people». ⁴²⁵ A national judge is suited to allay such fears and also to make known in the international college both the technicalities of each legal system and also, in some sense, the political sensitivities and the possible social results of judicial decisions - not under the form of veto powers or undue influence - but simply by making sure that the relevant decision-making process is guided by a large principle of international cooperation.

Thus, once we rationalize the otherwise puzzling idea of the need for “representation” in judicial bodies, and we contextualize in this sense the tension between judicial independence and judicial accountability at the international level, we can better understand the evolution in the selection process at a comparative international level and put it in parallel with the trend detected at the national level. In fact - in the context of that same recent general debate that we mentioned in our introduction about the legitimacy and the democratic justification of the growing authority of international courts - renowned scholars have suggested a direct parallel between the kind of democratic legitimacy to which these courts can aspire and the evolution of their human resources selection. In particular, Von Bogdandy and Venzke, in their *comparative international investigation*, ⁴²⁶ distinguish three possible answers to the problem of the independence/accountability conundrum, as declined when «peoples that are subject to a court's jurisdiction do not constitute a single people», ⁴²⁷ and «there is no» a single «'institutional sovereign'». ⁴²⁸

The approach Von Bogdandy and Venzke describe firstly, also in historical terms, is the most obvious, and linked to the *absolute* nature of national sovereignty. What they call a first model, the «*intergovernmental approach*», simply traces the authority of international courts and their judges to the will of their founding father, the unitary states, and in particular to the states' governments as prominent representatives in international law (in coherence with the “full powers” clauses of art. 7

⁴²⁵ *Ibidem*, at 184.

⁴²⁶ A. Von Bogdandy, I. Venzke, In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification, *op. cit.*.

⁴²⁷ *Ibidem*, at 37.

⁴²⁸ J. Crawford, J. McIntyre, Judicial Impartiality and the International Judiciary, in S. Shetreet, C. Forsyth (eds.), *The Culture of Judicial Independence. Conceptual Foundations and Practical Challenges*, *op. cit.*, at p. 190.

of the Vienna Convention on the law of the treaties).⁴²⁹ In this view, the selection of judges (according to the previously mentioned rationales) forms a genuine part of foreign politics, and therefore remains an *absolute* prerogative of the executive. They are “masters” of the relevant treaties and therefore also masters also of the selection procedures, seen as pure implementation with no possibility of external intervention whatsoever, but only of self-containment in the form of previously established criteria to be fulfilled.

This approach indeed informs most of the procedures still in place for electing international judges. As it has been said, and as we will see in detail in the next paragraph, «it amounts to a sad irony in world history» that this procedure has endured «in rare purity», and until recently, with regard to the selection of judges of the European Court of Justice, «the one court that has contributed to overcoming classical international law more than any other».⁴³⁰ This major paradigm of «*intergovernmental approach*» is still found nowadays by scholars in the Statute of the International Court of Justice, given the importance of the institution, even though there are surely some elements of hybridization in it «to insulate nominations from political influence»,⁴³¹ (at least in pure terms). In fact, within this context, according to art. 3 of the ICJ Statute, the designation of each of the fifteen judges is formally filtered by so-called “national groups” sitting in the Permanent Court of Arbitration or (in the case of countries not represented within the latter) by national groups specifically appointed for this purpose. At least three months before the date of the election, the Secretary-General of the United Nations calls these national groups to designate four candidates within a specified period, including a maximum of two nominees from the same nationality as the national group. Although no detailed regulations exist giving binding instructions to the states about how to proceed in the process of screening and evaluating candidates, art. 6 of the Statute of the Court even recommends each national group «consult with its highest court of justice, its legal

⁴²⁹ «Article 7

Full powers

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

(a) he produces appropriate full powers; or (b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty; (b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited; (c) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ».

⁴³⁰ A. Von Bogdandy, I. Venzke, In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification, *op. cit.*, at 37.

⁴³¹ R. Mackenzie, K. Malleson, P. Martin, P. Sands, The Nomination Process, in *Eid.*, Selecting International Judges: Principle, Process, and Politics, Oxford University Press 2010, at p. 65.

faculties and schools of law and its national academies and national sections of international academies devoted to the study of law». The lists of candidates are then sent to both the Assembly and the Security Council: individual applicants are evaluated and elected by these two bodies according to the possession of the broad and general requirements set out in art. 2 of the Statute of the ICJ, asking for judges of «high moral character», who should either «possess the qualifications required in their respective countries for appointment to the highest judicial offices» or «be jurisconsults of recognized competence in international law». These criteria are almost universally considered as too vague by scholars;⁴³² and empirical research has evidenced how the selections are not actually based on individual evaluations of single candidates but almost only on geographical considerations on the opportunity of the composition of the bench (with the establishment of a conventional pro quota system for each continent).⁴³³

In this vein, the procedure can still clearly be considered as «*intergovernmental*», according to Von Bogdandy and Venzke's taxonomy, for several concurring reasons. There are surely certified «strong vested interests of governments in controlling the nomination process in order to influence the composition» of the court (as usual, and natural); and, «(A)t a practical level», for ICJ appointments «states will most likely be actively involved in campaigning for a candidate to succeed, and therefore want to ensure that a candidate is politically acceptable and 'electable'». ⁴³⁴ But the decisive factor is that no practical, scrutinized/enforced limits are placed on the exercise of those sovereign interests, given the vague criteria for the appointment and the only formal role of the vote in the two international *fora* involved (the UN Assembly and the Security Council), entrusted with a simple formal consent. In particular, it is important to note that the candidacies are not subject to any supervision by any independent committee or subcommittee inside the Assembly so that there is no real evaluation of the quality of the candidates and of their independence. This is coupled with the lack of transparency in the work of national groups (subject, in fact, entirely to governmental directives).⁴³⁵ So, the historical forms verified nowadays as «*intergovernmental approaches*» to the problem of democratic legitimation and composition of the international courts are, as we see, in any case hybrid forms, with some kinds of limits (although weak) to the pure expression of sovereign interests by the executives.

Therefore, when scholars build two other categories for their proposed taxonomy, they do so on the basis of further and more stringent differentiations. Interestingly, they particularly look at the presence of effective limits posed to the national executives and to the different institutions which

⁴³² *Ivi.*

⁴³³ P. McAuliffe, *Selecting International Judges: Principle, Process, and Politics*, in 11 *International Criminal Law Review*, 2011, p. 359.

⁴³⁴ R. Mackenzie, K. Malleson, P. Martin, P. Sands, *The Nomination Process*, *op. cit.*, at p. 65.

⁴³⁵ P. McAuliffe, *Selecting International Judges: Principle, Process, and Politics*, *op. cit.*, at 359.

can be entrusted of such a counter-balance role.

Von Bogdandy and Venzke label «*liberal approaches*» - as second models in their taxonomy - the examples of international institutions in which the basic «division of domestic and foreign politics that characterizes the traditional intergovernmental approach»⁴³⁶ is no more accepted. Such categorical distinction should be considered, after all, «increasingly less plausible in the wake of the globalization of many spheres of life». The liberal approach would then be recognizable where the procedures for choosing «senior domestic and international judges» align; and in particular, where there is «a prominent role for domestic parliaments» in the selection procedures or in any case, a more incisive scrutiny made at the international level, also through independent *ad hoc* bodies, on the effective choices made at national level. In this sense, the liberal values that should be expressed at the national level would imbue the international institutions.

The historical example in this respect is to be found in the International Criminal Court. Its Statute was adopted in 1998 to create, as it is well known, the first permanent court established to try individuals accused of committing crimes of genocide, crimes against humanity and serious violations of the laws of war. In contrast to the International Court of Justice, also as a historical antecedent, the Statute of the ICC provides detailed guidance as to the individual qualifications of its eighteen judges as well as criteria and guidance for their nomination and election. It actually provides an interesting alternative: it allows the nomination procedure to follow either the ICJ procedure or, explicitly (Article 36), the procedure used for the appointment of national superior court judges. States are also required, in any case, to provide precise information on how the candidate they have nominated meets the criteria laid down by the Statute. These serious, stringent criteria include «established competence» and experience in criminal law and procedure, or in «relevant areas of international law such as international humanitarian law and the law of human rights». Moreover, it is remarkable that until 2010, these criteria were (specifically) scrutinized by the Assembly of State Parties (the general management oversight and legislative body of the court system): previous discussions as to whether there should be some type of specialized screening body to provide more information on candidates to guide states and to assess them (as proposed by member states such as the United Kingdom),⁴³⁷ did not lead to tangible results. But in December 2010 an *Independent Panel on International Criminal Court Judicial elections* was established, under the pressure and with the sponsorship sponsored of the “Coalition for the International Criminal Court”, a group of NGOs aiming to promote the nomination and election of the most

⁴³⁶ A. Von Bogdandy, I. Venzke, In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification, *op. cit.*, at 34.

⁴³⁷ See R. Mackenzie, K. Malleson, P. Martin, P. Sands, The International Court of Justice and the International Criminal Court in Historical Context, in *Eid.*, Selecting International Judges: Principle, Process, and Politics, *op. cit.*, at 21.

highly qualified officials through fair, merit-based, and transparent processes. This panel is now entrusted with the task of issuing a report containing an assessment of each judicial candidate as ‘Qualified’ or ‘Not Qualified’ after the closing of the nomination period and in advance of each judicial elections; and the official “Reports of the Advisory Committee on Nominations of Judges” in the ICC Assembly of States Parties also proves a clear osmosis between the opinions of the Independent Panel and the final results of the ICC selective process.⁴³⁸ It is already clear that the elements of important hybridization already traced at the national level, under the form of independent panels constituted by honourable professionals and responsible of an independent screening of the new candidacies, are taking place more and more at the international level - and with growing results.

Von Bogdandy and Venzke also add a third category, which they label the «*cosmopolitan approach*» to the legitimation and the selection of judges.⁴³⁹ Of course, this would be similar to the «*liberal*» approach as far as it creates a set of credible limits to the pure sovereign will of national executives. But the democratic legitimization and the balance between independence and accountability of international judges in this model is created through a stronger reliance - not on the national bodies - but directly on the international/supranational *fora* and their institutions, as possibly veritable direct factors of democratization. The *cosmopolitan* element would rest here in the detachment between the national and international level, and in considering this latter as an autonomous, independent space in which citizens - through their direct tools of control - can be the «ultimate reference point in the justification of public authority».⁴⁴⁰ The practical element of such a process of evolution of old sovereign schemes in the selection of international judges would be the central and active role of international/supranational assemblies, replacing in this sense the executives or also the legislature of the nation-states.

A «cautious expression» of such development in the judicial selection processes is to be found, according to Von Bogdandy and Venzke themselves, in how the election of judges to the European Court of Human Rights is evolving through the role of the Parliamentary Assembly of the Council of Europe. In fact, the nowadays ECtHR full college is composed of 47 judges (one per member state) «of high moral character», and with «the qualifications required for appointment to high judicial office or (...) jurisconsults of recognised competence». Naturally, the selection of these human resources is a two step process composed of a first, national phase, which leads to transmitting a list of three candidates and a second, supranational phase to scrutinize it and arrive to

⁴³⁸ See for instance http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-23-ENG.pdf , pp. 3-4.

⁴³⁹ A. Von Bogdandy, I. Venzke, In Whose Name? An Investigation of International Courts’ Public Authority and its Democratic Justification, *op. cit.* at 35.

⁴⁴⁰ *Ivi.*

the final election. The relevant *cosmopolitan* trend in this respect is in that all the reforms occurred - explicitly aimed at making the process of appointment «reflect the principles of democratic procedure, the rule of law, non-discrimination, accountability and transparency»,⁴⁴¹ and at «the need for maintaining the independence of the judges and preserving the impartiality and quality of the Court»⁴⁴² - have been taking place in the “Strasbourg phase” and have been autonomously led by the Parliamentary Assembly of the Council of Europe.

In particular, from 1996 onwards, the Parliamentary Assembly has started to think about possible improvements of its own procedures; and this particularly resulted in a request for standardization of the curricula of national candidates to better assess them and in the emergence of the practice of candidate interviews, made by a special *Sub-committee of the Assembly's Committee on Legal Affairs and Human Rights*. After the dissatisfaction of the 1998 round of elections - in terms of strong internal difference among the national procedures for candidacies and lack of transparency, bad qualifications of some candidates and lack of gender balance – a new set of reforms was prompted yet again by the Permanent Assembly. These resulted in the Assembly's Recommendation 1649 (2004), which tried to set rules on the transparency of the calls for interest, gender balance, qualifications and the linguistic knowledge of candidates;⁴⁴³ and in the Assembly's Resolution 1646 (2009), which stressed the need for states to make explicit their internal selection procedures and highlighted the need for satisfactory level of linguistic knowledge by the candidates.⁴⁴⁴ This unprecedented supranationally-led evolution culminated, first of all, in «a positive politicization of the election process», when the Assembly even «rejected a member state's list of candidates because it did not include any female candidate».⁴⁴⁵ Second, in 2010, an *Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights* was established: an independent body composed of seven experts, appointed by the Committee of Ministers of the Council of Europe but sitting in individual capacity, and entrusted with the tasks of screening the candidacies and consequently informing the States/Contracting Parties and the Parliamentary Assembly of its deliberations — i.e. a panel which adds its own work to that of

⁴⁴¹ As per the Recommendation 1649 (2004) of the Parliamentary Assembly of the Council of Europe concerning «Candidates for the European Court of Human Rights», par. 3.

⁴⁴² As per the objective No. 8 stated at the High Level Conference on the Future of the European Court of Human Rights, 19th February 2010, in the so called Interlaken Declaration, available at the website <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2045095&SecMode=1&DocId=1547616&Usage=2> (accessed 26 August 2015).

⁴⁴³ Available at the website http://assembly.coe.int/CommitteeDocs/2010/20100504_ajdoc12rev.pdf (accessed 26 August 2015).

⁴⁴⁴ Available at the website <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17704&lang=en> (accessed 26 August 2015).

⁴⁴⁵ A. Von Bogdandy, I. Venzke, In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification, *op. cit.* at 35.

supranational representative body, without substituting its selection.

It is interesting to note that, here again, the institutional solution of an independent screening panel is replicated in the special context of a supranationally/cosmopolitan inspired development.

IV.2 Selection of Judges of the Court of Justice of the EU: Liberal Supranationalism as a Reaction to Pure Intergovernmentalism?

Interestingly, the question of the appointment of the members of the Court of Justice of the European Union can be put in the context we have tried to sketch in the previous pages. In particular, it can be read as a paradigm of an evolution from a system devoted to the pure intergovernmental *raisons d'État* to the expression of a kind of *liberal supranationalism*: an evolution developed in the wake of what comparatively registered both at the national and the international level. The few scholars who analytically pointed to the problem of the international judicial selection proposed, in addition to all the previously mentioned heuristic tools, a historical division. As said earlier, a critical step in the early twentieth century was the move from an international judiciary system made of *ad hoc* tribunals, where states directly appointed adjudicators for specific disputes to the establishment of the first permanent international dispute settlement bodies. As we also saw, the previous unsettled model of adjudication was also proposed by some of the negotiating parties in the original context of the European Coal and Steel Community and afterwards, even in the negotiations of the European Economic Community Treaty. However, the European Communities definitely followed the second path, being one of the most important examples of the mentioned fundamental change in the nature of international adjudication.

However, the European Court of Justice was not paradigmatic of a second important move. The shift in the institutional nature of international adjudication also gradually led, in several contexts, to the acceptance of the appointment of non-national judges, selected by international intergovernmental bodies, based on criteria related to individual qualities and regional (or other) criteria of representation. A key distinction arose (which still affects judicial selection processes today) between «full representation courts», where each state has a judge of its nationality on the court permanently and «selective representation courts», where there are fewer seats than the number of states that are parties to the court's statute.⁴⁴⁶ Obviously, in the latter type of courts, a choice has to be made between candidates from different states, thus giving rise to a greater degree of competition in which political influences, among other factors, can and do hold sway.

⁴⁴⁶ E. Voeten, *The Politics of International Judicial Appointments*, *op. cit.*, at 410-402.

But there is an additional consequence to mention about this ideal partition. In «selective representation courts», such as the International Court of Justice, the International Criminal Court, or the International Tribunal for the Law of the Sea (ITLOS), precise procedures tend to be established for the nomination of candidates and their election by the relevant intergovernmental bodies: in most cases these procedures are in the governing statutes, or alternatively or additionally they come via accepted conventions. In «full representation courts», on the other hand, the historical tendency in general terms has been little procedural guidance and even less external supervision on the choice of judges.⁴⁴⁷ The states, as contracting parties, were in these contexts still initially already guaranteed through the perspective of an almost absolute sovereign exercise in their appointment, and therefore had no incentive to negotiate binding rules for the other parties, also to be applied for them.

This is clearly the case for the European Communities' judicial body in its early decades. As already mentioned, Von Bogdandy and Venzke described it as «a sad irony in world history»⁴⁴⁸ that an almost unfettered *intergovernmental approach* has endured «in rare purity», and until recently, with regard to the selection of judges of the European Court of Justice, «the one court that has contributed to overcoming classical international law more than any other». In fact, all the characteristic elements of what we define an *intergovernmental approach* to international judicial appointments were actually reified in the European Communities and in the European Union, at least until very recently, until the Treaty of Lisbon and 2010. Traditionally, the members of the ECJ have always been appointed by «common accord of the Member States», without any formal assessment of their appropriateness being made at the supranational level. Since the ECSC Treaty, no mention has been made of any specific machinery or rules for nominating candidates, or, most of all, about their nationality, so that in theory, members of the Court could always be drawn from persons of nationality other than that of any one of the Member States.⁴⁴⁹

In fact, an established convention has always been in charge according to which every state nominates one judge for six years, with partial re-election every three years and the possibility of renewable mandates. As the recent historical research has demonstrated to us,⁴⁵⁰ the most tangible

⁴⁴⁷ See R. Mackenzie, K. Malleon, P. Martin, P. Sands, *The International Court of Justice and the International Criminal Court in Historical Context*, *op. cit.*, at p. 8.

⁴⁴⁸ A. Von Bogdandy, I. Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification*, *op. cit.* at 37.

⁴⁴⁹ T. Kennedy, *Thirteen Russians! The Composition of the European Court of Justice*, in A.I.L. Campbell, M. Voyatzi (eds.), *Legal Reasoning and Judicial Interpretation of European Law: Essays in honour of Lord Mackenzie-Stuart*, Trenton Publishing 1996, p. 69.

⁴⁵⁰ A. Boerger-De Smedt, *La Cour de Justice dans les négociations du traité de Paris instituant la CECA*, *op. cit.*, at 19 *et seq.*; see also J.M. Sauvé, *Le rôle du comité 255 dans la sélection du juge de l'Union*, in A. Rosas, E. Levits, Y. Bot (eds.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law - La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence*, *op. cit.*, p. 99, at 100.

intergovernmental aspect - the very principle according to which every Member State directly and simply nominates one judge - was probably an easy and perhaps automatic principle to apply in the original context of six contracting entities. But was, in any case, the result of open negotiations among those entities. During the prodromes of the European Coal and Steel Community, and also later during the negotiations of the Treaty of Rome, such an equation was the proposal of the French delegation.⁴⁵¹ As we already know, the French delegation originally argued for an old-fashioned system of supranational European adjudication, modelled after ad hoc arbitral tribunals nominated for single controversies. While this last proposal for an unsettled status of the Court of Justice decisively failed, the French proposal for selecting its judges prevailed, particularly against the representatives of the German delegation. The same historical research on the Communities' origins tells us that these made a certain preoccupation explicit that a procedure dominated by the Member States might jeopardize the independence of the newly-established EU judicial institution.⁴⁵²

In the resulting context, based on the «common accord of the Member States», if for some scholars «fears of political pressure gradually dissipated»,⁴⁵³ it is a fact that Member States have traditionally enjoyed wide discretionary powers in choosing their candidates for judicial office at the Court of Justice and the later established Court of first instance. Until the Treaty of Lisbon, no nominee was ever officially rejected, although at least in theory the governments of the Member States could have refused, in the internal negotiations, to grant their “accord” to a nomination.⁴⁵⁴ Such a wide discretion was the result of a clear mutual agreement among States and the consequent formal, un-effective mutual limits posed in a context of clear «full representation». The ECSC Treaty of Paris merely stated that judges were to be chosen from persons «offering every guarantee of independence and competence»,⁴⁵⁵ without even mentioning the need for specific legal training. In fact, at least a couple of actual nominees in the early days of the European Court were absolutely not technically trained as lawyers; on the contrary, as anecdotally narrated by today's scholars with a

⁴⁵¹ A. Boerger-De Smedt, *La Cour de Justice dans les négociations du traité de Paris instituant la CECA*, *op. cit.*, at 20-21; D. Tamm, *The History of the Court of Justice of the European Union Since its Origin*, *op. cit.*, at 16 *et seq.*

⁴⁵² *Ivi*; see also T. Dumbrovský, B. Petkova, M. Van Der Sluis, *Judicial Appointments: the Article 255 TFEU Advisory Panel and Selection Procedures in the Member States*, in 51 *Common Market Law Review*, 2014, p. 455, at 458.

⁴⁵³ T. Dumbrovský, B. Petkova, M. Van Der Sluis, *Judicial appointments: The Article 255 TFEU Advisory Panel and selection procedures in the Member States*, *op. cit.*, at 458.

⁴⁵⁴ *Ivi*.

⁴⁵⁵ Art 32 of the Treaty Establishing the European Coal and Steel Community:
«Article 32. The Court shall be composed of seven judges, appointed for six years by agreement among the governments of the member States from among persons of recognized independence and competence. A partial change in membership of the Court shall occur every three years, affecting alternatively three members and four members. The three members whose terms expire at the end of the first period of three years shall be designated by lot. Judges shall be eligible for reappointment. The number of judges may be increased by unanimous vote of the Council on proposal by the Court. The judges shall designate one of their number as President for a three-year term.»

certain curiosity,⁴⁵⁶ some of them were secondary school teachers who became trade unionists⁴⁵⁷ or civil servants with an economic training.⁴⁵⁸ In the recent words of one of the recent *chroniqueurs* of the history of European integration, «if the first nominations sometimes appeared to be quite far from, if not the legal realm, then at least the judicial function, the professional qualifications of the Court's members were heterogeneous, to say the least».⁴⁵⁹

The impression of a tribunal based on the pure and simple representation of national wills is also corroborated by the fact that - unlike in the context of other international court such as the ICJ, where Article 9 of the Statute asks the judges to represent «the main forms of civilization and the principle legal systems of the world» - no principles of representativity were even sketched for the ECJ, leaving full discretion to the executives.

In all, this can be easily read as the founding fear that a certain lack of judicial independence, also highlighted by the technical shortcomings of the candidates, was in balance with a stressed accountability at least researched by the Member States. And this assumption can be corroborated if one juxtaposes and compares the thoughts of those who claim that, in this respect (and as we saw), «fears of political pressure gradually dissipated»,⁴⁶⁰ with the ideas of the authors who, on the other hand, speculate on the ever-present strong political significance of these nominations. For instance, Karen J. Alter's work in the 1990s on the European Court of Justice notoriously found that national nominations to the Court were governed by a variety of political considerations «including party affiliation and political connections».⁴⁶¹ Her work was surely aimed at explaining how an «unusually influential international court»⁴⁶² managed «to escape member states control»;⁴⁶³ but this did not imply a denial of the influence sought by the states and by their internal dynamics. Indeed, in some ways it was a reaffirmation of the problem of the possible “unusual” influence of the governments. Historically, it has always been «in the muffled atmosphere of ministerial cabinets and diplomatic meetings, sheltered from the public gaze»,⁴⁶⁴ that the members of the ECJ were appointed. But this grey nature of the nominations did not deprive them

⁴⁵⁶ H. de Waele, Not Quite the Bed that Procrustes Built? Dissecting the System for Selecting Judges at the Court of Justice of the European Union, *op. cit.*, p. 24.

⁴⁵⁷ This is the case of Petrus Josephus Servatius Serrarens, first Dutch judge of the ECSC Court despite its lack of any legal training.

⁴⁵⁸ This is the case of Jacques Rueff, first French judge of the ECSC Court and of the Court of the European Communities.

⁴⁵⁹ A. Cohen, 'Ten Majestic Figures in Long Amaranth Robes': The Formation of the Court of Justice of the European Communities' in A. Vauchez, B. de Witte (eds), *Lawyering Europe*, *op. cit.*, at 30.

⁴⁶⁰ T. Dumbrovský, B. Petkova, M. Van Der Sluis, Judicial appointments: The Article 255 TFEU Advisory Panel and selection procedures in the Member States, *op. cit.*, at 458.

⁴⁶¹ K.J. Alter, Who Are the 'Masters of the Treaty?': European Governments and the European Court of Justice, in *Ead.*, *The European Court's Political Power: Selected Essays*, Oxford University Press 2009, p. 109.

⁴⁶² *Ivi.*

⁴⁶³ *Ibidem*, at 110.

⁴⁶⁴ R. Dehousse, *The European Court of Justice. The Politics of Judicial Integration*, *op. cit.*, at 14.

of political salience. In the famous reading offered by J.H.H. Weiler, the national appointments were not only sources of formal legitimation of the Court,⁴⁶⁵ but also, at the empirical level, the sign of acceptance of its practices by governments. At least by «the 1970s and 1980s ... when any misconceptions about the ‘least dangerous branch’ would have already been dispelled», consequences could be drawn by the fact that they «eschewed any possible temptation at obvious ‘court packing’ or ‘jurisdiction stripping’», and clearly nominated «most appointees ... with a past reputation of a general accord with the constitutional and material construct of the European Court of Justice».⁴⁶⁶

In this game, a role was inevitably played by a sort of mutual trust not only in relation to the Court, but also among the national governments. In here as well, the importance of factors other than those represented in schematic dichotomy merit/affiliation, such as the desire on the part of states to signal a credible commitment to the international legal order and the role of political patronage, played a role. But while this could be seen - as far as one can tell in relation to a procedure which was far from transparent - as a positive dynamic for the overall quality of the judicial college, the same could not be said about the temporal nature of the judges' mandate. As it has always been renewable, the system of appointment gave national authorities a leverage to apply pressure on the single members, and this has always raised some concern for their independence.⁴⁶⁷

In any case, for a long while, another typical, if indirect, element of the *intergovernmental approach* to judicial selections has been detectable in the Court of Justice' case: the «startling»⁴⁶⁸ little amount of academic attention on the matter⁴⁶⁹ that clashed with the prominent place of the Court within the European Union and in European law scholarship since the beginning of the integration process. The reasons for the change and the evolution, that the ECJ judicial appointment procedure experienced are not investigated very much in depth by the literature and are rather to be found in the legislative history on the point - and in the contextual institutional setting - than in

⁴⁶⁵ J.H.H. Weiler, *Journey to an Unknown Destination. A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration*, *op. cit.*, at 424.

⁴⁶⁶ *Ibidem*, at 426.

⁴⁶⁷ See the remarks by J.H.H. Weiler, *Epilogue: Judging the Judges - Apology and Critique*, in M. Adams, H. de Waele, J. Meeusen, G. Straetmans (eds.), *Judging Europe's Judges. The Legitimacy of the Case Law of the European Court of Justice*, *op. cit.*, p. 235.

⁴⁶⁸ T. Dumbrovský, B. Petkova, M. Van Der Sluis, *Judicial appointments: The Article 255 TFEU Advisory Panel and selection procedures in the Member States*, *op. cit.*, at 456.

⁴⁶⁹ On the social recruitment of the early ECJ in the 1950s and 1960s see A Cohen, 'Ten Majestic Figures in Long Amaranth Robes': The Formation of the Court of Justice of the European Communities, *op. cit.*, the only other recent accounts on appointments at the ECJ being D. Siebert, *Die Auswahl der Richter am Gerichtshof der Europäischen Gemeinschaften: zu der erforderlichen Reform des Art. 167 EGV*, Taschenbuch 1997, and S.J. Kenney, *The Members of the Court of Justice of the European Communities*, in 5 *Columbia Journal of European Law*, 1999, p. 101.

doctrinal speculation. As we saw and in coherence with the evolutions at the national and international level, it is important to note that the need to reform the appointment process was in fact pushed up the European agenda from two separate sides.

First, pressure came from the European Parliament's political initiative. In the 1980s and early 1990s, the assembly demanded that the Council choose half of the Luxembourg judges and the Parliament choose the other half, or as an alternative that every judicial nominee be subjected to parliamentary assent.⁴⁷⁰ In official publications, the Court of Justice had previously rejected bolder propositions for opening up the procedure to full parliamentary scrutiny by involving separate hearings of all nominees by a parliamentary committee.⁴⁷¹ In this sense and according to the comparative categories already exposed, we can say that the road to a true *cosmopolitan* reform of the European Union judicial selection process has been attempted under the guidance or with the envisioned central role of the European Parliament, as the unique body entrusted with a direct democratic/popular legitimation and therefore as the only institution able to imbue such legitimation on other bodies. Not by chance, this was also the solution suggested by the *rapport Spinelli* in 1984,⁴⁷² and then replicated in other Parliaments' resolutions in which the centrality of the assembly for the CJ judicial appointments were constantly envisaged.⁴⁷³ But this bold step,

⁴⁷⁰ F.G. Jacobs, *The Member States, the Judges and the Procedure*, in Institut D'Études Européennes. Université Libre de Bruxelles (ed.), *La Cour de Justice des Communautés Européennes*, Éditions de l'Université de Bruxelles 1981, p. 11.

⁴⁷¹ Report of the Court of Justice on certain aspects of the application of the Treaty on European Union (Luxembourg, May 1995), paragraph 13, available at the website http://www.cvce.eu/content/publication/2003/4/2/3644862f-2e8f-4170-9616-e573a41b61c5/publishable_en.pdf (accessed 26 August 2015): «(...) the Court considers that a reform involving a hearing of each nominee by a parliamentary committee would be unacceptable. Prospective appointees would be unable adequately to answer the questions put to them without betraying the discretion incumbent upon persons whose independence must, in the words of the treaties, be beyond doubt and without prejudging positions they might have to adopt with regard to contentious issues which they would have to decide in the exercise of their judicial function».

⁴⁷² *Projet de traité instituant l'Union européenne* sur le site du CVCE. Retranscription du Bulletin des Communautés européennes. Luxembourg: Office des publications officielles des Communautés européennes. Février 1984, n° 2, available at the website http://www.cvce.eu/obj/projet_de_traite_instituant_l_union_europeenne_14_fevrier_1984_fr-0c1f92e8-db44-4408-b569-c464cc1e73c9.html (accessed 26 August 2015).

See Article 30: «La Cour de justice assure le respect du droit dans l'interprétation et l'application du présent traité et de tout acte adopté en vertu de celui-ci. 2. *Les membres de la Cour sont nommés pour moitié par le Parlement et pour moitié par le Conseil de l'Union. Au cas où le nombre des membres serait impair, le Parlement en nomme un de plus que le Conseil.* 3. L'organisation de la Cour, le nombre et le statut de ses membres et la durée de leur mandat sont régis par une loi organique qui détermine également la procédure et les majorités requises pour leur nomination. Jusqu'à l'entrée en vigueur de cette loi, les dispositions pertinentes des traités communautaires et les mesures prises pour leur mise en œuvre s'appliquent à la Cour de justice de l'Union. 4. La Cour arrête son règlement de procédure» (emphasis added).

⁴⁷³ See e.g. the resolution of 22 November 1990 (rapport Martin), in which it was proposed to nominate the judges «pour 12 ans par le Conseil avec l'avis conforme du Parlement européen»; the resolution of 16 September 1993, according to which «les membres de la CJCE devraient être élus par le Parlement européen et le Conseil, selon une procédure uniforme à définir, pour un mandat de 9 ans non renouvelable»; the resolution of 10 February 1994 (rapport Herman), proposing judges «nommés par le Parlement, à la majorité des membres qui le composent et par le Conseil, pour un mandat de 9 ans non renouvelable. Les modalités de cette nomination sont précisées par une loi organique»; the resolution of 13 March 1996 (rapport Dury – Maij-Weggen), again suggesting that «il conviendrait de renforcer le rôle du Parlement européen, l'avis conforme étant prévu pour les nominations à la Cour des comptes et à la CJCE». See for an extended analysis of these positions see G. Garzòn Clariana, *Le Parlement européen dans*

modelled after the national selection processes in charge in the United States of America and now tentatively transposed, eventually failed as we know in international contexts such as the European Convention for Human Rights.

A second source of pressure on the need for reform was constituted by certain reflection groups with a strong participation of ECJ judges that made reform proposals ahead of recent Treaty amendments. In particular, it was with the important Ole Due Report of 2000⁴⁷⁴ that the creation of a judicial selection panel was first mooted, as an independent entity composed of highly qualified jurists to be established to give independent opinions on the national nominations. Further, more complete discussion was held in the *cercle de discussion* on the Court of Justice at the Convention on the Future of Europe (2002-2003), despite the alleged lack of debate in the context of Intergovernmental Conferences on the court when compared to other institutions.⁴⁷⁵ In fact, the very idea of creating a Court with a restricted composition was openly debated and actually gathered certain sympathy from important then-members⁴⁷⁶ as a way to enhance the effectiveness of the working methods and internal cohesion; such an innovative proposal would have broken the axiom of the «full representation court» system, inevitably calling for revolutionary changes in the selection of human resources but it was discarded precisely by recalling the virtues of the principle of one judge per member state, also in terms of «the representation of all the legal traditions».⁴⁷⁷

Consequently, an examination of a full range of possible new procedures of selection (considered as directly applicable *rebus sic stantibus*) was undertaken. With a simple reaffirmation of then Art. 223 TCE on the nomination «by common accord of the governments of the Member States», the *cercle* discussed the idea of entrusting the Council of the powers of nomination in detail, so as to make, in their intention, the act of appointment theoretically amenable to judicial control;⁴⁷⁸ with the idea, again, of associating the European Parliament in the procedure, «*par un avis ou avis conforme*»,⁴⁷⁹ and with or without the task of a direct audition of candidates. From both the minutes of the works in the *Cercle* and in the Convention, and the words of the first commentators,⁴⁸⁰ it is clear that the establishment of an independent «*comité d'évaluation*» was

le développement de la CJCE, in N. Colneric, D. Edward, J.P. Puissochet, D.R. Colomer (eds.), Une Communauté de droit Festschrift per Gil Carlos Rodríguez Iglesias, Berliner Wissenschafts-Verlag 2003, p. 21.

⁴⁷⁴ Report by the Working Party on the Future of the European Communities' Court System for the European Commission, January 2000, available at the website http://ec.europa.eu/dgs/legal_service/pdf/due_en.pdf (accessed 26 August 2015).

⁴⁷⁵ R. Passos, Le Système juridictionnel de l'Union, in G. Amato, H. Bribosia, B. de Witte (eds.), Genèse et destinée de la Constitution européenne, Bruylant 2007, p. 565, at 565.

⁴⁷⁶ *Ibidem*, at 584: the President of the Court of the time, Gil Carlos Rodríguez Iglesias, expressed his favour for the proposal, together with then members M.M. Vitorino, Floch, Mme Azevedo, Lord Maclennan.

⁴⁷⁷ CONV 573/03, (CERCLE I-7) du 21 février 2003. See on this point again R. Passos, Le Système juridictionnel de l'Union, *op. cit.*, at 584.

⁴⁷⁸ R. Passos, Le Système juridictionnel de l'Union, *op. cit.*, at 584.

⁴⁷⁹ *Ivi*.

⁴⁸⁰ *Ibidem*, at 585.

proposed simply as a «*contrepartie*» both «*au maintien du système actuel*» and to the opposite idea, preferred by the majority in the *Cercle*, of a major involvement of the Council.

A clear will emerged to establish a «*filtre*» to check and offer clear guarantees on the «*qualité professionnelle*» of the candidates, without leaving absolute leeway to the states but also without centralizing the definitive choices at the supranational level. This was a clear purpose of the institutional reformers, pursued without even being precise on the composition of such an independent panel,⁴⁸¹ or on the possibility for the states to nominate single or multiple candidates.⁴⁸² The only clarified detail - already discussed since the beginning and again in an explicit spirit of compromise - was on the opportunity of offering the Parliament the power to design a candidate in the panel, once decided not to take a clear step in the affiliation of the assembly in direct selection decisions. This was the element resulting from previous negotiations, which provided much greater roles for the assembly. The suggestion of a «*consultation obligatoire*» of an independent committee was then formalized in Article III-357 of the abortive Constitutional Treaty and subsequently ended up without any additional debate in the Treaty of Lisbon that entered into force on December 1, 2009.

Such a Panel is now prescribed and regulated by Article 255 of the Treaty on the Functioning of the European Union. It was officially established on March 1, 2010, pursuant to a decision of the Council of 25 February 2010.⁴⁸³ The decision laying down the panel's operating rules was adopted simultaneously.⁴⁸⁴ In line with the terms of Article 255 TFEU, both decisions were taken on the initiative of the President of the Court of Justice. The Panel comprises seven persons chosen from former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom, as per the original idea, is proposed by the European Parliament. In the five years since its establishment, its works have been the object of a certain form of transparency in the form of official Reports published every year by the body itself⁴⁸⁵ and, often on the basis of those, of first critical academic commentaries.⁴⁸⁶

⁴⁸¹ *Ivi*.

⁴⁸² *Ibidem*, at 586.

⁴⁸³ 2010/125/: Council Decision of 25 February 2010 appointing the members of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union.

⁴⁸⁴ 2010/124/: Council Decision of 25 February 2010 relating to the operating rules of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union.

⁴⁸⁵ However, at the time of writing, the last Report published online seems to be the «Third Activity Report of the Panel Provided for by Article 255 of the Treaty on the Functioning of the European Union» of the end of 2013, available at the website <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-02/rapport-c-255-en.pdf> (accessed 26 August 2015).

⁴⁸⁶ See for example T. Dumbrovský, B. Petkova, M. Van Der Sluis, Judicial appointments: The Article 255 TFEU Advisory Panel and selection procedures in the Member States, *op. cit.*; A. Peri, La selezione dei giudici della Corte di giustizia. Poteri e limiti del comitato ex. Art. 255 TFUE, in 4 *Diritto Pubblico Comparato ed Europeo*, 2012, p. 1472; organically and in a comparative perspective, M. Bobek (ed.), *Selecting Europe's Judges*, *op. cit.*; and, as

In fact, the most critical remarks on the experiences of its first years of operation have been pointed to the only partial transparency of the actual functioning of the Panel. Point 6 of the operating rules in the Council Decision 2010/124/EU of 25 February 2010 mandates that Member State governments, once they have chosen their nominee as European judge, shall send their proposal to the General Secretariat of the Council. The proposal is then forwarded to the President of the Panel. If it wishes, the Panel can request that governments submit additional information or other materials on the candidatures, but it owns no self-standing powers of investigation and is thus dependent on their cooperation. After conducting the necessary analysis (including a possible interview), its members draft a collective opinion on the merits of the proposed candidate, which is communicated to the representatives of the Member State government. Unless the procedure is devoted to the renewal of the mandate of a Judge or an Advocate General, the interview of the candidate by the Panel constitutes, in practice, the centrepiece of the entire course of action. Point 7 of the Panel's operating rules explicates this key feature («Except where a proposal relates to the reappointment of a Judge or Advocate-General, the panel shall hear the candidate»), adding that «the hearing shall take place in private». Suggestions to open up these sessions to the broader public have also been advanced also during the negotiations of the Discussion Circle on the Court of Justice at the European Convention, but were ultimately rejected with a view to the protection of the candidates' privacy.

In addition to this, according to Point 5 of the operating rules, «all deliberations of the Panel», with no exception, «shall take place *in camera*». Once the Panel members have formulated their reasoned opinion on the candidate's suitability, this «shall be forwarded to the Representatives of the Governments of the Member States». Point 8 allows, if so desired, that the Presidency of the Council call upon the Panel's President to present the decision before the Member States' representatives meeting within that context. It has been inferred by the Panel itself, in its first composition, that a combined reading of these last rules implies that, apart in this last case, the opinion ought to remain confidential.⁴⁸⁷ In this sense, it would also seem to constitute a third-party document under the Union's general transparency rules, and under Article 4 of Regulation 1049/2001: therefore, the Council is bound to refuse access to a document where disclosure would undermine the privacy and integrity of individuals, in particular with regard to the protection of

views from within, coming from members of the first appointed Panel, Lord Mance, Judges judged, in European Advocate (Journal of the Bar European Society), 2012, p. 2; J.M. Sauvé, Le rôle du comité 255 dans la sélection du juge de l'Union, *op. cit.*.

⁴⁸⁷ See the first «Activity report of the panel provided for by Article 255 of the Treaty on the Functioning of the European Union», available at the website <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%206509%202011%20INIT> (accessed 26 August 2015), at pp. 5-6; on the point, see also H. de Waele, Not Quite the Bed that Procrustes Built? Dissecting the System for Selecting Judges at the Court of Justice of the European Union, *op. cit.*, at 21.

personal data.⁴⁸⁸ Indeed, the Panel has concluded from this provision, in conjunction with the judgement of the Court in the *Bavarian Lager* case,⁴⁸⁹ that its opinions on individual candidates could be principally qualified as personal data, so that their content therefore should not be disseminated to a wider audience.⁴⁹⁰ The overriding rationale forms the desire to protect the candidates' reputation. Equally, it is thought that more openness here might discourage potential candidates from letting their name go forward.⁴⁹¹

Scholars belittle the anxiety for a full transparency of what used to be, until few years ago and in general comparative terms, a rather obscure phenomenon by highlighting that - by way of compensation - the Panel has decided to publish periodic reports on its activities;⁴⁹² that the various talks and publications by its members are thought to offer sufficient additional insight on its working methods and ordinary proceedings;⁴⁹³ and that in several ways, one can find additional information on the nominations, given that no secrecy surrounds the governments' nominations to the panel, so that whenever a second candidate is put forward, everyone will understand that the first candidate did not make the grade. Moreover, since the Member States are obliged to submit all candidatures to the General Secretariat of the European Council and unsuccessful candidates can be traced online relatively easily, scholars have noticed that candidates are easily identifiable anyway.⁴⁹⁴

However, referring to specific works in this field, and apart from these specific points, one can tackle the overall diffuse, and understandable, criticism on the transparency of the system with the findings of our previous investigation on the comparative panorama of solutions for international judicial appointments, and on the EU legislative history on the point (especially of the last decade of negotiations). It is clear from our reconstruction how the evolution in the appointment of the EU judges was significant, going from a completely obscure, *intergovernmental approach* to a functioning system of supranational filtering of candidates. But the reform undertaken was born

⁴⁸⁸ Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.

⁴⁸⁹ C-28/08 P Judgment of 29 June 2010, Commission / Bavarian Lager (C-28/08 P, ECR 2010 p. I-6055) ECLI:EU:C:2010:378.

⁴⁹⁰ Lord Mance, The Composition of the European Court of Justice, talk given to the United Kingdom Association for European Law on 19th October 2011, available at the website http://ukael.org/past_events_46_1935078262.pdf (accessed 26 August 2015), at pp. 19-20.

⁴⁹¹ J.M. Sauvé, Le rôle du comité 255 dans le sélection du juge de l'Union, *op. cit.*, p. 116.

⁴⁹² H. de Waele, Not Quite the Bed that Procrustes Built? Dissecting the System for Selecting Judges at the Court of Justice of the European Union, *op. cit.*, at 38.

⁴⁹³ *Ibidem*, at 39.

⁴⁹⁴ T. Dumbrovský, B. Petkova, M. Van Der Sluis, Judicial appointments: The Article 255 TFEU Advisory Panel and selection procedures in the Member States, *op cit.*, at 461.

and clearly evolved as a compromised solution. The idea of setting up an independent panel as a filter for national selections was already in place since some years for the Civil Service Tribunal of the European Union, so that the solution was already in the arsenal of tested solutions and well known to the drafters of the reform.⁴⁹⁵

Also, as already suggested by some scholars,⁴⁹⁶ there is clear indication to be taken from the timing of the change. The fact that the idea made its appearance against a rather different background in the late 90s, being formalized by the Due Report,⁴⁹⁷ was then discussed within the context of the EU formal constitutionalization experiment,⁴⁹⁸ and then simply replicated at the end of the decade, makes one think about the institutional pressure that reformers identified in those circumstances. And it is evident that if the *ancien régime* was usually justified because of the mutual trust among governments in the selections of their judicial “representatives”, and the principle that every Member State nominates one judge that actually survived multiple rounds of enlargement of the European Union, a decisive role must have been played by the catalyzation of the concerns provoked by the last decade's Eastern enlargements. The often suggested lack of trust in the sovereign procedures of the new Eastern Member States for the selection of their supranational candidate judges is the phenomenon just as often suggested as the basis of the adoption of a new filter.

As found by scholars, «the advisory committee, in the form of the Article 255 TFEU Panel had the decisive appeal of reforming, without radically changing, the existing arrangements».⁴⁹⁹ The aim was clearly to guarantee objectivity in ensuring the competence of the nominated judges when a simple, unrulled mutual trust seemed to be no more effective. But if «the creation of the panel provided for in Article 255 TFEU ... to advise on appointments to the Court of Justice and General Court is part of a broader trend that interlinks with similar changes at the national level of EU Member States, and at the level of international and regional tribunals», as also recognized by other commentators,⁵⁰⁰ a proper contextualization tells us that the compromised nature in the institutional choice also took the form of a compromise in the deep sense from the model of supranational

⁴⁹⁵ See 2005/151/EC, Euratom: Council Decision of 18 January 2005 appointing members of the Committee provided for in Article 3(3) of Annex I to the Protocol on the Statute of the Court of Justice.

⁴⁹⁶ See T. Dumbrovský, The European Court of Justice after the Eastern Enlargement: An Emerging Inner Circle of Judges, paper presented at the EUSA Twelfth Biennial Conference, Boston, March 2011, available at the website http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2551211 (accessed 26 August 2015) and the reflections by M. Bobek, Epilogue: Searching for the European Hercules, in *Id.* (ed.), *Selecting Europe's Judges*, *op. cit.*, p. 279. The same point was also suggested by L. Pech, The CJEU at 60: Still Fit for Purpose?, paper presented at the 50th anniversary jubilee conference of the Common Market Law Review “Current Challenges for EU Law -New Views, New Inspirations”, 26-27 April 2013, Noordwijk, Netherlands.

⁴⁹⁷ See above footnote 474.

⁴⁹⁸ See the reflections above, and the references to R. Passos, *Le Système juridictionnel de l'Union*, *op. cit.*.

⁴⁹⁹ T. Dumbrovský, B. Petkova, M. Van Der Sluis, *Judicial appointments: The Article 255 TFEU Advisory Panel and selection procedures in the Member States*, *op. cit.*, at 459.

⁵⁰⁰ *Ibidem*, at 456.

control over the sovereign choice of states that was chosen. A pure, *cosmopolitan approach* - based on a centralization on the supranational institutions, for instance with a strong role of the European Parliament as proposed in several ways - was explicitly discarded, at least in the actual phase of integration. A median solution, with the establishment of a soft check by a supranational independent panel, was considered sufficient. It leaves the exercise of sovereign prerogatives to governments but also creates a credible institutional setting for the control of their choices, and their coherence with those *liberal* values which are at the basis of the judicial selection choices of every Member State at its national level. To do so, a purely advisory mechanism, with simple «fact-finding prerogatives» and a kind of «pedagogical mission»,⁵⁰¹ like the one provided in Article 255 TFEU, was established.

As we saw with our taxonomy on models of international judicial selection, a *liberal* approach lies behind this choice, aimed at a sort of osmosis between the values and the procedures affirmed at the national level and their projection and control at the supranational level. Not even a form of *elective retention*, as per the proto-typical form of *merit selection* procedures, was considered: not in the hands of the voters, and this can be considered as obvious in a supranational setting; but not even by the Parliament in an indirect move of representative confirmation. Quite the opposite, the original critical form of governmental renewal was left untouched, stressing the compromised nature of the solution once more. And the success of the indirect, pedagogical mission of such a form of *liberal* selective system - respecting the values that the States apply in their selection at the internal national level, with no full intrusion in their selection powers and no centralization - is proved by the first empirical evidence after some years from the reform. In fact, not only the first public (even though anonymous) internal Reports of the Panel actually confirm both the need and functioning of this filtering system, since, far from being a paper tiger, it has indeed already produced a good number of negative opinions,⁵⁰² and has therefore effectively helped in the streamlining of selections. After all, this is the first and foremost objective of the reform.

But, as some authors have recently highlighted,⁵⁰³ there is also a sort of spillover effect to be registered at the national level which reinforces, I argue, the idea of an osmotic relationship based

⁵⁰¹ A. Alemanno, How Transparent is Transparent Enough? Balancing Access to Information versus Privacy in Judicial Selection, in M. Bobek (ed.), *Selecting Europe's Judges*, *op. cit.*, p. 202, at 220-221.

⁵⁰² The last published «Report of the Panel Provided for by Article 255 of the Treaty on the Functioning of the European Union», of the end of 2013, available at the website <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-02/rapport-c-255-en.pdf> (accessed 26 August 2015), at p. 9, describes 7 of the 67 opinions delivered since the panel started working as unfavourable, with no unfavourable opinions were delivered on candidatures for the renewal of a term of office, so that «22 % (7 out of 32) of the opinions on candidatures for a first term of office were unfavourable».

⁵⁰³ T. Dumbrovský, B. Petkova, M. Van Der Sluis, *Judicial appointments: The Article 255 TFEU Advisory Panel and selection procedures in the Member States*, *op. cit.*, at 455-448.

on liberal values in the selection criteria and processes, according, as usual for the phenomena we observe in this work, to both upward and downward transfers. In fact, the members of the Panel based on art 255 TFEU are said to have taken particular account, in their first screenings (at least in the case of candidatures for a first term of office), of the following criteria: 1) the essential reasons which led the government to propose the candidate; 2) the letter from the candidate explaining the reasons for the application; 3) a bibliographic list of works (if any) published by the candidate; 4) the text of other recent publications, of which the candidate is the author, written in or translated into English or French; 5) information on the national procedure that led to the candidate being selected.⁵⁰⁴ And whenever any of these elements are not included in the dossier submitted, the standard practice of the Panel, recognised in the Activity Reports,⁵⁰⁵ has been to ask the government of the Member State concerned to supplement the information. This includes information on the national procedures of selection. And in this sense, the Panel is therefore more and more performing an analysis of the candidate's suitability, in terms of legal and language expertise, professional experience and so on, coupled with an analysis of the suitability of those national procedures. The Panel operationalizes the criterion of "judicial independence" by insisting on a formalized national procedure that can guarantee both the independence and the relevant qualifications of candidates. To that effect, Member States should inform the Panel for instance, «whether there was a public call for applications, whether a national selection committee was set up, and if so how the national selection committee was made up and what it recommended»:⁵⁰⁶ and this also leads to an indirect exam of these techniques as constitutive elements of the candidacy exam.⁵⁰⁷

In turn, this indirect exam may have been responsible for the introduction of new procedures in several Member States, precisely in the last years. If national procedures for the selection of

⁵⁰⁴ All criteria explicitly enumerated in the second «Activity report of the panel provided for by Article 255 of the Treaty on the Functioning of the European Union», of December 2012, available at the website <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%205091%202013%20INIT> (accessed 26 August 2015), at p. 8.

⁵⁰⁵ *Ivi*: «Whenever any of these elements, bar the last one, are not in the dossier forwarded to the panel, the panel automatically requests it».

⁵⁰⁶ *Ibidem*, at 9: «Since the start of its work, the panel has requested information on the national selection procedure whenever this information was not provided directly by the Member State proposing the candidature. The purpose of the request is to know whether there was a call for applications, whether an independent body had decided on the merits, i.e. the professional merits of the candidature chosen with regard to the post to be filled, or whether any other selection procedure offering at least equivalent guarantees, such as choice of the candidate by a Member State's highest court, had been used. Lastly, it wishes to know what conclusions the government drew from such a procedure, if it exists».

⁵⁰⁷ *Ivi*, admittedly: «a national selection procedure, even a very comprehensive and credible procedure, cannot, of course, by itself constitute grounds for considering as suitable a candidature deemed unsuitable by the panel. The existence of a national selection procedure can nonetheless help the panel overcome any doubts it may harbour following its examination of the dossier and/or the hearing of the candidate. In other words, the existence of a national procedure enabling the merits of candidates to be assessed in an independent and objective manner may, when in the eyes of the panel a candidature has certain weak points, work in the candidate's favour as the panel's doubts and questions can be put aside by the panel's justified trust in the national procedure».

national judges were, according to the *liberal* approach, the model for the selection at the international and at the European level, in turn, the new EU mechanism is found to have fostered new and more open national procedures for candidates as EU judges and advocates general. In fact, according to recent research on the point, whereas in the 1990s within the large majority of EU Member States the internal selection of supranational candidates was largely an informal and diffused process, usually neither stipulated in law nor transparent, in 2013 only very few countries from our selection displayed these features. Only Spain, Italy and Greece stick to pure governmental, opaque nominations; while «mixed-type» selection with the involvement, again, of independent Advisory Committees, have been put in place in the Netherlands, Finland, Germany, Austria, UK, Bulgaria, Slovenia, Croatia, the Czech Republic, Slovakia and Poland.⁵⁰⁸

IV.3 The Evolution of Judicial Appointments as a Form of Improvement of the Court's Authority

From the analysis conducted throughout this chapter, we can draw important conclusions on the ability of the Court of Justice to evolve from an institutional point of view. The reform finally adopted with the Treaty of Lisbon (but already discussed earlier in several settings), which introduced an independent supranational panel for the screening of the national candidate European judges, is decisive in the improvement of the Court's authority in several respects. We can easily see in our analysis above the institutional capability of the European Court to evolve by internalizing a model that is now widespread at a comparative level, both in national and international settings. As we said, the possibility of an independent screening as a filter of sovereign political choices of selection is the quintessential element of a so called «liberal approach»⁵⁰⁹ to the solution of the judges' independence/accountability conundrum.

It is easy to understand how this improves the authority of the Court, not only from the point of view of the inherent quality of the Court's composition, but also in the perspective of its external image - in a self-empowerment move that is typical, as we argue, of the institutional evolution of the Court across decades. This is even more visible from the element we touched upon in the last part. As typical in the oxymoric idea of the «liberal approach» described by Von Bogdandy and Venzke, the reform was so strong and decisive that, in its actual dynamics, it was not only

⁵⁰⁸ T. Dumbrovský, B. Petkova, M. Van Der Sluis, Judicial appointments: The Article 255 TFEU Advisory Panel and selection procedures in the Member States, *op cit.*, at 466 *et seq.*

⁵⁰⁹ A. Von Bogdandy, I. Venzke, In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification, *op. cit.* at 34.

influenced by existing procedures in Member States for other candidates, but has come to influence, in turn, the respective national procedures for the European candidates.

The deliberation of the Court and its Transparency

V. The Deliberation of the Court and its Transparency

1. Openness as Access to Deliberation: Comparative Remarks
2. Openness as Access to Deliberation: the Debate for the European Court of Justice (also with Reference to the Advocates General and their Opinions)
 - 2.1 Old and New Debates on the Adoption of Dissenting Opinions in Luxembourg
 - 2.2 The Advocates General and their Role in the Transparency of the Court's Deliberations
3. Openness as Access to Court Documents
 - 3.1 Access to Court Documents as a Second Dimension of Openness
 - 3.2 The International Debate, the Comparative Paradigms
 - 3.3 Openness as Access to Court Documents: the Debate in European Union law
4. Dimensions of Openness and the Authority of the Court of Justice

In this chapter, we will look at how the European Court of Justice has evolved and strengthened its authority throughout the decades, also in terms of its activity of deliberation and transparency. In particular, we will see that this aspect corresponds to both classic and new forms of institutional organization. Crucial to our topic are: both the old traditional debate on the forced collegiality of the Court's decision and therefore on the absence of the possibility of dissenting opinions, the role of the Advocates General, in addition to the brand new debate on the possibility of access, by thirds, to Court documents.

The connection with the authority of the Court as an institution is again evident. Courts are by force of nature exemplary deliberative institutions.⁵¹⁰ They are set up, entrusted with powers and composed with their selected members to perform certain functions. To do so, they necessarily perform as *fora* «in which reasons, explanations, and justifications are both expected and offered for coercive state policies».⁵¹¹ Their authority, after all, is supposed to rest in large part on the qualities of judicial reasoning and thus on reasons linking court decisions to legal or moral authority. This is

⁵¹⁰ See J. Ferejohn, P. Pasquino, *Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice*, *op. cit.*, in the wake of J. Rawls, *Political Liberalism*, Columbia University Press 1993.

⁵¹¹ *Ibidem*, at 24-25.

commonly traced to the fact that courts are institutions lacking democratic credentials and often lacking direct means to implement their decisions. So, deliberation, the duty to corroborate with reasons and the possibility for the public to externally check the way in which decisions are taken seem especially valuable (and familiar) aspects of judging.

After all, what kind of deliberation is asked of courts? What kind of transparency of it is required, and why? Since the basic Aristotelian teachings, the general understanding of deliberation focuses on an effectual requirement: deliberation, and public deliberation in particular, shall aim at critically evaluating and perhaps changing goals or preferences. Through deliberation, «people come to recognize and embrace reasons for action that they may not have understood previously».⁵¹² Furthermore, in public deliberation, the kinds of goals or preferences that agents might be expected to bring to the forum are especially likely to be subject of undertaking a process of evaluation and revision since - at least within a liberal legal system - private and public purposes, individual and political interests, must fit together in complex ways. In any case, whether goals or purposes actually change as a result of deliberation, or whether they merely remain open to revision, the way that deliberation changes or reinforces goals or purposes is by giving reasons or arguments and by making explicit and open to access and check both those and possibly the base material. In this sense, deliberation is participating in the process of reasoning about public action. This entails being open to reasons - being willing to alter your preferences, beliefs or actions if convincing reasons are offered to do so - and being willing to base attempts to persuade others on giving reasons rather than threatening coercion or duplicity.

Courts, in this sense, are institutions particularly expected to perform their deliberative tasks. As it has been noted by scholars, the most directly democratic institutions, in the sense of closeness to the people, such as parliaments (or, logically before, even the electoral proceedings), are subject to relatively scarce expectations in this respect, or even «are not expected to be deliberative at all». They are, indeed, often «surrounded with impediments to deliberation» and publicity, and are not asked to give particular reasons or motivation to their *dicta*,⁵¹³ whereas the least democratic decision-making institutions are expected to take the form of more or less pure *fora* of public reason. This is so for several interrelated reasons. Deliberation or reasoning, as already suggested, might be regarded as a substitute for more direct democratic legitimacy, which - as we have also seen in the previous pages⁵¹⁴ - judges of almost all types notoriously lack. This is also relevant from the point of view of the need to persuade the public to follow or comply with

⁵¹² *Ivi.*

⁵¹³ *Ibidem*, at 30.

⁵¹⁴ But see also, authoritatively, the rich reflections of M. Cappelletti, *The Judicial Process in Comparative Perspective*, Clarendon Press 1989.

authoritative decisions. And it can be compared to the somewhat opposite tendency, at least in «western democratic traditions», to consider the imposition of deliberative requirements on already majoritarian action as “anti-democratic or elitist”,⁵¹⁵ where good reasons and deliberations have been (and should have been) already scrutinized in advance by the votes of citizens and by their representatives. With regards to majoritarian action, it is often said that «(R)easons, in a democracy, shouldn't get counted twice».⁵¹⁶ On the contrary, one should consider not only the natural (desirable) insulation of every judicial body from the direct political circuit and therefore the need to “count” their reason at least once (since it is not done in advance) in addition to the specific sensible role of supreme, constitutional and international judiciaries in this respect. Using the same pun, we can say that in the case of apical judiciaries, there is a specific, relative high value of such a count. The more risk of taking patently counter-majoritarian decisions against the will of democratically elected body,⁵¹⁷ the more these are expected to be taken with particular safeguards of transparency.

In fact, public policies and sovereign choices - essentially the core business of supreme, constitutional and international courts - take place within a hierarchy of norms, especially when involving moral and constitutional norms that appropriately limit democratic choices. When engaged in regulating the boundaries between such norms and democratic choices, giving reasons and deliberation is thus crucially important. After all, what is being contemplated in such regulation is telling the people or their representatives that a certain policy or a certain sovereign choice is not legitimate and/or may not be permitted. Therefore, apical courts are especially burdened with deliberative expectations in precisely those areas where constitutional values and choices may be at stake. The legislature, insofar as it acts as a constitutional interpreter, would face similar deliberative expectations but not when it is engaged in making policies of the kind that are safely within the bounds of ordinary constitutional acceptability.

But there is even something more to say - as it has been argued⁵¹⁸ - with regards to international adjudicatory bodies' deliberation. Undoubtedly, these not only, «exercise public authority in deciding legal disputes»;⁵¹⁹ but they do not operate as parts of proper polities that include functioning political legislatures and the expression of a proper general will through deliberative means. Nonetheless, they can easily and strongly go against the decisions of political

⁵¹⁵ J. Ferejohn, P. Pasquino, *Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice*, *op. cit.*, at 30.

⁵¹⁶ *Ibidem*, at 36.

⁵¹⁷ In the terms made famous by A.M. Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*, *op. cit.*.

⁵¹⁸ See A. Von Bogdandy, I. Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification*, *op. cit.*.

⁵¹⁹ *Ibidem*, at 17.

powers. This aspect profoundly changes the relationship between law and politics, decouples the judicial interpretative tasks from the direct relation with parliamentary politics and the political circuit in general, and modifies - at the end of the day - the quintessential distinction between legislative law creation and judicial law-application, by petrifying the former («once an international agreement is in place, it is largely withdrawn from the grasp of its individual makers»)⁵²⁰. It also does so by giving more and more importance to judicial decisions. As it has been forcefully said, international judicial decisions «enjoy an exceptional standing in traditional semantic disputes about what the law is»⁵²¹ in the international realm.

In the light of all this, it comes as no surprise that scholars tend to also discuss more and more the authority and the legitimacy of courts, and in particular of international courts, in relation to the modalities of their «cognition and decision».⁵²² In this sense, high courts, unlike other political institutions, do not simply make orders or decisions known in different means. They are expected to publish acceptable rationales for their assertions: arguments that others - whether or not their own interests have been vindicated - can be expected to respect, embrace or eventually contest. In this sense, the expectation that courts explain their holdings has been effectively portrayed as a *deliberative* expectation in two ways.⁵²³ The first, as previously said, is reminiscent of Rawls' idiom and conceptualizes the judicial arguments as «public reasons for action - reasons of a kind each of us can be expected to embrace from our own moral vantage point».⁵²⁴ From here, the importance of the plausible, understandable nature of those reasons, which in some normative sense are offered to become *our own* reasons for action. Second, from an institutional point of view, since courts are naturally collegial institutions, their reasons are reached through an internal process of deliberation, guided by the particular court's decision-making norms. These norms feed shared expectations on the courts' behaviour and external understandability: for instance, on the point whether they will publish a single opinion or multiple opinions will be published as well. In this sense, a court's published reasoning is placed in a grey scale within a normative framework ranging from a commitment to consensus seeking to free majoritarian expression.

By making their reasons and processes of deliberation known, courts are providing indirect democratic justifications for public actions. At the same time, they are making «the working out of

⁵²⁰ *Ibidem*, at 21

⁵²¹ *Ibidem*, at 18.

⁵²² *Ibidem*, at 10.

⁵²³ Again in the words of J. Ferejohn, P. Pasquino, *Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice*, *op. cit.*.

⁵²⁴ *Ibidem*, at 24 *et seq.*.

democratic principles in new circumstances, and in particularities of specific cases» explicit.⁵²⁵ and in this sense, in doing so, deliberative judges may actually enhance the powers of democratically elected agents by offering them «a more flexible and intelligent system to implement and refine their own legislation and public ordinances».⁵²⁶ Judicial adjudication and its public nature also have a n *efficiency* enhancing effect, directly linked to fostering court's authority in legal systems: judicially provided reasons allow others - state officials, other judges, lawyers, ordinary citizens, etc. - to anticipate the implications of the current decision for future cases; they play a predictive or coordinating role in addition to the mere justificatory one, permitting society as a whole to more effectively coordinate actions and achieve important common purposes.

In basic procedural terms, these indirect democratic and efficiency/authority enhancing effects are conceptually mirrored in a sort of dual direction of judicial justifications within the two functions they perform. First of all, they are traditionally due to comply with the expectations of the participants in the process. The parties of a controversy are involved in how the case is handled and the court is required to deal with the arguments that they introduce. This co-operative treatment of the matter in dispute is not confined to questions of fact or evidence but - against the widespread understanding of the principle *jura novit curia* - also extends to questions of law. But judicial justifications are also addressed, in a broader sense, to the «epistemic communities»⁵²⁷ of reference of any court, so that judicial decisions are placeable at the same time «within the general context of justifying public authority».⁵²⁸ The open discussion of interests and competing positions is part of the social basis of democracy that feeds the democratic public as well as processes of social integration. Judgments of courts are part of this and may generate democratic potentials if only they are embedded in normative discourses «of a certain quality».⁵²⁹

These dual directions and double functions are what has led more and more scholars to not only assess the modalities of «cognition and decision» of courts but, in doing so, to use parameters such as the openness, «the publicness and transparency»⁵³⁰ of courts' procedures and deliberations, in evaluating their legitimacy and their exercise of authority. We find a certain paradox here, which

⁵²⁵ *Ibidem*, at 24.

⁵²⁶ *Ivi*.

⁵²⁷ In the sense of networks «of professionals with recognised expertise and competence in a particular domain and an authoritative claim to policy relevant knowledge within that domain or issue-area», according to the widely accepted definition offered by P. Haas, Introduction: Epistemic Communities and International Policy Coordination, in 46 International Organization, 1992, p. 1, at 3.

⁵²⁸ A. Von Bogdandy, I. Venzke, In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification, *op. cit.*, at 27.

⁵²⁹ *Ivi*.

⁵³⁰ *Ivi*.

is also defining the evolutive trends that we are talking about in this chapter as the more uncertain, and at a primordial stage. Traditionally, the arguments based on the protection of the authority and the impartiality of the courts were considered as promoting a certain opposite “closeness” of the judicial deliberations that we will explore in every sense in the following pages. The authoritative court, in this primordial perspective, was the closed one, capable of speaking with one loud voice irrespective of the modalities of internal deliberations and actually maintaining them secret. The idea of widening the access to courts' *interna corporis* as a tool for enhancing efficiency, effectiveness, public confidence in the judicial system, fair administration of justice and eventually authority came - or, better, is coming - only at a later time. What one can call the second direction of judicial deliberations - aimed at the public's perception of the judiciary and judicial decision-making, at promoting public confidence in the judiciary, allowing the public to access judicial proceedings and records, encouraging judges to act fairly, consistently and impartially, allowing the public, in a word, to “judge the judge” – comes as a disputed, late spillover of the general phenomenon of strengthening the right of access of the citizen to information held by public authorities and to assure “transparency”.

As the witticism goes, «(T)o work effectively, it is important that society's (...) process satisfy the appearance of justice (...) and the appearance of justice can best be provided by allowing people to observe it».⁵³¹ Clearly, this aspect as well is involved with the proper institutional setting to hold the judiciary accountable without compromising its independence; and, in tackling such a question, some scholars make a relevant distinction in this regard between more “traditional” forms of (hard) accountability, and more modern, “*soft accountability*”.⁵³² Hard accountability for the judiciary entails that judges can only be indirectly scrutinised and held answerable for their professional functioning. Traditional forms of control such as mechanisms of the appeal system, procedures of recruitment, appointment, promotion, permanent education, disciplinary action and so on are relevant in this sense. Hard accountability methods are purposively designed to be aloof, in order to not compromise judicial independence.⁵³³ On the other hand, soft accountability deals with the openness and representation of the judiciary in a more direct way. This type of accountability has to do with procedural transparency, representation and sensitivity towards different interests and «needs of a changing social environment».⁵³⁴ This is a two-way process according to which courts need to open up to the public, enter into a dialogue with other agents and social parts while at the

⁵³¹ Words of the United States Supreme Court Chief Justice Warren Burger in the well-known case *Richmond Newspapers, Inc. v. Virginia* 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980).

⁵³² W. Voermans, *Judicial Transparency Furthering Public Accountability for New Judiciaries*, in 3 *Utrecht Law Review*, 2007, p. 148, at 150.

⁵³³ *Ivi.*

⁵³⁴ *Ivi.*

same time being more sensitive to values and the needs of the community. In this sense, it could be broadly labeled as *social* accountability.⁵³⁵ Soft accountability is by no means a new concept for the judiciary but the increase of soft accountability instruments such as a more open complaints processes and a more open attitude regarding access to information and deliberation are indicative of a trend in which the relative instruments are used to answer growing public pressure for greater social accountability regarding the judiciary.

The chapter is structured as follows: In light of the mentioned coordinates, first we will look at the classic form of institutional organization attached to the idea of openness and transparency, in addition to the debate on the forced collegiality or the possibility of dissenting opinions as modalities of judicial deliberation. We will study the comparative trend in this respect and link it to the institutional reality of the CJEU. We will then turn our attention to a new form of institutional organization and a new idea of openness and transparency: the possibility of access, by thirds, to Court document, as a measure to increase its soft accountability. In this sense, we will look at the incipient comparative trend and at how the CJEU has evolved accordingly.

V.1 Openness as Access to Deliberation: comparative remarks

Concepts such as openness and transparency are more often invoked than defined.⁵³⁶ Nonetheless, as previously said, there is surely a typical meaning traditionally attached to the idea of judicial “openness”: I am referring to the possibility of having access not only to the official or officious documental output of the courts, i.e. the official judgments, but rather to the modalities of their internal deliberation as collegial institutions and therefore to the confrontation of different opinions and solutions (if any) to the cases at hand. In particular, I refer to the modalities of decision of the judicial college and specifically to the possible public knowledge of the different positions of the judges and therefore to the disclosure (official, not unofficial) of assents and dissents in the college as well as the subjective imputation of the dissents (indication of who dissented).⁵³⁷ Judicial openness has often been intended in this sense and only in this sense, not only

⁵³⁵ See on this G.Y. Ng, *Quality of Judicial Organisation and Checks and Balances*, Intersentia 2007, p. 17.

⁵³⁶ This is a recurring critique to the EU debate on the topic: see for recent examples D. Curtin, *Transparency, audiences and the evolving role of the EU Council of Ministers*, in J.E. Fossum and P. Schlesinger (eds.), *The European Union and the Public Sphere: A Communicative Space in the Making?*, Routledge 2007, p. 246; A. Alemanno, O. Stefan, *Openness at the Court of Justice of the European Union: Toppling a taboo*, *op. cit.*, at 102.

⁵³⁷ According to the conceptualization of S. Cassese, *Lezione sulla cosiddetta opinione dissenziente*, in 4 *Quaderni costituzionali*, 2009, p. 973.

because the aspects related to the access to judicial documents constitute a new and unexplored field of study but also because, on the contrary, a dense historical stratification of institutional solutions has been registered with regard to individual judicial opinions at the comparative level.

And while the problem has been declined in different ways at the comparative level, it has also been much discussed and singularly solved in the EU judicial system.

National and international approaches to their publication have always varied widely. A whole range of options can be traced, and different solutions have been adopted in different systems: from the historical practice of *seriatim* opinions - still followed by the Supreme Court of the United Kingdom - whereby each member of the college taking part in the deliberations makes explicit her opinion separately before publishing them in sequence, to the criminalization of violations of the secrecy of deliberations, interpreted as forbidding the publication of judges' individual opinions and votes and as an obligation of collegiality. Such diverging approaches find different justificatory reasons in the literature, leading to a discussion «that, according to some, has now become a matter of faith more than of reason».⁵³⁸ A sort of tralatitious taxonomy presents individual opinions as a specificity of common law systems and international law judicial bodies, leaving civil law systems to their long-established principle of secrecy of court deliberations.

However, this common understanding is no longer realistic, given the numerous hybridizations.⁵³⁹ First, many civil law countries, also of great representativeness as we will see, do allow judges sitting in their Supreme and Constitutional courts to publish separate opinions. Furthermore, if the prohibition against separate opinions usually implies the secrecy of deliberations, and the two principles are usually used as synonyms, the opposite is not necessarily true, and many legal systems adopt the principle of secrecy of deliberations (meaning that these are held *in camera* and that the discussions that take place among the judges remain secret) while allowing for the publication of separate opinions.⁵⁴⁰ Thus, conceptually, the secrecy of internal debates does not necessarily exclude the possibility of publishing individual opinions and therefore

⁵³⁸ R. Raffaelli, Dissenting Opinions in the Supreme Courts of the Member States : Study. Report for the Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs of the European Parliament, available at the website <http://www.europarl.europa.eu/studies> (accessed 26 August 2015), at p. 2, with reference to E. Friesenhahn, Verhandlungen des 47. Deutschen Juristentages, Bd. II, München 1969, R 33, and C. Walter, La pratique des opinions dissidentes en Allemagne, in 8 Nouveaux Cahiers du Conseil Constitutionnel, 2000, available at the website <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-8/la-pratique-des-opinions-dissidentes-en-allemande.52541.html> (accessed 26 August 2015).

⁵³⁹ See some more reflections on the point in J. Malenovsky, Les opinions séparées et leurs répercussions sur l'indépendance du juge international, in 3 Anuario Colombiano de Derecho Constitucional, 2010, p. 27, especially at 39 *et seq.*; K. Kelemen, Dissenting Opinions in Constitutional Courts, in 14 German Law Journal, 2013, p. 1345.

⁵⁴⁰ R. Raffaelli, Dissenting Opinions in the Supreme Courts of the Member States : Study, *op cit.*, at 8.

of shedding light on judicial deliberation *ex post*. The main theoretical arguments in favour and against separate opinions have been widely discussed. It is interesting, of course, to notice how they are differently declined in the various contexts and therefore in the various kinds of judicial bodies as well as in the different legal systems they are part of.

In historical terms, the principle of secrecy of deliberations and the concealment of individual votes are based primarily on the traditional view of the role of judges as a *bouche* declaring the will of the political power, the King. Since the King could not be wrong and thus could not but have one and only one will, judgments were - or at least had to seem - unanimous.⁵⁴¹ This view is coupled with the idea of tracing the origins of secrecy of deliberations back to the culture of secrecy deriving from the entanglement between State and religion: in fact, even in secular State such as France, judges used to and still take the traditional oath to “religiously” preserve the secrecy of deliberations.⁵⁴² Historical arguments have subsequently been rationalized and supported by more modern reasons. In particular, the already previously discussed necessary independence of the judge, especially in its external aspect (independence from possible sources of pressure coming from outside the court), is considered as calling for a “shield” to mask - behind the secrecy of individual opinions and the collegiality - the personal understandings of the single component. In this way, members of the bench cannot and do not have to calculate the potential consequences of their decisions, also within the singular professional field, and are free to decide following their own individual conscience and not be tempted towards explicit instrumental positions.

This argument is particularly valuable whenever judges are appointed or re-appointed with a decisive, tangible role of political forces (as is the case for many constitutional and all international judges), also to preserve an appearance of independence of the judicial institution as such. Particularly in the case of international judges, as we said, nationality is in the common understanding an important factor in determining their vote: rightly or wrongly,⁵⁴³ international judges are assumed to be particularly loyal to the State that appointed them for both concerns on

⁵⁴¹ See S. Cassese, *Lezione sulla cosiddetta opinione dissenziente*, *op cit.*; J. Malenovsky, *Les opinions séparées et leurs répercussions sur l'indépendance du juge international*, *op cit.*, at 37.

⁵⁴² See Y. Lécuyer, *Le secret du délibéré, les opinions séparées et la transparence*, in 54 *Revue trimestrielle des droits de l'homme*, 2004, p. 197.

⁵⁴³ Although the theoretical arguments appear to be very sound, research on the role of nationality in determining the judges' votes leads to more nuanced conclusions, especially in the context of regional tribunals. See for details on this debate: M. Kuijer, *Voting behaviour and national bias in the European Court of Human Rights and the International Court of Justice*, in 10 *Leiden Journal of International Law*, 1997, p. 49; A. M. Smith, *'Judicial nationalism' in International Law*, in 40 *Texas International Law Journal*, 2005, p. 197; E.A. Posner, M.F.P. de Figueiredo, *Is the International Court of Justice Biased?*, in 34 *Journal of Legal Studies*, 2005, p. 599; E. Voeten, *The Impartiality of International Judges: Evidence from the ECtHR*, in 102 *American Political Science Review*, 2008, p. 417.

their career or national initial selections based on their sentiments and restrained conduct. Therefore, a prohibition of separate opinions is decisive to break an inertia leading to a pernicious principal-agent relation between nations and appointees.

Another typical argument against the publication of separate opinions is the need to safeguard the authority of judgments. In this sense, being open and showing the existence of substantial disagreement inside the college of decision-makers would be detrimental for the public image of the judiciary and could undermine its authoritativeness. The transparency on the possible reasons for alternative solutions to certain controversies would in fact encourage to call into question the validity of the judgment and refuse to enforce it or appeal against it whenever possible. The tendency to a sort of individualization of justice would also be part of this criticism.⁵⁴⁴

A further contextualisation can be done by pointing to the level of establishment of the institution. There are well-established courts and there are courts whose authority is shaking, because they are newly born or institutionally weak for other reasons. Powerful courts could well afford the adoption of separate opinions without being afraid of possible contestations to their authority. Newly established or intrinsically flimsy institutions would need to demonstrate, towards the outside, a systemic (although fictitious) cohesion - thus needing to mask dissents. As we will see, for some, this was the original reason why separate opinions were not allowed at the European Court of Justice when it was a new and feeble institution bound to apply a completely new and technical set of legislation.⁵⁴⁵ Interestingly, scholars have also argued that the admissibility of dissents at the European Court of Human Rights risked initially constituting a factor weakening its authority vis-à-vis the nation States, putting the Court's survival at risk.⁵⁴⁶

The argument alluding to the safeguard of the authority of judgments is sometimes also declined in the sense of the need to ensure that the final judicial decisions adopted are unambiguous. They should give a definitive answer to a specific legal question and in this sense solve a controversy with no purpose in opening a discussion about the best possible or a coexistent interpretation⁵⁴⁷ with the relative risks for legal certainty. In fact, legal certainty is what is particularly at stake here. While some actors tend to give it the highest value (e.g., claimants, or practitioners), others do not (e.g., scholars, who are more interested in increasing the level and quality of the theoretical debate over a certain legal issue). And in terms of contextualisation, in

⁵⁴⁴ J. Malenovsky, *Les opinions séparées et leurs répercussions sur l'indépendance du juge international*, *op cit.*, at 38.

⁵⁴⁵ See D. Nicol, *Lessons from Luxembourg: Federalisation and the Court of Human Rights*, in *26 European Law Review*, 2001, p.3.

⁵⁴⁶ F. Rivière, *Les opinions séparées des juges à la Cour Européenne des Droits de l'Homme*, Bruylant 2004, at 17.

⁵⁴⁷ See W. Mastor, *Les opinions séparées des juges constitutionnels*, Presse Universitaire d'Aix-Marseille 2005, pp. 19 and 289 in particular.

some settings, when dealing with cases of value or constitutional significance, pluralism of solutions can be preferable over certainty while in others, when dealing with controversies affecting economic operators, the other way around holds true. In this sense, it is already evident that the case of the CJEU, given its variegated case-law, is halfway between these two paradigms.

Lastly, practical considerations are often raised against separate opinions since they would hamper the celerity of proceedings and an appropriate internal organization, also in terms of cohesion, of the courts,⁵⁴⁸ and since they would imply additional financial burdens. These last economic considerations are particularly relevant in the peculiar case of institutions, such as national tribunals in multilingual States or the CJEU itself, that might be required to publish their acts in more than one official language. In these institutions, allowing for individual opinions would represent a considerable burden in terms of time and resources since it would require their translation into all official languages.⁵⁴⁹

As already mentioned, in terms of arguments in favour of separate opinions, the common understanding of their practice as a typical trait of common law systems comes from the historical evolution from the British tradition of deciding *seriatim* (each judge adopting and publishing his own full decision with no majority opinion) to the practice of joining separate opinions to a majoritarian one in the US Supreme Court.⁵⁵⁰ But scholars have also explained that historically, many civil law systems were not strangers to breaches of the principle of secrecy of deliberations and the fiction of unanimous judicial bodies: several historical examples of an early emergence of dissents in Continental Europe could be found in the Spanish legal tradition, in pre-Napoleonic Italian States and in pre-united Germany,⁵⁵¹ sometimes allowing for the publication of such separate opinions.⁵⁵²

In coherence with the paradoxical ambivalence that we already discussed, the need to preserve the independence of judges is often presented as both a compelling argument against the publication of separate opinions and an argument in favour of the practice. In fact, in some readings, the possibility of issuing an individual opinion safeguards the judges' *internal*

⁵⁴⁸ J. Azizi, Unveiling the EU Courts' internal decision-making process: a case for dissenting opinions?, in 12 ERA Forum, 2011, p. 49.

⁵⁴⁹ D. Edward, How the Court of Justice works, in 20 European Law Review, 1995, p. 557.

⁵⁵⁰ Actually after a first period of *seriatim* decisions, at least until the Marshall presidency in the first half of the XIX Century: see for all of this R. Bader Ginsburg, The Role of Dissenting Opinions, in 95 Minnesota Law Review, 2010, p. 1.

⁵⁵¹ K. Kelemen, Dissenting Opinions in Constitutional Courts, *op cit.*, at 1347.

⁵⁵² K.H. Nadelmann, Non-Disclosure of Dissents in Constitutional Courts: Italy and West Germany, in 13 American Journal of Comparative Law, 1964, p. 268, at 272.

independence in the form of their autonomy and integrity from the other members of the bench and as a form of freedom of expression.⁵⁵³ The external aspect of independency, and therefore the risk of undue influence over judges, would not be a sufficient argument to ban separate opinions, also for the disproportionality between the means used and the objectives pursued.⁵⁵⁴

The idea of ensuring authority and clarity is also a recurring ambivalent argument for both supporting and contesting the admissibility of separate opinions. Authors who favour the publication of separate opinions argue that authority should not rest on secrecy, especially if somewhat fictitious, but on quality of deliberations; and judges and observers tend to agree that dissents can, and often do, improve the quality of the final judgment, and in general of legal reasoning beyond the details of the case at hand⁵⁵⁵ in the “chain novel” sense.⁵⁵⁶ A carefully drafted and circulated dissent can improve the quality of the judgment by forcing the others to deal with the arguments of the dissenters, soon or in the future. In some cases, dissenting opinions may even be drafted, circulated, and never published, if a certain argument is eventually dealt and inserted in the reasoning.⁵⁵⁷ In any case, dissents can thus play an essential role in the future development of the law: in some cases, they may eventually become the majority opinion or influence it, constituting the means for an ideal dialogue with future and lower courts.⁵⁵⁸ Authority would also be measured in the need for judicial bodies to be «not only authoritarian but also authoritative»,⁵⁵⁹ and therefore to issue amply explained and fully reasoned decisions: in this sense, separate opinions would also serve as a legitimating factor for the majority - proving to have carefully considered, even though ultimately rejected, all the possible arguments.⁵⁶⁰

Moreover, it is not only the idea of a forced unanimity, based on the assumption of only one correct interpretation of the law and of judicial reasoning as a legal syllogism,⁵⁶¹ that is increasingly considered obsolete. Nowadays, it is common sense that it can be detrimental to the quality of a

⁵⁵³ K. Kelemen, Dissenting Opinions in Constitutional Courts, *op cit.*, at 1360; W. J. Brennan, In Defense of Dissent, in 37 *Hastings Law Journal*, 1986, p. 427.

⁵⁵⁴ Other institutional protections to shield judges from external influences would be usable: for instance, providing for longer, non-renewable mandates, eliminating the role of the executive in their appointment, and excluding any possibility of retaliations. See e.g. Y. Lécuyer, *Le secret du délibéré, les opinions séparées et la transparence*, *op.cit.*, at 205.

⁵⁵⁵ R. Bader Ginsburg, The Role of Dissenting Opinions, *op cit.*, at 3: «there is nothing better than an impressive dissent to lead the author of the majority opinion to refine and clarify her initial circulation».

⁵⁵⁶ The reference here is obviously to the historical debate between R. Dworkin, *Law as Interpretation*, in 9 *Critical Inquiry*, 1982, p. 179 and S. Fish, *Working on the Chain Gang: Interpretation in the Law and in Literary Criticism*, in 9 *Critical Inquiry*, 1982, p. 201.

⁵⁵⁷ For instance, the BVerfG, § 26(1) of the 1986 *Geschäftsordnung des Bundesverfassungsgerichts*, allows judges to request a reopening of the deliberations when a dissenting opinion has been issued.

⁵⁵⁸ C. L'Heureux-Dubé, The dissenting opinion: voice of the future?, in 38 *Osgoode Hall Law Journal*, 2000, p. 495.

⁵⁵⁹ J.H.H. Weiler, Epilogue: The Judicial Après Nice, *op. cit.*, at 225.

⁵⁶⁰ *Ivi*; see also, extensively, V. Perju, Reason and Authority in the European Court of Justice, in 49 *Virginia Journal of International Law*, 2009, p. 308, at 323-325.

⁵⁶¹ W. Mastor, *Les opinions séparées des juges constitutionnels*, *op. cit.*, at 74.

court's judgments by compelling the members to try and reach a compromise at all cost - often at the expense of the rational coherence and clarity of the final output due to the need to include certain statements or reasons or views just to partially satisfy all the judges sitting on the bench.⁵⁶²

In hindsight, the need to preserve collegiality in the decision-making process is another twofold argument. Indeed, while some fear that judges, once given the possibility of writing their own individual statement, will no longer fully engage in the internal deliberations with a view of reaching a common decision or at least a common understanding, some experiences seem to prove the contrary. Indeed, in many of the States where separate opinions have been introduced, this has not fostered a less cooperative attitude of the judges. For example, this is the case of Germany, a paradigmatic civil law country which introduced dissents at the level of the Bundesverfassungsgericht,⁵⁶³ but where these are only used when it is truly impossible to come to an agreement between the judges.⁵⁶⁴ At least in legal cultures where judges feel a strong duty of loyalty to their institution, the introduction of dissenting opinions does not necessarily weaken the collegiality of the deliberations.⁵⁶⁵

With a clear focus on our binomial democracy/transparency, it is also relevant to notice that in many jurisdictions, judgments are formally issued «in the name of the people», recalling that the power exerted by judges comes from the people. However, if judges in several contexts cannot enjoy a direct democratic legitimation, it is their decision-making process which must become more transparent, allowing for internal criticism.⁵⁶⁶ This is also an important aspect for courts that enjoy powers of scrutiny over sovereign choices of political powers, such as constitutional and international jurisdictions: and in fact, the need of a transparent, open exercise of power is also an argument applied for the CJEU in the EU governance context.⁵⁶⁷

Such democratic potential is also visible in the role of dissents fostering an ideal dialogue - not only between courts of the present and future - but also between courts, political powers and practitioners. Separate opinions explicit additional and alternative arguments that lawyers or lower courts can adopt and translate into new legal reasoning; they may suggest new developments and

⁵⁶² D. Edward, How the Court of Justice works, *op. cit.*, at 557: «a disadvantage of the collegiate approach is that the judgment may simply cloak an inability to reach a clear decision. A camel is said to be a horse designed by a committee, and some judgments of the Court of Justice are camels».

⁵⁶³ I.e., as everybody knows, the Federal Constitutional Court.

⁵⁶⁴ M.T. Rörig, L'opinione dissenziente nella prassi del Bundesverfassungsgericht (1994-2009), available at the website http://www.cortecostituzionale.it/documenti/convegni_seminari/CC_SS_opinione_dissenziente_12012010.pdf (accessed 26 August 2015).

⁵⁶⁵ R. Raffaelli, Dissenting Opinions in the Supreme Courts of the Member States : Study, *op. cit.*, at 14.

⁵⁶⁶ W. O. Douglas, The Dissent: a Safeguard of Democracy, in 32 *Journal of the American Judicature Society*, 1948, p. 104, at 105.

⁵⁶⁷ See in particular H. Rasmussen, Present and Future European Judicial Problems after Enlargement and the Post-2005 Ideological Revolt, in 44 *Common Market Law Review*, 2007, p. 1661.

interpretations to legislators; or they can generally attract public attention and push political powers to reform certain contested fields of law.⁵⁶⁸ Separate opinions are part of the ongoing inter-institutional dialogue⁵⁶⁹ and «help improve its quality and quantity».⁵⁷⁰

If traditional arguments for and against the practice of separate opinions show us no prominent reasons either in favour or against their publication, there is nonetheless a remarkable comparative phenomenon to notice. A certain growing trend towards permitting judges to publish concurring and dissenting opinions has been noticed by scholars,⁵⁷¹ which is particularly visible among EU Member States and international courts. This is triggering a renewal of the debate at the EU level over the opportunity to prioritize publicity over secrecy also in this aspect of judicial activities, symbolized here as well by an official Study of the European Parliament on the point which explicitly aims at reopening the debate on the EU judicial architecture with a view towards comparative practice.⁵⁷²

Among European Member States, there are some which still prohibit such openness in judicial deliberation. However, even in those contexts, formal discussions about the possibility of reform take place, not only in academic quarters but often with the involvement and encouragement of the judicial institutions themselves. For instance, in Italy, judges are not allowed to publish individual opinions: the principle of the secrecy of deliberations and individual opinions applies both for ordinary judges and in the specialized Constitutional Court. But while such principle has been somewhat relaxed by the new law on judges' civil liability of 1988, applicable at all levels,⁵⁷³ it is important to notice that the extension of the ban to constitutional rulings was never been completely undisputed. Discussions on its opportunity took place during the Parliamentary debate leading to the adoption of the law on the functioning of the Constitutional Court,⁵⁷⁴ and it has subsequently been challenged a number of times, with early influential academic works;⁵⁷⁵ draft

⁵⁶⁸ C. L'Heureux-Dubé, *The dissenting opinion: voice of the future?*, *op cit.*, at 495; see also in this respect M. Cartabia, *Europe and Rights: Taking Dialogue Seriously*, in 5 *European Constitutional Law Review*, 2009, p. 5.

⁵⁶⁹ C. Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue*, in 71 *Brooklyn Law Review*, 2006, p. 1109.

⁵⁷⁰ R. Raffaelli, *Dissenting Opinions in the Supreme Courts of the Member States : Study*, *op cit.*, at 16.

⁵⁷¹ Recently, see the debate between K. Kelemen, *Dissenting Opinions in Constitutional Courts*, *op cit.*, and H. Rasmussen, L. Nan Rasmussen, *Comment on Katalin Kelemen - Activist EU Court 'Feeds' on the Existing Ban on Dissenting Opinions: Lifting the Ban is Likely to Improve the Quality of EU Judgments*, in 14 *German Law Journal*, 2013 as well, p. 1373.

⁵⁷² R. Raffaelli, *Dissenting Opinions in the Supreme Courts of the Member States : Study*, *op cit.*

⁵⁷³ See Art. 685 of the *Codice penale*, that criminalizes the publication of the names and votes of judges sitting in criminal cases; and tArt. 125(5), *Codice di procedura penale*, and Art. 131(2), *Codice di procedura civile*, as amended by Legge 13 aprile 1988, n. 117 and subsequently by the Corte costituzionale, judgment n. 18/1989.

⁵⁷⁴ Legge 11 marzo 1953, n. 87, *Norme sulla costituzione e sul funzionamento della Corte costituzionale*.

⁵⁷⁵ See in particular C. Mortati (ed.), *Le opinioni dissenzienti dei giudici costituzionali ed internazionali*, Giuffrè 1964; and, very recently, S. Cassese, *Dentro la Corte. Diario di un giudice costituzionale*, Il Mulino 2015.

bills were presented in Parliament,⁵⁷⁶ and a number of seminars were held at the Court itself to obtain information about the practice of other courts.⁵⁷⁷ France and Belgium adhere to the principle of the secrecy of deliberations, which has been explicitly interpreted in both contexts as prohibiting the publication of individual opinions. The Belgian Court of Cassation has recognized the secrecy of deliberations as a principle of Belgian law and recently confirmed that judges are bound to preserve it⁵⁷⁸ in coherence with the punishment of any violation according to Art. 458 of the local criminal code.⁵⁷⁹ The French *Conseil d'État* recognized the same principle as a characteristic of French public law, prohibiting even to label a court's decision as "unanimous" since this would amount to a revelation of the individual vote of each of the members.⁵⁸⁰ The secrecy of deliberations is still proscribed and forms part of the oath that judges must take when taking up judicial functions. It is also considered as binding not only on ordinary judges but also on the members of the *Conseil Constitutionnel*.⁵⁸¹ The principle of secrecy is also explicitly stated for the specialized Luxembourgish and Maltese constitutional courts, and in the diffuse system of judicial review in the Netherlands.⁵⁸² Lastly, but equally notable, Austria strictly adheres to the obligation of collegiality both in the ordinary and in the constitutional judiciaries; yet here again, dissenting judges are allowed, but simply recorded and kept secret, so that only higher courts (in the case of ordinary courts) and colleagues have access to the relative registers.⁵⁸³ However, this tradition of secrecy has not gone unchallenged and since the 1960s scholars have repeatedly called it into question, and many authors seem to support a reform, while the Constitutional Court, on the whole, is against such a change.⁵⁸⁴

Unlike the mentioned cases, which are nowadays considerable as exceptions despite

⁵⁷⁶ See in this respect G. Zagrebelsky, *La pratique des opinions dissidentes en Italie*, in 8 *Nouveaux Cahiers du Conseil Constitutionnel*, 2000, available at the website <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-8/la-pratique-des-opinions-dissidentes-en-italie.52545.html> (accessed 26 August 2015); see also in a comparative perspective W. Mastor, *Les opinions séparées des juges constitutionnels*, *op. cit.*, at .

⁵⁷⁷ See the acts of the seminar held at the Corte costituzionale in 1993, published in A. Anzon (ed.), *L'opinione dissenziente*, Giappichelli 1995; and the papers of the *Seminario di Studio* held on 22 June 2009 available at the website <http://www.cortecostituzionale.it/convegniSeminari.do> (accessed 26 August 2015).

⁵⁷⁸ R. Raffaelli, *Dissenting Opinions in the Supreme Courts of the Member States : Study*, *op cit.*, at 17.

⁵⁷⁹ See B. Nelissen, *Judicial Loyalty Through Dissent or Why the Timing is Perfect for Belgium to Embrace Separate Opinions*, in 15 *Electronic Journal of Comparative Law*, 2011, p. 1.

⁵⁸⁰ See *Conseil d'Etat*, 17 nov. 1922, *Lebon* 1922 849, cited in J.P. Ancel, *Les opinions dissidentes*, available at the website http://www.courdecassation.fr/IMG/File/opinions_dissidentes_jp_ancel.pdf (accessed 26 August 2015).

⁵⁸¹ Ivi, with reference to Art. 448, code de procédure civile, and art. 6, ordonnance 58-1270 for the case of ordinary judges and art. 3, ordonnance 58-1067 portant loi organique sur le Conseil constitutionnel, 7 November 1958 for the members of the *Conseil Constitutionnel*.

⁵⁸² R. Raffaelli, *Dissenting Opinions in the Supreme Courts of the Member States : Study*, *op cit.*, at 19.

⁵⁸³ See R. Machacek, *Die Einrichtung der "Dissenting Opinion" im internationalen Vergleich*, in 7 *Journal für Rechtspolitik*, 1999, p. 1.

⁵⁸⁴ H. Mayer, *Die Einführung der "dissenting opinion" am Verfassungsgerichtshof*, in 7 *Journal für Rechtspolitik*, 1999, p. 30, giving account of the local parliamentary inquiry on dissenting opinions that took place in 1998, leading to the publication of a number of papers addressing this issue precisely in the *Journal für Rechtspolitik* n. 7/1999.

significantly involving many original Members of the European Communities, twenty of the actual EU Member States embrace the institution of separate opinions in some form for ordinary or constitutional functions. Interestingly, several of them do so after relatively recent reforms. While we saw that most of the original Member States mandate, and mandated the full collegiality of courts at the time, Germany – another EC founding part - is the quintessential example of a country following the civil law tradition but allowing constitutional judges to issue separate opinions. But this phenomenon took place over the years. Historically, Germany has not always adhered to the principle of secrecy. Only since the XIX century this has become a general rule for ordinary judges.⁵⁸⁵ When the Federal Constitutional Tribunal was founded, separate opinions were not foreseen, although a discussion was held on the point and a formal proposal that would have granted minority judges the right to publish their dissent was rejected,⁵⁸⁶ on the ground that «the trust in justice and especially in constitutional justice was not yet sufficiently developed (...) to preclude the possibility in litigation with political aspects that public reactions (...) may result if, in litigation involving political issues, a judge himself asserted that it would have been possible to decide otherwise».⁵⁸⁷ However, dissenting opinions emerged through practice. The Tribunal took office in 1951 and already in some cases since 1952, the Court made the numerical results of the vote public, breaching the appearance of unanimity while still keeping the identity and the reasons of minority judges secret; later in 1952, there was a first case of dissenting opinion attached to the formal judgment, which fostered doubts about its formal validity.⁵⁸⁸ In 1966, a decision was taken with a 4 to 4 vote for the first time and the court therefore decided to incorporate the views of both groups of judges in the judgment. In 1967, the Second Section (Senat) of the Court established the practice of revealing the number of yes and no votes. As a result, a new case of parity happened in 1969, eventually leading to the modification of the statute on the Bundesverfassungsgericht proposed by the Federal Government.⁵⁸⁹ In its current text, as amended in 1970, the law explicitly grants minority judges the right to publish their separate opinion (*Sondervotum*).⁵⁹⁰ Interestingly, while this right was initially used extensively,⁵⁹¹ a compromise between secrecy and widespread use

⁵⁸⁵ See e.g. F. Fernández Segado, La recepción del Sondervotum en Alemania, in 12 Revista Iberoamericana de Derecho Procesal Constitucional, 2009, p. 77.

⁵⁸⁶ K. Kelemen, Dissenting opinions in constitutional courts, *op. cit.*, at 1347.

⁵⁸⁷ A. von Mehren, The Judicial Process: A Comparative Analysis, in 5 American Journal of Comparative Law, 1956, p. 197, at 209.

⁵⁸⁸ See for details P.W. Amram, The Dissenting Opinion Comes to the German Courts, in 6 American Journal of Comparative Law, 1957, p. 108; J. Luther, L'esperienza del voto dissenziente nei paesi di lingua tedesca, in 2 Politica del diritto, 1994, p. 241.

⁵⁸⁹ K.H. Nadelfmann, Non-Disclosure of Dissents in Constitutional Courts: Italy and West Germany, *op.cit.*, at 272 in particular; K. Kelemen, Dissenting opinions in constitutional courts, *op. cit.*, at 1347.

⁵⁹⁰ See § 30(2) of the Gesetz über das Bundesverfassungsgericht.

⁵⁹¹ In the first year after the amendment, 17 separate opinions were issued out of a total of 72 judgments: see for details J. Luther, L'esperienza del voto dissenziente nei paesi di lingua tedesca, *op. cit.*

of dissents was then struck, since the court is now known for its traditional efforts in reaching a common solution and an unanimous decision, and for the use of separate opinions only when such efforts do not succeed, for more coherence and transparency in the deliberations.⁵⁹²

The States that joined the European Communities in 1973 were in one way or the other all familiar with the practice of separate opinions. Denmark, which follows the tradition of diffuse judicial review, was familiar with a system of anonymous dissenting opinions, mentioned at least for their existence in the official judgment since the 1930.⁵⁹³ Since the 1950s, it adopted a full-fledged regime of open dissenting for all the collegiate courts of the legal order, including the Supreme Court.⁵⁹⁴ Ireland is the rare case in which the Constitution itself explicitly prohibits the publication of separate opinions in certain constitutional matters;⁵⁹⁵ but, in any case, as a common law system, it has always provided ordinary judges and judges of the Supreme Court's (when exerting ordinary jurisdiction) with the possibility to issue separate opinions (in some cases, through the *seriatim* procedure).⁵⁹⁶ In the United Kingdom, as we mentioned, judges' decisions were traditionally issued *seriatim* through separately published individual opinions and decisions then taken by majority. This is true for historical reasons, traced back to the modalities of adjudication of the House of Lords, whose members enjoyed the full right to freely express their opinion.⁵⁹⁷ In 1966, before the accession to the European Communities (also for the Judicial Committee of the Privy Council where dissents were originally not allowed), a reform was undertaken so that at least a single minority opinion was admitted.⁵⁹⁸ The tradition now also continues within the context of the new Supreme Court which issues *seriatim* decisions even when it decides cases based on the Human Rights Act and on the compatibility of UK legislation with the ECHR and the ECtHR's jurisprudence.⁵⁹⁹

In Greece, which joined the EEC in 1981, constitutional review is diffuse and the

⁵⁹² C. Walter, *La pratique des opinions dissidentes en Allemagne*, *op.cit.*; T. Rörig, *L'opinione dissenziente nella prassi del Bundesverfassungsgericht (1994-2009)*, *op.cit.*.

⁵⁹³ W. Mastor, *Les opinions séparées des juges constitutionnels*, *op.cit.*, at 132.

⁵⁹⁴ See for details also O. Due, *Danish preliminary references*, in D. O'Keefe, A. Bavasso (eds.), *Judicial Review in European Union law*, Kluwer 2000, p. 363.

⁵⁹⁵ See A.K. Koekkoek, *Ireland*, in L. Prakke, C.A.J.M. Kortmann, J.C.E. van den Brandhoff (eds.), *Constitutional Law of 15 EU Member States*, Kluwer Legal Publishers 2004, p. 465: according to Articles 26 and 34 of the Constitution, the Supreme Court, when exercising constitutional jurisdiction (upon the President's request or upon appeal) issues a single opinion, and no other opinion, «whether assenting or dissenting, shall be pronounced, nor shall the existence of any such other opinion be disclosed».

⁵⁹⁶ See G.P.J. McGinley, *The Search for Unity: The Impact of Consensus Seeking Procedures in Appellate Courts*, in 11 *Adelaide Law Review*, 1987, p. 203.

⁵⁹⁷ M. Kirby, *Judicial Dissent - Common Law and Civil Law Traditions*, in 123 *Law Quarterly Review*, 2007, p. 379; J. Lee, *A Defence of Concurring Speeches*, in 2 *Public Law*, 2009, p. 305.

⁵⁹⁸ *Ivi*; see also J. Alder, *Dissents in Courts of Last Resort: Tragic Choices?*, in 20 *Oxford Journal of Legal Studies*, 2000, p. 221.

⁵⁹⁹ See the details provided by C. Hanretty, *Dissenting opinions in the UKSC*, available at the website <http://uksblog.com/dissenting-opinions-in-the-uksc> (accessed 26 August 2015).

publication of dissenting opinions (although anonymous) is, exceptionally, even mandated by the Constitution (Article 93(3)) regardless of the type of adjudication (constitutional or ordinary) or institution.⁶⁰⁰ The same trend of openness was established in both Portugal and Spain. In the case of Portuguese, a long established tradition allowed both constitutional and ordinary judges to deliver a dissenting;⁶⁰¹ the debate and the institutional choice for the *voto vencido* (literally, defeated vote) was renewed with Article 42(4) of Law 28/1982, some years before the EC accession, in particular for the members of the Constitutional Tribunal.⁶⁰² In Spain, again a quintessential civil law country, the tradition of secrecy has never been followed to the same extent as France, and the practice of the so-called *voto reservado* (dissenting judges could have their vote recorded in a separate secret register) was maintained in the Code of Civil Procedure and in the Code of Criminal Procedure until recently. Furthermore, the Constitution of 1978 explicitly provides for the publication of dissenting opinions in the context of judgments of the *Tribunal Constitucional* (Art. 164);⁶⁰³ and subsequently, but before the EC accession, the possibility of adopting separate opinions was also extended to ordinary courts.⁶⁰⁴

With the exposure to nordic and eastern legal experiences, this European trend towards openness was even more evident. In fact, in Sweden and Finland, which joined in 1995, the diffuse judicial review systems unquestionably allow judges to publish separate opinions whether exerting ordinary or constitutional jurisdiction.⁶⁰⁵

And then, nearly all the legal systems interested in the massive EU enlargement of the last decade (in the two phases of 2004 and 2007) were and are familiar with the practice. This is true for the Czech Republic, which introduced it shortly after the division of Czechoslovakia with the law on the Constitutional Court of June 1993;⁶⁰⁶ and for Slovakia, which initially adhered to the

⁶⁰⁰ Law no. 184/1975, Article 35(1). Also see the information provided by A. M. Mavčič, Importance of the dissenting and concurring opinions (separate opinions) in the development of the Constitutional and judicial review with a special reference to the Slovenian practice, available at the website <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU%282010%29016-e> (accessed 26 August 2015).

⁶⁰¹ K.H. Nadelmann, The Judicial Dissent: Publication v. Secrecy, in 8 American Journal of Comparative Law, 1959, p. 415, at 421.

⁶⁰² Lei 28, 15 November 1982, Organização, Funcionamento e Processo do Tribunal Constitucional. See also C. Hanretty, Dissent in Iberia: The ideal points of justices on the Spanish and Portuguese Constitutional Tribunals, in 51 European Journal of Political Research, 2012, p. 671.

⁶⁰³ T. Freixes, La pratique des opinions dissidentes en Espagne, in 8 Nouveaux Cahiers du Conseil Constitutionnel, 2000, available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-8/la-pratique-des-opinions-dissidentes-en-espagne.52543.html> (accessed 26 August 2015) (with reference to the statute of the Constitutional Court of the Second Spanish Republic).

⁶⁰⁴ See Art. 260, Ley Orgánica 6/1985 del Poder Judicial.

⁶⁰⁵ W. von Eyben, Judicial Law making in Scandinavia, in 5 American Journal of Comparative Law, 1956, p. 112; W. Mastor, Les opinions séparées des juges constitutionnels, *op cit.*, at 132.

⁶⁰⁶ K. Kelemen, The road from common law to East-Central Europe: the case of the dissenting opinion, in P. Cserne, M. Könczöl (eds.), Legal and Political Theory in the Post-National Age, Peter Lang 2011, p. 118, in particular at 130 *et seq.*

Czechoslovak tradition of secrecy of deliberations, but first applied the corrective of a registration of the dissent, and then, since 2000, fully embraced published separate opinions.⁶⁰⁷ Estonia, considered by local jurists as a paradigm,⁶⁰⁸ allows the publication of judicial dissents in nearly all its judiciary; in particular, according to the Constitutional Review Court Procedure Act,⁶⁰⁹ separate opinions can be attached to final judgments and to opinions on the interpretation of the Constitution (performed, in the diffuse system of judicial review, by a special section of the Supreme Court). In Latvia and Lithuania, which on the contrary, are centralized systems with separate Constitutional courts, traces of the practice were already in the early regulations of the 1990s soon after independence and further reforms have expanded its use.⁶¹⁰ The Hungarian Constitutional Court, created in 1990, followed the German model and consequently constitutional judges were soon allowed to deliver their individual opinions, published together with the final judgment.⁶¹¹ The Polish Constitutional Tribunal, created in 1982 by constitutional amendment, had its powers established in the *Constitutional Tribunal Act* of 1997, which details the rules applicable to dissenting opinions.⁶¹² The same is true for the case of judges in the Slovenian Constitutional Court with the detailed Constitutional Court Act and in the Rules of Procedure of the Court.⁶¹³ Even in Cyprus, where there is an unsettled system according to which the Supreme Court currently also exercises constitutional jurisdiction, notwithstanding the constitutional provisions that foresee a separate constitutional court, judges are allowed to publish dissenting opinions.⁶¹⁴ Finally, after the fall of the Communist regime also Romania and Bulgaria adopted centralized systems of judicial review and set up a constitutional court. The first, modelled in the 1989 Constitution after the Italian and French models, did not initially contemplate separate opinions but these were introduced soon after.⁶¹⁵ The second, created in 1991, had dissenting and concurring opinions expressly mentioned in the Regulations on the Organization of the Activities of the Constitutional Court.⁶¹⁶

⁶⁰⁷ W. Mastor, *Les opinions séparées des juges constitutionnels*, *op. cit.*, at 142; K. Kelemen, *The road from common law to East-Central Europe: the case of the dissenting opinion*, *op. cit.*, at 127.

⁶⁰⁸ J. Laffranque, *Dissenting Opinion in the European Court of Justice - Estonia's Possible Contribution to the Democratisation of the European Union Judicial System*, in 9 *Juridica International*, 2004, p. 14.

⁶⁰⁹ *Ivi.*

⁶¹⁰ K. Kelemen, *The road from common law to East-Central Europe: the case of the dissenting opinion*, *op. cit.*, at 126.

⁶¹¹ L. Trosanyi, A. Horvath, *La pratique des opinions dissidentes en Hongrie*, in 8 *Nouveaux Cahiers du Conseil Constitutionnel*, 2000, available at the website www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-8/la-pratique-des-opinions-dissidentes-en-hongrie-les-opinions-individuelles-en-hongrie-une-institution.52544.html (accessed 26 August 2015).

⁶¹² W. Mastor, *Les opinions séparées des juges constitutionnels*, *op. cit.*, at 141.

⁶¹³ Available (respectively) at the websites <http://www.us-rs.si/media/constitutional.court.act.full.text.pdf> and <http://www.us-rs.si/media/the.rules.of.procedure-2012.pdf> (accessed 26 August 2015).

⁶¹⁴ R. Raffaelli, *Dissenting Opinions in the Supreme Courts of the Member States : Study*, *op. cit.*, at 25; A. Markides, *The Republic of Cyprus*, in C. Kortmann, J. Fleuren, W. Voermans (eds.), *Constitutional Law of 10 EU Member States*, Kluwer Law International 2006, p. 77.

⁶¹⁵ Art. 59 of Law n. 47 of 1992 on the Organisation and Operation of the Constitutional Court: see K. Kelemen, *Dissenting opinions in constitutional courts*, *op. cit.*, at 1350.

⁶¹⁶ K. Kelemen, *Dissenting opinions in constitutional courts*, *op. cit.*, at 1363.

These data are capable of breaking several traditional assumptions on the diffusion of the form of openness of judicial deliberations we are talking about. They go against outdated common understanding regarding cultural roots, supposedly only linked to common law systems; they go against the idea that separate opinions are an exception to the general rule of secrecy of individual votes, while the panorama of the practices in the EU Member States is definitely the opposite.

And the strong trend in the diffusion of this openness practice is only confirmed by an examination of the international jurisdictions - the other points of reference for comparative remarks and influences over the CJEU - so that many authors conclude that the permissive rule is a general principle of international law.⁶¹⁷ In the large part of international courts, the possibility for the members to detach themselves from the college choices constitutes an unchallenged tradition. International judges are commonly granted, for the series of rationales we already analysed above, the right to issue individual opinions, which are attached to the judgment of the majority and often carry a considerable importance.

Rules of the kind apply both in proto-typical international courts, such as the International Court of Justice, and in regional institutions like the European Court of Human Rights; only exceptionally individual opinions are limited in these contexts.⁶¹⁸ For instance, judges at the International Court of Justice, including *ad-hoc* judges if appointed, have the power to publish separate opinions: and such configuration was directly borrowed by the direct institutional predecessor, the Permanent Court of International Justice. The real discussion on the opportunity of such openness in deliberation happened in the 1920s, at the time of the latter's establishment, and interestingly, the major point debated was the opportunity to grant the right of public dissenting to all the judges, or with the exception of those having the nationality of the States concerned in the dispute at hand. This exception reflected, here again, a common understanding that we already investigated: the idea that national judges would always feel compelled to side and issue separate opinions in favour of their State. In the end, it was rejected, not to create disparities among those sitting in the bench, and the final decision was to allow all judges to publish dissenting opinions.⁶¹⁹

⁶¹⁷ See e.g. J. Malenovsky, *Les opinions séparées et leurs répercussions sur l'indépendance du juge international*, *op. cit.*, at 53: «il me paraît fondé de pouvoir constater, d'ores et déjà, l'existence d'une règle de droit international général de caractère permissif qui accorde à la magistrature internationale le pouvoir autonome de prévoir, dans le règlement de procédure d'une juridiction internationale, le droit de ses juges à une opinion séparée, même si un tel droit n'est pas expressément prévu par son traité constitutif».

⁶¹⁸ See, among the many, *ibidem*, at 31 *et seq.*, and organically D. Zimmermann, *The Independence of International Courts. The Adherence of the International Judiciary to a Fundamental Value of the Administration of Justice*, *Nomos/Hart* 2014; for interesting reflections cf. already R. P. Anand, *The Role of Individual and Dissenting Opinions in International Adjudication*, in 14 *The International and Comparative Law Quarterly*, 1965, p. 788.

⁶¹⁹ See M. Manouvel, *Les opinions séparées à la Cour Internationale*, *L'Harmattan* 2004, at 67-69 in particular.

The rule was then translated in the Statute of the ICJ (Art. 57), expressly allowing separate opinions: an option which is frequently used by the members, since according to a recent study, until 2005 the Court had rendered a total of 243 judgments with no less than 1017 individual opinions attached.⁶²⁰ This plethora of separate reasoning surely sheds light on the ICJ's deliberation details, often clarify the majority judgment, and is deemed capable of fostering the development of international law;⁶²¹ at the same time, it is interesting to notice that empirical and statistical research show a remarkable trend on the part of national judges (and even more so, *ad hoc* judges), to actually publish dissenting opinions whenever the decision is against their national State, therefore confirming certain original concerns. However, no serious contestations have been raised about the practice in recent years.⁶²² The European Convention of Human Rights expressly describes separate opinions as a possibility for its Court: Article 45(2) of the Convention clarifies that «if a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion». The principle is replicated and further explained in the *Rules of Court* of the ECtHR (Rule 74(2)), which foresee the possibility of «separate opinion, concurring with or dissenting from that judgment, or a bare statement of dissent», with a sort of gradation and discretion in the explication of transparency.⁶²³ In practice, dissenting opinions have been extensively used⁶²⁴ and fostered the development of the Court's interpretation of the Convention, especially when dealing with certain specific features of its jurisprudence, such as the search for a common “European consensus” or the need to adopt an evolutionary interpretation of a certain rule, by anticipating, in some cases, subsequent developments in the Court's case law.⁶²⁵ However, the possibility of issuing separate opinions has also had negative outcomes, especially leading to allegations that States have tried to pressure their national judges. Notably, an amendment of the rules concerning the appointment of judges was adopted to meet these concerns and those are now elected for a longer but non-renewable term.⁶²⁶ This detail will also be important for our reflections on the CJEU's reality. The rules on dissenting opinions at the ECtHR have also been substantially reproduced in similar regional institutions such as the Interamerican Court of Human Rights and the

⁶²⁰ A. Zimmermann, C. Tomuschat, K. Oellers-Frahm (eds.), *The Statute of the International Court of Justice: a commentary*, Oxford University Press 2006, at 1209.

⁶²¹ *Ibidem*, at 1210-1211.

⁶²² See A. M. Smith, 'Judicial Nationalism' in *International Law, op cit.*; E.A. Posner, M.F.P. de Figueiredo, *Is the International Court of Justice Biased?*, *op cit.*.

⁶²³ F. Rivière, *Les opinions séparées des juges à la Cour européenne des droits de l'homme: essai d'analyse théorique*, Bruylant 2004, at 81 *et seq.*

⁶²⁴ According to R.C.A. White, I. Boussiakou, *Separate Opinions in the European Court of Human Rights*, in 9 *Human Rights Law Review*, 2009, p. 37, at 50, in around 80% of the cases.

⁶²⁵ See for details K. Dzehtsiarou, *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, in 12 *German Law Journal*, 2011, p. 1730.

⁶²⁶ See Protocol 14 to the ECHR (CETS No 194) and its Explanatory Report, paragraph 50.

African Court on Human and People's Rights.⁶²⁷

Moreover, it is to be noted that all existing international criminal tribunals allow their members to publish separate opinions. Articles 23(2) of the Statute of the ICTY and 22(2) of the Statute of the ICTR both read «the judgement shall be rendered by a majority of the judges of the Trial Chamber and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended». The question was in this respect significantly debated at the time of the negotiation of the Statute of the International Criminal Court since the initial project, drafted by the UN International Law Commission in 1994, explicitly excluded the possibility of publishing individual opinions explicitly not to negatively affect the authority of the newly established Court. But here again, the final decision overturned these concerns, also by relying on the views expressed by the judges of the ICTY and ICTR and their positive appreciation of the role of individual opinions.⁶²⁸ As a result, the Rome Statute - famously considered as a unique blend of the civil law and common law traditions - also does allow the publication of the views of both majority and minority judges.

Therefore, probably one of the few and most notable exceptions to the principle of full transparency and openness in international tribunal and arbitrary bodies can only be found in the *Understanding on rules and procedures governing the settlement of disputes* annexed to the WTO Agreement. But in this context as well, not only individual opinions can be issued by panellists, and must just remain anonymous (Articles 14 and 17); also, scholars often highlight the facility to trace back opinions to the substantial author, so that the rule is able to only partly preserve the independence of panellists from possible external pressure.⁶²⁹

⁶²⁷ R. Raffaelli, *Dissenting Opinions in the Supreme Courts of the Member States : Study, op cit.*, at 32; see Art. 24(3) of the Statute of the IACHR and Art. 28(7) of the Protocol establishing the African Court on Human and People's Rights.

⁶²⁸ As reported by J. Malenovsky, *Les opinions séparées et leurs répercussions sur l'indépendance du juge international, op. cit.*, at 51. See for details C. Stahn, G. Sluiter, Introduction: From 'Infancy' to Emancipation? A Review of the Court's First Practice, in *Eid.*, *The Emerging Practice of the International Criminal Court*, Brill 2009, p. 1, at 3.

⁶²⁹ See J. Flett, *Collective Intelligence and the Possibility of Dissent*, in 13 *Journal of International Economic Law*, 2010, p. 287. See on the relative exceptionality of the practice M. Kolsky Lewis, *The lack of dissent in WTO dispute settlement*, in 9 *Journal of International Economic Law*, 2006, p. 895.

V.2 Openness as Access to Deliberation: the debate for the European Court of Justice (also with reference to the Advocates General and their opinions)

V.2.1 Old and New Debates on the Adoption of Dissenting Opinions in Luxembourg

The Court of Justice of the European Union follows the tradition of secrecy of deliberations and apparent unanimity that originally prevailed, as we saw, in the six founding Member States. In fact, Article 35 of the CJEU Statute provides that «(T)he deliberations of the Court of Justice shall be and shall remain secret»; and the «secrecy of the deliberations of the Court» is further mentioned in Articles 2, 10 and 13 of the act, also as an obligation of every single member.

Notably, the possibility of allowing the publication of individual separate opinions was initially discussed, but in the end, the proposal was rejected.⁶³⁰ In this narrow perspective, we cannot say that a positive institutional *evolution* occurred over time: but some interesting reflections can be made about today's peculiar institutional solution and the possibility of changes in the future — also in light of the new principles inserted in the Treaties and their impact on other aspects of the institutional “transparency” of the Court.

A first important source of knowledge is in the recent historical reconstruction of the debate's origins. The opportunity to introduce separate opinions in Luxembourg was already discussed in the negotiations of the Court of Justice of the European Coal and Steel Community in 1950.⁶³¹ In particular, this happened at a second stage of the negotiations within the context of the broader discussion on the mandates of the Court's judges and specifically on their duration. Historical evidence says that the matter was debated soon after the problem of whether to constitute lifelong mandates for the judges or to define their shorter duration, and as a logical consequence of this first problem.⁶³² We already made reference to how the duration of judicial mandates and the possibility for them to also express their individual position against the collegiality are both crucial aspects for their independence. It is also important to recall that since at the beginning, there was not even a clear idea on the number of judges that were to compose the ECSC Court and then on their appointment process, so that, for a certain period in the negotiations, even the idea that the

⁶³⁰ See the details offered by A. Boerger-De Smedt, *La Cour de Justice dans les négociations du traité de Paris instituant la CECA*, *op. cit.*, at 17-18, and D. Tamm, *The History of the Court of Justice of the European Union Since its Origin*, *op. cit.*, at 18 in particular.

⁶³¹ See, accordingly, A. Boerger-De Smedt, *La Cour de Justice dans les négociations du traité de Paris instituant la CECA*, *op. cit.*, at 17-18, and D. Tamm, *The History of the Court of Justice of the European Union Since its Origin*, *op. cit.*, at 18.

⁶³² *Ivi.*

seventh judge member could be elected as a «*représentant des syndicats ouvriers*» - by the trade unions active in the coal and steel business - took place. It was only later in time that the mentioned equilibrium of national representativity was reached.⁶³³

Put in this perspective, we can understand more of the initial ideas on the deliberation of the Court. The principle of the judges' independence was stated in Article 32 of the Treaty of Paris but not seriously inserted into a strict frame of norms to protect it. The much-discussed system of short term appointment and re-appointment of judges, comes directly from this climate and these original discussions. The intention was to both acknowledge «their rightful role» of discretion to the governments⁶³⁴ and foresee «*conversations d'ensemble*» over the appointments of members of the High Authority (a clearly political body) and of the Court (an independent one) - together.⁶³⁵ These original sensitivities - which saw in the judicial appointments choices of political nature, and sorts of bargaining chips in a larger balance of representation - made impossible to accept the German and Belgian proposals for long terms (9 years) or lifelong mandates against the French idea of renewable and relatively short mandates. The same original, political sensitivities were also very important in the idea - discussed and rapidly discarded at this stage of negotiations and with such problems on the table - to allow separate opinions. It would have been simply unthinkable to give judges of no clear representativity (as they were conceptualized at that stage) the possibility to express their singular view and to make the internal dynamics of such undetermined collegiality explicit. It is in this sense that Nicola Catalano, renowned negotiator of the time, then member of the ECSC legal service and judge of the Court itself, wrote years later that the opposite idea - to impose the secrecy of deliberation with the purpose to assure the autonomy of the judges - would lead to the final decision of the delegates with clear reference to comparative solutions.⁶³⁶

This influential and historical background shaped the structure and organization of the European Court throughout decades. A reform in this respect has never been realized. Still, several speculations have taken place. More transparency and the adoption of separate opinions have been

⁶³³ A. Boerger-De Smedt, *La Cour de Justice dans les négociations du traité de Paris instituant la CECA*, *op. cit.*, at 20.

⁶³⁴ «*Le rôle qui leur revenait*», according to Paul Reuter, FJM, AMG 12/2/2, Reuter "Observations sur les problèmes politiques réservés aux entretiens directs entre gouvernements", 06.02.1951: see *ibidem*, at 21.

⁶³⁵ *Ivi*: Paul Reuter talked of «*conversations d'ensemble sur les désignations à la Cour et à la HA, conversations où les satisfactions [pourraient] être négociées en faveur de tous les États membres*».

⁶³⁶ N. Catalano, *Manuale di diritto delle Comunità europee*, *op. cit.*, p. 63: «D'altro lato ciò che garantisce veramente l'indipendenza dei giudici è il segreto delle deliberazioni in camera di consiglio. Non è infatti prevista, come in certe giurisdizioni anglosassoni e come per la Corte internazionale di giustizia dell'Aja, la "dissenting opinion". I giudici prestano giuramento di osservare il segreto delle deliberazioni adottate in camera di consiglio. Le decisioni della Corte sono quindi decisioni del suo insieme, cioè della maggioranza o dell'unanimità dei suoi membri. L'opinione personale di ciascun giudice non è mai conosciuta. Ciò garantisce nella migliore maniera l'indipendenza dei giudici ed evita ogni pressione politica»; see also, accordingly, M. Lagrange, *La Cour de justice des Communautés européennes du Plan Schuman à l'Union européenne*, in 14 *Revue trimestrielle de droit européen*, 1978, p. 2, at 4-5.

repeatedly suggested by leading scholars and practitioners over the years, often with explicit reference to the level of attained *maturity* of the EU legal order. Among many, Grainne de Burca⁶³⁷ and J.H.H. Weiler⁶³⁸ have suggested the shift at the turn of the new millennium, and this last Author recently renewed his argument.⁶³⁹ Rasmussen has used the point to emphasize the inertial but reformable tendency of the Court of Justice towards «(P)oor Reasonings and the Complete Non-transparency of *Willensbildung*».⁶⁴⁰ Perju has recently published a refined plea «toward a discursive turn in European law», as a means and a contribution to a positive «politicization» of European law.⁶⁴¹ All these opinions are coherent with a notorious prediction made by Gordon Slynn, former Advocate General and then judge at the Court of Luxembourg in the 1980s, according to which the introduction of separate opinions was a project for our present century and not for the last one.⁶⁴²

Actually, in terms of legal basis, scholars have even speculated on the fact that, in pure abstract terms, it is not the reading of the mentioned numerous rules of the CJEU Statute concerning the secrecy of deliberations (Articles 2, 10, 13 and 35) that directly forbid the publication of dissents, but their interpretation.⁶⁴³ The principle of secrecy inserted may be after all intended as simply prohibiting judges from reporting what happens during *in camera* deliberations, as in other national contexts,⁶⁴⁴ and not from making known, afterwards, their opinion in a written form. In the same context - interestingly, here again in the context of an official Study commissioned by the European Parliament - not only it is suggested that the second interpretation prevailed in the context of the European Court possibly «as a consequence of the influence of the continental tradition»;⁶⁴⁵ but also that, in order to allow for the publication of separate opinions, legislative reform could not even be necessarily required, if not to provide a clearer legal basis for a practice possibly also applicable *rebus sic stantibus*.

New reflections were then prompted by the inclusion of the new Article 1 TEU and Article 15 TFEU in the fabric of the Treaty of Lisbon. The first, Article 1 TEU, states the general obligation of the European Union - and thus its institutions, bodies, offices and agencies - towards «decisions

⁶³⁷ G. de Búrca, The Principle of Subsidiarity and the Court of Justice as an Institutional Actor, in 36 Journal of Common Market Studies, 1998, p. 217, at 233.

⁶³⁸ J.H.H. Weiler, Epilogue: The Judicial Après Nice, *op. cit.*, at 225.

⁶³⁹ J.H.H. Weiler, Epilogue: Judging the Judges - Apology and Critique, *op. cit.*, at 252.

⁶⁴⁰ H. Rasmussen, Legal Opinion about the European Court of Justice's Competence Transgressions, Poor Reasonings and the Complete Non-transparency of *Willensbildung*, paper presented at the conference «National Judges and Supranational Laws: On the Effective Application of the EC Law and the ECHR», 15th/16th January 2010, at the Scuola Superiore di Studi Universitari e Perfezionamento Sant'Anna, Pisa, already published as H. Rasmussen, Le pouvoir de décision politique du juge européen et ses limites, in 63 Revue française d'administration publique, 1992, p. 413.

⁶⁴¹ V. Perju, Reason and Authority in the European Court of Justice, *op. cit.*, at 327 *et seq.*.

⁶⁴² G. Slynn, Introducing a European Legal Order, Stevens & Sons/Sweet & Maxwell 1992, at p. 162.

⁶⁴³ R. Raffaelli, Dissenting Opinions in the Supreme Courts of the Member States : Study, *op cit.*, at 34.

⁶⁴⁴ As is the case, for instance, in Estonia and Latvia, and at the US Supreme Court: see *ivi*.

⁶⁴⁵ *Ivi*.

(...) taken as openly as possible to the citizen».⁶⁴⁶ The second, more specifically, provides that in order to promote good governance and to ensure the participation of civil society, the Union - and thus all its institutions, bodies, offices and agencies - shall conduct its work as openly as possible, providing all the possible forms of transparency, active cooperation and communication between institutions and the public typically entailing access to information. Even in this sense, speculations were offered on the capability of such promises to change the status quo. The value of transparency, explicitly reaffirmed in the text of the Treaties, could be easily interpreted, after all, as an argument for the preference of openness over secrecy for judicial deliberations. And this could be linked - as is the case of the whole debate on Articles 1 TEU and 15 TFEU - with the overall process of democratization of the European Union.⁶⁴⁷

Still, some realistic notations are in order. The first to be made is a formal one. By virtue of the exception of Article 15(3) TFEU, the reaffirmed values of openness and transparency are legally applicable to Court of Justice simply when it is exerting administrative function and technically, not in its purely judicial functions. So, a simple extension of the principle of openness to the CJEU as provided by the Treaty of Lisbon is surely not set to change (according to this current interpretation), the actual situation alone. Despite the fact that the combined reading of the new Article 1 TEU and Article 15 TFEU has the potential to give rise to significant changes in the way the Court interacts with the public (as we will see *in extenso* in dealing with a second dimension of openness of judicial activities) it does not question the *raison d'être* of the principle of secrecy of collegiate deliberations per se, nor ensure the overall openness of the Court's proceedings.⁶⁴⁸ But there are also other reasons why it appears improbable that the CJEU (and the Member States) may decide in the near future to amend the Statute and embrace, in the short term, any practice of individual, separate or dissenting opinions. Public access to the deliberations may indeed allow the public - more than judgments fictionally written by a unanimous choir of voices - to grasp information from the debate that members of the bench had on particular points of law. Also, this would be particularly interesting and important in the development of EU law. But in the context of the EU, there are specific concerns on the serenity of legal proceedings and the possibility of external pressure on judges. All the arguments traditionally linked to the secrecy of judicial

⁶⁴⁶ In addition, the recital 7 of the preamble to the TEU declares the EU ambition «to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out [...] the tasks entrusted to them». This idea is later confirmed by several articles of the TEU, especially in Articles 10 and 11 TEU.

⁶⁴⁷ J. Laffranque, Dissenting Opinion in the European Court of Justice - Estonia's Possible Contribution to the Democratisation of the European Union Judicial System, *op. cit.*, at 23; H. Rasmussen, Present and Future European Judicial Problems after Enlargement and the Post-2005 Ideological Revolt, *op. cit.*, at 1667; V. Perju, Reason and Authority in the European Court of Justice, *op. cit.*, at 309 and 327 *et seq.*

⁶⁴⁸ We echo the words of A. Alemanno, O. Stefan, Openness at the Court of Justice of the European Union: Toppling a Taboo, *op. cit.*, at 131.

deliberation are still well present, and debated, at the CJEU's level, and their presence make the commentators think that the debate about separate opinions will never advance until they remain alive.⁶⁴⁹

Introducing dissenting opinions could surely lead the CJEU to move away from the actual forced cooperative method it has hitherto followed. Today, the practice of Luxembourg provides that the Rapporteur of every single case prepares a note that can serve as a basis for the judgment. Then all members who sit in the same chamber and disagree can also submit their notes explaining their position. Not only these documents, as we will see, are without a doubt unaccessible for the public. But if substantial disagreements emerge, discussions simply go on to try to reach an agreement on a common text. When a consensus eventually cannot be reached and a vote is taken, the outvoted judges continue to take part in the drafting of the text of the judgment, suggesting improvements in light of her position. Consequently, the final outcome will be in fact a truly collegiate judgment.⁶⁵⁰ But, as observed with acumen,⁶⁵¹ if «(A) camel is said to be a horse designed by a committee», the risk will be to always have “camel” judgments, which may cloak an inability to reach a clear decision, in which diverging views are in some ways all included. In the end, it is unclear which one prevails.⁶⁵² These concerns are even enhanced by the apodictic, cryptic, Cartesian⁶⁵³ argumentative style of the Court of Justice (on which we will elaborate further in the final chapter), accused in turn of making its judicial reasoning even less intelligible.

Again, some authors fear that allowing judges to deviate from the majority's opinion might lead to ignoring the views of dissenters and marginalize them at the time of drafting the judgment - resulting in less cooperation in the improvement of the reasoning and a radicalization of minoritarian positions.⁶⁵⁴ This concern for a cooperative method of deliberation and thoughtful and consensual decision can be counterbalanced, as we saw, with those empirical experiences (especially in national contexts and where separate opinions are a new tool) in which actually there is a practice of efforts made to ensure that no dissent is actually published, by taking into account, as far as possible, the views of the minority. In this sense, it would be difficult to predict whether allowing for separate opinions at the CJEU would lead to their actual use, given that of course, they

⁶⁴⁹ See A. Alemanno, How Transparent is Transparent Enough? Balancing Access to Information versus Privacy in Judicial Selection, *op. cit.*, at 211 *et seq.*.

⁶⁵⁰ D. Edward, How the Court of Justice works, *op. cit.*, at 555-556.

⁶⁵¹ *Ibidem*, at 557.

⁶⁵² R. Raffaelli, Dissenting Opinions in the Supreme Courts of the Member States : Study, *op. cit.*, at 14.

⁶⁵³ J.H.H. Weiler, Epilogue: The Judicial Après Nice, *op. cit.*, at 225.

⁶⁵⁴ See empirically N.Maveety, Concurrence and the Study of Judicial Behavior in American Political Science, in 8 *Juridica International*, 2003, p. 173; see also G.C. Rodríguez Iglesias, Entscheidungsfindung im Europäischen Gerichtshof, in 7 *Journal für Rechtspolitik*, 1999, pp. 27-28, and P. Jann, Entscheidungsbegründung am Europäischen Gerichtshof, in 7 *Journal für Rechtspolitik*, 1999, pp. 28-30, both with reference to the European context, and both claiming that the practice at the ECtHR supports such argument.

would not be obligatory and that there are great differences in terms of legal cultures of the judges in addition to different compositions in which the Court can be convened.

The typical argument made in *legal* terms against individual opinions, which has also been consistently cited with reference to the CJEU, is the potential threat to the authority of the Court's judgments. If, as said, according to some authoritative opinions, the EU legal order is mature enough to be confronted with a public debate and even a politicization of some of its features,⁶⁵⁵ according to some others, it is still too young and fragile to allow for public dissents that might weaken it. This argument assumes various relevant dimensions at the supranational level. In one sense, maturity could be measured against the readiness of States, as sovereign masters of the Treaties, to see national judges voting against national interests, or to accept the legitimacy/authority of the Court once its (apparent) unanimity is no longer veiling the existence of internal dissents and alternative (but equally valid) solutions to the legal issues at stake.⁶⁵⁶

Moreover, given the specificity of the EU federal judicial architecture and the complex interactions between the CJEU and national courts, especially in the context of the preliminary ruling procedure, allowing the publication of separate opinions might have unforeseen consequences: a more discursive, analytic and conversational style associated with more transparency could foster the dialogue with national courts; but conversely, it could also undermine their perception of (and their respect for) the authority of the CJEU by ordinary judges. In this sense, there would be a risk for the most precious and protected assets of the EU legal system: the (decent level of) uniform application of EU law throughout the territories of all the Member States' jurisdictions, the fundamental objective of what we often called the nomophylactic function of the Court of Justice.

Additionally, it is interesting to note that when it is argued that the EU legal order can already be considered as stable and settled, it is also recalled that Member States are already used to having “their” national judges voting independently and openly, since this already happens in the context of the European Court of Human Rights in Strasbourg (although, as we said, not without allegations of undue influences and pressures).⁶⁵⁷ And also, there are already scholarly efforts capable of piercing the veil of the apparent unanimity of Luxembourg — studying the patterns of the Court of Justice decisions and trying to establish the different preferences of individual judges.⁶⁵⁸ Thus, the introduction of individual opinions should not be measured against a still fully-

⁶⁵⁵ Most notably J.H.H. Weiler, Epilogue: The Judicial Après Nice, *op. cit.*, at 225; V. Perju, Reason and Authority in the European Court of Justice, *op. cit.*.

⁶⁵⁶ See the reflections provided, also as practitioner in the field, by J. Azizi, Unveiling the EU Courts' internal decision-making process: a case for dissenting opinions?, *op. cit.*, at 67.

⁶⁵⁷ R. Raffaelli, Dissenting Opinions in the Supreme Courts of the Member States: Study, *op. cit.*, at 36.

⁶⁵⁸ See for a recent systematic example the work of M. Malecki, Do ECJ judges all speak with the same voice?, in 19

fledged general perception of unanimity. In contrast, it would merely eliminate the task for scholars to second-guess individual judicial preferences using indirect indicators, with the risk of really endangering the judges' independence and also assuming mistaken conclusions.⁶⁵⁹

It has been suggested to look at the question of the authority of the CJEU at stake from two different perspectives: one focused on the quality of the Court's reasoning and the other, of course complementary, focused on the Court's formal role and position.⁶⁶⁰ When prominent scholars suggested a turn for the Court towards judgments «not only authoritarian but also authoritative», with fully reasoned decisions,⁶⁶¹ and a shift from a «command» model (in which the judgment has authority because it is formally a Court's order) to a «justification» model, where authority also rests on the quality and persuasiveness of the judgment's grounds,⁶⁶² such a change would be surely prompted by the adoption of individual opinions. These would arguably stimulate - at least in a first phase - deeper discussions among the judges thus leading to more authoritative and convincing decisions. But on the other hand, it is feared that the introduction of separate opinions merely to trigger a change in the style of the Court's decisions could amount to a disproportionate and hazardous reform, bringing more risks than benefits. Indeed, altering the decision-making process might be an excessive response to the need to improve quality and clarity in the judgments, as well as a symptom of insufficient trust in the ability of the Court to evolve in order to respond to the needs of national courts and other claimants. This is an ability to evolve that has been much inspired, as we will see, in the last years, more by opposite concerns, especially in terms of streamlining and speeding up the proceedings in front of the Court, in the constant search for better timing performances.

If these are the puzzling, debatable and debated aspects of the *legal* argument that still hampers a full open practice of the CJEU's deliberations, a clearer decisive *political* obstacle lies between the lines of the Treaties. A reform would particularly pose a problem in relation to the tralatitious renewable character of the mandate of the judges - already problematic per se in view of their so called “external” independence.⁶⁶³ In fact, the possibility of issuing separate opinions could be easily distorted in its purpose with the current rules on the judges' appointment, and particularly with the possibility for reappointment. National authorities, which are still in charge of the initial selection of appointees, might be tempted to use the threat of not reappointing a judge in order to

Journal of European Public Policy, 2012, p. 59.

⁶⁵⁹ In this sense also R. Raffaelli, Dissenting Opinions in the Supreme Courts of the Member States : Study, *op cit.*, at 36.

⁶⁶⁰ *Ibidem*, at 37.

⁶⁶¹ J.H.H. Weiler, Epilogue: The Judicial Après Nice, *op. cit.*, at 225.

⁶⁶² V. Perju, Reason and Authority in the European Court of Justice, *op. cit.*, at 338.

⁶⁶³ See the critical remarks by J.H.H. Weiler, Epilogue: Judging the Judges - Apology and Critique, *op. cit.*

pressure him/her to publish a dissent in the case of decisions contrary to their national interest. This possibility would not be averted by the new procedures ex Article 255 TFEU that we already investigated above. In the actual configuration, the new European Panel would be powerless in this respect, and its actual practice is not even very much concentrated, admittedly, in the critical cases of reappointments. In this context, the paradigm of the Strasbourg Court seems to be particularly relevant: in that setting, while the members of the bench definitely make use of the right to issue separate opinions, there have been reports of States trying to exercise pressure over their nominees,⁶⁶⁴ so that a recent amendment to the appointment rules became necessary and the mandates were rendered longer, but non-renewable.⁶⁶⁵

In fact, it should be noted that the same prominent Authors who have always advocated for a more confrontational style of the Court of Justice and a reform in the transparency of opinions are the same who suggested a similar development for the CJEU appointment system, even before the Treaty of Lisbon's new rules.⁶⁶⁶ The strength of such concerns is evident, yet doubts on the absolute necessity of comprehensive reform could have been raised. These include pointing to other possible avenues to preserve the judges' independence such as the forms of anonymous and separate opinions we already described (known in national European contexts such as Greece and in international areas such as the WTO system). In this respect, internal views tend to minimize the suggested interdependence of the non-renewability of the mandate and the independence of the individual judges. With the Court of Justice in mind, it is submitted that the Advocates' General example is particularly relevant, since their absolute and unchallenged independence in issuing their (individual) opinions seems not to be affected by the fact that they are appointed according to the same rules as judges, including the possibility of reappointment.⁶⁶⁷ This last point leads us to the investigation of another aspect of the Court's transparency practices, which deserves an autonomous appraisal.

⁶⁶⁴ See the allegations of J.F. Flauss, Brèves observations sur le second renouvellement triennal de la Cour Européenne des Droits de l'Homme, in 61 Revue Trimestrielle des Droits de l'Homme, 2005, p. 5; E. Voeten, The Impartiality of International Judges: Evidence from the ECtHR, *op.cit.*, at 421.

⁶⁶⁵ See again Protocol 14 to the ECHR (CETS No 194) and its Explanatory Report, para. 50.

⁶⁶⁶ See notably H. Rasmussen, European Court of Justice, *GadJura* 1998, at p. 66; J.H.H. Weiler, Epilogue: The Judicial Après Nice, *op. cit.*.

⁶⁶⁷ See for this argument D. Edward, How the Court of Justice Works, *op. cit.*, at 548-549.

V.2.2 The Advocates General and Their Role in the Transparency of the Court's Deliberations

The last relevant argument against a reform in the transparency practices of the Court of Justice, specifically towards the option of judicial separate opinions, has always relied on the *status quo*, and specifically on a sort of *functional equation*. According to many, separate opinions of the Luxembourg judges would not be particularly useful or valuable, because there are already opinions issued by the Advocates General of the Court. These would perform a comparable function, also for what concerns the public appraisal of the judicial deliberations, their clarification, their intelligibility, their understandability.⁶⁶⁸ These arguments deserve an autonomous investigation, not only because it is necessary to critically assess their veracity, but also because they lead us to the study of another important original *comparative* inspiration of the structure and the organization of the Court.

First of all, it is interesting to note that the functional equation between the opinions issued by the Advocates General and the dissenting opinions of judges of other jurisdictions is not the only suggestion provided by scholars in a comparative vein, to describe and understand this peculiar institution incardinated in Luxembourg. Curiously, in fact, while a group of Authors saw the AG as a substitute for individual opinions, others - especially until what is now the General Court came into existence - suggested its function «in a way as the first instance» of the judgment of the Court.⁶⁶⁹ This is the sign of a certain discomfort of the literature delineating the traits of this peculiar figure.

On the other hand, it is to be noted that what I call the functional equation with the role of the dissenting opinions can be suggested directly by the historical research. In fact, it is proven that

⁶⁶⁸ See *inter alia* G. Grementieri. Il processo comunitario. Principi e garanzie fondamentali, Giuffrè 1973, p. 71; W. Feld, The Court of the European Communities: A New Dimension in International Adjudication, Martinus Nijhoff 1964, p. 100; U. Klinke, Der Gerichtshof der Europäischen Gemeinschaften Aufbau und Arbeitsweise, Nomos 1989, p. 62.

⁶⁶⁹ See for this view e.g. O. Riese. Erfahrungen aus der Praxis des Gerichtshofs der Europäischen Gemeinschaft für Kohle und Stahl, Deutsche Richterzeitung 1958, p. 271; J.P. Warner, Some Aspects of the European Court of Justice, in 4 Journal of the Society of Public Teachers of Law, 1975, p. 15, at 18 in particular; A. Dashwood, The Advocate General in the Court of Justice of the European Communities, in 2 Legal Studies, 1982, p. 203, at 215; K.D. Borhardt. Der Europäische Gerichtshof: Besetzung, Anrufung, Zuständigkeiten, Vorabentscheidungen und einstweiliger Rechtsschutz. Kommentar zu den Art. 220–245 EGV mit Textanhang, Bundesanzeiger 2000, p. 59. See also the words of F.G. Jacobs, Advocates General and Judges in the European Court of Justice: Some Personal Reflections, in D. O'Keefe, A. Bavasso (eds.), Judicial Review, in European Union Law: Liber Amicorum in Honour of Lord Slynn of Hadley, Kluwer 2000, p. 20: «The main justification for the institution of advocate general lies precisely in the fact that it introduces a two-stage process in which the advocate general provides an independent judicial appraisal of the case. ... [In most cases] we have to consider points of often great importance and difficulty without the assistance of a judgment from a lower court deciding the point, and with no appeal from our own decision. Only in the limited number of cases which come to the Court of Justice on appeal from the Court of First Instance [about 12% of ECJ cases according to recent statistics] do we have the luxury of a judgment to consider.»

the historical reason why the office of Advocate General was established was exactly to compensate for the lack of dissenting opinions, when these were discarded to protect the judges' independence from their national governments, potentially threatened by their short, renewable mandate.⁶⁷⁰ In fact, there is historical evidence that the original proposal was made, here again, by the French delegation, with the express purpose of reproducing the same «*effets bienfaisants*» they provided in the French experience.⁶⁷¹ In the original Treaties, AGs were introduced into the institutional architecture of the newly established Court with an express reference to *commissaires du gouvernement* in the *Conseil d'Etat*: this was the spirit of the proposal advanced by Maurice Lagrange at the time, which he himself has repeatedly claimed,⁶⁷² and which he described as commonly accepted «*comme une sorte de contre-partie à l'interdiction du droit pour les juges de publier éventuellement leur opinion dissidente*».⁶⁷³

Still, in critically discussing the function of Advocates General for the openness and transparency of the Court's deliberation, a historical retrospective view on the original inspiration of the figure cannot be enough. Our analysis cannot but start from the way in which the figure was imported, and therefore from the textual reference upon which the European Advocates' General mandate is based. Indeed, the explicit mandate of the Advocates General, according to what is now Article 252 TFEU, is to *assist* the Court: its activity shall help to clarify the legal issues at stake in front of the bench by publicly issuing reasoned submissions on cases and doing so acting in complete impartiality and independence.

This can probably be intended as the explication of those general «*effets bienfaisants*» aimed

⁶⁷⁰ See recently on the point M. Rasmussen, *The First Advocate Generals and the Making of European Law, 1950-1958*, paper presented at the Seminar of the Advocates General held at the European University Institute, Firenze, 16 September 2010; D. Tamm, *The History of the Court of Justice of the European Union Since its Origin*, *op. cit.*, at 18.

⁶⁷¹ A. Barav, *Le commissaire du gouvernement près le Conseil d'État français et l'avocat général près la Cour de justice des Communautés européennes*, in 26 *Revue internationale de droit comparé*, 1974, p. 809, at 811: «*Le rapport officiel de la délégation française était particulièrement net sur ce sujet en concluant que 'c'est avec la conviction qu'une telle institution procurera à la nouvelle Cour ses mêmes effets bienfaisants que nos partenaires ont accepté de la faire profiter des fruits d'une expérience essentiellement française'* »».

⁶⁷² See M. Lagrange, *La Cour de justice des Communautés européennes du Plan Schuman à l'Union européenne*, *op. cit.*, p. 3, and his *Discours prononcé par M. l'Avocat général Maurice Lagrange à l'audience solennelle de la Cour*, le 8 octobre 1964, available at the website http://www.cvce.eu/obj/discours_de_maurice_lagrange_8_octobre_1964-fr-f2f00c1c-2587-497f-ace0-6890bf0cb85f.html (accessed 26 August 2015).

⁶⁷³ See M. Lagrange, *Discours prononcé par M. l'Avocat général Maurice Lagrange à l'audience solennelle de la Cour*, le 8 octobre 1964, *op. cit.*, p. 2: «*Une autre raison semble avoir milité en faveur de l'institution : celle-ci a été considérée comme une sorte de contre-partie à l'interdiction du droit pour les juges de publier éventuellement leur opinion dissidente. Il est certain, en effet, que l'exposé public par un magistrat d'une thèse qui sera ensuite confrontée avec l'arrêt peut utilement contribuer aux échanges d'idées et aux discussions doctrinales que provoque généralement la publication d'une opinion dissidente. D'autre part, que les conclusions soient "conformes" ou "contraires" à la solution adoptée, celle-ci se trouve éclairée et même confortée, que ce soit par analogie ou par opposition*».

at the internalization of the French influence.⁶⁷⁴ However, it is also true that, through a minimal contextual historical analysis, one can see an ironic torsion of this concept of “beneficial effects” of such «*expérience essentiellement française*», to be emulated at the supranational level. Ironically, also within French public law, the function of the *commissaires du gouvernement* had been predominantly justified by their on-going utility and by adherence to tradition.⁶⁷⁵ The office was in fact originally established for certain purposes and has mutated over time into something quite different; it was always confirmed, nonetheless, in its presence. Two basic justifications were behind its original appearance, in the first half of the 19th century.⁶⁷⁶ There was of course an *internal* justification, which aimed at improving the quality of the discussion, of the deliberation and of the decision drafting in the French administrative jurisdiction. The *commissaires* acted as critical readers and commenters of draft decisions of the judges and contributed to the internal debates both in the cases which foresaw the in-person presence of the parties and whenever that was not the case. But there was also a decisive, original *external* justification . retrospectively easy to understand but obviously disappeared over the decades. The *commissaires* were prefigured to control, in some sense, on behalf of the state and therefore of the government, the members of the bench and their activities, and in this sense to defend in front of them the interest of the state, its administration and general public interest. As icastically said, «(T)hat is why a fourth in the court was needed» originally: parties were seen «as pursuing just their own “egoist” interests and judges (including those formally part of the administration) could not be trusted», as third parties of new configuration but still of not fully accepted independence.⁶⁷⁷ When, in the years that followed, and surely by the mid-19th century, the need for such external justification largely disappeared and the *commissaires* simply emerged as a truly independent actor, questions arose in several respects on the part of the French doctrine and of the CdGs themselves on how to configure and justify the persisting presence of the figure. The *commissaires du gouvernement*, their name notwithstanding, were no longer bound by any advice from the executive or anyone else; they were magistrates themselves, as well as the judges they had to “overlook”; and also the views concerning judicial function and the creative role of the judge gradually changed, by replacing fears of arbitrary judicial legislating with the acceptance of judicial development of the law.⁶⁷⁸ In this sense, the search for a

⁶⁷⁴ A. Barav, *Le commissaire du gouvernement près le Conseil d'État français et l'avocat général près la Cour de justice des Communautés européennes*, *op. cit.*, at 811.

⁶⁷⁵ M. Bobek, *A Fourth in the Court: Why Are There Advocates-General in the Court of Justice?*, in 14 *Cambridge Yearbook of European Legal Studies*, 2011-2012, p. 529, at 540.

⁶⁷⁶ *Ibidem*, at 538.

⁶⁷⁷ *Ivi*.

⁶⁷⁸ See on this R.C. van Caenegem, *Introduzione storica al diritto privato*, Il Mulino 2004, chapters five and six, and, specifically, L. Montazel, *Entre faits et droit: histoire d'un pouvoir judiciaire. Les techniques de la cassation civile en France et en Allemagne au XIX^{ème} siècle*, Klostermann 1998.

rationalization of the figure became an «on-going soul-searching activity»,⁶⁷⁹ often solved through negative definitions, describing this peculiar example of “fourth in the court” only for what it was not. Deep, ideological justifications for why it ought to be there became difficult to find: and existential explanations, in both academic writings as well as in the case law of the *Conseil d’Etat*,⁶⁸⁰ simply relied on the actual work and the on-going benefits the *commissaires* provide to the bench, as «*commissaire des lois*»,⁶⁸¹ «*commissaire de la loi*»,⁶⁸² or «*défenseur du droit*».⁶⁸³

Two interrelated phenomena are important for our purposes here. The first is that the mentioned historical evidence tells us that, in the context of the original European Coal and Steel Community Treaty and the setting up of its Court of Justice, a tralatitious, originally ill-defined figure was purposively imported, by only making reference to its supposedly beneficial functions. The second is that, if one explores the functions performed by the historical antecedent directly and explicitly taken as paradigm, an original *external* function naturally had a short life, so that only an essentially *internal* justification remained: the French *commissaires du gouvernement*, as well as the European Advocates General, were meant to improve the quality of deliberations and decisions, and to bring discussion into a system in which the spaces for dialogue between the bench and the parties are rare and most of the decision-making is done *in camera*, behind closed doors. They were thought of as devices to supplement a perceived lack of external discourse and exchange, by actually enhancing internal discussion and built-in exchange, with a third pair of eyes and layer of analysis.⁶⁸⁴ It is easy to see that this can also produce some external benefits for the public, for the observers, for the readers of the judgments: but, in looking for functional equivalence in terms of external openness and transparency of judicial institutions with the issuance of separate opinions, how can one not consider the inherent genetical difference?

Given this significant historical insight, a real full appraisal of the capacity of the Advocates-General in Luxembourg to make the Court's openness and transparency more pronounced must be supplemented by an analysis *in corpore vili*, on the actual practice of the institution. If the historical French “creation story” - the reliance on original French inspiration for

⁶⁷⁹M. Bobek, A Fourth in the Court: Why Are There Advocates-General in the Court of Justice?, *op. cit.*, at 539.

⁶⁸⁰ Conseil d’Etat, 10 July 1957, Gervaise, Rec. p. 466; Conseil d’Etat, 29 July 1998, Eslatine, Rec. p. 320.

⁶⁸¹ T. Sauvel, Les origines des Commissaires du Gouvernement auprès du Conseil d’Etat statuant au contentieux, in 55 *Revue du droit public et de la Science Politique*, 1949, p. 5, at 17.

⁶⁸² R. Guillien, Les commissaires du gouvernement près les juridictions administratives et, spécialement, près le Conseil d’Etat français, in 71 *Revue du droit public de de la science politique en France et à l'étranger*, 1955, p. 281, at 297.

⁶⁸³ O. Dupeyroux, Le ministère public auprès des juridictions administratives, in Vv.Aa. (eds.), *L’Évolution du droit public: Études offertes à Achille Mestre*, Sirey 1956, p.183.

⁶⁸⁴ See M. Lasser, The European Pasteurization of French Law, in 90 *Cornell Law Review*, 2004-2005, p. 995.

the model of AG in the Court - cannot provide a fully-fledged systemic justification for AGs and a clear link of their role to openness practices, one shall also investigate their present and on-going uniqueness and utility.

In the EU law context as well, the literature first looked for relevant comparative reference points to describe the office. Early scholars generally sought to introduce the new institution by descriptively comparing its features with those of a *commissaire du gouvernement* in the French *Conseil d'Etat* (understandably, given the genetic history).⁶⁸⁵ In a second phase, authors frequently tried to display the institution to the emerging non-francophone audience after the ongoing enlargements of the Union⁶⁸⁶ until the final efforts to compare the professional figure (as realised in EU law) with other historical experiences of «fully independent fourth» parties in the court.⁶⁸⁷

The other replicated *common lieu* has been to see, in a functional analysis of the Advocates-General role, the detached representation of the “public interest” or the “interest of the law” within the Court of Justice.⁶⁸⁸ This reading can be easily criticized on the one hand because implying a sort of strong, systemic, holistic idea of the “public” that could possibly be admissible in the French administrative jurisdiction of the XIX century but hardly replicable in a supranational context. On the other hand, because it has been convincingly confuted by arguing that, should this be the case, «one should be able to position such public interest and AGs vis-à-vis the judges of the Court», with these last carrying a different interest.⁶⁸⁹ Actually, it is well known that as per the Treaties' mandate, it is the European Commission's task to represent and uphold the interests of the Union as a whole and, by the way, for doing so the Commissioners actually swear an oath in front of the European Court of Justice. Moreover, in implementing this task, as a matter of policy, the Commission usually submits observations and appears in the disputes submitted to the Court, such as in almost every request for a preliminary ruling presented by national courts. In such proceedings, to which the Commission itself is not formally a party, one might say that it is in fact the executive branch, through its intervention, that represents the European “public interest” (if any exists) and functions as a veritable “*ministère public européen*”, by pursuing its own agenda and normally advocating a pro-integration course in its observations. Therefore, in this context, it is arduous to identify an

⁶⁸⁵ See for instance, as early contributions, C. Salcedo, La figura del abogado general en las Comunidades Supranacionales Europeas: naturaleza jurídica y función, in 12 Revista española de derecho internacional, 1959, p. 119; P. Gori, L'avocat général à la Cour de justice des Communautés européennes, in 12 Cahiers de droit européen, 1976, p. 375.

⁶⁸⁶ See in this sense A. Dashwood, The Advocate General in the Court of Justice of the European Communities, *op. cit.*; M. Vranken, “Role of the Advocate General in the Law-Making Process of the European Community”, in Anglo-American Law Review, 1996, p. 39.

⁶⁸⁷ M. Bobek, A Fourth in the Court: Why Are There Advocates-General in the Court of Justice?, *op. cit.*, at 545 *et seq.*

⁶⁸⁸ See in this sense D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, European Union Law: Cases and Materials, Cambridge University Press 2006, p. 123.

⁶⁸⁹ M. Bobek, A Fourth in the Court: Why Are There Advocates-General in the Court of Justice?, *op. cit.*, at 550-551.

interest distinct from the one of the judges as independent third parties and the Commission's one as representative of the Community to be attached to the AGs' figure. Also, in empirical terms, it should be taken into account that the AGs are present in the Court of Justice but not in the General Court where, according to Article 49 of the Statute, there is only an *ad hoc* possibility of the members of the General Court to be called upon to perform the task of AG in a certain case, where considered necessary or beneficial. But here again, one can find more proof of the simply *internal* justification for the assistance of the office, not aimed at making the Union court of first instance more open or transparent, but only to co-operate in its deliberations when internally desired: and in fact, the *ad hoc* appointment of an AG at the GC is very rare and examples of its use are by now aged.⁶⁹⁰

Against such background, also absent in the context of the EU is any original strong ideological justification for the office of AGs. What remains and has become commonly invoked for a rationalization of its role is the argument of pragmatic internal and institutional utility. The Advocates provide a good service to the Court and, through it, directly or indirectly, to the outside world. However, perhaps there also lies the problem: how can we precisely draw the contours of the role of «assistance» (in the language of Art. 252 TFEU) AGs render to the Court, also to assess if there really exists any real external spillover with a view to openness and transparency?

A useful taxonomical effort has been recently provided in the literature,⁶⁹¹ which can be interestingly folded, for our purposes, to assess the inner workings and outer workings of such «assistance». In our view, it is important to reflect on how the possibly suggested definitions of «assistance» can or cannot have a real impact on the openness and the transparency of the Court. A first dimension of the assistance provided by AGs would be in their role of *framers*, of professional who have the task of framing, of delineating the case and the legal arguments used in proceedings before the Court of Justice. In fact, if the first sketch of a future CJEU's decision is to be found in the *rapport préalable*, the preliminary report drafted by the judge Rapporteur in view of the Court's general meeting and the discussion therein, it is in any case the Advocate General who shapes, by developing the relative legal arguments, any later discussion: and its opinion, once published, will

⁶⁹⁰ Article 49 of the Statute of the Court of Justice reads as follows: «The members of the Court of First Instance may be called upon to perform the task of an Advocate-General. ... A member called upon to perform the task of Advocate-General in a case may not take part in the judgment of the case».

See also *ibidem*, at 551: the cases in which the at the time Court of First Instance made use of Art. 49 of the Statute and appointed an AG are limited in number («slightly more than a dozen cases», e.g. Cases T-13/89; T-14/89; T-51/89; T-120/89; T-24/90) and time, being all of them from the period at the turn of the 80s and 90s.. The obsolescence of Art. 49 of the Statute is proven by the fact that in more complex or novel cases, the General Court relies in today's practice on a (more detailed) preliminary report presented by the reporting judge.

⁶⁹¹ *Ibidem*, at 552 *et seq.* See also, accordingly, L. Clément-Wiltz, *La fonction de l'avocat général près la Cour de justice*, Bruylant 2011, in particular at 53 *et seq.* with an interesting diachronic macro-distinction between «la fonction originelle» and «la fonction nouvelle» of the Advocate General.

constitute the reference point in the light of which the Rapporteur as well as other judges will take their positions. In this sense, the framing function of the AGs is similar to what elsewhere, in other jurisdictions, is simply the role of the reporting judge, with the specificity of giving a precise shape to potentially very broad requests, especially in the case of preliminary rulings: she will base her work on the materials already presented before the court, prepare a report or a draft with comments for the benefit of the deciding formation, which shape the debate and the overall case. In this sense, albeit published at a certain point in the course of action, this task is clearly internally-oriented, and internally justified. It is aimed at simply constituting a basis for the subsequent role of the college and not at making its further deliberations explicit. A second identified dimension of assistance of AGs would be in their role as *controllers*. An AG provides, in fact, according to a unique institutional arrangement, a “second pair of eyes”, performing as a sort of “second reporting judge”, both in the analysis of possible procedural and substantive points of law to be raised, and by asking questions with detailed knowledge of the file in the oral hearing. This is a role elsewhere performed by the presidents of chambers, who are nonetheless also present in the CJEU structure. In any case, it is another role more devoted to the internal functioning of the Court's works with no direct effect of externalization and thus no clear impact on the transparency of the Court's deliberation. The same negative remark can be attached, at least in part, to a third dimension of the assistance role, which is also a distinct feature of the style of the Advocates-General: their attitude as *researchers*, which often makes the opinions issued a sort of precious summary and systematisation of the previous case-law of the Court, of the relevant academic debate, of the pertinent precedents of the ECtHR and possibly of other jurisdictions. This is surely an activity of internal documentation and clarification - often in fact assisted by the internal Research and Documentation Service of the Court - for seeking better comprehension of the entire bench. It is an activity surely fraught with important consequences; it is, still, very much related to the internal working of the college, with no capability of explanation of what is the actual deliberation in the single case. It is also rather linked to the other two dimensions of the assistance as per Bobek's proposed taxonomy, where the external aspect of the office is more evident. In fact, a fourth role of assistance of AGs would be associated with them being *innovators*. It is acknowledged, again as a distinctive stylistic feature, that a good opinion of an AG is not only a mere summary of up-to-date case law; but, by relying on this and the other abovementioned research activity, it often transcends the existing law and suggest its further development - not just the solution for a case at hand, but usually with a broader view.⁶⁹² In this respect, the AG is asked to see and describe the greater picture, context and further directions, in a

⁶⁹² See on this in particular L. Clément-Wiltz, *La fonction de l'avocat général près la Cour de justice*, *op. cit.*, at 231 *et seq.*, on the newly acquired functions of «mise à l'épreuve» and «mise en cohérence de la jurisprudence» by the AGs.

dynamic way, «not tied by chamber-made compromises». But it is always important to note that this is done before the judges will give the final word, supported and maybe influenced by this potential source of inspiration; and moreover, that in the actual structure of the CJEU, where, as we will see in some more detail, more and more chambers and smaller formations of the court decide cases, the role of the Advocate General is more prosaically brought back at the necessity of keeping the case law consistent on the whole amongst such smaller formations - with some deprivation of the innovative or dynamic dimension. Thus, here as well, the external function does not seem preponderant and it is surely not aimed at “opening” the actual, coeval deliberation. Finally, a fifth role of assistance would be substantiated in the AGs' being *testers*. Their opinions could also be seen as testing balloons, in this sense also in an external dimension, being publicly available months before the decision of the Court. With the advantage of not being binding on anybody and not prejudicial to the parties, their peculiar function would be in the unique occasion to test potential reactions of various actors as far as the acceptability of certain legal solution. Then the bench would have full power to correct the course by adding, subtracting or also through radical change. In this sense, this aspect reminds us of the primitive comparative conceptualizations of the AGs as a first instance in relation to the final judgment of the Court we already mentioned above (a similar function is simply performed by the appellate systems in other jurisdictions).⁶⁹³ But here as well, no particular relevance for the openness and the transparency of the deliberations of the Court is visible; quite on the opposite, the draft directed to the external dimension is explicitly devoted to an improvement of the internal conditions of better informed decision-making and not to the disclosure of the effective judicial deliberation.

All these functional (and still precious) profiles are evidently discrepant from the practices of openness and transparency of deliberations of judicial separate opinions. Advocates-General opinions can actually provide the reader with more detailed arguments when confronted with the «cryptic, magisterial» decisions of the Court; they can even, occasionally, represent a dissenting voice in the otherwise externally «monolithic» Court.⁶⁹⁴ After all, empirical research tells us that about 15% of the court's judgements are made contrary to the opinion of the advocates-general.⁶⁹⁵ But this is not done with a direct contribution to the valuable practice of transparency as far as the actual deliberations and the individual decisions of the Court are concerned. Advocates-General

⁶⁹³ See the contributions already recalled above, footnote 669.

⁶⁹⁴ See the definition by I. Solanke, *The Advocate General: Assisting the CJEU of Article 13 TEU to Secure Trust and Democracy*, in 14 *Cambridge Yearbook of European Law*, 2012, p. 697, at 705.

⁶⁹⁵ J. Laffranque, *Dissenting Opinion in the European Court of Justice - Estonia's Possible Contribution to the Democratisation of the European Union Judicial System*, *op. cit.*, at 19, with reference to R. Streinz. *Europarecht*, 6th ed. C.F. Müller 2003, p. 127.

activity, in fact, has become first of all optional also in the context of the Court of Justice.⁶⁹⁶ Furthermore, it can neither explain nor dissent from decisions the AGs never see in course of action, but can only anticipate, in a more or less general or specific manner, topics that will be authoritatively expounded by the judges; whatever the common understanding is, the AG's opinion cannot *clarify* and make transparent the reasoning followed by the majority during the deliberation, since this simply takes place afterwards, logically and chronologically, but at most, it can only *contextualize* it. Therefore, not only is the course of action the other way around and it is the Court's judgment to be a follow-up of the AG's opinion, often worked by subtraction; but whenever the Court follows the substantial suggestions of the AG's opinion (which reportedly happens in a high percentage of cases, though not in all), the latter surely does not point to any possible alternative reasoning for an alternative decision which is still to be prefigured.⁶⁹⁷ In this sense, there can be a number of options. In some cases, the Court departs from the AG's conclusions; in others, it follows the substance of its suggestions without fully endorsing their reasoning, and therefore, actually, with no function of transparency whatsoever. Often, this will not require an explicit rejection of the arguments brought by the AG but a mere neglect of what is already stated. In these cases, it might be difficult to determine whether the court refused the argument, implicitly joined it, or just disregarded it; and the connection of the AG's opinions not only to dissents, but to transparency practices in general, becomes more and more blurred.

There is no explanation of the deliberation or transparent dissent in the AGs' work, at least in individual cases. Their contribution to the external debate - not to be confused with a genuine openness of Court's deliberations - is simply at a systemic level. The opinions' arguments can only explain or disagree generally in relation to directions a certain lines of case law or certain doctrinal interpretations. In a vein of stark realism and with a last appeal to functionality, this is, after all, the only source and dimension of confrontational style a court like Luxembourg can afford. «A more explicit drafting style, abundant reasons, a true account of judicial mentality and decision-making, allowing for dissents and open discourse»⁶⁹⁸ represent the myth of academics and external observers who want and can (also in terms of resources, including time) compenetrates every single aspect of

⁶⁹⁶ As well known, the Nice Treaty introduced for the first time the possibility for the ECJ to render judgments without an opinion from the Advocate-General in cases which do not raise new points of law: see Article 20 of the Protocol on the Statute of the Court of Justice as modified by the Nice Treaty, 2001 O.J. (C 80) 53, at its fifth paragraph: «Where it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate-General, that the case shall be determined without a submission from the Advocate-General».

⁶⁹⁷ See e.g. J. Azizi, *Unveiling the EU Courts' internal decision-making process: a case for dissenting opinions?*, *op cit.*, at 59; J. Laffranque, *Dissenting opinion in the European Court of Justice - Estonia's possible contribution to the democratisation of the European Union Judicial System*, *op cit.*, at 18-20; V. Perju, *Reason and Authority in the European Court of Justice*, in *Virginia Journal of International Law*, *op cit.*, at 355-357; and the comparative remarks given by M. Rosenfeld, *Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court*, in *4 International Journal of Constitutional Law*, 2006, p. 616, p. 640 *et seq.*

⁶⁹⁸ M. Bobek, *A Fourth in the Court: Why Are There Advocates-General in the Court of Justice?*, *op cit.*, at 558.

judicial decisions. But this ideal objective must always be balanced with the other values such as legal certainty (often represented by a line of case law which speaks concisely and in one voice) and celerity in the administration of justice. Seen comparatively, it has been remarked how the luxury of «lengthy and complex judicial opinions, containing extensive citations for almost every single proposition, dissenting in three parts and concurring in the other four»⁶⁹⁹ is affordable only in systems where judgments to be given are counted in tens, not thousands per year, and on specific topics. And thus, the CJEU - an overburdened general jurisdiction precisely with thousands of cases to handle every year - can only afford the systemic explanation of its case law through the broadly oriented, peculiar, under-theorized activity of the Advocates-General, with no openness of deliberations in the individual sense, if it does not want to collapse under the weight of its success and all the controversies brought to its knowledge.

V.3 Openness as Access to Court Documents

V.3.1 Access to Court Documents as a Second Dimension of Openness

We said that the debate on the separate judicial opinions is the traditional meaning attached to the concept of openness in judicial activity. Still, there is a second dimension which is more and more linked to the idea of openness and transparency in judicial deliberations as well as in political and academic discussion: the possibility by third parties to access documents related to the courts' activity.

As it is well known, the general right of citizen to access to public information, in the form of “administrative transparency”, is *en vogue* as a policy issue. However, it is by no means new. In the last two or three decades, a huge number of legislative measures and administrative reforms have been put in place both in EU Member States and non-member States, often in the fashionable terms of so-called “Freedom of Information Acts”.⁷⁰⁰ This recent trend originates from several different factors. Administrative transparency has been recognised by various courts, constitutions

⁶⁹⁹ *Ivi.*

⁷⁰⁰ Measures of the kind of “Freedom of Information Acts” (FOIA) have been enacted in Hungary (1992), Portugal (1993), Ireland (1997), Latvia (1998), the Czech Republic (1999), the United Kingdom (2000), Estonia (2000), Lithuania (2000), Poland (2001), Romania (2001), Slovenia (2003), Germany (2005), and at the European Union level (2001). See Organisation for Economic Co-operation and Development (OECD), *The Right to Open Public Administrations in Europe: Emerging Legal Standards*, 19 November 2010, Sigma paper no. 46, available at the website [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/SIGMA\(2010\)2/REV1&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/SIGMA(2010)2/REV1&docLanguage=En) (accessed 26 August 2015), at p. 7.

and treaties as a fundamental individual right. More crucially, the promotion of the “right to know” of the people is increasingly perceived as an essential component of a democratic society, seen as the other side of the coin in freedom of expression, which includes the right to seek, receive and impart information and ideas. Liberal democracies, after all, are so intended because they are based and shaped on specific kinds of relationships between public powers and individuals.⁷⁰¹ The individual’s right of access to information held by public authorities serves three main purposes in this context. First, it helps private citizens to participate more closely in public decision-making processes. Second, it enables citizen control over the government and thus feeds the political circuit and prevents corruption and other forms of maladministration. Third, it provides the public administration with greater legitimacy in the eyes of individuals, as it becomes more transparent and accountable, i.e. closer to the often invoked “glass house” ideal-type.

The legislation on access to public information - born from the development of this debate - often formally relates to all the branches of public authority and therefore to the executive, legislative and judicial powers. However, traditionally, the judiciary as such, or at least legal proceedings and deliberations, has been normally exempt from the openness duties. The tendency, as said, has always been to use canonical arguments based on the protection of the authority and the impartiality of courts to create a certain presumption of “closeness” of judicial deliberations. It is typically claimed that in order to preserve the courts' independence and efficiency, it is necessary to apply specific, restricted publicity rules. The situation is nonetheless changing. Once one adds the so called “soft” judicial accountability perspective to the traditional “hard” one - and therefore, as stated, the idea of judges scrutinised and held answerable for their professional functioning but also, more generally, for a perceived procedural transparency, representation and sensitivity regarding different interests and «needs of a changing social environment» - the same arguments on the protection of the authority and the impartiality of courts can lead to the opposite direction and therefore prompt openness of the judiciary. Nowadays, scholars in this vein support the view according that courts should also allow access to their files;⁷⁰² it is more and more submitted that, in order to actively promote transparency, courts should enable circulation of concerned documents beyond their walls.

In fact, the arguably emerging tendency within the EU and in non-EU Member States is towards submitting the judiciary to respect the principle of transparency. One can say - and it has

⁷⁰¹ S. Bartole, *Stato (forme di) (ad vocem)*, in *Enciclopedia del diritto*, Annali, II, 2, Milano, 2008, p. 1116.

⁷⁰² See for example P. Leino, *Just a little sunshine in the rain: the 2010 case law of the European Court of Justice on access to documents*, in *48 Common Market Law Review*, 2011, p. 1215, at 1251-1252; W. Voermans, *Judicial transparency furthering public accountability for new judiciaries*, *op.cit.*, at 149.

also been stated in official studies produced by the European Parliament⁷⁰³ - that there is an incipient but clear emerging comparative trend to make the courts part of the transparency/“Freedom of Information” campaigns. Several countries have recognised the need for open and transparent courts, either through legislation or through practices and guidelines, which recognise the right for members of the public to access court files.⁷⁰⁴ This has led to an interesting debate and certain partial but important developments, also in the European Union and with specific regard to the European Court of Justice.

In general terms, the introduction of the problem cannot but start from the fact that, once the basis for a “right to know” is established by the individual vis-à-vis public powers, it is equally easy to understand that, just like any other fundamental right, the right of access to information is not unlimited and must be balanced with competing interests in its concrete application. In fact, exceptions to the right of access to information represent the most sensitive part of Freedom of Information Acts regimes and *similia*.⁷⁰⁵ They are aimed at striking a balance and ensuring that disclosure of information held by public authorities does not harm relevant public or private interests. Of course, the risk is that the more the grounds for exemption are broadly defined and interpreted, the more the right to know may be compressed or even repressed. Two main kinds of legitimate public interests are commonly contemplated in national and European regulations. The first includes so called “sovereign functions” of the state, including public interests such as defence and military matters, international relations, public security, public order or public safety, and the monetary, financial and economic policy of the government. The second group of justified exemptions typically includes information related to so-called “internal documents”: documents relating to a matter where a final decision has not been taken as well as documents containing opinions for internal use as part of deliberations and preliminary consultations. These can encompass the conduct of investigations, inspections and audits, the formation of government decisions, and of course also court proceedings.

⁷⁰³ V. Naglič, National practices with regard to the accessibility of court documents. Study, Directorate General for Internal Policies. Policy Department C: Citizens' Rights and Constitutional Affairs, 2013, available at the website <http://www.europarl.europa.eu/studies> (accessed 26 August 2015).

⁷⁰⁴ Open Society Justice Initiative, Report on Access to Judicial Information, March 2009 available at the website www.right2info.org (accessed 26 August 2015), at p. I and v: «Access to judicial records and to information about the judiciary is an important, yet often overlooked, aspect of transparency and access to information. While much legislative and scholarly attention has focused on promoting freedom of information and access to records with regard to the executive functions of government, much less has been done to secure or even evaluate access to judicial information (...) Seventy countries have developed a framework for providing access to public information, and applying a comprehensive disclosure framework to the judiciary, while uniquely challenging, should be vigorously pursued.»

⁷⁰⁵ See footnote 700 above.

The application of such rationales to the activity of courts has peculiar forms. As previously stated, it constitutes an incipient, newly emerging legal discipline. In some states, it comes through as positive, written interventions (in laws or rules on internal administration of national courts) while in other states, a similar trend is paving its way through decisions of (mostly) supreme or constitutional courts establishing the right of access to court documents through case law. The examples that are normally recalled in this respect come - in the absence of extensive academic studies on the specific point - particularly from two European Union Member states: Finland and Slovenia, and from Canada⁷⁰⁶ (despite the fact that a recent official study of the Slovenian “Information Commissioner” included several other examples of continental national practices as a paradigm for its own national reform).⁷⁰⁷ Those mentioned are also the paradigms taken into account by an official Study commissioned by the European Parliament’s Committee on Legal Affairs,⁷⁰⁸ whose intention is precisely to examine national practices regarding access to court files and develop recommendations how to enable more comprehensive access by the general public to be achieved to the court files of the CJEU.

V.3.2 The International Debate, the Comparative Paradigms

Actually, technical instruments employed, sources of law, and the degree of access to court documents varies across these countries.

In Finland, in particular, the first move in technical terms has been to consider the general provisions of the Act on the Openness of Government Activities (621/1999) as applicable in relation to courts, unless provided otherwise in the *lex specialis* of the recent Act on the Publicity of Court Proceedings in General Courts (370/2007), entered into force on October 1, 2007. The main principle expressed by this provision is a general principle of publicity: «Court proceedings and trial documents are public unless provided otherwise (...)».⁷⁰⁹ In fact, the legislative measure provides for the general publicity of court proceedings and trial documents in a vast, though not complete, series

⁷⁰⁶ V. Naglič, National practices with regard to the accessibility of court documents. Study, *op cit.*, at 20 *et seq.*

⁷⁰⁷ See N.P. Musar, Access to court records and FOIA as a legal basis – experience of Slovenia, available at the website https://www.ip-rs.si/fileadmin/user_upload/Pdf/clanki/Access_to_court_records_and_FOIA_as_a_legal_basis_-_experience_of_Slovenia.pdf (accessed 26 August 2015), at 3.

⁷⁰⁸ V. Naglič, National practices with regard to the accessibility of court documents. Study, *op cit.*

⁷⁰⁹ Section 1 APCP. Unofficial English translation of this act is available at the website <http://www.finlex.fi/fi/laki/kaannokset/2007/en20070370.pdf> (accessed 26 August 2015).

of national judicial bodies.⁷¹⁰ Its section 3, moreover, gives broad definitions of the crucial terminology for the application of the ACPC. It labels «court proceedings» as all oral and written proceedings and deliberations by the courts; and then considers as «oral proceedings» all the documents pertaining to the main hearing, the preparatory session, judicial review or other court proceedings where a party has the right to be present or where someone is heard in person; and as «written proceedings» all the written presentation or other stage of court proceedings that is solely based on written trial documentation; finally, with «deliberations by the court» the reference goes to all the deliberations by members of the court and the referendaries for the purpose of reaching a decision. Definition of a trial document refers to a very broad definition of an official document in the AOGA, the general applicable law on administrative transparency: «An official document is defined as a document in the possession of an authority and prepared by an authority or a person in the service of an authority, or a document delivered to an authority for the consideration of a matter or otherwise in connection with a matter within the competence or duties of the authority. In addition, a document is deemed to be prepared by an authority if it has been commissioned by the authority; and a document is deemed to have been delivered to an authority if it has been given to a person commissioned by the authority or otherwise acting on its behalf for the performance of the commission».⁷¹¹

General publicity of such documents is to be intended as the principle according to which every person has an unconditional right to receive information from a public trial document. The unconditionality does not rest in the dependence on specific proof of any kind in relation to an interest by the person requesting a trial document (which is often the case in other countries asking for evidence of direct individual interest, legitimate interests, overriding interests etc.). Moreover, general publicity is also intended as the principle according to which trial documents become public after a certain period of time, specified in detail in section 8 of the APCP.

Given these general assumptions, the APCP provides for both absolute and relative types of exceptions as to the publicity of the trial documents (Section 7 APCP). In terms of absolute exceptions, the Finnish legislation provides that some documents are to be kept secret because they contain sensitive information,⁷¹² at least those included in a *numerus clausus* of categories exhaustively listed (for instance, information which if made public, would probably endanger the

⁷¹⁰ Including, according to Section 2(1) APCP, the High Court of Impeachment, the Supreme Court, the Court of Appeal, the District Court, the Labour Court and the Military Court; under certain conditions, the same applies also to cases considered by the Market Court; under certain conditions, the same applies also to cases considered by the Market Court (Section 2(2) APCP.).

⁷¹¹ Section 5 of the Finnish AOGA.

⁷¹² Section 9 APCP.

external security of the State or sensitive information regarding matters relating to the private life, health, disability or social welfare of a person). In these cases, the exception is to be applied automatically (documents need to be kept secret). Deliberations of the court also fall within this category. The period of secrecy for such trial documents is (no less than) 25 years; however, for some categories, it arrives at sixty or even eighty years. In terms of relative exceptions, these are applicable if the information is to be kept secret on the basis of the provisions of another act and revealing this information would probably cause significant detriment or harm to the interests that said secrecy obligation provisions are to protect. It is to be emphasised that the use of this exception is - unlike absolute ones - neither necessary nor automatic; the court may apply it or not, on its own motion or at the request of a party: these categories of documents are ordered secret. The period of secrecy for such trial documents is at most 60 years (for reasons of protection of private life) or at most 25 years (for any other reason related to secrecy).

Unless the secrecy of a trial document is provided through the automatism of absolute exceptions or through a judicial order in case of relative exceptions, the law provides for a detailed series of ways in which a trial document becomes public - essentially linked to its official receipt, or the public oral consideration, or the moment in which a decision is finally issued in the actual controversy. In this respect, a court's decision is always public unless the court orders for it to be kept secret. The trial document containing the decision (and therefore, at least the information of its existence) is in any case public, since the moment it has been issued or made available to parties. And even if a decision is secret, the conclusions of the decision and the legal provisions applied remain public. Moreover, in the case that a court orders that a decision be kept secret and the case has social significance or it has caused considerable interest to the public, a public report shall be prepared regarding the decision to be kept secret, publicising a general account of the case and the reasons for the decision (but not necessarily the identity of injured parties). A party or a person concerned in the case may only request that the court decide on the secrecy of a trial document or a part thereof during the course of action of the case; only exceptionally, in cases of specifically justified failures to make the request, may the court decide on the secrecy after the proceedings are no longer pending.⁷¹³

Specific law provisions and policies are devoted to the publication of documents on *ad hoc* databases and websites. The case-law is made available through Finlex,⁷¹⁴ which consists of over ten databases pertaining to the precedents of the various Finnish jurisdictions. In addition, there are databases with the summaries of judgments of the European Court of Human Rights and the Court

⁷¹³ Section 25 APCP.

⁷¹⁴ Available at the website <http://www.finlex.fi/en/oikeus> (accessed 26 August 2015).

of Justice of the EU. The databases are available also in English and are accessible free of charge.

In Slovenia, we find a similar approach and a comparable evolution of the applicable norms. The Judiciary of the Republic of Slovenia (*Sodstvo Republike Slovenije*), also has its own centralised and efficient webpage⁷¹⁵ — giving electronic access to all the courts and tribunals in Slovenia (general: civil and criminal; and specialised: labour, social and administrative), in all the instances (local, district, the Supreme court as well as the Constitutional Court of Slovenia). The webpage provides information on the entire Slovenian judicial system, types of procedures, lists of oral hearings, latest news, etc. All judicial decisions are available electronically while (unofficial) English translations are offered for key Supreme court judgements.

Moreover, access to information detained by public authorities has been positively regulated by the Act on the Access to Information of Public Character (AAPI)⁷¹⁶ - another piece of regulation of the last decade - which has introduced into the Slovenian context as well the principle of openness and transparency to all the three branches of the State: executive, legislative and judiciary. In this sense, Slovenia has adopted a uniform regulation on access to public information which exposes the judiciary as a whole to public scrutiny, not just its administration or so-called court management.⁷¹⁷ In this context, public information is defined as any information stemming from the field of the public administration's working activity which is in the form of a document, file, register, record or documentary material, produced or acquired by a public body. In addition to this general framework, access to judicial documents for third parties is also governed by procedural legislation. More specifically, the traditional principle according to which an applicant who wishes to view or obtain a copy of a court file is to demonstrate a legitimate interest (in criminal proceedings) or justifiable benefit (in civil and other judicial proceedings) is stated. Therefore, in Slovenia there is a clear legislative intention to foster the openness of public institutions including judicial bodies but there has been an overlapping of measures and regimes with some uncertainties as to the relationship between procedural rules governing access to a specific court file on the one hand and the material rules of the general Act on the Access to Information of Public Character on the other.

Some commentators, including the Information Commissioner of the Republic of Slovenia, claims that the two sets of rules govern different situations: the AAPI would deal with the general

⁷¹⁵ Available at the website <http://www.sodisce.si> (accessed 26 August 2015).

⁷¹⁶ Zakon o dostopu do informacij javnega značaja (published in Official Gazette RS, No. 24/2003). English translation available at the website <https://www.ip-rs.si/index.php?id=324> (accessed 26 August 2015).

⁷¹⁷ See N.P. Musar, Access to court records and FOIA as a legal basis – experience of Slovenia, *op cit.*, at 1.

right of every individual to access documents of public character, whereas the procedural rules would govern rights of individuals (those having a specific interest) to access a specific court file.⁷¹⁸ Others, including official Judiciary of Republic of Slovenia' sources,⁷¹⁹ claim that procedural rules are a *lex specialis* in relation to the AAPI, which implies that those procedural rules which derogate from the AAPI prevail over the latter. In this last sense, then anyone requesting access to a specific court file should first demonstrate his legitimate interest (in criminal proceedings) or justifiable benefit (in civil and other judicial proceedings) to access documents, whereas the requested court (or a public prosecutor's office) would need to decide whether the access might be granted by striking a balance and taking into account both provisions of procedural rules (as per the legitimate interest/justifiable benefit of the applicant) and the AAPI (for the potential overriding interest for non-disclosure governed in it).

In practice, the answer to the question whether the applicant will be granted access will primarily be given depending on how the notions of “legitimate interest” and “justifiable benefit” will be interpreted in individual cases, and if the said dubious overlapping of measures, given the clear legislative intention, will shape such an endeavour. If their interpretation will be broad, then applicants, also non-specifically interested applicants such as journalists, legal practitioners, academia, historians and so forth, will not face serious obstacles in order to obtain a certain court file. If, on the other hand, the idea that the procedural rules governing access are a *lex specialis* in relation to the AAPI will be abandoned, then once the applicant has demonstrated his legitimate interest (or justifiable benefit), the authority treating his request will simply apply the provisions of the AAPI. And in that sense, according to such an instrument, public information is generally freely available to legal or natural persons. Each applicant shall obtain public information in the form requested - enabling the review or obtention of a transcript, a copy or an electronic record.

Exceptions to the right to access public documents are listed in Article 6 AAPI. Some of them are particularly related to court proceedings. A request for access is (partially) rejected if information was obtained or compiled for criminal persecution purposes or in connection with the latter, or for the purposes of a misdemeanour procedure. This includes whether it was acquired or drawn up for the purposes of civil, non-litigious civil procedure or other court proceedings, and its disclosure would prejudice the implementation of such procedures, or if it is contained in a document that is in the process of being drawn up and is still subject to consultation by the body, and the disclosure of which would lead to misunderstanding of its contents.⁷²⁰ A document in

⁷¹⁸ *Ibidem*, at 6.

⁷¹⁹ Such an interpretation can be also found on the portal of the Judiciary of Republic of Slovenia: see http://www.sodisce.si/sodna_uprava/informacije_javnega_znacaja/ (accessed 26 August 2015).

⁷²⁰ Article 6 AAPI, in its English translation mentioned above at footnote 716, reads as follows:

process of elaboration and still subject to consultation in the context of judiciary, as per the last exemption, in practice means a document relating to internal deliberations of the court in a specific case: therefore, it is important to notice that such a document could be available, unless its disclosure would lead to misunderstanding of its content. Other exemptions that also might be relevant in a context of judicial proceedings, in which case a Slovenian tribunal can also deny the applicant the access to requested information, are then related to a business secret in accordance

«Article 6

(Exceptions)

(1) The body shall deny the applicant access to requested information if the request relates to:

1. Information which, pursuant to the Act governing classified data, is defined as classified;
2. Information which is defined as a business secret in accordance with the Act governing companies;
3. Personal data the disclosure of which would constitute an infringement of the protection of personal data in accordance with the Act governing the protection of personal data;
4. Information the disclosure of which would constitute an infringement of the confidentiality of individual information on reporting units, in accordance with the Act governing Government statistics activities;
5. Information the disclosure of which would constitute an infringement of the tax procedure confidentiality or of tax secret in accordance with the Act governing tax procedure;
6. Information acquired or drawn up for the purposes of criminal prosecution or in relation to criminal prosecution, or misdemeanors procedure, and the disclosure of which would prejudice the implementation of such procedure;
7. Information acquired or drawn up for the purposes of administrative procedure, and the disclosure of which would prejudice the implementation of such procedure;
8. Information acquired or drawn up for the purposes of civil, non-litigious civil procedure or other court proceedings, and the disclosure of which would prejudice the implementation of such procedures;
9. Information from the document that is in the process of being drawn up and is still subject of consultation by the body, and the disclosure of which would lead to misunderstanding of its contents;
10. Information on natural or cultural value which, in accordance with the Act governing the conservation of nature or cultural heritage, is not accessible to public for the purpose of protection of (that) natural or cultural value;
11. Information from the document drawn up in connection with internal operations or activities of bodies, and the disclosure of which would cause disturbances in operations or activities of the body.

(2) Without prejudice to the provisions in the preceding paragraph, the access to the requested information is sustained, if public interest for disclosure prevails over public interest or interest of other persons not to disclose the requested information, except in the next cases:

- for information which, pursuant to the Act governing classified data, is denoted with one of the two highest levels of secrecy;
- for information which contain or are prepared based on classified information of other country or international organization, with which the Republic of Slovenia concluded an international agreement on the exchange or transmitting of classified information.
- For information which contain or are prepared based on tax procedures, transmitted to the bodies of the Republic of Slovenia by a body of a foreign country;
- For information from point 4 of paragraph 1 of this Article;
- For information from point 5 of paragraph 1 of this Article, unless the tax procedure is final or the person liable for tax discovered the liability in the tax return and did not pay the tax in the prescribed time.

(3) Without prejudice to the provisions in the first paragraph, the access to the requested information is sustained:

- if the considered is information related to the use of public funds or information related to the execution of public functions or employment relationship of the civil servant, except in cases from point 1. and points 5. to 8. of the first paragraph and in cases when the Act governing public finance and the Act governing public procurement stipulate otherwise;
- if the considered is information related to environmental emissions, waste, dangerous substances in factory or information contained in safety report and also other information if the Environment Protection Act so stipulates.

(4) If the applicant holds, that information is denoted classified in violation of the Act governing classified data, he can request the withdrawal of the classification according to the procedure from the Article 21 of this Act.

(5) The body can choose not to provide the applicant with the requested information, if the latter is available in freely accessible public registers or is in another way publicly accessible (publication in an official gazette,

with the Act governing companies;⁷²¹ personal data protection as per its specific regulation;⁷²² or possible infringements of the tax procedure confidentiality or of a tax secret. But also in these cases, information cannot automatically be refused, rather only if its disclosure would be detrimental to the operation of the procedure and public interest for disclosure does not prevail over another public interest or interest of other persons to disclose the requested information, in the form of a *balance* test. However, in some cases, a different *harm* test applies. Even though there might be an overriding public interest prevailing over other interests to disclose information, the request to access court files should be in fact simply denied, inter alia, if: the information is, pursuant to the Act governing classified data, denoted with one of the two highest levels of secrecy; the information contains, or is prepared based on, classified information of another country or an international organization, with which the Republic of Slovenia concluded an international agreement on the exchange or transmission of classified information; the information contains, or is prepared based on, tax procedures, transmitted to the bodies of the Republic of Slovenia by a body of a foreign country.

Thus, unlike under the Finnish legislation, the access of members of the public to trial documents according to Slovenian legislation is generally acknowledged but actually strictly conditional in the sense that applicants nonetheless need to demonstrate their legitimate interest. However, here again, it is important to take note that the judiciary as such has been clearly and purposively included in the scope of application of the recent legislation on access to public information.

The new trend towards this kind of openness in judicial activity is not only visible in European countries. As stated, Canada has been, interestingly enough, considered as a third paradigm of courts' openness. In particular, it experienced a particularly developed debate on the point, which became a benchmark at the comparative level.

In that legal order, the public right to open courts has been extensively discussed as an important constitutional rule, considered as deriving from the fundamental right of expression

publications of the body, media, professional publications, internet and similar), and can only issue instructions as to the location of the information.

(6) The body shall deny the applicant's request to re-use information if the request relates to:

1. Information from the paragraph 1 of this Article, or
2. Information protected by the intellectual property rights of third parties, or
3. information held by bodies performing public services of public radio-television or bodies performing public service in fields of education, research and cultural activities, or
4. Information, for which another Act stipulates accessibility only to authorized persons».

⁷²¹ See Article 6(1)(2) AAPI above.

⁷²² See Article 6(1)(3) AAPI above.

which is guaranteed in the Canadian Constitution Act 1982 (Part I, Canadian Charter of Rights and Freedoms), Article 2.(b): «Everyone has the following fundamental freedoms: (...) (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (...)». Of course, as in other contexts, the right of an individual to privacy is also considered as a fundamental value. However, the adopted ideal of openness of judicial institutions outweighs the right to privacy.⁷²³ As a result, in Canada, all court files are accessible to the public under the existing presumption that all court records are available to the public *in loco*. If technically feasible, the public shall also be entitled to remote access to court files.

In Canada court files are traditionally and generally accessible to the public in the courthouse. Therefore, the question of accessing them has simply evolved in the last decade with the arrival of new technologies. Two aspects have been particularly explored and debated, so to make the Canadian case paradigmatic: the adoption of new information technologies for an enhanced realisation of the open courts principle; and on the other hand, the problem of unintended consequences of openness and therefore the possibility that unrestricted electronic access to courts' documents might facilitate some uses of information that are not connected to the underlying rationale for open courts and which might have a significant negative impact on values such as privacy, private and public security, the protection of confidential business information, the proper administration of justice and the timely conduct of judicial proceedings.

In other words, there has been an open debate on the question of how to reconcile two basic values: the right of the public to transparency in the administration of justice and the right of an individual to privacy. The debate started in the Canadian legal order more than ten years ago when in 2003, a “Discussion paper” entitled to “Open Courts, Electronic Access to Court Records, and Privacy”, prepared by the Judges Technology Advisory Committee (JTAC) for the Canadian Judicial Council, was publicly and widely discussed.⁷²⁴ This was actually built upon an earlier report for the Administration of Justice Committee of the Council. Reviewing and systematizing earlier jurisprudence of the Supreme Court of Canada, the Discussion Paper put forward thirty-three “conclusions” on different aspects of the “constitutional right” of the public to open courts, the connected right to privacy and policy, and logistical issues pertaining to access to court records if electronic and remote access is granted to the public. The result of the process was that the

⁷²³ Model Policy for Access to Court Records in Canada, September 2005, available at http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_AccessPolicy_2005_en.pdf (accessed 26 August 2015).

⁷²⁴ See the report prepared for the Judges Technology Advisory Committee (JTAC) entitled «Synthesis of the Comments on JTAC's Discussion Paper on Open Courts, Electronic Access to Court Records, and Privacy», available at the website http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_Synthesis_2005_en.pdf (accessed 26 August 2015).

Canadian Judicial Council - the federal body created in the 1970s to coordinate professional development and judicial conduct matters for judges, in a way that would respect the judiciary as an independent branch - adopted, in September 2005, a so-called *Model Policy for Access to Court Records in Canada*.

The purpose of this Model Policy, as a typical soft law measure, was «not to state legal rules governing access to court records. Its purpose is rather to provide courts with a framework to deal with new concerns and sensitive issues raised by the availability of new information technologies that allow for unprecedented access to court information». The basic idea was in fact to foster, among Canadian courts, a common autonomous development of new policies of access to their records, thus assuming their supervisory and protective power over these records, «in a manner that is consistent with the consensus that is emerging in Canada and in other countries on these issues»,⁷²⁵ and with the particularly appropriate Canadian constitutional framework, acknowledging that «(t)here is disagreement about the nature of the exemptions to the general rule». ⁷²⁶ The Model Policy aimed both civil and criminal proceedings' records, at both trial and appeal levels, with distinctions only made upon the type of proceeding (for instance for family, criminal or youth protection proceedings); and covered all court records in any form, whether these records are created, stored or made available on paper or in digital format. Its nature and its origin from the federal supervisory judicial body required that other laws on access to court records, such as statutory or common law provisions regarding access to, or publication of, court records, remain applicable. According to its definitions, «access» should be understood as “the ability to view and to obtain a copy of a court record”⁷²⁷ and «court record» broadly includes «any information or document that is collected, received, stored, maintained or archived by a court in connection with its judicial proceedings», encompassing all the elements that constitute a “case file” such as pleadings, indictments, exhibits, warrants and judgments, docket information and documents in connection with a single judicial proceeding as well as other information. As mentioned, the public has a

⁷²⁵ Model Policy for Access to Court Records in Canada, *op. cit.*, at p. ix: «The purpose of the Council in developing this model policy is not to state legal rules governing access to court records. Its purpose is rather to provide courts with a framework to deal with new concerns and sensitive issues raised by the availability of new information technologies that allow for unprecedented access to court information. This model policy was designed to help Canadian courts develop their own policies of access to their records, thus assuming their supervisory and protective power over these records, in a manner that is consistent with the consensus that is emerging in Canada and in other countries on these issues, including the recent Canadian Judicial Council report, “Use of Personal Information in Judgments and Recommended Protocol” (...) This model policy is also consistent with the current constitutional framework that applies in Canada with regard to the balance that needs to be struck between the open courts principle and other important values, such as privacy, security and the administration of justice».

⁷²⁶ *Ibidem*, at vii.

⁷²⁷ *Ibidem*, at 3:

«1.3 Definitions

1.3.1 Access

“Access” means the ability to view and to obtain a copy of a court record».

presumptive right of access to all of these, generally defined, court records. The Model Policy has been indicated as a model for the attention posed on the more practical aspects of the implementation of such a presumption. Therefore, in order not to frustrate this principle in practice, a specific rule on fees states that they should not impede access to court records.⁷²⁸ In addition, specific provisions acknowledge that tailored access to court information in electronic format might require the acquisition and operation of advanced information management systems that would necessitate for users to financially contribute, with the view of ensuring collective savings in the middle and long term.

The Model Policy takes into account the progressive transition from paper records (traditional form of access in the courthouse) to digital documents (provided by new technologies), while stating the autonomy of each court in deciding which formats of access are actually provided to the public, e.g. paper, electronic, or both. In this sense, Rule 4.4 provides that «(m)embers of the public are entitled to access court records in the format in which they are maintained».⁷²⁹ Moreover, the principle of open courts is further developed by stating a minimal requirement for openness, i.e. the public knowledge of the existence. «Members of the public are entitled to know that a case file exists, even when a case file is sealed or subject to a non-publication order»,⁷³⁰ according to which it is not possible to disclose its content. Merely giving access (remote or in the premises) of court records to the public is not considered sufficient. It is officially acknowledged that search functions should also be made available to users. It is also clearly considered that the availability of search tools should depend upon the type of court record accessed and the level of risk of improper use of personal information, so that a weighed design should be offered to limit the technical possibility of aggregation of information (for example only allowing searches in certain fields of information and not allowing full text searches). In fact, the Canadian Model Policy, contains specific recommendations as to what search functions should be made available to the public with regard to specific types of records and means of access. These recommendations included docket information, considered as essential to ensure a proper transparency of court proceedings.

⁷²⁸ *Ibidem*, at 10:

«4 Access
4.2 Fees
Fees should not impede access under this policy».

⁷²⁹ *Ivi*:

«4 Access
4.4 Format of Records
Members of the public are entitled to access court records in the format in which they are maintained».

⁷³⁰ *Ivi*:

«4 Access
4.3 Existence of a Case File
Members of the public are entitled to know that a case file exists, even when a case file is sealed or subject to a non-publication order».

Therefore, docket information shall be accessible on-site and, if available, remotely, being careful not to make personal data identifiers remotely accessible.⁷³¹ Simple search by docket number, names of parties and type of proceedings will suffice in most situations or for purposes closely linked with the rationale for open courts. The juridical treatment of remote access, the real specificity of the Canadian case, is nonetheless prudential. In the Model Policy, the principle rule is the right of on-site access,⁷³² coupled with access policies of specific courts which may determine a) that their records can be made available remotely; b) that persons who are granted extended access may access them; and/or that c) certain types of documents are available remotely.

The Model Policy itself acknowledges practical reasons why not to give a full, presumptive remote access to case files, and its intention to constitute a mere framework. Documents composing a case file (pleadings, indictments, exhibits, warrants and judgments) in fact can «include information such as personal data identifiers and other personally identifiable data, business proprietary information, details about financial situations and medical conditions of individuals, affidavits, exhibits, many of which are only partially relevant for the disposition of the case». Moreover, the pleadings of the parties «may also contain unsubstantiated and sometimes outrageous allegations, which may provide little assistance to the public's understanding of the judicial process or even be defamatory in nature». A specific analysis of the potential risks and the distortions of general, unrestricted remote access to individual and public rights and interests is offered in here, although in a context of great preference for transparency.

The last interesting element and potential comparative paradigm, is then to be found in the differentiation that the Model policy suggests in terms of categories of individuals asking for access. Rule 5.1 provides that «(A)ny member of the public may make a request for access to a portion of the court record that is otherwise restricted pursuant to the Model Policy». In this sense, it is suggested that the access policy of each court can be adaptable to the particular needs of certain members of the public and that it is foreseeable that certain categories of individuals (for instance academics, legal researchers and practitioners, or journalists) will ask for extended or comprehensive access. Therefore, tailored access agreements that are adapted are suggested in order

⁷³¹ *Ibidem*, at 12:

«4 Access

4.6.2 Docket

Information Members of the public shall have both on-site and, where available, remote access to docket information, provided that personal data identifiers are not made remotely accessible».

⁷³² *Ibidem*, at 13:

«4 Access

4.6.3 Case Files

Parties shall have both on-site and, where available, remote and registered access to their own case file. Members of the public shall only have on-site access to case files, unless otherwise provided in this access policy».

to accommodate different categories of users. In these contexts, there will be terms and conditions designed to minimize the heightened risks for privacy and security rights of individuals or the proper administration of justice, also in terms of rights and obligations of the user regarding registered access and applicable fees. Specific rules on remote access and downloading of files will also be particularly important. In this respect, the Model Policy also prescribes three criteria which shall be taken into consideration in deciding on the provision and the granting of extended access, and on its specific terms and conditions. The three criteria actually constitute a combination of three different tests: a) a causal-relationship test (in looking for the connection between purposes for which access is sought and the rationale for the constitutional right to open courts); b) a risk-analysis test (in analysing the potential detrimental impact on the rights of individuals and on the proper administration of justice, if the request is granted); and c) an availability-of-remedies test (in investigating the adequacy of existing legal or non-legal norms, and remedies for their breach, if improper use is made of the information contained in the court records to which access is granted). As a faithful implementation of the Model Policy, the Supreme Court of Canada adopted its own access to court records policy in February 2009.⁷³³

All these national paradigms have been considered by the first few commentators on the matter,⁷³⁴ and here again by an official Study commissioned by the European Parliament,⁷³⁵ as the pioneering and possible models for the juridical treatment of a rising, always more relevant problem in the structural organization of courts. While all of them enable a very broad access to court files (question of getting access to court files), the national European examples are peculiar for their direct legislative interventions and for the relevant questions they pose on the relationship between new regulations of judicial openness and classic instruments for public authorities' transparency. Moreover, they provide interesting elaborations on what kind of general or specific interests individuals should prove in order to have access to court documents and the type of counterbalancing interests, and the type of exemptions that can be prefigured. The Canadian rules go even further in two respects. They are the examples of an autonomous, soft law measure made by an independent federal judicial council after an early example of public open debate on the matter. Additionally, it is an important example of encompassing regulation of the new frontier of judicial openness, i.e. the availability of remote access to the public via the Internet and

⁷³³ Supreme Court of Canada: Access to Court Records: Policy for Access to Supreme Court of Canada Court Records, available at the website: <http://www.scc-csc.gc.ca/case-dossier/rec-doc/pol-eng.asp#s31> (accessed 26 August 2015).

⁷³⁴ A. Alemanno, O. Stefan, Openness at the Court of Justice of the European Union: Toppling a Taboo, *op. cit.*, at 117 *et seq.* in particular.

⁷³⁵ V. Naglič, National practices with regard to the accessibility of court documents. Study, *op cit.*.

technologies. In light of these important developments, it is interesting to have a look at how this debate - again, already officially started at the EU law level - is transposed in the special supranational context, also given that important policies have been developed in the “sister court” of the CJEU, the EFTA Court.⁷³⁶

V.3.3 Openness as Access to Court Documents: the Debate in European Union law

The transposition of the debate on institutional openness of judicial institutions occurred in the European Union context with dynamics that are comparable to the ones already seen in some national contexts. In this sense, we notice that if the Court did not properly *evolve* in institutional terms with regard to the traditional sense attached to the openness and transparency of deliberations, this happened in this second, more modern sense. First of all, there has been an important evolution in the EU in terms of the general attitude about the right of access to documents with a number of major institutional and legislative changes over the years. The typical enlargement of public sensitivity with regard to institutional openness also to the judicial sphere that has followed lately is coupled here again with scarce institutional and academic attention. However, there have been important developments (not always in the extensive direction) and an open debate on the European Court of Justice and its transparency which we will also investigate in the following pages.

In terms of general attitude towards the right of access to documents at the supranational level, it is important firstly to notice that the EU's predecessors, in the major institutional changes that have occurred over the years (the European Economic Community, the European Atomic Energy Community and the European Coal and Steel Community), definitely did not champion the ideas of administrative openness and transparency. On the contrary, they were essentially completely opaque in terms of information disclosure. Their «meetings were often held in secret and minutes were not published»; and public access to the relative documents held by the Communities «was not generally regulated by rules, but was a matter of wide, often arbitrary, discretion».⁷³⁷ The Maastricht Treaty represented the first major change and an important step

⁷³⁶ *Ibidem*, at 47. See in this respect also C. Baudenbacher, M.J. Clifton, Courts of Regional Economic and Political Integration Agreements, in C. Romano, K. Alter, Y. Shany (eds.), *The Oxford Handbook of International Adjudication*, Oxford University Press 2014, p. 250, at 256 and 258.

⁷³⁷ V. Naglič, National practices with regard to the accessibility of court documents. Study, *op cit.*, at 38.

towards openness. It notoriously included a Declaration on the Right of Access to Information which stated that «(T)he Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions».⁷³⁸ The Declaration was then soon after followed by the Commission and the Council's implementation, with the adoption of their Code of Conduct on public access to Commission and Council documents.⁷³⁹ In it, the general principle according to which «(t)he public will have the widest possible access to documents held by the Commission and the Council» was affirmed; in a similar vein, the European Parliament adopted its own Decision on public access,⁷⁴⁰ which provided that «(t)he public shall have the right of access to European Parliament documents pursuant to the conditions» specifically laid down. However, in terms of formal legal qualifications, it is relevant to note that neither the Declaration of 1992 nor the Code of Conduct (which was legally an internal regulation of administrative nature, not a proper binding EU legislation) explicitly conferred a legal right to access official information held by the EU institutions. The Court of Justice itself refused to read such a right in determining whether the Code was a challengeable act in front of itself.⁷⁴¹ Such recognition of a proper right, for any natural or legal person having its residence or registered office in a Member State, to have access to European Parliament, Council and Commission documents came years later with the fundamental Article 255 of the Amsterdam Treaty of 1998.⁷⁴² This time, its implementation arrived with a comprehensive Regulation on access to European Parliament and Council and Commission documents,⁷⁴³ which replaced the Code of

⁷³⁸ Annexed as Declaration 17 to the Final Act of the Treaty on European Union, signed in Maastricht on 7 February 1992 (OJ C 191, 29.7.1992).

⁷³⁹ 93/730/EC: Code of Conduct concerning public access to Council and Commission documents (OJ 1993 L 340, p. 41).

⁷⁴⁰ 97/632/EC, ECSC, Euratom: European Parliament Decision of 10 July 1997 on public access to European Parliament documents (OJ L 263, 25.9.1997, p. 27).

⁷⁴¹ See the Judgment of 30 April 1996, Netherlands / Council (C-58/94, ECR 1996 p. I-2169) ECLI:EU:C:1996:171. The Kingdom of Netherlands brought an action to partially annul the Code of Conduct on public access to Commission and Council documents mentioned above at footnote 739. The ECJ decided that the Code did not constitute an act having legal effects and therefore it did not qualify as challengeable act. The Court emphasised that the Code merely reflected the agreement reached between the Commission and the Council on the principles governing access to the documents of the two institutions, while inviting the institutions to implement those principles by means of specific regulations, thereby not confining any right to individuals.

⁷⁴² «Article 255

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.

3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents».

⁷⁴³ Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public

Conduct and the European Parliament rules on public access.

In the Lisbon Treaty, this provision of constitutional importance (now emphasized also by Article 42 of the Charter of Fundamental Rights of the European Union) became the previously discussed Article 15 TFEU. Not only has it been maintained, but its scope has been widened to reflect a concept of openness or transparency which is broader than mere public access to official documents. Coupled with Article 1 TEU («decisions are taken as openly as possible to the citizen»),⁷⁴⁴ it provides, as we said, that in order to promote good governance and to ensure the participation of civil society, not only the Union's institutions but also bodies, offices and agencies shall conduct their work as openly as possible - providing all the possible forms of active cooperation and communication between the institutions and the public typically entailing access to information. In this sense, the right of access to documents is very clearly linked to the principle of openness, which in turn requires transparency of institutions' actions to allow the exercise of the fundamental right of access to documents. Moreover, it is clear that the right to access documents is no longer confined to documents from political institutions such as the Parliament, the Council and the Commission, but aims generally to apply to all institutions, bodies and agencies.

In terms of secondary legislation, the Regulation 1049/2001 (which is currently under revision, and has been complemented by other legal standards in specific fields)⁷⁴⁵ had the purpose to put into effect the right of public access to documents and lay down general principles and restrictions to such access.⁷⁴⁶ In principle, the Regulation states that all institutions' documents shall be accessible to the public, reinforcing in its preamble the holistic idea that openness prompts citizens to closely engage in the decision-making process and gives the administration greater legitimacy by being more effective and accountable to the individuals in a democratic system.⁷⁴⁷

access to European Parliament, Council and Commission documents.

⁷⁴⁴ In addition, the recital 7 of the preamble to the TEU declares the EU ambition «to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out [...] the tasks entrusted to them». This idea is later confirmed by several articles of the TEU, especially in Articles 10 and 11 TEU.

⁷⁴⁵ Such as by the Directive 2003/4/EC of 28 January 2003 on public access to environmental information, repealing Council Directive 90/313/EEC; Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (data protection directive); Directive 2003/98/EC of 17 November 2003 on the re-use of public sector information.

⁷⁴⁶ Article 1 of the of the Regulation No 1049/2001, according to which «Article 1 Purpose The purpose of this Regulation is: (a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as 'the institutions') documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents; (b) to establish rules ensuring the easiest possible exercise of this right, and (c) to promote good administrative practice on access to documents», and recital 4 of the same Regulation, which reads: «(4) The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty».

⁷⁴⁷ Recital 2 of the Regulation 1049/2001: «(2) Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EUTreaty and in the Charter of

Openness contributes to strengthening the principles of democracy and respect for fundamental rights: a reading, after all, confirmed by the European Court of Justice case-law in the seminal *Turco* case for instance.⁷⁴⁸ Currently, Regulation 1049/2001 actually applies to the large part of EU institutions, either through an extension via separate legislative act or an unilateral adoption on a voluntary basis. In addition to the original institutions included, the Committee of the Regions, the European Economic and Social Committee, the European Central Bank, the European Investment Bank, the European Court of Auditors, Europol and Eurojust now all have rules that guarantee access to their documents which are identical or similar to the Regulation.

A notable exception in this evolution has always been represented by the EU Courts, which were not associated in this evolution, to the general provision of today's Article 15 TFEU notwithstanding. In this sense, the EU follows the typical phenomenology: the enlargement of public sensitivity with regard to institutional openness also to the judicial sphere is following only later in time, and actually in our current days. Also typically, the growing public sensitivity in this regard has been oddly coupled, here again, with scarce institutional and academic attention with regard to judicial institutions.⁷⁴⁹ As it has been noted,⁷⁵⁰ this is particularly remarkable in the EU context, where the law scholarship, on the opposite, as always been rather «Court-centered».⁷⁵¹ A sort of rationalization of the phenomenon has been interestingly offered, in the same vein,⁷⁵² by recalling the sarcastic words by J.H.H. Weiler, who depicted the legal actors of the European Union, custodians of the EU legal order, as a «conservative bunch»,⁷⁵³ recalcitrant to change; and the accusations of authors like Rasmussen, who often observed that the European Court of Justice has entered an era of «bewildering silence»,⁷⁵⁴ lacking a policy of openness with regards to its internal

Fundamental Rights of the European Union.»

⁷⁴⁸ See Judgment of 1 July 2008, *Sweden and Turco / Council* (C-39/05 P and C-52/05 P, ECR 2008 p. I-4723) ECLI:EU:C:2008:374. The Court rejected in here the arguments of the Council that the disclosure of an opinion of its legal service relating to a legislative proposal could lead to doubts as to the lawfulness of the legislative act concerned, with these clear words: «it is precisely openness in this regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole» (paragraph 59).

⁷⁴⁹ With some exceptions, notably offered by members of the Court of Justice: see F.G. Jacobs, *Recent and Ongoing Measures to Improve the Efficiency of the European Court of Justice*, in 29 *European Law Review*, 2004, p. 823; C. Timmermans, *The European Union's Judicial System*, in 41 *Common Market Law Review*, 2004, p. 393; K. Lenaerts, *The Rule of Law and the Coherence of the Judicial System of the European Union*, in 44 *Common Market Law Review*, 2007, p. 1625; A. Rosas, L. Armati, *EU Constitutional Law: An Introduction*, Hart 2012, p. 138 *et seq.*. Ultimately, for a comprehensive analysis, see A. Alemanno, O. Stefan, *Openness at the Court of Justice of the European Union: Toppling a taboo*, *op cit.*

⁷⁵⁰ A. Alemanno, O. Stefan, *Openness at the Court of Justice of the European Union: Toppling a taboo*, *op cit.*, at 100.

⁷⁵¹ J. Shaw, Introduction, in *Ead.*, G. More (eds.), *New Legal Dynamics of European Union*, Oxford University Press 1995, p. 1.

⁷⁵² A. Alemanno, O. Stefan, *Openness at the Court of Justice of the European Union: Toppling a taboo*, *op cit.*, at 100.

⁷⁵³ J.H.H. Weiler, *Epilogue: The Judicial Après Nice*, *op. cit.*, at p. 215.

⁷⁵⁴ See for instance H. Rasmussen, *Present and Future European Judicial Problems after Enlargement and the Post-2005*

functioning. Indeed, as openness and transparency progressively «became the modern buzzwords in debates on accountability and legitimacy of non-elected organizations», they also quickly became a «taboo subject» both within and outside the EU judiciary.⁷⁵⁵

In the literature, the studies focusing on transparency actually mainly looked at the way in which the Court helped to introduce the principle within the EU legal order and encouraged its application, but only with regard to the other institutions.⁷⁵⁶ As recently recognized,⁷⁵⁷ the rich and evergreen literature on the EU judicial system does not seem to have explored the application of openness and transparency to the CJEU's own activity (with few exceptions)⁷⁵⁸ by thus further consolidating the idea of a “taboo”. Still, with some really recent institutional reforms and some institutional and academic studies, the taboo was gradually toppled. This is not only coherent with comparative trends registered elsewhere, but is of particular importance within the realm of the EU.

We can surely say that CJEU is, in abstract terms, particularly exposed to the debate on the openness of its deliberations, not only in the general terms applicable to all courts that we already explained, but for the inherently dialogical, *nomophylactic* function that it is assigned to. For instance, through the preliminary ruling procedure, as it is well known, the Court is meant to assist national courts in the application of EU law. In this respect, it was pointed out that a policy of openness and communication would be simply natural in the “dialogical” context of the EU judicial federal-like architecture and might enhance the legitimacy and the authority of the Court vis-à-vis national courts.⁷⁵⁹ A smoother information flow between Luxembourg and national courts may serve not only to increase public knowledge about its judicial activities and to bolster the accountability and legitimacy of its outputs; it also would enhance mutual understanding and renders' compliance

Ideological Revolt, *op. cit.*, at 1687.

⁷⁵⁵ See in this sense A. Alemanno, O. Stefan, Openness at the Court of Justice of the European Union: Toppling a taboo, *op. cit.*, at 100-101. See also in this respect the broad reflections of the Authors of the Symposium – The Future of Judicial Transparency, in 53 Villanova Law Review, 2008.

⁷⁵⁶ See K. Lenaerts, In the Union We Trust: Trust - Enhancing Principles of Community Law, in 41 Common Market Law Review, 2004, p. 317, at 318-319. See also on the principle of transparency J. Lodge, Transparency and Democratic Legitimacy, in 32 Journal of Common Market Studies, 1994, p. 343; D. Curtin, Betwixt and Between: Democracy and Transparency in the Governance of the European Union, in J.A. Winter, D. Curtin, A.E. Kellerman, B. de Witte (eds.), Reforming the Treaty on European Union: The Legal Debate, Kluwer 1996, p. 95; S. Peers, From Maastricht to Laeken: The Political Agenda of Openness and Transparency in the EU, in V. Deckmyn (ed.), Increasing Transparency in the European Union, European Institute for Public Administration 2002, p. 7.

⁷⁵⁷ A. Alemanno, O. Stefan, Openness at the Court of Justice of the European Union: Toppling a taboo, *op. cit.*; V. Naglič, National practices with regard to the accessibility of court documents. Study, *op. cit.*

⁷⁵⁸ See H. Rasmussen, Present and Future European Judicial Problems after Enlargement and the Post-2005 Ideological Revolt, *op. cit.*; M. Lasser, Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy, *op. cit.*; E. Sharpston, Transparency and Clear Legal Language in the European Union: Ambiguous Legislative Texts, Laconic Pronouncements and the Credibility of the Judicial System, in 12 Cambridge Yearbook of European Legal Studies, 2009-2010, p. 409; A. Stone Sweet, The European Court of Justice, *op. cit.*, at 146.

⁷⁵⁹ M. Bobek, Of Feasibility and Silent Elephants: the Legitimacy of the Court of Justice through the Eyes of National Courts, in M. Adams, H. de Waele, J. Meeusen, G. Straetmans (eds.), Judging Europe's Judges: the Legitimacy of the Case Law of the European Court of Justice, *op. cit.*, at 200 and 217 *et seq.*

with EU case law more feasibly. If, as said, Article 15 TFEU imposes on all EU institutions the obligation «to ensure that (their) proceedings are transparent», and requires them to elaborate in their Rules of Procedure «specific provisions regarding access to documents, in accordance with the regulations» adopted by the European Parliament and the Council, an improved sensitivity has been raised on how the CJEU can guarantee such a principle of openness, in its various forms of active cooperation and communication between the EU institutions and the public typically entailing access to information.

The Court has consistently guaranteed the principles of transparency of judicial proceedings and publicity of trial vis-à-vis the parties to a dispute as also stemming from Article 6 of the European Convention of Human Rights; but, according to various commentators, it has failed to provide a similar level of “openness” beyond the parties involved in its judicial activities.⁷⁶⁰ This happened, in a rather typical way again, by emphasising the specificity of the judicial task with which the Court has been invested, in relation to the work of the executive and legislative powers, to which the openness principle is considered to essentially apply. A sort of nominalistic debate is open here. Article 15 TFEU expressly extends the application of this principle to the activities of the CJEU. According to its third and fourth Paragraphs TFEU, the Court is nonetheless bound by an obligation to provide access to documents only when exercising its administrative tasks. However, the general obligation to conduct its tasks as openly as possible, stated with the Lisbon Treaty in Article 15(1), still applies. Therefore, even though it is undisputed that the judicial activity of the Court – being by definition non-administrative – is exempted from the safeguards of Article 15(3), this activity does not escape all requirements imposed by the principle of openness. Indeed, by extending the principle of openness to the CJEU, the Lisbon Treaty and Article 15(1) seems to suggest that there exists an autonomous area of openness that should be guaranteed regardless of the nature, administrative or non-administrative, of the activity undertaken by the CJEU.⁷⁶¹ The result of such overlapping of general and specific norms is that the Court is therefore called to gradually define this space when – on the basis of Article 15(1) TFEU – it will be asked to determine the precise normative content of the principle of openness.

For a long time, no specific set of rules has been adopted on the openness and the transparency of the activity of the Court until the moment in which, with its Decision of December 11, 2012,⁷⁶² pursuant to Article 15(3) of the TFEU - which requires that all EU institutions elaborate

⁷⁶⁰ A. Alemanno, O. Stefan, Openness at the Court of Justice of the European Union: Toppling a taboo, *op cit.*, at 97.

⁷⁶¹ A. Alemanno, Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy, in 39 *European Law Review*, 2014, p. 72.

⁷⁶² See the Decision of the Court of Justice of the European Union of 11 December 2012 concerning public access to

in their Rules of Procedure «specific provisions regarding access to documents, in accordance with the regulations» adopted by the European Parliament and the Council - the CJEU has put rules in concerning public access to documents held in the exercise of its administrative functions. With this intervention, now the Court of Justice has autonomously adopted its formal fully-fledged regulation on the transparency of its activities at least where obliged, i.e. for its functions of administrative nature.

The Decision of 2012, in following the limitation provided in the Treaty and covering only the documents prepared in the exercise of the European Courts' administrative functions, does not discuss the precise parameters defining these, potentially leaving this clarification to case law or further interventions by the Court administration. Nevertheless, its approach substantially mirrors the solutions of the Regulation 1049/2001 in relation to the documents of the other EU institutions. The beneficiary of the right of access is any natural or legal person as long as he or she has a residence or registered office in a Member State (the right is not linked to citizenship). Discretionally, right of access can be granted even outside of these cases. The exceptions allowing the EU judicial bodies to reject a request are the same as in Regulation 1049 and include public interest, the privacy and integrity of the individual, commercial interests, court proceedings and legal advice as well as the purpose of inspections, investigations and audits.⁷⁶³ A form has been

documents held by the Court of Justice of the European Union in the exercise of its administrative functions (OJ C 38, 9.2.2013, p. 2-4).

⁷⁶³ Article 3 of the Decision of the Court of Justice of the European Union of 11 December 2012:

«Article 3 - Exceptions

1. The Court of Justice of the European Union shall refuse access to a document where disclosure would undermine the protection of:

a) public interest, as regards:

- public security,
- defence and military matters,
- international relations,
- the financial, monetary or economic policy of the European Union or a Member State;

b) the privacy and the integrity of the individual, in particular in accordance with European Union legislation regarding the protection of personal data.

2. The Court of Justice of the European Union shall refuse access to a document where disclosure would undermine the protection of:

- commercial interests of a natural or legal person, including intellectual property,
- court proceedings and legal advice,
- the purpose of inspections, investigations and audits.

3. Access to a document drawn up by the Court of Justice of the European Union for internal use or received by it, which relates to a matter on which the decision has not been taken by it, shall be refused if disclosure of the document would seriously undermine the decision-making process of the Court of Justice of the European Union. Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the Court of Justice of the European Union shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the decision-making process of the Court of Justice of the European Union.

4. The exceptions set out in paragraphs 2 and 3 shall not apply if there is an overriding public interest in disclosure of the document concerned.

5. If only parts of the requested document are covered by one or more of the exceptions set out in paragraphs 1, 2 and 3, the remaining parts of the document shall be disclosed.

made available online for the submission of the request. As per the explicit words of Article 4 (5) of the decision, the applicant is not obliged to state reasons for the application. The procedure for the requests and the eventual confirmatory applications in cases of denied access to documents is similar to what in Regulation 1049. Given a longer deadline to process the applications (one month, and not 15 days as for the Council, Commission, and Parliament), the Court has to inform the applicant of the result of its request and of its right to challenge the final decision.⁷⁶⁴ Here as well, the refusal of confirmatory applications can lead to judicial proceedings challenging such decision and/or to complaints to the European Ombudsman.⁷⁶⁵

Scholars interestingly noticed that such provision «might arguably give rise to difficult situations, with the Court acting as judge and defendant in the same case»; but it was also highlighted that, at the same time, the possibility to institute court proceedings against refusals to grant access should be interpreted «as streamlining the functional distinction existing between the CJEU as administrator and the same Court as a judicial body»,⁷⁶⁶ since the judges will actually simply assess the behaviour of administrative authorities of Luxembourg (such as the Director General whose service holds the document requested, the Head of Service and the Deputy Registrars) and certainly not their own actions.

The means of access are categorized by the Decision and essentially are the consultation *in loco*,⁷⁶⁷ the indication of the source of publication⁷⁶⁸ and the direct supply of the relative documents by the Court.⁷⁶⁹ But in this sense, it is remarkable that unlike Regulation 1049/2001 for the case of

6. The exceptions as laid down in paragraphs 1, 2 and 3 shall apply only for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests, the exceptions may, if necessary, continue to apply after this period.

7. The present article shall apply without prejudice to the provisions of Article 9».

⁷⁶⁴ Article 5 of the Decision of the Court of Justice of the European Union of 11 December 2012, on the «Processing of initial applications».

⁷⁶⁵ Article 7 of the Decision of the Court of Justice of the European Union of 11 December 2012, on the «Processing of confirmatory applications»: in particular, paragraph 2.

⁷⁶⁶ A. Alemanno, O. Stefan, Openness at the Court of Justice of the European Union: Toppling a taboo, *op cit.*, at 112-113.

⁷⁶⁷ Article 10(1) of the Decision of the Court of Justice of the European Union of 11 December 2012, on the «Means of access»:

«1. Documents shall be supplied in an existing version and format. The Court of Justice of the European Union shall not be required, by virtue of the present decision, to create a new document or gather information at the request of the applicant.

The copy supplied may be a paper copy or an electronic copy, having full regard to the applicant's preference in that respect.

If documents are voluminous or difficult to handle, the applicant may be invited to consult the documents on the spot.»

⁷⁶⁸ Article 10(2) of the Decision: «2. If a document has already been released by the Court of Justice of the European Union or by another institution concerned and is easily accessible, the Court of Justice may merely inform the applicant how to obtain it».

⁷⁶⁹ Article 11 of the Decision, on the «Charge for access»:

«1. A fee for producing and sending copies may be charged to the applicant.

other institutions, the Decision does not formally provide for the setting up of remote access in electronic form or through a register, and neither does it stipulate the obligation to draw annual reports on the cases where access was refused, in the vein of a modernization (elsewhere applied) through new technologies and of a sort of policy of transparency about transparency.

Not only for this last reason, the Court's Decision of 2012 on public access can be surely seen, from our perspective, as an interesting development in the internal organization of the institution, as a deliberate, autonomous initiative for a more accountable and ultimately authoritative relationship with users and stakeholders. Still, it has been subjected, by its few commentators,⁷⁷⁰ to considerable criticism. In a EU constitutional perspective, it has been generally seen as a welcome and timely regulatory development that can bring the Court a step closer towards compliance with the transparency requirements dictated in Article 15 TFEU and more broadly, by Article 1 TEU. In our perspective, it has been also recognized as a step of the Court in the direction of an internalization of modern comparative influences and trends registered in some Member States and elsewhere. But several doubts have been raised on both the theoretical and practical basis of the measure, so to say. Not only, in fact, given its novelty, there are still doubts on how the Decision «will be implemented in practice by the administrative apparatus of the Court».⁷⁷¹ But also, the Decision, which is based on the critical and criticized distinction between administrative and judicial tasks of the Court, has been considered as failing to clarify in a definitive way the line separating the two types of activities. Such *actio finium regundorum* between administrative and judicial tasks is certainly difficult to draw and blurs the normative content of the openness requirement applicable to the EU judicial body. As we saw, the Decision in certain aspects is set to strengthen and perhaps eventually institute a functional separation between the Court-administration and the Court-jurisdiction. Yet, one may wonder whether the development of such a functional separation may run against the competing and equally valuable objective of ensuring a smooth relationship between the Court-jurisdiction and those administrative services its judges depend upon while discharging their jurisdictional tasks. Equally important is the fact that such a distinction frustrates the broad requirement of openness of Article 1 TEU in only focusing on certain aspects and putting other judicial activities even more into the shadow.

2. Consultation on the spot and copies of less than 20 A4 pages shall as a general rule be free of charge».

⁷⁷⁰ See in particular A. Alemanno, O. Stefan, Openness at the Court of Justice of the European Union: Toppling a taboo, *op. cit.*, at 115 *et seq.*; V. Naglič, National practices with regard to the accessibility of court documents. Study, *op. cit.*, at 50 *et seq.*

⁷⁷¹ A. Alemanno, O. Stefan, Openness at the Court of Justice of the European Union: Toppling a taboo, *op. cit.*, at 115.

In the absence of case law and legislation on this matter, how to discern between the Courts' administrative and judicial tasks remains an open yet fundamental question to this day. A very recent and timely study⁷⁷² - to which we already referred to in several respects, also being one of the few commendable academic comments on the point - has critically proposed a tentative taxonomy of the distinction between administrative tasks (the "court administration"), subject to the general rules of transparency, and non-administrative tasks (the "court jurisdiction"), to which the transparency requirements do not apply. From this point of view, a second fundamental distinction is then proposed between the specific standard of *transparency* (ex Article 15 TFEU) that needs to be observed with regards to the fulfilment of administrative tasks and the general standard of *openness* (ex Article 1 EU) that applies to both the administrative side of the Court's activities as well as to its "judicial tasks". In this sense, it is suggested to consider the general, broad standard of *openness* as including public access to information, as well as the pro-active institutional duty to ensure that information about judicial activities is provided in an accessible and understandable way. Given the exception provided in Article 15 TFEU, it is nevertheless important to consider that there is a strong legal basis to legitimately limit transparency concerning certain proceedings or files. From this perspective, the following activities have been considered as falling with no doubt under the administrative (non-judicial) category: the organizational functioning of the Court as an institution, the management of its human resources as well as its infrastructures.⁷⁷³ But also in this respect, where both the principle of transparency and the principle of openness should be applied, certain flaws have been highlighted. For instance, when talking of organizational functioning in terms of administrative apparatus shared by the Luxembourg Courts, the process of appointing the Court of Justice Registrar was acknowledged as recently made more transparent by the new CJ Rules of Procedure, asking for instance for the publication of the vacancy notice.⁷⁷⁴ But at the same time, if the organisational chart of the Court's human resources gives brief information regarding the activities of each department, it provides little information on the persons in charge of the different activities, «for instance who are the directors and officials in each division».⁷⁷⁵ Even more critically, it is well known that the identities of important figures of officials and other servants, such as the *référéndaires* acting as clerks/legal consultants to the judges, are not disclosed and their appointment does not follow a common procedure being a prerogative of each member of the Court. The same can be said, more particularly, of the conditions under which officials and other servants of the Court of Justice render their services to the General Court and Civil Service Tribunal

⁷⁷² *Ibidem*, at 110.

⁷⁷³ *Ibidem*, at 108 *et seq.*.

⁷⁷⁴ Rules of Procedure of the CJ, OJ L 265/1, 2012, Article 18 at its par. 2. See on this recent change M.A. Gaudissart, *La refonte du règlement de procédure de la Cour de justice*, in 3 *Cahiers de droit européen*, 2012, p. 603.

⁷⁷⁵ A. Alemanno, O. Stefan, *Openness at the Court of Justice of the European Union: Toppling a taboo*, *op. cit.*, at 101.

(determined by the CJ President, on the one hand, and the GC and CST Presidents, on the other).⁷⁷⁶ In this sense, while, as we saw, some light was shed on the appointment of the judges of the Court, this does not hold true for other important roles. Since the appointments are essentially a task of an administrative nature pertaining to the management of human resources, one may expect these decisions to fall within the scope of Article 15 TFEU and its obligations. Yet there is no official list – unlike those available in virtually all other EU institutions, bodies and agencies – with the names of these officials, at least those whose activities affect third-parties, and their contact details.⁷⁷⁷ Another critical point raised in this respect is about the fact that, under the new Rules of Procedure of the CJEU, it is explicitly agreed that decisions concerning administrative issues are discussed and taken at the *general meeting* in which all court members take part;⁷⁷⁸ but at the same time, this is (according to the same Rules) the important weekly meeting in which the Court also discusses pending cases and in particular, adopts decisions upon the proposals contained in preliminary reports on the cases. Due to its «inherent judicial component»,⁷⁷⁹ the general meeting is not open to the public and the agenda and output thereof are never published. But precisely for this reason, it is critically discussed to what extent the whole current organizational structure of the Court of Justice in relation to the exercise of its administrative tasks - with the exception of the mentioned adopted rules governing the appointment of the Registrar - allows it to respond to the openness requirement as enshrined in Article 15 TFEU. Additionally, some activities of the Court are found to have a unclear statute, in the dichotomy of their administrative/judicial nature. If the key for defining judicial activities that escape the transparency requirement of Article 15 TFEU is the direct relationship with the fulfilment of the main judicial task to exercise judgment, such as hearing a case, deliberating, and issuing a judgment, there are serious doubts on how to consider those administrative activities that are so closely linked to the strictly judicial ones that can affect the way the court exercises its judgment. For instance, one can doubt whether part of the activity fulfilled by the Registry of the Court - such as collecting briefings of cases, communicating with the parties and potential interveners – actually creates an interface between parties, interveners and the Court, in the early stages of judicial proceedings; the same can be said for the way in which judgments are conveyed to the public, involving the tasks of translating and publishing judgments of the Court (in

⁷⁷⁶ See Article 52 of the Statute and Article 6 of Annex I to the Statute, and A. Alemanno, O. Stefan, *Openness at the Court of Justice of the European Union: Toppling a taboo*, *op. cit.*, at 101.

⁷⁷⁷ The official directory of the European Union - “EU Whoiswho” - does not report all officials employed by the CJEU, but merely some more important subjects, such as the members, their référendaires and the heads of services. As noted by A. Alemanno, O. Stefan, *Openness at the Court of Justice of the European Union: Toppling a taboo*, *op. cit.*, at 101, the EFTA Court lists all the names of its officials on its website: <http://www.eftacourt.int/the-court/members-staff/judges-and-staff/> (accessed 27 May 2015).

⁷⁷⁸ Article 25 of the Rules of Procedure of the CJ.

⁷⁷⁹ A. Alemanno, O. Stefan, *Openness at the Court of Justice of the European Union: Toppling a taboo*, *op. cit.*, at 111.

the charge of the Registrar and the Directorate General for Translation) or communicating the activity of the court to the outside world through press releases, visits, or exchanges with foreign courts. All these are activities of administrative nature but intrinsically linked to judicial tasks. Even more doubts could be raised about those activities directly performed by members of the Court: for instance the assignment of cases to certain Judges Rapporteur by the President, or the subsequent assignment, upon a proposal of the Judge Rapporteur herself, to a particular formation of the Court in its system of Chambers of different compositions (again, in the secret weekly general meeting); or, merely, an authorisation request introduced to the weekly general meeting by a Member of the Court to engage in an extra-judicial activity (e.g. teaching, public speaking, editorial meeting, etc).⁷⁸⁰

When dealing with activities and documents that clearly belong to the process - being a direct expression of a court's judicial activity - the principle of access to documents shall not be applied, but there remains for the Court the duty to act «as openly as possible», as any other EU institution. Thus, similar to all other EU institutions, the EU Courts have to make sure to exercise all their activities in an open fashion and also establish an active policy of reaching out and informing individuals of their work. Second, since the essence of the Courts' activities consists in handling proceedings and their related documents, the non-administrative category, although residual, is clearly more significant in size and consists of activities that may be qualified as judicial as they relate to Court proceedings.

But – while taking any exception based on the specificity of judicial dynamics - is it possible to say that the CJEU is faithful to this legal (constitutional?) obligation of openness? In assessing the openness of the strictly judicial activity of the Court, the views expressed in the literature with regards to the nature and degree of openness of the judicial activity of the EU Courts are mixed. On the one hand, Authors like Rasmussen warned that embracing a new policy of openness has been paradoxical since the beginning, since the activities of the Court are inherently non-transparent; but in critically arguing against such status quo, highlighted several critical points we also focus on in different parts of this dissertation. These include the procedure of appointing judges traditionally carried out behind closed doors, the lack of dissenting opinions and the potentially difficult cooperation with national courts due to increasing backlogs of cases (while we touched on all the previous points, we will also focus on the latter in the next chapter).⁷⁸¹ These problems have in part been treated recently, by changing, as we saw, the judges' appointment

⁷⁸⁰ *Ibidem*, at 115.

⁷⁸¹ H. Rasmussen, Present and Future European Judicial Problems after Enlargement and the Post-2005 Ideological Revolt, *op. cit.*, at 1678 *et seq.*.

procedure as well as by trying to reduce, as we will see, the time of processing preliminary references. Other Authors like Lasser discussed the problem by focusing from a different perspective, namely the judicial reasoning of the Court of Justice, intended as the language it speaks (and we will discuss this as the last chapter of our dissertation). In this sense, the judgment is much more nuanced, especially when supported by a comparative analysis.⁷⁸² We already touched the point of the arguments traditionally built on the absence of dissenting opinions, but on the presence at the same time of the peculiar role of the Advocates' opinions, also in terms of how such opinions can constitute a valuable bridge between the judicial deliberations of the Court and the external public, thus contributing not only to the institutional legitimacy of the Court but also to the substantive and authoritative legitimacy of a particular decision in the eyes of the public, in the mentioned form of social accountability.

But by focusing on our specific point of the institutional side of openness, we cannot but start from the logic premise that in order to be able to assess whether the legal reasoning of the Court is perspicuous or obscure, «one needs first and foremost to have access to the material that would enable such assessment».⁷⁸³ It is in this respect that the real growing public sensitivity to judicial openness can be traced at the EU level. Recently, following a public consultation, several legal practitioners complained to the Committee on Legal Affairs of the European Parliament that «it is often impossible to follow the process by which EU case law is made because documents of the Court of Justice of the European Union are not accessible».⁷⁸⁴ Their concerns actually prompted the study from the Citizen's Rights and Constitutional Affairs Department of the European Parliament on the national practices with regard to the accessibility of court documents we mentioned here in several respects. What are the fallacies still denounced by scholars and practitioners, in the judicial area of activities of the Court, also after the formalization of the openness principle in the Treaties and the 2012 Decision? In talking about the initial phase of the procedure before the EU Courts, it is argued⁷⁸⁵ that EU Courts should make clearer information concerning the existence of a case available and that, in principle, access to the parties' submissions should be granted to third party applicants. For instance, in terms of the access to information on the very existence of a case, the Official Journal of the European Union publishes a notice soon after the registration disclosing its date, the names of the parties, the subject-matter of the proceedings, the form of order sought by the applicant, and a summary of the pleas in law and of the main

⁷⁸² See M. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy*, *op. cit.*, chapter ten in particular.

⁷⁸³ A. Alemanno, O. Stefan, *Openness at the Court of Justice of the European Union: Toppling a taboo*, *op. cit.*, at 117.

⁷⁸⁴ V. Naglič, *National practices with regard to the accessibility of court documents. Study*, *op. cit.*, at 7.

⁷⁸⁵ A. Alemanno, O. Stefan, *Openness at the Court of Justice of the European Union: Toppling a taboo*, *op. cit.*, at 119 *et seq.*

supporting arguments. In the case of the preliminary ruling procedure, the notice also contains the identity of the referring court and of the parties in the main proceedings, as well as the questions asked.⁷⁸⁶ This publication represents the only information made available to the general public about pending cases, while for instance the EFTA Court publishes the case details on its website. Therefore, scholars applauded the choice of the final version of the new rules of procedure of the Court to discard the initial proposal of publishing «only when appropriate» the summary of the pleas in law and the supporting arguments.⁷⁸⁷ But, in a critical vein, when talking of references for preliminary rulings, problems were found in the practice of publishing the original requests from national courts. The original version of the preliminary reference is communicated by the Court to all Member States accompanied by a translation into the official language of the State to which it is addressed, also to make it possible for them to intervene: but these documents are never disclosed to the public.⁷⁸⁸ Moreover, where appropriate, on account of the length of the request, such translation «shall be replaced by the translation into the official language of the State to which it is addressed of a summary of that request, which will serve as a basis for the position to be adopted by that State»:⁷⁸⁹ a practice established in 2005, under the old Article 104 (1) of the Rules of Procedure, when - in the aftermath of the second-to-last collective accession - the EU moved from 11 to 20 official languages. A summary may also be established whereas a request for a preliminary ruling is longer than 20 pages, so that now a considerable part of the preliminary references is subject to summary. In this sense, while it is clear that these practices are based on the respect the Member States' autonomy in determining how their jurisdictions may co-operate with the CJEU in the European federal judicial structure, and they are decisive in order to enable the Court to treat the case within a reasonable period of time. Nonetheless, they may be problematic in several respects. A good flow of information between the CJEU and the national courts would require much more than providing the Member States with the original request for preliminary ruling or its summarized version. And indeed, as noted by scholars,⁷⁹⁰ national courts could benefit from having access to the original order requesting the preliminary ruling as well as the final decision of national courts following the CJEU judgment. This is also true in the case of any observer who would like to know more about the Court's decisions based on specific substantial aspects, but also on certain relevant procedural ones, for instance the declaration of inadmissibility of national requests. Scholars write that these «transparency deficiencies are to a certain extent palliated by other bodies than the

⁷⁸⁶ Article 21 (4) of CJ Rules of Procedure and Article 24 (6) of the GC Rules of Procedure.

⁷⁸⁷ Article 21 (4) of the Draft CJ Rules of Procedure, 25 May 2011.

⁷⁸⁸ A. Alemanno, O. Stefan, Openness at the Court of Justice of the European Union: Toppling a taboo, *op. cit.*, at 119.

⁷⁸⁹ Article 98 of the CJ Rules of Procedure.

⁷⁹⁰ M. Bobek, Of Feasibility and Silent Elephants: the Legitimacy of the Court of Justice through the Eyes of National Courts, *op. cit.*, at 219-220.

CJEU»,⁷⁹¹ making reference to the practice of some Member States' courts to publish their own compilations of preliminary references from various Member States translated into their own language,⁷⁹² or the practice of certain judicial networks or even of private companies to create databases sharing this type of case law.⁷⁹³ But in this sense, we cannot but notice that such differentiation in the national practices of different Member States can only lead to further discrimination for the possibility of claimants, and ultimately in the uniform application of European Union law. In fact, the CJEU established, through its Research and Documentation Service, Dec.nat, a first tentative summary of the case-law of the courts and tribunals of the Member States concerning EU law.⁷⁹⁴

When talking of courts' submissions, procedural documents and supporting items filed in the EU Courts by the parties are not published but only entered in the Court's physical register.⁷⁹⁵ Under the Rules of Procedure of EU Courts, third parties are free to consult this register and may obtain copies or extracts for a fee: but interestingly, scholars have highlighted how different specific rules are actually posed for the access to entries.⁷⁹⁶ At the Court of Justice, simply «anyone» may consult the register;⁷⁹⁷ at the General Court, only third individuals «having an interest» in the consultation can apply;⁷⁹⁸ in the case of the Civil Service Tribunal, «a duly substantiated interest» is requested.⁷⁹⁹ Again, if these differences are understandable and can be placed in the scale from the broad nomophylactic function of the CJ, where legal interpretation has the central role, to the specific, specialised and private nature of the CST, they are nonetheless sometimes considered incoherent and disproportionate, «as protecting private interests in cases might be done in a less restrictive manner by the Courts themselves, when classifying certain information».⁸⁰⁰

Once a case is registered, the relative procedural documents, decisions taken, minutes and reports of hearings, notices and other documents of correspondence,⁸⁰¹ are kept in the case file, to

⁷⁹¹ A. Alemanno, O. Stefan, Openness at the Court of Justice of the European Union: Toppling a taboo, *op. cit.*, at 121.

⁷⁹² This is the case, for instance, of the Netherlands, the Czech Republic, Poland, Romania and Portugal (in this last case, the Portuguese Supremo Tribunal de Justiça, at its website <http://www.stj.pt/jurisprudencia/tjue>, accessed 26 August 2015, only lists the questions referred, and it does not offer translations of the whole preliminary reference).

⁷⁹³ See for instance JuriFast, a data base set by the Association of Councils of State and the Supreme Administrative Jurisdictions, available at the website http://www.juradmin.eu/fr/jurisprudence/jurifast_fr.html (accessed 26 August 2015); or CASELEX, a private website available at <http://www.caselex.com> (accessed 26 August 2015).

⁷⁹⁴ See the Dec.nat database, available at the website http://www.juradmin.eu/en/jurisprudence/jurisprudence_en.lasso (accessed 26 August 2015).

⁷⁹⁵ Article 21 (1) of the CJ Rules of Procedure, Article 24 (1) of the GC Rules of Procedure, and Article 20 (1) of the CST Rules of Procedure.

⁷⁹⁶ A. Alemanno, O. Stefan, Openness at the Court of Justice of the European Union: Toppling a taboo, *op. cit.*, at 121 *et seq.*

⁷⁹⁷ Article 22 (1) of the CJ Rules of Procedure.

⁷⁹⁸ Article 24 (5) of the GC Rules of Procedure.

⁷⁹⁹ Article 24 (5) of the CST Rules of Procedure.

⁸⁰⁰ A. Alemanno, O. Stefan, Openness at the Court of Justice of the European Union: Toppling a taboo, *op. cit.*, at 122.

⁸⁰¹ Article 2 of the Instructions to the CJ Registrar, Article 5 (1) of the Instructions to the GC Registrar; Article 6 (1) of

which only the parties and the formal interveners can access. The situation here is different, especially for public access, since third parties do not enjoy a right of access to all these documents under the current legislative framework and in particular, to the procedural documents that the parties filed with the registries, even when the case is closed. This is surely coherent with their non-administrative nature and with the exemption of Article 15 (3) TFEU; but it has been discussed whether, given the possibility of third-parties to directly ask the parties of the proceeding to have access to the documents relevant to a dispute, this could be translated into an obligation for the EU institutions given the principle of free access to EU documents provided for in Regulation 1049/2001. However, the same Regulation recognizes that the refusal to grant access to institutional pleadings is justified if such access would undermine the protection of court proceedings, unless there is an overriding public interest in the disclosure.⁸⁰² An exemption that was famously discussed, also in comparative terms, in the *API* cases in front of the General Court⁸⁰³ and the Court of Justice some years ago,⁸⁰⁴ where in this respect, AG Maduro also noted that the «tendency seems to be that the more remote the judicial body, the greater its concern with the transparency of its judicial proceedings».⁸⁰⁵ Important elaboration was also devoted to the concern relating to public pressure in the context of access to legal opinions. As a result of CJ's judgment in *API*, EU institutions do not have an obligation to examine each request on a case-by-case basis before denying access to their pleadings in cases that are not yet closed, even if the hearings have already taken place. On the contrary, this presumption perishes once a judgment has been issued in a case. While these documents are still protected under Article 4(2) of Regulation 1049/2001, the institutions concerned are required to undertake a case-by-case analysis for each disclosure request. *API* epitomizes the difficulties faced by third parties when trying to access documents pertaining to the written phase of Court proceedings, difficulties which are nonetheless understandable - particularly when thinking to the otherwise impossibility of holding proceedings *in camera*, to the principle of equality of arms of the institutions (put in jeopardy in case of obligation of immediate publicness of institutions' files), and to the external pressure on the proceedings and the judicial body. Yet comparative research has here again highlighted that in other international and domestic experiences such as the ECHR pursuant of Article 40(2) of the Convention or the US federal judiciary, public access to files in both pending and closed cases is allowed in principle.⁸⁰⁶ With regards to closed cases, after the

the Instructions to the CST Registrar.

⁸⁰² Article 4 (2) of the Regulation 1049/2001.

⁸⁰³ Judgment of 12 September 2007, *API / Commission* (T-36/04, ECR 2007 p. II-3201) ECLI:EU:T:2007:258.

⁸⁰⁴ Judgment of 21 September 2010, *Sweden and others / API and Commission* (C-514/07 P, C-528/07 P and C-532/07 P, ECR 2010 p. I-8533) ECLI:EU:C:2010:541.

⁸⁰⁵ See at the paragraph 26 of AG Maduro's Opinion in the case mentioned above.

⁸⁰⁶ A. Alemanno, O. Stefan, *Openness at the Court of Justice of the European Union: Toppling a taboo*, *op. cit.*, at 124.

clarification of *API* the access to the file is seemingly easier. However, it still depends on the existence of a “legitimate interest” to be proved either to EU Courts or on the will of the parties to a case and then actual access can be frustrated since the documents are drawn up in the language of the case and generally not translated into other EU official languages.⁸⁰⁷ Given our comparative paradigms of the previous pages, we see the challenges for the future of the Court for complying with the spirit of the «as openly as possible» mandate: *rebus sic stantibus*, unlike other contexts, free access to case files is certainly not the rule, but it could be, giving individuals in ordinary situations the right of free access to a “public” part of the Court records (containing unclassified case files) and simply leaving the possibility for the Court to classify certain files if secrecy needs to be kept (for example, for the cases held *in camera*).⁸⁰⁸ This would lead to a better fulfilment of the duty of defence for practitioners but also to a better knowledge and comprehension of European case law by judges and academics. In this sense, this clearly involves the remote access dimension as in the Canadian example: in fact, from a logistical point of view, the European Parliament study links this point to the idea of a development of the e-Curia application, which already allows the exchange of documents between the parties and the Court.⁸⁰⁹

The technological remote access system of the Court is considered to already be efficient in the access to works of the Court, i.e. in giving transparency to its oral hearings. The publicity of oral hearings is guaranteed through the website of the Court, as expressly stated by the Statute and in accordance with Article 47 of the Charter of Fundamental Rights (CFR) and it includes the public knowledge of the judicial calendar and the dates of forthcoming hearings. This is commendable and coherent with similar, even more developed initiatives undertaken by international judicial bodies like the ECHR, which has made webcasts available online since 2007,⁸¹⁰ or the EFTA court, which publishes all the links to the available recordings of various judgments and press statements on its website. Of course, some restrictions are justifiable in those cases heard *in camera*.⁸¹¹

On the other hand, considerable criticism has been pointed out regarding the openness of the Court in relation to another specific aspect of its oral phase. Historically, what has also been called «throughput transparency»⁸¹² has been ensured in Luxembourg by the availability of an official Report for the Hearing, a formal document prepared by the Judge Rapporteur of the case

⁸⁰⁷ See Article 38(1), CJ Rules of Procedure; Article 35(3), GC Rules of Procedure.

⁸⁰⁸ A. Alemanno, O. Stefan, Openness at the Court of Justice of the European Union: Toppling a taboo, *op. cit.*, at 125.

⁸⁰⁹ V. Naglič, National practices with regard to the accessibility of court documents. Study, *op. cit.*, at 56.

⁸¹⁰ See in this respect the reflections of Justice Hedigan, The European Court of Human Rights: Yesterday, Today and Tomorrow, in 12 German Law Journal, 2011, p. 1716, at 1727.

⁸¹¹ Article 31 of the Statute; Article 79 Rules of Procedure of the CJ, Article 57 Rules of Procedure of the GC; Article 51 Rules of Procedure of the CST.

⁸¹² A. Alemanno, O. Stefan, Openness at the Court of Justice of the European Union: Toppling a taboo, *op. cit.*, at 127 *et seq.*.

summarizing the various arguments of the parties.⁸¹³ This was considered as the higher point of judicial transparency reached by the European Court of Justice, even before the topic became subject of real public discussion and more or less stringent legal obligations. After all, in several national legal orders this practice, important for both practitioners and doctrinal observers, is not yet established. Such a report used to be circulated to the parties before the hearing and made accessible on the day of the hearing to all the parties who attended *in loco*. Access was only possible upon request and in the language of the case. Nonetheless, such a policy of systematic publication of an official document with the advanced arguments during the course of action of the procedure was a proto-typical and tangible example of what the principle of openness in judicial activities could mean.⁸¹⁴ However, the main reason traditionally attached to the publication of the Report was more related to the idea of offering parties of controversy the possibility to verify whether the judges had correctly understood their reasoning (given that CJEU judges generally read a translation, and not the original submission), and not so centrally the idea of giving the general public a means to apprehend the implications of a pending case. Therefore, given the significant amount of implied resources required to draft and translate this document, and the criticism raised in the years about its real “added value”,⁸¹⁵ the new Rules of procedure for the Court abandoned the preparation of the Report. Notably, this document is still produced by the General Court of the EU - and in that context, it is now even accessible through the Press and Information Service - and by the EFTA Court. In fact, its disappearance from the Court of Justice has been criticized,⁸¹⁶ especially given the new mandate of Articles 1 TEU and 15 TFEU: its abandonment would disagree with the basic principles thereby reaffirmed by the Treaty of Lisbon.

The last important aspect discussed about the openness of the CJEU is in relation to the possibility of access to the judgments, orders and opinions of the Courts, once the proceedings are exhausted. First, European Courts' definitive outputs are formally notified to the parties of the disputes, in coherence with their full rights to fair trial. Moreover, third parties under the new Article 22 (3) of the CJ Rules of Procedure have a right to obtain certified copies of judgments and orders. But also in terms of wide distribution to the public, there is an intensive policy of publication which was formerly done in the papery European Court Reports, recently abandoned,

⁸¹³ See Article 20, sub-paragraph 4 of the Statute.

⁸¹⁴ A. Alemanno, O. Stefan, Openness at the Court of Justice of the European Union: Toppling a taboo, *op. cit.*, at 130.

⁸¹⁵ Article 29 of the old Rules of Procedure of CJ. See A. Alemanno, O. Stefan, Openness at the Court of Justice of the European Union: Toppling a taboo, *op. cit.*, at 130 *et seq.*, for further reflections.

⁸¹⁶ See in this sense the practical remarks by M. Patchett-Joyce, Barrister Outer Temple Chambers, London, in his Hearing on the Reform of the Court of Justice of the European Union before the Committee on Legal Affairs of the European Parliament, available at the website <http://www.europarl.europa.eu/document/activities/cont/201305/20130521ATT66428/20130521ATT66428EN.pdf> (accessed 26 August 2015), at p. 4 in particular.

and now on the Court website, CURIA, ensuring access free of charge. The website, through the new improved search engine of the Court, InfoCuria,⁸¹⁷ gives the possibility to undertake research in the case-law of the European Courts, and had a strong impact in the transparency of output, when confronted with the previous fragmented versions of Eur-lex (for the judgments, orders and opinions issued before 1997) and Curia (for the judgments, orders and opinions issued after 1997). Scholars have highlighted how much the attention to this aspect of openness for the CJEU is comparable to jurisdictions of common law countries.⁸¹⁸ In fact, the requirement to publish judicial precedents varies across jurisdictions and it is considered as intrinsically related to the local legal culture, and in particular to the binding nature of them in a certain legal order. If precedents not only constitute a source of *cognition* but a direct source of *production* of law, their disclosure become closely linked to basic legal certainty requirements. In fact, in common law countries, based on systems of precedent, the policy of publication of judgments dates back to the thirteenth century,⁸¹⁹ while in civil law orders, similar practices were introduced much later, probably in France only since the seventeenth century.⁸²⁰ History and comparative insight in this sense confirm what empirical studies have also taught us about the EU legal order: precedent plays a decisive role in EU law and the impact of judicial decisions often transcends the underlying controversy.⁸²¹

The real problem and the flaw are with respect to the linguistic aspect. The CURIA webpage ensures free access and the authenticity of the text of the decisions published in the language of the procedure. But if most of the judgments should be in principle translated in all official languages, while giving priority to the language of the case,⁸²² many cases are actually often not translated in languages other than French, the internal working language of the Court,⁸²³ considerably restricting access for those who do not speak this language. This is due to the high number of cases treated in Luxembourg and that require translation; backlogs and delays, also between the publication of the French and English versions of the orders and judgments, have been often registered,⁸²⁴ so that after

⁸¹⁷ Available at the website <http://curia.europa.eu/juris/recherche.jsf> (accessed 26 August 2015).

⁸¹⁸ See the consonant remarks by A. Alemanno, O. Stefan, Openness at the Court of Justice of the European Union: Toppling a taboo, *op. cit.*, at 135, and T. Neumann, B. Simma, Transparency in International Adjudication, in A. Bianchi, A. Peters (eds) *Transparency in International Law*, Cambridge University Press 2013, p. 436.

⁸¹⁹ See on this, *inter alia*, T. Sauvel, Histoire du jugement motivé, in 61 *Revue du droit public*, 1955, p. 5; A.P. Le Sueur, Legal Duties to Give Reasons, in 52 *Current Legal Problems*, 1999, p. 150.

⁸²⁰ See P. Godding, Jurisprudence et motivation des sentence, du moyen âge à la fin du 18e siècle, in C. Perelman, P. Foriers (eds), *La motivation des décisions de justice*, Bruylant 1978, p. 37; J. P. Dawson, *The Oracles of the Law*, Greenwood Press, 1968, p. 305.

⁸²¹ See on this specific aspect M. Shapiro, A. Stone Sweet, *On Law, Politics and Judicialization*, Oxford University Press 2002, p. 112 *et seq.*

⁸²² See on this the remarks by K. McAuliffe, Language And Law In The European Union: The Multilingual Jurisprudence Of The Ecj, in L.M. Solan, P.M. Tiersma (eds.), *The Oxford Handbook of Language and Law*, Oxford University Press 2012, p. 200, at 209 *et seq.*

⁸²³ See *ibidem*, at 212 *et seq.*, and M.A. Gaudissart, Le regime et la pratique linguistiques de la Cour de Justice, in D. Hanf, K. Malacek, E. Muir (eds.) *Langues et construction européenne*, PIE Peter Lang 2007, p. 137.

⁸²⁴ D. Edward, How the Court of Justice Works, *op. cit.*, at 548-549.

the 2004 EU enlargement, a policy of selective publication in the Courts' reports was decided.⁸²⁵ At the Court of Justice, specifically, judgments (other than in preliminary ruling proceedings) delivered by Chambers of three judges, or delivered by Chambers of five judges ruling without an opinion from the Advocate General, as well as Court orders are exempt from publication, unless otherwise decided by the relevant Chamber;⁸²⁶ similar rules are also present at the General Court. These formally unpublished acts are accessible on the CURIA website always only in the language of the case and the language of deliberation, in this sense compounding the peculiar problem of the Court with its multilingual regime and relative burdens and consequences.

V.4 Dimensions of Openness and the Authority of the Court of Justice

From the multi-dimensional analysis conducted throughout this chapter, we can draw important conclusions, here again, on the ability of the Court of Justice to evolve from an institutional point of view and strengthen its own authority accordingly.

In fact, we saw that an initial traditional way to intend, and realize, the principle of openness of judicial deliberations is by looking at the admissibility (or non-admissibility) of the practice of separate/dissenting opinions by judges. According to a certain pre-comprehension of the topic, an open court, by allowing judges to freely express their view, would enhance its own image of deliberative institution and therefore its authority. But a more traditional and realist reflection suggests that, actually, the fictitious collegiality invoked by not allowing the practice is primarily aimed at strengthening the authority of judicial institutions. In this way, courts always seem to speak with one voice - as authoritative mouthpieces of the only possible interpretation of the law, without contemplating any competing views. From a historical point of view, we saw that 1) the design of the European Court of Justice, since the times of the ECSC, adhered to the model of collegiality absolutely prevalent in its original Member States, and that 2) such a model was explicitly aimed at protecting the “external” independence of the member judges and the credibility of the institution, already in times in which the composition of the Court was yet to be clarified. In diachronic terms, we also noticed that 1) the original prevalence of collegial judicial systems among the Member States is no more true, since a majority of European systems now have separate

⁸²⁵ On this, specifically, M. Bobek, *The Binding Force of Babel: The Enforcement of EC Law Unpublished in the Languages of the New Member States*, in 9 *Cambridge Yearbook of European Legal Studies*, 2006-2007, p. 43.

⁸²⁶ See the relevant rules under the «Basis for publication» available at the website <http://curia.europa.eu/en/content/juris/contenu.htm#principes> (accessed 26 August 2015).

opinions, and that 2) important doctrinal proposals for the adoption of dissenting at the CJEU's level flourished, often declined in terms of maturity reached in the EU legal order for such a change. Nonetheless, 3) it still seems to be the case that the need for protection of the authority of the CJEU in a multilevel, dialogical judicial system, in which a clear single voice of interpretation of EU law is desirable, is the strongest reason against a positive evolution in this respect, and 4) the critical, tralatitious mandate system of the CJEU's judges - renewable with a strong discretion of the Member States' governments - also prevents a change in the direction of a complete transparency over the court's deliberation.

However, in terms of openness and transparency, we saw how the CJEU has been recently able to evolve and change in another dimension, by internalizing a certain comparative influence also epitomized by some Member States. Though not positively evolved in the general sense of a full openness of its deliberation, the Court of Justice was invested by the new trend of openness intended as access by thirds to court documents. We analysed how this typically happened through the expansion of this specific part of the transparency debate from the realm of political bodies to judicial ones. We also mentioned some of the shortcomings denounced by the scholars in the Court's administration. Still, it is evident that by adopting this discipline - by its own autonomous rulemaking, i.e. the mentioned Decision of December 11, 2012 - the European Court made important steps towards a progressive adherence with the “constitutional” principles of Articles 1 TEU and 15 TFEU, and with a modern idea of institutional governance aimed at fostering the perceived authority of the EU bodies. This can be conceptualized, as we said, as *soft accountability*: a dimension of procedural transparency and new relationship between institutions and “users”, according to which the Court, in becoming open up to the public and by creating the possibilities of a dialogue with agents and social parts, becomes more *socially* - one could even say *politically* - legitimated.

Docket Control at the Court of Justice

VI. Docket Control at the Court of Justice

1. The European Court of Justice and its Docket
2. Docket control as the Use of *Certiorari* and Procedural “Passive Virtues”
3. The Possibility of Adopting Other “Passive Virtues” in Luxembourg
4. Docket Control as Result of Substantive Interpretative Choices, Delegation and Efficiency in the Employment of Resources
5. Preliminary Reference Procedure, *Unitas, Diversitas*
6. Looking for *Neutral* Institutional Solutions
7. The evolution of Docket Control as a Form of Improvement of the Court's Authority

We mentioned in several respects throughout the dissertation the problem of the burden of cases that weighs on the Court of Justice's docket as an important aspect of its institutional structure and organization, collaterally related to other institutional problems of the body. This is another often neglected topic, at least in terms of academic attention. Still, it surely deserves an autonomous analysis for some coessential reasons.

The first one, to which we already hinted at, is that everyone who studies EU law is used to hearing about a European Court of Justice that is a «victim of its own success»,⁸²⁷ in this sense, making reference to the mass of cases that flow before the court; but a sort of general academic unconditional reflex is to study judicial bodies more through the lenses of grand theories of adjudication and talk about what they should do and how they should do it, rather than focusing on the equally important question of how many things they do and how they can do them better - regardless of what has been attributed to them. As we suggested in the previous chapter in talking about the practical possibility of fully open and transparent deliberations (in what is simply one of many possible examples), this *quantitative* in addition to *qualitative* study of judicial review is particularly relevant to understanding the reality of the Luxembourg Court. In the success of the inflow of cases and the practical problem of dealing with them effectively, we see the problem of

⁸²⁷ The first Author to use the phrase in a scientific article seems to be the already mentioned (footnote 133 above) T. Koopmans, *La procédure préjudicielle - victime de son succès?*, *op. cit.*

the authority of the Court of Justice very well symbolized vis-à-vis its interlocutors in its most concrete application.

The second reason of concern for the topic is that the Court has known an important institutional evolution. It has also undergone, as in the other case studies we are investigating, the influence of its Member States' practices and of other external comparative paradigms. In particular, as we will see, this happened in the problem of conceptualizing the idea of docket control - which had become a necessity at a certain point - and in understanding the best solutions to tackle it, given also the specificities of the interface with different cultures and attitudes in the different national legal systems.

For docket control, we generally refer to the basic institutional notion (and self-notion) that courts can actually decide, for capacity reasons, only a certain, limited fraction of issues generated in a legal system; and they are called to do so in a reasonable limit of time in order to offer an acceptable level of judicial protection to their users. The consequent institutional need for every court is to settle standards, doctrines and precedents, in the form of substantive choices in order to control the flow of litigation they receive in addition to the complementary need to isolate – through different expedients – among the cases and conflicts they receive, those which are to be dismissed as non-litigable from those which are admitted and dealt with a full judicial opinion on their merits. In general, they need forms of control over the human and timing resources that they can spend in deciding cases.

In this, we can easily see a '*quantitative*' dimension of judicial review that can be juxtaposed to the somewhat typical '*qualitative*' analysis of the work of courts. When we read that the dominant approach to the study of some specific areas of law has historically been «judicial review-centred»⁸²⁸ - and the disciplines of constitutional law, European Union law and international law are all but exceptions - this means that the dominant scholarship has focused on the activity of courts by studying the different methods of interpretation deployed, relying on grand foundationalist/organic theories of judicial review, often trying to justify or to reject the practice of judicial review *in toto* and/or dictating its parameters. Behind such strong positions and behind the search for «first-best principles» of interpretation and judicial legitimacy,⁸²⁹ one can see a series of latent and intractable tensions, inherent in traditional constitutional theories of interpretation and adjudication: these tensions are, after all, the consequences of the unavoidably creative function of the judicial role. But for a complete and more realist understanding of the judicial function in its practical aspects and in

⁸²⁸ As for instance noted by J. Shaw, Introduction, *op.cit.*, at 1.

⁸²⁹ In the words of N. Komesar, Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy, *op.cit.*, at 53.

every broad discussion «of the advantages and disadvantages of the adjudicative process»,⁸³⁰ one should always consider its institutional, quantitative dimensions. Scholars of the discipline of so-called Comparative Institutional Analysis use to conceptualize the first problem as one of «competence»: every court surely meets broad problems in its relationships of power with other institutions, and has to face the related constraints. By competence, it is meant here the comparative ability of judges and courts (as composite institutions) as decision-makers: and therefore the ability to understand «highly technical issues and evidence in complex, large-scale litigation», the ability to handle complex and delicate issues concerning politically sensitive subjects; the ability to deal with large-scale social policy issues «where there are many conflicting interests and a continuing need for implementation and oversight».⁸³¹ However, the same scholars use to juxtapose and stress the importance of severe problems and constraints related to the «scale» of courts.⁸³² In this perspective, the focus is not so much on the inherent tensions due to the legitimacy of the judicial interventions but precisely on the fact that the very «*physical capacity ... of any institution*»⁸³³ is important in determining its ability, the way in which it does whatever it is intended to accomplish. In fact, this is particularly true for courts, in comparison with other institutions; considerations of size, «*in particular the implications of severe constraints on growth*» in size of the tribunals, «*play such an important role in the adjudicative process and so strongly affect inter-institutional choices that they require special consideration*».⁸³⁴ If one considers the market (intended, in economics jargon, as the aggregate of all the free individual transactions) and the political processes (as its mediate, delegated representation) as the opposite institutions in an ideal triangle, in relation to courts, we can easily see to what extent a group of varying factors (demographic, economic, political, technological, among others) determine expansion in size and can lead to a significant increase in demand for adjudication. In the face of all this, the judicial bodies can hardly obviate with mere adjustments in size, and are called to control such relationship between demand and supply in different ways.⁸³⁵

In this respect, the scarce comparative literature that tries to explore this neglected, 'quantitative' dimension of judicial review (or at least try to call for new studies in the field) icastically makes a connection between «docket control and the success of courts».⁸³⁶ Giving courts – particularly courts performing some form of review of constitutional significance – the ability to

⁸³⁰*Ibidem*, at 138.

⁸³¹*Ibidem*, at 139.

⁸³²*Ibidem*, at 142.

⁸³³*Ivi*.

⁸³⁴*Ivi*.

⁸³⁵*Ibidem*, at 143.

⁸³⁶ D. Fontana, Docket control and the Success of Constitutional Courts, in T. Ginsburg, R. Dixon (eds.), *Handbook of Comparative Constitutional Law*, Elgar 2011, p. 624.

decide what to decide, or to manage in some ways their resources in deciding, proves crucial to what the scholars define as their «*success*». A court empowered to set or control - at least partially - its agenda, it is argued, is also a court that “«*can avoid excessive political conflict and ensure maximum compliance*»;⁸³⁷ it is in any case an institution able to better perform its basic tasks and positioned in the condition to work more effectively. While it is almost universal for political actors to receive control not only over the decisions they make - something on which the courts will never have full discretion⁸³⁸ - but also on the timing and resources employed for decisions, when it comes to judicial bodies, the situation is different. In principle, they are called and obliged to devote the same efforts to all cases treated under the law with no discrimination. Still, for their “success” courts nonetheless need to manage and streamline the aspects of timing and resources employed – at least in a certain sense - through different means.

In the following pages, we will analyse, within a tentative taxonomy, the methods that the courts can employ to accommodate the supply and demand for adjudication and in general to control their docket and the related quantity and quality of judicial activity they employ in performing their task. We will situate in particular the analysis in the CJEU realm, by talking of its peculiar problems in controlling the flow of cases it receives. We will see, in particular, how the different concepts of docket control one can comparatively sketch also correspond to the different phases in the debate on the CJEU’s quantitative dimension of adjudication, and to the different solutions that were also contemplated under the comparative influence of Member States’ practices and of other external paradigms.

VI.1 The European Court of Justice and its Docket

In a sort of functional portrayal, the competences and the scope of adjudication of the Court of Justice may be summarily divided into three main areas:⁸³⁹

⁸³⁷ *Ivi.*

⁸³⁸ Given at least the fundamental nature of the principle of *non liquet* and the prohibition of the denial of justice in judicial activity: see on this, in an interesting perspective linking national, comparative and international laws J. Kokott, *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems*, Kluwer Law International 1998, p. 168 *et seq.*

⁸³⁹ We rely in here on the representation offered by M. Bobek, *The Court of Justice of the European Union*, in A. Arnall, D. Chalmers (eds.), *The Oxford Handbook of European Union Law*, Oxford University Press 2015, chapter seven. See, interestingly, for a similar taxonomy already N. Catalano, *Manuale di diritto delle Comunità europee*, *op. cit.*, at 72 *et seq.*

- *Arbitration of (Inter-)Institutional disputes* - where the Court, performing as a veritable and typical international tribunal,⁸⁴⁰ decides on the types of actions that oppose primarily Union institutions and/or the Member States. These include, as it is known, infringement proceedings (Article 258 TFEU and its extension in Article 260 TFEU) and actions for failure to act (Article 265 TFEU). The remedy sought here is a declaration by the Court that a Member State or an EU institution failed to act or acted in violation of the Treaties.
- *(Proper) Judicial review* - where, inspired as we saw by national administrative categories, the Court reviews, directly or more frequently today on appeal, the legality of acts of Union institutions (Article 263 TFEU). The remedy sought is the annulment of the Union act challenged. Jurisdiction falling under this head includes actions brought by the Member States directly to the ECJ, appeals against first instance decisions of the General Court in cases of all other applicants,⁸⁴¹ as well as incidental review of legality of EU acts emerging from other types of proceedings.
- *References for preliminary rulings* - where the Court hears the requests, submitted pursuant to Article 267 TFEU by national courts, that seek either the authoritative interpretation or the assessment of the validity of an EU act. A decision rendered by the CJ forms part of the national proceedings - of which, as seen, this procedure is considered an “incident” - and will be applied by the referring court; it will then also bind other courts in the Member States.⁸⁴²

Although there are further kinds of relevant activities performed by the Court - such as the opinions rendered pursuant to Article 218(11) TFEU on the compatibility with the Treaties of contemplated international agreements of the EU, or the claims for compensation based on non-contractual liability of the Community of Article 268 TFEU - the three mentioned categories can be considered as *main* areas of cognition precisely from a *quantitative* standpoint. They have always amounted to the vast majority of the judicial activity carried out in Luxembourg, in terms of cases treated, and therefore of time and resources employed.

However, on the whole, the order in which we have described the three main types of CJEU activity also reflects, in ascending order, how strongly each category is represented within the overall docket of the Court today. In turn, this also reflects to what extent the Court has felt called to

⁸⁴⁰ G. Itzcovich, *The European Court of Justice as a Constitutional Court. Legal Reasoning in a Comparative Perspective*, STALS Research paper no. 4/2014, available at the website <http://www.stals.sssup.it/files/itzcovich%204%202014.pdf> (accessed 26 August 2015), p. 9.

⁸⁴¹ See Art. 256 TFEU and its (partial) derogation in Art. 51 of the Statute.

⁸⁴² See on the *inter partes* and/or *erga omnes* effects of the preliminary rulings, among the many, A. Trabucchi, *L'effet erga omnes des décisions préjudicielles rendues par la Cour de justice des Communautés européennes*, *op. cit.*; F.G. Jacobs, *The Effect of Preliminary Rulings in the National Legal Order*, in M. Andenas (ed.), *Article 177 References to the European Court – Policy and Practice*, Butterworths 1994, p. 29; T. Tridimas, *Precedent and the Court of Justice: a Jurisprudence of Doubt?*, in J. Dickson, P. Eleftheriadis (eds.), *Philosophical Foundations of EU Law*, Oxford University Press 2012, p. 307.

and is capable of somehow “controlling” the flow of relative cases it receives, from the moment such control started to be deemed necessary.

Some data, observed in diachronic terms, are in fact elucidative in this respect. In terms of relative numbers, in the last decades, and with an acceleration in the previous one, there was a distinct rise of the number of preliminary rulings, with a decline in direct actions; while their relationship in different stages of the history of the Court was inverse.⁸⁴³ Such a phenomenon is nowadays so evident that, in the five years from 2007 to 2011, references for a preliminary ruling became more than half of the proceedings before the ECJ; and in the past three years, these amounted to about 2/3 of all cases decided.⁸⁴⁴ The absolute numbers are even more telling. The judicial activity of the Court has in fact steadily increased over time. In the 1950s, when it was founded, the Court had less than 50 new cases each year; in the 1970s, usually between 100 and 200 new cases each year, still treated within a unique jurisdiction; in the 1990s, when the Court of First Instance had already been established, the apical Court of Justice alone had between 300 and 500 cases; and since 2001 there have been between 400 and 700 new cases each year, still generally on the increase despite the foundation of the European Union Civil Service Tribunal as an additional specialized branch (553 cases in 2009, 624 in 2010, 679 in 2011, 617 in 2012, 690 in 2013, 614 in 2014).⁸⁴⁵

All this has happened for several important concurring reasons.⁸⁴⁶ Some of them were evident and directly tangible, so to say. The first reason can be easily seen in the successive enlargements of the European Communities before and the European Union afterwards, with a progressive expansion from 6 to 28 States, which also meant a great expansion of the territorial validity of EU law. In turn, this led to an obvious expansion of the audience of potential applicants to the European jurisdiction and of potential national judges exercising their «European mandate».⁸⁴⁷ A second equally clear reason is in the constant parallel expansion of the European Communities' competences, epitomized, to name a few, in the succession of European Treaties, in

⁸⁴³ Detailed statistics concerning the judicial activity of the ECJ are available on the website of the Court, and published every year with rich and precious Reports commented by the President of the Court. See for details on the relative numbers of cases the statistics provided in its last Annual Report on the institutional activity – Annual Report 2014, published in 2015, available at the website http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-04/en_ecj_annual_report_2014_pr1.pdf (accessed 26 August 2015), at p. 113 in particular on the «General trend in the work of the Court (1952–2014) - New cases and judgments».

⁸⁴⁴ *Ibidem*, p. 114.

⁸⁴⁵ *Ivi*.

⁸⁴⁶ On the multidimensional nature of the docket problems of the Court see P. Craig, *The Jurisdiction of the Community Courts Reconsidered*, in 36 *Texas International Law Journal*, 2001, p. 555, at 561 *et seq.* (then published also in J.H.H. Weiler, G. de Burca, *The European Court of Justice*, *op. cit.*, chapter six).

⁸⁴⁷ Again using here - in describing the task of national judges as fundamental players of the European judicial architecture - the well known phrase by M. Claes, *The National Courts' Mandate in the European Constitution*, *op. cit.*.

the collapse of the “pillars” structure, ultimately in the recognition of the legally binding nature of the EU Charter of Fundamental Rights or in the new Eurocrisis-law measures.⁸⁴⁸ But there are also obvious reasons that are less relevant. A third factor can be traced back to the success of the supranational positive harmonization initiatives. These have always been one of the main tools in the arsenal of the European Communities aimed at fostering the creation of a truly single market through the removal of barriers to trade. But their success also depends upon the nature of the subject-matter in question and the differences between the existing laws of the Member States:⁸⁴⁹ when a harmonization measure is enacted, it often generates new controversies and therefore new work for the EU judicial system, since any new piece of legislation, whether enacted at the supranational or at the national level, will always contain important issues which require judicial clarification (also to understand the degree of discretion left in regulation at the different levels).⁸⁵⁰ The harmonization of national trademark laws brought about by the Trade Marks Directive in 1989⁸⁵¹ and the subsequent introduction of the Community Trade Mark⁸⁵² are often cited as the most evident examples, since they led without a doubt to a relevant number of applications to the competent European authorities and then to a huge number of controversies, as it is well known assigned to the Court of First Instance. A fourth factor, again surely effective but of difficult appraisal, is the always growing awareness of EU law by practising lawyers and judges in the national contexts. At the inception of the Communities few knew much about EC law, and for a long time it remained «the preserve of a limited number of specialists»,⁸⁵³ a project led by the consciousness and the activism of a sort of intellectual elite.⁸⁵⁴ Over decades and generations, this has undoubtedly changed, also thanks to specific programs of instruction provided and subsidized by Brussels.⁸⁵⁵ and it has become more and more natural for a lawyer to think about whether there is an EU law point in a case which comes before him. These rationales are listed without claiming to

⁸⁴⁸ See generally on this point, with reference to the actual *zeitgeist*, B. Smulders, K. Eisele, Reflections on the Institutional Balance, the Community Method and the Interplay between Jurisdictions after Lisbon, in 31 Yearbook of European Law, 2012, p. 112, and M. Dawson, B. de Witte, E. Muir (eds.), Judicial Activism at the European Court of Justice, *op cit.*

⁸⁴⁹ See P. Craig, The Jurisdiction of the Community Courts Reconsidered, *op. cit.*, at 561 *et seq.*

⁸⁵⁰ See on this, in extenso, I. Maletic, The Law And Policy Of Harmonisation In Europe's Internal Market, Elgar 2013.

⁸⁵¹ First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks.

⁸⁵² Council Regulation (EC) No. 40/94 of 20 December 1993 on the Community trade mark.

⁸⁵³ P. Craig, The Jurisdiction of the Community Courts Reconsidered, *op. cit.*, at 562.

⁸⁵⁴ See on this all the important contributions in P. Mbongo, A. Vauchez (eds.), Dans la fabrique du droit européen. Scènes, acteurs et publics de la Cour de justice des Communautés européennes, *op. cit.*, and A. Vauchez, B. de Witte (eds), Lawyering Europe, *op. cit.*; and, as *ante litteram* sociological legal studies on the point, E. Stein, Lawyers, judges, and the making of a transnational constitution, *op. cit.*, and H. Schepel, R. Wesserling, The Legal Community. Judges, Lawyers, Officials and Clerks in the Writing of Europe, in 3 European Law Journal, 1997, p. 165.

⁸⁵⁵ Such as the so called “Jean Monnet Action” for the widespread teaching of European integration in national Universities, or the various projects for the training of judges.

be exhaustive, and their single parts of contribution are obviously debatable. Still, their combined effect was also acknowledged in several of the Courts' annual Reports, and in the famous, specific Due Report «on the future of the European Communities' Court System», requested to a Working Party of Wise Men by the Commission in 1999⁸⁵⁶ (actually, the first of a series of institutional papers on the matter).⁸⁵⁷

While both the aforementioned numbers and factors can be considered as direct or indirect evidence of the success of the European integration project, the increase in the workload of the European judicial system has surely had an adverse effect on the CJEU's functionality. In particular, they had an impact on its ability to deliver its judgments within a short timeframe. Also, there were clear numbers that depicted the Court of Justice as the victim of such a success: in 1975, for instance, it took the ECJ an average of six months to deal with preliminary references, and nine months to deal with a direct action; in 1988, this time was no less than tripled, and the Court needed an average of 18 and 24 months respectively; in 2003, the average period to obtain a preliminary ruling reached a peak of 25.5 months.⁸⁵⁸

It is difficult and maybe speculative to try to single out a precise moment in which the phenomenon of inflow of cases assumed the characteristics of an emergency. Surely, we can say that a structured, plural debate on the matter started in the 1980s;⁸⁵⁹ and that neither the emergency nor the search for solutions can be said to be concluded, if the President of the Court of Justice, Vassilios Skouris, in presenting the penultimate published Report on the activity of the Court, wrote

⁸⁵⁶ Report by the Working Party on the Future of the European Communities' Court System for the European Commission, January 2000, available at the website http://ec.europa.eu/dgs/legal_service/pdf/du_en.pdf (accessed 26 August 2015).

⁸⁵⁷ See for other references the book "The Role and Future of the European Court of Justice", issued by The British Institute of International and Comparative Law in 1996; or the recent Report on "The Workload of the Court of Justice of the European Union" issued by European Union Committee of the UK House of Lords, available at the website <http://www.publications.parliament.uk/pa/ld201011/ldselect/ldeucom/128/128.pdf> (accessed 26 August 2015).

⁸⁵⁸ See T. Millett, *The Court of First Instance of the European Communities*, Butterworth 1990, p. 2. Note that this has become a matter of concern not only debated in every Annual Report issued by the Court of Justice, but also in monographs on the Court's procedural law (see for instance M. Broberg, N. Fenger, *Preliminary References to the European Court of Justice*, *op. cit.*, at 23 *et seq.*) and even general EU law textbooks (see e.g. D. Chalmers, G. Davies, G. Monti, *European Union Law*, 2nd ed. Cambridge University Press 2010, at 178 *et seq.*).

⁸⁵⁹ See in fact F.G. Jacobs, *Amendments to the Rules of Procedure*, in 5 *European Law Review*, 1980, p. 52; H. Rasmussen, *The European Court's Acte Clair Strategy in C.I.L.F.I.T.; Or, Acte Clair, of Course! But What Does it Mean?*, in 10 *European Law Review*, 1984, p. 242; F.G. Jacobs, *Procedural Reform in the European Court*, in J. Schwarze (ed.), *Perspectives for the Development of Judicial Protection in the European Community*, Nomos Verlagsgesellschaft 1987, p. 191; T. Koopmans, *La procédure préjudicielle - victime de son succès?*, *op. cit.*; F.G. Jacobs, *Proposals for Reform in the Organisation and Procedure of the Court of Justice of the European Communities: with Special Reference to the Proposed Court of First Instance*, in F. Capotorti, C. Ehlermann (eds.), *Du droit international au droit de l'intégration - Liber amicorum Pierre Pescatore*, *op. cit.*, p. 287; J.H.H. Weiler, *The European Court, National Courts and References for Preliminary Rulings - The Paradox of Success: A Revisionist View of Article 177 EEC*, in H.G. Schermers, C.W.A. Timmermans, A.E. Kellerman (eds.), *Article 177 EEC: Experiences and Problems*, North-Holland 1987, p. 366.

only some months ago that «(I)n 2013, the Court of Justice of the European Union experienced a striking increase in the pace of its judicial activity (...) the number of cases brought was the highest since the judicial system of the European Union was created (...) which indicates the confidence of national courts and of litigants in the judicature of the European Union. However, this intensification of judicial activity is liable, in the not necessarily distant future, to undermine the efficiency of the European Union's judicial system as a whole. For this reason, there is a constant and continuous need to seek means (...) of improving the efficiency of that judicial system».⁸⁶⁰

In light of all above, we realize how much what we define as docket control is decisive for the institutional evolution of the Court of Justice; and for our specific purposes in this study, it is actually important to notice first of all that the need for a quantitative streamlining of such inflow of cases had to face the specificity of the institutional position of the European Court of Justice. Quantitative concerns, although often neglected in academic studies, are common for every judicial body, as we said; they are particularly so for supreme judiciatures and higher courts, which are quintessential scarce resources, with particularly limited time and energy, and for which some rationing and targeting are essential.⁸⁶¹ However, in this sense much is done elsewhere by the physiological functioning of the appellate systems, according to which the apical court of a pyramid-like structured judicial system is *per se* reached only by a minority of appeals, for both lack of reasons, interests and economic resources of the parties. But from this perspective, the European Court of Justice is placed in a peculiar institutional position. A taxonomical analysis of its previously mentioned main competencies illustrates the point. As it has been said in a comparative vein,⁸⁶² the Court can be considered as a «particularly salient exemplar» of the *sui generis* nature of EU law and of its categories; and can be seen as a tribunal of hybrid nature, performing different tasks and in doing so assuming different forms.

When dealing with its exclusive and mandatory jurisdiction on the controversies arising between the Member States of the EU (in rare cases), and those between Member States and the EU in the infringement proceedings initiated by the Commission, the Court could be seen as a classic

⁸⁶⁰ As first sentences of the Foreword of the Annual Report for 2013, available at the website http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-03/en_version_provisoire_web.pdf (accessed 26 August 2015), p. 1.

⁸⁶¹ See generally D. Fontana, Docket control and the Success of Constitutional Courts, *op cit.*, and for reflections also on the CJEU J. Bell, The Role of European Judges in an Era of Uncertainty, in P.J. Birkinshaw, M. Varney (eds.), *The European Union Legal Order After Lisbon*, Kluwer 2010, p. 277, at 281-282 in particular.

⁸⁶² G. Itzcovich, *The European Court of Justice as a Constitutional Court. Legal Reasoning in a Comparative Perspective*, *op. cit.*, at 9. See, again, interestingly, for a similar taxonomy already N. Catalano, *Manuale di diritto delle Comunità europee*, *op. cit.*, at 72 *et seq.*

international court, albeit a «extraordinarily effective, sui generis one».⁸⁶³ In annulment proceedings and in the preliminary proceedings on the validity of EU law under Article 267(b), where it is competent to review the legality of EU acts such as legislative acts and other acts adopted by the European institutions which are intended to have legal effects, the Court is on the other hand comparable to a constitutional court, in the Kelsenian terms in which it is called to enforce «a norm or a group of norms which are of the highest rank in a legal order in the sense that the validity of all other norms is measured on them»; and, again, it enjoys an exclusive competence, except for today's General Court, which is subject to review by the CJEU. Finally, thanks to the decisive powers it exercises in preliminary ruling proceedings on the interpretation of Community law under Article 267(a) TFEU, the Court has also assumed the role of a veritable supreme court to which every national court of every Member State refers questions of interpretation in case of any doubt on the meaning of EU law. With the widespread acceptance of the doctrines of the direct effect and supremacy of European law, the CJEU is de facto empowered to assess - by means of the preliminary ruling proceedings - not only the validity of EU law but also the conformity to EU law of Member States' legislation and practices,⁸⁶⁴ in performing what we have repeatedly called a *nomophylactic* function typical of a supreme court. But it is always important to remark that this could happen - thanks to the inner *genius loci* of the preliminary reference procedure⁸⁶⁵ - by developing a constructive and mutual relationship (a “dialogue”, as it has become customary to say) with the national courts, which means that the European and the national courts have collaborated in shaping the content and Community law “in action”, without the need or the establishment of formal *hierarchical* relationship between themselves, nor the definition of an exclusive form of jurisdiction.

In recalling these well-known ingredients, we immediately see their decisive role in the integration process and in the constitutionalisation of the EU legal order between the lines, which put the Court of Justice at the forefront.⁸⁶⁶ Still, it is equally evident for the reader - already in

⁸⁶³ G. Itzcovich, The European Court of Justice as a Constitutional Court. Legal Reasoning in a Comparative Perspective, *op. cit.*, at 9.

⁸⁶⁴ See the well known reflections by K. Lenaerts, Form and Substance of the Preliminary Ruling Procedure, in D. Curtin, T. Heukels (eds.), *Institutional Dynamics of European Integration*, Martinus Nijhoff 1994, p. 355, and S. Prechal, Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union, in C. Barnard (ed.), *The Fundamental of EU Law Revisited*, Oxford University Press 2007, p. 35, at 37 *et seq.*

⁸⁶⁵ See in this respect, again, the recent authoritative summary by J.H.H. Weiler, The political and legal culture of European integration: An exploratory essay, *op. cit.*, at 691: «the preliminary reference procedure is, overwhelmingly, a device for judicial review of member state compliance with their obligations under the treaties. It is ingenious for two reasons: First, it deploys individuals, vindicating their own rights, as the monitors and enforcers of Community obligations vis-à-vis the member states. It has been called the private-attorney-general model. And second, it deploys national courts. The judgment is spoken through the mouths of member state courts. The habit of obedience associated with national law is, thus, attached to European law. The gap between the rule of law and the rule of international law is narrowed, even closed».

⁸⁶⁶ See the general reflections above, at footnotes 1 and 290.

looking at the definition of these powers - the limited capability of the Court to autonomously determine its own workload. In fact, given its competences, the caseload of the Court depends primarily on factors that are external to the choices made in Luxembourg. This is true for the previously-mentioned structural reasons that influence the potentiality of controversies such as the increasing size of the EU after the enlargements, the gradual but constant extension of EU competences into new policies areas, the growing constellation of economic, political and social interests involved in the enforcement of EU law, the general phenomenon of “*judicialisation*” (the tendency to a greater presence of judicial institutions in political and social life), and so on. But it is also true for technical reasons that influence the introduction of formal disputes when a controversy, in general terms, is already in place. It suffices to think of the full discretion of the Member States and the Commission in the purely international, arbitral part of the jurisdiction of the Court, in which in fact no spaces of discretion and no powers of control remain for the Court to streamline its docket: in particular, infringement proceedings are always initiated by the Commission which acts *motu proprio* or at the solicitation of individuals, businesses and associations, and which enjoys a full discretionary power to assess whether the action is appropriate and suitable from a political as well as legal point of view. In this respect, scholarly suggestions lean towards a move from trying to enforce an all breached approach to a more targeted approach by the Commission;⁸⁶⁷ which, indeed, is trying to adopt the practice of pilot procedures to reduce the number of enforcement actions.⁸⁶⁸ In the context of annulment proceedings, the action can be brought by certain preferential plaintiffs (the Member States, the Council, the Commission and the Parliament), by certain specialised bodies such as the Court of Auditors, the European Central Bank and the Committee of the Regions for the purpose of protecting their prerogatives, and directly by individuals with an interest in taking action against measures that address them or that directly and individually concern them. Also in this sense, for obvious political sensitivity and for the “constitutional” rationality of the system, it was difficult to think of compressing the political discretion of institutions; and the possibility of individual actions has always been compressed and limited to rare, restricted cases of *individual concern*,⁸⁶⁹ ignoring the suggestions and the opportunities for a reform of the *locus standi* requirements.⁸⁷⁰ This last limitation - academic criticism based on the principle of access to justice

⁸⁶⁷ See in this vein M. Smith, *Enforcement, Monitoring, Verification, Outsourcing: the Decline and Decline of the Infringement Process* in 33 *European Law Review*, 2008, p. 777.

⁸⁶⁸ See the directions set forth in the Commission Staff Working Document accompanying the 25th Annual Report on Monitoring the Application of Community Law (2007) Situation in the Different Sectors, EC Commission, SEC (2008), 2854, at p. 32 and p. 166 *et seq.*

⁸⁶⁹ See the well known Judgment of 15 July 1963, *Plaumann / Commission of the EEC* (25/62, ECR 1963 p. 95).

⁸⁷⁰ Namely, in particular, the Opinion of Advocate General Jacobs in Judgment of 25 July 2002, *Unión de Pequeños Agricultores / Council* (C-50/00 P, ECR 2002 p. I-6677) ECLI:EU:C:2002:462, the judgment by the Court of First Instance (CFI) in Judgment of 3 May 2002, *Jégo-Quéré / Commission* (T-177/01, ECR 2002 p. II-2365) ECLI:EU:T:2002:112, and the new wording of Article 263 (4) TFEU in the Lisbon Treaty.

notwithstanding⁸⁷¹ - has always been taken as a *datum*, and, though debated in both theory⁸⁷² and practice,⁸⁷³ has never been questioned or involved in the debate on the management of the workload of the Court, which took place simultaneously and evolved later in time. In the context of interpretative preliminary rulings, precisely for the aforementioned heterarchical structure of the system, based on the ongoing voluntary dialogue with national courts, the more or less collaborative attitude of these latter can be fed and prompted, as we will see, by the Court of Justice; but the related inflow of cases from national tribunals is also to be considered by the large part as an exogenous variable, to be critically taken into account when trying to contain the weight of the docket.

These peculiarities notwithstanding, the debate on the docket control of the European Court of Justice has been shaped around the contemplation of typical instruments. As anticipated, they can be fruitfully investigated from the perspective of this study.

⁸⁷¹ For instance, F.G. Jacobs, *Access to Justice as a Fundamental Right in European Law*, in G.C. Rodríguez Iglesias *et al.* (eds.) *Mélanges en hommage à Fernand Schockweiler*, Nomos 1999, p. 197, and, recently, I. Pernice, *The Right to Effective Judicial Protection and Remedies in the EU*, in A. Rosas, E. Levits, Y. Bot (eds.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law - La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence*, *op. cit.*, p. 381.

⁸⁷² See *inter alia* A. Arnulf, *Private applicants and the action for annulment under Article 173 of the EC Treaty*, in 32 *Common Market Law Review*, 1995, p. 7; D. Waelbroeck, A.M. Verheyden, *Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires: à la lumière du droit comparé et de la Convention des droits de l'homme*, in 31 *Cahiers de droit européen*, 1995, p. 399; G. Vandersanden, *Pour un élargissement du droit des particuliers d'agir en annulation contre des actes autres que les décisions qui leur sont adressées*, in 31 *Cahiers de droit européen*, 1995, p. 535; D. Boni, *Il ricorso di annullamento delle persone fisiche e giuridiche*, in B. Nascimbene, L. Daniele (eds.) *Il ricorso di annullamento nel Trattato istitutivo della Comunità*, Giuffrè 1998, p. 53, at 55-56.; E. Biernat, *The Locus Standi of Private Applicants under article 230 (4) EC and the Principle of Judicial Protection in the European Community*, Jean Monnet Working Paper No. 12/03, especially pp. 15-16 *et seq.*

⁸⁷³ See in this sense the Opinions issued by Advocate General Slynn in Judgment of 10 June 1982, *Lord Bethell / Commission* (246/81, ECR 1982 p. 2277), by Advocate General Jacobs in Judgment of 16 May 1991, *Extramet Industrie / Council* (C-358/89, ECR 1991 p. I-2501) ECLI:EU:C:1991:214 and in Judgment of 9 March 1994, *TWD / Bundesrepublik Deutschland* (C-188/92, ECR 1994 p. I-833), by Advocate General Ruiz-Jarabo Colomer in Judgment of 12 December 1996, *Associazione agricoltori della provincia di Rovigo and others / Commission and others* (C-142/95 P, ECR 1996 p. I-6669) ECLI:EU:C:1996:493.

See also the doctrinal contributions of members of the Court such as F. Schockweiler, *L'accès à la justice dans l'ordre juridique communautaire*, in 25 *Journal des tribunaux, Droit européen*, 1996, p. 1; G.F. Mancini, *The Role of the Supreme Courts at the National and International Level: a Case Study of the Court of Justice of the European Communities*, in P. Yessiou-Faltsi (ed.), *The Role of the Supreme Courts at the National and International Level*, Sakkoulas 1998, p. 421; K. Lenaerts, *The legal protection of private parties under the EC Treaty: a coherent and complete system of judicial review?*, and A. Saggio, *Appunti sulla ricevibilità dei ricorsi d'annullamento proposti da persone fisiche o giuridiche in base all'art. 173 quarto comma del Trattato CE*, both in P. Alleva *et al.* (eds.) *Scritti in onore di Giuseppe Federico Mancini*, Vol. II, Giuffrè 1998, p. 591 e p. 879 respectively.

VI.2 Docket Control as the Use of *Certiorari* and Procedural “Passive Virtues”

A policy of docket control, in fact, has not been an exclusive necessity of the European Court of Justice. Quantitative concerns on adjudication have been raised, and studied, and contemplated, also in other jurisdictions, although to a lesser degree in comparison to what we called qualitative ones. Often, this happened before the relatively recent explosion of the problem at the EU level.

Notoriously, a sort of quintessential paradigm in this respect has been in the American system of “judicial federalism”.⁸⁷⁴ This became an example for several reasons. The Supreme Court of the United States is, as it well known, the apical institution of a federal pyramid-like judicial architecture. In the past, it historically experienced serious problems in the management of its increasing caseload;⁸⁷⁵ such problems were vastly debated and strongly fought with peculiar solutions. The American system is not only therefore the one in which the observer can find the most traditional and highest degree of formalization in black-letter law or in the case-law of the relevant tools of docket control, but it is also the one in which we can find the highest degree of theorization on the use of these tools, in their broad constitutional implications, and the one in which more doctrinal efforts have been devoted to the matter.

Not by chance, as we will see with details, the vast majority of the first efforts in the European debate on docket control made specific reference to the American experience,⁸⁷⁶ in search of previous and somewhat settled experiences as well as some lessons in comparative perspective.

The American experience is characterized, first and foremost, by the settlement and the instrumental employment of procedural tools for what has been generally labeled as the «selection of cases» to be heard by its apical Court. The United States Supreme Court is part of typical pyramid-like structure, with 94 federal district courts at its broad base, 13 courts of appeals at its somewhat narrower middle section, and the «one Supreme Court» mandated by Article III of the US Constitution as its apex. It has, briefly said, ultimate appellate jurisdiction over all federal courts

⁸⁷⁴ See D. Halberstam, *Comparative Federalism and the Role of the Judiciary*, in K. Whittington, D. Kelemen, G. Caldeira (eds.) *The Oxford Handbook of Law and Politics*, Oxford University Press 2008, p. 142.

⁸⁷⁵ See the historical analysis by G. Casper, R.A. Posner, *The Workload of the Supreme Court*, American Bar Foundation 1974.

⁸⁷⁶ See most notably J.P. Jacqu , J.H.H. Weiler, *On the Road to European Union – A New Judicial Architecture: An Agenda for the Intergovernmental Conference*, in 27 *Common Market Law Review*, 1990, p. 185; T. Kennedy, *First steps towards a European certiorari?*, in 18 *European Law Review*, 1993, p. 121; L. Heffernan, *The Community Court post-Nice: a European Certiorari revisited*, in 52 *The International and Comparative Law Quarterly*, 2003, p. 907.

and over state court cases involving issues of federal law, and original jurisdiction over a small range of cases: a rather traditional structure, only made special by the ample powers of docket control it enjoys. To make a long story short, concerns about the caseload of the Supreme Court also emerged in the American context and in different historical phases of its judicial system. Important organic studies of prominent scholars⁸⁷⁷ have been devoted to the increase in the workload and its relative causes. Typically, they pointed to the growth of the Union, the growing mass of economic, political and social interests involved in its activity (especially, not by chance, after the Civil War fought from 1861 to 1865) and made special reference to the parallel increase of federal competences and the expansion of federal legislative production.⁸⁷⁸ Essentially, the case submitted to the Court passed from a few hundred to thousands.⁸⁷⁹

A series of efforts to keep the Court's docket under control were made. The one that rendered the US Supreme Court a paradigm in the debate is the procedural transformation of its jurisdiction from one in which the cases that could reach it were heard as a matter of right (and in which, therefore, the Court was required to issue a decision in each of those, and thus to review all properly presented appeals on the merits, hear oral argument, and write a judgment) to a largely discretionary one. This had already happened in 1891, when after the physical expansion of the United States in the nineteenth century, the federal judicial system became increasingly strained - with the Supreme Court experiencing a backlog of several years.⁸⁸⁰ The Judiciary Act of 1891, also known as the *Evarts Act* named after the name of its primary sponsor,⁸⁸¹ changed the whole architecture of the system. First, it created nine new courts, labeled the “United States circuit courts of appeals”, and reassigned the jurisdiction of most routine appeals from the lower district and circuit courts to these appellate courts. The decisions in those cases were designed as normally final: in the majority of those, the Supreme Court could only review legal issues that a court of appeals certified to it (by voluntarily asking for an opinion on the question of law during the pendency of the case: a very infrequent procedure), and could also review court of appeals decisions by *writ of certiorari*. The *certiorari* (the word is the present passive infinitive of the Latin verb *certioro*, *certiorare* - “to inform, apprise, show” - and thus translates “to be informed, apprised or shown”) is in this system the writ that the Supreme Court, asked by a party through a “petition for

⁸⁷⁷ F. Frankfurter, J.M. Landis, *The Business of the Supreme Court of the United States - A Study in the Federal Judicial System*, Macmillan 1928; G. Casper, R.A. Posner, *The Workload of the Supreme Court*, *op cit.*

⁸⁷⁸ G. Casper, R.A. Posner, *The Workload of the Supreme Court*, *op cit.*, in particular at 27 *et seq.*

⁸⁷⁹ *Ibidem*, at 20.

⁸⁸⁰ R.A. Posner, *The Federal Courts*, Harvard University Press 1996, at 53 *et seq.*

⁸⁸¹ Judiciary Act of 1891 (26 Stat. 826).

writ of certiorari”, issues to a lower court to review its judgment for legal error (reversible error) and review where no appeal is available as a matter of right. At the time, the change resulted in an immediate reduction in the Supreme Court's workload (from 623 cases filed in 1890 to 379 in 1891 and 275 in 1892). And it was confirmed, and even enhanced, by the subsequent *Judiciary Act* of 1925 and the *Supreme Court Case Selections Act* of 1988: the latter formalized in positive law the concept and the phrase of “selection of cases”, then used also elsewhere, emphasizing the inherent discretion involved in the choice of *certiorare*. With these last measures, the same explicit aim of limiting the workload of the Supreme Court led to further reducing the cases of appeals as of right, and extending the system according to which appellants would file petitions for writs of certiorari with the Supreme Court, which would be accepted at the discretion of four of the nine Justices (the so called rule of four).⁸⁸²

The shift from an appellate system - with an individual right of appeal and to a judgment and a parallel obligation of the Court - to a discretionary supervisory system was not only a formal matter. The US Supreme Court has made extensive use of its discretionary powers so that debates on a change in nature of its jurisdiction were already raised in the 1920s.⁸⁸³ Without entering into too many details, it suffices to say that the judges deny (in the present setting) the vast majority of petitions, thus leaving the relative decision of the lower court to stand without review. They accept roughly 80 to 150 cases each term, out of thousands of petitions, with a grant rate that in the last years was around approximately the 1 and 1.5 percent of appeals. The Supreme Court is generally careful to only choose cases over which the Court has clear jurisdiction and which the Court considers sufficiently important, such as cases involving deep constitutional questions, to merit the use of its limited resources. Moreover, while both appeals of right and certiorari petitions often present several alleged errors of the lower courts for appellate review, the Court normally only grants review of one or two questions presented in a certiorari petition, therefore choosing which of the questions to answer. The Supreme Court sometimes grants a writ of certiorari to resolve a “circuit split”, when the federal appeals courts in two (or more) circuits have ruled differently in similar situations (the so called “percolating issues”).

The introduction of the *certiorari* as the more radical, strong and quintessentially discretionary tool for docket control had a wide resonance, as previously said. Such resonance also

⁸⁸² See for details H.W. Perry Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court*, Harvard University Press 1991, at chapters 7 and 8 in particular.

⁸⁸³ The data collected by F. Frankfurter, J.M. Landis, *The Business of the Supreme Court of the United States - A Study in the Federal Judicial System*, *op.cit.*, persuaded the Authors that by 1925 the Supreme Court has ceased to be a «common law court»: see *ibidem*, at p. 307.

shaped the comparative debate. Not only the United States' model became the yardstick against which to measure the attempts to quantitatively control the docket of other (supreme) courts; it was also cited and taken as a reference point for reform proposals in several contexts.⁸⁸⁴ It is remarkable that this also happened for the European Court of Justice. The idea of “certiorari” has been repeatedly employed in looking for possible solutions to the massive workload and backlog of the European Union judicial architecture.⁸⁸⁵ But in some of these references, it seems clear that the label “certiorari” is used in a non-specific manner, almost as a generic image, as a *synecdoche*, by making reference to a part to represent a whole, to a species (the specific procedural tool) to intend a category (the idea of docket control, as defined in this chapter, and therefore as a phrase to indicate all the possible usable tools for streamlining the inflow of cases).

First, this is true because the idea of “certiorari” is associated in certain EU law literature not to the adoption of the powerful instrument of discretionary admission of petitions by the apical court, but to other, not strictly comparable tools (which we will see in the next pages) with a different nature and different effects.⁸⁸⁶

But it is also true because sometimes there is no clear reflection on the fact that surely, the writ of certiorari, with its broad discretionary nature, would abruptly solve any problem of workload of any judicial institutions in the pure quantitative terms of its workload. It is also an instrument that, as we also mentioned, clearly qualitatively change the nature of the jurisdiction of a certain institution and whose adoption should therefore be weighed carefully. As said, first of all this comes at the price of making judicial discretion replace the concepts of obligation (by the court) and right (of the appellant) for a review of appeal. It gives a court the possibility of streamlining the employment of its own scarce resources by selecting from among the vast number of petitions those cases that most clearly invoke its essential functions. It also gives the possibility for a court to “set its own agenda”, deciding which cases to decide, perhaps avoiding much sensitive areas and surely simply aiming, with selective interventions, at preserving the integrity and the efficiency of judicial interpretation in a certain legal system as well as the quality of its own judgments. Nonetheless, two important features are to be considered. First, the certiorari system is clearly and inherently designed for the purposes of a traditional, pyramidal appellate system. Only with such an architecture, the denial of a grant for certiorari leaves in any case the judgment of the previous court

⁸⁸⁴ D. Fontana, Docket control and the Success of Constitutional Courts, *op cit.*, at 625.

⁸⁸⁵ See above, footnote 876, for the most explicit proposals in this sense.

⁸⁸⁶ See in particular T. Kennedy, First steps towards a European certiorari?, *op cit.*, and L. Heffernan, The Community Court post-Nice: a European Certiorari revisited, *op cit.*. On the other hand, as we will see later in detail, the work by J.P. Jacqu e, J.H.H. Weiler, On the Road to European Union – A New Judicial Architecture: An Agenda for the Intergovernmental Conference, *op cit.*, inserted (aptly) the certiorari tool in a more general and refined reform proposal of the EU judicial architecture.

alive, as *res iudicata inter partes* and as valid and unaltered precedent in point of law. Not by chance, its introduction in the US system came, as seen, in the context of an organic legislative measure (the Judiciary Act of 1891) that also restructured the appeals of lower court decisions and added a new layer of tribunals to the national system. Moreover, it is clear that a system where a supreme court is endowed with such discretionary powers of selection of cases is a system that envisages for the latter, more than a role of *corrector* of any possible error in the interpretation and the application of law in the single cases, a different role of *guidance* for lower courts for the correct and uniform application of law, through few weighed interventions in selected areas of concern.

We already noticed, in brief, how these two aspects are of great and peculiar specificity (and sensitivity) within the legal realm of the EU. When talking of the EU judicial architecture, we know that in some respects, in dealing with its “direct access” jurisdiction, the Court is bound to firstly satisfy the needs of the other EU institutions with no envisaged possibility of “selection”. This is, after all, what still happens in the US system for the residual parts of the Supreme Court's “original jurisdiction”. On the other hand, when speaking of preliminary references - the vast part of the Court's docket where streamlining would be decisive and in abstract feasible – it is always important to remember that the structural organization of the system is completely different from a pyramidal appellate system. A pyramidal appellate system of the kind, with the European Court of Justice at its apex, was interestingly envisioned but never applied under the European Defence Community Treaty in 1952⁸⁸⁷. But as well know, the system created by what is today Art. 267 TFEU (and formerly was 234 EC and 177 EEC) is a completely different one: a heterarchical, cooperative and dialogical system which designs a different relationship between national and supranational judicial bodies. It is designed as an ongoing conversation between the Court of Justice and its interlocutors, all the national courts of the Member States, identified in Opinion 1/09 as joint guardians of the Union legal order alongside the ECJ.⁸⁸⁸ The procedure, already in its original inspiration as we saw in the first part of this dissertation, was born to be an incidental parentheses of the national proceeding, and therefore to offer an authoritative *ex ante* interpretation of the relevant European law to apply in relation to the final decision of the national judge. In such a system, often no previous judgment whatsoever, as *res iudicata* for the parties of the controversy, is available (if, as it frequently happens, the preliminary ruling is asked during a first instance trial); in any case, there is always an open proceeding which is ongoing at the national level, which must be eventually

⁸⁸⁷ D.G. Valentine, *The Court of Justice of the European Coal and Steel Community*, *op cit.*, at 202.

⁸⁸⁸ See recently the reflections by A. Arnall, *Judicial Dialogue in the European Union*, in J. Dickson, P. Eleftheriadis (eds), *Philosophical Foundations of EU Law*, *op cit.*, p. 109, at 118.

concluded with the application of the interpretative principle authoritatively stated in Luxembourg.

We already see an important and quite obvious problem of applicability of the real *certiorari* instrument for the case of the Court of Justice of the European Union. Not by chance, the most refined observers who suggested the application of a veritable discretionary system of selection of cases for the CJ - namely Jacqué and Weiler in a seminal reform proposal in 1990⁸⁸⁹ - made it in the context of an overall reflection on a «New Judicial Architecture» for the European legal order, and notably by indicating a move strictly comparable to the one made in the US with the Judiciary Act of 1891 which introduced the *certiorari* system. In fact, their idea to tackle the increasing workload was to simultaneously restrict the possibility of direct access to the ECJ to major issues of Community law, expand the jurisdiction of (at the time) new Tribunal of First Instance and create four new Community regional courts. The European Court of Justice, remaining as the apical supreme court of the system, would in this pyramidal configuration settle divergent rulings of the regional courts and generally hear only the most important questions of Community law by discretionally selecting them through the use of writs of *certiorari*, at this point non-problematic.

As we will specifically see the facts and reasons in the following pages, the path of institutional reforms of the European judicial system took different directions. But for now, it is important to also reflect on the second mentioned aspect and on a second decisive problem of applicability of *certiorari*. It is the problem of the scope of powers of the Court of Justice as controller of the correct and uniform application of EU law, and of the proper nature of its *nomophylactic* role. The reluctance to change the features of the preliminary ruling procedure is in fact understandable, in general terms. It is the reluctance to modify and distort a tool whose importance «is hard to exaggerate»,⁸⁹⁰ given its particularly profound influence on the Union's «constitutional» development. Once embraced by the national courts - prompted by individual parties, as per the decisive model of the «private attorney-general»⁸⁹¹ - the procedure enables the

⁸⁸⁹ J.P. Jacqué, J.H.H. Weiler, On the Road to European Union – A New Judicial Architecture: An Agenda for the Intergovernmental Conference, *op. cit.*, See for a discussion of this proposal A. Bzdera, The Court of Justice of the European Community and the Politics of Institutional Reform, in M.L. Volcansek (ed.), *Judicial Politics and Policy-making in Western Europe*, Frank Cass 1992, p. 122.

⁸⁹⁰ A. Arnall, *Judicial Dialogue in the European Union*, *op. cit.*, at 118.

⁸⁹¹ Once more in the recent authoritative words of J.H.H. Weiler, The political and legal culture of European integration: An exploratory essay, *op. cit.*, at 691, «the preliminary reference procedure is, overwhelmingly, a device for judicial review of member state compliance with their obligations under the treaties. *It is ingenious for two reasons: First, it deploys individuals, vindicating their own rights, as the monitors and enforcers of Community obligations vis-à-vis the member states. It has been called the private-attorney-general model.* And second, it deploys national courts. The judgment is spoken through the mouths of member state courts. The habit of obedience associated with national law is, thus, attached to European law. The gap between the rule of law and the rule of international law is narrowed, even closed» (emphasis added). See also in this respect J.H.H. Weiler, Revisiting Van Gend en Loos: Subjectifying and Objectifying the Individual, in *Court of Justice of EU, 50th Anniversary of the*

European Court to directly influence the way they applied Union law. This is also true because it offers an opportunity to rule on a vast variety of issues and areas on which the Court might otherwise have been unable to pronounce, and a «detailed insight into the practical and legal problems (...) at the national level».⁸⁹² The procedure has been the vehicle through which the Court of Justice and the national judges educated each other «about the rules, principles, and methodologies of their respective systems»;⁸⁹³ it led the CJEU to borrow and adapt principles and concepts of national law and in doing so it also bolstered the authority of Union law by ensuring that it was firmly rooted in the everyday practice of the legal systems of the Member States and merged with their underlying values. But, from this sketched description of the ingenious, delicate dynamics of the preliminary reference procedure, it is already clear that its success is measured against certain premises. First of all, since most national courts enjoy discretion in deciding whether to refer a case, the effectiveness of the procedure strictly depends on the willingness of the parties, and most of all of the national courts to make use of it. Any practice that has the potentiality to breach such natural, eventually established inflow of references - including a practice of selection of cases at the supranational level, which would leave some of them unanswered – could also lead the national courts to stop making use of the procedure and to routinely resolve questions of Union law for themselves. This would be a direct problem for the CJEU, which would be deprived of the raw material of national cases it needs: and it needs it not only to engage in a productive, continuous dialogue with its national counterparts, but also to actually control the exact application of EU law at the national level. This leads to a second interrelated argument, which we also mentioned with reference to the question of the transparency in the deliberations of the Court: the problem of the maturity of the EU legal order. Several observers think, as we saw, that the general application of EU law in all the 28 internal legal systems of the Member States has not already achieved the necessary level of solidity and certainty so as to open its argumentation to a more plural, agonistic debate.⁸⁹⁴

This is even more the case when talking about the dynamics of the preliminary ruling procedure, and it has a direct impact on them. The general understanding is that the time is not yet ripe for a mere *supervisory* role of the Court of Justice, simply played, as per the *certiorari* mechanism, by selecting some cases in some selected areas of law, and by giving *guidance* to lower

Judgment in *Van Gend en Loos* 1963-2013, Conference Proceedings – Luxembourg, 13th May 2013, available at the website http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-12/qd30136442ac_002.pdf (accessed 26 August 2015), p. 11, at 13.

⁸⁹² A. Arnulf, *Judicial Dialogue in the European Union*, *op. cit.*, at 118.

⁸⁹³ *Ivi.*

⁸⁹⁴ See above, chapter six in particular at paragraph three.

courts by merely solving those few cases.⁸⁹⁵ The correct and uniform application of EU law still needs the European Court of Justice to play a more organic, encompassing role of *corrector*, dealing with *any* possible error in the interpretation and the application of supranational law in all individual national cases. These concerns are so relevant in the EU legal order that they also hindered the adoption of the rational compromise solution advanced in the form of the so called “green-light procedure”.⁸⁹⁶ According to this model, the cooperative system of the preliminary ruling procedure would be maintained and even prompted, but the workload of the Court at the same time would be alleviated, by encouraging/obligating national courts to include in their reference for a preliminary ruling, an autonomous proposal suggesting the answer to be given. The Court of Justice may then dispose of a case by simply giving a “green light” to the proposal; or, otherwise, where on the opposite the Court would deem necessary a different or more elaborate answer, the case would be submitted for the ordinary procedure. The rationality of the idea is evident. The Court would be able to dispose in an agile way of a relevant number of references, with a right balance between the employment of internal resources for their solution and on the other hand, the need for unity and consistency in the interpretation and development of EU law. A mix between what we called the role of controller and the role of supervisor by the Court would be found.

But one should always note that in such an institutional setting doubts would arise not only about the value of the CJ's precedents; but also, importantly, about the possibility for Member States and for the Commission to present, as usual, their views on the substance of the case; and the system would require in the national courts an already acquired good knowledge of EU law, also in specific fields, which is probably - at the actual level of maturity of the EU legal system - still not the case.⁸⁹⁷ On the contrary, since such an acquired level of knowledge cannot be taken for granted,

⁸⁹⁵ See for a recent reflection on the point S. Prechal, *National Courts in EU Judicial Structures*, *op. cit.*, at 432-433.

⁸⁹⁶ On such a model see the Court of Justice's Report on «The Future of the Judicial System of the European Union (Proposals and Reflections)», 1999, published in A. Dashwood, A. Johnston, *The Future of the Judicial System of the European Union*, Hart Publishing 2001, p. 145, and the Report of the Working Party on the Future of the European Communities' Court System, 2000 (the so called, already mentioned Due Report, see footnote 856 above). In a resolution of the 9th July 2008 on the role of the national judge in the European judicial architecture (2007/2027(INI)), the European Parliament has pleaded for the consideration of the green-light procedure (see point 31: «31. Considers that, in a decentralised and mature Community legal order, national judges should not be marginalised but rather given more responsibility and further encouraged in their role as first judges of Community law; therefore urges consideration of a "green light" system whereby national judges could include their proposed answers to the questions they refer to the Court of Justice, which could then decide within a given period whether to accept the proposed judgment or whether to rule itself in the manner of an appellate court»). See also F.G. Jacobs in his hearing before the House of Lords, European Union Committee, 14th Report of Session 2010-11, “The Workload of the Court of Justice of the European Union”, available at the website <http://www.publications.parliament.uk/pa/ld201011/ldselect/ldeucom/128/128.pdf> (accessed 26 August 2015), pp. 31-32, advocating for such a reform.

⁸⁹⁷ See X. Groussot, C. Wong, A. Inghammar, A. Bruzelius, *Empowering National Courts in EU Law*, Swedish Institute for European Policy Studies, Report No. 3/2009, available at the website <http://www.sieps.se/sites/default/files/541->

national courts could be in practice inhibited in their tendency to submit references and other players would be inhibited in their possibility to opine before the Court on the interpretation of EU law - an unacceptable result at this stage of EU integration.

VI.3 The Possibility of Adopting Other “Passive Virtues” in Luxembourg

Certiorari, as we said, has been historically considered as the quintessential, paradigmatic tool of docket control. This made the US system a point of reference in the debate. But, as we also said, this came at the price of some confusion in the taxonomy of instruments capable of some streamlining of judicial workload: precisely because the US system, in its judicial and doctrinal elaboration, focused for the purpose also on other tools of procedural nature, and these fell in subsequent comparative reflection, also about the case of the European Court of Justice,⁸⁹⁸ perplexingly under the same label of “certiorari”.

In particular, we are talking of the instrumental, purposive use of procedural tools linked to the technical admissibility of the cases in front of the bench. A precise categorization of those has been notoriously conducted in the US judicial system, *in primis* in the form of a jurisprudential elaboration of positive law, and in particular in the interpretation of the limit of the presence of a “*case of controversy*” posed by Art. III of the American Constitution to the power of adjudication of all federal courts. The existence of a veritable “*case of controversy*” in fact, as it is well known, explicitly governs the “*justiciability*” of a case by American courts. From this acquired datum of positive law, a whole theorization on the nature and the scope of the consequent «doctrines of justiciability» was developed, identifying the different procedural concepts of *mootness*, *ripeness*, *standing* and *political question*. These shall be used by American judges and by the Supreme Court to measure the admissibility of a certain case in front of them. As per the diffuse model of judicial review of the US system,⁸⁹⁹ these concepts are ways for the courts to verify the *concreteness* of a certain case as a necessary feature for its solution: their presence ensures the existence of an adversarial proceeding with a real, active dispute. Respectively, they pertain to 1) the idea that

[2009-3-rapport.pdf](#) (accessed 26 August 2015), at 26 *et seq.* in particular.

⁸⁹⁸ T. Kennedy, First steps towards a European certiorari?, *op cit.*; L. Heffernan, The Community Court post-Nice: a European Certiorari revisited, *op cit.*

⁸⁹⁹ See for concordant successful theorizations of the different existing models M. Cappelletti, Judicial Review in Comparative Perspective, in 58 California Law Review, 1970, p. 5, and A. Brewer Carias, Judicial Review in Comparative Law, Cambridge University Press 1989.

further legal proceedings with regard to a matter can have no effect, or events have placed it beyond the reach of the law; 2) the readiness of a case for litigation, «if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all»; 3) the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case; and 4) the general question of whether or not the court system is an appropriate forum in which to hear the case.

The difference from the specific certiorari tool and the consonance with the general matter of the “selection of cases” are both evident. In the case of the Supreme Court, a case must first of all, from the logical point of view, be picked and accepted through the discretionary system of certiorari; then, only in rare, though significant hypotheses, the Supreme Court can be in the situation to deem a certain case as inadmissible and therefore not decide it on the merits, with scarce and rapid use of resources. Nonetheless, the strong similarity is in the common use of all these procedural tools as a means of extreme self-restraint and as a way to decide not to decide. It is from here that the mentioned confusion among procedural tools for docket control arises. And it is by the way understandable, since for non-local readers, these concepts were widely divulged, together, by the work of those leading constitutional theorists of the last century such as Alexander Bickel, who famously argued for an abundant use of all these tools as instruments of self-restraint by the Supreme Court in its constitutional adjudication, as organic forms of purposeful passivity that the Court has at its own disposal.⁹⁰⁰ The drafter of the even more notorious conceptualizations describing the driving forces behind constitutional adjudication, such as the «counter-majoritarian difficulty»,⁹⁰¹ or the distinction between the role of the elected branches and the judiciary as being between «expediency» and «principle»,⁹⁰² invented an equally memorable phrase for this common “quantitative” and “qualitative” idea of judging. Bickel put the certiorari and the “*doctrines of justiciability*”, together, in the category of decisive «*passive virtues*» that the Supreme Court could instrumentally and strategically use. The common purpose was of course to streamline its docket, to selectively pick and choose its interventions in sensitive areas and to ultimately enhance its

⁹⁰⁰ A.M. Bickel, *The Supreme Court, 1960 Term – Foreword: the Passive Virtues*, in 75 *Harvard Law Review*, 1961, p. 40, then also in *Id.*, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, *op. cit.*, at 111 *et seq.*. For multidisciplinary comments on such influential perspective, see: E.A. Purcell Jr., *Alexander M. Bickel and the Post-Realist Constitution*, in 11 *Harvard Civil Rights-Civil Liberties Law Review*, 1976, p. 521; J. Moeller, *Alexander M. Bickel: Toward a Theory of Politics*, in 47 *Journal of Politics*, 1985, p. 113; A.T. Kronman, *Alexander Bickel's Philosophy of Prudence*, in 94 *Yale Law Journal*, 1985, p. 1567; T. Peretti, *An Empirical Analysis of Alexander Bickel's the Least Dangerous Branch*, in K.D. Ward, C.R. Castillo (eds.), *The Judiciary in American Democracy: Alexander Bickel, the Counter-majoritarian Difficulty, and Contemporary Constitutional Theory*, State University of New York Press 2005; and in a broad comparative sense, D. Fontana, *Docket control and the success of constitutional courts*, *op. cit.*.

⁹⁰¹ A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, *op. cit.*, at 16 *et seq.*

⁹⁰² *Ibidem*, at 24 *et seq.*

legitimacy and authoritativeness.⁹⁰³ This idea of judicial «passive virtues» icastically merged together the *certiorari* and the “*doctrines of justiciability*” in a same category of procedural tools.

So, when at a certain point in its historical evolution - actually coinciding with the years in which, as we saw, its workload started to increase alarmingly - the European Court of Justice gave the impression of starting to close the traditionally open doors of the preliminary reference procedure, this move was vaguely (and, as said, non accurately) compared to an incipient form of continental *certiorari*.⁹⁰⁴ It was also naturally (and understandably) considered, in general terms, as a form of docket control and a form of exercised “passive virtue”.

It must be noted that this happened in a context - the special incidental configuration of the procedure of Art. 267 TFEU (ex 234 EC/177 EEC) - in which, in technical terms, the division or “separation” of functions⁹⁰⁵ between Luxembourg and the national judges has always been clear, at least apparently. Some important criteria of admissibility, comparable in fact to the American «doctrines of justiciability», are present, as it is well known There must be, here as well, a genuine dispute between the parties;⁹⁰⁶ this must result in an action before a national court or tribunal;⁹⁰⁷ in this context, a decision on the question of supranational law shall be “necessary” to enable the national court to give judgment.⁹⁰⁸ Should this be the case, any court or tribunal “may” make a reference, and a “final” court or tribunal “shall” make a reference, as per the wording of the Treaty. But it is also true that the general understanding has always been that the assessment of the general criteria of justiciability should be the task of national courts in the context of the original proceedings. According to established teachings, it is for them - «which alone has direct knowledge

⁹⁰³ *Ibidem*, at 169 *et seq.*

⁹⁰⁴ T. Kennedy, *First steps towards a European certiorari?*, *op. cit.*

⁹⁰⁵ According to the wording of Judgment of 2 June 1994, *AC-ATEL Electronics / Hauptzollamt München-Mitte* (C-30/93, ECR 1994 p. I-2305) ECLI:EU:C:1994:224, at paragraph 17.

⁹⁰⁶ Judgment of 11 March 1980, *Foglia / Novello* (104/79, ECR 1980 p. 745) and Judgment of 16 December 1981, *Foglia / Novello* (244/80, ECR 1981 p. 3045); but see also Judgment of 9 February 1995, *Leclerc-Siplec / TF1 and M6* (C-412/93, ECR 1995 p. I-179) ECLI:EU:C:1995:26, and recently Judgment of 22 November 2005, *Mangold* (C-144/04, ECR 2005 p. I-9981) ECLI:EU:C:2005:709 and Judgment of 7 July 2011, *Agafitei and others* (C-310/10, ECR 2011 p. I-5989) ECLI:EU:C:2011:467.

⁹⁰⁷ See Judgment of 9 December 1965, *Hessische Knappschaft / Singer et Fils* (44/65, ECR 1965 p. 965); Judgment of 22 November 1978, *Matheus / Doego* (93/78, ECR 1978 p. 2203); Judgment of 17 September 1997, *Dorsch Consult Ingenieurgesellschaft / Bundesbaugesellschaft Berlin* (C-54/96, ECR 1997 p. I-4961) ECLI:EU:C:1997:413; Judgment of 27 April 2006, *Familiensache : Standesamt Stadt Niebüll* (C-96/04, ECR 2006 p. I-3561) ECLI:EU:C:2006:254.

⁹⁰⁸ See Judgment of 16 June 1981, *Salonia / Poidomani e Giglio* (126/80, ECR 1981 p. 1563); Judgment of 16 July 1992, *Lourenço Dias / Director da Alfândega do Porto* (C-343/90, ECR 1992 p. I-4673); Judgment of 3 March 1994, *Eurico Italia and others / Ente Nazionale Risi* (C-332/92, C-333/92 and C-335/92, ECR 1994 p. I-711) ECLI:EU:C:1994:79; Judgment of 17 May 1994, *Corsica Ferries / Corpo dei piloti del porto di Genova* (C-18/93, ECR 1994 p. I-1783); Judgment of 13 December 1994, *Grau-Hupka / Stadtgemeinde Bremen* (C-297/93, ECR 1994 p. I-5535) ECLI:EU:C:1994:406.

of the facts of the case»,⁹⁰⁹ and «before which the actions are brought, and which must bear the responsibility for the subsequent judicial decision»⁹¹⁰ - to evaluate the relevance of the question of EU law to the outcome of the dispute, and therefore to decide whether a reference is necessary⁹¹¹ and the pertinent content of the questions to be referred.⁹¹²

Given this background, the resulting tasks of the Court of Justice should simply be to act in a way that does not discourage references from national courts, to receive cases, and solve them (since it is in «in principle, bound to give a ruling»)⁹¹³ being attentive to both provide enough guidance for the national judges to resolve the matter at hand and promote, in general terms, the correct and uniform application of EU law. In fact, it must be noted that in the entire first decades of the European integration, a clear «great willingness to receive references» was demonstrated by the Court, with almost no procedural limits and no judicial and doctrinal elaboration on the admissibility of the cases.⁹¹⁴ This was the phase of the tuning of the procedure, in which the Court had to defeat the natural reluctance of national courts (at least, of some national courts, in some Member States) to employ the new instrument; and it was also the phase in which the Court established, through the channels of Article 177 EEC, some of the fundamental tenets of Community law, including, as everybody knows, the concepts of primacy and direct effect.⁹¹⁵

Evidence of such willingness could actually already be found in early, historical judgments

⁹⁰⁹ See Judgment of 15 December 1994, *Stadt Lengerich and others / Helmig and others* (C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93, ECR 1994 p. I-5727) ECLI:EU:C:1994:415, at paragraph 8.

⁹¹⁰ Judgment of 28 November 1991, *Durighello / INPS* (C-186/90, ECR 1991 p. I-5773) ECLI:EU:C:1991:453, at paragraph 8.

⁹¹¹ See e.g. Judgment of 27 June 1991, *Mecanarte-Metalurgica da Lagoa / Alfandega do Porto* (C-348/89, ECR 1991 p. I-3277) ECLI:EU:C:1991:278, at paragraph 47; Judgment of 20 October 1993, *Balocchi / Ministero delle finanze dello Stato* (C-10/92, ECR 1993 p. I-5105) ECLI:EU:C:1993:846, at paragraphs 13 and 14; Judgment of 3 March 1994, *Eurico Italia and others / Ente Nazionale Risi* (C-332/92, C-333/92 and C-335/92, ECR 1994 p. I-711) ECLI:EU:C:1994:79, at paragraph 11; Judgment of 15 December 1995, *Union royale belge des sociétés de football association and others / Bosman and others* (C-415/93, ECR 1995 p. I-4921) ECLI:EU:C:1995:463, at paragraph 59; Judgment of 13 March 2001, *PreussenElektra* (C-379/98, ECR 2001 p. I-2099) ECLI:EU:C:2001:160, at paragraph 38.

⁹¹² See e.g. Judgment of 18 October 1990, *Dzodzi / Belgian State* (297/88 and C-197/89, ECR 1990 p. I-3763), at paragraph 34; Judgment of 8 November 1990, *Gmurzynska-Bscher / Oberfinanzdirektion Köln* (C-231/89, ECR 1990 p. I-4003) ECLI:EU:C:1990:386, at paragraph 19; Judgment of 2 June 1994, *AC-ATEL Electronics / Hauptzollamt München-Mitte* (C-30/93, ECR 1994 p. I-2305) ECLI:EU:C:1994:224, at paragraph 17.

⁹¹³ See the same Judgment of 8 November 1990, *Gmurzynska-Bscher / Oberfinanzdirektion Köln* (C-231/89, ECR 1990 p. I-4003) ECLI:EU:C:1990:386, at paragraph 20; accordingly, Judgment of 16 July 1992, *Meilicke / ADV-ORGA* (C-83/91, ECR 1992 p. I-4871), at paragraph 24, and here again Judgment of 15 December 1994, *Stadt Lengerich and others / Helmig and others* (C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93, ECR 1994 p. I-5727) ECLI:EU:C:1994:415, at is paragraph 9.

⁹¹⁴ C. Barnard, E. Sharpston, *The Changing Face of Article 177 References*, in 34 *Common Market Law Review*, 1997, p. 1113, at 1117.

⁹¹⁵ On the fundamental nature of the preliminary reference procedure for the construction of the basic tenets of the EU legal order see again footnote 290 above.

like *Da Costa en Schaake*⁹¹⁶ and *Costa v. ENEL*.⁹¹⁷ In fact, in the first case, the Court - going against the opinion of the Commission that pleaded for the dismissal - explicitly accepted to rule on legal issues materially identical to those dealt with in *Van Gend en Loos* only some weeks before.⁹¹⁸ In the second case, it formally stated its «power to extract from a question imperfectly formulated by the national court those questions which alone pertain to the interpretation of the Treaty»,⁹¹⁹ adding that «(S)ince (...) Article 177 is based upon a clear separation of functions between national courts and the Court of Justice, it cannot empower the latter either to investigate the facts of the case or to criticize the grounds and purpose of the request for interpretation». ⁹²⁰ In this respect, the much discussed practice of the Court reframing/rewriting questions posed by national judges, «having regard to the facts in the main proceedings and in order to provide a helpful response to the national court»,⁹²¹ could also be read as an element of such ample willingness to receive, to answer and to solve cases. Given the tendency, in a second phase at least in the history of the Court, to receive more complicated references, «both because the issues themselves were becoming more complex and because the national courts were trying to be more sophisticated in what they asked»,⁹²² the Court found itself in the necessity to rephrase certain national court questions to better frame and answer the relevant issues. In fact, it is to be noted that this started to happen in early examples of imperfectly and inadequately formulated references⁹²³ (which, at a later stage, have been treated differently): this gives the idea of a practice settled precisely not to declare the impossibility of an

⁹¹⁶ Judgment of 27 March 1963, *Da Costa en Schaake NV and others / Administratie der Belastingen* (28 to 30-62, ECR 1963 p. 31).

⁹¹⁷ Judgment of 15 July 1964, *Costa / E.N.E.L.* (6-64, ECR 1964 p. 585).

⁹¹⁸ See Judgment of 27 March 1963, *Da Costa en Schaake NV and others / Administratie der Belastingen* (28 to 30-62, ECR 1963 p. 31), at 37-38, in which the Court recognized that «(...) the authority of an interpretation under Article 177 already given by the Court may deprive the obligation [to refer under Article 177(3)] of its purpose and thus empty it of substance. Such is the case especially where the question raised is materially identical (...)». Nevertheless, the Court also added that «(...) it is no less true that Article 177 always allows a national court, if it considers it desirable, to refer questions of interpretation to the Court again (...) The Court must, therefore, give a judgment on the present interpretation».

⁹¹⁹ Judgment of 15 July 1964, *Costa / E.N.E.L.* (6-64, ECR 1964 p. 585), at 593.

⁹²⁰ *Ivi.*

⁹²¹ See Judgment of 7 March 1996, *Merckx and Neuhuys / Ford Motors Company Belgium* (C-171/94 and C-172/94, ECR 1996 p. I-1253) ECLI:EU:C:1996:87, at par. 15.

⁹²² C. Barnard, E. Sharpston, *The Changing Face of Article 177 References*, *op. cit.*, at 1120: they cite as early examples the procedures of Judgment of 31 March 1981, *Jenkins / Kingsgate* (96/80, ECR 1981 p. 911); Judgment of 16 February 1982, *Burton / British Railways Board* (19/81, ECR 1982 p. 554) ECLI:EU:C:1982:58; Judgment of 11 March 1981, *Worringham and Humphreys / Lloyds Bank* (69/80, ECR 1981 p. 767), this last also critically commented by A. Lester, *The uncertain trumpet. References to the Court of Justice from the United Kingdom: Equal pay and equal treatment without sex discrimination*, in H.G. Schermers, C.W.A. Timmermans, A. E. Kellermann, J. S. Watson (Eds.), *Article 177 EEC: Experiences and Problems*, *op. cit.*, p. 164.

⁹²³ See for instance Judgment of 23 November 1989, *Parfümerie-Fabrik 4711 / Provide* (150/88, ECR 1989 p. 3891), in which it was also stated, in paragraph 12, that «When ruling on questions intended to permit the national court to determine whether provisions of its national law are in accordance with Community law, the Court may provide the criteria for the interpretation of Community law which will enable the national court to solve the legal problem with which it is faced. The same is true when it is to be determined whether the provisions of the law of a Member State other than that of the court requesting the ruling are compatible with Community law».

answer and aimed at avoiding the declining of jurisdiction at any cost.

Nonetheless, an opposite tendency began with an epiphany around the late 1970s and the early 1980s, arriving to a more complete realization since the 1990s. The Court began to decline jurisdiction in Article 177 references and to put limits to the inflow of cases from national courts through new interpretation of the admissibility/justiciability criteria. This altered attitude surprised the scholars, who started to talk about a «*changing face*»,⁹²⁴ or a transformation in the «*spirit*»,⁹²⁵ of the preliminary reference procedure.

The trend had its first episodes in the often disregarded *Mattheus v. Doego* case of 1978,⁹²⁶ and in the (on the other hand) well-known *Foglia v. Novello (No. 1)* case of 1980,⁹²⁷ in which for the first time the Court of Justice declined its jurisdiction in Article 177 references. In *Mattheus*, the Court easily refused to answer in a trivial episode where the requested interpretation related to measures not yet adopted by the Community institutions; but interestingly, it did so against an attempt by private parties to compel via their agreements both the national court of the Member State to request a preliminary ruling, and the CJ to rule on a certain decisive matter, and by making an explicit reference to «the independent exercise of the discretion» and the spaces thereof provided by Article 177.⁹²⁸ In a more disputable (and disputed)⁹²⁹ move, in *Foglia v. Novello*, the Court did the same, and recognized the «artificial», fabricated nature of the dispute, in which two parties had merely used the device of a contractual clause to induce an Italian judge to refer a question on the validity of the French tax system, cleverly endangering «the whole system of legal remedies available to private individuals» in doing so.⁹³⁰ Remarkably, it did so notwithstanding the danger implied in crossing the boundaries of the fact-finding domain, considered as a preserve of the referring courts.⁹³¹ In the following *Foglia v. Novello (No. 2)* case, raised by the same national court, the Court highlighted that by refusing jurisdiction, it was not trespassing on the prerogatives of the national court, but was simply preventing the application of Article 177 to purposes other than those appropriate that were for it: in particular, it focused on the concreteness of the cases at

⁹²⁴ C. Barnard, E. Sharpston, *The Changing Face of Article 177 References*, *op. cit.*

⁹²⁵ See D. O' Keeffe, *Is the Spirit of Article 177 Under Attack? Preliminary References and Admissibility*, in P. Alleva *et al.* (eds.) *Scritti in onore di Giuseppe Federico Mancini*, *op. cit.*, p. 695; the phrase «in conformity with the spirit of 177» was actually coined by AG Mancini in Judgment of 11 June 1987, *Pretore di Salò / X* (14/86, ECR 1987 p. 2545), at 2557, paragraph 5. See for a recent reflection on the same aspect X. Groussot, *Spirit, Are You There? Reinforced Judicial Dialogue and the Preliminary Ruling Procedure*, Eric Stein Working Paper No. 4/2008, available at the website http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1279367 (accessed 26 August 2015).

⁹²⁶ Judgment of 22 November 1978, *Mattheus / Doego* (93/78, ECR 1978 p. 2203).

⁹²⁷ Judgment of 11 March 1980, *Foglia / Novello* (104/79, ECR 1980 p. 745).

⁹²⁸ Judgment of 22 November 1978, *Mattheus / Doego* (93/78, ECR 1978 p. 2203), at 2210.

⁹²⁹ See for instance G. Bebr, *The Existence of a Genuine Dispute: An Indispensable Precondition for the Jurisdiction of the Court Under Article 177 EEC Treaty*, in *17 Common Market Law Review*, 1980, p. 525.

⁹³⁰ Judgment of 11 March 1980, *Foglia / Novello* (104/79, ECR 1980 p. 745), at par. 11.

⁹³¹ D. Anderson, *The Admissibility of Preliminary References*, in *14 Yearbook of European Law*, 1994, p. 170.

hand and the unwillingness to offer mere advisory opinions.⁹³²

The second and much discussed macroscopic episode came a couple of years later, in 1982, with the case *CILFIT Srl and Lanificio di Gavardo SpA v Ministero della Sanità*.⁹³³ At a time in which the Court «was already receiving about 100 references a year from nine Member States»,⁹³⁴ the Court introduced, according to the general understanding,⁹³⁵ the doctrines of *acte clair* and *acte éclairé* into Community law: by interpreting the scope of the obligation for «national courts and tribunals against whose decisions there is no judicial remedy under national law» to refer questions concerning the interpretation of European law, it seemed to relax the unequivocal wording of paragraph three of Article 177 EEC and to exonerate “final” courts of the Member States in certain circumstances from what otherwise appeared to be an unconditional obligation to refer. In particular, it called them to an autonomous analysis on both whether the question posed in front of them could be irrelevant and also whether the Community provision in question had already been authoritatively interpreted by the Court of Justice (*acte éclairé*), or, whether the correct application of Community law is «so obvious as to leave no scope for any reasonable doubt» (*acte clair*). This seemed to constitute a potential crack in the imperative of the uniform protection, since the Court was «replacing the mandatory wording of the Treaty with a formula which was open to judicial interpretation».⁹³⁶ The Advocate-General of the case, Francesco Capotorti, in his opinion,⁹³⁷ and some scholars further underlined that by relaxing at least «psychologically» such obligation, and by drawing a «move from power (Article 177(2)) and obligation (Article 177(3)) to a perception of no absolute obligation»,⁹³⁸ the CJ was creating doubts as to the real necessity of making a reference even for lower courts, and frustrating a years-long campaign for the inflow of cases and eventually for the uniform interpretation of Community law.

The discussed trend went on and was corroborated by a series of cases in which - later in time, starting in the 1980s but with a strong acceleration in the 1990s - with unprecedented moves, the Court declined jurisdiction, again by focusing on reasons strictly related to the admissibility and justiciability of the dispute. These amounted at more than 20 controversies,⁹³⁹ and included for instance: cases such as where the procedure before the court making the reference for a preliminary

⁹³² Judgment of 16 December 1981, *Foglia / Novello* (244/80, ECR 1981 p. 3045).

⁹³³ Judgment of 6 October 1982, *CILFIT / Ministero della Sanità* (283/81, ECR 1982 p. 3415).

⁹³⁴ C. Barnard, E. Sharpston, *The Changing Face of Article 177 References*, *op. cit.*, at 1125.

⁹³⁵ See the reflections on what he defined a «frequently misunderstood» judgment by D. Edward, *CILFIT and Foto-Frost in their Historical and Procedural Context*, in L. Azoulai, L.M. Poiares Maduro (eds.) *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, *op. cit.*, p. 173.

⁹³⁶ C. Barnard, E. Sharpston, *The Changing Face of Article 177 References*, *op. cit.*, at 1125.

⁹³⁷ Judgment of 6 October 1982, *CILFIT / Ministero della Sanità* (283/81, ECR 1982 p. 3415), at 3437.

⁹³⁸ C. Barnard, E. Sharpston, *The Changing Face of Article 177 References*, *op. cit.*, at 1125.

⁹³⁹ See the caselaw cited by C. Barnard, E. Sharpston, *The Changing Face of Article 177 References*, *op. cit.*, at 1126-1127.

ruling had already been terminated (and therefore the case, in the described American terms, was “moot”);⁹⁴⁰ situations where the Court simply declared to have no jurisdiction under the EC Treaty over what it was asked to consider, in relation to the objects of the references (interpretation of national law;⁹⁴¹ references to Treaty articles on the objectives of the Union,⁹⁴² at least some of the disputes in which Community law does not apply *qua* Community law but is transposed into a national context by national law);⁹⁴³ situations where the Court was controlling, more closely than before, whether all the conditions for a reference laid down in Article 177 itself were satisfied, in particular about the nature of «*court or tribunal*» of the referring authority;⁹⁴⁴ questions where the Court perceived that there was either no genuine dispute or that the issue is hypothetical,⁹⁴⁵ where it considered that inadequate information of fact and law has been provided,⁹⁴⁶ or where it took the view that the questions referred had no connection with the dispute before the national court.⁹⁴⁷

These episodes can be read and were read, in different ways, from different points of view. Surely, some parts of the mentioned case-law, which outlined important «new criteria for review of jurisdiction»,⁹⁴⁸ are considered nowadays as settled teachings of the Court of Justice. In some aspects, they were even incorporated in the black letter law of the new *Guidance on References by National Courts for Preliminary Rulings* issued by the Court of Justice,⁹⁴⁹ a soft-law measure aimed at fostering the knowledge by national judges of the technicalities of the Art. 267 procedure. In historical perspective, a certain tendency towards an optimization of the procedure was evident, also given the transformation in size and quality of the EU integration process, of the EU legal order, of the Court's case-law, and also, as previously said, of the national courts' references. In this sense, there was a symbolic value: the trend was clearly the sign of new phase of relative *maturity*

⁹⁴⁰ Judgment of 21 April 1988, Pardini / Ministero del commercio con l'estero (338/85, ECR 1988 p. 2041) ECLI:EU:C:1988:194, especially at paragraph 11.

⁹⁴¹ For instance Order of 21 December 1995, Max Mara / Ufficio del registro di Reggio Emilia (C-307/95, ECR 1995 p. I-5083) ECLI:EU:C:1995:465, at paragraph 5.

⁹⁴² For instance Order of 7 April 1995, Grau Gomis and others (C-167/94, ECR 1995 p. I-1023) ECLI:EU:C:1995:113.

⁹⁴³ For instance Judgment of 28 March 1995, Kleinwort Benson / City of Glasgow District Council (C-346/93, ECR 1995 p. I-615) ECLI:EU:C:1995:85.

⁹⁴⁴ For instance Judgment of 30 March 1993, Corbiau / Administration des contributions (C-24/92, ECR 1993 p. I-1277).

⁹⁴⁵ See for instance Judgment of 16 July 1992, Meilicke / ADV-ORGA (C-83/91, ECR 1992 p. I-4871), in particular at paragraph 24.

⁹⁴⁶ See for instance Judgment of 26 January 1993, Telemarsicabruzzo and others / Circostel and others (C-320/90, C-321/90 and C-322/90, ECR 1993 p. I-393); Order of 26 April 1993, Monin Automobiles (C-386/92, ECR 1993 p. I-2049) ECLI:EU:C:1993:153.

⁹⁴⁷ See for instance Judgment of 16 September 1982, ONTPS / Vlaeminck (132/81, ECR 1982 p. 2953) ECLI:EU:C:1982:294; Order of 26 January 1990, Falciola / Comune di Pavia (286/88, ECR 1990 p. I-191) ECLI:EU:C:1990:33.

⁹⁴⁸ C. Barnard, E. Sharpston, *The Changing Face of Article 177 References*, *op. cit.*, at 1141.

⁹⁴⁹ The last version of the *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings* [Official Journal C 338 of 6.11.2012], is available at the website [http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32012H1106\(01\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32012H1106(01)) (accessed 26 August 2015).

acquired by the system, and we already saw how this concept can be relevant in the evolution of the Court and of the European judicial architecture, in several respects.

But we also said that the trend was interpreted by a part of scholars as a evolution towards a «European certiorari», or generally towards some form of docket control. Was this really the case? We already pointed at the comparative misunderstanding of taking the *certiorari* as a unified label for any procedural tool for the selection of cases. From our analysis, it is evident that several of the «new criteria for review of jurisdiction» forged by the European Court since 1980s and 1990s coincided, in both their nature and their development, to the American «doctrines of justiciability», precisely aimed at assessing the concreteness of certain cases in its various dimensions. Thus, it was tempting to see the same underlying dynamics theorized in the American context in those, and therefore a Court of Justice that - departing from its obligation to rule on preliminary references - changed the «spirit» of the procedure and moved towards quantitative and qualitative selections, also for strategic reasons.⁹⁵⁰

However, a diachronic analysis can also tell us more in this respect and disprove certain premises taken for granted. It is in fact to be noted that these elements have often given a mere impression of a shift towards strategic docket control without being supported by coherent developments. For instance, *Foglia v. Novello* was, as previously said, the first widely discussed case of procedural inadmissibility (often considered the first that ever happened):⁹⁵¹ and it provided a dismissal on a rather typical and central feature pertaining to the genuineness of the underlying dispute and the unwillingness to issue mere advisory opinions (an aspect of the “concreteness” of a case, in both the American jargon and the Italian theorization of constitutional incidental adjudication, as we know the paradigm for Article 177 EEC). But in hindsight, the doctrine had not such a decisive application later on. In fact, the Court did not apply it in other later cases which probably would have merited the same treatment, even in the immediate aftermath.⁹⁵² In *Vinal*,⁹⁵³ a case of the subsequent year, the Italian Government submitted that the controversy between the parties was artificial and only aimed to «impeach the Italian state in the absence of any actual

⁹⁵⁰ See the reconstructions given in this respect by T. Kennedy, *First steps towards a European certiorari?*, *op cit.*; L. Heffernan, *The Community Court post-Nice: a European Certiorari revisited*, *op cit.*; and recently by E. D'Alessandro, *Il procedimento pregiudiziale interpretativo dinanzi alla Corte di Giustizia*, Giappichelli 2012, at 22 *et seq.*

⁹⁵¹ See e.g. R. Lane, *Article 234: a Few Rough Edges Still*, in M. Hoskins, W. Robinson (eds.), *A True European: Essays for Judge David Edward*, Hart Publishing 2004, p. 327, at 334.

⁹⁵² C. Barnard, E. Sharpston, *The Changing Face of Article 177 References*, *op. cit.*, at 1123-1124.

⁹⁵³ Judgment of 14 January 1981, *Vinal / Orbat* (46/80, ECR 1981 p. 77) ECLI:EU:C:1981:4.

dispute»;⁹⁵⁴ but both the Advocate General⁹⁵⁵ and the Court laconically distinguished⁹⁵⁶ the case from *Foglia* and rejected the objection, pointing to the lack of decisive evidence of a «friendly suit», and that the facts were only sufficient to show «that the parties *may* have had a perfectly reasonable interest» in fabricating it.⁹⁵⁷ The same happened later, in the cases *Rau*⁹⁵⁸ and *Provide*,⁹⁵⁹ where the facts of the cases could be dubious (in both, one party strangely refused to take delivery of the goods ordered by it and was sued by the other party in the national court), but the Court readily accepted the genuineness of the disputes. In *Delhaize*,⁹⁶⁰ there was evidence that the parties were in agreement and that the action before the local judges was deliberately engineered in order to see whether Article 34 EEC forbade the application of a Spanish law prohibiting the export in bulk of wine protected by the Rioja D.O.C. designation of origin. The parties suggested identical solutions to the questions referred by the national court, in certain cases even expressly making a *renvoi* to the submissions of each other; and the action in the proceedings of origin was for specific performance, alternatively for damages «provisionally assessed at BF 1».⁹⁶¹ However, the Court, in here as well, made no reference to its (possible lack of) jurisdiction under Article 177.

The potential magnitude of the *CILFIT* case for the docket control is even more profound and debatable. The criteria set in the judgment surely importantly shaped, and are still part of, the fundamental division of labour in the EU judicial architecture, between the CJEU and the national courts. But a contextual comparative analysis of the case is again capable of putting it in a different light, in particular if one is tempted to interpret it as a major tentative quantitative streamlining of the inflow of cases. In fact, it has been recently written against the general vulgate, that the Court in *CILFIT* indeed «rejected the doctrine of *acte clair*»,⁹⁶² by in a certain sense simply reinforcing, in a different historical phase, its holding in *Da Costa*.⁹⁶³ We already mentioned how in this latter judgment, the Court of Justice accepted to rule on two questions materially identical to those of the *Van Gend en Loos* case, raised by the same Netherlands Tariefcommissie while it had not yet received an answer in the seminal proceeding. Already in 1963, the Court talked of the

⁹⁵⁴ *Ibidem*, at paragraph 5.

⁹⁵⁵ *Ibidem*, at 98-99: «there is nothing in the conduct of the parties in concluding the contract which points inescapably to the conclusion that the contract was only intended to provide a pretext to call in question the Italian tax arrangements before the Court of Justice on the basis of a main action in the form of a friendly suit».

⁹⁵⁶ *Ibidem*, at paragraphs 5-6.

⁹⁵⁷ *Ibidem*, at 99, with original emphasis.

⁹⁵⁸ Judgment of 10 November 1982, *Rau / De Smedt* (261/81, ECR 1982 p. 3961) ECLI:EU:C:1982:382, in particular at paragraph 9.

⁹⁵⁹ Judgment of 23 November 1989, *Parfümerie-Fabrik 4711 / Provide* (150/88, ECR 1989 p. 3891), in particular at paragraph 9.

⁹⁶⁰ Judgment of 9 June 1992, *Delhaize Frères / Promalvin and others* (C-47/90, ECR 1992 p. I-3669) ECLI:EU:C:1992:250.

⁹⁶¹ See *ibidem*, A.G. Gulmann, paragraph 14, I-3691.

⁹⁶² D. Edward, *CILFIT and Foto-Frost in their Historical and Procedural Context*, *op cit.*, at 179.

⁹⁶³ See footnote 918 above.

«unrestricted» nature of the obligation of Article 177(3); it simply went on in its reasoning and relied on the two concepts of the “authority” of its own rulings and the “cause” of the national courts' obligation to refer. In *Da Costa*, the combination of these two concepts led the Court to state that the authority of a prior ruling of its own may at least in principle deprive the national obligation of its cause and so empty it of its substance;⁹⁶⁴ however, not only this did not lead it to decline in any way its obligation to rule in the individual case but when looking closer, this refined reasoning was nothing but an answer to other bolder and “dangerous” reconstructions. In fact, in *Da Costa*, the Commission argued for the dismissal of the case by the Court, for lack of substance; and the Advocate-General Lagrange, relying on his own previous opinion in *Fédéchar*,⁹⁶⁵ and on a French traditional argumentative *tòpos*, suggested that in similar cases, when the text of black-letter law is clear (or clarified) it would require no activity of “interpretation”, and therefore could require no work by the Court. Between the lines and the didactic tone of *Da Costa* (and before, in *Fédéchar*) laid the tentative application in Community law of the *acte clair* doctrine as per its derivation from French administrative law.⁹⁶⁶ This doctrine, aimed at denying any role for a creative “interpretation” of law when a mere “application” was at stake, was originally forged by the *Conseil d'État* to historically circumvent the rule according to which the French executive had exclusive competence to interpret treaties. By holding that treaties could not require an active interpretation when their texts were clear, the French judiciary restricted the power of the government to interfere with its own role.⁹⁶⁷ The Court of Justice, in its final judgment in *Da Costa*, departed from this view and the suggestions of the Advocate-General by hinting at a more nuanced approach. But such a solution was surely not enough since in the following years, the *acte clair* doctrine found its way in some Member States in order to circumvent the application of European law. This was the case of the *Conseil d'État* itself, already in 1964, which through that theory, denied its obligation to request a preliminary ruling to the ECJ in the *Shell-Berre* case⁹⁶⁸ by arguing about the existence or not of a proper “question” as per the wording of Article 177 EEC.⁹⁶⁹ It was then followed by other national jurisdictions such as Germany, in 1970, by the German Federal Social Court in the notorious *Widow's Pension* case⁹⁷⁰ (and the practice was recognized by local scholars as a clear import of the

⁹⁶⁴ D. Edward, CILFIT and Foto-Frost in their Historical and Procedural Context, *op cit.*, at 179.

⁹⁶⁵ Judgment of 16 July 1956, Fédération charbonnière de Belgique / ECSC High Authority (8/55, ECR 1954-1956 p. 245).

⁹⁶⁶ X. Groussot, Spirit, Are You There? Reinforced Judicial Dialogue and the Preliminary Ruling Procedure, *op. cit.*, at 6; D. Edward, CILFIT and Foto-Frost in their Historical and Procedural Context, *op. cit.*, at 175.

⁹⁶⁷ See in this respect the erudite reconstruction by Advocate-General Capotorti, Judgment of 6 October 1982, CILFIT / Ministero della Sanità (283/81, ECR 1982 p. 3415), at 3435.

⁹⁶⁸ Case Re Société des Petroles Shell-Berre and Others, Conseil d'État, 1964-06-19, (1964) CMLR 462.

⁹⁶⁹ See for a survey of the Conseil d'État's approach M.F Conniff, The French Conseil d'État and Article 177 of the Treaty of Rome: a Case Analysis, in 12 Virginia Journal of International Law, 1972, p. 377.

⁹⁷⁰ Case BSG 1970-01-22, 4 RJ 109/69 (Re French Widow's Pension Settlement), (1971) CMLR 530.

French doctrine)⁹⁷¹ and, in 1974, by the British judiciary.⁹⁷² A scholarly debate on the point flourished starring among others,⁹⁷³ former Advocate-General Lagrange arguing in some articles on the perfect compatibility of the doctrine with the preliminary reference procedure⁹⁷⁴ in addition to other renowned scholars and even judges of the Court such as Pierre Pescatore⁹⁷⁵ on more skeptical, critical positions. A Written Question in the European Parliament was even submitted on the point, with the Commission restating its positive attitude towards the autonomy of national courts.⁹⁷⁶ It was against this factual, contextual background that the ECJ gave its ruling in CILFIT. The Advocate-General Capotorti, as previously said, argued for a restrictive approach and a rejection of the practice and he did so not only on refined theoretical grounds but also as a clear reaction to the practical “abusive” employment made by the *Conseil d'État*. Interestingly, he also offered an interesting reflection on how the concept of “*manifesta infondatezza*” (“manifestly unfounded nature” of a question raised) in the Italian incidental system of constitutional adjudication - as the original historical inspiration of Article 177 - could be considered as a parallel but not anymore as a relevant point of reference, given «the specific formal and technical characteristics of Community law» as practically evolved as well as the «differences in the methods of interpretation adopted by the Court of Justice and those on which national courts rely, stemming from the differences between the legal spheres in which the former and the latter operate».⁹⁷⁷ The judges, when confronted with all the above, chose not only to restate the words of the Treaty of Rome and the obligation therein provided, in a certain sense already breached in the early days of *Da Costa*. But they offered an important and cunning lesson that, in the wake of the Advocate-General's opinion, took the specificity of the supranational legal order into account. The result was surely not, as per the general understanding, a plain adoption of the *acte clair* doctrine. Quite the opposite, the description of such

⁹⁷¹ See E. Schober, Die Lehre vom 'Acte Clair' im französischen Recht, in 19 Neue Juristische Wochenschrift, 1966, p. 2252.

⁹⁷² Court of Appeal, 22 May 1974, *HP Bulmer Ltd & Anor v. J. Bollinger SA & Ors* (1974) EWCA Civ 14.

⁹⁷³ See for instance, in the pre-CILFIT literature, S.A. Kuipers, Pertinence et acte clair, art. 177 CEE. Observations sur Hoge Raad der Nederlanden, in Cahiers de droit européen, 1967, p. 81, or G. Bebr, Development of Judicial Control of the European Communities, Brill 1981, at p 495 *et seq.*, and then N. Catalano, La pericolosa teoria dell'atto chiaro, in 1 Giustizia Civile, 1983, p. 3; G. Bebr, The Rambling Ghost of 'Cohn Bendit'. Acte clair and the Court of Justice, in 20 Common Market Law Review, 1983, p. 440; F. Capotorti, Sull'obbligo del rinvio alla Corte di giustizia per l'interpretazione a titolo pregiudiziale a norma del 3° comma dell'art. 177 del trattato Cee, in 1 Giurisprudenza italiana, 1983, p. 1008.

⁹⁷⁴ See M. Lagrange, Cour de Justice et Tribunaux nationaux. La théorie de l'acte clair pomme de discorde ou trait d'union, in 1 Gazette du Palais, 1971, and *Id.*, The theory of acte clair: a bone of contention or a source of unity?, in 8 Common Market Law Review, 1971, p. 313.

⁹⁷⁵ See P. Pescatore, L'interpretation du droit communautaire et la doctrine de l'acte clair, in 33/34 Bulletin des juristes Européens, 1971, p. 49; *Id.*, Interpretation of Community law and the doctrine of 'acte clair', in 27 Legal Problems of an Enlarged European Community, 1972, p. 46.

⁹⁷⁶ Answer to Written Question by Mr. Krieg no. 600/78 (OJ 1979 C28), quoted under “Facts and procedure” in Judgment of 6 October 1982, CILFIT / Ministero della Sanità (283/81, ECR 1982 p. 3415), at 3425, and in extenso in D. Edward, CILFIT and Foto-Frost in their Historical and Procedural Context, *op. cit.*, at 176.

⁹⁷⁷ Judgment of 6 October 1982, CILFIT / Ministero della Sanità (283/81, ECR 1982 p. 3415), at 3435.

meticulous guidelines for the apical national courts (since then known as «CILFIT criteria»)⁹⁷⁸ were clearly (in practice) aimed at circumscribing and circumventing the scope of the doctrine. The Court of Justice famously ruled that national judges, who want to embrace the *acte clair* rationale, must be convinced that the interpretation would not lead to divergences in other Member States' courts and the Court of Justice; and importantly, the existence of this possibility must be assessed by them on the basis of the characteristic features of EU law regarding interpretation, i.e. comparison of the different language versions, all equally authentic, specificity of the Community law terminology, and recourse to contextual/teleological interpretation. When Rasmussen famously observed in the aftermath of the decision, that the Court appeared to be «giving» to the national courts, but in reality it was «maintaining the *status quo*» because of the highly restrictive criteria imposed,⁹⁷⁹ this could be simply interpreted as a witticism of a famous dissenter: but in reality, his depiction was even limitative if one literally takes the obligations of exhaustive linguistic and jurisprudential comparison imputed on the national judges. In reality the CILFIT criteria obviously constitute a sort of *fictio iuris*, that *idem operatur, quod veritas*: the existence of a fact, i.e. the exhaustion of all the criteria must be taken as occurred in order to make the foreseen legal consequences possible. In the case of CILFIT, this nowadays includes a full linguistic and jurisprudential comparison made among 28 legal systems and 24 languages, and many Authors have already highlighted how technically impossible and disruptive a faithful obedience would be;⁹⁸⁰ but already at the time of the judgment 10 legal systems and at least 7 languages were part of the European Communities, so that the nature of *probatio diabolica* of the criteria was already evident. Several neglected proposals⁹⁸¹ and several refused occasions⁹⁸² to relax the standards of CILFIT occurred in the following years, so

⁹⁷⁸ X. Groussot, Spirit, Are You There? Reinforced Judicial Dialogue and the Preliminary Ruling Procedure, *op. cit.*, at 6.

⁹⁷⁹ See H. Rasmussen, The European Court's Acte Clair Strategy in C.I.L.F.I.T.; Or, Acte Clair, of Course! But What Does it Mean?, *op. cit.*.

⁹⁸⁰ See for instance M. Bobek, On the Application of European Law in (Not Only) the Courts of the New Member States: “Don’t Do as I say”?, in 10 Cambridge Yearbook of European Legal Studies, 2007-2008, p. 1; X. Groussot, Spirit, Are You There? Reinforced Judicial Dialogue and the Preliminary Ruling Procedure, *op. cit.*, at 7.

⁹⁸¹ See the proposals of the Report by the Working Party on the Future of the European Communities' Court System for the European Commission, January 2000 (so called Ole Due Report, see footnote 856 above), at 17 *et seq.*, and of the Report of the Working Group on the Preliminary Ruling Procedure, Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, The Hague, December 2007, available at the website http://www.juradmin.eu/seminars/DenHaag2007/Final_report.pdf (accessed 26 August 2015), at p. 11.

⁹⁸² See Judgment of 15 September 2005, Intermodal Transports (C-495/03, ECR 2005 p. I-8151) ECLI:EU:C:2005:552 and Judgment of 15 July 2010, Gaston Schul (C-354/09, ECR 2010 p. I-7449) ECLI:EU:C:2010:439: in both the occasions, the Advocates General pleaded for a reconsideration of the CILFIT criteria. See e.g. the clear words in the Opinion of AG Stix-Hackl in C-495/03 Intermodal Transports, at paragraphs 99 and 100: «I take the view that the judgment in Cilfit cannot be intended to mean that the national court is required, for example, to examine a provision of Community law in every one of the official Community languages. That would place a practically intolerable burden on the national courts and would de facto reduce the – albeit limited – delegation to national courts of last instance of questions of Community law which can be answered ‘unequivocally’ in accordance with the judgment in Cilfit to a lip service or a ‘tactical move’. 100. It must therefore be concluded that the requirements set out in Cilfit cannot be regarded as a type of instruction manual on decision-making for national courts of last instance which is to be rigidly adhered to and on the basis of which an objective and clear dividing line can be

that it is nowadays impossible to see in the judgment, as originally done or feared, as a strategic technique for limiting the inflow of cases. CILFIT was suggested, in the aftermath of the Court's decision, as the conclamation of a docket control strategy:⁹⁸³ but as previously seen, its historical and contextual meaning was different, influenced by the specific directions taken by some Member States' judiciaries; and , if any, the «strategy», as per the words of Rasmussen,⁹⁸⁴ was actually the opposite.

Briefly, the same can be said for the requirement of adequate information in the order of reference, which was then also relaxed in practice by the possibility acknowledged by the Court to supplement the allegations with the material in the case-file forwarded by the national court and the written observations submitted to the Court (especially with a view to the notice of governments and other interested parties);⁹⁸⁵ or by the supposed strategic filtering nature of the check of the existence of a proper “court or tribunal” asking for a ruling, since some of the components for such assessment were considered too lax even by internal members of the Court.⁹⁸⁶

In sum, we can surely conclude that if all the mentioned trends of new procedural *rigueur* by the Court of Justice could be technically similar to other courts' experiences, and could lead to comparative speculations on the adoption in Luxembourg of a sort of “European certiorari”, in fact they did not amount - both in the original intention and in the actual practice- to techniques of docket control. As mentioned, they were signs of a new phase of relative maturity of the EU legal order and of the functioning of its judicial architecture: per se, a relevant, interrelated but different phenomenon. These choices had no sensible quantitative or statistically relevant effects (nor even subtle, qualitative ones, as per the American example) in the streamlining of received cases.⁹⁸⁷ For

drawn between questions of interpretation which may exceptionally be resolved by such courts themselves and questions of interpretation which must be referred to the Court of Justice. Those requirements cannot be used as a benchmark for establishing ‘objectively’ when the meaning of a Community provision is so obvious as to leave no scope for any reasonable doubt as to its interpretation».

⁹⁸³ See e.g. N. Catalano, *La pericolosa teoria dell'atto chiaro*, *op. cit.*; J.C. Masclet, *Vers la fin d'une controverse ? La Cour de justice tempère l'obligation de renvoi préjudiciel en interprétation faite aux juridictions suprêmes* (art. 177, alinéa 3, CEE), in *26 Revue du Marché Commun*, 1983 p.363.

⁹⁸⁴ See H. Rasmussen, *The European Court's Acte Clair Strategy in C.I.L.F.I.T.; Or, Acte Clair, of Course! But What Does it Mean?*, *op cit.*

⁹⁸⁵ See for instance Judgment of 13 April 2000, *Lehtonen and Castors Braine* (C-176/96, ECR 2000 p. I-2681) ECLI:EU:C:2000:201.

⁹⁸⁶ See for instance the well-known flamboyant, critical remarks made by Advocate-General Jarabo Colomer in Judgment of 29 November 2001, *De Coster* (C-17/00, ECR 2001 p. I-9445) ECLI:EU:C:2001:651 (especially at paragraph 14 of the Opinion) about the liberal criterion employed by the Court to assess the judicial independence of the referring authority.

⁹⁸⁷ See P. Craig, *The Jurisdiction of the Community Courts Reconsidered*, *op. cit.*, at 565: «The Foglia principle, and the case law based upon it, will only serve to exclude *a limited number of references*» (emphasis added); T. Tridimas, *Knocking on Heaven's Door: Fragmentation, Efficiency and Definance in the Preliminary Reference Procedure*, in *40 Common Market Law Review*, 2003, p. 9, at 22: «Despite fears to the contrary, the ECJ has not

instance, empirical analysis has noted how, in a sample period of three years in the recent times of massive workload, less than ten references were rejected as inadmissible.⁹⁸⁸ The Court of Justice's institutional evolution did not pass through these bottlenecks; in this respect, it needed to take different paths.

VI.4 Docket Control as a Result of Substantive Interpretative Choices, Delegation and Efficiency in the Employment of Resources

Apart from the mentioned restriction posed in the *Plaumann formula* to the *locus standi* of individuals in annulment actions — then adopted and confirmed by positive law until actual Article 263(4) TFEU — the procedural tools for the “selection”, admission, and treatment of cases, typical instruments of docket control for several judicial bodies, have not been and could not be a decisive instrument in the hand of the Court of Justice, in spite of the perceived need of limiting the workload. The only abstractly workable solutions could be implemented in the preliminary reference procedure, but we saw how strong the concerns not to change the dynamics of such fundamental mechanism of dialogue among courts and development of the EU legal order have always been, with the risk of distorting it. We showed how this rationale also laid behind cases such as *Foglia v. Novello* or *CILFIT*, which a certain vulgate wanted to see as examples of a different attitude and a new awareness of its dimensional constraints by the Court, at a certain point of its historical evolution.

used its power to control the admissibility of references as a means of introducing certiorari by the back door», and at 47: «The Court's residual power to control the admissibility of references has been used in a cautious and measured way. This is correct as control of admissibility can be no substitute for the absence if a power of certiorari».

⁹⁸⁸ See the reconstruction made by T. Tridimas, *Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure*, *op cit.*, at 22, on the period between 1998 and 2001, in which only the following cases were subject: Judgment of 12 March 1998, *Djabali / Caisse d'allocations familiales de l'Essonne* (C-314/96, ECR 1998 p. I-1149) ECLI:EU:C:1998:104; Order of 30 April 1998, *Italia Testa and Modesti* (C-128/97 and C-137/97, ECR 1998 p. I-2181) ECLI:EU:C:1998:187; Order of 8 July 1998, *Agostini / Ligue francophone de judo et disciplines associées and Ligue belge de judo* (C-9/98, ECR 1998 p. I-4261) ECLI:EU:C:1998:339; Order of 28 April 1998, *Reisebüro Binder* (C-116/96 REV, ECR 1998 p. I-1889) ECLI:EU:C:1998:169; Order of 21 April 1999, *Charreire* (C-28/98 and C-29/98, ECR 1999 p. I-1963) ECLI:EU:C:1999:188; Order of 11 May 1999, *Anssens* (C-325/98, ECR 1999 p. I-2969) ECLI:EU:C:1999:244; Order of 2 March 1999, *Colonia Versicherung and others* (C-422/98, ECR 1999 p. I-1279) ECLI:EU:C:1999:113; Order of 28 June 2000, *Laguillaumie* (C-116/00, ECR 2000 p. I-4979) ECLI:EU:C:2000:350. In some instances, the Court considered some of the questions referred irrelevant and thus refused to answer them, but accepted others: see Judgment of 13 July 2000, *Idéal tourisme* (C-36/99, ECR 2000 p. I-6049) ECLI:EU:C:2000:405.

Some more relevant results - often neglected in the mainstream doctrinal analysis as generally the case for such quantitative matters - first came about from what we can define as substantive interpretative choices, addressed (not necessarily as their only reason) at regulating the inflow of disputes and “selecting” the cases devoting a full treatment and a comprehensive employment of resources. This is the most evident result of a general method of “internal” docket control, which comes in the form of a strategy of delegation of decision-making, decentralisation and self-restraint, to make the employment of cognitive resources and time in the solution of a single case more efficient. This form of management of the workload, in the form of a best management of resources, would in any case result in aggregate benefits for all the «normative commitments» of the quality in judging, the preservation of correct and uniform application of law as well as timely and efficient access to the legal system.

We already talked of a traditionally higher-developed American doctrine with regard to the quantitative aspects of judging. This is also the case in this respect, at least if we think of those scholars (already mentioned) who advocate a “comparative institutional analysis” of the capacity and potentiality of different decision-making bodies.⁹⁸⁹ From them came a call to conceptualize docket control not only through the lenses of *procedural* devices to formally admit (or not) a case in front of a court or for a full review on the merits. Also *substantive* choices and standards posed by courts in the different areas of law vastly influence the amount of litigation those courts will receive and the degree of review they will must give to the cases. From this literature comes an invitation to consider that the underlying reasons of several judicial choices and standards of decision are also related, sometimes explicitly, sometimes not, to institutional concerns. Courts are naturally constrained for «scale» and capacity reasons to decide cases in a way that keeps the total volume of litigation below some threshold level; and in this sense, judges, sometimes more than scholars, would have a «general strong intuitive understanding of what kinds of decisions invite large volumes of litigation»⁹⁹⁰ - also by evaluating and fostering the complexity of the relative substantive areas of law, their certainty or uncertainty, and consequently their tendency to produce disuniformity and new controversies.⁹⁹¹ Through this conceptual framework, some interesting developments in the «substance» of American constitutional law have been historically investigated

⁹⁸⁹ N. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy*, *op. cit.*; A. Coan, *Judicial Capacity and the Substance of Constitutional Law*, in 122 *Yale Law Journal*, 2012, p. 422.

⁹⁹⁰ A. Coan, *Judicial Capacity and the Substance of Constitutional Law*, *op. cit.*, at 453.

⁹⁹¹ See accordingly N. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy*, *op. cit.*, at 147- 148, and R.A. Posner, *The Federal Courts*, *op. cit.*, at 90-91.

and explained.⁹⁹² for example, in the field of the «constitutional rights revolution of the 1950s and 1960s, which generated an enormous volume of new litigation», and then asked for the setting of some clearer forms of standard of review to regulate and limit its inception;⁹⁹³ or in the *Commerce clause* adjudication, where a somehow fictitious distinction between economic and noneconomic activity has been judicially constructed with the effect of keeping the incentives to challenge federal government regulation low,⁹⁹⁴ given the well-known highly deferential rational basis test applied to the regulation of economic activity.

But in the same vein, one can fruitfully inspect and vindicate several choices of the European Court of Justice, also of fundamental and historically contested nature. Upon closer inspection, the Court seems to have used such techniques of deference towards other decision makers and strategic setting of its standards of review to reduce the burden of its potential case-law in the game of supply and demand for adjudication.

For instance, one can surely think of the judicial definition of certain complaints as “outside the scope of application” of supranational law. This definition is surely devoted to a proper allocation of competences and related institutional discretion in a federal-like system and to respect certain spheres of autonomy to Member States. But it is also clearly aimed at closing the doors of the Court to the relative arising litigation. In thinking to established areas of review, this famously happened in *Keck and Mithouard*,⁹⁹⁵ when the Court decided to “clarify” the scope of application of the free movement of goods rules in relation to national restrictions on the ways goods were traded. This was done by establishing a category of measures that was not caught by Article 28 (now Article 34 TFEU) so that they did not have to be justified:⁹⁹⁶ remarkably, this was done through the judicial introduction of a non-Treaty term, «selling arrangement», which became a concept for the national decision-makers to define.⁹⁹⁷ As noted by its commentators,⁹⁹⁸ the judgment wanted to prevent national traders from invoking Article 28/34 when their real complaint was not really about

⁹⁹² In the words of A. Coan, *Judicial Capacity and the Substance of Constitutional Law*, *op. cit.*.

⁹⁹³ *Ibidem*, at 438.

⁹⁹⁴ *Ibidem*, at 443.

⁹⁹⁵ Judgment of 24 November 1993, *Keck and Mithouard* (C-267/91 and C-268/91, ECR 1993 p. I-6097).

⁹⁹⁶ *Ibidem*, at paragraph 16: «By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment (Case 8/74 [1974] ECR 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States».

⁹⁹⁷ See J. Bell, *The Role of the European Judges in an Era of Uncertainty*, *op. cit.*, at 288.

⁹⁹⁸ S. Weatherill, *After Keck: Some thoughts on how to clarify the clarification*, in 33 *Common Market Law Review*, 1996, p. 885.

restrictions on inter-state trade but merely about national trading rules: but in doing so, the judicial move was also doubtlessly intended to empower national courts to dismiss far-fetched attempts to deploy internal market law which was clogging up the European judicial system with the minutiae of purely local affairs⁹⁹⁹ - having no adequate effect on intra-Community trade.

Actually, the same could also be said for other cases of “purely internal situations”, i.e. those situations in which the Court finds all the facts confined within one Member State and no “cross-border element”. In these cases, where no “connecting factor” or “connecting link” with “the situations envisaged by Community law” is found, the Court has consistently held that the market freedoms and the Treaty's protections do not apply (at least at the current stage) and has refused to intervene, even at the cost of “reverse discriminations” suffered by citizens. Thus, in a number of free movement cases under the preliminary reference procedure, this interpretation has critically led the Court to hold certain national measures illegal “only in so far as” they apply to cross-border situations, while such national measures remain valid in relation to purely internal situations, so that the same national measure is sometimes legal, sometimes illegal, depending on the underlying factual situation in which it is applied.¹⁰⁰⁰ It is easy to see, also in this respect, not only an attention by the Court to the allocation of competences and the preservation of States' autonomy, but also concerns about both its own physical resources and to its own ability to investigate on such questions¹⁰⁰¹ The potential litigation that could arise in case of more lenient interpretation would surely be massive.

But dynamics of delegation, decentralisation and control of the burden of potential case-law are not to be found only in these clear *actiones finium regundorum*. As previously said, a clarification of the intensity of judicial oversight can also lead to important effects, especially in controlling the incentives for litigation and inviting more or less high volumes of it. As suggested by Paul Craig,¹⁰⁰² this has been the technique that has been strategically employed by the Court of Justice when reviewing cases brought to it under the preliminary ruling procedure to contest the validity of Community acts which cannot be challenged directly through the annulment procedure, because of the mentioned limited *locus standi* rules for individual parties. Applicants who wish to challenge the validity of Brussels' action, given the difficulty to directly access the Court, will often

⁹⁹⁹ *Ibidem*, at 885-886.

¹⁰⁰⁰ See the reflections by C. Ritter, Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234, in 31 *European Law Review*, 2006, p. 690, at 691.

¹⁰⁰¹ P. Caro de Sousa, Catch Me If You Can? The Market Freedoms' Ever-expanding Outer Limits, in 4 *European Journal of Legal Studies*, 2011, p.162.

¹⁰⁰² See P. Craig, The Jurisdiction of the Community Courts Reconsidered, *op. cit.*, at 564.

have to do so through national courts and a request for preliminary ruling, «as to whether, for example, an agricultural measure was disproportionate and hence in breach of Article 34» (now Article 40 TFEU).¹⁰⁰³ In any case, such a move amounts to a surreptitious circumvention of the standing rules and the Court - not to be overburdened by it - had to set a high standard for the success of a such a challenge: it will not readily find that the challenged Community norm is invalid, more especially in an area where the Commission and Council have broad discretionary power, and it made explicit that the applicant may well have to prove that the measure was manifestly disproportionate, or very obviously discriminatory.¹⁰⁰⁴ In doing so, it is clearly strategically limiting the inflow of actions from a whole category of potential actors.

A second example, again in an established area, could be seen in the rules created by the Court on the national remedies for the breach of European law.¹⁰⁰⁵ The Court has notoriously mandated the existence of national remedies, has taken the view that they should be at least as good as those that apply in national law; and in addition, has stated the requirement of their at least “effective” nature.¹⁰⁰⁶ When English law rules, in a seminal case, were found to not be effective in providing a remedy, the CJ insisted on applying a standard of effectiveness based on principles built from the laws of Member States.¹⁰⁰⁷ It did so by laying down precise criteria: the infringed rule of law must have been intended to confer rights on individuals, there was a sufficiently serious breach of Community law, and there was a direct causal link between the breach and the damage sustained. Such criteria clearly delegate key issues of interpretation and fact to the national courts, in particular about the rather indefinite concept of “sufficiently serious” breach, and the approach has had an impact on the role of the Court in enforcement matters: to the extent that national judges have been encouraged to ensure that there are national-level remedies for the failure to implement EU law, this is said to explain why there are fewer enforcement cases being brought at the supranational level.¹⁰⁰⁸

However, the most relevant practice of delegation, decentralisation and control of employed

¹⁰⁰³ *Ivi.*

¹⁰⁰⁴ See e.g. the well known Judgment of 7 February 2002, Weber (C-328/00, ECR 2002 p. I-1461) ECLI:EU:C:2002:91.

¹⁰⁰⁵ See J. Bell, *The Role of the European Judges in an Era of Uncertainty*, *op. cit.*, at 288.

¹⁰⁰⁶ See, *inter alia*, originally, Judgment of 15 May 1986, Johnston / Chief Constable of the Royal Ulster Constabulary (222/84, ECR 1986 p. 1651), Judgment of 15 October 1987, Unectef / Heylens (222/86, ECR 1987 p. 4097), Judgment of 3 December 1992, Oleificio Borelli / Commission (C-97/91, ECR 1992 p. I-6313), and, notably, after the formalization of the principle in Article 47 of the Charter of Fundamental Rights of the European Union, the recent Judgment of 22 December 2010, DEB (C-279/09, ECR 2010 p. I-13849) ECLI:EU:C:2010:811.

¹⁰⁰⁷ Judgment of 5 March 1996, Brasserie du pêcheur / Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, *ex parte* Factortame and others (C-46/93 and C-48/93, ECR 1996 p. I-1029) ECLI:EU:C:1996:79.

¹⁰⁰⁸ J. Bell, *The Role of the European Judges in an Era of Uncertainty*, *op. cit.*, at 288; A. Arnulf, *The European Union and its Court of Justice*, 2nd edition, Oxford 2006, at p. 82 *et seq.*

resources by the Court of Justice rests somewhere else, again in the basic peculiarities of the preliminary ruling procedure: in particular, in the ambivalent nature of its interpretative version. It is well known how a judgment rendered according to what is today Article 267 TFEU is in these cases an answer to an interpretative question raised by a national judiciary and its content serves two purposes simultaneously. First, the reply should give, in a specific vein, useful input to guide the referring body in solving the concrete case. Second, the interpretation should attempt universality and reach beyond the specific facts of the dispute at hand, providing insightful information for future cases that may arise in all the Member States.¹⁰⁰⁹ In the above, we saw first-hand operative rules governing such inherent, precious ambivalence. The mandate and the division of labour provided by the procedure would ask at European Court of Justice a mere *interpretation* on questions of law, thereby leaving the moment of the consequent *application* of the stated principle by the national referring judges. At the same time, in an apparently paradoxical way, we saw how Luxembourg is asking, formally as an admissibility requirement, the national judges to provide exhaustive information of the specificities of the cases, so to make a complete and fruitful answer possible: it emphasised in several occasions that it can only deal with references where the context is made very clear.¹⁰¹⁰ Furthermore, we saw how the *CILFIT* judgment is an invitation, or almost a lesson, from Luxembourg to all the national judges to “think globally” - or better “comparatively/European” - by accepting a cooperative role and making the procedure work as a means to «(...) *assurer l'unité du droit communautaire, son efficacité, son dynamisme, son 'génie' propre, c'est-à-dire son originalité et sa conformité aux buts de la construction européenne*».¹⁰¹¹

The fundamental efficiency of the procedure is ensured by the coexistence in it of «abstractness and concreteness»,¹⁰¹² by its strategic relevance as a «way through which primary and secondary law find useful solutions for the present but also for the future».¹⁰¹³ Such double role ensures, or should ensure, what we have repeatedly called the *nomphylachia* of the Court, its role of φύλαξ, of guardian, of the νόμος, of the law: its *dicta* should ensure the correct application of European law in the individual cases and in a pro-active sense, simultaneously transcend them to «flirt with the conventional tasks of a rule-maker»,¹⁰¹⁴ and ensure certainty and uniformity of

¹⁰⁰⁹ D. Sarmiento, Half Case at a Time. Dealing with Judicial Minimalism at the European Court of Justice, in M. Claes, M. de Visser, P. Popelier and C. van de Heyning (eds.), *Constitutional Conversations in Europe. Actors, Topics and Procedures*, Intersentia 2012, p. 13, at 19.

¹⁰¹⁰ See e.g. the cases mentioned in footnote 946 above.

¹⁰¹¹ P. Pescatore, *L'ordre juridique des communautés européennes. Etude des sources du droit communautaire*, Presses universitaires de Liège 1975, at p. 215.

¹⁰¹² G. Davies, *Abstractness and Concreteness in the Preliminary Reference Procedure*, *op. cit.*

¹⁰¹³ D. Sarmiento, Half Case at a Time. Dealing with Judicial Minimalism at the European Court of Justice, *op. cit.*, at 19.

¹⁰¹⁴ *Ivi.*

interpretation in general terms. It is always important to consider that this ambivalence includes, in the ongoing process of the EU integration, a constructive, almost didactic role of the Court. Its judgments are intended to help national courts solve cases, and this should become, after the interpretative effort, «a job no harder than child's play»;¹⁰¹⁵ at the same time, the success of the device, its effects, the jurisdiction of the Court are actually almost totally dependent on the national courts' «good will»,¹⁰¹⁶ in their willingness and capacity to refer questions - a feature that still needs to be constantly nurtured. In a nutshell, it could be said that the Court of Justice is constantly addressing, by calibrating the scope of its decisions, both a single interlocutor, the referring court, and a general audience, the wide array of individuals and institutions concerned by and bound to European law. As per a traditional adage, it is called to both give a fish and feed a man for a day, and teach to fish and feed him for a lifetime.¹⁰¹⁷

Now, it is evident that playing such a double role is a considerable effort in terms of time and internal resources, for the cognition and the solution of every interpretative question. In practice, this is particularly so given the tendency of the national courts to intend references for preliminary rulings not as abstract questions on the interpretation of the relevant primary or secondary EU law applicable to the case at hand, but on the contrary, commonly, as questions on the compatibility of internal national law with such supranational regulation or principles.¹⁰¹⁸ Accepting this partial, functional distortion of the procedure was a price to pay for the European Court, given its willingness to foster the precious dialogue with national judges. The mentioned tendency to reformulate the references, and answer to what «essentially» they mean, is major evidence of the phenomenon. Over the years, the Court has been quite consistent, in delineating and restating the basic division of labour with national courts. The activity of *application* of relevant national and supranational law is preserved for them; they are the only competent courts to assess the facts and the legality or proportionality of specific national measures. The teaching that «the court (has) no jurisdiction either to apply the Treaty to a specific case, or to decide upon the validity of a provision of domestic law in relation to the Treaty» was already part of the fundamental tenets of *Costa v. ENEL*;¹⁰¹⁹ and it was then also explicitly stated that «it is for the national court to apply the rules of Community law, as interpreted by the Court, to an individual case», since «(N)o such application is

¹⁰¹⁵ G.F. Mancini, A Constitution for Europe, in 26 Common Market Law Review, 1989, p. 595, at 606.

¹⁰¹⁶ G.F. Mancini, D.T. Keeling, From CILFIT to ERT: the Constitutional Challenge Facing the European Court, in 11 Yearbook of European Law 1991, p. 1.

¹⁰¹⁷ The image is suggested by G. Davies, Abstractness and Concreteness in the Preliminary Reference Procedure, *op. cit.*, at 233.

¹⁰¹⁸ K. Lenaerts, Form and Substance of the Preliminary Ruling Procedure, *op. cit.*; M. Broberg, N. Fenger, Preliminary References to the European Court of Justice, *op. cit.*, 156 *et seq.*

¹⁰¹⁹ Judgment of 15 July 1964, *Costa / E.N.E.L.* (6-64, ECR 1964 p. 585), at 592-593.

possible without a comprehensive appraisal of the facts of the case». ¹⁰²⁰

Yet, the relationship of the CJEU with the facts is at least uncertain and multi-faceted. For some observers, the Court is delivering judgments so specific that the case is effectively already decided, and therefore with unambiguous rulings on matters of fact, in more than two-thirds of the references. ¹⁰²¹ Apart from statistics and aggregate percentages, this activity of the Court of Justice as a *de facto* «internal judge» ¹⁰²² is surely evident in some well-studied areas of law. For instance, in the application of free movements rules, especially concerning goods, the abstract principles developed by the Court are quite simple and lean, ascribable to a limited set of standards; but the considerable, ever-growing body of relative case-law is composed of repeated specific applications of such principles and standards in an iterative stream of formally similar cases. The most obvious example is the case-law following *Cassis de Dijon*. ¹⁰²³ Everyone knows that this last judgment stated that Article 28 EC (now Article 34 TFEU) forbade the use of national standards to exclude imports, unless those standards served some legitimate aim (and were not just protectionist) and their application to imports was proportionate (genuinely necessary for that aim, not going beyond what is necessary, and not resulting in disproportionately onerous disadvantages for the importer once compared with the claimed individual or aggregate benefits). Nonetheless, once stated these historical principles, the Court had to face a vast series of cases on standards and product rules, in which it was simply asked to consider a particular national measure in the light of those: and the reference was commonly phrased as an assessment of the proportionality of the national measure. Any sensible assessment of the kind, on whether a measure really goes beyond what is necessary, or what its effects are, obviously requires a factual investigation; and the Court would be neither abstractly competent nor actually able to seriously undertake it, since it has often stated that the proportionality of a measure is a question of fact left the national courts. ¹⁰²⁴ Nonetheless, the Court has for instance investigated in an overwhelming series of cases the possible legitimate limitations based on consumer protection, with specific analysis of possible confusion induced by door-to-door

¹⁰²⁰ Judgment of 8 February 1990, *Staatssecretaris van Financiën / Shipping and Forwarding Enterprise Safe* (320/88, ECR 1990 p. I-285), at paragraph 11.

¹⁰²¹ H. Rasmussen, *Remedying the Crumbling EC Judicial System*, in 37 *Common Market Law Review*, 2000, p. 1071, at 1101. See also on this J.C. Cohen, *The European Preliminary Reference and U.S. Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism*, in 44 *American Journal of Comparative Law*, 1996, p. 421, at 429-430; G.F. Mancini, D.T. Keeling, *From CILFIT to ERT: the Constitutional Challenge Facing the European Court*, *op cit.*, at 6 *et seq.*

¹⁰²² To echo the words by G. Morelli, *La Corte di Giustizia delle Comunità europee come giudice interno*, in 41 *Rivista di diritto internazionale*, 1958, p. 3.

¹⁰²³ Judgment of 20 February 1979, *Rewe / Bundesmonopolverwaltung für Branntwein* (120/78, ECR 1979 p. 649).

¹⁰²⁴ See for instance Judgment of 26 November 1996, *Graffione / Ditta Fransa* (C-313/94, ECR 1996 p. I-6039) ECLI:EU:C:1996:450, paragraph 25; Judgment of 8 March 2001, *Gourmet International Products* (C-405/98, ECR 2001 p. I-1795) ECLI:EU:C:2001:135, paragraph 33; Judgment of 5 February 2004, *Greenham and Abel* (C-95/01, ECR 2004 p. I-1333) ECLI:EU:C:2004:71.

sellers,¹⁰²⁵ deceptive labels,¹⁰²⁶ deceptive words,¹⁰²⁷ with a sort of compulsion to repeat and to delve into the facts. In this vein, another relevant example concerns controversies over selling arrangements, before and after the distinction made in *Keck*. In early cases, when the Court still conceptualized them as obstacles to movement, it sometimes had to decide proportionality itself,¹⁰²⁸ and sometimes it left it as a matter of fact to the national court.¹⁰²⁹ Critically,¹⁰³⁰ also after the historical “clarification”, the Court found itself having to delve deeply into facts in order to assess whether there was an unequal effect provided by the arrangements on imported products.¹⁰³¹ The same can also be said of cases regarding discriminatory taxation, where Article 90 EC (now Article 110 TFEU) has led to great factual scrutiny on the concepts of “similar products”, “indirect protection”, “protective effect”;¹⁰³² or the even more detailed, notoriously debated¹⁰³³ cases concerning common custom duties imposed on goods.¹⁰³⁴

All this tendency to distort the division of labour provided by Article 267, and to blur the distinction between the concepts and the moments of the interpretation and the application of EU

¹⁰²⁵ For instance Judgment of 16 May 1989, *Buet and others / Ministère public* (382/87, ECR 1989 p. 1235) ECLI:EU:C:1989:198.

¹⁰²⁶ For instance Judgment of 6 July 1995, *Verein gegen Unwesen in Handel und Gewerbe Köln / Mars* (C-470/93, ECR 1995 p. I-1923) ECLI:EU:C:1995:224.

¹⁰²⁷ For instance Judgment of 2 February 1994, *Verband Sozialer Wettbewerb / Clinique Laboratories and Estée Lauder* (C-315/92, ECR 1994 p. I-317) (SVXV/I-13 FIXV/I-13) ECLI:EU:C:1994:34.

¹⁰²⁸ See for instance Judgment of 16 December 1992, *Council of the City of Stoke-on-Trent and Norwich City Council / B & Q Plc* (C-169/91, ECR 1992 p. I-6635) (SVXIII/I-227 FIXIII/I-239) ECLI:EU:C:1992:519; Judgment of 28 February 1991, *Marchandise and others* (C-332/89, ECR 1991 p. I-1027) (SVXI/I-87 FIXI/I-99) ECLI:EU:C:1991:94; Judgment of 28 February 1991, *Union départementale des syndicats CGT de l'Aisne / Conforama and others* (C-312/89, ECR 1991 p. I-997) ECLI:EU:C:1991:93.

¹⁰²⁹ Judgment of 23 November 1989, *Torfaen Borough Council / B & Q PLC* (145/88, ECR 1989 p. 3851).

¹⁰³⁰ See N. Reich, *The “November Revolution” of the European Court of Justice: Keck, Meng and Audi Revisited*, in 31 *Common Market Law Review*, 1994, p. 459; S. Weatherill, *After Keck: Some Thoughts on How to Clarify the Clarification*, *op. cit.*

¹⁰³¹ See Judgment of 15 December 1993, *Hünernmund and others / Landesapothekerkammer Baden-Württemberg* (C-292/92, ECR 1993 p. I-6787) (SVXIV/I-467 FIXIV/I-515) ECLI:EU:C:1993:932; Judgment of 29 June 1995, *Commission / Greece* (C-391/92, ECR 1995 p. I-1621) ECLI:EU:C:1995:199; Judgment of 2 June 1994, *Punto Casa and PPV* (C-69/93 and C-258/93, ECR 1994 p. I-2355) ECLI:EU:C:1994:226; Judgment of 20 June 1996, *Semeraro Casa Uno and others / Sindaco del Comune di Erbusco and others* (C-418/93, C-419/93, C-420/93, C-421/93, C-460/93, C-461/93, C-462/93, C-464/93, C-9/94, C-10/94, C-11/94, C-14/94, C-15/94, C-23/94, C-24/94 and C-332/94., ECR 1996 p. I-2975) ECLI:EU:C:1996:242; Judgment of 23 October 1997, *Franzén* (C-189/95, ECR 1997 p. I-5909) ECLI:EU:C:1997:504; Judgment of 9 July 1997, *Konsumentombudsmannen / De Agostini and TV-Shop* (C-34/95, C-35/95 and C-36/95, ECR 1997 p. I-3843) ECLI:EU:C:1997:344.

¹⁰³² See for instance Judgment of 14 January 1981, *Chemial Farmaceutici* (140/79, ECR 1981 p. 1); Judgment of 15 July 1982, *Cogis* (216/81, ECR 1982 p. 2701) ECLI:EU:C:1982:275; Judgment of 9 May 1985, *Humblot / Directeur des services fiscaux* (112/84, ECR 1985 p. 1367); Judgment of 4 March 1986, *Walker / Ministeriet for Skatter og Afgifter* (243/84, ECR 1986 p. 875) ECLI:EU:C:1986:100; Judgment of 17 September 1987, *Feldain / Services fiscaux du département du Haut-Rhin* (433/85, ECR 1987 p. 3521); Judgment of 7 May 1987, *Co-Frutta / Amministrazione delle finanze dello Stato* (193/85, ECR 1987 p. 2085).

¹⁰³³ See H. G. Schermers, D. F. Waelbroeck (eds.), *Judicial Protection in the European Union*, *op. cit.*, at 238-239.

¹⁰³⁴ See for instance Judgment of 20 November 1997, *Wiener / Hauptzollamt Emmerich* (C-338/95, ECR 1997 p. I-6495) ECLI:EU:C:1997:552; Judgment of 7 February 2002, *Turbon International* (C-276/00, ECR 2002 p. I-1389) ECLI:EU:C:2002:88; Judgment of 7 March 2002, *Biochem* (C-259/00, ECR 2002 p. I-2461) ECLI:EU:C:2002:150.

law, has led scholars to invitations to reconsider the practice - precisely to deal with the problem of workload.¹⁰³⁵ In this view, the Court of Justice should rediscover its natural role of a review court in questions that are supposed to be simply of law: it should restrain from examining fact too carefully and try to use its resources sparingly by evading the facts and their meticulous and time-consuming examination, and try to answer preliminary references by focusing on the broad, supervisory vision that is appropriate for the procedure. In this sense, it is also suggested that the more the Court of Justice continues to consider its mandate as a universal potential one, for which «any new fact set can be seen as requiring an interpretation» of the supranational norms,¹⁰³⁶ the more it will devote time and energy to the analytical solutions of trivial and repetitive cases, it will face problem of workload attracting that minute and time-consuming species of references, and ultimately even discourage possible genuine references from national courts that, having discretion to refer and exercising it with an eye to cost and time, will prefer not to do it. In this sense, even the precious uniformity in the application of EU law, which the Court should protect as a major principle, could be endangered. Such circularity in the argument against the overburdened Court of Justice, which carries a great deal of truth, is also a mirror of the criticality of the situation.

In truth, such a picture could also be worsened if one considers that, according to the opinion of insiders of the Court,¹⁰³⁷ its tendency to a mere *arrêt d'espèce* with no breath and ambition to provide general guidance to the community of stakeholders is on the rise - prompted by the increasing workload and limited time for the examination of cases. In this sense, it is suggested that the Court is taking an opposite direction to the one suggested, in principle, above: a tendency not towards less better theorized interventions, but towards numerous less theorized ones, which has been conceptualized as judicial *minimalism*, here again by borrowing and exporting American doctrinal insights on the practice of small, case-specific interpretations away from precedent, and narrowly-applied.¹⁰³⁸ This tendency would be signalled, among other things, by the recent expansion of the use of formulas like «in the specific circumstances of the present case»,¹⁰³⁹ «in those precise circumstances»,¹⁰⁴⁰ or «taking into account all the relevant factors in the individual case»,¹⁰⁴¹ also in

¹⁰³⁵ J. Bell, *The Role of the European Judges in an Era of Uncertainty*, *op. cit.*, at 285; G. Davies, *Abstractness and Concreteness in the Preliminary Reference Procedure*, *op. cit.*, at 229.

¹⁰³⁶ G. Davies, *Abstractness and Concreteness in the Preliminary Reference Procedure*, *op. cit.*, at 229.

¹⁰³⁷ D. Sarmiento, *Half Case at a Time. Dealing with Judicial Minimalism at the European Court of Justice*, *op. cit.*.

¹⁰³⁸ See for such reflections C.R. Sunstein, *Legal Reasoning and Political Conflict*, Oxford University Press 1996, and *Id.*, *One Case at a Time: Judicial Minimalism on the Supreme Court*, Harvard University Press 1999.

¹⁰³⁹ Judgment of 15 July 2010, *Purrucker* (C-256/09, ECR 2010 p. I-7353) ECLI:EU:C:2010:437.

¹⁰⁴⁰ Judgment of 29 April 2004, *Faxworld* (C-137/02, ECR 2004 p. I-5547) ECLI:EU:C:2004:267; Judgment of 7 December 2010, *R.* (C-285/09, ECR 2010 p. I-12605) ECLI:EU:C:2010:742; Judgment of 16 December 2010, *Euro Tyre Holding* (C-430/09, ECR 2010 p. I-13335) ECLI:EU:C:2010:786; Judgment of 22 December 2010, *Sayn-Wittgenstein* (C-208/09, ECR 2010 p. I-13693) ECLI:EU:C:2010:806.

¹⁰⁴¹ Judgment of 23 November 2010, *Tsakouridis* (C-145/09, ECR 2010 p. I-11979) ECLI:EU:C:2010:708.

cases of potential theoretical relevance involving questions such as the importance of the constitutional identity of Member States, the scope of the European citizenship provisions, the scope of the judicial cooperation in matters of parental responsibility. This could also be added to a more stratified inclination towards argumentatively impaired interventions in equally important areas such as direct effect of directives in relation to administrative authorities,¹⁰⁴² the scope of the duty to conform interpretation,¹⁰⁴³ or again the scope of the European citizenship provisions.¹⁰⁴⁴

Such practice has been critically examined and rejected by the same scholar who has masterfully denounced it, for the inherent decline of the supervisory role of the Court it entails, and the possible paradoxical result of it can bring in terms of invitation of new litigation in non-clarified areas of law. But it can be also seen, descriptively, as the last evidence of a sort of zero sum game between « abstractness and concreteness» in preliminary reference procedures in the current stage of EU integration and development of EU law. This decisively involves the energy and time resources of the Court, which is forced to lean to one side and somehow leave the other in the alternative: a situation understandable only by looking closer at the influence of the national legal orders on the functionality of the system.

VI.5 Preliminary Reference Procedure, *Unitas, Diversitas*

Our analysis has for now focused on two different, general methods of docket control, through the use of procedural and substantive devices. In investigating their applicability in the EU judicial architecture, the analysis has highlighted possibilities, evolutive paths and problems. Particular in relation to these latter problems, in one way or another, the analysis always seems to be compressed at a certain point by the peculiarity of the preliminary reference procedure, the preponderant form of action at the European Court of Justice and that on which efforts of streamlining are focused. Possible procedural devices are suggested but ultimately not used by the Court for concern of not distorting the procedure. Substantive devices are subject of intense thought and are sometimes suggested as evolutive paths by scholars and internal members of the Court, but eventually collide with the specificity of the Court's situation.

What lies behind these arguments? Indeed, the nature of the preliminary reference as a

¹⁰⁴² Judgment of 22 June 1989, *Fratelli Costanzo / Comune di Milano* (103/88, ECR 1989 p. 1839).

¹⁰⁴³ Judgment of 16 June 2005, *Pupino* (C-105/03, ECR 2005 p. I-5285) ECLI:EU:C:2005:386.

¹⁰⁴⁴ Judgment of 8 March 2011, *Ruiz Zambrano* (C-34/09, ECR 2011 p. I-1177) ECLI:EU:C:2011:124.

chain, as a binding element, between the European legal order and those of the Member States, with their specificities that cannot but shape the actual dynamics of the procedure. As previously said, several studies have been devoted to the success of the instrument, pointing to the positive reception of it by national courts. Almost all the fundamental tenets in the construction of the EU legal system have been shaped through preliminary references;¹⁰⁴⁵ these have constantly, importantly raised over the decades, reaching the dangerous quantitative levels that we are discussing; refined, now classic reflections have indicated the reasons for such apparent enthusiasm of national judges, on which the preliminary rulings procedure decisively depends. These reasons include the «legalist»¹⁰⁴⁶ perception of a particularly plausible legal reasoning employed by the Court of Justice, especially in its glorious early years, which persuaded their counterparts;¹⁰⁴⁷ the incentives offered, in turn, in terms of reciprocity and cross-fertilization, for a better quality and authoritativeness of the national reasonings;¹⁰⁴⁸ the pull represented by that «whole community of interests, by individuals, lawyers and courts which developed a stake - professional, financial and social - in the successful administration of Community law»,¹⁰⁴⁹ for which the national judiciary acted as an agency;¹⁰⁵⁰ the dynamics of self empowerment, perceived especially by the lower courts, in terms of facility to engage with the highest jurisdiction in the Community and innovative gain of a power of judicial review over executive and legislative branches «even in those jurisdictions where such judicial power was weak or non-existent»;¹⁰⁵¹ the confidence strengthened by its extensive programme of outreach activities, which enabled national judges to directly get in touch with the Court of Justice and learn about its activities, and by a growing body of initially all supportive specialist practitioners and academics.¹⁰⁵²

All these interesting reconstructions of a premature history of success in the reception and in the structuring of the procedure cannot, in any event, be exempt from an appraisal on the following stages and the current one in the diachronic evolution. In fact, whatever episodes of fundamental contribution we can enumerate and whatever general factors we might identify as liable to affect the willingness of national courts to use the procedure, it is becoming more and more common to read

¹⁰⁴⁵ For a “bibliographic” evidence of such a fundamental nature see again footnote 290 above.

¹⁰⁴⁶ A.M. Burley, W. Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, *op. cit.*, at 45-46.

¹⁰⁴⁷ J.H.H. Weiler, *The Constitution of Europe: 'Do the New clothes Have an Emperor?'*, Cambridge University Press 1999, at 33 and 195 in particular.

¹⁰⁴⁸ J.H.H. Weiler, *Journey to an Unknown Destination. A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration*, *op. cit.*, at 424.

¹⁰⁴⁹ *Ivi.*

¹⁰⁵⁰ A.M. Burley, W. Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, *op. cit.*, at 45-46.

¹⁰⁵¹ J.H.H. Weiler, *Journey to an Unknown Destination. A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration*, *op. cit.*, at 425; see also K. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, *op. cit.*, at 47.

¹⁰⁵² A. Arnall, *Judicial Dialogue in the European Union*, *op. cit.*, at 121. See on this sociological aspects also the organic works cited in footnote 854 above.

concerns on the general coverage capacity of the procedure in relation to the whole abstract mass of cases decided at the national level in which EU law is applicable (and therefore, there are doubts on the overall actual level of use of the procedure).¹⁰⁵³ Furthermore, the statistics show that there is a wide variation in national reference rates which cannot be explained with mere independent variables and «structural factors»,¹⁰⁵⁴ such as, as a more obvious example, population size (and therefore, there are concerns on the specific level of use of the procedure in some Member States, more than in others). In other words, it has become evident that, next to satisfactory practices of “acceptance” and “embracing”, there are still important areas of ignorance and disregard;¹⁰⁵⁵ and it is viewed with concern the fact that the likelihood that a reference will be made in any particular case may depend on the Member State in which it has been brought.¹⁰⁵⁶ In fact, this means that the specific potentiality, inherent in the preliminary rulings, of cooperation and mutual education for the CJEU and the national courts about their respective systems and approaches is at least still to be nurtured, if not to be considered as in danger in the present setting; and that additionally, such potentiality is not being felt uniformly across the Union. In sum, there are dangers for both the *correct* and the *uniform* application of EU law: the first put in doubt by the general numbers on the acceptance of the preliminary reference procedure and the second particularly by relative ones. Still, both are major subjects of the *nomophylactic* mandate of the Court of Justice.

When talking of general numbers, it is usual in the literature to move from estimates of speculative, though convincing nature, in the absence of large empirical works on the point. The search is not for single, loud episodes of resistance against the teachings of the ECJ, but for aggregate data on the silent practices of national judges who, for whatever reasons, disregard them. For such a calculation, it has been suggested¹⁰⁵⁷ to start from thinking to how many cases are decided by national court of the Member States every year, in all their layers (possibly, tens of millions); then to consider what portion of national judicial decisions are nowadays rendered materially within the scope of application of EU law; and then, in contrast, to think to how many

¹⁰⁵³ See for a recent explication of this by a renowned academician and practitioner in the field S. Prechal, *National Courts in EU Judicial Structures*, *op. cit.*, at 432-433 in particular. See also, accordingly, A.W.H. Meij, *Guest Editorial: Architects or judges? Some comments in relation to the current debate*, in *37 Common Market Law Review*, 2000, p. 1039, at 1044-1045, J. Baquero Cruz, *La procédure préjudicielle suffit-il à garantir l'efficacité et l'uniformité du droit de l'Union Européenne?*, in L. Azoulai, L. Burgogue-Larsen, *op. cit.*, p. 241, and the remarks in the Report by the Working Party on the Future of the European Communities' Court System for the European Commission, January 2000 (so called Ole Due Report, see footnote 856 above), at 12 *et seq.*

¹⁰⁵⁴ M. Broberg, N. Fenger, *Variations in Member States' Preliminary References to the Court of Justice – Are Structural Factors (Part of) the Explanation?*, in *19 European Law Journal*, 2013, p. 488.

¹⁰⁵⁵ In the words of M. Bobek, *Of Feasibility and Silent Elephants: the Legitimacy of the Court of Justice through the Eyes of National Courts*, *op. cit.*, at 212.

¹⁰⁵⁶ A. Arnall, *Judicial Dialogue in the European Union*, *op. cit.*, at 123; M. Broberg, N. Fenger, *Preliminary References to the European Court of Justice*, *op. cit.*, chapter 2.

¹⁰⁵⁷ M. Bobek, *Of Feasibility and Silent Elephants: the Legitimacy of the Court of Justice through the Eyes of National Courts*, *op. cit.*, at 209-210.

requests for preliminary ruling does this mass of national cases actually generate. Even if one considers in this operation, prudentially, the percentage of judicial application of EU law as sensibly lower than the percentage of overall amount of directly applicable norms and implementing legislation (in turn, esteemed not so far from the much discussed Jacques Delors's 80% threshold),¹⁰⁵⁸ and hypothesizes, soberly, that in one out of eight national cases (a percentage of approximately 15%) EU law is applicable, one would have in any case millions of cases potentially within the scope of application of EU law and of jurisdiction of the CJEU, before lower courts with the opportunity to submit requests, and tens of thousands of them in courts of last instance, which would be bound to raise references in case of doubts.¹⁰⁵⁹ Against such assumptions stand the annual statistics of the Court of Justice, to which we already made reference, with their few hundreds of preliminary reference submitted (265 in 2007, 288 in 2008, 302 in 2009, 385 in 2010, 423 in 2011, 404 in 2013, 450 in 2013, 428 in 2014).¹⁰⁶⁰ With millions of EU law cases before national courts and many of thousands of them in supreme courts, less than five hundred preliminary references are annually generated. And those few hundreds are surely problematic with a view to the actual situation and resources of the Court of Justice, as said; but when seen in this light, compared with a potentiality which is in some sense also desirability for a proper check on the real correct and uniform application of law in the EU territory, they assume a different dimension, they seem a meagre outcome, they make the specialists talk of underemployment of the fundamental procedure or at least of a slow and just ongoing trend of improvement in this respect.¹⁰⁶¹

It is evident that all these ideas embody a completely opposite tendency to the one for a pronounced docket control by the CJEU. In dealing with the relative numbers, attention has been

¹⁰⁵⁸ Notoriously, the former French European Commission President, speaking to the European Parliament in July 1988, soon after the enactment of the Single European Act, predicted that in ten years time the European Community would be the source of 80 per cent of our economic legislation and perhaps even our fiscal and social legislation as well. The claim is sometimes considered as a «factoid in discussions of the EU», in the words of P.L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State*, *op. cit.*, at 45, and, though not based on scientific data or methods, has gained momentum in the political debates since then. Several Authors consider it as a reliable esteem: see e.g. S. Hix, *The Political System of the European Union*, Palgrave 1999, at 3.

See, from a legal perspective useful for our arguments, M. Bobek, *Of Feasibility and Silent Elephants: the Legitimacy of the Court of Justice through the Eyes of National Courts*, *op. cit.*, at 210, with reference to A. Töller, *Mythen und Methoden. Zur Messung der Europäisierung der Gesetzgebung des Deutschen Bundestages jenseits des 80-Prozent-Mythos*, in 1 *Zeitschrift für Parlamentsfragen*, 2008, p. 3; T. Hoppe, *Die Europäisierung der Gesetzgebung: Der 80-Prozent-Mythos lebt*, in 6 *Europäische Zeitschrift für Wirtschaftsrecht*, 2009, p. 168; Y. Bertocini, *What is the impact of the EU interventions at the national level?*, in *Notre Europe – Jacques Delors Institute, Studies & Reports n° 73* May 2009.

¹⁰⁵⁹ M. Bobek, *Of Feasibility and Silent Elephants: the Legitimacy of the Court of Justice through the Eyes of National Courts*, *op. cit.*, at 210-211.

¹⁰⁶⁰ See the Annual Report of the CJEU for 2014, available at the website http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-04/en_ecj_annual_report_2014_pr1.pdf (accessed 26 August 2015), at p. 113 *et seq.*

¹⁰⁶¹ See again S. Prechal, *National Courts in EU Judicial Structures*, *op. cit.*, at 432-433.

devoted to such aspects as the important variations in the number of references, the areas of law which they concern and the level of courts from which they originate in the various Member States. The fact that some areas of law actually create more litigation than others has been accepted or rationalized¹⁰⁶² and it is surely not a specificity of the EU legal order; the variations among lower or apical national courts were explained for both reasons of incentives¹⁰⁶³ and in natural functioning of appellate systems, some needed corrections notwithstanding.¹⁰⁶⁴ Variations in Member States' use of preliminary references are, on the contrary, of utmost concern.

Studies on the average number of preliminary references per year in the different EU Member States, concerning for instance the last decade of considerable expansion, has illustrated that more than 60 of the mentioned hundreds of cases in the CJEU's docket comes from Germany, more than 40 from Italy, more than 20 each from the Netherlands and Belgium, around 20 from France and the United Kingdom, more than 15 from Austria and Spain and less than 10 from all the other nations.¹⁰⁶⁵ The statistics pertaining to the whole antecedent period of the Court of Justice's activities with the preliminary reference procedure, and therefore for the decades between 1961 (year of the first reference) and the last, show no differences in the ratio.¹⁰⁶⁶ The rates of preliminary references calculated per million inhabitants particularly highlight the role of the Benelux countries, yet for the rest simply normalising the other data.¹⁰⁶⁷

As already hinted at, so-called structural factors are not considered as the only possible explanation for such diversity.¹⁰⁶⁸ There is of course a trend related to differences in population size, since larger countries have more individuals, undertakings, and therefore more plaintiffs in static terms, but also a bigger market for exporters and more transnational activities.¹⁰⁶⁹ Nonetheless, the difference between the attitude of German and Italian courts and that of French or British courts, more or less comparable “markets”, would not be satisfied with such simplistic answer. There are historical differences in terms of general litigation rates: in some states, scholars could find a more pronounced tendency to resolve controversies through the judicial systems than by the use of other

¹⁰⁶² See the relative numbers in this respect given by the Annual Report of the CJEU for 2014, available at the website http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-04/en_ecj_annual_report_2014_pr1.pdf (accessed 26 August 2015), at p. 102 *et seq.*.

¹⁰⁶³ See again J.H.H., *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, *op. cit.*, at 518 *et seq.* in particular.

¹⁰⁶⁴ Judgment of 30 September 2003, Köbler (C-224/01, ECR 2003 p. I-10239) ECLI:EU:C:2003:513.

¹⁰⁶⁵ M. Broberg, N. Fenger, *Preliminary References to the European Court of Justice*, *op. cit.*, at 35.

¹⁰⁶⁶ See M. Wind, D.S. Martinsen, G.P. Rotger, *The Uneven Legal Push for Europe. Questioning Variation when National Courts go to Europe*, in *10 European Union Politics*, 2009, p. 63, at 66.

¹⁰⁶⁷ *Ivi.*

¹⁰⁶⁸ M. Broberg, N. Fenger, *Variations in Member States' Preliminary References to the Court of Justice – Are Structural Factors (Part of) the Explanation?*, *op. cit.* at 499 *et seq.*

¹⁰⁶⁹ A. Stone Sweet, T. Brunell, *The European Court and the National Courts: a Statistical Analysis of Preliminary References, 1961–95*, in *5 Journal of European Public Policy*, 1998, p. 66.

means,¹⁰⁷⁰ patterns that tend to correlate in various ways, with a high number of “courts and tribunals” as per Article 267 in the internal systems and with a larger number of preliminary references from the Member States in question.¹⁰⁷¹ A third basic structural factor has been seen in the level of Member States' internal application of EU law, compliance with their obligations under EU law, timely transposition of supranational legislation, all elements that can determine the likelihood that national legislation can be challenged in this sense before the local courts.¹⁰⁷²

Other factors have been categorized by scholars as «behavioural», since not related to the likelihood that a national court is faced with a question of EU law but on the following logical step of whether the judge, once so, will make an actual reference to the CJ.¹⁰⁷³ These are particularly interesting for our perspective because evidently linked to the inherent differences in the legal cultures of the Member States, more than other factors (such as the already discussed willingness to litigate, which are «structural» because they pertain to the existence of potential cases, but surely “behavioural” in terms of relation to psychological, social, cognitive factors), and linked to the influence that these differences have in the development of the procedure. In this respect, a first interesting explanation of the mentioned divergencies came from those theories that link the use of the procedure with the Member States' constitutional traditions, in particular pertaining to the perception of the role of courts vis-à-vis the political branches.¹⁰⁷⁴ It has been suggested that some Member States more than others have an institutional legacy of «majoritarian democracy», rooted in the notion of parliamentary supremacy or sovereignty:¹⁰⁷⁵ this would be the base not only of a less intense familiarity of those with judicial review of legislative acts, but also to a certain reluctance in the adoption of a procedure which is similar to, and historically based on, as we saw, judicial review of legislation, and also often directed at contesting public powers' choices.¹⁰⁷⁶ This would be, in

¹⁰⁷⁰ M. Broberg, N. Fenger, Preliminary References to the European Court of Justice, *op. cit.*, at 40, with a reference to J. Blank, M. van der Ende, B. van Hulst, R. Jagtenberg, Bench Marking in an International Perspective. An International Comparison of the Mechanisms and Performance of the Judiciary System, studied commissioned by The Netherlands Council for the Judiciary, available at the website <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/Benchmarking.pdf> (accessed 26 August 2015).

¹⁰⁷¹ See M. Vink, M. Claes, C. Arnold, Explaining the Use of Preliminary References by Domestic Courts in EU Member States: A Mixed-Method Comparative Analysis, paper presented at the 11th Biennial Conference of the European Union Studies Association, Marina del Rey 24 April 2009, available at the website http://aei.pitt.edu/33155/1/vink_maarten.pdf (accessed 26 August 2015).

¹⁰⁷² M. Broberg, N. Fenger, Variations in Member States' Preliminary References to the Court of Justice – Are Structural Factors (Part of) the Explanation?, *op. cit.*, at 497-498.

¹⁰⁷³ M. Broberg, N. Fenger, Preliminary References to the European Court of Justice, *op. cit.*, at 49.

¹⁰⁷⁴ See M. Wind, D.S. Martinsen, G.P. Rotger, The Uneven Legal Push for Europe. Questioning Variation When National Courts go to Europe, *op. cit.*; M. Wind, The Nordics, the EU and the Reluctance Towards Supranational Judicial Review, in 48 *Journal of Common Market Studies*, 2010, p. 1048; M. Wind, D.S. Martinsen, When National Courts go to Europe, in H. Koch, K. Hagel-Sørensen, U. Haltern, J.H.H. Weiler (eds.), *Europe. The New Legal Realism - Essays in Honour of Hjalte Rasmussen*, *op. cit.*, p. 479.

¹⁰⁷⁵ See M. Wind, D.S. Martinsen, G.P. Rotger, The Uneven Legal Push for Europe. Questioning Variation when National Courts go to Europe, *op. cit.*, at 72.

¹⁰⁷⁶ J.H.H. Weiler. Deciphering the Political and Legal DNA of European Integration: an Explanatory Essay, in J.

particular, the case of the nordic countries, Denmark, Sweden, Finland, and the United Kingdom. In fact, they all perform very poorly in terms of preliminary referrals, so as to be labeled as «reluctant Europeans».¹⁰⁷⁷ UK, with more than 60 millions inhabitants, has an average of less than 20 cases raised per year in the last decade. The nordic countries all have an average of less than 5. They all share traditions of strong conceptions of parliamentary sovereignty in which powers of legislative review have been for a long while downplayed (UK),¹⁰⁷⁸ or formally recognized but almost never practised (Sweden and Denmark),¹⁰⁷⁹ or simply forbidden until very recent constitutional amendments (Finland).¹⁰⁸⁰ Variants of this theory have been proposed, specularly, to point at the importance of the degree of perceived independence of national judges in relation to the political branches, since, at least in some countries, they would tend to strategically raise references to provoke certain outcomes and support desired substantive policies.¹⁰⁸¹ The same analysis of the traditional degree of independence of the judiciary would also serve to measure the tendency of lower courts to use the procedure as a mean of internal «inter-court competition», to circumvent and contest the practice of higher courts, for self-empowerment and for the promotion of autonomous policy positions.¹⁰⁸² Also the tendency of national legal systems towards the creation of specialized judiciary - which is somewhere viewed with suspicion, essentially for historical reasons¹⁰⁸³ - has been studied in its effects for preliminary references since highly specialized tribunals, for instance in tax or competition law, would tend to work more intensively with the relative EU law norms, be more competent and be more likely to make a reference.¹⁰⁸⁴ Finally, the more or less stratified familiarity of the national judiciaries with European law would be an asset, though to be weighed

Dickson, P. Eleftheriadis (eds), *Philosophical Foundations of EU Law*, *op cit.*, p. 137, at 155.

¹⁰⁷⁷ See M. Wind, D.S. Martinsen, G.P. Rotger, *The Uneven Legal Push for Europe. Questioning Variation when National Courts go to Europe*, *op. cit.*, at 72; see also T. Tridimas, *Knocking on Heaven's Door: Fragmentation, Efficiency and Definance in the Preliminary Reference Procedure*, *op. cit.*, at 37-38.

¹⁰⁷⁸ See, with a view at the relationship with European affairs, D. Chalmers, *The Positioning of EU Judicial Politics within the United Kingdom*, in K.H. Goetz, S. Hix (eds.), *Europeanised Politics. European Integration and National Political Systems*, Frank Cass Publishers 2001, p. 169.

¹⁰⁷⁹ J. Nergelius, *North and South: Can the Nordic States and the European Continent Find Each Other in the Constitutional Area – or Are They Too Different?*, in M. Scheinin (ed.) *The Welfare State and Constitutionalism in the Nordic Countries*, Nordic Council of Ministers 2001, p. 79.

¹⁰⁸⁰ *Ibidem*, at 85.

¹⁰⁸¹ See J. Golub, *The Politics of Judicial Discretion: Rethinking the Interaction between National Courts and the European Court of Justice*, in *19 West European Politics*, 1996, p. 360; G. Tridimas, T. Tridimas, *National Courts and the European Court of Justice : a Public Choice Analysis of the Preliminary Reference Procedure*, in *24 International Review of Law and Economics*, 2004, p. 125. See specifically K. Alter, J. Vargas, *Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy*, in K. Alter, *The European Court's Political Power*, *op. cit.*, p. 159, at 180.

¹⁰⁸² As per the theories of K. Alter, *Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration*, in A. Slaughter, A. Stone Sweet, J.H.H. Weiler (eds.), *The European Courts and National Courts – Doctrine and Jurisprudence: Legal Challenge in its Social Context*, *op. cit.*, p. 227, and W. Mattli, A.M. Slaughter, *Revisiting the European Court of Justice*, in *52 International Organisation*, 1998, p. 177.

¹⁰⁸³ See e.g. the provisions of Article 102 of the Italian Constitution.

¹⁰⁸⁴ T. de la Mare, *Article 177 in Social and Political Context*, in P. Craig, G. de Búrca (eds.), *The Evolution of EU law*, 1st edn, *op. cit.*, p. 215, at 234.

with the massive programs of specialized EU law education often directed to judges of newly accessed states and a certain tendency to post-accession «euphoria» in the use of the procedure.¹⁰⁸⁵

An investigation into the different legal cultures and national inclinations, in any event, does not only shed light on the likelihood of EU law cases to exist, or actual preliminary references to be raised. In having a look at these dynamics, we better understand all the reluctance of the Court of Justice towards though institutionally necessary practices of docket control in the procedural and substantive forms we have discussed. All the realist perspectives on Article 267 TFEU practical reality talk to us of a procedure still in the process of consolidation, still to be nurtured by Luxembourg, and of risks of accentuating trends of discrepancy among Member States.

A last word in this respect must be added, on the mentioned ambivalence of «abstractness and concreteness» of the procedure. This is also significantly influenced by cultural differences, in a way that further frustrates the suggested idea of a recalibration between “facts and norms” of the resources of the Court for docket control reasons.

In fact, as also suggested by some scholars,¹⁰⁸⁶ the preliminary reference procedure naturally takes different dimensions if seen through the lenses of the civil law and the common law lawyer. The first, at least in terms of habit, has no problems in conceptualizing the distinction between law and judgments and interpretation and application of the law. In general terms, civil law’s ideal type of uniformity of interpretation in a legal system consists precisely in the centralised identification of identical abstract rules, then to be applied in decentralised way by all courts.¹⁰⁸⁷ The second privileges in inductive terms, as a habit of mind, a discovering of law based on looking at what has been decided in individual cases, and by a process by analogy therefrom. It is quite unusual for education to form a conceptual distinction between interpretation and application, since interpretation, in his understanding, *is* also application; and tends to «leave posterity and lawyers to pronounce the principles which, with time, will surely emerge»,¹⁰⁸⁸ through stratification.¹⁰⁸⁹

These basic conceptions have consequences on the practical use of the preliminary reference procedure and on its pendulum between «abstractness and concreteness». Civil lawyers and

¹⁰⁸⁵ All these aspects are critically discussed by M Bobek, *Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts*, *op. cit.*, at 210 *et seq.*.

¹⁰⁸⁶ G. Davies, *Abstractness and Concreteness in the Preliminary Reference Procedure*, *op. cit.*, at 233 *et seq.*. See also L.N. Brown, T. Kennedy, *The Court of Justice of the European Communities*, *op. cit.*, at 368 *et seq.*.

¹⁰⁸⁷ See the general reflections by J.H. Merryman, *The Civil Law Tradition*, *op. cit.*, at 34 *et seq.*; R.C. van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History*, *op. cit.*, at 113 *et seq.*.

¹⁰⁸⁸ G. Davies, *Abstractness and Concreteness in the Preliminary Reference Procedure*, *op. cit.*, at 235.

¹⁰⁸⁹ R.C. van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History*, *op. cit.*, at 127 *et seq.*.

common lawyers are naturally tempted to use it in different ways. Civil lawyers are in fact naturally less concerned with autonomous interpretation and application of EU law, which could also eventually be seen as not really threatening the uniformity: judgments are not law. But they also tend to ask, idealtypically, to the Court of Justice to play a role it simply cannot, not only because of the current nature of the system described above, but inherently: by providing only pure abstract interpretations, given the fabric of EU primary and secondary law, the Court would in fact add a new layer of abstract principles, generally applicable propositions, analytically indistinguishable from those of a legislator.¹⁰⁹⁰ Their pendulum lean, perhaps in a stereotyped way, towards the abstractness. On the contrary common lawyers tend to ask the Court precedents. By their references, which will also differ stylistically, they require judgments containing fully argued analysis of the facts. Their pendulum leans towards the facts and the concreteness: they consider the uniqueness of every single case, they will tend to ask (with all the conditions above) an applicable solution to the CJEU, with which they are happy in practice, but not in principle, on the distinction between interpretation and application. As it has been written, the common lawyer, «if the same robust sense that gave him the common law did not also incline him to a respect for consideration of cost and time», can be easily become, for the Court, «a dangerous rich source of workload».¹⁰⁹¹

It is possible to offer countless examples in this respect, when one has a look at the actual references for preliminary rulings raised by judges with different legal cultural backgrounds.

In simply adopting a temporary criterium, it is easy to compare, for instance, the intricate questions for a preliminary ruling that the European Court had to answer in a notorious case such as *Case C-446/03 Marks & Spencer plc vs. David Halsey (HM Inspector of Taxes)*,¹⁰⁹² solved on the December 13, 2005 and raised by the High Court of Justice (England & Wales), Chancery Division - a common law jurisdiction - and the questions solved *on the same day* in a case treated by the Grand Chamber (and therefore, of no triviality) such as *Case C-411/03 SEVIC Systems AG*,¹⁰⁹³ raised by the German Landgericht of Koblenz - a civil law tribunal. The first common law court sent to Luxembourg the following reference:

¹⁰⁹⁰ G. Davies, *Abstractness and Concreteness in the Preliminary Reference Procedure*, *op. cit.*, at 234; J.C. Cohen, *The European Preliminary Reference and U.S. Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism*, *op. cit.*, at 439 *et seq.* Cfr. with the various opinions of A. Toth, *The Authority of Judgments of the European Court of Justice: Binding Force and Legal Effects*, in 4 *Yearbook of European Law*, 1984, p. 1; F. Capotorti, *Le sentenze della Corte di Giustizia delle Comunità Europee*, in Vv.Aa. (eds.), *La sentenza in Europa. Metodo, tecnica e stile*, CEDAM 1988, p. 230; C. Nourissat, *La jurisprudence de la Cour de justice des Communautés européennes: Un regard privatiste à partir de l'actualité*, in Vv.Aa. (eds.), *La création du droit par le juge*, Dalloz 2006, p. 247.

¹⁰⁹¹ G. Davies, *Abstractness and Concreteness in the Preliminary Reference Procedure*, *op. cit.*, at 236.

¹⁰⁹² Judgment of 13 December 2005, *Marks & Spencer (C-446/03)*, ECR 2005 p. I-10837 ECLI:EU:C:2005:763.

¹⁰⁹³ Judgment of 13 December 2005, *SEVIC Systems (C-411/03)*, ECR 2005 p. I-10805 ECLI:EU:C:2005:762.

«1. In circumstances where:

.provisions of a Member State, such as the UK provisions on group relief, prevent a parent company which is resident for tax purposes in that State from reducing its taxable profits in that State by setting off losses incurred in other Member States by subsidiary companies which are resident for tax purposes in those States, where such set off would be possible if the losses were incurred by subsidiary companies resident in the State of the parent company;

.the Member State of the parent company:

subjects a company resident within its territory to corporation tax on its total profits, including the profits of branches in other Member States, with arrangements for the availability of double taxation relief for those taxes incurred in another Member State and under which branch losses are taken account of in those taxable profits;

does not subject the undistributed profits of subsidiaries resident in other Member States to corporation tax;

subjects the parent company to corporation tax on any distributions to it by way of dividend by the subsidiaries resident in other Member States while not subjecting the parent company to corporation tax on distributions by way of dividend by subsidiary companies resident in the State of the parent;

grants double taxation relief to the parent company by way of a credit in respect of withholding tax on dividends and foreign taxes paid on the profits in respect of which dividends are paid by subsidiary companies resident in other Member States;

is there a restriction under Article 43 EC, in conjunction with Article 48 EC? If so, is it justified under Community law?

2.(a)What difference, if any, does it make to the answer to Question 1 that, depending on the law of the Member State of the subsidiary, it is or may be possible in certain circumstances to obtain relief for some or all of the losses incurred by the subsidiary against taxable profits in the State of the subsidiary?

(b)If it does make a difference, what significance, if any, is to be attached to the fact that:

.a subsidiary resident in another Member State has now ceased trading and, although there is provision for loss relief subject to certain conditions in that State, there is no evidence that in the circumstances such relief was obtained;

.a subsidiary resident in another Member State has been sold to a third party and, although there is provision under the law of that State for the losses to be used under certain conditions by a third party purchaser, it is uncertain whether they were so used in the circumstances of the case;

.the arrangements under which the Member State of the parent company takes account of

the losses of UK resident companies apply regardless of whether the losses are also relieved in another Member State?

(c) Would it make any difference if there were evidence that relief had been obtained for the losses in the Member State in which the subsidiary was resident and, if so, would it matter that the relief was obtained subsequently by an unrelated group of companies to which the subsidiary was sold?». ¹⁰⁹⁴

In cases of the kind, it is evident that the Court of Justice is faced by a preliminary reference in the form of various questions asked, each one composed of different interpretative doubts, in a relationship of conditionality with each other, and a continuous recall to factual circumstances. It is likely that the judges simply reported in their reference the point raised by the parties in the national proceedings, with no autonomous activity of judicial *interpretation*, as we said. It is also evident that both the distinction between interpretation and application and the one between abstractness and concreteness of the procedure are blurred: the Court of Justice will be naturally prompted by this approach to become the judge of the facts of the case, with obvious major efforts in terms of internal resources in solving the case.

In our first example, the civil law tribunal of Koblenz raised a question like this in the Case C-411/03 *SEVIC Systems AG*, faced on the same day by the ECJ:

«Are Articles 43 and 48 EC to be interpreted as meaning that it is contrary to freedom of establishment for companies if a foreign European company is refused registration of its proposed merger with a German company in the German register of companies under paragraphs 16 et seq. of the Umwandlungsgesetz (Law on transformations), on the ground that paragraph 1 (1)(1) of that law provides only for transformation of legal entities established in Germany?». ¹⁰⁹⁵

In such a question referred, an autonomous activity of interpretation by the local judge is evident, in particular in its filtering effects vis-à-vis the factual details and the technicalities of the single case. Moreover, the reference is made in the form of a single, plain question. As a consequence, the distinction between interpretation and application and between abstractness and concreteness inherent in the procedure is respected, and the Court of Justice will be able to more easily focus on a general, *nomophylactic* response, with an explanatory potential for the single case but also for the generality of the national cases on the matter.

¹⁰⁹⁴ See the notice for the Official Journal available at the website <http://curia.europa.eu/juris/document/document.jsf?text=&docid=50524&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=344217> (accessed 26 August 2015).

¹⁰⁹⁵ See the notice for the Official Journal available at the website <http://curia.europa.eu/juris/document/document.jsf?text=&docid=52706&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=344351> (accessed 26 August 2015).

For a more contextual approach, we can merge a temporary criterium like the latter with a thematic one, and therefore compare civil law and common law references solved on the same day, but also references solved in the same period of time and on the same area (and matter) of law. This allows us to understand whether the differences between the references' styles exist irrespective of the differences in the various areas of law, which may well affect the complexity of the questions referred. In adopting both the criteria, we can compare, again randomly, the questions for a preliminary ruling referred in the Case C-16/10 - *The Number (UK) and Conduit Enterprises*,¹⁰⁹⁶ solved on the 17th February of 2011, and raised by the Court of Appeal (England & Wales) (Civil Division) - a common law jurisdiction, the questions solved on the same day in a case raised by a civil law court (the *Cour d'appel de Rouen*) in the Case C-78/10 - *Berel and Others*,¹⁰⁹⁷ and the questions solved in the same period (just three months later) involving the same area of law and the same pieces of legislation of the first case, but raised by a civil law tribunal (the *Bundesverwaltungsgericht* in the Case C-543/09 - *Deutsche Telekom*).¹⁰⁹⁸ Here again, the questions posed by the common law judges read as follows:

«Is the power afforded to Member States under Article 8(1) of Directive 2002/22/EC ("the Universal Service Directive"), read together with Article 8 of Directive 2002/21/EC ("the Framework Directive"), Articles 3(2) and 6(2) of Directive 2002/20/EC ("the Authorisation Directive"), and Article 3(2) of the Universal Service Directive and other material provisions of EC law, to designate one or more undertakings to guarantee the provision of universal service, or different elements of universal service, as identified in Articles 4, 5, 6, 7 and 9(2) of the Universal Service Directive, to be interpreted as:

(a) Permitting the Member State, where it decides to designate an undertaking pursuant to this provision, only to impose specific obligations on that undertaking which require the undertaking itself to provide to end users the universal service or element thereof in respect of which it is designated? Or

(b) Permitting the Member State, when it decides to designate an undertaking under this provision, to place the designated undertaking under such specific obligations as the Member State considers to be most efficient, appropriate and proportionate for the purpose of guaranteeing the provision of the universal service or element thereof to end users, whether or not those obligations require the designated undertaking itself to provide the universal service or element thereof to end users?

Do the above provisions, when read also in light of Article 3(2) of the Universal Service Directive, permit Member States, in circumstances where an undertaking is designated

¹⁰⁹⁶ Judgment of 17 February 2011, *The Number (UK) and Conduit Enterprises* (C-16/10, ECR 2011 p. I-691) ECLI:EU:C:2011:92.

¹⁰⁹⁷ Judgment of 17 February 2011, *Berel and others* (C-78/10, ECR 2011 p. I-717) ECLI:EU:C:2011:93.

¹⁰⁹⁸ Judgment of 5 May 2011, *Deutsche Telekom* (C-543/09, ECR 2011 p. I-3441) ECLI:EU:C:2011:279.

under Article 8(1) of the Universal Service Directive in relation to Article 5(l)(b) of that Directive (comprehensive telephone directory enquiry service) without being required to supply such a service directly to end users, to impose specific obligations on that designated undertaking:

(a) to maintain and update a comprehensive database of: subscriber information;

(b) to make available in machine readable form the contents of a comprehensive database of subscriber information, as updated on a regular basis, to any person seeking to provide publicly available directory enquiry services or directories (whether or not that person intends to provide a comprehensive directory enquiry service to end-users); and

(c) to supply the database on terms which are fair, objective, cost oriented and non-discriminatory to such a person?».¹⁰⁹⁹

On the other hand, the questions asked by the first civil law judge of this example read as follow:

«Do Articles 213, 233 and 239 of the Community Customs Code prevent a joint and several co-debtor of a customs debt who is not the beneficiary of a decision to remit that debt from enforcing, against the administration responsible for collection, the decision to remit based on Article 239 of the Community Customs Code which that administration notified to another joint and several co-debtor, in order to be excused payment of the customs debt?».¹¹⁰⁰

The second civil law judge of this new comparison asked the following question, in the same period and on the same topic of her common law colleagues:

«Must Article 25(2) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) be interpreted as meaning that Member States may require undertakings which assign telephone numbers to subscribers to make available data relating to subscribers to whom the undertaking in question has not itself assigned telephone numbers for the purpose of the provision of publicly available directory enquiry services and directories, in so far as that undertaking has such data in its possession?

If the answer to the previous question is in the affirmative:

Must Article 12 of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) be interpreted as meaning that the imposition of the abovementioned

¹⁰⁹⁹ See the notice for the Official Journal available at the website <http://curia.europa.eu/juris/document/document.jsf?text=&docid=75430&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=344351> (accessed 26 August 2015).

¹¹⁰⁰ See the notice for the Official Journal available at the website <http://curia.europa.eu/juris/document/document.jsf?docid=82352&doclang=en&mode=&part=1> (accessed 26 August 2015).

*obligation by the national legislature is conditional upon the consent of, or at least the lack of any objection by, the other telephone service provider or its subscribers to the transmission of the data?».*¹¹⁰¹

Again, in this second example, we can see the tendency of the civil law judges not only towards a more concise and simple style of reference, also in cases of technical difficulty and where more questions, in logically subordinate relationship with each other, are needed. We also see a filtering function performed, again, by the interpretative activity of the referring court. This is reflected in the evident minor importance given to the facts of the case in the structuring of the reference.

These differences are the mirror of the mentioned ambivalence between concreteness and abstractness of the preliminary reference procedure. But they also explain how this ambivalence and the oscillation between the two extremes are culturally influenced, if not shaped. The same existence of this conceptual ambivalence and of the consequent distinct conceptualizations of the procedure is in itself a problem of workload for the European Court of Justice. As we saw, it must face and hold together and meet very different demands in its practice. This is in itself a complicating factor for the activity of the court. The fact that these differences are culturally shaped, as we highlighted, is the deciding factor for the impossibility of preparing common solutions towards a streamlining of the preliminary reference procedure and a better management of internal cognitive resources. The Court - also given the described presence of further, numerical, differentiation in the use of the procedure - is not in the position to impose a certain rationalization, which could clash with the legal cultural background of belonging of certain national judges and fatally could go further to the detriment of its *nomophylactic* capabilities. The permanence of a still imperfect acceptance rate of the preliminary reference in the national legal orders forces the CJEU to accept its partial distortion, or even vilification. It is, in this sense, still forced to give answers and therefore analyse and spend its own resources (in terms of time and energy) to almost all the various forms of references it receives, with no possibility of *ad hoc* solutions in this respect. This leads, as previously said, to also receiving more and more cases, possibly specifying what already restated in precedents or just applying the same dicta to trivially different situations. Still, we can say that such a dynamic is surely and consciously accepted by the Court to strengthen its authority in the actual configuration of the EU judicial architecture and its maturity. It is in this perspective that the institutional evolution of the European Court of Justice throughout the decades must be read, as a

¹¹⁰¹ See the notice for the Official Journal available at the website <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30ddd04f29bdeb794c4b90aada7affe91fcf.e34KaxiLc3qMb40Rch0SaxqTbhn0?text=&docid=79881&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1829> (accessed 26 August 2015).

continuous effort towards *neutral* institutional solutions, simply endogenous, without effects on its relationship with the other players of the EU federal judicial architecture.

VI.6 Looking for *Neutral* Institutional Solutions

Sacha Prechal, a renowned EU law scholar who was already legal secretary at the Court of Justice and then became judge, recently wrote that: «(O)n the basis of some scarce and stray publications - where often some cautious allusions are made on the matter - personal experience and contact with the national judiciary, one comes to a somewhat perplexing conclusion, namely that the quality and capacity of the national courts to apply EC law and to do so correctly is a matter for serious concern. It seems that after several decades of EC membership national judges, even the 'younger' generation, are rather still struggling with EC law than smoothly applying it». ¹¹⁰² One is tempted to compare this telling and authoritative vision, which seems to support our reflections above, with the one of another former member of the Court, Federico Mancini, who famously wrote in the early 1990s about the «inherent weakness of Article 177», ¹¹⁰³ despite the fact that its mentioned success had already been ratified in the general understanding. ¹¹⁰⁴ In substantiating his argument, Mancini wrote that «the outstanding feature of the procedure established by Article 177 of the EC Treaty is that it is entirely dependent on the goodwill of national courts». ¹¹⁰⁵ and that was already, in his view, perceived as a problem. He pointed first of all to the dishomogeneity inside the Community, since «the area (...) is enormous, the judges number tens of thousands and their ideological cohesion is zero», also because of decisive differences in their cultural backgrounds and the politicization of some of them ¹¹⁰⁶ (in this sense, he anticipated some of the most relevant sociological/political reflections on the reasons for the different rates in preliminary references among the Member States). He then clearly stated the necessity of preserving as much as possible a role of «helmsman» conferred upon the Court by means of the preliminary ruling procedure, in

¹¹⁰² S. Prechal, National Courts in EU Judicial Structures, *op. cit.*, at 432-433.

¹¹⁰³ G.F. Mancini, D.T. Keeling, From CILFIT to ERT: the Constitutional Challenge Facing the European Court, *op. cit.*, at 1, then published also in G.F. Mancini, Democracy and Constitutionalism in the European Union. Collected Essays, Hart Publishing 2000, p. 17.

¹¹⁰⁴ See again the first use of the phrase made by T. Koopmans, La procédure préjudicielle - victime de son succès?, *op. cit.*.

¹¹⁰⁵ G.F. Mancini, D.T. Keeling, From CILFIT to ERT: the Constitutional Challenge Facing the European Court, *op. cit.*, at 1, and G.F. Mancini, Democracy and Constitutionalism in the European Union. Collected Essays, *op. cit.*, at 17.

¹¹⁰⁶ G.F. Mancini, D.T. Keeling, From CILFIT to ERT: the Constitutional Challenge Facing the European Court, *op. cit.*, at 6.

terms of an accentuated “«need for a central steering as «the only way of preserving Community law from disintegrating as a result of divergent interpretations»». ¹¹⁰⁷ In this sense, he made interesting comparative remarks on the level of maturity of the EU legal order, which he described as «still in its adolescence, more or less as American constitutional law was in the age of Marshall and, like American constitutional law (...) suffering all the pangs of nation-building»». ¹¹⁰⁸

If this last aspect of the direct comparability of the EU integration process with a nation-building one is of course very disputable, and has been authoritatively disputed for decades, ¹¹⁰⁹ the power of the argument on the maturity of the legal architecture and of its tools remains. As we saw, in the current stage, with larger numbers of employment of preliminary references, but all the divergences we have explored, we have just done a small step more, facing in any cases the same problems of «inherent weakness». In our view, this is confirmed first of all by the reluctance of the Court of Justice to deploy procedural instruments to streamline the inflow of references, given a clear concern to distort the still fundamental procedure. It is shown by the perceived obligation of the Court to answer nearly all the preliminary references, also of repetitive nature, also of accentuated analytical-factual nature, even beyond the theoretical division of labour of Article 267 TFEU. It is also shown by the perceived, accepted mandate to meet different, culturally shaped demands in the procedure, trying by all means to put together «abstractness and concreteness». This is all done in view of keeping the doors and the channels of the procedure open and unaltered, since the Court, at the current stage of European integration, still seems to consider the didactic, constructive effects of Article 267 TFEU as essential.

The result of all this - in which an additional confirmation of the specific concerns on the dynamics of the preliminary rulings can be seen - is in the constant search for *neutral* solutions for the problem of workload of the Court. This is the most evident characteristic of the institutional evolution of the Court in this respect. By neutral, we mean here that all the actual implemented solutions were aimed, not by chance, at solving, or *rectius* at alleviating, the problem of the Court's workload via structural arrangements, with better management of the resources and the energies devoted at solving the cases and better efficiency in terms of timing; but they were all inspired by the constant concern of taking no risk of distorting effects on the perceived possibility or opportunity for national courts for raising references, and in general for all the players of the EU

¹¹⁰⁷ *Ivi.*

¹¹⁰⁸ *Ivi.*

¹¹⁰⁹ See the well known exchange between G.F. Mancini, Europe: The Case for Statehood, in 4 European Law Journal, 1998, p. 29 and J.H.H. Weiler, Europe: The Case Against the Case for Statehood, in 4 European Law Journal, 1998, p. 43.

judicial sphere to interact with Luxembourg.

This is true, of course, for the early creation by Council Decision 24 October 1988,¹¹¹⁰ of the Court of First Instance, then renominated General Court, with jurisdiction to deal with almost all cases against the institutions and the agencies of the EU, which alleviated the Court of Justice of a good part of the direct actions (and on whose decisions the ECJ has jurisdiction to hear appeals). The creation of such an autonomous court was clearly aimed at rationalizing the judicial architecture and alleviating the apical Court of Justice of some of its burden.¹¹¹¹ In turn, it then became subject of serious problems of workload,¹¹¹² and harsh debates on the possibility of its strong numerical expansion have started in the very recent times.¹¹¹³

The same is true for the later creation of the Civil Service Tribunal, the only specialised court of the EU system - in existence since 2005 and explicitly settled, in turn, to ease the workload of the General Court since the appeals on its cases are heard by the latter.¹¹¹⁴

The same debate on the opportunity of the creation of specialised courts for the EU judicial system is telling. Suggestions in this sense are common in the literature¹¹¹⁵ and a legal basis is already provided by Article 256(2) TFEU, so to constitute a sort of preference in principle set by the Masters of the Treaties.¹¹¹⁶ But they have never been implemented for the concern on decentralising the treatment of preliminary rulings or, worst, for the risk of inhibiting their emergence in areas of supposed specialty but in which potential references of constitutional significance can in any case exist.

In turn, this is also the reason why the possibility, stated in the Treaty, to decentralise Article

¹¹¹⁰ Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities.

¹¹¹¹ See e.g. the clear words in the aftermath of the creation by G. Slynn, Court of First Instance of the European Communities, in 9 *Northwestern Journal of International Law & Business*, 1989, p. 542 and G. Vandersanden, A Desired Birth: The Court of First Instance of the European Communities, in 21 *Georgia Journal of International and Comparative Law*, 1991, p. 51.

¹¹¹² See the recent Report on “The Workload of the Court of Justice of the European Union” issued by European Union Committee of the UK House of Lords, available at the website <http://www.publications.parliament.uk/pa/ld201011/ldselect/ldecom/128/128.pdf> (accessed 26 August 2015), at 18 *et seq.*

¹¹¹³ See for a timely comment C. Curti Gialdino, Il raddoppio dei giudici del Tribunale dell’Unione: valutazioni di merito e di legittimità costituzionale europea, in 8 *Federalismi.it. Rivista di diritto pubblico, comparato, europeo*, 2015, available at the website <http://www.federalismi.it/AppOpenFilePDF.cfm?artid=29318&dpath=document&dfile=27042015190643.pdf&content=Il+raddoppio+dei+giudici+del+Tribunale+de+ll%E2%80%99Unione:+valutazioni+di+merito+e+di+legittimit%C3%A0+costituzionale+europea++-+unione+europea+-+dottrina+-+> (accessed 26 August 2015).

¹¹¹⁴ See the 2004/752/EC, Euratom: Council Decision of 2 November 2004 establishing the European Union Civil Service Tribunal.

¹¹¹⁵ Notably, also by members of the Court: see e.g. P.J.G. Kapteyn, The Court of Justice of the European Communities after the year 2000, in D. Curtin, T. Heukels (eds.), *Institutional Dynamics of European Integration*, *op. cit.*, p. 135.

¹¹¹⁶ And in some Regulations such as Regulation 40/94/EC on the Community Trade Mark or Regulation 2100/94/EC on the Community Plant Variety Rights, both envisaging the creation of special Bords of appeals.

267 treatment also at the level of the General Court has always been resisted.¹¹¹⁷

In the same vein, the organisation of the Court in small chambers of three or five judges, which deal with the majority of cases, and leave to the Grand Chamber or to the even more rare Plenary treatment the more relevant controversies, has been a decisive reform evidently aimed at a better use of human and therefore timing resources.¹¹¹⁸ Recently, a small tuning, directly asked by the President of the Court, has been done to create the figure of the Vice-President,¹¹¹⁹ and allow a simpler and smoother operation of such a chambers system.

With the intention of rationalizing the timing of the procedures, an opportunity to autonomously decide whether an oral hearing, with its employment of time and resources, is actually necessary in an individual case, given its complexity, has been attributed by Article 76(2) of the Courts' Rules of Procedure to the full College of Judges.¹¹²⁰

The same rationale is behind the possibility to reply «by reasoned order», according to Article 99 of the Rules of Procedure, «where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt».¹¹²¹

Internal spaces of discretion for the treatment of preliminary references have also been recognized by the settlement of special separate procedures (“expedited preliminary ruling procedure” and “urgent preliminary ruling procedure”) if the circumstances of the case show that «the nature of the case requires that it be dealt with within a short time» (Article 105 of the Court of Justice's Rules of Procedure),¹¹²² or, when deemed necessary, in questions concerning the area of freedom, security and justice (Article 107 of the Court of Justice's Rules of Procedure).¹¹²³ All this is

¹¹¹⁷ An option already envisaged by Article 256(3) of the TFEU, still not applied, and often discussed in the literature: for a summary, see K. Lenaerts, *The Future Organisation of European Courts*, in P. Demaret, I. Govaere, D. Hanf (eds.) *European Legal Dynamics – 30 Years of European Legal Studies at the College of Europe*, Peter Lang 2007, p. 129, in particular at 144 *et seq.*

¹¹¹⁸ For recent reflections on this see M. Malecki, *Do ECJ Judges All Speak with the Same Voice?*, *op. cit.*, and D. Kelemen, *Selection, Appointment, and Legitimacy: a Political Perspective*, in M. Bobek (ed.), *Selecting Europe's Judges*, *op. cit.*, p. 244, at 254.

¹¹¹⁹ See 2012/671/EU: Decision of the Court of Justice of 23 October 2012 concerning the judicial functions of the Vice-President of the Court.

¹¹²⁰ Article 76(2): «2. On a proposal from the Judge-Rapporteur and after hearing the Advocate General, the Court may decide not to hold a hearing if it considers, on reading the written pleadings or observations lodged during the written part of the procedure, that it has sufficient information to give a ruling».

¹¹²¹ According to Article 99, this can happen «at any time, on a proposal from the Judge Rapporteur and after hearing the Advocate General».

¹¹²² Article 105(1): «1. At the request of the referring court or tribunal or, exceptionally, of his own motion, the President of the Court may, where the nature of the case requires that it be dealt with within a short time, after hearing the Judge-Rapporteur and the Advocate General, decide that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure derogating from the provisions of these Rules».

¹¹²³ Article 107(1): «1. A reference for a preliminary ruling which raises one or more questions in the areas covered by

coupled by the possibility to use the normal procedure but with priority over other cases (where “special circumstances” according to Article 53(3) of the Rules of Procedure exist).¹¹²⁴

All the mentioned aspects are remarkable reforms undertaken throughout recent decades in Luxembourg, which significantly changed the structure and the organization of the Court of Justice, had a strong impact in its institutional evolution, and were generally welcomed by commentators.¹¹²⁵ In particular, they had a decisive impact on the timing of the procedural activity of the Court, an improvement often emphasized in the recent Annual Reports.¹¹²⁶

From our perspective, it is important to highlight that they were also clearly influenced by a common rationale and had the same, only apparently paradoxical effects. In fact, it is easy to see how all these moves were inspired by a continuous effort towards *neutral* institutional solutions of simply endogenous nature — aimed at rationalizing and improving the capabilities of the European Court in delivering justice. The constant attention was at the strengthening and streamlining of internal resources, with the creation of new sub-institutions, new procedures, new powers, new timings. On the other hand, it is important to note that - given the described various, indented panorama of relationships with the other players of the EU federal judicial architecture, and in particular with national courts - each reform was very cautious in its *exogenous* effects and therefore in touching the though relevant interplay with other actors and their spillover on the resources of the Court. No risk of disentanglement within the still-to-be-nurtured EU judicial gameplay was even contemplated, as it would have been the case in hypotheses such as the mentioned ideas of radical reform of the judicial architecture¹¹²⁷ or even with the soft power of the green light procedure.¹¹²⁸ Not even the risk of forcing national judges to present their own solution (as per this last proposal) was faced, as said: a simple invitation, deliberately not enforceable, to do

Title V of Part Three of the Treaty on the Functioning of the European Union may, at the request of the referring court or tribunal or, exceptionally, of the Court’s own motion, be dealt with under an urgent procedure derogating from the provisions of these Rules».

¹¹²⁴ Article 53(3): «3. The President may in special circumstances decide that a case be given priority over others». See also the specular Article 56, on the «Deferment of the determination of a case»: «After hearing the Judge-Rapporteur, the Advocate General and the parties, the President may in special circumstances, either of his own motion or at the request of one of the parties, defer a case to be dealt with at a later date».

¹¹²⁵ See the authoritative remarks by K. Lenaerts, The rule of law and the coherence of the judicial system of the European Union, *op. cit.*, and M. Broberg, N. Fenger, Preliminary References to the European Court of Justice, *op. cit.*, at 396 *et seq.*.

¹¹²⁶ Just as an example, see the Foreword by the President of the Court of Justice Vassilios Skouris at p. 5 of the last Report for 2014, available at the website http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-04/en_ecj_annual_report_2014_pr1.pdf (accessed 26 August 2015): «A new record was achieved in 2014 with a total of 1 691 cases brought before the three courts, that is to say, the highest number since the judicial system of the European Union was created. On the other hand, as 1 685 cases were completed, the institution’s productivity was likewise the highest recorded in its history. *This increased productivity also had its counterpart in the duration of proceedings, which was reduced*» (emphasis added).

¹¹²⁷ J.P. Jacqu , J.H.H. Weiler, On the Road to European Union – A New Judicial Architecture: An Agenda for the Intergovernmental Conference, *op cit.*.

¹¹²⁸ M. Broberg, N. Fenger, Preliminary References to the European Court of Justice, *op. cit.*, at 28 *et seq.*

so is contained in the mentioned *Guidelines* for the national tribunals,¹¹²⁹ which are also reassured at the same time that they will continue to see their references all answered.

When we referred to the apparently paradoxical effects of such an institutional evolution, we pointed in fact to an even trivial result in light of our reflections but still not generally obvious in light of the debate on docket control of the last decades: all the mentioned reforms were actually aimed at a control of docket management but they were in fact also very much concerned with resulting - and in fact resulted - in the enhanced inflow of cases. In turn, a better and quicker treatment of cases eventually invited more preliminary references from the national courts: those national judges who have always historically/culturally restrained from making reference are still a matter of concern for the correct and uniform application of EU law, but those national professional who have always used the procedure are now sure that they will face a Court with enhanced tools, attentive to a fast treatment of cases, with rationalized powers, and therefore they are prompted to make further use of the procedure.

VI.7 The Evolution of Docket Control as a Form of Improvement of the Court's Authority

From the analysis conducted throughout this chapter, we can draw, again, important conclusions on the ability of the Court of Justice to evolve from an institutional point of view.

The problem of its docket control has emerged over time as a decisive aspect of its structure and organization. This coincided, as we said, with the progressive entrenchment of the dynamics of the European federal-like judicial architecture in the everyday life of national judges and other players, and therefore with the ECJ becoming more and more a «victim of its own success». The topic started at a certain point to become at the same time a symbol of the Court's acquired authority and crucial for its improvement over time in several respects.

We highlighted some main important points in this respect. First, the debate on the conceptualization itself of the idea of docket control, and on the possible solutions for the European

¹¹²⁹ See the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2012/C 338/01), available at the website [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012H1106\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012H1106(01)&from=EN). (accessed 26 August 2015) at paragraph 13: «13. Thus, a national court or tribunal may, in particular when it considers that sufficient guidance is given by the case-law of the Court of Justice, itself decide on the correct interpretation of European Union law and its application to the factual situation before it. However, a reference for a preliminary ruling may prove particularly useful when there is a new question of interpretation of general interest for the uniform application of European Union law, or where the existing case-law does not appear to be applicable to a new set of facts».

Court of Justice, was very much influenced by comparative arguments, not always of refined quality. In fact, it had to confront the specificities of the heterarchical European judicial architecture where a simple transplant of foreign solutions could be particularly problematic. The main concerns actually came from the diversity of patterns of behaviour by national judges, often clearly influenced by culturally-shaped factors. The appraisal of this complex phenomenon led the Court to necessarily evolve, given the situation of strain of its own resources, but evolve accordingly.

Still, serious concerns for the correctness, coherence and uniformity in the interpretation and the application of EU law in the current stage of EU integration, and therefore for the level of maturity of the EU legal system, are evidenced by data and research. There is still the need for a qualitatively unchanged, central role of the Court of Justice and for the Article 267 TFEU procedure as a drive chain between the supranational and the national judges. The possible nature of «another infant disease» recognized by some in the procedure¹¹³⁰ must be confronted with the reality of a body not yet grown and fully developed. It is for this simple, but often overshadowed, reason that any reform involving the relationship between the ECJ and the other players in the field was discarded; and the Court of Justice, forced and able to internalize the influences coming from the different culturally-shaped behaviours of national judges, only evolved through rigorously *endogenous* reforms, by strengthening its own resources and capabilities but with a view at eventually maximizing its activity.

In the current setting, the authority of the CJEU as an effective guardian of the correct and uniform application of EU law throughout the continent surely rests on its power to solve cases efficiently and with a control of its resources of energy and time. Still, its authority also rests very much on its ability to attract cases, with the least possible risk of pockets of non-cooperation or compliance with its own work.

¹¹³⁰ P. Allott, Preliminary Rulings: Another Infant Disease, in 25 *European Law Review*, 2000, p. 538, at 542, obviously with a provocative reference to the historical definition by P. Pescatore, The Doctrine of “Direct Effect”: An Infant Disease of Community Law, in 8 *European Law Review*, 1983, p. 155; see also in this respect, recently, J. Baquero Cruz, La procédure préjudicielle suffit-il à garantir l’efficacité et l’uniformité du droit de l’Union Européenne?, *op cit.*; J. Komarek, In the court(s) we trust? On the need for hierarchy and differentiation in the preliminary ruling procedure, in 32 *European Law Review*, 2007, p. 467.

The Style of Court Decisions

VII. The style of the Court's decisions

1. The style of the Court's Decisions Within the “Fabrication” Process of EU Law
2. The Style of the Court's Decisions as Culturally Shaped
3. The Style of Decisions as Shaped by the Machinery of the Court and the Plurality of the EU Legal Order
4. The style of Decisions and the New Factors of Change
5. The Evolution of Judgment Style as a Form of Improvement of the Court's Authority

VII.1 The style of the Court's Decisions Within the “Fabrication” Process of EU Law

In the final chapter of this work, we will focus on the style of the Court of Justice's decisions by looking at them in their specific nature of products and indicators of the judicial body's institutional setting. Similar to other chapters, we will also try to demonstrate how by looking at this last specific aspect of the Court's activity, at its direct output, the judgments, we can notice a diachronic influence played by the diverse environment of the European Union as well as by the interplay of its different legal cultures. As usual, we will also look at how this development was directly linked to the matter of the Court's authority, and at its strengthening.

In what sense can the style of the judgments be intended as a product and an indicator of the Court's institutional setting? One is tempted to look at the classic debates according to which judges are defined, also in modern settings, as «oracles of law».¹¹³¹ In both historical experiences and modern usage and attitudes, they have been in fact considered as ultimate depositaries of the law and of its interpretation,¹¹³² consequently, their activities and their decisions have always been closely inspected and investigated as authoritative explanations and justification for the correct application of law. Such investigation has been directed, with great efforts made by learned

¹¹³¹ In the words of J.P. Dawson, *The Oracles of the Law*, *op.cit.*

¹¹³² See W. Blackstone, *Commentaries on the Law of England*, Clarendon Press 1765 – 1769, vol. I, p. 69, from whom Dawson's suggestive title is taken.

specialists of law of any era,¹¹³³ to the substantial activity of interpretation made by judges in all the different areas of law and of their institutions, as well as to the argumentative tools thereby employed, with special characteristics in the different areas.

But the same investigation has been also directed towards the judges' decisions *per se*, towards their style, their form, their discourse, their rhetoric. This study has never been considered secondary by scholars: on the contrary, its relevance has often been emphasized as a way to comprehensively understand the legal practice and the judicial role in a certain given setting. It has been said that the judicial decisions' «form, discourse, and rhetoric combine to make implicit assertions about the process that produced the decisions. Judicial decisions, and judicial arguments generally, are therefore texts that offer representations of judicial practice and of the judicial role. These representations may be thought of as portraits: they are images of judging. Insofar as these portraits are produced by judges in judicial texts, they may be termed judicial self-portraits».¹¹³⁴

The same idea of a “process” producing decisions - described by judicial forms, discourses, and rhetoric combined - is reminiscent of those sociological, «ethnographic» theories that look at the judicial bodies as veritable «*fabriques du droit*».¹¹³⁵ This approach is explicitly aimed, by its adopters, at appreciating the importance of the textual materiality of law and understanding the channels through which such materiality is built and transported. As we will see throughout the chapter, such industrialist metaphor can be particularly apt for our purposes since the same idea of a «fabrication» of European law - as it has been already suggested¹¹³⁶ - can lead to important reflections on the influences the Court is able to face and internalize in its decisions.

So, while recognizing that an analysis of the peculiar aspects of the Court's modalities of substantive interpretation of EU law, though interesting and remarkable also in terms of its evolution, is outside the reach of this study, we will embark on a stylistic analysis of its decisions, precisely intended as «judicial self-portraits» made by the Court and as the form of its external interaction. This will constitute the last chapter of our diachronic, comparative analysis of its institutional evolution, as the tentative appraisal - after an investigation of all the logically antecedent aspects in the structuring and the organization of the Court - of the characteristics of its ultimate “product”: the judgment, in its morphological elements.

¹¹³³ See R.C. van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History*, *op. cit.*, at 127 *et seq.*

¹¹³⁴ M. Lasser, "Lit. Theory" Put to the Test: A Comparative Literary Analysis of American Judicial Tests and French Judicial Discourse, in 111 *Harvard Law Review*, 1998, p. 689, at 691-692.

¹¹³⁵ See the fundamental work by B. Latour, *La fabrique du droit. Une ethnographie du Conseil d'Etat*, *op. cit.*

¹¹³⁶ See the various contributions to P. Mbongo, A. Vauchez (eds), *Dans la fabrique du droit européen. Scènes, acteurs et publics de la Cour de justice des Communautés européennes*, *op. cit.*

The comparative law literature has previously clarified what is relevant to study when taking the “style of the judicial decisions”¹¹³⁷ into account. This phrase is said to precisely refer to a series of «morphological» elements, such as the syntactic structure, the language used by the courts, whether and how the facts of the case are presented, how issues to be decided are treated, the possible use of theoretical digressions or divagation, the reference to previous cases. The comprehension of all these elements is presented as a prerequisite for the understanding of the judgment itself; and it is also relevant to assess whether and to what extent the judgment can assume, according to these elements, the form of a veritable “precedent”. In this definition, we can also see how the substantive/argumentative tools of judges' legal reasoning are considered as external elements to the concept of style of judicial decisions - or better, they are conceivable as independent elements which can be used and declined in all the possible formal styles with no decisive impact both from and on the machinery of the institution.

Focusing on the CJ, we already made reference to the common accusation directed to the Court pertaining to the excessively concise, laconic nature of its judgments. According to the common doctrinal understanding, they would not merely, formally amount to a frequently invoked (and reproached) «cryptic, Cartesian style»,¹¹³⁸ but they would, very much in practice, give serious problems of clarity and intelligibility with a «pretense of logical reasoning and inevitability of results»¹¹³⁹ which is surely not beneficial for an envisioned “dialogue” with the other EU institutions, the national courts, a broader public. In Weiler's blunt words, the style of the Court's decisions would be «outmoded, does not reflect the dialogical nature of European Constitutionalism, and is not a basis for confidence-building European constitutional relations between the European Court and its national constitutional counterparts».¹¹⁴⁰ The problems of transparency and openness of the Court would thus not be confined to the limited possibility of access to information about its deliberations in course of action (see chapter five). They would result, even more relevantly and critically, in the final products and final output issued by the judges, affecting the institution's overall activity and, even more importantly, its inter-institutional relationships.

This result would be problematic for any judicial body per se. The first vector of legitimacy

¹¹³⁷ See the historical contribution by G. Gorla, *Lo stile delle sentenze. Ricerca storico-comparativa*, in 21 Quaderni de “Il Foro italiano” 1967, p. 291, actually coeval to the already mentioned J.P. Dawson, *The Oracles of the Law*, *op. cit.*. See also the antecedent T. Sauvel, *Histoire du jugement motivé*, *op. cit.*, and, recently, in the Italian literature, L. Vacca (ed.) *Lo stile delle sentenze e l'utilizzazione dei precedenti. Profili storico-comparatistici*, Giappichelli 2000.

¹¹³⁸ J.H.H. Weiler, *Epilogue: The Judicial Après Nice*, *op. cit.*, at 225.

¹¹³⁹ *Ivi.*

¹¹⁴⁰ *Ibidem*, at 219.

and authoritativeness for courts is surely represented by the quality of their decisions¹¹⁴¹ since it is the inherent power of persuasion of their judgments that entitles courts to expect acceptance by those affected by the decisions. Reliance on the power of persuasion is particularly important in contexts such as the European Union legal order in which the means for enforcing judgments are limited and in which compliance with them ultimately depends on the recognition by all concerned that the common interest requires respect for the relative *dicta*.¹¹⁴² Nonetheless, we also already made reference to the opinions of who has depicted a certain formalism in the ECJ's judgments, at least in the glorious, early years of the structuring of the EU legal order, as a positive feature, which nurtured the habit of obedience of other players including national courts in particular.¹¹⁴³

In analytically examining all of this, this last chapter will try to investigate, from our usual perspective, the reality and determinant factors of such denounced laconicity and lack of clarity. In particular, we will first explore the asserted determinant cultural factors in the shaping and the development of the style of the Court. We will then examine other factors of complication, due to the specific machinery of the Court and shaped again by the peculiarity of the EU legal order and its plurality. We will then conclude by trying to understand, in an evolutive dimension, whether and why the situation has changed, is changing or is likely to change in the future. In all these, the relevance of the comparative element and the link to the strengthening of the Court's authority will be evident and emphasized.

VII.2 The Style of the Court's Decisions as Culturally Shaped

The French model was not only preponderant in the structuring of the competences and the powers of the Court, as we saw in detail in the first part of this study. As everybody knows, the importance of French culture in the XIX and in the first half of the XX century was measured first and foremost in terms of radiation of the French legal forms in continental Europe (as well as in northern Africa and some specific areas of America), and from French being the recognized *lingua franca* of diplomacy and generally of learned layers of society during that whole period.¹¹⁴⁴

¹¹⁴¹ This is probably the basic teaching of comparative analysis like the one by M. Cappelletti, *The Judicial Process in Comparative Perspective*, *op. cit.*, at 15 *et seq.* in particular.

¹¹⁴² U. Everling, *The Court of Justice as a Decision-Making Authority*, in 82 *Michigan Law Review*, 1984, p. 1294, in particular at 1307 *et seq.*

¹¹⁴³ J.H.H. Weiler, *Journey to an Unknown Destination. A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration*, *op. cit.*, at 424.

¹¹⁴⁴ For both the aspects, see H.E.S. Mattila, *Comparative Legal Linguistics. Language of Law, Latin and Modern Lingua Franca*, Ashgate 2013, at p. 241 *et seq.*

Therefore, it is not surprising that both the negotiations leading up to the Treaty establishing the European Coal and Steel Community and subsequent ones that resulted in the Treaty establishing the European Economic Community were conducted in French;¹¹⁴⁵ that the first ECSC Treaty contained an Article 100 stating it was concluded and therefore only original in French; that on that basis the French delegates argued that since the Treaty was concluded in French the judgments of the Court of Justice and the application rules should only be made public in French. Already at that early stage, the opposition of German delegates was the first step towards the multilingual nature of EU law. A compromise was found on the ECSC Treaty in declaring it as only authentic in French but in publishing official translations of all three languages;¹¹⁴⁶ the principle of equal value of all official languages of the European Communities (four, at the time) was then fully applied with the EEC Treaty (equally authentic in all of those) and with Regulation 1/58, which «determined» the authentic working languages «to be used by the European Economic Community».¹¹⁴⁷ As per specifically the Court of Justice, an apposite conference of the six original founding states of the European Coal and Steel Community in 1952¹¹⁴⁸ treated the question, and decided (for obvious reasons on fair accessibility to justice) the principle of plurilinguism of the proceedings of the Court:¹¹⁴⁹ a principle that is still in place today with twenty-four and not just four official idioms.¹¹⁵⁰

Nevertheless, the internal working language of the Court to be used in the deliberation room and in the drafting of judgments became French, as the quite obvious *lingua franca* among high level lawyers and functionaries of the mid XX century. As written by former Advocate General Francis Jacobs some years ago - echoing a series of famous witticisms by Oscar Wilde, George Bernard Shaw, and Winston Churchill - «unlike the English and the Americans, who are divided by a common language, language differences in Europe do not prevent a common way of thinking»:¹¹⁵¹ and surely the idea of a common way of thinking was also behind the choice of French, which was not only the more natural working language for a group of continental lawyers in order to facilitate internal communications, but also the more apt to facilitate the creation of an *esprit de corps*, a sense of togetherness.

In any case, such a choice was also fraught with consequences. Languages are vehicles of

¹¹⁴⁵ See K. Loehr, *Mehrsprachigkeitsprobleme in der Europäischen Union: Eine empirische und theoretische Analyse aus sprachwissenschaftlicher Perspektive*, Peter Lang 1998, p. 50; M. Derlén, *Multilingual Interpretation of European Union Law*, Wolters Kluwer 2009, p. 3.

¹¹⁴⁶ *Ivi.*

¹¹⁴⁷ EEC Council: Regulation No 1 determining the languages to be used by the European Economic Community, Official Journal 017, 06/10/1958 P. 0385 – 0386.

¹¹⁴⁸ D.G. Valentine, *The Court of Justice of the European Coal and Steel Community*, *op. cit.*, at 3 and 147.

¹¹⁴⁹ Article 27 of the original Rules of Procedure of the Court of Justice.

¹¹⁵⁰ Article 36 *et seq.* of the actual Rules of Procedure of the Court of Justice.

¹¹⁵¹ F.G. Jacobs, *The European Court of Justice: Some Thoughts on its Past and its Future*, *op. cit.*, at 7.

cultural heritage and also of legal cultural heritage in particular. They have specific characteristics, which can shape the way of thinking and conceptualize law in a certain language, using a certain “toolkit”. Being a decisive “morphological element”, surely they shape legal documents written according to their codes.¹¹⁵² This is also the case of judicial decisions. Already the first French scholars who specifically commented in the 1950s on the «*problème de l'influence des droits internes sur la Cour de Justice de la Communauté Européenne du Charbon et de l'Acier*»¹¹⁵³ recognized, from their privileged point of view, the early adoption by the Court, in terms of «*technique juridictionnelle*»,¹¹⁵⁴ of the same *imperatoria brevitatis* of the French judiciary. As also noted by several other authors,¹¹⁵⁵ in the first three decades of its activity, the Court of Justice strictly adhered to a form of concise reasoning with a fixed and immutable structure. Each judgment opened with a short summary of the case, followed by the description of the relevant supranational legal framework; the relevant national legal discipline; facts, procedure and presentation of the questions referred in case of preliminary references, or of the «conclusions of the parties» in other actions; «*moyens et arguments*» of the parties; judges' appraisal; and all these elements were always neatly packed in paragraphs and numbered.¹¹⁵⁶ The judgments all tended to be quite short and concentrated, with most of the facts and details being confined to the separately-printed ‘report for the hearing’. In this sense, the inspiration of the French drafting style was readily visible in both form and effects. The organization of the text took the typical form of a series of single paragraphs opened by the phrase «*attendu que*» («considering that», «whereas-es»)¹¹⁵⁷. This is considered one of the main specificities of the French heritage, traced back to the local tribunals of the 15th century¹¹⁵⁸ - a practice then followed in many continental countries including Belgium, Luxembourg, the Netherlands, Spain, Portugal and the Nordic countries.¹¹⁵⁹ It was therefore a

¹¹⁵² H.E.S. Mattila, *Comparative Legal Linguistics. Language of Law, Latin and Modern Lingua Francas*, *op. cit.*, at 87 *et seq.*

¹¹⁵³ J. Rivero, *Le problème de l'influence des droits internes sur la Cour de Justice*, *op. cit.*.

¹¹⁵⁴ *Ibidem*, at 297.

¹¹⁵⁵ See, accordingly, *inter alia*, U. Everling, *The Court of Justice as a Decision-Making Authority*, *op. cit.*, at 1302 *et seq.*; T. Koopmans, *The Birth of European Law at the Crossroads of Legal Traditions*, *op. cit.*, at 500 *et seq.*; G.F. Mancini, D.T. Keeling, *Language, Culture and Politics in the Life of the European Court of Justice*, in 1 *Columbia Journal of European Law*, 1994-1995, p. 397, at 399 in particular (see also in G.F. Mancini, *Democracy and Constitutionalism in the European Union. Collected Essays*, *op. cit.*, p. 179); M. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy*, *op. cit.*, at chapter seven in particular; G. Itzcovich, *The European Court of Justice as a Constitutional Court. Legal Reasoning in a Comparative Perspective*, *op. cit.*, at 42 *et seq.*; M. Bobek, *The Court of Justice of the European Union*, *op. cit.*, at 170.

¹¹⁵⁶ M. Bobek, *The Court of Justice of the European Union*, *op. cit.*, at 169.

¹¹⁵⁷ R. David, J.E.C. Brierley, *Major Legal Systems in the World Today: an Introduction to the Comparative Study of Law*, Free Press 1978, p. 129; H.E.S. Mattila, *Comparative Legal Linguistics. Language of Law, Latin and Modern Lingua Francas*, *op. cit.*, p. 258 *et seq.*

¹¹⁵⁸ G. Gorla, *Lo stile delle sentenze. Ricerca storico-comparativa*, *op. cit.*, at 313; H.E.S. Mattila, *Comparative Legal Linguistics. Language of Law, Latin and Modern Lingua Francas*, *op. cit.*, at 259.

¹¹⁵⁹ R. David, J.E.C. Brierley, *Major Legal Systems in the World Today: an Introduction to the Comparative Study of Law*, *op. cit.*, at 129-130.

technique not only shaped by the same choice of using French as a language, with its own constraints and common usages; but also another example of «common way of thinking» around which the large part of the original members of the Court could easily converge with their own background of practice.

In turn, the «*attendu que*» structure has consequences on the rest of the «morphological elements» of the decisions and on its «substance»: after all, it was already clear for the first observers that «(L)a substance même du raisonnement, son déroulement, se trouvent dans une large mesure commandés par la forme dans laquelle il se coule». ¹¹⁶⁰ This way of structuring the grounds of a judgment leads, for instance, to writing using verbs in the indicative tense, with avoidance of conditional ones and hypothetical periods. ¹¹⁶¹ In general terms, it fosters the articulation of the judicial «*démarche intellectuelle*» in a contained and progressive way in which every argumentative step is a distinct, clearer and most visible explanation of the antecedent. ¹¹⁶² In this sense, the early commentators had already emphasized how this technique generally leads judges to «*s'expliquer*», to *explain* themselves and their deductive reasoning, more than to *justify* themselves and their choices, as more typical of «*la forme 'dissertation'*». ¹¹⁶³ This idea was then taken up and developed by recent comparative scholars who talked of a clear contrast between the transparent judicial opinions usual for a certain common law judiciary, in which a «unified or integrated decision making» is produced, on the one hand, and the «bifurcation» typical of the French legal infrastructure, on the other, in which the «*démarche intellectuelle*» leading effectively to a certain decision tends not to coincide - but quite the contrary to be contained, even cloaked, in the rigid pre-set forms of the official judgment. ¹¹⁶⁴

It is at the weight of the French heritage that the scholars who have described the «succinct, syllogistic structure, with a dry tone» of the Court, ¹¹⁶⁵ its «formal, terse, and abstract» reasoning, ¹¹⁶⁶ the nature of its judgments as «terse and opaque summary of the outcome and the reasons for it», expressed in a «strictly deductive form», ¹¹⁶⁷ «carbon copy of the judgments of the great French

¹¹⁶⁰ J. Rivero, Le problème de l'influence des droits internes sur la Cour de Justice, *op. cit.*, at 298.

¹¹⁶¹ T. Krefeld, Das französische Gerichtsurteil in linguistischer Sicht. Zwischen Fach- und Standessprache, *Studia Romanica et linguistica*, Peter Lang 1985, at 107-109; H.E.S. Mattila, Comparative Legal Linguistics. Language of Law, Latin and Modern Lingua Francas, *op. cit.*, at 259.

¹¹⁶² J. Rivero, Le problème de l'influence des droits internes sur la Cour de Justice, *op. cit.*, at 298-299.

¹¹⁶³ *Ibidem*, at 299.

¹¹⁶⁴ On such idea of «bifurcation» between internal and external discourse see notably M. Lasser, Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy, *op. cit.*, at 60 and 179 *et seq.* in particular.

¹¹⁶⁵ G. Itzcovich, The European Court of Justice as a Constitutional Court. Legal Reasoning in a Comparative Perspective, *op. cit.*, at 32.

¹¹⁶⁶ T.C. Hartley, The Foundations of European Community Law, 4th edn, Oxford University Press 1998, p. 74.

¹¹⁶⁷ M. Wells, French and American Judicial Opinions, in 19 Yale Journal of International Law, 1994, p. 85, at 92 and 94; U. Everling, Reflections on the Reasoning in the Judgments of the Court of Justice of the European Communities, in J. Rosenløv *et al.* (eds.), Festschrift til Ole Due, Gads Forlag 1994, p. 55, at 59.

courts»,¹¹⁶⁸ all pointed. As a result, the Court certainly reached that kind of «stern, authoritarian style, expressed in a single-sentenced statement in which shines a single subject (the Court)» considered as typical of the French jurisdictions.¹¹⁶⁹

But can we consider this purely the result of a deterministic choice, the obvious fruit of a fecund legacy? Probably this is only part of the story: not only for the inherent weakness of any «legal transplant», especially in peculiar contexts such the supranational one, but also because differences and dissonances from the weighty paradigm of the past readily emerged, and other functional reasons were also present.

The same early observers who highlighted the relevance of the general adoption of the «*attendu que* structure» also pointed to the first forms of hybridization.¹¹⁷⁰ A «lack of unity», also of «exterior unity», was already denounced in the first years of the ECSC Court of Justice. In some of its cases, the original rigid structure with separated, consequential paragraphs and single-sentenced statements (the technique of the «*phrases unique*»),¹¹⁷¹ was clearly followed;¹¹⁷² in others, it was disregarded,¹¹⁷³ while in others still, a sort of compromise solution with a general structure made of «*attendu que*», yet the whole «*motifs de droit*» grouped under the same unique «*attendu*» (so, with no «*phrases unique*»), was found.¹¹⁷⁴ Even judgments given in the same days presented stylistic dissonances of the kind.¹¹⁷⁵

Later members of the Court highlighted that the «concision and clarity» of the French style judgment was surely influenced by the «rigorous and terse» working language but also very much appreciated, in functional terms, for the univocity of the message that they were able to convey to «national judges whose knowledge of Community law and its bewildering intricacies» was «inevitably summary» (in this sense confirming Weiler's mentioned thesis of an early instrumental use of formalism); for the provided ease of translation in all the other official languages of the Communities, another connected practical factor often overlooked; for the possibility to mask, behind «the oracular tone» of a concise series of dicta, the inevitable dissonances and disagreements

¹¹⁶⁸ G.F. Mancini, D.T. Keeling, Language, Culture and Politics in the Life of the European Court of Justice, *op. cit.*, at 399, (see also in G.F. Mancini, Democracy and Constitutionalism in the European Union, *op. cit.*, at 179).

¹¹⁶⁹ G. Gorla, Lo stile delle sentenze. Ricerca storico-comparativa, *op. cit.*, at 16.

¹¹⁷⁰ J. Rivero, Le problème de l'influence des droits internes sur la Cour de Justice, *op. cit.*, at 298-299.

¹¹⁷¹ G. Gorla, Lo stile delle sentenze. Ricerca storico-comparativa, *op. cit.*, at 313.

¹¹⁷² See an example in Judgment of 13 June 1958, Meroni / ECSC High Authority (9/56, ECR 1957-1958 p. 133).

¹¹⁷³ See an example in Judgment of 12 June 1958, Compagnie des hauts fourneaux de Chasse / ECSC High Authority (2/57, ECR 1957-1958 p. 199).

¹¹⁷⁴ See as examples Judgment of 21 December 1954, France / ECSC High Authority (1/54, ECR 1954-1956 p. 1); Judgment of 21 December 1954, Italy / ECSC High Authority (2/54, ECR 1954-1956 p. 37); Judgment of 11 February 1955, Assider / ECSC High Authority (3/54, ECR 1954-1956 p. 63).

¹¹⁷⁵ Compare Judgment of 12 June 1958, Compagnie des hauts fourneaux de Chasse / ECSC High Authority (15/57, ECR 1957-1958 p. 211) and Judgment of 13 June 1958, Meroni / ECSC High Authority (9/56, ECR 1957-1958 p. 133).

of single members obliged, with no separate opinions, to a joined collegiality.¹¹⁷⁶

The development of a proper style of the Court was therefore a matter of stratification, surely strongly affected by a visible French basis but also open to other influences, and to purely functional, instrumental considerations of government of the *unitas in diversitate*.

In one of the first studies devoted to the European Court of Justice with some comparative breadth,¹¹⁷⁷ Maurice Lagrange, another renowned former member of the Court from France, described in fact, on the basis of his own experience, a certain neutrality or better yet a *laissez-faire* practice in Luxembourg - especially when dealing with the drafting of judgments. Already in the mid 1960s, he recognized that «(T)he Court very wisely has refrained from interfering with the method of drafting with which each Justice is familiar, so that the drafter of each opinion, who usually is the "reporter judge" (*juge-rapporteur*), has considerable latitude in form and style».¹¹⁷⁸ Lagrange made the example of the German judges, who, more than others, had a tendency to move away from the primitive style of the Court: in an explicit contraposition with the style of the «French judge» - who tends to reach «his conclusions through a process of logical reasoning» and then to formulate «these conclusions in the dispositional part of his judgment», according to a historical scheme that we described - the «German judge» on the other hand was described as one that «first sets forth the specific decision in the case, and then supports it with as elaborate an explanation as possible, drafted informally without using “in consideration of which” and “whereas”; he endeavors to omit nothing and to make the judgment as convincing as possible».¹¹⁷⁹

This internal stylistic plurality should not seem to be the result of mere perception or anecdotal: in fact several commentators who ranged in the Court's college described it, and imputed it, precisely in terms of a stratification of styles, to the different German cultural influence in the early days.¹¹⁸⁰ Its different and more «dissertational» style is generally seen as prompted by the lexical richness and the consequent ample range of conceptual distinctions made possible by all the languages of the Germanic branch.¹¹⁸¹ It is surely commonplace to see this at an evergreen offspring of *Begriffsjurisprudenz*, as an innate German tendency to a “jurisprudence of concepts” in which law can be traced back to a logically organized system, or a pyramid, of concepts.¹¹⁸²

¹¹⁷⁶ See for these points G.F. Mancini, D.T. Keeling, Language, Culture and Politics in the Life of the European Court of Justice, *op. cit.*, at 398.

¹¹⁷⁷ M. Lagrange, The Court of Justice as a Factor in European Integration, *op.cit.*

¹¹⁷⁸ *Ibidem*, at 721.

¹¹⁷⁹ *Ivi*.

¹¹⁸⁰ See for instance U. Everling, The Court of Justice as a Decision-Making Authority, *op. cit.*, at 1301-1302; G.F. Mancini, D.T. Keeling, Language, Culture and Politics in the Life of the European Court of Justice, *op. cit.*, at 399.

¹¹⁸¹ H.E.S. Mattila, Comparative Legal Linguistics. Language of Law, Latin and Modern Lingua Francas, *op. cit.*, at 218.

¹¹⁸² As done by H.E.S. Mattila, Comparative Legal Linguistics. Language of Law, Latin and Modern Lingua Franca, *op. cit.*, at 218. See H.P. Haferkamp, A. Nieschlag, Begriffsjurisprudenz / Jurisprudence of Concepts (*ad vocem*), in The Oxford International Encyclopedia of Legal History, 2009, for a taxonomy of the various meanings attached to such

Surely, on the other hand, it has been emphasized how a tendency towards legal thinking based on conceptual analysis, in which notions formally unknown to the EC Treaties of the time such as «good faith, good morals, proportionality, legitimate expectations etc.» found a place, could not but lead to a «less deductive and apodictic» style.¹¹⁸³ Authoritative, internal opinions from the Court emphasized that «(A)s time moved on, German influences became visible in the Court's case law»;¹¹⁸⁴ and other scholars have suggested that an «examination of judgments in the 1960s and 1980s will reveal differences in the breadth of the Court's judgments and the tendency to be more discursive in its judicial style».¹¹⁸⁵ Actually, if one takes some of the judgments of that period in which, famously, some general legal principles often said to be derived by the German influence made their way, a certain tendency by the Court to be more discursive in its judicial style becomes evident. For instance, it is well known that the *Verhältnismäßigkeitsprinzip*, the principle of proportionality, which found its most achieved expression in German law, was already recognized by the European Court of Justice in early historical cases such as *Federation Charbonniere de Belgique*¹¹⁸⁶ and *International Handelsgesellschaft*,¹¹⁸⁷ as the general basic idea according to which «the individual should not have his freedom of action limited beyond the degree necessary in the public interest». The Court particularly elaborated the principle when it had to decide how far Member States could go in limiting one of the market freedoms when the Treaties allows certain restrictions for specific purposes. For its analysis, in doing so, in a second phase, it worked out more and more multi-pronged tests comparable to those of national jurisdictions.¹¹⁸⁸ With this passage, it surely and definitively broke the chains of any orthodox «*attendu que*» or «*phrases uniques*» structure for the elaboration of numerous dense paragraphs of detailed analysis of national regulatory policies. For instance, the famous *Italian vinegar case* («*Aceto P*») of 1981 counted twenty eight paragraphs of «*motifs de l'arrêt*», with a central single paragraph of proportionality analysis of fourteen lines.¹¹⁸⁹ The even more famous *German beer case* some years later counted no

contested label.

¹¹⁸³ T. Koopmans, *The Birth of European Law at the Crossroads of Legal Traditions*, *op. cit.*, at 502. In the same sense, see G.F. Mancini, D.T. Keeling, *Language, Culture and Politics in the Life of the European Court of Justice*, *op. cit.*, at 400; P. de Cruz, *Comparative Law in a Changing World*, Cavendish Publishing Limited 1999, p. 160.

¹¹⁸⁴ T. Koopmans, *The Birth of European Law at the Crossroads of Legal Traditions*, *op. cit.*, at 501.

¹¹⁸⁵ P. de Cruz, *Comparative Law in a Changing World*, *op. cit.*, at 161; for a similar remark, see M. Bobek, *The Court of Justice of the European Union*, *op. cit.*, at 168.

¹¹⁸⁶ Judgment of 29 November 1956, *Fédération charbonnière de Belgique / ECSC High Authority* (8/55, ECR 1954-1956 p. 292).

¹¹⁸⁷ Judgment of 17 December 1970, *Internationale Handelsgesellschaft mbH / Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (11/70, ECR 1970 p. 1125).

¹¹⁸⁸ See for recent accounts on this, among the many: M. Cohen-Eliya, I. Porat, *American Balancing and German Proportionality: the Historical Origins*, in 8 *International Journal of Constitutional Law*, 2010, p. 263; A. Stone Sweet, J. Mathews, *Proportionality Balancing and Global Constitutionalism*, in 47 *Columbia Journal of Transnational Law*, 2008, p. 73.

¹¹⁸⁹ See Judgment of 9 December 1981, *Commission / Italy* (193/80, ECR 1981 p. 3019) ECLI:EU:C:1981:298, at the single paragraph 27: «Il n'est pas exclu, toutefois, que, suite a la mise en oeuvre de la reglementation litigieuse, les

less than fifty five paragraphs of «*motifs de l'arrêt*», of similar length and complexity.¹¹⁹⁰ Another example, among many, could be found in the *British fishery case*:¹¹⁹¹ in this, the Court imported another principle of direct German (federal) influence, the notion of “*Bundestreue*”, meaning something like federal loyal cooperation or federal comity, in adjudicating on a Treaty provision on the obligation of Member States to facilitate the achievement of the Community's tasks.¹¹⁹² In adjudicating such principle of clear public policy nature (like proportionality after all), any velleity of contained, apodictic structure had to be abandoned and no «*attendu*» or «*phrases unique*» could find their place, and the Court used forty-four paragraphs of «*motifs de l'arrêt*» to find the United Kingdom as failing to fulfil its obligations under the EEC Treaty.

Of course, it is clear that what we are discussing are only cultural influences, in the classic comparative sense of *formants*,¹¹⁹³ of one of a number of concomitant legal bases upon which legal institutions evolve. Other concurring ingredients can be enumerated. For instance, the complexity of the Court's decisions has also gone hand in hand with the complexity of the set of EU norms it had to adjudicate. But the impact of the German conceptualizations - in any case confirmed, as said, by several internal observers¹¹⁹⁴ - can also somehow be isolated if one notices that, in those same days of the mentioned case-law, several judgments replicating the pure French style were still issued.¹¹⁹⁵ After all, such a different way of thinking of legal arguments¹¹⁹⁶ and presenting them stylistically cannot but lead to a different way of “fabrication” of the law. The output, the textual materiality of the law, in this case of the judicial European law, could not but change after the graft in the assembly line of new and different treatment modalities.

consommateurs italiens se soient habitués à l'utilisation commerciale du terme 'aceto' pour les seuls vinaigres de vin. Dans ces conditions, la préoccupation du gouvernement italien de veiller à la protection du consommateur peut être justifiée. Une telle protection peut cependant être assurée par d'autres moyens permettant un traitement égal des produits nationaux et des produits importés, et notamment par l'apposition obligatoire d'un étiquetage adéquat concernant la nature du produit vendu, comportant les qualificatifs ou compléments spécifiant le type de vinaigre proposé à la vente, à la condition que cette prescription s'applique à tous les vinaigres, y compris le vinaigre de vin. En effet, un tel procédé permettrait au consommateur de fixer son choix en toute connaissance de cause et assurerait la transparence des transactions commerciales et des offres au public en indiquant la matière première employée dans la fabrication du vinaigre».

¹¹⁹⁰ Judgment of 12 March 1987, Commission / Germany (178/84, ECR 1987 p. 1227).

¹¹⁹¹ Judgment of 5 May 1981, Commission / United Kingdom (804/79, ECR 1981 p. 1045).

¹¹⁹² T. Koopmans, *The Birth of European Law at the Crossroads of Legal Traditions*, *op. cit.*, at 502.

¹¹⁹³ R. Sacco, *Legal Formants. A Dynamic Approach to Comparative Law*, *op. cit.*, on which see footnote 347 above.

¹¹⁹⁴ See e.g. T. Koopmans, *The Birth of European Law at the Crossroads of Legal Traditions*, *op. cit.*, at 494 *et seq.*; U. Everling, *The Court of Justice as a Decision-Making Authority*, *op. cit.*, at 1302 *et seq.*; G.F. Mancini, D.T. Keeling, *Language, Culture and Politics in the Life of the European Court of Justice*, *op. cit.*, at 402.

¹¹⁹⁵ See just for instance Judgment of 7 May 1981, Hansen / Hauptzollamt Flensburg (153/80, ECR 1981 p. 1165) ECLI:EU:C:1981:98, published just a couple of days after the mentioned British fishery case, replicating, in just sixteen paragraphs, the morphological elements of the judgments of the early years and of the French paradigm.

¹¹⁹⁶ See the reflections of B. Latour, *La fabrique du droit. Une ethnographie du Conseil d'Etat*, *op. cit.*, on the influence of the specific French idea of «moyen» as compared to other modalities of construction of legal arguments.

The same discourse holds true for the subsequent registered stratification of cultural influences, obviously seen in the mid 1970s accession of common law judges from the United Kingdom and Ireland (and in some respect, also from a tradition different from the continental one like Denmark) in the ranks of the Court. Apart from the asserted enrichment of the EC law conceptual patrimony with substantive rules and notions drawn down from common law,¹¹⁹⁷ two main practical impacts on the style of the Court and, directly or indirectly, of its decisions, have been discussed.

First, it has been acknowledged that the more traditionally adversarial culture of lawyers trained in the jurisprudential techniques of common law influenced «the style and the format of the hearings» of the Court.¹¹⁹⁸ The Court's proceedings assumed a less formal atmosphere in the context of the encouragement of some sort of dialogue between judges and advocates,¹¹⁹⁹ which was absent in the past. Exchange of information and opinions between bar and bench became usual in addition to the practice of open questions put to the parties' agents or counsel, either in writing or orally at the hearing, also with interruptions and lively debates.¹²⁰⁰ This surely went on at the advantage of the usefulness and liveliness of the hearings; but a better, *de visu* comprehension of the facts of the case and of the submissions of parties and interveners could not but shape the way in which those are translated in the judgments of the Court, by a clarification of the facts and of the intricacies of national and supranational law elements. Again, this is perfectly explicable in our metaphorical perspective of the “fabrication” of the law. The hearing is a decisive step in the assembly line of judge-made law, often forgotten or underestimated in academic commentaries on the CJEU precisely because it only had a development in a second phase of its historical evolution; but it is evident that a more dialogical and oxmotic construction of the European legal fabric, with an enhancement of the parties' contributions, cannot but change the final output, the judgment, where a more multifaceted reality will be represented. In this sense, it is easy to think about how a different and better comprehension of the technicalities and intricacies of the relevant national law in European cases, conveyed by the more active role of the parties, began to play a role. In the same

¹¹⁹⁷ In G.F. Mancini, D.T. Keeling, *Language, Culture and Politics in the Life of the European Court of Justice*, *op. cit.*, at 401, it is suggested that the important dicta of Judgment of 4 December 1974, Van Duyn / Home Office (41/74, ECR 1974 p. 1337) and Judgment of 5 April 1979, Ratti (148/78, ECR 1979 p. 1629) could be decisively influenced by the common law doctrine of *estoppel*; both T. Koopmans, *The Birth of European Law at the Crossroads of Legal Traditions*, *op. cit.*, at 502 and P. de Cruz, *Comparative Law in a Changing World*, *op. cit.*, at 161, suggest that the right to a fair hearing in the supranational decision making process before an administrative body or agency was prompted by the influence of the the English rule of *audi alterem partem*, see for instance Judgment of 23 October 1974, Transocean Marine Paint Association / Commission (17/74, ECR 1974 p. 1063).

¹¹⁹⁸ See G.F. Mancini, D.T. Keeling, *Language, Culture and Politics in the Life of the European Court of Justice*, *op. cit.*, at 401. In the same sense, T. Koopmans, *The Birth of European Law at the Crossroads of Legal Traditions*, *op. cit.*, at 503.

¹¹⁹⁹ P. de Cruz, *Comparative Law in a Changing World*, *op. cit.*, at 161-162.

¹²⁰⁰ T. Koopmans, *The Birth of European Law at the Crossroads of Legal Traditions*, *op. cit.*, at 505.

vein and with the same pursued effects of clarification, the new adversarial attitude led the Court to show (for the first time) a willingness to reopen a case for oral argument when it felt that it was possible to expedite a decision on the basis of arguments which had not yet been discussed by the parties.¹²⁰¹

Additionally, a renewed approach of the Court of Justice with regard to its earlier case law is often charged to the influence of common law judges. While (as we also saw above just simply in dealing with early cases such as *Da Costa*) it is no less than a myth that the Court never cited its previous decisions before the advent of common lawyers,¹²⁰² and while of course the development of a case-law basically means that there is always more case law to refer to, some interesting developments actually took place. First of all, not only did the reference to precedents become numerically usual if compared to the relative rarity of the 1960s and early 1970s;¹²⁰³ but it became common for the Court the practice of declaring that it would follow a previous precedent because no new arguments had been advanced. In this sense, earlier cases became used as the sole or the main argument for a decision,¹²⁰⁴ by the employment of formulas such as «it is established case law that...», or «as the Court already held in its judgment of...», or even «as the Court repeatedly held...», or the reference to a «settled case law of the Court».¹²⁰⁵ This practice was coupled with the previously-seen choice in *CILFIT* to talk of an incipient form of European *stare decisis*, a system in which cases started to be decided by reference to earlier *dicta* and by a gradual process of extending or reducing the scope of earlier rulings,¹²⁰⁶ and in which traces of the typical parallel “binding” and “persuasive” forms of authority of precedents started to be seen¹²⁰⁷ - though probably under-theorized.¹²⁰⁸ The complementary dimension of such an approach was seen in the first episodes of explicit overruling by the Court of its own precedents, while the idea itself of acknowledging the existence of a conflict in its case-law was probably unacceptable in the previous decades.¹²⁰⁹ In fact,

¹²⁰¹ This happened for the first time in cases such as Judgment of 18 May 1982, *AM & S / Commission* (155/79, ECR 1982 p. 1575), Judgment of 10 July 1980, *Lancôme / Etos* (99/79, ECR 1980 p. 2511); Judgment of 12 July 1983, *Commission / United Kingdom* (170/78, ECR 1983 p. 2265).

¹²⁰² See in this respect, also the reflections of T. Koopmans, *Stare Decisis in European Law*, in D. O'Keeffe, H.G. Schermers (eds.) *Essays in European Law and Integration*, Kluwer, 1982, p. 11, with reference in particular to H.G. Schermers, *Judicial Protection in the European Communities*, 2nd edn. Springer 1979, p. 123.

¹²⁰³ See G.F. Mancini, D.T. Keeling, *Language, Culture and Politics in the Life of the European Court of Justice*, *op. cit.*, at 402.

¹²⁰⁴ T. Koopmans, *The Birth of European Law at the Crossroads of Legal Traditions*, *op. cit.*, at 504.

¹²⁰⁵ See for instance Judgment of 17 June 1981, *Commission / Ireland C-113/80*, ECR 1981 p. 1625, at 1639.

¹²⁰⁶ See Lord Mackenzie Stuart and J.P. Warner, *Judicial Decisions as a Source of Community law*, in Va.Aa. (eds.), *Europäische Gerichtsbarkeit und nationale Verfassungsgerichtsbarkeit*, Festschrift H. Kutscher, Nomos 1981, p. 273; T. Koopmans, *Stare Decisis in European Law*, *op. cit.*, at 11.

¹²⁰⁷ T. Koopmans, *Stare Decisis in European Law*, *op. cit.*, at 20 *et seq.*

¹²⁰⁸ See the recent critical reflections by A. Arnulf, *The European Union and its Court of Justice*, *op. cit.*, at 631; J. Komarek, *Judicial Lawmaking and Precedent in Supreme Courts: The European Court of Justice Compared to the US Supreme Court and the French Cour de Cassation*, in 11 *Cambridge Yearbook of European Legal Studies*, 2008-2009, p. 399.

¹²⁰⁹ See G.F. Mancini, D.T. Keeling, *Language, Culture and Politics in the Life of the European Court of Justice*, *op. cit.*,

it was at the instigation of a British Advocate General, Sir Francis Geoffrey Jacobs, that the Court explicitly first took this bold step;¹²¹⁰ although the same attempt famously made some months later in *Keck and Mithouard*, where the Court expressly stated its intention to overrule some of its earlier decisions, without formally indicating which ones, also made clear an under-theorization and a primitive nature of the practice - with serious risks for the correct and uniform application of EC law.¹²¹¹

VII.3 The Style of Decisions as Shaped by the Machinery of the Court and the Plurality of the EU Legal Order

A qualitative analysis of the style of the Court of Justice's decisions, especially if shaped around the critical evaluation of the common accusations of opacity and lack of clarity, cannot only be conducted in terms of broad cultural influences. As we saw, the ECJ's judgments are surely the products of a mandatory collegiality that includes several different dynamics and cultural attitudes. But other relevant factors linked to the machinery of the Court and of the EU legal order, to how the cases arrive in Luxembourg and to how they are there treated and solved, shape the morphological elements of the decisions.

Precisely by adopting an “industrialist” similitude in describing the work of the Court, one is forced to note that the judgment is only the «ultimate ‘product’» of an «assembly line»,¹²¹² and that the Court, in such a process of «fabrication»,¹²¹³ makes just the final intervention. It is to be noted in this respect that the Court is not the full master of the case and of the textual material it employs: and that, as it has been said, it does not even work with raw material but with refined material, already with its own specific characteristics.¹²¹⁴ There are several factors, exogenous and endogenous, that shape the Court's process of arriving at its decisions and limit, according to the critics, the extent to which it can develop truly coherent, ideal-typically convincing reasoning.¹²¹⁵

Starting *ab origine*, by what has been categorized as the first of the «inputs» into the Court's

at 402.

¹²¹⁰ See Judgment of 17 October 1990, CNL-SUCAL / HAG (C-10/89, ECR 1990 p. I-3711).

¹²¹¹ See for a recent comprehensive account E. Carpano (ed.) *Le revirement de jurisprudence en droit européen*, Bruylant 2012.

¹²¹² M. Bobek, *The Court of Justice of the European Union*, *op. cit.*, at p.168.

¹²¹³ Again in the words of B. Latour, *La fabrique du droit. Une ethnographie du Conseil d'Etat*, *op. cit.*, then adopted by L. Azoulay, *La fabrication de la jurisprudence communautaire*, *op. cit.*.

¹²¹⁴ L. Azoulay, *La fabrication de la jurisprudence communautaire*, *op. cit.*, at 158.

¹²¹⁵ U. Everling, *The Court of Justice as a Decision-Making Authority*, *op. cit.*, at 1308.

judicial machinery,¹²¹⁶ one has to consider that the same legislative texts with which the European judges have to deal are of a peculiar nature. They are, as the simplification of the legal literature sometimes goes, the result of a fictitious “supranational legislator”. However, behind such a label, in the institutional reality, we all know that sometimes such texts come from the Commission exercising delegated powers in minor legislation; but, more often, in the case of major acts, they are what results from an original Commission proposal, scrutinised and amended by negotiators from all the Member States’ individual governments, then further scrutinised and amended by the elected members of the European Parliament, and finally accepted by the Council of Ministers soon before a not-so-obvious effort of technical translation in all the official languages of the EU. In technical terms, the EU drafting process is widely considered as a paradigm in quality, for which a *Quality of legislation team* is settled within the Legal Service Directorate of the Commission¹²¹⁷ and for which several soft law measures are set to assure clarity and simplicity - including an *Inter-institutional Agreement on common guidelines for the quality of drafting of Community legislation*¹²¹⁸ and a *Joint Practical Guide* «for persons involved in the drafting of European Union legislation» for its implementation.¹²¹⁹ Despite these efforts, it remains, as underlined by scholars,¹²²⁰ a process often undertaken under strong timing and political pressure, in which a large number of different positions must converge into a single “product”, often in the hands of people not working in their mother tongue, and subject to an essential work of internal translation of thousands of pages of EU legislation. In this reality, it is thus «virtually impossible to guarantee» the absence of «any infelicity, any ambiguity, any error».¹²²¹ It has been also emphasized how, in some borderline cases in front of the Court, the references for preliminary rulings have even been almost entirely prompted by the doubts on discrepancies between two linguistic versions of a certain contested regulation.¹²²² Already, the first step of the process of «fabrication» of EU law, as refined material

¹²¹⁶ E. Sharpston, Transparency and Clear Legal Language in the European Union: Ambiguous Legislative Texts, Laconic Pronouncements and the Credibility of the Judicial System, *op. cit.*, at 410-411.

¹²¹⁷ See its webpage available at the site http://ec.europa.eu/dgs/legal_service/legal_reviser_en.htm (accessed 29 May 2015).

¹²¹⁸ Inter-institutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation, [1999] OJ C 73/1.

¹²¹⁹ The ‘Joint Practical Guide: Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions’, available at the website <http://eur-lex.europa.eu/content/pdf/techleg/joint-practical-guide-2013-en.pdf> (accessed 26 August 2015).

¹²²⁰ E. Sharpston, Transparency and Clear Legal Language in the European Union: Ambiguous Legislative Texts, Laconic Pronouncements and the Credibility of the Judicial System, *op. cit.*, 411.

¹²²¹ *Ivi.*

¹²²² See for instance the reference from the German Oberlandesgericht Frankfurt am Main in Judgment of 10 July 2008, Emirates Airlines (C-173/07, ECR 2008 p. I-5237) ECLI:EU:C:2008:400, cited by E. Sharpston, Transparency and Clear Legal Language in the European Union: Ambiguous Legislative Texts, Laconic Pronouncements and the Credibility of the Judicial System, *op. cit.*, 411, whose question referred was in fact the following: «Is Article 3(1)(a) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, to be interpreted as meaning that 'a flight' includes

for the work of the Court, is thus a prime suspect for the accusations of lack of clarity.

The «assembly line» of the Court of Justice's decisions then has a second necessary phase, a second textual «input», when dealing with preliminary ruling procedures, in the production of national courts: the orders of reference. These are *per se* autonomous acts made under national procedural law and in compliance with internal rules and for which no standard supranational rule exists on how such orders for reference shall be drafted. There are only, as already recalled in the previous chapters, a series of «Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings»,¹²²³ issued by the Court, and in particular by its *Rules of Procedure Committee*, which, «(S)ince the preliminary ruling procedure is based on cooperation», essentially aim at providing «guidance», «(I)n no way binding», to the national judges « as to whether it is appropriate to make a reference for a preliminary ruling, as well as practical information concerning the form and effect of such a reference». ¹²²⁴ Such detailed guidance, actually for both national judges and advocates who interact with the Court, is intended to supplement the Rules of Procedure of the Court of Justice (Articles 93 to 118) and is regularly updated to «reflect innovations introduced by those Rules which may affect both the principle of a reference for a preliminary ruling (..) and the procedure for making such a reference». ¹²²⁵

We already reflected on how certain cultural conceptions of differently trained national judges can have an effect on the substantial use of the procedure and particularly on how preliminary rulings are expected to state on the abstract interpretation of relevant EU law and/or also on the factual *minutiae* of the cases at hand. Also, in terms of formality serious discrepancies are registered, which make members of the Court suspect of a complete ignorance, voluntary or even simply on the existence, of such recommendations by national lawyers. ¹²²⁶ Each national legal system is said to have, also in this sense, its own irresistible conception of what “should” go into an order for reference and how this should be composed. ¹²²⁷ So, for instance, the «Recommendations» hasten to point out the average desirable length of the optimal reference («(A)bout 10 pages is often

in any event the flight from the point of departure to the destination and back in the case where the outward and return flights are booked at the same time?».

¹²²³ Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2012/C 338/01), available at the website [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012H1106\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012H1106(01)&from=EN) (accessed 26 August 2015).

¹²²⁴ *Ibidem*, at paragraphs 5 and 6.

¹²²⁵ *Ibidem*, at 338/01.

¹²²⁶ See E. Sharpston, Transparency and Clear Legal Language in the European Union: Ambiguous Legislative Texts, Laconic Pronouncements and the Credibility of the Judicial System, *op. cit.*, at 411: «Judging by what sometimes arrives at the Court, either the very existence of these notes has escaped a significant proportion of the legal profession throughout the EU, or else they are known but usually ignored. (Either hypothesis is depressing if you happen, as I do, to sit on the Rules of Procedure Committee!)».

¹²²⁷ *Ibidem*, at 413-414.

sufficient to set out in a proper manner the context of a request for a preliminary ruling»);¹²²⁸ they specify Article 94 of the Rules of Procedure in pointing at its necessary content («That request must be succinct but sufficiently complete and must contain all the relevant information (...) a summary of the subject-matter of the dispute and the relevant findings of fact (...) or, at least, an account of the facts (...) the tenor of any national provisions applicable in the case (...) a statement of the reasons which prompted the referring court or tribunal to inquire»);¹²²⁹ they underline its functional purpose («must be succinct but sufficiently complete and must contain all the relevant information to give the Court and the interested persons entitled to submit observations a clear understanding of the factual and legal context of the main proceedings»);¹²³⁰ dare to give stylistic suggestions («(O)wing to the need to translate it into all the official languages of the European Union, the request for a preliminary ruling should therefore be drafted simply, clearly and precisely, avoiding superfluous detail»,¹²³¹ and «(I)n order to make the request for a preliminary ruling easier to read, it is essential that the Court receive it in typewritten form»);¹²³² beg for some efforts also in terms of solution for the case at hand («If it considers itself able to do so, the referring court or tribunal may, finally, briefly state its view on the answer to be given to the questions referred for a preliminary ruling»);¹²³³

But, the confessed everyday practice, according to the same members of the Court,¹²³⁴ seems to range from references in «1 1/2 pages of almost illegible judicial manuscript» with almost no indication of facts whatsoever, to fully-fledged judgments of tens and tens of pages from which the Court is called to extract the needed indication; from hard conceptions of the principle of *jura novit curia* for which it would be for the ECJ to decide on the incompatibility of a certain internal measure, with reference to «10 separate (unconnected) Treaty articles ‘or any other provision of

¹²²⁸ Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2012/C 338/01), paragraph 22:

«22. About 10 pages is often sufficient to set out in a proper manner the context of a request for a preliminary ruling. That request must be succinct but sufficiently complete and must contain all the relevant information to give the Court and the interested persons entitled to submit observations a clear understanding of the factual and legal context of the main proceedings.

In accordance with Article 94 of the Rules of Procedure, the request for a preliminary ruling must contain, in addition to the text of the questions referred to the Court for a preliminary ruling:

- a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions referred are based;
- the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;
- a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings».

¹²²⁹ *Ivi.*

¹²³⁰ *Ivi.*

¹²³¹ *Ibidem*, at paragraph 21.

¹²³² *Ibidem*, at paragraph 25.

¹²³³ *Ibidem*, at paragraph 24.

¹²³⁴ See E. Sharpston, Transparency and Clear Legal Language in the European Union: Ambiguous Legislative Texts, Laconic Pronouncements and the Credibility of the Judicial System, *op. cit.*, 413-414.

Community law'», to precise efforts to solve the case by suggesting an application of the relevant EU provisions. In this sense, it is also suggested that while «some national traditions» would have no difficulty in thinking «in order for the national judge to set out his own tentative views on what the answers to those questions are (or should be)», others take the view that «if the judge thinks he may know the answers, he should not be asking the questions - so, if he *is* making a reference, it is improper for him to express any opinion». ¹²³⁵

We saw how, in any case, the declarations of inadmissibility of references are rare, and for what good or at least understandable reasons. In such a process of “fabrication”, the Court does not want to afford to lose raw material for its refining activity. Therefore, almost all the ample latitude of stylistically spurious references are at the end of the day accepted, translated and notified to all Member States and the Commission, to constitute the basis of their observations in the proceedings before the Court. The possible uncertainty of EU law’s textual fabric, filtered through the possible uncertain formalities of national references thus propagates and becomes the basis of the submissions to the Court, the third source of its «inputs». ¹²³⁶ Not by chance, the submissions are also said to «vary enormously in their quality», some being mere political statements or expressions of belief, others «models of clarity and helpful research» in terms of relevant case-law and policy choices, others simply «lengthy, repetitious, obfuscatory and virtually untranslatable» ¹²³⁷ in the working language in which all this material will be actually discussed by judges and their assistants: French. After all, the interveners can be puzzled over a certain interpretation and over the meaning of a certain reference just like anybody inside and outside the Court of Justice. And the quality itself of the submissions of the different Member States' agents can vary.

Only at this point, with this mass of material moulded by others' hands, after all this early process of “fabrication”, comes the Court's activity. Also in the Court, texts are shaped by an ever-expanding multi-lingual, multi-cultural judicial machine, which in any case functions with a single working language. In its expansion, this machine passed, in the words of its professionals, from the nature of a relatively culturally and numerically homogenous «bit of a family» (in the previous days of the EC restricted composition) to the current state of «a bit of a factory». ¹²³⁸

Judges with different professional backgrounds and rooted cultural traditions discuss the

¹²³⁵ *Ibidem*, at 413 (original emphasis).

¹²³⁶ *Ibidem*, at 415.

¹²³⁷ *Ivi*.

¹²³⁸ The reference is to the phrase used by Judge (and previously Legal Secretary) Sacha Prechal of the European Court of Justice in her Interview 'Part I: Working at the CJEU' of 18 December 2013, available at the website <http://europeanlawblog.eu> (accessed 26 August 2015).

cases in this context, in a common *lingua franca* of noble tradition but which is no longer - as it used to be - the *trait d'union* of the cultural experiences of all the members. Calls for a substitution of the «*langue de travail de la Cour*» - actually, a phrase that is not included in either the Treaties or in the Rules of Procedure of the Court - arised very recently by renowned former Judges,¹²³⁹ who based their reflections on the changing statistics on the languages of the cases, determined for each action, and which describe English overtaking French in the last five years.¹²⁴⁰ Still, the same Author who recently pleaded for such reform acknowledges that the time is still not ripe, internally, institutionally, for such a momentous change in the organization of the Court,¹²⁴¹ which would have important consequences on the composition of staff, recruiting and also the translation services and therefore on the budgetary allocations of the institution. Therefore, French will continue to be the internal working language of the Court for several years, with relevant outcomes resulting from an organizational point of view.

It has become usual to talk of an unequal situation among member judges so that the use of the working language would not only now be depleted of its original deep sense of commonality, but become nothing less than a source of power for some members over others - especially at the moment of the common internal debates of the *projet de motif* (the draft judgment) presented in French among the judges and the *référéndaires*, given the various levels of knowledge and interaction skills.¹²⁴²

But there is something more about the linguistic aspect. Empirical research on process of multilingual fabrication of the Court not only highlighted the specificity (also in this respect) of the EU and of Luxembourg vis-à-vis other international organizations and jurisdictions, which function smoothly using only a few official languages.¹²⁴³ It also emphasized the specificity of a process of “fabrication” in which deliberations are drafted in a language which is not native for the vast part of actual internal writers, in which these admittedly tend to think and reflect in their own mother tongue and then «translate» their reflections in French (instead of really «working in French»),¹²⁴⁴ in

¹²³⁹ K. Schiemann, *La langue de travail de la Cour*, in A. Tizzano, A. Rosas, R. Silva de Lapuerta, K. Lenaerts, J. Kokott (eds.), *La Cour de justice de l'Union européenne sous la présidence de Vassilios Skouris (2003-2015)*. Liber amicorum Vassilios Skouris, Bruylant 2015, p. 563.

¹²⁴⁰ According to K. Schiemann, *La langue de travail de la Cour*, *op. cit.*, at 567-568, in the period 2004/2009 there were, at the Court of Justice, 500 cases in which the language of the procedure was French and 310 in which it was English; in the same period, at the Tribunal of first instance, there were 518 cases governed by French and 509 governed by English. In the subsequent period 2009/2014, at the Court of Justice 398 cases had French as language of the procedure, and 406 had English; at the General Court, 459 cases had French and 1019 had English.

¹²⁴¹ *Ibidem*, at 572-573.

¹²⁴² *Ibidem*, at 568.

¹²⁴³ See K. McAuliffe, *Language and Law in the European Union: The Multilingual Jurisprudence of the ECJ*, in P. Tiersma, L. Solan (eds.), *The Oxford Handbook of Language and Law*, *op. cit.*, at 201-202, who takes the EFTA as the major example of institution using, also in its judicial arm, English as an only foreign language for all of its four members.

¹²⁴⁴ *Ibidem*, at 205, quoting the words of some interviewed *référéndaires*: e.g. «I tend to *translate* what I want to say

which a sort of mechanical «Court French» («alien to the “real” French language») is fostered by such rudimental language regime¹²⁴⁵ and even by the internal translation services of the institution, including technological ones,¹²⁴⁶ leading to a stilted and rigid formulaic style in which adherence to previous dicta is prompted.¹²⁴⁷ The results of all this process are then often put through the permutations of the Court’s translation services to finally become part of the official “output” of the Court.

Apart from the decisive specificity of the language regime, it is also important to recall that cases are being assigned on a large scale, precisely since the times of the “industrialist” transformation, to Chambers of restricted compositions, with no stable presence of judges, and therefore with obvious increasing risks of internal divergences both at the substantive and at the formal stylistic level. Furthermore, the Court, as we know, is forced to produce a single text signed by all participants to the single *délibéré*, with no possibility of majority and minority opinion, and therefore to “iron out”, also with its drafting style, the possible differences. Moreover, it has been more and more working under strong time constraints (at least since a certain period of time, for the reasons that we investigated above) and this comes, deliberately, «often at the expense of quality».¹²⁴⁸ To this irrefutable *cahier de doléances*, it must be added that here again, for reasons that we already explored above, the idea of looking at the Opinions of the Advocate-Generals, in academic terms, as a completely different drafting style - dissertational and confrontational - surely holds true. Their Opinions are, in contrast to the somewhat anonymous, collegiate bench style, written in the first person, with a different breadth, openly addressed to possible inconsistencies in the case-law of the Court, provided with a justificatory and not explanatory tone. However, «(I)n contrast to a popular myth»,¹²⁴⁹ they can hardly be thought of as part of the *ratio decidendi* of the

into French instead of *really* working *in* French... all of my own reasoning and thinking about the case is done in my own language and then put into French when I come to the writing stage» (interviewee's emphasis).

¹²⁴⁵ *Ivi*: «The only référendaires who expressed any problems or difficulties (...) were “francophones” who feel that the formulaic style of the ECJ judgments and the ensuing “Court French” are almost as alien to the “real” French language as English or German would be», quoting words such as «The mechanical French that is used at the Court is so far removed from “proper” or “real” French that it is almost like another language entirely» or «The French that is used at the Court is not “real” French but a type of “Court French”».

¹²⁴⁶ The reference is to the GTI, a computer software developed by the ECJ to aid and speed-up its translation process, which, still, seems to have its impact also on the style of the Court: according to the words of a référendaire, «you are so bound to what has been said before that you can hardly even use a new verb or express the same thing in a slightly different way in case the GTI doesn't pick it up. Judgments are time-consuming but most are easy to draft because it has all already been said by the Court - maybe once in five or six years a case will come along that might have one single paragraph saying something completely new or different»: see *ibidem*, at 206.

¹²⁴⁷ *Ivi*: «Working in “Court French” is actually *easier* than drafting in your own language – provided that you don't actually want to write anything on your own» (interviewee's emphasis).

¹²⁴⁸ See E. Sharpston, Transparency and Clear Legal Language in the European Union: Ambiguous Legislative Texts, Laconic Pronouncements and the Credibility of the Judicial System, *op. cit.*, at 418.

¹²⁴⁹ M. Bobek, The Court of Justice of the European Union, *op. cit.*, at p. 167. See also, specifically, L. Clément-Wiltz, La fonction de l'avocat général près la Cour de justice, *op. cit.*, at 614 *et seq.*

Court,¹²⁵⁰ and therefore source of some kind of additional clarity for the style of the Court, at least in terms of the appraisal of its single judgments. On the contrary, they are another intrusive factor that the court's fabrication shall (not necessarily explicitly) take into account for its product.

VII.4 The Style Decisions and the New Factors of Change

We saw above that there have been strong structural and organizational factors, also pertaining to cultural influences, that have shaped the often-invoked and reproached lack of clarity of the Court of Justice's style. But are judgments of today's Court still as cryptic as they used to be? Have there been recent new factors that can have led, or eventually can lead to a stylistic change? Some concluding, prognostic words are in order.

We indeed faced with a mixed picture. On the one hand, in the 1980s, the Court abandoned, at least formally, the structure of the *attendus* in order to favour a more discursive style of argumentation.¹²⁵¹ This happened under the pressure of incipient different internal modalities of reasoning and drafting. Nonetheless, its judgments still remained «strongly structured and somewhat rigid», characterized by the introduction of arguments in single and distinct paragraphs opened by standard, recurring phrases such as “it must be observed that”, “it must be pointed out that”, “it is clear that” and “it follows from the foregoing that”.¹²⁵² According to the critics, such style is still oriented towards the production of «short, terse, and magisterial decisions» to «demonstrate tremendous interpretative confidence and suggest a certain logical compulsion».¹²⁵³ And in this sense, in light of our reflections above, one would be tempted to speculate on whether the Court still subjectively perceives some benefit in a certain *quid* of formalism, in the wake of a still-unsettled maturity of the EU legal system as a whole, and a need to clearly “instruct” its counterparts, as it was said to be in its early days.¹²⁵⁴

One should also emphasize that what we already mentioned as a confessed exigency of the

¹²⁵⁰ As, for instance, still claimed by E. Calzolaio, *Il valore di precedente delle sentenze della Corte di giustizia*, in 1 *Rivista critica del diritto privato*, 2009, p. 41, at 50: «E' allora evidente che lo studio di ogni sentenza della Corte non può prescindere da una attenta considerazione delle conclusioni dell'avvocato generale, al fine di individuare in modo realistico e completo la *ratio decidendi*» (emphasis in the original text).

¹²⁵¹ G. Itzcovich, *The European Court of Justice as a Constitutional Court. Legal Reasoning in a Comparative Perspective*, *op. cit.*, at 45.

¹²⁵² *Ibidem*, at 46.

¹²⁵³ M. Lasser, *Judicial Deliberations. A Comparative Analysis of Judicial Transparency and Legitimacy*, *op. cit.*, at 112.

¹²⁵⁴ As famously emphasized by J.H.H. Weiler, *Journey to an Unknown Destination. A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration*, *op. cit.*, at 423 and 427 in particular.

Court,¹²⁵⁵ already in the first years - and therefore the idea that the judgments, though written in French, are then designed to be translated into every official language of the EU - has become even more pressing in the last decades of massive expansion. With this, there is no need to speculate. The consequences of such a «multilingual and multicultural»¹²⁵⁶ mandate for the kind of prose that the Court is able to employ were not only recognized but somehow programmed/prefixed by authoritative past members. In his *Vade-mecum*/formulary for his colleagues at the Court, an influential member like Pierre Pescatore explicitly recommended, already in the 1980's, to «(W)rite simple and uncluttered sentences, use the simplest possible vocabulary, avoid abstract and learned terms»,¹²⁵⁷ and argued that «legal reasoning, even when it is complicated, should eventually be reduced (...) to simple options that are compatible with the work of the machine». ¹²⁵⁸ In this sense, he remarkably anticipated the “industrialist” transformation of the Court and its necessities, the special need for replicable and easy translatable forms in the supranational setting, and also the more modern strategic choices for information retrieval in the age of database queries.¹²⁵⁹

How the Court actually followed such recommendations would be evident not only in its actual tendency to avoid «rhetorically shaped, ornate language, elegant and brilliant prose, as well as abstract conceptualism and academic thoughtfulness». ¹²⁶⁰ An overall tendency towards “impersonality” would also very much be tangible in the ECJ's distinctive feature to use a formulaic language, made of fabricated, copy-and-paste quotations from the previous case law. Also these rhetoric tools amount to specific means towards standardisation, creation of consistency and redundancy, and ultimately self-legitimation. As it has been noted,¹²⁶¹ the judgments of the Court become in this way «the result of a complex kind of ‘collage’ of judicial formulas», i.e. of doctrines and *rationes decidendi* formulated in landmark decisions and then repeated «to such an extent that in some cases it may seem as if it is the formulas which are speaking, instead of the Court and the preferences of its members». ¹²⁶² In this phenomenon, an ever-present struggle of the Court of Justice is clearly visible to maintain its interpretative authority over national judges, started with a certain strategic use of stylistic, structural formalism, and evolved in such tendency towards

¹²⁵⁵ See again G.F. Mancini, D.T. Keeling, *Language, Culture and Politics in the Life of the European Court of Justice*, *op. cit.*, at 398. See recently G. Itzcovich, *The European Court of Justice as a Constitutional Court. Legal Reasoning in a Comparative Perspective*, *op. cit.*, at 48 *et seq.*

¹²⁵⁶ In the words of J. Bengoetxea, *Multilingual and Multicultural Legal Reasoning*, *op. cit.*.

¹²⁵⁷ P. Pescatore, *Vade-mecum. Recueil de formules et de conseils pratiques à l’usage des rédacteurs d’arrêts*, 1985, 3rd edn. Bruylant 2007, p. 46.

¹²⁵⁸ *Ibidem*, at 28.

¹²⁵⁹ G. Itzcovich, *The European Court of Justice as a Constitutional Court. Legal Reasoning in a Comparative Perspective*, *op. cit.*, at 48-49.

¹²⁶⁰ *Ivi.*

¹²⁶¹ L. Azoulay, *La fabrication de la jurisprudence communautaire*, *op. cit.*, at 163 *et seq.*

¹²⁶² L. Azoulay, *The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization*, in 45 *Common Market Law Review*, 2008, p. 1335, at 1339.

standardisation.

On the other hand, while it is maybe still exaggerated to talk of a «stylistic earthquake» occurred in Luxembourg, like some Authors do,¹²⁶³ it is nonetheless true that, compared with the decisions of the early years, but also with those of the 1980s and the beginning of 1990s, the average length of the Court's judgments changed and «almost doubled».¹²⁶⁴ The mere length of the decisions is certainly not to be linked directly with discursiveness or clarity: it has also to do with the nature of the proceedings, since the ECJ today also hears appeals against judgments of the General Court,¹²⁶⁵ and it is also influenced by the rising complexity of EU law and of its interrelationships with national laws. Moreover, even more than in the past, after the recent eastern enlargements, the Court of Justice has to deal primarily with Continental, civil law tribunals, whose expectations are certainly not for ample dissertational rulings but for applicable products more similar to their own standards.¹²⁶⁶

Nonetheless, it is important to add a reflection, at least as a conclusion of these pages, on the overall audience that the Court is now facing in its everyday activities. If direct counterparts of the Court are simply the EU institutions and national courts, words of truth and realism like those of Bobek - who stresses the nature of «academic dreams» of all the idealtypes of ample, confrontational, discursive, judgments - are welcome.¹²⁶⁷ Actually, institutions and national judges value «reasonable conciseness» and coherence in the Court's case-law more than any other principle, and for understandable, pragmatical reasons in their everyday practice of adjudication. We also saw how these concerns are behind several of the Court's internal choices in terms of the use of procedures, resources and control of its docket. However, if we were successful, in a study like this, to leave aside for many pages the celebrated, always present Eric Stein's words on the Court of Justice «tucked away in the fairy land Duchy of Luxembourg and blessed, until recently, with the benign neglect by the powers that be and the mass media»,¹²⁶⁸ we cannot but recall them now, and to state the obvious and thus say that those words are surely no longer true. The Court is

¹²⁶³ G. Martinico, Reading the Others: American Legal Scholars and the Unfolding European Integration, in 11 European Journal of Law Reform, 2009, p. 35, at 37.

¹²⁶⁴ M Bobek, Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts, *op. cit.*, at 204.

¹²⁶⁵ See for instance the paradigmatic 380 paragraphs and 29.000 words of the Judgment of 3 September 2008, Kadi and Al Barakaat International Foundation / Council and Commission (C-402/05 P and C-415/05 P, ECR 2008 p. I-6351) ECLI:EU:C:2008:461.

¹²⁶⁶ M Bobek, Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts, *op. cit.*, at 204-205.

¹²⁶⁷ *Ibidem*, at 205-206 and at 214 *et seq.*.

¹²⁶⁸ E. Stein, Lawyers, Judges and the Making of a Transnational Constitution, *op. cit.*, at 1.

now an unmasked power, whose activities are openly and often critically debated,¹²⁶⁹ well under the spotlight of the media,¹²⁷⁰ and which, as we saw, is evolving accordingly by openly facing the challenges of modernity. Did this have an impact on the Court's own language? Any direct answer would be unmeasurable at best, apodictic and speculative at worst. But it would be impossible not to note that while the Court's initial audience was composed of few specialised Community lawyers, it nowadays includes many lawyers from many disciplines, also those that were initially foreign to Community law;¹²⁷¹ involves a larger and more plural academic community, now more accustomed to critical remarks on Luxembourg than to hagiography;¹²⁷² and, given the social, political and economic impact of EU law, the Court is subject to a broad public scrutiny prompted by the unprecedented mediatism of some of its decisions.¹²⁷³ The Court of Justice, as any other judicial body, cannot answer to debates and criticism in the public arena; but it is evident, also in the academic discussion,¹²⁷⁴ that there is an increasing perception of such new challenges from its ranks, and that the Court's style cannot in some sense be influenced, although not distorted.

VII.5 The Evolution of Judgment Style as a Form of Improvement of the Court's Authority

From the analysis conducted throughout this chapter, we can once again draw relevant conclusions on the ability of the Court of Justice to evolve from an institutional point of view.

We defined the stylistic modalities of the Court's judgments as aspects of its structure and organization, as morphological elements of the judicial final output influenced by the institutional setting of the Court. We saw how much they were influenced by the progressive osmosis with the legal cultures of the Member States. The original paradigm of the ECJ's judgments was clearly of French origin, and that impression also remained evident in their structural formalism in the following decades. Still, the stratification of the cultural influences led to relevant changes in the Court's practice and a renewed kind of formalism arose, easily linkable, as the original one, to the struggle of Luxembourg for an interpretative authority. Both the original stern, authoritarian style

¹²⁶⁹ See the general reflections on the doctrinal waves by J.H.H. Weiler, Hjalte Rasmussen - *Nemo propheta in patria sua*, *op. cit.*, at xiii *et seq.*

¹²⁷⁰ See for recent remarks Editorial Comment – The Court of Justice in the Limelight Again, in 45 *Common Market Law Review*, 2008, p. 1571.

¹²⁷¹ L. Azoulay, L.M. Pórigues Maduro, Introduction, in L. Azoulay, L.M. Pórigues Maduro (eds.) *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, *op. cit.*, at p. xviii.

¹²⁷² J.H.H. Weiler, Hjalte Rasmussen - *Nemo propheta in patria sua*, *op. cit.*, at xiii *et seq.*

¹²⁷³ L. Azoulay, L.M. Pórigues Maduro, Introduction, *op. cit.*, at p. xviii.

¹²⁷⁴ See E. Sharpston, *Transparency and Clear Legal Language in the European Union: Ambiguous Legislative Texts, Laconic Pronouncements and the Credibility of the Judicial System*, *op. cit.*, at 423.

and (although in a process of complication) its subsequent increasing formulaic approach have been traced back to the will to convey an univocal voice as much as possible with no possibility of misunderstandings given the complexity of the multilingual EU environment and its concerns. The authority of the CJEU as an effective guardian of the correct and uniform application of EU law throughout the continent is also called in question in this case. Its stylistic modalities are, after all, a mirror of its special role of final manufacturer in the assembly line of fabrication of EU law, where the Court is called to play an authoritative activity by working with raw material already influenced by the inherent complexity of the supranational legal order. Also, our final speculative remarks of the new factors of change for the style of its decisions can only lead to a reflection on the role of the Court of Justice vis-à-vis the other powers of every nature, given the changed “political” environment in which it has to act and in which it is called to bring out its own voice. Provocatively, one could say that the court is asked to choose whether to simply adhere to its old role of clear addresser of domestic courts and counterparts or rather to interact in a more modern and dialogical way with the larger social audience emerging behind the EU legal order.

VIII. Conclusions

Summing up our reflections, we can say that throughout this dissertation, we tried to highlight and investigate a particular and complex phenomenon. We argued that by looking at some specific aspects of the structure and the organization of the European Court of Justice - which form, however, a complete picture of its institutional setting - a specific history of its evolution can be read. In particular, we argued that the history of the European Court of Justice is a history of success not only in its role of shaper of the EU legal order, as a motor of the continent's integration and as a substantive interpreter of the inherent potentialities of the supranational political and legal construction, as the common narrative goes. It is a history of success in precise regards to its own institutional evolution as well - because of the capacity of the Court of Justice not to constitute a simple “unmoved mover” but to change as a living institution that made its way by both fostering and adapting to the different stages of a progressive integration. The evolution of the Court's structure and organization took place with specific characteristics. It evolved, in our view, by facing several organizational challenges and by solving them through a specific capacity of internalization of internal and external comparative lessons — stemming from the osmosis with its own Member states and their legal cultures and from the international debate. Through this way, we also argued, the Court of Justice increased its authority within the EU legal order, particularly but not only within its federal-like judicial architecture.

In substantiating this claim, we started *ab origine*, by saying that these dynamics already took place with the process of establishing a permanent European Court of Justice, and with its primitive institutional design. The very choice of establishing a permanent court, the design of its specific, decisive powers of adjudication - in particular its “administrative” powers and the preliminary reference jurisdiction - and even the first functional principles it happened to decisively develop in its early jurisprudence, were all based, as we saw, on the institutional internalization of specificities coming from external influences - particularly by the decisive influence of the Member States' legal cultures. As everybody knows, only in its nature of permanent jurisdiction and by playing such decisive roles with such decisive powers could the European Court of Justice emerge as a key actor of the supranational legal order.

In following a sort of “institutional building” roadmap, once we looked into the structuring of the institutional position and the powers of the Court, we then looked at its composition and the

choice of the its members. Here, the evolution of the Court was also decisively influenced by the comparative conversation, in national and international environments: and the reform finally adopted with the Treaty of Lisbon (already previously discussed in several settings), which introduced an independent supranational panel for the screening of the national candidate European judges, has been decisive in the improvement of the Court's authority, in several respects, not only related to the inherent quality of the its composition but also to its external image.

We could trace the same dynamics when we turned our attention to the problem of the deliberation of the Court as well as its transparency. In this respect, the original debate looked at the topic of the admissibility or not of the practice of separate/dissenting opinions by judges as well as the related role of collegiality as the crucial point. Here, we said that in its tralatitious adherence to the principle of forced collegiality, the Court's institutional setting was influenced by the model of collegiality absolutely prevalent in its original Member States at the time of the ECSC, to which it adhered; and that such a choice was explicitly aimed at protecting the “external” independence of the member judges and the credibility of the institution - in times where the composition of the Court, and the authoritativeness thereby implied, was not still clarified. Although the comparative panorama has meanwhile changed, the need for a protection of the authority of the CJEU in its legal order and of its judges in their professional mandates is a strong and evergreen reason against an evolution in this respect.

Still, we noted how the Court was able to evolve in another relevant sense related to its deliberation and transparency. In internalizing a certain comparative influence, also epitomized by some Member States, the Court was invested by the new trend of openness intended as access by thirds to court documents. In doing so, it fostered its dimension of *soft accountability*: a dimension of procedural transparency and a new relationship between institutions and “users”, according to which the Court, in becoming open up to the public and by creating the possibilities of a dialogue with agents and social parts, becomes more *socially* - one could even say *politically* - legitimated.

Once looked at its competences' design, composition and openness in deliberation, we then focused on the capacity of docket control of the Court, a well-known decisive aspect of its structure and organization. This became more and more debated with the progressive entrenchment of the dynamics of the European federal-like judicial architecture in the everyday life of national judges and other players and therefore with the CJ becoming, as it has been said, more and more a «victim of its own success»; the topic has been a simultaneous symbol of the Court's acquired authority and crucial for its improvement over time, in several respects. Important trends were visible from our perspective. The debate on the conceptualization itself of the idea of docket control and on the

possible solutions for the European Court of Justice was very much influenced by comparative arguments, not always of appropriate quality. Even more importantly, the solutions actually considered by the Court always had to confront the specificities of the heterarchical European judicial architecture, where a simple transplant of foreign solutions could be particularly problematic. The main concerns, for any possible solution, actually came from the diversity of patterns of behaviour by national judges, especially in the use of the preliminary reference procedure, often clearly influenced by culturally-shaped factors. We realized how the whole debate on the topic, and the choice to discard certain possible *endogenous* solutions and to adopt other “neutral” ones, were all influenced by the need to not put at risk the relationship between the Court and the other players in the field, precisely because of their culturally-shaped behaviours.

Finally, we had a look at the style of the Court's judgments. We said how the stylistic modalities of the Court's decisions can be considered as final aspects of its structure and organization, as morphological elements of the judicial final output influenced by the institutional setting of the Court. We also saw how much they were influenced by the progressive osmosis with legal cultures of the Member States in the original paradigmatic model and within the stratification of influences of the following decades. We highlighted that the Court is often the final manufacturer in a complex assembly line of fabrication of EU law, influenced yet again by the complexity of the EU legal order. We also stressed how its different waves of stylistic formalism were traceable to the will of Luxembourg to convey its univocal voice as much as possible and the struggle for an interpretative authority - a need that will probably also inspire the possible new changes ahead.

Already in the title of this dissertation, we proposed a definition for this specific, multi-faceted modality of institutional evolution embodied by the European Court of Justice. We talked of *mimetism* and said that it can be considered as something peculiar about the project of supranational institutionalization of the EU. By *mimetism* we meant the capacity of the Court of Justice of the EU, as a supranational institution, to evolve by facing several organizational challenges and by solving them through a selective internalization of internal and external comparative lessons - therefore stemming from the osmosis with the legal cultures of its own Member states as well as the international conversation. In several respects, this has led to an enhancement of its own authority in the EU legal space.

The peculiarity of this complex phenomenon is double-fold and leads us to a couple of final reflections which can meaningfully represent the conclusion of our dissertation. The first, at the phenomenological level, is on the capacity of the Court of Justice to evolve with a large dose of

institutional autonomy; the second, at the methodological level, is on how this phenomenon shall be investigated by the researcher.

VIII.1 The Autonomy and Authority of the Court in its Evolution

We said that the Court of Justice evolved, in its structure and its organization, by facing several organizational challenges, and we offered a panorama of relevant case studies. We emphasized its ability to face these challenges with a specific capacity of selective employment of internal and external comparative lessons, therefore coming from the osmosis with its own Member states and their legal cultures and from the international debate. We actually gave a definition to this specific capacity and we highlighted how it was relevant for the improvement of the Court's authority in its legal system - beyond the trite clichés on its “legitimacy” to perform as an institutional actor.

The story that we told, this story of *mimetic* evolution, also gives us the measure of how much and to what extent the Court of Justice has been *autonomous* in its development vis-à-vis other powers of its legal system. Its institutional evolution has always happened with a distinctive dose of self-determination, of autonomous negotiation: in a certain sense, this has been the logical premise for the particular forms of internalization that we described throughout the dissertation. It is relevant to reflect on this specific autonomous nature of the Court since it is peculiar for a judicial institution and it is also very much a characteristic of the most recent debates on its structure and organization. Not only the European Court of Justice is not an unmoved mover of the EU integration, and it is an institution able to evolve; it is important to notice that it has been capable of evolving autonomously, often with a large dose of independence from political powers - making itself a bearer and responsible of its own choices and positions.

We notice this special institutional feature in several organizational aspects.

For instance, in the specific supranational environment, it happens that the judicial arm of the Community has its own Statute - containing the general traits of the institutional organization and the broader principles of its procedure - set by the High Contracting Parties «in a separate Protocol» of the Treaties, as per Article 281 Treaty on the Functioning of the European Union. In fact, the Statute is nowadays provided by the Protocol no. 3 «on the statute of the Court of Justice of

the European Union» attached to the TFEU.¹²⁷⁵ Soon after that provision, Article 281 TFEU further provides that «The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may amend the provisions of the Statute, with the exception of Title I and Article 64. The European Parliament and the Council shall act either at the request of the Court of Justice and after consultation of the Commission, or on a proposal from the Commission and after consultation of the Court of Justice». Therefore, it is to be noted that already in setting the rules for the position and for any reform of the Statute, a request or at least a consultation of the Court of Justice as an independent, separate entity is designed as necessary. We will later see that often, this request does not even come in the forms of a mere introductory act, but of a full-fledged policy proposal autonomously drafted by the Court.

It is then to be highlighted that the proper and specific «Rules of Procedure of the Court of Justice», as per Article 253 TFEU, are directly and autonomously established by the CJEU, and are just *ex post* approved by the Council. The idea and the extent of inherent self-determination in such an establishment are clear when reading, for example, the recitals of the act nowadays containing those Rules.¹²⁷⁶ In the text in force today, before the introductory provisions, it is the Court of Justice itself - having regard to all the pertinent primary norms - to adopt its procedural devices advancing a vast series of broached «whereas». It explicitly links the perceived necessity for a reform to the changes in quantity and in quality of the caseload;¹²⁷⁷ it describes the experience acquired in the different procedures and in light of this the opportunity of a better differentiation among the various actions, the simplifications of some and the clarification of others;¹²⁷⁸ it recalls the opportunity for it to dispose within a reasonable period of time of the cases brought before the judges and therefore to extend the opportunities for the Court to rule by reasoned order;¹²⁷⁹ it

¹²⁷⁵ Protocol (No 3) on the statute of the Court of Justice of the European Union, available at the website http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/statut_2008-09-25_17-29-58_783.pdf (accessed 26 August 2015).

¹²⁷⁶ Rules of Procedure of the Court of Justice. OJ L 265, 29.9.2012, p. 1–42 (BG, ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV). Special edition in Croatian: Chapter 01 Volume 011 P. 3 – 44.

¹²⁷⁷ *Ivi*, first Recital: «(1) Despite having been amended on several occasions over the years, the Rules of Procedure of the Court of Justice have remained fundamentally unchanged in structure since their original adoption on 4 March 1953. The Rules of Procedure of 19 June 1991, which are currently in force, still reflect the initial preponderance of direct actions, whereas in fact the majority of such actions now fall within the jurisdiction of the General Court, and references for a preliminary ruling from the courts and tribunals of the Member States represent, quantitatively, the primary category of cases brought before the Court. That fact should be taken into account and the structure and content of the Rules of Procedure of the Court adapted, in consequence, to changes in its caseload».

¹²⁷⁸ *Ibidem*, third Recital: «(3) In the light of experience gained in the course of implementing the various procedures, it is also necessary to supplement or to clarify, for the benefit of litigants as well as of national courts and tribunals, the rules that apply to each procedure. The rules in question concern, in particular, the concepts of party to the main proceedings, intervener and party to the proceedings before the General Court, or, in preliminary rulings, the rules governing the bringing of matters before the Court and the content of the order for reference. With regard to appeals against decisions of the General Court, a clearer distinction must also be drawn between appeals and cross-appeals in consequence of the service of an appeal on the cross-appellant».

¹²⁷⁹ *Ibidem*, sixth Recital: «(6) In order to maintain the Court's capacity, in the face of an ever-increasing caseload, to

emphasizes the interest in making the applied Rules easier to understand, to justify the necessity to delete some outdated or unapplied rules as well as the re-numeration and harmonization of the content in distinct paragraphs and headed articles.¹²⁸⁰ All these (reasonable) arguments, in different settings, would be at the undisputed and unique discretionary disposal of political powers – yet this is not the case of the EU legal system where a large role is played by the autonomous deliberations of the judicial institution.

Our findings about our case studies throughout the dissertation are also relevant in this perspective. For instance, in following our previous order, we recalled how the Court's originally conferred powers were decisively enhanced by some basic judicial, autonomous interpretative choices. We saw that the idea to establish an independent panel for the screening of candidate judges was part of the proposals of some formal *cercles de discussion* composed of Court's members, and ended up in an institutional solution in which the applicable law came by the initiative of the Court and in which former members of the Court are involved. We noticed that the recent choice to open up access to the Court's documents came again by an autonomous Decision of the Court itself, «in the exercise of its administrative functions».¹²⁸¹ We also realized how the necessity of docket control has been one of the major topics debated internally, it has always been measured against other self-determined priorities of the Court - first the preservation of its *nomophylactic* function - and we just recalled how this also explicitly inspired the last reform of the Rules of procedure. Finally, we analysed how the Court's style reflects the natural, “organical” stratification of its autonomous internal practices governed by cultural and even individual leverage.

In this sense, it is impossible not to mention the last important events in which the high degree of autonomy of the Court of Justice has been expressed with particular clarity, and precisely in matters with strong structural and organizational implications.

The first episode is obviously the procedure of accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms: the so-called

dispose within a reasonable period of time of the cases brought before it, it is also necessary to continue the efforts made to reduce the duration of proceedings before the Court, in particular by extending the opportunities for the Court to rule by reasoned order, simplifying the rules relating to the intervention of the States and institutions referred to in the first and third paragraphs of Article 40 of the Statute and providing for the Court to be able to rule without a hearing if it considers that it has sufficient information on the basis of all the written observations lodged in a case».

¹²⁸⁰ *Ibidem*, seventh Recital: «(7) In the interests of making the Rules applied by the Court easier to understand, lastly, certain rules which are outdated or not applied should be deleted, every paragraph of the present Rules numbered, each article given a specific heading summarising its content and the terminology harmonised».

¹²⁸¹ Precisely echoing the words of the Decision of the Court of Justice of the European Union of 11 December 2012 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions (OJ C 38, 9.2.2013, p. 2-4).

E.C.H.R. As very well known, the Court concluded two decades ago in its Opinion 2/94¹²⁸² that, under the existing treaty provisions, there was no competence for the Community to accede to the Convention. The Lisbon Treaty remedied this by amending Article 6(2) TEU and placed an obligation on the EU to accede. At the same time, a specific Protocol no. 14 of the ECHR was issued in June 2010, allowing the accession. In April 2013, a draft agreement on accession was agreed between the European Commission and the Council of Europe. Still, the Court of Justice, again exercising its *ex ante* jurisdiction now according to Article 218(11) TFEU with a contested Opinion no. 2/13¹²⁸³ and to the surprise of many,¹²⁸⁴ found the accession agreement incompatible with EU law.

This is noteworthy for several interesting reasons. First of all, it is notable because the Court has been already accused of having masked, through the defence of the autonomy of EU law, the defence of its own jurisdictional powers and its own autonomy vis-à-vis the European Court of Human Rights, threatened by perils such as the expansion of the latter's judicial review in matters of the common foreign and security policy, the procedure for the prior involvement of the Court of Justice in indirect actions concerning EU law brought in the courts of the member states and reaching Strasbourg without giving rise to a preliminary reference, the co-respondent mechanism needed when a responsibility of a Member State stems from the implementation of an action emanating from the EU.¹²⁸⁵ Second, this (temporary?) negative outcome is even more noteworthy if we think that reliable sources have reported that the Court has constantly participated - in the person of its Registrar - in the negotiations between the High Parties leading to the draft agreement on the accession of 2013,¹²⁸⁶ incidentally making tangible, once more, an autonomous, self-determined nature which is even difficult to justify or conceptualize.

A second relevant episode is the new exacerbated debate on the institutional reform of the Court of Justice taken as a whole, started in late 2014, to which we already made a reference at the

¹²⁸² Opinion 2/94, of 28 March 1996 (ECR 1996 p. I-1759) ECLI:EU:C:1996:140.

¹²⁸³ Opinion 2/13, of 18 December 2014 (ECLI:EU:C:2014:2454).

¹²⁸⁴ See for instance the immediate critical responses issued in blog posts by renowned scholars such as S. Peers, The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection, available at the website <http://eulawanalysis.blogspot.co.uk/2014/12/the-cjeu-and-eus-accession-to-echr.html> (accessed 26 August 2015), S. Douglas-Scott, Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice, available at the website <http://www.verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice/#.Vbj545Ptmkr> (accessed 26 August 2015), and L.F.M. Besselink, Accessing to the ECHR notwithstanding the Court of Justice Opinion 2/13, available at the website <http://www.verfassungsblog.de/en/acceding-echr-notwithstanding-court-justice-opinion-213/#.VJq5SFIM-U> (accessed 26 August 2015), this last even arguing for a disobedience to the Court of Justice' Opinion.

¹²⁸⁵ All technical points touched by both the Draft Agreement and, critically, by the Opinion 2/13, of 18 December 2014 (ECLI:EU:C:2014:2454).

¹²⁸⁶ I take this information by the oral intervention/interview of J.P. Jacqué in the workshop "The European Court of Justice Inside Out", organized in Florence, at the European University Institute, on the 26th May 2015, by the EUI, the Université Versailles Saint-Quentin en Yvelines and the Institut d'études politiques de Paris.

end of Chapter six. It is, in fact, a renewed phase of the never-ending quarrel on the docket control of the Court, opened by a letter of the Italian Presidency of the Council of September 2014 directed to the judicial institution «to invite new suggestions regarding the procedures for increasing the number of judges at the General Court». In fact, the idea of increasing the number of members sitting in the EU tribunal of first instance was part of the legislative initiative to reform the Statute of the Court of Justice of the EU which the Court itself, according to the previously described procedure, submitted to the EU legislature in March 2011,¹²⁸⁷ already showing how and to what extent it is the master of its own structure and organization. Such initiative was favourably received by the Commission and by the Parliament, where it was approved in a first reading; more difficulties raised in the Council, under the Greek Presidency of the first half of 2014, where the usual quarrels on any solutions involving fewer judges than the number of Member States (as also described) took place, also with reference to the Civil Service Tribunal, where such problems are already in order and in fact some appointments due at the end of 2014 were seriously delayed.

In light of all this, the Court of Justice of the EU - in the person of its President Vassilios Skouris - submitted in October 2014 an official «response to the invitation of the Italian Presidency to present new proposals»,¹²⁸⁸ aimed at offering solutions to «reinforce the efficiency of justice at EU level». In the document, an extensive policy analysis was offered by the Court, including statistical analysis of the workload of the EU courts, the presentation of the first, heavy actions for damages in which the breach of the General Court's duty to adjudicate within a reasonable time was foreshadowed, and a detailed proposal to double the number of judges of the General Court was put forward, in a three-stage temporal programme including the transfer to the General Court of the EU civil service cases. The Court's proposal was so rich that it was not simply articulated in its temporal aspects but also discussed in its pro and cons, justified for the «lack of alternatives», and even accompanied by a financial statement showing the estimated costs of the various solutions.

Here again, we can see the profound link between the discretionary autonomy and the authority of the Court of Justice in the moves of an institution that directly and independently negotiates its own reform. Still, here again, there is something more to corroborate the argument. In fact, on the one hand, one can be tempted to speculate on the merits of the Court's autonomous proposals which - for good or bad reasons - in foreseeing an effacement of the Civil Service Tribunal, shift away from the preference of the Masters of the Treaties enshrined in Article 257 TFEU for specialised courts «attached to the General Court to hear and determine at first instance

¹²⁸⁷ The proposals are available at the website <http://data.consilium.europa.eu/doc/document/ST-8787-2011-INIT/en/pdf> (accessed 26 August 2015).

¹²⁸⁸ The document is available at the website <http://data.consilium.europa.eu/doc/document/ST-14448-2014-REV-1/en/pdf> (accessed 26 August 2015).

certain classes of action or proceeding brought in specific areas».¹²⁸⁹ Such primary political preference can also be seen in the fact that the Treaty of Lisbon maintained the existing provisions on the possible establishment of specialised courts but introduced changes in relation to the procedures for the creation of such courts, namely that they can today be created in accordance with the ordinary legislative procedure (that is to say by co-decision with a qualified majority) rather than, as hitherto, by unanimity; in this sense, the proposal for a generalist jurisdiction made up of two judges per each Member State certainly goes in the opposite direction. Moreover, it happened that - following the President Skouris' initiative - the proposal was opposed by many staff in the General Court. The General Court took an explicit, contrary position with an official position paper of September 17, 2014, contesting some of the basic data; four of its judges then appeared before the European Parliament to object to the plan, explicitly explaining why «progressive, reversible and more economical solutions are far better» for a new reform of the EU judicial architecture.¹²⁹⁰ They also made known that the President of the Court of Justice commenced a critical official disciplinary procedure against them «with the aim of preventing the communication of any previously uncensored information to the legislative authorities»,¹²⁹¹ a fact that was then publicly discussed in the press in the terms of «EU judges at war».¹²⁹² The same disciplinary action was also

¹²⁸⁹ Article 257

(ex Article 225a TEC)

«The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish specialised courts attached to the General Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas. The European Parliament and the Council shall act by means of regulations either on a proposal from the Commission after consultation of the Court of Justice or at the request of the Court of Justice after consultation of the Commission.

The regulation establishing a specialised court shall lay down the rules on the organisation of the court and the extent of the jurisdiction conferred upon it.

Decisions given by specialised courts may be subject to a right of appeal on points of law only or, when provided for in the regulation establishing the specialised court, a right of appeal also on matters of fact, before the General Court.

The members of the specialised courts shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office. They shall be appointed by the Council, acting unanimously.

The specialised courts shall establish their Rules of Procedure in agreement with the Court of Justice. Those Rules shall require the approval of the Council.

Unless the regulation establishing the specialised court provides otherwise, the provisions of the Treaties relating to the Court of Justice of the European Union and the provisions of the Statute of the Court of Justice of the European Union shall apply to the specialised courts. Title I of the Statute and Article 64 thereof shall in any case apply to the specialised courts».

¹²⁹⁰ The report of the four General Court's Judges is available at the website

<http://g8fip1kplyr33r3krz5b97d1.wpengine.netdna-cdn.com/wp-content/uploads/2015/04/EP-Strasbourg-Summary-and-costs.pdf> (accessed 26 August 2015).

¹²⁹¹ *Ivi*, at 1: «Nevertheless, we are of the view that, in the interest of the Institution and the public interest generally, we should strive to find more efficient and less costly long term solutions to ensure the smooth running of the General Court. In that light, it is regrettable that the President of the Court of Justice has commenced an official disciplinary procedure against our court with the aim of preventing the communication of any previously uncensored information to the legislative authorities (which is also particularly difficult to accept given that we are independent judges charged, inter alia, with the duty of adjudicating upon the Court's administrative decisions)».

¹²⁹² See for instance <http://www.politico.eu/newsletter/playbook/politico-brussels-playbook-eu-judges-at-war-varoufakis-out-the-le-pens-top-twiplomats-spokespeople-shuffle/> (accessed 29 July 2015). See also, similarly,

reported to be taken against the President of the General Court, Marc Jaeger, again for the public expression of a position contrary to the Court's unitarian one represented by its proposals (in a letter of response to the Italian Presidency's position), after having considered that it «seriously damages the Court's position in future budgetary negotiations».¹²⁹³ Apart from the folkloristic tone of such quarrels, it is evident that here again, the idea of autonomy of the Court of Justice is very much linked to that of its authority, so much that a real battle for the expression of such an autonomous position has been embarked on, and kept around the most typical structural/organization matter of those discussed throughout the dissertation.

VIII.2 Mimetism as Phenomenon and a Method in the Plurality of the EU Legal Order

A second, final reflection on the idea of *mimetism* in the institutional evolution of the Court of Justice links the phenomenological level to the methodological one. In my view, such peculiar nature of what we have studied can be traced back to both the described phenomenon of institutional evolution itself and to the way in which, methodologically, the phenomenon should be investigated by the researcher.

We said that the adopted perspective of *mimetism* represents a peculiar syneresis of two main comparative approaches, the *functional* and the *culturalist*, considering this latter as a general category including comparative legal history, the study of legal transplants and the comparative study of legal cultures¹²⁹⁴ — all “contextual” approaches that characterized our analysis throughout all the chapters. These are two schools of thought that are usually kept separate as antithetical in classic horizontal comparisons — intended as the typical comparisons «between legal systems or institutions belonging to the same level, both national (e.g. for comparative constitutional law) and international level (e.g. comparing international institutions)».¹²⁹⁵

<http://bruxelles.blogs.liberation.fr/2015/04/26/la-justice-europeenne-au-bord-de-la-crise-de-nerfs/> (accessed 29 July 2015).

¹²⁹³ See again <http://www.politico.eu/newsletter/playbook/politico-brussels-playbook-eu-judges-at-war-varoufakis-out-the-le-pens-top-twiplomats-spokespeople-shuffle/> (accessed 29 July 2015) and, for details, <http://blogs.ft.com/brusselsblog/2015/04/27/the-1st-rule-of-ej-flight-club-is-about-to-be-broken/> (accessed 29 July 2015).

¹²⁹⁴ As the «three main current approaches other than functionalism»: see R. Michaels, *The Functional Method of Comparative Law*, *op. cit.*, at 339-340.

¹²⁹⁵ A. Momirov, A. Naudé Fourie, *Vertical Comparative Law Methods: Tools for Conceptualizing the International Rule of Law*, *op. cit.*; R. Scarciglia, *Comparative Methodology and Pluralism in Legal Comparison in a Global Age*,

Still, we can say that in light of all of the above, the *functional* and the *culturalist* are two perspectives that naturally merge together in the evolutionary studies of the supranational legal context, in which both horizontal and vertical comparisons are in order. Only by looking at the way in which different comparative influences have been faced and internalized by the structure and the organization of the Court of Justice, can we understand some of the “efficient secrets” of the functional evolution of the institution, able to develop and increase its own authority in an increasingly plural setting and with a self-empowerment dynamic — often autonomously from other powers. Again, although the local specificities and the associated «cultural argument» have been deployed «in the specific European context (...) most often (...) in opposition to the possibility of achieving more legal Europeanisation», and in antithesis to the «edification of a community» and the construction of a «common legal culture», a more refined use of the «legal cultures» sensitivity, applied in the supranational environment, cannot but merge such an approach with the functional, evolutionary one.¹²⁹⁶

In the analysis of a whole series of decisive aspects of its structure and organization, we realized how the institutional development of the CJEU has been wisely *culturally* influenced with the clear aim of being *functionally* efficient, to strengthen the authority of the Court. This happened in the structuring of the powers of the ECJ, to create a stable and decisively powerful institution; this happened in the evolution pertaining to its composition, to create a more independent and legitimate body with certain original vices in the choice of its members notwithstanding; this happened with respect to the openness of the Court's deliberation, with historical closures and new openings all linked to the need of strengthening the judicial authority; this happened in relation to the problem of the docket control, with a specific attention to the peculiarities of the interrelation with national players not to erode the *nomophylactic* capacity of the ECJ; finally, this happened with the style of the Court, profoundly influenced by the progressive osmosis with legal cultures but always much aimed at conveying the clear voice of the Court. In all these moves, the cultural influence and the attention to the diversity of the EU legal space as well as the ability to create a *unitas in diversitate* proved crucial.

All this analysis is not only important, in our view, for the understanding of an interesting and relevant phenomenon. It is also naturally conducive to significant reflections on the way in which this phenomenon and similar others should be methodologically investigated by the researcher and with which approach and tools.

op. cit..

¹²⁹⁶ G. Comparato, *New Voices: Challenging Legal Culture*, *op. cit.*, at pp. 16-17 in particular.

Since the beginning, we clarified the plurality of references that inspired this work. It was explicitly *situated*, as we said, at the crossroads of different important debates. We called them a discovery (or re-discovery) of historical studies of European Union law, a discovery (or re-discovery) of debates on the legitimacy and the authority of international judicial review bodies, a discovery (or re-discovery) of debates on the cultural diversity in the supranational project and its role in the legal context.

We also suggested that, in looking in particular at the role of cultural diversity in the supranational project, a more refined approach should be adopted by striking a distinction - not always done in classic comparative law - between an external and an internal dimension of legal culture, and therefore by looking more specifically at the channels through which cultural elements have an impact on legal configurations. In this sense, the broad societal and the more specific professional ideas of legal culture — the latter linked to the way in which legal operators think about the law — should be kept separate.¹²⁹⁷ In fact, while the often idealized societal perception of legal *culturalism* leads to the design of separated, fractured *families* of legal development,¹²⁹⁸ with none or scarce permeability, a more realist appraisal of the higher degree of homogeneity within the professional legal operators,¹²⁹⁹ who are also the actual actors of legal development, cannot but make us think of cultural differences also as an arsenal or a toolkit of solutions that can be used for functional purposes.

To analyse how and to what extent such degree of homogeneity was very much present and is still present in the process of integration and institutionalization of the EU - so that we can consider the institutional evolution of the CJEU as a single experiment of *unitas in diversitate* - a look at the new historiographical and sociological literature on the legal construction of the European Communities also proved decisive. It was all aimed at looking at how structural/cultural differences could also become, in the supranational setting and in Atlan's terms, functional factors of organization and re-organization for an institutional evolution.

In sum, our research was originally and explicitly intended to be eclectic in nature. This should not be read as an acceptance of an «anything goes methodology in a Feyerabendian sense»,¹³⁰⁰ as a methodological «anarchism» that «helps to achieve more progress in any one of the senses one cares to choose». ¹³⁰¹ Quite the contrary, in a more modest way, we realized that only by

¹²⁹⁷ *Ivi*, with reference to L.M. Friedman, *The Legal System. A Social Science Perspective*, *op.cit.*, at p. 223.

¹²⁹⁸ See on the usual instrumentality of such design P.G. Monateri, *Geopolitica del diritto: genesi, governo e dissoluzione dei corpi politici*, *op cit.*.

¹²⁹⁹ Often «authoritatively created through legal education»: see G. Comparato, *New Voices: Challenging Legal Culture*, *op cit.*, at 17.

¹³⁰⁰ J. Husa, *Methodology of Comparative Law Today: From Paradoxes to Flexibility?*, in 4 *Revue Internationale de Droit Comparé*, 2006, p. 1095, at 1096.

¹³⁰¹ The reference is of course to the well known work by P. Feyerabend, *Against Method: Outline of an Anarchist*

accepting the more recent calls for a «flexible understanding of methodology», capable of using different inspirations together in a «both-and», and not «either-or» perspective,¹³⁰² and by employing the tools offered by different professionals, «historians, sociologists, political scientists, linguists, and anthropologists»,¹³⁰³ though inserted in a technical perspective - as we did throughout the dissertation - a fruitful and original perspective on certain specific legal phenomena can be offered.

If this was the first way of dealing with the pluralism inherent in the study of the supranational legal order applied in our research, at least a second one was also adopted and was of utmost importance. We refer to the idea to expand, not only methodologically but also dimensionally, the boundaries of the comparative research. This is what is done when a vertical comparison - a comparison between systems or legal institutions which «do not belong to the same level»¹³⁰⁴ - is added to a classic horizontal comparison, which «compare legal systems or institutions belonging to the same level, both national (e.g. for comparative constitutional law) and international level (e.g. comparing international institutions)».¹³⁰⁵ A call for this multi-dimensional approach - as a way to deal with the problem of the «comparative methodology and pluralism in legal comparison in a global age» - in recent times came from several Authors.¹³⁰⁶ It has been suggested to expand the comparative research in a «top-down» vein to study the context of the *internalization* of international norms and regulations by national legal orders, whereby national law is required to incorporate international concepts into the national legal system;¹³⁰⁷ the same expansion could be also directed in a «bottom-up» vertical comparison to analyse «the transposition of legal concepts, or the ideas behind them, from national to international level»,¹³⁰⁸ or the incorporation of national principles by international standards.¹³⁰⁹ It is not a surprise that in these manifestos, the processes of globalization or regionalization - and the process of Europeanisation primarily as a fundamental paradigm - are taken first as potential scope of application of such expansion, since they are, according to many, *de facto* «challenging the mechanical understanding of methodology».¹³¹⁰

Theory of Knowledge, Verso ed. 1978, at p. 18.

¹³⁰² J. Husa, *Methodology of Comparative Law Today: From Paradoxes to Flexibility?*, *op. cit.*, at 1116 with reference to K.Å. Modeér, Östersjöområdet rättsliga kartor w rättskulturella konstruktioner i förändring, in J. Kekkonen et al. (eds.), *Norden, rätten, historia: Festskrift till Lars Björne, Suomen lakimiesyhdistys 2004*, at pp. 194-5.

¹³⁰³ J. Husa, *Methodology of Comparative Law Today: From Paradoxes to Flexibility?*, *op. cit.*, at 1116.

¹³⁰⁴ R. Scarciglia, *Comparative Methodology and Pluralism in Legal Comparison in a Global Age*, *op. cit.*, at 45.

¹³⁰⁵ *Ivi.*

¹³⁰⁶ *Ivi*; A. Momirov, A. Naudé Fourie, *Vertical Comparative Law Methods: Tools for Conceptualizing the International Rule of Law*, *op. cit.*, at 295.

¹³⁰⁷ A. Momirov, A. Naudé Fourie, *Vertical Comparative Law Methods: Tools for Conceptualizing the International Rule of Law*, *op. cit.*, at 295.

¹³⁰⁸ *Ibidem*, at 296; R. Scarciglia, *Comparative Methodology and Pluralism in Legal Comparison in a Global Age*, *op. cit.*, at 45.

¹³⁰⁹ H.E. Chodosh, *Comparing Comparisons: In Search of Methodology*, *op. cit.*, at 1038 in particular.

¹³¹⁰ J. Husa, *The Method Is Dead, Long Live the Methods! European Polynomia and Pluralist Methodology*, *op. cit.*, at

Already in 1996, an heterodox scholar like Ian Ward wrote that «(T)he law of Community cannot, and must not, be studied in splendid isolation. A proper understanding of the context of European Union law is vital. (...) European law, like any law, only exists in context. There is no such things as 'law'; it is not a discrete concept. Law only exists as a function of history, of politics, of society, of philosophy, of literature, and, perhaps most importantly in our particular context, of economics. Any attempt to study European law without a proper acknowledgement of this truth can only be described as insufficient, perhaps even dishonest».¹³¹¹ In this sense, the methodological foundations of comparativism are said to be precisely «not only the comparative method» in itself, as mere juxtaposition, «but also the contrastive, systemic, functional axiological, synergetic, historical, and a number of other methods which are combined in the comparative approach»;¹³¹² and its philosophy is found precisely in the recognition of such contextual multiplicity, which reflects «the diversity of the world, a contemplation of the 'universal, general, different, and unique'» between different systems, and the possibility of a dialogue among them.¹³¹³

Our comparative perspectives on the institutionalization of the Court of Justice of the EU - which considered internal and external influences, vertical osmosis from Member States' legal cultures and experiences and inspiration from international debates, all in a functional perspective - are a modest contribution to this new research in an expanded area. What we called *mimetism* in the CJEU's evolution is not only, in itself, a fruit of the EU legal order pluralism. It can also only be read through the adoption of pluralism, as a methodological stance and as a broad perspective of research.

252; R. Scarciglia, *Comparative Methodology and Pluralism in Legal Comparison in a Global Age*, *op. cit.*, at 45.

¹³¹¹ I. Ward, *A Critical Introduction to European Law*, Butterworths 1996, at pp. vii-viii.

¹³¹² A.D. Tikhomirov, *Philosophical Problems of Legal Comparativistics*, *op. cit.*, at 165.

¹³¹³ *Ibidem*, at 173.

Bibliography

Monographs, dissertations, collected volumes

- M. Adams, H. de Waele, J. Meeusen, G. Straetmans (eds.), *Judging Europe's Judges: the Legitimacy of the Case Law of the European Court of Justice*, Hart 2013
- A. Albi, J. Ziller (eds.), *The European Constitution and National Constitutions: Ratification and Beyond*, Kluwer Law International 2006
- P. Alleva *et al.* (eds.) *Scritti in onore di Giuseppe Federico Mancini*, Vol. II, Giuffrè 1998
- K.J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford University Press 2001
- K.J. Alter, *The European Court's Political Power: Selected Essays*, Oxford University Press 2009
- A. Anzon (ed.), *L'opinione dissenziente*, Giappichelli 1995
- H. Arendt, *Between Past and Future: Six Exercises in Political Thought*, Meridian 1963
- A. Arnall, *The European Union and its Court of Justice*, 1st edition, Oxford 1999
- A. Arnall, *The European Union and its Court of Justice*, 2nd edition, Oxford 2006
- A. Arnall, P. Eeckhout, T. Tridimas (eds.), *Continuity and Change in EU Law. Essays in Honour of Sir Francis Jacobs*, Oxford University Press 2008
- H. Atlan, *Entre le cristal et la fumée. Essai sur l'organisation du vivant*, Editions du Seuil 1979
- D. Augenstein, *Integration through Law Revisited. The Making of the European Polity*, Ashgate 2012
- M. Avbelj, J. Komárek (eds.) *Constitutional Pluralism in the European Union and Beyond*, Hart Publishing 2012
- L. Azoulai, L. Burgorgue-Larsen (eds.) *L'autorité de l'Union européenne*, Burylant 2006
- L. Azoulai, L.M. Poiares Maduro (eds.) *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Hart 2010
- W. Bagehot, *The English Constitution*, Oxford University Press 1867, reprinted 2001
- B. Balassa, *The Theory of Economic Integration*, Homewood 1961
- B. Barbisan, *Il mito di *Marbury v. Madison* e le origini della giustizia costituzionale negli Stati Uniti*, Il Mulino 2008
- R. Barents, *The Autonomy of Community Law*, Kluwer Law International 2004
- V. Barsotti, *L'arte di tacere: strumenti e tecniche di non decisione della Corte suprema degli Stati Uniti*, Giappichelli 1999
- G. Bebr, *Development of Judicial Control of the European Communities*, Brill 1981
- G. Beck, *The Legal Reasoning of the Court of Justice of the EU*, Hart Publishing 2013

- J. Bell, *Judiciaries within Europe: A Comparative Review*, Cambridge University Press 2010
- J. Bengoetxea, *The Legal Reasoning of the European Court of Justice*, Clarendon Press 1993
- P. Bianchi, *La creazione giurisprudenziale delle tecniche di selezione dei casi*, Giappichelli 2001
- P. Biavati, *Diritto processuale dell'Unione europea*, 4^a ed., Giuffrè 2009
- A.M. Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*, Yale University Press 1986
- R. Bin, *A discrezione del giudice. Ordine e disordine. Una prospettiva «quantistica»*, Franco Angeli 2013
- W. Blackstone, *Commentaries on the Law of England*, Clarendon Press 1765 – 1769, vol. I
- M. Bobek (ed.), *Selecting Europe's Judges*, Oxford University Press 2015
- S. Boccialatte, *La motivazione della legge. Profili teorici e giurisprudenziali*, CEDAM 2008
- A. Brewer Carias, *Judicial Review in Comparative Law*, Cambridge University Press 1989
- The British Institute of International and Comparative Law, *The Role and Future of the European Court of Justice*, 1996
- M. Broberg, N. Fenger, *Preliminary References to the European Court of Justice*, 2nd ed. Oxford University Press 2014
- G. Canivet, M. Andenas, D. Fairgrieve (eds.) *Independence, Accountability and the Judiciary*, British Institute of International and Comparative Law 2006
- F. Capotorti, C. Ehlermann (eds.), *Du droit international au droit de l'integration - Liber amicorum Pierre Pescatore*, Nomos Verlagsgesellschaft 1987
- M. Cappelletti, *La giurisdizione costituzionale delle libertà. Primo studio sul ricorso costituzionale (con particolare riguardo agli ordinamenti tedesco, svizzero e austriaco)*, Giuffrè 1955
- M. Cappelletti, *Il controllo giudiziario di costituzionalità delle leggi nel diritto comparato*, Giuffrè 1968
- M. Cappelletti, *The Judicial Process in Comparative Perspective*, Clarendon Press 1989
- M. Cappelletti, M. Seccombe, J.H.H. Weiler (eds.), *Integration Through Law. Europe and the American Federal Experience*, vol. 1. *Methods, Tools and Institutions*, De Gruyter 1986
- E. Carpano (ed.) *Le revirement de jurisprudence en droit européen*, Bruylant 2012
- G. Casper, R.A. Posner, *The Workload of the Supreme Court*, American Bar Foundation 1974
- S. Cassese, *Dentro la Corte. Diario di un giudice costituzionale*, Il Mulino 2015
- N. Catalano, *Manuale di diritto delle Comunità europee*, Giuffrè 1962
- F. Cerutti, E. Rudolph (eds.), *A Soul for Europe. Vol. 1: A Reader*, Peeters 2001
- D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, *European Union Law: Cases and Materials*, Cambridge University Press 2006
- D. Chalmers, G. Davies, G. Monti, *European Union Law*, 2nd ed. Cambridge University Press

2010

- M. Claes, *The National Courts' Mandate in the European Constitution*, Hart Publishing 2006
- L. Clément-Wiltz, *La fonction de l'avocat général près la Cour de justice*, Bruylant 2011
- M. Codinanzi, R. Mastroianni, *Il contenzioso dell'Unione europea*, Giappichelli 2009
- L. Conant, *Justice Contained: Law and Politics in the European Union*, Cornell University Press 2002
- G. Conway, *The Limits of Legal Reasoning and the European Court of Justice*, Cambridge University Press 2014
- P. Curci, *La Corte costituzionale : composizione, attribuzioni, funzionamento*, Giuffrè 1956
- D.M. Curtin, D. O'Keeffe (eds.), *Constitutional Adjudication in European Community and National Law*, Butterworth 1992
- E. D'Alessandro, *Il procedimento pregiudiziale interpretativo dinanzi alla Corte di Giustizia*, Giappichelli 2012
- A. Dashwood, A. Johnston, *The Future of the Judicial System of the European Union*, Hart Publishing 2001
- R. David, J.E.C. Brierley, *Major Legal Systems in the World Today: an Introduction to the Comparative Study of Law*, Free Press 1978
- J.P. Dawson, *The Oracles of the Law*, Greenwood Press, 1968
- M. Dawson, B. de Witte, E. Muir (eds.), *Judicial Activism at the European Court of Justice*, Edward Elgar 2013
- G. de Búrca, J. Scott (eds.), *Constitutional Change in the EU*, Hart Publishing 2000
- G. de Búrca, J.H.H. Weiler (eds.), *The European Court of Justice*, OUP 2001
- G. de Búrca, J.H.H. Weiler (eds.), *The Worlds of European Constitutionalism*, Cambridge University Press 2012
- P. de Cruz, *Comparative Law in a Changing World*, Cavendish Publishing Limited 1999
- R. Dehousse, *The European Court of Justice. The Politics of Judicial Integration*, Macmillan 1998
- R. Dehousse, J.H.H. Weiler, *The Dynamics of European Integration*, Pinter Publishers 1990
- M. Derlén, *Multilingual Interpretation of European Union Law*, Wolters Kluwer 2009
- A. de Tocqueville, *Democracy in America*, Vol. 1, available at the website <https://www.gutenberg.org/files/815/815-h/815-h.htm>
- G. de Vergottini, *Diritto costituzionale comparato*, CEDAM 2013
- J. Dickson, P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law*, Oxford University Press 2012
- P. Duez, G. Debreyere, *Traité de Droit Administratif*, Dalloz 1952
- W. Feld, *The Court of the European Communities: A New Dimension in International*

Adjudication, Martinus Nijhoff 1964

- P. Feyerabend, *Against Method: Outline of an Anarchist Theory of Knowledge*, Verso ed. 1978
- F. Frankfurter, J.M. Landis, *The Business of the Supreme Court of the United States - A Study in the Federal Judicial System*, Macmillan 1928
- L.M. Friedman, *The Legal System. A Social Science Perspective*, Russell Sage Foundation, 1975
- H.P. Glenn, *Legal Traditions of the World*, Oxford University Press 2014
- A.W. Green, *Political Integration by Jurisprudence*, A. W. Sijthoff 1969
- G. Grementieri. *Il processo comunitario. Principi e garanzie fondamentali*, Giuffrè 1973
- A. Grilli, *Le origini del diritto dell'Unione europea*, Il Mulino 2009
- E.B. Haas, *The Uniting of Europe: Political, Social, and Economic Forces, 1950-1957*, Stanford University Press 1958
- H.R. Harré, *Social Being. A Theory for Social Psychology*, Blackwell 1979
- T.C. Hartley, *The Foundations of European Community Law*, 4th ed. Oxford University Press 1998
- T.C. Hartley, *The Foundations of European Community Law*, 6th ed. Oxford University Press 2007
- D. Hawkins, D.A. Lake, D. Nielson, M.J. Tierney (eds.), *Delegation and Agency in International Organizations*, Cambridge University Press 2006
- J. Hendry, *Unitas in Diversitate: on Legal Cultures and the Europeanisation of Law*, PhD Thesis (European University Institute 2009)
- S. Hix, *The Political System of the European Union*, Palgrave 1999
- S. Hoffman, *The European Sisyphus. Essays on Europe, 1964-1994*, Boulder: Westview Press 1995
- O. W. Holmes Jr., *The Common Law*, M. Howe ed. 1963
- M.O. Hudson, *International Tribunals: Past and Future*, Carnegie Endowment for International Peace and Brookings Institution 1944
- J.W. Hurst, *The Growth of American Law: the Law Makers*, Little Brown and Company 1950
- G. Itzcovich, *Teorie e ideologie del diritto comunitario*, Giappichelli 2006
- L. Johns, *Strengthening International Courts: The Hidden Costs of Legalization*, University of Michigan Press 2011
- H. Kelsen, *General Theory of Law and State*, Harvard University Press 1945
- A.L. Kjær, S. Adamo (eds.) *Linguistic Diversity and European Democracy*, Ashgate 2011
- U. Klinke, *Der Gerichtshof der Europäischen Gemeinschaften Aufbau und Arbeitsweise*, Nomos 1989
- H. Koch, K. Hagel-Sørensen, U. Haltern, J.H.H. Weiler (eds.), *Europe. The New Legal Realism -*

Essays in Honour of Hjalte Rasmussen, Djøf Forlag 2010

- D. Kochenov, G. de Búrca, A. Williams, *Europe's Justice Deficit?*, Hart Publishing 2015
- N. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy*, University of Chicago Press 1994
- N. Komesar, *Law's Limits. Rule of Law and the Supply and Demand of Rights*, Cambridge University Press 2001
- T. Krefeld, *Das französische Gerichtsurteil in linguistischer Sicht. Zwischen Fach- und Standessprache*, *Studia Romanica et linguistica*, Peter Lang 1985
- T. Kuhn, *The Structure of the Scientific Revolutions*, University of Chicago Press 1962
- E. Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis: l'expérience américaine du contrôle judiciaire de la constitutionnalité des lois*, M. Giard & Cie edition 1921
- M. Lasser, *Judicial Deliberations. A Comparative Analysis of Judicial Transparency and Legitimacy*, Oxford University Press 2004
- B. Latour, *La fabrique du droit. Une ethnographie du Conseil d'Etat*, La Découverte & Syros 2002
- R. Lecourt, *L'Europe des juges*, Bruylant 1976
- O. Lecucq (ed.), *La composition des juridictions. Perspectives de droit comparé*, Bruylant 2014
- E. Leferrrière, *Traité de la Jurisdiction Administrative et les Recours Contentieux*, Berger-Levrault 1896
- K. Lenaerts, I. Maselis, K. Gutman, *EU Procedural Law*, Oxford University Press 2014
- B. Lincoln, *Authority: Construction and Corrosion*, University of Chicago Press 1994
- P.L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State*, Oxford University Press 2010
- K. Loehr, *Mehrsprachigkeitsprobleme in der Europäischen Union: Eine empirische und theoretische Analyse aus sprachwissenschaftlicher Perspektive*, Peter Lang 1998
- R. Mackenzie, K. Malleson, P. Martin, P. Sands, *Selecting International Judges. Principle, Process, and Politics*, Oxford University Press 2010
- H. Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas*, Beacon Press 1963 (1st ed. London 1861)
- I. Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market*, Elgar 2013
- K. Malleson, *The New Judiciary: the Effects of Expansion and Activism*, Ashgate 1999
- K. Malleson, Peter H Russell (eds.) *Appointing Judges in an Age of Judicial Power. Critical Perspectives from Around the World*, University of Toronto Press 2007
- G.F. Mancini, *Democracy and Constitutionalism in the European Union. Collected Essays*, Hart Publishing 2000

- C.J. Mann, *The Function of Judicial Decision in European Economic Integration*, Brill Academic Publishers 1972
- M. Manouvel, *Les opinions séparées à la Cour Internationale*, L'Harmattan 2004
- G. Martinico, *L'integrazione silente. La funzione interpretativa della Corte di giustizia e il diritto costituzionale europeo*, Jovene 2009
- G. Martinico, *The Tangled Complexity of the EU Constitutional Process: The Frustrating Knot of Europe*, Routledge 2012
- G. Martinico, O. Pollicino, *The Interaction between Europe's Legal Systems. Judicial Dialogue and the Creation of Supranational Laws*, Elgar 2012
- W. Mastor, *Les opinions séparées des juges constitutionnels*, Presse Universitaire d'Aix-Marseille 2005
- H.E.S. Mattila, *Comparative Legal Linguistics. Language of Law, Latin and Modern Lingua Franca*, Ashgate 2013
- P. Mbongo, A. Vauchez (eds), *Dans la fabrique du droit européen. Scènes, acteurs et publics de la Cour de justice des Communautés européennes*, Bruylant 2009
- J.H. Merryman, *The Civil Law Tradition*, Stanford University Press 2007
- T. Millett, *The Court of First Instance of the European Communities*, Butterworth 1990
- P.G. Monateri, *Geopolitica del diritto: genesi, governo e dissoluzione dei corpi politici*, Laterza 2013
- C.L. de Secondat Montesquieu, *De l'Esprit des Loix*, Huart 1748
- A. Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*, Cornell University Press 1998
- C. Mortati (ed.), *Le opinioni dissenzienti dei giudici costituzionali ed internazionali*, Giuffrè 1964
- G. Napolitano (ed.), *Diritto amministrativo comparato*, Giuffrè 2007
- U. Neergard, R. Nielsen, L. Roseberry (eds.), *The Role of Courts in Developing a European Social Model: Theoretical and Methodological Perspectives*, Djøf Publishing 2010
- L. Neville Brown, T. Kennedy, *The Court of Justice of the European Communities*, 5th edn, Sweet & Maxwell 2000
- G.Y. Ng, *Quality of Judicial Organisation and Checks and Balances*, Intersentia 2007
- N. Nic Shuibhne (ed.) *Regulating the Internal Market*, Edward Elgar Publishing 2006
- D. O'Keefe, A. Bavasso (eds.), *Judicial Review in European Union law: Liber Amicorum in Honour of Lord Slynn of Hadley*, Kluwer 2000
- C. Perelman, P. Foiriers (eds), *La motivation des décisions de justice*, Bruylant 1978
- I. Pernice, J. Kokott, C. Saunders (eds.), *The Future of the European Judicial System in a Comparative Perspective*, Nomos 2006

- H.W. Perry Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court*, Harvard University Press 1991
- P. Pescatore, *L'ordre juridique des communautés européennes. Etude des sources du droit communautaire*, Presses universitaires de Liège 1975
- P. Pescatore, *Vade-mecum. Recueil de formules et de conseils pratiques à l'usage des rédacteurs d'arrêts*, 1985, 3rd edn. Bruylant 2007
- L.M. Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution*, Hart 1998
- R.A. Posner, *Economic Analysis of Law*, Little Brown, 2d ed. 1977
- R.A. Posner, *The Federal Courts*, Harvard University Press 1996
- L. Prakke, C.A.J.M. Kortmann, J.C.E. van den Brandhoff (eds.), *Constitutional Law of 15 EU Member States*, Kluwer Legal Publishers 2004
- H. Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking*, BRILL 1986
- J. Rawls, *Political Liberalism*, Columbia University Press 1993
- M. Reimann, R. Zimmerman (eds.), *The Oxford Handbook of Comparative Law*, Oxford University Press 2006
- A. Riles (ed.), *Rethinking the Masters of Comparative Law*, Hart Publishing 2001
- F. Rivière, *Les opinions séparées des juges à la Cour européenne des droits de l'homme: essai d'analyse théorique*, Bruylant 2004
- A. Rosas, L. Armati, *EU Constitutional Law: An Introduction*, Hart 2012
- A. Rosas, E. Levits, Y. Bot (eds.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law - La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence*, T.M.C. Asser Press 2013
- W. Sadurski (ed.) *Constitutional Justice, East and West*, Kluwer Law International 2002
- D. Sarmiento, *Poder Judicial e integración europea. La construcción de un modelo jurisdiccional para la Unión*, Thomson Civitas 2004
- G. Sartori, *Comparative Constitutional Engineering. An Inquiry into Structures, Incentives and Outcomes*, New York University Press 1994
- H.G. Schermers, *Judicial Protection in the European Communities*, 2nd edn. Springer 1979
- H.G. Schermers, C.W.A. Timmermans, A.E. Kellerman (eds.), *Article 177 EEC: Experiences and Problems*, North-Holland 1987
- H.G. Schermers, D.F. Waelbroeck, *Judicial Protection in the European Union*, 6th edn, Kluwer Law 2001
- A. Seibert-Fohr (ed.), *Judicial Independence in Transition*, Springer 2012

- J. Shaw, G. More (eds.), *New Legal Dynamics of European Union*, Oxford University Press 1995
- M. Shapiro, *Courts: A Comparative and Political Analysis*, University of Chicago Press 1986
- M. Shapiro, A. Stone Sweet, *On Law, Politics and Judicialization*, Oxford University Press 2002
- S. Shetreet, C. Forsyth (eds.), *The Culture of Judicial Independence. Conceptual Foundations and Practical Challenges*, Martinus Nijhoff–Brill Publishers 2012
- D. Siebert, *Die Auswahl der Richter am Gerichtshof der Europäischen Gemeinschaften: zu der erforderlichen Reform des Art. 167 EGV*, Taschenbuch 1997
- A.M. Slaughter, A. Stone Sweet, and J.H.H. Weiler (eds.), *The European Court and National Courts, Doctrine and Jurisprudence. Legal Change in its Social Context*, Hart 1997
- G. Slynn, *Introducing a European Legal Order*, Stevens & Sons/Sweet & Maxwell 1992
- E. Steindorff, *Le recours pour excès de pouvoir dans le droit de la Communauté européenne du charbon et de l'acier*, Klostermann 1952
- G.G. Stendardi, *La corte costituzionale : il giudizio di legittimità costituzionale delle leggi*, Giuffrè 1955
- A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*, Oxford University Press 2000
- C.R. Sunstein, *Legal Reasoning and Political Conflict*, Oxford University Press 1996
- C.R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court*, Harvard University Press 1999
- D. Terris, C.P.R. Romano, L. Swigart, *The International Judge, An Introduction to the Men and Women Who Decide the World's Cases*, Oxford University Press 2007
- M. Tushnet, *The Constitution of the United States of America. A Contextual Analysis*, Hart 2009
- L. Vacca (ed.) *Lo stile delle sentenze e l'utilizzazione dei precedenti. Profili storico-comparatistici*, Giappichelli 2000
- D.G. Valentine, *The Court of Justice of the European Coal and Steel Community*, Martinus Nijhoff 1955
- R.C. van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History*, Cambridge University Press 1987
- R.C. van Caenegem, *Introduzione storica al diritto privato*, Il Mulino 2004
- G. Vandersanden, A. Barav, *Contentieux communautaire*, Bruylant 1977
- A. Vauchez, B. de Witte (eds.), *Lawyering Europe. European Law as a Transnational Social Field*, Hart 2013
- A. Vidaschi, *Istituzioni europee e tecnica legislativa*, Giuffrè 2001
- R. von Jhering, *The Struggle for Law*, 2nd edn, Callaghan 1915
- A. von Bogdandy, J. Bast (eds.), *Principles of European Constitutional Law*, Hart Publishing 2010

- F. von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, A. Hayward trans. London 1831, Arno Press reprint 1975
- I. Ward, *A Critical Introduction to European Law*, Butterworths 1996
- K.D. Ward, C.R. Castillo (eds.), *The Judiciary in American Democracy: Alexander Bickel, the Countermajoritarian Difficulty, and Contemporary Constitutional Theory*, State University of New York Press 2005
- A. Watson, *Legal Transplants: An Approach to Comparative Law*, University Press of Virginia 1974
- M. Weber, *Economy and Society: An Outline of Interpretive Sociology*, University of California Press 1978
- J.H.H. Weiler, *The Constitution of Europe: 'Do the New clothes Have an Emperor?'*, Cambridge University Press 1999
- J.H.H. Weiler, M. Wind (eds.), *European Constitutionalism Beyond the State*, Cambridge University Press 2003
- J. Wigmore, A. Kocourek (eds.) *Evolution of Law: Select Readings on the Origin and Development of Legal Institutions*, Little Brown 1915-1918
- A. Williams, *The Ethos of Europe. Values, Law and Justice in the EU*, Cambridge University Press 2010
- A. Zimmermann, C. Tomuschat, K. Oellers-Frahm (eds.), *The Statute of the International Court of Justice: a commentary*, Oxford University Press 2006
- D. Zimmermann, *The Independence of International Courts. The Adherence of the International Judiciary to a Fundamental Value of the Administration of Justice*, Nomos/Hart 2014
- K. Zweigert, H. Kötz, *An Introduction to Comparative Law*, Clarendon Press 1998

Articles, papers, chapters (when not included in collected volumes listed above)

- J. Alder, *Dissents in Courts of Last Resort: Tragic Choices?*, in 20 *Oxford Journal of Legal Studies*, 2000, p. 221
- S.A. Akkas, *Appointment of Judges: A Key Issue of Judicial Independence*, in 16 *Bond Law Review*, 2004, p. 1
- A. Alemanno, *Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy*, in 39 *European Law Review*, 2014, p. 72
- A. Alemanno, O. Stefan, *Openness at the Court of Justice of the European Union: Toppling a Taboo*, in 51 *Common Market Law Review*, 2014, p. 97

- P. Allott, Preliminary Rulings: Another Infant Disease, in 25 European Law Review, 2000, p. 538
- K.J. Alter, The European Court's Political Power Across Time and Space, in 59 Revue française de science politique, 2009, p. 1
- P.W. Amram, The Dissenting Opinion Comes to the German Courts, in 6 American Journal of Comparative Law, 1957, p. 108
- R. P. Anand, The Role of Individual and Dissenting Opinions in International Adjudication, in 14 The International and Comparative Law Quarterly, 1965, p. 788
- J.P. Ancel, Les opinions dissidentes, available at the website http://www.courdecassation.fr/IMG/File/opinions_dissidentes_jp_ancel.pdf
- S.S. Andersen, The Mosaic of Europeanization. An Organizational Perspective on National Recontextualization, ARENA Working Papers No. 04/11
- D. Anderson, The Admissibility of Preliminary References, in 14 Yearbook of European Law, 1994, p. 170
- A. Antoine, La Court de Justice de la C.E.C.A., in 6 Révue Générale de Droit International Public, 1953, p. 234
- A. Arnall, Private Applicants and the Action for Annulment under Article 173 of the EC Treaty, in 32 Common Market Law Review, 1995, p. 7
- A. Arnall, A Constitutional Court for Europe?, in 6 Cambridge Yearbook of European Legal Studies, 2003- 2004, p. 1
- M. Avbelj, Questioning EU Constitutionalisms, in 9/1 German Law Journal, 2008, p. 1
- M. Avbelj, The Pitfalls of (Comparative) Constitutionalism for European Integration, Eric Stein Working Paper 1/2008, available at the website: <http://ssrn.com/abstract=1334216>
- J. Azizi, Unveiling the EU Courts' Internal Decision-making Process: a Case for Dissenting Opinions?, in 12 ERA Forum, 2011, p. 49
- L. Azoulai, The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization, in 45 Common Market Law Review, 2008, p. 1335
- L. Azoulai, The Future Constitutional Role of the European Court of Justice, in J. Baquero Cruz, C. Closa (eds.), European Integration From Rome to Berlin, Peter Lang 2009, p. 229
- R. Bader Ginsburg, The Role of Dissenting Opinions, in 95 Minnesota Law Review, 2010, p. 1
- J. Baquero Cruz, The Changing Constitutional Role of the European Court of Justice, in 34 International Journal of Legal Information, 2006, p. 223
- C. Baudenbacher, M.J. Clifton, Courts of Regional Economic and Political Integration Agreements, in C. Romano, K. Alter, Y. Shany (eds.), The Oxford Handbook of International Adjudication, Oxford University Press 2014, p. 250
- A. Barav, Le commissaire du gouvernement près le Conseil d'État français et l'avocat général près

- la Cour de justice des Communautés européennes, in 26 *Revue internationale de droit comparé*, 1974, p. 809
- C. Barnard, E. Sharpston, The Changing Face of Article 177 References, in 34 *Common Market Law Review*, 1997, p. 1113
 - S. Bartole, Stato (forme di) (*ad vocem*), in *Enciclopedia del diritto*, Annali, II, 2, Milano, 2008, p. 1116
 - C. Bateup, The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue, in 71 *Brooklyn Law Review*, 2006, p. 1109
 - G. Bebr, The Existence of a Genuine Dispute: An Indispensable Precondition for the Jurisdiction of the Court Under Article 177 EEC Treaty, in 17 *Common Market Law Review*, 1980, p. 525
 - G. Bebr, The Rambling Ghost of 'Cohn Bendit'. Acte clair and the Court of Justice, in 20 *Common Market Law Review*, 1983, p. 440
 - J. Bell, European Perspectives on a Judicial Appointments Commission, in 6 *The Cambridge Yearbook of European Legal Studies*, 2003-2004, p. 35
 - J. Bell, The Role of European Judges in an Era of Uncertainty, in P.J. Birkinshaw, M. Varney (eds.), *The European Union Legal Order After Lisbon*, Kluwer 2010, p. 277
 - M. Bellocci, T. Giovannetti (eds.), Il quadro delle tipologie decisorie nelle pronunce della Corte costituzionale. Quaderno predisposto in occasione dell'incontro di studio con la Corte costituzionale di Ungheria. Palazzo della Consulta, 11 giugno 2010, available at the website http://www.cortecostituzionale.it/documenti/convegni_seminari/STU%20219_Tipologia_decisioni.pdf
 - Y. Bertoincini, What is the impact of the EU interventions at the national level?, in *Notre Europe – Jacques Delors Institute, Studies & Reports n° 73 May 2009*
 - L.F.M. Besselink, The Constitutional Duty to promote the Development of the International Legal Order, in 34 *Netherlands Yearbook of International Law*, 2003, p. 89
 - L.F.M. Besselink, Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13, available at the website <http://www.verfassungsblog.de/en/acceding-echr-notwithstanding-court-justice-opinion-213/#.VJq5SFIM-U>
 - A.M. Bickel, The Supreme Court, 1960 Term – Foreword: the Passive Virtues, in 75 *Harvard Law Review*, 1961, p. 40
 - E. Biernat, The Locus Standi of Private Applicants under article 230 (4) EC and the Principle of Judicial Protection in the European Community, *Jean Monnet Working Paper No. 12/03*
 - F. Bignami, Rethinking the Legal Foundations of the European Constitutional Order: The Lessons of the New Historical Research, in 28 *American University International Law Review*, 2013, p. 1311

- J. Blank, M. van der Ende, B. van Hulst , R Jagtenberg, Bench Marking in an International Perspective. An International Comparison of the Mechanisms and Performance of the Judiciary System, studied commissioned by The Netherlands Council for the Judiciary, available at the website <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/Benchmarking.pdf>
- M. Bobek, The Binding Force of Babel: The Enforcement of EC Law Unpublished in the Languages of the New Member States, in 9 Cambridge Yearbook of European Legal Studies, 2006-2007, p. 43
- M. Bobek, On the Application of European Law in (Not Only) the Courts of the New Member States: “Don’t Do as I say”?, in 10 Cambridge Yearbook of European Legal Studies, 2007-2008, p. 1
- M. Bobek, Learning to talk: Preliminary rulings, the courts of the new Member States and the Court of Justice, in 45 Common Market Law Review, 2008, p. 1611
- M. Bobek, Quantity or Quality? Reassessing the Role of Supreme Jurisdictions in Central Europe, in 57 American Journal of Comparative Law, 2009, p. 33
- M. Bobek, A Fourth in the Court: Why Are There Advocates-General in the Court of Justice?, in 14 Cambridge Yearbook of European Legal Studies, 2011-2012, p. 529
- M. Bobek, The Court of Justice of the European Union, in A. Arnall, D. Chalmers (eds.), The Oxford Handbook of European Union Law, Oxford University Press 2015
- A. Boerger-De Smedt, La Cour de Justice dans les négociations du traité de Paris instituant la CECA, in 2 Journal of European Integration History, 2008, p. 7
- A. Boerger-De Smedt, Negotiating the Foundations of European Law, 1950-1957: the Legal History of the Treaties of Paris and Rome, in 21 Contemporary European History, 2012, p. 339
- A. Boerger-De Smedt, M. Rasmussen, Transforming European Law: The Establishment of the Constitutional Discourse from 1950 to 1993, in 10 European Constitutional Law Review, 2014, p. 199
- D. Boni, Il ricorso di annullamento delle persone fisiche e giuridiche, in B. Nascimbene, L. Daniele (eds.) Il ricorso di annullamento nel Trattato istitutivo della Comunità, Giuffrè 1998, p. 53
- M. Broberg, N. Fenger, Variations in Member States' Preliminary References to the Court of Justice – Are Structural Factors (Part of) the Explanation?, in 19 European Law Journal, 2013, p. 488
- A.M. Burley, W. Mattli, Europe Before the Court: A Political Theory of Legal Integration, in 47 International Organization, 1993, p. 41
- H. Brady, Twelve things everyone should know about the European Court of Justice, paper of the

Centre for European Reform no. 42/2014

- W. J. Brennan, In Defense of Dissent, in 37 *Hastings Law Journal*, 1986, p. 427
- A. Bzdera, The Court of Justice of the European Community and the Politics of Institutional Reform, in M.L. Volcansek (ed.), *Judicial Politics and Policy-making in Western Europe*, Frank Cass 1992, p. 122
- S.G. Calabresi, J. Owens, The Origins of Judicial Review, *Northwestern Public Law Research Paper No. 14-05*, available at the website <http://ssrn.com/abstract=2391457>
- P. Calamandrei, La Corte costituzionale e il processo civile, in F. Carnelutti *et al.* (eds.), *Studi in onore di Enrico Redenti nel XL anno del suo insegnamento*, Giuffrè 1951
- G.A. Caldeira, J.L. Gibson, The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support, in 89 *American Political Science Review*, 1995, p. 356
- E. Calzolaio, Il valore di precedente delle sentenze della Corte di giustizia, in 1 *Rivista critica del diritto privato*, 2009, p. 41
- F. Capotorti, Sull'obbligo del rinvio alla Corte di giustizia per l'interpretazione a titolo pregiudiziale a norma del 3° comma dell'art. 177 del trattato Cee, in 1 *Giurisprudenza italiana*, 1983, p. 1008
- F. Capotorti, Le sentenze della Corte di Giustizia delle Comunità Europee, in Vv.Aa. (eds.), *La sentenza in Europa. Metodo, tecnica e stile*, CEDAM 1988, p. 230
- M. Cappelletti, Judicial Review in Comparative Perspective, in 58 *California Law Review*, 1970, p. 5
- P. Caro de Sousa, Catch Me If You Can? The Market Freedoms' Ever-expanding Outer Limits, in 4 *European Journal of Legal Studies*, 2011, p.162
- C.J. Carrubba, Courts and Compliance in International Regulatory Regimes, in 67 *Journal of Politics*, 2005, p. 669
- C.J. Carrubba, A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems, 71 *Journal of Politics*, 2009, p. 55
- C.J. Carrubba, M.J. Gabel, Courts, Compliance, and the Quest for Legitimacy in International Law, in 14 *Theoretical Inquires in Law*, 2013, p. 505
- M. Cartabia, Europe and Rights: Taking Dialogue Seriously, in 5 *European Constitutional Law Review*, 2009, p. 5
- S. Cassese, Lezione sulla cosiddetta opinione dissenziente, in 4 *Quaderni costituzionali*, 2009, p. 973
- N. Catalano, La pericolosa teoria dell'atto chiaro, in 1 *Giustizia Civile*, 1983, p. 3
- D. Chalmers, The Positioning of EU Judicial Politics within the United Kingdom, in K.H. Goetz, S. Hix (eds.), *Europeanised Politics. European Integration and National Political Systems*, Frank

Cass Publishers 2001, p. 169

- H.E. Chodosh, Comparing Comparisons: In Search of Methodology, in 84 Iowa Law Review, 1999, p. 1025
- M. Claes, The Europeanisation of National Constitutions in the Constitutionalisation of Europe: Some Observations Against the Background of the Constitutional Experience of the EU-15, in 3 Croatian Yearbook of European Law and Policy, 2007, p. 1
- A. Coan, Judicial Capacity and the Substance of Constitutional Law, in 122 Yale Law Journal, 2012, p. 422
- A. Cohen, A. Vauchez, The Social Construction of Law: The European Court of Justice and its Legal Revolution Revisited, in 7 Annual Review of Law and Social Science, 2011, p. 417
- J.C. Cohen, The European Preliminary Reference and U.S. Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism, in 44 American Journal of Comparative Law, 1996, p. 421
- M. Cohen-Eliya, I. Porat, American Balancing and German Proportionality: the Historical Origins, in 8 International Journal of Constitutional Law, 2010, p. 263
- G. Comparato, New Voices: Challenging Legal Culture, in 7 European Journal of Legal Studies, 2014, p. 5
- M.F Conniff, The French Conseil d'État and Article 177 of the Treaty of Rome: a Case Analysis, in 12 Virginia Journal of International Law, 1972, p. 377
- A. Corbin, The Law and the Judges, in 3 Yale Review, 1914, p. 234
- A. Corbin, Principles of Law and Their Evolution, in 64 Yale Law Journal, 1954, p. 161
- P. Craig, The Jurisdiction of the Community Courts Reconsidered, in 36 Texas International Law Journal, 2001, p. 555
- C. Curti Gialdino, Il raddoppio dei giudici del Tribunale dell'Unione: valutazioni di merito e di legittimità costituzionale europea, in 8 Federalismi.it. Rivista di diritto pubblico, comparato, europeo, 2015, available at the website <http://www.federalismi.it/AppOpenFilePDF.cfm?artid=29318&dpath=document&dfile=27042015190643.pdf&content=Il+raddoppio+dei+giudici+del+Tribunale+dell%E2%80%99Unione:+valutazioni+di+merito+e+di+legittimit%C3%A0+costituzionale+europea++-+unione+europea+-+dottrina+-+>
- D. Curtin, Betwixt and Between: Democracy and Transparency in the Governance of the European Union, in J.A. Winter, D. Curtin, A.E. Kellerman, B. de Witte (eds.), Reforming the Treaty on European Union: The Legal Debate, Kluwer 1996, p. 95
- D. Curtin, Transparency, audiences and the evolving role of the EU Council of Ministers, in J.E. Fossum and P. Schlesinger (eds.), The European Union and the Public Sphere: A Communicative Space in the Making?, Routledge 2007, p. 246

- M.A. Damirli, Comparative Law Hermeneutics: Cognitive Possibilities, in 5 Journal of Comparative Law, 2010, p. 65
- P. Dann, Thoughts on a Methodology of European Constitutional Law, in 6 German Law Journal, 2005, p. 1453
- A. Dashwood, The Advocate General in the Court of Justice of the European Communities, in 2 Legal Studies, 1982, p. 203
- M. Dawson, How Does the European Court of Justice Reason? A Review Essay on the Legal Reasoning of the European Court of Justice, in 20 European Law Journal 2014, p. 423
- G. de Búrca, The Principle of Subsidiarity and the Court of Justice as an Institutional Actor, in 36 Journal of Common Market Studies, 1998, p. 217
- R. Dehousse, Comparing National law and EC law: the Problem of the Level of Analysis, in 42 American Journal of Comparative Law, 1994, p. 761
- T. de la Mare, Article 177 in Social and Political Context, in P. Craig, G. de Búrca (eds.), The Evolution of EU law, 1st edn, Oxford University Press 1999
- U. de Siervo, L'istituzione della Corte costituzionale in Italia: dall'Assemblea costituente ai primi anni di attività della Corte, in P. Carnevale, C. Colapietro (eds.), La giustizia costituzionale fra memoria e prospettive. A cinquant'anni dalla pubblicazione della prima sentenza della Corte costituzionale, Giappichelli 2008, p. 49
- B. De Witte, The Impact of Van Gend en Loos on Judicial Protection at European and National Level: Three Types of Preliminary Questions, in Aa.Vv., 50th Anniversary of the Judgment in Van Gend en Loos 1963-2013, Conference Proceedings, Luxembourg, Office des Publications de l'Union Européenne, 2013, p. 93
- W. O. Douglas, The Dissent: a Safeguard of Democracy, in 32 Journal of the American Judicature Society, 1948, p. 104
- S. Douglas-Scott, Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice, available at the website <http://www.verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice/#.Vbj545Ptmkr>
- T. Dumbrovský, The European Court of Justice after the Eastern Enlargement: An Emerging Inner Circle of Judges, paper presented at the EUSA Twelfth Biennial Conference, Boston, March 2011, available at the website http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2551211
- T. Dumbrovský, B. Petkova, M. Van Der Sluis, Judicial Appointments: the Article 255 TFEU Advisory Panel and Selection Procedures in the Member States, in 51 Common Market Law Review, 2014, p. 455
- O. Dupeyroux, Le ministère public auprès des juridictions administratives, in Vv.Aa. (eds.), L'Évolution du droit public: Études offertes à Achille Mestre, Sirey 1956, p.183

- R. Dworkin, Law as Interpretation, in 9 Critical Inquiry, 1982, p. 179
- K. Dzehtsiarou, European Consensus and the Evolutive Interpretation of the European Convention on Human Rights, in 12 German Law Journal, 2011, p. 1730
- D. Edward, How the Court of Justice works, in 20 European Law Review, 1995, p. 557
- M. Egan, Toward a New History in European Law: New Wine in Old Bottles?, in 28 American University International Law Review, 2013, p. 1223
- E.D. Elliott, The Evolutionary Tradition in Jurisprudence, in 85:38 Columbia Law Review, 1985, p. 38
- U. Everling, The Court of Justice as a Decision-Making Authority, in 82 Michigan Law Review, 1984, p. 1294
- U. Everling, Reflections on the Reasoning in the Judgments of the Court of Justice of the European Communities, in J. Rosenløv *et al.* (eds.), Festschrift til Ole Due, Gads Forlag 1994, p. 55
- N. Fennelly, Legal Interpretation at the European Court of Justice, in 20 Fordham International Law Journal, 1996, p. 656
- F. Fernández Segado, La recepción del Sondervotum en Alemania, in 12 Revista Iberoamericana de Derecho Procesal Constitucional, 2009, p. 77
- S. Fish, Working on the Chain Gang: Interpretation in the Law and in Literary Criticism, in 9 Critical Inquiry, 1982, p. 201
- C. Flanders, Towards a Theory of Persuasive Authority, in 62 Oklahoma Law Review, 2009, p. 55
- J.F. Flauss, Brèves observations sur le second renouvellement triennal de la Cour Européenne des Droits de l'Homme, in 61 Revue Trimestrielle des Droits de l'Homme, 2005, p. 5
- J. Flett, Collective Intelligence and the Possibility of Dissent, in 13 Journal of International Economic Law, 2010, p. 287
- A. Follesdal, M. Wind, Introduction - Nordic Reluctance towards Judicial Review under Siege, in 27 Nordic Journal of Human Rights, 2009, p. 131
- D. Fontana, Docket control and the Success of Constitutional Courts, in T. Ginsburg, R. Dixon (eds.), Handbook of Comparative Constitutional Law, Elgar 2011, p. 624
- T. Freixes, La pratique des opinions dissidentes en Espagne, in 8 Nouveaux Cahiers du Conseil Constitutionnel, 2000, available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-8/la-pratique-des-opinions-dissidentes-en-espagne.52543.html>
- G. Garrett, The Politics of Legal Integration in the European Union, in 49 International Organization, 1995, p. 171
- G. Garzòn Clariana, Le Parlement européen dans le développement de la CJCE, in N. Colneric,

- D. Edward, J.P. Puissochet, D.R. Colomer (eds.), *Une Communauté de droit Festschrift per Gil Carlos Rodríguez Iglesias*, Berliner Wissenschafts-Verlag 2003, p. 21
- M.A. Gaudissart, *Le regime et la pratique linguistiques de la Cour de Justice*, in D. Hanf, K. Malacek, E. Muir (eds.) *Langues et construction européenne*, PIE Peter Lang 2007, p. 137
 - M.A. Gaudissart, *La refonte du règlement de procedure de la Cour de justice*, in *3 Cahiers de droit européen*, 2012, p. 603
 - M. Gilligan, L. Johns, B.P. Rosendorff, *Strengthening International Courts and the Early Settlement of Disputes*, 54 *Journal of Conflict Resolution*, 2010, p. 5
 - H.P. Glenn, *The Capture, Reconstruction and Marginalization of 'Custom'*, in 45 *American Journal of Comparative Law*, 1997, p. 613
 - J. Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, in 49 *University of Miami Law Review*, 1994, p. 1
 - J. Goldsmith, D. Levinson, *Law for States: International Law, Constitutional Law, Public Law*, in 122 *Harvard Law Review*, 2009, p. 1791
 - J. Golub, *The Politics of Judicial Discretion: Rethinking the Interaction between National Courts and the European Court of Justice*, in 19 *West European Politics*, 1996, p. 360
 - P. Gori, *L'avocat général à la Cour de justice des Communautés européennes*, in 12 *Cahiers de droit européen*, 1976, p. 375
 - G. Gorla, *Lo stile delle sentenze. Ricerca storico-comparativa*, in 21 *Quaderni de "Il Foro italiano"*, 1967, p. 291
 - A. Grimmel, *Judicial Interpretation or Judicial Activism? The Legacy of Rationalism in the Studies of the European Court of Justice*, in 18 *European Law Journal*, 2012, p. 518
 - X. Groussot, *Spirit, Are You There? Reinforced Judicial Dialogue and the Preliminary Ruling Procedure*, Eric Stein Working Paper No. 4/2008, available at the website http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1279367
 - X. Groussot, C. Wong, A. Inghammar, A. Bruzelius, *Empowering National Courts in EU Law*, Swedish Institute for European Policy Studies, Report No. 3/2009, available at the website <http://www.sieps.se/sites/default/files/541-2009-3-rapport.pdf>
 - C. Guarnieri, *Judicial Independence in Europe: Threat or Resource for Democracy?*, in 49 *Representation*, 2013, p. 347
 - R. Guillien, *Les commissaires du gouvernement près les juridictions administratives et, spécialement, près le Conseil d'État français*, in 71 *Revue du droit public de de la science politique en France et à l'étranger*, 1955, p. 281
 - A.T. Guzman, *International Tribunals: A Rational Choice Analysis*, in 157 *University of Pennsylvania Law Review*, 2008, p. 171

- P. Haas, Introduction: Epistemic Communities and International Policy Coordination, in 46 International Organization, 1992, p. 1
- H.P. Haferkamp, A. Nieschlag, Begriffsjurisprudenz / Jurisprudence of Concepts (*ad vocem*), in The Oxford International Encyclopedia of Legal History, 2009
- G. Hafner, Risks Ensuing from Fragmentation of International Law, in Official Records of the General Assembly, 55th Session, Supplement No. 10 (A/55/10), annex, the Report of the Study Group on Fragmentation of International Law', doc. A/CN.4/L.644
- D. Halberstam, Comparative Federalism and the Role of the Judiciary, in K. Whittington, D. Kelemen, G. Caldeira (eds.) The Oxford Handbook of Law and Politics, Oxford University Press 2008, p. 142
- C. Hanretty, Dissent in Iberia: The ideal points of justices on the Spanish and Portuguese Constitutional Tribunals, in 51 European Journal of Political Research, 2012, p. 671
- C. Hanretty, Dissenting opinions in the UKSC, available at the website <http://ukscblog.com/dissenting-opinions-in-the-uksc>
- O.A. Hathaway, Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System, 86 Iowa Law Review, 2001, p. 101
- Justice Hedigan, The European Court of Human Rights: Yesterday, Today and Tomorrow, in 12 German Law Journal, 2011, p. 1716
- L. Heffernan, The Community Court post-Nice: a European Certiorari revisited, in 52 The International and Comparative Law Quarterly, 2003, p. 907
- L. H. Helfer, A.M. Slaughter, Why States Create International Tribunals: A Response to Professors Posner and Yoo, in 93 California Law Review, 2005, p. 899
- C. Hen, La motivation des actes des institutions communautaires, in 13 Cahiers de Droit Européen, 1977, p. 54
- F. Hoffmeister, Constitutional Implications of EU Membership: a View from the Commission, in 3 Croatian Yearbook of European Law and Policy, 2007, p. 59
- T. Hoppe, Die Europäisierung der Gesetzgebung: Der 80-Prozent-Mythos lebt, in 6 Europäische Zeitschrift für Wirtschaftsrecht, 2009, p. 168
- T. Horsley, Reflections on the Role of the Court of Justice as the 'Motor' of European Integration: Legal Limits to Judicial Lawmaking, in 50 Common Market Law Review, 2013, p. 931
- J. Husa, Methodology of Comparative Law Today: From Paradoxes to Flexibility?, in 4 Revue Internationale de Droit Comparé, 2006, p. 1095
- J. Husa, The Method Is Dead, Long Live the Methods! European Polynomia and Pluralist Methodology, in 5 Legisprudence, 2011, p. 249
- G. Itzcovich, The European Court of Justice as a Constitutional Court. Legal Reasoning in a

Comparative Perspective, STALS Research paper no. 4/2014, available at the website

<http://www.stals.sssup.it/files/itzcovich%204%202014.pdf>

- F.G. Jacobs, Amendments to the Rules of Procedure, in 5 European Law Review, 1980, p. 52
- F.G. Jacobs, The Member States, the Judges and the Procedure, in Institut D'Études Européennes. Université Libre de Bruxelles (ed.), La Cour de Justice des Communautés Européennes, Éditions de l'Université de Bruxelles 1981, p. 11
- F.G. Jacobs, Procedural Reform in the European Court, in J. Schwarze (ed.), Perspectives for the Development of Judicial Protection in the European Community, Nomos Verlagsgesellschaft 1987, p. 191
- F.G. Jacobs, The Effect of Preliminary Rulings in the National Legal Order, in M. Andenas (ed.), Article 177 References to the European Court – Policy and Practice, Butterworths 1994, p. 29
- F.G. Jacobs, The European Court of Justice: Some Thoughts on its Past and its Future, in 2 The European Advocate, 1994-1995, p. 2
- F.G. Jacobs, Access to Justice as a Fundamental Right in European Law, in G.C. Rodríguez Iglesias *et al.* (eds.) Mélanges en hommage à Fernand Schockweiler, Nomos 1999, p. 197
- F.G. Jacobs, Recent and Ongoing Measures to Improve the Efficiency of the European Court of Justice, in 29 European Law Review, 2004, p. 823
- F.G. Jacobs, The Evolution of the European Legal Order, in 41 Common Market Law Review, 2004
- J.P. Jacqué, The Principle of Institutional Balance, in 41 Common Market Law Review, 2004, p. 383
- J.P. Jacqué, J.H.H. Weiler, On the Road to European Union – A New Judicial Architecture: An Agenda for the Intergovernmental Conference, in 27 Common Market Law Review, 1990, p. 185
- P. Jann, Entscheidungsbegründung am Europäischen Gerichtshof, in 7 Journal für Rechtspolitik, 1999, p. 28
- C. Joerges, Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form, LEQS Paper No. 28/2010
- C. N. Kakouris, Use of the Comparative Method by the Court of Justice of the European Communities, in 6 Pace International Law Review, 1994, p. 267
- A.M. Kales, Methods of Selecting and Retiring Judges, in 11 Journal of the American Judicature Society, 1928, p. 133
- K. Kelemen, The road from common law to East-Central Europe: the case of the dissenting opinion, in P. Cserne, M. Könczöl (eds.), Legal and Political Theory in the Post-National Age, Peter Lang 2011, p. 118
- K. Kelemen, Dissenting Opinions in Constitutional Courts, in 14 German Law Journal, 2013, p.

- H. Kelsen, *La garantie juridictionnelle de la Constitution (la Justice constitutionnelle)*, in 35 *Revue du droit public et de la science politique*, 1928, p. 197
- D. Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, in 2 *Utah Law Review*, 1997, p. 545
- T. Kennedy, *First steps towards a European certiorari?*, in 18 *European Law Review*, 1993, p. 121
- T. Kennedy, *Thirteen Russians! The Composition of the European Court of Justice*, in A.I.L. Campbell, M. Voyatzi (eds.), *Legal Reasoning and Judicial Interpretation of European Law: Essays in honour of Lord Mackenzie-Stuart*, Trenton Publishing 1996, p. 69
- S.J. Kenney, *The Members of the Court of Justice of the European Communities*, in 5 *Columbia Journal of European Law*, 1999, p. 101
- M. Kirby, *Judicial Dissent - Common Law and Civil Law Traditions*, in 123 *Law Quarterly Review*, 2007, p. 379
- J. Kokott, *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems*, Kluwer Law International 1998, p. 168
- M. Kolsky Lewis, *The lack of dissent in WTO dispute settlement*, in 9 *Journal of International Economic Law*, 2006, p. 895
- J. Komarek, *Federal elements in the Community judicial system: Building coherence in the Community legal order*, in 42 *Common Market Law Review*, 2005, p. 9
- J. Komarek, *In the court(s) we trust? On the need for hierarchy and differentiation in the preliminary ruling procedure*, in 32 *European Law Review*, 2007, p. 467
- J. Komarek, *Judicial Lawmaking and Precedent in Supreme Courts: The European Court of Justice Compared to the US Supreme Court and the French Cour de Cassation*, in 11 *Cambridge Yearbook of European Legal Studies*, 2008-2009, p. 399
- T. Koopmans, *Stare Decisis in European Law*, in D. O'Keefe, H.G. Schermers (eds.) *Essays in European Law and Integration*, Kluwer, 1982, p. 11
- T. Koopmans, *The Birth of European Law at the Crossroads of Legal Traditions*, in 39 *American Journal of Comparative Law*, 1991, p. 493
- M. Koskenniemi, P. Leino, *Fragmentation of International Law. Postmodern Anxieties?*, in 15 *Leiden Journal of International Law*, 2002, p. 553
- A.T. Kronman, *Alexander Bickel's Philosophy of Prudence*, in 94 *Yale Law Journal*, 1985, p. 1567
- M. Kuijper, *Voting behaviour and national bias in the European Court of Human Rights and the International Court of Justice*, in 10 *Leiden Journal of International Law*, 1997, p. 49
- S.A. Kuipers, *Pertinence et acte clair*, art. 177 CEE. *Observations sur Hoge Raad der Nederlanden*,

in Cahiers de droit europeen, 1967, p. 81

- J. Laffranque, Dissenting Opinion in the European Court of Justice - Estonia's Possible Contribution to the Democratisation of the European Union Judicial System, in 9 *Juridica International*, 2004, p. 14
- M. Lagrange, The Court of Justice as a Factor in European Integration, in 15 *American Journal of Comparative Law*, 1966-1967, p. 709
- M. Lagrange, Cour de Justice et Tribunaux nationaux. La theorie de l'acte clair pomme de discorde ou trait d'union, in 1 *Gazette du Palais*, 1971
- M. Lagrange, The theory of acte clair: a bone of contention or a source of unity?, in 8 *Common Market Law Review*, 1971, p. 313
- M. Lagrange, La Cour de justice des Communautés européennes du Plan Schuman à l'Union européenne, in 14 *Revue trimestrielle de droit européen*, 1978, p. 2
- R. Lane, Article 234: a Few Rough Edges Still, in M. Hoskins, W. Robinson (eds.), *A True European: Essays for Judge David Edward*, Hart Publishing 2004, p. 327
- M. Lasser, "Lit. Theory" Put to the Test: A Comparative Literary Analysis of American Judicial Tests and French Judicial Discourse, in 111 *Harvard Law Review*, 1998, p. 689
- M. Lasser, The European Pasteurization of French Law, in 90 *Cornell Law Review*, 2004-2005, p. 995
- Y. Lécuyer, Le secret du délibéré, les opinions séparées et la transparence, in 54 *Revue trimestrielle des droits de l'homme*, 2004, p. 197
- J. Lee, A Defence of Concurring Speeches, in 2 *Public Law*, 2009, p. 305
- P. Leino, Just a Little Sunshine in the Rain: the 2010 case law of the European Court of Justice on Access to Documents, in 48 *Common Market Law Review*, 2011, p. 1215
- K. Lenaerts, Constitutionalism and the Many Faces of Federalism, in 38 *American Journal of Comparative Law*, 1990, p. 205
- K. Lenaerts, Form and Substance of the Preliminary Ruling Procedure, in D. Curtin, T. Heukels (eds.), *Institutional Dynamics of European Integration*, Martinus Nijhoff 1994, p. 355
- K. Lenaerts, Interlocking Legal Orders in the European Union and Comparative Law, in 52 *International & Comparative Law Quarterly*, 2003, p. 873
- K. Lenaerts, In the Union We Trust: Trust - Enhancing Principles of Community Law, in 41 *Common Market Law Review*, 2004, p. 317
- K. Lenaerts, The Rule of Law and the Coherence of the Judicial System of the European Union, in 44 *Common Market Law Review*, 2007, p. 1625
- K. Lenaerts, The Future Organisation of European Courts, in P. Demaret, I. Govaere, D. Hanf (eds.) *European Legal Dynamics – 30 Years of European Legal Studies at the College of Europe*,

Peter Lang 2007, p. 129

- A.P. Le Sueur, Legal Duties to Give Reasons, in 52 Current Legal Problems, 1999, p. 150
- C. L'Heureux-Dubé, The dissenting opinion: voice of the future?, in 38 Osgoode Hall Law Journal, 2000, p. 495
- J. Lodge, Transparency and Democratic Legitimacy, in 32 Journal of Common Market Studies, 1994, p. 343
- M. Luciani, Costituzionalismo irenico e costituzionalismo polemico, in 2 Giurisprudenza costituzionale, 2006, p. 1643
- Y. Lupu, International Judicial Legitimacy: Lessons from National Courts, in 14 Theoretical Inquires in Law, 2013, p. 437
- I.S. Lustick, Institutional Rigidity and Evolutionary Theory: Trapped on a Local Maximum, in 2(2) Cliodynamics: the Journal of Theoretical and Mathematical History 2011, p. 3
- J. Luther, L'esperienza del voto dissenziente nei paesi di lingua tedesca, in 2 Politica del diritto, 1994, p. 241
- R. Machacek, Die Einrichtung der "Dissenting Opinion" im internationalen Vergleich, in 7 Journal für Rechtspolitik, 1999, p. 1
- R. Mackenzie, P. Sands, International Courts and Tribunals and the Independence of the International Judge, in 44 Harvard International Law Journal, 2003, p. 272
- Lord Mackenzie Stuart and J.P. Warner, Judicial Decisions as a Source of Community law, in Va.Aa. (eds.), Europäische Gerichtsbarkeit und nationale Verfassungsgerichtsbarkeit, Festschrift H. Kutscher, Nomos 1981, p. 273
- G. Maggi, The Role of Multilateral Institutions in International Trade Cooperation, in 89 American Economic Review, 1999, p. 190
- M. Malecki, Do ECJ judges all speak with the same voice?, in 19 Journal of European Public Policy, 2012, p. 59
- J. Malenovsky, Les opinions séparées et leurs répercussions sur l'indépendance du juge international, in 3 Anuario Colombiano de Derecho Constitucional, 2010, p. 27
- Lord Mance, Judges judged, in European Advocate (Journal of the Bar European Society), 2012, p. 2
- G.F. Mancini, A Constitution for Europe, in 26 Common Market Law Review, 1989, p. 595
- G.F. Mancini, The Role of the Supreme Courts at the National and International Level: a Case Study of the Court of Justice of the European Communities, in P. Yessiou-Faltsi (ed.), The Role of the Supreme Courts at the National and International Level, Sakkoulas 1998, p. 421
- G.F. Mancini, Europe: The Case for Statehood, in 4 European Law Journal, 1998, p. 29
- G.F. Mancini, D.T. Keeling, From CILFIT to ERT: the Constitutional Challenge Facing the

- European Court, in 11 Yearbook of European Law 1991, p. 1
- G.F. Mancini, D.T. Keeling, Language, Culture and Politics in the Life of the European Court of Justice, in 1 Columbia Journal of European Law, 1994-1995, p. 397
 - G. Martinico, Reading the Others: American Legal Scholars and the Unfolding European Integration, in 11 European Journal of Law Reform, 2009, p. 35
 - J.C. Masclet, Vers la fin d'une controverse ? La Cour de justice tempère l'obligation de renvoi préjudiciel en interprétation faite aux juridictions suprêmes (art. 177, alinéa 3, CEE), in 26 Revue du Marché Commun, 1983 p.363
 - W. Mattli, A.M. Slaughter, Law and Politics in the European Union: A Reply to Garrett, in 49 International Organization, 1995, p. 183
 - W. Mattli, A.M. Slaughter, Revisiting the European Court of Justice, in 52 International Organisation, 1998, p. 177
 - J.L. Maute, English Reforms to Judicial Selection: Comparative Lessons for American States, in 34 Fordham Urban Law Journal, 2007, p. 387
 - A. M. Mavčič, Importance of the dissenting and concurring opinions (separate opinions) in the development of the Constitutional and judicial review with a special reference to the Slovenian practice, available at the website <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU%282010%29016-e>
 - A.M. Mavčič, Guarantees of Independence of the Judiciary: the Slovenian Experience, paper presented at the International Judicial Reform Symposium, 2-3 April 2012, Ankara, Turkey, available at the website http://www.concourts.net/lecture/Ankara%202012_1_.pdf
 - N.Maveety, Concurrence and the Study of Judicial Behavior in American Political Science, in 8 Juridica International, 2003, p. 173
 - H. Mayer, Die Einführung der "dissenting opinion" am Verfassungsgerichtshof, in 7 Journal für Rechtspolitik, 1999, p. 30
 - P. McAuliffe, Selecting International Judges: Principle, Process, and Politics, in 11 International Criminal Law Review, 2011, p. 359
 - K. McAuliffe, Language And Law In The European Union: The Multilingual Jurisprudence Of The Ecj, in L.M. Solan, P.M. Tiersma (eds.), The Oxford Handbook of Language and Law, Oxford University Press 2012, p. 200
 - G.P.J. McGinley, The Search for Unity: The Impact of Consensus Seeking Procedures in Appellate Courts, in 11 Adelaide Law Review, 1987, p. 203
 - A.W.H. Meij, Guest Editorial: Architects or judges? Some comments in relation to the current debate, in 37 Common Market Law Review, 2000, p. 1039
 - A.W.H. Meij, Access to the European Union Courts. Standing in Direct Actions after Lisbon, in

- M. van Roosmalen (ed.), *Fundamental Rights and Principles. Liber Amicorum Pieter van Dijk*, Intersentia 2013, p. 141
- J. Mertens de Wilmars, *Le droit comparé dans la jurisprudence de la Cour de Justice des Communautés Européennes*, in 110 *Journal des Tribunaux*, 1991, p. 37
 - J. Moeller, Alexander M. Bickel: *Toward a Theory of Politics*, in 47 *Journal of Politics*, 1985, p. 113
 - A. Momirov, A. Naudé Fourie, *Vertical Comparative Law Methods: Tools for Conceptualizing the International Rule of Law*, in 2 *Erasmus Law Review*, 2003, p. 291
 - P.G. Monateri, *Il problema di una definizione di Europa: una questione di teologia politica?*, in 1 *Rivista critica del diritto privato*, 2005, p. 3
 - L. Montazel, *Entre faits et droit: histoire d'un pouvoir judiciaire. Les techniques de la cassation civile en France et en Allemagne au XIXème siècle*, Klostermann 1998
 - A. Moravcsik, *Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach*, in 31 *Journal of Common Market Studies*, 1993, p. 473
 - G. Morelli, *La Corte di Giustizia delle Comunità europee come giudice interno*, in 41 *Rivista di diritto internazionale*, 1958, p. 3
 - C. Mortati, *La Corte costituzionale ed i presupposti per la sua vitalità*, in *Iustitia*, 1949, p. 69
 - N.P. Musar, *Access to court records and FOIA as a legal basis – experience of Slovenia*, available at the website https://www.ip-rs.si/fileadmin/user_upload/Pdf/clanki/Access_to_court_records_and_FOIA_as_a_legal_basis_-_experience_of_Slovenia.pdf
 - K.H. Nadelmann, *The Judicial Dissent: Publication v. Secrecy*, in 8 *American Journal of Comparative Law*, 1959, p. 415
 - K.H. Nadelmann, *Non-Disclosure of Dissents in Constitutional Courts: Italy and West Germany*, in 13 *American Journal of Comparative Law*, 1964, p. 268
 - V. Naglič, *National practices with regard to the accessibility of court documents. Study*, Directorate General for Internal Policies. Policy Department C: Citizens' Rights and Constitutional Affairs, 2013, available at the website <http://www.europarl.europa.eu/studies>
 - B. Nelissen, *Judicial Loyalty Through Dissent or Why the Timing is Perfect for Belgium to Embrace Separate Opinions*, in 15 *Electronic Journal of Comparative Law*, 2011, p. 1
 - C. Nelson, *A Re-evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, in 37 *American Journal of Legal History*, 1993, p. 190
 - J. Nergelius, *North and South: Can the Nordic States and the European Continent Find Each Other in the Constitutional Area – or Are They Too Different?*, in M. Scheinin (ed.) *The Welfare State and Constitutionalism in the Nordic Countries*, Nordic Council of Ministers 2001, p. 79

- T. Neumann, B. Simma, Transparency in International Adjudication, in A. Bianchi, A. Peters (eds) Transparency in International Law, Cambridge University Press 2013, p. 436
- D. Nicol, Lessons from Luxembourg: Federalisation and the Court of Human Rights, in 26 European Law Review, 2001, p.3
- F. Nicola, Critical Legal Histories in EU Law, in 28 American University International Law Review, 2013, p. 1173
- C. Nourissat, La jurisprudence de la Cour de justice des Communautés européennes: Un regard privatiste à partir de l'actualité, in Vv.Aa. (eds.), La création du droit par le juge, Dalloz 2006, p. 247
- D. O'Keefe, Is the Spirit of Article 177 under Attack? Preliminary References and Admissibility, in 23 European Law Review, 1998, p. 509
- P. Oliver, La recevabilité des questions préjudicielles : La jurisprudence des années 1990, in 37 Cahiers de droit européen, 2001, p. 15
- J. Olsen, Unity and Diversity - European Style, ARENA Working Paper No. 24/2005
- Open Society Justice Initiative, Report on Access to Judicial Information, March 2009, available at the website www.right2info.org
- Organisation for Economic Co-operation and Development (OECD), The Right to Open Public Administrations in Europe: Emerging Legal Standards, 19 November 2010, Sigma paper no. 46, available at the website [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/SIGMA\(2010\)2/REV1&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/SIGMA(2010)2/REV1&docLanguage=En)
- R. Passos, Le Système juridictionnel de l'Union, in G. Amato, H. Bribosia, B. de Witte (eds.), Genèse et destinée de la Constitution européenne, Bruylant 2007, p. 565
- M. Patchett-Joyce, Barrister Outer Temple Chambers, London, Hearing on the Reform of the Court of Justice of the European Union before the Committee on Legal Affairs of the European Parliament, available at the website <http://www.europarl.europa.eu/document/activities/cont/201305/20130521ATT66428/20130521ATT66428EN.pdf>
- L. Pech, Between Judicial Minimalism and Avoidance: the Court of Justice's Sidestepping of Fundamental Constitutional Issues in Römer and Dominguez, in 50 Common Market Law Review, 2012, p. 1841
- L. Pech, The CJEU at 60: Still Fit for Purpose?, paper presented at the 50th anniversary jubilee conference of the Common Market Law Review "Current Challenges for EU Law -New Views, New Inspirations", 26-27 April 2013, Noordwijk, Netherlands
- S. Peers, From Maastricht to Laeken: The Political Agenda of Openness and Transparency in the EU, in V. Deckmyn (ed.), Increasing Transparency in the European Union, European Institute for

Public Administration 2002, p. 7

- S. Peers, The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection, available at the website <http://eulawanalysis.blogspot.co.uk/2014/12/the-cjeu-and-eus-accession-to-echr.html>
- C. Peneira, The Beginnings of the Court of Justice and its Role as a Driving Force in European Integration, in 1 Journal of European Integration History, 1995, p. 111
- A. Peri, La selezione dei giudici della Corte di giustizia. Poteri e limiti del comitato ex. Art. 255 TFUE , in 4 Diritto Pubblico Comparato ed Europeo, 2012, p. 1472
- V. Perju, Reason and Authority in the European Court of Justice, in 49 Virginia Journal of International Law, 2009, p. 308
- P. Pescatore, L' interpretation du droit communautaire et la doctrine de l'acte clair, in 33/34 Bulletin des juristes Européens, 1971, p. 49
- P. Pescatore, Interpretation of Community law and the doctrine of 'acte clair', in 27 Legal Problems of an Enlarged European Community, 1972, p. 46
- P. Pescatore, Le recours dans la jurisprudence de la Cour de justice des Communautés européennes, à des normes déduites de la comparaison des droits des Etats membres, in 32 Revue international de droit comparé, 1980, p. 337
- P. Pescatore, Les Travaux du 'Groupe Juridique' dans la négociation des Traités de Rome, in 34 Studia Diplomatica, 1981, p. 159
- P. Pescatore, The Doctrine of "Direct Effect": An Infant Disease of Community Law, in 8 European Law Review, 1983, p. 155
- T.R. Phillips, The Merits of Merit Selection, in 32 Harvard Journal of Law & Public Policy, 2009, p. 67
- A.E. Platsas, The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks, in 12.3 Electronic Journal of Comparative Law, 2008, p. 1
- L.M. Poiares Maduro, Contrapunctual Law: Europe's Constitutional Pluralism in Action, in N. Walker (ed.), Sovereignty in Transition, Hart Publishing 2003, p. 502
- L.M. Poiares Maduro, Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism, in 1 European Journal of Legal Studies, 2007, p. 1
- P. Pollack, The New EU Legal History: What's New, What's Missing?, in 28 American University International Law Review, 2013, p. 1257
- R. Posner, Utilitarianism, Economics, and Legal Theory, in 8 Journal of Legal Studies, 1979, p. 103
- R. Posner, The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication, in 8 Hofstra Law Review, 1980, p. 487

- E.A. Posner, M.F.P. de Figueiredo, Is the International Court of Justice Biased?, in 34 Journal of Legal Studies, 2005, p. 599
- E.A. Posner, J.C. Yoo, Judicial Independence in International Tribunals, in 93 California Law Review, 2005, p. 1
- R. Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, in 40 American Law Review, 1906, p. 729
- S. Prechal, Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union, in C. Barnard (ed.), The Fundamental of EU Law Revisited, Oxford University Press 2007, p. 35
- S. Prechal, National Courts in EU Judicial Structures, in 25 Yearbook of European Law, 2007, p. 429
- E.A. Purcell Jr., Alexander M. Bickel and the Post-Realist Constitution, in 11 Harvard Civil Rights-Civil Liberties Law Review, 1976, p. 521
- C. Radaelli, Whither Europeanization? Concept Stretching and Substantive Change, European Integration online Papers (EIoP), 2000
- R. Raffaelli, Dissenting Opinions in the Supreme Courts of the Member States : Study. Report for the Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs of the European Parliament, available at the website <http://www.europarl.europa.eu/studies>
- H. Rasmussen, Why is Article 173(2) Interpreted against Private Plaintiffs, in 5 European Law Review, 1980, p. 112
- H. Rasmussen, The European Court's Acte Clair Strategy in C.I.L.F.I.T.; Or, Acte Clair, of Course! But What Does it Mean?, in 10 European Law Review, 1984, p. 242
- H. Rasmussen, Le pouvoir de décision politique du juge européen et ses limites, in 63 Revue française d'administration publique, 1992, p. 413
- H. Rasmussen, Remediating the Crumbling EC Judicial System, in 37 Common Market Law Review, 2000, p. 1071
- H. Rasmussen, Present and Future European Judicial Problems after Enlargement and the Post-2005 Ideological Revolt, in 44 Common Market Law Review, 2007, p. 1661
- H. Rasmussen, Legal Opinion about the European Court of Justice's Competence Transgressions, Poor Reasonings and the Complete Non-transparency of Willensbildung, paper presented at the conference "National Judges and Supranational Laws: On the Effective Application of the EC Law and the ECHR", 15th/16th January 2010, at the Scuola Superiore di Studi Universitari e Perfezionamento Sant'Anna, Pisa
- H. Rasmussen, L. Nan Rasmussen, Comment on Katalin Kelemen - Activist EU Court 'Feeds' on

- the Existing Ban on Dissenting Opinions: Lifting the Ban is Likely to Improve the Quality of EU Judgments, in 14 German Law Journal, 2013, p. 1373
- M. Rasmussen, The Origins of a Legal Revolution – The Early History of the European Court of Justice, in 2 Journal of European Integration History, 2008, p. 77
 - M. Rasmussen, The First Advocate Generals and the Making of European Law, 1950-1958, paper presented at the Seminar of the Advocates General held at the European University Institute, Firenze, 16 September 2010
 - M. Rasmussen, Rewriting the History of European Public Law: The New Contribution of Historians, in 28/5 American University International Law Review, 2013, p. 1187
 - M. Rasmussen, Revolutionizing European law: A History of the Van Gend en Loos Judgment, in 12 International Journal of Constitutional Law 2014, p.136
 - N. Reich, The “November Revolution” of the European Court of Justice: Keck, Meng and Audi Revisited, in 31 Common Market Law Review, 1994, p. 459
 - D. Reiling, Technology in Courts in Europe: Opinions, Practices and Innovations. In 4 International Journal for Court Administration, 2012, p. 11
 - C. Ritter, Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234, in 31 European Law Review, 2006, p. 690
 - J. Rivero, Le problème de l'influence des droits internes sur la Cour de Justice de la Communauté Européenne du Charbon et de l'Acier, in 4 Annuaire français de droit international, 1958, p. 295
 - F. Rivière, Les opinions séparées des juges à la Cour Européenne des Droits de l'Homme, Bruylant 2004, at 17
 - G.C. Rodríguez Iglesias, Entscheidungsfindung im Europäischen Gerichtshof, in 7 Journal für Rechtspolitik, 1999, p. 27
 - M.T. Rörig, L'opinione dissenziente nella prassi del Bundesverfassungsgericht (1994-2009), available at the website http://www.cortecostituzionale.it/documenti/convegni_seminari/CC_SS_opinione_dissenziente_12012010.pdf
 - M. Rosenfeld, Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court, in 4 International Journal of Constitutional Law, 2006, p. 616
 - P. Rubin, Why Is the Common Law Efficient?, in 6 Journal of Legal Studies, 1977, p. 51
 - D.W.P. Ruiters, A Basic Classification of Legal Institutions, in 10 Ratio Juris 1997, p. 357
 - P.H. Russell, Judicial Recruitment, Training, and Careers, in P. Cane, H. Kritzer (eds.), The Oxford Handbook of Empirical Legal Research, Oxford University Press, 2010, p. 522
 - R. Sacco, Legal Formants. A Dynamic Approach to Comparative Law, in 39 American Journal of Comparative Law, 1991, p. 1

- C. Salcedo, La figura del abogado general en las Comunidades Supranacionales Europeas: naturaleza jurídica y función, in 12 Revista española de derecho internacional, 1959, p. 119
- D. Sarmiento, Half Case at a Time. Dealing with Judicial Minimalism at the European Court of Justice, in M. Claes, M. de Visser, P. Popelier and C. van de Heyning (eds.), Constitutional Conversations in Europe. Actors, Topics and Procedures, Intersentia 2012, p. 13
- T. Sauvel, Les origines des Commissaires du Gouvernement auprès du Conseil d'État statuant au contentieux, in 55 Revue du droit public et de la Science Politique, 1949, p. 5
- T. Sauvel, Histoire du jugement motivé, in 61 Revue du droit public, 1955, p. 5
- R. Scarciglia, Comparative Methodology and Pluralism in Legal Comparison in a Global Age, in 6 Beijing Law Review, 2015, p. 42
- H. Schepel, R. Wesserling, The Legal Community. Judges, Lawyers, Officials and Clerks in the Writing of Europe, in 3 European Law Journal, 1997, p. 165
- H.G. Schermers, The European Court of Justice: Promoter of European Integration, in 22 The American Journal of Comparative Law, 1974, p. 444
- K. Schiemann, La langue de travail de la Cour, in A. Tizzano, A. Rosas, R. Silva de Lapuerta, K. Lenaerts, J. Kokott (eds.), La Cour de justice de l'Union européenne sous la présidence de Vassilios Skouris (2003-2015). Liber amicorum Vassilios Skouris, Bruylant 2015, p. 563
- T. Schilling, Multilingualism and Multijuralism: Assets of EU Legislation and Adjudication?, in 12 German Law Journal, 2011, p. 1460
- E. Schober, Die Lehre vom 'Acte Clair' im französischen Recht, in 19 Neue Juristische Wochenschrift, 1966, p. 2252
- F. Schockweiler, L'accès à la justice dans l'ordre juridique communautaire», in 25 Journal des tribunaux, Droit européen, 1996, p. 1
- M. Shapiro, Comparative Law and Comparative Politics, in 53 Southern California Law Review, 1980, p. 537
- M. Shapiro, The European Court of Justice, in P. Craig, G. de Búrca (eds.), The Evolution of EU Law, 1st edn, Oxford University Press 1999, p. 321
- M. Shapiro, Judicial Independence: New Challenges in Established Nations, in 20 Indiana Journal of Global Legal Studies, 2013, p. 253
- E. Sharpston, Transparency and Clear Legal Language in the European Union: Ambiguous Legislative Texts, Laconic Pronouncements and the Credibility of the Judicial System, in 12 Cambridge Yearbook of European Legal Studies, 2009-2010, p. 409
- G. Slynn, Court of First Instance of the European Communities, in 9 Northwestern Journal of International Law & Business, 1989, p. 542
- G. Slynn, What is a European Community Law Judge?, in 52 Cambridge Law Journal, 1993, p.

- A. M. Smith, 'Judicial nationalism' in *International Law*, in 40 *Texas International Law Journal*, 2005, p. 197
- M. Smith, *Enforcement, Monitoring, Verification, Outsourcing: the Decline and Decline of the Infringement Process* in 33 *European Law Review*, 2008, p. 777
- B. Smulders, K. Eisele, *Reflections on the Institutional Balance, the Community Method and the Interplay between Jurisdictions after Lisbon*, in 31 *Yearbook of European Law*, 2012, p. 112
- I. Solanke, *Diversity and Independence in the European Court of Justice*, in 15 *Columbia Journal of European Law*, 2008, p. 89
- I. Solanke, *The Advocate General: Assisting the CJEU of Article 13 TEU to Secure Trust and Democracy*, in 14 *Cambridge Yearbook of European Law*, 2012, p. 697
- E. Stein, *The European Coal and Steel Community: the Beginning of its Judicial Process*, in 55 *Columbia Law Review*, 1995, p. 985
- E. Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, in 75 *American Journal of International Law*, 1981, p. 1
- A. Stone Sweet, *The European Court of Justice and the Judicialization of EU Governance*, in 5 *Living Reviews in European Governance*, 2010, available at the website <http://www.livingreviews.org/lreg-2010-2> (accessed 29 July 2015)
- A. Stone Sweet, *The European Court of Justice*, in P. Craig, G. de Búrca (eds.), *The Evolution of EU Law*, 2nd edn, OUP 2011, p. 121
- A. Stone Sweet, T. Brunell, *The European Court and the National Courts: a Statistical Analysis of Preliminary References, 1961–95*, in 5 *Journal of European Public Policy*, 1998, p. 66
- A. Stone Sweet, J. Mathews, *Proportionality Balancing and Global Constitutionalism*, in 47 *Columbia Journal of Transnational Law*, 2008, p. 73
- C.R. Sunstein, *Practical Reason and Incompletely Theorized Agreements*, in 51 *Current Legal Problems*, 1998
- Symposium – *The Future of Judicial Transparency*, in 53 *Villanova Law Review*, 2008
- A.D. Tikhomirov, *Philosophical Problems of Legal Comparativistics*, in 5 *Journal of Comparative Law*, 2010, p. 159
- C. Timmermans, *The European Union's Judicial System*, in 41 *Common Market Law Review*, 2004, p. 393
- A.V. Tkachenko, *Functionalism and the Development of Comparative Law Cognition*, in 5 *Journal of Comparative Law*, 2010, p. 71
- A. Töller, *Mythen und Methoden. Zur Messung der Europäisierung der Gesetzgebung des Deutschen Bundestages jenseits des 80-Prozent-Mythos*, in 1 *Zeitschrift für Parlamentsfragen*,

2008, p. 3

- A. Toth, The Authority of Judgments of the European Court of Justice: Binding Force and Legal Effects, in 4 Yearbook of European Law, 1984, p. 1
- A. Trabucchi, L'effet erga omnes des décisions préjudicielles rendues par la Cour de justice des Communautés européennes, in 10 Revue trimestrielle de droit européen, 1974, p. 56
- G. Tridimas, T. Tridimas, National Courts and the European Court of Justice : a Public Choice Analysis of the Preliminary Reference Procedure, in 24 International Review of Law and Economics, 2004, p. 125
- T. Tridimas, The Role of the Advocate General in the Development of Community Law: Some Reflections, in 3 Common Market Law Review, 1997, p. 1349
- T. Tridimas, Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure, in 40 Common Market Law Review, 2003, p. 9
- T. Tridimas, Constitutional review of member state action: The virtues and vices of an incomplete jurisdiction, in 9 International Journal of Constitutional Law, 2011, p. 737
- L. Trosanyi, A. Horvath, La pratique des opinions dissidentes en Hongrie, in 8 Nouveaux Cahiers du Conseil Constitutionnel, 2000, available at the website www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-8/la-pratique-des-opinions-dissidentes-en-hongrie-les-opinions-individuelles-en-hongrie-une-institution.52544.html
- S. Turenne, Constitutional Adjudication and Appointments to the UK Supreme Court, in S. Shetreet (ed.), The Culture of Judicial Independence, Brill 2014, p. 396
- G. Vandersanden, A Desired Birth: The Court of First Instance of the European Communities, in 21 Georgia Journal of International and Comparative Law, 1991, p. 51
- G. Vandersanden, Pour un élargissement du droit des particuliers d'agir en annulation contre des actes autres que les décisions qui leur sont adressées», in 31 Cahiers de droit européen, 1995, p. 535
- W. van Gerven, The Role and Structure of the European Judiciary Now and in the Future, in 21 European Law Review, 1996, p. 211
- M. Van Hoecke, M. Warrington, Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law, in 47 The International and Comparative Law Quarterly, 1998, p. 495
- K. Van Leeuwen, On Democratic Concerns and Legal Traditions: The Dutch 1953 and 1956 Constitutional Reforms 'Towards' Europe, in 21 Contemporary European History, 2012, p. 357
- H. F. van Panhuys, The Netherlands Constitution and International Law, in 47 American Journal of International Law, 1953, p. 537

- H. F. van Panhuys, The Netherlands Constitution and International Law. A Decade of Experience, in 58 American Journal of International Law, 1964, p. 88
- A. Vauchez, The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda), in 2 International Political Sociology, 2008, p. 128
- A. Vauchez, The Transnational Politics of Judicialisation: Van Gend en Loos and the making of EU polity, in 16 European Law Journal, 2010, p. 1
- I. Venzke, Understanding the Authority of International Courts and Tribunals: On Delegation and Discursive Construction, in 14(2) Theoretical Inquiries in Law, 2013, p. 382
- B. Vesterdorf, A Constitutional Court for the EU?, in 4 International Journal of Constitutional Law, 2006, p. 607
- M. Vink, M. Claes, C. Arnold, Explaining the Use of Preliminary References by Domestic Courts in EU Member States: A Mixed-Method Comparative Analysis, paper presented at the 11th Biennial Conference of the European Union Studies Association, Marina del Rey 24 April 2009, available at the website http://aei.pitt.edu/33155/1/vink_maarten.pdf
- W. Voermans, Judicial Transparency Furthering Public Accountability for New Judiciaries, in 3 Utrecht Law Review, 2007, p. 148
- E. Voeten, The Impartiality of International Judges: Evidence from the ECtHR, in 102 American Political Science Review, 2008, p. 417
- E. Voeten, The Politics of International Judicial Appointments, in 9 Chicago Journal of International Law, 2009, p. 389
- M.L. Volcansek, Appointing Judges the European Way, in 34 Fordham Urban Law Journal, 2006, p. 363
- A. von Bogdandy, The European Lesson for International Democracy. The Significance of Articles 9 to 12 EU Treaty for International Organizations, in 23 European Journal of International Law, 2012
- A. von Bogdandy, The Democratic Legitimacy of International Courts: a Conceptual Framework, 14 Theoretical Inquiries in Law, 2013, p. 361
- A. von Bogdandy, I. Venzke, Beyond Dispute: International Judicial Institutions as Lawmakers, in 12 German Law Journal, 2011, p. 979
- A. Von Bogdandy, I. Venzke, In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification, in 23 European Journal of International Law, 2012, p. 7
- W. von Eyben, Judicial Law making in Scandinavia, in 5 American Journal of Comparative Law, 1956, p. 112
- A. von Mehren, The Judicial Process: A Comparative Analysis, in 5 American Journal of

Comparative Law, 1956, p. 197

- M. Vranken, Role of the Advocate General in the Law-Making Process of the European Community, in *Anglo-American Law Review*, 1996, p. 39
- D. Waelbroeck, A.M. Verheyden, Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires: à la lumière du droit comparé et de la Convention des droits de l'homme, in *31 Cahiers de droit européen*, 1995, p. 399
- N. Walker, Legal Theory and the European Union: A 25th Anniversary Essay, in *25 Oxford Journal of Legal Studies*, 2005, p. 581
- C. Walter, La pratique des opinions dissidentes en Allemagne, in *8 Nouveaux Cahiers du Conseil Constitutionnel*, 2000, available at the website <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-8/la-pratique-des-opinions-dissidentes-en-allemande.52541.html>
- J.P. Warner, Some Aspects of the European Court of Justice, in *4 Journal of the Society of Public Teachers of Law*, 1975, p. 15
- S. Weatherill, After Keck: Some Thoughts on How to Clarify the Clarification, in *33 Common Market Law Review*, 1996, p. 885
- J.H.H. Weiler, The Transformation of Europe, in *100 Yale Law Journal*, 1991, p. 2403
- J.H.H. Weiler, Journey to an Unknown Destination. A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration, in *31 Journal of Common Market Studies*, 1993, p. 417
- J.H.H. Weiler, A Quiet Revolution. The European Court of Justice and its Interlocutors, in *26 Comparative Political Studies* 1994, p. 510
- J.H.H. Weiler, Europe: The Case Against the Case for Statehood, in *4 European Law Journal*, 1998, p. 43
- J.H.H. Weiler, On the Distinction between Values and Virtues in the Process of European Integration, paper of the Institute for International Law and Justice, International Legal Theory Colloquium Spring 2010, available at the website <http://iilj.org/courses/documents/2010Colloquium.Weiler.pdf>
- J.H.H. Weiler, The Political and Legal Culture of European Integration: An Exploratory Essay, in *9 International Journal of Constitutional Law*, 2011, p. 678
- J.H.H. Weiler, Revisiting Van Gend en Loos: Subjectifying and Objectifying the Individual, in *Court of Justice of EU, 50th Anniversary of the Judgment in Van Gend en Loos 1963-2013, Conference Proceedings – Luxembourg, 13th May 2013*, available at the website http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-12/qd30136442ac_002.pdf
- J.H.H. Weiler, J. Trachtman, European Constitutionalism and Its Discontents, in *17 Northwestern*

Journal of International Law & Business, 1997, p. 354

- M. Wells, French and American Judicial Opinions, in 19 Yale Journal of International Law, 1994, p. 85
- R.C.A. White, I. Boussiakou, Separate Opinions in the European Court of Human Rights, in 9 Human Rights Law Review, 2009, p. 37
- M. Wind, The Nordics, the EU and the Reluctance Towards Supranational Judicial Review, in 48 Journal of Common Market Studies, 2010, p. 1048
- M. Wind, D.S. Martinsen, G.P .Rotger, The Uneven Legal Push for Europe. Questioning Variation when National Courts go to Europe, in 10 European Union Politics, 2009, p. 63
- G. Zagrebelsky, La pratique des opinions dissidentes en Italie, in 8 Nouveaux Cahiers du Conseil Constitutionnel, 2000, available at the website <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-8/la-pratique-des-opinions-dissidentes-en-italie.52545.html>
- M. Zürn, M. Binder, M. Ecker-Ehrhardt, International Authority and its Politicization, in 4 International Theory 2012, p. 69

All the abovementioned websites were accessible on 26th August 2015.

All the references to relevant judicial cases, legislation, institutional material in general, are provided in extenso in the footnotes of the dissertation.