EDITORIAL - JUDGING JUDGES

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I. THE VIRTUOUS JUDGE

The trial and subsequent execution of Socrates in Athens in 399 B.C. has puzzled historians; posed considerable challenges to classical linguists; inspired philosophers and teachers; and last but not least, posed substantial dilemmas to legal theorists and practitioners alike:[1] What prompted five hundred Athenian men to impose the death penalty on a seventy year old philosopher? How to capture in modern languages the colour and sentiment expressed in Classical Greek? How to assess Socrates' engagement of his prosecutors and judges both from an ethical and legal perspective?

When Socrates faced the assembly of men chosen by lot to judge his guilt on charges of impiety and corrupting the young through teaching them about "things aloft and under the earth", being foreign to the manner of speech before a court of law, Socrates appealed to his judges to leave aside the style of his words, pleading: "for perhaps it may be worse, but perhaps better - and instead consider this very thing and apply yourmind to this: whether the things I say are just or not; for this is the virtue of a judge, while that of an orator is to speak the truth". [2]

Socrates did not accept that he was merely subjected to the will of those that have power, arguing that his actions are valuable in a democratic society, and do not warrant criminal prosecution. In expanding his arguments, through the interpretative quill of Plato, he suggested there is a connection between law and reasoned justice, and a virtuous judge is to adjudicate on this basis. However, as is clear from the course of the proceedings, law is not only linked to justice, and as his defence falters and Socrates is found guilty, it becomes apparent that law can be an instrument of violence, coercion, intolerance and oppression, and hence of injustice. In exploring the riddle as to why the Oracle of Delphi found him to be the wisest of men, Socrates -through questioning the purportedly wise men of Athens- came to a single conclusion: after decades of practice, of confronting Athenians in discussions, of challenging their conceptions of justice and how to live the good life, Socrates knew one thing; that when he knows nothing, he is wise because he does not suppose that he knows.[3]

In a similar vein, the second issue of the EJLS seeks to question common

assumptions and hypotheses on the role of the judge, and thus develop our knowledge on a broad range of issues related to judges, both from an international, European, comparative and theoretical perspective. Rather than trace the seventeen contributions to this issue according to the section in which they appear, the articles have been embroidered on Plato's Apology and discussed according to their central theme: the judicial role in a globalising society, the nature of judicial reasoning, the role of justice, injustice; or, more rudimentary, emotions and intellectual curiosity of the judge in adjudication. Indeed, the contrast with Socrates' words when facing the plenum of Athenian judges highlights that these and other questions related to adjudication are as controversial in the 21st century as they were more than two millennia ago.

II. Justice and judicial cosmopolitanism

The theme of justice in adjudication which figures so prominently in Plato's Apology is central throughout the international law section. Several of our contributors focus on the relationship between justice and law, and the increasingly important function of the judge in a globalising society,[4] flowing forth from, and closely related to, the relationship of law and justice. Ernst-Ullrich Petersmann argues that judges have a constitutional duty to settle disputes in conformity with principles of justice, as increasingly shaped by human rights. Building on this submission, he then posits that in the context of the European multilevel judicial system,[5] justice in adjudication at all echelons of that system was and is instrumental in the development of multilevel judicial cooperation, given that constitutional rights provided the justification for convergence and cross-fertilisation between the different levels.

David Ordóñez-Solís equally touches upon this theme, offering a distinct account through a bifurcated prism: firstly that of the power of the judge, and secondly the language and arguments s/he employs in deciding the case in hand. In relation to the power of the judge, he, as Petersmann, emphasises the importance of the protection of private parties' fundamental rights in the rapprochement of the judicial actors in the European multilevel system. When discussing the role of language and argumentation in the Anglo-Saxon and continental 'legal adjudicative cultures' encompassed by the European multilevel system, he reports that structure of reasoning, conceptions of the role of the judge, and other social differences and corresponding sensitivities are fading away, and converge in the European judges appreciating new judicial models that are represented by the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR). Based on this, he concludes that for the attainment of a judicial cosmopolitanism, the international judicialisation

of human rights is acondition sine qua non although it seems at this moment a utopia. Petersmann, using a different but highly complementary set of case-law, formulates a similar conclusion, and hence it is recommended that these contributions be read in tandem.

Miguel Poiares Maduro and Pierre-Marie Dupuy, each within their respective fields, equally focus on 'the globalisation of law' and the challenges related to a legal system with multiple levels; but move away from the previous two authors' focus on justice and fundamental rights and centre more on the institutional, procedural and interpretational side of the coin. Dupuy, as Ordóñez-Solís, sketches a model of what a true judicial cosmopolitanism could look like, with the ICJ as a universal supreme court and an organic hierarchy of national and international jurisdictions to guarantee the respect of any normative overlap; and subsequently richly explores the path towards completing that model. In the final section of his contribution, Dupuy finds that "at the end of the day, the integration of international law will depend on what the judges decide to do with it", and the author is particularly strong in his conclusions on the role for the ICJ in the unified application of international law: all depends on the mindset of the judges who, when it comes to such issues as a preliminary question procedure at the international level, prove themselves somewhat naïve when it comes to political realism and diplomacy. Finally, Dupuy concludes, and one certainly ought to contrast this with Petersmann's views on the role of justice in multilevel adjudication, that institutional architecture is less important than the mental one, the latter being the deciding factor.

Miguel Maduro's contribution gives further insight into the role of the judge in the multilevel judicial system focusing on the specific role of the ECJ in a context of internal and external (constitutional) pluralism, and the necessity for this court to provide normative guidance to the community of actors in EU law, notably the national courts. In so doing, he further expands his ideas on the use of comparative methods of interpretation and the use of the teleological interpretational method by the ECJ, the appropriateness of which are explained by the nature of the EU legal order. Thus, a teleological interpretation in EU law does not refer exclusively to a purpose driven interpretation of the relevant legal rules, but to a particular systemic understanding of the EU legal order that permeates the interpretation of all its rules.

What Petersmann and Ordóñez-Solís discuss through the prism of justice and fundamental rights, what Maduro sees not as judicial activism but as "a systemic understanding of EU law", Dupuy states more boldly: the role, mindset and power of the judge is crucial and decisive in the legal

pluralist context and future evolutions therein. These four contributions, which of course present much more complex arguments than can be succinctly set out in this context, nonetheless help us to further understand and contextualise the power of judges beyond the realist view that adjudicated outcomes might be determined by what the judge 'had for breakfast'. These articles, tied together by their relationship with an emergent judicial cosmopolitanism, are further enriched by -among others- the accounts given by three judges' experiences in that multilevel judicial system. A first such complementary article is the taxonomy of judicial dialogue provided by Judge Allan Rosas of the ECJ as it adds to Maduro's contribution, which is linked to the body of literature on constitutional pluralism, but also gives an insider's view to the concept of 'judicial communication' and/or 'dialogue'.

III. JUDGE'S EMPIRE

Rosas argues that the role of the judge in formulating values and principles through a deliberative process with decision-makers is crucial, and helps to mitigate the hardships and anxieties felt by many in a sea of change. Thus, Plato and Socrates are joined by Judge Rosas who submits that the judge's participation in that process involving law-formulation and justice is an indispensable part of the judicial profession. If such leads the ECJ to being accused of 'judicial activism', then this is due to an overly narrow conception of the role of the court as a mere economical court, rather than a (quasi-) constitutional one.

Nonetheless, one should not forget the lesson found in Plato's Apology. Socrates, in defiance of common custom before an Athenian court, refused to seek mercy from his judges who were given power over life and death; and in a Society which deemed itself civilised and above all democratic, a man who vigorously questioned common assumptions was put to death.

Jacques Lenoble in his article calls precisely for the questioning of the mentalist assumptions underlying a traditional concept(ion) of law. So as to ensure the guiding function of law, one should epistemologically look at the rule of recognition, and more importantly to its choice and identification by judges, a choice which is ultimately based on background representations. Thus, any sound analysis of governance by law must address these background representations, one that would allow for the participation of the citizens in the process, and this is the challenge taken on and tackled by Lenoble's genetic approach "which [...] takes into account all the conditions of 'engenderment' of the convention by which law is defined" and strives for a democratic concept of law.

These considerations are even more crucial given that, as Michel Troper's contribution reminds us, if we start from the classical definition of democracy (a system in which power is exercised through general rules adopted by the people or its elected representatives), that the current-day governments under which we live are not democratic. At most, under that classical definition, they can be considered as mixed regimes with both democratic and aristocratic elements, the latter being the judges creating general rules and the former in the form of parliament. Current governments could even be defined as 'polysynodies', aristocratic regimes in which power is exercised by a number of collegial aristocratic organs, where only the procedures of appointment differ.

While the unquestionably pivotal role of the ECJ in European integration is somewhat less dramatic than a miscarriage of justice with lethal consequences, all contributors to the EJLS 2nd issue agree on one point: the power of the (international, European, etc.) judge has grown rapidly over the past two decades, a process which is still ongoing. While this is not necessarily a bad thing, some caution is in place. In the interview with Judge Rudolf Bernhardt, former President of the ECHR, the EJLS sought to explore further the realm of the judge as a creator of law or as a mere mouthpiece engaging in simple legal syllogisms. In seeking to provide the reader with a view from the inside, Judge Bernhardt expresses the need for self-restraint on the part of what Troper considers the aristocrats: a judge should apply a "certain reticence" when walking the tightrope of application, interpretation and creation of law. Indeed, referring to the United States, he posits that the judge should avoid judicial activism, and adjudication should "not mean the labelling of a personal agenda as jurisprudence", which in Troper's view captures the essential tension between the legislative and judicial power, and thus of political liberty and democracy. Bernhardt is joined in this view by Benedetto Conforti, former judge of the ECHR, who greets the strengthening of the judicial function at the international, regional and national level with enthusiasm, so long as it does not degenerate into a governo dei giudici, the rule by judges.

The contribution by Noora Arajärvi focuses on the judge as a lawmaker in the field of international criminal law, with particular emphasis on the ICTY. From her contribution it emerges that this tribunal (rightly or wrongly?) oversteps the boundaries of judicial reticence as identified by Judge Berhnardt. Her research finds that quite often the ICTY has invoked its own precedents as evidence for the emergence of customary international law, on which it subsequently bases its decision. Additionally, the paper shows that the frequency of this occurrence raises the question

whether the concept of state practice itself is becoming outdated, and that as a source of international criminal law it is being replaced ever more by judicial interpretation. As the role of judges increases, so does their impact in international custom of their diverse approaches and different methodologies in adjudication, thus contributing to the fragmentation of this body of law; which, as this author seems to conclude, is not necessarily a bad thing.

Mattias Kumm's contribution is highly suitable to bring to a close this section related to the role and power of the judge in society, as his article presents a defence of European judicial review, countering the recent "cases against judicial review" as presented by Jeremy Waldron and Richard Bellamy.[6] In doing so, Kumm draws very much on the Socratic method of contestation. Questioning the common wisdom of Athenian society should not be viewed as something dreadful, leading Socrates to being put on trial; but rather it is beneficial to the polis in which he lives, and thus, if anything, he should be rewarded through being served his meals with the highest dignitaries. Indeed, according to Kumm, the value of judicial review in Europe lies in the legal institutionalisation of a practice of Socratic contestation: the critical engagement of public authority which ensures that their decisions are based on reasonable and plausible justifications. In that sense, judicial review does not merely add legalistic burdens to the political debate, or produce democratically illegitimate outcomes, but, in fact, judicial review as Socratic questioning is desirable because it expresses a deep commitment to liberal democracy.

At times, unfortunately, democracies falter, and societies are thrown into unrest, turmoil and even bloodshed. When that society then finally manages to overcome this difficult period, seeking to throw off its troubled past, come to terms with it, and fully re-establish its commitment to the rule of law and democratic values, then too, the role of judicial review is pivotal.

IV. JUDGES AND SOCIETIES IN TRANSITION

The trial of Socrates took place in 399 B.C., four years after the reinstatement of the Athenian democracy which had been overthrown by the infamous oligarchy of the Thirty, a violent episode in which Critias and Charmides, two former associates of Socrates, were involved. Subsequently, Socrates and his teachings were no longer considered as being so harmless, but rather quite perilous as they had allegedly incited and corrupted the minds of the young thus leading to these violent episodes in Athenian history. In relation to that accusation, this editorial already raised the question: "what might have prompted a society that

deemed itself civilised and democratic to condemn to death this old man"? A partial answer must be sought after in the field of 'transitional justice': the difficult choices a society faces when transitioning from violent, undemocratic regimes to peaceful, democratic ones. While the word 'transition' is rather self-evident: passing from one condition to the other,[7] justice in this field, as in any, is more elusive. 'Justice in transition' (two words which seem to be somewhat of a mismatch) can take many shapes and forms. One might seek the truth about the painful past, and in return proclaim a sweeping or limited amnesty for the actors responsible for those actions; one might seek to prosecute and punish the persons involved, applying a wide range of punishments; or as an alternative one might seek to reconcile the citizens through a process of dialogue, education and uncovering the truth of the difficult past.[8] The role of the judge in this process of transition can range from rather marginal to absolutely pivotal, and Marek Safjan, president of the Polish Constitutional Court from 1997 to 2006, explains the challenges faced by a constitutional court in finding a balance between different and competing rationales for lustration in transitional societies. Indeed, 'transitional justice' brings with it the challenge of being 'temporary', a notion which does not fit well with 'justice', per se. Hence, when seeking to purify the new Polish democracy of its potential 'contaminants' from the communist past, judges were and are faced with a difficult balancing exercise. When the court is represented with the societal choice for retributive justice, it needs to act in conformity with what is perceived to be the public interest: the prosecution of collaborators with the former regime; but it evidently seeks to commit itself to the democratic values that have been re-instated, and hence it seeks to respect the individual rights of the 'wrongdoers'. In adjudicating such cases, the judge not only has great power, but also great societal responsibility. Safjan's contribution gives the reader an insider's opinion on the approach followed by the Polish Constitutional Court in its case-law, when faced with exactly that dilemma. He argues that only a well balanced attitude manifested by the series of the judgments of the constitutional court allowed the real revolutionary and radical break from the totalitarian past. However, in this final conclusion, he does recognise that some harm done by the former regime, unfortunately, can never be undone.

Darinka Piqani's contribution also looks to the future, but shifts the focus from the national legal order to the European legal order, and discusses the power and role of constitutional courts of central and Eastern European countries (CEEC) in the integration of these countries into the European Union. Through an analysis of pre- and post-accession case law, she finds that there too, the judges were aware of their broader societal role. On the one hand, she finds through an exegesis of relevant CEEC case-law that

the constitutional courts adopted a friendly, pro-European stance, welcoming the political changes in which they found themselves; while, on the other hand, not losing sight of their role and allegiance to their own national constitutions and the fundamental rights contained therein.

V. THE MANAGEMENT OF THE ADJUDICATIVE PROCESS

Following the vote by which Socrates was found guilty by the plenary of Athenian citizens, Meletus, Socrates' prosecutor, proposes the death penalty. Following his speech, it is up to Socrates to make a counterproposal, and first he suggests that he be given his meals in the Prytaneion, where usually ambassadors, distinguished foreigners, and citizens who had done signal service to the city-state were entertained. After laconically mentioning this, Socrates returns to the subject of justice, defiantly comparing the procedure to which he is subjected to that of Sparta, the arch-enemy of Athens:

"If you had a law like other human beings [Sparta had such a policy], not to judge anyone in a matter of death in one day alone, but over many, you would be persuaded. But as it is, it is not easy in a short time to do away with great slanders".[9]

The EJLS comparative law section contains two articles which do not focus on traditional elements of due process and procedural justice as one might expect from Socrates' excerpt above, but, approach comparatively the adjudicative process through the organisational prism, as an activity which needs to be managed, funded, subjected to quality control, and held accountable, all with the final objective of effectively rendering and doing justice, an end-goal towards which different jurisdictions have different solutions. Richard Mohr and Francesco Contini study these challenges in nine different European countries, and reveal that the practices in these countries have to face common problems such as the conflict between accountability and the insistence on judicial independence, problems to which different countries have different solutions. The article attempts to reach solutions that resulted solely into a ritualism that failed to improve judicial performance; but equally draws attention to responses and solutions that proved effective. So as to achieve that goal, they conclude, it is necessary to ensure the effective collaboration and involvement of such interested parties as judges, managers and the public.

The article by Marco Fabri and Philip M. Langbroek further embroiders on the theme of organisational efficiency through the comparative lens, but focuses on a more specific issue; i.e., that of case

distribution and assignment, a central issue in court organisation because it is essential to the practice of rendering justice and the balance between judicial impartiality and court organisation. This contribution digs deep into the world of national judges, and uncovers a range of interesting elements that influence case assignment, ranging from formal process so as to ensure equality among the judges, to the informal exchange of cases between judges.

VI. Speech, sentiment and sensation

Judges are not gods, semi-gods or heroes like Hercules, immensely wise and fully knowledgeable, but rather human beings influenced by education and socialisation, by intellectual interests and political convictions, by sensation and sentiment which they inadvertently or expressly entrench in their task of adjudication. Emotions too are highly influential in the act of doing justice, and hence require further exploration. In Plato's Apology, emotion emerges as central in adjudication in at least two ways. The first has been touched upon already, and relates to the fact itself that Socrates was put on trial, the societal emotions that his teachings and subsequent acts of his pupils evoked in antique Athens. The second relates to the role of emotion in the adjudicative process itself, and there too the Apology highlights that language and sentiment are of great importance in Greek adjudicatory custom: it is the blatant refusal of Socrates to follow this custom that was pivotal in Socrates' guilty verdict.

Indeed, it was expected from the accused that he would seek the pity of the jurors, bringing in family, friends and children, so as to avoid being found guilty, or at the very least having the sentence reduced to exile rather than execution. However, Socrates stated that he "will do none of these things, although in this too I am risking, as I might seem, the extreme danger". He added, reflecting on the possible reaction of his judges, that "perhaps, then, someone thinking about this may be rather stubborn toward me, and, angered by this very thing, he may set down his vote in anger".[10] After mentioning various reasons as to why Socrates refuses to involve those close to him in a plea for mercy, he ends by saying that:

"To me it also does not seem to be just to beg the judge, nor to be acquitted by begging, but rather to teach and to persuade. For the judge is not seated to give away the just things as a gratification, but to judge them. For he has not sworn to gratify whoever seems favourable to him, but to give judgment according to the laws. Therefore we should not accustom you to swear falsely, nor should you become accustomed to it".

These passages, together with those mentioned earlier in this paper, further highlight the potency of Plato's analysis. Not only does it concern the role of adjudication in a purportedly democratically governed system, or brings us to think on what justice might entail in such a society, but it also very much focuses on the judge as a human susceptible to various external and internal influences, and the ways in which these can be expressed and communicated.

The article by Carlos L. Bernal studies the language of judges; i.e., it focuses on adjudication through the theory of 'speech acts'. While it is difficult to succinctly capture this contribution without doing injustice to it, essentially, the analytical theoretical approach expanded upon seeks to uncover the ontology of a judicial decision through the application of the speech act theory. In doing so, the article evaluates the logical sequence of illocutionary acts which constitute a judicial decision in terms of true or false; correct or incorrect, and valid or invalid. In providing this account, the article also seeks to contribute to the theory of speech acts per se; namely, in analysing speech in the highly institutionalised context of adjudication.

That the content of the speech act is very much a reflection of the psychological state of the judge is further expanded by the contribution of Marie-Claire Belleau, Rebecca Johnson and Valérie Bouchard, and more in particular the presence of 'anger' in law and adjudication. The article argues that 'wrath' is a persistent judicial emotion, which the authors explore through an in-depth exegesis of several opinions of the justices on the Canadian Supreme Court. In this case, the Court was visibly split in relation to a case of incestuous paedophilia, and where legal technicalities lead the justices to thoroughly disagree on the need to order a re-trial, and thus for the family and victims to undergo the same painful process from the start; or rather to confirm the original conviction. The contribution, especially when read in the broader context of the judge as needing to walk the tightrope of judicial philosophy or political ideology, is highly thought provoking on the role of anger as either being appropriate or inappropriate depending on its relation to, and effect on, justice. Indeed, anger can be aroused because of injustice, and thus channel and support 'doing justice'; but equally, as with Socrates, this emotion can lead to injustice through negatively affecting objectivity. Additionally, anger might be caused by the suffering that doing justice entails, but be the unfortunate and necessary side-effect of justice.

VII. Conclusion

Socrates was accused of corrupting the young by teaching them "the things

aloft and under the earth". Faced with this indictment he confronts his accuser Meletus by asking:

> - "If I, Socrates, corrupt them, then who can make them better?"
> - To which Meletus responds: "the laws".
> - Socrates retorts: "I am not asking this, best of men, but rather what human being is it who knows first of all this very thing, the laws?"
> - To which Meletus replies: "these men, Socrates, the judges".[11]

Whether laws make people better, or whether judges do; whether judges pursue their political ideology, or rather a 'judicial philosophy'; whether they manage to walk the tightrope of judicial activism and the application of justice; and whether speech is a mere cover for the judge's emotions; all that might not have been definitely settled by second issue of the EJLS. Nonetheless, following in the 2500 year old footsteps of Socrates, each contribution has questioned common assumptions on judges, power, law, justice, etc. (to name but a few), and shed further light on the topics they cut into, in the hope that some day, a legal order might emerge in which people are not persecuted, jailed, or worse, for their convictions on "things aloft and under the earth".

REFERENCES

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[1] I.F. STONE, The Trial of Socrates, Boston, Brickhouse, 1988; H.M. HERMAN, The Trial of Socrates from an Athenian point of view, Kgl. Danske Videnskabernes Selskab, 1995, p. 36, who states that Stone in his book neglected several important sources, and misinterpreted others; P.E. EASTERLING, The Cambridge history of Classical Literature, Vol. I, Greek Literature, Cambridge, Cambridge University Press, 1985; J.A. COLAIACO, Socrates against Athens: Philosophy on Trial, New York, Routledge, 2001; R. BONNER, "The Legal Setting of Plato's Apology", Classical Philology, Apr. 1908, pp. 169-177.

[2] Translation of Plato's Apology taken from: T.G. WEST and G.S. WEST, Four Texts on Socrates: Plato's Euthyphro, Apology, and Crito and Aristophanes' Clouds, New York, Cornell University Press, revised ed., 1998, p. 64; the authors add in a note that virtue is to be interpreted as the specific excellence of a thing, that excellence may or may not involve what we call morality.

[3] T.G. WEST and G.S. WEST, Four Texts on Socrates, o.c., pp. 69-72.

[4] That the importance of the judge is increasing, or at least has increased over the past few decades, is a common that emerges from the articles in this issue.

[5] By which he refers to the relationship of the European Court of Justice and the Court of First instance to the national courts; the relationship between the EFTA Court and national courts, and the European Court of Human Rights and national courts.
[6] J. WALDRON, "The Case against Judicial Review", Yale Law Journal, 2006, pp. 1348-1406; R. BELLAMY, Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy, Cambridge, CUP, 2007.
[7] See further, on the notion of 'transitional justice': M. AUKERMAN, "Extraordinary Evil, Ordinary Crimes: A Framework for Understanding Transitional Justice", Harvard Human Rights Journal, 2002, pp. 39-97; D. CROCKER, "Reckoning with Past Wrongs: A Normative Framework", Ethics and International Affairs, 1999, pp. 43-67.
[8] The Athenians had proclaimed a general amnesty four years prior to Socrates' trial, but another failed uprising two years thereafter in 401 B.C. seems to have tipped the balance from reconciliatory justice to retributive justice.
[9] T.G. WEST and G.S. WEST, Four Texts on Socrates, o.c., p. 91.
[10] Ibid., pp. 87-88.
[11] Ibid., p. 73.

JUDGE'S EMPIRE?
INTERVIEW WITH RUDOLF BERNHARDT

Kai P. Purnhagen*, Emanuele Rebasti**

Prof. Dr. Rudolf Bernhardt is the former President and Vice-President of the European Court of Human Rights, Strasbourg (France) and former Director of the Max Planck Institute for Comparative Public Law and International Law, Heidelberg (Germany). The interview was held at the European University Institute, Florence (Italy) in German and English.

I. INTRODUCTION

The role of the judge has probably been subject to discussion since the need of dispute resolution was first identified. In developed legal systems, adjudications nowadays are accepted as an integral part of society. On an international level, recent legal treaties provide a powerful position for the judge: Art. 220 § 1 EC states that the EC Courts ensures "that in the interpretation and application of this Treaty the law is observed". Art. 32 § 1 ECHR describes the role of jurisdiction as to "extend to all matters concerning the interpretation and application of the Convention and the protocols thereto". But not one of the international treaties empowers the judge to make or even develop law.[1] Nevertheless, there is no doubt that adjudications are an integral part of the law making process, though critics continuously argue that international judges exceed their limits.[2]

The legal philosopher Dworkin defines the role of the judge through the image of Hercules, an omniscient judge: "When [Hercules] intervenes in the process of government to declare some statute or other act of government unconstitutional, he does this in service of his most conscientious judgement about what democracy really is and what the Constitution, parent and guardian of democracy, really means".[3] However, Dworkin sees Hercules as a server of the law; that is why his book, where this statement was made, was called Law's Empire. If judges exceed their limits and step out of the legal framework provided, we head to a 'Judge's Empire' beyond the law; or, in German terminology, the Rechtsstaat would emerge to a Richterstaat.[4] We had the opportunity to ask Prof. Dr. Bernhardt about his opinion on whether the international system had already emerged as such a 'Judge's Empire'. With a twinkle in his eye, he replied that we ought to take caution, because agreeing with Dworkin's doctrine would mean perceiving that "any judge's opinion is itself a piece of legal philosophy".[5]

II. Interview

1. *The role of the judge in the European Union*

EJLS: Mr. Bernhardt, is the European Union a 'Judge's Empire' [Richterstaat]?

Bernhardt: Firstly, I have to clarify that I have been only a member of the European Court of Human Rights (ECHR). Therefore, my personal experience with the Court in Luxembourg is limited; this Court has to face completely different situations. Nonetheless, I have reviewed the judgements and the development of the European Court of Justice (ECJ), but I find it extraordinarily difficult to adequately answer your question. It is unquestionable that the ECJ has played a major role in the process of European integration. Thus, the Court is prevalently referred to as the engine of European integration. Indeed, we can say nowadays that a large number of decisions have paved the way for a strong integration of the European Union and Community, for instance concerning the absolute precedence of Community law over national law. Whether this process will continue in this way in the future is a question I could only answer if I had visionary abilities. However, to me there seems to be one difficulty. With the current reforms of the European Union it is likely that the principle of subsidiary will be emphasised more strongly. That means, in general, that the possibility of national rather than European decision-making will be emphasised much more. To come back to your question, I do think that the ECJ will still play a major role in integration process. Nevertheless, we will have to wait and see if the process will evolve with the same verve and speed as it did in the past. I cannot imagine, however, that there will be a standstill or even a regression.

EJLS: The ECJ has without doubt issued path-breaking decisions. You mentioned the judgement on the supremacy of EC law and we would like to add the whole case law on the creation, or finding of, European basic rights. Taking into account their normative basis, the decision was mainly based upon Art. 220 § 1 EC, which obliged the ECJ to ensure that "the law is observed". This formulation gave reason to the ECJ to find or create basic rights. Can this still be called interpretation of law or does it warrat the terminology of 'creation'? Was the ECJ exceeding its interpretatory limits? Or, to ask in more general terms, is there any borderline between interpretation and creation? When do we have a Judge's Empire [Richterstaat] rather than a Law's Empire [Rechtsstaat]?

Bernhardt: Again you have addressed an extraordinary difficult question.

I have contested in many occasions that there is a clear line between the creation and interpretation of law. It always means to walk a tightrope. Each judicial decision combines the interpretation and the knowledge of law with, to a certain extend, the creation of law. But one should avoid what Americans call 'Judicial Activism'. A very important question is whether the judge contains himself within the limits of interpretation and application of the law in the sense, that he develops law only step by step, or if he sees himself as the engine of the development. In this case it might become problematic where the judge is too much convinced of his role as a law creator and just labels his personal goals and opinions as jurisprudence. This is a thin line that the judge has to draw. Personally, I have the opinion that a certain reticence of the judge often is the better way. But he will never avoid creating law, even though he shows the most reluctance possible.

2. *The role of the judge in international law*

EJLS: In international law the borderline between interpretation and creation might even be more vague than in EU law. For instance, new notions are discussed, for example in humanitarian law, that seem to provide judges with a more powerful role in terms of establishing new norms at the international level. Is the role of a judge changing at the international level? And, if the answer is yes, how is it changing?

Bernhardt: Again, I am a little bit reluctant to give a very clear answer. Let us take two international courts with quite different tasks. The International Court of Justice (ICJ) in The Hague and the other example is the ECHR in Strasbourg. The ICJ still only decides interstate cases and I do not see that the ICJ really tries to develop the law. I think it still is to a great extent reluctant to do so.

I follow the case law of the ICJ carefully but nevertheless it is extremely difficult to answer your question in relation to this court and I still do not think that it really plays an outstanding role in the creation of international law as part of interstate law. The situation in the ECHR is to a certain extent different. The ECHR can be more usefully compared to a national constitutional court. It has to decide cases in which people are asking for a judgement against their own state. And the ECHR is always in the extremely difficult situation where it has to decide not only many cases of minor importance but also extremely difficult cases. Take for instance the cases concerning the Russian activity in Chechnya. Here you have the first judgements of the Strasbourg court 'condemning' Russia, but nevertheless I am sure that the Russian government still thinks that the Strasbourg court is going much too far. But in the area of human rights I think that an

international court cannot behave otherwise than, to a certain extent, apply and create the law in respect of extremely difficult situations. The same is not only true for Russia and Chechnya, but also for the Turkish situation in the Kurdish area. So, coming back to your starting question, whether the international judge is really more or less promoting international law I would say again there is a certain medium situation. In international law I generally think that the judge does not play an outstanding role. In terms of matters concerning European human rights, things are different: If we consider that we do have not only the ECHR but also the Inter-American Court of Human Rights, we have to admit that the judges of the Inter-American Court are sometimes going further than the ECHR would do. Accordingly they may be a promoter of international human rights law. But one must see the general danger that international courts are still dependant on the co-operation of national governments and if an international court is pronouncing judgements which seem to be unacceptable to governments, it might well be that they are no longer willing to accept or to follow their respective judgements.

EJLS: Let us switch the perspective to the role of the judge from the view of the individual. What is, generally speaking, the role that the individual has gained on an international level? Does this new role of the individual have any effect on the role of judges and the function of international law? How are those dynamics reshaping the role of judges in their relationship with the other states and other powers within the state?

Bernhardt: Again one must probably differentiate. In the last fifty years the ECHR has decided more and more cases concerning human rights and the individuals have always been the applicants in these disputes. Until now I think one can say that the judgements of the human rights courts had great influence on the development of the national legal orders. In most western European states considerable changes in law have taken place as a consequence of the Strasbourg case law. And the same might be true for the Western hemisphere, America included, except for the United States which never took part in all these judicial activities. I think that the role of international human rights courts and the judges of these courts have gained much importance in relation to the legal orders of Europe in general concerning human rights. But again I am a little bit afraid that this might change if I look to the difficulties in Strasbourg and the fact that the court in the near future will not be able really to handle all the cases. At present there are 100 000 applications in Strasbourg pending and 19,000 of these cases against Russia. I see a certain danger that the whole system may break down under this burden. To come back to your question this could result in the human rights judge no longer playing a decisive role.

EJLS: If we focus on your thesis that judgements of international courts have substantially influenced legal orders, a number of questions arise. Firstly, how can you define the role of the international judge in establishing a hierarchical structure on the international law level? Ius cogens, for example, has a normative content but not a specific normative source. Thus, it is up to the judge to define the normative content. Does this possibility increase the power of judges? We have, for example, the Yussuf case in mind; where the EU Court of the First Instance used ius cogens to review the legality of a Security Council's decision.

Bernhardt: First it is still too early to say whether this decision is really accepted. We will see what happened when the case has been through the ECJ. I think it is an interesting aspect that this Luxembourg Court has found that normally the decisions of the Security Council are sacrosanct more or less except where ius cogens is involved. Now you see the notion is itself very controversial. I would agree that the prohibition of torture is one example of ius cogens, which is widely recognised. But let us ask whether access to a court can be considered ius cogens. It is clear that such access must exist but if we get more concrete, things become difficult: Take for example the case of Guantanamo Bay. Is what was and is practiced there a violation of ius cogens? I am to a certain extent inclined to say that it is.

It is interesting that the Court in Luxembourg decided that the Security Council's decision cannot be reviewed in principle. I think this is correct if you look into Art. 103 UN Charter. But, as for whether the ius cogens exception is the best solution, we will see! Whether international law and the judges in general will play a more important role cannot be said without a doubt, since it is still the governments of the states that decide what should happen. I am afraid that at some point Luxembourg or any other international court will decide a case in which the government is against the decision and ignores it. I can hardly imagine that, for instance, the Chinese government would follow an international judge.

EJLS: Coming back to more general issues. Do you think that recent political developments influenced the role of an international judge as such? For we have an increasing number of permanent jurisdictions that have been established by the Security Council through Chapter 7 powers in the last fifteen years. Can you identify a reason for that phenomenon and do you think that it might have an effect on the role of the international judge?

Bernhardt: One thing is quite clear: During the last ten, fifteen years the role of the judges has grown in importance. This is clearly one

consequence of the disappearance of the East and West clash. It is true that in so many different areas we now have judges deciding cases. We should mention the criminal tribunals for former Yugoslavia and Rwanda. This would have been impossible before 1990 when the East-West Confrontation was still in full swing. Nowadays, international Criminal Courts exist and are active. The general international criminal court under the so-called Rome-Statute, for example, has been accepted by a great number of states. We will see in the future how far this court can be active. Then take other international judicial bodies like the WTO-institutions. They also decide more and more cases. Activities of the ECHR have been mentioned already. Its success became possible only through major reforms of the Strasbourg machinery in the late 1980s. Now all 47 member states of the Council of Europe have accepted the jurisdiction of the Strasbourg court. And so you find a good number of examples for the increasing role of the international judge and the usual consequence is that the international judge becomes more inclined to accept his new role. He has to decide cases and thereby influences the development of the international legal order. So we are on new ground and it should be that in the future the judge plays a more important role in the development of the international law. Nonetheless I am not always convinced that the larger states are prepared to accept this role and I do not exclude counter developments.

3. *Dialogue of Judges*

EJLS: Let us switch the perspective to another issue concerning the interaction and communication between judges. Do you think that an increasing number of legal orders and courts at the international level are changing the role of the judge? Do they have to overcome this multiplication of legal orders and should they do to prevent dissenting judgements? Does the judge have to serve as a parenthesis to ensure the unity of the international law system? What policies can judges develop if there are no normative instruments?

Bernhardt: I have heard several times in the past that there are too many international jurisdictions nowadays. If you look to the law of the sea, then you will see that according to the Law of the Sea Convention there are three different possibilities: The ICJ, the Law of the Sea Tribunal and arbitral tribunals of different kinds can all hear cases. I must say that in my opinion it is better to have a greater number of courts even with concurring jurisdictions. If we compare this to the situation in the past where there have not been any judges available for many cases, the current situation is preferable. Additionally, I do not think that it is a difficult or

dangerous situation that we have these concurring jurisdictions. Firstly I would say that as far as I can see, until now, contradictions in the jurisprudence of different courts are very seldom. Although I, of course, cannot be familiar with everything that has been decided, I would state that there are very few cases where different international courts have rendered decisions which are incompatible with each other. So to better emphasise this, we need more judges and more judicial settlement or judicial disputes than to have political decisions in judicial questions!

EJLS: Does this also apply to the relationship with national courts? We have in mind the ongoing dispute between the ECHR and the German Federal Court where there has recently been some movement, in our opinion in the right direction. Do you not think -from a national perspective- that the principle of legal certainty might be in danger if they have to comply with more, sometimes even dissenting decisions on an international level?

Bernhardt: My first answer is: I hope that at some point in the future international courts are no longer necessary for the protection of human rights because national courts will be deciding such questions better than they did before. As we all know, it is a clear principle of international law that an international court can only be involved when national remedies have been exhausted. It would be regrettable if there was a clear contradiction between the jurisprudence of an international court and a national court, especially a national constitutional court like the German Constitutional Court. The better solution would be, and I think you indicated this development implicitly, that national courts should more frequently take into account what international law and international judges decide. And they should accept that in the interpretation of international norms the international courts have some priority and one should follow this. Accordingly, the solution is not only a dialogue between international and national judges but that national courts accept and follow the case law of international courts.

EJLS: Taking this very desirable harmony between national and international courts into account and switching the perspective to a more practical one: How does language influence the acceptance of international jurisdiction? Do you see any effect on the judicial function caused by linguistic diversity?

Bernhardt: You know that under the Strasbourg system the official languages are only English and French, but applications in other languages are at least accepted. What remains is that from a certain point onwards the proceedings take place only in English or French. Now comes a very

simple but practically important question: The European human rights system in Strasbourg has not only 47 judges but also more than 500 staff members. I do not know the exact number of languages but nevertheless, it ranges from Russian to Icelandic, from German to Greek or Turkish. I think the whole system would not function if there were more than two languages spoken in the practice of the court. If you had more languages the risk of more misunderstandings among the judges is greater. Then the role of the interpreters becomes more important. So, I think in a court of law two languages are nearly the maximum. What is also very interesting to see is that in the ICJ there are Russian and Chinese judges, both very important states, and they accepted French and English as the only official languages of the Court. This indicates that states accept this if this is the only solution that makes the system workable.

EJLS: The decisions of the ECHR for example are only officially published in English and French. Would it aid in gaining the acceptance of national courts if the official decision were provided in more languages, at least in the language of the country involved in the case?

What is very important is that the judgements of the Strasbourg courts are translated as soon as possible into all languages, in the countries concerned; because one weak point in the whole system is that the national judges normally do not know what has been decided in Strasbourg. This could not be changed by introducing new official languages but only by making decisions accessible in other languages for the judges at the national level. Translations of judgements into the national language of the defending State concerned are absolutely necessary and indispensable in all cases; judgements finding a breach of the Convention by Germany or Russia should be immediately available in German or Russian translations.

Other judgements should be also available in translations if they are of general importance. Given the great number of judgements adopted each year in Strasbour -at present more than 1000- it would be impossible to translate them all, but a selection of the most important decisions should be available in all languages of the member States of the Council of Europe.

EJLS: Prof. Bernhardt, thank you very much for the interview.

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THE ROLE OF THE JUDGE IN INTERNATIONAL LAW

Benedetto Conforti

I. INTRODUCTION

In the last ten years, the role of international and national judges in the elaboration and application of international norms has grown enormously. With respect to international tribunals, their multiplication both at global and at regional level, is impressive. It is not necessary to furnish a list here. In turn, international law is gradually extending its valence to matters which pertain directly to individuals and consequently, national judges more and more base their decisions on international law.

II. INTERNATIONAL TRIBUNALS AND SELF-CONTAINED REGIMES

The multiplication of international tribunals has been the focus of ample doctrinal debate with the aim of defining or redefining the role of these judges. Three aspects of the debate seem important.

First, there are risks which may result from a fragmentation of international law: given that many tribunals, – for instance: human rights courts, the International Tribunal for the Law of the Sea, the Appellate Body of the World Trade Organization, the international criminal courts – have sectoral competences, the greatest risk is of parochial decisions which fail to take heed of, and therefore compromise, the unity of the international juridical order.

Second, and connectedly, there is the problem of divergent interpretation of the same norms by different tribunals.

Third, now that international judges are numerous, what effect will they have on the elaboration of general international law.

As regards the first aspect, the concept of 'self-contained' regimes has emerged. The question is as to whether or not the specific groups of rules (e.g., the norms of the European Union, the human rights conventions, the law of the sea, international commercial law) created by way of treaties and the sectoral tribunals which regulate them can be self-sufficient and impermeable to general international law.

Put this way, the question does not make sense. In reality, the norms of special(ist) regimes prevail over general law by dint of the ancient rule, that

the particular takes precedence over the general. However, these regimes are founded upon norms of international law and it is therefore difficult to argue that general law may not play a role, particularly by filling a lacuna or resolve ambiguities. It is obvious that the ascertainment of the extent to which the special regime is subordinate or not to the general law is a question of pure interpretation. The interpretation will be more efficacious and it is here that the proliferation of judicial or quasi-judicial organs controlling these regimes plays an extremely important role - the greater the sphere of competence of these organs. Indeed, all these organs tend to sustain that the regimes under their supervision is self-sufficient .With respect to human rights, the practice of the international courts and that of the Human Rights Committee created by the UN Covenant on UN Civil and Political Rights has furnished us with ample examples. Moreover, even here the practice shows no more than a tendency, more or less accentuated, depending on the circumstances, and this is true also with regard to that particularly self-sufficient juridical order, namely, the European Union Law.

III. THE POSSIBILITY OF DIVERGENT INTERPRETATIONS BETWE EN INTERNATIONAL COURTS

A further question, and this is the second aspect to examine, is if the multiplication of the tribunals might give rise to divergent interpretations of identical norms, threatening the unity of the international juridical order or having a deleterious effect on the principle of legal certainty. In the absence of an ordered hierarchy of international courts, many authors underline the need for coordination amongst their decisions.

It should be said immediately that, up until now, the examples of verified divergences are few and are always the same: the most documented is the discrepancy between the decision of the International Court of Justice in the Military and Paramilitary Activities in and against Nicaragua Case (1996) and the International Tribunal for the Former Yugoslavia (ITFY) in Tadic (1999), with respect to the notion of 'effective control' of a state intervening in an armed conflict in another state. A further example is the jurisprudence of courts with respect to reservations to human rights obligations. This case law would seem to rebut the classic principle -affirmed recently by the ICJ in the case on its competence to determine a fisheries dispute (1998) and in the case concerning the aerial incident of 10 October 1999 (2000)- according to which an invalid reservation excludes the reserving state from the treaty. This clashes with the norm which stipulates that participation in a treaty may only be based on a validly expressed consent; according to human rights case law, in such a circumstance, the applicable principle would be utile per inutile non

vitiatur (cf. the leading case of Belilos by the European Court of Human Rights, in 1988).

It would seem that the possibility that interpretive divergences between different courts occur cannot be ruled out. In fact, the fact of divergences can be considered an important medium for the growth of international law. Together with the reciprocal influence exerted by courts through the dialectic process, divergences of interpretation contribute to the evolution of interpretation of international norms. From the other perspective, divergent interpretations of international norms are a common feature of domestic courts (think for example about state immunity), and it would not seem that this should be considered a danger for international legal certainty; rather it reflects a healthy dialogue between courts. It should be recalled that the principal effect of judgments is to adjudicate only between the parties involved. Thusly, the ultra partes effects, which of course do obtain, are to be accepted only with caution. We shall return to this point when discussing the role of the judge in the elaboration of norms of general international law.

It is also to be said that, often, the divergences in interpretation of the same norm are justified by the diverse contexts in which the norm is applied . It is clear, for example, that though the ICJ and the ICTY differed in their interpretation of the principle of "effective control" in armed conflicts, this was dependent on the fact, that the former concerned state responsibility, and the latter, the criminal responsibility of organs or individuals – hence, the stricter reading of control adopted by the ICJ was justifiable.
With regard to another example, i.e. that of the legality of the use of nuclear weapons, it is strange that some authors regard context-dependent hermeneutics in this area as scandalous. On the contrary, our opinion is exactly that the legality of the use of nuclear weapons might be subject to different interpretation if considered from the different points of view of human rights law and humanitarian law in armed conflicts.
Correctly, in its Mox Plant decision of 2001, the Tribunal for the Law of the Sea held that, in principle, a divergence in the interpretation of a norm might be a necessary result of the differences in the respective contexts; such differences may normally concern either the object, scope, and preparatory work of the treaty from which the norm derives or the successive practice of the contracting states.

Subsequently, it has been suggested that interpretive divergences between courts could increase the incidence of forum shopping.This opinion does not seem convincing. In fact, the competence of international judges is

based on consensus between the parties. Consequently, it is unclear why, if the parties are agreed, they cannot avail themselves of a judge of their choice. In cases where unilateral recourse before a judge is admissible, this is nothing more than the consequence of the acceptance of competence of this judge, manifested once for all by the other party.

Last but not least, mindful of the dialectic and the possibility of reciprocal influence between courts, it is certainly utopian to think that the ICJ should play a role of preeminence. Such an opinion has been upheld, for instance, by the authors who would assign to the ICJ a kind of competence to give preliminary rulings, as it is the case of the European Court of Justice according to Article 234 of the European Community Treaty.

IV. THE CONTRIBUTION OF INTERNATIONAL TRIBUNALS TO THE EL ABORATION OF CUSTOMARY NORMS

The final aspect to examine with respect to the role of international tribunals is their contribution to the elaboration and development of general international law.

There is no doubt that the contribution is of extraordinary importance, a contribution which becomes more extensive with the proliferation of judges. No small amount of general norms exists that have their roots in international decisions. This, as is acknowledged, is true above all for the advisory and contentious activity of the ICJ. It would be enough to cite the rules formed with respect to reservations in the famous Advisory Opinion of 1951 or, with regard to the legal personality of the international organizations, in the 1949 Advisory Opinions on Reparation for injuries suffered in the service of UN, and of 1980 on the interpretation of the agreement of 25 March 1951 between the World Health Organization and Egypt.

As a consequence, and as always in the reconstruction of the content of general rules of international law, it is useful and salutary to take as a reference point, the activity of international judiciary, particularly with the ICJ in mind. Nevertheless, one should not exaggerate and consider the reference to this source as an exhaustive indicator of the existence of a customary norm. The present writer has the impression that the recent studies on the elaboration of customary norms or general principles of international law is unduly limited to case law, particularly that of the ICJ. Such an approach overlooks that the decisive word, according to the classic principles of thediuturnitas and opinio

iuris, must come from the states, and only the states.

In practice, there are many cases in which the states have demonstrated their repudiation or their partial rejection of principles affirmed in the jurisprudence. Recall for example, with respect to the principles which can be deduced from the Charter of the United Nations, of questions of the earnest obligation incumbent on states to contribute to the costs which stem from resolutions of the General Assembly or the Security Council with respect to its 'actions' for peace. This obligation was affirmed in the celebrated Advisory Opinion of the ICJ on The question of certain expenses of the United Nations (1962). That Opinion was and is frequently cited to explain the effects of resolutions of the United Nations. However, in reality, in light of the decision of the General Assembly in 1965 (confirmed by subsequent practice), rather than an obligation to contribute, it would seem that the states are expected to cover this expenditure withvoluntary contributions only.

It is contended that another case of this nature is that of the obligation, enjoined by general international law, to avoid damaging the environment. As is acknowledged, this obligation, recognized by the majority of commentators, was affirmed in the Advisory Opinion onLegality of the threat or use of nuclear weapons (1996), and in the judgment of the Gabčìcovo-Nagymaros Case (1997). The same was already proclaimed in the Stockholm Convention (1972) and the Rio Declaration (1992), neither of which is binding. But what, is the significant state practice? It is difficult to give a positive response. In fact, the matter is only the object of specific conventions that are principally concerned with responsibilities for environmental damage in internal legal orders

It is further impossible to say that the category of obligations erga omnes, which have their roots in a dictum in the Barcelona Traction judgment (1970), have been the subject of certain and precise application in state practice. In particular, it is not clear what 'omnes' can do in the event of a violation of an obligation of this nature, as demonstrated inter alia by the divergent opinions and reservations which states registered to the work of the International Law Commission on the responsibility of states.

This is not the place to search for other examples. All that should be said at this point is that the problem of the relationship between judicial practice and the practice of states could be the profitable subject of a scientific analysis.

V. DOMESTIC JUDGES AND INTERNATIONAL LAW

Moving onto domestic judges, it is clear, first of all, that their decisions contribute to, and are, interpretations and elaborations of international norms both customary and conventional. In a sense, their influence on the evolution of international law is more 'direct' as they function as state organs and, as a result, their practice in this capacity has to be considered as state practice.

That said, the author of this note has constantly fought, either against the dependence of the judiciary upon the executive when it comes to questions of international law, or the tendency to exclude or restrict the review by national judges over the international legality of actions and inactions of their Governments. In brief, the following rules, upon which the present author has had the occasion to insist in various fora, and which were adopted by the Institut de droit international in the Milan session of 1993, should govern the judiciary:

- International law rules should be treated in a manner similar to rules of domestic legal orders. In particular, the judges should enjoy the same liberty in the elaboration and interpretation of the former as they do with respect to the latter.

- The determination, naturally limited to the specific case under adjudication, of the existence, the validity, the modification or extinction of an international treaty should be carried out in total judicial independence. In reality, the practice in many countries of requesting the binding opinion of the executive is slowly dying out.

- Judicial fact-finding about relevant international conduct should be carried out with equal independence. In this case too, anachronistic rules subordinating the judiciary to the executive branch are gradually disappearing, most noticeably in civil law countries . For example, as early as the 1980s, the French Court of Cassation held that its opinion on the reciprocity of application of international treaties could be arrived out without reference to the executive. Even the Italian Constitutional Court has abolished the norm which attributed to the minister of justice the competence to certify the reciprocity of foreign state immunity with respect to the enforcement of judgments. If the judicial practice, prevalent in common law countries, to refer to executive opinion in fact-finding (with regard to the existence of states, the existence of a state of warfare) persists, the opinion ("certificate") of the executive is considered only as a prima facie evidence of the existence of a fact.

- The notion of a political act or question which acts as a limit on the court's powers of review should be repudiated in cases when the international legal obligations of the forum state is in question. In fact,, even with respect to internal law, the eighth-century notion of political act or question is progressively being revised in civil and common law countries alike.

- In the cases in which, pursuant to the international private law of the forum, a foreign law falls to be applied (e.g., in expropriatory proceedings), that law should be set aside if it violates a rule of international law.

VI. CONCLUSION

The proliferation of international tribunals represent a clear erosion of the old maxim according to which international law boasted ni lois, ni judges, ni gendarmes. With the exception of the gendarmerie, still missing, no doubt can be had about the existence of international conventions (les lois) and judges. Additionally, there is a growing willingness of national tribunals to tackle the interpretation and application of international norms, an area which, in the past, either because of inadequate judicial familiarity with international rules, or parochial prejudices, was considered the exclusive preserve of the executive. This strengthening of the judicial function, so long as it does not degenerate into "the government of judges" , must be greeted with enthusiasm.

THE UNITY OF APPLICATION OF INTERNATIONAL LAW AT THE GLOBAL LEVEL AND THE RESPONSIBILITY OF JUDGES

Pierre-Marie Dupuy*

I. INTRODUCTION

The phenomenon of globalisation stimulates the search and identification by certain authors of the numerous manifestations of a 'globalisation of law', a search to which Professor Mireille Delmas-Marty brings a particularly stimulating contribution.[1] In this context, the aim of unity in the interpretation and application of international law at the universal level would imply, from a purely logical point of view, the creation of a truly global judicial system. Ideally, this model would be set up in such a way as to guarantee at every level the effective respect by states of their international obligations. There would thus be a corresponding normative and institutional hierarchy.

To this end, this global judicial system should first rely on a simplified and harmonised relationship between international law and national laws. The next step would then be, within the international legal system, to coordinate the competence of international jurisdictions.

This ideal vision is faced in reality with a certain number of obstacles of various natures.[2] These obstacles are not necessarily definitive. Indeed, there is both an evolution in the relationship between international and national law, as well as a search at the strictly international level of a still shaky coordination between international jurisdictions.

An analysis of the actual structure of the interaction between, on the one hand, international and national courts, and on the other hand, international courts themselves, tends to show that beyond the institutional question, it is first and foremost in the mind of judges that the problem is solved. If they are convinced that a harmonised application of the rules of international law is necessary, its unity will be guaranteed. If they disregard this fundamental unity, from cultural reasons or through incompetence, then its survival can indeed be threatened.

II. NATIONAL AND INTERNATIONAL LAW: BETWEEN PERSISTENT DUALISM AND PROGRESSIVE INTEGRATION

The unitary application of international law at the global level would imply, not so much the disappearance of the barrier between the national

and international legal orders, which is unlikely, but at least its progressive diminution. If this were to happen, it would increase the porosity of the border between national law and international law. In an ideal model, which we can refer to at this stage as a simple working hypothesis, both the national legal order and the international legal order would be in charge of the application of the international norm. This model would promote at the same time normative integration and organic cooperation. It would lead quite naturally to a monist system.[3] The International Court of Justice, as a kind of universal supreme court, would stand at the top of this institutional pyramid. At the other end, the first instance national judge, whether civil or administrative, having become the 'common judge of international law' in a similar fashion to what happened from the beginning with European law, would be the first to guarantee that states respect human rights and that, more specifically, an individual be punished if he commits crimes "of concern to the international community as a whole".[4]

Still according to the theoretical framework previously laid down, an organic hierarchy of national and international jurisdictions would guarantee the respect of a normative overlapping. National law would need to conform itself to the substantial requirements of international law, but beyond that, it would also make its national courts available. Without necessarily making international law directly applicable,[5] the national judge could be invited to set aside the application of national law, whether his own or that of another state, when an analysis of the international rule would easily show that its application does not require any reference to a national rule. The progressive globalisation of law would thus be the result of the establishment of a form of judicial federalism.

In the actual circumstances, this ideal model is far from being completed. It would however be a mistake to consider that it is merely a utopia.

All can immediately see the obstacles to a total realisation of this coordination of legal orders which requires their mutual recognition and, beyond declarations of intent, the effective acceptance at the national level of the supremacy of the international over the national, thus paving the way for an even partial integration of the second into the first.

Such a movement presupposes a belief in the need to respect the international rule of law, shared by the greatest possible number of states composing the international community, but also their judges, as we will see later.[6] This implies for example that national constitutions do not prevail over international rules. As we know, such a vision is fundamentally and most notably not shared by a large portion of American elites and the

case-law of the Supreme Court.[7] Elsewhere, with less arrogance but with an equally blind determination, national legal practice shows that dualism still appears to hold a certain appeal. Its continued existence is of course at odds with a harmonious realisation of the purest form of monism described previously. Most national judges eventually accept to enforce the primacy of international law. However, even in countries which have adopted monism in their constitution, the natural tendency of the judge is to apply international law only when there exists an equivalent or compatible rule in his own national legislation. It is first and foremost national law that the judge is trained to apply and respect, in a technical but also in a psychological and ideological sense.[8] As for international law, one can in fact consider that it is also based on dualism when it states that national laws are simple facts.[9]

However, it would be a mistake to believe that the previously laid out integrationist model is purely a utopia. Far from that. In fact there have long been practical applications of this model directly inspired by Georges Scelle's role splitting theory,[10] which even seem to be expanding. Scelle defines it as the situation where "the agents granted with an institutional competence or invested by a legal order, used their functional capacity as it is organised in the legal order that instituted it to guarantee the efficiency of another legal order devoid of the organs necessary to its implementation".[11]

In other words, the existing organs of the internal legal order help compensate the organic deficiencies of the international legal order by providing it with their competence. Due to a lack of a sufficiently developed international institutional framework, international law relies on state organs to guarantee its effective application. These state organs thus "kill two birds with one stone". While still acting within the framework of their competence as it is defined in the national legal order, they also play a part in the application of international law.

This role splitting theory was elaborated in the 1930s, in a period when the organic development of the international legal order could only be described as embryonic. At least, this is the case when we compare the number of international organizations at the time with those existing today. The structuring of the international society by the United Nations and its specialised bodies, itself being a strong indicator of the appearance of an 'international community', is without comparison with what had be sketched by the League of Nations.[12] Back then, the organic lacunas of the system were the rule, not the exception.

As a consequence, one could have thought that the opportunities to apply

the role splitting theory would diminish as the international legal order created an increasing number of organs directly guaranteeing the effectiveness of international law. This hope w as shared, among others, by Wolfgang Friedmann.[13] In fact, the opposite seems to be happening. Indeed, two phenomena have simultaneously been taking place. Of course, the last sixty years have seen a spectacular organic development of the international judicial system. However, this institutional expansion has been accompanied by a similarly spectacular expansion in the scope and density of international norms. In other words, if there are many more international organs, there are also many more international norms the respect of which must be guaranteed than seventy or eighty years ago. To say things differently, the ratio between the number of international norms and the number of international organs in charge of enabling their application has not necessarily become more favourable than at the time Scelle was writing.

Moreover, the economic and social evolution of the international system, encouraged by the ambiguous 'globalisation' phenomenon, has modified the ways in which the national and the international spheres establish links. As we mentioned at the start of this article, some claim an irreversible globalisation of law,[14] identifiable by an increased porosity of legal orders enabling a better adaptation of the regulation of human activity in the context of a multiform and increasing overtaking of state structures.

In any case, it must be said that international law needs help! And the one it is getting at this stage does not allow in a lot of cases its effective application. This considerable increase in the content of international law, both general and special, has led, since the end of the Second World War, to an increase in the number of situations where states are called upon to lend a hand to guarantee its effectiveness, even if it remains imperfect.

Already, in the context of the most orthodox general international law, the conditions of exercise of diplomatic protection demonstrated the organic dependency of international law's legal institutions on internal law, as illustrated by the requirement to exhaust all local remedies. As was pointed out by Roberto Ago in his reports to the International Law Commission, this requirement triggers a procedural mechanism allowing internal jurisdictions to get their states to respect their binding international obligations. Thus, they can remove the need to call upon the international responsibility of that state.[15]

The development of Human Rights has further strengthened this phenomenon.[16] The dozens of treaties adopted in this field have for the

most part inbuilt mechanisms to monitor their respect by states. However, the national judge remains the one to control the respect of the obligations undertaken. An application to both the European Court of Human Rights and its American counterpart is conditioned on the same procedural rule, that of the exhaustion of local remedies. For example, when a national judge hears a case on issues such as the right to life, to liberty or to a fair trial, there is a role splitting by which he controls at the same time the respect of international law as laid down in the treaty and the conformity of national law to the treaty, particularly if it is not directly integrated in the national legislation.

In the context of the current evolution of state responsibility, the most striking feature, crystallised in the codification process, is without doubt that of the multilaterisation of international obligations. The recognition of the erga omnes obligations by the ICJ in 1970, around the same time as the recognition of ius cogens by the Vienna Convention on the law of treaties, has led, beyond the failed attempt to realise the idea of state crimes, to the recognition of legal standing for all states, based on their membership of the international community. When "the obligation breached is owed to the international community as a whole, any state other than an injured state is entitled to invoke the responsibility of another state", to require from that state the cessation of the internationally wrongful act, guarantees of non-repetition, the recognition as well as the execution to the right to reparations. Thus is the system promoted by Article 48 of the Draft Articles on State Responsibility adopted by the International Law Commission in 2001.[17] It would be wrong to believe that such rules will not be applied in the future. Indeed, Article 48 found its inspiration in a developing state practice that started in the 80ies: that of measures taken by some states other than the injured one against states accused of breaching their obligations against the international community as a whole. This practice has been amply commented upon, and here is not the place to develop further the analysis.[18] Let us just point out that when a state takes an initiative against another state based on the protection of a rule of "fundamental importance" for the international community, he is acting through his national organs, including the judiciary ones, in favour of international law.

The situation is identical when, in the context of the law of peace and security, states put in practice sanctions decided by the Security Council in conformity with Chapter VII, to, among other things, freeze foreign assets, impose bans on the sale of weapons or on international flights to the country towards which the sanctions are aimed at. In such a case, we have further evidence of Scelle's role splitting.

There are other examples of even more recent developments of international law, in the field of international criminal law, where role splitting can come into play. These developments, rather than the integration of national and international law, are concerned with the coordination of these laws in order to allow the first one to help in the application of the second one through the judicial bodies of the competent state. Echoing the preamble, Article 1 of the Rome Statute affirms that the International Criminal Court "shall be complementary to national criminal jurisdictions".[19] Article 17 then considers the examples of inadmissibility of cases, the first one of which is when "the case is being investigated or prosecuted by a state which has jurisdiction over it". Therefore, contrary to the two ad hoc tribunals competent to try crimes committed in former Yugoslavia andRwanda, the International Criminal Court does not have primacy over national courts to try those responsible for committing the crimes listed in Articles 5 to 8.[20] The state in which the acts were committed, or of which the accused person is a national of, will have priority over the ICC if they decide to prosecute the crime. The rationale for the principle of complementarity is laid down in the preamble which states that the state parties are "determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes". There must therefore be no gap in the allocation of judicial competence to prosecute the crimes. Criminals must not escape prosecution, first at the national level, and, if need be, at the international level.

The novelty of this principle resides in the fact that it organises, in the context of a treaty, the distribution of competences between national jurisdictions and a specialised international one. For the rest, it follows in fact a time-old logic: it respects territoriality, as well as active nationality, as basis for determining competence. Tribute is thus paid to the traditional attributes of sovereignty. Complementarity, applying the role splitting model, recognizes the competent national jurisdictions as the common jurisdictions to prosecute those who committed the core crimes, those that Article 5 of the ICC Statute calls "the most serious crimes of concern to the international community as a whole". This principle establishes a hierarchy in the exercise of jurisdiction. The organic priority that it recognises is made possible by the fact that the national judge and the international one have the same goal: punish crimes committed against the community.

Concerning the functioning of internal jurisdictions, similar remarks could be made in situations when a state prosecutes someone accused of a crime affecting the community, based not on the territoriality or nationality principles, but on universal jurisdiction. Without detailing the conditions

under which it is recognised in positive law,[21] it is interesting to notice that in such a case, the judicial organs of the prosecuting state act on behalf of the international community. We therefore remain within the role splitting framework.

We can thus see that the ideal model of integration, both organic and normative, is far from being a simple utopia. Classical institutions, such as the exhaustion of local remedies, but mostly new developments linked to the institutionalisation of the international community, in fields such as peace and security, the multilateralisation of obligations and its consequences on state responsibility, or even more recent innovations in international criminal law, illustrate the articulation of the international and national legal orders. This contradicts the dualist tendencies, despite their persistency.

Thus, there is a dynamic tension between the defence of the national legal setting which still often defines itself in opposition to international law, and the corresponding recognition of what one could call the rights of the international community which call on the contrary for more openness on the part of national legal orders towards the international sphere. It is possible to see in this confrontation of opposing logics one example of the fundamental tension existing between the two principles of unity of the international legal order, one formal, and the other substantial, the theoretical analysis of which having been done elsewhere.[22]

III. International jurisdictions: Towards an empirical coordination around the International Court of Justice?

In the ideal model of vertical organic integration mentioned in the introduction of this paper, the International Court of Justice occupied the top of the pyramid. More particularly, in this pure monist approach, the Court would impose its authority on the other international jurisdictions of the international legal order, at least in respect of the interpretation of the general rules of international law that might be applied by all. As we know, proposals have been made to achieve this result, whether, as was suggested by Pinto and Orrego-Vicuna, by formally recognising the ICJ as the supreme court of the international legal order, by granting prejudicial competence[23] to the Court, by extending the field of its consultative role, or by accepting de lege ferenda that the Court has a compulsory competence as an international tribunal des conflits. It would thus determine the competent international jurisdiction to settle an international dispute in a case of competing jurisdictional claims from courts belonging to different sub-systems of the international legal

order.[24] All these proposals should be taken seriously. It is not impossible that some of them have, in the future, an influence on the elaboration of a structured international judicial system.[25] They are all challenged, at various degrees, on political or technical grounds. Some of the challenges have been examined elsewhere.[26]

These proposals were made in the context of the multiplication of international jurisdictions, a particularly discussed topic in academic literature, and strongly linked to the fragmentation concept.[27] Some authors express their concern about the dangers of incoherent case-law,[28] while others contest even the idea of the unity of international law.[29] However, they do this in the theory, without also checking if in reality, such difficulties have actually arisen in the recent past.[30] Given that it is fact not the case,[31] these authors based their analysis on only one precedent, which has become famous for this reason. As we all know, it is the divergence in approaches between the ICJ in the Nicaragua Case (1986) and the ICTY in the second appeal decision by the Appeals Chamber in the Tadic Case, in respect of the conditions under which the actions of an armed non-state actor can be attributed to a state. In any case, this divergence in case-law was resolved in the February 2007 decision by the ICJ in the Genocide Case opposing Bosnia and Yugoslavia.[32]

Without forgetting that it is necessary to distinguish two separate questions, that of competing jurisdictional claims and that of potential of real conflicting decisions,[33] the Tadic Case is a reminder of the relativity if not the weakness of the position of the ICJ in respect to other existing international courts, whatever its prestige. The still valid idea that the resort to the international judge is consensual is at odds with the idea of an international judicial hierarchy with the ICJ at the top.

Even if the ICJ remains the only jurisdiction with general competence, thus giving it an unquestionable moral authority, its primacy over other courts is far from being unquestionable (A). As a result, when faced with potentially conflicting views from other courts, as is more and more frequently the case, the Court tries to avoid any conflict (B). General principles of law in the field of the procedural articulation of legal decisions can sometimes be a guide for the Court. However, they cannot in most situations be the basis for the establishment of a systematically effective coordination between international judges (C). Empiricism and 'courtesy' between tribunals is thus necessary in order to allow the parties to a dispute to adequately choose the forum conveniens when several areas of law are concerned. But, more than that, it is an extremely subjective element, therefore fragile, that will best guarantee the

coherence of the system, namely the culture of international judges and the extent to which they believe that they are part of one and the same international legal order (D).

1. *Statutory situation of the distribution of competence between the ICJ and other jurisdictions: The absence of primacy of the first over the others*

Whatever the considerable prestige of the ICJ and its moral authority, both fluctuating according its case-law, the Court is far from being recognised as an international supreme court. This is in any case the result of a statutory reality. The Charter contains two dispositions establishing a fairly balanced situation. On the one hand, Article 92 describes the court as "the principal judicial organ of the United Nations". On the other hand, Article 95 adds that this special position does not impose on states any obligations in terms of dispute resolution: "nothing in the present Charter shall prevent members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future". In other words, the Court has a superior hierarchical position in the institutional framework, but is a tribunal like any other from a relational perspective.[34] This last perspective still relies on autonomy and the consensual basis to the recourse to a judge.

Going further, the Tadic precedent is proof of something else. Within the institutional framework of the UN, a judge has contested the authority of the ICJ, based on the independent nature of each jurisdiction. In this sense, the ICTY did not see in Article 92 an obligation not to depart from the case-law of the ICJ on an important point of the law of state responsibility.[35] The analysis made by the Court on the question of attribution had of course only been exposed in the motifs of the June 1986 decision, not its merits. But one could still have argued that given the importance of this pointing in international law in the institutional context of the United Nations, a subsidiary organ of the Security Council, given its judicial nature, would feel bound by the terms of Article 92. The ICTY did not feel bound and this approach was received with a certain degree of suspicion in academic circles.[36] The sharp response made by the ICJ in its February 26th decision seems to be a call to order from a superior to a subordinate, implicitly based on Article 92 of the Charter.[37] In any case, outside the institutional framework of the UN, the Court remains challenged by other international tribunals, each one having its own special jurisdiction.

All conventional systems do not contain dispute resolution mechanisms, far from that. In those systems that do, there is not necessarily an

exclusive competence afforded to the established organ. The EU system is the one that goes the furthest in terms of establishing autonomy. As the European Court of Justice said once again in its May 30th decision in relation to the dispute between the United Kingdom and Ireland over the Mox Plant, Article 292 of the EC Treaty calls for a strict jurisdictional monopoly for the ECJ to guarantee the "respect of the EU legal system". This monopoly thus defined in favour of the Luxembourg court must of course be respected by all tribunals, including the ICJ. The ECJ recently imposed on an arbitration tribunal sitting on the Rhine dispute to verify whether part or whole of the legal questions to be dealt with did not in fact fall within the scope of community law, which, as is confirmed by the Mox decision, is like the universe: in perpetual expansion![38]

Outside of this extreme example, Article 55 of the European Convention on Human Rights is generally considered to give exclusive competence to the Strasbourg Court, through its consultative function, on matters of interpretation of the Convention when the issue arises between states.[39]

In terms of jurisdictional monopoly, one must also consider the WTO system.[40] Articles 23 and 25 of the Memorandum of understanding on Rules and Procedures governing the Settlement of Disputes are generally construed as establishing a strict monopoly with regards to international disputes relating to trade. This would seem to be confirmed by the Panel decision in the Us-Sect. 301-310 of the Trade Act of 1974 case.[41] However, there is no lack of voices to claim that the parties to a dispute can always choose another forum, including the ICJ, at least when the situation has a sufficient amount of elements which are outside the system defined in the Marrakech agreement to justify leaving the strict scope of application of the Memorandum.[42]

The Convention on the Law of the Sea, on the other hand, is notable for its openness and variety of approaches.[43] We know that Article 282 recognises the priority that states might want to give to a "a procedure that entails a binding decision" in the context of another agreement. As for Article 287, it proposes a wide range of solutions to the parties in terms of choice of procedure, the International Tribunal for the Law of the Sea being only one option among others, including recourse to the ICJ or an arbitral tribunal. However, this generosity in the choice of procedure left to the state parties to resolve disputes related to the law of the sea, illustrates once again how the principle of consensualism is at odds with the dream we presented at the beset of an organic integration of the international judicial system. This is the principled objection to the statutory recognition of pre-eminence of the ICJ over the others modes of

dispute resolution. The case-law of the ICJ itself has consistently acknowledged this lack of priority over other jurisdiction, at least when it is clear that the choice of another mode of dispute resolution is actually based on the consent of the parties.[44] Contrary to what we were describing about the relationship between national and international law previously, there is no indication of a clear establishment of a priority of the ICJ over other tribunals. Its authority being moral, not technical, despite being real, it remains fragile.

2. *Increase in disagreements of the ICJ with previous positions of other dispute settlement bodies*

If the Court does not benefit from a superior position in respect to other jurisdictions from a statutory point of view, how does it consider other international justice decisions, and more generally, other modes of dispute resolution, whether judicial or not, which might be strongly linked to its own jurisdictional competence? What must be considered here is not so much the way in which special tribunals apply general international law (as in the case of the ICTY ruling on the attribution of a conduct to a state), but the way the ICJ and other tribunals deal with rules or legal situations governed by a secondary international legal order endowed not only with specific secondary norms, but also with its own dispute settlement mechanism.[45]

To illustrate this second hypothesis, one can notice in the case-law of the ICJ of the past 25 years a multiplication of situations where the Court has encountered the existence of leges specialia, where, either there were ongoing parallel dispute settlement proceedings (cases of "connexity") or where there had been past decisions on issues being dealt with by the ICJ. The 1992 decision concerning the Land, Island and Maritime Frontier dispute between El Salvador and Honduras fits within the second category. In it, the ICJ had to deal with an old decision by the central American court of justice dating back to 1917 in which this regional court, first of its kind, had ruled on the dispute between three bordering states over the waters of the Gulf of Fonseca.[46]

In the 1988 case opposing Nicaragua and Honduras, which remained at the admissibility stage for empirical reasons, the Court was asked by the defendant to take into account the ongoing mediation attempt with the Organisation of American States called 'Contadora Procedure' and the Bogota Pact on Inter-American Dispute Settlements.[47]

In the Fisheries dispute between Spain and Canada, the Court was invited to consider the distribution of competences between the European

Union and the member states. This type of question also arose recently, as we saw earlier, before arbitration tribunals in the Mox Case[48] and the Rhine Case.[49]

Moreover, in the Lagrand Case and the Avena Case, which gave rise to decisions respectively in 2001 and 2004, Germany and Mexico were claiming support against the USA from an advisory opinion rendered by the Inter-american Court on Human Rights concerning Article 36 § 1 of the 1963 Vienna Convention on Consular relations.[50]

In the Certain Property Case between Liechtenstein and Germany, which was decided in 2005, the Court was aware that the same facts had given rise to a decision by the ECHR following a submission by Prince Adam of Liechtenstein.[51] Finally, in the Genocide Case, the Court was confronted with the previous legal qualification by the ICTY of the facts under consideration.[52]

In those cases where the Court had to examine judicial findings or points of law already dealt with by a special international jurisdiction, how was it going to deal with these previous cases, which did not constitute 'precedent', in the technical sense of the term? The procedural conditions pertaining among other things to the strict identity required between the subject and object of the two cases having never been verified in the previously cited decisions, the principle of res iudicata, although sometimes referred to by the Court, has never been applied as such. The only possible situation could have been where the Court, convinced by the reasoning of another tribunal have not decided on the same issue, adopted for itself the same solution. This approach seems verified in the 11 September 1992 decision on El Salvador and Honduras on the legal status of the waters of the Gulf of Fonseca[53] and in the 26 February 2007[54] decision, to the extent that the ICJ adopted the analysis and even the legal qualification that the ICTY had made of the facts under consideration.[55]

For the rest, the Court rightly refuses to consider argumentations based on legal arguments or positions held by other jurisdictions if they are irrelevant to solving the case at hand. This judicial economy can be seen in the Fisheries Case, the Lagrand and Avena Cases or the Certain Property Case.

In any case, it appears that until the recent Genocide Case opposing Bosnia and Serbia-Montenegro, and even then it was on a point of general international law, the Court has never felt the need to

openlycontradict a position taken by another jurisdiction. On the contrary, it either adopted the findings of the Central-American Court, or avoided pronouncing itself on legal points which were the object of a decision by a another jurisdiction. It that sense, the Genocide Case appears as a noticeable exception to past practice of the Court. However, as stated previously, in that exceptional situation the Court remained within the institutional framework of the UN, with its position as 'primary judicial body' is recognised by the Charter.[56] Outside of this relative institutional protection, the Court remains exposed to the competition of other tribunals.

In the absence of an organic organisation of international tribunals, could the Court therefore be possible for the Court to resort to a normative guidance, by referring to an assortment of general principles of law allowing for a procedural articulation of judicial decisions?

3. *The limits of the guidance provided by general principles of procedural law*

All systems that reach a certain level of sophistication are faced with the question of competing jurisdictions and its consequence, the danger of contradictory case-law. In that sense, the problems encountered by the international legal order are more a sign of its increasing maturity rather than endemic crisis.[57] However, the help that international law, having reached this level of development can hope for by borrowing general principles from national orders is very limited: it is not by reverting to using Latin in an erudite way like the processualists that it will be saved[58]. There are quite substantial reasons to this fact. All the procedural principles relating for example to lis pendens or res iudicata were elaborated in the context of already well integrated legal systems, at the organic as well as the material level. More particularly, there is an organic hierarchy between jurisdictions within national legal systems which is precisely what is missing in the international order.

It is furthermore not possible to solve the problems related to the multiplication, connexity or even interrelation of international legal sub-orders through the use of private international law. First of all, this law remains private (i.e., also internal), before being international, which brings us back to the previously mentioned objection. It relates to the impossibility of transposing rules which have been elaborated in an organically integrated system, to one which is not. Moreover, private international law developed its judicial procedural principles with in mind the idea of coexisting distinct and autonomous legal orders. The situation is not the same in international law. Each of its legal sub-orders, for

example that of the WTO, the EU or the Kyoto Protocol on climate change, has in common something with the other international sub-orders: they are international law. Contrary to the internal private laws, each of which defines as 'international' the rules which define its relation with the others, these international sub-orders belong to the same order, the international legal order. Except if one chooses the easy way of accepting the fad of the 'fragmentation' of international law, the inanity of which was proven, both with certain authors, by the ILC,[59] it is obvious that the international legal order remains unified, if not homogenous. Therefore, it is difficult to resort to general principles of procedural law because international law is both unified substantially but organically not integrated. Whatever the situation, we must not refuse to test the operability of these principles, especially when the ICJ itself refers to them.[60]

Let us first recall that the Court determines in every case the specific object of the dispute it must decide and the extent of its material competence based on the way it is seized. The electio fori is dependent on the parties. Whether through a unilateral request or a compromis, the formal expression of the will of the states involved in a dispute is a determining factor to ascertain a competence dependent on this will. We have already established that the Court is ready, in principle, to declare itself incompetent if it appears that a previous agreement between the states gives competence to another jurisdiction.[61] Alternatively, it sees no reason to decline competence when non-jurisdictional attempts have in parallel been made to solve the dispute, whether through a mediation or any other diplomatic process mentioned in Article 33 of the UN Charter.[62]

In any case, it is according to the identification of the questions that are put to it that the Court will be able to decide if and to what extent there is possibly an interference between its own jurisdiction and that of other international bodies. In relation to the object of the dispute, the decision on the applicable law on the basis of Article 38 of the Statute will play a crucial role. More specifically, if the Court establishes that a treaty is applicable to the dispute, and that the treaty contains specific dispositions on this point, it is according to these dispositions that it will determine whether it is competent or not. It is not necessary to insist on this point given that is it obvious.

In relation to the applicable law and the choice of the fora that it might contain, one can ask the question of whether the posterior derogat priori principle might be of any help in identifying the competent tribunal.[63] The answer is both affirmative and limited. This principle

can certainly help decide between a jurisdiction with general competence and one with specific competence. Basically, it can only play between the ICJ and another court with a judicial organ with a narrower scope of action, and always to the detriment of the Court itself. This has long been made clear in the ICJ case-law, in the Mavromatis Case.[64] We can therefore only agree with Andrea Gattini when he says that "if this situation did not seem to bother the PCIJ or the ICJ when the objective was to determine their competence in respect to arbitration tribunals, it is not at all certain that things will be the same when face with the perspective of relinquishing jurisdictional competence to permanent judicial or quasi-judicial organs".[65]

Rules borrowed to national law relating respectively to lis pendens and the principle of res iudicata have at least one common point in order to be applicable in international law.[66] They impose the verification of the identity of cases at three levels: the subjects, the cause and the object. If these conditions are rarely met for lis pendens, they are partially put in question, at least in academic literature, in cases of res iudicata, the previously quoted author being right to point out that its scope is blurry.[67] As for the decisions of the Court, Article 59 of its Statute limits the effects of res iudicata in two ways: it concerns only the courts "holding"; i.e., the ratio decidendi of the Court and is only compulsory for the parties to the dispute.[68] One must therefore distinguish between, on the one hand, the importance of an opinion expressed by the Court, itself relative when it is related to the justification of one of its decisions[69], and res iudicata in the technical sense of the term.[70]

We must therefore accept that the coordinated articulation of judicial competences is possible only through an empirical alliance between flexibility and authority.[71] Flexibility calls for each judge to evaluate empirically what should be the answer given in a specific context to the following question: should he declare himself incompetent in order to allow another institution to handle the case, taking into account more specifically the scope of competence of each jurisdiction? The answer might lead the judge to stay his decision.[72] At this stage, and by imitation of the German Bundesverfassungsgericht, the so called So lange doctrine can be of great help. This method, by which a tribunal accepts to limit its own jurisdiction in order to respect that of another one, has already been applied by the European Court of Human Rights in the Bosphorus Case in relation to the European Court of Justice. Nevertheless, this precedent, abundantly criticized by scholars, shows that this path is not an easy one to go down. The assessment of the scope and conditions of application of the jurisdiction of one court by another tribunal remains indeed subject to errors or approximations[73]. A similar

approach could allow waiting for another court to legally qualify facts relevant for both proceedings.[74] Another question is whether the case can be divided in separate questions, each one being able to be the object of a distinct resolution.[75]

This return to the appreciation of judges shows that the split portrait of international justice gives them a crucial role in the strengthening or dereliction of the unity of interpretation and unity of international law.

4. *Judges' culture and actions as the final guarantor of the unitary interpretation and application of international law*

In the absence of mechanisms and procedural principles guaranteeing an always effective coordination of international jurisdictions, we are left to acknowledge that at the end of the day, the integration of international law will depend on what the judges decide to do with it.

Concerning the national judge, whichever his hierarchical level, and given the now inevitable phenomenon of globalisation, he must increasingly broaden his horizon in order to take into account the impact of international law on the national laws he has to apply. For example, one can hardly conceive that a national judge can ignore not only the content of the European Convention on Human Rights, but also the often evolutive interpretation of it by the Strasbourg Court. Such a situation exists not only for regional *lex specialis*, as in the previous example, but also for the evolutions of general international law. This is for example what the Italian Supreme Court has understood in its Ferrini Case, dealing with the application of the classical rule of state jurisdictional immunity before national courts when what is considered is the violation of a *ius cogens* norm. The Italian judge finally set aside the immunity to allow access to the courts based on the legal nature of the obligation to prevent and enforce the prohibition of torture and forced labour, considered in this case as war crimes.[76] The attitude of the national judge here shows the rare knowledge and conscience he had of the deep evolutions of international law, moulded by the tensions, and sometimes the confrontation between some of the rules guaranteeing its formal unity (based, as the principle of immunity, on sovereign equality), and others, telling of a still emerging substantial unity, based on a hierarchy of norms founded not merely on their form, but also on their content, of importance to the international community as a whole (formal unity), of which the compulsory norms identifiable in the field of human rights are the most striking example.[77] The openness of national judges in respect to international law is moreover not limited to accepting the effects of compulsory norms in its national law. It also covers the acceptance of the

international obligations of the state in technical fields such as international trade or the international protection of the environment. Beyond the fact that one rarely finds today a clear-cut choice between pure monism and radical dualism concerning the relationship of national and international law, it is increasingly difficult for a national judge from a member state of the WTO to ignore reports from the group of experts and the decisions by the Appeals panels of the institution.[78] In the same way, it is likely that state parties to the Kyoto Protocol will soon produce national case-law on its application.

At the international level, there is a need for a jurisprudential coordination in order to guarantee the unity of interpretation and application of international law. There too, however, all will depend on the state of mind of the judges. Concerning specialised judges, they must remain aware of the fact -as did the Appeals' panel of the WTO in its first report- that their special law cannot be applied in a clinical void but must be considered in the framework of the international legal order it is a part of, which governs more than the rules relating to its interpretation.[79]

As for the ICJ, its members are delusional in believing that they will succeed in imposing the idea of a preliminary question procedure, by which other tribunals would require enlightenment on the interpretation of rules of international law. It will not succeed either in being officially granted a role as a referee in situations where there might be a jurisdictional conflict between different international tribunals. The measures to structure international justice and make it coherent can seem appealing on paper. However, they have but a minute link with political realism and diplomacy! The authority of the ICJ as a *de facto* supreme court in the international legal order will depend on the judges themselves. He cannot be claimed, it has to be conquered. The way to proceed in through its case-law, which must not limit itself to merely resolving the dispute at hand, but must take every opportunity is has to advance the interpretation of law, as is has started to do again in recent times, for example by finally recognising that ius cogens is part of positive law.[80] Here again, the institutional architecture is less important than the mental one.

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[2] See C. GRAY, Judicial Remedies in International Law, Oxford, Oxford University Press, 1990 547.

[3] On the distinction between monism and dualism in the relationship between national and international law, see for example: P.M. DUPUY, Droit international public, Paris, Dalloz, 8th ed., 2006, §§ 416-422.

[4] According to the expression of the Rome Statute of the International Criminal Court, Article 5.

[5] P.M. DUPUY, supra note 3, §§ 412-415.

[6] See infra, Section 2 D.

[7] See, for example, M. BYERS and G. NOLTE, United States Hegemony and the Foundations of International Law, Cambridge, Cambridge University Press, 2003; E. JOUANNET and H. RUIZ-FABRI, Impérialisme et droit international en Europe et aux Etats-Unis, Société de législation comparée, 2007.

[8] For the French case, see P.M. DUPUY, Droit international et droit interne dans la jurisprudence comparée du Conseil constitutionnel français, Paris, Panthéon-Assas, 2001.

[9] In a strict sense, international law could only be considered monist with primacy of national laws if it saw them as legal orders. The situation is however ambiguous, given that international law goes beyond the simple fact of national law, and recognises as internationally valid certain situations resulting from the application of national rules; C. SANTULLI, Le statut international de l'ordre juridique étatique, Paris, Pedone, 2001.

[10] For a presentation of this theory: G. SCELLE, Précis de droit des Gens, Vol I., Principes et systématique, 1932, pp. 43, 54-56 et 217; Vol. II, 1934, pp. 10, 319 et 450; "Le phénomène du dédoublement fonctionnel", Rechtfragen der Internationalen Organisazion, Festschrift für H. Weberg, 1956, p. 324-342. For a commented presentation of the theory: H. THIERRY, "The Tought of Georges Scelles et A. Cassese: Remarks on Scelles's Theory of 'Role Splitting'", EJIL, Vol. 1, No 1, http//www.ejil/org/Journal/Vol/N°1.

[11] G. SCELLE, "Le phénomène du dédoublement fonctionnel", o.c., p. 331; "Quelques réflexions hétérogènes sur la technique de l'ordre juridique interétatique", in Hommage d'une génération de juristes au Président Basdevant, 1960, pp. 473-488.

[12] On the ambiguities of the notion of "international community", and its different possible meanings, we refer to our analysis in: L'unité de l'ordre juridique international, RCADI, 2002, Vol. 297, p. 245-269.

[13] W. FRIEDMANN, The Changing Structure of International Law, Londres, Stevens & Sons, 1964. On a recent analysis of this author's contribution, see the special edition of the European Journal of International Law, 1998, Vol. 9, No 2; especially, G. ABI-SAAB, "Whither the International Community?", pp. 248-265.

[14] See M. DELMAS-MARTY, supra note 1.

[15] See P.M. DUPUY, Droit international public, o.c., §§ 477-479; J. DUGARD, Deuxième rapport sur la protection diplomatique, 28 feb. 2001, A/CN.4/514.

[16] See TOMUSCHAT, Human Rights, between Idealism and Realism, Oxford, Oxford University Press, Academy of European Law, Vol. XIII/1.

[17] See M. IOVANE, "E possibile codificare la responsabilità dello stato per violazione delle norme internazionali d'importanza fondamentale?", in M. SPINEDI, A. GIANELLI et M.L. ALAIMO, La Codificazione della responsabilità internazionale degli Stati alla prova dei fatti, Milano, Giuffrè, 2006, pp. 342-384; P.M. DUPUY, Obligations multilatérales, droit impératif et responsabilité internationale des états, Colloque de Florence, IUE, Paris, Pedone, 2003.
[18] See our Cours at the Hague Academy of International Law on international wrongful acts, RCADI, 1984, Vol. 188, pp. 13-133.
[19] See the text of the Rome Statute, most notably in P.M. DUPUY, Grands textes de droit international public, Paris, Dalloz, 2006, pp. 232-ff.
[20] Ibid., pp. 207-ff.
[21] See A. CASSESE, "Is the Bell Tolling for Universality? A Plan for a Sensible Notion of Universal Jurisdiction", Journal of International Criminal Justice, Vol. 1, No 3, pp. 589-595; D. VERMEERSCH, "La compétence universelle", in A. CASSESEet M. DELMAS-MARTY, Juridictions nationales et crimes internationaux, Paris, 2001, pp. 589-611.
[22] See, P.M. DUPUY, L'unité de l'ordre juridique international, o.c., notamment pp. 399-ff.
[23] See Président Schwebel's statement before the United Nations General Assembly on 26 October 1999, Annuaire CIJ (1999-2000), pp. 282-ff., et that of President Guillaume before the Sixth Committee of the General Assembly on 27 October 2000,Annuaire CIJ (2000-2001), pp. 326-ff. See also G. GUILLAUME, "The Future of International Judicial Institutions", ICLQ, 1995, pp. 848-ff., at p. 862. For similar proposals dating back to 1905, see TREVES, "Advisory Opinions of the International Court of Justice on Questions Raised by Other International Tribunals", Max Planck United Nations Yearbook, 2000, pp. 215-ff.; G. ABI-SAAB, "Fragmentation or Unification: Some Concluding Remarks", in Symposium NYU, pp. 919-ff., at p. 928.
[24] See P.M. DUPUY, "The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice", NYU Journal of International Law & Policy, 1999, dans le cadre du symposium The Proliferation of International Tribunals: Piercing Together the Puzzle, pp. 791-sv. [NYU Symposium].
[25] See MARTINEZ, "Towards an International Judicial System", Stanford Law Review 2003, pp. 429-460.
[26] See supra note 25
[27] See, among others, RAO, "Multiple International Judicial Forums", in Symposium organisé par la Law School of the Michigan University et publié au Michigan Journal of International Law, 2004, under the title Diversity or Cacophony?[Symposium Michigan University], pp. 929-ff.; see also, La multiplication des juridictions internationales: Un système anarchique?, Paris, Pedone, 2003 (Colloque de Lille); more particularly the reports done by E. JOUANNET, pp. 343-ff., and S. KARAGIANNIS, pp. 82-ff.
[28] See, among others, CHARNEY, "Is International Law Threatened by Multiple International Tribunals?", Recueil des Cours, 1998, Vol. 271, p. 101; TREVES, "Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice", Symposium NYU, pp. 809-sv.; "Le tribunal international du droit de la mer et la multiplication des juridictions internationales", Rivista di diritto internazionale, 2002. All these authors justly

point out that the multiplication of international tribunals does not necessarily imply that there will be contradictions in the case-law.

[29] See M. KOSKENNIEMI, "Fragmentation of International Law? Postmodern Anxieties", Leiden Journal of International Law, 2002, pp. 553-ff.; FISCHER LESCANO and TAUBNER, "Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law", in Symposium Michigan University, pp. 999-ff.

[30] For a comprehensive overview of the question, see A. GATTINI, "Un regard procédural sur la fragmentation du droit international", RGDIP, 2006, pp. 303-337.

[31] See the report of P. WECKEL, in R. HUESA VINAIXA and K. WELLENS, L'influence des sources sur l'unité et la fragmentation du droit international, Bruxelles, Bruylant, 2006.

[32] See the analysis of the case made in the Revue générale de droit international public, 2007 No 2; particularly the comments made by P.M. DUPUY and H. ASENCIO.

[33] The second being a consequence of the first.

[34] On the distinction between the institutional and the relational, see R.-J. DUPUY, Le droit international, Paris, PUF, 1961, 2001.

[35] See the Appeal's Chamber of the ICTY: "In international law, every tribunal is a self-contained system (unless otherwise provided)", Prosecutor v. Tadic, IT-94-1, 2 Oct. 1995, § 11. The same tribunal also claimed that "there is no hierarchical link" between the tribunal and the ICJ, Celebici, Delalic et al., IT-96-21, decision of 20 Feb. 2001, § 24.

[36] See L. CONDORELLI, "Jurisdictio et (dés)ordre judiciaire en droit international: Quelques remarques au sujet de l'arrêt du 2 octobre 1995 dans l'affaire Tadic", in Mélanges en l'honneur de Nicolas Valticos: Droit et justice, Paris, Pedone, 1999, pp. 281-286.

[37] See supra, note 33.

[38] See §§ 97-141 of the arbitral award, http://www.pca-cpa.org/upload/files/BE-NL%20240505.pdf; see also commentary by S. MALJEAN-DUBOIS, "L'affaire de l'usine Mox devant les tribunaux internationaux", Journal de droit international (Clunet), 2007.

[39] There is no need here to consider the ordinary competence of the ECHR as it does not create a conflict with the ICJ, given that a case is brought forward by an individual before the first tribunal and by a state before the second one.

[40] See P. NEUMANN, Die Koordination des WTO-Rechts mit anderen völkerrechtlichen Ordnungen – Konflikte des materiellen Rechts und Konkurrenzen der Streitbeilegung, Berlin, 2002, pp. 5170-ff.

[41] US-Sect. 301-310 of the Trade Act of 1974, 22 déc. 1999, WT/DS 152/R, § 7.43: "members have to have recourse to the DSU dispute settlement system to the exclusion of any other system"; confirmed by E.-U.PETERSMANN, "The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948", Common Market Law Review, 1994, p. 1208. See also: LUFF, Le droit de l'organisation mondiale du commerce, Bruxelles-Paris, 2004, p. 803: "Article 34 of the Memorandum of understanding even seems to suggest the pre-eminence of the WTO dispute settlement mechanism over any other competing international jurisdiction in issues relating to areas covered by WTO agreements".

[42] For a critical appraisal of such a proposition, see G. MARCEAU, "Conflict of Norms and Conflict of Jurisdictions: The Relationship Between the WTO Agreement and MEAS and Other Treaties", Journal of World Trade, 2001, p. 1119.

[43] See R. RANJEVA, "Règlement des différends", in R.-J. DUPUY et D. VIGNES, Traité de nouveau droit de la mer, Paris-Bruxelles, Pedone-Bruylant, 1985, pp. 1105-ff.
[44] The main precedent for this proposition is Concessions Mavrommatis en Palestine [Greece v. United Kingdom], 30 Aug. 1924, CPJI Series A, No 2, p. 31.
[45] Which does not make it necessarily "self-sufficient".
[46] I.C.J., Land, Island and Maritime Frontier Dispute [El Salvador v. Honduras], 11 Sept. 1992, http://www.icj-cij.org/docket/files/75/6670.pdf
[47] Border and Transborder Armed Actions [Nicaragua v. Honduras], 20 Dec. 1988, admissibility, Recueil CIJ, 1988, § 91. Honduras had, among other things, raised an issue about admissibility in respect to article IV of the Bogota Pact according to which another peaceful procedure could not be used as long as the current one had not be completed. The parties were in disagreement about the qualification as a "special procedure" of Contadora Peace Process. The Court acknowledged that the parties agreed to proceed with the ongoing mediation, but also found that at the time when Nicaragua filed its motion in July 1986, the Contadora process was exhausted and that the ulterior intervention of the Contadora group initiated by the 1987 Esquipulas II agreement was to be considered as independent. The Court also establishes that the Contadora group had not claimed an exclusive role in the peace process (§ 97). See E. DECAUX, "L'arrêt de la Cour international de justice dans l'affaire des actions armées frontalières et transfrontalières", Annuaire français de droit international, 1988, pp. 147-sv.; BUFFET-TCHAKALOFF, "La compétence de la Cour internationale de justice dans l'affaire des Actions frontalières et transfrontalières",RGDIP, 1989, pp. 623-ff.
[48] Mox Plant [Ireland v. United Kingdom], provisory measures, 3 Dec. 2001, ILM, 2002, pp. 405-ff. In June 2001, Ireland had also initiated an arbitration process based on Article 32 of the 1992 Paris Convention on the protection of the maritime Environment in the North-East Atlantic, claiming a violation of Article 9 on the exchange of environmental impact information. The tribunal rendered its decision on 2 July 2003, rejecting the Irish claim, ILM, 2003, pp. 1118-ff.; see also the commentary by SHANY, "The First MOX Plant Award: the Need to Harmonize Competing Environmental Regimes and Dispute Settlement Procedures", Leiden Journal of International Law, 2004, pp. 815-ff. See CHURCHILL and SCOTT, "The MOX Plant Litigation: The First Half-Life", ICLQ, 2004, pp. 643-ff.; RÖBEN, "The Order of the UNCLOS Annex VII Arbitral Tribunal to Suspend Proceedings in the Case of the Mox Plant at Sellafield: How Much Juridisdictional Subsidiarity?", Nordic Journal of International Law, 2004, pp. 223-ff. See also: S. MALJEAN-DUBOIS, supra note 39.
[49] Belgium v. the Netherlands, 24 May 2005, http://www.pca-cpa.or/upload/files/BE-NL%Award20240505pdf, §§ 97-141.
[50] In its advisory opinion on 36 § 1 (b) of the Convention on Consular Rights [Adv. Op., OC-16/99, § 85], the Court refused to give any importance to the fact that the same question of interpretation had been raised before the ICJ in the Lagrand Case, because the two institutions were autonomous judicial bodies.
[51] E.C.H.R., Prince Hans-Adam de Liechtensetien v. Germany, 12 July 2001.
[52] For doubts about the 'monopoly' instituted by Article 55, see: A. GATTINI, "A Trojan Horse for Sudeten Claims ?", EJIL, 2002, p. 537; "La renonciation au

droit d'invoquer la responsabilité internationale", in DUPUY, SHAW andSOMMERMANN, Essays in Honour of Tomuschat, 2006, pp. 317-ff.
[53] Land, Island and Maritime Frontier Dispute [El Salvador v. Honduras], 11 Sept. 1992, http://www.icj-cij.org/docket/files/75/6671.pdf
[54] http://www.icj-cij.org/docket/files/91/13684.pdf
[55] We do know however that the Court did not feel bound by the position held by the same tribunal on the conditions of attribution to a state of illicit acts committed by a non-state entity.
[56] This hierachical position of the Court is recognised only in relation to the ICTY, the ICTR and the administrative Court of the UN.
[57] See B. SIMMA, "Fragmentation in a Positive Light", Symposium Michigan University, pp. 847-ff.: "interest triggered by the increase in the number of international courts and tribunals".
[58] In its report on the international liability of states, in respect to Article 44 on the "admissibility of the request", the ILC mentions that the articles do not consider the question of jurisdiction of international courts and tribunals and therefore, "they don't have as a function to deal [...] with doctrines of lis pendens or choice of jurisdiction, that can affect the competence of an international tribunal in respect to another"; ILC Report to the General Assembly at its Fifty-Third Session, A/56/10, p. 328, § 1.
[59] See the articles published in the first edition of the European Journal of Legal Studies; more particularly, our article: Un débat doctrinal à l'ère de la globalisation: Sur la fragmentation du droit international, http://www.ejils.eu
[60] See A. GATTINI, "Un regard procédural sur la fragmentation du droit international", RGDIP, 2006, pp. 303-337.
[61] Mavrommatis Concessions in Palestine [Greece v. United Kingdom], 30 Aug. 1924, CPJI Series A, No 2, p. 31.
[62] See Plateau continental de la mer Egée [CIJ Recueil, 1978, p. 12, § 29]; "the jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement have been pursued paripassu". In the case ofZones franches de la Haute-Savoie et du Pays de Gex, 1932, CPJI Series A, No 22, p. 13; the PCIJ had considered that the judicial resolution of international disputes was to be seen as an "alternative to the direct and amicable resolution of conflicts between the parties". See also: the order of 29 July 1991 of the ICJ in the case of Passage par le Grand-Belt [Finland v. Denmark], ICJ Recueil, 1991, p. 20; "pending a decision of the Court on the merits, any negotiation between the Parties with a view to achieving a direct and friendly settlement is to be welcomed". A Gattini rightly notes in the previously referred to article: " it is therefore astonishing that in the [Nicaragua Case] the Court referred to Article 103 of the UN Charter to impose its primacy over the Contadora diplomatic negotiations"; A. GATTINI, o.c., p. 318.
[63] See A. GATTINI, "Un regard procédural sur la fragmentation", o.c., pp. 311-312; LINDROOS, "Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex specialis", Nordic Journal of International Law, 2005, pp. 27-ff.: "lex specialis is not a substantive rule of international law that might help determine which rule is special in relation to a more general rule; it is a descriptive principle that has little independent normative force".
[64] Mavrommatis Concessions in Palestine [Greece v. United Kingdom], 30 Aug. 1924, CPJI Series A, No 2, p. 31.
[65] See A. GATTINI, "Un regard procédural sur la fragmentation", o.c., p. 312.

[66] See A. REINISCH, "The Use and Limits of res iudicata and litis pendens as procedural tools to avoid conflicting dispute settlement outcomes", Law and Practice of International Courts and Tribunals, 2004, p. 48.
[67] A. GATTINI, o.c., pp. 326-ff.
[68] V. LOWE, "Res Iudicata and the Rule of Law of International Arbitration", African Journal of International & Comparative Law, 1996, pp. 38-ff.
[69] See L. CONDORELLI, "La juridiction internationale", in Colloque de la Société française de droit international, 1987, p. 309; RÖBEN, "Le précédent dans la jurisprudence de la Cour internationale", German Yearbook of International Law, 1989, p. 398; I. SCOBBIE, "Res Iudicata, Precedent and the International Court: A Preliminary Sketch", Australian Yearbook of International Law, 1999, p. 303.
[70] See SHAHABUDDEN, "Consistency in Holdings by International Tribunals", in ANDO et al., Liber Amicorum Oda, The Hague, 2002, pp. 633-ff.
[71] See R. HIGGINS, "Respecting Sovereign States and Running a Tight Courtroom", ICLQ, 2001, p. 122; R. WOLFRUM, "Konkurrierende Zuständigkeiten internationaler Streitentscheidungungsinstanzen: Notwendigkeit für Lösungsmöglichkeiten und deren Grenzen", in ANDO et al., Liber Amicorum Oda, o.c. p. 657.
[72] See V. LOWE, "Overlapping Jurisdictions in International Tribunals", Australian Yearbook of International Law, 1999, p. 197.
[73] See A. Ciampi, L'Union européenne et le respect des droits de l'homme dans la mise en oeuvre des sanctions devant la Cour européenne des droits de l'homme,RGDIP 2006/1, pp. 85-117.
[74] In the previously quoted study, A.Gattini notes that in the Kvocka et al. [IT-98-30/1] before the ICTY, one of the indictees had made a request for the suspension of proceedings pending the decision of the ICJ on relevant questions in theGenocide Case. The Appeals Chamber confirmed the denial of the claim, considering that there was no legal basis to bind the tribunal to decisions of the ICJ; Decision on the Interlocutory Appeal by the accused Zigic against the decision of Trial Chamber I dated 5 December 2000, 25 May 2001. See ADJOVI and DELLA MORTE, "La notion de procès équitable devant les Tribunaux Pénaux Internationaux", in H. RUIZ FABRI, Procès équitable et enchevêtrement des espaces normatifs, Paris, 2002.
[75] See, among others, G. GAJA, "Relationship of the ICJ with Other International Courts and Tribunals", in ZIMMERMANN et al., The Statute of the International Court of Justice, Oxford, 2006, p. 543.
[76] See P. DE SENA et F. DE VICTOR, "State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case", EJIL, 2005, pp. 89-113.
[77] On the dialectic between formal and substantial unity, we refer once again to our Hague Course: P.M. DUPUY, "L'unité de l'ordre juridique international", RCADI, 2002, Vol. 297.
[78] See J.H.H. WEILER, The EU, the WTO and the NAFTA, Towards a Common Law of International Trade?, EUI, Academy of European Law, Oxford University Press, 2000.
[79] Report in Etats-Unis – Normes concernant l'essence nouvelle et ancienne formules, 29 Apr. 1996, p. 9; see the commentary by G. MARCEAU, "A Call for Coherence in International Law: Praises for the Prohibition against 'Clinical Isolation' in WTO Dispute Settlement", Journal of World Trade, 1999, No 5, pp. 87-152.

[80] See I.C.J., Activités armées sur le territoire du Congo (new application 2002) [Congo v. Rwanda], 3 Feb. 2006, http://www.icj-cij.org/docket/files/126/10434, §§ 60 and 64; I.C.J., Application de la convention pour la prévention et la répression du crime de génocide [Bosnia-Herzegovina v. Serbia-Montenegro], 26 Feb. 2007, http://www.icj-cij.org/docket/files/91/13684.pdf; for a critical analysis of the ICJ's judicial policy between 1986 and 2000, see P.M. DUPUY, L'unité de l'ordre juridique international, o.c., pp. 473-478.

DO JUDGES MEET THEIR CONSTITUTIONAL OBLIGATION TO SETTLE DISPUTES IN CONFORMITY WITH 'PRINCIPLES OF JUSTICE AND INTERNATIONAL LAW'?

Ernst-Ulrich Petersmann*

The American legal philosopher Ronald Dworkin begins his recent book on Justice in Robes with the story of US Supreme Court Justice Oliver Wendell Holmes who, on his way to the court, was greeted by another lawyer: "Do justice, Justice!"; Holmes replied: "I am not here to do justice, but to decide cases according to the rules".[1] Should lawyers and judges apply positive law without regard to justice, like a watchmaker may have no interest in the notion of time as such? Does the separation of judicial power from legislative and executive powers require that, as postulated by Montesquieu, decisions of courts must always conform to the exact letter of the law, as understood by the legislator? Is judicial protection of 'constitutional justice' democratically legitimate in international relations governed by power politics? Why do international courts so rarely refer to their legal obligation (as codified in the VCLT) to settle disputes "in conformity with the principles of justice"?

I. LAW, JUDGES AND 'CONSTITUTIONAL JUSTICE': THE JUDICIAL FUNCTION TO SETTLE DISPUTES THROUGH JUST PROCEDURES

In a world of scarce resources and imperfect knowledge, conflicts of interests among self-interested individuals, as well as among states pursuing rational self-interests, are inevitable. Such conflicts, and their peaceful settlement on the basis of law and judicial procedures, also entail positive incentives for competition enhancing productive uses of resources, new discoveries, social learning processes and mutually beneficial cooperation.[2] The task of judges consists primarily in the independent and impartial interpretation, clarification and protection of the rule of law. By offering complainants and defendants 'their day in court', judges promote "free trade in ideas" (Oliver Wendell Holmes),[3] "public reason"[4] and "justice"[5] that may also justify judicial correction of cases of injustice for the benefit of adversely affected citizens. The US Supreme Court, for example, has been described as "the voice of the national conscience"[6] and as the most independent and impartial guardian of the constitutional 'checks and balances' protecting US citizens and their constitutional rights against potential "tyranny of majorities" [T. Jefferson] and governmental abuses of powers.

The legal institution of impartial judges has existed since the beginnings of legal civilisation. The functional interrelationships between law, judges and

justice are reflected in legal language from antiquity (e.g., in the common core of the Latin terms jus, judex, justitia) up to modern times (cf the Anglo-American legal traditions of speaking of courts of justice, and giving judges the title of Mr. Justice, Lord Justice, or Chief Justice). Like the Roman god Janus, justice and judges face two different perspectives: their 'conservative function' is to apply the existing law and protect the existing system of rights so as "to render to each person what is his [right]"; yet, laws tend to be incomplete and subject to change. Impartial justice may require 'reformative interpretations' of legal rules in response to changing social conceptions of justice. This is particularly true following the universal recognition -by all 192 UN member states- of inalienable human rights, which call for a 'constitutional paradigm change' and for citizen-oriented interpretations of the power-oriented structures of international law. Former UN Secretary-General Kofi Annan, in his final address as UN Secretary-General to world leaders assembled in the UN General Assembly on 19 September 2006, criticised the power-oriented UN system as "unjust, discriminatory and irresponsible" in view of its failures to effectively respond to the three global challenges to the United Nations: "to ensure that globalisation would benefit the entire human race; to heal the disorder of the post-Cold War world, replacing it with a genuinely new world order of peace and freedom; and to protect the rights and dignity of individuals, particularly women, which were so widely trampled underfoot". According to Kofi Annan, these three challenges -"an unjust world economy, world disorder and widespread contempt for human rights and the rule of law"- entail divisions that "threaten the very notion of an international community, upon which the UN stands".[7] Under which conditions may national and international judges interpret 'principles of justice and international law' from citizen-oriented, human rights perspectives rather than from the state-centred perspectives of governments, whose representatives all too often pursue self-interests in limiting their personal accountability by treating citizens as mere objects of international law and of discretionary foreign policies?

The functions of judges are defined not only in the legal instruments establishing courts. Since legal antiquity, judges also invoke inherent powers deriving from the constitutional context of the respective legal systems (such as constitutional safeguards of the independence of courts in the Magna Charta and in the US Constitution), often in response to claims for independent 'justice'. Article III Section 2 of the US Constitution provides, for example, that the "judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made [...] under their Authority". Based on this Anglo-Saxon distinction between statute law and equity limiting the permissible content of governmental regulations, courts and judge-

made law have often assumed a crucial role in the development of 'constitutional justice'.[8] Also in international law, international courts invoke inherent powers to protect procedural fairness and principles of reciprocal, corrective and distributive justice, for example by using principles of equity for the delimitation of conflicting claims to maritime waters and to the underlying seabed.[9] Since the democratic constitutions of the 18th century, almost all UN member states have adopted national constitutions and international agreements that have progressively expanded the power of judges in most states as well as in international relations.[10] The constitutional separation of powers provides for ever more comprehensive legal safeguards of the impartiality, integrity, institutional and personal independence of judges.[11] Regional and worldwide human rights conventions recognise human rights of access "to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" for the "determination of civil rights and obligations or of any criminal charge".[12] An ever larger number of other international treaties continue to extend such individual rights of access to courts and to effective legal remedies to other fields of law, notably in the field of international economic and environmental law.

Alexander Hamilton, in the Federalist Papers, described the judiciary as "the least dangerous branch of government" in view of the fact that courts dispose neither of "the power of the sword" nor of "the power of the purse".[13] In modern, multilevel governance systems with their ever more national and international "checks and balances", courts remain the most impartial and independent 'forum of principle'; for example, fair and public judicial procedures entitle all parties involved to present and challenge all relevant arguments, and judicial decisions require more comprehensive and more coherent justification than in the case of political and administrative decisions. As all laws and all international treaties use vague terms and incomplete rules, the judicial function goes inevitably beyond being merely "la bouche qui prononce les mots de la loi" [Montesquieu]. By choosing among alternative interpretations of rules and 'filling gaps' in the name of justice, judicial decisions interpret, progressively develop and complement legislative rules and intergovernmental treaties. An ever larger number of empirical political science analyses of the global rise of judicial power, and of 'judicial activism' of national supreme courts and some international courts (notably in Europe), confirm the political impact of judicial interpretations on the development of national and international law and policies.[14] Both positivist-legal theories as well as moral-prescriptive theories of adjudication justify such judicial clarification and progressive development of indeterminate legal rules (e.g., general human rights guarantees) on the ground that independent courts are the most principled

guardians of constitutional rights and of "deliberative, constitutionally limited democracy", of which the public reasoning of courts is an important part.[15] For example, the judicial protection of equal treatment for children of different colour by the US Supreme Court in the celebrated case of Brown v. Board of Education in 1954 - notwithstanding earlier denials by the law-maker and by other courts of such a judicial reading of the US Constitution's safeguards of "equal protection of the laws" (Fourteenth Amendment)- was democratically supported by the other branches of government and is today celebrated by civil society as a crucial contribution to protecting more effectively the goals of the US Constitutions (including its Preamble objective "to establish justice and secure the blessings of liberty") and human rights.

In its Advisory Opinion on Namibia, the International Court of Justice [ICJ] emphasised that -also in international law- legal institutions ought not to be viewed statically and must interpret international law in the light of the legal principles prevailing at the moment legal issues arise concerning them: "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation".[16] International human rights courts (like the ECtHR) and economic courts (like the ECJ) have often emphasised that effective protection of human rights and of non-discriminatory conditions of competition may require 'dynamic interpretations' of international rules with due regard to changed circumstances (such as new risks to human health, competition and the environment). As in domestic legal systems, intergovernmental and judicial rule-making are interrelated also in international relations. As all international treaties remain incomplete and build on general principles of law, the judicial interpretation, clarification and application of international law rules, like judicial decisions on particular disputes, inevitably influence the dynamic evolution and clarification of the *opinio juris* voiced by governments, judges, parliaments, citizens and non-governmental organisations with regard to the progressive development of international rules. The universal recognition, by all 192 UN member states, of "inalienable" human rights deriving from respect for human dignity, and the ever more specific legal obligations accepted by all states to protect human rights, entail that citizens (as the 'democratic owners' of international law and institutions) and judges (as the most independent and impartial guardians of 'principles of justice' underlying international law) can assert no less democratic legitimacy for defining and protecting human rights than governments that have, for centuries, disregarded rights-based struggles for human rights in international relations and continue to prefer treating citizens as mere objects of international law in most UN institutions. From the perspective of citizens and 'deliberative democracies', active judicial protection of

constitutional citizen rights (including human rights) is essential for 'constitutionalising', 'democracising' and transforming international law into a constitutional order, as it is emerging for the more than 800 million European citizens benefiting from human rights and fundamental freedoms protected by the ECtHR, and especially for the 480 million EC [European Community] citizens who have been granted by EC law and by European courts constitutional freedoms and social rights across the EC that national governments had never protected before. The inalienable ius cogens and erga omnes core of human rights, and the judicial obligation to settle disputes "in conformity with principles of justice and international law", are constitutional foundations of 'constitutional justice' in constitutional democracies and international law in the 21st century.

II. MULTILEVEL JUDICIAL PROTECTION BY EUROPEAN COURTS OF CONSTITUTIONAL RIGHTS AND ECONOMIC RIGHTS OF CITIZENS

Europe has a long history of multilevel judicial governance in regional economic unions (e.g., the BENELUX Court), functional organisations (e.g., the supranational Rhine River Court based on the Rhine River Navigation Act of 1868) and in (con-)federal associations of states (e.g., the Reichskammergericht in the Holy Roman Empire of a German Nation). The transformation of the intergovernmental EC treaties and of the European Convention on Human Rights [ECHR] into objective constitutional orders protecting constitutional citizen rights across national frontiers was driven by different kinds of 'multilevel judicial governance':

- The multilevel judicial governance in the EC among national courts and European courts remains characterised by the supranational structures of EC law and the fact that the fundamental freedoms of EC law and related social guarantees go far beyond the national laws of EC member states [below 1].

- The multilevel judicial governance of national courts and the ECtHR in the field of human rights differs from the multilevel judicial governance in European economic law in many ways. For example, both the ECtHR and the ECHR assert only subsidiary constitutional functions vis-à-vis national human rights guarantees and the diverse democratic traditions in the 47 countries that have ratified the ECHR [below 2].

- The multilevel judicial governance among national courts and the European Free Trade Association [EFTA] Court has extended the EC's common market law to the three EFTA members (Iceland, Liechtenstein

and Norway) of the European Economic Area [EEA] through intergovernmental modes of cooperation rather than by using the EC's constitutional principles of legal primacy, direct effect and direct applicability of the EC's common market law. This different kind of multilevel judicial cooperation (e.g., based on voluntary compliance with legally non-binding preliminary opinions by the EFTA Court) has demonstrated that citizens in third countries can effectively benefit from the legal 'market freedoms' and social benefits of European integration law without full membership in the EC [below C].

This Section II emphasises the diverse forms of 'judicial dialogues', 'judicial cooperation', judicial resistance or judicial self-restraint among national courts, the EC courts, the EFTA Court and the ECtHR. The following Section III argues that the 'Solange-method' used by these courts as the basis for their conditional respect ('as long as') of the diverse legal and judicial methods of protecting constitutional rights should serve as model for promoting judicial cooperation, comity and judicial self-restraint also beyond Europe in the judicial interpretation and progressive development of international economic, environmental, criminal law, human rights and related constitutional rights of citizens.

1. *Multilevel judicial protection of European economic law inside the EC*

A citizen-driven common market with free movement of goods, services, persons, capital and payments inside the EC can work effectively only to the extent that the common European market and competition rules are applied and protected in coherent ways in national courts in all 27 EC member states. As the declared objective of an "ever-closer union between the peoples of Europe" (Preamble to the EC Treaty) was to be brought about by economic and legal integration requiring additional law-making, administrative decisions and common policies by the European institutions, the EC Treaty differs from other international treaties by its innovative judicial safeguards for the protection of rule of law – not only in intergovernmental relations among EC member states, but also in the citizen-driven common market as well as in the common policies of the European Communities. Whereas most international jurisdictions (like the ICJ, the Permanent Court of Arbitration, the Law of the Sea Tribunal, the World Trade Organisation (WTO) dispute settlement bodies) remain characterised by intergovernmental procedures, the EC Treaty provides unique legal remedies not only for member states, but also for EC citizens and EC institutions as guardians of EC law and of its 'constitutional functions' for correcting 'governance failures' at national and European levels:

- The citizen-driven cooperation among national courts and the ECJ in the context of preliminary rulings procedures (Article 234 EC) has uniquely empowered national and European judges to cooperate, at the request of EC citizens, in the multilevel judicial protection of citizen rights protected by EC law.
- The empowerment of the European Commission to initiate infringement proceedings (Article 226 EC) rendered the ECJ's function as an intergovernmental court much more effective than it would have been possible under purely inter-state infringement proceedings (Article 227 EC).
- The Court's 'constitutional functions' (e.g., in case of actions by Member States or EC institutions for annulment of EC regulations), as well as its functions as an 'administrative court' (e.g., protecting private rights and rule of law in response to direct actions by natural or legal persons for annulment of EC acts, failure to act, or actions for damages), offered unique legal remedies for maintaining and developing the constitutional coherence of EC law.
- The EC Court's teleological reasoning based on communitarian needs (e.g., in terms of protection of EC citizen rights, consumer welfare, and of undistorted competition in the common market) justified constitutional interpretations of 'fundamental freedoms' of EC citizens that would hardly have been acceptable in purely intergovernmental treaty regimes.

The diverse forms of judicial dialogues (e.g., on the interpretation and protection of fundamental rights), judicial contestation (e.g., of the scope of EC competences) and judicial cooperation (e.g., in preliminary ruling procedures) emphasised the need for respecting common constitutional principles deriving from the EC Member States' obligations under their national constitutions, under the ECHR (as interpreted by the ECtHR) as well as under the EC's constitutional law. This judicial respect for 'constitutional pluralism' promoted judicial comity among national courts, the ECJ and the ECtHR in their complementary, multilevel protection of constitutional rights, with due respect for the diversity of national constitutional and judicial traditions. Section III [below] concludes that it was this multilevel judicial protection of common constitutional principles underlying European law and national constitutions which enabled the ECJ, and also the ECtHR, to progressively transcend the intergovernmental structures of European law by focusing on the judicial protection of individual rights in constitutional democracies and in common markets rather than on state interests in intergovernmental relations.

2. *Multilevel judicial enforcement of the ECHR: Subsidiary 'constitutional*

functions' of the ECtHR

The ECHR, like most other international human rights conventions, sets out minimum standards for the treatment of individuals that respect the diversity of democratic constitutional traditions of defining individual rights in democratic communities. The 14 Protocols to the ECHR and the European Social Charter (as revised in 1998) also reflect the constitutional experiences in some European countries (like France and Germany) with protecting economic and social rights as integral parts of their constitutional and economic laws. For example, in order to avoid a repetition of the systemic political abuses of economic regulation prior to 1945,[17] the ECHR also includes guarantees of property rights and rights of companies. The jurisdiction of the ECtHR for the collective enforcement of the ECHR -based on complaints not only by member states but also by private persons- prompted the Court to interpret the ECHR as a constitutional charter of Europe[18] protecting human rights across Europe as an objective 'constitutional order'.[19] The multilevel judicial interpretation and protection of fundamental rights, as well as of their governmental restriction "in the interests of morals, public order or national security in a democratic society" (Article 6 ECHR), are of a constitutional nature. But ECtHR judges rightly emphasise the subsidiary functions of the ECHR and of its Court:

> "These issues are more properly decided, in conformity with the subsidiary logic of the system of protection set up by the European Convention on Human Rights, by the national judicial authorities themselves and notably courts of constitutional jurisdiction. European control is a fail-safe device designed to catch the breaches that escape the rigorous scrutiny of the national constitutional bodies".[20]

The Court aims at resisting the "temptation of delving too deep into issues of fact and of law, of becoming the famous 'fourth instance' that it has always insisted it is not".[21] The Court also exercises deference by recognising that the democratically elected legislatures in the member states enjoy a 'margin of appreciation' in the balancing of public and private interests, provided the measure taken in the general interest bears a reasonable relationship of proportionality both to the aim pursued and the effect on the individual interest affected.[22] Rather than imposing uniform approaches to the diverse human rights problems in ECHR member states, the ECtHR often exercises judicial self-restraint, for example:

- by leaving the process of implementing its judgments to the

member states, subject to the 'peer review' by the Committee of Ministers of the Council of Europe, rather than asserting judicial powers to order consequential measures;
- by viewing the discretionary scheme of Article 41 ECHR for awarding just satisfaction "if necessary" as being secondary to the primary aim of the ECtHR to protect minimum standards of human rights protection in all Convention states;[23]
- by concentrating on 'constitutional decisions of principle' and 'pilot proceedings' that appear to be relevant for many individual complaints and for the judicial protection of a European public order based on human rights, democracy and rule of law; and
- by filtering out early manifestly ill-founded complaints because the Court perceives its 'individual relief function' as being subsidiary to its constitutional function.

Article 34 of the ECHR permits individual complaints not only "from any person", but also from "non-governmental organisations or groups of individuals claiming to be the victim of a violation" of ECHR rights by one of the State parties. Whereas the African, American, Arab and UN human rights conventions protect human rights only of individuals and of people, the ECHR and the European Social Charter protect also human rights of non-governmental legal organisations (NGOs). The protection of this collective dimension of human rights (e.g., of legal persons that are composed of natural persons) has prompted the ECtHR to protect procedural human rights (e.g., under Articles 6, 13, 34 ECHR) as well as substantive human rights of companies (e.g., under Articles 8, 10, 11 ECHR, Protocol No 1)[24] in conformity with the national constitutional traditions in many European states as well as inside the EC (e.g., the EC guarantees of market freedoms and other economic and social rights of companies). The rights and freedoms of the ECHR can thus be divided into 3 groups:

- Some rights are inherently limited to natural persons (e.g., Article 2 ECHR: right to life) and focus on their legal protection (e.g., Article 3 ECHR: prohibition of torture; prohibition of arbitrary detention in Article 5 ECHR; Article 9 ECHR: freedom of conscience).
- But some provision of the ECHR explicitly protect also rights of 'legal persons' (e.g., property rights protected in Article 1 of Protocol No 1 ECHR).
- Rights of companies have become recognised by the ECtHR also in respect of other ECHR provisions that protect rights of "everybody" without mentioning rights of NGOs, notably rights of companies to invoke the right to a fair trial in the determination of civil rights (protected under Article 6 ECHR), the right to respect

> one's home (protected under Article 8 ECHR), freedom of expression (Article 10 ECHR), freedom of assembly (Article 11 ECHR), freedom of religion (Article 9 ECHR), the right to an effective remedy (Article 13 ECHR), and the right to request compensation for non-material damage (Article 41 ECHR). Freedom of contract and of economic activity is not specifically protected in the ECHR which focuses on civil and political rights; but the right to form companies in order to pursue private interests collectively is protected by freedom of association (Article 11 ECHR), by the right to property (Protocol No 1 ECHR) and, indirectly, also by the protection of "civil rights" in Article 6 ECHR.

This broad scope of human rights protection is reflected in the requirement of Article 1 ECHR to secure the human rights "to everyone within their jurisdiction", which protects also traders and companies from outside Europe and may cover even state acts implemented outside the national territory of ECHR member states or implementing obligations under EC law. Yet, compared with the large number of complaints by companies to the ECJ, less than 3% of judgments by the ECtHR relate to complaints by companies. So far, such complaints concerned mainly Article 6 § 1 ECHR (right to a fair trial), Article 8 ECHR (right to respect for one's home and correspondence), Article 10 ECHR (freedom of expression including commercial free speech), and the guarantee of property rights in Protocol No 1 to the ECHR.

Similar to the constitutional and teleological interpretation methods used by the ECJ, the ECtHR -in its judicial interpretation of the ECHR- applies principles of 'effective interpretation' aimed at protecting human rights in a practical and effective manner. These principles of effective treaty interpretation include a principle of "dynamic interpretation" of the ECHR as a "constitutional instrument of European public order" that must be interpreted with due regard to contemporary realities so as to protect "an effective political democracy" (which is mentioned in the Preamble as an objective of the ECHR).[25] Limitations of fundamental rights of economic actors are being reviewed by the ECtHR as to whether they are determined by law, in conformity with the ECHR, and whether they are "necessary in a democratic society". Governmental limitations of civil and political human rights tend to be reviewed by the ECtHR more strictly (e.g., as to whether they maintain an appropriate balance between the human right concerned and the need for "an effective political democracy") than governmental restrictions of private economic activity that tend to be reviewed by the Court on the basis of a more lenient standard of judicial review respecting a 'margin of appreciation' of governments.

Article 1 of Protocol No 1 to the ECHR protects "peaceful enjoyment of possessions" (§ 1); the term "property" is used only in paragraph 2. The ECtHR has clarified that Article 1 guarantees rights of property not only in corporeal things (rights in rem) but also intellectual property rights and private law or public law claims in personam (e.g., monetary claims based on private contracts, employment and business rights, pecuniary claims against public authorities).[26] In Immobiliare Saffi v. Italy, the Court also recognised positive state duties to protect private property, for example to provide police assistance in evacuating a tenant from the applicant's apartment; the lack of such police assistance for executing a judicial order to evacuate a tenant was found to constitute a breach of the applicant's property right.[27] The inclusion of the right to property into the ECHR confirms that property is perceived as a fundamental right that is indispensable for personal self-realisation in dignity.[28] As the moral justifications of private property do not warrant absolute property rights, Article 1 ECHR recognises -in conformity with the constitutional traditions of many national European constitutions which emphasise individual as well as social functions of property (e.g., in Article 14 of the German Basic Law)- that private property can be restricted for legitimate reasons. The case-law of the ECtHR confirms that such restrictions may include, for example:

- taxation for the common financing of public goods (including redistributive taxation if it can be justified on grounds of reciprocal benefit, correction of past injustices or redistributive justice);
- governmental control of harmful uses of property (e.g., by police power regulations designed at preventing harm to others); as well as
- governmental takings of property by power of eminent domain, whose lawful exercise depends on the necessity and proportionality of the taking for realising a legitimate public interest and -if the taking imposes a discriminatory burden only on some individuals- may require payment of compensation for the property taken.

Even though the ECtHR respects a wide margin of appreciation of states to limit and interfere with property rights (e.g., by means of taxation) and to balance individual and public interests (e.g., in case of a taking of property without full compensation), the Court's expansive protection -as property or 'possessions'- of almost all pecuniary interests and legitimate expectations arising from private and public law relationships reveals a strong judicial awareness of the importance of private economic activities and economic law for personal self-realisation in dignity and effective protection of human rights. The Court's review of governmental limitations of, and interferences with, property rights is based on

'substantive due process' standards that go far beyond the 'procedural due process' standards applied by the US Supreme Court since the 1930s.[29] In the different European context of creating an ever broader 'social market economy' across the 47 member states of the Council of Europe, the ECtHR's constitutional approach to the protection of broadly defined property rights and fundamental freedoms, including those of companies, appears appropriate.

3. *Diversity of multilevel judicial governance in free trade agreements (FTAs): The example of the EFTA Court*

The 1992 Agreement between the EC and EFTA States (Iceland, Liechtenstein and Norway) establishing the European Economic Area (EEA)[30] is the legally most developed of the more than, in terms of the General Agreement on Tariffs and Trade (GATT) Article XXIV, 250 Free Trade Agreements (FTAs) concluded after World War II. The EFTA Court illustrates the diversity of judicial procedures and approaches to the interpretation of international trade law, and confirms the importance of 'judicial dialogues' among international and domestic courts for the promotion of rule of law in international trade. In order to ensure that the extension of the EC's common market law to the EFTA countries would function in the same manner as in the EC's internal market, the 1991 Draft Agreement for the EEA had provided for the establishment of an EEA Court, composed of judges from the ECJ as well as from EFTA countries, and for the application by the EEA Court of the case-law of the EC Court. In Opinion 1/91, the ECJ objected to the structure and competences of such an EEA Court on the ground that its legally binding interpretations could adversely affect the autonomy and exclusive jurisdiction (Articles 220, 292 EC) of the ECJ (e.g., for interpreting the respective competences of the EC and EC Member States concerning matters governed by EEA provisions).[31] Following the Court's negative Opinion, the EEA Agreement's provisions on judicial supervision were re-negotiated and the EEA Courtwas replaced by an EFTA Court with more limited jurisdiction and composed only of judges from EFTA countries. In a second Opinion, the ECJ confirmed the consistency of the revised EEA Agreement[32] subject to certain legal interpretations of this agreement by the Court.[33] In order to promote legal homogeneity between EC and EEA market law, Article 6 of the revised EEA Agreement provides for the following principle of interpretation:

> "Without prejudice to future developments of case-law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the [EC Treaty and the ECSC

> Treaty] and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the [EC] given prior to the date of signature of the agreement".[34]

The EFTA Court took up its functions in January 1994. Following the accession of Austria, Finland and Sweden to the EC in 1995, the Court moved its seat to Luxembourg and continues to be composed of three judges nominated by Iceland, Liechtenstein and Norway. According to the 1994 Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA)[35], the Court has jurisdiction for infringement proceedings by the EFTA Surveillance Authority against an EFTA state (Article 31 SCA), actions concerning the settlement of disputes between EFTA states (Article 32 SCA), advisory opinions on the interpretation of the EEA Agreement (Article 33 SCA), review of penalties imposed by the EFTA Surveillance Authority (Article 35 SCA), as well as jurisdiction in actions brought by an EFTA state or by natural or legal persons against decisions of the EFTA Surveillance Authority (Article 36 SCA) or against failure to act (Article 37 SCA). Out of the 62 cases lodged during the first ten years of the EFTA Court, 18 related to direct actions, 42 concerned requests by national courts for advisory opinions, and 2 related to requests for legal aid and suspension of a measure.[36]

In its interpretation of EC law provisions that are identical to EEA rules (e.g., concerning common market and competition rules), the EEA Court has regularly followed ECJ case law and has realised the homogeneity objectives of EEA law in terms of the outcome of cases, if not their legal reasoning. In its very first case, Restamark,[37] the EFTA Court interpreted the notion of court or tribunal (in the sense of Article 34 SCA regarding requests by national courts for preliminary opinions) by proceeding from the six-factor-test applied by the ECJ in its interpretation of the corresponding provision in Article 234 EC: the referring body must, in order to constitute a "court or tribunal", (1) be established by law (rather than by private agreement as in the case of commercial arbitration); (2) be permanent; (3) have compulsory jurisdiction for legally binding decisions on issues of a justiciable nature (res judicata); (4) conduct inter-partes procedures; (5) apply rules of law and evidence; and (6) be independent. Yet, the EFTA Court considered the request admissible even if, as frequently in administrative court proceedings in Finland and Sweden, only one party appeared in the proceedings. In the ECJ judgments in cases Dorsch Consult of 1997[38] and Gabalfrisa of 2000,[39] the ECJ followed suit and acknowledged that the inter-partes requirement was not absolute.

The EFTA Court's case-law on questions of locus standi of private associations to bring an action for nullity of a decision of the EFTA Surveillance Authority offers another example for liberal interpretations by the EFTA Court of procedural requirements.[40]

The EC Court, in its Opinion 1/91, held that the Community law principles of legal primacy and direct effect were not applicable to the EEA Agreement and "irreconcilable" with its characteristics as an international agreement conferring rights only on the participating states and the EC.[41] The EFTA Court, in its Restamark judgment of December 1994, followed from Protocol 35 (on achieving a homogenous EEA based on common rules) that individuals and economic operators must be entitled to invoke and to claim at the national level any rights that could be derived from precise and unconditional EEA provisions if they had been made part of the national legal orders.[42] In its 2002 Einarsson judgment, the EFTA Court further followed from Protocol 35 that such provisions with quasi-direct effect must take legal precedence over conflicting provisions of national law.[43] Already in 1998, in its Sveinbjörnsdottir judgment, the EFTA Court had characterised the legal nature of the EEA Agreement as an international treaty sui generis that had created a distinct legal order of its own; the Court therefore found that the principle of state liability for breaches of EEA law must be presumed to be part of EEA law.[44] This judicial recognition of the corresponding EC law principles was confirmed in the 2002Karlsson judgment, where the EFTA Court further held that EEA law -while not prescribing that individuals and economic operators be able to directly rely on non-implemented EEA rules before national courts- required national courts to consider relevant EEA rules, whether implemented or not, when interpreting international and domestic law.[45]

III. LESSONS FROM THE EUROPEAN 'SOLANGE-METHOD' OF JUDICIAL COOPERATION FOR WORLDWIDE ECONOMIC AND HUMAN RIGHTS LAW?

From the perspectives of economics and international law, FTAs are sometimes viewed as sub-optimal compared with the rules of the WTO for trade liberalisation, rule-making and compulsory dispute settlement at worldwide levels. For example:

- As most FTAs only provide for diplomatic dispute settlement procedures (e.g., consultations, mediation, conciliation, panel procedures subject to political approval by member states) without preventing their member countries from submitting trade disputes to the quasi judicial WTO dispute settlement procedures, the compulsory WTO dispute

settlement system may offer comparatively more effective legal remedies. This is illustrated by the fact that most intergovernmental trade disputes among the 3 member countries of the North American Free Trade Agreement (NAFTA) have been submitted to the WTO dispute settlement system rather than to the legally weaker dispute settlement procedures of Chapter 20 of the NAFTA Agreement).[46]
- Submission of trade disputes among FTA member countries to the WTO has only rarely given rise to legal problems, for example if the respondent country could not invoke in WTO dispute settlement procedures legal justifications based on FTA rules[47] or on FTA dispute settlement procedures.[48] The rare instances of successive invocations of FTA and WTO dispute settlement procedures challenging the same trade measure[49] did not amount to "abuses of rights", for instance because WTO Members have rights to conclude regional trade agreements with separate dispute settlement procedures as well as rights to the quasi automatic establishment of WTO dispute settlement bodies examining complaints in the WTO on the different legal basis of WTO law.

Yet, from the perspective of citizens and their economic rights as protected by courts in Europe, the EC and EFTA courts offer citizens direct access and judicial remedies that appear economically more efficient, legally more effective and democratically more legitimate than politicised, intergovernmental procedures among states for the settlement of disputes involving private economic actors. The fact that the ECJ has rendered only three judgments in international disputes among EC member states since the establishment of the ECJ in 1952 illustrates that many intergovernmental disputes (e.g., over private rights) could be prevented or settled by alternative dispute settlement procedures if governments would grant private economic actors more effective legal and judicial remedies in national and regional courts against governmental restrictions. Unfortunately, national and international judges often fail to cooperate in their judicial protection of the rule of law in international relations beyond the EC and ECHR, for example because they perceive international and domestic law as being based on mutually conflicting conceptions of justice. For instance, US courts claim that WTO dispute settlement rulings "are not binding on the US, much less this court";[50] similarly, the EC Court has refrained long since -at the request of the political EC institutions who have repeatedly misled the ECJ about the interpretation of WTO obligations so as to limit their own judicial accountability-[51] from reviewing the legality of EC measures in the light of the EC's GATT and WTO obligations. WTO law tends to be perceived as intergovernmental rules, which governments and domestic courts may ignore without legal and judicial remedies by their citizens

adversely affected by welfare-reducing violations of WTO guarantees of market access and rule of law.[52] Both the EC and US governments have requested their respective domestic courts to refrain from applying WTO rules at the request of citizens or of NGOs;[53] in order to limit their own judicial accountability, they have repeatedly encouraged their respective courts to apply domestic trade regulations without regard to WTO dispute settlement findings on their illegality.[54] The simultaneous insistence by the same trade politicians that WTO rules are enforceable at their own request in domestic courts vis-à-vis violations of WTO law by states inside the EC or inside the US, illustrates the political rather than legal nature of such Machiavellian objections against judicial accountability for violations by trade bureaucracies of the international rule of law.

Section I had argued that the universal recognition of inalienable human rights requires national and international courts to review whether -in their judicial settlement of "disputes concerning treaties, like other international disputes, [...] in conformity with the principles of justice and international law"; Preamble Vienna Convention on the Law of Treaties [VCLT]- human rights and other principles of justice (like due process of law) justify judicial application of international guarantees of freedom, non-discrimination, rule of law and social safeguard measures for the benefit of citizens. Section II described the citizen-driven, multilevel judicial protection of the EC, EEA and ECHR guarantees of freedoms, fundamental rights and rule of law as models for decentralising and transforming intergovernmental rules and dispute settlement procedures for the benefit of citizens. This Section III suggests that the 'Solange-method' of conditional cooperation by national courts with the ECJ 'as long as' (which is 'solange' in German) it protects the constitutional rights of citizens [below 1], as well as the judicial self-restraint by the ECtHR vis-à-vis alleged violations of human rights by EC institutions 'as long as' the EC Court protects the human rights guarantees of the ECHR [below 2], should serve as a model for 'conditional cooperation' among international courts and national courts also in international economic law, environmental law and human rights law beyond Europe [below 3]. Section IV asks whether the judicial function to settle disputes in conformity with principles of procedural and substantive justice can assert democratic legitimacy in international relations which -beyond rights-based European integration law- continue to be dominated by power politics. It is argued that the legitimacy of judicial cooperation, self-restraint, 'judicial competition' and 'judicial dialogues' among courts derives from their protection of constitutional citizen rights as a constitutional precondition for individual and democratic self-development in a constitutionally protected framework of 'participatory',

'deliberative' and 'cosmopolitan democracy'. Citizens have reason to support the multilevel, judicial protection of citizen rights in European law and to challenge international judges (e.g., in worldwide and non-European institutions) if they perceive themselves as mere agents of governments and disregard the constitutional obligation of judges to settle disputes in conformity with human rights.

1. *The German constitutional court's 'Solange-method' of protection of fundamental rights in the EC's legal system*

Section II recalled how the ECJ, the EFTA Court and the ECtHR have -albeit in different ways- interpreted the intergovernmental EC, EEA and ECHR Treaties as objective legal orders protecting also individual rights of citizens. All three courts have acknowledged that the human rights goals to empower individuals and effectively protect human rights, like the objective of international trade agreements to enable citizens to engage in mutually beneficial trade transactions under non-discriminatory conditions of competition, call for 'dynamic judicial interpretations' of treaty rules with due regard to the need for judicial protection of citizen interests in economic markets and constitutional democracies. These citizen-oriented interpretations of the EC and EEA Agreements were influenced by the long standing insistency by the German Constitutional Court on its constitutional mandate to protect fundamental rights and constitutional democracy also vis-à-vis abuses of EC powers affecting citizens in Germany. The 'Solange jurisprudence' of the German Constitutional Court, like similar interactions between other national constitutional courts and the EC Court,[55] contributed to a more effective judicial protection of human rights in Community law:

- In its Solange I judgment of 1974, the German Constitutional Court held that "as long as" the integration process of the EC does not include a catalogue of fundamental rights corresponding to that of the German Basic Law, German courts could, after having requested a preliminary ruling from the ECJ, also request a ruling from the German Constitutional Court regarding the compatibility of EC acts with fundamental rights and the German Constitution.[56] This judicial insistence on the then higher level of fundamental rights protection in German constitutional law was instrumental for the ECJ's judicial protection of human rights as common, yet unwritten, constitutional guarantees of EC law.[57]
- In view of the emerging human rights protection in EC law, the German Constitutional Court held -in its Solange II judgment of 1986-[58] that it would no longer exercise its jurisdiction for reviewing EC legal acts "as long as" the ECJ continued to generally and effectively protect fundamental rights against EC measures in ways comparable to the

essential safeguards of German constitutional law.
- In its Maastricht judgment (Solange III) of 1993, however, the German Constitutional Court reasserted its jurisdiction to defend the scope of German constitutional law: EC measures exceeding the limited EC competences covered by the German Act ratifying the EU Treaty [ausbrechende Gemeinschaftsakte] could not be legally binding and applicable in Germany.[59]
- Following GATT and WTO dispute settlement rulings concerning EC import restrictions of bananas violating WTO law, and in view of an ECJ judgment upholding these restrictions without reviewing their WTO inconsistencies, several German courts requested the Constitutional Court to declare these EC restrictions to be ultra vires (i.e., exceeding the EC's limited competences) and to illegally restrict constitutional freedoms of German importers. The German Constitutional Court, in its judgment of 2002[60] (Solange IV), declared the application inadmissible on the ground that it had not been argued that the required level of human rights protection in the EC had generally fallen below the minimum level required by the German Constitution.
- In its judgment of 2005 on the German act implementing the EU Framework Decision (adopted under the third EU pillar) on the European Arrest Warrant, the Constitutional Court held that the automatically binding force and mutual recognition in Germany of arrest orders from other EU member states were inconsistent with the fundamental rights guarantees of the German Basic Law.[61] The limited jurisdiction of the ECJ for third pillar decisions concerning police and judicial cooperation might have contributed to this assertion of national constitutional jurisdiction for safeguarding fundamental rights vis-à-vis EU decisions in the area of criminal law and their legislative implementation in Germany.
- Since the 1990s, the EC Courts have begun to refer to individual judgments of the ECtHR[62] and have clarified that -in reconciling economic freedoms guaranteed by EC law with human rights guarantees of the ECHR that admit restrictions- all interests involved have to be weighed "having regard to all circumstances of the case in order to determine whether a fair balance was struck between those interests", without giving priority to the economic freedoms of the EC Treaty at the expense of other fundamental rights.[63] The EC courts have also been willing to adjust their case-law to new developments in the case-law of the ECtHR,[64] and to differentiate -as in the case-law of the ECtHR- between judicial review of EC measures,[65] state measures[66] and private restrictions of economic freedoms in the light of fundamental rights.[67]

The progressively expanding legal protection of fundamental rights in EC law in response to their judicial protection by national and European

courts illustrates how judicial cooperation has been successful in Europefar beyond economic law. Judge A. Rosas[68] has distinguished the following five "stages" in the case-law of the EC Court on the protection of human rights:

- In the supra-national, but functionally limited European Coal and Steel Community, the Court held that it lacked competence to examine whether an ECSC decision amounted to an infringement of fundamental rights as recognised in the constitution of a member state.[69]
- Since its Stauder judgment of 1969, the EC Court has declared in a series of judgments that fundamental rights form part of the general principles of Community law binding the member states and EC institutions, and that the EC Court ensures their observance.[70]
- Since 1975, the ever more extensive case-law of the EC courts explicitly refers to the ECHR and protects ever more human rights and fundamental freedoms in a wide array of Community law areas, including civil, political, economic, social and labour rights, drawing inspiration "from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories".[71]
- Since 1989, the ECHR has been characterised by the ECJ as having "special significance" for the interpretation and development of EU law[72] in view of the fact that the ECHR is the only international human rights convention mentioned in Article 6 EU.
- Since the 1990s, the EC courts have begun to refer to individual judgments of the ECtHR[73] and have clarified that -in reconciling economic freedoms guaranteed by EC law with human rights guarantees of the ECHR that admit restrictions- all interests involved have to be weighed "having regard to all circumstances of the case in order to determine whether a fair balance was struck between those interests", without giving priority to the economic freedoms of the EC Treaty at the expense of other fundamental rights.[74] The EC courts have also been willing to adjust their case-law to new developments in the case-law of the ECtHR,[75] and to differentiate -as in the case-law of the ECtHR- between judicial review of EC measures,[76] state measures[77] and private restrictions of economic freedoms in the light of fundamental rights.[78]

2. *"Horizontal" cooperation among the EC Courts, the EFTA Court and the ECtHR in protecting individual rights in the EEA*

Judicial cooperation between the EC courts and the EFTA Court was legally mandated in the EEA Agreement (e.g., Article 6 EEA) and

facilitated by the fact that the EEA law to be interpreted by the EC and EFTA courts was largely identical with the EC's common market rules (notwithstanding the different context of the EC's common market and the EEA's free trade area). The Court of First Instance (CFI), in its Opel Austria judgment of 1997, held that Article 10 of the EEA Agreement (corresponding to the free trade rules in Articles 12, 13, 16 and 17 EC Treaty) had direct effect in EC law in view of the high degree of integration protected by the EEA Agreement, whose objectives exceeded those of a mere free trade agreement and required the contracting parties to establish a dynamic and homogenous EEA.[79] In numerous cases, EC court judgments referred to the case-law of the EFTA Court, for example by pointing out "that the principles governing the liability of an EFTA state for infringement of a directive referred to in the EEA Agreement were the subject of the EFTA Court's judgment of 10 December 1998 in Sveinbjörnsdottir".[80] In its Ospelt judgment, the ECJ emphasised that "one of the principal aims of the EEA Agreement is to provide for the fullest possible realisation of the four freedoms within the whole EEA, so that the internal market established within the European Union is extended to the EFTA states".[81]

The case-law of the EFTA Court evolved in close cooperation with the EC courts, national courts in EFTA countries and with due regard also to the case-law of the ECtHR. In view of the intergovernmental structures of the EEA Agreement, the legal homogeneity obligations in the EEA Agreement (e.g., Article 6 EEA) as well as in the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (e.g., Article 3 SCA) were interpreted only as obligations de résultat with regard to the legal protection of market freedoms and individual rights in EFTA countries. Yet, the EFTA Court effectively promoted "quasi-direct effect" and "quasi-primacy" [C. Baudenbacher] as well as full state liability and protection of individual rights of market participants in national courts in all EEA countries.[82] In various judgments, the EFTA Court followed the ECJ case-law also by interpreting EEA law in conformity with the human rights guarantees of the ECHR and the judgments of the ECtHR (e.g., concerning Article 6 ECHR on access to justice, Article 10 ECHR on freedom of expression). In its Asgeirsson judgment,[83] the EFTA Court rejected the argument that the reference to the EFTA Court had unduly prolonged the national court proceeding in violation of the right to a fair and public hearing within a reasonable time (Article 6 ECHR); referring to a judgment by the ECtHR in a case concerning a delay of two years and seven months due to a reference by a national court to the ECJ (pursuant to Article 234 EC), the EFTA Court shared the reasoning of the ECtHR that adding the period of preliminary references (which was less than 6 months in the case before

the EFTA Court) could undermine the legitimate functions of such cooperation among national and international courts in their joint protection of the rule of law.

The ECtHR has frequently referred in its judgments to provisions of EU law and to judgments of the ECJ. In Goodwin, for example, the ECtHR referred to Article 9 of the EU Charter of Fundamental Rights (right to marry) so as to back up its judgment that the refusal to recognise a change of sex for the purposes of marriage constituted a violation of Article 12 ECHR.[84] In Dangeville, the ECtHR's determination that an interference with the right to the peaceful enjoyment of possessions was not required in the general interest took into account the fact that the French measures were incompatible with EC law.[85] In cases Waite and Kennedy v Germany, the ECtHR held that it would be incompatible with the purpose and object of the ECHR if an attribution of tasks to an international organisation or in the context of international agreements could absolve the contracting states of their obligations under the ECHR.[86] In the Bosphorus case, the ECtHR had to examine the consistency of the impounding by Ireland of a Yugoslavian aircraft on the legal basis of EC regulations imposing sanctions against the former Federal Republic of Yugoslavia; the ECtHR referred to the ECJ case-law according to which respect for fundamental rights is a condition of the lawfulness of EC acts, as well as to the ECJ preliminary ruling that "the impounding of the aircraft in question [...] cannot be regarded as inappropriate or disproportionate"; in its examination of whether compliance with EC obligations could justify the impugned interference by Ireland with the applicant's property rights, the ECtHR proceeded on the basis of the following four principles:

> (a) "a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations";
> (b) "state action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides";
> (c) "if such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of

> the organisation";
> (d) "however, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient; in such cases, the interest of international cooperation would be outweighed by the Convention's role as a 'constitutional instrument of European public order' in the field of human rights".[87]

After examining the comprehensive EC guarantees of fundamental rights and judicial remedies, the ECtHR found "that the protection of fundamental rights by EC law can be considered to be, and to have been at the relevant time, 'equivalent' [...] to that of the Convention system; consequently, the presumption arises that Ireland did not depart from requirements of the Convention when it implemented legal obligations flowing from its membership of the EC". As the Court did not find any "manifest deficiency" in the protection of the applicant's Convention rights, the relevant presumption of compliance with the ECHR had not been rebutted.[88]

3. *Towards a 'Solange-method' of cooperation among international trade and environmental courts beyond Europe?*

Competing multilateral treaty and dispute settlement systems with 'forum selection clauses' enabling governments to submit disputes to competing jurisdictions (with the risk of conflicting judgments) continue to multiply also outside economic law and human rights law, for example in international environmental law, maritime law, criminal law and other areas of international law. Proposals to coordinate such overlapping jurisdictions through hierarchical procedures (e.g., preliminary rulings or advisory opinions by the ICJ) are opposed by most governments. Agreement on exclusive jurisdiction clauses (as in Article 292 EC Treaty, Article 23 Dispute Settlement Understanding (DSU)/WTO, Article 282 Law of the Sea Convention) may not prevent submission of disputes involving several treaty regimes to competing dispute settlement fora. For example, in the dispute between Ireland and the United Kingdom over radioactive pollution from the MOX plant in Sellafield (UK), four dispute settlement bodies were seized and used diverging methods for coordinating their respective jurisdictions.

a. The OSPAR arbitral award of 2003 on the MOX Plant dispute

In order to clarify the obligations of the United Kingdom to make available all information "on the state of the maritime area, on activities or measures adversely affecting or likely to affect it" pursuant to Article 9 of the Convention for the Protection of the Marine Environment of the

North-East Atlantic (OSPAR), Ireland and the United Kingdom agreed to establish an arbitral tribunal under this OSPAR Convention. Even though Article 32 § 5 (a) of the Convention requires the tribunal to decide according to "the rules of international law, and in particular those of the Convention", the tribunal's award of July 2003 was based only on the OSPAR Convention, without taking into account relevant environmental regulations of the EC and of the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (ratified by all EC member states as well as by the EC). The OSPAR arbitral tribunal decided in favour of the United Kingdom that the latter had not violated its treaty obligations by not disclosing the information sought by Ireland.[89]

b. The UNCLOS 2001 provisional measures and 2003 arbitral decision in the MOX Plant dispute

The UN Convention on the Law of the Sea (UNCLOS) offers parties the choice (in Articles 281-ff) of submitting disputes to the International Tribunal for the Law of the Sea (ITLOS), the ICJ, arbitral tribunals or other dispute settlement fora established by regional or bilateral treaties. As Ireland claimed that the discharges released by the MOX Plant contaminated Irish waters in violation of UNCLOS, it requested establishment of an arbitral tribunal and -pending this procedure- requested interim protection measures from the ITLOS pursuant to Article 290 UNCLOS. The ITLOS order of December 2001, after determining the prima faciejurisdiction of the Annex VII arbitral tribunal to decide the merits of the dispute, requested both parties to cooperate and consult regarding the emissions from the MOX plant into the Irish Sea, pending the decision on the merits by the arbitral tribunal. The arbitral tribunal suspended its proceedings in June 2003 and requested the parties to clarify whether, as claimed by the United Kingdom, the EC Court had jurisdiction to decide this dispute on the basis of the relevant EC and EURATOM rules, including UNCLOS as an integral part of the Community legal system.[90]

c. The EC Court judgement of May 2006 in the MOX Plant dispute

In October 2003, the EU Commission started an infringement proceeding against Ireland on the ground that -as the EC had ratified and transformed UNCLOS into an integral part of the EC legal system- Ireland's submission of the dispute to tribunals outside the Community legal order had violated the exclusive jurisdiction of the EC Court under Article 292 EC and Article 193 of the EURATOM Treaty. In its judgment of May 2006, the Court confirmed its exclusive jurisdiction on the ground that the

UNCLOS provisions on the prevention of marine pollution relied on by Ireland in its dispute relating to the MOX plant "are rules which form part of the Community legal order".[91] The Court followed from the autonomy of the Community legal system and from Article 282 UNCLOS that the system for the resolution of disputes set out in the EC Treaty must in principle take precedence over that provided for in Part XV of UNCLOS. As the dispute concerned the interpretation and application of EC law within the terms of Article 292 EC, "Articles 220 EC and 292 EC precluded Ireland from initiating proceedings before the Arbitral Tribunal with a view to resolving the dispute concerning the MOX plant".[92] By requesting the arbitral tribunal to decide disputes concerning the interpretation and application of Community law, Ireland had violated the exclusive jurisdiction of the Court under Article 292 EC as well as the EC member states' duties of close cooperation, prior information and loyal consultation of the competent Community institutions as prescribed in Article 10 EC.

d. The 2004 IJzeren Rijn arbitration between the Netherlands and Belgium

The IJzeren Rijn arbitration under the auspices of the Permanent Court of Arbitration concerned a dispute between Belgium and the Netherlands over Belgium's right to the use and reopening of an old railway line leading through a protected natural habitat and the payment of the costs involved.[93] The arbitral tribunal was requested to settle the dispute on the basis of international law, including if necessary EC law, with due respect to the obligations of these EC member states under Article 292 EC. The Tribunal agreed with the view shared by both parties that there was no dispute within the meaning of Article 292 EC because its decision on the apportionment of costs did not require any interpretation of EC law (e.g., the Council Directive on the conservation of natural habitats).

e. The 'Solange-method' as reciprocal respect for constitutional justice

The above-mentioned examples for competing jurisdictions for the settlement of environmental disputes among European states raise questions similar to those regarding overlapping jurisdictions for the settlement of trade disputes, human rights disputes or criminal proceedings in national and international criminal courts. The UNCLOS provisions for dispute settlement on the basis of "this Convention and other rules of international law not incompatible with this Convention" (Article 288) prompted the ITLOS to affirm *prima facie* jurisdiction in the MOX plant dispute. The Annex VII Arbitral Tribunal argued convincingly, however, that the prospect of resolving this dispute in the

EC Court on the basis of EC law risked leading to conflicting decisions which, bearing in mind considerations of mutual respect and comity between judicial institutions and the explicit recognition of mutually agreed regional jurisdictions in Article 282 UNCLOS, justified suspending the arbitral proceeding and enjoining the parties to resolve the Community law issues in the institutional framework of the EC. WTO law recognises similar rights of WTO Members to conclude regional trade agreements with autonomous dispute settlement procedures; yet, the lack of a WTO provision corresponding to Article 282 UNCLOS, and the WTO rights to the quasi automatic establishment of WTO dispute settlement panels entail that WTO dispute settlement bodies must respect the right of WTO Members to receive a WTO dispute settlement ruling on the WTO obligations of members of FTAs, even if the respondent WTO Member would prefer to settle the dispute in the framework of the FTA procedures. The EC Court's persistent refusal to decide disputes on the basis of the WTO obligations of the EC and its member states offers an additional argument for WTO dispute settlement bodies to respect the rights of WTO Members (including EC member states) to WTO dispute settlement rulings on alleged violations of WTO rights and obligations (e.g., by the EC Council's import restrictions on bananas), notwithstanding the exclusive (but ineffective) ECJ jurisdiction for settling disputes inside the EC over WTO law as an integral part of the Community legal system: 'as long as' the EC Court continues to ignore the WTO obligations of the EC in its dispute settlement practices and offers EC member states no judicial remedy against EC majority decisions violating WTO law, WTO dispute settlement bodies may see no reason to exercise judicial self-restraint in WTO disputes over alleged violations by the EC of its WTO obligations vis-à-vis EC member states.[94] This lack of a treaty provision similar to Article 282 UNCLOS might also have prompted the OSPAR arbitral tribunal to decide on the claim of an alleged violation of the OSPAR Convention, without any discussion of Article 292 EC and without prejudice to future dispute settlement proceedings in the EC Court based on EC law (which, arguably, includes more comprehensive information disclosure requirements). The Ijzeren Rijn arbitral tribunal examined the legal relevance of Article 292 EC and decided the dispute without prejudice to EC law.

This 'Solange-principle', conditioning respect for competing jurisdictions on respect of constitutional principles of human rights and rule of law, has also been applied by the EC Court itself, for instance when -in its Opinion 1/91 on the inconsistency of the EEA Draft Agreement with EC law- the EC Court found the EEA provisions for the establishment of an EEA Court to be inconsistent with the "autonomy of the Community legal order" and the "exclusive jurisdiction of the Court of Justice" (e.g., in so far

as the EEA provisions did not guarantee legally binding effects of "advisory opinions" by the EEA Court on national courts in EEA member states).[95] The "Solange-principle" also explains the jurisprudence of both the EC Court[96] as well as the EFTA Court[97] that voluntarily agreed, private arbitral tribunals are not recognised as courts or tribunals of member states (within the meaning of Article 234 EC and Article 33 SCA) entitled to request preliminary rulings by the European courts. As international arbitral tribunals (like the OSPAR and IJzeren Rijn arbitral tribunals mentioned above) are likewise not entitled to request preliminary rulings from the European Courts, they might exercise judicial self-restraint and defer to the competing jurisdiction of European Courts in disputes requiring interpretation and application of European law. To the extent conflicts of jurisdiction and conflicting judgments cannot be prevented by means of exclusive jurisdictions and hierarchical rules,[98] international courts should follow the example of national civil and commercial courts and European courts by resolving conflicts through judicial cooperation and 'judicial dialogues' based on principles of judicial comity and judicial protection of constitutional principles (like due process of law, *res judicata* and human rights) underlying modern international law. The horizontal cooperation among national and international courts with overlapping jurisdictions for the protection of constitutional rights in Europe reflects the constitutional duty of judges to protect 'constitutional justice' and should serve as a model for similar cooperation among national and international courts with overlapping jurisdictions in other field of international law,[99] such as the settlement of trade and environmental disputes among the 151 WTO Members. Especially in those areas of intergovernmental regulation where states remain reluctant to submit to review by international courts (e.g., as in the second and third pillars of the EU Treaty), national courts must remain vigilant guardians so as to protect citizens and their constitutional rights from inadequate judicial remedies at the international level of multilevel governance.

IV. Is judicial protection of "constitutional justice" legitimate in international relations governed by power politics?

The universal recognition of *ius cogens* and of inalienable human rights, the 'treaty constitutions' of international organisations with rule-making, executive and judicial powers, the proliferation of international courts, their judicial protection of rule of law and judicial clarification of 'constitutional principles' limiting abuses of public and private power transform some of the intergovernmental structures of international law (notably in Europe) by constitutional 'checks and balances' and procedural as well as substantive 'constitutional restraints'. In most of the 47

European states cooperating in the Council of Europe, human rights, fundamental freedoms and mutually beneficial cooperation of citizens across national frontiers are now legally and judicially protected by national and European constitutional law. As explained in Sections I and II, the constitutional obligation of independent and impartial judges to protect constitutional rights, and the multilevel cooperation of judges in protecting 'constitutional justice' and mutually beneficial cooperation among citizens across national frontiers in Europe, were major driving forces behind this 'constitutionalisation' of transnational economic and civil society relations in Europe. Disputes among European states have become rare not only in the EC Court, the EFTA Court and in the ECtHR; they are also decreasing in worldwide courts (e.g., the ICJ) and in other dispute settlement bodies (such as the WTO). Many other examples -like European citizenship, the legal autonomy of EC institutions and European courts, the ever closer networks of independent regulatory agencies and other multilevel governance institutions in Europe, and the rare recourse to the 'horizontal' enforcement mechanisms of international law (such as inter-state sanctions) in relations among European democracies- confirm that 'state sovereignty' is 'disaggregating' in Europe.[100] The success of the 'Solange-method' of judicial cooperation and contestation among European courts, based on respect for 'constitutional pluralism', leads to judicial clarification and 'judicial defence' of an ever larger number of common constitutional principles limiting abuses in European economic, environmental and human rights law for the benefit of citizens.

The limited role of European courts in the second and third 'pillars' of the European Union, and the limited cooperation among European and worldwide courts (like the ICJ and the WTO's Appellate Body), illustrate the political limits of international courts also in Europe, notably in areas of national security and foreign policy disputes over the distribution of power or the legitimacy of international law rules. Beyond Europe, international relations remain dominated by power politics, refusal by most UN member states to submit to the compulsory jurisdiction of the ICJ, insistence on state sovereignty and introverted 'constitutional nationalism' impeding collective supply of global public goods.[101] Proposals for extending European 'multilevel constitutionalism' to worldwide organisations (such as the UN and the WTO) are opposed by most states outsideEurope (including the United States) in view of their different constitutional and democratic traditions and power-oriented foreign policies. The more intergovernmental networks and worldwide organisations evade parliamentary and democratic control, and the more legislators fail to correct the ubiquitous 'market failures' and 'governance failures' in international relations, the more

citizens have reason to appeal to the 'public reasoning' of independent and impartial courts mandated to protect constitutional rights and rule of law 'in conformity with principles of justice'.

If democratic institutions are perceived as instruments for protecting the constitutional rights of citizens without which individual and democratic self-development in dignity are not sustainable (e.g., due to public and private abuses of power, including majoritarian abuses of parliamentary powers), then multilevel judicial protection of fundamental freedoms of citizens can be justified as a necessary precondition for constitutional democracy in a globally integrated world. The risk of paternalist abuses of judicial powers must be countered by 'deliberative democracy' and 'public reasoning'. Rights-based 'judicial discourses' focusing on 'principles of justice' tend to be more precise and more rational than political promises to protect vaguely defined 'public interests'. Similar to European courts, also national constitutional judges and economic courts outside Europe increasingly argue that constitutional democracies are premised on "active liberty"; hence, the exercise of rights to individual and democratic self-government (in citizen-driven 'political markets' no less than in consumer-driven economic markets) may serve as a "source of judicial authority and an interpretative aid to more effective protection of ancient and modern liberty alike".[102] Legitimacy no longer derives from (inter)governmentalfiat, but from democratic and judicial justification of the relevant rules as being just.[103] The independence, impartiality and constitutional function of judges to protect constitutional rights against abuses of power legitimise adjudication as a necessary component of constitutional democracy. Citizens must hold judges more accountable for meeting their constitutional obligation to protect 'constitutional justice' in terms of justifying legal interpretations and judicial decisions independently and impartially, in conformity with the human rights obligations of government institutions and the constitutional rights of citizens. The increasing cross-references in ECJ and EFTA judgments to their respective case-law, as well as to other European and international courts (such as the ECtHR, WTO dispute settlement rulings, the ICJ), may serve models for cooperation also among other international courts in order to better coordinate their respective jurisprudence on the basis of common legal principles.[104]

Civil society and their democratic representatives rightly challenge traditional conceptions of international justice shielding an authoritarian 'international law among states' as being inconsistent with the universal recognition of inalienable human rights, which call for constitutional conceptions of justice as a shield of the individual and of her human rights against abuses of power. As long as world governance for the collective

supply of the ever more needed 'global public goods' (such as international 'democratic peace', respect for universal human rights, poverty reduction, protection of the global environment) remains so deficient as it is, legal and judicial protection of constitutional rights in transnational relations 'in conformity with principles of justice and international law' remain essential for protecting human rights through pragmatic piecemeal reforms of international legal practices. Just as multilevel constitutionalism in Europe was rendered possible by the intergovernmental creation and judicial protection of common markets and of rights-based, transnational communities (rather than by 'Wilsonian liberalism' projecting national democratic institutions to the worldwide level), so will the needed 'constitutionalisation' of intergovernmental power politics and 'cosmopolitan peace' depend crucially on the wisdom and courage of judges supporting citizen-oriented reforms of international economic law and judicial protection of constitutional rights in the peaceful cooperation among citizens across national frontiers.

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[1] R.M. DWORKIN, Justice in Robes, Cambridge (Mass.), Harvard University Press, 2006, Chapter 1.

[2] On the productive value of competition, conflicts and peaceful conflict resolution, see E.U. PETERSMANN, "Justice as Conflict Resolution: Proliferation, Fragmentation and Decentralisation of Dispute Settlement in International Trade", University of Pennsylvania Journal of International Economic Law, 2006, pp. 273-366.

[3] See G.E. WHITE, The American Judicial Tradition: Profiles of Leading American Judges, Oxford, Oxford University Press, 1988, p. 170.

[4] On Rawls' conception of supreme courts as "the exemplar of public reason" which can reduce problems resulting from "the fact of reasonable pluralism" by promoting an "overlapping consensus" on basic political and legal principles among citizens, notwithstanding their often different and incompatible worldviews, see J. RAWLS, Political Liberalism, New York, Columbia University Press, 1993, pp. 231-ff.

[5] On "justice as fairness" and "first virtue of social institutions", see J. RAWLS, A Theory of Justice, Cambridge (Mass.), Harvard University Press, 1999, p. 3; see also R. FORST, Das Recht auf Rechtfertigung, Frankfurt am Main, Suhrkamp, 2007; who infers from the Kantian idea of reason based on universalisable principles that individuals can reasonably claim moral and legal rights to participation in decision-making affecting them, as well as to receive a justification of restrictions of individual freedoms.

[6] A. COX, The Warren Court, Cambridge (Mass.), Harvard University Press, 1968, p. 27.

[7] The speech of Kofi Annan is reproduced in UN Doc., GA/10500o, 19 Sept. 2006.

[8] See T.R.S. ALLAN, Constitutional Justice: A Liberal Theory of the Rule of Law, Oxford, Oxford University Press, 2001.
[9] See the examples given by T.M. FRANCK, Fairness in International Law and Institutions, Oxford, Clarendon, 1997, Chapters 3 and 10.
[10] See C. GUARNIERI and P. PEDERZOLI, The Power of Judges: A Comparative Study of Courts and Democracy, Oxford, Oxford University Press, 2002.
[11] See A. SAJÓ and L.R. BENTCH, Judicial Integrity, Leiden, Nijhoff, 2004.
[12] See Article 6 of the European Convention on Human Rights and similar guarantees in other regional human rights conventions (e.g., Article 8 of the Inter-American Convention on Human Rights), UN human rights conventions (e.g., Article 14 of the International Covenant on Civil and Political Rights) and other UN human rights instruments (e.g., Article 10 of the Universal Declaration of Human Rights), which have given rise to a comprehensive case law clarifying the rights of access to courts and related guarantees of due process of law (e.g., justice delayed may be justice denied); see D. SHELTON, Remedies in International Human Rights Law, Oxford, Oxford University Press, 2005, pp. 113-ff.
[13] A. HAMILTON, The Judiciary Department, A. HAMILTON, J. MADISON and J. JAY, The Federalist Papers, No 78, New York, Bantam.
[14] See A. STONE SWEET, Governing with Judges: Constitutional Politics in Europe, Oxford, Oxford University Press, 2000; who describes how much third-party dispute resolution and judicial rule-making have become privileged mechanisms of adapting national and intergovernmental rule-systems to the needs of citizens and their constitutional rights. In his book The Judicial Construction of Europe [A. STONE SWEET, Judicial Construction of Europe, Oxford, Oxford University Press, 2004], Stone Sweet analyses the judicial "constructing of a supra-national constitution" [Chapter II] as a self-reinforcing system driven by self-interested private market actors, litigators, judges, European parliamentarians and academic communities. The former EC Court judge P. Pescatore confirmed that -when deciding the case van Gend & Loos- the judges had a certain idea of Europe, and that these judicial ideas -"and not arguments based on legal technicalities of the matter"- had been decisive; P. PESCATORE, "The Doctrine of Direct Effect", European Law Review, 1983, pp. 155-177, at p. 157. On the criticism of such 'judicial law-making', see T. MÄHNER, Der Europäische Gerichtshof als Gericht, Berlin, Duncker & Humblot,2005; who criticises the inadequate democratic legitimacy of the ECJ's expansive case law limiting national sovereignty in unforeseen ways (e.g., by judicial recognition of fundamental rights as general principles of Community law). From the point of view of 'deliberative democracy', however, the ECJ's case-law has been approved by EC member states, parliaments and citizens.
[15] For a justification of judicial review as being essential for protecting and promoting deliberative democracy, see C.F. ZURN, Deliberative Democracy and the Institutions of Judicial Review, Cambridge, Cambridge University Press, 2007.
[16] I.C.J., Namibia Case, Adv. Op., 21 June 1971, § 53.
[17] For example, the wide-ranging guarantees of economic regulation and legally enforceable social rights in Germany's 1919 Constitution for the 'Weimar Republic' had led to ever more restrictive government interventions into labour markets, capital markets, interest rates, as well as to expropriations 'in the general interest' which –during the Nazi dictatorship from 1933 to 1945– led to systemic political abuses of these regulatory powers.
[18] See Ireland v. United Kingdom, 18 Jan. 1978.

[19] See Loizidou v. Turkey [preliminary objections], 23 Mar. 1995, § 75; referring to the status of human rights in Europe. Unlike the ECJ, the ECtHR has no jurisdiction for judicial review of acts of the international organisation (the Council of Europe) of which the Court forms part of.
[20] L. WILDHABER, "A Constitutional Future for the European Court of Human Rights?", Human Rights Law Journal, 2002, pp. 161-165.
[21] Ibid., p. 161.
[22] See J. SCHOKKENBROCK, "The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights", Human Rights Law Journal, 1998, pp. 30-36.
[23] L. WILDHABER, "A Constitutional Future for the European Court of Human Rights?", o.c., pp. 164-165.
[24] See M. EMBERLAND, The Human Rights of Companies: Exploring the Structure of ECHR Protection, Oxford, Oxford University Press, 2006.
[25] On the Court's teleological interpretation of the ECHR in the light of its "object and purpose", see M. EMBERLAND, The Human Rights of Companies, o.c., pp. 20-ff.
[26] On private law and constitutional law meanings of property (as a relationship to objects of property and to other legal subjects that have to respect property rights), and on the different kinds of property protected in the case-law of the ECtHR, seeA.R. ÇOBAN, Protection of Property Rights within the European Convention on Human Rights, Aldershot, Ashgate, 2004, Chapters 2 and 6.
[27] Immobiliare Saffi v Italy, 28 July 1999.
[28] On the moral foundations of market freedoms, see E.U. PETERSMANN, "Human Rights and International Trade Law: Defining and Connecting the Two Fields", in T. COTTIER, J. PAUWELYN and E. BÜRGI BONANOMI, Human Rights and International Trade, Oxford, Oxford University Press, 2006, pp. 29 and 48-ff; A.R. ÇOBAN, Protection of Property Rights within the European Convention on Human Rights, o.c., Chapter 3; justifies property rights as prima facie human rights on the basis of four arguments: (1) both the use value and the exchange value of property are essential for private autonomy; (2) a system of private property is also essential for personal self-realisation; (3) respect for individual autonomy requires respect for the entitlement of people to the fruits of their labour as well as respect for the outcome of peaceful, voluntary cooperation (e.g., in markets driven by consumer demand and competition); and (4) a system of private property further encourages fruitful initiative and an autonomy-enhancing society based on welfare-increasing competition, division of labour and satisfaction of consumer demand.
[29] The US Constitution (Amendments V and XIV) includes strong guarantees of private liberty and property rights against takings without "due process of law" and "just compensation". Up to the late 1930s, the US Supreme Court frequently overturned legislation on the ground that it violated economic liberties. Yet, since the Democrats took over the US Supreme Court in 1937, the Court has limited judicial protection of "substantive due process of law" essentially to civil and political rights; in the economic field, the Court introduced a constitutional presumption (in the famous Carolene Products case of 1938 [304 U.S. 144]) that legislative restrictions of private property are presumed to be lawful and no longer subject to judicial review of "economic due process of law". Also the commerce clause in the US Constitution does not guarantee individual economic liberties as in the EC Treaty, but merely gives regulatory authority to the US Congress.
[30] Signed on 2 May 1992 and in force as of 1 January 1994 [O.J., 1994, L 1/3].

[31] Opinion 1/91, Agreement on the EEA, ECR [1991] I-6079, §§ 31-ff.
[32] O.J., 1994, L 1/3.
[33] Opinion 1/92, Agreement on the EEA, ECR [1992] I-2821.
[34] The limitation to prior case-law was due to the refusal by EFTA countries to commit themselves to unforeseeable, future case-law of the EU courts on which they are not represented. V. SKOURIS, "The ECJ and the EFTA Court under the EEA Agreement: A Paradigm for International Cooperation between Judicial Institutions", in C. BAUDENBACHER, P. TRESSELT and T. ORLYGSSON, The EFTA Court: Ten Years On, Oxford, Hart, 2005, p. 124; concludes, however, that "it does not seem that the EFTA Court has treated the ECJ case-law differently depending on when the pertinent judgments were rendered".
[35] O.J., 1994, L 344/1.
[36] See H.P. GRAVER, "The Effects of EFTA Court Jurisprudence on the Legal Orders of the EFTA States", in C. BAUDENBACHER, P. TRESSELT and T. ORLYGSSON, o.c., pp. 79-ff.
[37] EFTA Court, Case E-1/94, 16 Dec. 1994.
[38] Case C-54/96, ECR [1997] I-4961
[39] Cases C-110/98 to C-147/98, ECR [2000] I-1577
[40] See C. BAUDENBACHER, "The EFTA Court Ten Years On", in C. BAUDENBACHER, P. TRESSELT and T. ORLYGSSON, o.c., p. 24; who mentions that this liberal tendency might be influenced by the fact that the EFTA Court, unlike the ECJ, is not overburdened.
[41] Opinion 1/91, § 28.
[42] Case E-1/94, 16 Dec. 1994.
[43] Case E 1/01, 22 Feb. 2002.
[44] Case E 7/97, 30 Apr. 1998.
[45] EFTA Court, Case E 4/01, 30 May 2002, § 28.
[46] See W.J. DAVEY, "Dispute Settlement in the WTO and RTAs: A Comment", in L. BARTELS and F. ORTINO, Regional Trade Agreements and the WTO Legal System, Oxford, Oxford University Press, 2006, pp. 343-357. There have been only 3 intergovernmental disputes under Chapter 20 since NAFTA entered into force in 1994. On the other six NAFTA dispute settlement procedures and their very diverse records, see A. DE MESTRAL, "NAFTA Dispute Settlement: Creative Experiment or Confusion?", in L. BARTELS and F. ORTINO, o.c., pp. 359-381.
[47] For example, in the WTO dispute between the USA and Canada over Canadian restrictions on "split-run periodicals" (WTO Panel Report, Canada-Periodicals, WT/DS31/R, 30 July 1997), Canada did not consider it was entitled to justify in the WTO its violation of GATT Article III by invoking Article 2106 NAFTA permitting preferential measures in favour of cultural industries, see A. DE MESTRAL, "NAFTA Dispute Settlement: Creative Experiment or Confusion?", o.c., pp. 364-365.
[48] For instance, the WTO Appellate Body Report on Mexico-Tax Measures on Soft Drinks (WT/DS308/AB/R, adopted in May 2006) upheld the WTO Panel's conclusion that the Panel had no discretion "to decline to exercise its jurisdiction" based on the existence of a NAFTA dispute on an allegedly related matter (§§ 44-53).
[49] Examples would include challenges of US import restrictions on Canadian lumber in both NAFTA and WTO panels, challenges of EC import restrictions on bananas and genetically modified organisms in the ECJ and in the WTO, challenges of Argentine import restrictions on cotton and of Brazilian import restrictions of

retreaded tyres in both Mercosur and WTO dispute settlement proceedings; see K. KWAK and G. MARCEAU, "Overlaps and Conflicts of Jurisdiction between the WTO and Regional Trade Agreements", in L. BARTELS and F. ORTINO, o.c., pp. 465-485.

[50] US Court of Appeals for the Federal Circuit, judgment of 21 January 2005, Corus Staal BV v Department of Commerce, 395 F.3d 1343 C.A. Fed., 2005, available at http://www.fedcir.gov/opinions/04-1107.pdf. In the Corus Staal dispute, the US Supreme Court denied petition for certiorari on 9 January 2006, Corus Staal BV v Department of Commerce, 546 U.S. 1089, 126 S. Ct. 1023 (Mem) U.S., 2006 (http://www.supremecourtus.gov/docket/05-364.htm), notwithstanding an amicus curiae brief filed by the EC Commission supporting this petition ("We argue that the Federal Circuit went too far by construing the Uruguay Round Agreements Act to make considerations of compliance with international obligations completely irrelevant in construing a Department of Commerce anti-dumping determination, and further argue that the Department's 'zeroing' methodology –held invalid by both a WTO Appellate Body and a NAFTA Binational Panel– is not entitled to Chevron deference because it would bring the United States into noncompliance with treaty obligations"; available at http://www.robbinsrussell.com/pdf/265.pdf).

[51] See P.J. KUIJPER and M. BRONCKERS, "WTO Law in the European Court of Justice", Common Market Law Review, 2005, pp. 1313-1355; who claims [p. 1334] that "it is difficult to point out one specific moment at which it can be established beyond doubt that WTO rules have been breached, even after a decision of a panel or report of the Appellate Body", and "that it is rarely or never possible to speak of a sufficiently serious breach of WTO law" by the political EC institutions justifying the EC's non-contractual liability for damages pursuant to Article 288 EC Treaty.

[52] See, e.g., the criticism by the EC's legal advisor of the ECJ's 'Kupferberg jurisprudence' on the judicial applicability of the EC's free trade area agreements at the request of citizens as politically 'naïve' in P.J. KUIJPER and M. BRONCKERS, "WTO Law in the European Court of Justice", o.c., p. 1320.

[53] On the exclusion of "direct applicability" of WTO rules in the EC and US laws on the implementation of the WTO agreements see E.U. PETERSMANN, The GATT/WTO Dispute Settlement System: International Law, International Organisations, and Dispute Settlement, London, Kluwer, 1997, pp. 19-ff; at the request of the political EC institutions, the EC Court has refrained long since from reviewing the legality of EC acts in the light of the EC's GATT and WTO obligations; the Court refers only very rarely to WTO rules and WTO dispute settlement rulings in support of the ECJ's interpretations of EC law. In the US, courts are barred by legislation from challenging the WTO-consistency of US federal measures.

[54] See J.A. RESTANI and I. BLOOM, "Interpreting International Trade Statutes: Is The Charming Betsy Sinking?", Fordham International Law Journal, 2001, pp. 1533-1547. On the controversial relationship between the 'Charming Betsy doctrine' of consistent interpretation and the 'Chevron doctrine' of judicial deference see A. DAVIES, "Connecting or Compartmentalising the WTO and United States Legal Systems? The Role of the Charming Betsy Canon", Journal of International Economic Law, 2007, pp. 117-149. The European Court of Justice has a long history of ignoring GATT and WTO rules at the request of political EC bodies which have often misinformed the EC Court on the meaning of GATT/WTO rules and dispute settlement reports (e.g., in Case C-112/80, Dürbeck, ECR [1981] 1095,

the Commission misinformed the EC Court on an unpublished GATT dispute settlement finding against the EC, and the Court relied on this information without verifying the obviously wrong information submitted to the Court).

[55] F.C. MAYER, "The European Constitution and the Courts", in A. VON BOGDANDY and J.BAST, Principles of European Constitutional Law, Oxford, Hart, 2006.

[56] BVerfGE 37, 327.

[57] The ECJ's judicial protection of human rights has continued to evolve since 1969; see ECJ, Case C-29/69, Stauder, ECR [1969], 419; ECJ, Case C-11/70, Internationale Handelsgesellschaft, ECR [1970], 1125; ECJ, Case C-4/73, Nold, ECR [1974], 491.

[58] BVerfGE 73, 339, at 375.

[59] BVerfGE 89, 115.

[60] BVerfGE 102, 147.

[61] BVerfGE 113, 273.

[62] See Case C-13/94, P v. S, ECR [1996] I-2143, § 16.

[63] See Case C-112/00, Schmidberger, ECR [2003] I-5659. The Court began by examining the EC's economic freedom, as requested by the national court, and observed that "since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods; unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose" [§ 80]. The judicial balancing by the ECJ refutes the claim that the ECJ gives priority to economic freedoms at the expense of other human rights.

[64] In Case C-94/00, Roquette Frères, ECR [2002] I-9011, § 29, for example, the ECJ referred explicitly to new case-law of the ECtHR on the protection of the right to privacy of commercial enterprises in order to explain why –despite having suggested the opposite in the ECJ's earlier judgment in Hoechst (Joined cases C-46/87 and C-227/88, Hoechst, ECR [1989] 2859)– such enterprises may benefit from Article 8 ECHR: "For the purposes of determining the scope of that principle in relation to the protection of business premises, regard must be had to the case-law of the European Court of Human Rights subsequent to the judgment in Hoechst. According to that case-law, the protection of the home provided in Article 8 of the ECHR may in certain circumstances be extended to cover such premises (see, in particular, the judgment Société Colas Est v. France, 16 Apr. 2002, and second, the right of interference established by Article 8 § 2 of the ECHR might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case.)

[65] See, e.g., the ECJ cases listed in footnote 57.

[66] See, e.g., ECJ, Case C-36/02, Omega ECR [2004] I-9609, in which the ECJ acknowledged that the restriction of market freedoms could be necessary for the protection of human dignity despite the fact that the German conception of protecting human dignity as a human right was not shared by all other EC member states.

[67]See M. EMBERLAND, "The Human Rights of Companies: Exploring the Structure of ECHR Protection", o.c.; and the Opinion of Advocate-General

Mengozzi in Case C-341/05, Laval (still pending before the ECJ), as well as of Advocate-General Poiares Maduro in Case C-438/05, Viking Line (still pending before the ECJ); both Advocates-General recommend that the ECJ should recognise that trade unions are legally bound by the EC's common market freedoms, and that the private plaintiffs in these cases can rely directly on the EC Treaty in their judicial challenge of restrictions imposed on market freedoms by trade unions invoking their social rights to strike (e.g., in order to prevent relocation of Viking Line to another EC member state.

[68] A. ROSAS, "Fundamental Rights in the Luxembourg and Strasbourg Courts", in C. BAUDENBACHER, P. TRESSELT and T. ORLYGSSON, o.c., p. 169.

[69] Case C-1/58, Storck, ECR [1959], 43.

[70] See the cases cited in footnote 57.

[71] See, e.g., Opinion 2/94, ECHR, ECR [1996] I-1759, § 33.

[72] Joined Cases 46/87 and 222/88, Hoechst, ECR [1989], 2859, § 13.

[73] See Case 13/94, P v. S, ECR 1996 I-2143, § 16.

[74] See Case C-112/00, Schmidberger, ECR 2003 I-5659. The Court began by examining the EC's economic freedom, as requested by the national court, and observed that "since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods"; "unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose" [§ 80]. The judicial balancing by the ECJ refutes the claim that the ECJ gives priority to economic freedoms at the expense of other human rights.

[75] In Case C-94/00, Roquette Frères, ECR 2002 I-9011, § 29, for example, the ECJ referred explicitly to new case-law of the ECtHR on the protection of the right to privacy of commercial enterprises in order to explain why –despite having suggested the opposite in the ECJ's earlier judgment in Hoechst– such enterprises may benefit from Article 8 ECHR: "For the purposes of determining the scope of that principle in relation to the protection of business premises, regard must be had to the case-law of the European Court of Human Rights subsequent to the judgment in Hoechst. According to that case-law, the protection of the home provided in Article 8 of the ECHR may in certain circumstances be extended to cover such premises (see, in particular, the judgment of 16 April 2002 in Colas Est and Others v France, not yet published in the Reports of Judgments and Decisions) and second, the right of interference established by Article 8 § 2 of the ECHR might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case".

[76] See, e.g., the ECJ cases listed in footnote 57 above.

[77] See, e.g., the Omega Case C-36/02, ECR 2004 I-9609; in which the ECJ acknowledged that the restriction of market freedoms could be necessary for the protection of human dignity despite the fact that the German conception of protecting human dignity as a human right was not shared by all other EC member states.

[78] See Emberland (footnote 24) and the Opinion of Advocate-General Mengozzi in Case C-341/05, Laval (still pending before the ECJ), as well as of Advocate-

General Poiares Maduro in Case C-438/05, Viking Line (still pending before the ECJ); both Advocates-General recommend that the ECJ should recognise that trade unions are legally bound by the EC's common market freedoms, and that the private plaintiffs in these cases can rely directly on the EC Treaty in their judicial challenge of restrictions imposed on market freedoms by trade unions invoking their social rights to strike (e.g., in order to prevent relocation of Viking Line to another EC member state).

[79] Case T-115/94, ECR [1997] II-39.

[80] Case C-140/97, Rechberger, ECR [1999] I-3499, § 39.

[81] Case C-452/01, ECR [2003] I-9743, § 29.

[82] See the EFTA Court President C. BAUDENBACHER, "The EFTA Court Ten Years On", o.c.; H.P. GRAVER, "The Effects of EFTA Court Jurisprudence on the Legal Orders of the EFTA States", o.c., at p. 97: "direct effect of primary law, state liability and the duty of the courts to interpret national law in the light of EEA obligations have been clearly and firmly accepted in national law by Norwegian courts".

[83] Case E-2/03, 12 Dec. 2003.

[84] Goodwin v United Kingdom, 11 July 2002, §§ 58 and 100.

[85] SA Dangeville v France, 16 Apr. 2002, §§ 31-ff.

[86] Waite and Kennedy v Germany, 18 Feb. 1999, § 67.

[87] Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland, 30 June 2005, §§ 153-ff.

[88] Ibid., §§ 165-166.

[89] See T. MCDORMAN, "Access to Information under Article 9 OSPAR Convention (Ireland v UK), Final Award", American Journal of International Law, 2004, pp. 330-339.

[90] See Y. SHANY, "The First MOX Plant Award: The Need to Harmonise Competing Environmental Regimes and Dispute Settlement Procedures", Leiden Journal of International Law, 2004, pp. 815-827.

[91] Case C-459/2003, Commission v. Ireland, ECR [2006] I-4635, § 121.

[92] Ibid., § 133.

[93] See N. LAVRANOS, "The MOX Plant and IJzeren Rijn Disputes: Which Court is the Supreme Arbiter?", Leiden Journal of International Law, 2006, pp. 1-24.

[94] Such challenges in the WTO by EC member states of EC acts violating WTO law have never occurred so far. Most Community lawyers argue that not only from the point of view of Community law, but also "from the point of view of international law, the supremacy of Community law within the EC and its member states must be accepted"; see, for example, N. LAVRANOS, o.c., pp. 10-11. Yet, it is arguable even from the point of view of Community law that the duty of loyalty (Article 10 EC) applies 'as long as' the ECJ offers effective judicial remedies against obvious violations by EC institutions of their obligations (e.g., under Articles 220 and 300 EC) to respect the rule of law and protect EC member states from international legal responsibility for EC majority decisions violating mixed agreements.

[95] Opinion 1/91, Agreement on the EEA, ECR [1991] I-6079.

[96] Case C-125/04, Denuit/Cordenier v Transorient, ECR [2005] I-923.

[97] See footnote 37.

[98] N. LAVRANOS, "The MOX Plant and IJzeren Rijn Disputes: Which Court is the Supreme Arbiter", o.c., p. 20; "the key to all solutions is hierarchy".

[99] See N. LAVRANOS, "Towards a Solange-Method between International Courts and Tribunals?", in T. BROUDE and Y. SHANY, The Allocation of

Authority in International Law. Essays in Honour of Prof. R. Lapidoth, 2008; "if the Solange-method would be applied by all international courts and tribunals in case of jurisdictional overlap, the risk of diverging or conflicting judgments could be effectively minimised, thus reducing the danger of a fragmentation of the international legal order; [...] one could argue that the Solange-method, and for that matter judicial comity in general, is part of the legal duty of each and every court to deliver justice".

[100] More generally, on 'disaggregated sovereignty', see A.M. SLAUGHTER, A New World Order, Oxford, Princeton University Press, 2004, pp. 266-ff.

[101] On this 'globalisation paradox' (i.e., needing multilevel governance for the collective supply of international pubic goods, but fearing and opposing such governance), see A.M. SLAUGHTER, A New World Order, o.c., pp. 8-ff. On the need for 'multilevel constitutionalism' as a necessary legal framework for collective, democratic supply of international public goods, see E.U. PETERSMANN, "Multilevel Trade Governance Requires Multilevel Constitutionalism", in C. JOERGES and E.U. PETERSMANN, Constitutionalism, Multilevel Trade Governance and Social Regulation, Oxford, Hart, 2006, pp. 5-57.

[102] See US Supreme Court justice S.G. BREYER, Active Liberty: Interpreting Our Democratic Constitution, New York, Kopf, 2005.

[103] On the diverse (e.g., rational Kantian, contractarian Rawlsian and discursive Habermasian) methodological approaches to identifying just rules, see e.g. C.S. NINO, "Can there be Law-abiding Judges?", in M. TROPER and L. JAUME, 1789 et l'invention de la constitution, Brussels, Bruylant, 1994, pp. 286-ff.

[104] A. ROSAS, "With a Little Help from My Friends: International Case-Law as a Source of Reference for the EU Courts", in The Global Community Yearbook of International Law and Jurisprudence 2005, 2006, Vol. I, pp. 201-230.

THE ROLE OF THE INTERNATIONAL CRIMINAL JUDGE IN THE FORMATION OF CUSTOMARY INTERNATIONAL LAW

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I. INTRODUCTION

The construction of international customary norms in international criminal law includes a distinctive normative element, and, therefore, in the fields of international law that contain moral considerations, for example the preservation of human life and dignity, the construction of customary law by the courts should not necessarily be limited to the traditional model based on state practice and opinio iuris. Therefore the role of the international criminal judge in evaluating the substance and definition of customary international law is prominent. The main thrust of this paper is to examine whether and how this hypothesis finds support in the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY). Moreover, the approach of the ICTY on the formation of customary international law has not been consistent throughout its operation, and its case law suggests that there have been several periods of varying approaches to the way customary law should be constructed. In the light of these developments in the case law of the ICTY, the changes in custom construction and the reasons for the somewhat capricious approaches of the judges are analysed.

One possible assertion that cannot straightforwardly be excluded is the possibility that the case law of the ICTY points to a new source of international law that is created by the international judge, when the judge bases his analysis in the decision-making on the premise of normative considerations instead of the positivist reality.[1] However, political considerations in international trials may overshadow the theory that a new source of international law is emerging, because states generally do not wish to move beyond consensual law-making in international relations. Thus, if the judge-made law arising from the international criminal tribunals were considered to be binding, the role of the state as an actor only bound by international law when it so chooses would be diminished.

On the other hand, political considerations may underlie the whole rationale of setting up an international criminal tribunal and the scope of jurisdiction granted to it. For instance, the Nuremberg and Tokyo trials have been condemned by a few scholars for being politically motivated and presenting the victor's justice - only the acts committed by the citizens of Nazi Germany

and Japan were reviewed, while the conduct of the Allied Powers was left uninvestigated.[2] Similarly, the ICTY has been criticised for its rejection to review the actions taken by outside entities, such as the North Atlantic Treaty Organisation, during the war in the former Yugoslavia.[3]

In 1988 Georges Abi-Saab stated that:

> "We are calling different things custom, we are keeping the name but expanding the phenomenon. After all, custom, if considered from a technical point of view, is not so much the rule; it is procedure of creating the rule. These procedures are changing under our very eyes but we are still calling them custom because of the general recognition of custom as a source capable of creating general international law, while other procedures (or sources) are not or not yet generally recognised or accepted as having this potential. [...] We are no longer speaking of the same source, but we are in the presence of a very new type of law-making".[4]

This statement illustrates that the concept of customary international law has not been static even before the inventive methods of custom construction by the international criminal tribunals since the mid-nineties. Nevertheless, the assertion of Abi-Saab is very appropriate in relation to the case law of the ICTY, discussed in more detail in Part II, indeed because the procedure of creating a customary rule has evolved into a quite different form from what was depicted, for example, by Professor D'Amato in 1971. His understanding was that custom consists of strictly limited sources of state practice; in other words, only actual physical acts may constitute state practice for the purpose of the formation of customary rule; and the requirement that practice is preceded or accompanied by articulation that forms the opinio iuris of custom.[5] However, in some areas of law where the state practice might be scarce or lacking altogether, there is a need for modernised methods of customary law-making in order to respond to the developing needs and interests of the international society. Thus, here the focus is on assessing the construction of custom by international criminal courts, the prospect of judge-made law in the field of international criminal law, and the effects of the changing nature and procedure of custom in international law in general. In the procedure of forming customary rules, here reflecting international criminal law, the judge has become a key-figure in determining the elements that are needed for a custom to emerge, as well as in defining the applicability and definition of a rule of customary international law.

Throughout the article, I shall focus on the case law of the ICTY, making

only infrequent references to the other international tribunals, such as the International Criminal Tribunal for Rwanda (ICTR). This is for the reason that the interpretation of customary international law has been the most recurring in the cases of the ICTY, primarily because only the ICTY has been required by its Statute to apply only law that is "beyond any doubt part of customary law".

II. GENESIS OF INTERNATIONAL CUSTOMARY CRIMINAL LAW AS REFLECTED IN INTERNATIONAL JUDICIAL DECISIONS

1. *Traditional sources of customary international law and international criminal law*

The 1945 Statute of the International Court of Justice[6] reproduces the list of sources of international law as codified in the Statute of the Permanent Court of Justice in the 1920,[7] and it defines international custom as evidence of a general practice accepted as law. The method of custom construction that is often seen to derive from Article 38 of the Statute is here referred to as the traditional model, consisting of two elements, state practice and opinio iuris. One of the earliest precedents where the terminology of the traditional model was articulated was in the case Paquete Habana by the United States Supreme Court in 1900.[8] The court held that fishing vessels were exempt from capture as prizes of war under a rule of customary international law, evidenced by earlier treaties, national orders and instruction of many states and works of jurists and scholars. The two elements of the traditional model, state practice and opinio iuris, were further elaborated in the subsequent cases, in 1927 by the Permanent Court of International Justice in the Lotus Case,[9] and in 1950 by the International Court of Justice (ICJ) in the Asylum Case.[10]

The traditional model has been interpreted in various ways by courts as well as by scholars. For example, Frederick Kirgis's sliding scale theory from 1987 introduces the idea of the relative significance or weight of the state practice and opinio iuris. The theory is based on the idea that "the more destabilising or morally distasteful the activity [...] the more readily international decision makers will substitute one element for the other, provided that the asserted restrictive rule seems reasonable."[11] I mention the sliding scale theory here as an example of one interpretation given to the traditional conception of custom as a summation of the state practice and opinio iuris, because it contains connotations similar to that of custom construction by the international criminal tribunals. Moreover, the discretion on determining what consists of "destabilising or morally distasteful activity", and thus the relative weight given to practice

and opinio iuris is left to the "international decision maker"; in other words, the judge. For example, the ICTY has concluded in relation to the principles of humanitarian law that these principles can materialise as customary norms even if the state practice is scarce or nonexistent, but "the demands of humanity or the dictates of public conscience" stress the need for such a customary norm.[12]

In the North Sea Continental Shelf Case,[13] the ICJ relied largely on the actual state practice; whereas, in the Nicaragua Case,[14] the actual practice was not even thoroughly examined, and instead the court gave priority to words over deeds, emphasising the importance of opinio iuris in international custom formation. It could be said that in the latter case the ICJ considered the underlying issue of international peace and security so important, whether on practical or moral grounds, that to deny a customary rule prohibiting the use of force and intervention in the affairs of sovereign states would reduce the significance of international law, as well as reduce confidence in the court.[15]

In international criminal courts similar rationales, international peace and security, protection of fundamental human rights, preservation of life and so on, could explain the need to move away from traditional model of custom construction. In the next Part of this paper, I concentrate my analysis on a limited number of cases, mainly from the ICTY, and discuss the methods of constructing customary norms used in those cases and if, and how, these methods differ from the traditional model. First, however, it is essential to go back in history to the Nuremberg tribunal after the Second World War, because this was the first instance where customary international norms relating to international criminal law were articulated.

2. *Nuremberg military tribunal*

The Nuremberg Trial of the Major War Criminals (IMT) was the first occasion where international criminal law was applied directly by an international tribunal.[16] It was not entirely unprecedented, however because judicial proceedings on war crimes had long existed, just as war crimes and aggression had been present much before the mid-twentieth century. In the words of Georg Schwarzenberger, "unfortunately, the history of international relations prior to 1939 does not easily lend itself to description in terms of an international Garden of Eden in which the original sin has still to be committed".[17] Nonetheless, the establishment of theNuremberg tribunal was at the time considered to be the focal point in crystallising the individual criminal responsibility for international crimes as well as defining the scope of those crimes.

Before and at the time of the proceedings of the IMT and the International Military Tribunal for the Far East in Tokyo the treaties on international criminal were scarce. Especially the crimes against humanity had not been codified, and no precedents of tribunals invoking the crimes against humanity existed. Hence the tribunal had to find other sources of law on which to base its jurisdiction. One interpretation was that the Charter of the Military Tribunal codified pre-existing norms, either those under international custom or general principles of law. In the same vein, it has been put forth that the norms pronounced in the Charter stem from the natural law and are therefore higher principles of morality, and thus they do not violate the principles of legality.[18] Judith Shklar has completely rejected any role of natural law in the Nuremberg trials. She writes: "natural law thinking played no part in Nuremberg, where every effort was made to build on the fiction of positive international law envisaged as analogous in its formal structure to the legalistic image of municipal law in matured systems".[19]The problematic relation between the application of international criminal law and the principles of legality is further discussed in Part III of this paper.

Whether or not one agrees with Shklar on the absence of the natural law basis of the jurisdiction, it is useful to examine briefly, before turning into an analysis of the construction of custom by the ICTY, what sources the Nuremberg tribunal invoked in instituting the international criminality of certain acts and more precisely for this study, the sources of customary international law.

3. *Customary status of Nuremberg crimes*

In relation to war crimes, the Nuremberg tribunal bluntly accepted that the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land[20] was without a doubt declaratory of existing customary international law and could be directly applied in the proceedings.[21]

In considering the crimes against peace, the tribunal held that prohibition to wage aggressive war had developed into a customary norm that had been codified in the 1928 Pact of Paris (also known as the Kellogg-Briand Pact).[22] Subsequently, some scholars have argued that the prohibition to wage aggressive war had undoubtedly been proscribed by the norms of natural law, and that the Pact of Paris brought this prohibition into the sphere of positive international law, thus being positivised natural law.[23] Although the tribunal considered it unnecessary to define "whether and to what extent, aggressive war was a crime before the execution of the London Agreement",[24] it still drew attention to a few instruments dealing with violations of peace. With the exception of the

1907 Hague Convention IV,[25] the instruments discussed were not legally binding, and the decision to cite them as evidence of the emerged customary rule has later been criticised, for example by Schwarzenberger, for not providing, at the time, a sound basis for establishing either state practice or, moreover,opinio iuris.[26]

Schwarzenberger points to the fact that the actual practice of states before and during the Second World War goes against the findings of the tribunal that the prohibition to wage aggressive war had come to exist under customary law. Various examples, including the invasion of Manchuria by the Soviet Union (1929) and subsequently by Japan (1931), Italy's occupation of Albania (1939) and the preventive war by the Soviet Unionagainst Finland (1939), confirm that states on various continents had been engaging in actions identical to that which the court announced to amount to a crime against peace.[27]

IMT linked the crimes against humanity to war crimes and to the crime of aggression, and thus brought it them under the scope of customary international law, by simply stating, without further elaboration, that "in so far as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity".[28] IMT, probably intentionally, omitted entering into any discussion on whether crimes against humanity were a new category of offences and hence ex post facto law.

Some of the official declarations made by the Allied Nations during the Second World War condemning the acts of the Nazis were invoked in the Nuremberg trial as evidence of state practice that a customary norm prohibiting the crimes against peace, war crimes and crimes against humanity had emerged. In addition to the Charter of the International Military Tribunal, as an instrument confirming and codifying pre-existing norms of customary international law as well as the tribunal's interpretation of the customary law, the United Nations General Assembly passed two resolutions in 1946 that affirmed the principles of law articulated by the Nurembergtribunal.[29] These resolutions have been relied on in subsequent cases as further confirming the customary nature of the Nuremberg law.[30]

If one compares the right of the accused to challenge the legality of the proceedings under customary international law in the Nuremberg tribunal and in the subsequent ad hoc criminal tribunals, there is a definite development, much of which has been induced

by the emergence of human rights law that endorses the right to a fair and uncontentious trial.[31] For instance, in Nuremberg, according to Article 3 of the Charter of the International Military Tribunal, the accused did not have the right to challenge the legality of the tribunal or its judges, and this restriction was considered to comply with the minimum requirements of a fair trial. Oppositely, in the Tadic Case (1995) the ICTY was challenged by the accused asserting that the ICTY was not established legally, it had wrongful primacy over the jurisdiction of the national court, and it lacked jurisdiction ratione materiae.[32] In relation to the challenge of the primacy of the ICTY over national courts, the Trial Chamber held that only a sovereign state could invoke such an argument, and an individual, as in Tadic, was not entitled to raise the issue.[33] The Appeals Chamber argued against the reasoning of the Trial Chamber. It stated that international law has moved away from state-centralism to a more human-centred approach, and an individual was allowed to raise the issue of primacy. However, the Appeals Chamber did not accept the challenge to primacy dismissing it on the ground that "the offences which, if proven, do not affect the interests of one state alone but shock the conscience of mankind".[34]

On the other hand, the ICTY has wider jurisdictional basis than the Nuremberg tribunal, despite the notion that it must apply humanitarian law that is beyond doubt customary international law, while it was held in the Nuremberg Judgment that "the freedom of the Tribunal to apply international customary law is limited by its overriding duty to apply the law of its Charter whether or not such law is declaratory of existing international law".[35] This judgment means that in Nuremberg trials the Charter of the International Military Tribunal, in which some customary international norms were codified, was considered to be the exclusive source of applicable law, providing an exhaustive list of crimes falling under its jurisdiction. Conversely, the Statute of the ICTY provides the tribunal with wider discretion to determine the substantive scope of its jurisdiction. For instance, Article 3 list crimes that are violations of the laws or customs of war, but adds that the violations are not limited to the list; and, in Article 5 on crimes against humanity, the last provision of a similar list states that the court has power to prosecute individuals for also "other inhumane acts".

III. INTERNATIONAL CRIMINAL AD HOC TRIBUNALS AND ROLE OF THE JUDGE IN THE FORMATION OF CUSTOMARY LAW

1. *Establishment of the ICTY, the ICTR and their jurisdiction*

Unlike with the pre-existing dispute settlement bodies, such as the

International Court of Justice, the establishment of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda was not based on the consent of equal states but was a unilateral, 'peremptory' decision by the executive body of an international organisation, thus the setting up of the tribunals illustrated the will of the most powerful states.

In 1993, after a number of resolutions condemning the violations of international humanitarian law in the territory of the former Yugoslavia, the Security Council decided by the Resolution 808 to set up International Criminal Tribunal for the former Yugoslavia to deal with the atrocities committed after 1991 in that territory.!36" The following year the Security Council created the International Criminal Tribunal for Rwanda.!37"The resolutions were adopted under the powers granted to the Security Council by the Chapter VII of the Charter of the United Nations, and thus the situations were determined to be threats to international peace and security.

In initiating the establishment of the ICTY by the Resolution 808, the Security Council requested the Secretary-General to submit a report on all aspects, for example the legal basis and the subject-matter jurisdiction, relating to the establishment of the ICTY. The Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 !1993" sets out a Statute for the ICTY!38" with explanations of each article.!39" The tribunal has the competence to apply international humanitarian law that is "beyond any doubt part of customary law so that the problem of adherence of some but not all states to specific conventions does not arise".!40" Also, by resorting to the norms that are beyond any doubt customary international law, the court complies with the nullum crimen sine lege principle, which I will address in more detail in Part III of this paper.

Among the sources of law applicable by the ICTY, the Report of the Secretary-General lists international legal instruments that are also part of customary law relating to armed conflict: the 1949 Geneva Conventions, the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land !as also discussed in Nuremberg" and the Regulations annexed to it, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and the 1945 Charter of the International Military Tribunal. Interestingly, the nature of the armed conflict -international or internal- is not mentioned in relation to the competencies of the tribunal's. This omission is most likely a deliberate one, made in order to avoid raising the question whether, and at what point in time, the conflict in the territory of the former Yugoslavia constituted an internal as opposed to an

judge-made custom. Without going into the merits of the case, in the North Sea Continental Shelf case (1969) the ICJ implied that the formation of custom could be said to arise not from explicit external facts but from the judge.[75] After the ICJ announced its decision, Wolfgang Friedmann wrote that in the North Sea Continental Shelf Case the decision of the court was ex aequo et bono ('according to what is right and good') under the disguise of interpretation.[76] Thus, the court did not interpret law as it stood but in manner that it considered would lead to the most just outcome for the parties to the dispute.[77] In his article Friedmann acknowledged the same dilemma that is still deliberated with regard to the case law of the ICTY: the focal problem of the international courts is that "the borderlines between interpretation of existing law and the making of new law are inevitably fluid".[78]

The case Krstic concerned the criminal responsibility of General Krstic for acts, including mass executions and forcible transfer of Bosnian Muslims, which took place in Srebrenica in 1995.[79] In relation to the killings the accused was charged with genocide, and alternatively, with complicity to genocide. The Trial Chamber considered that the definition given to the crime of genocide in Article 4 § 2 of the Statute of the ICTY needs to be interpreted taking into account the customary international law at the time the act was committed. The court, again, did not resort to finding evidence of state practice and opinio iuris but, instead, referred to five different sources arising mainly from the international sphere.

First, the court stated that the Genocide Convention was the main source because Article 4 of the ICTY Statute adopts its definitions. In addition, the Genocide Convention has been acknowledged to have codified existing norms of international law, as was affirmed in the advisory opinion of the ICJ in Reservations to the Convention on the Prevention and Punishment of Genocide (1951).[80]

Secondly, the court considered international case law, especially in the ICTR, as a source of customary law. For instance, in discussing the meaning of a 'group' as a target of genocide, the court recognised that in the cases Akayesu (1998) and Kayishema and Ruzindana (2001) the ICTR confirmed the principles put forth in preceding soft law instruments such as the UN General Assembly resolution 96 (1946), the statement of the UN Secretariat (1948), the ICJ judgment in the case in Reservations to the Convention on the Prevention and Punishment of Genocide (1951), and finally by the International Law Commission (1996).

Thirdly, the reports of international committees, for instance the Report

of the International Law Commission on the Draft Code of Crimes against Peace and Security of Mankind, were stated to be relevant for the interpretation of the Article 4 of the ICTY Statute.

Fourthly, the preparatory works and the draft text of the Rome Statute of the International Criminal Court were viewed as evidence of the status of customary international law on genocide. By assessing that the draft text produced by Preparatory Commission for the ICC constitutes evidence of the opinio iuris of the states, the court demonstrated that the traditional model of "state practice supported by opinio iuris" has not entirely vanished in the vocabulary of the construction of custom by the ICTY.

Finally, the court evaluated the "legislation and practice of states, especially their judicial interpretations and decisions".[81] For example, the court referred to the French Criminal Code and a decision by theGerman Constitutional Court in determining that the intent to destroy is as an element of genocide.

However, as in the Furundzija Case, the concepts of state practice and opinio iuris as understood in the traditional construction of customary law were not really articulated. Also, it is surprising, especially in the light of the traditional approach of the construction of customary international law that the court does not draw any distinctions between legally binding documents, actual practice of states, and the so-called soft law documents such as General Assembly resolutions.[82]

In the Hadzihasanovic case (2003), which was concerned with the definition of command responsibility, the Appeals Chamber returned to the traditional construction of custom and stated that "to hold that a principle was part of customary international law, it has to be satisfied that state practice recognised the principle on the basis of supporting opinio iuris"[83] and that "it is the task of a court to interpret the underlying state practice and opinio iuris".

In this connection, it should be noted that the two ad hoc tribunals have adopted somewhat different approaches to the impact of the Rome Statute on their construction of customary law. The ICTY stated in theFurundzija case that "in many areas the Statute may be regarded as indicative of the legal views; i.e., opinio iuris of a great number of states; [...] depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law".[84] By contrast, in determining which acts can fall under the category of crimes

against humanity, the ICTR in the Akayesu Case referred to the list in Article 7 of the Rome Statute but only after a lengthy deliberation on other sources defining crimes against humanity, for example the Charter of the International Military Tribunal (1945) and the cases of Eichmann (1961), Barbie (1988), and Touvier (1994).[85]

In the 2000 Kupreskic case, concerning the ethnic cleansing of the Bosnian Muslims in the Lasva River Valley, the Trial Chamber of the ICTY discussed whether the attacks on the civilian population were absolutely prohibited under international humanitarian law, and whether the rules prohibiting such acts had become part of customary international law, hence falling under the jurisdiction of the ICTY.[86] The Trial Chamber invoked various sources of evidence for the customary nature of the prohibition.

First, it held that the 1938 Resolution of the Assembly of the League of Nations stating that "the intentional bombing of civilian population is illegal", confirmed by the ICJ in the Legality of the Threat or the Use of Nuclear Weapons Advisory Opinion, is a universally recognised principle.

Secondly, once again, Geneva Conventions were referred to in relation of the demise of the rights of the civilians in a situation where they abuse those rights.

Thirdly, after implying that the prohibition of attacking the civilian population is not an absolute proscription, the court mentioned two general principles: the duty to take reasonable care and the principle of proportionality. According to the court, these principles have been codified in the First Additional Protocol to the Geneva Conventions, and the court concluded that "such provisions [...] are now part of customary international law, not only because they specify and flesh out general pre-existing norms, but also because they do not appear to be contested by any state, including those that have not ratified the Protocol".[87] The court continued by stating that these principles fall into the area of "elementary considerations of humanity", and it listed three cases of the ICJ, Corfu Channel Case, Nicaragua Case and Legality of the Threat or Use of Threat of Nuclear Weapons Advisory Opinion, that illustrate these considerations as general principles of international law. The court confirmed its previous case law to the effect that many provisions of the First Additional Protocol have acquired the status of customary international law.

In relation to the Martens Clause, which the court held to be expressive of customary international law because of the "authoritative view of the ICJ",

the court considered that the "principles of humanity" and the "dictates of public conscience", as these has already been formulated in the 1907 Hague Convention, cannot be seen as independent sources of international law. It is noteworthy that the court nevertheless regarded this denial to a relevant issue to be articulated in the judgment, as if to say that according to some interpretation the principles of humanity and dictates of public conscience could have materialised as independent sources.

Perhaps the most outspokenly progressive idea in Kupreskic judgment is a reformulation of the 'sliding scale' approach to customary international law introduced by Frederick Kirgis in an article of 1987.[88] Kirgis had suggested that it is possible to disregard either state practice or opinio iuris entirely if there is a very strong evidence of the other one. He had supported this 'sliding scale' theory by a notion of reasonableness and moral considerations: "the more destabilising or morally distasteful the activity [...] the more readily international decision makers will substitute one element for the other, provided that the asserted restrictive rule seems reasonable".[89] In relation to the reprisal attacks against civilians, the court pronounced in Kupreskic that:

> "There does not seem to have emerged recently a body of state practice consistently supporting the proposition that one of the elements of custom, namely usus or diuturnitas[90] has taken shape. This is however an area where opinio iuris sive necessitates may play a much greater role than usus, as a result of the aforementioned Martens Clause. In the light of the way states and courts have implemented it, this Clause shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where state practice is scant or inconsistent".[91]

Significantly, the court considered the importance of the case law in the formation of customary norms. It accepted that in international tribunals the stare decisis principle of common law countries has no direct application, even though the Trial Chamber of the ICTY must follow the decisions of the Appeals Chamber. The court went on to state that "the precedents may constitute evidence of customary rule in that they are indicative of the existence of opinio iuris sive necessitates and international practice on a certain matter, or else they may be indicative of the emergence of a general principle of international law".[92] Without further analysis, the court said that the decisions of international courts carry much more weight in the formation of customary rules than the decisions of national tribunals, because "international judgments [...] are at

least based on the same corpus of law that is applied by international courts".[93]

This Part has illustrated the wealth of sources used by the ICTY in establishing that a rule of customary international law has emerged. From the case law one can deduct an apparent extension of the variety of the elements in the custom formation, and the significance of the judge in determining where to look for those elements. In addition, the judge has the task of reading in definitions for the customary rules, rules that sometimes have no previous judicial applications.

IV. Conceptual tensions in judicial application and construction of international customary criminal law

1. *International customary criminal law and principles of legality*

There has been academic discourse on whether the Charter of the International Military Tribunal codified, and the Nuremberg tribunal applied, existing customary international law or whether they created new, retrospective law, as was discussed in Part I, possibly in breach of the principles of legality. This Part addresses the relationship between the judicial application of the customary criminal norms and the principles of legality in more detail and draws illustrations from the case law of the ICTY as well as from some cases decided by national courts. The underlying problem the judge encounters is the conflicting consequences of following the principles of legality, on the one hand, and not allowing impunity, on the other. In other words, the question arises whether the courts should compromise the principles of legality in order to be able to bring perpetrators to justice, or whether they should respect those principles at the cost of justice, and if and how these two aspects should be balanced against one another.

The principles of legality are comprised of the nullum crimen sine lege principle ("no crime without law") and the nulla poena sine lege principle ("no punishment without law"). According to a contemporary commentary, there are four elements to the nullum crimen principle: the concept of written law, the value of legal certainty, the prohibition on analogy, and non-retroactivity.[94] However, it is noteworthy, that sometimes the concept of the principles of legality is used to refer to merely to the nullum crimen principle (and in a fewer instances only to the nulla poena principle). Likewise, occasionally, the principle nullum crimen is taken to consist of only one or two of the elements, most often of only the non-retroactivity. For the reason of these inconsistencies, the analysis of the case law or the works of scholars is not

always unequivocal.

In the Nuremberg trials, the notion of nullum crimen was incorporated into international criminal law from national criminal codes. In the criminal law of the civil law countries the nullum crimen principle, especially its non-retroactivity element, which is purported to proscribe ex post facto laws, is absolute, whereas in the common law countries it has been said to have "the force of an interpretative presumption".[95] Even though the precedent set by the Nuremberg tribunal on how the application of the customary criminal norms conforms with the nullum crimen principle is somewhat indistinct and unpersuasive, as discussed in above, the subsequent applications of the Nuremberg precedent have reinforced its validity, a process aptly summarised by Professor Bassiouni, saying that "reiteration of the same argument confirms is validity".[96]

The trial of Adolf Eichmann in Israel in 1961 which is as a whole -luckily- more of an exception in its rather arbitrary interpretation of international law, is an example of the court denying the applicability of the principles of legality in order to reach what the court saw was the only possible moral outcome. Court basically stated that the acts Eichmann was accused of had been prohibited under customary international law "since time immemorial" and at the same time denied that the principle of nullum crimen sine lege, nulla poena sine lege had yet developed into a customary rule.[97]

The case law of the International Military Tribunal has been relied on and reasserted for example in the Canadian case Regina v. Finta, where the accused was a former Hungarian general suspected of Nazi war crimes and crimes against humanity. Justice Cory quoted Kelsen by stating that "to punish those who were morally responsible for the international crime of the Second World War may certainly be considered as more important than to comply with the rather relative rule against ex post facto laws, open to so many exceptions".[98] On the reverse, in the ICTY case Erdemovic (1997) the Presiding Judge Cassese in his separate and dissenting opinion stated that "policy-oriented approach in the area of criminal law runs contrary to the fundamental principle nullum crimen sine lege".[99] Subsequently, though, in 2006, Professor Cassese first referred to the principle of substantive justice embraced by the Nuremberg tribunal that "whereby any conduct that is socially harmful or causes danger to society should be prohibited and punished, whether or not that conduct had already been criminalised by law at the moment it had been taken".[100] After a brief analysis contrasting the national and international criminal law, he states that "the need to make

international values upholding human dignity (and the legal rules enshrining those values) prevail over diverging national legislation, tips the balance in favour of international law, to the detriment of the accessibility and foreseeability of criminal law".[101] These two statements illustrate that Professor Cassese, despite rejecting that policy considerations should affect the application of the criminal law, accepts that some considerations, for instance upholding the human dignity, may be taken into account in the decision-making and they should even rebuff the principles of legality. This fluidity also reflects the more general problematic the judge is faced with in evaluating the principles of legality under thenullum crimen principle, such as the value of legal certainty, and not allowing impunity for morally wrongful acts in international criminal tribunals.

A subsequent former President of the ICTY, Professor Meron, has recently taken a conservative view on compliance with the principles of legality in constructing, or creating, customary international law: "in my view the looser, more progressive approach to the analysis of customary international law embraced by dissents -one that would affirmatively engage the criminal tribunal in the development of customary law, rather than simply in its application- cannot be reconciled with the legality principle".[102] From this comment can be deduced that Professor Meron rejects the idea that the judges, here presumably main emphasis being on the ICTY, play a role in the evolution of customary norms. However, Meron accepts that "a more relaxed approach to the identification of relevant customary norms may be justified where a norm in question does not concern the substantive scope of the criminal prohibition, or of the defendant's liability, and thus does not directly implicate the nullum crimen principle".[103] He does not offer any further reasons or analysis on why the method of custom construction should be different in "non-substantive scope of criminal prohibition or defendant's liability" than in the substantive matters, nor explanation on whether it is for the judge himself to determine when "a more relaxed approach" could be resorted to. Interestingly, nearly two decades earlier, much before being elected as a judge to the ICTY and before there was any indication that such tribunal would be established - Professor Meron wrote that "the tribunals have [thus] been guided, and are likely to continue to be guided, by the degree of offensiveness of certain acts to human dignity; the more heinous the act, the more the tribunal will assume that it violates not only a moral principle of humanity but also a positive norm of customary law".[104] So, it seems that Meron's experience as a judge in the ICTY, perhaps surprisingly, made him embrace a more restrictive approach on the role of international criminal judge in the development of customary international law.

In relation to the application of customary international law by the international criminal judge and the compliance with the nullum crimen principle, the problem has been the imprecision of some of the customary norms; even though it can be shown that a general prohibition in customary international law has emerged, its scope and substance must be determined by the judges. For example, despite the general recognition that torture can constitute a war crime and a crime against humanity, the court in the Furundzija (1998) case, discussed in more detail above in Part II, was left with the task of determining on the basis of various sources including human rights treaties what the elements of torture are, and if rape could be a form of torture and thus a war crime and a crime against humanity.[105] Furthermore, the Appeals Chamber of the ICTY stated in the caseDelalic (2001),[106] referring to the previous Aleksovski Case (2000),[107] that "the principle of nullum crimen sine lege does not prevent a court from interpreting and clarifying the elements of a particular crime".[108]Subsequently even more avant-garde approach has been put forward in the joint Milutinovic, Sainovic and Ojdanic Case (2003), where the Appeals Chamber held that the nullum crimen principle prevents the court from creating new law and from interpreting existing law "beyond reasonable limits of clarification" but does not preclude "the progressive development of law by the court".[109] The court found support for the latter view in the case law of national courts as well as the European Court of Human Rights. Mohamed Shahabuddeen, a current judge in the ICTY, has implicated that as long as the interpretation, or even the expansion, of the elements of the crime are "within the very essence of the original crime even though not corresponding to every detail of it", the court does not infringe the nullum crimen principle.[110]

It has been suggested that the breach of the nullum crimen principle could be justified by the rationale that those who commit the most heinous atrocities should not go unpunished even when no clear legal rule has prohibited the acts at the time they were committed.[111] If one adopts the view that the judges may create new law, perhaps a more substantive justification for retroactive application of the principles of law is that "the principle[s] of legality is [...] a principle of justice flowing from natural law doctrine".[112] The Nuremberg tribunal accepted that the principle of non-retroactivity is "in general a principle of justice" but it could not be invoked to protect the accused as such, because in relation to atrocities, "it would be unjust if his wrong were allowed to go unpunished".[113] From this premise, it could be deduced that the principles of legality -or at least some parts of it- should not be accepted for the purpose of allowing immoral or unjust outcome. However, in

contrast to the relaxed approach to the application of the principles of legality endorsed by the IMT, and to lesser extent by the ICTY, it can be presumed that the judges in the ICC are left with much less discretion on this matter, and the Rome Statute unambiguously asserts that "the Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute".[114]

2. *Applicability of human rights norms directly in international criminal proceedings*

Deducing international criminal law that gives rise to individual criminal responsibility directly from treaties that were intended to be applied between the state parties has been thought somewhat troublesome already in the 1940s after the Nuremberg judgment. In relation to the crimes against peace the Nuremberg tribunal stated that any breach of the 1928 Paris Pact,[115] which created binding obligations on states, was illegal, and furthermore, without explaining the correlation, held that such an illegal act constitutes a crime entailing individual responsibility.[116] In recent times, mainly in the ICTY, international judges have encountered the issue of direct incorporation of the human rights (treaty or customary) norms to international criminal law, which involves individual criminal responsibility.[117] In other words, the court has had to determine how do the obligations of the states entailing state responsibility transfer to the culpability of the individuals? One justification, although not its raison d'être, for the application of the human rights norms directly or as evidence of international customary criminal law by the international criminal courts could be that many of the international human rights norms (especially when referring to the so-called 'core crimes') have been implemented into the national legislation of most countries. The national laws implementing international human rights treaties grant rights to the individuals, and the state must not breach these rights, and moreover the state must ensure that no other individual breaches the human rights of another individual.[118]

The problem has been further elaborated by the ICTY. For example, in the case Furundzija (1998), the Trial Chamber stated that albeit torture is prohibited under humanitarian law, that area of law does not provide a definition for torture as a war crime.[119] The court referred to a case decided less than a month previously, Delalic (1998), where another Trial Chamber derived a definition for torture, which it said was consistent with customary international norms, directly from human rights law.[120] More precisely, the court in Delalic attained its findings for this definition from various human rights instruments -both legally binding as well as non-binding- both international and regional, for example the

Universal Declaration of Human Rights, the European Convention on Human Right, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights.[121] In considering the instruments focusing just on torture -the Torture Convention, the United Nations General Assembly Declaration on the Protection from Torture, and the Inter-American Convention to Prevent and Punish Torture- the court concluded that "the definition of torture contained in the Torture Convention includes the definitions contained in both the Declaration on Torture and the Inter-American Convention and thus reflects a consensus which the Trial Chamber considers to be representative of customary international law".[122]

The interpenetration of human rights law, in relation to torture, to international criminal law was further discussed in the case Kunarac (2001).[123] After reviewing again many human rights instruments and the case law of various legal systems, the court concluded that:

> "The definition of torture contained in the Torture Convention cannot be regarded as the definition of torture under customary international law which is binding regardless of the context in which it is applied. The definition of the Torture Convention was meant to apply at an inter-state level and was, for that reason, directed at the states' obligations. [...] The definition of torture contained in Article 1 of the Torture Convention can only serve, for present purposes, as an interpretational aid".[124]

Furthermore, the Trial Chamber in Kunarac held, challenging the argumentation of Delalic, that "the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law".[125]

It is interesting to ask what led the court to depart from the previous decisions in this case. The main substantial difference to human rights instruments in the court's interpretation of the elements of torture was that the involvement of a state -the requirement that the offence is carried out by a state official- was perceived by the court as 'peripheral'.[126] From these decisions it is possible to perceive a move towards the construction of customary criminal law independently from the impetus of human rights law.[127] This move "toward the formation of a fully-fledged body of law in this area"[128] illustrated the impact of the decisions of the international criminal judge on the general body of international law - here, the disintegration of human rights law and international criminal law.

V. Conclusion

In international criminal law, the decisions of courts play an increasing role in custom formation despite some academic opposition to the active role of the judge in the development customary international norms. In the judicial decisions, resolutions and statements of non-state institutions are increasingly accepted as evidence of state practice, opinio iuris, or even both, contributing to the custom formation. Moreover, the international criminal judge has the discretion to determine which sources are invoked as evidence of customary norm, and thus, the choices of the judge may influence the general theory of how customary international law forms.

In some cases -for instance, in Tadic-, the ICTY has implied that declarations and even practice of non-state organs, whether international organisations, NGOs, or secessionist movements, could have a direct impact on the formation of customary international law. A question arises, therefore, whether the concept of state practice as an element of custom is becoming outdated, at least in some fields of international law. Moreover, we can ask whether the developments in international criminal law, and more precisely in the interpretation of law by the international criminal tribunals, reflect a completely new source of evidence of international law in which the role of the international judge is vital for determining the substance and definition of a customary norm.

It has been claimed that "continental writers of positivistic allegiance" have been unwilling to admit that the interpretations of law by judges shape and even afford to the development of customary international law.[129] However, especially the UN ad hoc tribunals, mostly the ICTY, have had a large impact on the formation of international criminal norms, just like the Nuremberg tribunal had half a century previously. The ICTY has invoked its own precedents as evidence of emerged customary norms. Thus, the decisions and opinions of the judges are used as a source of evidence of the state of customary international law. The acceptance of the decisions of the international tribunals on the current status of customary international law as an authoritative expression of opinio iuris could induce state practice into the desired direction and thus fundamentally affect the compliance by the states with a new customary norm.

Two conceptual issues, the application of the principles of legality and customary human rights law in international criminal tribunals, are still in the midst of academic as well as practical discourse. Also in relation to these issues uniformity is desired and the discretion of the individual

judges should be limited in order to provide for legal certainty and consistent development of international criminal law. International criminal law is moving away from the traditional human rights law as the case law illustrates in relation to the issue of direct applicability of customary human rights law in international criminal law tribunals where individual responsibility, instead of the state responsibility, is at stake. The decisions of the international criminal judge influence not only the future method of formation of customary international law in international criminal law but also its interface to human rights law and the theory of custom formation in general public international law.

The previous sections show that there is a definite need for greater consistency in the formation of customary international norms in the ICTY. Different judges and chambers have, even in the phase of ten years, interpreted, applied and also created customary norms using very diverse approaches and methodology. For the further development of customary criminal law it is necessary to establish a common and consistent system of the custom formation and the role of the judge thereto, not least in order to ensure compliance with the principles of legality, such as the nullum crimen principle. It can be expected that the newly instigated International Criminal Court will provide more detailed techniques on this matter. The applicable law as well as the Rules of Procedure and Evidence and the Elements of Crimes of the ICC were quite firmly defined and adopted by the Assembly of States Parties, unlike in the situation of the ICTY where the Rules of Procedure and Evidence were left for the first judges to determine themselves.

I conclude on a quotation, which not only captures the crux of this paper but also entices for future studies on the nature of modern customary international law: "time has come [...] to articulate different types (and elements) of [customary international law] in relation to different subject matters and areas".[130]

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[1] In relation to international judicial decision-making in general, Professor Teson has written that "the commendable purpose [of not having to abandon the positivist illusion], however, should not obscure what is really going on: the adjudication of cases reveals, rather than an interest in finding patterns of state behaviour, an impulse to decide cases correctly by applying the best, just, fair, or efficient rules"; in F.R. TESON, A Philosophy of International Law, Boulder, Westview, 1998, p. 91.

[2] For some references, see G. CLARK, "Yet another example of victor's justice", The Japan Times, 22 July 2001; for a more detailed discussion on the nature of political trials, see R. CHRISTENSON, "A Political Theory of Political Trials", Journal of Criminal Law and Criminology, 1983, pp. 547-578, at p. 547.
[3] For critical commentary, see M. MANDEL, How America Gets Away with Murder: Illegal Wars, Collateral Damage and Crimes against Humanity, London, Pluto, 2004; see also V. PESKIN, "Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda", Journal of Human Rights, 2005, Vol. 4, pp. 213-231, at p. 213.
[4] Comment of GEORGES ABI-SAAB in the discussion on the sources of international law in A. CASSESE and J.H.H. WEILER, Change and Stability in International Law-Making, Florence, European University Institute, 1988, p. 10.
[5] A. D'AMATO, The Concept of Custom in International Law, Ithaca, Cornell University Press, 1971.
[6] Statute of the International Court of Justice, 16 June 1945.
[7] Statute of the Permanent Court of Justice, 16 Dec. 1920.
[8] United States Supreme Court, Paquete Habana Case, 8 Jan. 1900, 175 US, 677, at p. 700.
[9] I.C.J., Lotus Case [France v. Turkey], 7 Sept. 1927, 4 ILR, 153.
[10] I.C.J., Asylum Case [Colombia/Peru], 20 Nov. 1950; for commentary, see H.W. BRIGGS, "The Columbian-Peruvian Asylum Case and Proof of Customary International Law", American Journal of International Law, 1951, pp. 728-731, at p. 728.
[11] F.L. KIRGIS, "Custom on a Sliding Scale", American Journal of International Law, 1987, pp. 146-151, at p. 149.
[12] I.C.T.Y., Prosecutor v. Kupreskic, IT-95-16-T, Judgment, 14 Jan. 2000, § 527.
[13] I.C.J., North Sea Continental Shelf Cases [Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands], 20 Feb. 1969.
[14] I.C.J., Military and Paramilitary Activities in and against Nicaragua [Nicaragua v. The United States], 27 June 1986.
[15] H.C.M. CHARLESWORTH, "Customary International Law and the Nicaragua Case", Australian Yearbook of International Law, 1984-1987, pp. 1-30, at pp. 27-29.
[16] IMT was set up by Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and the Charter of the International Military Tribunal, 8 Aug. 1945, London, 82 UNTS, 280.
[17] G. SCHWARZENBERGER, "The Judgment of Nuremberg", Tulane Law Review, 1947, pp. 329-361, at pp. 338-339.
[18] See, for example, S. GARIBIAN (translated from French by G. M. GOSHGARIAN), "Crimes Against Humanity and International Legality in Legal Theory after Nuremberg", Journal of Genocide Research, 2007, pp. 93-111.
[19] J.N. SHKLAR, Legalism: Law, Morals, and Political Trials, Cambridge (Mass.), Harvard University Press, 1964, at p. 156.
[20] Hague Convention IV Respecting the Laws and Customs of War on Land, 18 Oct. 1907, 1 Bevans 631.
[21] I.M.T., Nuremberg Judgment, 1946, Cmd. 6964, at p. 64.
[22] General Treaty for the Renunciation of War as an Instrument of National Policy, 27 Aug. 1928, 94 LNTS. 57.

[23] See, for example, Q. WRIGHT, "War Crimes under International Law", Law Quarterly Review, 1946, pp. 40-52; for more general discussion, see Q. WRIGHT, "The Law of the Nuremberg Trial", American Journal of International Law, 1947, pp. 38-72.
[24] I.M.T., Nuremberg Judgment, 1946, Cmd. 6964, at p. 38.
[25] The judgment refers to the 1923 Draft Treaty of Mutual Assistance, 1924 Geneva Protocol and 1927 Resolution of the Assembly of the League of Nations.
[26] G. SCHWARZENBERGER, "The Judgment of Nuremberg", at pp. 345-347.
[27] Ibid., at pp. 347-348.
[28] I.M.T., Nuremberg Judgment, at p. 249. In the later case law, it has been held that it is not necessary to establish a link between crimes against and war crimes or crime of aggression: "it is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict [or] any conflict at all"; ICTY, Appeals Chamber, Prosecutor v. Tadic, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, § 141.
[29] Resolution 3(I) on Extradition and Punishment of War Criminals, 13 Feb. 1946; Resolution 95(I) on Affirmation of the Principles of International Law recognised by the Charter of the Nuremberg Tribunal, 11 Dec. 1946.
[30] For example, House of Lords, R. v. Bow Street Metropolitan Stipendiary Magistrate and Others (Ex parte Pinochet Ugarte), 25 Nov. 1998, [2000] 1 AC 61; E.C.H.R., Kolk and Kislyiy v. Estonia [Non-Applicability of Statutory Limitations to Crimes against Humanity], 17 Jan. 2006.
[31] For example, see 1950 European Convention on Human Rights, Article 6; 1966 International Covenant on Civil and Political Rights, Article 14.
[32] I.C.T.Y., Appeals Chamber, Prosecutor v. Tadic, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995.
[33] "A plea that the sovereignty of a state has been violated, a plea only a sovereign state may raise or waive and a right clearly the accused cannot take over from that state"; Ibid. at §§ 41-42.
[34] Ibid, § 57. For further commentary, see A. BIRDSALL, "The International Criminal Tribunal for the former Yugoslavia: Towards a More Just Order?", Peace Conflict & Development, 2006, www.peacestudiesjournal.org.uk.
[35] I.M.T., Nuremberg Judgment, 1946, Cmd. 6964, at p. 109.
[36] United Nations Security Council Resolution 808, 25 May 1993, UN Doc. S/25704.
[37] United Nations Security Council Resolution 955, 8 Nov. 1994, UN Doc. S/RES/955.
[38] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993, UN SC Res. 827, 32 I.L.M. 1203 (1993).
[39] Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808, 3 May 1993, available at http://www.un.org/icty/legaldoc-e/index.htm.
[40] Ibid., § 34.
[41] For further elaboration, see for example P. MALANCZUK, Akehurst's Modern Introduction to International Law, 7th ed., London, Routledge, 1997, at

pp. 47 (state succession and customary international law) and 161-172 (general description of state succession in international law).
[42] For instance: Tadic, supra note 32, § 137.
[43] Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring states, between 1 January 1994 and 31 December 1994, 8 Nov. 1994, UN SC Res. 955, 33 ILM 1598.
[44] I.C.T.R., Prosecutor v. Rutaganda, ICTR-96-3, 6 Dec. 1999, § 86.
[45] 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Field, 75 UNTS, 31; 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS, 85; 1949 Geneva Convention Relative to the Treatment of Prisoners of War, 75 UNTS, 13; 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS, 267; all adopted on 12 Aug. 1949.
[46] 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts; 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 16 ILM 1391 and 1442; both adopted on 8 June 1977.
[47] Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948, 78 UNTS, 277.
[48] Tadic, supra note 32, § 99.
[49] Ibid.
[50] References are made to the 1967 conflict in Yemen, the statement of the Prime Minister of Congo in 1964 during the civil war in Congo, the 1967 Operational Code of Conduct for Nigerian Armed Forces and the 1988 statement by the rebels in El Salvador; Tadic, supra note 32, §§ 105-107.
[51] Ibid., § 109.
[52] United Nations General Assembly Resolutions 2444 and 2675 (respectively).
[53] Tadic, supra note 32, § 112.
[54] Ibid., § 16.
[55] 1977 Additional Protocol II, supra note 46.
[56] Tadic, supra note 32, § 117.
[57] I.C.T.Y., Prosecutor v. Furundzija, IT-95-17/1-T, Judgment, 10 Dec. 1998.
[58] Ibid., § 137.
[59] Ibid., § 138; in the previous paragraph the court referred in passing to a decision of the Constitutional Court of Columbia which had held that the Geneva Conventions and also the Additional Protocols thereto have in their entirety become customary law.
[60] Nicaragua, supra note 14.
[61] Furundzija, supra note 57, § 138.
[62] Geneva Conventions, Article 3 § 1 (a).
[63] For discussion, see T. MERON, "The Geneva Conventions as Customary Law", American Journal of International Law, 1987, pp. 348-370.
[64] Furundzija, supra note 57, § 159.
[65] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, U.N. Doc. A/39/51, 1465 UNTS, 85.
[66] I.C.T.R., Prosecutor v. Akayesu, ICTR-96-4-T, Judgment, 2 Sept. 1998.

[67] I.C.T.Y., Prosecutor v. Delalic and Others, IT-96-21-T, Judgment, 16 Nov. 1998.
[68] Inter-American Convention to Prevent and Punish Torture, 9 Dec. 1985, OAS Treaty Series No 67, 25 ILM, 519.
[69] Delalic, supra note 67, § 458.
[70] Furundzija, supra note 57, § 160.
[71] Ibid.
[72] Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 9 Dec. 1975, UN GA Res. 3452, UN Doc. A/10034.
[73] Furundzija, supra note 57, § 160.
[74] Ibid. § 161.
[75] I.C.J., North Sea Continental Shelf Cases, supra note 13.
[76] W. FRIEDMANN, "The North Sea Continental Shelf Cases: A Critique", American Journal of International Law, 1970, pp. 229-240, at p. 236.
[77] Eyal Benvenisti has presented a theory of custom formation based on efficiency. He has suggested that in the Gabcikovo-Nagymaros Project Case the ICJ bypassed the traditional construction of customary norms in relation to environmental issues. Benvenisti considers that "the ICJ has [...] the power to invent custom" if the newly formed custom is more efficient, no other entity is taking active steps towards the same goal, and treaties (or treaty negotiations) between states have been inefficient, usually because of the non-reciprocal nature of the issues at hand in the custom formation. Despite the disputable nature of this interpretation, perhaps something from the efficiency argument could be incorporated into the construction of custom by international criminal tribunals. This, however, so far has not been really at the focus of my research, but it is an initiative to be kept in mind while analysing the construction of customary norms by the international criminal courts.
[78] W. FRIEDMANN, "The North Sea Continental Shelf Cases", o.c., at p. 235.
[79] I.C.T.Y., Prosecutor v. Krstic, IT-98-33-T, Judgement, 2 Aug. 2001.
[80] I.C.J., Reservations to the Convention on the Prevention and Punishment of Genocide, Adv. Op., 28 May 1951.
[81] Krstic, supra note 79, § 541.
[82] The role of General Assembly resolutions in custom formation has not been agreed upon. Akehurst has stated that only those resolutions which claim to be declaratory of existing law, thus lex lata, can be used as authoritative evidence of state practice of customary law by the courts; see M. AKEHURST, "Custom as a Source of International Law", British Yearbook of International Law, 1974-1975, pp. 1-53, at p. 6. On the other hand, Judge AMMOUN adopted wider approach in his separate opinion in the Barcelona Traction Case by stating that positions taken by delegates of states in international organisations and conferences, with a special emphasis on the United Nations, "naturally form part of state practice"; ICJ, Barcelona Traction, Light and Power Company Limited [Belgium v. Spain)], 5 Feb. 1970, Separate Opinion of Judge Ammoun.
[83] ICTY, Appeals Chamber, Prosecutor v. Hadzihasanovic, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, § 12.
[84] Furundzija, supra note 57, § 227; for some commentary, see R. CRYER, "International Criminal Law v. State Sovereignty: Another Round?", European Journal of International Law, 2005, pp. 979-1000, at p. 992.
[85] Akayesu, supra note 66, §§ 563-577.

[86] Kupreskic, supra note 12, § 521.
[87] Ibid., § 524.
[88] F.L. KIRGIS, "Custom on a Sliding Scale", supra note 11.
[89] Ibid., at p. 149.
[90] Usus = use, experience, skill, advantage, profit, to use, employ, possess, enjoy. Diuturnitas = lasting a long time, of long duration. Results for were found using the Internet version of the Latin Dictionary of the University of Notre Dame:http://archives.nd.edu/latgramm.htm.
[91] Kupreskic, supra note 12, § 527.
[92] Ibid., § 540.
[93] Ibid., § 542.
[94] See S. LAMB, "Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law", in A. CASSESE, P. GAETA and J.R.W.D. JONES, The Rome Statute of the International Criminal Court: A Commentary, Volume I, Oxford, Oxford University Press, 2002, Chapter 20, at p. 733.
[95] Ibid., at p. 740, note 30.
[96] C.M. BASSIOUNI, Crimes against Humanity in International Criminal Law, Dordrecht, Nijhoff, 1992, pp. 145-146.
[97] Supreme Court of Israel, A-G Israel v. Eichmann, 29 May 1962, 36 ILR 277. In a later case Schilingo (2005) of Spanish Audienca Nacional, in the absence of codified rules, the court relied on the pre-existing customary international law criminalising certain atrocities as crimes against humanity. It has been argued by many that the decision breached the nullum crimen principle, especially in the light of the structure of Spanish legal system that entails strict principle of legality. See, for instance, C. TOMUSCHAT, "Issues of Universal Jurisdiction in the Scilingo Case", Journal of International Criminal Justice, 2005, pp. 1074-1081; A. GIL GIL, "The Flaws of the Scilingo judgment", Journal of International Criminal Justice, 2005, pp. 1082-1091.
[98] Supreme Court of Canada, Regina v. Finta, 24 Mar. 1994, 1 SCR 701.
[99] ICTY, Appeals Chamber, Prosecutor v. Erdemovic, IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, 7 Oct. 1997, § 11.
[100] A. CASSESE, "Balancing the Prosecution against Crimes against Humanity and Non-Retroactive Criminal Law: The Kolk and Kislyiy v. Estonia Case before the ECHR", Journal of International Criminal Justice, 2006, pp. 410-418, at pp. 416-417.
[101] Ibid, at p. 417.
[102] T. MERON, "Revival of Customary Humanitarian Law", American Journal of International Law, 2005, pp. 817-834, at p. 825.
[103] Ibid., at p. 829.
[104] T. MERON, "The Geneva Conventions as Customary Law", American Journal of International Law, 1987, pp. 348-370, at p. 361.
[105] Furundzija, supra note 57, §§ 159-186.
[106] ICTY, Appeals Chamber, Prosecutor v. Delalic, IT-96-21-T, Judgment, 20 Feb. 2001.
[107] ICTY, Appeals Chamber, Prosecutor v. Aleksovski, IT-95-14/1-T, Judgment, 24 Mar. 2000.
[108] Delalic, supra note 106, § 173.
[109] ICTY, Appeals Chamber, Prosecutor v. Milutinovic, Sainovic and Ojdanic, IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction, 21 May 2003, §§ 37-38.

[110] M. SHAHABUDDEEN, "Does the Principle of Legality Stand in the Way of Progressive Development of Law?", Journal of International Criminal Justice, 2004, pp. 1007-1017.
[111] For references, see G. ENDO, "Nullum Crimen Nulla Poena Sine Lege Principle and the ICTY and ICTR", Revue québécoise de droit international, 2005, pp. 205-219.
[112] S. GARIBIAN, "Crimes against humanity and international legality in legal theory after Nuremberg", Journal of Genocide Research, 2007, pp. 93-111, at p. 99.
[113] I.M.T., Nuremberg Judgment, 1946, Cmd. 6964, at p. 217.
[114] Rome Statute, Article 11 § 1; for further discussion, see H-H. JESCHECK, "The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute", Journal of International Criminal Justice, 2004, pp. 38-55.
[115] General Treaty for the Renunciation of War as an Instrument of National Policy, supra note 22.
[116] For comments, see G. SCHWARZENBERGER, "The Judgment of Nuremberg", at pp. 346-347.
[117] In my view a too narrow explanation is that "if a human rights treaty or humanitarian law treaty includes a penal provision directed at individual accountability, then obviously such treaty overlaps with international criminal law"; C. DE THANand E. SHORTS, International Criminal Law and Human Rights, London, Sweet and Maxwell, 2003, at pp. 12-13.
[118] See, for example, the decision: E.C.H.R., Osman v. the United Kingdom, 10 July 1998.
[119] Prosecutor v. Furundzija, supra note 57, § 159.
[120] Delalic, supra note 67, 16 Nov. 1998, §§ 452-460.
[121] Ibid., §§ 452-458.
[122] Ibid., § 459.
[123] I.C.T.Y., Prosecutor v. Kunarac, IT-93-23-T & IT-96-23/1-T, Judgment, 22 Feb. 2001.
[124] Ibid., § 482.
[125] Ibid., § 496.
[126] Ibid., § 493.
[127] See, for instance, S.R. RATNER, "The Schizophrenias of International Criminal Law", Texas International Law Journal, 1998, pp. 237-256.
[128] A. CASSESE, "International Criminal Law", in M.D. EVANS, International Law, Oxford, Oxford University Press, 2003, Chapter 23, at p. 724.
[129] R. KOLB, "Selected Problems in the Theory of Customary International Law", Netherlands International Law Review, 2003, pp. 119-150, at p. 128.
[130] Ibid.

THE EUROPEAN COURT OF JUSTICE IN CONTEXT: FORMS AND PATTERNS OF JUDICIAL DIALOGUE

Allan Rosas

I. INTRODUCTION

While the feudal system was monist, the nation state system was dualist and characterised by the dichotomies of international law versus national law, public law versus private law, and law versus non-law. Post-industrialised or 'post-modern' society implies a more pluralist system, involving globalisation, regionalisation as well as localisation. We are facing a patchwork of authorities instead of just one national government and one legislature.[1] The international and the internal are increasingly intertwined. Especially in EU-law, the distinction between public and private law seems less relevant. The phenomenon of soft law dilutes the barrier between law and non-law.

This plurality of international, European, national and sub-national norms and norm-givers seems to be accompanied by an increased focus on universal and European values and principles. They tie together, as it were, the various bits and pieces and give some stability and predictability to an otherwise somewhat chaotic world constantly on the move. The values and principles are articulated and interpreted mainly by a sort of "aristocracy of wise men and women".[2] It is, or at least should be, an open group, in fact more of a loose forum, consisting of political, administrative and economic elites, judges, ombudsmen and other monitoring bodies, academic circles and the vanguard of non-governmental and interest organisations.

Whether we like it or not, courts and judges play an important -and probably increasing- role in this process. At the international level, speaking of the 'proliferation' of international courts and tribunals has already become trite.[3] It is a jargon, but it also, to some extent at least, reflects reality. Not only has there been an increase in the number of such courts and tribunals but some of them such as the World Trade Organization (henceforth, "WTO") panels and Appellate Body and the European Court of Human Rights (henceforth, "E.C.H.R.") are far from complaining about a scarcity of cases on their dockets. As to national judicial systems, the role of an independent judiciary in ensuring the rule of law and protecting fundamental rights has been recognised to a greater extent even in countries such as the Nordic countries and France where the judge was traditionally seen more as a civil servant who should

implement the will of the State. One facet of this development is an increased emphasis on the constitutional review of legislation exercised by a constitutional court or ordinary courts.[4] The Rechtsstaat of today does contain elements of a Richterstaat.

The Court of Justice of the European Communities (henceforth, "E.C.J.") and the other two EU courts in Luxembourg are sometimes mentioned as examples of a tendency towards a Richterstaat. We can argue about the precise role and importance of the E.C.J. and its influence on European integration, but it is difficult to deny that it has played a considerable, probably crucial, role in the 'constitutionalisation' of the EU legal order. As is well-known, the E.C.J. is sometimes criticised for its alleged 'judicial activism'.[5] Part of this criticism may be based on a narrow conception of the role of the judge as being someone whose task it is to apply rather than interpret and construe the law. Some people, in any case, may have expected the E.C.J. to be a technical, economic tribunal rather than a constitutional or quasi-constitutional court.

It is true that the case-law of the E.C.J. and the Court of First Instance (henceforth, "C.F.I.") does not confine the Courts to the model of a technical, economic tribunal but suggests, at least for the E.C.J., a mixture of the roles of constitutional court, supreme court, administrative court and economic and commercial court. It is also true that such a broad function is entrenched in several modifications and additions to the basic Treaties, notably the Treaty on European Union (henceforth, "TEU") and the Treaty establishing the European Community (henceforth, "ECT").

By the Reform Treaty, the jurisdiction of the Court, according to the mandate for the work of the Intergovernmental Conference adopted by the European Council in Brussels on 21-22 June 2007,[6] would be enlarged to cover fully, inter alia, police and judicial cooperation in criminal matters (the current Title VI TEU). And instead of defining, as the pouvoir constitutif, the principle of primacy of EU law in the TEU, the Member States, assembled in the European Council adopting the said mandate, have preferred to provide for a separate Declaration, which would recall that EU law has primacy over the law of the Member States, "under the conditions laid down" by the case-law of the E.C.J. The principles of direct effect and respect for fundamental rights, articulated by the E.C.J. in 1963 and 1969,[7] respectively, have been endorsed already in earlier amendments of primary and secondary EU law.[8]

II. THE E.C.J. IN A BROADER CONTEXT

In guarding the specific nature of the Community legal order, the E.C.J.

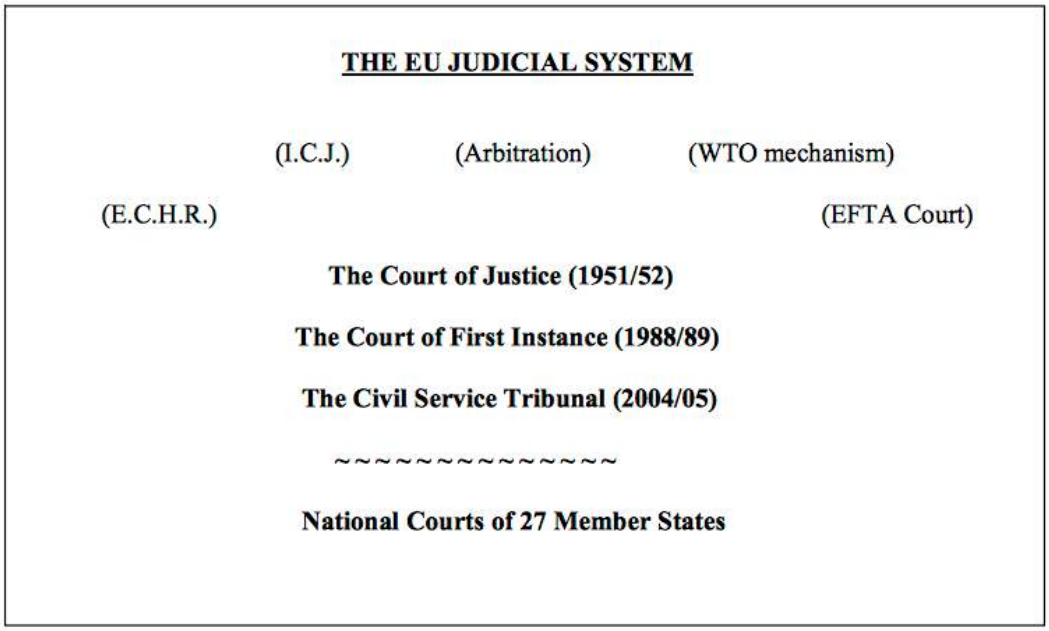
has been prone to underlining its "autonomy" especially in relation to other international or European regimes.[9] This has not prevented the Court from accepting the conclusion, by the Communities, of international agreements providing for courts or tribunals which have jurisdiction to settle disputes concerning the application and interpretation of these agreements.[10] As to such international agreements concluded in actual practice, binding and obligatory dispute settlement mechanisms are contained notably in the agreement relating to the European Economic Area (henceforth, "EEA"), the WTO Agreements, the United Nations Convention on the Law of the Sea as well as some bilateral agreements concluded by the European Community with third countries.[11] Moreover, the commitments of the EU to respect customary international law as well as fundamental rights, in other words commitments which have been first articulated by the E.C.J. itself, have induced the Court to take into account the case-law of the International Court of Justice (henceforth, "I.C.J.") and the E.C.H.R., respectively.[12]

The existence of these external dispute settlement mechanisms underlines the fact that the EU legal order and its judicial system are functioning not in isolation but in a broader international and European context. There is another feature more inherent in the EU legal order itself which contradicts the idea of the EU courts as some kind of lonely riders in the storm. I am, of course, thinking of the close relationship which exists between the E.C.J. and the national courts of the 27 Member States. In the application of EU law, national courts, in fact, function as EU courts (in the large sense of the word). Community law is not an external regime for theMember States but part of their law of the land. In some special cases, EU legislation even assigns certain national courts to perform specific tasks as Community courts, just as national administrative authorities are sometimes assigned to perform the functions of national regulatory authorities (NRA).[13] If there is a genuine problem of interpretation of a norm of EU law, or doubts about the validity of EU legislation, national courts and tribunals have the right, and in the case of courts of last instance, the obligation, to request the E.C.J. to give a preliminary ruling. This brings the E.C.J. into what if often called a constant 'dialogue' with the national courts.

It goes without saying that the E.C.J. is in close contact with the C.F.I. and the new EU Civil Service Tribunal,[14] which are lower courts belonging to what is still the same judicial institution in the broad sense. Finally, the E.C.J. and the other EU courts may follow, be it at a certain distance, what courts in jurisdictions outside the EU come up with.

The broader judicial context I have just outlined could be summarised and

simplified as follows:[15]



This brings me to the question of the relations in law and in practice between the E.C.J. and the other courts and tribunals mentioned in the chart. One can also ask to what extent, if any, the E.C.J. takes into account the case-law of national courts of foreign countries such as the US Supreme Court. It has become commonplace to speak of not only the proliferation of courts but also 'judicial dialogue' between the various courts and their judges.[16] It may be useful to distinguish between different situations, which are not all examples of judicial dialogue in the narrow sense but may denote a relationship which is closer to a hierarchy of higher and lower courts and thus goes beyond a willingness to be informed about and eventually be inspired by rulings of foreign courts. I shall now distinguish between five different types of relationships between courts, passing from avertical hierarchy towards relations of a more horizontal nature, and try to situate the ECJ in this broader adjudicatory framework.[17] It should be noted that I am not speaking of a vertical hierarchy in the administrative sense, given the principle of independence of courts and judges. It should also be emphasised that 'judicial dialogue' is a notion used for various purposes and with different connotations,[18] and that all the categories I shall consider do not necessarily fit into the idea of a genuine dialogue between two equal partners.

III. FIVE CATEGORIES OF 'JUDICIAL DIALOGUE'

My first category refers to a vertical, hierarchical system in the broad sense of the term. Such a relationship exists between courts belonging to the same national system, where there may be a supreme court, courts of appeal, courts of first instance, and so on. In the EU system that would come close to the relation between the E.C.J., the C.F.I.[19] and more recently also the EU Civil Service Tribunal. While one cannot exclude that the C.F.I. advances an interpretation which is not in conformity with the case-law of the E.C.J., it obviously then runs the risk that its judgment be annulled on appeal or dissected in another subsequent case decided by the E.C.J.[20] While an appeal against a judgment of the C.F.I. is not possible if the latter acts on appeal from the Civil Service Tribunal, the E.C.J., on the proposal of its First Advocate-General, may decide to "review" such a decision of the C.F.I. if there is "a serious risk of the unity or consistency of Community law being affected".[21]

The C.F.I. for obvious reasons cites E.C.J. case-law on a daily basis (and the Civil Service Tribunal cites both higher courts) but it may also occasionally happen that the E.C.J., or its Advocates-General, cite a judgment of the C.F.I., not only in dealing with an appeal, but more as a source of inspiration especially in cases where there are scant or no rulings from the E.C.J. itself on a particular point of law.[22]

The next or second category concerns the special relationship which exists between the E.C.J. and national courts of the EU Member States faced with problems of interpretation or validity of EU law, notably Community 'First Pillar' law. In this case there is not a relation of vertical hierarchy in the sense that the E.C.J. does not function as a court of appeal being empowered to annul let alone modify judgments of national courts. On the other hand, the preliminary rulings that the national judge requests from the E.C.J. by virtue of Article 234 ECT are not only binding on the national judge making the request but they also function more generally as canons of interpretation for all courts and authorities of all the Member States, and this in the context of the principle of supremacy (primacy) of EU law.[23] The preliminary ruling given by the E.C.J. moreover applies in principle retroactively, going back to the entry into force of the norm that has been interpreted.[24]

Failure to respect such an interpretation, or failure of a court of last instance to request a ruling even if there are doubts on the correct interpretation of EU law or the validity of a Community act, could lead to an infringement case started by the Commission, or a Francovich-type action for damages instigated by a private person, against the Member States concerned. In response to a reasoned opinion by the European Commission, Sweden has recently amended its legislation destined to

remind its courts of last instance of their obligation to use, if need be, the Article 234 procedure.[25] In Köbler (2003), the ECJ held that liability of the Member State may in principle arise also in cases where the alleged infringement consists of the refusal of a national court of last instance (such as a Supreme Court) to request a preliminary ruling.[26] Failure of a court of last instance to request a preliminary ruling may also trigger an obligation, under certain conditions, to review a decision that has become final as a result of a judgment of that court which, in the light of a subsequent ruling of the E.C.J., turns out to constitute a misinterpretation of EU law.[27]

On the other hand, there is a dialogue between the E.C.J. and national courts in the sense that it is up to the latter to formulate the questions that they wish to have a preliminary ruling on. While the questions may sometimes be re-formulated by the E.C.J., this is done to increase the usefulness of the answer for the national court. The national court may also suggest an answer or outline optional answers in its order of reference,[28] in which case this may also be reflected in the E.C.J. judgment. On the other hand, the E.C.J. is not in the habit of citing other national courts than the referring court in its ruling, unless it is necessary for understanding national law on a certain point.[29] The E.C.J., of course, is not authorised to interpret purely national law. It should also be noted that in preliminary ruling cases, it is up to the national judge to decide definitively the entire case before him.

The third category of 'judicial dialogue' would be the 'semi-vertical' relation which exists, for instance, between the E.C.J. and the Strasbourg Court (the E.C.H.R.). Another example could be the relationship between the European Court and the WTO Appellate Body or on points of general customary international law, between it and the I.C.J. I am thus thinking about a situation where the EU has committed itself to a certain set of international norms and this international regime provides for a court or other dispute settlement mechanism. To what extent should the ECJ take into account especially binding decisions taken by such adjudicatory mechanisms?

In the case of the WTO the commitment of the EU is a formal and express one, as the EU (in the name of the EC) is a Contracting Party to the 1994 WTO Agreements. As is well known, the ECJ does not recognise the direct effect of these agreements in view of their special system of implementation, but that does not mean that the WTO Agreements are not part of the EU legal order and that they cannot be used as interpretative tools.[30] That is why the E.C.J., in the case of Anheuser-Busch (2004), cited two different decisions of the WTO Appellate Body

as authoritative interpretations of the TRIPS Agreement.[31]

In the case of the Strasbourg Court and the European Convention on Human Rights, the commitment is less formal in the sense that the EU or the EC is not -at least not yet- a Contracting Party to the European Convention. But the EU has in the EU Treaty committed itself to respect fundamental rights, "as guaranteed" by that Convention.[32] Since the 1980s, the E.C.J. has held that the European Convention has "special relevance" in determining what fundamental rights have become general principles of Community law.[33]

In actual practice, the Luxembourg judges follow very closely the case-law of the Strasbourg Court. Since the mid-1990s, the E.C.J. and the C.F.I. cite the E.C.H.R. on a regular basis in their judgments. It should be added that the E.C.H.R., too, from time to time cites the case-law of the Luxembourg courts.[34] While the European Convention is not part of the Community legal order in the formal sense, the policy of the EU Courts seems to be based on an intention to avoid that European human rights and fundamental rights law takes on two different strides. That could create problems especially for the EU Member States, as in the application and implementation of EU law, they could be faced with conflicting interpretations, one from Luxembourg, the other from Strasbourg. While in the context of EU law, the Luxembourg interpretation would arguably prevail by virtue of the principle of primacy of EU law, the Member State complying with the EU interpretation could later find itself in the uncomfortable situation of facing a finding in Strasbourg of a violation of the European Convention.[35]

It should be added that contrary to what sometimes seems to be assumed in legal literature,[36] I am not aware of a single case where the E.C.J. has gone clearly against an interpretation advanced by the European Court of Human Rights.[37] Thus formal EU adherence to the European Convention, envisaged in the mandate for the Reform Treaty currently being negotiated,[38] would not in my view change things radically, although it is of course true that through this device the Convention would as such become an act of Community law rather than a particularly important guideline informing us of the content of the general principles of Community law.

As the E.C.J. has acknowledged that the EU is bound by general, customary international law, it is only natural that it also may cite what is perhaps the most authoritative interpreter of general international law, that is, the I.C.J. There are several cases where this has been done, with

respect to substantive international law mainly relating to the law of the sea, and with respect to procedural law mainly the law of treaties.[39] The EU cannot be a party in a dispute before the I.C.J. but that has not prevented the ECJ to recognise the World Court as an important dispute settlement mechanism of global dimensions.

As to the UN Convention on the Law of the Sea, the EU is both a Contracting Party[40] and can be a party before two of its three main dispute settlement mechanisms, that is, arbitration and the Law of the Sea Tribunal in Hamburg. As the EU has not accepted generally the jurisdiction of the Tribunal, arbitration remains the only obligatory mechanism for the EU.[41] But as the Swordfish Case between the EU and Chiledemonstrates,[42] the EU can always accept the jurisdiction of the Hamburg Tribunal ad hoc. I am not aware of any judgment from the ECJ citing the Hamburg Tribunal, but I suspect this is simply due to the fact that the case-law of this Tribunal cannot be described as extensive and that there has so far been no case before the E.C.J. raising questions already decided by the Hamburg Tribunal. One cannot perhaps exclude that the I.C.J. and the Hamburg Tribunal came up with differing interpretations. Such an effect of the proliferation of international courts could put the E.C.J. or other courts having to apply the Law of the Sea Convention before an interesting dilemma. To my knowledge, the E.C.J. has never been confronted by the existence of two conflicting judgments arising from a situation of overlapping jurisdictions of international courts.

It should be underlined that the use by the E.C.J. of the case-law of international tribunals such as the I.C.J., the WTO Appellate Body or the E.C.H.R. does not necessarily mean that the E.C.J. is legally 'bound' by their judgments, at least in the strict sense of the term. It is true that the E.C.J. has observed that it would be 'bound' by decisions of dispute settlement mechanisms contained in agreements binding the Community,[43] but one wonders whether this statement was meant to apply to all such mechanisms and/or whether the intention was really to rule out any margin of appreciation for the EU courts.[44]

In this context of "semi-vertical" judicial dialogue between the E.C.J. and some international courts, it may be appropriate to note that public international law and EU external relations issues, while not quantitatively very significant in the case-law of the E.C.J., are not on their way of diminishing in importance. On the contrary, some fairly high-profile cases have been recently decided or are actually pending before the Court. Among the former one can mention the IATA Case (2006) on the validity of Community legislation on air passengers rights in view of, inter alia, the Montreal Convention for the unification of rules for

international carriage by air,[45]Opinion 1/03 (2006) on the exclusive competence of the EU to conclude the Lugano Convention on jurisdiction of courts and enforcement of judgments,[46] the Mox Plant Case (2006) on disputes between EU Member States under the UN Law of the Sea Convention and the status of the Convention in the Community legal order[47] and the Passenger Name Records Case (2006) on the legality of agreements between the EU and the US on the transfer of passenger data from the former to the latter.[48] Among pending cases, it suffices to note that on 2 October 2007, the E.C.J. had an oral hearing in the well-known Yusuf and Kadi cases which are on appeal against the judgments of the C.F.I. and concern sanctions against terrorism and the relationship between EU law and international law, notably UN Charter law.[49]

In the context of the UN Convention on the Law of the Sea, I mentioned the possibility of overlapping jurisdiction. My fourth category concerns, in fact, the existence of such overlapping or 'competing' jurisdiction,[50] in other words a situation where at least two international courts, less often national courts, have jurisdiction over the same issue. Such a situation would often give the parties a possibility of 'forum shopping'. An obvious example which was already mentioned above concerns the overlapping jurisdiction of the I.C.J. and the Law of the Sea Tribunal in Hamburg. The same dispute could go to either of the two, if the parties have accepted their jurisdiction either generally or ad hoc. As already noted, it could also go to arbitration which is a third possibility, depending on what the parties have agreed to.

Article 292 ECT confers exclusive jurisdiction on the European Court of Justice in matters of Community law so here the risk of overlapping jurisdictions is minimal to the extent that Article 292 is respected. A problem arose in the Mox Plant Case already mentioned above.[51] In that case, the Commission successfully brought Ireland to court for having resorted to extra-EU dispute settlement procedures in its dispute with the UK, thus another EU Member State, in a case concerning the interpretation of the Law of the Sea Convention, which as was noted above has been concluded by the EC. The main legal problem in this case arose from the fact that the Law of the Sea Convention is a so-called mixed agreement, in other words has been concluded by both the EU and its Member States, and there was thus uncertainty as to what parts of the Convention have become Community law to such an extent and intensity that Article 292 ECT bars the jurisdiction of international dispute settlement mechanisms other than the E.C.J.[52] As the E.C.J. concluded that Ireland could not resort to arbitration in its dispute with the United Kingdom, the outcome was the elimination of overlapping jurisdiction and

the judicial dialogue which might accompany it.

My last and fifth category can be called horizontal judicial dialogue, by which I mean dialogue taking place between courts which are more or less at the same level. These courts may belong to the same judicial system (for instance, two national courts of appeal) but they may also belong to different regimes (for instance, national courts in different countries). In the latter respect, there seems to be a certain tendency in many countries of national judges looking at what their neighbours are doing. Sometimes they cite judgments from other jurisdictions. There are obvious differences between national systems in this regard.[53] It is sometimes a one-way street, devoid of reciprocal dialogue.

As to the EU system, the EFTA Court seems to offer the best example of a court with which the E.C.J. is engaged in a relationship of horizontal dialogue. But when the EFTA Court, as it routinely does, cites the EU courts it does so more in the context of 'vertical' or at least 'semi-vertical' dialogue (my three first categories above). This is not only because the legal material which is applied and interpreted, the Agreement on the European Economic Area (henceforth, "EEA") and accompanying EEA law, is sometimes identical or at least similar, but because there is an obligation enshrined in the EEA Agreement that identical rules in the EEA Agreement "be interpreted in conformity with the relevant rulings of the [E.C.J.] given prior to the date of signature of this Agreement".[54] As far as E.C.J. rulings which have been given after the EEA Agreement entered into force are concerned, the EFTA Court should "pay due account to the principles laid down by the relevant rulings" of the E.C.J.[55] In practice, the difference between the two obligations is minimal, to say the least.[56]

As to the E.C.J., there is no obligation to interpret EU law in conformity with the decisions of the EFTA Court. But it does occur from time to time that the E.C.J. cites EFTA Court judgments. This may happen especially if the E.C.J. deals with a point of law which has not been settled by itself (or the C.F.I.) in a previous judgment. It may then cite an EFTA Court judgment, provided that it can agree with it. There are also examples where the EU approach would be somewhat different from that of the EFTA Court because of the differences in the two legal orders, the EU legal order implying a higher degree of integration.[57]

The search light of the E.C.J. does not necessarily stop at the EFTA Court but the Court may occasionally take a look at what courts in third countries, such as the U.S. Supreme Court, are up to. While the E.C.J. is not in the habit of citing, for instance, US case-law, this has been done

in the descriptive parts of a few judgments and more often by some of the Advocates-General.[58] In areas such as competition law and intellectual property law it may be useful to take into account developments outside the EU as well, without of course being in any way bound to follow.

IV. Concluding remarks

The five situations I have described bring out the fact that 'judicial dialogue' can cover many different things. There are many forms and patterns of judicial cooperation, judicial dialogue and judicial openness. Sometimes a judge is more or less bound to follow what another judge has ruled (for instance, the EFTA Court with respect to E.C.J. case-law preceding the entry into force of the EEA Agreement). Sometimes a 'must' or a 'shall' becomes a 'should'. An example of a 'should' relationship exists in my view between the E.C.J. and the E.C.H.R.; especially in what I called horizontal judicial dialogue (category 5 above), it is at most a question of a 'may'. But even in the last-mentioned case, judges should be aware of what their colleagues in other jurisdictions are doing, notably if there are similar problems to be solved and similarities in the norm systems applied.

As legal systems and subsystems are interacting in a pluralist world and a pluralist Europe, courts must interact too. This is particularly important in the articulation of values and general principles of law. As I noted at the outset, the patchwork of authorities we are facing calls for some stability, consistency and predictability and values and general principles play a role in this respect. They serve as road-signs and yardsticks for the legislator, the judge and other decision-makers. They may at best help to mitigate the hardships and anxieties felt by many in a sea of change. Values and general principles should emerge and evolve in a deliberative process, where judges and other decision-makers interact in a search for general acceptability. The distinction between applicable law and 'foreign' law becomes a matter of degree rather than an iron-clad curtain. Values and principles are not closed systems neither geographically nor temporally but draw upon national, regional and universal sources as well as past, present, and future exigencies. It goes without saying that not all values and principles are of universal scope but may reflect specificities of a certain region, sub-region, or country.[59]

Judicial cooperation and judicial dialogue is not just a question of studying and citing judgments from other courts. A genuine dialogue requires some reciprocity and an exchange of views and experiences. The E.C.J., for its part, is actively engaged in an on-going series of contacts and discussions

with other courts and their judges. The C.F.I. and the Civil Service Tribunal are a special case as they belong to the same institution in the broad sense. The EFTA Court is not far away, neither geographically nor intellectually. Judges from the national courts of the EU Member States visit the E.C.J. almost on a weekly basis and round table discussions and other joint events are frequent. From time to time, the E.C.J. also pays official visits to the Member States, including sometimes non-member countries,[60] normally at the invitation of their supreme and/or constitutional courts. With the E.C.H.R., there are meetings either in Strasbourg or Luxembourg on a regular basis.[61] Judges from courts from outside the EU area, including African and Latin American regional courts, sometimes visit the E.C.J. With the US Supreme Court, there is a fairly regular exchange of views and organisation of joint seminars.[62] At the time of writing (October 2007), upcoming events include a meeting of international courts and tribunals organised by the I.C.J. and a (first ever) visit to the E.C.J. by the WTO Appellate Body.[63]

The need for such contact will not disappear. What goes on in the deliberation room of the E.C.J. remains a secret,[64] but that does not prevent the E.C.J. from participating in a broader space of judicial dialogue and cooperation. Such dialogue and cooperation has, in fact, become an important part of the judicial profession.

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[1] A. ROSAS, "The Decline of Sovereignty: Legal Aspects", in J. IIVONEN, The Future of the Nation State in Europe, Aldershot, Elgar, 1993, pp. 130-158, at pp. 152-153.

[2] Cf J.-J. ROUSSEAU, "Du contrat social; ou, Principes du droit politique", Livre III, Ch. V, in J.-J. ROUSSEAU, Œuvres complètes III, Paris, Gallimard, 1964: "Il y a donc trois sortes d'Aristocratie; naturelle, élective, héréditaire. La premiere ne convient qu'à des peuples simples; la troisieme est le pire de tous les Gouvernements. La deuxieme est le meilleur: c'est l'Aristocratie proprement dite" [p. 406]; "En un mot, c'est l'ordre le meilleur et le plus naturel que les plus sages gouvernent la multitude, quand on est sûr qu'ils la gouverneront pour son profit et non pour le leur" [p. 407].

[3] See, e.g., Y. SHANY, The Competing Jurisdictions of International Courts and Tribunals, Oxford, Oxford University Press, 2003, pp. 1-11; and other publications of the Project on International Courts and Tribunals (PICT), http://www. pict-pcti.org.

[4] M. CLAES, The National Courts' Mandate in the European Constitution, Oxford, Hart, 2006, pp. 253-255.

[5] See, e.g., A. ROSAS, "The European Court of Justice and Fundamental Rights: Yet Another Case of Judicial Activism?", in C.

BAUDENBACHER and H. BULL, European Integration through Interaction of Legal Regimes, Oslo, Universitetsforlaget, 2007, pp. 33-63.
[6] EU Council, Brussels European Council 21-22 June 2007, Presidency Conclusions, doc. 11177/07, Annex I.
[7] E.C.J., Case 26/62, Van Gend en Loos, 1963 ECR 1; Case 29/69, Stauder, 1969 ECR 419.
[8] At the level of primary law, one can mention Article 6 § 2 TEU (fundamental rights) and Article 34 § 2 (b) TEU, which by providing that framework decisions adopted under Title VI TEU "shall not entail direct effect", seems to recognise implicitly that Community law ('First Pillar') instruments may have such direct effect.
[9] See, e.g., E.C.J., Opinion 1/91 on a draft agreement relating to the creation of the European Economic Area, 1991 ECR I-6079.
[10] Ibid., §§ 40 and 70.
[11] A. ROSAS, "International Dispute Settlement: EU Practices and Procedures", German Yearbook of International Law, 2003, pp. 284-322; M. BRONCKERS, "The Relationship of the EC Courts with Other International Tribunals: Non-committal, Respectful or Submissive?", Common Market Law Review, 2007, pp. 601-627, at p. 604.
[12] A. ROSAS, "With a Little Help from My Friends: International Case-Law as a Source of Reference for the EU Courts", The Global Community Yearbook of International Law and Jurisprudence, 2005, pp. 203-230.
[13] See, e.g., Articles 91-101 of EU Council, Regulation (EC) on the Community trade mark, No 40/94, 20 Dec. 1993, Official Journal, 14 Jan. 1994, L 11; and, more generally, A. ROSAS, "The European Union as a Federative Association", in Durham European Law Institute, European Law Lecture 2003, Durham, University of Durham, 2004, pp. 8-11.
[14] EU Council, Decision establishing the European Union Civil Service Tribunal, No 2004/752/EC, 2 Nov. 2004, Official Journal, 9 Nov. 2004, L 333.
[15] See also: A. ROSAS, "With a Little Help from My Friends", supra note 12, pp. 206-210.
[16] See, e.g., "Symposium Issues on 'Globalisation and the Judiciary'", Texas Journal of International Law, 2003, pp. 397-ff; Ibid., 2004, pp. 347-ff.
[17] See also: A. ROSAS, "With a Little Help from My Friends", supra note 12, pp. 204-205.
[18] M. BRONCKERS, "The Relationship of the EC Court with Other International Tribunals", supra note 11, pp. 625-626.
[19] On the role of the C.F.I. and its relationship with the E.C.J., see, notably: K. LENAERTS, "Le Tribunal de première instance des Communautés européennes: Regard sur une décennie d'activités et sur l'apport du double degré d'instance au droit communautaire", Cahiers de droit européen, 2000, pp. 323-411.
[20] See, e.g., C.F.I., Case T-177/01, Jégo-Quéré, 2002 ECR II-2365, set aside by the E.C.J. in Case C-263/02 P, 2004 ECR I-3425; see also: E.C.J., Case C-50/00 P, Unión de Pequeños Agricultores, 2002 ECR I-6677.
[21] Articles 62-62(b) of the Statute of the Court of Justice [Protocol No 6 annexed to the TEU, the ECT and the Treaty establishing the European Atomic Energy Community].
[22] A. ROSAS, "With a Little Help from My Friends", supra note 12, p. 207.
[23] On the relationship between EU law and national law and EU courts and national courts in general see, e.g., M. CLAES, The National Courts' Mandate in the European Constitution, supra note 4, passim.

[24] The E.C.J. has held that "the interpretation which, in the exercise of the jurisdiction conferred on it by Article 234 EC, the Court gives to a rule of Community law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force", see. e.g.: E.C.J., Case C-292/04 Meilicke, judgment of 6 March 2007, n.y.r., § 34. In this judgment, the E.C.J. also confirmed that it cannot limit the application in time (rationae temporis) of its judgment in relation to one Member State only but that such temporal limitation must apply to all Member States under the principle of equal treatment [§§ 35-37].
[25] M. SCHMAUCH, "Sweden Introduces National Measures to Protect the Expectations of Individuals regarding the Application of Article 234 EC", European Law Reporter, 2006, pp. 425-435; Swedish Law relative to Preliminary Rulings from the EC Court [Lag med vissa bestämmelser om förhandsavgörande från EG-domstolen], 24 May 2006, Svensk författningssamling, 14 June 2006, SFS:502.
[26] E.C.J., Case C-224/01, Köbler, 2003 ECR I-10239.
[27] E.C.J., Case C-453/00, Kühne & Heitz, 2004 ECR I-837. The scope and meaning of this judgment may be elucidated by Case C-2/06 Kempter pending at the time of writing.
[28] See E.C.J., Information Note on References from National Courts for a Preliminary Ruling, 2005, Official Journal, 11 June 2005, C 143, § 23: "Finally, the referring court may, if it considers itself to be in a position to do so, briefly state its view on the answer to be given to the questions referred for a preliminary ruling", http://curia.europa.eu/en/instit/txtdocfr/autrestxts/txt8.pdf.
[29] A. ROSAS, "With a Little Help from My Friends", supra note 12, p. 207.
[30] A. ROSAS, "Case Annotation on Case C-149/96, Portugal v Council, judgment of the Full Court of 23 November 1999", Common Market Law Review, 2000, pp. 797-816; A. ROSAS, "Implementation and Enforcement of WTO Dispute Settlement Findings: An EU Perspective", Journal of International Economic Law, 2001, pp. 131-144, at pp. 138-139; A. ROSAS, "With a Little Help from My Friends", supra note 12, pp. 218 and 226-227. The lack of direct effect of WTO rules in the Community legal order has been reaffirmed, e.g., in E.C.J., Case C-377/02, Van Parijs, 2005 ECR I-1465.
[31] E.C.J., Case C-245/02, Anheuser-Busch, 2004 ECR I-10989, §§ 49 and 67; see also: C.F.I., Case T-274/02, Ritek Corp., 2002 ECR II-4305, §§ 89-108; compare: M. BRONCKERS, "The Relationship of the EC Courts with Other International Tribunals",supra note 11, at p. 616, who claims that "essentially, the EC courts fail to appreciate that WTO rulings do produce legal effects"; it is submitted, however, that Bronckers here confuses the question of the legal nature of the WTO dispute settlement rulings with the questions of whether WTO norms have direct effect and whether individuals can claim damages if WTO norms have been violated [see ibid., pp. 611-612 and 615-616]; the fact that (adopted) panel and Appellate Body rulings are binding does not necessarily mean that WTO norms have direct effect under Community law, nor does it settle the question of liability and compensation; to take another example, while the UN Law of the Sea Convention provides for binding dispute settlement mechanisms [infra at note 41], the direct effect in Community law of that Convention is another matter.
[32] Article 6 § 2 TEU; see also: Article 46 (d) concerning the jurisdiction of the E.C.J.
[33] A. ROSAS, "Fundamental Rights in the Luxembourg and Strasbourg Courts", in C. BAUDENBACHER, PER TRESSELT and THORGEIR ÖRLYGSSON, The EFTA Court: Ten Years

On, Oxford, Hart, 2005, pp. 163-175, at 168-171; see also: V. SKOURIS, "The ECJ and the EFTA Court under the EEA Agreement: A Paradigm for International Cooperation between Judicial Institutions", in id., pp. 123-129, at p. 127.

[34] Ibid., pp. 171-172.

[35] In its judgment of 30 June 2006 in the Case of Bosphorus v. Ireland, the E.C.H.R. held that there is a "presumption" that a Member State implementing legal obligations flowing from its membership in the EU has not violated the European Convention (as the EU has developed a system of human rights protection "equivalent" to the Strasbourg system) but that that presumption can be rebutted "if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient" [§ 156]; see also: A. ROSAS, "With a Little Help from My Friends", supra note 12, pp. 216-217; and, more generally, A. CLAPHAM, "The European Union before the European Court of Human Rights", in L.BOISSON DE CHAZOURNES, C. ROMANO and R. MACKENZIE, International Organisations and International Dispute Settlement: Trends and Prospects, New York, Transnational, 2002, pp. 73-88.

[36] See, e.g., C. TURNER, "Human Rights Protection in the European Community: Resolving Conflict and Overlap between the European Court of Justice and the European Court of Human Rights", European Public Law, 1999, pp. 453-463, with references.

[37] And in Case C-94/00, Roquette Frères, 2002 ECR I-9011, § 29, the E.C.J. reversed its ruling in Joined Cases 46/87 and 227/88, Hoechst, 1989 ECR 2859, as "regard must be had to the case-law of the European Court of Human Rights subsequent to the judgment in Hoechst"; see also: J. MISCHO, "Hoechst, Colas, Roquette: illustration d'une convergence", in N. COLNERIC et al., Une communauté de droit: Festschrift für Gil Carlos Rodríguez Iglesias, Berlin, Berliner, 2003, pp. 137-145.

[38] See supra, at note 6.

[39] A. ROSAS, "With a Little Help from My Friends", supra note 12, pp. 222-226; for an example, see E.C.J., Case C-286/90, Poulsen, 1992 ECR I-6019, § 10.

[40] EU Council, Decision 98/392, 23 March 1998, Official Journal, 23 June 1998, L 179.

[41] A. ROSAS, "International Dispute Settlement", supra note 11, pp. 301-302; A. ROSAS, "EU ja kansainvälinen merioikeus" ["EU and the International Law of the Sea"], in K. KOIVUROVA, Kansainvälistyvä oikeus. Juhlakirja professori Kari Hakapää, Rovaniemi, University of Lapland, 2005, pp. 419-440.

[42] International Tribunal for the Law of the Sea, Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. European Community), Case No. 7. The proceedings have been suspended for a long time and are at the time of writing still suspended, as the two parties have tried to settle the dispute by negotiation; see, e.g., A. ROSAS, "International Dispute Settlement", supra note 11, pp. 301-302; M.O. ORELLANA, "The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO", Nordic Journal of International Law, 2002, pp. 55-81.

[43] E.C.J., Opinion 1/91, supra note 9, § 39; M. BRONCKERS, "The Relationship of the EC Courts with Other International Tribunals", supra note 11, pp. 606 and 618.

[44] See also: M. BRONCKERS, "The Relationship of the EC Courts with Other International Tribunals", supra note 11, pp. 618-627, who advocates that the EU courts "should normally follow" the interpretation of an international agreement given by an international tribunal but that that "presumption" could be "overturned

in limited circumstances" [pp. 621-622]. In the Case T-274/02 Ritek Corp., supra note 31, the C.F.I. saw no need "to rule on whether the Community judicature is bound by the recommendations and decisions contained in the reports of the Dispute Settlement Body established within the WTO" [§ 98].

[45] E.C.J., Case C-344/04, International Air Transport Association, 2006 ECR I-403.

[46] E.C.J., Opinion 1/03, 2006 ECR I-1145.

[47] E.C.J., Case C-459/03, Commission v Ireland, 2006 ECR I-4635.

[48] E.C.J., Case C-317/04 and C-318/04, Parliament v. Council and Commission, 2006 ECR I-4721.

[49] E.C.J., Case C-402/05 P, Kadi, and Case C-415/05 P, Yusuf, pending on appeal from the C.F.I., Case T-315/01, Kadi, 2005 ECR II-3649; Case T-306/01 Yusuf, 2005 ECR II-3533.

[50] Y. SHANY, Competing Jurisdictions, supra note 3.

[51] E.C.J., Case C-459/03, Commission v Ireland, supra note 47.

[52] For a thorough discussion on the substantive and procedural issues involved see, e.g., R. CHURCHILL and J. SCOTT, "The Mox Plant Litigation: The First Half-Life", International and Comparative Law Quarterly, 2004, pp. 643-676.

[53] See the materials based on a symposium on globalisation and the judiciary mentioned supra, note 16.

[54] Article 6 of the EEA Agreement.

[55] Article 3 § 2 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice [ESA/Court Agreement].

[56]C. BAUDENBACHER, "The EFTA Court Ten Years On", supra note 33, pp. 13-51, at p. 20; V. SKOURIS, "The ECJ and the EFTA Court under the EEA Agreement", supra note 33, p. 124.

[57] A thorough analysis is provided by C. BAUDENBACHER, "The EFTA Court Ten Years On", supra note 33, at pp. 20-48.

[58] A. ROSAS, "With a Little Help from My Friends", supra note 12, pp. 205-206.

[59] For instance, in Case C-144/04, Mangold, 2005 ECR I-9981, the E.C.J., held that the principle of non-discrimination on grounds of age must be regarded as a general principle of Community law. This does not necessarily mean that the prohibition of age discrimination has already become a universal principle.

[60] During the last years, such visits have included Switzerland and the People's Republic of China.

[61] The next meeting will take place in Strasbourg, in November 2007.

[62] The most recent occasion was a seminar at the US Supreme Court in Washington D.C., in February 2007.

[63] Both events will take place in December 2007.

[64] See Articles 2 and 35 of the Statute of the Court of Justice.

Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism

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There is an emerging body of literature which describes a context of constitutional pluralism, in particular by reference to the EU legal order and its relationship with national legal orders. Usually such constitutional pluralism identifies the phenomenon of a plurality of constitutional sources which creates a context of potential constitutional conflicts between different constitutional orders to be solved in a non-hierarchical manner. Such context affects the role of courts and the character of judicial adjudication. In this essay I want to focus on the European Court of Justice and how its role is impacted by and needs to be adapted to such context of constitutional pluralism. Moreover, I want to undertake this analysis by reference to a broad notion of pluralism. This pluralism expresses a new context in which courts (including the ECJ) have to exercise their judicial function. In this respect, it is necessary to distinguish between the internal and external sources of pluralism in the European Union legal order. We can identify four main sources of internal pluralism. First, there is a plurality of constitutional sources (both European and national) which have fed the EU constitutional framework and its general principles of law, particularly as developed in the jurisprudence of the Court of Justice. Second, the acceptance of the supremacy of EU rules over national constitutional rules has not been unconditional, if not even, at times, resisted by national constitutional courts. This confers to EU law a kind of contested or negotiated normative authority.[1] Third, there is an emergence of new forms of power that challenges the traditional private/public distinction and the different mechanisms of accountability associated to them. Such pluralism in the forms of power challenges, in turn, the traditional legal categories upon which EU rules have been framed. Fourth, the European Union is also dominated by a form of political pluralism that can assume a rather radical form since the conflicting political claims are often supported by corresponding claims of polity authority. External pluralism derives from the increased communication and inter-dependence of the European Union legal order with international and foreign legal orders. From this, different relationships emerge that can take the forms of legal integration (where the EU participates in another legal order), interpretative competition (where, albeit the Union is not part to another legal order, it shares a similar set of norms and, possibly, jurisdiction with that legal

order), legal externalities (where the decision taken in a certain jurisdiction has a social and an economic impact, albeit not legal impact, in another jurisdiction) and what Neil Walker as called of sympathetic consideration.[2] My argument is that such context of internal and external pluralism affects different dimensions of the role of courts. What is sketched here is a normative approach to how courts, and particularly the European Court of Justice, should address some of the challenges brought by increased political and legal pluralism. In the process I will relate some of the traditional originalities usually identified in the interpretative methods and role of the Court of Justice to such context. The role of courts being intimately connected with issues of legitimacy the present text also addresses some of the conditions that determine the legitimacy of courts in general and of the Court of Justice in particular. Discussions on the role of the Court of Justice tend to focus on its particular methods of interpretation. Interpretation can perhaps be suggestively described as the software of Courts. In a narrow sense interpretation can be understood simply by reference to the methodologies to be employed in the interpretation of rules: the types of legal arguments used by Courts, their techniques of exegesis of the text and the rules of logic that make of legal reasoning a form of practical reasoning. However, debates about legal interpretation often assume a broader dimension linked to the proper role of courts in a democratic society. In this broadest sense, the role of courts is a function of the hermeneutics, institutional constraints and normative preferences that determine judicial outcomes in the light of an existent body of rules. Interpretation is here at the intersection of the debates not only about different methods of interpretation (or forms of legal reasoning) but also about broader questions on the proper role of courts in a democratic society. The concrete interpretation to be given to legal rules is therefore a product of legal reasoning and of the institutional constraints and normative preferences that determine the role of courts in a given political community. The blending of these different dimensions may be presented in the form of a theory of constitutional or judicial adjudication. It is also frequently presented as a matter of judicial philosophy. In this sense, all courts (and their members) have a judicial philosophy, be it publicly articulated or not. Such a judicial philosophy is however, to a large extent, a product of the system of law in which those courts operate. The methods of interpretation used by courts as well as their institutional and value choices reflect (or ought to reflect) a certain systemic understanding of the normative preferences and institutional constraints of the legal order in which those courts operate. Only such an approach is both capable of securing the coherence and integrity of that legal order (by fitting individual decisions into a coherent whole) and judicial accountability (by constraining the power of courts in individual decisions and subjecting

them to a normative, and not political, scrutiny with regard to the normative preferences they attribute to their legal order). Understood in this way, a theory of judicial adjudication or a judicial philosophy (which ought not to be confused with a judicial ideology or, even less so, with a political ideology) serves not only to objectivise and constrain the subjective preferences of judges but to define and legitimate the proper role of courts in a given political community. In this present contribution I want to discuss two of those three dimensions of judicial adjudication in discussing the role of Court of Justice in a context of constitutional pluralism. I will start by briefly reviewing the methods of interpretation employed by the Court of Justice with a focus on the importance of comparative law and teleological reasoning. I will try to highlight how a context of constitutional pluralism affects both the legal rules which the Court is to interpret and the nature of its legal reasoning. In the second part of the article I focus on the institutional constraints arising from the context of constitutional pluralism, in particular with regard to the relations among courts. In this context, I will start by highlight how the role played by the Court is also a function of institutional constraints and how the interpretation of legal rules is only properly understood in the light of the interplay between courts and other actors.[3] Second, I identify the role of the Court in framing forms of institutional dialogue and securing the coherence and integrity of the EU legal order in a context of internal legal pluralism. Third, I discuss how the external forms of pluralism may also require forms of judicial dialogue with other jurisdictions. In a subsequent article I hope to relate the institutional and methodological dimensions of judicial adjudication with the normative preferences of a particular legal system so as to highlight both how the judicial role in interpreting the law ought also to be a function of institutional choices and what should guide those institutional choices. Together, these three dimensions help sketching an emerging a theory of judicial and constitutional adjudication in the EU legal order. In this context I restrict my analysis to the first two. I. Methods of interpretation and legal reasoning at the Court of Justice: In defence of Telos Legal interpretation at the Court of Justice is governed by text, context and telos or purpose. These are the three methods indicated early on in the Van Gend en Loos judgment by the reference to the 'spirit, the general scheme and the wording' of the legal provisions which the Court has to interpret.[4] But the Court has done more than simply refer to these methods of interpretation. It has, in effect, deduced from the treaties a particularly hermeneutic framework distinct from that of traditional international law. It is what is often referred to as the constitutional interpretation of the treaties or constitutionalisation of Community law.[5] This constitutional construction departed from a particular epistemological understanding of EC law as an autonomous legal order. In

its initial path-breaking decisions the Court interpreted such legal order as an agreement between the peoples of Europe and not simply their States. The autonomous and peculiar character of the European Communities legal order required, in turn, a constitutional reading of Community law founded on the principles of direct effect and supremacy, complemented with the adoption of concepts such as fundamental rights, implied competences, state liability, effectiveness, separation of powers (institutional balance) and, broadly, the notion of a community of law (the EU equivalent of Staatsrecht or the rule of law). Teleological interpretation in EU law does not, therefore, refer exclusively to a purpose driven interpretation of the relevant legal rules. It refers to a particular systemic understanding of the EU legal order that permeates the interpretation of all its rules. In other words, the Court was not simply been concerned with ascertaining the aim of a particular legal provision. It also interpreted that rule in the light of the broader context provided by the EC (now EU) legal order and its 'constitutional telos'. There is a clear association between the systemic (context) and teleological elements of interpretation in the Court's reasoning. It is not simply the telos of the rules to be interpreted that matters but also the telos of the legal context in which those rules exist. We can talk therefore of both a teleological and a meta-teleological reasoning in the Court.[6] This is particular important in view of the autonomy of the Community legal order and its subjection to the rule of law. This assumes both an independent normative claim (EU law determines its own criteria or validity) and a claim of completeness (that it can provide legal answers to all the legal questions that emerge within its jurisdiction). These claims faced possible challenges from national legal orders (particularly national constitutions) upon which the authority of the 'constitutive' authority of the Community legal order ultimately rested. In the face of such potential challenges and of largely 'incomplete' legal texts it was only natural for the Court to 'appeal' to national legal orders. This was particularly the case when confronted with the need to provide legal answers which could not be directly and easily found in the Community texts. Reference to the general principles of law common to the member states[7] is both an expression of the particular legitimacy of the Community legal order (which ultimately rests on the peoples of Europe and their national legal orders) and a method of interpretation particularly useful in the light of the gaps of the Community legal order[8] and the ambiguity of its texts. It is this that explains the importance that comparative law has acquired in the case law of the Court.[9] Moreover, a law which is based on the common law of the member states will also provide an added guarantee for the social acceptance of its decisions and its smoother application by national courts. The use of comparative law is not, however, without doubts. What exactly

should be the method of comparison, and what should constitute the yardstick for such comparison? Early on Advocate General Lagrange stated that the Member States 'should not be content to derive from its sources a mean, more or less arithmetic, but it should select from all the member countries those of the various national solutions which [...] appear as the better ones or, if one wants to use the word, the most progressive. This is also the spirit which has guided the court until now.'[10] One must not take this statement too literally, however. The Court does not and should not use comparative law to identify what it believes to be the best legal solution in abstract. Such use of comparative law would risk being merely instrumental: national law would be used in the discovery process of the 'best law' and not really as a tool for the construction of a common law. A comparative law approach mindful of constitutional pluralism will not only see in national law a source of inspiration but recognise to it a particular authority. The bottom up construction and legitimacy of EU law requires the Court to pay due respect to the common national legal traditions and not simply to search for its preferred legal solution among a variety of national legal regimes. On the other hand, one of the values of constitutional pluralism and of a proper comparative law methodology is the learning and experimentalism it promotes among different legal orders. It creates a framework for arbitrating between different legal solutions which compete in answering to what might be a common problem.[11] As a consequence, a comparative law methodology that would amount to a simple arithmetic exercise will also ignore the value of constitutional pluralism. It will also ignore that such comparative exercise takes place not as an academic exercise but in the context of questions arising within the EU legal order and should be mindful of the specificities of this legal order. The methodology of comparative law to be employed by the Court has, therefore, to balance the respect of national legal traditions with the need to accommodate them to the specific needs of the EU legal order. In this respect, the comparative law methodology to be employed by the Court must be shaped by a requirement of consistency within the EU legal system. In other words, it is not simply a question of determining what legal solution is common to the national legal orders. It is also, or mostly, a question of determining what legal solution fits better with the EU legal order (in the light of its broader set of rules and principles and of its context of application). Comparative law becomes, in this way, one more instrument of what is the prevailing technique of interpretation at the Court: teleological interpretation. The best solution to which Advocate General Lagrange referred to is the solution that best fits the underlying goals and requirements of the EU legal order and its particular context of application. The interpretation methods of the Court have, sometimes, been the subject of criticism particularly its reliance on teleological

interpretation. Some perceive teleological interpretation as a source of judicial activism. In fact, the emphasis given to different methods of interpretation is often connected to different conceptions of the role of courts and their legitimacy. Theories of interpretation which emphasise reliance on text (such as constructivism or originalism),[12] for example, are theories that articulate a vision of judicial deference and a conception of courts as simple 'carriers' of the legislative will, devoid of any autonomous set of normative preferences or value choices. In this sense, theories arguing for an interpretation based on the literal meaning of the legal rules coincide with historical intent theories in that they appear to believe to be both possible and desirable for judicial decisions to be, in themselves, value free and deprived of discretion. This would be, furthermore necessary, because courts would not benefit from the same legitimacy as the political (democratic) process. But is such an approach both possible and desirable in the context of the EU legal order? I believe not, both from a general point of view and taking into account the particular constrains of the EU legal order and its context of constitutional pluralism. It is important to note, at the outset, that the fact that courts benefit from a different legitimacy from the legitimacy of the political process does not mean that they benefit from a lower legitimacy. Judicial legitimacy flows from the legal document that attributes powers of judicial review over the acts of the political process to courts. If the idea is that courts legitimacy can never be opposed to that of the democratic legitimacy of the political process, then the idea of judicial review is itself under attack.[13] When courts should defer or not to the political process has therefore to be a function of a more sophisticated theory: the theory of constitutional or judicial adjudication that is embodied in the Constitution or of a similar legal document giving powers of judicial review to courts. In here I would like to argue that a method of interpretation which pays due attention to teleological and meta-teleological reasoning is the more appropriate for the EU legal order. Reasoning through telos will be an increased necessity in the context of a pluralistic legal order. Such pluralism tends to increase the textual ambiguity of legal provisions and to enhance the potential for conflicting legal norms. In the EU legal order this is, first and foremost, a consequence of its plurality of languages and different legal traditions. It is not uncommon for the same legal rule to be susceptible of rather different textual interpretations depending on the linguistic version one appeals to. Since they all have the same legal value the Court has to 'arbitrate' such linguistic disputes under different criteria.[14] Moreover, the pluralism of languages and legal traditions brings with it conceptual problems of translation. In a context of this type, teleological interpretation is also the more appropriate form of guarantying a uniform application of EU law at the national level. It is also the form of

interpretation that can best guide national courts as the 'first instance' courts of Community law: it not only provides a specific legal outcome for the case at hand but offers a broader normative 'lesson' with which to address future cases. One must remember that the function of the European Court of Justice, under the preliminary ruling mechanism, is not solely that of helping national courts deciding individual cases. The Court must also state the law. In a decentralised legal order it is important for the Court to reason its decisions so as to provide a thicker normative understanding of the law beyond the decision in the case of hand. Only this is capable of guiding national courts in interpreting and applying EU law in the large majority of EU law cases which never reach the ECJ.[15] The textual ambiguity of EU law is also a function of a deeper normative ambiguity. In fact, the constitutional pluralism of the Union also entails an extreme form of political pluralism. Different political positions are often entrenched in strong institutional positions which make it particularly difficult to reach political consensus. As a consequence, EU rules could often be characterised as 'incompletely theorised agreements';[16]agreements reached on the basis of different normative assumptions. They are the product of a complex political bargain where, to a certain extent, there was an 'agreement not to agree'. So long as the political process itself will not be capable to follow upon on that incomplete agreement, such decisions are bound to lead, intentionally or not, to a delegation to courts of the final decisions on those issues. This is not necessarily negative: a political community may legitimately decide to exclude certain issues from the passions of the political process and 'delegate' them to more insulated institutions. It is important, however, for such 'delegation' not to become so extensive or systematic as to reduce the space for democratic deliberation. The answers to be given by courts, in this context, should be mindful of this concern and should, as far as possible, not pre-empt future democratic deliberation on those questions but, instead, help to promote and rationalise such deliberation. There is a paradox, in this respect, in the European Union. On the one hand, the difficulties of its political process often demands from the Court legal answers to questions of broad political relevance. On the other hand, this context also puts a particular responsibility on the Court as the 'rigidity' of the political process makes it more difficult for the solution provided by the Court to be politically overcome.[17] Since, however, courts cannot deny jurisdiction on the basis of the legal complexity or political sensitivity of a certain issue the only appropriate way to deal with these issues is to try to decide them under what the courts perceive as the underlying normative foundations of their legal order. Questions of this type can often only be legally solved by appealing to universal principles. Courts remain courts in

this instance because they reason in normative terms (by appeal to a certain normative conception of their legal order) and because they are bound by the constraints of legal reasoning, defined by the limits imposed by the text, by the logical rules of practical reasoning,[18] and by the systemic requirements of coherence and consistency.[19] In this respect, teleological reasoning reinforces the Court's accountability as it increases transparency as to its normative choices In the context of ambiguous or conflicting provisions, telos signifies an higher constrain than pure reference to wording or intent. It binds courts to a consistent normative reading of those provisions. Teleological interpretation can also be seen as more faithful to the democratic outcomes since it prevents textual manipulation of the legal rules. In fact, an interpretation that pays attention to the goals of the rule, and not simply its wording, prevents opportunistic behaviours and minimises the risk of an interpretative manipulation of the legislation. Such a manipulation would derive, in practise, effects from those rules which were neither wished for nor debated in the political process. As such, to allow such interpretative manipulations would affect the mechanisms of political responsibility and the democratic control of legislative choices. In other words, certain subjects would obtain, outside the democratic political process, the satisfaction of certain policy preferences. It can certainly be said that the teleological interpretation of a particular rule may also not correspond to what was sought by the legislator. However, while teleological reasoning favours a debate among alternative normative preferences in the interpretation of the rule, a simple appeal to text would hide those alternatives and preclude a debate among them. There is one more argument in favour of the importance of teleological interpretation in the EU legal order. EU Treaties frequently appeal to broad universal principles. This is so because the member states trusted on the universalisability potential of such principles both as mechanisms of self-discipline imposed on themselves and as instruments for the development of a legal order that would be, at once, dynamic and principled based. Both the nature of the project of European integration (increased integration)[20] and the incomplete character of its political and legal instruments required the formulation of universal principles. In the European Union the appeal to universal principles fulfils two main purposes. The first is that of allowing agreement on a delicate and controversial political question by politically deferring its practical effects to a legal solution to be derived from a universally agreed principle. The second is that of providing an instrument for the continuous adaptation of the EU legal order to its fast moving context of application. Universal principles maintain the legal text updated. They are a function of the dynamic character of the process of integration recognised in the Treaty

(notably by objective of creating 'an ever closer union among the peoples of Europe'). In particular, they offer a rational and legitimate basis to solve legal conflicts in the increasing number of cases where the political, economic and social reality of the Union is not matched by the available legal rules. Consider, for example, how the protection of fundamental rights in the Community legal order was necessary in the light of the normative authority which had been recognised to EC rules in national legal orders and which, at the same time, prevented their review under national fundamental rights.[21] In the same way, the introduction of new principles in EU law can have a radiating effect over the entire legal order. It may not only create new rights and obligations but require a reinterpretation of pre-existent rights and obligations. That was the case with the introduction of European citizenship which, more than providing a new set of rights, granted a new status in the light of which many of the existing Community rights acquire a new dimension. The Court has stated so, for example, in the domain of the free movement of persons.[22] As with Constitutions the EU Treaties are based on principles so as to be open to the future.[23] Since, in particular, they tend to have a broad normative ambition (a juridification of the social sphere) as well as temporal ambition (they are often 'rigid' legal documents) they need to be formulated in principles open to development and reinterpretation. Any interpretation that would freeze them in time would go against la raison d'etre of the constitutional project and would risk to imprison current generations to the decisions of those of the past. EU constitutional law is no different. On the contrary, its constitutional pluralism requires an ever greater adaptability which, must, at the same time be respectful of the limits imposed by national constitutionalism. In this respect, teleological and meta-teleological interpretation is the mechanism through which such principles are developed in a controllable and transparent manner. They impose on the Court to highlight the second order choices involved in its reasoning[24] and to make transparent how it balances conflicting principles.[25] The importance of teleological interpretation is a function of the particular nature of the EU legal order but, moreover, it does not give free reign to the Court neither does it makes of its judicial function a function of its members value preferences or an exercise in political discretion. Instead, the Court's interpretation has a very clear set of constraints. First, as mentioned earlier the Court's use of teleological interpretation is always combined with other legal arguments be them based on wording (the normal departing point), legislative history, comparative law, context or other. Teleological reasoning is, instead, an element of accountability within the space of discretion left by the other legal arguments to the Court. Second, the Court always filters its reasoning through the canons of practical reasoning, highlighted by the classical

frequent recourse to syllogism. If anything, the Court is sometimes also accused of using a too strict syllogistic reasoning. In this respect, the identification by the Court of the purpose it attributes to certain rules and of the systemic understanding of the EU legal order that permeates its interpretation of EU rules in general should be welcomed. It is a move beyond pure syllogism. As stated before it actually highlights the second order choices, to which legal philosophers often refer as a necessary part of judicial deliberation, particularly in the so-called hard cases.[26] It makes the Court judicial justification correspond closer to its judicial deliberation. It may be true that the Court does not always fully articulate why it identifies a particular goal as the predominant one in a certain area of the law. However, the fact that such choice is made public allows a debate about these second order choices, promoting a form of judicial accountability. Moreover, a more articulated presentation of the different alternative teleological interpretations can often be found in the opinions of the Advocate Generals. Mitchel Lasser has noted that the legitimacy of the reasoning of the Court of Justice is, in fact, supported by the co-existence of two argumentative modes: a more magisterial, syllogistic and deductive mode, to be found in the judgements of the Court; and a more personal and teleological one, to be found in the Opinions of its Advocates Generals.[27] But he also noted that they finally coincide at a meta-purpose or meta-teleological level. The difference between the legal reasoning of the Advocate Generals Opinions and the Court's judgments is explicable by different reasons but among the most important of them it is certainly the particular character of judicial deliberation at the Court. The lack of dissenting opinions and the constraints of collective deliberation (which, moreover, takes place in a foreign language) no doubt helps explaining the different nature of the reasoning of the judgements of the Court, when compared with the Opinions of its Advocate Generals. In this respect, one of the functions of the Advocate Generals, by their broader discussion of the systemic impact of the individual case and their identification of the alternative teleological foundations for a certain interpretation, is to map to the Court and to the legal community the deeper normative choices involved in a particular case. In doing so they provide a basis to understand better how the judgment of the Court fits into a particular systemic and meta-teleological understanding of the EU legal order. All this favours judicial accountability. Finally, the Court is also constrained by a 'precedent-oriented' approach. Independently of determining whether or not its decisions have the nature of a classical legal precedent, the Court has consistently stated that deference is due to a well established line of case law. The authority which the Court itself recognises to its previous decisions is a consequence of the need to guarantee the values of coherence, uniformity and legal certainty inherent

to any legal system. But these values are particularly important in the framework of a decentralised system of enforcement such as that of the EU legal order. Moreover, a proper use of a 'precedent oriented' approach is only meaningful if it is coupled with a teleological and metateleological legal reasoning. Such form of reasoning is necessary to control that a Court is coherent and consistent not only with respect to the interpretation it gives to particular rules but also with regard to how that interpretation fit into its broader pattern of decision making. In other words, it is not enough for a court to be consistent in how interprets a particular legal rule. It is necessary for that court to be consistent in its interpretation of that rule in the light of its interpretation of the entire legal system. Zagrebelsky (former President of the Italian Constitutional Court) has stated that discretion is unavoidable in the judicial function.[28] It is even more so, I would argue, in a pluralist, open and dynamic system of law such as the EU legal order. In a context of this type, the importance of teleological interpretation (both at a rules and systemic level) is both a product of the nature of the legal order, itself, and, actually, the best form of constraint on the exercise of the judicial function. It forces the Court to highlight its normative understanding of the EU legal order and it creates a yardstick to better assess the coherence and consistency of its case law. It also creates an opportunity for a broader debate on the nature of the EU legal order and its underlying values. While more formal forms of legal reasoning would hide discretion and preclude debate, teleological reasoning fosters the conditions necessary for such a debate, in which the plurality of actors that 'construct' the EU legal order can participate. It is to that that I will turn next. II. A court among courts The Court of Justice is one in a community of legal actors that 'constructs' the EU legal order. Such constitutional pluralism means that the development of EU law is dependent on a discursive process with other actors and that it is both shaped by that discourse and has to be shaped in the light of its likely 'appropriation' by those actors. But what consequences ought therefore to be taken from such constitutional pluralism in institutional terms? Apart from the methodological constraints of interpretation, the Court's role is also a product of institutional constraints. The European Court of Justice is one actor in a community of actors that composes the EU legal order. The success of this legal order was the product of the cooperation between the Court of Justice and the different national legal actors. First, EU law is today a source of rights to which litigants can appeal; in this way, EU law has given individuals a direct stake in the promulgation and implementation of this legal order. One could say, along with Burley and Mattli, that 'the Court created a pro-community constituency of private individuals by giving them a direct stake in promulgation and

implementation of Community Law'.[29] The court has also benefited from the questions posed by national courts; these have in a sense helped to shape EU law. It was often national courts that proposed some of the most dynamic and creative interpretations of Community law.[30] At the same time, these same national courts provided ECJ decisions with the same authority of national judicial decisions.[31] This created a dynamic of cooperation between national courts and the European Court of Justice and a dynamic of development of Community law between litigants that fed the case law of the Court of Justice. This also means, however, that the development of EU law is at least partially a function of, or dependent upon, national courts and national litigants. They set an important part of the agenda of the EU jurisprudence and they 'make use' of such jurisprudence in the decentralised application of EU law and the Court's rulings. Legal discourse is a two-way road. The role played by a larger legal community means that legal outcomes and interpretations are a function of this larger legal community. What the law is does not become the exclusive property of courts. The rules, decisions, and interpretations given by courts are instead taken over and used by a broader legal community with meanings that may not always be consistent with those originally intended by courts. To a certain extent we could draw a parallel with the free market in the sense that the final allocation of the judicial and legal resources is determined by supply and demand. Interpretative criteria are not simply a result of judicial drafting, but of a complex process of demand and supply of law in which a broader legal community participates. Judicial decisions do not singly command the use of law but are subject to transformation by other legal actors. This discursive character in the construction of law assumes a particular relevance in the context of the EU legal order because of its decentralised nature. This explains why this discourse is often referred to in the European Union context as a discourse among equals. There is no better example of this than the so-called question of constitutional pluralism in the European Union legal order. It is well known that EU law has supremacy and direct effect in national legal orders. It is to a certain extent the higher law of the Union and the criteria of validity of secondary rules and decisions as well as of all national legal rules and decisions within the scope of application of EU law. However, it is also true that in many national legal orders the supremacy of EU law is often recognised through national constitutions, preserving to a certain extent an idea of supremacy also of national constitutions. This creates fears of constitutional conflict between the European Union legal order and national constitutional legal orders, but those have nevertheless never clearly manifested themselves. From a theoretical point of view, this situation does require a conception of the law which is no longer dependent on a classical, hierarchical understanding and construction of

the law and the constancy of supremacy. It is I have called of 'counterpunctual' law.[32] Similar to what happens in music, where you can have different melodies, one can have different mechanisms of recognising the supremacy of EU law that can be perfectly compatible with one another so long as they lead to the same result.[33] Thus, to take full advantage of this idea of legal and constitutional pluralism we need to conceive forms of reducing or managing the potential conflict between legal orders and promoting communication between them. There are in this respect conclusions to be drawn from the institutional and constitutional pluralism of the European Union legal order both for the exercise of the judicial function of national courts and the European Court of Justice. In other words, how should this internal pluralism be framed in the EU legal order? What kind of meta-methodology and values must be shared by all the actors? In other words, what are the conditions and the language necessary for such communication. First of all, there is a requirement of systemic compatibility. Different legal systems and institutions can defer to each and accommodate their jurisdictional claims so long as they are compatible in systemic terms. For example, the supremacy and direct effect of EU law is accepted and not interfered with by national constitutional orders because it is assumed, and properly so, that there is a systemic compatibility; that is, an identity as to the essential values of the two systems.[34] EU law does not challenge the constitutional identity of national constitutional orders because it is grounded on the same legal values. The same approach has to a certain extent been adopted by the European Court of Human Rights regarding potential conflicts between the European Convention case law and acts of the European Union.[35] Both the national constitutional approaches and the ECHR approach can be seen as the other side of the development by the Court of Justice of the basic principles of the European Union legal order precisely by reference to national constitutional orders and also by reference to the European Convention of Human Rights and Freedoms. This fostered the systemic compatibility necessary to support a fruitful dialogue between courts and prevent conflicts between their respective legal orders. But such decentralised development of systemic compatibility is a product of another necessary requirement imposed on the judiciary in a pluralist context: institutional awareness. Courts must increasingly be aware that they don't have a monopoly over rules and that they often compete with other institutions in their interpretation. They have to accept that the protection of the fundamental values of their legal order may be better achieved by another institution or that the respect owed to the identity of another legal order should lead them to defer to that jurisdiction. This requires courts to both develop instruments for institutional comparison and to set the limits for jurisdictional deference

at the level of systemic identity. The third requirement imposed on the courts developing such a pluralist and decentralised legal order is the sharing of the same hermeneutic framework. This is particularly the case where a legal order risks being asymmetric. In the case of the EU legal order, it is as important for national courts to know EU rules as it is for them to understand the particular methods of interpretation of EU rules. National courts when acting as EU courts have also to have a different institutional understanding of their role. They are obliged to reason and justify its decisions in the context of a coherent and integrated European legal order. In fact, the European legal order integrates both the decisions of national and European courts interpreting and applying EU law. In this context, any judicial body must justify their decisions in a universal manner by reference to the EU context. The decisions of national courts applying EU law must be grounded in an interpretation that could be applied by any other national court in similar situations. This is the core of the CILFIT doctrine.[36] It requires national courts to decide as European courts and to internalise in their decisions the consequences to the European legal order as a whole. As I stated in the beginning, internal pluralism is not the only form of pluralism. Nowadays, legal pluralism has a broader dimension because, increasingly, legal orders communicate. This is the domain of what I described as external pluralism. This form of pluralism has also promoted forms of dialogue between courts.[37] I think there are three ways one can use and make reference to foreign legal sources and foreign courts in our own legal order. The first one is largely consensual: when a foreign legal source is mostly a matter of fact in the decision of the court. One example is in the context of private international law where a court might have to use international legal sources or the rules of another legal system as a matter of fact to reach a decision in its case. The second model of using foreign legal sources starts to be more controversial. It is the use of foreign legal sources or decisions of other courts as an argument of persuasion but not of authority in the context of deliberation and/or the justification of a certain judicial decision. There are three possible reasons to use foreign legal sources and the case law of other courts in the context of another legal order. The first one is intellectual persuasion. It's the same thing basically as scholarship. I ask myself: has that court solved a certain legal problem that is similar in a manner that is convincing to me? If it has, then I will use it. And maybe the best way for me to make clear to the outside world why I've decided this way is by making reference to how that other court has decided. The second instance is as a form of communication between systems. This is even more complex and controversial. But it is most likely justified when legal systems interpret the same rules or their legal orders communicate or interlock between themselves. It corresponds to the instances of interpretative competition

and legal externalities which I've identified above in the context of external pluralism. To a certain extent, looking at the jurisprudence of another court, promotes some form of informal coherence among these legal orders. A good example may be the mutual attention that the European Court of Justice, the European Court of Human Rights, and EFTA court give to each other's case law. Through this communication between legal systems, courts actually co-interpret 'shared' rules. The third possible reason is what former Chief Justice Barak of Israel described, in a rather beautiful metaphor, as foreign law being a mirror of oneself. It is the idea that by looking at other courts you can better differentiate yourself or enter into a process akin to judicial introspection; an effort to better understand what you yourself are doing. These are three reasons to use foreign legal sources as an argument of persuasion in judicial reasoning. Much more controversial and much more difficult to support is the use of foreign legal sources as legal authority, so as to argue that judges are, to a certain extent, bound by the foreign source. The merits of this approach depend, in my view, on the instrument that the court is called to interpret. The legitimacy of a court comes from a particular political community and it is based on the values of that polity, values that are expressed in the legal document that that the court is supposed to interpret. Hence, to use a foreign legal source in this context, as a mandatory source of authority, is in my view highly contestable. But this might not be so, if the legal instrument the court is supposed to interpret itself adheres to universal values, and if it adheres to them in a manner that indicates that they ought to be interpreted in light of the set of values of a broader set of political communities. A good example of this is the South African Constitution. It has a provision that expressly mandates the constitutional court to interpret fundamental rights in the light of international standards of fundamental rights protection. Courts are thus, increasingly, operating in dialogue with other courts both within their legal order and from other legal orders. In this way they are not only subject to legal pluralism but they shape such legal and constitutional pluralism. III. Conclusion I have argued that the increased context of internal and external legal pluralism requires the Court of Justice to adopt particular methods of interpretation and assume a particular institutional position in the context of the European legal order. I have highlighted how the nature of the EU legal order explains and requires an extended recourse to teleological interpretation and comparative law. But I have further noted that teleological interpretation must also take place at the systemic level (meta-teleology) and that the methodology of comparative law should be guided by a requirement of 'best fit' the EU legal order. Furthermore, I have argued that the interpretation of EU law is a function of a border community of actors (notably national courts). This imposes requirements

on the reasoning of the Court of Justice (which must not simply decide cases but provide normative guidance to national courts as European courts). It also fosters judicial dialogue and a decentralised development of the EU legal order. In this respect, I've tried to suggest some meta?principles which ought to guide the Court of Justice and national courts in their respective tasks. I concluded by briefly highlighting how instances of external pluralism may also affect the future role of courts and the nature of their legal reasoning.

Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review

Mattias Kumm*

The debate about judicial review is not over. In the latest round of contributions on what is one of the classical issues of Post World War II constitutionalism, Jeremy Waldron[1] and Richard Bellamy[2] restate, sharpen and refine old arguments against the authority of courts to set aside or declare null and void legislation on the grounds that it violates constitutional or human rights.

The core criticism of judicial review is focused on two main grounds. First, at least in reasonably mature liberal democracies there is no reason to suppose that rights are better protected by this practice than they would be by democratic legislatures. In particular the legalist nature of judicial rights discourse, its focus on text, history, precedent etc., tend to unhelpfully distract from the moral issues central to the validation of rights claims, whereas these legalistic distractions do not burden political debate. Second, quite apart from the outcome it generates, judicial review is democratically illegitimate. The protection of rights might be a precondition for the legitimacy of law, but what these rights amount to in concrete circumstances is likely to be subject to reasonable disagreement between citizens. Under those circumstances the idea of political equality requires that rights issues too should be decided using a process that provides for electoral accountability. To some extent the arguments Waldron and Bellamy make, like the debate over judicial review more generally, is unlikely to resonate strongly in Europe. In most European jurisdictions the question whether or not there should be judicial review is institutionally settled by positive law in form of clear constitutional and international legal commitments.[3] But these challenges provide a welcome occasion to reflect more deeply about the nature of human and constitutional rights practice as it has evolved in Europe and to ask what, if any, its specific virtues are and how these virtues relate to the legitimacy of law in a liberal democracy. As will become clear, European constitutional and human rights practice provides good reasons to think again about the nature of those rights, the relationship between rights and democracy and the institutions that seek to reflect and realise these commitments.

I will argue that Waldron and Bellamy address the right kind of concerns, but they get things exactly wrong. First, outcomes are likely to be

improved with judicial review. The essay defends conventional wisdom against the challenge of legalist distortion, but does so in a way that is focused specifically on contemporary European human and constitutional rights practice. In this practice the legalist distortions that Waldron in particular describes are mostly absent. Instead in Europe what I refer to as a Rationalist Human Rights Paradigm (hereinafter, RHRP) is dominant. Within such a paradigm the four prong proportionality test in particular allows courts to engage all relevant moral and pragmatic arguments explicitly, without the kind of legalistic guidance and constraint that otherwise characterises legal reasoning. Furthermore, when judges do so, they are not generally engaged in an exercise of sophisticated theorising, but in a relatively pedestrian structured process of scrutinising reasons. This process is capable of identifying a wide range of political pathologies that are common enough even in mature democracies. In describing the Rationalist Human Rights Paradigm, the article highlights some central structural features of European human rights practice, that distinguish it in interesting ways from the US context, to which Waldron and much of the most sophisticated thinking about judicial review, generally refers.

Second, even though the Rationalist Human Rights Paradigm does not provide much in terms of legal constraint and authoritative guidance for courts adjudicating rights claims, this does not exacerbate or confirm the legitimacy problem that sceptics claim is at the heart of the case against judicial review. The opposite is true. Under reasonably favourable circumstances of a mature liberal democracy judicial review is a necessary complement to democratically accountable decision-making. Both judicial review of legislation and electoral accountability of the legislator give institutional expression to co-original and equally basic commitments of liberal-democratic constitutionalism. Both are central pillars of constitutional legitimacy. Judicial review deserves to be defended not only on the pragmatic grounds that it leads to better outcomes, but also as a matter of principle.

At the heart of a defence of judicial review has to be an account of the point of such a practice. That account has to both fit the practice it purports to defend and articulate what is attractive about it.[4] An account can fail either because it does not meaningfully connect to an actual practice or because it does not show what is attractive about it. The rich literature on judicial review generated by US scholars[5] that generally addresses US Constitutional practice does not capture some central features of European Constitutional practice. It does not fit that practice and therefore does little to illuminate it.[6] More specifically none of that literature captures the distinct structural features central to

the Rationalist Human Rights Paradigm. On the other hand those comparative or European constititutional scholars more attuned to the core features of the Rationalist Human Rights Paradigm[7] that dominates European practice have not provided well-developed persuasive accounts about why such a practice should be regarded as attractive. This essay is an attempt to provide the barebones structure of such an account. It can only present the argument in a cursory and underdeveloped way and does not claim to do justice to the rich set of questions that will be encountered or the considerable literatures that address them.

The point of judicial review, I will argue, is to legally institutionalise a practice of Socratic contestation. Socratic contestation refers to the practice of critically engaging authorities, in order to assess whether the claims they make are based on good reasons. This practice, described most vividly in the early Platonic dialogues,[8] led to understandable frustration of many of the established authorities whose claims Socrates scrutinised and found lacking. It led the historical Socrates to be convicted and sentenced to death for questioning the gods of the community and corrupting youth in democratic Athens. Human and constitutional rights adjudication, as it has developed in much of Europe, I will argue, is a form of legally institutionalised Socratic contestation. When individuals bring claims grounded in human or constitutional rights, they enlist courts to critically engage public authorities in order to assess whether their acts and the burdens they impose on the rights-claimants are susceptible to plausible justification. The Socrates that Plato describes in his early dialogues is right to have claimed a place of honour in the Democratic Athenian Polis, rather than having to suffer for it on trumped up charges that his activities violated community values and corrupted youth. Conversely, citizens in Europe are right to have legally institutionalised a practice of Socratic contestation as a litmus test that any act by public authorities must meet, when legally challenged. Legally institutionalised Socratic contestation is desirable, both because it tends to improve outcomes and because it expresses a central liberal commitment about the conditions that must be met, in order for law to be legitimate.

The first part of the essay will highlight the core structural features of the Rationalist Human Rights Paradigm that informs much of European human and constitutional rights practice. The second part will argue that the point to institutionalise a rights-practice that has this structure is to legally establish a practice of Socratic contestation. Socratic contestation is a practice that gives institutional expression to the idea that all legitimate authority depends on being grounded in public reasons, that is, justifiable to others on grounds they might reasonably accept.[9] In practice Socratic contestation is well suited to address a wide range of ordinary

pathologies of the political process. The third part first puts both the RHRP and judicial review in a historical context, before arguing that judicial review of rights is not in tension with democratic legitimacy but a necessary complement to it. I will argue that the idea of competitive electoral politics grounded in an equal right to vote and the rights-based practice of Socratic contestation are complementary basic institutional commitments of liberal democratic constitutionalism, whose legitimacy does not turn exclusively on outcome related arguments. Liberal democracy without judicial review would be incomplete and deficient. A final part will contain some tentative hypothesis about why there has been so much debate about the counter-majoritarian difficulty and judicial review and so little about the majoritarian difficulty. It is only in the Europe of the last fifty years that the liberal democratic constitutional tradition has gradually begun to emancipate itself from the authoritarian, collectivist –and often nationalist– biases that have, in the form of constitutional theories of democracy as collective self-government, continued to inform a great deal of constitutional thinking in the age of the nation state. The shadow of Hobbes continues to hover over much of contemporary constitutional theory.

I. THE 'RATIONAL HUMAN RIGHTS PARADIGM'

Human and constitutional rights practice in Europe is, to a significant extent, not legalist but rationalist. It is generally focused not on the interpretation of legal authority, but on the justification of acts of public authorities in terms of public reason. Arguments relating to legal texts, history, precedence, etc. have a relatively modest role to play in European constitutional rights practice. Instead the operative heart of a human or constitutional rights challenge is the proportionality test (1). That test, however, provides little more than a check-list of individually necessary and collectively sufficient criteria that need to be met for behaviour by public authorities to be justified in terms of public reason. It provides a structure for the assessment of public reasons (2). Furthermore the range of interests that enjoy prima facie protection as a right are generally not narrow and limited, but expansive. Both the German Constitutional Court and the ECJ, for example, recognise a general right to liberty and a general right to equality. That means that just about any act infringing on interests of individuals trigger are opened up for a constitutional or human rights challenge and requires to be justified in terms of public reason (3).

(1) It is true that not all constitutional or human rights listed in legal documents require proportionality analysis or any other discussion of limitations. The catalogues of rights contained in domestic constitutions

and international human rights documents include norms that have a simple categorical, rule like structure. They may stipulate such things as: "the death penalty is abolished"; or "every citizen has the right to be heard by a judge within 24 hours after his arrest". Most specific rules of this kind are best understood as authoritative determinations made by the constitutional legislator about how all the relevant first order considerations of morality and policy play out in the circumstances defined by the rule. Notwithstanding interpretative issues that may arise at the margins, clearly the judicial enforcement of such rules is not subject to proportionality analysis or any other meaningful engagement with moral considerations.

But at the heart of modern human and constitutional rights practice are rights provisions of a different kind. Modern constitutions establish abstract requirements such as a right to freedom of speech, freedom of association, freedom of religion etc. These rights, it seems, can't plausibly have the same structure as the specific rights listed above. Clearly there must be limitations to such rights. There is no right to shout fire in a crowded cinema or to organise a spontaneous mass demonstration in the middle of Champs Elysées during rush hour. How should these limits be determined?

In part constitutional texts provide further insights into how those limits ought to be conceived. As a matter of textual architecture it is helpful to distinguish between three different approaches to the limits of rights.

The first textual approach is not to say anything at all about limits. In the United States the 1st Amendment, for example, simply states that "Congress shall make no laws [...] abridging the freedom of speech [or] the free exercise of religion".[10] Not surprising it remains a unique feature of US constitutional rights culture to insist on defining rights narrowly, so that there are as few as possible exceptions to them.[11]

The second approach is characteristic of Human Rights Treaties and Constitutions enacted in the period following WWII. Characteristic of rights codifications during this era is a bifurcated approach. The first part of a provision defines the scope of the right. The second describes the limits of the rights by defining the conditions under which an infringement of the right is justified. Article 10 of the European Convention of Human Rights, for example, states:

"Everyone has the right to freedom of expression [...]; the exercise of these freedoms [...] may be subject to such formalities, conditions, restrictions or penalties as prescribed by law and are necessary in a democratic society, in

the interest of national security, territorial integrity or public safety".

Similarly, Article 2 § 1 of the German Basic Law states that "every person has the right to the free development of their personality, to the extent they do not infringe on the rights of others or offend against the constitutional order or the rights of public morals".

The first part defines the scope of the interests to be protected – here: all those interests that relate respectively to "freedom of expression" or "the free development of the personality". The second part establishes the conditions under which infringements of these interests can be justified: "restrictions [...] necessary in a democratic society in the interests of" and "when the limitations serve to protect the rights of others, the constitutional order or public morals". The first step of constitutional analysis typically consists in determining whether an act infringes the scope of a right. If it does a *prima facie* violation of a right has occurred. The second step consists in determining whether that infringement can be justified under the limitations clause. Only if it can not is there a *definitive* violation of the right.

Even though the term proportionality is not generally used in constitutional limitation clauses immediately after WWII, over time courts have practically uniformly interpreted this kind of limitation clauses as requiring proportionality analysis. Besides the requirement of legality – any limitations suffered by the individual must be prescribed by law– the proportionality requirement lies at the heart of determining whether an infringement of the scope of a right is justified.

Finally more recent rights codifications often recognise and embrace this development and have often substituted the rights-specific limitation clauses by a general default limitations clause.[12]

Article II § 112 of the recently negotiated European Charter of Fundamental Rights, for example, states that "subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet the objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

(2) The connection between rights and proportionality analysis has been thoroughly analysed by Robert Alexy.[13] According to Alexy the abstract rights characteristically listed in constitutional catalogues are principles. Principles, as Alexy understands them, require the realisation of something to the greatest extent possible, given countervailing concerns. Principles

are structurally equivalent to values. Statements of value can be reformulated as statements of principle and vice-versa. We can say that privacy is a value or that privacy is a principle. Saying that something is a value does not yet say anything about the relative priority of that value over another, either abstractly or in a specific context. Statements of principle, express an 'ideal ought'. Like statements of value they are not yet, as Alexy puts it, "related to possibilities of the factual and normative world". The proportionality test is the means by which values are related to possibilities of the normative and factual world. Whenever there is a conflict between a principle and countervailing concerns, the proportionality test provides the criteria to determine which concerns take precedence under the circumstances. The proportionality test provides an analytical structure for assessing whether limits imposed on the realisation of a principle in a particular context are justified.

The proportionality test is not merely a convenient pragmatic tool that helps provide a doctrinal structure for the purpose of legal analysis. If rights as principles are like statements of value, the proportionality structure provides an analytical framework to assess the necessary and sufficient conditions under which a right takes precedence over competing considerations as a matter of first order political morality. Reasoning about rights means reasoning about how a particular value relates to the exigencies of the circumstances. It requires general practical reasoning.[14]

An example drawn from the European Court of Human Rights [hereinafter ECHR] illustrates how proportionality analysis operates in the adjudication of rights claims.

In Lustig-Prean and Beckett v. United Kingdom[15] the applicants complained that the investigations into their sexual orientation and their discharge from the Royal Navy on the sole ground that they are gay violated Article 8 of the European Convention of Human Rights [hereinafter ECHR]. Article 8, in so far as is relevant, reads as follows:

"Everyone has the right to respect for his private [...] life. There shall be no interference by a public authority with the exercise of this rights except such as is in accordance with the law and is necessary in a democratic society [...] in the interest of national security, [...] for the prevention of disorder".

Since the government had accepted that there had been interferences with the applicants' right to respect for their private life -a violation of a prima facie right had occurred- the only question was whether the interferences were justified or whether the interference amounted to not merely a prima

facie, but a definitive violation of the right. The actions of the government were in compliance with domestic statutes and applicable European Community Law and thus fulfilled the requirement of having been 'in accordance with the law'. The question was whether the law authorising the government's actions qualified as 'necessary in a democratic society'. The Court has essentially interpreted that requirement as stipulating a proportionality test. The following is a reconstructed and summarised account of the court's reasoning.

The first question the Court addressed concerns the existence of a legitimate aim. This prong is relatively easy to satisfy in cases where the constitutional provision does not specifically restrict the kind of aims that count as legitimate for justifying an interference with a specific right. In this case the constitutional provision limits the kind of aims that count as legitimate for the purpose of justifying an infringement of privacy. Here the UKoffered the maintenance of morale, fighting power and operational effectiveness of the armed forces -a purpose clearly related to national security- as its justification to prohibit gays from serving in its armed forces.

The next question is, whether disallowing gays from serving in the armed forces is a suitable means to further the legitimate policy goal. This is an empirical question. A means is suitable, if it actually furthers the declared policy goal of the government. In this case a government commissioned study had shown that there would be integration problems posed to the military system if declared gays were to serve in the army. Even though the Court remained sceptical with regard to the severity of these problems, it accepted that there would be some integration problems if gays were allowed to serve in the armed forces. Given this state of affairs there was no question that, as an empirical matter, these problems are significantly mitigated if not completely eliminated by excluding gays from the ranks of the armed forces.

A more difficult question was whether the prohibition of homosexuals serving in the armed forces is necessary. A measure is necessary only if there is no less restrictive but equally effective measure available to achieve the intended policy goal. This test incorporates but goes beyond the requirement known to US constitutional lawyers that a measure has to be narrowly tailored towards achieving the respective policy goals. The 'necessary' requirement incorporates the 'narrowly tailored' requirement, because any measure that falls short of the 'narrowly tailored' test also falls short of the necessity requirement. It goes beyond the 'narrowly tailored' requirement, because it allows the consideration of alternative means, rather than just insisting on tightening up and limiting the chosen means

to address the problem. In this case the issue was whether a code of conduct backed by disciplinary measures, certainly a less intrusive measure, could be regarded as equally effective. Ultimately the Court held that even though a code of conduct backed by disciplinary measures would go quite some way to address problems of integration, the government had plausible reasons to believe that it does not go so far as to qualify as an equally effective alternative to the blanket prohibition.

Finally the court had to assess whether the measure was proportional in the narrow sense, applying the so-called 'balancing test'. The balancing test involves applying what Alexy calls the 'Law of Balancing': "the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other".[16]

The decisive question in the case of the gay soldiers discharged from the British armed forces is whether on balance the increase in the morale, fighting force and operational effectiveness achieved by prohibiting gays from serving in the armed forces justifies the degree of interference in the applicant's privacy or whether it is disproportionate. On the one hand the court invoked the seriousness of the infringement of the soldiers' privacy, given that sexual orientation concerns the most intimate aspect of the individual's private life. On the other hand the degree of disruption to the armed forces without such policies was predicted to be relatively minor. The Court pointed to the experiences in other European armies that had recently opened the armed forces to gays, the successful cooperation of the UK army with allied NATO units which included gays, the availability of codes of conduct and disciplinary measures to prevent inappropriate conduct, as well as the experience with the successful admission of women and racial minorities into the armed forces causing only modest disruptions. On balance the UK measures were held to be sufficiently disproportionate to fall outside the government's margin of appreciation and held the United Kingdom to have violated Article 8 ECHR.

The example illustrates two characteristic features of rights reasoning. First, a rights-holder does not have very much in virtue of his having a right. More specifically, the fact that a rights holder has a prima facie right does not imply that he holds a position that gives him any kind of priority over countervailing considerations of policy. An infringement of the scope of a right merely serves as a trigger to initiate an assessment of whether the infringement is justified. But the fact that rights are not trumps in this sense does not mean that they provide no effective protection. The example demonstrates that in practice, even without such priority, rights can be formidable weapons. The second characteristic feature of rights reasoning is the flip side of the first. Since comparatively

little is decided by acknowledging that a measure infringes a right, the focus of rights adjudication is generally on the reasons that justify the infringement. Furthermore, the four-prong structure of proportionality analysis provides little more than a structure which functions as a checklist for the individually necessary and collectively sufficient conditions that determine whether the reasons that can be marshalled to justify an infringement of a right are good reasons under the circumstances. Assessing the justification for rights infringements is, at least in the many cases where the constitution provides no specific further guidance, largely an exercise of structured practical reasoning without many of the constraining features that otherwise characterises legal reasoning. Rights reasoning under this model, then, shares important structural features with rational policy assessment.[17] The proportionality test merely provides a structure for the justification of an act in terms of public reason.

(3) Conceiving rights in this way also helps explain another widespread feature of contemporary human and constitutional rights practice that can only be briefly be pointed to here. If all you have in virtue of having a right is a position whose strength in any particular context is determined by proportionality analysis, there are no obvious reasons for defining narrowly the scope of interests protected as a right. Shouldn't all acts by public authorities effecting individuals meet the proportionality requirement? Does the proportionality test not provide a general purpose test for ensuring that public institutions take seriously individuals and their interests and act only for good reasons? Not surprisingly, one of the corollary features of a proportionality oriented human and constitutional rights practice is its remarkable scope. Interests protected as rights are not restricted to the classical catalogue of rights such as freedom of speech, association, religion and privacy narrowly conceived. Instead with the spread of proportionality analysis there is a tendency to include all kinds of liberty interests within the domain of interests that enjoy prima facie protection as a right. The European Court of Justice, for example, recognises a right to freely pursue a profession as part of the common constitutional heritage of member states of the European Union, thus enabling it to subject a considerable amount of social and economic regulation to proportionality review. The European Court of Human Rights has adopted an expansive understanding of privacy guaranteed under Article 8 ECHR and the German Constitutional Court regards any liberty interest whatsoever as enjoying prima facie protection as a right. In Germany the right to the 'free development of the personality' is interpreted as a general right to liberty understood as the right to do or not to do whatever you please. It has been held by the Constitutional Court to include such mundane things as a right to ride horses through public woods, feeding pigeons on public squares or the right to trade a

particular breed of dogs. In this way the language of human and constitutional rights is used to subject practically all acts of public authorities that effect the interests of individuals to proportionality review and thus to the test of public reason.[18]

II. The point of rights: Legally institutionalising Socratic contestation

But what is the point of authorising courts to adjudicate just about any policy issue, once it is framed as an issue of rights within the RHRP?

(1) There is a puzzle relating to the wisdom of judicial review that shares many structural features of the puzzle of Socratic wisdom, as it becomes manifest in Plato's early dialogues. The kind of claims that have to be made on behalf of constitutional courts to justify their role in public life, are, prima facie, as improbable as the claims of wisdom made by and on behalf of Socrates, to justify his way of life to run around and force members of the Athenian political establishment into debates about basic questions of justice and what it means to live your life well.

That puzzle is not plausibly resolved, but only deepened, by pointing to authority: True, in the case of Socrates it is the Oracle of Delphi that determines that Socrates is the wisest man.[19] Similarly, constitutional law and European Human Rights Law have authoritatively established courts with the task to serve as final arbiters of human and constitutional rights issues as a matter of positive law, presumably believing that this task is best left to them rather than anyone else. But of course the puzzle remains. How can these authorities be right? Does it make any sense? There is a puzzle here. Socrates, a craftsman by trade, denies that he has any special knowledge about justice or anything else. He is not and makes no claim to be the kind of philosopher king that Plato would later describe as the ideal statesman in the Republic.[20] In fact he insists that the only thing he does know is that he knows nothing. Similarly a constitutional or human rights court, staffed by trained lawyers, is not generally credited with having special knowledge about what justice requires and constitutional judges widely cringe at the idea that they should conceive of themselves as philosopher kings,[21] no doubt sensing their own ineptness. The only thing judges might plausibly claim to know is the law. Ironically, this is much the same as saying they know nothing, because within the rationalist human rights paradigm, the law -understood as the sum of authoritatively enacted norms guiding and constraining the task of adjudication- typically provides very little guidance for the resolution of concrete rights claims. Just as there is no reason to believe that a man of humble background and position such as Socrates is the wisest man alive,

there seems to be no reason to believe that courts staffed by lawyers are the appropriate final arbiters of contentious questions of right, second-guessing the results of the judgment made by the democratically accountable politically branches using the check-list that the proportionality test provides.

But perhaps the specific wisdom of Socrates and constitutional judges lies not in what they know about theories of justice or policy, but in the questions they know to ask others who have, at least prima facie, a better claim of wisdom on their side. When Socrates is told that he is the wisest man, he goes and seeks out those who seem to have a better claim on wisdom and scrutinises their claims. It is only in the encounter with those who are held out as wise or think of themselves as wise that Socrates begins to understand why the Oracle was right to call him the wisest man alive. Socratic questioning reveals a great deal of thoughtlessness, platitudes, conventions or brute power-mongering that dresses up as wisdom, but falls together like a house of cards when pressed for justifications. His comparative wisdom lies in not thinking that he knows something, when in fact he does not, whereas others think they know something, which, on examination it turns out they don't.

At this point it is useful to take a closer look at what the Socrates of Plato's early dialogues is actually doing. How exactly does he engage others? First, Socrates is something of an annoying figure, insisting on involving respected establishment figures, statesmen first of all,[22] wherever he encounters them in conversations about what they claim is good or just, even when they don't really want to or have had enough. In some dialogues the other party runs away in the end, in others the other party resigns cynically and says yes to everything Socrates says just so that the conversation comes to an end more quickly. He forces a certain type of inquiry onto others. Second, the characteristic Socratic method in Plato's earlier dialogues is the elenchus.[23] On a general level elenchus "means examining a person with regard to a statement he has made, by putting to him questions calling for further statements, in the hope that they will determine the meaning and the truth value of his first statement".[24] The Socratic elenchus is adversative and bears some resemblance to cross-examination. His role in the debate is not to defend a thesis of his own but only to examine the interlocutor's. Socrates is active primarily as a questioner, examining the preconditions and consequences of the premises the other side accepts, in order to determine whether they are contradictory or plausible. Socrates does not know anything, but he wants to know what grounds others have to believe that the claims they make are true. He tests the coherence of other persons' views. Third, Socrates does what he does in public spaces, but he does it removed from

the practice of ordinary democratic politics. The type of public reasoning he engages in, he claims,[25] is impossible to sustain when the interests and passions of ordinary democratic politics intervene.

This type of Socratic engagement shares important features that are characteristic of court's engagement with public authorities. First, courts compel public authorities into a process of reasoned engagement. Public authorities have to defend themselves, once a plaintiff goes to court claiming that his rights have been violated. In that sense, like the Socratic interlocutors, they are put on the spot and drawn into a process they might otherwise have resisted. Second, court's engagement with public authorities shares some salient features with the Socratic elenchus.[26] At the heart of the judicial process is the examinations of reasons, both in the written part of the proceedings in which the parties of the conflict can submit all the relevant reason, to a limited extent also in the oral proceedings where they exist and, of course, in the final judgment. Furthermore in this process of reason-examination the parties are the ones that advance arguments. The court's role consists in asking questions - particularly the questions that make up the four prongs of the proportionality test- and assessing the coherence of the answers that the parties provide it with. A court's activity is not focused on the active construction of elaborate theories,[27] but on a considerably more pedestrian form assessing the reasons presented by others, in order to determine their plausibility. Third, this engagement takes place as a public procedure leading to a public judgment, while institutional rules relating to judicial independence ensure that it is immunised from the pressures of the ordinary political process.[28]

(2) But even if there are some important structural similarities between the practice of Socratic contestation described by Plato in his early dialogues and the judicial practice of engaging public authorities when rights claims are made, what are the virtues of such a practice? Socrates claimed that the way he lived his life -his perpetual critical questioning - should have earned him a place of honour in Athens. He claims to be to the Athenian people as a gadfly to a noble but sluggish horse.[29] By convincing Athenians that they are ignorant of the things they think they know -by puzzling them and sometimes numbing his interlocutors like an electric ray-[30] Socrates creates a situation in which perhaps the truth will be more seriously sought after, because the false beliefs no longer foster false complacency. Because of the insights his critical questioning brings to the fore, he is described as a midwife bringing to light insights which otherwise would have remained undeveloped and obscure. But what exactly is so important about sustaining a practice of reasoning and truth seeking? What is so terrible about a complacent people governing itself

democratically? The answer lies in part in the nexus in Platonic philosophy between seeking knowledge and virtue on the one hand, and the centrality of the virtue not to do injustice on the other. Socrates insists that, whatever you do, you should never act unjustly. It is worse to suffer injustice than to do injustice. The life of the tyrant is more miserable than the life of those the tyrant persecutes.[31] So if it is central that you do not commit injustice, how do you avoid doing injustice? By knowing what justice requires. It turns out, however, that it is not easy to know what justice requires. There is much disagreement about it. The virtue of Socratic contestation is that it helps to keep alive the question what justice requires, so that we may avoid committing injustice unknowingly.[32]

It is possible to think of the virtues of courts adjudicating human and constitutional rights in a related way.

First, the very fact that courts are granted jurisdiction to assess whether acts by public authorities are supported by plausible reasons serves as an institutionalised reminder that any coercive act in a liberal democracy has to be conceivable as a collective judgment of reason about what justice and good policy requires. It reminds everyone that the legitimate authority of a legal act depends on the possibility of providing a justification for it based on grounds that might be reasonably accepted even by the party who has to bear the greatest part of the burden. Every judicial proceeding, every judgment handed down and opinion written applying something like the RHRP is a ritualistic affirmation of this idea.

Second, it is not at all implausible that in practice the judicial process functions reasonably well to produce improved outcomes. The most persuasive way to substantiate that claim would be to analyse more closely a large set of randomly selected cases across a sufficiently wide set of jurisdictions and addressing a sufficiently wide range of issues. Such an analysis might provide a typology of pathologies of the political process that courts successfully help uncover and address. It might also uncover the limits and deficiencies of courts as they fail to live up to the task assigned to them. But none of this can be done here. Here it must suffice to provide some general observations that might go some way to establish *prima facie* plausibility for the claim that the availability of judicial review improves outcomes.

To begin with it might be useful to take up another challenge by Waldron and Bellamy. Their scepticism about judicial review producing better outcomes is not just informed by claims about the distracting legalist nature of judicial review. They also claim more generally, that the political process provides an arena where sophisticated arguments can be

made and deliberatively assessed. As an example Waldron points to the abortion debate, comparing the dissatisfying reasoning of the US Supreme Court with the rich and sophisticated parliamentary debate in the UK.[33] Waldron has chosen his examples well. First he focuses on a case, in which the judicial reasoning by the US Supreme Court[34] is particularly poor and did not persuade anyone not already persuaded on other grounds. Second, he describes a political process in the UK that worked as well as one might hope for, with reasons on all sides being carefully assessed. Waldron is right about two things. In many cases the political process works well. And in some instances judicial reasoning is poor. But to establish his case it would have been helpful to choose the debates that typically informed state laws prohibiting abortion in the United States as a point of comparison, rather than debates in the UK. It may have turned out that the laws on the books in many US states existed primarily because of traditional patriarchal views about gender roles that placed central importance on male control over female sexuality. Given that the Supreme Court had encountered these prejudices and stereotypes in its previous engagement with issues such as the availability of contraceptives,[35] the case against Supreme Court intervention might not be strong, even if a better reasoned judgment could have been hoped for. The UK example does little more than provide an argument for the claim that when a serious, extended and mutually respectful parliamentary debate has taken place before deciding an issue that is a good reason for the court to be deferential to the outcome reached. But such a conclusion at least comes close to a tautology. If there has been an extended debate of a deliberate, mutually respective nature in a mature liberal democracy, any results reached is highly likely to be based on plausible reasons and thus deserve and are likely to be given deference by rights-adjudicating courts.

A much more telling example is the ECHR case relating to gays in the military, which also originates in Britain. In order to understand the power of Socratic contestation, it is necessary to move away from the discussions of 'operative effectiveness and morale' that characterise much of the opinion. The significance of Socratic contestation lies not only in what it makes explicit, but also what it forces underground. Why was it that those suspected of being gay were intrusively investigated and, when suspicions were confirmed, dishonourably discharged? Let's entertain a wild guess. Here are some answers that one might expect some military leaders, parts of the ministerial bureaucracy and some members of parliament to have invoked in moments of candour, protected from public scrutiny: "We have never accepted homosexuals here; we all agree that this I not a place for homosexuals; we just don't want them here; faggots are disgusting".[36] These are arguments, if you want to call them that, based

on tradition, convention, preference, all feeding prejudice. Furthermore some Christians might have claimed, in line with many -though by no means all- official church doctrines, based on scripture: "homosexual practices are an abomination against god". This is an argument based on what political philosophers such as Rawls would call 'conceptions of the good'. An important point about the practice of justifying infringements of human rights is that these types of reasons don't count. They are not legitimate reasons to restrict rights and do not fulfil the requirements of the first prong of the proportionality test. Traditions, conventions, preferences, without an attachment to something more, are not legitimate reasons to justify an infringement of someone's right, and nor are theologically based accounts -whether or not they are plausible interpretations of scripture- of what it means to live a life without sin. Like some of the characters that Socrates quarrels with in the early Platonic dialogues, those who embrace this kind of reasons have good reasons to evade Socratic questioning. Once forced into the game of having to justify a practice in terms of public reason, participants are forced to refocus their arguments, and what comes to the foreground are sanitised argument relating to 'operative effectiveness and morale'. But once the focus is on only legitimate reasons of that kind, they often turn out to be insufficient to justify the measures they are supposed to justify, because, just by themselves, they turn out not to be necessary or disproportionate. Very often this is the point of proportionality analysis: not to substitute the same cost-benefit analysis that the legislature engaged in with a judgment by the court. But to sort out the reasons that are relevant to the issue at hand, while setting aside those that are not, and then testing whether those legitimate reasons plausibly justify the actions of public authorities. One important function of proportionality analysis is to function as a filter device that helps to determine whether illegitimate reasons might have skewed the democratic process against the case of the rights-claimant.

There is another form of thoughtlessness however, that judicial review is reasonably good at countering, that I will refer to as ideological reasoning that I can only briefly describe here. Ideological reasoning did not play a role in the case of Lustig Preen v. Beckett. But it plays a huge role in the context of measures taken in the 'war on terrorism'. A necessary ingredient of ideological thinking is the idea of a powerful and vicious enemy that needs to be fought effectively. Clearly not all claims that there is a powerful and vicious enemy that needs to be fought effectively are ideological. Such claims might well reflect reality, as it did when Roosevelt rallied his country against Nazi Germany. But the characteristic feature of ideological thinking is that the nature of the threat is characterised without much attention to relevant detail and is immunised from serious scrutiny either by put-downs, threats or claims of

secrecy, whereas the evil nature of those who are against us and the pure nature of our cause is perpetually emphasised. Furthermore asking questions relating to the means ends relationship of the purportedly necessary counter-measures is regarded as symptom of weakness, perhaps even of sympathy with the enemy. Ideological thinking is symptomatic for totalitarian dictatorships.[37] But, as recent years have illustrated, it can also at least temporarily take hold in mature constitutional democracies, subverting them and raising the spectre of liberal constitutional democracy degenerating into electoral dictatorship. In such a dark world, wars of aggression are justified as preventive wars, a head of state can claim with impunity that he is authorised to detain for an unlimited amount of time on his say-so, and measures that qualify as paradigm cases of torture are not discussed in the context of impeachment proceedings or international criminal law, but publicly defended as 'enhanced interrogation techniques'. There is an increasingly rich case law, both in the US and inEurope that bears testimony to ideological thinking in the context of the 'war on terrorism'. It also illustrates how judicial review can help undermine it at least to some extent and bring back some realism into the discussion of legitimate security concerns. Furthermore it is not implausible that a political culture that supports a practice of legally institutionalised Socratic contestation is immunised to a greater extent from ideological thinking than a political culture that is likely to damn any kind of impartial third party reasoned scrutiny as undemocratic and elitist. The point here is not that judicial review in those and comparable cases can solve the serious problems that societies have, that have succumbed to ideological thinking and the propaganda that characterises it. Whatever the merits of judicial review, it is no panacea. But judicial review might have a role to play in putting the thumb on the scales to counteract at least some of the worst policies and provide institutional support for the political forces that try to overcome it.

I have identified three types of pathologies of the political process, that even mature democracies are not generally immune from and that a rights based legal practice of Socratic contestation plausibly provides a helpful antidote for. First, there is the vice of thoughtlessness based on tradition, convention or preference, that give rise to all kinds of inertia to either address established injustices or create new injustices by refusing to make available new technologies to groups which need them most. Second, there are illegitimate reasons relating to the good, which do not respect the limits of public reason and the grounds that coercive power of public authorities may be used for. Third, there is the problem of ideology. Ideological claims are claims loosely related to concerns that are legitimate. But they fail to justify the concrete measures they are invoked for, because they lack a firm and sufficiently concrete base in reality and

are not meaningfully attuned to means-ends relationships.

To summarise, the legal institutionalisation of Socratic contestation helps keep alive the idea that acts by public authorities must be understandable as reasonable collective judgments about what justice and good policy require to be legitimate. This is likely to have a disciplining effect on public authorities and help foster an attitude of civilian confidence among citizens. And second, the actual practice of rights based Socratic contestation is likely to improve outcomes, because such contestation effectively addresses a number of political pathologies that even legislation in mature democracies are not immune from. Clearly both the very limited examples and the limited range of arguments that have been addressed so far do not make a comprehensive case for judicial review as Socratic contestation. But for now it must suffice to have addressed at least some powerful arguments why a certain type of judicial review, based on the RHRP, might be attractive. What remains to be explored is whether this type of judicial review raises serious issues with regard to democratic legitimacy.

III. SOCRATIC CONTESTATION, THE 'RATIONAL HUMAN RIGHTS PARADIGM' AND THE LEGITIMACY OF LAW

There are at least two important differences between what the early Platonic Socrates was described as doing and real world judges adjudicating human and constitutional rights claims. First, the Socratic commitment to reason has something heroic about it, whereas the institutionalisation of Socratic contestation does not generally require judges to be the hero that Socrates was. Instead the impartial posture and commitment to reason-giving that characterised Socratic inquiry is secured in adjudication by means of institutional rules which guarantee relative independence from immediate political pressures. Judges find themselves in an epistemic environment, which favours, supports and immunises from serious political backlashes the kind of contestation-oriented practice, that Socrates risked dying for.[38] Second, whereas Socrates might have humiliated his interlocutors and undermined their authority, his actions did not have any immediate legal effect. The actions of courts, however, do have legal effects, often invalidating political decisions held in violation of human or constitutional rights. This raises the basic issue whether, notwithstanding a plausible claim that outcomes may be improved, legally institutionalising a practice of Socratic contestation unduly compromises constitutional democracy.

1. *On the relationship between rights and democracy*

There is nothing new in understanding rights in the expansive way of the RHRP. The Declaration of Independence states that the whole point of government is to secure the rights that individuals have. And the framers of the US constitution knew that the more specific rights they enumerated in the Bill of Rights did not exhaust the rights that the constitution was established to protect.[39] In the French revolutionary tradition rights were understood in much the way the RHRP describes. The French Declaration of the Rights of Man establishes that everyone has an equal right to equality and liberty. In the enlightenment tradition that has gave rise to modern constitutionalism as defining a limited domain not subject democratic intervention. Indeed, the core task of democratic intervention in a true republic was to delimitate the respective spheres of liberty between individuals in a way that takes them seriously as equals and does so in a way that best furthers the general interest and allows for the meaningful exercise of those liberties. In this way democracy was conceived not only as rights-based, but as having as its appropriate subject matter the delimitation and specification of rights. Legislation, such as the enactment of the Code Civil, was rights specification and implementation.

Furthermore, the abstract rights, as they were articulated in the Declaration, were only specified, interpreted and implemented through the legislative process. Courts originally had no role to play whatsoever in the exercise to determine the specific content of what it means to be free and equal in specific circumstances. Courts, discredited as part of the ancien régime -the noblesse de robe- were to function as the mouthpiece of the law as enacted by the legislature and had no additional constitutional role. Rights and democracy were not conceived as in tension to one-another, but as mutually referring to one-another. Rights needed specification and implementation by democratic legislatures and the authorisation of the democratic legislatures consisted exclusively in spelling out the implications of a commitment to everyone's right to be regarded as free and equal. Rights and democracy were co-equal and mutually dependant. Democratic actions not conceivable as rights specification and implementation -for example laws establishing one religion as the true religion- were illegitimate, as was rights specification and implementation that was not democratic. The basic rights of individuals were the exclusive subject matter of legislative intervention and, in abstract form, guided and constrained legislative intervention.[40]

The RHRP, it turns out, is little more than the constitutionalisation of this idea. There is nothing radical or new about the RHRP on the level of

a conception of rights. What is new about post WWII constitutionalism is the general supervisory role of the judiciary in the process of rights-specification and implementation. In the second half of the 20th century the vast majority of countries that have gone through the experience of either national-socialist, fascist-authoritarian, communist or simply racist rule and made the transition to a reasonably inclusive liberal constitutional democracy have made a remarkable and original institutional choice. To establish a Kelsenian type constitutional court and constitutionalise rights that generally authorise those whose non-trivial interests are effected by the actions of public authorities to challenge them in court.[41] The court would then assess whether, under the circumstances, the acts of public authorities, even of elected legislatures, can reasonably be justified. Of course the primary task of delimitating the respective spheres of liberty of free and equals continuous to be left to the legislatures. Legislatures remain the authors of the laws in liberal constitutional democracies. But courts have assumed an important editorial function[42] as junior-partners and veto players in the enterprise of specifying and implementing a constitutions commitment to rights. Courts, as guardians and subsidiary enforcers of human and constitutional rights serve as an institution that provides a forum in which legislatures can be held accountable at the behest of effected individuals claiming that their legitimate interests have not been taken seriously.

2. *Rights and democracy: The institutional question*

But given that there is often reasonable disagreement about what rights individuals have with regard to concrete issues, should decisions relating to that disagreement not be made by a political process, in which electorally accountable political decision-makers make the relevant determinations? Was the original French institutional commitment to legislation by an elected assembly not right? Given reasonable disagreement, does the idea of political equality not demand, that everyone's conception of how to delimitate these rights, should be given equal respect? Is the idea of political equality not undermined, when electorally unaccountable courts are empowered to override legislative decisions to make these determinations? That, as I understand it, is the core challenge posed by arguments such as those put forward forcefully by Waldron and Bellamy. In the following I will provide an argument that judicial review based on the RHRP should be regarded as basic an institutional commitment of liberal-democratic constitutionalism as electoral accountability based on an equal right to vote. There is nothing puzzling about the legitimacy of judicial review. Arguably the more interesting issue is why the practice of judicial review receives the critical attention that it does.

(1) From a historical perspective there is a peculiar asymmetry between the critical attitude displayed towards judicial review and the relatively untroubled embrace of representative, electorally-mediated decision-making. Historically, the transition from direct democracy - Athens, Geneva and the New England Town Hall- to the elections of representatives was a serious issue. Democracy referred only to a process by which the people legislated directly. In 18th century France the idea of representative democracy was by many thought to be a contradiction in terms and in the US the framers thought of themselves a establishing a republic, not a democracy, exactly because the constitution had no place for a national town hall or national referenda. Over the course of the 19th century democracy was reconceived to include legislation by elected representatives. Participation-wise, that transition involves a significant empowerment of officials to the detriment of the 'people'. Similarly, after WWII, the establishment of courts as additional veto-players can be construed as the empowerment of another group of officials, one further step removed from the 'people', whose task includes the supervision of activities by the other group of empowered officials. As a matter of principle I understand the scepticism articulated by those who refused to accept 'representative democracy' as democracy properly so-called. But once the step to the empowerment of officials to legislate in the name of the people has been accepted as a matter of principle, it is difficult to see why the restriction of the powers of those officials by other officials that are generally appointed by the officials that have been given the authority to legislate, can possibly be wrong as a matter of principle. If representative democracy is legitimate, why can't representative democracy involving a rights-based judicial veto-power be legitimate? All three decision-making procedures are majoritarian. In referenda it is the majority of those who vote that count, in legislative decision-making it is the majority of representatives that count, and in judicial decision-making it is the majority of judges. Furthermore all of these institutions are republican in that they claim to make decisions in the name of the people and derive their legitimacy ultimately from the approval of the electorate. The core difference is the directness of the link between authoritative decision-making and the electorate. If the principle of democracy required the most direct and unmediated form of participation possible, under present day circumstances much of representative decision-making would be illegitimate. There would seem to be as much cause to talk about the undemocratic empowerment of elected representatives, who get to decide on laws without the people having a direct say in the legislative decision, as it is to talk about the undemocratic empowerment of judges, who make their decisions without direct participation of the people. The reason why representative democracy is not regarded as illegitimate, is presumably

because any plausible commitment to democracy allows trade-offs along the dimension of participatory directness, when less direct procedures exhibit comparative advantages along other dimensions, such as deliberative quality or outcomes. It is not clear what the issue of deep principle could be, that would condemn judicial review, but not electoral representation.

At the very least it is utterly implausible to claim that through ordinary legislative procedures 'the people themselves' decide political questions, whereas decisions of duly appointed judges are cast as platonic guardians imposing their will on the people. Anyone who uses that language does not deserve to be taken seriously, because instead of presenting an argument they engage in a rhetorical sleight of hand. Why not say, that elected representatives have usurped the power of the people by making decisions for them? Why is the legislature the medium of 'We the people'? And if it can be, why not say that the people themselves, through the judicial process, sometimes act to constrain a runaway legislature? What excludes the possibility of including the judiciary as a medium by which 'We the people' articulates itself? The rhetoric of 'the people themselves' sabotages clear thinking. There are no plausible reasons to identify 'the people' with the voice of one institution, even when that institution is a Parliament. A parliament is a parliament, not the people. You and I and the others subject to the public authorities that have jurisdiction over us, are the people. You and I, as citizens, can participate in the political process. But as individuals among millions of similarly situated individuals, practically none of us can make much difference by participating in the political process. Whether you vote or not is unlikely to ever change the government that you are under. The probability that your or my individual vote, looked at in isolation, will change anything is no higher than the probability of winning the national lottery. When we discuss political issues we may understand more deeply what we believe and who we are as citizens. Some of us may found movements and become charismatic leaders for a cause or run for office. But nothing the great majority of us will ever do is likely to bring about any meaningful change in national public policy. The most likely way that a citizen is ever going to change the outcomes of a national political process, is by going to court and claiming that his rights have been violated by public authorities. If courts are persuaded by your arguments rather the counterarguments made by public authorities, you will have effectively said 'no, not like this!' in a way that actually changes outcomes. In the real world of modern territorial democracy, the right to persuade a court to veto a policy is at least as empowering as the right to vote to change policy.

(2) But the puzzle deepens. The legitimacy of the political process depends

on the consent of the governed. On this thinkers in the contractualist tradition as well as French and American Revolutionaries agree. Note that consent is the starting point for thinking about legitimacy, not majorities. Of course, given reasonable disagreement, actual consent is impossible to achieve in the real world. If legitimate law is to be possible at all -and given the problems that law is required to solve it had better be possible- less demanding criteria of constitutional legitimacy adapted to the conditions of real political life need to be developed to serve as real world surrogates and approximations to the consent requirement. In modern constitutional practice there are two such surrogates that need to cumulatively be fulfilled in order for law to be constitutionally legitimate. First, a political process that reflects a commitment to political equality and is based on majoritarian decision-making needs to be at the heart of political the decision-making process. This is the procedural prong of the constitutional legitimacy requirement. But this is only the first leg on which constitutional legitimacy stands. The second is outcome-oriented. The outcome must plausibly qualify as a collective judgment of reason about what the commitment to rights of citizens translates into under the concrete circumstances addressed by the legislation. Even if it is not necessary for everyone to actually agree with the results, the result must be justifiable in terms that those who disagree with it might reasonably accept. Even those left worst of and most heavily burdened by legislation must be conceivable as free and equal partners in a joint enterprise of law-giving. Those burdened by legislation must be able to see themselves not only as losers of a political battle dominated by the victorious side (ah, the spoils of victory!), they must be able to interpret the legislative act as a reasonable attempt to specify what citizens -all citizens, including those on the losing side- owe to each other as free and equals. When courts apply the proportionality test, they are in fact assessing whether or not legislation can be justified in terms of public reasons, reasons of the kind that every citizen might reasonably accept, even if actually they don't. When such a justification succeeds a court is in fact saying something like the following to the rights-claiming litigant: "what public authorities have done, using the legally prescribed democratic procedures, is to provide a good faith collective judgment of reason about what justice and good policy requires under the circumstances; given the fact of reasonable disagreement on the issue and the corollary margin of appreciation/deference that courts appropriately accord electorally accountable political institutions under the circumstances, it remains a possibility that public authorities were wrong and you are right and that public authorities should have acted otherwise; but our institutional role as a court is not to guarantee that public authorities have found the one right answer to the questions they have addressed; our task is to police the boundaries of the reasonable and to strike down as violations of right

those acts of public authorities that, when scrutinised, can not persuasively be justified in terms of public reason". Conversely, a court that strikes down a piece of legislation on the grounds that it violates a right is in fact telling public authorities and the constituencies who supported the measure: "our job is not to govern and generally tell public authorities what justice and good policy requires; but it is our job to detect and strike down as instances of legislated injustice measures that, whether supported by majorities or not, impose burdens on some people, when no sufficiently plausible defence in terms of public reasons can be mounted for doing so". Note how this understanding of the role of courts acknowledges that there is reasonable disagreement and that reasonable disagreement is best resolved using the political process. But it also insists that not all winners of political battles and not all disagreements, even in mature democracies, are reasonable. Often they are not. Political battles might be won by playing to thoughtless perpetuation of traditions or endorsement of prejudicial other-regarding preferences, or ideology, or straightforward interest-group politics falling below the radar screen of high-profile politics. Socratic contestation is the mechanism by which courts ascertain whether the settlement of the disagreement between the public authorities and the rights claimant is in fact reasonable. Courts are not in the business of settling reasonable disagreements. They are in the business of policing the line between disagreements that are reasonable and those that are not and ensure that the victorious party that gets to consecrate its views into legislation is not unreasonable.[43] Acts by public authorities that are unreasonable can make no plausible claim to legitimate authority in a liberal constitutional democracy. The question is not what justifies the 'counter-majoritarian'[44] imposition of outcomes by non-elected judges. The question is what justifies the authority of a legislative decision, when it can be established with sufficient certainty that it imposes burdens on individuals for which there is no plausible justification. The judicial practice of Socratic contestation, structured conceptually by the RHRP and the proportionality test, and institutionally protected by rules relating to independence, impartiality and reason-giving, is uniquely suitable to give expression to and enforce this aspect of constitutional legitimacy. Constitutional legitimacy does not stand only on one leg.

(3) The right to contest acts of public authorities that impose burdens on the individual is as basic an institutional commitment underlying liberal-democratic constitutionalism as an equal right to vote. Just as the ideals underlying liberal democratic constitutionalism are not fully realised without the institutionalisation of genuinely competitive elections in which all citizens have an equal right to vote, they are not fully realised without a rights and public reason based, institutionalised practice of Socratic contestation. There is a symmetry here that deserves to be

described in some greater length, because it helps sharpen the implications of the argument made above.

Both the constitutional justification of an equal right to vote and the legal institutionalisation of Socratic contestation do not depend exclusively on the outcomes generated. Both constitutional commitments are justified because they provide archetypal expressions[45] of basic constitutional commitments. Citizens get an equal right to vote largely because it expresses a commitment to equality. The weight of a vote is not the result of carefully calibrating different assignment of weights to outcomes. We do not ask whether it would improve outcomes if votes of citizens with university degrees, or those with children or those paying higher taxes would count for more, even though it is not implausible, that it would.[46] There are many aspects of election laws that can be tinkered with on outcome-related grounds. But any such laws much reflect a commitment to the idea that each citizens vote counts for the same to be acceptable. The same is true for the idea of Socratic contestation. It expresses the commitment that legitimate authority over any individual is limited by what can be justified in terms of public reason. If a legislative act burdens an individual in a way that is not susceptible to a justification he might reasonably accept, then it does not deserve to be enforced as law. We should not need to discuss whether or not to provide for the judicial protection of rights, even if it were not relatively obvious that outcomes are improved. What deserves a great deal of thought is how to design the procedures and institutions that institutionalise Socratic contestation. Should each individual be able to have any court address constitutional rights issues? Should there be special constitutional courts with the exclusive jurisdiction over constitutional issues? How should the judges be appointed? How long should their tenure be? What should the rules governing dissenting opinions, submission of amicus briefs, etc. be? How are the decisions by the judiciary linked to the political process? What comeback possibilities are there for the judicial branches? What are the advantages, what the drawbacks of having an additional layer of judicial review in the form of trans-national human rights protection? These are the kind of questions that need to be addressed by taking into account outcome-related considerations. But the commitment to legally institutionalise Socratic contestation reflects as basic a commitment as an equal right to vote and is, to a certain extent, immune from outcome-related critiques, much like the equal right to vote.

No doubt the successful institutionalisation of both electoral democracy and judicial review depend on a demanding mix of cultural, political and economic presuppositions. In Europe propitious conditions for the institutionalisation of Socratic contestation did generally not exist in the

ideologically divided world of the late 19th century and first half of the 20th century. Only after the end of WWII and the end of the Cold War had conditions changed in Europe to allow for the complete constitutionalisation of liberal democracy. One of the preconditions for the successful constitutionalisation of judicial review as Socratic contestation might well be a strong and dominant commitment to a rights-based democracy by political elites and a political culture that has a strong focus on deliberation and reason-giving. Just as there may be good prudential reasons not to force an immediate transition from a non-electoral benign despotism to an electoral form of government, because of the disastrous outcomes it might produce in a particular political environments, there might be context specific outcome-related reasons not to move from a purely electoral form of government to one that also institutionalises a practice of rights based Socratic contestation. But in either case those committed to liberal democratic constitutionalism have reasons to mourn a real loss.

IV. Conclusion

Thinking about litigation of human and constitutional rights in terms of institutionalising a form of Socratic contestation is more than an at best playful and at worst misleading analogy. It helps clarify thinking about two major questions presented by contemporary human and constitutional rights practice in Europe, that lie at the heart of the debate about judicial review. Does judicial review improve outcomes? And is it democratically legitimate? I have argued that judicial review as Socratic contestation is attractive both because it leads to better outcomes and because it reflects a deep commitment of liberal democracy.

Moreover, Socratic contestation provides an antidote to the collectivist - and often nationalist-[47] biases that underlies much of 20th century constitutional theorising about democracy.[48] It is no coincidence that inEurope the proliferation of legally institutionalised Socratic contestation was a corollary to European integration and the relative abatement of nationalist passions that had tormented Europe throughout much of the 19th and early 20th century. Europe no longer sees its legal foundation in a collectivist macro-subject, which started its life as mythical monster called Leviathan.[49] That monster is still not extinct and continuous to haunt the world with its insatiable hunger for adulation, subjection and sacrifice. It no longer wears the17th and 18th century garb of a sovereign king, nor the 19th century garb of the sovereign state or the 20th century garb of the sovereign nation. Where it exists in the western world that monster today is dressed up as 'We the People' and claims to speak as the embodiment of

democracy. Whichever clothes it covers itself with, it ultimately speaks the language of will, not the language of rights-based reasons. It will always have a precarious and unstable relationship with the practice of Socratic contestation. Socrates is never safe under public authorities that conceive of themselves as sovereign. In Europe that monster has been tamed, for the time being, and duly pushed off its throne and replaced by the idea of human dignity as the foundation of law. Human dignity is no less mysterious as the foundation of law than sovereignty, probably more so. But whatever is required to understand that mystery, it does not require idolatrous submission to a Leviathan that conceives of itself as an earthly god, an earthly god that not only claims to provide the ultimate horizon of meaning and defines for its citizens the limits of who they are. It also claims to have the coercive power to draft into service its citizens to kill the enemies that it defines and, if necessary, require citizens to sacrifice their lives. The great virtue and challenge of human dignity as the foundation of law is that as a philosophical idea is that it leaves open to each individual to explore what it means and wherein it lies. Its limits are the limits of a person's courage to seriously explore the horizons of her existence. Its mystery is the possible subject of an existential quest, which can take an infinite variety of forms or be ignored by those who choose to do so. Such a quest might have a strong political component, but it might also be spiritually focused and it might be none of the above.[50] But addressed to public authorities as a legal postulate human dignity is prosaic and reasonably straightforward. Central among the prescriptions derived from it[51] is the requirement that public authorities help build and sustain a world in which human rights are respected, protected and fulfilled. The practice of legally institutionalised Socratic contestation, along with electoral accountability and trans-national legal integration, is a central element of such a world.

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[1] J. WALDRON, "The Case Against Judicial Review", Yale Law Journal, 2006, pp. 1348-1406.

[2] R. BELLAMY, Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy, CUP, 2007; besides addressing the issue of judicial review, this book addresses a significantly wider range of constitutional questions.

[3] Of course this is a generalisation. In Britain as well as Scandinavian countries the role of courts in authoritatively deciding constitutional rights issues is limited and debates about the desirability of judicial review are very much alive.

[4] This way of framing the issue has much in common with the methodology described by R. DWORKIN, Law's Empire, 1986; such an approach does not only provides a positive account that shows the practice in its best light, it also articulates

a normative standard by which specific aspects of that practice can be criticised as falling short of what it is supposed to be.

[5] Canonical contributions include A. BICKEL, The Least Dangerous Branch, 1969; J.H. ELY, Democracy and Distrust, 1981; R. BORK and R. DWORKIN, Freedom's Laws, HUP, 1996; C. EISGRUBER, Constitutional Self-Government, HUP, 2001;L. SAGER, Justice in Plainclothes, Yale University Press, 2004; L. KRAMER, The People Themselves, OUP, 2004; M. TUSHNET, Taking the Constitution Away from the Courts, Princeton University Press, 1999.

[6] This is a point rightly made by D. BEATTY, Ultimate Rule of Law, OUP, 2004.

[7] R. ALEXY, A Theory of Constitutional Rights, OUP, 2002; D. BEATTY, Ultimate Rule of Law, OUP, 2004.

[8] Here I follow Gregory Vlastos, who distinguished between the Socrates of the elenctic dialogues of Plato's earlier period and the Socrates depicted in later dialogues. The elenctic dialogues are, in alphabetical order: The Apology, Charmides, Crito,Eutyphro, Gorgias, Hippias
Minor, Ion, Laches, Protagoras and the first book of The Republic; See G. VLASTOS, Socrates: Ironist and Moral Philosopher, CUP, 1991, p. 46.

[9] Note how this formulation is different from the one that Scanlon uses to capture the core of the liberal contractualist conception of justice, requiring "justifiability to others on grounds they could not reasonably reject"; see T.M. SCANLON, What We Owe to Each Other, HUP, 1998. The difference between these formulations is the difference between a formulation that seeks to establish criteria for justice and one that establishes criteria for legitimacy. Even though this is in issue of some importance, it can't be addressed here. As I will argue in greater depth below, judicial review is concerned with legitimacy, not justice.

[10] Perhaps also for reasons relating to the structure of constitutional text in the US there is a view that courts charged with their enforcement of such provisions should read them as short-hand references to a set of more specific rules that were intended either by the constitutional legislator or that reflect a deep historical consensus of the political community. Whenever courts can't find such a concrete and specific rule, the legislator should be free to enact any legislation it deems appropriate.

[11] F. SCHAUER, "Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture", in G. NOLTE, European and US Constitutionalism, Cambridge University Press, 2005; see also: C. FRIED, Right and Wrongs, OUP, 1978.

[12] The Canadian Charter prescribes in Section 1 that rights may be subject to "such reasonable limits prescribed by law as can demonstrably be justified in a free and democratic society". Section 36 of the South African Constitution states that rights may be limited by "a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; (e) less restrictive means to achieve the purpose".

[13] R. ALEXY, A Theory of Constitutional Rights, OUP, 2002. The following pages draw heavily on M. KUMM, "Constitutional rights as principles: On the structure and domain of constitutional justice", ICON, 2004, No 2, pp. 574-596.

[14] If legal reasoning is a special case of general practical reasoning [cf R. ALEXY, A Theory of Legal Argumentation, Clarendon, 1989], reasoning about rights as principles is a special case of legal reasoning that approximates general practical reasoning without the special features that characterise legal reasoning.
[15] E.C.H.R., Lustig-Prean and Beckett v. United Kingdom, 27 Sept. 1999.
[16] R. ALEXY, supra note 8, at p. 102. Alexy illustrates the Law of Balancing using indifference curves, a device used by economists as a means of representing a relation of substitution between interests. Such a device is useful to illustrate the analogy between the Law of Balancing and the law of diminishing marginal utility.
[17] That does not mean that the two are identical. There are at least four differences between substantive rights analysis and general policy assessments. First, courts are not faced with generating and evaluating competing policy proposals, but merely to assess whether the choices made by other institutional actors is justified. Second, they only assess the merit of these policy decisions in so far they affect the scope of a right. Third, specific constitutional rules concerning limits to constitutional rights or judicial precedence establishing rules that fix conditional relations of preference frequently exist. Fourth, proportionality analysis leaves space for deference to be accorded to other institutional actors. The ECHR refers to this as the 'margin of appreciation'.
[18] For the argument that the ECJ's human rights jurisprudence also fits the RHRP, see: M. KUMM, "Internationale Handelsgesellschaft, Nold and the New Human Rights Paradigm", in M. MADURO and L. AZOULAI, The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Treaty of Rome, Hart [forthcoming].
[19] PLATO, Apology, 21a.
[20] As Vlastos points out, only the Socrates of the middle and later dialogues has sophisticated theories about metaphysics, epistemology, science, etc.
[21] Arguably nothing made Ronald Dworkin's account of judging more suspect to judges then his claim that adjudication required demi-god like 'Herculean' intellectual labor; see ICON, 2003, No 4 [special issue on Dworkin].
[22] PLATO, Apology, 21c.
[23] For an insightful analysis, see: G. VLASTOS, "The Socratic Elenchus", Oxford Studies in Ancient Philosophy, 1983, pp. 27-58.
[24] R. ROBINSON, Plato's Earlier Dialectics, 2nd ed., Oxford, Clarendon, 1953, Chapter 2.
[25] PLATO, Apology, 31c-32a.
[26] The claim is not that Socratic elenctic reasoning is generally like proportionality analysis, or that cross-examination plays an important role in constitutional litigation. Instead the claim is that courts and the early Platonic Socrates engage in a practice, in which they challenge others to provide reasons for their claims and then assess these reasons for their internal consistency and coherence. In this way the two practices share salient features. Note how in the Georgias Plato has Socrates describe the difference between his procedure and that of the law courts [see PLATO, Georgias, 471E-472C, 474A, 475E].
[27] This does not mean that there is never an occasion where theoretical sophistication is required.
[28] Interestingly highest courts are often geographically located not in a political power centres, but in the provinces. The ECJ is in the sleepy Duchy of Luxembourg, not in the European political power-centre that is Brussels. The European Court of Human Rights is in Strasbourg, not a European capital. The German Federal Constitutional Court is in Karlsruhe, not in Berlin. On the other hand I am not

aware of a single country in Europe that does not have its highest political branches located together in its capital. The widely challenged double seat arrangement of the European Parliament in Strasbourg and Brussels is the only exception to this rule.

[29] PLATO, Apology, 30 E.

[30] PLATO, Menon, 84.

[31] PLATO, Republic, Book I.

[32] In modern political thought it was Hannah Arendt, who, through the figures of Socrates on the one hand and Eichmann on the other, reflected on the link between justice and the practice of thinking on the one hand and evil and thoughtlessness on the other; see H. ARENDT, The Life of the Mind, Harvest, 1981, pp. 3-16.

[33] J. WALDRON, "The Case Against Judicial Review", supra note 1.

[34] Supreme Court of the United States, Roe v. Wade, 1973, 410 US 113.

[35] Supreme Court of the United States, Griswold v. Connecticut, 1965, 381 US 479.

[36] Of course I don't know how widespread these sentiments were in the British officer corps, the ministerial bureaucracy or the parliament at the time. I am merely assuming that the British context was, at the time, not radically different from views I encountered discussing this and connected issues while doing military service in the relative progressive German Bundeswehr in the 1980s.

[37] H. ARENDT, The Origins of Totalitarianism, Harvest, 1985, pp. 461-474.

[38] L. SAGER, Justice in Plainclothes, Yale University Press, 2004, pp. 199-201.

[39] See the 9th Amendment of the US Constitution; C. BLACK, A New Birth of Freedom, 1997.

[40] Even today France is something of an outlier in the institutions it chooses to protect rights. In France the Conseil constitutionnel, an institution that increasingly engages in rights analysis of the kind described above, is not referred to as a court. Though it is a veto player in that it can preclude legislation from entering into force by holding it to be in violation of rights, it remains a 'council' to the legislature and individuals may not bring cases.

[41] Individuals can either vindicate their rights by filing a complaint with the constitutional court after exhausting other remedies, or they have to convince an ordinary court that their constitutional claim is meritorious, requiring that court to refer the issue to the constitutional court.

[42] P. PETTIT, Republicanism: A Theory of Freedom and Government, OUP, 1997. Larry Sager refers to the court as a redundant 'quality control' mechanism; see L. SAGER, Justice in Plainclothes, YUP, 2004. Tom Franck refers to the function of courts as 'providing a second opinion'; see T. FRANCK, Proportionality as Global Second Opinion, unpublished [on file with the author].

[43] Of course the very fact of rights litigation suggests that there is also reasonable disagreement about the limits of reasonable disagreement. Here the original argument about reasonable disagreement about rights as the proper domain of the democratic process resurfaces on the meta-level. But whereas it is a plausible claim to suggest that disputes about justice are at the heart of what the democratic process is about, it is not as obvious that the democratic process is also good at policing the domain of the reasonable. At any rate, there is no reason not to entrust the task of delimitating the domain of the reasonable to courts, both as a matter of principle - giving expression to the link between legitimacy and reasonableness- and because it improves outcomes [see infra].

[44] For an account of the 'counter-majoritarian difficulty' as an academic obsession in US constitutional scholarship, see generally: B. FRIEDMAN, "The Countermajoritarian Problem and the Pathology of Constitutional Scholarship", N.W. U. L. Rev,2001, pp. 933-ff.
[45] For the idea of legal archetype as a legal rule emblematic for a wider commitment, see: J. WALDRON, "Torture and Positive Law: Jurisprudence for the White House", Columbia Law Review, 2005, pp. 1681-ff.
[46] Even when the right to vote is withdrawn, as it is in many states for convicted prisoners, the reasons for doing so are not outcome-oriented, but seek to punish the prisoner by expressly denying him the status of an equal member of the political community.
[47] Is it a coincidence that the only member states of the European Union that do not have a strong form of judicial review have a monarch as a head of state (e.g., Britain, Holland, Denmark, Finland, Sweden) as a representative of national unity? Is it a coincidence that, with the exception of Spain, there is no country that has a strong from of judicial review that is a monarchy? Is it a coincidence that the government that strengthened the constitutional role of the European Convention of Human Rights in the UK was also the government that dared to radically reform the hallowed but deeply undemocratic national institution that is the House of Lords and encourage devolution? At the very least these patterns invite further analysis.
[48] This authoritarian and collectivist bias is something that 20th century constitutional theory shares with much of 18th century constitutional thinking. It is a remarkable feature of continental thinkers such as Rousseau, Kant or Fichte, how quickly they move from the conceptual starting point of citizens recognising each other as free and equal to apologists of a strong centralised state. The shadow of Hobbes has cast a long shadow and continues to linger over much of constitutional theory.
[49] Article 6 EUT mentions human rights, democracy and the rule of law as foundations of law. Ultimately these in turn are derived from a commitment of human dignity [see infra].
[50] Carl Schmitt's insinuation that existential seriousness is exclusively connected to the drama of the 'political' as he understands it is so evidently impoverished that it is difficult not to accept it as an invitation to psychologies; see Der Begriff des Politischen, 3d ed., Duncker & Humblodt, 1963.
[51] There are two other, more specific rules derived from human dignity: first, the general prohibition of instrumentalisation of persons without their consent; second, an anti-humiliation rule. For the way that human dignity has been understood in human rights discourse, see: D. KRETZMER and E. KLEIN, The Concept of Human Dignity in Human Rights Discourse, Kluwer, 2002.

EUROPEAN JUDGES IN A GLOBAL SOCIETY: POWER, LANGUAGE AND ARGUMENTATION

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I. INTRODUCTION

The vertiginous changes that are occurring in our society are called globalisation, and, obviously, law as an instrument or technique in the service of all society cannot be free from their effects. Precisely in this field, one of the elements characterising our society is the judge and he is in furtherance, the axis of the political system around which law is created and applied, a reason why it is also reasonable to think that the judge is suffering special transformations as a consequence of globalisation.

To overestimate the phenomenon of globalisation and its effects in law means to forget too quickly other times which were requirements for the configuration of the legal field, the expansion of the Roman empire in ancient times, the middle ages' Christendom, or even the effects that the discovery of the American continent had from the 16th century. In furtherance, Kant, in the end of the 18th century and in his well-known workPerpetual Peace, considered a process of globalisation associated with law in the following terms:

> "The community –more or less narrow– that was established among all the peoples of earth has made it to a point in which a violation of law, committed anywhere, has effects in all other places; from this one can infer that the idea of a global citizenship law is not a legal fantasy, but a necessary complement of the unwritten code of political and international law that in this way is elevated to the category of public law of mankind and favours perpetual peace, being the condition necessary for it to be possible to keep the hope of a continuous approximation to the state of peace".[1]

In any event, if it was possible to simplify reality so as to better understand it we could bring ourselves closer to the contemporary judge starting from three essential features: the judge is a power of the state that, despite its distinctive configurations, is in general limited to the solution of concrete problems;[2] the judge uses a very peculiar legal language; and it is more and more important that in his/her decisions the judge makes and effort to justify him/herself with a particular argumentation, reasoning why a particular option was chosen as the most appropriate among the different possible ones.

It is thus that first of all the judge is a power of the state who, to paraphrase J.L. Austin, "does things with cases",[3] with which its limitations are evident to the extent that it is not the judge who selects the cases but s/he must resolve only those disputes within their conferred competence and must act in accordance with very precise rules of procedure; probably the best articulated of these external limits to judicial power was done by Alexis de Tocqueville by observing closely the political evolution of North-American society in its foundational years from the early 19th century.[4] Secondly, the power of the judge is manifested in the solution of cases with words, which highlights the importance of the language of judges, the judicial language,[5] from which, as a rule, other powers of the state draw inspiration, for example the Administrations. And, lastly, if something characterises the judicial power it is the necessity to reason its decisions and use arguments that, according to orthodox thinking, can only be legal. Even though the decisions of the judge are binding and must be complied with inexorably, the evolution of society allows that judgments are criticised to the point after which it is legitimate to change them, by introducing constitutional amendments, by passing new statutes, or simply changing the judges via the established procedure.[6]

It is interesting, thus, to observe in the context of globalisation some relevant aspects of these constitutive elements of the contemporary judge, their power, language and argumentation, and observe it precisely from the European experience; that further can identify these elements easily and almost linearly after the Second World War, in little more than half century. The results of the European experience is the configuration of a judge that should be prepared to face the new perspectives of globalisation, to accommodate a new model of what could be called "judicial cosmopolitanism", understood as the process of establishing international and supranational judicial instances, necessarily supported by an involvement of national judges in the application of a universal order; and that must be developed in "communicative deliberative contexts", what is visible especially in relation to human rights in regional spheres, such as the European and American, and in the global legal space.[7]

II. The power of the European judge in the society of globalisation: Constitution, European Union and fundamental rights

Within the narrow limits imposed upon the judge, s/he has an extraordinary effective power in the cases s/he gets to analyse. In The Federalist, by approving the U.S. Constitution of 1787, the founding

fathers of the United States of America considered that the judicial power was "the least dangerous to the rights established by the Constitution, as its capacity to disturb or curtail them will be smaller";[8] nevertheless, A. Bickel undertook the duty to warn about the difficulties of the "compatibility of judicial control with democratic government".[9] The same can be observed in present day Europe where the increasing power of judges is evident. This is due, in substance, to the fact that the judge of our days is a constitutional judge, a judge bound to fundamental norms, superior to the very laws enacted by Parliaments. But in the Europe of the last half century a new complementary phenomenon has emerged and, even though it has the same raison d'être, the existence of new fundamental texts, to this the decisive circumstance that these news texts have their own judicial interpreters must be added: thus, next to the judges applying the Constitution and who, in this way, are constitutional judges, a special jurisdiction in the form of a Constitutional Court; but also an international treaty has been adopted, the European Convention of Human Rights, which, nevertheless, via its supreme interpreter, the European Court of Human Rights, has attained the rank of constitutional charter in Europe. Lastly, starting from an initially economic aspiration, the European Union was created, whose Court of Justice of the European Communities consecrated by its own interpretation the community legal order as an order that, taken as a whole and in the fashion of federal constitutional law, has primacy over the laws of the member states of the Union.

Thus, what characterises European judges is their role as constitutional judges applying the Constitution, judges applying the European Convention of Human Rights and judges bound by European Union law. It is necessary to underline that the legal strength of the several fundamental texts -the Constitution, the European Convention of Human Rights and the constitutive Treaties of the European Communities and the European Union- is derived precisely from the intervention of certain courts, either Supreme or Constitutional Courts of the respective member states, or the Strasbourg Court with respect to the 47 states of the Council of Europe,[10] or the Luxembourg Court in the 27 states of the European Union. One could say, to sum up, that the labelling of a judge as constitutional, human rights or supranational is nothing other than a way of appreciating a certain aspect of the 'constitutional' power of the European judge.

The first revolution in contemporary law is derived from the recognition of legal effects of national Constitutions and, consequently, its application by the judges. This transformation was visible in the North American constitutional evolution advocated from its beginning in the realisation of

a federation of states and of the supremacy of the federal Constitution, what took place especially in the 19th century and most prominently after the Civil War,[11] but was also extended to fundamental rights in particular during the 20th century.[12] Nevertheless, in Europe it was in the middle of the 20th century that the pioneer experiences of the 1920s and 1930s in Austria and Spain were crystallised in systems of concentrated control of constitutionality in Italy, Germany and France, expanding afterwards in the 1970s to Southern Europe; and, in the last decade of the 20th century, to countries of Central and Eastern Europe, including the Russian Federation.[13]

Without prejudice to national peculiarities, the creation of a Constitutional Court, supreme interpreter of the Constitution, does not presuppose taking away power from ordinary judges to interpret and apply the Constitution, but, except for some national systems, as in the paradigmatic French case, judges can question the constitutionality of the laws themselves before the Constitutional Court. In fact, and without reaching the extreme situation of the North American diffuse control that allows the judge not to apply a law s/he considers unconstitutional, in most of the European judicial systems the judge can review the constitutionality of a law in the Constitutional Court.

As the Constitutions claim normative force, the powers of the judge increase to the point that the direct application of the Constitution is done in prejudice of the supremacy of Parliamentary law. In fact, this effect has been particularly meaningful in two of the great legal systems of Europe, the French and the British, which until recently were still "statute-centered" and their deficiencies were put in evidence precisely by confronting them with other orders applicable in France and the United Kingdom with respect to European Union law and the law derived from the European Convention of Human Rights. Thus, for example, the role of the European human rights judge, in the case of the UK, has led to the adoption of a quasi-constitutional statute as the Human Rights Act of 1998.[14] And the same can be said about the effect of the reception of European Community law in the United Kingdom and in France. There, complex challenges to the constitutionality of national laws have been especially paradoxical. National laws are not immune to the effects of Union law, in that they are susceptible to judicial suspension ('disapplication'), as demonstrated by Factortame in the UK,[15] or can be the subject of a 'conventionality' review, as in France.[16]

As U. Breccia has pointed out, this increase in the powers of the judge is manifested in a complementary way in a "return to law", as a wider point of reference than the law itself, and in an "increase of the responsibility of the

interpreters".[17]

The penetration of the supranational judge, configured in the framework of the European Communities and the European Union, has had in practice a revolutionary effect similar to the one that produced the consideration of the Constitution as a fundamental norm; probably the new factor is that the supranational judge must apply, mutatis mutandis, another constitutional order in the internal order. And this transforming effect has been essential in national legal systems. In fact, the Court of Justice of the European Communities, as it evolved from its condition of mere "judge of the market" towards a "constitutional judge", has developed some structural principles of Union law -the primacy of Community law over municipal law, the direct effect of Community law and the liability of national authorities for violations of Community law- and has configured a law that, despite any reticence it may bring, resembles faithfully a federal law the objective of which is to solve the problems raised by the relations this federal law must maintain with the laws of the states of the federation.[18]

If the relations between European Community law and the laws of the member states are so similar to the ones peculiar to federal law, the judicial system of the European Union responds precisely to this same federal institutional scheme and counts on judges of the federation, of the European Union, the Community Courts seated in Luxembourg, and the national judges that also act as judges of the European Union.[19]

Precisely the preliminary ruling system constitutes the most paradigmatic example of a procedure of 'federal' collaboration between national judges and the Court of Justice. In this sense, without the richness of this special way of access to the Luxembourg Court, European Community law could not have become what it is nowadays. For example, it is unlikely that in a direct action, such as the action for annulment, damages, etc., which deals with merely administrative or constitutional questions among the European institutions, could have created a jurisprudential doctrine about direct effect, primacy and liability. The same can be said about the action of non-compliance, put in the hands of the Commission or even of the member states and that, definitely, resembles and builds on the Luxembourg Court, an arbitral tribunal on the compliance of obligations derived from European Community law. In turn, in preliminary rulings and without prejudice to the prudence sometimes shown in answers to national judges, the Court of Justice resolves concrete cases of citizens.

In the evolution of the same action for non-compliance the procedure adopted, of fundamentally intergovernmental character, has been adapted

in such a way to the new profiles of European integration that the classic technique of International law is softened and adapted to a focus more concerned with the resolution of questions asked initially to the European Commission but that in fact try to resolve complaints or disputes of the citizens.

For this reason the Court of Justice often resolves by two simultaneous judgments a preliminary ruling and an action of non-compliance; obviously, the jurisprudential doctrine is the same but the formal answers from the Court of Justice to the action of non-compliance and the preliminary ruling are different; in the first case the non-compliance from a member state is declared and in the second one there is an indication to the national judge on how s/he should resolve the dispute affecting the citizen.[20]

But it is also important to underline that the jurisdictional activity of the Court of Justice of the European Communities is very meaningful if one refers to statistics in accordance with which in 2006 preliminary rulings represented 46.32% of the cases started before the Court; further, in 2006 of the 389 judgments, 192 were preliminary rulings and 111 were judgments relative to the non-compliance by the authorities of member states. From an evolutionary point of view, from 1952 to 2006, the Court of Justice has given 7,178 judgments and during this same period 5,765 preliminary rulings from national judges have been registered in the Luxembourg Court.[21]

In the past decades the Court of Justice has added to its work as "judge of the market" that of "human rights judge", a task facilitated with the adoption in December 2000 by the European Union institutions of the Charter of Fundamental Rights of the European Union. It must be stressed that even in the language one can appreciate a qualitative change: one does not speak in the European Union, as it is normal in the international arena, of "human rights" but of "fundamental rights", that is, the terminology used in continental Europe, by German influence, to refer to "constitutional rights"; this is due, definitely, to the technique of this very Court of Justice in deriving its interpretation from "the constitutional traditions common to the member states".

To sum up, the Court of Justice is acquiring a new, more constitutional profile than it was initially possible to imagine, what is derived from a revised judicial structure in the last two decades with the constitution of a Court of First Instance and a specialised Court of Public Service.[22] Definitely, the European Union Court faces new challenges, especially after the enlargement of the European Union to 27, but the elevation of European Union law to Constitutional law in the

member states and its consideration as a constitutional norm by community courts and national courts in applying Union law is uncontestable.

Lastly, the protection of fundamental rights is connected to the recognition of the normative value of the Constitutions in which they are proclaimed. Even if one could think that in the North American case since 1791 the Bill of Rights of the Constitution had effects upon the interpretation of the Supreme Court, what happened is that it was necessary to wait until the 20th century for North America to make the effective judicial protection of individuals' fundamental rights a reality. In the European case, the point of departure is much clearer as until the second half of the 20th century one could not properly speak of judicial protection of fundamental rights. And this protection has been undertaken at the same time as the several democracy waves: in the late 1940s and 1950s in France, Italy and Germany; in the 1970s and 1980s in Southern Europe; and in the 1990s in Central and Eastern European countries.[23]

This judicial protection of constitutional rights has been strengthened by the work of the European Court of Human Rights in the application of the European Convention of Human Rights of 1950. Even if the evolution of the Strasbourg Court from its inception in 1959 has been gradual, in it one can appreciate an opening to the presentation of individual complaints that has been made fully effective from the entry into force of Protocol 11 on 1st November 1998. But in any event the jurisprudential repository achieved until this moment was already impressive.

The European Court of Human Rights, which applies the European Convention to which there are already 47 states Parties, has experienced a spectacular increase in the number of cases what has supposed an extraordinary judicial response to the point that in 2006 in Strasbourg 47,733 complaints were received and 1,560 judgments were given. While in the foundational stage of the European Court, from 1960 to 1998, it had not given more than 837 judgments, from 1998 to 2006 the number of judgments rises to 5,655.[24]

Thus, once a critical mass of judicial decisions is obtained, the most important challenge faced by the Strasbourg Court is in facing the risk of a judicial collapse. In response to such a concern on 13 May 2004Protocol 14 was signed, and it is awaiting only the last and necessary ratification, the 47th, from the Russian Federation. In this protocol important institutional and procedural changes are proposed: for example judges would be elected for a non-renewable term of 9 years (new Article

23 of the Convention); the function of admitting complaints now left to a committee of three judges would be undertaken by a single judge (new Article 27 of the Convention), and the committees would have the possibility to give judgments on matters where there is a settled jurisprudence (new version of Article 28 of the Convention); the Human Rights Commissioner of the Council of Europe would have the possibility of presenting written observations and participating in the public hearing (new Article 36 § 3 of the European Convention). A possibility of enforcement of judgments before theEuropean Court to the Council of Minister is also foreseen (new Article 46 of the Convention); lastly, the adherence of the European Union is made possible (Article 59 § 2 of the Convention).

The institutional relation between the development of the European Union and the protection of human rights in Europe has been the work of judges. On the one hand, the Court of Justice of the European Communities, before it could rely on a Charter of Fundamental Rights of the European Union, already referred since 1974 to the common constitutional traditions, to the European Convention and its interpretation by the European Court of Strasbourg.[25] In the same way, the European Court has been, to the greatest possible extent, respectful of jurisprudential developments of the Court of Justice of the European Communities even though it has reminded the connection of the European Union Institutions, including the Court of Justice itself, to the European Convention and the doctrine of the European Court itself.[26]

Thus, in the characterisation of the European judge, the complementary traits, characteristic of a constitutional jurisdiction, a supranational jurisdiction and a fundamental rights jurisdiction, relative to the several levels in the exercise of jurisdiction merge: in every state, in the European Union or on the European scene. It should be noted that, in any case, each judicial instance unequivocally aspires to simple, proper, and full constitutional jurisdiction.

III. THE LANGUAGE AND ARGUMENTATION OF CONTEMPORARY EUROPEAN JUDGES: THE CONVERGENCE OF MODELS

The external aspect of judicial language and the internal structure of a judge's discourse are connected and have a series of implications of particular importance not only within law but also in the political conception of the functions and powers performed by judges in society. In this way, for example, Michel Troper considers that the 'motivation' constitutes an ideology that dons a mask and dissimulates the reality of

power with the value of law, but also in the structure of the motivation lies its autonomy for at the same time the power is shaped, it is limited.[27]

Both the language and the argumentation of judges depend, to a large extent, of the legal tradition to which they belong. A long time ago, Neil MacCormick has presented in a simple yet particularly penetrating way the difference between two cultural traditions, the Continental European and the Anglo-Saxon, and explained how they are translated into the language of the judges, and also in their way of reasoning and argumentation:

"The contrast is sometimes considered as that between deduction and induction, sometimes as that between law as science and law as art. Certainly, I have the impression that in Continental Europe, with its tradition of a career judiciary recruited from among gifted and relatively young men and women, there is much emphasis (perhaps there has to be) on the idea of judging as a science which can be learned and which must be practised with an impersonal rigour. In Britain, on the other hand, it is not the trained scientist but the practised artist who, having distinguished himself in a long period of practise in advocacy, is eventually summoned on to the bench to be a judge. And in that role it would almost be true to say that he is being called to a more exalted practice of the same art as before, rather than graduating to a wholly different mode of thought and activity."[28]

Now, these social differences and the corresponding sensitivities derived from the civil law and common law traditions fade away and converge in the European judges appreciating some new judicial models in continuous evolution and that are represented by the Court of Justice of the European Communities and the European Court of Human Rights; the Luxembourg one as the direct heir of the Roman-Germanic legal tradition -as one can deduct from the establishment of the European Communities in the 1950s as a French signal particularly relevant through one of the drafters of the ECSC Treaty, Professor Paul Reuter-, and the Strasbourg more influenced by the Anglo-Saxon legal culture – to the extent that the United Kingdom has participated since the beginnings of the European system of human rights protection, unlike the Common Market and its institutions until its adherence in 1973. In any event, the transformation points towards the achievement of a transparent language, adjustable to the demands of the democratic principle and the requirements of a judicial argumentation that, definitely, legitimises the exercise of judicial power. The result has manifested itself in a fertile dialogue among the judges, not exempt from tensions and polemic, that gradually configured an embryonic European judicial power; or, if preferred, an European judicial space open to debate and controversy.

The expansive force of democracy has also left some of its effects in the power of the judges, and, by influence of these, in the other powers of the state.[29] Now, traditionally one tends to think that judicial language, more than clarifying, tries to obscure the reasons behind the judicial decision; nevertheless, democratic values, of unveiling the powers that belong to the people, of the arcana imperii, require that the exercise of power is clarified, require power to be exercised in the most transparent way possible.[30]

In this way, the first demand imposed on the judge, or to who exercises judicial power, is that s/he understands what s/he is saying and, secondly, it is required that the raison d'être of the judicial decisions is explained, since modernly it is also necessary that the mandates are accepted and it is required, thus, that arguments are given why the decision is adopted in a certain way. About this one can affirm as a sign of our times, as Viola and Zaccaria indicate, that "law is a task consisting of inoculating reasonability into the exercise of authority".[31]

In fact, to refer to the power of persuasion of the judge has an evident 'valorative' burden as to what are the powers of the judge and what her/his function in current society presupposes.[32] It is commonplace to consider that the motivation of decisions constitutes an advancement made by the revolutionaries of the 18th century in the face of the absolute power of the ancien régime; more specifically, as a more eloquent manifestation of this tradition one can recall the advice of the medieval commentator: si cautus sit iudex, nullam causam exprimet; that is, if the judge is prudent s/he will abstain from offering reasons.[33] In the Anglo-Saxon legal tradition no legal text imposed as a rule on the English judge the obligation of motivating decisions; by being an officer of the King, no accountability and reasoning for decisions could be demanded, but this obligation to motivate sentences had to be founded on ancient jurisprudence from the early 18th century.[34]

The internal structure of reasoning employed by judges at the moment of adopting their decisions depends to a large extent on one's conception of law and one's own cultural and legal environment.

One the one hand, the reach of argumentation varies substantially according to the perspective from which the power of the judge is conceived: as a power bound to reason or as a power derived from will. When a judicial decision is considered as a result from saying the law, of iurisdictio, judicial argumentation has a secondary function and would consist solely of making the legal reasoning employed understandable and

that inevitably leads to the judicial decision adopted, as it seems to be deducted from the technique of subsumption [subsunción], so much advocated in continental Europe and until recently the one responsible for the peculiar way French courts had of expressing themselves.[35] On the other hand, when one understands that the function of the judge consists of a power of decision founded upon the power's will, the argumentation demands an unexpected leading role to the extent the judge must explain why s/he chooses one or another of the different alternatives offered in the application of law and that it is not for a fancy but in attending to reasons expressed by the judge and that lead to the imposition of will. Obviously, legal reality is not that simple and every judicial decision requires conformity to the law, demanding a combination of reason and will in judicial decision-making.

Similarly and by what is referred to the effect that different legal conceptions have on the way of argumentation, one can consider, for example, that in the positivist view the application of law is not more than a logical inference, the judge's way of expressing does not require more than an explanation of the elements used in the automatic application of law; in exchange, if the conception sustained admits several solutions as legally possible, the argumentation demands an extraordinary dimension to the extent that it is sought after for showing that the decision reached is the best one possible.

We could also take into account the legal tradition manifested in the choice of judges and that, obviously, has a decisive influence on the forms of reasoning, argumentation and decision of judges. Thus, the Anglo-Saxon judicial reasoning is best understood if one takes into account that it corresponds to judges who in general have been previously acting as attorneys or barristers, while in the continental European cultural sphere judges are usually recruited like the rest of servants among graduated young people and only after a professional career they reach the highest positions of judicature, a circumstance that favors decisively the more technocratic language.

The preceding factors influence, at last, the interpretation undertaken by each judge, who must choose, among the several available methods of legal interpretation, the one best adjusted to the decision. As Alf Ross already warned, "every interpretation that shifts the basis of the logical-grammatical principle is law creation".[36] But also Jean Hauser has recalled and proved with examples a painful obviousness to any lawyer: "only with the words of the law one can make much, both in the 19th and in the 20th centuries or even, with the same words, one can maintain in the 20th century the opposite of what was maintained in the 19th

century".[37]

The judicial models of each legal system support these conclusions. Thus, for example, M. Lasser did a comparative analysis among three courts that are significant examples of three different ways of expression and reasoning: the model of the French Cour de cassation is institutional, the U.S. Supreme Court takes an argumentative focus and the community Court of First Instance adopts an argumentative and institutional perspective.[38] To get to this conclusion he analyses the modes of interpretation of the three courts, their composition and the origin of the judges (in the French case they come from the elitist group of magistrates; in the U.S. case the most frequent case is that they have been in several careers such as attorneys, civil servants or academics).[39] Lasser also examines the manner of expression (for a North American lawyer it is surprising that a decision of the Cour de cassation can fit into one single page, while the U.S. Supreme Court presents its decisions in an extremely detailed fashion); and, similarly, it is relevant that the debate is only internal (in the European case) or that it is made public in individual opinions (in the U.S. Supreme Court one can easily identify the opinion of each judge that is frequently laid down in a concurring or dissenting opinion in relation to the majority decision); which definitely creates different kinds of responsibility: institutional in the European case and individual in the U.S. practice. To sum up, "the key to control and legitimacy of the North American judicial system lies on an interpretive justification made public in discursive terms, while [in the French case] the republican justification is undertaken through institutional, professional and educational means".[40] When it comes to the Court of Justice of the European Union, M. Lasser presents the function of intervention of the Advocate General, who, even though being a member of the Community Court, lays down his/her conclusions independently and impartially before the Court of Justice adopts the judgment through secret voting and without the possibility of individual opinions.[41]

Making reference to the difference between European courts, in this case the European Union Court of Justice, and American courts, J.H.H. Weiler underlined the "special and dependent relationship" between the Court of Justice and national courts and has proposed, "in what refers to the architecture", "that the model should be less Anglo-American and more continental, but in what refers to the style of the decisions, I believe that the Court should abandon the cryptic and Cartesian style that keeps on characterising many of its resolutions and adopt a more discursive, analytical and conversational style that is more often associated with the world of common law (even though others also practice it, such as, for example, the German Constitutional Court)".[42]

Thus, the divergences in legal culture can result in an extraordinarily important obstacle for the functioning of courts up to the point that, in the opinion formulated by the judge of the European Court of Human Rights Gerald Fitzmaurice, when referring to the difficulties of interpreting the European Convention, is determining the political and cultural framework:

"Both parties may, within their own frames of reference, be able to present a self-consistent and valid argument, but since these frames of reference are different, neither argument can, as such, override the other. There is no solution to the problem unless the correct -or rather acceptable- frame of reference can first be determined; but since matters of acceptability depend on approach, feeling, attitude, or even policy, rather than correct legal or logical argument, there is scarcely a solution along those lines either".[43]

For this reason, in Europe, a convergence of models is produced and one seeks to find a balance between the continental European traditions and perspectives and the Anglo-Saxon focus and practical solutions, avoiding extremes such as the synthetic oracles of French courts and the argumentative over-abundance of other European courts. This convergence is appreciated and is progressive between the modes of action and reasoning of the European Court of Justice and the more flexible model of the European Court of Human Rights.

IV. THE JUDICIAL COSMOPOLITANISM AND THE COMMUNICATIVE DELIBERATIVE CONTEXTS IN EUROPE AND THE WORLD

In Europe the simultaneous activity of national judges, European Community judges and judges of the European Court of Human Rights has presumed in the past five decades the opening of an intense dialogue among judges.[44] In a society of globalisation this judicial dialogue should be more intense in the sense indicated by, for example, G. Zagrebelsky: "when constitutional goods are made interdependent and indivisible, it is natural that constitutional justice of any level aspires to integrate itself -even if not in a cosmopolitan supranational institutional way, what is not the goal and perhaps never comes to be- at least in communicative deliberative contexts; sooner or later the interaction will not be able to prevent a certain convergence of results".[45] Nevertheless, while in Europe the dialogue in the judicial space increases, in the international society it keeps on encountering obstacles.

Because it refers to Europe and practically for the same reasons why the

power of the judge in his/her condition as a constitutional judge is increased, the process of constitutionalisation has converted the dialogue of judges into a "dialogue of constitutional reach". In all levels of jurisdiction -national, supranational and human rights- a dialogue is produced, not exempted from true battles among judges within each level and, obviously, among the different jurisdictional levels. In this way the fact that the judicial power is an effective power in our society and that there is no power to which there is no open or hidden control, or any interference from other power, is put in evidence, if anyone still doubted it.[46]

Internally, the judicial dialogue in European states has been conducted fundamentally among the ordinary courts and the new constitutional courts. In fact, this dialogue has presupposed, even when not explicitly, true field battles in which pseudo-legal arguments are used and there is always an appeal to a well determined policy. In Italy after World War II, the guerra fra Corti, but also in Spain the fight between the Constitutional Court and the Supreme Court one trying to assert itself over the other or, at least, to keep spheres immune from the intervention of the other, reveal the reach of this dialogue or of this struggle for dominance, to the point that the Spanish Constitutional Court achieved in 2007 that, at least formally, the legislator protected the supremacy of the Constitutional Court through amendments to its organic law.[47]

Further, the influence of European law over municipal law is particularly notable in the judicial argumentation when new judicial references start manifesting themselves and can be authoritative, even to the extent of equivalence to or supremacy over those of the Supreme or Constitutional Courts. In fact, the most important and fruitful dialogue has happened between the Court of Justice and the Constitutional Courts, especially inGermany and Italy, since the mid-1970s.[48] This dialogue was established precisely in the area of protection of fundamental rights and since this moment the Court of Justice -in the words of some only to defend the primacy of European Community law- has elaborated a jurisprudence respectful of fundamental rights and inspired, on one hand, by the national constitutional traditions, and, on the other, by the European Convention of Human Rights and its interpretation by the Strasbourg Court.[49] More recently one can appreciate a dialogue between the Courts of Luxembourg and Strasbourg that is facilitated by the provisions of the European Constitutional Treaty of 29 October 2004, where Article I § 9 alinea 2 reads: "the Union shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms; such accession shall not affect the Union's competences as defined in the Constitution". Nevertheless, this same

clause seems likely to be kept once the works of the intergovernmental conference of 2007 are concluded.[50]

For the moment the dialogue has not had any meaningful crises, even though an increase of the control of the European Court over the Court of Justice is progressively announced. In fact, this is how the judgments of the European Court of Human Rights of 18 February 1999, Matthews v. United Kingdom and 30 June 2005, Bosphorus v. Ireland are read. In the latter judgment, the Strasbourg Court has established a jurisprudential criterion according to which:

> "The protection of fundamental rights by EC law can be considered to be, and to have been at the relevant time, "equivalent" (within the meaning of § 155 above) to that of the Convention system. Consequently, the presumption arises thatIreland did not depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the EC (see § 156)".[51]

In turn the Court of Justice has acted as a "fundamental rights judge" applying the jurisprudential doctrine of the European Court as a precondition for the application of Community law itself and interpreting Community law in accordance with fundamental rights.

When it comes to the European Convention as a precondition for the application of Community law, the judgment of 7 January 2004, K.B., is very important, in which the Court of Justice comes to the conclusion that "Article 141 EC, in principle, precludes legislation, such as that at issue before the national court, which, in breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, prevents a couple such as K.B. and R. from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other".[52] In this way the Community Court takes as its own the conventional tools for protection of fundamental rights coming from Strasbourg.

As to the interpretation of Community law in accordance with human rights as interpreted by the European Court, in a judgment of 12 September 2006, the Court of Justice dismisses an action for non-compliance presented by Spain against the United Kingdom relative to the new regime of elections for the European Parliament in Gibraltar adopted precisely in compliance with the judgment of the Matthews Case in the European Court of Human Rights. In this action for non-compliance both the European Commission and the British Government maintained in

Luxembourg that the conformity of the British regulation with Community law should be examined "so far as possible in the light of and in conformity with fundamental rights" (§ 86), a reason why the Court of Justice ended up considering:

> "In the light of that case law of the European Court of Human Rights and the fact that that Court has declared the failure to hold elections to the European Parliament in Gibraltar to be contrary to Article 3 of Protocol No 1 to the Convention in that it denied 'the applicant, as a resident of Gibraltar' any opportunity to express her opinion on the choice of the members of the European Parliament, the United Kingdom cannot be criticised for adopting the legislation necessary for the holding of such elections under conditions equivalent, with the necessary changes, to those laid down by the legislation applicable in the United Kingdom".[53]

One must note that the Court of Justice departed from the proposal of Advocate General A. Tizzano, who in his conclusions reasoned: "such an exception can be allowed only to the extent to which it is imposed by a superior rule, such as one designed to protect a fundamental right. In the case before us, however, no such right is at stake".[54] For this reason the judgment of the Court of Justice claims greater importance by adopting, unlike the Advocate General, a perspective more concerned with the rights of people than keeping the traditional focus of international relations in which 'state sovereignty' is a principle that, despite it all, is still deeply rooted.

As it is obvious, this dialogue between courts is not limited to the vortex of different legal systems but it allows a crossed and concurrent dialogue of all European judges. That is why it is more and more frequent that lower courts openly reject the doctrine of courts of appeal or cassation invoking or making reference, for example through the preliminary ruling procedure, to the Court of Luxembourg;[55] or simply giving more attention to the doctrines of some courts to the detriment of others.[56]

Now, outside of Europe and in a secessionist universal judicial field, one can see strong tensions and important attempts of express opposition to this phenomenon of judicial cosmopolitanism. Even when the process of globalisation requires, on the one hand, a greater attention from judges to comparative law,[57] and despite the fact that a 'legal globalisation' has occurred through more or less successful attempts following the European model of jurisdictional protection of human rights,[58] it is certain that this judicial cosmopolitanism is made more difficult in an important way by the proponents of a "judicial provincialism" and before the lack of

evolution or of 'jurisdictional' solutions for the international society.

The most meaningful example of judicial provincialism is the attempt to approve in the U.S. Congress the Constitution Restoration Act, with which it was intended to prevent that the Supreme Court and federal judges resorted to legislation or case law coming from other countries or from an international organisation. The Constitution Restoration Act proposed in 2004 and re-proposed in 2005 by some American Congress Members and which, luckily, has not been approved, had a provision according to which: "in interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organisation or agency, other than English constitutional and common law up to the time of the adoption of the Constitution of the United States". The worst of this political proposal, which would be nothing but legal nonsense, is that the non-compliance with this prohibition would constitute, according to the Constitution Restoration Act, an infraction by which the judge -any judge, including the Supreme Court judges- could be removed as a breach of this law supposed non-compliance with the requirements of judicial good conduct.[59]

Also the limits of judicial cosmopolitanism are rooted in the lack of international judicial organs that go beyond the international regional spheres, for example the European or the Inter-American, and constitute 'universal justice'. In fact, not even the International Court of Justice has become a true universal judge as it is mediated in its operation by states; and, to a certain extent, the same can be said about specialised Courts of the United Nations, particularly the International Tribunals for former Yugoslavia, for Rwanda, etc.

With respect to the International Court of Justice, it is still limited in the exercise of its jurisdictional functions due largely to the procedural and substantive legitimacy of state before the Hague Court. In this way, only timidly and through unclear constructions -from a more sensitive and developed internal judicial perspective-, as the rules about ius cogens, the jurisprudence of the International Court of Justice only has effects on the doctrine about the judicial protection of human rights.[60]

Only in cases such as the opinion, of 9 July 2004, about the legal consequences of the building of a wall in the occupied Palestinian territories, the Hague Court explains:

> "To sum up, the Court is of the opinion that the construction of the

> wall and its associated régime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto) as guaranteed under Article 12 § 1 of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child. Lastly, the construction of the wall and its associated régime, by contributing to the demographic changes referred to in §§ 122 and 133 above, contravene Article 49 § 6 of the Fourth Geneva Convention and the Security Council resolutions cited in § 120 above".[61]

Also indirectly, the International Court of Justice, when referring to the exercise by states of the defense of human rights the holders of which are, obviously, people, their affected nationals, could deal with questions relating to citizens. From this results the judgment of 27 June 2001, in the Lagrand Case, that pitted Germany against the United States, in which the Hague Court considered that Article 36 § 1 alinea b) of the Vienna Convention on consular relations establishes the obligations of the state of origin with respect to a person who has been detained and, in particular, the obligation that, in some instances, the state of residence informs "with no delay" the state of origin about the detention of the person in question.[62] Applying this same doctrine the International Court of Justice adopted the judgment of 31 March 2004, in the case of Avena and other Mexican Nationals, that put Mexico and the United States as adversary parties in the case and by virtue of which the Hague Court declared that the United States had not complied with the obligation under Article 36 § 1alinea b) of the Vienna Convention, of informing the detained Mexican nationals of their rights.[63]

Considering the aspired universality of human rights within the United Nations, it must observed the way in which the United States of America are reticent, and simply do not bind themselves to certain international treaties; in fact, there is a negative and even a militant opposition from the U.S. government to becoming a party to the Statute of the International Criminal Court, adopted by virtue of the Rome Convention of 17 July 1998.[64] Moreover, the specialised tribunals, that will be able to establish precise doctrines about the exercise of rights by citizens, have reduced their jurisdictional scope to international crimes. Finally, as we have signalled in the European sphere, judges need a critical mass of cases to do things. In this sense, the comparison between the European Court and the Court of Justice is very revealing, with its abundant critical mass of

cases, and the Inter-American Court of Human Rights, before which only gradually new cases are presented; in this sense and in the period of functioning of the Court from 1979 to 2006, it has handed down 162 judgments and 19 advisory opinions; in the non-advisory sphere the judgments only resolved 85 cases.[65] And the same can be said, mutatis mutandis, about the International Court of Justice in The Hague which in 60 years of functioning it has only registered 136 cases.[66]

V. Conclusion

As it has happened in the last two centuries and especially in the second half of the 20th century, the new times of globalisation are presuming a gradual and unstoppable increase of the power of judges, a power that can be characterised as 'constitutional'; but in exchange for this power the judge has to be clearer and more transparent in her/his language and must try to ascertain which are the reasons of judicial decisions in a permanent dialogue with all courts; a dialogue to which the creation of supranational courts, which, along with national judges, decide in shared spheres, has contributed decisively. For this reason, in Europe the constitutional judge, the supranational judge and the human rights judge do not stop being expressions of a same legal reality in which different levels or spheres of decision have been established that, in the case of the most evolved orders, are characterised by the creation of a superior jurisdictional organ, such as is the case, in particular, of the Court of Justice of the European Union and the European Court in the sphere of the Council of Europe, for the interpretation of the new constitutionally neighboring spheres.

One of the problems with the power of the judge is its legitimacy. Just as in internal law the issue of legitimacy of the judge can be resolved by appealing to the legitimacy of exercise and only secondarily one takes into account the judge belonging to the same national community, in supranational and international spheres the democratic legitimacy is still harder to argue and is only sustainable to refer to a legitimacy of exercise. Hence, the legitimacy of the great courts is only possible from their focus or attention to private parties, to the rights of natural and legal persons, and not to those that until now were the lead players of international and municipal public law, 'sovereign' states, 'federal' states, member states to and international organisation. In this sense, when the judicial procedures allow the access of private individuals, either directly – as is reflected in the access to the European Court of Human Rights -or indirectly- as is the case of the preliminary ruling procedure to the Court of Justice of the European Communities that must be always connected to the resolution of a pending case before national courts –, they produce a revolutionary change in the bringing of legal questions and, consequently, in judicial

answers. It cannot be other the interpretation that must be given to the compliance with judgments of the Strasbourg Court, or the foundation of the great jurisprudential principles gradually construed in Luxembourg, first direct effect, and then almost automatically supremacy, and, last, as an inexcusable complement the right to damages for private parties in cases of responsibility of national authorities in the breach of Community law.

The effectiveness of the power of the judge is rooted in the possibility of entertaining cases in which private parties are implicated and that have consequences for citizens. Further, it is necessary to build a critical mass of judgments, not too big or too limited, that allows the resolution of issues with cases. Until now the Court of Justice has managed that, to a certain extent, the critical mass is sufficient and the risk of collapse was eliminated with the creation of prior judicial instances – the Court of First Instance of 1989 and the Court of Public Service in 2004. Similarly, with respect to the European Court, the transformation of the judicial system since November 1st, 1998, with the suppression of the European Commission of Human Rights, has forced the European Court to an intense adaptation that, at this moment, is not completed.

If the European judicial experience is a step towards the attainment of a judicial cosmopolitanism, its realisation will only be possible if the United Nations charter takes into account the change operated in the international society where the states and international organisations cannot be the only subjects of the legal order, but globalisation requires a new leading role to individuals, to people. The evolution towards this new international society must pass necessarily through an international judicialisation of human rights that, even though it can seem at this moment an utopia, cannot go without being proposed, precisely because it is an ideal of justice.

In the case of the introduction of a superior and universal judicial level one must seek to strike a balance and exercise power deferentially with respect to the other courts, such as it has happened in Europe, making the dialogue among judges possible. The key to the success of the new universal court would be localised in the prudent application of subsidiarity among the courts and the exercise of their powers within a margin of discretion each court should enjoy and that must respect the superior court. This is a margin as given by the European Court of Strasbourg to the Community Courts of Luxembourg and national courts, but also the margin of action that the Court of Justice tries to respect vis-à-vis national courts, or that must be given to national courts among themselves, especially in relations among Constitutional and ordinary courts.

To sum up, judges are one of the keys to contemporary political systems and legal orders. When judges do things with cases and when they do them to resolve problems of the citizens they are democratically legitimating themselves and, obviously, they must attend to what happens to citizens in a given historical moment. For this reason in a society which is increasingly interdependent and global it is reasonable that judges keep on performing their functions but it is also understandable that it is necessary to create new supranational and international courts that, along with national courts and in dialogue with these traditional jurisdictions, closely follow the needs of citizens and offer them the solutions that new times require. The European experience is an example of what should be the foundations of a judicial cosmopolitanism centered on the person and based on his/her fundamental rights, constitutional rights, human rights.

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* Magistrate, PhD in law and member of the Spanish Judicial Network of European Union law.

[1] I. KANT, Lo bello y lo sublime: La paz perpetua, 1795, transl. [A. SÁNCHEZ and F. RIVERA, 5th ed., Madrid, Espasa-Calpe, 1972], p. 117. The Spanish version from which this excerpt was translated reads as follows: "la comunidad –más o menos estrecha– que ha ido estableciéndose entre todos los pueblos de la tierra ha llegado ya hasta el punto de que una violación del derecho, cometida en un sitio, repercute en todos los demás; de aquí se infiere que la idea de un derecho de ciudadanía mundial no es una fantasía jurídica, sino un complemento necesario del código no escrito del derecho político y de gentes que de ese modo se eleva a la categoría de derecho público de la Humanidad y favorece la paz perpetua, siendo la condición necesaria para que pueda abrigarse la esperanza de una continua aproximación al estado pacífico".

[2] One must precise the effect that the 'constitutionalisation' of the whole legal order has had and the distinctive function and evolution the judicial power has had in each legal system, especially the "constitutional courts", be it the U.S. Supreme Court or continental Constitutional Courts; about the problems created in the U.S., see the work of L.G. SAGER, Juez y democracia. Una teoría de la práctica constitucional norteamericana, transl. [V. FERRERES, Madrid, Marcial Pons, 2007] [Original title: Justice in Plainclothes: A Theory of American Constitutional Practice, New Haven, Yale University Press, 2004].

[3] J.L. AUSTIN, How to Do Things with Words, transl. [G.R. CARRIÓ and E. A. RABOSSI, Cómo hacer cosas con palabras, Barcelona, Paidós, 1982].

[4] A. DE TOCQUEVILLE, La democracia en América, transl. [D. SÁNCHEZ DE ALEU, Barcelona, RBA, 2005], p. 104; who observes: "North Americans have kept these three distinctive characteristics of judicial power; the North American judge can only give a judgment when there is a dispute; s/he does not intervene in particular cases, and in order to act must always wait for the case to be submitted; [...] the American judge resembles in all, thus, the magistrates of other nations; but

s/he is invested with an immense political power; [...] this single fact is the cause: Americans have recognised to judges the right to reason their decisions in the Constitution more than in laws; in other words, they are allowed not to apply laws they deem unconstitutional". The Spanish version from which this translation was done reads as follows: "Los norteamericanos han conservados estos tres rasgos distintivos del poder judicial. El juez norteamericano sólo puede pronunciar sentencia cuando hay litigio; no interviene sino en casos particulares, y para actuar debe siempre esperar a que se le someta una causa [...] El juez americano se parece en todo, pues, a los magistrados de otras naciones. Pero está revestido de un inmenso poder político. [...] Este solo hecho es la causa: los americanos han reconocido a los jueces el derecho de fundamentar sus decisiones en la Constitución más que en las leyes. En otros términos, se les permite la no aplicación de las leyes que les parezcan inconstitucionales".

[5] See in the North American political sphere the analysis of R.A. POSNER, Law and Literature, Cambridge (Mass.), Harvard University Press, 1998; especially when he refers to the issue of 'legal texts as literary texts', pp. 209-302; in fact, he dares to evaluate, for example, judge B.N. CARDOZO "mostly a purist, was one of the finest judicial writers in our history" [p. 291].

[6] A.M. BICKEL, The Least Dangerous Branch: The Supreme Court at the Bar of Politics, 8th printing, New Haven, Yale University Press, 1976, p. 75; recalls the open battle in the United Status between the Executive, presided by F.D. Roosevelt, and the federal Supreme Court during the period of 1937 and 1942, a period he calls the "great constitutional war".

[7] G. ZAGREBELSKY, "Corti costituzionali e diritti universali", Rivista trimestrale di diritto pubblico, 2006, pp. 297-311.

[8] A. HAMILTON, El Federalista, 28 May 1788, No 78, transl. [I. SÁNCHEZ-CUENCA and P. LLEDÓ, Artículos federalistas y antifederalistas: El debate sobre la Constitución americana, Madrid, Alianza Editorial, 2002], p. 196. The Spanish translation from which this version was derived reads as follows: "menos peligroso para los derechos que establece la Constitución, puesto que su capacidad para perturbarlos o menoscabarlos será menor".

[9] A.M. BICKEL, The Least Dangerous Branch: The Supreme Court at the Bar of Politics, o c., p. 235; the later analysis of J. HART ELY, Democracy and Distrust. A theory of Judicial Review, Cambridge (Mass.), Harvard University Press, 1980, is complementary. The Spanish quote reads as follows: "compatibilidad del control judicial con el gobierno democrático".

[10] The last state to joint the Council of Europe on 11 May 2007, was Montenegro that has also ratified the European Convention of Human Rights.

[11] Thus explains, for instance, C. WOLFE, La transformación de la interpretación constitucional, Madrid, Civitas, 1991, p. 15.

[12] M. AHUMADA RUIZ, La jurisdicción constitucional en Europa. Bases teóricas y políticas, Navarra, Thomson-Civitas, 2005, p. 34, explains: "the modern conception of judicial review, founding its aim of legitimacy on the protection of constitutional rights and liberties, is now so deeply rooted that it tends to be taken as classic, when it is a product of the second half of the 20th century". The original in Spanish reads as follows: "la moderna concepción de la judicial review, la que funda en la protección de los derechos y libertades constitucionales su pretensión de legitimidad, está ahora tan arraigada que tiende a tomarse por clásica, cuando es un producto de la segunda mitad del siglo XX".

[13] The best known expression in Europe of the normativity of the Constitution, and, especially, of constitutionally recognised fundamental rights is drawn from Germany and the Basic law of Bonn of 1949 the Article 1 § 3 of which determines that fundamental rights "bind the legislature, the executive, and the judiciary as directly applicable law".
[14] I. CRAM, "Judging Rights in the United Kingdom: The Human Rights Act and the New Relationship between Parliament and the Courts", Review of Constitutional Studies / Revue d'études constitutionnelles, 2006, pp. 53-82.
[15] E.C.J., Case C-213/89, Factortame and others, 1990, Rec. p. I-2433.
[16] G. PROTIERE and P. BLACHER, "Le Conseil constitutionnel, gardien de la Constitution face aux directives communautaires", Revue française de Droit constitutionnel, 2007, pp. 123-144.
[17] U. BRECCIA, "Immagini della giuridicità contemporanea tra disordine delle fonti e ritorno al Diritto", Politica del Diritto, 2006, pp. 361-384.
[18] M. POIARES MADURO, We, The Court: The European Court of Justice and the European Economic Constitucion; A Critical Reading of Article 30 of the EC Treaty, Oxford, Hart, 1998.
[19] D. RUIZ-JARABO COLOMER, El juez nacional como juez comunitario, Madrid, Civitas, 1993.
[20] Thus illustrate, for example, the two judgments of the Court of Justice of the European Communities, of 27 October 2005, about public contracting; in the first judgment, about a case that was pending before a Spanish judge, the Audiencia Nacional (C-234/03, Contse, S.A., Rec. p. I-9315), the Community Court answered in these terms: "It follows from all the foregoing considerations that Article 49 EC precludes a contracting authority from providing in the tendering specifications for a public contract for health services of home respiratory treatment and other assisted breathing techniques, first, for an admission condition which requires an undertaking submitting a tender to have, at the time the tender is submitted, an office open to the public in the capital of the province where the service is to be supplied and, second, for evaluation criteria which reward, by awarding extra points, the existence at the time the tender is submitted of oxygen production, conditioning and bottling plants situated within 1 000 kilometres of that province or offices open to the public in other specified towns in that province, and which, in the case of a tie between a number of tenders, favour the undertaking which was already providing the service concerned, in so far as those elements are applied in a discriminatory manner, are not justified by imperative requirements in the general interest, are not suitable for securing the attainment of the objective which they pursue or go beyond what is necessary to attain it, which is a matter for the national court to determine"; and in the second judgment, addressing an action for non-compliance Commission / Spain (C-158/03, not published in the Rec.), the Court of Justice concluded declaring "thatthe Kingdom of Spain has not complied with its obligations by virtue of Article 49 EC by including in the list of conditions for a public contract of sanitary services of residential respiratory therapies and other techniques of assisted ventilation, on the one hand, a requirement of admission that forces the procuring company to dispose, in the moment of presenting the offer, of an office open to the public in the province in which the service must be rendered or, in its case, in the capital and, on the other hand, some criteria of valuing of offers that, in order to give additional points, take into consideration the existence, in this same moment, of production and packaging facilities located, according to the case, in Spain or at least 1,000 km from the province in question, or offices open to the public in other determined locations of the latter, and that, in case of a tie among several offers, the company

that has previously rendered the service in question". The original in Spanish, from which no official English translation is available, reads as follows: "que el Reino de España ha incumplido las obligaciones que le incumben en virtud del artículo 49 CE al incluir en el pliego de condiciones de un contrato público de prestación de servicios sanitarios de terapias respiratorias domiciliarias y otras técnicas de ventilación asistida, por una parte, un requisito de admisión que obliga a la empresa licitadora a disponer, en el momento de la presentación de la oferta, de una oficina abierta al público en la provincia en la que debe prestarse el servicio o, en su caso, en su capital y, por otra parte, unos criterios de valoración de las ofertas que, a efectos de atribuir puntos adicionales, toman en consideración la existencia, en ese mismo momento, de instalaciones de producción, de acondicionamiento y de envasado ubicadas, según el caso, en España o a menos de 1.000 km de la provincia de que se trate, o de oficinas abiertas al público en otras localidades determinadas de esta última, y que, en caso de empate entre varias ofertas, favorecen a la empresa que haya prestado anteriormente el servicio de que se trata".

[21] E.C.J., Activity Report 2006, Luxembourg, Opoce, 2007, http://curia.europa.eu/es/instit/presentationfr/index.htm

[22] G. DE BÚRCA and J.H.H. WEILER, The European Court of Justice, Florence, European University Institute, 2001.

[23] Certainly each country has had its own evolution when it comes to the judicial recognition of fundamental rights; thus, for example, in the case of France it was the Conseil Constitutionnel who, through its decision of 16 July 1971, undertook a revolution expressed in four words: "vu la Constitution et notamment son préambule" what made that the revolutionary Declaration of 1789 acquired, almost two centuries later, full constitutional normativity.

[24] E.C.H.R., Report 2006, Strasbourg, 2007, http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Reports/Annual+surveys+of+activity/

[25] E.C.J., Case C-4/73, Nold , 14 May 1974, Rec., p. 491, § 13.

[26] E.C.H.R., Matthews v. United Kingdom, 18 February 1999, §§ 32-33 and 39; E.C.H.R., Bosphorus v. Ireland, 30 June 2005, §§ 159-165.

[27] M. TROPER, "La motivation des décisions constitutionnelles", in La motivation des décisions de justice, Brussels, Bruylant, 1978, pp. 301-302.

[28] N.D. MACCORMICK, "The Motivation of Judgements in the Common Law", in La motivation des décisions de justice, Brussels, Bruylant, 1978, pp. 168-169. The Spanish translation from which the current version has been derived reads as follows: "En unos casos el contraste que resulta sería al equivalente al que existe entre deducción e inducción, y en otros se correspondería con el que se produce entre el derecho como ciencia y el derecho como arte. Tengo la impresión de que en la Europa continental, con su tradición de jueces de carrera reclutados entre hombres y mujeres brillantes y relativamente jóvenes, se tiene muy en cuenta, quizás tendría que ser así, que la tarea de juzgar es una ciencia que debe ser aprendida y que debe ser practicada con un rigor impersonal. En cambio, en Gran Bretaña no es un científico entrenado sino un artista práctico el que, habiéndose distinguido durante un amplio período de práctica en la abogacía, finalmente es llamado al estrado para ser juez; y en esta función se puede constatar que es convocado para realizar la más conspicua práctica del mismo arte que ya practicaba con anterioridad y que propiamente no le exigirá un modo de pensar y una actividad diferente de la desarrollada con anterioridad".

[29] A. DE TOCQUEVILLE, El Antiguo Régimen y la Revolución, 1856, transl. [A. HERMOSA ANDUJAR, Madrid, Istmo, 2004], p. 171, recalled,

nevertheless, that in pre-revolutionary France "the administration itself had borrowed much of the language and uses of justice. The king felt always obliged to motivate his decrees and expose the reasons before concluding; the council laid down decrees preceded by large preambles; the prefect notified his ordinances through an usher. In the bosom of all the administrative bodies of ancient origin -such as, for example, the one of treasurers in France of the elected ones-, matters were discussed publicly, being decided after the arguments. All these habits, al these forms constitute so many other barriers to the arbitrariness of the prince". The Spanish version from which this translation was done reads as follows: "La propia administración había tomado mucho en préstamo del lenguaje y de los usos de la justicia. El rey se sentía siempre obligado a motivar sus edictos y a exponer sus razones antes de concluir; el consejo emanaba decretos precedidos de largos preámbulos; el intendente notificaba sus ordenanzas por medio de un ujier. En el seno de todos los cuerpos administrativos de origen antiguo -como, por ejemplo, el de los tesoreros de Francia o el de los elegidos-, los asuntos se discutían públicamente, decidiéndose después de los alegatos. Todos esos hábitos, todas esas formas constituían otras tantas barreras al arbitriodel príncipe".

[30] L. WITTGENSTEIN, Tractatus logico-philosophicus, 1918, transl. [Madrid, Alianza, 1993], formulated a proposition 4,116 the literal application of which would do much good to judicial language: "one it can even be thought of, it can be thought of clearly; when it can be expressed, it can be expressed clearly". The Spanish version from which this translation was done reads as follows: "Cuanto puede siquiera ser pensado, puede ser pensado claramente. Cuanto puede expresarse, puede expresarse claramente".

[31] F. VIOLA and G. ZACCARIA, Diritto e interpretazione. Lineamenti di teoria ermeneutica del diritto, Bari, Laterza, 2000, p. 74. The Spanish translation from which the current version is derived reads as follows: "el Derecho es una tarea que consiste en inocular razonabilidad al ejercicio de la autoridad".

[32] About authoritarian societies, that could be the absolute monarchies of the 18th century, H.G. GADAMER, Verdad y método, Fundamentos de una hermenéutica filosófica, 5th ed., Salamanca, Sígueme, 1993, Vol. I, p. 401, pointed out: "For the possibility of a legal hermeneutic it is essential that the law binds all members of the legal community equally. When this is not the case, as it happened, for example, during the absolutism, where the will of the absolute lord was above the law, it is no longer possible to have any hermeneutic, 'as a superior lord can explain his own words including against the usual rules of interpretation'". The Spanish version from which this translation was done reads as follows: "Para la posibilidad de una hermenéutica jurídica es esencial que la ley vincule por igual a todos los miembros de la comunidad jurídica. Cuando no es éste el caso, como ocurría, por ejemplo, en el absolutismo, donde la voluntad del señor absoluto estaba por encima de la ley, ya no es posible hermenéutica alguna, 'pues un señor superior puede explicar sus propias palabras incluso en contra de las reglas de la interpretación usual".

[33] P. GODDING, "Jurisprudence et motivation des sentences, du Moyen Âge à la fin du 18e siècle", in La motivation des décisions de justice, Brussels, Bruylant, 1978, p. 48.

[34] J. SPREUTELS, "La motivation des sentences pénales en Angleterre", in La motivation des décisions de justice, Brussels, Bruylant, 1978, p. 196.

[35] J. JIMÉNEZ CAMPO, "Sobre los límites del control de constitucionalidad de la ley [en] España", in E. AJA, Las tensiones entre el Tribunal Constitucional y el Legislador en la Europa actual, Barcelona, Ariel, 1998, p. 178 ; is an advocate of a

deeply rooted version thus expressed: "Jurisdictional argumentations are, and this is of the greatest importance, decisive, not persuasive. Their value lies, to put it in another way, not on their positive effect of convincing or, more modestly, of persuasion, but on their objectivity, that is, their straneity to any estimatives that require, or intend, a community of 'beliefs' ('general doctrines' in the sense of John Rawls) or appreciations of opportunity between those arguing and the addressees of the argument. These, certainly, are not few in a court (the parties, the doctrine, the public opinion), but, independent of that, the value (legitimacy or acceptability) of the jurisdictional reasoning must be, strictly speaking, of negative character: one accredits most of all that one does not have and leaves it to the world of opinions". The original in Spanish from which this version was done reads as follows: "Las argumentaciones jurisdiccionales son, y esto es del mayor relieve, decisorias, no suasorias. Su valor está, dicho de otro modo, no en su positiva eficacia de convicción o, más modestamente, de persuasión, sino en su objetividad, esto es, en su ajenidad a cualesquiera estimaciones que requiera, o que pretendan, una comunidad de 'creencias' ('doctrinas generales' en el sentido de John Rawls) o de apreciaciones de oportunidad entre quien argumenta y los destinatarios de la argumentación. No son pocos, por cierto, los destinatarios de la argumentación de un tribunal (las partes, la doctrina, la opinión pública), pero, con independencia de ello, el valor (legitimidad o aceptabilidad) del razonamiento jurisdiccional ha de ser, en sentido estricto, de carácter negativo: se acredita por todo aquello de lo que prescinde y relega al mundo de lo opinable".

[36] A. ROSS, Teoría de las fuentes del derecho. Una contribución a la teoría del derecho positivo sobre la base de investigaciones histórico-dogmáticas, 1926, transl. [J.L. MUÑOZ DE BAENA, A. DE PRADA and P. LÓPEZ, Madrid, Centro de Estudios Políticos y Constitucionales, 1999], p. 406. The Spanish version from which the current translation was derived reads as follows: "toda interpretación que rebase [e]l principio lógico-gramatical es creación de derecho".

[37] J. HAUSER, "Le juge et la loi", Pouvoirs, 2005, No 114, pp. 141-142. The Spanish version from which the current translation was derived reads as follows : "Tan sólo con las palabras de la ley se puede hacer mucho, tanto en el siglo XIX como en el siglo XX o incluso, con las mismas palabras, se puede sostener en el siglo XX lo contrario de lo que se sostenía en el siglo XIX".

[38] M. LASSER, Anticipating Three Models of Judicial Control, Debate and Legitimacy: The European Court of Justice, the Cour de cassation and the United States Supreme Court, New York, New York School of Law, Jean Monnet Working Papers, 2003, No 1/03, p. 31.

[39] J.F. WEBER, La Cour de cassation, Paris, Études de la documentation française, 2006, p. 153.

[40] The original reads as follows: "la clave del control y de la legitimidad del sistema judicial norteamericano radica en una justificación interpretativa hecha pública y en términos discursivos, mientras que [en el caso francés] la justificación republicana se lleva a cabo a través de medios institucionales, profesionales y educativos".

[41] The advocate general fulfills also a pedagogical role manifested in the custom of bringing in her/his conclusions a great number of scholarly opinions with a widespread use of footnotes from which s/he exposes her/his own proposal; one must be warned, however, of the risk that this scholarly urge of advocate generals leads them to a more professorial analysis and deviates them from the judicial solution.

[42] J.H.H. WEILER, "La arquitectura judicial después de Niza", in La encrucijada constitucional de la Unión Europea, Madrid, Colegio Libre de

Eméritos y Civitas, 2002, p. 480. The Spanish original reads as follows: "que el modelo debería ser menos angloamericano y más continental, pero en lo que se refiere al estilo de las sentencias, creo que el Tribunal debería abandonar el estilo críptico y cartesiano que sigue caracterizando a muchas de sus resoluciones y adoptar el estilo más discursivo, analítico y conversacional que se asocia más con el mundo del common law (aunque otros también lo practiquen, como, por ejemplo, el Tribunal Constitucional alemán)".

[43] E.C.H.R, Golder v. United Kingdom, 21 Feb. 1975, individual opinion, § 23.

[44] D. SARMIENTO RAMÍREZ-ESCUDERO, Poder judicial e integración europea. La construcción de un modelo jurisdiccional para la Unión, Navarra, Thomson-Civitas, 2004, p. 331.

[45] G. ZAGREBELSKY, "Corti costituzionali e diritti universali", o.c., pp. 297-311. The Spanish version from which the current translation is derived reads as follows: "Cuando los bienes constitucionales se hacen interdependientes e indivisibles, es natural que la justicia constitucional de cualquier nivel aspire a integrarse -si bien no en una forma institucional supranacional cosmopolita, lo que no está a la vista ni quizás lo esté jamás- al menos en contextos deliberativos comunicantes. Tarde o temprano la interacción no podrá impedir una cierta convergencia de resultados".

[46] As Judge Jackson has warned in his well-known concurring opinion: "we are not final because we are infallible, but we are infallible only because we are final"; U.S. Supreme Court, Brown v. Allen, 1953, 344 U.S. 443, 540.

[47] The Organic Law [Ley Orgánica] 6/2007, of May 24, which modifies the Organic Law 2/1979, of October 3, of the Spanish Constitutional Court, BOE, 25 May 2007, No 125 introduces a new Article 4 § 2 according to which and in case it was not already clear: "The resolutions of the constitutional Court cannot be judicially questioned by any jurisdictional organ of the state" (the Spanish original reads as follows: "Las resoluciones del Tribunal Constitucional no podrán ser enjuiciadas por ningún órgano jurisdiccional del Estado". This legislative reform is undertaken after grotesque battles taken in Spain between the Supreme Court and the Constitucional Court, the former even declaring the civil liability of all judges of the Constitucional Court, except one, for rejecting over procedural grounds a rights appeal (recurso de amparo) formulated against a decisión of the Supreme Court relative to the form of appointment of law cleros in the Constitucional Court, and convicting 11 constitutional magistrales to pay 500 Euros each TS (Sala 1a), Sierra Gil de la Cuesta, 23 Jan. 2004, No 51/2004.

[48] See a more detailed analysis in the study of J. BAQUERO CRUZ, The Legacy of the Maastricht-Urteil and the Pluralist Movement, Florence, European University Institute, RSCAS Working Papers, 2007, No 13.

[49] P. MENGOZZI, as an Advocate General of the Court of Justice, in his conclusions of 26 October 2006, in the case Gestoras Pro Amnistía and others v. Council [C-354/04 P and C-355/04 P, § 180], pointed out "how unfounded is the suspicion often voiced that the jurisdiction of the Court with regard to respect for fundamental rights as general principles of Community law is inspired not so much by genuine concern for the protection of such rights as by a desire to defend the primacy of Community law and of the Community court in relation to the law and authorities of the member states".

[50] According to the Conclusions of the German Presidency of the European Council of 21-22 June 2007, in the Draft mandate of the Intergovernmental Conference (IGC), contained in annex one, a new Article 6 for the Treaty of the

European Union will be adopted, according to which: "(1) The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of 7 December 2000, as adapted on [...] which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions. (2) The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. (3) Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the member states, shall constitute general principles of the Union's law".

[51] E.C.H.R., Bosphorus v. Ireland, 31 July 2005, §§ 154-156 and 165.

[52] E.C.J., Case C-117/01, K.B., 7 Jan. 2004, Rec. p. I-541, Opinion, § 36.

[53] E.C.J., Case C-145/04, Spain v. United Kingdom, 12 Sept. 2006, Rec. p. I-7917.

[54] E.C.J., Case C-145/04, Spain v. United Kingdom, Opinion of Advocate General A. Tizzano, 6 Apr. 2006; E.C.J., Case C-300/04, Eman and Sevinger, § 129, Rec. p. I-7917.

[55] This is the result, for example, of the preliminary rulings from Spanish judges resolved in judgments of the E.C.J.,Case C-342/01, Merino Gómez, 18 Mar. 2004, Rec. p. I-2605, §§ 22-23; E.C.J.,Case C-81/05, Cordero Alonso, 7 Sept. 2006, Rec. p. I-7569, § 41.

[56] A. GUAZZAROTTI, "La CEDU e l'ordinamento nazionale: Tendenze giurisprudenziali e nuove exigenze teoriche", Quaderni costituzionali. Rivista Italiana di Diritto Costituzionale, 2006, pp. 494-495, has proven the pression under which theConstitutional Court is put in what refers to the protection of human rights both by the Luxembourg Court and, particularly, the Strasbourg Court.

[57] A. BARAK, "L'exercice de la fonction juridictionnelle vu par un juge: le rôle de la Cour suprême dans une démocratie", Revue française de Droit constitutionnel, 2006, p. 301, affirms: "I am convinced that with globalisation comparative law will play a more and more important role". The Spanish version from which this translation was done reads as follows: "Estoy convencido de que con la mundialización, el Derecho comparado representará un papel cada vez más importante".

[58] J. GARCÍA ROCA, "La interpretación constitucional de una declaración internacional, el Convenio Europeo de Derechos Humanos, y bases para una globalización de los derechos", Revista Europea de Derechos Fundamentales, 2005, pp. 37-82.

[59] In the Anglo-Saxon legal sphere one can notice a certain setback when it comes to the international protection of human rights, as noticeable in the analysis of M.A. WATERS, "Creeping Monism: The Judicial Trend toward Interpretive Incorporation for Human Rights Treaties", Columbia Law Review, 2007, pp. 628-705, when advising national courts to be cautious in adopting more monistic techniques of interpretation, trying to anchor the use of international sources in a firm commitment to consider, first and foremost, their function as internal actors [p. 695] and avoid that through the judicial back door international human rights norms enter which have not managed to enter through the legislative front door [pp. 697-

698]. And in American constitutionalism the discussions of the past four years have had an extraordinary reach that has increased even within the U.S. Supreme Court:, Roper v. Simmons, 2005, 543 U.S. 551; see, for example the analysis of C.A. BRADLEY, "The Federal Judicial Power and the International Legal Order", The Supreme Court Review, 2006, No 3, pp. 59-113; D.C. GRAY, "Why Justice Scalia Should Be a Constitutional Comparativist", Stanford Law Review, 2007, pp. 1249-1279; L. HELFER and A.M. SLAUGHTER, "Why States Create International Tribunals: A Response to Professors Posner and Yoo", California Law Review, 2005, pp. 1-58; E. A. POSNER and C.R. SUNSTEIN, "The Law of Other States", Stanford Law Review, 2006, pp. 131-179.

[60] C. VILLÁN DURÁN, Curso de Derecho internacional de los derechos humanos, Madrid, Trotta, 2002, pp. 507-508.

[61] I.C.J., Legal consequences of the building of a wall over occupied Palestinian territories, Judgment, 9 July 2004, Rec., 2004, p. 136, § 134.

[62] I.C.J., Lagrand [Germany v. United States], Judgment, 27 June 2001, Rec., 2001, p. 466, § 77.

[63] I.C.J. Avena [Mexico v. United States], Judgment, 31 Mar. 2004, Rec., 2004, p. 12, § 106; prior to that, in the affair relative to the provisional measures requested by Paraguay to suspend the execution of the death penalty determined against a Paraguayan national, Ángel Francisco Breard, by the courts of Virgina, the North American counsel, as indicated by the I.C.J. Vienna Convention on consular relations, provisional measures [Paraguay v. United States], Order, 9 Apr. 1998, Rec., 1998, p. 248, alleged: "that the indication of the provisional measures requested by Paraguay would be contrary to the interests of the states parties to the Vienna Convention and to those of the international community as a whole as well as to those of the Court, and would in particular be such as seriously to disrupt the criminal justice systems of the states parties to the Convention, given the risk of proliferation of cases; and whereas it stated in that connection that states have an overriding interest in avoiding external judicial intervention which would interfere with the execution of a sentence passed at the end of an orderly process meeting the relevant human rights standards" [§ 22]. Despite the judicial order to suspend the execution U.S. Courts disregarded it and in Virginia the death penalty imposed was executed on 14 April 1998, being the reason why Paraguay gave up the contentious procedure, accepting only the diplomatic apologies of the United States.

[64] Until the signature of the Rome Statute there was hope that, with adaptations, the United Status would eventually become parties to the treaty; however, the sweetening of the international judicial system in this sphere has not had effects so far; see the analysis of the negotiations in the study coordinated by K. AMBOS, La nueva justicia penal supranacional. Desarrollos post-Roma, Valencia, Tirant lo blanch, 2002.

[65] I.-A.C.H.R., Annual Report 2006, http://www.corteidh.or.cr/informes.cfm.

[66] According to the data of the International Court of Justice itself, between 22 May 1947 and 2 June 2007, there had been 136 cases registered, of which 112 were contentious cases and 24 advisory opinions: http://www.icj-cij.org/docket/index.php?p1=3; in the case of the Permanent Court of International Justice and in the period between 1922 and 1944 there were 29 contentious cases and 27 advisory opinions.

CONSTITUTIONAL COURTS IN CENTRAL AND EASTERN EUROPE AND THEIR ATTITUDE TOWARDS EUROPEAN INTEGRATION

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I. INTRODUCTION

The aftermath of the communist regimes in the Europe of XXth century was characterised, among other things, by a struggle for constitutional justice:[1] together with their democratic constitutions, CEE countries opted for the abstract (with elements of concrete review in the form of preliminary questions) and centralised model of constitutional review, thereby trusting constitutional review of laws in the hands of constitutional courts. It was the time of proliferation of these courts, which emerged powerfully in Central and Eastern Europe. The picture was not new: after the Second World War the model of constitutional justice was embraced quickly by Western European countries,[2] which were eager to guarantee a successful settlement of democratic regimes. As Luis Lopez Guerra[3] points out, constitutional courts emerge during the building of democratic regimes, after experiences of authoritarian regimes "in which constitutional norms and guarantees had been violated or disregarded, often with the collaboration of the legislature".[4]

Constitutional courts in the region undertook an important role in the political, economic and social reforms of their respective countries. After the first years of judicial activism, which was mainly related to internal reforms and fashioning of a new democratic system, these courts have shown that they could turn into important actors of the European integration process, which implies among other things the integration of national legal orders into the European one. Recent challenges to the European Arrest Warrant and other Community acts have identified these courts as important factors in the context of relations between the national and the European legal order.

The main purpose of this paper is to explore the role played by constitutional courts of CEE in order to assess their position as participants in the integration process in Europe. This shall be done thorough analysis of their pre- and post-accession case law. The main finding of the paper is that constitutional courts of CEE have taken quite an equilibrated stance towards European integration: generally speaking, their rhetoric is characterised by a Euro-friendly discourse in the pre-accession period which, after the enlargement was complemented by a set

of controlimiti, especially with regard to the safeguard and superiority of national constitutional values.

In the first part of the paper there is a short introduction on the establishment of constitutional review in Central and Eastern Europe. This shall be followed by a general overview of the pre-accession jurisprudence by highlighting the main constitutional discourse in the region. Afterwards, the post-accession period will undergo a careful analysis in order to understand the general tendencies shown by these courts after the European enlargement of May 2004.

II. GENERAL REMARKS ON THE ESTABLISHMENT OF CONSTITUTIONAL REVIEW IN CENTRAL AND EASTERN EUROPE

During the important political transformations in Central and Eastern Europe, one could detect a general prevailing tendency according to which constitutional adjudication was considered an important and sometimes even indispensable factor of a democratic system. Constitutional courts were perceived as important factors of implementing the rule of law in the fragile democratic systems of countries of CEE. According to Venelin I. Ganev in a country report on Bulgaria "the prevailing consensus was that the mechanism of judicial review is an indispensable component of modern democracy". [5] According to the same report, a small faction of communist party opposed the creation of a Constitutional Court in Bulgaria, by proposing that the review of constitutionality of legislation should be entrusted to the Supreme Court and with a right of a qualified parliamentary majority to override the decisions of the court. This proposal was not accepted and in the Bulgarian Constitution the chapter on the Constitutional Court was included. Similarly, Lithuania dropped the American model of constitutional review, by arguing that "the constitution drafters determined that a completely independent institution was necessary to ensure that the Constitution would be implemented accurately and the branches of power would be kept separate and balanced".[6]

Moreover, there is an important 'European' argument when it comes to the establishment of constitutional review in CEE. One of the most active European institutions militating in the area of human rights protection and constitutionalism, the Council of Europe, became a central point of reference for countries coming out of communist regimes. At the same time, the European perspective played an important role in the emergence of the European model of constitutional review in CEE countries. As Prochazka argues, "the EU membership perspective, however, impacted also the process of constitution making as a whole. In fact, it became the

principal legitimising feature of political action as such".[7] Prochazka points out that, return to Europe for CEE countries (and especially for the Visegrad countries which are at centre of his research) was not equivalent to informing the EC/EU about their reforms, but rather to adjust their own institutions according to the model of Member States. This did not happen as an imposed set of rules and guidelines to be followed by CEE countries; on the contrary these countries had a strong will to achieve "normality, which in other words meant compliance with European institutional choice".[8] This argument seems to reflect quite well the reality in the region, if one takes into consideration the urge of CEE countries to approximate their governance and institutional framework to the European democratic standard and their rush to get rid of their communist past.

The first period of the institutional life of these courts can be easily related to the period of substantial political, economic and social reforms in Central and Eastern Europe. The Hungarian constitutional court - sometimes labelled as "the most powerful constitutional court in the world"-[9] is well known for its controversial decision on the constitutionality of property restitution law of nationalised lands to pre-Communist owners,[10] the decision on lustration law, and for its influence on the welfare reform in Hungary.[11] In Poland, as Judge Garlicki points out, the needs of transformation of the country determined the nature of matters referred to the Polish Constitutional Tribunal - mostly regarding economic, taxation and social regulations. Therefore, "the practical realisation of those tasks required a considerable dose of judicial activism reflected in a relatively high number of judgments of unconstitutionality of statutes" [emphasis added].[12]

In the new context of accession, where the approximation of national legal orders to the European one became substantial and where European law was given a status of precedence over national law, these courts emerged with the task of guarding their national constitutions and in the same time complying with all European requirements.

The following parts of the paper shall give a summary of the role of these courts in the pre-accession process, followed by a more detailed analysis of their post accession case law on the relation between national and European legal orders.

III. Constitutional courts in Central and Eastern Europe and their attitude towards European integration in the pre-accession stage

As Kuhn rightly points out, after the first wave of transformation in the early 90's which was related to the elimination of major deficiencies of communist legal system, the second major challenge for the institutions of CEE countries was 'Europeanisation'.[13] This process had broad implications on the legal and institutional framework of these countries and constitutional courts intervened as important actors.

During the pre-accession period, one of the most important discourses was that of "judicial harmonisation", which according to Albi implied "whether the national courts should apply the interpretation of the European Court of Justice and take account of EU legislation when applying provisions of domestic laws or the provisions of the Europe Agreements".[14] In this context, where European Union law de iure did not have binding force in the candidate countries, constitutional courts of these countries by acting as actors of Europeanisation, frequently made reference to the acquis communautaire and to the case law of the ECJ, by generating a pro-European doctrine of 'consistent interpretation between national and European law'.[15]

In this context, the main general observation is that these courts have been quite receptive with regard to the harmonisation of their domestic legal orders with the European legal order. If one takes a look at secondary sources of literature (Albi, Kuhn, Sadurski, Volkai), it can be reported that in nine decisions overall of constitutional courts of Poland, the Czech Republic, Lithuania, Estonia and Latvia related to constitutional issues in the pre-accession period, six of them reflect a general tendency of referring to European case law or normative regulations. Last but not least, three dissenting opinions of constitutional judges in Latvia and Estoniapoint out the importance of referring to the case law and law of the Union, as well as of approximation of legal theory and thinking.[16] In contrast to the above, as it will be discussed in the following paragraphs of the paper, the Hungarian Constitutional Court showed defiance in its judgment on the Europe Agreement.

A few examples can be listed to illustrate the above general observation. An important case of the Polish Constitutional Tribunal, dating 1997 - which has been reported by many commentators-[17] dealt with the difference in age retirement for male and female employees. Respective domestic provisions were found contrary to the Constitution and to the acquis communautaire on equal treatment (precisely Directive 207/76/EEC). The Polish Constitutional Tribunal ruled that:

> "Of course, EU Law has no binding force in Poland. The

> Constitutional Tribunal wishes, however, to emphasise the provisions of Article 68 and Article 69 of the [Polish Association Agreement]. Poland is thereby obliged to use 'its best endeavors to ensure that future legislation is compatible with Community legislations'. The Constitutional Tribunal holds that the obligation to ensure compatibility of legislation (borne, above all, by the parliament and government) results also in the obligation to interpret the existing legislation in such a way as to ensure the greatest possible degree of such compatibility" [emphasis added].[18]

It is clear from the above statement that the Polish Tribunal established, through its interpretation, a distinction between binding force of EU law and, obligation of ensuring compatibility between domestic and European Union law. Even though EU law could not be deemed as binding in Poland (due to the fact that Poland was not yet a member of the European Union), Polish institutions -including the Court- were under the obligation stemming from the Accession Agreement, to provide for the maximum of compatibility between EU and domestic legislation. The Tribunal attributed to itself the obligation of interpreting existing legislation in a pro-European way.

In the case of Referendum on Poland's Accession to the European Union, which also dates before the accession of Poland to the Union, the Tribunal repeated once more that the interpretation of domestic statutes should be done in a manner sympathetic to the process of European integration. Moreover, the Tribunal referred to a "constitutional principle of sympathetic predisposition towards the process of European integration and the cooperation between states",[19] which should be taken into account during the interpretation of binding statutes. It is clear from the wording of the judgment that the Constitutional Tribunal granted to the above mentioned principle, a constitutional status, as a principle which could be derived by the Preamble and Article 9 of the Polish Constitution.

In a case of the Czech Constitutional Court regarding the interpretation of the Czech antitrust law consistently with the case law of the ECJ, the Court affirmed that both the EC and EU Treaty derive from the same values and principles as Czech constitutional law, therefore the interpretation of European antitrust law by European bodies is valuable for the interpretation of the corresponding Czech rules.[20] The Czech Constitutional Court reaffirmed this position in the Milk Quota Case where it stated in a Euro-friendly manner that "primary Community law is not foreign law for the Constitutional Court, but to a wide degree

it penetrates into the Court's decision making-particularly in the form of general principles of European law". [21]

Apart from pointing out the necessity of interpreting national law in conformity with the acquis communautaire, these courts have widely referred to the case law of the European Court of Justice and EC legislation. In the Skoda Case regarding the abuse of dominant position by the Czech car manufacturer, the Czech Constitutional Court referred to the ECJ case Merci Convenzionali Porto di Genova.

In the Telecommunications' Case concerning the constitutionality of domestic law referring to the requirements of EU law, the Lithuanian Constitutional Court referred to EC Directives 90/388 and 98/10/EEC.[22]Moreover, in the Death Penalty Case, the same court makes reference to a political document as the European Parliament's Resolution of 1997 on the abolition of death penalty, which is foreseen by the European Parliament as a condition concerning Partnership and Cooperation Agreements.[23]

On the other hand, the Estonian Review Chamber has highlighted in the pre-accession period the need to consider legal principles of EU law. According to the Chamber "in creating the general principles of law for Estonia, the general principles of law developed by the institutions of the Council of Europe and the European Union should be considered; these principles have their origin in the general principles of law of the highly developed legal systems of the Member States".[24]

It is quite clear from the abovementioned examples that, even on the eve of accession, constitutional courts of CEE countries (1) have made use of interpretative tools with the purpose of establishing an obligation of consistent interpretation of domestic law with European Union law; (2) have referred widely to the case law of the ECJ and EC legislation by giving the message of judicial harmonisation and that the process of integration implies also legal integration of domestic law into the acquis communautaire.

At the end of the day, one can detect a general Euro- friendly attitude of constitutional courts. Nevertheless, the particular context of regained sovereignty in which these courts pronounce their judgments, might be the source of certain claims regarding "violation of sovereignty" by the direct application of EU secondary law and ECJ case law, as was the case of the Hungarian Constitutional Court.[25] In its famous pre-accession judgment on the Europe Agreement,[26] the Hungarian Constitutional Court found partially unconstitutional the law implementing the Europe

Agreement by ruling that European law had no direct effect and direct applicability before accession.[27] The Court highlighted that:

> "The mechanism of direct applicability is a typical characteristic of the relationship between the Community legal system and EU Member States. However, the situation flowing from the ensemble of Article 62(2) EA and Article 1IR has to be assessed in the course of constitutional control with regards to the fact that presently the Hungarian Republic is not a Member State of the European Union".[28]

Furthermore, the Court clarified that norms of another public order (in this case Community norms) on the creation of which Hungary has no influence because of not being a member of the Union, cannot generate an obligation of applicability in the Hungarian legal order. This, according to the Court, would require an express constitutional authorisation.[29] The criteria and requirements deriving from Community law in the pre-accession stage, qualified as foreign law from the point of view of Hungarian law enforcement as Hungary is not a Member of the Union.

How much from the above attitude of these courts has been reflected in their post-accession jurisprudence? Have the Polish and Czech Constitutional Court maintained a Euro-friendly attitude towards European law? In what way has supremacy of European Union law has been shaped and what kind of compromises have the courts found with their constitutional requirements? The following part of the paper makes an effort to address some of these issues.

IV. Après enlargement: Some reflections on the post-accession case law of CEE constitutional courts.

Immediately after the enlargement of the European Union with 10 Member States in May 2004, one can take note of ten constitutional judgments rendered by four constitutional courts in CEE: the constitutional court of Hungary, Poland, the Czech Republic and Estonia.

The Hungarian constitutional court presents an interesting case study,[30] due to the fact that it tried to isolate the challenged act from any European implication and therefore it ruled out the possibility of being involved in discourses of "relations between national and European law". According to the Court, the case was completely domestic and it was under its full constitutional jurisdiction to review the constitutionality of the Act of Parliament which implemented certain European regulations on

the surplus stock of agricultural products.

Different readings of this judgment have been suggested. On a first reading proposed by Sajo, the Hungarian Constitutional Court was unwilling to participate in the European learning process. According to another reading offered by Uitz, the Court avoided taking a stand directly on the supremacy of Community Law, showing judicial deference or self-restraint in seeking to leave Community law undisturbed to the farthest possible extent.[31] Furthermore, according to Sadurski, the Hungarian decision can be read as follows: "the Court came across a deeply troubling defect in the law (troubling, especially, from the point of view of its earlier strong anti-retroactivity jurisprudence) [...] but in order not to appear un-cooperative with regards to Hungary's accession to the EU, it preferred to characterise its scrutiny as concerning exclusively domestic issues, thus avoiding making any gestures questioning the (putative) supremacy of European law over the Hungarian constitutional doctrines".[32] Another reading proposed by the same author is that the Court seized the opportunity to establish its own position as the umpire of the validity of European law, according to its own conceptions of democracy, but chose to minimise the friction and merely to send a signal according to which it will not accept any 'foreign norms' which do not square with its own philosophy of the rule of law and democracy.[33]

In practice, the Court used the surplus stock case to convey certain messages, perhaps both to the national and international (in this case European) audience, regarding the ultimate importance of the sacred Hungarian principles of legal certainty and non-retroactivity of laws. This was done through a cleaver move: the Hungarian Constitutional Court was conscious that it could not openly go against the European Regulation, which was mimicked in detail by the Hungarian implementing law. Therefore, it chose the path of situating the case in a very domestic context, thereby avoiding direct confrontation with Community Law.

The Polish Constitutional Tribunal has been far more active from a quantitative point of view: starting from the spring of 2004, it has rendered five constitutional judgments. The Bio Petrol Case[34] and theEuropean Parliamentary Elections Case[35] can be considered as a follow-up to the pre-accession case law of the Tribunal: again the Tribunal points out the fact that "whilst interpreting legislation in force, account should be taken of the constitutional principle of sympathetic predisposition towards the process of European integration and the cooperation between states".[36]

While the above decisions seem to reproduce some of the Polish pre-

accession judgments, the discussion becomes more interesting with the two famous decisions of the Tribunal: the European Arrest Warrant Case[37] and the Treaty Accession Case. Both decisions contain important indicators concerning the relations between the Polish and the European legal order. In the EAW Case, first the Tribunal asserts that there is no room for presumptions of conformity between derivative EU law and acts implementing it and the national constitution. Afterwards, it warns that the prohibition of extradition has constitutional value and it stands as an absolute prohibition. At a later stage, it touches upon the issue of consistent interpretation, a doctrine of the ECJ introduced and applied in the framework of community directives. By pre-empting the ECJ in parts of its laterPupino judgment, the Court does not rule out, at least in principle, the possibility to apply consistent interpretation in the case of framework decisions.

At the very end, the practical outcome of the ruling is clear: domestic provisions implementing the EAW Decision would normally apply, even if declared unconstitutional. This means that the absolute prohibition of extradition provided by the Constitution was momentarily left aside and European obligations to implement EAW prevailed. Moreover, the Tribunal suggested that the legislator should initiate respective legislative amendments which should be followed by constitutional amendments in order to avoid the possibility of encroachment upon requirements of EU law. As one commentator has rightly pointed out:

"This suggestion, in my opinion, indicates that the Constitutional Tribunal in fact recognised the supremacy of EU law. [...] It thus accepted that the constitution itself was no longer an absolute framework for control-if it hinders the correct implementation of EU law, it should be changed. [...] It seemed that in this judgment the Tribunal went further than the existing practice - it implicitly accepted the supremacy of EU law over constitutional norms".[38]

In this context, the judgment can be considered as a hybrid of a pro-European attitude and several careful statements regarding the ultimate status of the national constitution. One commentator,[39] by elaborating arguments for both sides, emphasises that one of the reasons for which the ruling can be classified as anti-European is that the Tribunal defined extradition very broadly by including surrender as well, where it could have decided differently. Moreover, she suggests that "the Tribunal could have also argued, [...] that the institution of surrender grants a higher level of protection of fundamental rights than extradition, where the decision is made by the executive; this would have allowed the Tribunal to conclude that the rationale for prohibiting extradition of Polish citizens does not

apply here".[40] From another perspective, according to the same author the remedy chosen by the Tribunal -to delay the loss of the binding force of law provisions- counts as a pro-European aspect of the judgment. According to another commentator, the fact that the Tribunal encouraged the revision of the Constitution in an inter-institutional dialogue with the Polish Parliament shows its supportive attitude towards the EU.[41]

The EAW decision was the first important encounter between EU and Polish constitutional law. In the Treaty Accession Case,[42] the Tribunal further clarifies its doctrine on the interaction between national and European law. As it typically happens in delicate issues such as those tackled by these courts, the Tribunal's decisions are built upon two important parts: the first -the 'diplomatic' part-, which generally refers to the new post-accession context and the need to comply with requirements stemming from accession to the EU, and a second one which sets limits to the sympathetic interpretation of European law and in a more general sense, to the intrusion of European law into national law.

By taking quite a balanced attitude, the Tribunal first sets the background for a typically pluralist approach by pointing out that:

> "The concept and model of European law created a new situation, wherein, within each Member State, autonomous legal orders co-exist and are simultaneously operative. Their interaction may not be completely described by the traditional concepts of monism and dualism regarding the relationship between domestic law and international law. The existence of the relative autonomy of both, national and Community legal orders in no way signifies an absence of interaction between them. Furthermore, it does not exclude the possibility of a collision between regulations of Community law and the Constitution".[43]

Afterwards, the Tribunal excludes any possibility of ultimate supremacy of Community norms over constitutional norms. It makes clear that in case of a collision between constitutional and Community norms, the supremacy of a Community norm may not be assumed over a constitutional norm. Moreover, it cannot be assumed that a constitutional provision might lose its binding form, or be substituted by a Community norm.

This is followed by a series of bitter paragraphs in which the Tribunal lists a number of limits regarding sympathetic interpretation of national law, the functioning of the Communities and the powers of the ECJ in relation to the application of the Treaties. Regarding the first issue, the Tribunal

pointed out that the principle of interpreting domestic law in a manner sympathetic to European law, cannot lead to results which contradict the explicit wording of constitutional norms or which are irreconcilable with the minimum guarantee functions realised by the Constitution.[44]

Furthermore, the Tribunal asserted that the functioning of Communities and the European Union should be based upon conferred powers by Member States. On the other hand, Member States shall ensure that decision makers at European level, shall not transgress their competences and shall act by respecting subsidiarity and proportionality when legislating. In an opposite case, such European provisions cannot prevail over national law. In the same context, the Tribunal lists three limits which apply to the ECJ: (a) its interpretation of community law should fall within delegated competences; (b) interpretation of Community law by the ECJ should observe the principle of subsidiarity; (c) the interpretation should be based on the assumption of mutual loyalty between Community/Union institutions and Member States. According to the Tribunal, there should be sympathy from both sides: the assumption of mutual loyalty generates a duty for the ECJ to be sympathetically disposed towards the national legal system and a duty for the Member States to show the highest standard of respect for Community norms.[45] Having said this, it can be concluded that the Accession Treaty decision represents a significantly bitter decision regarding European Union law and its relation towards national constitutional law.

In a more recent decision regarding excise duties,[46] the Tribunal seizes again the possibility to extend its doctrine on the interaction between national and European law.
The Tribunal points out that:

> "Undoubtedly, of crucial importance in this matter is the fact that the ECJ safeguards Community law and, while passing judgments, it does not have to take into consideration the standards deriving from legal orders of particular Member States, including the status of the constitution in the system of sources of domestic law thereof" [emphasis added].[47]

As has been already analysed in the Accession Treaty Case, the Tribunal elaborated on an assumption of mutual loyalty between the Community/Union institutions and the Member States, which should serve as the basis for the interpretation of Community law by the ECJ. According to this assumption, the ECJ has a duty to be sympathetically disposed towards national legal systems. To be sure, the rhetoric of the Accession Treaty Case is one of greater expectation with regard to

the attitude of ECJ vis-à-vis domestic legal orders, if compared with the wording of the Excise Duty Case.

Moreover, it might seem that the Tribunal in the Excise Duty Case loosened the requirements of loyalty addressed to the ECJ. However, the court did not abandon its protectionist declarations according to which the Constitutional Tribunal safeguards the Constitution, which on the other hand shall be the supreme law in Poland. Furthermore, the Tribunal asserts once more its role as guardian of the Constitution, which should not be perceived only as an attribute, but also as an obligation deriving from the Polish Constitution. It reaffirms its position by stating that:

> "A collision may occur between decisions taken by the ECJ and decisions taken by the Constitutional Tribunal. Taking the above into consideration, one must state that also by virtue of Article 8 § 1 of the Constitution, the Constitutional Tribunal is obliged to such recognition of its position that in fundamental issues relating to the constitutional system of the State it shall retain its status of the 'last-word' court".[48]

Thus, it seems that the Tribunal decided to safeguard its position as the last word court, but at the same time it acknowledged that there might be situations where there is no need for its involvement, as matters might fall under the jurisdiction of the ECJ of simply ordinary courts. In this case, the Tribunal steps back by asserting that:

> "The issue of solving conflicts in relation to domestic statutes falls outside the scope of jurisdiction of the CT, since the decisions of whether a statute remains in conflict with Community law, shall be delivered by the Supreme Court, administrative courts and common courts, while the interpretation of Community law norms shall be provided by the ECJ by way of a preliminary ruling".[49]

Certain parts of the judgment, where the Tribunal claims an obligation on ordinary national courts to refuse to apply domestic law which conflicts with Community law, are a re-statement of the Simmenthal mandate as elaborated many years ago by the ECJ. However, the main source of the problem remains the constitutional conflict, the conflict deriving from a possible clash between a Union legal norm and a constitutional provision. In this context, it is hard for the Tribunal to abandon its status as the 'last word' court.

This complex picture of attitudes offered by the Polish Tribunal draws our

attention to the equilibrist pattern which was attached to these constitutional courts in the main finding of the paper. After the accession to the European Union, constitutional courts of CEE countries had to deal not only with cases of constitutionality review of national laws, but also with problems of relation between national and European law. Therefore, they faced a new reality which required them to act not only as guardians of national constitutions (and in the same time by safeguarding their status as 'last word' courts), but also as courts of the Union.

In the Czech Republic the situation is not that different. The Czech Constitutional Court started its involvement in the supremacy discourse with the Sugar Quotas Case.[50] In this case the Court recognises, as its Polish counterpart, the fundamental change and new impact in the national legal order due to the accession of the country to the Union. Moreover, it acknowledges, by almost mimicking So Lange II that the level of protection of fundamental rights in the Community is not troublesome, and not lower than the level of protection in the Czech Republic. This would mean an extension of pax germana also in the jurisprudence of the Czech Constitutional Court. Nevertheless, the court reminds us that it will act as the protector of constitutionalism in order to protect the essential fundamentals of the Czech constitution and constitutional tradition. Again it seems that the judgment articulated by the court is structured in a way so as to provide for a balance between a Euro-friendly approach and qualified statements which mostly refer to the exercise of conferred powers by European institutions.

In the European Arrest Warrant decision rendered a few months later,[51] the Czech Constitutional Court was faced with an issue of European Union law, precisely with the extradition of indicted persons on the basis of the European Arrest Warrant. In the end, the Court managed to reconcile, through the use of interpretative tools, its domestic legal enactments with the requirements imposed by the EAW. The law implementing the EAW Decision was upheld as not being contrary to the Charter of Fundamental Rights and Basic Freedoms (forming part of the Czech Constitution). In contrast to its Polish (and especially German) counterpart, the Czech Constitutional Court tried to minimise any kind of possibility of a clash between its constitutional fundamentals and the European legal order. It did not engage in any kind of sovereignty discourse, which would be typical in the context of extradition procedures that usually trigger serious concerns for the protection by the state of its own citizens.

It is worthwhile to highlight one of the paragraphs of the judgment where the court ruled that: "if the Constitution [...] can be interpreted in several

manners, only certain of which lead to the attainment of an obligation which the Czech Republic undertook in connection with its membership in the EU, then an interpretation must be selected which supports the carrying out of that obligation, and not an interpretation which precludes it".[52]Yet again, the above statements identify a relatively friendly attitude towards European Union law and European integration.

Estonia represents an interesting case in the full picture of challenges to the supremacy of European Union legal order. In the pre-accession stage to the European Union, the Estonian Constitution, due to low public support for accession and a difficult amendment procedure, was not amended but only supplemented by the Act Supplementing the Constitution.[53] Many provisions of the Estonian constitution dealing with sovereignty and independence, right of Estonian citizens to belong to political parties and the exclusive right of the Estonian Bank to emit Estonia's currency, were not tailored to the requirements of the acquis.[54] Therefore the chances of collision might be very high.

Instead, the Act Supplementing the Constitution authorises Estonia's membership to the European Union and provides that the Constitution should be applied by taking into consideration the rights and obligations deriving from the Accession Treaty. Thus, the room for interpretation by the Estonian Court through its respective Review Chambers remains very broad as in a theoretical case of conflict between a constitutional provision and Union law, the only guideline given by the Act Supplementing the Constitution, is that the latter should be applied by taking into consideration rights and obligations stemming form Estonia's membership in the European Union.

In the Political Parties' Case,[55] the Estonian court took the opportunity to give its view on the supremacy issue by affirming that:

> "The European Union law has indeed supremacy over Estonian law, but taking into account the case law of the European Court of Justice, this means the supremacy upon application. The supremacy of application means that the national act which is in conflict with the European Union law should be set aside in a concrete dispute".[56]

Dissenting judges pointed out that the General Assembly of the Supreme Court should have declared the provision of the Political Parties Act restricting the membership in political parties only to Estonian citizens, invalid due to the unconstitutionality thereof or, should have asked the ECJ for a preliminary ruling for the interpretation of Article 19 of the

Treaty Establishing the European Community. Moreover, according to the same dissenting judges, the Supreme Court did not fulfil its function as the interpreter of the Constitution. Moreover, their argument goes as follows:

> "It is regrettable that the highest court of the state, who has the obligation to interpret the Constitution, did not explain the meaning and implications of the Constitution of the Republic Amendment Act, and did not give the foundations for interpreting the Constitution on the basis of the Act. [...] The Constitution of the Republic Amendment Act does not constitute a mere permission for Estonia to accede to the European Union. It is just as important that within the context of EU membership the Constitution must be interpreted on the basis of the Amendment Act. [...] Unlike the Constitutions of many other EU Member States, the Constitution of the Republic of Estonia Amendment Act regulates the relationship between Estonia and the EU very laconically, thus rendering further interpretation of the Constitution by the Supreme Court indispensable" [emphasis added].[57]

Dissenting judges found the challenged article of the Political Parties Act of Estonia in conflict with the interpretation of the Estonian Constitution, thereby "constituting an unacceptable intensive infringement of the passive suffrage of the citizens of other EU Member States".[58] According to the dissenting bench, the second sentence of article 48 of the Estonian constitution which provides explicitly that only Estonian citizens may belong to political parties, should have been interpreted as to guarantee to EU citizens the possibility to belong to political parties with the aim of standing as candidates for municipal elections. The legal basis for this approach could be found in paragraph 2 of the Supplementing Act which provides that the Estonian Constitution should be interpreted by taking into account the rights and obligations arising from the Accession Treaty.

The outcome of the case is similar to that of the Excise Case judged by the Polish Constitutional Tribunal. Both highest courts declined their competence of reviewing -and/or invalidating- domestic law in the light of Community provisions. Supremacy of European law implies supremacy in application, i.e. national law is set aside by courts in case it conflicts with norms of the European legal order. Constitutional courts declared their incapacity of declaring domestic law invalid in the light of Community law.

Nevertheless, one cannot draw exact parallels between the two cases: in the Polish case, the only direct link of review was between provisions of

tax law and Community provisions on the free movement of goods, taxes etc. Therefore, the Polish Constitutional Tribunal could not assess domestic provisions exclusively in the light of Community law. In the Estonian case, the chancellor of Justice claimed that the provisions of the Political Parties Act were in conflict with the Estonian Constitution and European Union law. However, it is quite evident that the court decided not to use its broad interpretative power granted by the Supplementing Act. It followed a strategy of self restraint and did not clarify the function or status of the Supplementing Act in the Estonian legal order.

Later on, in an opinion issued by the Constitutional Review Chamber of the Supreme Court,[59] the status of the Supplementing Act and of the Estonian Constitution, as well as the issue of supremacy of Community law, was better clarified. One of the most important statements of the Court is related to its explicit acknowledgment that the adoption of the Supplementing Act amounted to a material amendment of those parts of the Constitution which are not compatible with the European Union law. Furthermore the Court opts for a broadly 'pro-European' approach by accepting ultimate supremacy of Community law.[60] It affirmed that:

> "Only that part of the Constitution is applicable, which is in conformity with the European Union law or which regulates the relationships that are not regulated by the European Union law. The effect of those provisions of the Constitution that are not compatible with the European Union law and thus inapplicable is suspended. This means that within the spheres, which are within the exclusive competence of the European Union or where there is a shared competence with the European Union, the European Union law shall apply in the case of a conflict between Estonian legislation, including the Constitution, with the European Union law".[61]

V. Final comments on the rationale and implications of the case law of constitutional courts in CEE

The above 'excursion' through the case law of constitutional courts of CEE has shown that these courts have adopted a relatively balanced attitude towards European integration and none of them has openly rejected the supremacy of EU law over national law (especially ordinary national law). They have plainly recognised that accession to the Union inevitably brings about obligations regarding the approximation and full integration of domestic legal orders into the acquis communautaire. It seems that Kuhn was correct in his early predictions that "considering the nature of the post-communist judiciaries, it is unlikely that they will manifest open hostility or refuse to accept the leading role exercised by the ECJ in the

field of European law".[62]

However, except for the interpretation of the Estonian constitution (opinion of the Estonian Constitutional Review Chamber regarding the emission of Estonian currency), which can be considered as a clear acceptance of the ultimate supremacy of Community law, other constitutional courts of CEE have been very careful in elaborating their views on the absolute supremacy of community law over constitutional norms. As has been mentioned above, the Polish Constitutional Tribunal made it clear that the norms of the constitution will be the standard for the review of implementing acts, and in the Accession Treaty Case the same court took a very clear stance against the ultimate supremacy of European law over the Polish Constitution. The Czech Constitutional Court also, in its Sugar Quotas Case, reminded us that any transfer of powers to Community institutions is conditional and not unlimited and that in any case, the constitutional court could be called upon to protect constitutionalism and inalienable fundamental principles of the Czech Constitution.

Constitutional courts of CEE have been conscious of the fact that with the accession to the Union, some limitations of national sovereignty might occur and some powers are transferred to the institutions of the Community. As a result, national legal orders, here including the Constitution, should open up to accommodate the precedence in application of European law, in case of a conflict of the latter with national law. However (!), this limitation and transfer is conditional upon the fact that it should not transgress certain fundamentals such as fundamental rights, legal certainty, principles of a democratic-law based state, which usually happens to be tailored by constitutional courts according to their sensitivities and legal tradition.

Precedent case law -also elsewhere in Europe- shows that often there is a 'however' or a 'so lange' clause or conditionality in the discourse of these courts which appears complementary to the integrationist attitude. These conditionality frameworks or controlimiti rarely emerge in the pre-accession stage: perhaps the willingness to join the club is so strong that it sets the tone of constitutional courts in high levels of European friendliness. Moreover, the post-accession stage brings about a new reality in which ordinary courts are transformed into courts of the Union and each of them can decide to disapply national law if it goes against a European norm. It is not unlikely that constitutional courts might perceive this as an empowerment of ordinary courts and therefore make use of any possibility of emphasising that the constitution is the supreme law of the land and that they remain the 'last word' courts.

On the other hand, this double reality of European friendliness and controlimiti, as served by CEE constitutional courts, is quite understandable if one takes into account the fact that these courts, similarly to their European counterparts, function as actors of European integration, but within a certain constitutional framework determined by their national constitutions. They are equipped by their constitutions with a constitutional mandate of observing the word and principles of national constitutions, which on the other hand is the raison d'être of these bodies. As De Witte rightly points out, in a remark on constitutional courts of Old Member States (regarding in particular the Italian, German, French and Belgians cases):

> "The cause of all these reservations against an absolute primacy of EC law is the fact that constitutional courts, quite understandably, cannot accept that any source of law might prevail over the national constitution itself, which after all is the source of their own existence. If the constitution is seen as the basis for recognising the primacy of Community law, then absolute primacy of the type postulated by the European Court in Internationale Handelsgesellschaft is only possible by way of an 'auto-limitation' clause in the constitution".[63]

This is an extremely important finding which, in my opinion, applies similarly to the case of constitutional courts of CEE countries. Constitutional courts are creations of their respective constitutions and they have the obligation to act as their guardians. They have the constitutional duty to interpret the constitution by taking into consideration the obligations stemming from the accession to the Union, but in any case they cannot rule against its wording. Therefore, every kind of analysis on their role in the European integration process should take into account a certain constitutional 'playground', which very often might be delimitated by a rigid wording of the constitution, specific principles strongly embedded in member states' constitutional traditions (such as legal certainty and non-retroactivity in the case of Hungary), and sometimes a lack of European awareness in the old generation of constitutional judges.

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[1] Term borrowed by H. SCHWARTZ, The Struggle for Constitutional Justice in Post-Communist Europe, Chicago, University of Chicago Press, 2000.

[2] Constitutional courts were established or re-established as in the case of Austria, in many European countries such as Germany, Italy, Greece, Spain, Portugal, Belgium, France.

[3] As cited by H. SCHWARTZ, The Struggle for Constitutional Justice in Post-Communist Europe, supra note 1, p.19.

[4] Ibid

[5] V.I. GANEV, "The Rise of Constitutional Adjudication in Bulgaria", in W.SADURSKI, Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective, The Hague, Kluwer, 2003, p. 250.

[6] N. GELAZIS, "Defending Order and Freedom: The Lithuanian Constitutional Court in its First Decade", in W.SADURSKI, Constitutional Justice, East and West, o.c., p. 395.

[7] R. PROCHAZKA, Mission Accomplished on Founding Constitutional Adjudication in Central Europe, Budapest, Central European University Press, 2002, p.17.

[8] Ibid., pp. 18-19.

[9] J. ELSTER, "On Majoritarianism and Rights", East European Constitutional Review, 1992, No. 3, p. 22.

[10] Ibid.

[11] A. Sajo makes a very strong argument to this regard, where he criticises the decision of the Hungarian Court regarding the welfare reform. He states that the decisions of the Constitutional Court "have slowed down the restructuring of the Hungarian welfare system and dramatically raised fundamental questions concerning society's post-communist welfare dependence"; A. SAJO, "How the Rule of Law Killed Hungarian Welfare Reform", East European Constitutional Review, 1996, p. 31.

[12] L. LECH GARLICKI, "The Experience of the Polish Constitutional Court", in W.SADURSKI, Constitutional Justice, East and West, o.c., pp. 281-282.

[13] Z. KUHN, "The Application of European Union Law in the New Member States: Several Early Predictions", German Law Journal, 2005, p. 564.

[14] A. ALBI, EU Enlargement and the Constitutions of the Central and Eastern Europe, Cambridge, Cambridge University Press, 2005, p. 52.

[15] For sure, one should be careful not to overestimate, from a quantative and qualitative point of view the pre-accession case law of CEE constitutional courts. However, one can not deny the importance of the "European discourse" during this stage of integration, especially in case one aims at shedding some light at the attitude of these courts in the aftermath of the 2004 enlargement.

[16] A. ALBI, EU Enlargement and the Constitutions of the Central and Eastern Europe, supra note 14, pp. 54-55.

[17] A. ALBI, EU Enlargement and the Constitutions of the Central and Eastern Europe, supra note 14, p. 53.

Z. KUHN, "The Application of European Union Law in the New Member States", supra note 13, p. 566.

[18] Reported by Z. KUHN, "The Application of European Union Law in the New Member States", supra note 13, p. 566.
[19] Polish Constitutional Tribunal, Referendum on Poland's Accession to the European Union, 27 May 2003, K11/03.
[20] Czech Constitutional Court, RE Skoda Auto, Sbirka Nalezu a Usnesei, Collection of Judgments and Rulings of the Constitutional Court, Vol. 8, p. 149 [in Czech], as reported by Z. KUHN, "The Application of European Union Law in the New Member States", supra note 13, p. 567.
[21] Ibid., p. 568.
[22] A. ALBI, EU Enlargement and the Constitutions of the Central and Eastern Europe, supra note 14, p.54.
[23] Ibid.
[24] Ibid, p. 55.
[25] Ibid, pp. 55-56.
[26] Hungarian Constitutional Court, Decision 30/1998, (VI 25) AB.
[27] See, for further comments, J. VOLKAI, "The application of the Europe Agreement and European Law in Hungary: The judgment of an activist Constitutional Court on Activist Notions", Harvard Jean Monnet Working Paper, 1999, No 8, p. 9,www.jeanmonnetprogram.org/papers/99/990801.rtf; W. SADURSKI "Solange, Chapter 3: Constitutional Courts in Central Europe, Democracy, European Union", EUI Working Paper, 2006, No 40,http://cadmus.iue.it/dspace/bitstream/1814/6420/1/LAW-2006-40.pdf
[28] J. VOLKAI, "The Application of the Europe Agreement and European Law in Hungary", supra note 27.
[29] Ibid.
[30] Hungarian Constitutional Court, Decision 17/2004 (V.25.)AB. The mechanism of constitutional review was initiated by the Hungarian President who, after having declined to sign an act of Parliament on measures related to the accumulation of commercial surplus stocks of agricultural products, forwarded the act to the constitutional court for constitutional review on grounds of legal certainty and non-retroactivity. The Act of the Hungarian Parliament, aimed at the implementation in Hungarian of the European regulations, which on the other hand contained measures dealing with the prevention of speculative stock accumulation of agricultural products. The Court held as unconstitutional several provisions of the said Act of Parliament, by arguing that it violated the principle of legal certainty due to the fact that the Act imposed tax related obligations in a retroactive way. In fact, the Act would enter into force not earlier than the second half of May 2004, but it would eventually be considered as valid and with binding effects starting from 1st of May 2004, the day in which Hungary joined the Union.
[31] For a concise summary of both positions, see A. ALBI, "Supremacy of EC Law in the New Member States: Bringing Parliaments into the Equation of 'Co-operative Constitutionalism'", European Constitutional Law Review, 2007, No 3, p. 56.
[32] See W. SADURSKI "Solange, Chapter 3", supra note 27, p. 14.
[33] Ibid.
[34] Polish Constitutional Tribunal, Bio-Components in Gasoline and Diesel, 21 April 2004, K 33/03.
[35]Polish Constitutional Tribunal, Participation of Foreigners in European Parliamentary Elections, 31 May 2004, K15/04.
[36] See paragraph 1 of the summary of the Judgment on the Participation of Foreigners in European Parliamentary Elections.

[37] Polish Constitutional Tribunal, European Arrest Warrant, 27 Apr. 2005, No 1/05. The mechanism of constitutional review was initiated by a legal question lodged by the Regional Court in Gdansk which requested the Tribunal to consider the conformity with the Polish Constitution, of respective articles of the Code of Penal Procedure allowing the surrender of a Polish citizen to a Member State according to the procedures set by the European Arrest Warrant. Despite the fact that the Constitutional Tribunal declared the extradition clause of the Code of Penal Procedure implementing the EAW as incompatible with Article 55 paragraph 1 of the Polish Constitution, it decided that the article would apply for an additional period until a future revision of the Polish Constitution.
[38] K. KOWALIK-BANCZYK, "Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law", German Law Journal, 2005, pp. 1360- 1361.
[39] D. LECZYKIEWICZ, "Case Note on the Judgment of 27 April 2005 of the Polish Constitutional Tribunal", Common Market Law Review, 2006, p. 1187.
[40] Ibid., p. 1187.
[41] A. LAZOWSKI, "The Polish Constitution, the European Constitutional Treaty and the Principle of Supremacy", in A. ALBI and J. ZILLER, The European Constitution and National Constitutions: Ratification and Beyond, The Hague, Kluwer, 2007, p. 178.
[42] Polish Constitutional Tribunal, Poland's Membership in the European Union (Accession Treaty case), 11 May 2005, K 18/04.
[43] See paragraph 13 of the judgment.
[44] See paragraph 14 of the Judgment.
[45] See paragraph 16 of the Judgment.
[46] Polish Constitutional Tribunal, Procedural Decision no. 176/11/A/2006 on the Excise Duty Tax, 19 Dec. 2006, No 37/05. The case at hand reached the Tribunal as a question of law referred by the Regional Administrative Court in Olsztyn, which decided to stay its proceedings until the Tribunal would decide. The case dealt with a request of a Polish citizen regarding a refund of an overpayment of excise duty paid by him in the purchase of a passenger car in Germany. According to the applicant, who had addressed his question to respective Polish Tax authorities, the obligation to pay excise duty deriving from Polish legislation conflicted with several provisions of the EC Treaty(namely articles 23 (1)(2), article 25 and article 90- dealing mainly with free movement of goods, the customs union and tax provisions). The question of law brought before the Constitutional Tribunal was to determine whether respective provisions of the Polish Act on excise duty stipulating that passenger cars not registered in the territory of Poland shall be subject to excise duty, conform to Article 90(1) of the Treaty establishing the European Community and, to article 91 of the Constitution providing that an international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with statutory provisions. The Constitutional Tribunal decided not to rule on the merits of the case by demonstrating considerable judicial self restraint. According to the Tribunal, ruling on the substance of the case, thus assessing the conformity of the Polish act on excise duty with Community provisions, would imply an interpretation of provisions of Community law by the Polish Constitutional Tribunal, which "would fail to take into account interpretation standards relating to all EU Member States".
[47] See the decision on the Excise Duty Tax.
[48] Ibid.
[49] Ibid.

[50] Czech Constitutional Court, Judgment Pl. ÚS 50/04, 8 Mar. 2006. The object of the case concerned a governmental regulation which regulated the process of allocation of sugar quotas production for sugar producers. The Court annulled paragraph 3 of the Government Regulation on the grounds that the Czech Government had acted ultra vires "by exercising an authority which had been already transferred to Community organs and which the Government, as a result, no longer held".
[51] Czech Constitutional Court, Judgment Pl. US 66/04.
[52] Ibid.
[53] A. ALBI, "Supremacy of EC Law in the New Member States", supra note 31, p. 43.
[54] Ibid.
[55] General Assembly of the Estonian Supreme Court, Case no. 3-4-1-1-05, 19 Apr. 2005. The case was brought to the Supreme Court of Estonia by the Chancellor of Justice who requested the Court to declare certain provisions of the Political Parties Act to be in conflict with the Constitution read together with the Supplementing Act and with the Treaty Establishing the European Community. The Court decided to dismiss the petition of the Chancellor of Justice on the basis that the general assembly has no possibility to declare national legal acts invalid because of conflict with the European Union law
[56] See paragraph 49 of the Judgment.
[57] Ibid.
[58] See paragraph 10 of the dissenting opinion by Justice Julia Laffranque joined by other judges of the Estonian Supreme Court.
[59] Constitutional Review Chamber of the Estonian Supreme Court, Opinion on the Interpretation of the Estonian Constitution, No 3-4-1-3-06, 11 May 2006. The Estonian Supreme Court was seized by the Estonian Parliament which asked the interpretation by the Court concerning Article 111 of the Constitution in relation with the Supplementing act and European Union Law. This request by the Parliament was introduced in a specific context, where Estonia started its legislative procedures for the enactment of the draft act providing for the withdrawal of Estonian currency from circulation when the Republic of Estonia would become a full member of the economic and monetary union. Therefore, a new law providing for the withdrawal of Estonian currency was about to be introduced. In the same time Article 111 of the Constitution provided that "The Bank of Estonia has the sole right to issue Estonian currency. The Bank of Estonia shall regulate currency circulation and shall uphold the stability of the national currency".
[60] See also A. ALBI, "Supremacy of EC Law in the New Member States", supra note 31, p.45.
[61] See Opinion of the Constitutional Review Chamber of the Estonian Supreme Court.
[62] Z. KUHN, "The Application of European Union Law in the New Member States", supra note 13, p. 572.
[63] B. DE WITTE, "Constitutional Aspects of European Union Membership in the Original Six Member States: Model Solutions for the Applicant Countries?", in A.E. KELLERMANN et al., EU Enlargement: The Constitutional Impact at EU and National Level, The Hague, Asser, 2001, p. 77.

TRANSITIONAL JUSTICE: THE POLISH EXAMPLE, THE CASE OF LUSTRATION

Marek Safjan*

I. DILEMMAS OF TRANSITIONAL JUSTICE

1. *Preliminary remarks*

Can we actually justify the qualification of transitional justice as a specific phenomenon existing at a special time in the modern history in Europe,[1] i.e. just after the collapse of the communist system? Is it true that the differences between the regular judicial system in the countries with a stable democratic system, and the post-communist states can justify naming this period as one of 'transitional justice'? The notion of transitional justice has a negative connotation: we immediately think about something exceptional, different from the normal justice system, something extraordinary or provisional. The adjectives relating to this notion, 'exceptional' and 'extraordinary', however do not coexist well with the notion of justice per se. Is transitional justice really transitional, 'condemned' to be forgotten in the near future, and soon to be exposed as a relic of totalitarianism; as a special object which served to purify the new democracy of its Communist contaminants during this period?

To answer this question we should determine the criterion by which such qualification is made. Theoretically, we can suggest some 'determinants' of the transitional jurisprudence.

Firstly, we can draw attention to the cases initiated before the constitutional courts which were indicative of the transformation process. Undoubtedly such cases were of a completely different nature to those confronted by the justice system prior to transformation. They all involved important issues raised by the 'system in transformation', above all by the new legal constitutional and political landscape, dramatic economic reforms and also by the need for a new evaluation of the totalitarian past (the so-called 'past cases').

Secondly, we may attempt to distinguish a new methodology applied during the transitional process by the justice system in order to resolve matters brought before the constitutional courts. To be sure, constitutional methodology always differs from that used by ordinary courts. However, at that time there were many elements in the

jurisprudence which reflected an altogether new approach to constitutional issues. In the first place, we should note the crucial role played by the general clauses of the constitutional regulations, such as the principle of the democratic state ruled by law, the protection of human dignity, the principle of proportionality, social justice and equal treatment, etc. However, we cannot deny that the general clauses play a significant role in all constitutional jurisprudence,[2] and it is insufficient to stress the importance of basic principles to differentiate transitional justice from the regular justice system. Nevertheless, it seems that a deep difference exists in the interpretative method chosen by new constitutional courts at the time. It was directly determined by the first and most important purpose of transitional justice, namely, to boost the emerging democracy in order to enable its development. In short, we can say that the objective was to create a new axiology of the constitutional system.

The legal constitutional culture had to be established in a vacuum; i.e. in the absence of a written constitution,[3] without stable constitutional jurisprudence deeply enrooted in the traditions of the legal system, without clear and precisely formulated principles of the democratic system and, last but not least, without a transparent hierarchy of constitutional values. However, the existence of a vacuum in a 'volcanic environment' is not possible. If we compare the scope and depth of reforms adopted by a new democracy to the eruption of a volcano, we can say that this eruption created a new environment and a new atmosphere. Hence, a democratic system after the collapse of a communist system requires a new legal axiology; restoration of the adequate relations between the state and the individual, a dramatic breakthrough in legal thinking, a localisation of the fundamental constitutional rights in the centre of the legal system. The search for that new axiology was the dominant factor guiding the evolution of the constitutional system.

It is worth mentioning that an important element of the new methodology was an increase in the significance of the principle of proportionality due to the high degree of conflicting values and principles (being at the same level of the hierarchy) in constitutional matters. At the same time, a great battle between the old concept of law belonging to the former system and the new democratic values forced the establishment of a new hierarchy of the constitutional principles. Transitional justice was similar to Dworkin's experimental laboratory "in the field of constitutional thinking".

2. *Positivism v. constitutional axiology*

One can say that the establishment of the new methodology of constitutional jurisprudence has been manifested by the permanent clash between the positivistic dogma of legal thinking on the one hand, and on the other hand, a very open, functional, purposive interpretation of the constitution adopted by the constitutional courts.[4]

At the outset of the transformation process there were theoretically two possible way in which a new constitutional jurisprudence could develop:

- A narrow approach, limited to the necessary elements of the settlements based on literal, semantic and logical interpretation of constitutional norms;

- An approach characterised by an openness to active and creative interpretation, which itself became an autonomic (independent) factor of evolution of the legal system in post-communist countries.

The first approach would be directed towards slow evolution of the constitutional system through the legislative initiatives undertaken by the lawmaker (the parliament). The burden and the liability for the quality of new democracy would be located in the political bodies having the direct democratic legitimacy to govern. The self-restraint of the justice system could ensure the full predictability of the jurisprudence and even decrease the probability of tensions between the parliament and the justice system.

The second approach would give a real chance for the acceleration and transformation of the new democracy by stimulating the process of the replacement of the former legal communist system axiology with new democratic values.

In the majority of post-communist states the second approach was chosen in jurisprudential practice through constitutional justice.[5] In fact, jurisprudence became the independent source of new normative principles and values (which had not previously existed in the legal system), injected into the system by creative and axiologically directed judgments.[6] To illustrate, such basic principles might include: the right to a fair trial, dignity of each human person, the right to fair legislation (consisting of a number of different elements belonging to the 'interior morality of law' conforming to Fuller's approach,[7] such as the legal security of citizens[8] or the interdiction of the retroactivity of laws), the right to privacy, etc.

However, neither of these different approaches was risk-free. Which method was ultimately more effective for the development of future democratic mechanisms? The answer is by no means obvious and surely controversial.

3. *Destructive or constructive? Effects of the new approach*

What are the theoretically possible 'destructive effects' of the creative approach of the jurisprudence and activism of the constitutional courts?

The first and most important destructive effect is the existence of a substantial risk of increasing the arbitrariness of judges due to the role played by the both vague and broad categories of normative constitutional notions such as 'justice', the 'rule of law', 'human dignity', etc. They can become the autonomous, unpredictable factors of the constitutional jurisprudence subordinated to the subjective interpretation of the judges.[9]

The second possible effect could be theoretically manifested by the erosion of the necessary balance between the justice system and the other segments of state power. The government of the judges could become an increasingly realistic vision and could decrease the importance of the democratically legitimated bodies.[10] The court would replace the lawmaker in the creation of laws and would ultimately be transformed from the 'negative lawmaker' into 'the positive lawmaker'. The possible outcomes of infringements of the basic principle of separation of powers could be easily identified and among them we can mention:

- Inevitable tensions between the court and the parliament;

- The hierarchy and the internal order of the sources of law may be broken;

- The impact of politics becomes stronger and results in a decrease in public confidence in the court.

What are the constructive effects of constitutional activism?

Only creative jurisprudence could build a new legal constitutional culture and change the attitudes and the mentality of the people. From a historical perspective it would be difficult to overestimate the significance of that factor for the constitutional environment.

The second positive or constructive element which has to be taken into consideration is linked directly to the very essence of constitutional review. Activism of constitutional jurisprudence would allow faster framing of the arbitrariness of the legislative process and, as a result, restoration of the importance and the sense of the rule of law. It stimulated positively the evolution of the attitudes of people and their respect for the principle of the division of power. After the collapse of communism both ordinary citizens and members of the political elite and lawyers identified democracy as the rule of a democratically elected majority. From this perspective the predomination status among all state institutions belonged to the parliament as the institution 'embodying the will of the nation' and being empowered with unlimited prerogatives. Finally, that characteristic was inscribed into the nature of the system. Hence, the people found it difficult to adhere to the new requirements and were unable to understand the subtlety of the democratic state. The strong impulse coming from the active constitutional jurisprudence was indispensable in challenging those attitudes and aiding in the elimination of the former schema of legal thinking.[11]

Finally, the activism of the constitutional court could raise awareness of the public on some crucial issues and strengthen the pressure on the political structure to speedily reform the new system for the better.

II. Lustration or 'vetting' as the most emotive topic of transitional justice

1. *Preliminary remarks*

The crucial and the most dramatic cases of transitional justice concerned the communist past.[12] A new democracy needed not only to build a completely new economic space and to restore the adequate place of property rights,[13] (by a rational system of re-privatisation[14] or privatisation) and for the market economy which required the establishment of new legal and market instruments, but had also to resolve dramatic conflicts which had their roots in the oppressive totalitarian system of the past. The nature of the conflicts was strongly differentiated: some concerned the responsibility of former functionaries of the communist state[15] (including the judges who issued the oppressive decisions under martial law),[16] others required an answer to the general question of the status and possible liability of the thousands of people who were closely engaged in supporting the communist ideology and the activities of the communist state (such as the academics, administrative public servants, journalists and the members of communist party structure). The crucial issue was whether democratic standards could be

applied as adequate instruments in evaluating the reality of the public space subordinated under communism to a completely different philosophy of public life from the one which is typical for a normal democratic country. This issue also had a legal dimension, namely the extremely complex problem of retroactivity. It has to be recalled that the communist state authorised by its legal system the use of oppressive and even criminal means. However, it is not evident, whether (and eventually to what extent) we can apply our democratic legal standards to assess the totalitarian past. To answer the question we should make the difficult choice between two different values. The first of them expresses the consequent respect for the maxim lex retro non agit inscribed into rational legal thinking in the European tradition. The second one is based on the general idea of justice requiring consequent elimination and penalisation of the "evident evil" committed by people even by these who committed crimes authorized by the law. These questions directly reflect the famous Gustav Radbruch dilemmas on the legality of the laws formally adopted by state bodies but at the same time violating the minimal necessary axiological standards of the law.[17]

There is no doubt that the essence of the conflicts concerning the totalitarian past has been represented by the so-called lustration cases initiated before the Constitutional Court. For these reasons, it is worth focusing further reflections on this topic and trying to identify where opposing stakes and values were located.

2. *Contexts and facts*

Many thousands of people cooperated with the security services of the communist state. Mostly threatened were those people who belonged to the different categories of political dissidents. The security service concentrated its activity especially in this milieu, using different methods such as: invigilation and blackmail to induce cooperation of intellectuals, artists and scientists (the culture elite of the countries). Categories of the secret collaborators (TW) were strongly differentiated by the motives and degrees of culpability. Among them the following groups could be identified:

a) those supporters convinced by the communist regime;

b) cynical individuals, having only pecuniary interests;

c) 'collapsing' or 'broken' dissidents, forced to cooperate through blackmail;

d) 'players' who tried to balance the negative and positive effects of cooperation;[18]

e) 'apparent' agents, who formally accepted the cooperation but practically never committed wrongs against others;[19]

f) 'restored' dissidents: the persons who changed their minds and, after few or even many years of cooperation, understood the nature of the totalitarian regime, rejected cooperation and sometimes fought against communism;

g) naïve or inexperienced persons who provided a great deal and sometimes important information acquired during their professional activity, but who ignored the identity of their interlocutors and of the final beneficiaries of the delivered information.

There are two additional but essential elements which can complement this description well. First, there is the evident illegality of the activity of the communist state organs, which collected the information on the ordinary citizens and who created great databases comprising thousands of secret files on a large part of civil society. The second factor is the partial disintegration and destruction of the security services files, carried out just after the collapse of communism. As a result, the long and complex procedure of recreating such documents is necessary. It can happen that it will never be possible to uncover the truth about the role and conduct of persons qualified as 'TW' in the past.

3. *Legislative context*

The politicians in all post-communist countries tried to find the solution to this matter by specific regulations.[20] The principle means was a law adopted by the parliament shortly after the collapse of the communist regime (e.g., Germany, Czechoslovakia, Hungary; the Polish situation was exceptional because the first law on lustration was adopted in 1997).[21] There were different models of the lustration procedure introduced by such regulations ranging from wide access to secret files, ensured for everyone in Czechoslovakia, through to the balanced model in Germany and to the relatively narrow lustration model adopted in Hungary (limited to the most important public functionaries).

In Poland, we should differentiate between two approaches to the lustration procedures taken by parliament.

The first of them was represented by the bill adopted by parliament in

1997 which adopted a relatively narrow model of lustration involving the most important state employees (deputies, ministers, judges, ambassadors, etc.). The law guaranteed judicial review of each accusation (based on the so-called 'lustration lie') introduced by the specific public prosecutor (public interest ombudsman). The law also gave limited access to the files, in practice allowed only to victims, and later -after some amendments in 2001- also to journalists, scientists and finally even to former secret service collaborators (though only to their own personal data). The judicial procedures were lengthy and in many cases the court verified negatively the accusations made on the basis of the documents registered by the communist secret service.

The second approach took place in 2006[22] when the new parliamentary majority created by the right parties (above all, Law and Justice), which came to the election as the only 'non-communist party', proclaimed the urgent need of wide and effective lustration. The main element of the procedure was the large scale of lustration which involved not only the superior functionaries of the state, but also the middle level of the administrative public servants and even the private sector employees (academics, journalists, barristers, as well as legal and tax counsellors, members of the boards of state companies). Another characteristic of the new law was the large public access (guaranteed to everyone) to the secret files including data about present and former superior public functionaries. Access to that information was additionally ensured by the publication made by the state institution (the institute of national remembrance) of official lists with the names of people who have been registered by security services (including the names of people qualified as so called "non-personal sources of information"). The people who did not accept to submit the "lustration declaration" and those who lied (or hid the fact of their cooperation) were threatened with serious administrative penalties including the loss of the occupied posts for 10 years. The result could be the termination of professional activity of journalists (who could lose the right to publish) or of the scientists (who could lose the right to teach and carry out research for a lengthy period of time).

4. *Constitutional values: The battle of principles*

No doubt, in such a specific matter as lustration, two opposite sides can present serious arguments based directly on constitutional values and principles. The lustration cases are, for these reasons, useful when studying the constitutional methodology and interpretation. It is also especially encouraging for the analysis of the crucial Dworkinian question of the hierarchy of principles.[23]

a. Constitutional arguments for lustration

Lustration law is one of the instruments used by the post-communist society to 're-conquer' its past. Having a right to the past; a right to the knowledge of one's own identity through the historical process is an element of transparency of public space and the essential moral condition for healthy public awareness. Without the truth about the past, even comprising the dramatic and sometimes very uncomfortable 'stories' of the conduct of well-known figures, the state and the nation become totally helpless in the face of the real threat of a repetition of that history. One can mention some important constitutional principles which support such a position.

In the first place, we should indicate the principle of transparency of public life and the right of each citizen to access the information on state activity. Both guarantees are provided by the constitutional regulations (in all post-communist countries)[24] and by the European Convention of Human Rights (especially, Article 10). The documents collected by the communist authorities are part of the public archive and all citizens (not only the victims) should profit from the possibility of having open access to such archives.

In the second place, we can mention the freedom of historical research which should not be limited by restrictions imposed by the law. Freedom of scientific research is directly expressed in the Constitution.[25]

In the third place is state security. No doubt, the former communist agents are potentially dangerous for the security of a new democratic state, especially in some crucial arenas of the state policy. Protection of public order and state security are values indicated directly or at least indirectly in constitutional texts.[26]

The fourth constitutional reason is the requirement of 'justice' as a whole.[27] It should be accomplished especially with regard to the victims of communist oppressions. Justice requires and is based on truth.

b. Constitutional arguments against lustration

The right to privacy is protected expressly by all new constitutional regulations and by international treaties.[28] Disclosure of the secret service files violates the privacy which guarantees the individual a right to freely dispose of the information on his past, including that concerning for example family matters, sexual life, alcohol or drug addiction.

Data banks created by the public authorities can be allowed only if the law permits expressly the collection of such personal data (the so-called right to informational autonomy is inscribed in the modern constitutional regulations).[29] However, the secret service files have been created illegally and violate even the laws which were in force during the communist era. Hence, everyone can ask for the destruction of all files comprising the illegally collected information.

The truth 'decoded' from the secret files is not the real truth (the files were frequently falsified, partially destroyed and created with the use of blackmail practices against the victims). Public disclosure of the registers of the secret service can violate the presumption of innocence and can reverse the burden of proof (everyone who is included in the register has to present proof of his innocence (the European tradition requires that guilt be proven by the accuser).[30]

Compulsory declaration (under serious penalty) on the past activity of every 'lustrated' person violates the right to defence which is guaranteed for each individual.[31] Such a declaration is a kind of self-accusation and represents an enormous risk for the people undergoing lustration because of the imprecise, unclear and indefinite terms used for the qualification of different forms of cooperation with the secret services.

The principle of proportionality requires proportional means regarding both the acceptable depth of the state interference in the sphere of individual rights and the severity of penalties.[32]

These two opposite groups of arguments defend two separate and different models related to the communist past settlement.

Simplifying our analysis we can say that one of these models represents a radical, revolutionary approach which tries to impose the extraordinary means adequate to the transitory transformation period, hence stressing the dominance or even the priority of public interest (public security) over individual rights. The exceptional character of applied instruments should find its justification in the extreme authoritarian vocation of the communist state, the permanent 'emergency state'. The oppressive nature of the communist system deeply enrooted in a large part of the society, as well as its length, requires effective legal means to ensure a definitive break with the communist past. The suffering of the society and negative secondary effects of such an operation cannot be avoided. A trauma such as communism requires the finding of an adequate equivalent in the application of such an atypical and exceptional legal infrastructure designed specifically to prevent the revival of the totalitarian system.

The second approach stressed the importance of the new legal democratic space in the post-communist state. It stressed the 'red line' below which the fundamental rights, which can never be transgressed even for such purposes as the protection of state interests, have been placed

It is clear that each theoretically possible solution carries negative effects. The crucial question in the present context is the following: does the choice between the two opposite approaches belong to the judges or, inversely, to politics, i.e. to the representatives of the 'voice of the nation' expressed by the democratic parliament? Is there the necessary and sufficient space for Dworkin's Hercules' reasoning to resolve this dispute between two opposite visions of the past and the future of democracy?

5. *Methodology and framework for constitutional reasoning*

The choice made by the Polish Constitutional Court through its jurisprudence had a real and direct impact on politics, but it expressed at the same time a crucial choice of fundamental constitutional importance.

Constitutional justice of the post-communist states and especially the lustration cases reflected the real dispute on the future of democracy. In the short history of the post-communist system it is no exaggeration to say that each case in this matter was a constitutional moment.[33]

The methodology of constitutional reasoning was typical, but also included important new elements. On the one hand, these cases involved classical argumentation based on the mechanism of balancing the opposite principles and the values but, on the other hand, the central issue , 'the core preliminary' disputed question was of the limits of the democratic system ruled by law. Can the objective of protecting democracy justify a temporary use of 'non-democratic means'? Is it acceptable to suspend the constitutional guarantees of fundamental rights to open the perspectives for a better and stronger democratic future? Such questions recall the famous dilemma faced by the democratic system at a crucial moment of history: is freedom also guaranteed for the opponents of freedom? Hence, we can say that the constitutional stakes were situated one level higher than in a typical constitutional dispute. The reasoning referring to the typical 'methodology of balance' (being a component of the principle of proportionality) was possible only at the later stage of the procedure. However, first this preliminary issue should be resolved. If we accept, in principle, that transitional justice can justify all necessary means to break definitively with the communist past in cleaning the democratic space from all the ingredients which have survived after lengthy totalitarian

contamination, the 'methodology of balance' is not applicable. And, inversely, if we accept that in principle the effectiveness of 'cleaning' from the totalitarian past is not a sufficient reason for applying all possible means because of the limits imposed by democratic guarantees, we can continue our steps to balance the opposite values and try to find the rational 'medium' solution.

Let us come back to the question concerning the nature of the choice challenged before the constitutional jurisprudence in the lustration cases: is it political or constitutional? The answer is ambiguous and the final assertion depends on the selected criterion. The results of the settlements are always strongly political while the reasons, motives and applied methodology are not necessarily political (and should not be political). Of course, the ultimate outcome (i.e., the choice made by the judges) is not directly determined by the constitution: saying the opposite would be pure hypocrisy. Finally, we have seen a large space for free judicial evaluation but such 'free space' is not equivalent to the political choices. My personal experiences in such matters lead me to the conviction that the decisive factors are the judges' own axiology, their constitutional sensibility and, above all, their independence.[34] In my view, this last factor is probably the most important for shaping the constitutional justice in post-communist countries and putting it on the road towards the role of principal player in the new democracy. Real independence of the constitutional courts in these states is conditioned by the quality of the political system. We obtain finally a very complex mechanism, whose elements remain mutually interdependent. A new democratic system of low quality, based only on majority rule, will be marked by a strong tendency to limit the prerogatives of constitutional justice and to subordinate judges to the political will. Hence, in such states the system of appointment of new judges is also not balanced rests on primitive rule (i.e., on the vote of the parliamentary majority). The politically composed and fragile constitutional justice became unable to impose real democratic standards on the system which is increasingly threatened with erosion and digressive evolution toward the authoritarian state.[35]

6. *Choice on behalf of democracy: Constitutional justice imposes the limits in the last lustration decision*

Constitutional justice in Poland often interfered, as mentioned above, in the sphere of the legislative freedom in the case of lustration. However the most recent decision taken by the Polish Constitutional Court, on 11 May 2007,[36] on the new rigorous and very broad lustration procedure can be presented as a perfect exemplification of the constitutional methodology described above. It proved the necessity to examine topics

such as the lustration law on two levels of constitutional reasoning: the first regarding the nature of democracy as well as the second regarding particular issues contained in the lustration law.

a. First level of reasoning

First of all, the court identified the basic issues and values which reflect the constitution and tried to establish the main points of its further argumentation.

The court explained clearly the whole constitutional axiology which must be respected by all legislative activity concerning the communist and totalitarian past. The court recalled that lustration is not the purpose in itself and it cannot be used by the state as a form of revenge against the people who were involved in the structure of the communist state. Lustration is directed at the protection of evident and direct interests of the public structure of a new democratic state and it must neither stigmatise nor blame the people (including the former agents) who are now engaged in a different sphere of their professional activity.

The court stated:

> "While eliminating the communist totalitarian heritage, a democratic state based on the rule of law must use only the formal legal means which could be accepted in the framework of axiology of such a state. No other means can be accepted because such a state would not be better than a typical totalitarian regime, which must be eliminated. A democratic state ruled by law has sufficient legal instruments necessary to guarantee justice and to punish the people who committed crimes. A law which is based on the idea of revenge cannot be accepted in a democratic state.".

Finally, the court stressed that the need to disclose the totalitarian past can never justify the violation of democratic standards. The fundamental rights of individuals should always be observed, and among them "such human rights and fundamental freedoms as the right to fair process, the right to a hearing [trial] before an independent court and the right to defend oneself". Such rights must be applied also with regard to those people who violated them when they governed during the communist period. The state based on the rule of law can defend itself against the renewed communist-totalitarian threat. There are instruments at its disposal which are not contrary to human rights and the principle of the rule of law, and which result from the justice system as well as from public administrative law. These instruments could comply with the principle of a

democratic state if some necessary requirements are fulfilled. The fault must always be individual rather than collective and should be proved in each individual. There is a crucial role to be played by the right to a defence and for the presumption of innocence until the fault is proven or to the right to the court.

b. Second level of reasoning

Adopting such a general axiological framework for its decision, the court further developed the reasoning and formulated expressly some indications which are addressed to the lawmaker, namely:

- Lustration procedures cannot involve the people who occupy the post in a private organisation;

- Lustration has to include proportional instruments, and the interdiction (or prohibition) to exercise the determined public function cannot be longer than a rationally defined period;

- The penalties provided by lustration laws (including the above mentioned interdiction) should be addressed only to the people who were in fact engaged in the activity which violated the human rights and ordered such activity;

- Lustration procedures must provide a precise and transparent definition of the cooperation (or collaboration);

- The necessary judicial procedural guarantees must be observed in respect of the people subjected to the lustration;

As a result of the presented argumentation, the main part of the new substantive regulation has been recognised by the court as non-conforming to the constitution and eliminated from the legal system. It is then for the lawmaker to amend the law if he wants to continue the lustration procedure.

It is not possible to develop further the topic. However, one can stress that the position of the constitutional jurisprudence in the case of lustration was not accidental and it can be perfectly inscribed to the lines consequently developed by earlier judgments. Apart from the lustration cases, we should remember among them the judgments issued by constitutional court in the case of the penal liability of the former functionaries of the communist state in which the limits imposed on the lawmaker by the axiology of the new democratic state were challenged by

the court. In one such judgment, the constitutional court examined the issue of whether it would be admissible to apply penal liability if no crimes were expressed by the laws being in force at the time these crimes were committed. In the famous decision issued on 25 of September 1991,[37] the constitutional court stressed the exceptional historical context in which the transformation process is realised. The Tribunal identified clearly the contradictions between the results of the application of the principle lex retro non agit toward the perpetrators of crimes and the evident request for restitution of justice. However, the Tribunal said: "all exceptions from the principle lex retro non agit which are motivated by the sentiment based on justice require precise definition of all the cases where such exceptions could take place; [...] this principle is also inscribed into the fundamental notion of the state ruled by law". Opening some space for the retroactivity in the penal law, the court set the limits for such legislative practice regarding the fundamental rights of the individual.[38]

III. Conclusion

A new axiology of the legal system means that the exceptional character of the time of transformation does not justify the resignation from the use of minimal standards including with regard to the people having some form of communist past. Some of the opponents of such an approach assert that it expresses the very weakness and naivety of the intellectual elite having the dominant status in the post-communist state. One of the most important Polish politicians used a metaphoric notion to stress the essence of such an approach, 'impossibilism'.[39]

In my view, only a well balanced attitude manifested by the series of the judgments of the constitutional court allowed a real revolutionary and radical break from the totalitarian past. Another approach, which would allow the violation -at the first stage of the transformation- of basic human rights, would have had a 'killer effect' on the new democratic system. It would be a continuation of the methods of the totalitarian regime. I do not think such an approach could be the foundation of a state ruled by law.

The process of transformation and restitution of freedom is closely linked with the shaping of attitudes and the democratic mentality of average people who were almost all touched by the stigma of homo sovieticus. For this reason it is more important to observe, at the initial point, the rigorous requirements of democratic standards than to execute the penal responsibilities of the former functionaries.

Finally, we should accept the uncomfortable truth that there are also such harms caused by a totalitarian past which could be never removed from our

recent history, unless we want to create a new Orwellian reality.

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* Marek Safjan is professor of private law at Warsaw University. He was the president of Polish Constitutional Tribunal between 1997-2006. At present he is Fernand Braudel Fellow at European University Institute.

[1] See, generally, W. SADURSKI, Constitutional Justice. East and West: Democratic Legitimacy and Constitutional Courts in Post-communist Europe in Comparative Perspective, Kluwer, 2003; W. SADURSKI, Rights Before Courts: A Study of Constitutional Courts in Post-communist States of Central and Eastern Europe, Springer 2005; M. KRYGIER and A. CZARNOTA, The Rule of Law after Communism: Problems and Prospects in East- Central Europe, Dartmouth, Ashgate, 1999.

[2] D.P. KOMMERS, "Germany: Balancing Rights and Duties", in J. GOLDSWORTHY, Interpreting Constitution: A Comparative Study, Oxford, Oxford University Press, 2004, pp. 161-215; A. STONE SWEET, Governing with Judges: Constitutional Politics in Europe, Oxford, Oxford University Press, 2000, pp. 31-60.

[3] Case of Poland , where the new Constitution was adopted in 1997; until that time, during the most important stage of transformation, Poland kept the 1952 Constitution (partially amended), the same one which was imposed on Poland by the Stalinist regime.

[4] I apply a precise notion, explained fully by A. BARAK, Purposive Interpretation in Law, Princeton, Princeton University Press, 2005.

[5] P. SELZNICK, "Legal Cultures and the Rule of Law", in The Rule of Law after Communism, supra note 1; L. MORAWSKI, "Positivist or Non Positivist Rule of Law: Polish Experience of General Dilemma", in id., at pp. 39-55.

[6] P. WINCZOREK, "Axiological Foundations of the Polish Constitution", in M. WYRZYKOWSKI, Constitutional Essays, Varsovie, 1999, pp. 59-71.

[7] L.L. FULLER, The Morality of Law, New Haven, Yale University Press, 1977.

[8] Since the beginning of 1990, the principle providing that the state has to ensure necessary protection for the legal security of citizens has been elaborated and repeated in many Polish constitutional judgments. That laws created by parliament should be predictable (especially in tax law) has been reiterated many times by the Constitutional tribunal. And the interest of citizens involving their justified expectations on the stability of tax –regulations cannot be threatened by sudden dramatic changes in legislation, especially if they made strategic investment decisions on the basis of existing laws See, e.g., Polish Constitutional Tribunal, Tax Amnesty and Proprietary Declarations, 20 Nov. 2002, K 41/02.

[9] See, on the limits of the judicial discretion, the essays published in D. DYZENHAUS, Recrafting the Rule of Law: The Limits of Legal order, Oxford, Portland; A. HUTCHINSON, The Rule of Law Revisted: Democracy and the Courts, pp. 196-227;O. WIKLUND, Judicial Discretion in European Perspective, Kluwer, 2003; S. B.BURBANK et B. FRIEDMAN, Judicial Independence at the Crossroads: An interdisciplinary Approach, Thousands Oaks, 2002.

[10] A. STONE SWEET, Governing with Judges: Constitutional Politics in Europe, Oxford, Oxford University Press, 2000, pp. 31-60.
[11] A good example is the judgment on Investigative Committee of Parliament to Examine Decisions Concerning Capital and Ownership Transformation in the Banking Sector, 22 Sept. 2006, K4/06, Monitor Polski, No 66, item 680; this decision is a sort of 'constitutional lesson' on the principle of division of power.
[12] A. CZARNOTA and P. HOFMANSKI, "Can We Do Justice to the Past", in M. KRYGIER and A.CZARNOTA, The Rule of Law after Communism, Ashgate, 1999, pp. 197-212; A. KANIOWSKI, "Lustration and Decommunisation: Ethical and Theoretical Debates", in id., pp. 213-248; M. WYRZYKOWSKI, "Legal Aspects of Settling Accounts with the Past ", in Constitutional Essays, Varsovie, 1999, pp. 351-367; W. SADURSKI, Rights Before Courts: A Study of Constitutional Courts in Post- Communist States of Central and Eastern Europe, Springer, 2005, pp. 223-263.
[13] It is interesting that during the communist period no constitutional guarantees were provided by the constitutional act dated 1952. The state promised only the protection of the so-called personal property (that is, only the items serving personal needs and not those for economic-commercial or industrial activity). The legal structure of property was built on the medieval model (hierarchy of the different models of the property as well in the protection and in the substance of the subjective right). At the summit of this specific construction was state ownership, in the following order: so-called 'social' ownership belonging to the socialist organisations; personal ownership; individual ownership (individual economic activity-the farmers, the handcrafts, etc.); and, in the last place, the property only tolerated by the communist state, the capitalist ownership.
[14] The debates on re-privatisation began in all post-communist countries just after the collapse of communism. In some countries the issues were resolved through the legislative way and the parliaments adopted the regulations establishing the subject and the scale of re-privatisation (e.g., Hungary, Czech Republic, Bulgaria, Slovakia). In other countries, such as Poland, the issue has been left to be resolved by the constitutional justice, but it refused to do it [see, e.g., a famous procedural decision of the Polish Constitutional Tribunal, Inadmissibility to Review the Constitutionality of Rural Land Reform 1944, 28 Nov. 2001, SK5/01]. Of course, the kind of policy chosen by the post-communist state was not determined by the rational public debate and the conscious choice made by the political elite. They were conditioned by the lack of consensus and endless disputes about it.
[15] M. ŁOŚ and M. ZYBERTOWICZ, "State Crime in Communist and Post-Communist Poland", in The Rule of Law, o.c., pp. 261 -277.
[16] Martial law was a great challenge for the judges. The best description of the attitudes of judges in this period presents the book of A. STRZEMBOSZ and M. STANOWSKA, Sędziowie czasu próby, Warsaw, 2005.
[17] R. ALEXY, "A Defence of Radbruch's Formula", in Recrafting the Rule of Law: The limits of Legal Order, Oxfod, Oxford University Press, 1991, pp. 15-40.
[18] They accepted to do something as a 'lesser evil' for exchange and to receive something of 'greater profit' on the level of personal and professional or even public interest (e.g., a scientist working on an important topic received an offer from the state to be sent to a Western university in exchange for some services for the security service; thanks to such a 'transaction', he received the opportunity to complete his important scientific work). Thanks to such 'transactions', Polish science never lost its links with the Western scientific milieu and Polish society was better

prepared than the other post-communist societies for the contestation of the communist system. Similar situations concerned great artists or famous writers; among them Ryszard Kapuscinksi who, according to recently published documents, signed such commitment to cooperation with the security services. Only very few material effects (in the form of reports written by him during his trips round the world) have been presented as the proof of such cooperation. The question is (not coming from a legal perspective but from an ethical, philosophical, political and sociological perspective) whether such choices were subjectively and objectively justified or not? What would be better for the society in this time: small scale cooperation for the sake of creative artistic or scientific development or refusing, on principle, the opportunity for development?

[19] Among them, there were the persons who signed formally the documents promising the cooperation but never actually cooperated.

[20] W. SADURSKI, Rights before Courts: A Study of Constitutional Courts in Post-Communist States of Central and Eastern Europe, Dordrecht, Springer, 2005, pp. 223-270.

[21] Ustawa z 11 kwietnia 1997 o ujawnieniu pracy lub służby w organach bezpieczeństwa państwa lub współpracy z nimi w latach 1944-1990 osób pełniących funkcje publiczne , Dz.U.1997, No 42, poz. 428 ze zm [Lustration Act on the Disclosure by Persons Holding Public Office of Work, Service or Cooperation with the State Security Services during the Years 1944-1990, 11 Apr. 1997].

[22] Ustawa z 18 X 2006 o ujawnieniu informacji o dokumentach organów bezpieczeństwa państwa z lat 1944-1990 oraz treści tych dokumentów, Dz.U.No 218, poz.1592 ze zm [Lustration Act on Disclosure of Information on Documents of Security Service Organs Collected during the period 1944-1990 or on the Content of these Documents, 2006].

[23] R.M. DWORKIN, A Matter of Principles, Oxford, Oxford University Press, 1986; id., Taking Rights Seriously, London, Duckworth, 1977. We can even say that lustration law is the best place for the activity of metaphoric judge Hercules (his reasoning , interpretations and means of argumentation).

[24] See, e.g., Polish Constitution, Article 61; "A citizen shall have the right to obtain information on the activities of organs of public authority".

[25] See, e.g., Polish Constitution, Article 73; "The freedom of artistic creation and scientific research as well as dissemination of the fruits thereof, the freedom to teach and to enjoy the products of culture, shall be ensured to everyone".

[26] In Poland, 'state security' is applied as one of the criteria and the point of reference for decisions concerning justification of limitation of the fundamental rights; see Article 31 § 3 of the Constitution.

[27] In the Polish Constitution, one of the most important principles consists of Article 2, which provides that "the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice".

[28] See, e.g., Polish Constitution, Article 47; "Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decision about his personal life"; see also M. SAFJAN, "The Right to Protection of Personal Privacy and Autonomy in the Case Law of the Polish Constitutional Tribunal ", in L. WILDHABER, Human Rights, Democracy and the Rule of Law, Nomos, 2007, pp. 693-708.

[29] Article 51 of the Polish Constitution expressly provides guarantees for the individual against arbitrariness of the public authorities which would like to collect more information than it is justified in a democratic society.

[30] See, e.g., Polish Constitution, Article 42 § 3; "Everyone shall be presumed innocent of a change until his guilt is determined by the final judgment of a court".
[31] See, e.g., Polish Constitution, Article 42 § 2; "Anyone against whom criminal proceedings have been brought shall have the right to defence at all stages of such proceedings".
[32] In Poland, the problem concerned above all the penalties applied against the journalists and the scientists. Is it imaginable in democratic state ruled by law the injunction to abstain from publishing and from continuation of scientific work?
[33] For lustrations cases, see Polish Constitutional Tribunal, Parliamentary Resolution Concerning the Disclosure of the Secret Services Files, K6/90, 19 June 1992; Polish Constitutional Tribunal, Lustration Act 1997, K 39/97, 10 Nov. 1998;Polish Constitutional Tribunal, Amendment of 'cooperation' within Lustration Act, K 44/02, 28 May 2003; Polish Constitutional Tribunal, Restricting Access to Documents of Communist Security Agencies, K 31/04, 26 Oct. 2005.
[34] Paradoxically such factors should not be related to the personal experiences of the judges during the communist period. It happened frequently that same approach was used by the judges having totally different pasts behind them, some of them being political prisoners while other played an active role as communist party members.
[35] However, there are two important factors which-even in that situation-can positively influence the attitudes of judges: (1) one of them is the subjective factor mentioned above; e.g., the internal independency of judges stimulated by the specificethos of the constitutional justice and personal sentiment of responsibility for the quality of democratic standards; (2) strong, formal guarantees of independency of constitutional judges (in result, the politicians lose all instruments for influencing the decisions making process before the Court).
[36] Polish Constitutional Tribunal, Constitutional Case K2/7, Jurisprudence of the Constitutional Court, 2007, No 5 A, item 48.
[37] OTK 1991, poz.24, Jurisprudence of Constitutional Court, 1991, item 224.
[38] The similar cases were challenged before the German justice system just after the collapse of the Berlin wall. Reference to the famous golden rule of extreme injustice, formulated by Gustav Radbruch in 1946, has been made by the courts; see R. ALEXY, The Golden Rule, pp. 15-40.
[39] The word has the Roman origins 'impossiblium' and means that 'nothing is possible'.

JUDICIAL EVALUATION IN CONTEXT: PRINCIPLES, PRACTICES AND PROMISE IN NINE EUROPEAN COUNTRIES

Richard Mohr* and Francesco Contini**

I. THE INSTITUTIONAL CONTEXT OF THE RESEARCH

The evaluation of judges' performance takes place in many ways. Traditionally, there are avenues of appeal and legal accountability mechanisms. More recently, ministries of justice and judicial councils across Europe have introduced a range of complaints mechanisms, quality assessment procedures and other managerial methods of judging judges and the courts within which they operate. This paper reports on a study of these mechanisms in nine member countries of the European Union. Our purpose is to survey the possible ways in which the judiciary can be evaluated, with a view to improving those practices and, ultimately, contributing to a better functioning of the courts.

The study focuses on judges within the institutional context of courts. The staffs of courts are commonly employed by a ministry of justice or some other executive body. A ministry is responsible for allocating funds and accounting to parliament for their expenditure. In many European countries (including six of the nine discussed here) the status of judges (discipline, promotion, transfer, appointment), and in Denmark and the Netherlands also the management of courts, is under the direct responsibility of a judicial council which has substantial judicial representation and a degree of independence from the executive government.[1]

With these intertwined responsibilities for staffing and personnel matters and for funding and accountability, relationships between judiciaries and ministries are of particular relevance to the efficacy and quality of judicial work. Interposing judicial councils has raised other questions, or more precisely the old questions of judicial accountability[2] in new forms. The various ways of approaching these issues are at the heart of this inquiry into the forms of evaluation and quality assessment.

We discovered a great variety of approaches to the evaluation of judicial performance, some of which are based on the traditional activities of quality control that are already built into the institutional practices of courts and justice ministries. The most established and effective means of accountability or quality control in justice systems conform to the

evaluative activities associated with particular institutional bases: the legal base of the judiciary and the public administration base of the executive. Our discussion of evaluation methods begins with those traditions, while pointing out the limitations of these exercises at the systemic level: judges predominantly deal with individual cases, and ministries have a limited view of accountability with a focus on finance and efficiency. The apparent barriers to reform have prompted us to analyse the theoretical and political foundations of the judicial role in its institutional context before describing some of the national experiences.

Evaluation of judges and courts is an aspect of the normal functioning of justice systems. Justice ministries account for their use of funds, traditionally simply by monitoring the legality of the expenditure.[3] Judicial systems have traditionally been characterised almost exclusively by legal forms of accountability.[4] Courts of appeal are effective in reviewing the decisions of lower courts. It appears that difficulties arise at the points of intersection between administrative and legal systems. As will become apparent, administrative responses to legal demands, and judicial responses to fiscal demands quickly become confused in clashes over values such as independence, accountability and justice. More adventurous approaches to reform and evaluation can easily be wrecked on these rocks as soon as they are launched. In this article we identify opportunities for ministries as well as judiciaries to reinforce their legitimacy by using a broader repertoire of evaluation methods, going beyond a purely traditional framework.

The research we report here has demonstrated the growth of new forms of accountability developed to protect and promote other interests and values. On the one hand there have been increasing numbers of instances of ministries or judicial councils developing measures to promote values such as efficiency or cost control. Program budgeting and management by objectives have been introduced to monitor responsiveness to government policy initiatives. On the other hand, we find the public has also entered the scene in direct or indirect ways. As will be seen in the following pages, there is some evidence that the courts and justice systems have begun to listen to public demands, ranging from broad and unspecific reforms demanded of the Belgian justice system by the huge protests over the Dutroux affair, to the specific proposals for transparent impartiality of the lobby group Court Watch in the Netherlands.

The judges and managers are already so attuned to the principles underlying their traditional forms of evaluation, and are so deeply associated with the institutions and the roles they play in them, that their very expertise can stand in the way of a more systemic or global evaluation.

By presenting selected cases from nine countries we will demonstrate some of the difficulties that have arisen from the tensions between the approaches of the judiciary, the executive and the public. However, since the traditional principles, institutions and roles are central to the whole system of justice, it will only be possible to find new approaches by building upon them. Applying a new discipline, such as total quality management or some other discipline imported from private enterprise or the academy, is no substitute for the hard work of understanding the foundations of the justice system as the basis for its improvement. In France, the international management standards ISO 9000 and ISO 9001 were explored in the late 1990s,[5] with ephemeral impact. In other cases, generic quality assurance schemes sometimes laid the groundwork for more specific elaboration. Portugal and the Netherlands both used the model of the European Foundation for Quality Management (EFQM) from which to elaborate a set of quality standards.[6] The experience of the Netherlands, the country having taken this approach furthest, is discussed in more detail below.

To understand and evaluate judicial work within its institutional context, it must be assessed in accordance with judicial, executive and public expectations. Given the diverse traditions which have led to each of their institutional evaluative methods, it is important to find common denominators which relate these systems to each other and which underpin their legitimacy and acceptability. The following sections do this by exploring the principles of authority and accountability in their traditional application as well as seeking new developments in each of these areas. The analysis then considers the legal, managerial, and public methods of assessing and directing performance, again in their traditional forms before looking for new forms which have developed in the interactions between the various institutions and players. Such examples demonstrate the potential development of newer forms of accountability and assessment, which might be described as mixed (because they embody diverse interests) and cooperative (involving more than one of the institutional players working together). These examples are analysed in order to understand ways in which the conflicts between the institutional interests have been worked through and accommodations have been found. We conclude by analysing the barriers to and conditions for the success of innovative forms within the institutional and political context of the courts and justice systems.

This discussion draws on the findings of several research projects financed by different institutions.[7] The projects focussed a common group of researchers and methods on the broad research objects of discovering the state of quality evaluation of justice systems in Europe. The projects were

designed to stimulate a dialogue among the participating researchers, who were selected by the project leaders[8] through formal and informal networks of scholars and practitioners working in this field. This led to the involvement of academics, policy makers, public managers and judges with different perspectives on the issues at stake. To ensure comparability of the data produced by researchers from such diverse backgrounds, a first draft framework for analysis was prepared, and the researchers met to discuss it. Once adapted into a final framework, each national team[9] prepared a first draft report which, after comment and discussion among the researchers, was transformed into the final report.[10]

II. Principles

1. *Authority*

It is necessary to review the key concepts on which justice systems are based before considering specific modes of monitoring and assessment. We argue that accountability and authority are the key guiding principles of a justice system. While these may be seen as embodying the foundations of the legitimacy of the executive and the judiciary respectively, neither of these principles stands alone or is an end in itself. Ministries have authority as well as judges, and judges too must be accountable. To appreciate their broader context it is necessary to consider by what authority a justice system can function, and to whom it is accountable. This requires a careful analysis of the notions of accountability and authority, which highlights the role of the public. In later discussion we consider how the people authorise judicial power and demand accountability of the courts in these European democracies. These are fundamental political questions which underpin the evaluation of judges.

We begin this analysis by considering the roles played by the judiciary, the executive and the public in the traditional methods of evaluating the performance of judges and the courts. Existing side by side with the long-standing political and legal principles of authority and accountability, there are also well-established methods of assessment embedded in the respective systems of the institutional players. The legal system of evaluation used by judges focuses on the individual case, applying the law to the facts (to refer to a classic, if oversimplified formulation). Executive government traditionally evaluates its performance and that of its agencies through the principle and practices of accounting and fiscal responsibility: resources are allocated to administrative units which must justify their use, either by adhering to spending and accounting procedures or through increasingly sophisticated methods for relating outcomes to particular policy areas and funding inputs. The public, finally, has its say on how well

these systems are functioning, and in promoting directions for their future actions, by various structured and unstructured measures, ranging from opinion surveys and elections to campaigns, protests and riots.[11]

These traditional forms of assessment may be broadly mapped onto the three underlying "core values" of fairness, democracy and efficiency[12] that Sanders identified in a critique of an English inquiry into the criminal justice system. There are dangers, however, in too close an identification of the institutional players -the judiciary, the public and the ministry- with a particular core value. Each of these values is too important and too multifaceted to be allocated to a single institutional custodian. If it were, the competition between institutional players might be reduced to a competition between values, amounting to a sterile and familiar zero sum game. We hope to overcome this deadlock by understanding the functioning of the justice system in a broader context.

Justice and the application of the law are based in long-standing traditional principles which have been updated by democratic and managerial demands. The contemporary appeals to judicial, democratic and managerial values may be traced to a common root in the concept of representation. Pitkin explored this notion's multiple uses in politics starting from its etymological root as "the making present in some sense of something which is nevertheless not present literally or in fact".[13] That is to say, the representative "makes present" an abstraction or a collectivity which cannot itself act or make decisions. The modern theory of the state, itself a significant abstraction, has organs of government representing "the people". In its pre-democratic form this was a relationship of authority: for Hobbes, for instance, the sovereign is authorised to act in the name of the people.

In its later democratic sense representation is based on accountability, so that the representatives of the people can be held accountable for their actions. We generally think of representation in this latter sense as the way in which legislatures represent the people. They are accountable retrospectively at the next election, while having been authorised at the previous election. A representative whose representativeness rests upon accountability is "someone who has to be held to account, someone who will have to answer to another for what he does".[14] There is a temporal distinction between these two foundations of representation: one must beauthorised to carry out a particular role before one can do so; one is accountable for one's actions after the event.[15]

The concept of representation is generally applied to the executive and

legislative powers. Within the framework of representative democracy the authority of elected representatives derives from their election by the people. It is more complex to apply Pitkin's analysis to the judiciary, where we find that judges preserve a pre-democratic version of representation as authorisation. In the contemporary world, so thoroughly dominated by democratic ideology, this makes them vulnerable to mockery[16] and to an even more severe erosion of their legitimacy. The prospective authorisation of judges as those who may say the law flows from a complex network of processes and sources. While they are selected by various authorities (i.e., those authorised to appoint judges) in different jurisdictions, the explicit source of that authority is some combination of the law and the people.

The judge may only be appointed through a lawful process and once appointed is the authorised interpreter of the law. This is found in a strong form in the common law tradition whereby the judge 'makes' law by setting precedent, but is also clear in Montesquieu's notion of the judge as bouche de la loi.[17] Contemporary French discussions of quality measurement continue to see the key function of the judge as being "to pronounce law in an exact and reasoned manner".[18] The judge has authority as long as he or she pronounces the law as it applies to a specific case. This is 'legitimate' in the root meaning of the term, having enormous legal content, but little public appeal.[19]

This pre-modern version of authority is challenged and re-worked by democratic regimes, so that before being accountable to the public, judges must be authorised by the public as well as by the law. The authorisation of the law and of the people comes together in the constitutions of a number of countries where legitimate authority flows from the people. This assumption, taken for granted in many democracies, is explicitly written into the constitutions of several Latin countries: "Justice is administered in the name of the people",[20] or "emanates from the people and is administered in the name of the King by judges".[21] Judicial power is thus formally representative of the people, even if in different ways and within specific institutional settings.

We may find further insight into the complex role of the people in the authority relations of the courts in another of Pitkin's distinctions. If the elected representative must be responsible to the represented as people with interests, the 'people' that the judges represent are rather the "unattached interests" of the people in whose name the Constitution authorises judges to apply the law.[22] As guardian of the law and its proper application, the judiciary can be considered to be a representative institution in the sense that it represents those unattached interests of

equality, consistency and other such guiding principles of the constitution and the rule of law.

If both forms of representation persist in the case of the elected representatives, so that they must be authorised while being primarily accountable, the role of the people in the authorisation of the judges brings with it certain contradictions or confusions. In the judicial context the 'people' play a dual role. On the one hand they are the authorising source of legitimacy for judicial power, either in the strong legal sense of the Latin constitutions or the weak common law sense that judicial authority derives from "the confidence of the community".[23] The judge acts in the name of the people, who may be considered as an abstract or unattached interest. On the other hand the people are parties appearing in court before the judge, the very "people with interests" from whom the judge must be aloof to maintain impartiality. Thus, the 'people' are present in a dual role, both as actually existing persons before the court, and as that abstraction which authorises the judge to represent them. The judge's position, at that interface, is identified by Agamben between the 'people' as the poor and the "popular" masses on one hand, and the sovereign People of the modern democracy on the other. In their relations with the public the judiciary must continually straddle this fundamental "conceptual pair" of "the original political structure: naked life (people) and political existence (People)".[24]

Judges may thus be authorised by and even accountable to the People as an abstraction, but must be quite detached from actually existing people as parties to the case. When real people come before the judge they are subject to authority; they are bound by the judicial decision.[25] Garapon expresses the ambivalence of the judge to "the paradox of publicity, without which there is no justice", but which at the same time introduces anger and irrationality to the courtroom.[26] The judges' complex relationship to the authority of the People is consequently tinged on the one hand with a dismissive authority based in law which is above "popular opinion" and the interests of the parties before the court, and on the other with recognition that the law itself is the will of the People. The judge maintains authority by "making present" and speaking in the name of a People who would otherwise only be an abstraction.[27]

To this point we have tried to overcome the unproductive allocation of values among institutional players who claim to represent one or the other: fairness to judges, democracy to the public and efficiency to the administration. We have sought their common sources of authority in a notion of representation by which the people are seen to be represented in different ways by ministries and by the judiciary. This analysis offers a

means of understanding the complex and often difficult relations, which we discuss later, between the judiciary, the executive and the public, each one of them vital to the effective operation and assessment of the judiciary. However, since authority alone cannot justify or form the sole basis for this assessment, we must first consider the other form of representation.

2. *Accountability*

The research carried out in the nine countries identified numerous attempts to introduce 'managerial' systems to increase the accountability of judges and the courts. These were often opposed by the judges who responded that the use of such systems would violate the principle of independence. This generates tensions between the divergent values (legality versus managerial controls) and conflict among the actors who espouse them (judiciary versus executive). In various cases these conflicts led to zero sum games in which a gain by one party, for instance in terms of greater managerial efficacy, was seen as a loss by the other (of independence).

As will be seen in the instances documented in the following sections, in some countries this conflict obstructed processes of reform while in others we have been able to observe constructive feedback and positive sum games. In the latter cases interactions among the various actors promoting different values and interests have led to creative solutions, not only in terms of greater efficiency and improved management of the judicial system, but also in reinforcing certain values specific to that system, such as impartiality. By analysing such cases we try to identify possible approaches to unlock the traditional tensions between independence and accountability.[28] Approaching this issue first from the point of view of accountability, we have been forced to reconsider the ways in which debates on quality and the functioning of the judiciary have conceived of accountability. While traditionally the judiciary has focused on the discretion and political choices involved in judicial decision-making,[29] more recently managerial approaches have been introduced, which are seen as instruments of managerial control.[30] By distinguishing between the methods of evaluation traditionally associated with the executive and those legal methods associated with the judiciary, we hope to clarify an increasingly "amorphous concept".[31]

Accountability is the combination of methods, procedures and forces determining which values are to be reflected in administrative decisions.[32] If, as is commonly held, public officials acting in the name of or on account of the State are responsible to the citizens for their

actions, accountability becomes the instrument which expresses this responsibility.[33] This is characterised by a mass of formal and institutional procedures as well as by various unanticipated intrusions from political and social forces making claims and demanding responses in ways which are both unprogrammed and unprogrammable.

Accountability can thus be characterised on the one hand as those systems which instil the values and interests of the appropriate stakeholders[34] within organisational behaviour. On the other hand, accountability can be characterised as the 'mechanisms' by which one can analyse or assess whether the organisation builds those values and interests into its own actions and decisions. In this way accountability can be considered as a two way channel of communication. First, it must convey information about the functioning of the organisation to those having the right to know. This information may include its objectives, its fundamental values, and the interests it is dedicated to protecting. Second, it must provide for methods and techniques to ensure that the members of the organisation act consistently with those values and interests. Thus, accountability is that complex of means which reinforce the responsibility of public actors.

It is evident that the concept of accountability, defined inclusively as above, cannot be limited simply to verifying productivity or efficiency, but includes a broader complex of values which public organisations must adopt based on the fundamental values of democratic regimes. These include legality, equality and impartiality. This inclusive notion of accountability is at a different and perhaps higher level than the individual values specific to a single unit of public administration. Accountability is conceived of in such a way as to enable the democratic process of establishing respect for those values, whether of efficiency or independence, efficacy in achieving objectives, or impartiality in the treatment of citizens.

From this point of view neither the judicial system as a whole nor any particular court or individual judge can be seen to be above the demands of accountability. There must be some channels of checking and transparency in order that each may account for their actions. The difficulties arise in understanding which forms or mechanisms of accountability are compatible with and appropriate to the functions of the judges, the courts, the judicial councils and the ministries of justice. To do without them would lead to a judicial system whose absolute independence would be difficult to reconcile with the fundamental values of democratic and representative regimes.

Even those control systems that have been developed throughout the law's long history in order to ensure the legality of judicial procedures represent forms of this broad concept of accountability. Measures such as reasoned decisions, public trials and channels of appeal are available to check whether the judicial processes respect substantive and important values and interests such as impartiality and legality. The role of these measures as foundations of a specifically legal system of evaluation or quality assurance is discussed in the next section. They represent the traditional approach to accountability which has been developed in the legal environment to promote certain important interests and values which should underlie judicial evaluation. There is, however, a broader range of interests and values to be served.

Following a discussion of the traditional forms of legal accountability, we trace the development of other forms of accountability which may be described as managerial and public. From this point of view the tensions commonly generated by the introduction of any new form of accountability may be seen as unavoidable if justice systems are to incorporate means of assessing their performance based on a broader range of values and interests than those of a narrow legal tradition. It may also be seen that each of these demands for accountability come from specific interests and may itself be one dimensional unless it can be balanced by recognising the others which also promote their own legitimate demands.

III. Practices

1. *Judicial*

Judges have a long history and experience of internal evaluative mechanisms as means for testing claims and determining rights and wrongs, based on law and the appellate process. Indeed, the very raison d'être of the judiciary is assessment, based on particular values associated with justice and the law, such as fairness and the impartial and proper application of established law. In addition to these values, it is important also to consider the institutional context in and through which the judiciary operates.

This environment includes the court registry where files are kept for each case and where the key procedural events are recorded and organised. These practices and files constitute the memory of the proceedings, making it possible to retrace the steps, the acts and events and so providing the means to check that proper procedure and law have been applied in every case.[35]

The institutional context also includes legal and conventional principles which are so strongly institutionalised that they are taken for granted without necessarily being codified. These include giving reasons for decisions, and the principle of the public trial which brings the public and the media (excluding cameras and microphones in some jurisdictions) into the heart of the judicial process.[36] These too are means of checking that the judicial process has been fair and just. The reasoned decision records the law and the facts relevant to the case and how these led to the result.[37] As to the records of events and decisions, these assume a particular significance in the context of the appellate system which is the most important evaluation mechanism within the juridical framework.

The assessment of cases according to procedural law applies not only to the court's assessment of the specific case but, through the appellate process, may also be seen to reflect back on the courts themselves. In other words, each court must assess the cases before it, but since every decision is potentially open to appellate challenge, the court itself is liable to assessment. However, deliberations at each stage of the process are directed to specific cases and have few repercussions at the systemic level; i.e., decisions overturned on appeal are only that: decisions in specific cases, and not evaluations of the judge making the original decision.

The nine countries considered here had implemented a variety of other measures for the assessment of individual judges and courts. These included internal complaints mechanisms, criminal and/or civil liability, and some versions of an ombudsman system. Without assessing the efficacy of these systems, which are of course only as good as the procedures and practices for implementing them, we simply comment here on some of the complex interactions between the legal and other principles and systems at work in judging the judges. Complaints mechanisms in France and Spain have received some 2,000 and 1,000 complaints per year (respectively), but limited evaluative data suggests that very rarely have these resulted in action against a judge. What is of particular interest here is that the complaints are overwhelming about unjustifiable delay (France) and the only two cases of sanctions against judges in Spain were in response to very serious delay.[38] This is an area which is susceptible to both legal and administrative assessment, as will be seen in more detail below, but which is fundamentally a quantitative measure of time lapse. The very limited number of cases resulting in sanctions suggests that it is difficult for citizens to take action against judges through a disciplinary system controlled (as in both these cases) by the judiciary. That successes have been limited to matters involving delay suggests that this is the major concern of court users (for which there is

some corroborating evidence)[39] and also that it is one of the few areas in which disciplinary committees can or will find against judges.

The experience of introducing an ombudsman in the Netherlands and in Austria has been particularly interesting with regard to the line between legal and administrative or publicly-driven procedures. In the Netherlands complaints may only go to the ombudsman after they have been dealt with internally by the courts. Even this involvement of an ombudsman is intended as a temporary solution only while more internal checks are implemented by the courts themselves. In order to preserve the independence of the judicial procedure, on-going proceedings may never be investigated by the ombudsman.[40] Similar provisions exist in Austria to avoid any possible interference in an on-going matter. These have extended to preclude the ombudsman investigating any judicial proceeding other than administrative cases. Having originally argued that "the scheduling of hearings is a function of court administration", and thus within his domain, it has been decided that the Austrian ombudsman may not investigate any judicial proceedings.[41]

These brief comments on attempts to introduce innovative elements into the assessment procedures of the legal system indicate some of the difficulties involved in relating the assessment process to the performance of the judicial system or the judge rather than to the outcome in an individual case. As some of these instances suggest, insulating the judges from outside influences during the course of a trial is among the most deeply held principles in the legal system. Where this issue may be open to challenge is at that point after a trial where action may be appropriate retrospectively, and at the interface between judicial and administrative matters characterised by delays in decisions and in the scheduling of hearings. In these matters the judiciary closes ranks and insists that due to their being of a judicial nature, any outside involvement would transgress the principle of judicial independence.[42]

The legal processes of quality control through judicial and appellate processes are generally so well established and so deeply ingrained in the nation's constitution and laws that they are almost invisible from the point of view of quality assessment in relation to reforms. Where they have been conspicuous is in the jurisprudence that has grown out of decisions of the European Court of Human Rights (ECHR). A number of the countries reported that decisions involving appeals under Article 6 (right to a fair trial) of the European Convention of Human Rights had repercussions for the quality assurance of their justice systems. Article 6(1) includes the provision that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by

law".

Findings that trials had exceeded "a reasonable time" were more commonly cited than any of the other grounds, reflecting the pattern of complaints reported above. Finland, priding itself on average handling times of 2 to 13 months, was "surprised" by an ECHR finding of excessive delay (3 years) in an appeal case, but this was seen as a statistical "outlier" and no systemic approach was taken to address delay.[43] The report from France also notes successful appeals to the ECHR on grounds of exceeding reasonable time, and of the independence and impartiality of the judges (the relations between the prosecutors and the court). In these and other cases the Cour de cassation has taken steps to ensure future compliance.[44] From 2000 to 2005 Finland had among the fewest appeals to the ECHR on the grounds of delay, while France was at the opposite pole.[45]

The capacity of ECHR decisions to go beyond the individual case to influence the overall functioning of the judicial system depends on the particular institutional setting in which it is located. Various agencies of the Council of Europe (COE), notably the Committee of Foreign Ministers of Member States, have responsibility for overseeing compliance with decisions of the Court and monitoring the adequacy of measures taken by national judicial systems to avoid repetition of such violations.[46]

This approach has demonstrated its capacity to produce systemic changes which may not necessarily be desirable. The Italian case illustrates this point. Until 2000 Italy was the country with the highest number of appeals and violations on the grounds of excessive delay in court proceedings, whose sheer number were practically blocking the decision-making capacity of the ECHR. Consequently the Committee of Foreign Ministers asked the Italian government to take steps to speed up judicial proceedings and to reduce the number of appeals to the court. Even if the Italian government was not able to achieve satisfactory results in case processing times, it was able to reduce appeals to the Court, thanks to passage of the so-called 'Pinto' legislation.[47] This placed a judge within the courts of appeal to hear appeals against excessive delay and also provided for compensation. Thus before being able to appeal to the ECHR, a claim must first be screened by the Italian judicial system which may eventually offer compensation. It is clear that this system treats the symptoms rather than the disease, thus it has reduced the number of appeals to Strasbourg but not the length of trials.[48] The COE and the Council of Foreign Ministers nonetheless keeps the Italian judicial system under observation, requesting annual reports and action plans on the state

of justice in order to examine the results in delay reduction.

This follow through on findings of the ECHR to interventions at the systemic level represents a stimulating exception rather than the rule. The legal decision, whether in a first instance court or on appeal, is a prospective order applied to a specific case. The prime goal of the judicial system is to uphold the authority of the law by ensuring the recognition of the judicial decision. It is through this recognition that the law reaches beyond the confines of the legal system itself, to the other branches of government and to the public. However the judges have few opportunities and fewer formal channels through which to gauge the efficacy of their authority. In legal terms it can only be assured through conformity with the procedures and substance of formal law, subject to checking by the mechanism of the appeal. If an appeal points to systemic failures, as in this Italian example, the judges' interest in maintaining authority suggests prospective legal action. This distinguishes it from accountability which can also act retrospectively.

More commonly judicial decisions do not have systemic implications. Legal accountability is not limited to the purely procedural aspects we have been discussing above. In every legal system there exists disciplinary responsibility with more or less effective procedures,[49] which enable them to be checked, and also provide a type of fiscal accountability which is usually limited to ensuring that processes for spending and recording expenditure conform to formal requirements. The legal processes which ensure conformity to the law reflect the importance the judiciary places on protecting and reinforcing the fundamental principles and authority of the rule of law, but tell us little about how they utilise the resources that the State makes available to them. The many attempts to introduce systems of managerial accountability are a response to this need. They include a wider range of checks on the day to day activities of individual judges

2. *Managerial*

All nine of the countries considered here have tried to introduce systems of managerial accountability into their justice systems. The results have not always been satisfactory.

Rather than try to give a full account of these attempts we will describe only some of them in order to identify the distinctive features of such an approach. We will note certain tensions between these new approaches and the purely legal methods traditionally applied to courts before trying to analyse some of the difficulties.

As organs of executive government answerable to the legislature, ministries are the bearers of a culture and a tradition of accountability and responsible government. As such they must ensure that public funds are spent appropriately, and they also have responsibility for policy implementation. This is also true of those judicial councils (such as the Dutch)[50], or court services (such as the Danish) that allocate human and financial resources to courts and are answerable to the parliament or to the ministry for this function.[51] Policies implemented by these organisations in relation to courts range from those areas close to judicial decision-making, such as the establishment of time standards for handing down decisions, to areas involving administrative and support services (e.g., those which are increasingly provided to victims of crime). The line between judicial decisions and managerial responsibility is well understood in theory, but in practice there are numerous points of contact and, potentially, conflict.

Before considering examples of this contested territory, it is worth commenting on an important difference in perspective. While judges, as noted above, deal in decisions in specific cases, managers deal in aggregates. Even those conscientious managers who understand and measure case processing times with care and attention can be surprised, as were the Finnish team, when an individual case is overturned for excessive delay by the ECHR. To the manager or the statistician, this is an 'outlier', an extraordinary piece of data which simply disrupts normal calculations. To the court, this is an injustice which must be remedied in the specific case. The gulf between the judicial and the managerial cultures may be illustrated by further examples from the study.

Following the wave of interest in the "new public management",[52] recent approaches initiated by government agencies such as ministries and judicial councils seek to understand and evaluate the judicial system in terms of outputs (such as the number of cases resolved). They can even be designed to put pressure on judges and staff to achieve specific objectives, in the style of management by objectives (MBO).

For instance in Finland the Ministry of Justice[53] has collaborated with the court offices to introduce systems of MBO that apply both to the individual judge (still being trialled) as well as at the national level, following the introduction of this approach across the whole national public administration[54] in 1995. The system assesses the courts' performance using indicators of their productivity, economy and efficacy. Productivity is calculated in terms of the number of decisions per judge or per unit of administrative staff. The principal indicator of the economy or efficiency of the courts is the cost per decision, calculated by dividing the

annual budget of a particular court by the number of decisions made by its judges. The calculation of efficacy is more complex. It is based on the assumption that the length of proceedings is fundamental to the judicial process and the rights of the citizens. Consequently case processing times are taken as the key measure of efficacy.[55]

Even though these indicators were developed in order to allocate resources to particular court offices, their use for this purpose does not follow automatically. The indicators instead form a source of knowledge on which to base discussion around the negotiation of the budget of each individual court. They are also used during annual meetings to help the Ministry of Justice and the heads of each court office to define the objectives to be met. Although this soft approach should allow even handed negotiation between competing values, it has been criticised by the judiciary. Some have argued that the definition of objectives by officials of the Ministry would violate judicial independence which is protected by the Constitution. Others maintain that with the introduction of the system of management by results the judge's attention would shift to the number of cases and their processing times, thus reducing the quality of the decisions.[56] It was also suggested that the system of measurable objectives could not be implemented by the courts. The Ministry of Justice replied:

"The judiciary through its management by results system may not interfere with the objective and subjective independence of the courts in their decision making and other application of the law, which is the real essence of the independent judicial power safeguarded in the constitution. The fact that general information about handling times, [...] is written in documents of courts dealing with management by results does not in itself lessen or endanger the independence of the court in reaching a decision in individual court cases". [57]

The Finnish Ministry of Justice's gentle and collaborative approach, while avoiding open conflict between the judiciary and the executive, may nonetheless provoke a judicial reaction. The executive's introduction of a system of management by results that emphasises the courts' productivity and efficiency promotes values and interests identified as managerial. This has the potential to create equal and opposite reactions from the judiciary who for their part emphasise the legal and normative values of the judicial process. In this situation zero sum games may arise between the judiciary and the executive so that the final outcome depends almost exclusively on the relative strengths of the main players.

The introduction of management by objectives in Italy has led directly to

the realisation of this concern. In this case, instead of starting with instruments to evaluate the functioning of the judicial system, or of the individual office, the new system set out to evaluate the results achieved by the managers of each court office, with consequences for their remuneration and career prospects. These did not cover the work of the court's chief judge. In practice, each office manager must, after a 'frank discussion' with the chief judge, define the organisational objectives to be met.[58] It is taken for granted that these objectives do not include the outputs of the whole court, for example the number of civil cases to be dealt with in the current year, on the grounds that this would violate judicial independence. Instead the objectives are exclusively those of the individual managers and their limited areas of responsibility. In contrast, the chief judge, who has the broader responsibility for the whole court's performance, is completely excluded from the evaluation process. Consequently the objectives defined by the manager are strictly limited to administrative tasks such as reducing filing backlogs and are marginal to the legal and managerial objectives, like reducing the cost per judicial decision. Clearly responsibility for objectives of this type must fall squarely on both the heads of the individual court: the judicial and the administrative managers. In order to evaluate the court's management, the results achieved by both managers must be considered together as in the Dutch case.[59]

The Italian Ministry's decision to limit its MBO-driven evaluation to the administrative managers could be interpreted as a strategy of stealth which first attacks the point of least resistance (the administrators). After that position was consolidated one could extend it to the judiciary. However, we have seen no trace of any argument which would support that interpretation. The Ministry's official explanation seems instead to rely on the necessity of developing an adequate information system to allow monitoring of the objectives of each court office before extending the system of MBO. More precisely, the system should "provide in real time an up to date picture of the on-going progress in order to permit timely intervention to minimise the divergence between the stated [objectives] and the current situation".[60] Maintaining that this statistical information system is a prerequisite to further extension of the evaluation appears to be little more than a technocratic excuse.

As we saw in the Finnish experience, a system of MBO can be based on a small amount of essential data. This need not be considered as an objective representation of the 'true' functioning of the court office, but as base line information from which to negotiate budgets and objectives. Instead the one-sided Italian solution clearly reflects the logic and the power relations of the particular historic moment. The Ministry of Justice has not yet seen

fit to extend this system to the chief judges because this would have led to a battle they could not have won. This is why the system has focused purely upon the weakest link in the chain: the administrative managers of the court office.

Instead of opening a broad discussion among the various institutional, social and political interests, the Ministry used technocratic means to tackle the problem internally. This involved a search for "informatic solutions" deemed indispensable to the development of the system, which simply put off the need to define its essential elements: its legitimate objectives, who was to identify them, and the link between outcomes and financial allocations. This may take into account not only allocations to court offices as a whole, but also the remuneration and selection of the heads of those offices. These crucial questions must be confronted to avoid a purely ritualistic use[61] of this management tool.

Austria and Spain have developed ways of measuring output relating cases to numbers of judges. The Austrian approach is based in the Ministry's computerised personnel information system and can be used to calculate the number of judges needed in particular courts.[62] The Spanish measures were developed by the Judicial Council and are intended as a means of rewarding judges according to their productivity, offering bonuses or penalties of up to 10% of salary.[63] Unsurprisingly there has been substantial resistance to the principle of paying judges according to the number of cases they process.

As far as we know this is one of the few such systems to have been applied to the judiciary. As in the Austrian case, the Spanish system has been used originally to establish the number of judges and staff needed in different courts. The system, based on so-called 'output measures' (módulos de dedicación) was quite rough and gave only a broad indication of the number of cases that each office could realistically process. The system was criticised by the judiciary on the grounds that the measures did not take into account weightings for different types of cases.[64]

In 1997 the Spanish Judicial Council[65] collected the various critiques in a 'white paper' which also proposed means of refining the output measures. Groups of expert judges developed new measures calculating the average times it took judges to dispose of various types of cases. In 2000 new output measures were approved that, since 2003, have been used to determine the judges' needs and also affect their remuneration. In practice, those judges who deal with at least 20% more cases than the module anticipates receive additional remuneration (from 5 to 10% of their salary). The Judicial Council has decided that for now it will not use the

modular system also to sanction the less productive judges by reducing their salaries.[66] Not surprisingly, the introduction of this remuneration system has drawn strong criticism from the Spanish judges. Two of the judges' associations, even though they accept the need to evaluate the judiciary, consider the system insufficiently reliable to form a basis for remuneration. A third association has been far more radical in its critique, calling the system "productivity-focussed and mean" and incompatible with judicial activity. Despite these strong criticisms, the Judicial Council continues to apply the measures to determine a performance based salary, and is working to improve the methodology. Recently, a consultancy firm has produced a new system to record the productivity of judges which should permit a more comprehensive evaluation of their work. The new system is much more complex. It is based on several clusters of indicators covering five areas of judicial activity: efficacy, quality, timeliness, commitment and professional development.[67]

In 2006 the Tribunal Supremo decided that the law which established the módulos (15/2003) contravened articles 402 and 403 of the Ley Orgánica del Poder Judicial requiring the state to guarantee the economic independence of the judiciary, and to base judicial remuneration on objective, equitable and transparent principles.[68] Consequently the módulos are no longer applied.

France has embarked upon a far more ambitious programme to link budgets to results. The Loi organique relative aux lois de finances (1 August 2001) was a national initiative of the legislature which applied to all ministries: they were required to submit budgets according to missions and programmes, whose objectives and results were to be examined by Parliament as part of the financial allocation process. The Justice Ministry responded with ten objectives, each with indicators of the courts' success in achieving them, under the headings of socio-economic efficacy (e.g., access, involvement with victims), quality of service (e.g., delay reduction, sentencing options) and effective management (case listing).[69] The debate in France now concerns the appropriateness of the objectives and indicators, rather than the principle of budgetary accountability on which the law is based.[70] However, since the objectives and indicators were developed by the Ministry without any transparent process or the involvement of the judiciary, it has been suggested that opposition to the law may focus on concerns over independence.[71]

In the Netherlands the process of developing measures of quality was developed in conjunction with the establishment of a Judicial Council. On its establishment in 2002 the Council was made responsible for distributing resources within the judicial system. A "program to strengthen

the organisation of the judiciary" was established as a judicial initiative, and it was this group which developed quantitative measures of cases, personnel and time, originally based on the EFQM model (mentioned at the outset) and updated through regular research. These measures, together with planning proposals from the courts responsible for their implementation, now form the basis of annual resource allocation.[72] While the Justice Ministry had been reluctant to impose accountability on the courts, to avoid perceptions of interference with judicial independence, the accountability has been devolved to the link between the judicial council and the judges even though the Minister is still responsible to Parliament under the Constitution.[73] According to the documents made available to the quality of justice project there seems to be little substantive difference between the measures used by the French and the Dutch systems. Indeed, with their emphasis on policy areas as diverse as victim support and alternatives to custodial sentencing, the French measures may be less rigid, technocratic and econometric than those developed in the Netherlands. The difference, according to the judicial critique, derives from the source of the values that are embodied in the measures: the ministry or the judiciary. Judicial reactions have had more to do with process than results.

The Dutch, Austrian, Italian and Spanish measures considered here are internal management systems which do not achieve external transparency and which were criticised (in the Spanish case) for confounding cases of different degrees of complexity. Whether developed by a judicial council or a justice ministry, to the extent that they have been successfully introduced, they signal the growing force of a managerial approach to the administration of the courts.

The systems of managerial accountability in the participating countries include a number of more or less rigorous mechanisms for evaluating the functioning of the judicial system. These organisational management evaluations have consequences, either at the level of the allocation of resources to various courts and court offices (Austria, France, the Netherlands and Spain) or in some cases for the remuneration of personnel (administrative managers in Italy, judges in Spain). These instances highlight some of the differences between legal and managerial forms of accountability. Evaluations deriving from models of managerial accountability conceive the relevant unit of analysis as aggregated data rather than the individual case. Their methodologies are thus statistical or economic and their evaluation criteria are no longer established by the norms of the legal system but by the authority with overall responsibility for managing the justice system: a justice ministry or a judicial council. Judicial councils, as organisations of the judges themselves, have been more

ambitious (in Spain) and more successful (in the Netherlands) in introducing managerial measures of the judicial process. In either case, the values and interests which are protected and supported are principally those of efficiency and efficacy in achieving internally defined objectives.

We can draw some tentative conclusions from the managerial forms of evaluation considered above. The first point to note is that the cost of using these systems is directly related to their complexity. The Italian and Spanish cases indicate, albeit in different ways, a worrying tendency to make the means of monitoring activity ever more complex and fragmented and, therefore, costly.[74] This may be due to the technical difficulty involved in measuring such complex and multi-faceted tasks as those of the judge. It may also derive to some extent from the judges' dissatisfaction with the type of knowledge which is produced by these systems. As we noted above, managerial systems operate at the level of aggregated and general data, rather than those individual cases on which the judge must focus.

In the face of the conflicting approaches to professional practice of the manager and the judge, monitoring systems acquire more and more layers of analysis, each one adding to the complexity and fragmentation of the one before. As long as these fundamentally different approaches are treated in a technocratic manner, the diverse underlying means of understanding the job of the courts are unlikely to be reconciled. Rather, the problem becomes more acute as the economic and statistical knowledge produced diverges ever further from the way in which judges' usually understand their role, as arbiters in the individual case.

The above discussion has nonetheless shown at least one way in which the problem may be rendered less acute. The Finnish case shows the potential benefit of treating the data produced by the managerial systems as a foundation for discussion in a collaborative process, rather than as absolute data to be applied automatically. This approach seems more reasonable in part due to the difficulty of correctly interpreting the meaning of particular data or of all the information collected by these systems. It also offers opportunities of avoiding the risk that "managerial" values may prevail to the neglect of the other values which must be protected in the judicial processes. It is of particular importance, where one institutional value may be seen to trump the others, that the data be interpreted and the outcomes evaluated from the points of view of all the relevant interests and values.

3. *Public*

The public forms the rhetorical apex of the dual systems of accountability and authority. Both the judiciary and the other branches of government appeal to their position vis à vis the public, either as citizens authorising and respecting their authority or as the voters and taxpayers to whom they are accountable. If the ministry justifies the introduction of managerial accountability to show the taxpayers they are getting value for money (as in Austria), the judges protect their authority by appeals to judicial independence (as in Spain or France). That these appeals so often result in the zero sum games discussed above may be related to a paucity of reliable information about the wishes and beliefs of the public.

A fundamental difficulty here is the vague meaning of the term public, including the 'people' or the 'People', those manifestations of interested parties and sovereign will that we discussed previously. A great deal may ride on whether we view 'the people' as taxpayers, citizens, 'clients' of the court or 'parties to an action' before the court. It is possible to map some of these distinctions and thus to see the derivation of particular viewpoints, as we will have occasion to do shortly. The next step however is to review the traditional forms of public scrutiny of the courts and justice systems, as we have done with the traditional legal and managerial forms.

The public gaze is a fundamental guarantee of the fairness of the trial and a 'condition of justice'.[75] The demand for public scrutiny of the judicial function was elucidated in the years immediately after the French Revolution when Mirabeau insisted to the Constituent Assembly that even the most corrupt judge could be trusted à la face du public.[76] It was again defended in response to the crisis in the United States following the publicity of the O.J. Simpson trial, by the director of the American Judicature Society: "if the rule of law, and the independent judiciary that is required for it, are to be maintained, the public must support the legitimacy of these institutions [...] we believe that openness and public access is [sic] the ultimate guardian of fairness in our justice system".[77] This approach to public scrutiny is on the one hand a legal version of accountability: the public must see justice as being done. On the other hand it is a guarantee of judicial authority, so that "the public [...] support the legitimacy" of the courts.

A third possible way to guarantee the openness of courts is through the direct involvement of the people in judicial decision making. In the countries considered in this research,[78] this operates to improve the capacity of the court system to decide cases in specific matters (e.g., lay

members of commercial or labour tribunals) or to improve the legitimacy of the decision in the most serious crimes (e.g., juries in the courts of assize), rather than to make judiciaries accountable to the people.

Crises of legitimacy of justice systems may be almost endemic, as appears to be the case in Latin Europe, or they may be prompted by specific events. The most spectacular of these which our research encompasses was the public outcry over the Dutroux affair in Belgium. The bungled prosecution of Dutroux for child sex offences led in October 1996 to the massive demonstration known as the 'marche blanche', considered to be Belgium's "most important protest march since the second World War".[79] The government and the justice system were obliged to respond to this political and legal crisis: a parliamentary commission as well as a number of internal inquiries were charged with investigating the sources of public discontent and recommending reforms. The diagnosis appears to have been summed up as "mal connu, mal aimé", leading to attempts to bridge the perceived gulf between the courts and the public. While a considerable programme of reforms has been discussed in Belgium, the tangible results during the study period appear to have been limited to policies aimed at improving of the position of victims of crime and providing more information and better orientation to the courts and their processes for both victims and offenders.

While critical events like the marche blanche can prompt urgent and unusual responses, the normal functioning of justice systems are oriented on one hand to fiscal accountability and on the other to "soft forms of accountability",[80] such as transparency measures which often amount to little more than leaving the courtroom door unlocked. In the absence of any genuine involvement by or reliable information from the public, the various mechanisms for ensuring internal accountability and the passive public gaze are deemed to guarantee adequate measures for reporting back to the people. As institutional checks on the authority of the people and accountability to the public, these legal and fiscal mechanisms operate with few means to register any dissenting views or take any action as a consequence. Parliamentary processes offer occasional channels for active scrutiny or public direction of the justice system. These have differing levels of access to the judges, the courts and the policies of the ministries or judicial councils, as will be seen in later examples.

The experiences of the nine nations in the study provide useful examples of the need to gain information on the views of the public as a real, and not simply abstract, collectivity, and to see what consequences this information may have. In contrast to the well established techniques of evaluation embedded in the legal and the managerial traditions, those

involving the public are indeterminate in both their origins and their outcomes. The uses of public opinion polls in evaluations of justice are common examples of research without consequences. Courts and justice ministries solicit opinions from the public and also use opinion polls which may be independent of the ministries. Many of the national reports referred to surveys of citizen confidence in the justice system, such as those of the regular 'Eurobarometer' surveys of public opinion carried out by the European Union.[81] These were most often cited by the Latin countries, where public appraisal puts the courts at the lowest end of the scale of public institutions. France and Italy rate their justice systems at or near the bottom of the scale of public satisfaction. The Spanish report notes that only in those two countries and Portugal do citizens rank their judiciary lower than they do in Spain, where only the politicians and their parties are lower on the scale of satisfaction than the courts.[82] These broad public opinion surveys, though disturbing for the countries at the bottom of the scale and, no doubt, reassuring for those at the top, give little indication of where the problems lie, let alone what to do about them.

Surveys of court users provide more detailed and potentially more useful information. Surveys in Finland indicate that court users are less satisfied with the courts than are citizens in general, while the converse is true of Spain.[83] Since court users form their opinions from experience rather than by the public image or media representation of the courts, we would also expect them to be better informed. Well structured surveys of court users indicate in more detail just where the problems may lie. Themes emerging from surveys in France, Denmark, Portugal, Spain and Finland point variously to accessibility (cost and complexity), delay, fairness and judicial competence as issues of importance or concern to users.

Of greater interest are some of the findings on fairness and competence of judges, in part because they begin to give us some insight into how the users evaluate these qualities. In Portugal court users were concerned at 'favouritism',[84] while French users referred to 'inequality' in the administration of justice ('inégalité devant la justice').[85] These comments flag somewhat different public perceptions of judicial impartiality than the independence from executive government to which the judges traditionally refer. We return to this issue in more detail below.

Respondents in France and Portugal questioned the competence of judges in regard to the comprehensibility of their written decisions.[86] In Spain there was concern that judges did not adequately understand the case before them.[87] Data available from detailed surveys in Denmark proved to be useful in a controversy following a law professor's criticisms of the

inadequate reasoning of appeal court judgements. The critique focused on, but was not limited to, a particular case in which no reason was given for reducing a five year sentence to four years. A financial newspaper reported interviews with lawyers who said they were "shocked by badly written and incomprehensible explanatory statements" from one of the courts particularly criticised in the law professor's article. The President of that court responded by quoting survey data which indicated 82% user satisfaction with court services, but only 59% satisfaction with judges' explanatory statements.[88] Here the data was relevant and available on a court by court basis, so it was actually available to address a particular controversy. The end result of that affair has been that the Judicial Council prepared "a new language policy [that] aims at establishing general guidelines for explanatory statements, which will make them more concise and comprehensible".[89]

Other instances in which informed public opinion has led to changed practices are seen in the Netherlands and again in Denmark. Both cases involved public concern over possible conflicts of interest among judges who were engaged in other employment, either as a sideline job (Denmark) or who were selected as part time "substitute" judges from among practising lawyers (Netherlands). In Denmark public reporting of sideline jobs in 2001 indicated that judges were earning average additional incomes of €11,000 - €88,000 per annum (depending on the court), most of which came from private arbitration. Concern was based on whether such judges are deprived of adequate time for court work (which was denied by court presidents) or whether there were conflicts with impartiality.[90] Impartiality was at the heart of public concerns in the Netherlands where a pressure group, Court Watch, investigated possible conflicts of interest, notably where a substitute judge may be hearing a case involving a colleague from the law firm in which they normally work. "Court Watch has forced the courts to publish the secondary functions of all their judges on the website for the judiciary".[91]

The ambivalence in judicial attitudes to public opinion, seen in Garapon's characterisation of the public as both "guarantee and menace"[92] is illustrated in confrontations between judicial decisions and public opinion. Controversies over inadequately harsh sentences for crimes, highlighted in the media, seem almost to be a ubiquitous, if not perennial phenomenon. National reports from France and Denmark reflect similar patterns of events and reactions in the two countries. In France this debate followed a reorganisation in 2000 of the responsibilities of the juges d'instruction and the juges des libertés et de la détention (who deal with applications for alternatives to detention) which saw a marked decline in incarceration rates. Public reaction highlighted issues of security as a

result of this decline, and, as the national report puts it, "the jurisprudence changed: the number of committals to provisional detention increased significantly, independent of any legislative change".[93] In Denmark the debate over sentencing for violent crime was heated, with judges accused of being "flabby humanitarians" by a member of Parliament. With the judges and the government resisting pressure for legislated mandatory minimum sentences, it was found that average sentences for violent crimes had increased from 87 days imprisonment in 1995 to 119 in 2000. This data tracks changes following a 1994 legislative change which allowed harsher sentences.[94] It is unclear how much of this change is attributable to legislation and how much to judicial responses to public opinion, as in France. The apparent accommodation of the judges to public opinion in these instances suggests that while it may be denigrated as "irrational" and formally discounted as a source of judicial decision-making, public opinion may operate in unacknowledged and unofficial ways.

We may draw some tentative conclusions from this brief summary of the role of the public in assessing and directing the justice systems under discussion. The public, in its various guises as citizens, voters, taxpayers and users of court services, has a legitimate interest in the quality of justice. Up to this point we have identified few initiatives which bring together that interest with any effective mechanisms for assessment and reform. Public opinion is often solicited in forms which have little relevance to policy implications and therefore few consequences for the reform of justice systems. When there are perceptions of a crisis of legitimacy or of deep-seated public criticisms of the justice system, responses are inconsistent. While often purporting to better inform the citizens as to the processes of justice, the nexus between information and outcomes remains tenuous. Judges pride themselves on their aloofness from public opinion while apparently accommodating it almost surreptitiously. The judiciary may well be as poorly informed about public opinion as the public is held to be about judicial processes. The information available to most justice systems (ministries, judges and judicial councils alike) is based on media reporting of crime, justice and public responses (through editorials or sound grabs) of dubious validity, and opinion polls of equally dubious relevance to key policy issues.

The various forms of public input to the justice systems we have been reporting do, however, suggest some common themes and possible directions. When they are able to express views about substantive issues of justice, through well directed surveys or well informed pressure groups, public perceptions are more sophisticated than the "irrational" or "archaic and uncontrollable" mechanisms feared by the judges as the other face of the public guarantee of justice.[95] Evidence from Portugal, France and

Denmark shows that people truly desire to be better informed about the processes of justice through comprehensibly argued judicial decisions. This is clearly important to individual litigants, but also relevant on a broader scale to sentencing decisions. In addition we have seen that the users of the justice systems of the Netherlands, France, Portugal and Denmark consider the impartiality of judges to be important and threatened. Of particular and perhaps surprising interest is the nature of that impartiality and the source of its vulnerability. In contrast to the frequently expressed concern that the judiciary must maintain its independence from ministries or the interference of governments, the impartiality envisaged by the users has more to do with equality between the parties. This is threatened when judges have second jobs, which might mean working with other lawyers who may appear before them, or when prosecutors are perceived to be working out of the same office as the judge. This is a simple and fundamental conception of impartiality which serves as a reminder that the separation of powers was never more than a necessary but not sufficient condition for the more basic principle of fair judgment.

IV. PROMISE

The foregoing discussion of some current European practices employed in evaluating the quality of judicial activity within the context of the justice system has highlighted a number of difficulties. In conclusion we try to analyse certain factors underlying such problems in practice, and relate these to any indications of a possible way forward by reference to the earlier consideration of the principles upon which justice systems are based. A couple of the more promising examples arising from the research will again introduce a practical element to the discussion before we sum up with some tentative general proposals.

The distinctive power bases of the key players involved in the delivery of justice are explicitly enshrined in the principle of the separation of powers. According to that doctrine, judges are to remain independent of the executive power and, a related issue, aloof from popular influences. As a principle of long official and even constitutional standing it underpins many of the institutional arrangements, as well as the habits of thought, obtaining in justice systems. Indeed, with the proliferation of judicial councils as a bulwark between the judiciary and the executive, the doctrine appears to be enjoying a period of particular influence. While powers should perhaps be separated through institutional internal divisions, evaluative mechanisms do not thrive on them. The research found many instances of unilateralism and entrenched opposition based precisely in these divisions of power. We have on many occasions referred to the zero sum games that result.

The evaluation of quality and other means for ensuring accountability and conformity to standards of law and good practice are widely understood to be desirable and even essential to public management and to justice alike. Whether the pressures come from adverse findings of the ECHR, from parliaments demanding more formal and specific accountability, or from cash-strapped ministries, it often becomes obvious that new evaluative mechanisms must be implemented. When these have failed we have commonly noted one or two underlying factors: either a ritualistic adherence to some tenets of evaluative practice, or a more or less cynical justification of the means by the ends. In the former case the mechanisms and processes take on a life of their own, so that increasingly elaborate data collection protocols (or measures, or information technology) are understood as the solution to problems which really arise in the very conception of the process. Losing sight of the goals of the evaluation system, as of the justice system itself, attention shifts to the minutiae of the data and away from the purpose for which it was required in the first place.

If ritualism mistakes means for ends, a narrow focus on the quick fix makes the converse error. With sufficient will, power and cunning, a technological solution may be imposed on many different problems. The Italian Pinto legislation is illustrative: through a combination of domestic legal devices and the promise of compensation, appeals to the ECHR on the grounds of delay were reduced without reducing the delay itself. Less spectacular examples of technical solutions to juridical, managerial and political problems were seen in the automatic connections made by some justice ministries (Austria) and judicial councils (Spain) between evaluative devices and financial allocation. The Spanish system of output measures as a basis for judicial remuneration illustrates both ritualism and technologism: on the one hand, the measuring system becomes an end in itself, losing sight of the purposes for which it exists. On the other hand, the results of that measurement are applied mathematically to financial outputs. By focussing the attention of the judges on their salaries, of the ministry on the measures, and of both interest groups on the nexus between the two, any broader interests or ends are effectively eclipsed.

Some potential solutions to these problems can be illustrated by some practical examples from the research. Before turning to those we briefly revisit our earlier analysis of the principles underlying justice systems to see what guidance they may offer. We saw that both authority and accountability are means of representing interests which cannot literally be present in a practical setting such as a court or a ministry. The ministries and courts represent the traditional sources of authority of the state and of

law. Modern democracies also base the legitimate authority of the state and the judiciary in the will and confidence of the people, who are also represented as an abstraction, or in a few cases as a jury or citizen judge. The representation of law, state and a sovereign people prospectively authorises courts to pass judgment on those real persons before the court who stand to lose property or liberty as a consequence. The authority of the entire system must stand above the interests of the parties, including the victims of crime, while being based in the represented abstraction, the people. This paradoxical relationship between justice and the public leads to various devices for keeping popular interests at arms length. Continually represented only as an abstraction, the will of the people can be formally canvassed in opinion polls, or informally (and unreliably) deduced from the media. In keeping a distance between themselves and actual people with interests, judges and justice systems may lose sight of the legitimate interests of people as users of the courts. Where those interests have been able to communicate effectively we have seen demands for timely justice, competent and communicative judges, and transparent judicial impartiality. We discovered more vocal citizen concern over judges' connections with the private interests of parties (through their other appointments, as in the Netherlands and Denmark) than with those of public authorities.

Accountability is a retrospective check on the representativeness of the justice system. This does not imply that it should be any less broad in its conception of the interests to which it must answer. Substantive issues of timeliness, competence, communication and impartiality are as central to the system of accountability as to that of authority. Courts are only accountable to the executive as a means to the end of accounting to the citizens. And as we see in this overview of citizens' concerns, they are accountable for a great deal more than money.

This brief overview of the principles which underlie the evaluation of judges in context bear out the issues we identified in practice: the balkanisation of interests within the justice systems; the ritualism of seeking evaluative mechanisms for their own sake; and the search for a quick technological fix which will have assured or automatic outcomes. This syndrome is collectively characterised by an approach blinkered by partial interests and a hiatus between means and ends, so losing sight of the underlying aims and principles of the justice system. Evaluative mechanisms must take into account a complex of interests and values, not losing sight of their diverse sources in the judges, office and ministry personnel, citizens, lawyers, victims of crime and other court users. As long as many of these interests are represented as abstractions, the views and interests of real persons can only be adduced from the media or as a by-

product of technical data collection. That these interests often enter into the debate only as representations of overarching demands for accountability versus independence stifles broader debate. If it were possible to find ways for citizens, lawyers, politicians, judges and public servants to work together to define the goals and priorities of the justice system, this may help to reattach the ends of the justice with the means of evaluation.

If that suggestion seems utopian, it may be opportune to return to some practical examples arising out of the research which, we believe, point in some positive directions. We must explore the extent to which various institutional actors may be involved in assessing and implementing proposals that have a broader base than their own immediate institutional environment. We see progress in those areas where the demands of the public are heard, and when judges and managers work together to respond to those demands as well as to understand each others' values, interests and modes of representation.

In addition to the Finnish experience of national management by results considered above, it is worth drawing attention to a local pilot scheme. This was begun in 1999 in the district of the Rovaniemi Court of Appeal (which includes nine first instance district courts) where quality targets were set by a Development Committee of the Quality Project whose members are judges, practising lawyers and prosecutors. The committee worked through a process that involved frequent communications among the judges, and between the judges and the various stakeholder groups. These communications included an increased dialogue among judges on court practices, the formation of working groups, annual quality conferences and the preparation of quality benchmarks.[96] One of the results is the development of a new culture of communication between all the actors involved in the judicial process.

The targets dealt with substantive legal and judicial management issues, and were able to be assessed by fairly straightforward measures. They included increased consistency in sentencing (initially in theft, drink driving and assault, expanded to narcotics cases the following year), overcoming impediments to the preparation of civil cases (in consultation with lawyers), leadership skills in the admission of evidence, improvement in the quality of written judgements and increasing participation in judicial training (to 100%) with some expansion of postgraduate study. Not only was this an innovative local quality assurance pilot scheme, but it was itself evaluated,[97] with such positive results that it was recommended for nationwide adoption and was awarded a European prize for "innovative practice contributing to the quality of civil justice".[98]

In contrast to the various arrangements, noted throughout this article, by which the judiciary, the ministry and, occasionally, the parliament act unilaterally and without regard to each others' interests and values, recent developments in Denmark have been dynamic and exemplary. With the introduction into Parliament of the bill to establish a Judicial Council there was extensive debate between the Ministry, the Parliament and the General Public Auditor on the allocation of funds and the responsibility of the Council. The Parliamentary opposition and the Auditor (who is independent but reports to Parliament) considered that the Auditor's office should have the same powers and responsibilities in relation to the courts and the Judicial Council as apply to any public agency. This being conceded, the stumbling block became the sanctions that could be imposed upon an independent judicial council in the event that there were irregularities in its accounting for resources. The Council was established in 1999 on the basis that the Auditor can criticise and instruct the Council to take any measures agreed with the Minister, who can dismiss the entire Council if it does not comply with such instructions.[99] These arrangements were put to the test soon enough when, in 2000, the Auditor and the Ministry of Finance criticised the productivity of certain district courts. In response to these concerns the Judicial Council developed goals and introduced and evaluated a new district court reporting regime including productivity measures and targets which led to a 10% productivity increase. The process implemented by the Council includes qualitative comment back from the courts, which has allowed improvements in the data collection. This has consequences in decisions to fill vacancies, models for court staffing, and flow-through to non-salary expenses. The Auditor is now satisfied with the arrangements put in place by the Council.[100]

Key issues emerging from these examples revolve around what is to be measured, who is to decide what those measures should be, and how to negotiate what consequences should flow from the outcomes. Local initiatives, as in the case of the Finnish Rovaniemi district, have the advantage that the objectives are set by the same personnel who are to implement them. While this makes for optimum levels of commitment and responsiveness, it does not necessarily ensure accountability. At the other extreme, then, objectives are set by the Ministry (as in the case of the French performance measures discussed above) or by Parliament (Finnish national system) and the courts are required to meet them to maintain their flow of resources. Between these two systems we find various means of negotiating objectives between the courts and auditors, ministries or parliaments. Where these objectives are purely related to managerial accountability, as in the case of the Danish Auditor, they are

limited to quantitative productivity measures. They may also be used as tools of policy which again brings us back to the question of who is to determine the policy directions to be pursued by the courts.

The traditional lines of responsibility of judges and managers have been challenged in many of the instances of evaluation considered by the research projects. This may derive from the application of new public management principles to the operation of courts. It has also been stimulated by institutional reforms such as the establishment of judicial councils (as in the Netherlands and Denmark). These innovative approaches, in which judges are expected to respond to managerial criteria, or managers to public criteria (to suggest two of the possible combinations) are more interesting but also riskier than some of the one dimensional procedures we discussed earlier. The most successful modes of evaluation which this research identified were those combining the methods or claims coming from different institutional positions. A common element in successful evaluation regimes with positive outcomes has been the communication between players and the respect for a wider range of values and interests. The involvement of the parliament or court users has helped to overcome the stalemate between a judiciary relying on authority and a narrowly conceived independence, confronting a ministry or judicial council claiming the supreme importance of accountability conceived in a narrow fiscal and managerial sense. The role of the public has been most effective when it is represented by a well informed lobby group (e.g. Court Watch in the Netherlands). Across the various Danish examples we have mentioned, effective public participation has included lawyers and a legal academic, the media and the parliament. Public participation is least effective when the demands are vague and there is little or no follow through (as in Belgium). The public can act as a circuit-breaker to the usual zero-sum games.

Analysing the quality of justice from the different points of view of the institutional and public interests, it is clear that courts cannot be evaluated according to a single dimension. The criteria to be applied must recognise the distinctive approaches to representation which we found underlying both authority and accountability, and need to be negotiated among these diverse and possibly competing interests. While each of the criteria or interests has legitimate, and in many cases established, means of evaluating justice from its specific point of view, we have discovered the most promising examples to be those in which the stakeholders represent their own and respect each others' overlapping interests. They negotiate the assessment criteria and the uses to which they are put, and each has a stake in achieving successful outcomes.

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[1] The only countries without judicial councils at the time the study was carried out were Austria and Finland. In Belgium, a council was established during our research. While these councils have various names in their original languages, all are councils and all refer to judicial power. We use the generic term 'judicial council' to apply to all those organisations distinct from the ministries which are specifically responsible for the judiciary. T. RENOUX, Les Conseils supérieurs de la magistrature en Europe, Paris, La Documentation Française, 1999.

[2] J.L. WALTMAN and H.M. HOLLAND, The Political Role of Law Courts in Modern Democracies, London, Macmillan,1988.

[3] The origins of public administration are in the inspecting and accounting procedures mainly oriented to determining whether public money is spent by courts according to proper procedures.

[4] G. STURGESS and P. CHUBB, Judging the World: Law and Politics in the World's Leading Courts, Richmond, Butterworths, 1988, p. 184.

[5] C. DEFFIGIER et al., "Qualité et Justice en France", in M. FABRI, P. LANGBROEK and H. PAULIAT, The Administration of Justice in Europe: Towards the Development of Quality Standards, Bologna, Lo Scarabeo, 2003, p. 236; M.-L. CAVROIS,H. DALLE and J.-P. JEAN, La qualité de la justice, Paris, La Documentation Francaise, 2002, p. 197.

[6] EFQM Excellence Model, http://www.efqm.org/Default.aspx?tabid=35 [accessed 27 September 2005].

NG, G.Y., "Nederland", in M. FABRI et al., L'administration de la justice en Europe et l'évaluation de sa qualité, Paris, Montchrestien, 2005, pp. 305 and 328 [see bibliographical note].

[7] The projects were: "The administration of justice in Europe and the evaluation of its quality", financed by the Agis programme of the European Union; "Case Assignment to courts and within courts", financed by the Dutch Ministry of Justice; and "Internal case allocation in courts", financed by the Dutch Judicial Council. The preparation of this article has been supported by a fourth research project: "The quality of justice in Europe: policies, results and institutional settings", funded by the Italian Ministry of Research and by an International Strategic Links Grant from the University of Wollongong, Australia.

[8] The Research Institute on Judicial Systems of the Italian National Research Council (IRSIG-CNR), Bologna, and the Institute of Constitutional and Administrative Law at Utrecht University. Project leaders of the project "The administration of Justice in Europe and the Evaluation of its quality" were the Mission Droit et Justice of the French Ministry of Justice along with the other two Institutes already mentioned.

[9] The researchers were not formal representatives of their countries, or their justice systems. However, we will, for reasons of convenience, refer to their reports in brief by the names of the countries concerned.
[10] M. FABRI et al., L'administration de la justice en Europe et l'évaluation de sa qualité, supra note 6; M. FABRI, P.M. LANGBROEK and H. PAULIAT, The Administration of Justice in Europe: Towards the Development of Quality Standards,supra note 5.
[11] A. HIRSCHMAN, "Exit, Voice and the State", World Politics, 1978, No 31, pp. 90-107.
[12] A. SANDERS, "Core Values, the Magistracy, and the Auld Report", Journal of Law and Society, 2002, No 29, pp. 324-341.
[13] H.F. PITKIN, The Concept of Representation, Berkeley, University of California Press, 1972, pp. 8-9.
[14] Ibid., p. 55.
[15] Ibid., p. 57.
[16] Latour observes that, of all the disciplines, "the law has least suffered the ravages of modernism [...] If we so often mock the lawyers, it is because they have never really been modern"; B. LATOUR, La fabrique du droit: Une ethnographie du Conseil d'État, Paris, La Découverte, 2002, p. 267.
[17] "But the judges [...] are only the mouth that pronounces the words of the law" ["ne sont ... que la bouche qui prononce les paroles de la loi"]; MONTESQUIEU, De l'esprit des lois", 1748, http://classiques.uqac.ca/classiques/montesquieu/de_esprit_des_lois/partie_2/de_esprit_des_lois_2.html
[accessed 26 May 2006]; MONTESQUIEU, The Spirit of the Laws, transl., [A.M. COHLER et al., Cambridge, Cambridge University Press, 1989], p. 163.
[18] E.E.A. BREEN, "Mesurer la justice? Elaboration d'indicateurs de la qualité de la justice dans une perspective comparative", Paris, Ecole Normale Supérieure, Institut des Hautes Etudes sur la Justice, 2001, http://www.gip-recherche-justice.fr/recherches/rapports-recherche.htm [accessed 12 October 2005].
[19] J.L. WALTMAN and H.M. HOLLAND, The Political Role of Law Courts in Modern Democracies, supra note 2, p. 1.
[20] Italy, art 101 § 1; Portugal, art. 202 § 1.
[21] Spain, art. 117 § 1.
[22] H.F. PITKIN, The Concept of Representation, supra note 13, p. 55.
[23] J. Mc GARVIE, quoted in R.D. NICHOLSON, "Judicial Independence and the Conduct of Media Relations by Court", Journal of Judicial Administration, 1993, No 2, pp. 207-221.
[24] G. AGAMBEN, Means Without End: Notes on Politics, Minneapolis, University of Minnesota Press, 2000, pp. 30-31.
[25] Pitkin contrasts this authorisation theory with the accountability theory, which sees "precisely the converse"; i.e., the representative is bound, while the represented is free [supra note 15].
[26] A. GARAPON, "Il Rituale Giudiziario", in A. GIASANTI and G.MAGGIONI, I Diritti Nascosti: Approccio Antropologico e Prospettiva Sociologica, Milano, Raffaello Cortina, 1995, pp. 289-305.
[27] We have followed Agamben, in the discussion above, in distinguishing the 'sovereign People' from 'people with interests' by use of the capital 'P'. In the reminder of the article, we will maintain normal use of the lower case 'p' throughout, distinguishing between these distinct roles of the people by context or clarification.

[28] J. DOUGLAS and R. HARTLEY, "The Politics of Court Budgeting in the States: Is Judicial Independence Threatened by the Budgetary Process?", Public Administration Review, 2003, No 63, pp. 441-453.; American Bar Association, "An Independent Judiciary: Report of the ABA Commission on Separation of Powers and Judicial Independence", 1997, http://www.abanet.org/govaffairs/judiciary/report.html [accessed 17 May 2006].
[29] G. STURGESS and P. CHUBB, Judging the World: Law and Politics in the World's Leading Courts, supra note 4, p. 4.
[30] NCSC, "Trial Court Performance Standard and Measurement System", 2001, http://www.ncsconline.org/D_Research/tcps/index.html, accessed on 6 June, 2006; NCSC, "Court Tools", 2006, http://www.ncsconline.org/D_Research/CourTools/tcmp_courttools.htm [accessed on 30 May 2006].
[31] A. LE SUEUR, "Developing Mechanisms for Judicial Accountability in the UK"', Legal Studies, 2004, No 24.
[32] H.A. SIMON, D.W. SMITHBURG and V.A. THOMSON, Public Administration, New York, Knopf, 1961, p. 513.
[33] Ibid., p. 513.
[34] By this, we mean those stakeholders who have legitimate interests in and expectations of the organisation and its actions.
[35] The law "protects all the traces of disengagement to tirelessly reattach, by the perilous tracks of the signature, the archive, the text, the file, the statements to their speakers" [les énoncés à leurs énonciateurs]; B. LATOUR, La fabrique du droit: Une ethnographie du Conseil d'État, supra note 16, p. 297.
[36] A. LE SUEUR, "Developing Mechanisms for Judicial Accountability in the UK", Legal Studies, supra note 31, pp. 80-81.
[37] We will deal in more detail with the principles underlying publicity and transparency when we come to the topic of public means of assessment and accountability.
[38] C. DEFFIGIER et al., "France", in M. FABRI, L'administration de la justice en Europe et l'évaluation de sa qualité, Paris, Montchrestien, 2005, p. 268; C. DEFIGGER et al., supra note 5, pp. 152-153.
[39] This is discussed below in relation to surveys of court users.
[40] Ng, supra note 9, pp. 310-311.
[41] G.E.KODEK and M. STELZER, "Quality and Justice in Austria" in M. FABRI, P.M. LANGBROEK and H. PAULIAT, The Administration of Justice in Europe: Towards the Development of Quality Standards, Bologna, Lo Scarabeo, 2003, pp. 14-15.
[42] More could be said about the transparency of these processes and the importance of evaluating them, but that would require more specific investigations than those we are reporting on here.
[43] A. AARNIO et al., "Quality and Justice in Finland", in M. FABRI, P. LANGBROEK and H. PAULIAT, The Administration of Justice in Europe: Towards the Development of Quality Standards, Bologna, Lo Scarabeo, 2003, p. 209.
[44] C. DEFFIGIER, supra note 38, pp. 267-268.
[45] Authors' analysis of cases brought before the ECHR under Article 6 § 1 of the European Convention on Human Rights, from 2000 until 2005.
[46] F. BUONOMO, "Nuove regole per l'adempimento delle sentenze CEDU", Diritto e Giustizia, 2005.
[47] 2001 Law No 89.

[48] D.CARNEVALI, "La violazione della ragionevole durata del processo: Alcuni dati sull'applicazione della Legge Pinto", in C.GUARNIERI and F. ZANNOTTI, Giusto Processo?, Padova, CEDAM, 2006.
[49] See the discussion above on the limited effectiveness of judicial discipline; also G. DI FEDERICO, Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe, Bologna, Lo Scarabeo, 2005.
[50] P. LANGBROEK, "Changing the Judiciary and Judicial Administration: The Netherlands and Guatemala", in Empowerment, Security and Opportunity through Law and Justice, Saint Petersburg, World Bank, 2001.
[51] This is not the case for the Latin judicial councils -Italy, France, Spain, and Portugal-, that are only in charge of recruitment, appointment, promotion, training and discipline of judges.
[52] H. WOLLMANN, Evaluation in Public Sector Reforms: Concept and Practices in International Perspective, Cheltenham, Elgar, 2003.
[53] Finland does not have a judicial council or equivalent body.
[54] P. UUSIKYLÄ and P. VIRTANEN, "Public Sector Performance Contracting in Finland", Paris, OECD, 1999.
[55] A. AARNIO et al., "Finland", in M. FABRI et al., L'administration de la justice en Europe et l'évaluation de sa qualité, Paris, Montchrestien, 2005, pp. 231-232.
[56] Aarnio supra note 43., pp. 176.
[57] Ibid., pp. 177.
[58] M. FABRI et al., "Quality and Justice in Italy", in M. FABRI, P. LANGBROEK and H. PAULIAT, The Administration of Justice in Europe: Toward the Development of Quality Standards, Bologna, 2003, p. 278.
[59] NG, G.Y., Quality of judicial organisation and checks and balances, Utrecht, Intersentia, 2007, p. 110.
[60] F. PIANTELLI, "La programmazione strategica e gli strumenti di gestione: Esperienze a confronto", 2005, http://www.giustizia.it/newsonline/data/multimedia/685.pdf [accessed on 30 may 2006], p. 2.
[61] J.MEYER and B. ROWAN, "Institutionalized Organisations: Formal Structures as Myth and Ceremony", American Journal of Sociology, 1977, pp. 340-363.
[62] G.E. KODEK and M. STELZER, "Quality and Justice in Austria", in M.FABRI, P.M.LANGBROEK and H. PAULIAT, The Administration of Justice in Europe: Towards the Development of Quality Standards, Bologna, Lo Scarabeo, 2003, p. 15; P. BAUER, "A Show Case for the Future: e-Justice in Austria", in M.FABRI and F. CONTINI, Justice and Technology in Europe: How ICT is Changing Judicial Business, The Hague, Kluwer, 2001.
[63] H.S. MUÑOZ, "Qualité et Justice en Espagne", in M.FABRI et al., The Administration of Justice in Europe: Towards the Development of Quality Standards, Bologna, Lo Scarabeo, 2003, p. 157.
[64] P. SIGNIFREDI, "Misurare la produttività dei giudici: Il caso Spagnolo", Bologna, IRSIG-CNR, 2006.
[65] Consejo General del Poder Judicial (CGPJ).
[66]P. SIGNIFREDI, "Misurare la produttività dei giudici: Il caso Spagnolo", supra note 64, p. 8.
[67] Ibid., p. 9.
[68] Tribunal Supremo, Sala de lo contencioso-administrativo, pleno, sentencia, Votación, 21 Feb. 2006.

[69] C. DEFFIGIER, supra note 38, p. 269; NG, G.Y., Quality of Judicial Organisation and Checks and Balances, Utrecht, Intersentia, 2007, p. 235.
[70] J.-P. JEAN and H. PAULIAT, "An Evaluation of the Quality of Justice in Europe and its Developments in France", Utrecht Law Review, 2006, No 2, pp. 44-60.
[71] J.-P. JEAN and D. MARSHALL, "Francia: Un controverso progetto per migliorare il servizio giustizia", Questione Giustizai, 2005, pp. 591-610, at pp. 594-595.
[72] NG, supra note 6, pp. 310-311.
[73] Ibid., p. 308.
[74] United States experience indicates how quickly such measurement systems can become so complex and onerous that they become almost impossible to use, promoting calls for a return to simpler systems; B. OSTROM, "Court Tools: A Court Performance Framework", Williamsburg, National Centre for State Courts, 2006.
[75] A. GARAPON, "Il Rituale Giudiziario", supra note 26, pp. 289-305, at p. 302.
Le Sueur refers to judges who appeal to these forms of accountability as 're-conceptualists', since they are reconceiving traditional legal values and principles under the new demand for accountability; LE SUEUR, supra note 31, p. 76.
[76] "Donnez-moi le juge que voudrez, partial, corrupt, mon ennemi même, si vous voulez: peu m'importe pourvu qu'il ne puisse rien faire qu'à la face du public"; quoted in R.W. MILLAR, "The Formative Principles of Civil Procedure", Illinois Law Review, 1923-24, pp. 1-36, 94-117 and 150-168.
[77] F.K. ZEMANS, "Public Access: Ultimate Guardian of Fairness in Our Justice System", Judicature, 1996, pp. 173-175.
[78] The role of lay judges and jurors varies considerably across the countries considered. As a general trend, juries are used mainly in panels with professional judges to try the most serious cases. But the involvement of lay people in judicial decision making also includes the appointment to labour and commercial courts of people who usually have some degree of knowledge on the subject to be decided, as in France and Austria, and the district court in Finland. Finally semi-professional judges, usually with some qualifications or experience in law, decide minor cases in countries such as Italy and Spain (justices of the peace). Portugal and the Netherlands have no lay judges.
[79] R. DEPRE and J. PLESSER, "Belgique", in M. FABRI et al., L'administration de la justice en Europe et l'évaluation de sa qualité, Paris, Montchrestien, 2005; R. DEPRE and J. PLESSER, "Belgium", 2005, p. 138.
[80] W. VOERMANS, "Judicial Transparency Furthering Public Accountability for New Judiciaries", Utrecht Law Review, 2007, p. 3.
[81] http://europa.eu.int/comm/public_opinion/index_en.htm
[82] H.S. MUNOZ, "Qualité et Justice en Espagne", in H. PAULIAT, The Administration of Justice in Europe: Towards the Development of Quality Standards, supra note 63, p. 158.
[83] Ibid., p. 162; AARNIO, supra note 43, p. 208.
[84] B. SOUSA-SANTOS, C. GOMES and J. PEDROSO, "Portugal", in M.FABRI et al, L'administration de la justice en Europe et l'évaluation de sa qualité, Paris, Montchrestien, 2005, p. 335.
[85] DEFFIGIER, supra note 38, p.266.
[86] Ibid., p. 266; SOUSA-SANTOS, supra note 84, p. 335.
[87] MUÑOZ, supra note 63, p. 162.

[88] The President also invited dissatisfied lawyers to lodge formal complaints with the court. Complaints, and the mechanisms for handling them, form another means of evaluating justice systems, which fall between legal (including disciplinary) measures and administrative ones. They are also a means of gaining direct information from the public and lawyers using the courts.
[89] J. WITTRUP and P. SØRENSEN, "Quality and Justice in Denmark", in M.FABRI, P. LANGBROEK and H. PAULIAT, The Administration of Justice in Europe: Towards the Development of Quality Standards, Bologna, Lo Scarabeo, 2003, p. 144.
[90] Ibid., pp. 131-132. An ironic aspect of this controversy is found in the remarks of the Director of the Council of the Judiciary who in 2000 told regional seminars of judges and clerical staff that one of the reasons for courts to improve their performance was that they were in competition with private sector providers of dispute resolution services [p. 140]. These are the competitors for whom the judges are working in their spare time.
[91] NG, supra note 6, p. 313.
[92] A. GARAPON, supra note 25, pp. 289-305, at p. 302.
[93] C. DEFFIGIER, supra note 38, p. 274.
[94] J.WITTRUP, supra note 76, p. 144-145.
[95] A. GARAPON, supra note 26, pp. 301-302.
[96] "Quality Project in the Courts in the Jurisdiction of the Court of Appeal of Rovaniemi, Finland", 2005. http://www.oikeus.fi/uploads/wz1uke8tvs.pdf [accessed on 6 March 2006].
[97] This is a notable exception to the project's general observation of the remarkably low rate of evaluation of specific reforms; A.SAVELA, Evaluation of the Quality of Adjudication in Courts of Law Principles and Proposed Quality Benchmarks: Quality Project of the Courts in the Jurisdiction of the Court of Appeal of Rovaniemi, Oulu, Painotalo Suomenmaa, 2006.
[98]AARNIO, supra note 39, pp. 181-182, http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Operation_of_justice/Efficiency_of_justice/Finalists%20E.asp#TopOfPage [accessed in March 2006].
[99] J. WITTRUP, supra note 76, p. 125.
[100] Ibid., pp. 128-129.

Is There a Right Judge for Each Case? A Comparative Study of Case Assignment in Six European Countries

Marco Fabri and Philip M. Langbroek*

I. Introduction

Case assignment is the core-business of court organisations, because it touches upon some of the essential aspects of rendering justice: judicial independence and impartiality, organisational flexibility and efficiency. Organising case assignment properly is a necessary, but in itself insufficient precondition for public trust in the absence of bias in the courts, and it is also essential for a timely delivery of justice. The actual organisation has to make certain that cases are not allocated to judges who have, or appear to have, an interest in a case, or who may appear prejudiced otherwise; if a wrongful allocation happens accidentally, the court organisation must have a way to reallocate a case to another judge. This illustrates that case assignment practices touch upon both essential principles of adjudication and the practicability of everyday work in the courts. Would courts not organize case allocation properly, the general public could maintain the vision that judges are not impartial, inclined to favour parties they have a personal interest with or even may be bribed. Media exposure on judicial impartiality in the courts may have far reaching consequences for public trust. If the general public is of opinion that judges are not integer, it will be likely to hold the judiciary in low regard, and may not accept the authority of judgments. It therefore is essential that case allocation processes are well organized and transparent. Furthermore, under the rule of law, parties should have the possibility to disqualify a judge, as an external check on the case allocation process. Nonetheless, there may be different ways of organizing case allocation processes within these normative margins.

We started this research on an assignment from the Council for the Judiciary of the Netherlands. The interest of the Dutch Council in this information is related to the expansion and implementation of the Quality System 'RechtspraaQ' in the Dutch courts, which is also intended to prevent judicial bias and to make the measures that protect and enhance judicial integrity transparent.[1] This can be seen as part of the process of organisational development in which the courts and the judicial organisation have been involved since 1998. This research is therefore related to the concept of courts as learning organisations[2] and to the aim of maintaining and enhancing the general public's trust in the courts.

Within this context, Dutch courts are preparing measures to make the method of distributing cases within the courts transparent and to explain to the general public the principles they apply when doing this.[3] The goal of the research assignment was to check if rules and practices in other countries existed that were not yet present in the Netherlands. It therefore should be acknowledged, that this comparative research was policy driven.

Our main task was to make an inventory of applicable rules and practices concerning case distribution among judges within courts in different European countries. We were aware of the fact that this question not only refers to the actual organisation of distribution of cases within the courts. It also refers to the normative side of internal case distribution within the courts; in other words, to the ways in which values such as judicial independence, impartiality and integrity are safeguarded in the case assignment process. This may happen with or without detailed legal norms. We approached these aspects in our research from a comparative perspective, and postponed our judgement in the process, in order to be able to describe not only the applicable rules, but also the self-evident experience of persons working in the courts.

In this article we will first explain our research methodology. Next, we will summarize our research using a comparative perspective, first focusing on the actual organisation of case distribution and second on the values connected to the allocation process as we found them. Then, we will show our analysis of the multiple relations between the practices and values we found. Finally, we will make a reflection on the usefulness of the traditional classification of legal systems for the explanation of the ways cases are assigned to judges in courts.

II. Methodology

This research was of a qualitative, empirical nature. The outcome is indicative of processes in the countries within our sample. Starting from a possible classification of legal systems from comparative law,[4] we selected countries with a French (France, the Netherlands, and Italy), a Scandinavian (Denmark), an Anglo-Saxon (England and Wales), and a German Law System (North Rhine-Westphalia). This study is mainly based on the information provided by the national researchers who wrote the six case studies.[5] They selected at least three courts and interviewed judges and court clerks. The courts should be of small, middle and large size. They also should imply an administrative court or tribunal.

In order to collect the information to be compared, we made a common

research format. This was discussed and amended in the first research meeting among the partners to the project.[6] The outcome of this meeting was that the original research format was adapted to the explanations of the researchers of the systems of case assignment in their countries, in order to obtain questions which were answerable and comparable. It involved explanations of terms and instructions on what kind of and how many interviews were to be conducted.

Subsequently, the researchers prepared a first case study, the concept of which was discussed during a second research meeting. This allowed us to ask and provide further clarification of some issues and to eventually amend and complete their case studies. Part of the research process was also that researchers filled out a comparative matrix, in order to have an effective comparative tool. Interaction between researchers appeared to be a most powerful research tool, also after they had filled out the comparative matrix.

The research questions are:

> Which are the rules to enhance and protect judicial integrity and impartiality in relation to case allocation?
> How are the rules concerning internal case allocation applied in practice?
> How do judges value these rules and practices?
> Next, we asked researchers for their opinion on the case allocation process in the courts researched.

We present here the answers to those research questions comparing three main issues, leaving out the subject of the institutional court settings of the nations considered in this study, for the sake of length of this paper.[7] The first issue deals with the principles and general rules applicable to internal case assignment in the judicial systems included in this examination. We describe the rules and practices concerning the allocation of judges and the rules and practices to enforce judicial impartiality. The second issue concerns the main topic of this research: the internal case assignment systems used in the six judiciaries considered. It explores in some detail the information provided by the national case studies about the practice and opinions of interviewees and researchers on case assignment in the courts. The last issue deals with some aspects of the internal court organisation related to case assignment. Case assignment rules, practices and instruments, the main point of interest in this research project, are connected to several other aspects of court organisations that may affect the case assignment process like judicial specialisation.

Field research on judicial administration is scarce in Europe, and this also applies to the subject of this research project.[8] We were therefore unable to rely on a broad 'body of literature' on this subject. However, thanks to the quality of the researchers and to the interactive approach used for this study, we believe the information provided is accurate and reliable. Therefore we consider the outcomes of this research as hypotheses that can be tested on a wider scale.

The research findings are based on a heuristic interpretation of the data. As this is a description of facts primarily, on which we have based our analyses in the following paragraphs, readers not interested in these facts can skip the following paragraph.

III. CASE ASSIGNMENT: RULES AND PRACTICES

1. *Principles and general rules: Legal judge, immovability, disqualifying judges, sideline jobs*

a. The legal judge

We explored the 'principles and general rules' related to the case assignment process adopted in each country. Some of them may also be embedded in the Constitution, such as the ius de non evocando, meaning that no one may be denied the court to which he is legally or 'naturally' entitled, and which also comprises the prohibition to establish special courts to meet a single situation. As a consequence, special tribunals may not be set up to try a special subject; neither may a case be transferred to a court other than the competent court, unless prescribed by law. This civil right is not known as such everywhere. It is non-existent in Denmark, Englandand Wales, and France. In the Netherlands, the principle is laid down in the constitution, but it has no meaning in the context of internal case assignment. It merely refers to the civil right that a case cannot be given to another court than the court indicated by statutory rules of jurisdiction against the will of the parties.[9] In Germany, the principle is called the right to one's legal judge; in Italy it is called the right to one's natural judge. Both constitutions state that the establishment of an exceptional court is prohibited and no one may be removed from the legal or natural judge provided by law.

Summarising the case studies, the principle strengthens the perception of the impartiality of the courts as also stated in Article 6 of the European Convention on Human Rights which provides for an 'independent and impartial tribunal'.

b. The immovability of judges

Another significant principle for the study of case assignment is the principle of the immovability of judges and its practical application, which can be found in all the constitutions of the countries considered except in England and Wales, as they do not have a formal constitution. The assignment of judges to another court than the one they were originally appointed to may have reasons other than the normal functioning of the courts,e.g. relating to their aptitude, the content of their judgements or other reasons preferred by the office which appoints the judges – either the Minister of Justice, another executive public office or the head of the court. Moving judges for wrong reasons can impair judicial impartiality and therefore it is most important to safeguard judges against appointments to courts without their consent – that is the meaning of this principle.

It is a logical possibility that where cases can be moved from one judge to another we can also move judges to where they are needed most. The possibility of having a certain flexibility in moving judges from one court to another, is an issue of some importance. Such flexibility may add to the efficient deployment of judges in courts at different locations and to the timeliness of judgements within the area of those locations.

Procedures to move judges from a fixed position at a court to another court are cumbersome and formalised in most countries. Generally speaking, the transfer of a judge is only possible with the judge's consent, but exceptions may occur related to court reorganisations or disciplinary proceedings. The process is guided by the Judicial Councils in France and Italy, by the Court Administration in Denmark, by the Ministry of Justice in North Rhine-Westphalia, and by an informal negotiation between judges and the heads of courts in England and Wales. But there, the context is different, because apart from the magistrates' courts, the bench is still only open to qualified barristers and solicitors and hence the judiciary is an exclusive professional group. Appointment as a judge involves the obligation to sit in a number of different courts. The so-called ticketing systemsomehow limits the possibility of being transferred. In the Netherlands judges can be transferred to another court only with the consent of the management boards of the courts involved in the transfer.

The legal protection of the immovability of judges for the sake of their impartiality may create tensions concerning an efficient deployment of judges in courts where they are (temporarily) needed most. Based on our

research we can conclude that in most countries of our sample, except England and Wales and the Netherlands, the appointment of judges to a court fixes them in that position and makes a temporary transfer of a judge to another court quite difficult. Of course England and Wales do recognise the security of position of their judges, once appointed, as do the Netherlands.

c. Disqualifying judges and judges resigning from cases

The country studies also provide information about the possibility to disqualify a judge and the possibility for judges to resign from a case. All the countries, except England and Wales, have a list of detailed circumstances in which judges are supposed to resign or to may be disqualified by the parties. Nonetheless, English judges must also resign themselves from a case when there is a conflict of interest. These cases mainly deal with the issue of putting their impartiality at risk and therefore may involve personal interests or being related to the parties. In Denmark, judges who ruled against the defendant revealing a particular confirmed suspicionduring the preliminary hearing, cannot serve at the trial.[10] A similar situation exists in France with the examining judge. For examining judges, in civil cases it depends on the scheduling order of the head of court if the examining judge will be involved in the final judgement of the court.

A special rule exists in France concerning judges dealing with summary proceedings in civil cases. The Court of Cassation ruled that judges delivering judgements in summary proceedings should not take part in the final proceedings in the same case.[11] But in practice it is up to the heads of court to adjust the assignment of cases to this rule and certain heads of court do not want to do this because it makes the case management process more complicated. Because their decisions do not constitute an administrative act, such decisions cannot be challenged before an administrative court judge. But in Italy decisions concerning case assignment are considered an administrative act, and therefore may be challenged before an administrative court by the judges.

In Italy, the rules about the incompatibility of a judge and a case, particularly in criminal proceedings, are extremely detailed and create several problems for the functioning of the smaller criminal courts. This principle does not play a similar role in the administrative courts. In France and Italy judicial involvement in preliminary proceedings in a case does not exclude them from participation in proceedings later in the same case. In theNetherlands these issues are regulated by the Codes of Criminal and Civil Procedure, and in the General Administrative Law Act.

Especially in Denmark and the Netherlands, judges are used to deal informally with appearances of bias. Instead of starting formal resignation proceedings, they will exchange the case in which they might appear biased with a colleague. In order to make better visible for the general public how judicial integrity is enhanced, the courts, with the help of the Dutch Council for the judiciary, have developed guidelines judges should adhere to in order to preserve their (appearances) of impartiality.
In all countries, it is primarily up to the judges themselves to prevent any suspicion of bias arising, and there are no explicit rules on this other than the indication that judges may do this. This means that judges are expected to scrutinise their assigned cases themselves for any appearance of bias, and if bias is likely or there may be an appearance thereof, they should ask for the case to be assigned to another judge. Hence, the prevention of (any appearance of) bias is primarily an individual judicial responsibility and only at second instance a possibility of disqualification is given to the parties to a case. Only if judges do not maintain these values by themselves, other such mechanisms can be used.

d. Sideline jobs

We also collected some information about sideline jobs of judges. These may cause (appearances of) bias and therefore may relate to their resigning or disqualification from a case. Interestingly enough, only inFrance sideline jobs are completely prohibited both for ordinary and administrative judges. Such activities are allowed in Denmark, but only as far as they do not interfere with judicial impartiality. Professional judges can earn quite a lot of money from sideline jobs, especially Danish High Court judges. There, judges should nonetheless have the consent of the board of presidents of the higher courts. Some activities, such as teaching or being part of a governmental commission or international organisation, do not seem to be considered as an impairment to judicial independence – albeit that this is discussed in England and Wales. However, lucrative arbitrations are clearly seen as a potential problem.
In England and Wales, judges do not even need to be authorised to function as arbitrators. In North Rhine-Westphalia they have to be authorised by the Ministry of Justice, in Italythey must be authorised by the Judicial Council. In Italy, judges have been progressively limited by the Council's policy not to consent too often to judges engaging in extrajudicial activities but teaching. Administrative judges are wanted for consultation functions and are still granted authorisation by their specific Council. When permission is denied, they can appeal to the administrative court of Rome, which very often reverses the Council's negative decisions. The extrajudicial activities and the related income are published each year

in Denmark, and recently also in Italy.[12] In the Netherlands extrajudicial activities should be communicated to the management board and are published on the website of the courts. But it is not known if the judges really inform the management board of their court about all the extrajudicial activities that they perform.[13] A bill has been presented to Parliament in order to ensure that judges ask their management board explicit permission for extrajudicial activities, thus expanding the boards' control over judges.

2. *Internal court organisation: Specialisation, allocation of judges, task forces*

a. Specialisation

The kind of compartmentalisation in the courts may differ from country to country and also depends on the size of a court. Together with judicial specialisation, and the case assignment system adopted, this may affect the case assignment process. In order to compare information we introduced a distinction between courts, court divisions (e.g., civil law, criminal law, family law and administrative law), and court units (often calledchambers) within a division. Units may be specialised parts within a division, for example within a civil law division there may be units for movables, children's cases, succession cases and real estate cases.

As throughout this study, the simpler situation is found in Denmark where all the judges are generalists and they deal with all kinds of cases. All the other countries work with some kind of internal specialisation, which is quite evident in England and Wales as well as in Italy, where there are less specialised full courts than in France and North Rhine-Westphalia. It is a common feature of all courts that they have more distinct divisions when they are of larger size. In the Netherlands decisions on the internal organisation of the courts are taken by the management board, within the statutory limits of maximum four court divisions. In all the countries the number of specialised units depends on the law, on the size of the courts, on the decision taken by the heads of the courts (e.g., heads of the courts in France, Germany and Italy, but in the two last-mentioned with consent of the local and national Judicial Councils in Germany and Italy respectively). It is intuitive that a larger court may have an internal organisation divided into several divisions or units. A remarkable exception is Denmark, where neither in the Copenhagen court nor at the appeal court level has any formal specialisation been organised. In all the countries in our sample the specialisation in the courts of appeal follows the specialisation of the courts at first instance.

The court units in North Rhine-Westphalia are quite specialised, e.g. in the civil sector: legal aid, cases related to ownership of houses, international family affairs (children), real estate, movables, insolvency cases,etc. As a consequence, judges sit in such a unit for at least one year. It is possible, however, for a judge to be assigned to more than one unit. In England and Wales, the number of specialised administrative tribunals of first instance is quite large. Appeals from these tribunals go before a specialised division of the High Court. In this way, decisions of such tribunals may be subject to review by the ordinary judiciary.

b. Allocation of judges

In principle it is possible to move judges from one specialised division or unit of a court to another, but the levels of discretion of the heads of court differ from country to country. In England and Wales the decision as to the allocation of judges is made once and for all by the Lord Chancellor, along with the head of court. In Denmark, judges of first instance courts, as generalists, deal with all judicial matters without differentiation. In the High Courts, judges can be transferred to another division at their request and with the consent of the head of court. In France, it is the competence of the head of court to allocate judges within the organisation by a scheduling order. An exception concerns the examining criminal judges who are appointed by the President of the Republic on the advice of the Minister of Justice and after consultation with the Judicial Council. The scheduling competence is used quite differently, e.g. in one court (Avignon) the head of court (i.e., the president of the court) insists that all judges sit in the (criminal) misdemeanour unit, in other courts specialisation in criminal law is possible. In Italy, in the ordinary courts, the head makes a proposal that must be approved by the national Judicial Council, after consultation with the local Judicial Board, the head of the court of appeal and the Bar. In the administrative courts, it is formally the head that makes the decision, but in practice it is based on seniority. In North Rhine-Westphalia, judges are allocated to court units according to the annual regulatory case assignment plan (Geschäftsverteilungsplan), which may be adapted to changing circumstances several times a year and which has to be approved by the local council of judges. In the Netherlands the management board takes decisions about the internal organisation of the court, and allocates judges to the different court divisions.

In the countries considered, judges perform their services primarily in the courts to which they have been allocated, but there are exceptions to this

practice. In Italian courts, in order to gain some flexibility in the allocation of judges, the law provides for so called district judges, who may serve in all the offices of the judicial district when needed. However, this initiative has not provided the expected benefits in terms of flexibility. The same possibility has also recently been introduced in France. There, judges may be moved from one court to another within every district of a court of appeal by the head of a court of appeal. In the Netherlands, judges are appointed to a specific court, but by legal provision they are also substitute judges in all the other courts at the same level. Hence, they may be asked to hear cases in another court than the one they have been appointed to. This is usually arranged between the head of a court with a low caseload and a court with a high caseload; sometimes it is also arranged because of the special expertise of a judge, or in order to prevent appearances of bias. Several courts have signed agreements for such exchange of judges. In England and Wales, the so-called ticketing system allows judges to hear cases on some specific subjects on a certain court level, if they have been trained or if they have experience in that subject. Accordingly, there are judges who serve at a certain level who may hear a particular kind of case, if they have the appropriate ticket or qualification. This allows the judges to hear specific kinds of cases in several courts within their assigned geographic area. Accordingly in England and Wales it seems as if there is a specialisation of courts, but there is also a specific qualification of judges which goes beyond the single unit.

c. Task forces

The increasing caseload has pushed courts to establish task forces in order to address peaks or backlogs. This may bring some problems in the case assignment process. In France, task forces of judges have been used, on rare occasions, mainly for immigration cases. In Italy, task forces have been used to try to clean up the oldest civil cases dating back to 1995. For this purpose, a specific law has defined the kind of cases that these temporarily assigned judges are supposed to deal with and they are coordinated by a full-time judge of the first instance court. Also in the Netherlands, task forces have been deployed in order to help courts deal with backlogs. The flexibility of England and Wales allows the temporary appointment of judges from a reservations list when the caseload is overwhelming in a particular court.

Task forces may be a solution for a bulk of pending cases, especially in countries where the strict application of the principle of immovability of judges makes the process of transferring judges very cumbersome and formal. Generally speaking, it is possible only with the judge's consent, but

a few exceptions may occur related to court reorganisations or disciplinary proceedings. The process of temporarily assignment of judges is often guided by a central instance: the Judicial Councils in France, Italy, by the Court Administration in Denmark, by the Ministry of Justice in North Rhine-Westphalia, and by an informal negotiation between judges and the heads of courts in England and Wales on the basis of the ticketing system.

d. Case assignment: Who does it and how

Case assignment and the responsibility of the head of court

In Denmark, formally the head of court carries out the assignment, but in practice the assignment to the generalist judges is done randomly by a computer or by the clerk of court. The head of court intervenes only exceptionally, if the computer malfunctions or if there is a very intricate case that needs special attention. In England and Wales, the head of court and the top of the judicial system, such as the Lord Chancellor or the Master of the Rolls, have a formal role, but in practice the assignment is done by the court clerk. It is this functionary's task to identify the judge who has the time available to deal with the case. France, Germany and Italy work, in principle, with a similar system in the ordinary courts, but they differ in some aspects, which affects the day-to-day operation of the courts. The most important feature of German and Italian case assignment is that they have embedded in their Constitution the principle of the legal and natural judge respectively. They have both adopted a system in which the heads of court make proposals for case assignment (and also for the allocation of judges within the court). But the actual decision is made by others. In Germany, the decision is made by the local Judicial Council every year after a process that takes a few weeks. Neither Germany nor North Rhine-Westphalia has a Judicial Council such as France and Italy. In Italy, the decision to approve the session schedule for every court is made by the National Judicial Council, which concerns about 1200 offices (it includes courts and offices of the public prosecutor and justices of the peace); it is a process that takes years and the approved court schedules therefore do not always reflect the actual situation in the courts. In France, where the principle of the natural judge has no legal status, the case assignment schedule is made every year by the head of court without any apparent supervision. In the Netherlands the assignment to the various divisions (so-called 'sectors') is a responsibility of the management board, but within each division the sector chair is responsible. In practice cases are assigned by a coordinating judge, with the assistance of a court clerk.

When the heads of court in Italy and Germany do not follow the case assignment system they may, in principle, be subject to disciplinary measures, since the criteria are established by the judicial council and are considered binding. In the other countries the heads of court do not have to follow instructions to assign cases in their courts issued by a superior authority. In England and Wales, the assignment is made by a listing officer,who is supposed to follow the listing policies set up by the judges. Any dispute is supposed to be solved by a senior judge. The Ministries of Justice of the countries considered here do not play any role in the case assignment process. The Bar may be informed about the court assignment process, but can only make suggestions in England and Wales as well as in Italy, and only in the ordinary courts.

Some differences have been noted in the French and Italian administrative courts, where the heads of courts, or of the heads of units within the largest courts, still play a major role in the assignment process. This role has only recently been diminished in Italy, with the introduction of a more automated case assignment system. In both countries, the head of the unit assigns the cases, while the head of court, or the clerk in France, carries out the first assignment to every unit on a subject-matter basis.

The heads of court may also allocate judges to cases

The discretion of the head of court to move judges is a point of attention. Moving judges easily from one unit to another, may have a great effect on the case flow of the court (Di Federico, 2005). In the countries considered, only in Denmark the head of court is responsible for the appointment of the heads of a division or unit and for the allocation of the judges to them. In England and Wales, it is the Lord Chancellor, in consultation with the existing heads of divisions, who appoints the new heads, while the local presiding judge, along with the court manager, decides on the allocation of the judges to the various units. In France, the heads of division are appointed by a promotion committee (mainly consisting of heads of courts), and they are responsible for the allocation of judges within the divisions of the court that they preside over. In North Rhine-Westphalia, it is the local council of judges that decides on the allocation of judges within the units. In Italy, it is the national judicial council that must supervise and approve the proposal for the allocation of the judges made by the heads of court after a very long and time-consuming process that involves the head of the court of appeal, the local judicial council and the local Bar. In the Netherlands, the head of court in practice does not play a significant role in case allocation, but the management board is responsible for the internal court organisation. The actual case allocation is often carried out by a court clerk under the supervision of a coordinating

judge.

Judges' specialisation comes before randomization

Assignment of cases generally follows the specialisation of judges. Randomisation is not applied everywhere. Particularly in France, case assignment is a supervisory task of the head of court. In the German administrative courts, cases are allocated according to the case allocation plan; specialisation within the administrative courts is a leading principle for case allocation (e.g., election law, urban and regional planning law, aliens' law, tax law, economic administrative criminal law). In the Dutch administrative appeal courts, cases are assigned in the same informal way as in the ordinary courts.

All the court systems do have some kind of specialisation by jurisdictions (territory) or within the single court organisation (subject related). Once the case has first been assigned on the basis of the subject-matter, there is a random case assignment that can be handled in several ways. In Denmark, where the assignment is not even made by subject-matter because the judges deal with all kinds of cases without any differentiation, the assignment is in practice fully random by computer. In the smaller courts it is done by the clerk. In England and Wales, the assignment made by the listing officer assigns the case to the first judge who has the professional qualification (the so-called ticket) to hear the case and who has the necessary time. In France, North Rhine-Westphalia and Italy the assignment is randomized using the plaintiff's or defendant's name, or it may be based on judges' weekly or daily shifts. This happens in particular in some criminal courts in Italy. In the Netherlands, within a division, cases are assigned on the basis of the following criteria: the kind of procedure, specialisation and skill of the judge, judicial continuity and then randomness.

In the French administrative courts, the case is assigned according to subject-matter and then at random or according to geographical criteria. In the Italian administrative courts, recently a new case assignment system has been introduced. In order to balance the distribution of cases among the administrative judges, the head of court assigns the case to the various units, if present, by subject-matter, then the head of the unit prepares a number of balanced sets of cases equal to the number of judges of the unit and subsequently draws lots to assign them. Exceptions may occur and they have been managed in different ways from court to court, depending on the role played by the head of court.

Balancing caseloads amongst judges has the highest priority

According to the research findings, there is just one priority concerning

the case assignment systems in use that seems to be shared by all the six countries: balancing the caseload amongst judges. Other aspects are relevant, such as the appreciation of a judge's specialisation or judicial continuity in dealing with a case, but they are specific for each country and are related to the way in which local case assignment processes work. InDenmark the assignment is made by computer in some courts, but in the other countries the randomisation is done manually. A weighted caseload which is fundamental for a well-balanced caseload per judge is used inDenmark only in the Copenhagen city court. This is also a point of attention in the case allocation plans in North Rhine-Westphalia which are internally completely transparent. In England and Wales, the case is given to the judge who has the time to deal with it and cases are not weighted. In the Netherlands cases are not weighted either, but coordinating judges of divisions (i.e., sectors) and units take the pending workload of judges into account when assigning cases.

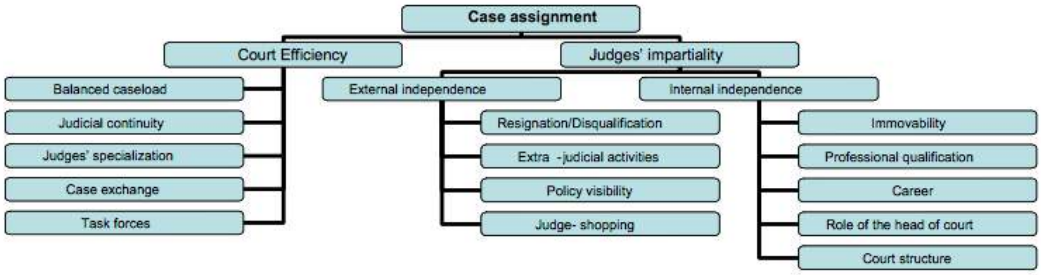
Informal exchange of cases between judges is not allowed everywhere

An informal exchange of cases between judges is possible in Denmark, England and Wales, and in the Netherlands; but it is considered something absolutely unacceptable in Germany and Italy. In these two countries the possibility of changing judge must be strictly provided by the law, by a judicial council order, or exceptionally by a reasoned decision by the head of court. No informal exchanges whatsoever are allowed due to the natural or legal judge principle. In France, exchanging cases is possible with the consent of the head of court only. The consistency between the case assignment rules and their use in practice is considered quite low in England and Wales, and in Denmark, and fairly high in France, Italy and the Netherlands. In Germany this consistency is indicated as stringent.

IV. VALUES AND FACTORS THAT AFFECT CASE ASSIGNMENT: A COMPARATIVE ANALYSIS

In the former paragraph, we have provided a description of rules and practices concerning assignment of cases to units and judges to courts in six judicial organisations. An apparent function of case assignment processes is to balance two sets of values: judges' impartiality and courts' organisational efficiency. The case assignment process must balance these factors. This balancing process leaves a number of choices open for those who develop and carry out policies regarding case assignment, due to the different weights that each justice system gives to the different factors and values. In this paragraph we explain these factors and values, but we also show how these factors and values may be balanced

differently. Figure 1 graphically summarises the main values and related factors that affect, and are affected by the case assignment system.



1. *Judges' impartiality*

Judges' impartiality is pursued through the means of judges' independence, which can be further divided into external independence and internal independence.[14] External independence refers to the mechanisms established to preserve the judge's independence -therefore impartiality- from all the possible influence coming from the parties and the other State authorities such as the Government and the Legislative.Internal independence refers to the mechanisms established to preserve the judges' independence from pressure that may come from the judiciary itself, such as: pressure from a superior judge or from the judicial council. We would like to point out that when judges' impartiality, and independence, are involved, the matter is not only if they are impartial, but also if they appear to be so before the parties and the public in general. Therefore the way in which independence and impartiality policies are implemented, communicated and perceived are a point of attention.

a. External independence

External independence, according to our study, is related to the case assignment system through the four factors listed in figure 1: resignation and disqualification of judges, judge- shopping, extra-judicial activities, visibility of policies.

The regulation and practices concerning the way through which the self-resignation and the parties' disqualification of a judge may be effectuated are among the strongest mechanisms to enhance and enforce the external independence of the judges. Resignation and disqualification rules are, generally speaking, carefully listed in the procedural rules or codes and they look quite similar in all the judiciaries considered here. Our study shows that the self-regulating mechanisms work out quite well. Among the countries considered, we notice a high level of sensitiveness, sometimes, as in Denmark due also to a specific case that has changed

the judges' behaviour on this issue.

The extra-judicial activities (sideline jobs of judges) are another factor affecting the judges' external independence and therefore the case assignment process. It is intuitive that the number and the kind of activity (e.g., member of the executive board of a corporation, member of a Ministerial cabinet, etc.) may jeopardize the substance and appearance of the judges' independence and then their impartiality. As our research shows only in France extra-judicial activities are not allowed, in Denmark, the Netherlands and in Italy -but with the exceptions of the numerous positions within the Government and International organisations- they are supposed to be clearly published on the web. The case assignment process may consider these extra judicial activities and avoid the assignment of the cases to judges who may have developed connections with one of the party due to these 'extras'.

The publicity of these activities brings us to the other factor listed, which is the policy visibility. We think that the visibility of court policies helps to enhance the external independence of judges, or better, the appearance of impartiality. However, generally speaking, the practices to make the court policies transparent, including the case assignment criteria, are not really that well developed in the case studies considered here. Information about court policies, in particular about case assignment, seems hard to find – except for North Rhine-Westphalia. A point of attention for future research is the discretion given to each court to implement local practices for its functioning. This is, of course also relevant for the courts' policies on publicity. This possibility seems to be quite relevant in Denmark, England and Wales, the Netherlands and a little more limited in the countries of Continental Europe, even though, particularly in this matter, the leadership role of the head of the court may be more significant than the general rules and customs.

Judge shopping is the last issue that we considered within the area of external independence. If the case assignment system allows some kind of judge's picking (judge-shopping), it goes without saying that there may be a serious problem of external independence. The phenomenon has been mentioned only in the criminal court in France and Italy, while it has been not acknowledged in the other judiciaries considered in the study. Notwithstanding the apparent non-existence of the problem, we think, this is an issue to be empirically and constantly monitored, particularly in small courts.

b. Internal independence

After having considered the external factors that affect and are affected by the case assignment system, we will now exploit those that deal with the judges' internal independence. More in detail, the way through which the principle of judges' immovability is pursued is certainly a point of interest.

Immovability is a principle shared in all the judiciaries considered in our study, even though it has been constitutionalised only in Germany and Italy. The constitutionalisation of the principle has created a certain rigidity of the case assignment process, which is particularly evident in Italy. However, since the immovability concept is founded in all the judiciaries, every country has established mechanisms to 'overcome' the judges' fixation in a court and give some flexibility to the court organisation, both within the same court or between courts. These mechanisms are not formalized at all in countries such as Denmark and England and Wales, where cases can be exchanged informally between judges, average formalized in countries such as France an the Netherlands, where decisions are taken by the head of courts or by the so called management board, highly formalized in Germany and, above all, in Italy, where changes are allowed only after a specific written decision by the head of court supported by the local (Germany) or national (Italy) Judicial Council. This is a strong limit to court flexibility in case management, which will affect court performance in terms of efficiency.

Partly connected to immovability is the professional specialisation of judges, and the way in which courts are structured. In this context, professional specialisation means that judges have acquired a qualification to deal with specific matters, so they can be considered specialized. Actually, if the court structure is highly specialized in division, sections and subsections that deal with specific matters, and the judges are highly qualified to deal specifically with these matters in a specific section, it is intuitive that where the immovability principle is applied more stringent, this limits organisation flexibility in case assignment. This seems to be the case of Germanyand Italy, even though in this latter the rigidity is given more by the stiff court structure rather than the specialisation of the judges. On the contrary, in Denmark, because of the generalist character of judges, and in Englandand Wales, due to the so called ticketing system, the case assignment system is quite flexible. The Netherlands and France are in between, with a moderate specialisation of both judges and court structure.

The judges' career path is another point of attention for the case assignment system. This is related to the common practice to give judges a

balanced caseload. In countries where the judges' career advancement is connected to their performance, for example measured through the 'quality' and the number of judgements, the case assignment system used is of paramount importance. For example, 'quality' decisions can be more easily performed if there is the opportunity to deal with difficult cases in point of law, while big numbers can be pursued processing massive similar cases such as injunctive orders or simple social security cases. For this reason, we expected to find in the judiciaries, which have a so called bureaucratic setting,[15] the adoption of a weighted caseload system, in order to have a more balanced distribution of cases among judges. On the contrary, a weighted caseload system seems to be used only in North Rhine-Westphalia and in the Copenhagen city court. This leads to the need of other balancing mechanisms in particular in the other two bureaucratic judiciaries, such as France and Italy, and a different role played by the heads of courts.

In this research we also pointed out the importance of the role of the head of court in the case assignment system, which is related to the internal independence of the judges. Automatism in case assignment, a low discretion in the assignment process by the head, such are the cases of Germany, Italy and Denmark, increases the level of internal independence, but it may decrease the capacity of the courts to deal with the case in an effective way. A more managerial role of the head, or of the management board, should call for the assignment of cases in a more effective and efficient way rather than a simple randomization. Theoretically, there is an "efficient allocation" of a mix of cases, which should help the judges' and court's productivity.

2. *Efficiency of court organisations*

This leads us to the second 'pillar' of the case assignment system which is the search for court organisation efficiency.[16] Judges' specialisation, like division of labour in general, is assumed to be a major precondition for efficient functioning of courts. Case complexity and the existing caseload of judges call for a better specialisation of judges, and maybe also of courts, to increase, at least in theory, the average case processing speed. Judges have a professional interest in having assigned to them a fair mix of interesting and simple cases in comparison with their colleagues. Therefore the internal transparency of case assignment and caseloads is a major issue in courts in all the countries studied. In Italy, for example, judges perceive themselves to be entitled to a balanced caseload and therefore mix it up with the value of internal judicial independence. And this mix is protected by the constitutionally fixed way of case assignment in Italian courts. We think, therefore the professional interest of judges in

a balanced caseload may conflict with the court-organisations' interest in efficiency by enhancing different kinds of specialisation.

The case assignment system also affects the court efficiency through choosing for or against judicial continuity in dealing with the same case. In England and Wales judicial continuity is considered a 'privilege' for parties in the actual overwhelming situation and cases are assigned not considering judicial continuity, but selecting the judge who has some time available for the case. On the contrary, we think that a case assignment system that also acknowledges the importance of judicial continuity can give a better service to the parties and increase the overall efficiency of courts, since the judges do not need to study too many new cases from the beginning.

We have already mentioned that the informal exchange of cases between judges has been recognized as an informal but effective mechanism of coordination by mutual adjustment. As shown in our research this is not allowed in the judiciaries (i.e., Germany, Italy and France) where the assignment process is more formalized and based on a legalistic approach. In the Netherlands, Denmark and England and Wales if the judges do have reasons to resign or to be disqualified by the parties, cases can be informally exchanged, preserving both the judge's impartiality and court efficiency.

3. *Balancing values and factors*

One of the most striking conclusions from this study is the strong contrast between the formal approaches in Germany and Italy versus the informal approaches in Denmark and England – where the actual internal case assignment process typically is not prescribed by law. As a consequence, it is easier for the German and Italian courts to live up to formal requirements of accountability for the internal case allocation than for the Danish courts, while the French take a middle position with a dominant function of the head of court; this middle position has recently also been taken in the Netherlands, where the courts have started to develop internal guidelines for case allocation within the frameworks of internal court regulations.

Whereas in Germany and Italy the law seeks to support the professional values of the judges and the heads of courts, by preventing judicial bias and unequal treatment of judges by the head of court, in Denmark and England the professional values are apparently considered to be self-evident and internalised by the judicial services - and do not seem to have the need to

lay down these values in rules. We consider the self-evidence of strong professional values like impartiality an asset for every court. However, when moving from an informal arrangement of internal case allocation to a more formal arrangement, it may seem as if the responsible state institutions give the message that there are no longer sufficient grounds for such self-evident trust in the judicial professionals – in other words, that they cannot be trusted anymore. This is to be avoided. Even so, the increased external transparency of courts as a result of modern means of communications and the increased interest of the press in the courts makes it advisable that the courts develop clear policies on the assignment of cases, so that they can explain the way they apply and achieve a balance between their organisational and professional values and acceptable court performance. Thus, judges can share their professional responsibility in preventing bias from occurring.

Related to the informal or formal approach in dealing with case assignment, we also observed a potential tension between organisation and management on the one hand, and the juridical, normative approach on the other. Formal steering competences, striving for efficiency, flexibility and, to a certain extent, transparency are inevitable in modern organisations. We have shown however, how dominant traditional juridical and judicial values still are in courts, also supported by traditional judicial professional values. These values have been partly summarized in article 6 of the European Convention for Human Rights and are also concerned with case management; they concern judicial impartiality, judicial expertise, equality of arms, timeliness and judicial continuity in a case.

It is an outcome of this study that in Denmark and England and Wales[17] court organisation seems to be able to put a greater interest in efficiency because the organisational rules do not stress juridical and judicial values as explicitly as those rules in Italy and Germany do. France and the Netherlands have made their interest in an efficient court organisation very clear by introducing out-put based financing systems. Nonetheless, they take a middle position in the way they try to reconcile juridical and organisational values. In the Netherlands the organisational demands have been made explicit by Statutory Act, and the juridical values are in a process of juridification; they are operated explicitly, partly in a Statutory Act and partly in court internal regulations and guidelines. In France, the juridical and judicial values are guarded by the courts' presidents.

These organisational and juridical values must be balanced in modern case assignment, but a minimum of human rights and juridical quality must remain unchallenged. In this respect, a firm constitutional and/or

supranational legal basis of juridical values remains a necessity; the countries in our sample show that this can be achieved in different ways.

The method of case assignment in France, Italy and Denmark suggests that judges can manage all juridical fields. Also the Dutch way of having judges in first instance courts change court division every four years is an exponent of that thought. But with the current complexity of law and society the professional demand that a judge knows and masters all fields of law is no longer reasonable. Courts with only generalists seem more flexible from an organisational perspective, but judges who appear not to be able to handle and judge cases adequately would also risk to harm the public trust in the courts.

In England and Wales an effort to solve this problem has been made with the ticketing system, meaning that judges must have a certificate in order to be allowed to handle specific kinds of cases. In Germany a far-reaching juridical specialisation within the courts is considered normal. This reduces organisational flexibility, whereas it will reduce the risk of judicial mistakes. Therefore judicial specialisation may be expected to contribute to the public trust in the courts.

In conclusion, the values and the instruments emphasised in this study show that they must be balanced keeping human rights and juridical quality unchallenged. In this respect, a firm constitutional and/or supranational legal basis of juridical values remains a necessity; the countries in our sample show that this can be achieved in different ways. We think that it is a challenge for all judicial organisations to manage their cases not only from the perspective of judicial values, but from efficiency as well. This may need a constant rethinking of working processes within the court organisations – and also the functioning of judicial organisations as a whole. This is a matter of the public accountability of the courts as organisations and a matter of judges avoiding delays in deciding cases.

V. A FINAL WORD ON THE RELATION BETWEEN THE CLASSIFICATION OF LEGAL SYSTEMS AND THE ORGANISATION OF CASE ASSIGNMENT

We started this study by selecting countries with different legal traditions, assuming that we would have found some relations and consistency between the main feature of the legal system and its case assignment. We distinguish between legalistic legal systems (the Latin or French ones) where reference to codes is predominant in adjudication, and jurisprudential legal systems where reference to jurisprudential precedent is predominant (the Anglo-Saxon ones). The role of legal rules in case assignment (formal/informal) is also a point of attention, as we expect the

informal rules to lead to more flexibility than the formal ones.[18]

From our research we can conclude that the most rigid system of case assignment can be found in Italy, followed by Germany, whereas the French system, although formal, is quite flexible. The Danish, Dutch, and English case assignment processes are also quite flexible. England and Wales and Italy fully confirm the hypothesis, whereas it should be rejected for France altogether. German case assignment confirms the hypothesis in part, but is quite adaptable and contradicts it for that part. The Netherlands has an informal case internal case assignment: but is originally a French legal system, which is operated with quite some room for judicial precedent. Therefore, we positioned it with Denmark between legalistic and jurisprudential legal systems. We would expect both countries to be less formal than Germany and Italy and more formal than England and Walesin case assignment; and we would expect both countries to be more flexible than France and Italy, and less flexible than England and Wales. It appears that they are just as flexible and informal as England and Wales in their case assignment. So, also the Dutch and Danish cases do not fit the hypothesis entirely. An explanation for these finds could be that the distinction between legalistic and jurisprudential legal systems is not absolute at all, because also courts in civil law countries may contribute to the development of law, as Merryman asserts.[19]

Based on this outcome, we question whether a typology of legal systems can contribute to the explanation of the role of law in society and in organisations like courts. As far as case assignment is concerned, the typology explains very little. The exchange between researchers from the countries in our sample gave us more insight into the actual methods of case allocation than only a legal comparative study based on this classical typology would have done. From our research we derived that comparison on the basis of interaction between scholars who studied the functioning of the legal rules that govern court organisations and their application is more fruitful than a juridical comparison on the basis of a traditional typology of legal systems. It is probably about time to abandon this typology as a starting point for comparative work in the field of judicial administration and court administration.

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[8] M. FABRI and P. LANGBROEK, The Challenge of Change for Judicial Systems: Developing a Public Administration Perspective, Amsterdam, IOS Press, 2000; M. FABRI, J.P. JEAN, P. LANGBROEK and H. PAULIAT, L'administration de la justice en Europe et l'évaluation de sa qualité, Paris, Montchrestien, 2005.

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[12] Extrajudicial activities haven been published on the web site of the Italian Judicial Council only recently.

[13] M. VELICOGNA and G.Y. NG, "Legitimacy and Internet in the Judiciary: A Lesson from the Italian Courts' Websites Experience", International Journal of Law and Information Technology, 2006, pp. 370-389.

[14] It has to be clear that in this work we are not considering all the variables that may affect judicial impartiality and independence, but only those that are related to

the case assignment system based on the empirical research. See. N. BROWNE-WILKINSON, "The Independence of the Judiciary in the 1980s", Public Law, 1988, pp. 53-57; C. GUARNIERI and P. PEDERZOLI, The Power of Judges, Oxford, Oxford University Press, 2002; K. MALLESON, "Safeguarding Judicial Impartiality",Journal of Legal Studies, 2002, pp. 53-70; S. SHETREET and J. DESCHÊNES, Judicial Independence: The Contemporary Debate, Dordrecht, Nijhoff, 1988; J.C. VILE, Constitutionalism and the Separation of Powers, Oxford, Oxford University Press, 1967; M.B. ZIMMER, "Judicial Independence in Central and East Europe: The Institutional Context", Tulsa Journal of Comparative and International Law, 2006, pp. 53-65.

[15] Typical feature of bureaucratic judiciaries is that the recruitment and the career are those used for other positions within the public sector. Generally speaking, judges do not have a previous specific professional experience and they have a quite rigid career ladder mainly related to seniority and performance; see G. DI FEDERICO, "The Italian Judicial Profession and its Bureaucratic Setting", Juridical Review, 1976, pp. 40-57. In our sample, judiciaries that can be classified as bureaucratic areFrance, Germany and Italy. England and Wales, and Denmark can be classified as professional judiciaries, since, generally speaking, judges are selected among lawyers who have been practising law, and there is not a rigid career ladder strictly related to seniority and performance. The Netherlands take a middle position because judges are selected both from law school graduates and experienced lawyers.

[16] L. CADIET, "Efficience versus équité?", in Mélanges Jacques van Compernolle, Brussels, Bruylant, 2004, pp. 24-47; H. FIX-FIERRO, Courts, Justice and Efficiency, Oxford, Hart, 2004.

[17] J. PLOTNIKOFF and R. WOOLFSON, Judges Case Management Perspectives: The Views of Opinion Formers and Case Managers, London, DCA Research Series, 2002, No 3.

[18] K. ZWEIGERT and H. KÖTZ, Introduction to Comparative Law, Oxford, Clarendon, 1998.

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THE JUDICIAL POWER AND DEMOCRACY

Michel Troper*

A simple and naive stance could have as a consequence of phrasing the question in the following terms: "is it in conformity with the principle of democracy that legal proceedings are not dealt with by the people, as was the case in certain antique democracies, but by judges"? The starting position here would be the point of origin of installing a democratic society, where we would hesitate to entrust the resolution of judicial proceedings to judges rather than the people. Of course, the question is not framed as such by anyone, and today there is no system under which the people would directly settle disputes. Nonetheless, the question itself loses its naivety when it is posited whether the power to settle a dispute a trial, given to professional judges, actually makes them a 'power'? And when subsequently this question is answered affirmatively; whether that power is compatible with democracy?

One must resist the temptation of seeking to resolve the issue through examining the nature of judicial power, and subsequently that of democracy, given that the answer would depend on the choice of definitions;i.e., the concepts linked to the essence of democracy and judicial power.

Therefore, if we are trying to avoid the metaphysical level, it is necessary to limit oneself to a purely descriptive approach starting from a single conclusion: either because certain constitutions expressly institute a judicial power declaring their democratic nature; or they want to recognise the existence of a judicial power while still considering themselves as democrats, a large number of jurists support the thesis that it is compatible with democracy. Based on this, they then advance a certain number of definitions and arguments.

These theses are the ones under scrutiny through analysing the strategies and argumentative restraints that lead to them being adopted.

Firstly, it is argued that there is no judicial power. However, as the expression 'judicial power' has two principal meanings in legal language: a functional meaning -i.e., that of "the totality of acts which lead a trial to be adjudicated"- and an organic meaning -i.e., "a totality of courts which represent certain structural exigencies". Therefore, the thesis of absence of judicial power is equally bifurcated: there is no judicial power in the organic sense; and judges exercise a function which does not give them any

real power.

When these two arguments fail, it has become increasingly commonplace to resort to a third argument: there can be judicial power, but democracy is not what a vain people desire, and it cannot be generally identified with the power of the majority. True democracy is the power of the judiciary.

I. THE QUESTION OF ORGANIC JUDICIAL POWER

One must from the start avoid the common way of approaching the issue, which is founded on linguistics. Often certain practices are invoked, notably the fact that in the language of several constitutions, one uses -or to the contrary one consciously avoids to use- the expression of judicial power. For example, in France, many discussions focus on the fact that Title VIII of the Constitution is entitled "de l'autorité judiciaire" [of the judicial authority] rather than "du pouvoir judiciaire" [of the judicial power]. Nonetheless, if these terms favour the extension of competences to courts, or their independence, they do not shape the whole of different juridical rules. For example, Article 64 of the 1958 Constitution disposes that "the president of the republic is the guarantor of the independence of the judicial authority", while the 1848 Constitution contained a title "the judicial power", but not different rules from other constitutions. Therefore, these expressions have but a mere symbolic significance.

If linguistics offers no help, one can proceed along the path through which the existence of a legislative or executive power is determined: this is said to be true when there is an authority, principally charged with a function in which it is specialised. Thus, it is necessary that each of these authorities accomplishes all these actions, be they legislative or executive, by themselves. Without a doubt there is never a perfect specialisation, but nonetheless one can consider a power to be executive when almost all executive acts, and the most important ones are accomplished by the same authority. Thus, it is easy to identify the legislative power with parliament or with the government.

Conversely, one cannot transpose this solution to the judicial power, because there is never a single tribunal, but several. One must thus reason in the same way as with other powers in the presence of several authorities. The linguistic practices are not uniform: there are various mayors in a single country taking administrative decisions, but this does not mean that one finds in that country an administrative power in the organic sense, or an municipal power; in contrast, one considers that there is a legislative power even though there are two chambers or an executive power, and

even though there is a president of the republic and a plurality of ministers. In reality, these differences can be accounted for.

First of all, in the case of parliament or the executive power, the diverse authorities of which it is composed; i.e., the chambers or the ministers, do not produce juridical acts in a parallel fashion, but converge in doing so as co-authors. The chambers do not make laws independently, but vote on the same text which subsequently becomes law. Ministers equally converge in drawing up decrees; while in contrast mayors, take their decisions independently from each other.

Moreover, the acts of the chambers or the ministers are not attributed to these authorities, but to the group of authorities to which they belong; i.e., the parliament or the government.[1] On the contrary, acts of mayors are only attributed to themselves, and not to some administrative or municipal power.

According to this framework, one can only consider that there is a judicial power, if and only if:

> (1) The tribunals collaborate in the production of acts, of which they are co-authors, rather than produce decisions of which they are the individual authors;
>
> (2) The acts which they fulfil are not attributed to the tribunals themselves, but to the judicial power as a whole.

It is obvious that neither of the two conditions is fulfilled.

Nonetheless, if one cannot transpose the process through which one has identified the legislative or executive power one can nonetheless speak of a judicial power in a different way.

> (a) If the authorities are hierarchically structured. One must evidently refer to a flexible rather than strict concept of hierarchy. According to the strict notion, the inferior authority is legally bound to follow the instructions of the superior authority, with a risk of disciplinary sanctions if it does not do so. It is a hierarchical model as it is found in the army or an administration. Following the flexible notion, it is sufficient that the superior authority is endowed with the means of exercising a determining influence on the substance of the decisions taken by the inferior authorities. It is clear that among tribunals there exists a hierarchy which conforms to the flexible notion, as supreme courts, whether supreme courts in the strict

sense, or Cours de Cassation, can effectively influence the decisions of inferior courts.

(b) If the superior authorities have a discretionary power at the decision-making level. The existence of a hierarchy in the strict or flexible sense is indeed not sufficient for there to be a judicial power. For example, in the tax administration, where one finds a strict hierarchy, the authorities can solely decide upon the amount of the tax through performing the arithmetic operation prescribed by tax legislation. In this sense, regardless of the hierarchy, it cannot be said that the superior authorities dispose of the fiscal power.

One thus only speaks of the existence of a judicial power when superior courts -in the exercise of their influence on inferior courts- perform more than the sole application of a pre-existent law, or impose the application of that law. In that fashion, there is only a judicial power in the organic sense when there is a judicial power in the functional sense.

It is however precisely this second aspect which is at the heart of the debate. The problem of reconciling democracy only arises if there exists a judicial power as we have just defined it, and where democracy is a system where the general rules are created by the people.

II. THE QUESTION OF THE POWER OF JUDGES

In order to maintain that the role of tribunals is in conformity with democracy, one either should deny that they dispose of a discretionary power, and claim that they limit themselves to the application of a pre-existing law without the ability of expressing ideological preferences or making axiological choices, or one should conceive an organisation in which they are not endowed with such a discretionary power.

1. *The denial of discretionary power*

So as to deny that judges dispose of a discretionary power, the usual approach is to employ some variant of the theory of judicial syllogism, the origin of which can be traced back to Montesquieu. This theory is thus not solely linked to the theory of democracy, even if certain theories of democracy make use of it.

It is evidently not necessary to expand on the well known theory of syllogism, which derives from Montesquieu, but was first enunciated by Beccaria and became a true official doctrine under the French Revolution.

The most transparent formulation was given by Clermont-Tonnerre: "judicial power, what is improperly called judicial power, is the application of the law or the public will to a specific fact, thus in its final analysis it is nothing more than the execution of the law".[2] It is thus clear from this formula that if a judgment is nothing but the product of a syllogism, there is no judicial power. The same idea has been picked up and developed by numerous authors and political figures -Kant, Condorcet, Robespierre-, and if it is not exclusively linked to the theory of democracy, it is in full conformity with it.

Its justification can be found in the principle of legality, which itself is closely linked to the conception of political liberty as it existed during the Enlightenment. The expression 'political liberty' indeed had two meanings at that time. In the broad sense, it is the liberty of those who are only subject to the law. They are free because in society, as in the physical world, they are capable, if they know the law, to evaluate of their actions, and thus make informed choices. Liberty is thus simply legal predictability or security.

This is why, if the judge did anything else than apply rules, if for example he or she could create or recreate the rules at the point of application, we would live under a despotic system. Governing according to its whim, or despotism, is thus defined by the absence of separation of powers; i.e., the system in which the one who executes the law can also make or remake that law according to the circumstances. Despotism is not only a system in which there is a single despot, and a system where a multitude of judges could do something else than apply the law could also be considered as such. For that matter, in pre-revolutionary France, the power of sovereign courts, les parlements, was considered as despotic.

Political liberty in the broad sense is thus protected even if the government is not democratic, but in a democracy it is liberty in the strict sense which is guaranteed, as one is only subjected to laws to which one has consented.

In spite of its appearance, the model of Kelsen does not differ much from this one. He without a doubt denies the existence of distinction between law creation and law application, and he posits that judges are norm creators, as the judicial decision itself is a norm. He equally posits that laws always leave judges with an important margin of appreciation, for example when they allow the judge in criminal law to choose between a maximum and minimum penalty; or when in civil law he is entrusted with the determination of the amount of damages, or with the ordering of measures which serve some kind of interest: the interest of the child, of the

company, of society, etc.

However, Kelsen maintains that the judge does not create general norms, and that thus there is no jurisprudence, except in the case where the law authorises the creation of general rules through the judicial process. Democratic theory is thus saved, because even if judges do not make decisions which are the logical consequence of the application of the law, they undoubtedly rule on cases in a discretionary fashion, but in a way that is at least compatible with laws adopted in a democratic fashion.

Another version of the thesis which posits that judges do not dispose of a discretionary power is the Dworkinian theory of the 'one right answer'. According to Dworkin, the judge does not apply law as a syllogism, but he nonetheless founds the solution on the legal system as a whole, and does not exercise law-creation powers.

However, this theory of the syllogism is by no means satisfactory. It presents itself as a simple technical norm: to insure the rule of law, one should reduce the judge to the production of syllogisms. This technical norm itself is the translation of a proposition which describes a causal relationship: If the judge limits himself to the production of syllogisms, this ought to have as its consequence the exclusive reign of the law.

But as a technical norm, the theory fails if such a limitation proves to be impossible. It is never true, and it cannot be true that the decision is but a conclusion of a syllogism, of which the premises are independent from the judge. Firstly law prescribes nothing for a single case, but for a class of cases. One must thus determine first to which class the case to be judged belongs to. In other words, one must start by determining the minor premise, which is not a given, but the result of an intellectual operation. A similar act can be for example tried as rape or as an indecent assault. The decision to subsume it under one or the other category is discretionary. In other terms, one must decide to apply this law, or another. Secondly, once it is decided which law will be applicable, one must then interpret the text; i.e., determine the major premise, which is equally not a given but a construction. The law is indeed not a general norm, but is an expression, the significance of which is a general norm. Thus one must interpret that expression to determine the general norm it contains, and interpretation is a free-will activity; i.e., a discretionary process.

For that matter, one finds that operations on the major and the minor are linked because it is not possible to determine whether a case belongs to a certain class without at the very least having an idea of the meaning of the expression which defines that class.

Thus, even if our reasoning is based on the wholly imaginary case of on a perfectly codified criminal law which foresees but only one fixed punishment for any category of crimes, there nonetheless remains a margin of discretionary power. But of course, such a hypothesis does not occur, and the law never limits a judge to such a specific conduct but, as one has seen with Kelsen, it leaves him always with a margin of appreciation. That is why, even if the law was adopted democratically, it is impossible that the decision of the judiciary be considered democratic because it would be derived from the law.

But there is more: if the judge redrafts the law, it is the law itself that ceases to be democratic. Yet, the judge can do so by interpreting the law, or even by changing it retroactively, as the law is supposed to have the meaning which it is given by the judge not at the day of interpretation, but at the day of its adoption by the parliament. And as the interpretations produced by supreme courts are respected by the inferior courts simply because of the hierarchy of courts, mentioned above, there is legislative power in the hands of tribunals.

The conclusion is that one can never consider that judges are reduced to the production of syllogisms. Accordingly, judges dispose of a margin of discretionary power, and above all of the power to choose the applicable law, and subsequently to determine its meaning. Citizens are thus subject to individual norms which are not deduced from democratic laws, or to general norms which were not adopted democratically.

One can thus attempt to imagine procedures which would limit the power of judges.

2. *The mechanisms to prevent the exercise of a discretionary power*

The first option is to draw up codes, systematised systems drawn up in a coherent and clear fashion. These codes would contain rules covering all possible cases, so as to make sure that there is no more room for discretionary power, or for interpretation.

It is well known how codification has failed to reach this objective. First of all it is impossible to avoid lacunae or contradictions, not in the least because the legislator can simply not foresee all future cases, in particular those which emerge from technical or social evolutions. Moreover, these codes are drawn up in a vague and ambiguous language, which renders interpretation simply inevitable. Finally, if decisions could be the target of legislative oversight, the separation of powers, and even the principle of

political liberty itself is breached because the legislature could always revise the laws depending on the circumstances. Viewed differently however, if they are not prone to oversight by the legislative power, nothing can stop judges to redraft the law under the cover of interpretation.

All attempts during the French Revolution to deny judges the option of interpreting the law, and prescribing them to refer back to the legislature have failed, as they did under Frederic II. One can even argue that this prohibition had the effect of strengthening the power of judges in a concealed way, as now interpretation is presented as simple application of a law which is presumed to be clear, without the necessity of justifying the choice of a certain meaning.[3] Yet this meaning is itself a general norm. Whichever way one looks at it, it cannot be denied that general rules are produced by judges and that there indeed is a judiciary power, which belongs more specifically to Supreme Courts.

Those who seek to avoid this conclusion underline that judges, even those in the supreme courts, are subjected to various constraints: they cannot decide by themselves to deal with a situation; they decide according to a certain procedure; they are held to justify their decisions, thus not allowing them to pass judgment as is possible for a parliamentary majority which can do so by simply affirming its will. For that matter, all statements by judges are testimony of the fact that they have the feeling themselves not of a discretionary power, but of the fact that they are tied, which often emerges from the fact that they adjudicate in a fashion opposing their political views, because the law prescribes the given outcome.

All this might be true, but unfortunately irrelevant. All power, including the absolute kind, is subjected to factual constraints, and even Louis XIV could not act as he pleased. Well then, the restraints mentioned in this context are merely factual ones. Thus, the question is not to know whether judges justify their decisions and whether these justifications realistically reflect the reasoning followed or mere window-dressing, but solely to know if, should the judge have wished to do so, he or she could have taken one decision, or another one. The affirmative answer is inevitable, as the greatest support for that option of choice can be found in the voting procedures in collegial jurisdictions, where each decision could have had a different or even contrary outcome based simply on a different configuration of votes, which would be equally valid. Thus, when appeal is no longer possible, every decision regardless of its content, even if it is absurd, is legally valid and part of the legal order.

One could even go so far as to say that even if there is a good answer, as it

is claimed by Dworkin, that would not change the simple fact that a bad answer has the same legal value, as a bad law is equally prescriptive as a good one.

A final remark needs to be made: it has been argued that there could be a judicial power in the organic sense, because there is one in the functional sense where judges can create rules under the oversight of theCour de Cassation. However, this approach has been followed because, in seeking to deny the existence of a judicial power, it has been claimed that there is no unity and thus no judicial power as there is a legislative one. But frankly that element is not essential since the problem of compatibility with democracy does not pose itself in similar terms if there is no system of centralised tribunals. In the France of the Ancien Regime, there was no hierarchy whatsoever between the parlements, each of which could produce general rules within their jurisdiction without having to take into account those of the others.

It matters little that there is a judiciary power as long as there is any judiciary power. Thus the question remains: since we are subjected to general rules produced by judges, can we say that we live in a democracy? Evidently not if one applied the classical definition of democracy as a system in which the general rules are adopted by the people or the representatives of the people. If one wishes to maintain the thesis of compatibility, it is necessary to change that definition.

III. THE DEFINITION OF DEMOCRACY

It is necessary to highlight that no attempt is made here to confront the judicial power with true democracy, but rather to examine several theories of democracy which aim to see judges as a democratic institution. The different theories presented here will not be analysed in terms of true or false, but solely from the perspective of whether they are useful, and whether they more or less fulfil their function of justifying power, rather than -in the absence of power- denying the existence of a judicial power per se. In reality, none of these theories fulfils its role perfectly, and none can truly be applied in practice, since one always runs into their internal contradictions or the implications of the notions they imply. I choose to consider two groups of theories. One can maintain that judges exercise the power of making general rules in the name of the people, or one can assert that democracy is not at all the power of the people, but a whole of principles, or finally that the people is a more complex notion that we could think at first glance.

1. *Democracy is not the power of the people, but a power exercised in the name of*

the people

According to a first version of this doctrine, judges form a democratic institution because democracy does not demand from the people that they exercise this power themselves or through elected representatives. It suffices that it is exercised by delegation, a delegation which is not necessarily explicit.

Thus, it can be asserted that there is always an implicit legislative reference, through the fact that the legislative power can always make a new law which reverses a rule produced by the Cour de Cassation of which it disapproves, as for example the French parliament has done in the Perruche Case.[4] If it does not do so however, then it implicitly accepts the general rule created by the judged, and consequently judges produce rules pursuant to an implicit delegation given by the legislative power.

Three objections can be levelled at this justification, which show that this theory does not solve the problem of compatibility with democracy.

Firstly, one is presented with a considerable modification to the definition of democracy, as democracy becomes nothing more than a system in which the people adopt general rules. It is no longer, as with Kelsen,[5] a system of autonomy, or even as in a representative democracy, a system in which the majority of voters delegates the power to produce general rules to an elected legislative authority, but it becomes a system in which the elected delegates themselves delegate their power. The people is thus no longer the whole of citizens whom are in turn authors and subjects of norms, or even the whole of those that choose whom exercises this power, but solely the entity in whose name this power is exercised, the one whose name is invoked, almost as is done with god, without the necessity to establish a correspondence between an expressed will and another actual will. Sometimes it is argued that judges, in some cases, are elected. But the difference with parliamentary elections, they cannot be elected based on a manifesto promising the creation of certain general rules.

The second objection is of a practical nature: the legislative power can never be sure of its ability to impose its will, because a new law too can be the object of an interpretation which reintroduces the ancient case-law.

The third objection is of an equally practical nature. In various cases, the review is not actually exercised, and it is even difficult to do so. This is not only true for the cases in which parliament is not informed of the decisions of the courts, but also those occurrences in which the creation of a rule by

the judge is based on a supra legislative principle, which the parliament cannot touch. This can be a constitutional rule, or even an international rule, in systems where, as in France, the latter rules have a superior authority to that of laws.

One can attempt to avoid the final objection by maintaining that the constitutional rule which stops parliament from setting aside this jurisprudence is not an obstacle, but to the contrary a guarantee for democracy.[6]

Substantially, that is the argument that Kelsen makes to justify constitutional review of legislation: by deciding that a law is contrary to the constitution, a constitutional court does not pronounce itself on the substance, and does not oppose parliament, but what it in fact does is limit itself to declaring that a certain rule can only be adopted in the form of a constitutional law; i.e., with a stronger majority. In that fashion, the court is an instrument of democracy because the requirement of a qualified majority guarantees that a larger number of citizens will be subjected to rules to which they themselves consented, or lacking that, their representatives.

Dean Vedel had put forward a similar argument: without contesting that the decision concerns the substance and not solely procedural elements, he underlines that this decision can always be reversed by the constitution-making power, by the sovereign 'bathing in justice'.[7]

Nonetheless, these two approaches run into considerable difficulties, two of which are worth mentioning here. The first is that, from the perspective of the theory of democracy, they do not explain the impossibility for the people or its representatives to reverse a jurisdictional decision, when this decision is founded on an international norm. One can indeed not present an international norm as the expression of a popular will superior to that of an elected parliament. The second difficulty is that of reconciling the idea that the constitution-making power expresses better the will of the sovereign people with the notion which is fundamental to a representative democracy: the fact that a law decided upon by parliament is the expression of the general will. If indeed the parliament represents the sovereign people, it does not express that will less well than the constitution-making power does, as sovereignty does not come in degrees. In the version of Georges Vedel, through the application of the metaphor of the 'bath of justice', it constitutes the confession that the constitutional judges initially raise themselves against the initial will of the sovereign prior to bowing to it.

According to the second version of the theory which claims that the judge speaks in the name of the people, the judges does not exercise a power delegated tacitly by parliament, but he himself is the representative of the people. This thesis, elaborated only to a limited extent, bases itself on the theory of representation developed by the National Constituant Assembly in 1791, notably by Barnave.[8] It is argued that the law is the expression of the general will, which means that those which adopt the law express the general will rather than their own. They are thus the representatives of the subject of that will, the representatives of the sovereign. Representation is thus not linked to elections and the king must be considered as a representative, as, through his vetoing right, he participates in the law-creating process. This reasoning can be transposed: if the judge participates in the creation of general rules, he himself is a representative. This is true of the constitutional judge, who can cancel laws adopted by parliament, but also of the ordinary judge who can interpret them.

It is quite apparent that this justification consists simply of a change of the theory of democracy, which no longer consists of a system of autonomy, or one of power exercised by the people through its elected representatives, but solely of a power exercised in the name of the people by representatives of which only some are elected. But there are other ways of modifying the definition of democracy.

B. Democracy is not the power of the people but a set of principles, the rule of law

At this point we are confronted with a pure product of politico-juridical argumentative restraints. Certainly, say the defenders of the ideology of the rule of law [état de droit], the system which we praise runs counter to the principle of democracy, but only if one identifies this principle with the majority rule. Yet democracy cannot be limited to that, as the will of the people is not the will of the majority of the people, and even less that of the parliamentary majority. Because of this impossibility of identifying this will of the people, one must necessarily consider that it manifests itself in a certain number of fundamental principles which constitute the rule of law. By guaranteeing the respect for these principles, the judges are the upholders of democracy.

This idea, which presents itself in diverse variations, equally runs into important difficulties. The first one is of a definitional nature, which leads one to consider as democracy an enlightened despotism which nonetheless respects fundamental rights. The second is linked to the relationship between the constitution and fundamental rights: if judges only demand respect for those rights enshrined in the constitution, that is not

guaranteeing the rule of law as it was defined, but solely the supremacy of the constitution, which would have been defending whatever its content, irrespective of the fact that it contained rights or not. If, on the other hand they guarantee all fundamental rights, whether or not they are included in the constitution, by virtue of their sole intrinsic value, then the rule of law does not entail a constitutional state. Finally, and above all, in all the cases the list and the content of fundamental rights are thus defined in a totally discretionary fashion by judges. It is thus not very difficult to prove that the government of judges is perfectly democratic.

IV. CONCLUSIONS

It is important to keep in mind that the above is but an analysis of the discourse, and not of reality, and we refused to pronounce ourselves on the reality of the democratic or non-democratic nature of the judicial power. All depends on the definitions, but a single thing is clear: if one maintains the classical definition of democracy (a system in which the power is solely exercised by general rules adopted by the people or by its elected representatives), the government under which we live today is not democratic, since a large number of general rules are created by unelected judges. Still resorting to classical definitions, that government can be qualified either as a mixed regime (because power is exercised through both the democratic element of parliament, and the aristocratic element of judges) or as a polysynody, an aristocratic regime in which the power is exercised by a number of collegial aristocratic organs, where only the procedures of composition differ.

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[1] Here 'attribution' is not used in the normal technical sense. In that technical sense, one must always say that acts are attributed to the state, and not to parliament or to the government. However in daily language, one identifies an organ as the author of this act, and in doing so it is either parliament or government which are identified.
[2] A.P., Vol. 15, p. 425.
[3] M. TROPER, Le droit, la théorie du droit, l'état, Paris, PUF, 2001, p. 163.
[4] The law of 4 March 2002 aimed at reversing the rule emerging from the decision of the Cour de Cassation of 17 November 2000.
[5] H. KELSEN, La démocratie, sa nature, sa valeur, 2nd ed., 1929, transl. [C. EISENMANN, Paris, Sirey, 1932]; Presentation of M. TROPER, 2nd ed., Paris, Economica, 1988.
[6] M. TROPER, "La logique de la justification du contrôle de la constitutionnalité des lois", in Mélanges Pactet, 2003, pp. 911-ff.

[7] Translation of the French expression 'dans une sorte de lit de justice'; G. VEDEL, Schengen et Maastricht, with regard to the decision of the Constitutional Council, 25 July 1991, No 91-294 DC, RFDA, March-April 1992, pp. 173-ff.

[8] It is however elaborated on by Pierre Rosanvallon: "the representatives of the people are of course first those who are elected; but not only; can also be considered as representatives those that speak, act and decide 'in the name of the people'; it is the case of judges, whether judicial or constitutional, but also, by extension, the case of several regulatory authorities"; P. ROSANVALLON, La démocratie inachevée: Histoire de la souveraineté du peuple en France, Paris, Gallimard, 2000, p. 407.Among jurists, Dominique Rousseau defends a similar concept; D. ROUSSEAU, Droit du contentieux constitutionnel, 5th ed., Paris, Montchrestien, 1999; "La jurisprudence constitutionnelle: Quelle 'nécessité démocratique'?", in G. DRAGO, B. FRANÇOIS and N. MOLFESSIS, La légitimité de la jurisprudence du Conseil constitutionnel, Paris, Economica, 1999, pp. 363-376; see, for my comments and the response of D. Rousseau: Ibid., pp. 377-382.

BEYOND THE JUDGE: FROM HERMENEUTIC AND PRAGMATIST APPROACHES TO A GENETIC APPROACH TO THE CONCEPT OF LAW

Jacques Lenoble*

I. INTRODUCTION

Philosophical inquiry, J. Coleman[1] recently rightly said, is an exercise that develops austerely and modestly, like a variation on a familiar theme rather than like the chimerical construction, often too prized today, of a new system for its own sake. But this does not prevent advances and shifts. To pursue the musical metaphor, the quality of the variations become evident when, on the basis of a familiar theme, they open up to stimulating and even sometimes destabilising interpretations[2] and thereby reveal an unknown face of the seemingly over-familiar.

Of course, this observation also applies to philosophical reflection on law. In fact, it may even take on broader significance here. A brief look at the history of philosophy of law during the last century seems indeed to attest that those "variations" that are generally considered to have been truly "inspired" are the work of authors who have been especially aware of the necessity to learn, not only from the history of their own discipline, but also from a discussion conducted in the background: the meta-theoretical discussion of epistemological reflection.[3]

There are many indications that a favourable moment is approaching for the emergence of such a new variation. It would be linked mainly to the debate prompted by the revisiting of traditional issues in legal theory in the light of the recent pragmatist[4] revival in epistemology.[5]

One of its most representative and fully developed expressions is Coleman's project of "pragmatic conceptualism"[6] and his proposal for what might be called a pragmatist turn in the philosophy of law. We will therefore take it as the starting point for our own reflections. Of course, this proposal for a pragmatist turn is not without predecessors. The interpretivist or hermeneutic turn that governs numerous recent studies in philosophy of law itself reflects the will to respect a form of epistemological internalism which anticipates the project for a pragmatist approach to legal theory. Similarly, beyond the sphere of philosophy of law, the anti-foundationalist trend which has characterised a significant part of American legal scholarship since the sixties anticipates the pragmatist turn, although in a still more implicit and less developed way.

Certain features specific to the pragmatist turn, however, augur the fruitfulness of this approach.

First, the project for a pragmatist turn (and more broadly the movement of which it is a privileged expression) has introduced a salutary clarification to current debate in legal theory. Thanks to a patient rereading of current findings in positivist research on law (and of certain elements of the background to these findings that help in gauging their import),[7] it has been possible to reinterpret the theoretical significance of the theses in question and thus assess what is at issue in several current debates. As we shall see, it allows in particular for an understanding of why the interpretivist or hermeneutic turn in philosophy of law, and more generally the central place assigned to the judge in current reflection on law, do not yield the critical denunciation of legal positivism that their supporters still too often continue to credit them with.

However, this first feature reflects a second, deeper one. Of course, simply listening attentively to the lessons of the past helps place the purported advances of much current reflection on law in perspective. It does not suffice, however. The advance made by the pragmatist turn consists mainly of its reformulation of the lessons of the past (and the questions underlying them) in the light of a meta-theoretical, that is, epistemological, reflection. As the term indicates, the pragmatist project, by deploying the theoretical clarity of recent epistemological discussion in analytic philosophy, leads to the restoration[8] of an essential link between legal theory and a theory of judgement. Elucidating the concept of law comes down to understanding the practice by which a social group produces shared normative meaning. Such understanding necessarily presupposes a degree of understanding of the process by which meaning is produced in (social) reality. This is the issue at the heart of any theory of judgement: it aims to reflect on the conditions for possibility of the operation (i.e., the action, the practice) by which judgement produces meaning effects.[9] In reconstructing the conditions for the process of effecting (that is, the process of applying) a judgement, epistemological reflection provides a necessary and privileged means of revealing the conditions for the possibility of the practice by which a social group produces and recognises a normative authority, that is, a means of revealing the conditions for the possibility of governance by law. The pragmatist turn, advanced mainly by Coleman in philosophy of law, leads to the elaboration of the discussion surrounding these presuppositions and to its analysis in the light of critiques of mentalism (associated in particular with the work of Quine and Putnam) that embody the main trends in current epistemological thought.[10]

It is the explicit insistence on this epistemological requirement that accounts for the fruitfulness of the pragmatist turn proposed by Coleman. Certainly, as already indicated, for some time now many authors had been revisiting the traditional questions of reflection on law in the light of the instruments developed by the philosophy of language, Quine's and Wittgenstein's[11] holistic approaches included. The internalist approach Dworkin has attempted to develop on the basis of his hermeneutic perspective is one revealing example. But, as will be seen below with regard to Dworkin, the advance inherent in the pragmatist turn as proposed by Coleman is due to the effects associated with the explicit invocation of epistemological arguments. This explicit invocation not only makes it possible to reformulate the fundamental question of theory of law as the question of the conditions of emergence of a given social practice (be it interpretive or other) of adherence to a shared normative meaning. It also reveals the twofold inadequacies of current theories of law. First, the inadequacy of hermeneutic theories,[12] which, though they seek to expose the inconsistencies of positivist theories with regard to a holistic approach to meaning, are themselves incapable of making explicit the requirements of such an approach and respecting them. Second, the parallel inadequacy of current representations of legal positivism,[13] which, in spite of their accurate insight into the need for a conventionalist approach to law, remain incapable of adequately inferring all the conditions of emergence of such an approach.

This is where the central issue in our own reflection emerges. While highlighting the significant gains made by the process that the pragmatist turn has launched in theory of law, we nevertheless wish to extend it in the name of the epistemological requirement that this turn is working to enact. In relying on the especially highly developed version of the pragmatist turn that J. Coleman has provided us with today, we shall seek to apply to it the movement that H. Putnam, in the figurative terms he uses to explain his analysis of the limitations of cognitivist theories, has described as "the trick attributed to adepts in jiu-jitsu of turning an opponent's strength against himself".[14] In other words, we wish to show how Coleman's explicitly epistemological project contains within itself requirements that make it necessary to deepen and indeed modify his proposed pragmatist reformulation of current theses in legal positivism. These modifications relate to the way that the conditions for possibility of the conventional social practice by which a group produces and recognises normative authority must be understood. We will show how a non-mentalist approach to the operation of judgement entails extending the requirement of what Hart has called "the internal point of view" specific to this practice of recognition beyond the officials responsible for applying the rules (i.e., mainly the judges). Our hypothesis is that an exact

understanding of these requirements of the epistemological holism called for by the pragmatist turn entails revisiting a presupposition shared by the positivist and hermeneutical approaches, namely the conception of the operation of the production of normative authority mainly through the operation of judges' production of law. We will specify below the exact content of these modifications and its twofold consequences: first, an epistemological consequence that reveals the normative meaning of the concept of technical law; and second, a consequence related to the need for the theory of law to reconnect with political philosophy and open up to the current debate in the social sciences about the question of governance.[15] The latter consequence is also implicitly introduced by the pragmatist turn, although inadequately. This is the case not so much because Coleman and Zipursky have used as their point of departure for their reflection a confrontation with the 'law and economics' approach; nor is it because Shapiro and Coleman borrow explicitly from theories of action whose significance in current reflection in social science is well known. Rather it is the case because from the very heart of the pragmatist reformulation of Hart's rule of recognition there emerges the notion that an adequate understanding of the conditions for possibility of the form of cooperative activity by which law is produced results in an inclusion of the need for specific institutional mechanisms. The opening up of the concept of law to the neo-institutionalist reflection at the heart of current debate in the social sciences is however only sketched out. It does result in a revisiting of the usual postulate in current approaches in philosophy of law, consisting of "inoculating" analysis of the concept of law against other analyses pursued by theory of governance (or political philosophy). Our hypothesis, in contrast, is that an inoculation of this kind must be critiqued for epistemological reasons. In prompting us to better formulate the epistemological requirements of an analysis of the practice by which a social group produces normative authority, the pragmatist turn provides a definitive opening up onto the path of its own deepening and renewed understanding of the conditions for possibility of governance by law. In so doing, it succeeds, as we will show, in justifying the opening up of the analysis of the concept of law to current debate in the social sciences; i.e., to the normative question of the desirable reorganisation of our modes of production of norms.

We will proceed with our argument in two stages. Firstly, we will demonstrate how, in the synthetic version provided by J. Coleman, the pragmatist turn appears to pinpoint the inadequacy of both interpretivist critiques of positivism and the presuppositions of the theory of collective action that distort the usual way of formulating the rule of recognition as found in Hart (II). Secondly, we will demonstrate the way this pragmatist reformulation of the conventionalist definition of law demands that it be

deepened in the direction of a genetic approach to the practice by which a social group produces normative authority.[16] We will also demonstrate the consequences of this deepening as regards the necessary opening up of the theory of law to the question of the desirability of transforming our modes of production of norms (III).

II. FROM A HERMENEUTIC CRITIQUE TO A PRAGMATIST REDEFINITION OF THE RULE OF RECOGNITION

The main criticism of positivist theses since they rose to prominence within theory of law has usually been based on their inadequate understanding of the operation of the application of normative judgement. Positivist approaches were seen as reflecting an inadequacy associated with an epistemologically defective construal of the operations of judgement necessarily presupposed by any theory of norms. True, often enough these critiques were not formulated with explicit reference to this philosophical background. But we consider their having been presented this way to have two benefits. First, this approach pinpoints the true philosophical impact of the critical insight that has fuelled the regular recurrence of the critique of positivist approaches since the end of the nineteenth century. Second, it offers the benefit of framing the question in terms that make it possible to measure the limitations of the critique while opening up an approach to reformulating the valid insight this critique seeks to express.

That is our hypothesis. While this critique has often correctly perceived the inadequacy of positivist theories in relation to the operations of the application of normative judgement, it has remained riveted to a restrictive interpretation of those operations. This critique therefore missed its target and was open to a valid rebuttal by positivists. In contrast, a shift in emphasis in the way of construing the question of the application (or effectuation) of a judgement and a broader conception of the levels at which this question is posed within the theory of norms would allow for a clearer view of the direction in which the positive approach to law needs to be extended. This hypothesis strikes us as being all the more fruitful for being imbricated with the dynamics of the discussion internal to present-day legal positivism.

The most recent reformulations of the positivist analysis of the concept of law -more specifically, the pragmatist reformulation of Hart's rule of recognition- implicitly reflect growing recognition of the need for greater respect within theory of law for recent advances in the theory of action. While this pragmatist reformulation has itself remained tied to an incomplete construal of the conditions for possibility of action, the advance it has facilitated in current philosophy of law must not be

underestimated. Besides making it possible to deepen the internal dynamics of positivist research, it has initiated its own extension by shedding light on the usefulness of a deepening examination of the conditions for possibility of the social practice by which normativity is constituted. This is the project that defines our own hypothesis, as will be seen below (III). However, before analysing this "pragmatist" reformulation of Hart's rule of recognition and the extension it calls for, we must conduct a rapid review of those critiques of legal positivism that bear on its inadequate understanding of the operation for application internal to any normative judgement.

As indicated above, this critical current, which has lasted until the present time, conceives of the question of the operation of the application of a norm in somewhat restricted terms. That is, the critique often levelled at positivists is associated with the way the latter conceive of the operation of judgement. The operation of application internal to any normative judgement is conceived on the model of judicial operation.[17] This critique has taken two successive forms, the first of which we call the realist critique (A) and the second the hermeneutic critique (B). While most readers will be familiar with them, it will be useful to summarise them briefly. This will help in understanding the reasons for a "pragmatist" corrective to Hart's concept of law (C).

1. *The realist critique*

The realist critique essentially stemmed from work in the sociological and realist theory of law and sought to expose the lack of scientific precision in the positivist definition of law. As formulated by N. Bobbio, this definition is based on the following assessment of the facts: "it is true that law as presently in force consists of a set of rules for conduct which, whether directly or indirectly, are formulated and validated by the state".[18]The realist and sociological critics point out that this assessment is inaccurate as a question of fact, because it underestimates the 'creative' power of the judge in applying these rules. Critiques of this kind have been very legitimately rebutted. As L. Green reminds us, they are "the product of confusion; lawyers often use 'positivist' abusively, to condemn a formalistic doctrine according to which law is always clear and, however pointless or wrong, is to be rigorously applied by officials and obeyed by subjects. It is doubtful that anyone ever held this view; but it is in any case false, it has nothing to do with legal positivism, and it is expressly rejected by all leading positivists".[19] Besides this, however, these critiques are fallacious in logical terms. It is worth reviewing two relevant arguments at this point.

One counter-argument is succinctly stated by N. Bobbio. As he points out, and as we have just seen in citing L. Green, "the creation of law by the judge [...] is a reality [...] that ethical arguments come up against like arrows shot against a wall. Even the most faithful and orthodox partisans of legal positivism have been unable to do other than come to terms with this reality: the 'mechanistic' theory of interpretation has been abandoned by nearly everyone. Kelsen himself set the example".[20] However, N. Bobbio then observes that this fact does not in itself negate the positive theory of the sources of law according to which law is reduced to rules. We must choose one of two possibilities. Either, as many authors propose, we restrict the label 'sources of law' to the facts that the legal system recognises as productive of generally constraining norms. And, if so, even if through judges' decisions "the law in force in a given country is changed, is supplemented, is adapted to new situations, this does not authorise us to include decisions among the sources of law (where, of course, the institution of precedent does not exist)". The judge's decision in effect constrains only the parties involved. If it takes the form of a general maxim that tends towards becoming obligatory through the practice of the courts, "then the source of law in this instance is custom and not the judge". Or else, as advanced for instance by Kelsen, we extend the compass of sources of law to include individual norms. In that case, judicial decisions clearly do constitute a source of law. But "this elevation [of the judge's decision] is not dependent on a discovery of the creative power of the judge, because a sentence is an individual norm, both when it is the product of the judge's power and when it consists purely of an application of a general norm".[21]

H.L.A. Hart presented another counter-argument in The Concept of Law in 1961. It is well known that Hart shed light on the fact that the creative power of the judge results from the impossibility for any rule to lay out the cases for its own application. This argument definitively negates any theory of law that, under the pretext of extreme conceptualism or formalism, would deny or minimise this source of indeterminacy in order to restore a mechanistic concept of interpretation. However, Hart observes, we must also reject the position at the other extreme which, in the form of sceptical theory, would have it that "talk of rules is a myth, cloaking the truth that law consists simply of the decisions of courts and the prediction of them".[22] It is not just that a perspective of this kind must itself acknowledge at the very least the existence of organic secondary rules of the court and other legislative authorities. As well, and most important, this perspective does not take account of a second dimension that the theory of language has been effective in revealing, which rests on the distinction between "mention and usage".[23] The fact is that what is specific to the behaviour of those who

make use of the "norms" of law, whether as their ultimate addressees or as public authorities in charge of applying norms, relates to the fact that these norms "are used as rules not as descriptions of habits or predictions".[24] In reducing norms to predictions, we fail to take account of what emerges through our way of using them when we apply them. True, this does not negate the fact that judges often reason purely intuitively. But the sceptical perspective fails to differentiate between two distinct things: "the question whether a person, in acting in a certain way, thereby manifested his acceptance of a rule requiring him so to act" on one hand; and on the other hand, "psychological questions as to the processes of thought through which the person went before or in acting".[25]

2. *The hermeneutic critique*

A second kind of discussion succeeded the first critique based on the judge's creative power. As we have just seen, no theoretical argument opposed to an understanding of law in terms of 'rules' can be inferred from the so-called sociological and realist approaches to law or the new light they shed on the functioning of the operations of judgement. But, according to some present-day theorists, the insight that produced these approaches remains valid, providing it is reformulated and displaced.

The question is in fact not that of the creative power of the judge – which in any case no one seriously doubts. The fact that this power exists does not in itself invalidate recourse to the notion of the rule as a way of accounting for the concept of law. According to these theorists, the question is rather that a more powerful analysis of the way judges exercise this discretionary power entails an invalidation of the way that current positivist theory of law defines the concept of law.

The best-known representative of this recent critique is R. Dworkin, although the fullest developments of the justifications and philosophical extensions that it entails has not always been R. Dworkin himself.[26] His argument is very simple. As he emphasises, judicial practice shows that alongside rules in the strictest sense, judges often use 'principles' (which may or may not be expressed as written norms). Of course, use of these 'principles' constitutes on way of applying "rules" in the broad sense. But the importance of these principles (that is, the power to neutralise rules, in the strict sense, that their use makes possible) and their mode of operation lead, as R. Dworkin points out, to the putting into question of our usual understanding of what law consists of; i.e., the conditions for its identity or existence. Thus clearer understanding of the way judges exercise their power of interpretation (that is, how they identify the 'meaning' of law) reflects back on our understanding of the

question of the validity of law; i.e., the conditions for its definition.

As R. Dworkin argues, the dominant theory of law is tainted with 'the semantic sting': "people are its prey who hold a certain picture of what disagreement is like and when it is possible; they think we can argue sensibly with one another if, but only if, we all accept and follow the same criteria for deciding when our claims are sound, even if we cannot state exactly, as a philosopher might hope to do, what these criteria are".[27]However, as R. Dworkin points out, not all our disagreements can be reduced to this model. For example, there are certain words we use to confer what are often controversial interpretations on a social practice in which we participate. According to this hypothesis, our agreements and disagreements can be explained not by our obeying shared rules but by our shared or divergent interpretations of the same material. As Dworkin points out, the example of 'rules' of courtesy within a given society is particularly illuminating. The way members of a social group determine what is required by courtesy is a function of an 'interpretive attitude',[28] which subjects these requirements to ongoing reinterpretation in light of the values that they must serve. "Law is an interpretive concept as courtesy in my imagined example".[29] In effect, "legal philosophers are in the same situation as philosophers of justice and the philosopher of courtesy we imagined; they cannot produce useful semantic theories of law; they cannot expose the common criteria or ground rules lawyers follow for pinning legal labels onto facts, for there are no such rules; [theories of law] are constructive interpretations: they try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice; so no firm line divides jurisprudence from adjudication or any other aspect of legal practice".[30]

If law is thus an 'interpretive concept', it follows, as Dworkin argues, that not only the positivist approaches of Austin (reduction of law to an imperative) and Kelsen (the normativist perspective), but also their more recent and subtle reformulation advanced by H.L.A. Hart in his work on the rule of recognition, would prove to be unacceptable. For Hart, as is well known, law can be explained in terms of social facts. These are of a particular kind: law is effectively made possible by a kind of convention or social practice that consists of agreement by the officials in charge of applying the law as to the criterion for the identity or existence of law. This practice can itself be formulated in the terms of a rule that Hart calls the 'rule of recognition'. It is this conventionalist approach to the criterion for legality, as framed in terms of the rule of recognition, that R. Dworkin wishes to critique and prove invalid. Such a conventionalist approach, he argues, would lack two defining features of legal practice.

First, the practice by which the law of a social group is identified is of an interpretive nature. It follows, argues Dworkin, that not all the criteria for identification can be formally defined in terms of 'rules'.

Then, this interpretive practice reflects the necessary link between law and morality, and consequently invalidates the positivist conception of a science of law that would be descriptive rather than normative. Law, Dworkin says, can be identified, whether by judges or scholars, only by means of the interpretation of the requirements of the political morality of the social group. "Hard cases arise for any judge, when his threshold test does not discriminate between two or more interpretations of some statute or line of cases; then he must choose between eligible interpretations by asking which shows the community's structure of institutions and decisions -its public standards as a whole- in a better light from the standpoint of political morality".[31] According to Dworkin, then, the interpretive practice regarding what law consists of itself refers us back to the normative requirements of an institutional morality that is simultaneously immanent in the community[32] and the subject of ongoing reinterpretation.

Thus, as L. Green quite accurately points out, Dworkin rejects positivist theses: "he denies that there can be any general theory of the existence and content of law; he denies that local theories of particular legal systems can identify law without recourse to its merits; [...] a theory of law is for Dworkin a theory of how cases ought to be decided and it begins, not with an account of political organisation, but with an abstract ideal regulating the conditions under which governments may use coercive force over their subjects".[33]

This hermeneutic critique of conventionalist approaches to law in terms of the 'rule of recognition' is itself nowadays the subject of definitive critiques which have made possible a productive deepening of legal positivism.

3. *Law and social recognition: A pragmatist reformulation of the rule of recognition*

From among the many objections levelled at this hermeneutic critique of legal positivism and more precisely at the version developed by Dworkin, we will address here only the one formulated by J. Coleman, which to us appears definitive. Clearly, Coleman has no intention of challenging the descriptive contribution made by hermeneutic approaches to the operation of judging. On the contrary, it could be said that Coleman achieves the same shift with respect to the hermeneutic approaches to the

function of judging as these approaches themselves had effected with respect to the sociological and realist critiques of legal positivism. Recall that these critiques had erroneously purported to expose the reduction of law to a set of rules by pointing to the 'creative power of the judge'. It soon became apparent that a critique of this nature, whatever the evidence on which it relied, resulted in an impasse. Nevertheless, the hermeneutic approach had shifted and reformulated the perception of an inadequacy in formalist approaches, namely the reduction of the concept of law to the idea of the 'rule'. Clearly, Dworkin does not deny that the law consists of norms (rules and principles) which impose reasons for action. Rather, he proposes that a better understanding of the operation of judgement entails abandoning a positivist thesis that defines the criteria for the 'validity' (i.e., for the existence) of norms in the terms of a 'rule of recognition'. Thus, his critique bears on the definition of the concept of law in terms of 'rules'.

Coleman's undertaking is to expose the inconsistency of Dworkin's critique (a). At the same time, however, he reformulates the notion of the "rule of recognition" in such a way as to definitively deny this critique any relevance (b). Let us take a closer look at each of these features of his argument.

(a) The objection levelled at Dworkin is as follows. Not only does Dworkin wrongly believes that defining law in terms of a rule of recognition presupposes a 'semantic' approach to the criteria for validity of norms, he also falls victim, in his approach to the operations of application in law, to an excessively formalist approach to law.

As was just recalled, according to Dworkin, the interpretive dimension of the law invalidates the positivist project of reducing the conditions for the validity (or for the identification) of law to a rule of recognition, that is, to the way that judges determine the necessary and sufficient conditions for a norm's membership in a given judicial system. According to him, a reduction of this kind effectively presupposes a semantic conception of law, that is, the idea that the criteria for membership (the condition for the identification of law) can be framed in a propositional form that corresponds to the content of the convergent behaviours of the officials in charge of applying of law. An approach of this kind is tainted with the semantic sting because it assumes that formal criteria exist for applying the term 'law'; i.e., for identifying norms likely to be considered legal. Consequently, argues R. Dworkin, such an approach is incompatible with the idea of law as consisting of moral principles that are by their very nature subject to controversial interpretations.

J. Coleman rightly points out that Dworkin's error is to overlook the fact

that the 'rule of recognition' need not necessarily be interpreted in semantic terms. It is in fact open to being conceived of in a pragmatist manner. In other words, Dworkin is right to reject any semantic interpretations of the concept of law (i.e., the idea that the meaning of the term 'law' could be formally defined in a propositional statement).[34] Indeed, as Coleman points out, this rejection was already well framed by Wittgenstein in his discussion of rule-following.[35] But R. Dworkin gives the rule of recognition a restrictive interpretation. He supposes that for Hart, the rule of recognition consists of judges' convergent practice that, in and of itself, defines a given group's criteria for legality. Moreover, according to such an interpretation, the rule of recognition must be understood as a 'source thesis': that is, on this view the rule of recognition defines the 'social and conventional sources' that make it possible to identify the content of law. A thesis of this kind does not need to be linked to a conventionalist positivist approach. True, numerous positivists, including J. Raz, maintain this 'semantic' interpretation of the rule of recognition and of the definition of the criteria for legality. But it is possible to defend the idea that law is in finedefined by judges' social practices (the conventionalist and positivist approach) without subscribing to this semantic interpretation framed in the terms of a 'source thesis'. A social system can consider that its positive law depends not just on identifiable formal sources but also on its content's compliance with moral requirements. If legality is thus defined not just in terms of its formal and conventional source, but also in terms of its content, it is clear that its identification is a function of interpretations that are subject to controversy. Indeed, this is the view that Hart worked to defend and that Coleman has in turn adopted.[36]

But if the criteria for the identity of legality can no longer be reduced to propositional content that defines the formal criteria (the formal and conventional sources) for identifying the content of a specific judicial order, what does the rule of recognition mean? In such a case, the rule of recognition can only be defined in a 'pragmatist' manner; i.e., by referring to the use that is made of it. On this view, the rule would be identified with a 'practice' of a more complex kind than one whose meaning could be reduced to propositional content. H.L.A. Hart and still more J. Coleman distinguish this practice by virtue of two features. First, this practice is associated not with all the addressees of all the judicial norms in a social group but rather only the officials in charge of its application.[37] Next, this practice must be of such a kind that it respects two conditions: it reflects the 'recognition of the obligatory nature' of these criteria for legality with respect to the officials in charge of applying law; and it incorporates the potentially conflictual aspect of interpretations of the contents of the normative requirements.

(b) It is with respect to this last point that Coleman deems Hart's hypotheses must be reformulated. This is where he deepens the analysis of the concept of law, using the gains made by the pragmatic theory of collective action. The interpretive dimension of the concept of law necessitates avoiding any excessively 'mechanical' understanding of the way convergent practice by judges, in relation to what is considered law within a given society, is constructed. If, within a pragmatist perspective, it is accepted that the meaning of the normative requirements (i.e., the conditions of existence of law) emerge from the use made of them within practices that attest to their recognition by those in charge of applying them, it remains to identify the nature of this practice, that is, to define its conditions for possibility.

Hart has already successfully revealed the nature of this social practice by pointing out that it is not to be understood as a simple 'factual regularity': it is defined by an "internal point of view" which expresses the fact that the performers of this "convergent" practice recognise that they "have an obligation" to comply with these conditions of legality.

But this internal point of view, observes Coleman, is not sufficient on its own to account for the existence of the obligation: "while the internal point of view explains how the rule of recognition can create reasons for acting, this does not yet explain how those reasons can be duties".[38] An understanding of the conditions for possibility of legal regulation thus necessitates as well "explaining how a rule can impose a duty; the solution to this problem requires that we return our attention from the psychological capacity to adopt a practice or a pattern of behaviour as a norm, and focus instead on the normative structure of the pattern of behaviour to which we commit; in other words [...] we must look beyond the internal point of view that officials adopt toward their practice, and consider instead the structure of the practice that rule governs".[39]

Undoubtedly, Hart's insight into this requirement is valid. However, he has failed to carry his analysis of its precise nature to a sufficient depth. What is the reason for this inadequacy? Hart, observes Coleman, assumes that this convergent practice (the rule of recognition) results from a spontaneous effort at coordination among judges, as though potential conflicting interpretations in law inevitably and automatically eventuate in the choice of a common conventional solution representing a Nash equilibrium (that is, in the choice of the best possible solution or, if we believe, as Nash does, that there are several possible best solutions, one of the best possible solutions).[40] A conception of the rule of recognition as a 'coordination convention' derives from an analysis of the concept of

law based on the conventionalist model of David Lewis.[41] As S. Shapiro has justly noted,[42] "Lewis's model of conventions[43] provides the positivist with a powerful argument in favour of the claim that in every legal system, legal officials follow conventions when determining which authority structure to heed".[44] As Coleman and Shapiro point out, problems of coordination among (legal) authorities relating to the determination of the criteria for legality are more complex. It would be non-reasonable to reduce them solely to the category of game that game theory labels 'coordination games',[45] which are solved by adopting 'coordination conventions' of the kind analysed by Lewis. A telling sign, Coleman points out, of this irreducibility of the rule of recognition to the convention model analysed by Lewis is that "such conventions do not seem to capture well the kinds of reasons officials have for acting as other officials". While it is true that the fact that judges apply certain criteria of legality can be a reason for any particular judge to do so, it is not simply the fact that others do so that explains the character of the reason that any particular judge has. A full explanation of the character of the reason any judge has to apply the relevant criteria will accommodate the fact that these criteria have been adopted as part of a plan or project (a legal system) that can serve valuable ends".[46] This means that the conventional practice by means of which the rule of recognition is constructed is of a more complex kind than the one Hart had in mind. Accordingly, in illuminating the distinctly hermeneutic dimension of this practice, Dworkin, while mistakenly denouncing the conventionalism of Hart's positivism, is accurate in his perception of its inadequacy. This hermeneutic dimension entails not, obviously, the abandonment of the conventionalist thesis, but the deepening of the true nature of the operation of construction of this convention. The conditions for possibility of the emergence of this convergent practice cannot be reduced to rational choice of an arbitrary convention, allowing for a quasi-mechanical resolution of the usual problems of coordination, like those that can be resolved by adopting a rule of the road requiring drivers to keep to the right rather than to the left.

What, then, are these conditions for possibility? How are we to understand the structure of this collective action? Coleman says that it is both necessary and useful to take a detour via discussions in social theory and the philosophy of action. He believes it is appropriate to invoke here the model developed by M. Bratman in philosophy of action and called 'shared cooperative activity' (SCA). Naturally, this model of action is not unique to law. But this form of shared cooperative activity "might help us understand the nature of the practice of legal officials".[47]

The practice of recognition by means of which judges define the criteria

for legal normativity within a social group cannot be thought as a form of shared cooperative activity, or SCA. Shared cooperative activity implies a 'shared intention'. But, as Bratman rightly points out, such an intention is not an intention found in minds: it is an attitude[48] reflected in a certain mode of organising cooperative practice. This is where the conditions for possibility of this specific type of action are revealed. M. Bratman points out that for the cooperative dimension that this shared intention calls for, various institutional mechanisms must be put in place. The organisation of such cooperative activity requires the implementation of an organisational framework in order to "coordinate our intentional actions", "coordinate our planning", and "structure relevant bargaining". These organisational conditions are designed to make possible the threefold 'commitment' that this 'shared intention' reflects: mutual responsiveness,[49] commitment to the joint activity,[50] and commitment to mutual support.[51] J. Coleman concludes: "the practice of officials of being committed to a set of criteria of legality exhibits these features; judges coordinate their behaviour with one another through, for example, practices of precedent, which are ways in which they are responsive to the intentions of one another".[52]

III. From a positivist to a genetic approach to the conventionality of law: A necessary deepening of the pragmatist theory of law

In the second part of this paper, we wish to show how the arguments presented by J. Coleman as a justification for reformulating the positivist approach to the concept of law impose a shift that is more significant that he himself realises and open up new perspectives in philosophy of law.

First, note that by reformulating Hart's thesis, J. Coleman incorporates in the positivist approach a certain normativity. For the function of law as a guide to be realised, the institutional conditions needed for the success of the cooperative action among the officials responsible for applying the rule of recognition must be respected. The reason is that all forms of cooperative activity entail an intentional element and satisfaction of this intentionality cannot be assumed to be guaranteed by 'rules stored in the minds' of participants in this collective action. True, this normativity does not resemble the 'eternal moral normativity' to which theorists of natural law customarily refer. The present argument is much deeper philosophically: it relates to normativity at the level of the conditions for possibility[53] internal to the social activity by means of which law is produced.

At the same time, however, J. Coleman appears to be proposing that these

conditions have been fulfilled since the birth of the modern state. The "normative" conditions for the existence of law would, on this view, thus have always been satisfied. At the moment when J. Coleman appears to recognise that the classical positive approach regarding the conventional nature of law should yield to what we call a 'genetic' approach to the 'conventionality thesis',[54] he also wipes out its effects. In our view, the reason is his inadequate understanding of the conditions for possibility of the concept of law and his reduction of these exclusively to the level of the classical conditions for organisation of the judicial apparatus in the modern state. This inadequacy is clearly the result of a theoretical inadequacy. In our view, J. Coleman's reasoning labours under a twofold limitation which results in two consequences whose recognition makes it possible to gauge the scope of the shift that must be effected in relation to the current debate on the concept of law. The present section of this paper will develop the two points in question. First, however, an outline of their key features must be presented.

The twofold limitation that effects the pragmatist reformulation of the positivist thesis is revealed as a function of the theoretical instrument that J. Coleman himself deploys to underpin his own reformulation of the positivist thesis, namely the critique of mentalism in the theory of action.

First, as will be shown below, an in-depth understanding of this critique of mentalism would entail a radical extension of J. Coleman's understanding - and Bratman's, for that matter- of the conditions necessary to satisfying the intentionality inherent in any cooperative activity. This first limitation, though essential for gauging the nature of the improvements that it would be appropriate to make to our system of governance,[55] is nevertheless not essential to an understanding of the main reason for the inadequacy that compromises current approaches to the concept of law, whether positivist or hermeneutic (for instance, Dworkin's). Suffice it to point out this first limitation here without going into it further.

Identification of the second limitation, on the other hand, plays a major role in revealing the inadequacy that affects both classical approaches to legal positivism and pragmatist reformulations of it (i.e., hermeneutic 'alternatives'). We will show how the argument J. Coleman opposes to Hart's can be turned against J. Coleman himself. A deeper analysis of the 'fact' of citizens' recognition of the authority of the officials in charge of applying the law reveals that this 'fact' is the product of numerous operations of judgement. Moreover, as will be shown below, a close examination of these operations of judgement reveals two essential facts. First, they reflect a search for "a maximisation of normative expectations" (intentionality) by the leaders of social groups. Next, this intentional

purpose depends for its fulfilment on the conditions specific to the success of any cooperative activity. In other words, in contrast to what is understood under traditional approaches to the concept of law (whether positivist or hermeneutic), the conditions for production of the rule of recognition cannot be reflected upon exclusively by judicial authorities. The existence of law is also a function of the conditions set up to ensure recognition of the norm by the citizens for whom the norm is intended. In other words, the possibility of law (that is, the possibility for a social group to be regulated by law) is also a function of the way that citizens 'recognise' their relationship with the 'officials', that is, of the way citizens organise their form of the 'representation of authority' in order to satisfy their normative expectations.

This twofold limitation, and more prominently the misunderstanding of the need to extend the internal point of view -to use Hart's terminology- of the rule of recognition to the citizen level, has important consequences. We here present two of these.

First, the recognition of this limitation makes it possible (and this is the first consequence we will examine below) to grasp the extent to which positivist theory, even in its pragmatist version, has been infected by what Dworkin calls the 'semantic sting'. But this semantic sting has a greater significance than Dworkin assigns to it. The fact is that, in avoiding recognising its true philosophical implications, Dworkin not only appears unable to respond to the searing critiques of positivists, but also himself yields to this semantic error. Of course, Dworkin -and, beyond him, the whole 'hermeneutic or interpretivist' trend in philosophy of law- is clearly aware of the need to conceive the concept of law as being 'shot through' with an internal normativity that leads it always to 'exceed' the formal representations of it. Thus the concept of law invokes 'normative expectations' that no formal calculus can foresee: law is thus impossible to 'effect' unless it so organises itself as to respect the necessary 'ongoing transformation' in the offing of a continuously renewed exigency. At the same time, however, at a deeper level, Dworkin assumes the "capability" of the "formal system of social representation" to satisfy this exigency, that is to ensure, "to the extent possible" the fulfilment of the normative expectations and guarantee that they will be continuously adjusted. This is the role he assigns to legal officials, who are thus invested with a presumed capability to address the exigencies internal to the normativity of the concept of law. As regards the organisation of the 'capability' of the social group to "maximise to the extent possible" the group's normative expectations, the system of formal representation of the modern state is thus assumed, as it is by positivists, to ensure entirely on its own the success of the operation of the social production of law. The pragmatist

reformulation of the rule of recognition emerges, by other paths, in the assumption that our formal systems of institutional representation have the same capability of ensuring the fulfilment of the concept of law. Put in more theoretical terms, the pragmatist redefinition of the rule of recognition proves incapable, as in Hart, of construing thepragmatic limitation of the operation of the application of law, and in consequence, of the necessary extension of the operation of recognition that governs the possibility for such an operation. Now that one can call a semantic sting: the assumption of the possible formalisation of the conditions for fulfilment of the concept of law.

It is easy to infer the second consequence from the first. Yielding to this semantic error and not taking into account this pragmatic limitation of the operation of effectuation that is internal to any normative operation, legal thinking, whether positivist or hermeneutic, arrives at an effect of blockage and idealisation. On one hand, it does not allow for the incorporation into its agenda of the needed reflection on the institutional means that must be set up to ensure cooperative activity that allows for the best possible fulfilment of the normative expectations of those for whom a norm is intended when hard cases emerge. On the other hand, by reducing these conditions solely to the installation of the legal authorities specific to the modern state and consequently by assuming that they are always already in existence, the theory of law obliterates the normative conditions that must be respected to ensure law's guiding function, which defines the concept of law. The second consequence is all the more astonishing to note, in that it results in the theory of law remaining hermetically sealed vis-à-vis two phenomena that ought to be able to engage with it: first, the recent turn in the social sciences, which have become aware of the need to put the question of governance back on the table (whereas traditionally it was addressed only by political science); second, the recurring efforts, mainly emerging in American law, to transform the traditional modes of organisation of the function of judging. Of course, these efforts continue to focus on the figure of the judges. But, despite their theoretical and practical inadequacies, they highlight, through trial and error in the sphere of public law litigation, the need for the production and application of law to be open to modes of negotiated participation which include the private addressees of the norm.

1. *Pragmatist positivism's advances and limitations, or the requirements of the pragmatic turn in philosophy of law*

a. Advances made by pragmatist positivism

The pragmatist redefinition of the rule of recognition proposed by Coleman offers a twofold advantage over Dworkin's hermeneutic position.

Its first advantage is that it clearly reveals the error of the critique, addressed to conventionalist approaches according to which overlook the 'interpretive' nature of the concept of law. As Coleman quite rightly observes, an incorporationist conventionalist approach does not overlook this interpretive dimension. By assuming that every conventionalist approach to law necessarily entails a semantic theory of language, Dworkin fails to perceive the possible pragmatist understanding of the conventionalist approach. The result, as we have seen, is that his critique of positivist conventionalism misses the mark.

There is more, however. Dworkin's inability to formulate correctly the nature of the 'semantic sting' in epistemological terms and therefore the conditions that a non-semantic approach to the operations of judgement would have to respect, also become clear. This explains not just, as H. Putnam correctly inferred and as will be demonstrated below, why Dworkin himself falls back into the error that he imputes to positivist approaches to law, which he thought he could avoid through his hermeneutic approach. It also accounts for why he fails to substantiate his accurate insight into the inadequacy of legal positivism.

This is where we see the second advantage the pragmatist redefinition of the rule of recognition offers over Dworkin's approach. While remaining linked to a positivist approach to the conventionality thesis, the pragmatist redefinition put forward by Coleman itself embarks on the process of its own epistemological radicalisation. What then is the contribution made by this redefinition? By reinterpreting the rule of recognition on the basis of M. Bratman's model of 'shared cooperative activity', Shapiro and Coleman make the existence of law subject to that of institutional mechanisms that enable the implementation of cooperative practice among those in charge of applying law. Not only is law determined exclusively by recognition of it on the part of those responsible for applying it, but, as well, any possible conflicts in meaning entailed by the plural nature of possible interpretations on the part of the officials in charge of applying law cannot be resolved by means of a simple calculus of rational forethought, as in 'coordination' games. Establishment of a balanced solution requires a more complex form of collective action: it requires a cooperative activity, in order to define, in common, objectives deemed acceptable. Moreover, this cooperative construction necessitates institutional mechanisms in order to ensure the effectiveness of this 'shared intentionality' for constructing a common vision. As Bratman says, 'shared intention' cannot be understood in a mentalist fashion: it does not consist of an 'attitude in the minds'. It requires institutional mechanisms designed to ensure its effective fulfilment. Note that this need for

institutional mechanisms suitable for enabling the cooperative nature of collective practice in itself reveals the link between the theory of norms and the theory of governance.

b. The limitations and reformulation of pragmatist positivism

Right from the outset, there were indications to justify our asking whether this redefinition of the rule of recognition advanced by Shapiro and Coleman is possibly itself also inadequate and overlooks the epistemological requirement that it implicitly entails. After all, is it not significant that Coleman himself states his theoretical project does not entail particular attention to the institutional conditions for possibility of any cooperative activity?[56] In fact, attention to these conditions, and above all to their epistemological justifications, would have enabled Coleman to perceive the inadequacy of his own construal of the link between law and the practice of recognition. We thus arrive at the question of whether the reproach of epistemological inconsistency that Coleman levels at Dworkin[57] could also be levelled at him. Does not the pragmatist reformulation of the rule of recognition advanced by Coleman itself rest on the formalist and mentalist presuppositions that his pragmatist project claims to expose? We believe that this reformulation does indeed need to be extended, in two directions.

To start with, if the rule of recognition consists of a cooperative practice, the institutional conditions required for this cooperation's realisation cannot be reduced to those defined by Bratman and repeated by Coleman. In other words, the understanding (as M. Bratman, S. Shapiro, and J. Coleman present it) of the conditions for possibility of shared cooperative activity needs, in our view, to be deepened and reformulated. Next, this "shared cooperative activity" that the existence of law depends on does not only concern the officials in charge of applying law (i.e., in essence, judges); it also concerns citizens who are concerned by norms. The reason for the need for this twofold extension is epistemological: it results from the accurate understanding of the operations of normative judgement, that is, of the way that practical reason operates. Further, the elucidation of this necessity will enable us to understand that at the epistemological level Dworkin's hermeneutic approach and Coleman's pragmatist approach partake of a shared mentalism and thus present the same difficulty.

Coleman's proposed reformulation of Hart's way of formulating the rule of recognition thus appears to us to demand a twofold extension. First, if the rule of recognition consists of cooperative practice, the necessary institutional conditions for realisation of this Cupertino cannot be reduced to those defined by Bratman and repeated by Coleman (a). Next, this

"shared cooperative activity" on which law depends for its meaning does not only concern the officials in charge of applying law (i.e., essentially judges); it also concerns the citizens who are concerned by the norms (b).

A deepening of the approach to the conditions for cooperative activity

Why would the approach to cooperative activity advanced by Coleman reflect an inadequate grasp of the conditions for possibility of such activity? What is at issue here is not the point of departure for this approach. On the contrary, we can only agree fully with the proposal that Coleman (along with Shapiro), following Bratman, presents as the foundation for his analysis of cooperative activity. Let us once again quote Bratman's formulation: "shared intention [...] is not an attitude in any mind; it is not an attitude in the mind of some fused agents, for there is no such mind; and it is not an attitude in the mind or minds of either or both participants; rather, it is a state of affairs that consists primarily in attitudes (none of which are themselves shared intentions) of the participants and interrelations between those attitudes".[58] However, if we grasp the full implications of this position, we are led to see consequences that entail not just an extension of the institutional conditions necessary for the accomplishment of such action, but also and above all a modification of the customary conventionalist approach that positivists take to the concept of law.

If we grant that shared intention is not 'in the minds' of the players but rather must be embodied in institutional mechanisms that enable its possibility, we can reformulate this position as follows: the resources provided by the capabilities internal to the players' reason are not sufficient to ensure the realisation of the intentionality aimed at by cooperative activity. This comes down to saying that in its realisation, this intentionality is a function of an internal limitation, since it cannot find it within itself, i.e., within the internal capabilities alone of representation of the intentional agent, the sufficient conditions for its effectuation. In other words: In social reality, any effectuation of such an intentional aim is a function of X external to itself.

This reformulation, however, reveals a deeper consequence of the proposal that shared intention does not exist in minds. It is not sufficient to stop with this latest reformulation in terms of conditions for possibility of effectuation of any shared intentional aim that are external to reason. If we make an effort to fully grasp what is entailed by this reformulation, we see immediately that the idea of externality necessarily entails another proposition: No form, no representation of this intentional aim, "exhausts"

all possible representations, all possible forms of this shared intention. Every form (or representation) given to a cooperative activity is merely one possible form among others and none "satisfies" the requirements for the optimal realisation of the normative requirement of cooperation. Or, to put it in other words: the form that is spontaneously given to cooperative activity, even when it respects the requirements of responsiveness to participants' "interests, intentions, preferences and actions"[59] and the "commitment to the joint activity and to mutual support" identified by Bratman, still remains a function of the background representation that the various parties have of their own preferences. To assume that the representations immediately deployed by the parties reflect an "optimal" representation of the preferences of participants in the shared activity would come down to assuming once again that the conditions for realisation of intentionality are internal to that intentionality and, in so doing, to overlooking the principle of externality mentioned above. This principle of externality entails that the resources internal to the intentionality cannot suffice on their own to ensure the intentionality's effectuation in social reality.

Thus, any representation of these preferences and in consequence any form that cooperative activity might take constitutes no more than one form among others of the realisation of the requirements entailed by the shared purpose of a common goal.

But what is to say that such an observation should imply significant consequences? After all, it could be retorted that it matters little whether such a representation is specific, since to want to define the conditions for a supposed ideal representation of the parties' preferences and thus of an optimal form of cooperative activity is an illusory goal.

True, it will never be possible to define such an optimal representation, since to do so assumes, as mentioned above, the possibility of a form of intentionality that would contain its capability for self-realisation within itself; that is, it supposes the possibility of the absence of judgement's self-limitation. But the true implication lies elsewhere. In truth, does the only alternative to such an impossibility consist of supposing that the 'naturally' limited capabilities (that is, natural in the sense that participants have them immediately at their disposal for defining their preferences and interests) are to be assumed to be the only capabilities available? It is an assumption of this kind that underlies the position adopted by Coleman (as well as Shapiro and Bratman) in assuming as given the specific representation that the parties have of their interests and preferences. But how could the fact be overlooked that to assume such a representation is a given entails neglecting the epistemological principle by which we are

forbidden to assume the intentionality would have within itself the capabilities for its effectuation within social reality?

Even if we accept the possible absence of an ideal representation of preferences and accordingly of an optimal form of cooperative activity, there is a third position, which is the only one that respects this epistemological principle. This position consists of taking into account the fact that the representation of their intentions, interests, and preferences that the agents formulate immediately (i.e., in the absence of mechanisms specially arranged to help them reconstruct their interpretive frameworks) is only one specific selection among other possible ones and that "attention" to this operation of choice could eventually allow for the construction of other possible selections. This would result in an extension of the possibilities and thus in an 'optimisation' of the representations deployed by participants in the cooperative activity, and consequently in 'optimisation' (which does not mean attainment of the optimum) of the forms of the cooperative activity. This extension of possibilities would be associated with the implementation not just of those mechanisms already clearly pointed out by Bratman, but also of specific mechanisms intended to prompt the players to revisit their initial perceptions of their preferences and to consider these preferences' possible redefinition through the broadening of the interpretive frameworks immediately deployed. There would thus occur the identification of their 'specific' representation of the requirements of the common intentional purpose; but this one would have as an 'advantage' an advance in 'extension' over the specific forms that did not take account the self-limitation affecting the representation of the intentionality.

It could thus be said that, besides the conditions of responsiveness and mutual support identified by Bratman, incentives aiming to ensure the parties' reflexive learning would be necessary in order to allow them to carry out a reflexive revisiting of the background representations that immediately orient their judgements.

The proposition according to which a shared intention does not exist "in the minds" of the parties to a cooperative activity thus has an epistemological implication which entails supplementing the way Bratman, Shapiro, and Coleman conceive of the nature of the conditions for possibility for ensuring such an action's realisation. After all, it is revealing that the various examples Bratman uses to construct his philosophical understanding of the nature of a cooperative activity are all examples in which the meaning of the shared intention is always already given and takes a comparatively simple form (singing together, painting a house together, and so on). True, Bratman's analyses show clearly that the

application of this meaning necessitates mechanisms for building in common. But in allowing himself a formulation of shared intentionality that is assumed to be given, Bratman is faced with the difficulty in identifying the radical epistemological meaning of his fundamental principle, as well as in identifying its implications for a theory of intentionality.

The deepening of the analysis of the normative requirements internal to shared intention is not without consequences for an analysis of the concept of law. We will return to this. Nevertheless, at this point we can raise several questions about the use Coleman makes of the concept of shared cooperative activity, or SCA, in his theory of the rule of recognition. Coleman appears to assume that the forms of judicial organisation developed by all modern states would satisfy the requirements for the realisation of an SCA. Granted, Coleman would acknowledge that these forms may have varied in time and space. Nevertheless, they are all assumed to reflect, at a level beyond their diversity, the way of taking into account the conditions for possibility specific to an SCA. Where would this spontaneous capability of collective systems for satisfying the requirement of cooperative organisation on the part of the officials in charge of interpreting the criteria for the validity of law originate? If we take into account the dimension of reflexive learning that was mentioned above, it is undoubtedly necessary to be more circumspect about this assumed capability on the part of our systems of judicial organisation to satisfy the conditions for an SCA. Note that this caution is strongly in accord with the current social theory that Coleman appears (quite rightly) to invoke in support of his own reformulation of the theory of the rule of recognition put forward by Hart. Whatever the limitations of current social theory,[60] it is symptomatic that the whole of its evolution reflects a shared concern increasingly to extend the nature of the incentives and mechanisms that must be put in place in order to realise cooperative equilibrium. Moreover, numerous authors, including Argyris and Schön, explicitly subordinate these equilibria to forms of reflexive learning, even though their theory of reflexivity fails adequately to construe the epistemological framework that it requires. As well (although this observation is less theoretical than sociological), similar prudence regarding the question of whether all forms of judicial organisation "exhaust" all the conditions for possibility for "optimised" (but not optimal) satisfaction of the requirements for realising cooperation in how to interpret the rule of recognition, would perhaps allow theory to better take into account the dynamic that characterises these forms of judicial organisation. In this perspective, various trajectories are revealing of the need sometimes felt by judicial players themselves for a desirable adjustment in their modes of organisation. To take just one example, the

significant changes linked to the introduction, in American law, of the civil rights injunction following the Brown v. Board of Education judgment[61] could be said to have reflected the need to reorganise certain kinds of trial in order to ensure a better construal of the judge's "perceptions" in litigation related to certain public policies.

But the extension of the SCA approach called for by a more epistemologically based understanding of the conditions for possibility of shared intention entails more significant theoretical shifts than this revisiting -decidedly secondary from a philosophical point of view- of the sufficiently or insufficiently cooperative nature of our forms of legal organisation. In order to present this, we must first show that a second extension of Coleman's proposed approach to the rule of recognition must be carried out.

> *A reinterpretation of the relationship between the rule of recognition and citizens' practice in terms of cooperative activity*

Why is consideration solely of cooperative activity by the officials in charge of applying law too reductive to ensure a full understanding of the conditions necessary for the realisation of the form of collective action by which a group regulates itself legally? That is, what is the reason why limiting oneself to that consideration alone results in overlooking a conceptual requirement specific to the guiding function of law?

Once again, the reason for the lack of validity of this reduction is epistemological. Moreover, it is analogous to the justification for the first extension of Coleman's approach. As we shall show, a reduction of this kind also rests on an assumed given capability, by the social group, to act in common, but without reflecting upon the conditions for possibility of such a capability. To show how this presupposition operates in Hart's and Coleman's approaches, we will recapitulate their reasoning step by step.

As we have seen, Hart, and Coleman after him, postulate that the existence of a legal system within a social group does not require that the "internal point of view" needed by officials in charge of applying law be manifested among the citizens. All that is necessary is that citizens' behaviour reflects a simple, accustomed, and generalised practise of obedience to law.[62] As Coleman points out, "the majority of persons need not as a conceptual matter adopt the internal point of view toward the behaviour by which officials validate law, nor towards the subordinate rules that are validated under the legal system".[63] In other words, regardless of whether the majority of the population "feels obliged" or is considers itself to 'have the obligation' to respect the rules of

law.[64] Requiring citizens to adopt an internal point of view would, according to Hart, come down to requiring "that both [the bulk of the population] and the officials of the system 'accepted', in the same explicit, conscious way, a rule of recognition".[65] A requirement of this sort, notes Hart, is unrealistic because in all complex modern states, "the reality of the situation is that a great proportion of ordinary citizens -perhaps a majority- have no general conception of the legal structure or of its criteria of validity; [...] he may obey [the law] for a variety of different reasons and among them may often, though not always, be the knowledge that it will be the best for him to do so; he will be aware of the general likely consequences of disobedience: that there are officials who may arrest him and others who will try him and send him to prison for breaking the law". [66] Once again, Hart expresses himself highly explicitly. In a scenario where "only officials might accept and use the system's criteria of legal validity", society "might be deplorably sheep-like; the sheep might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system".[67]

Of course, it is neither a question of denying that such a system is a legal system, nor of criticising the elementary observation that the majority of citizens have no comprehensive knowledge of the structure of law or its criteria of validity. Similarly, Coleman is right to say that the generalised practice of obedience to law must not be the result of a conscious process of judgement regarding the legitimacy of such criteria. In this sense, Hart and Coleman (as well as most first-rank positivists, including Kelsen) are right to emphasise that the existence of a legal system is not dependent on the nature of the individual motivations that justify its generalised and customary application by citizens. But once again, as with the cooperative activity approach, does an alternative of this kind allow for an adequate construal of the problem and for an identification of the conditions that make such a generalised practice of obedience possible? Let us look again at the scenario Hart advances as being especially probative of his own reasoning, namely that of a social group in which member citizens identified with a flock of sheep and even went so far as to allow themselves to be led to the slaughterhouse from pure obedience to a sanctioned order. What must be assumed for such a social group and such a generalised practice of obedience to exist?

Undoubtedly, if we lived on a planet where members of the group were 'lobotomised', we would be able to understand identical behaviour consisting of obedience to the orders of authority as simple behavioural responses to an external stimulus. However, absent such a hypothesis of lobotomised individuals, we must deploy other propositions to account for a generalised practice of this kind. In effect, we must assume that

members of the group conduct at least three operations of judgement preliminary to their own individual decision to obey and behave 'like sheep'. First, a group member must anticipate the behaviour of other group members and have sufficient reason to believe that the latter will also behave like sheep, that is, in such a manner that this individual is justified, in "cost-benefit" terms, in submitting to the police or the dictatorship's officials and adopting purely passive behaviour, even at the risk of being led to the slaughterhouse. Further, the individual must anticipate the anticipations of others, that is, assume that other group members will go through a process of anticipation identical to the individual's own regarding the 'passive behaviour' of the other members of the group.[68] Last, the individual group member must carry out a third form of anticipation: the assumption that the authorities the individual has decided to submit to will in the future themselves decide to continue behaving in conformity with their present role. Absent these anticipations, there could be no 'generalised' or 'customary' practice of obedience. The implementation of such a practice necessarily implies a dimension of duration and a collective dimension that could not take shape if these three anticipations were not already minimally present. However, if this is the case, we must unavoidably conclude that even in the most extreme form of group members' 'sheep-like' behaviour, any generalised and customary practice of obedience presupposes some form of intention; i.e., the adoption and shared acceptance of a form of common life.

Thus at this point in our reasoning, we observe a kinship between the form of action characteristic of "the officials in charge of applying the law" and the form of action necessarily deployed by any generalised and customary practice of obedience by citizens. To repeat: this kinship or formal analogical structure clearly does not imply that what 'motivates' the generalised practice of obedience by citizens is a common reflection on the technical matters entailed by an interpretation of the legal criteria of validity. But the link must be brought to light that exists between this practice of majority respect and the possibility for causing the emergence, within a group, of a common culture of 'trust' and of adherence to a way of life instituted by the group's institutional structure. Thus, it is a question of understanding the link that exists between this respect and the construction of a sufficiently common 'belief' that makes possible the majority's practical acceptance of the instituted way of life. How are we to understand the operations by which is built up this minimal trust that the members of a social group grant to the officials in charge of determining normative requirements? As was just seen, it is not possible to understand this operation without reference to a condition of belief, that is, a form of practical acceptance of a way of life. Thus the possibility of giving

'meaning' to a normative requirement (and thereby to law) in social reality, i.e., of 'applying' it, of causing it to produce effects in reality, depends on a 'will', a 'common motivation', on the part of the addressees of this norm, and thus on a common culture among the players, which is likely to ensure effective realisation of the normative requirements. The possibility for 'governance by law' depends on its 'practical acceptance' by those in charge of respecting it and thus of ensuring its realisation within social reality.

Both Hart on one hand and Coleman and Kelsen on the other prevent themselves from opening the black box that is constituted by the operation which makes possible the emergence of such a culture for law. Moreover, they do not perceive the necessity for this conditionality and the form of cooperative activity that it entails. Failing to construe these conditions for possibility of any generalised and customary practice of obedience by the majority of citizens, Hart and Coleman end up assuming as given a form of spontaneous capability on the part of any social group to erect a form of common life, that is, the capability to form a community. Is it not the case that in so doing Coleman falls into the very error he wished to expose in Hart, which consisted of analysing the rule of recognition in terms of a 'coordination convention'? From the moment when we identify the dimension of shared intention that must necessarily structure any generalised practice of obedience, the question arises of its possible realisation, that is, of the question arises of its conditions for possibility. And thus we come back to the question of the conditions for the realisation of any form of shared intentionality, which was analysed above in the specific framework of the practice of recognition by the officials in charge of applying law.

As we have seen, by not questioning further the conditions for possibility of this general practice of obedience and recognition of the authority of officials, Coleman presupposes this recognition to be given. Byassuming it, he does not perceive that it is itself the result of an operation of judgement that is internal to the collective practice of construction of a way of living together. This recognition is itself dependent on the way in which the 'common' belief which gives rise to this recognition is constructed. In this sense, the practice of recognition by the officials itself depends on an externality that enables it.

2. *The dual consequences of the limitations of pragmatist positivism*

a. The epistemological consequence and the normative impact of the concept of law

The analyses above, and especially those concerned with extending the

approach to cooperative activity proposed by Coleman and Shapiro, now enable us to work through a further stage of reasoning. That is, they help us grasp the extension of the epistemological framework that the "pragmatist turn" effected by Coleman within theory of law calls for. As we will see, this extension results in a broader understanding of the reflexivity of all operations of judgement (a). Consequently, the epistemological extension of the pragmatist approach allows us to look afresh at two key questions in present-day discussion in the theory of law: the question of an assessment of the Dworkinian critique of legal positivism (b); and that of the judgement of application in law, which, as we have seen, has been, for over a century, at the heart of repeated efforts to expose the inadequacies of the positivist analysis of the concept of law (c). The second question will also enable us to reinterpret the question of the normative meaning of the concept of law.

The need to go beyond pragmatist epistemology

It is one of Coleman's merits (and indeed a merit of American philosophers close to Coleman; e.g., B. Leiter) that he constructs his theory of law on explicit and well considered epistemological bases. This is how we should view his "pragmatist approach" and the four main features that distinguish it epistemologically.[69] It is surely respect for the epistemological requirement specific to the pragmatist approach that accounts for the advances made by Coleman's theory over those of Hart and Dworkin. Deeper attention by Dworkin and Hart to the precise implications of the principles of semantic holism and the revisability of beliefs would surely have made them aware of the inadequacies of some of their theses and the need to put forward better-constructed versions of them. Dworkin would soon have seen that conventionalism in theory of law is, contrary to what he claims, not at all incompatible with an interpretivist approach to the rule of recognition. Similarly, Hart would have been obliged to confront explicitly the question of the form and the conditions for possibility of a collective action (a coordination convention or cooperative activity) likely to produce, among the officials, an identical normative meaning for all. Moreover, it is Coleman's pragmatism, and the rejection (associated with it) of all epistemological mentalism[70] that, with the help of Shapiro and Bratman, enables him to open up the theory of law to the constraints of a non-mentalist understanding of the conditions for cooperative activity. It is here that we see the implications of what has been presented above. The extension we proposed for Coleman's (and Bratman's) analysis of cooperative activity points to the need for a similar extension of his 'pragmatic method'.[71]

Perhaps our undertaking will elicit surprise. Is it not at first sight curious

that reflection on cooperative activity should be deemed transferable to a theory of intentionality and meaning? True, just as it is easy to see that a non-mentalist approach to intentionality can be used to better understand the conditions for constructing shared meaning as part of cooperative activity (and this is certainly the process followed by Bratman to analyse shared cooperative activity), it could appear puzzling to do the opposite and transfer the lessons from reflection on cooperative activity to epistemological reflection on the conditions for a judgement's semantic productivity. But this is not so. If we properly grasp the impact of the pragmatist approach as Coleman presents it, we see that the question of a judgement's semantic productivity is quite appropriately analysed in terms of cooperative activity. Semantic holism and the rejection of mentalism consist precisely of considering meanings (that is, the intentional purposes of the operation of judgement), far from constituting physical or computational entities that rest in the mind, always depend on the meaning of other factors[72] whose meaning itself cannot be assumed to be fixed and susceptible of determination through the application of formal rules. That is, as was made clear by L. Wittgenstein and H. Putnam, meaning is ultimately a function and usage necessarily takes the form of shared social practice. Thus the fixing of meaning -or, to put it in other words, the determination of the effects of meaning produced by the operations of judgement- is a function of a form of cooperative activity within social groups intended to produce common beliefs. At the same time, this turning back of meaning towards usage and the social practices which reflect it also makes possible an understanding of the principle of the revisability of beliefs that Coleman has quite rightly placed at the heart of the pragmatist approach. The fact is: practices of cooperative activity by which our common representations (or beliefs) are constructed ensure their own 'revisability'; i.e., their adjustment in light of the 'interests' -the intentionality- that 'motivated' us to make use of our judgements.[73]

It is precisely on this score, however, that it proves to be necessary to transfer to Coleman's pragmatist approach the reflections we conducted regarding his conception of cooperative activity. It is certainly the case that the rejection of mentalism that results from semantic holism requires a further examination of the 'black box' that Coleman leaves unexamined and that relates to the conditions for the 'revisability of beliefs'. It would appear that, not just with Coleman but also with the contemporary pragmatist theorists Coleman relies on, such as H. Putnam, everything takes place as if this 'collective self-revision' resulted from the immediate play of the competencies inscribed in the minds of players in any social group. But as was seen above, assuming such 'innate or immediate capabilities' for ensuring such revision comes down to making two highly problematical suppositions. On one hand, it means restoring a mentalist

approach that conflicts with the holism of beliefs Putnam rightly recognised as being logically linked to semantic holism. On the other hand, and as a result of this mentalism, there is an assumption that any operation of judgement has within itself the capabilities needed to ensure, to the extent possible, the realisation of the intentionality that motivates its usage. Certainly, no social group can achieve an ideal 'revision' of its beliefs. The capabilities of human reason are obviously limited. But if we do not examine the conditions for operation of the revision of beliefs, we will be led to assume that, within these limitations, the best possible revision of the beliefs of a social group is achieved solely by the immediate play of the competencies internal to the operation of judgement. As was seen above, this assumption contradicts the very principle that underlies the rejection of mentalism that is foundational to pragmatist epistemology.

Thus the rejection of mentalism entails revealing what we might call the reflexive dimension of any operation of judgement. This reflexive dimension does not consist, as is generally thought, of declaring the 'retrospective' competency of reason to reflect back on its previous representations (that is, "to turn back on itself"). Rather, it aims to state that any 'application' of reason rests on ("reflects on") a background representation that the operations of reason do not on their own allow for a reconstruction of. It is this reflexive dimension that justifies the view, expressed above, that the representation that parties to a cooperative activityimmediately form of their intentions, interests, and preferences (that is, absent mechanisms specially organised to lead them to reconstruct their interpretive frameworks) is no more than a specific choice among other possible choices, and that attention to this operation of choice will thus potentially allow for constructing other possible selections. In other words, attention to the contextual self-limitation that results from the reflexivity that affects any operation of reason would allow for an extension of possibilities and thus an 'optimisation' of the representations deployed by participants in the cooperative activity and, thereby, 'optimisation' (which does not mean achieving an optimum) of the forms of cooperative activity. This extension of possibilities would be associated with the setting up of mechanisms other than those already identified by Bratman. These would be specific mechanisms intended to incite the players to revisit their initial perceptions of their preferences and examine the possible redefinition of their preferences by broadening the interpretive frameworks immediatelydeployed. Thus, another 'specific' representation of the requirements of the common intentional aim would emerge, but this one would have the 'advantage' of having attained greater 'extension' than those specific forms that did not take into account the self-limitation that affects the representation of the intentionality form. Thus, one could say that, besides the conditions of responsiveness and

of mutual support emphasised by Bratman, incentives designed to ensure reflexive learning by agents would be needed in order to enable agents to conduct a reflexive review of the background representations that immediately orient their judgements. It is only when we have thus deduced the ultimate 'epistemological' consequences of the pragmatist rejection of mentalism, and on that basis identified the conditions for possibility of revisability, that we can state the principle of such revision, i.e., that we can assume the normative requirements inherent in the intentionality that guides this requirement for the 'self-revision' of beliefs on the part of a social group to have been satisfied. Absent this, the principle of revisability remains a 'black box' and entails, in an occult manner, the restoration of the form of epistemological mentalism that pragmatism aimed to expose. Before analysing some of the consequences that this 'extension' of Coleman's pragmatist approach leads to, we will make a brief detour to consider both the advantages and the limitations of Putnam's approach, as a way of understanding his point better still.

Putnam is without doubt the present-day pragmatist who has most effectively sought to identify the epistemological implications of semantic holism and the rejection of mentalism that it entails. As observed above, he has brought to light the 'logical' link between holism of meaning and the holism of belief that guides the social practices by means of which meanings have their usage. Moreover, Putnam has never ceased to draw attention to the fact that this holism of belief prohibits formally fixing the procedures for defining the beliefs that govern the usage by which any judgement produces meaning effects. It is precisely in order to avoid exceeding the pragmatic limitations of reason that he postulates that the fixing of shared beliefs can only result in a procedure for common construction through public exchange. Thus, Putnam explicitly and illuminatingly perceived the constitutive link that exists between the semantic productivity of operations of judgement and cooperative activity. However, this line of reasoning needs to be taken further.[74] Because, if it is accurate, the reflexivity entailed by this holism[75] prohibits the assumption that the belief governing the meaning effect of what it leads to defining as rational requirements is constructed solely by the play of the formal constraints of discursivity. The implementation of the cooperative culture that governs the adaptation of existing beliefs to those that are entailed by reason thus requires specific conditions for possibility.[76] To assume that the mere play of the formal constraints of the ethics of discussion (i.e. the mere formal play of public discussion) will itself ensure the realisation of the cooperative culture that it requires, is to neutralise and disregard Putnam's argument concerning the impossibility of formalising the procedures by which beliefs are fixed. To assume that the mere internal play of the formal constraints of debate ensures the

adjustment of beliefs disregards the fact that the possibility for debate is itself only made possible by a shared belief that motivates participants to use it.

The necessity for such a "belief" -which the formal operations of reason on their own are not sufficient to cause to emerge- reflects the inferentially reflexive[77] relationship upon which the possibility for reason to make meaning, that is, the possibility for reason to be realised in the world, is dependent.[78] Any rational purpose for meaning can be realised only by submitting to a specific dependency that the formal play of reason on its own is not sufficient to guarantee. To schematise this capability for realisation means assuming that a rule (one that must be inscribed in the minds of the players) will guarantee its use. This means that mentalism is restored. The fixing of belief is itself a reflexive operation whose realisation can never be assumed to have been "settled" by an assumed capability of the subject. On the contrary, unless mechanisms are put in place aimed to organise the reflexivity of this operation of the common construction of an adjustment of beliefs to the critical requirements entailed by formal reason, nothing guarantees that the application of these formal requirements will ensure the transformation of the world and of behaviours that they call for.

What does theory of law gain through this 'reflexive' deepening of a pragmatist approach to judgement? We will not return here to the renewed approach it makes possible to the conditions for possibility of the social practice by which the "rule of recognition", which is constitutive of the criteria for defining law in a social group, is defined and interpretively revised. We will only mention that this deepening, which took the form of a twofold extension of the redefinition of Hart's thesis proposed by Coleman, rested directly on a better consideration of the conditions for possibility of the principle of revisability of beliefs and of a better consideration of the cooperative activity that ensures its implementation. That is why we called this analysis a genetic approach to the concept of law: that is, an approach which, in contrast to classical positivism, takes into account all the conditions of 'engenderment' of the convention by which law is defined, in other words, the conditions for possibility[79] of this convention. We wish to show here the advance that is made possible by this 'reflexive' deepening of the pragmatist theory of judgement in comparison with the usual critiques of positivism. The fact is that, though Coleman quite rightly exposes their inadequacies, at the same time he risks overlooking the reformulation these critiques require, reformulations that would allow for a validation of the insight the critiques harbour. Two matters, then, merit a brief review: first, Dworkin's hermeneutic critique; and second, as shown at the start of this article, how to assess the insight

that has driven reflection on law since the end of the nineteenth century, namely the idea that the inadequacy of legal positivism is linked to an inadequate understanding of the operation of application in law. As we will see, the latter question will allow us at the same time to reassess the false opposition between descriptive and normative approaches to law and introduce the 'epistemologically' necessary link between the conceptual analysis of law and the theory of governance.

A reassessment of the Dworkinian critique of positivism

When showing the advantages Coleman's work offers over both Dworkin and Hart, we already identified the twofold inadequacy of Dworkin's critique of conventionalist positivism. First, this critique is theoretically inconsistent: contrary to what Dworkin believes, an incorporationist conventionalist approach, far from overlooking the interpretive dimension of the rule of recognition, entails such a dimension. It is now clear this entailment is directly associated with the pragmatist principle of the revisability of beliefs. Second, Dworkin's difficulty in correctly grasping the pragmatist impact of the redefinition of the positivist thesis reflects his own inability to formulate in adequately epistemological terms the nature of the 'semantic trap' that he attacks in the positivists. This second inadequacy accounts for the way Dworkin himself falls back into the very error that he ascribes to positivist approaches to law and that he thought he could avoid by means of his hermeneutic approach. But it also accounts for the fact that he fails to construe his correct insight into the inadequacy of legal positivism. As was been pointed out above, that is why we argue that a certain semantic inadequacy is common to both Dworkin's perspective and Hart's and Coleman's positivist conventionalism.

Let us return first of all to the question of the 'semantic' pitfall that Dworkin himself falls into even though he thought he had avoided through recourse to the hermeneutic model. At this stage of our examination, we are in a better position to grasp how this semantic error manifests itself. To explain our position, we can do no better than to begin with H. Putnam's critical analysis of Dworkin's theses. This critical analysis, which Putnam performed at the request of Coleman and indeed Leiter, is highly stimulating because it seeks to formulate its critique in a directly epistemological fashion. But, while it quite rightly exposes, in other than 'deconstructionist or Derridean' terms, the formalist pitfall Dworkin falls into, this critique remains fragile and incomplete. Let us go over Putnam's reasoning. Doing so will make it possible to show how the reflexive extension of Putnam's pragmatism that we investigated above helps deepen and reformulate this critique.

The critique developed by Putnam relates to the epistemological presuppositions underlying Dworkin's theory of 'one right answer'. Clearly, the theory of one right answer in no way implies a reassessment of the eminently 'controversial' nature of the meaning of law. Putnam willingly grants that, at any rate since Law's Empire, [80] "Dworkin now holds that in some cases there may not be a unique 'right answer' (reasons of both sides may be equally strong)". Thus it is quite true that Dworkin has abandoned the principle of bivalence, that is, "the logical principle that a statement is either true or false – tertium non datur". However, Putnam quite rightly points out, "this sort of failure of a unique right answer to exist is ubiquitous in language, and has nothing to do with the (unreasonably strong) form of bivalence that Dworkin continues to accept". What then is the form of bivalence that Dworkin continues to accept? "Dworkin's present position [...] is that for an answer to be 'right' just is for it to be the answer that is best supported by reasons;[81] if the fact that there may not be a right answer (in this sense) in some cases (because there may be a 'tie' in the strength of the reasons) meant that the logical principle of bivalence had to be given up, then the fact that there may be no right answer to the question 'Who is the tallest kid in the class?' because two or more kids may be tied for tallest would already mean that bivalence has to be given up!; bivalence would have never been accepted as a logical principle in the first place[82] if this sort of thing were a counterexample". But, as Putnam quite rightly points out, "what is a problem for the principle of bivalence is that it entirely abstracts from -in fact denies- the possibility of what is called "second order vagueness" – that is, the possibility that, not only may there be cases in which there is no determinate right answer, but that it may be indeterminate which those cases are (where vagueness ends may itself be vague, in other words)".[83] What Putnam is exposing is thus the presupposition of the existence of a rule that would allow us, at some level, to formalise interpretive practice, that is, the operation constitutive of meaning.

Is Putnam's critique accurate? Putnam quite rightly perceives that Dworkin, at a certain level in his reasoning, overlooks not the holism of meaning but the holism of belief; i.e., the concept that there is no formal procedure for fixing belief. But this epistemological inadequacy in Dworkin cannot be formulated in the terms used by Putnam. Dworkin definitely recognises what Putnam calls the "second order of vagueness". He would be the first to acknowledge that the 'controversial' nature of law implies that we cannot determine what the easy and the hard cases are by means of a formal rule. He acknowledges that such a distinction is itself the result of an interpretive practice and consequently not subject to formalisation. Thus, it is not at the second level of this "second order of vagueness" that the "reformalisation of the normative operation" that

Dworkin falls victim to is manifested. But, this third level is inaccessible to Putnam because, as indicated above, his understanding of the consequences associated with a 'non-mentalist' approach to the operation of judgement is inadequate. That is, such an approach makes it impermissible for reason to find within itself the resources necessary for its own semantic productivity (that is, necessary for its ability to take effect in social reality). Since Putnam himself has restored a mentalist presupposition (in relation to the capability of the social group to 'automatically' ensure the revisability of its beliefs) and thus underestimates the extent of the reflexivity of all judgement, he does not see that it is at this pragmatic level that Dworkin re-formalises the operation of normative judgement.

Dworkin's hermeneutic approach does try to respect the link being formed between meaning and usage and take the holism of usage into account. However, by not construing its epistemological conditions sufficiently, he does not see the reformalisation of the operation of reason that his 'mentalism' entails. Where does this mentalism manifest itself? As an alternative to the hypothesis of the rule of recognition, Dworkin defines the conditions for legality by reference to a substantial morality assumed to be shared by the social group and to an idealised judge who would be able to ensure its ongoing reinterpretation in light of the requirements for adjustment to transformations in the social context. The judge is supposed to be capable of deducing the meaning of the law from the requirements internal to the 'institutional morality' of the group to which she or he belongs. Dworkin's hermeneutic approach assumes the givenness of rules in the mind of the judge that enable the judge to subsume various specific situations under general categories of institutional morality (principles). That is, Dworkin mentalises the normative judgement approach by having those rules inscribed in the judge's mental capabilities that make it possible to deduce the normative meanings of law from the requirements of institutional morality and reflect in those meanings (to paraphrase Paul Ricoeur) the injunctions of historical reality.[84]

In still assuming a homogenous substantive morality as given within the social group, along with a judge who is capable of providing for its ongoing reinterpretation in light of the requirements for adjustment to transformations in the social context, Dworkin assumes a rule of reason capable of guaranteeing realisation of the 'right way' by which the meaning of the normative requirements within the social group will be optimised. It is just such a presupposition that Putnam hopes to expose as philosophically incorrect. As M. Maesschalck has shown in connection with Putnam's internalist realism,[85] this project in effect implies not only the immanence of interpretive practice within belief, but also the

impossibility for interpretive practice to define standard procedures for fixing beliefs. This is just what Dworkin overlooks.[86] It is also what accounts for the fact that heformalises the operation of judgement and, consequently, falls back into the 'semantic' error that he believed he was exposing in positivist thinking.

It is on this score as well that the advance made by Coleman's pragmatist redefinition of the rule of recognition appears. As we saw, this redefinition subordinates the ability of judges to define the rule to the existence of institutional mechanisms that make possible their own cooperative production of a uniform interpretation. Thus, it could be said that Coleman tempers Dworkin's epistemological internalism by subordinating the assumed capability of the social players -in this instance, judges- to the externality of the incentive of the institutional mechanisms that guarantee the possibility of shared intentionality. However, as has been seen, this way of understanding the 'limitations' of epistemological internalism -and its institutional expression- continues to be insufficiently extended and therefore reflects the re-emergence of a semantic error. The fact is that Coleman's analysis, like Dworkin's, also ultimately rests on the 'mentalist' assumption of the group's presumed given capability to ensure the conditions for satisfying the requirements of governance by law. A brief examination of this question will enable us to see how our epistemological observations will help better construe the recurring insight within legal reflection that positivist analysis has an inadequate analysis of the operation of the application of normative judgement.

Positivism and the question of the judgement of application: The normative significance of the concept of law

Contrary to what is claimed by critiques of positivism in various forms, whether sociological or, as more recently, hermeneutic, the conventionalist approach in no way implies a denial of the interpretivist dimension of judicial work. And yet, subject to reformulation, a valid insight underlies this recurring critique.

The extension of the approach to pragmatism developed by Coleman allows for the exposure of a deeper inadequacy in the understanding of the operation of the application of judgement than that related to his approach to the operation of judgement. It is symptomatic that in theory of law the discussion of the operation of the application of judgement appears not to notice that the question of the application is not limited to the application of an assumed existing norm. The meaning given to the operation of the application of a rule is reduced to the classical concept of application corresponding to that customarily used in ordinary language

when it is said a judge 'applies a rule' or there exists a technical problem of 'applying' a certain normative guideline deemed to be desirable. The operation of application is assumed to be restricted to the scenario in which the rule, or the normative orientation, is given. But in limiting the question to this formulation, we make it impossible to formulate the problem in more epistemological terms. There is a more fundamental operation of application on which development of the norm (or determination of the normative orientation) itself depends. The choice of norm is in itself already the result of an operation of application. The 'form' (representation) taken by the norm results from the 'application' of the rational requirement inherent in the activity of judgement that members of a social group have decided to deploy in order to solve a problem of collective coordination. The question raised by this operation of application thus concerns the conditions for possibility of the operation by which reason (the activity of judgement) produces meaning effects in reality, that is, 'is applied' or 'is effected' in social reality.

Must we assume that this application is wholly determined, in the last analysis, by the formal rules of rational activity (which would necessarily be stored in the mind)? On this view, the operations of application and of the justification of judgement are governed by the same resources and thus exist in a symmetrical relationship. It is clear, then, that this perspective is that of mentalism. It should be noted that this position does not prevent the recognition of a degree of autonomy inherent in the interpretive activity specific to the operation of application.[87] Such a recognition of the 'reversibility' of the operation of application and the operation of justification does not necessarily entail abandoning a symmetrical approach to the operation of judgement, that is, the mentalist point of view. The hermeneutic theory laid out by Dworkin is a good example of this.

Must we then assume, in contrast, as would be entailed by a non-mentalist understanding of the semantic productivity of judgement, that the conditions necessary to such productivity (and thus to the application of reason in the world) cannot be reduced to the formal rules of rational activity? If so, it would be understood that reason does not have within itself the conditions for its application within the world, that is, the capability for producing meaning effects. From this second perspective, which is the one opened up by any holistic or pragmatist approach to the activity of judgement, we bring to light the asymmetrical reversibility[88] of the operation of reason. While the two operations reference each other, the resources needed for the operation of application are not symmetrical to the formal rules on which the operation of rational justification depends. Thisasymmetric reversibility merely reflects what

was called above the 'reflexivity' of any operation of reason, which is the sole protector against the pitfalls of mentalist epistemology. That is, the activity of reason 'reflects' a 'perception' that reason itself cannot justify through its own formal rules, but that nevertheless depends on reason for its implementation, in other words, for the 'choice' of following a way of life governed by 'reason'. Could we then say that reason reflects on itself in the sense that it reflects what it gives 'itself", namely the choice of reason as a way of life, the choice of a world understood to be 'rationalisable', 'transformable' according to the requirement dictated by the formal rules of reason. This reflexivity, laid out above in a speculative manner, is even easier to understand if we translate it into the 'concrete' terms of the theory of norms. As will be seen, we come back here to certain views already formulated above regarding Bratman's theory of cooperative activity.

A non-mentalist reflexive approach to judgement can only be achieved if we open up the 'black box' that has been left unexplored by current theories of norms because of their restrictive approach to the operation of the application of normative judgement. This black box relates to the conditions for realisation of the purpose underlying any activity of norm development. This purpose consists, from the outset, of perceiving a problem to be solved, of defining the 'rationalising' of the world required in order to solve the problem according to the conception of the norm held by its authors. Granted, it has become common sense to point to the limitations of the cognitive capabilities of human reason. But the 'contextual' limitation we wish to draw attention to here, which derives from the reversible and asymmetrical nature of the operation of application, is of another kind.[89]This asymmetry in fact implies that the application of a norm within social reality necessitates the deployment of resources that are not supplied by the formal operations of reason on their own.

Underlying any rational decision or voluntary action are two (not just one, as is usually assumed) operations of selection or choice. There is obviously the choice of the transformation that would appear to be called for rationally (that is, the solution deemed to be most rational in solving the problem). But this choice is itself possible only because it rests on a prior operation of selection related to the way of 'perceiving' the 'context' in relation to which the problem to be solved will be defined, and the use made of the solutions envisaged by the players called upon to apply them, will be determined. Here, the asymmetry is evident in the emergence of the background that any operation of justification relies on. This second operation of selection -on which the first depends- is not solved by the first. It thus calls for a specific "attention" if it is hoped to

fulfil the objective sought, which consists of accomplishing the best rational action possible to deal with the problems that need to be solved. The fact is, no "transformation" – and thus no effective realisation of the intentional purpose specific to every norm – is possible unless the second conditionality is taken into account and a specific procedure for the adjustment and construction of a common perception of the context is organised. What is at issue is the procedural organisation of the adjustment of existing perceptions by the players involved in order to name the meaning and the nature of the inadequacies to be settled and the problems to be solved.

Thus, two processes that cannot be dissociated from each other must be articulated. First, it is necessary to guarantee the necessary consideration of the formal rules on which depends the rational acceptability of the solutions to be implemented in order to deal with the inadequacies of existing life situations. But determining the meaning effects that the solutions to be constructed will produce depends on what will be selected at the outset as the context in which the inadequacies to be solved and the solutions to be constructed must be perceived. To assume this context is given, or that the players involved will immediately and naturally identify their own interests and the meaning of the new constraints that motivate the search for new solutions, is to overlook precisely the structure specific to every judgement, namely the fact that the adjustment of perceptions does not depend solely on the formal rules of judgement. As well, it cannot be assumed that the "perception of context" is identical among the various authors and addressees of the norm. Nor can it be assumed that their common adherence to the solution deemed to be the most rationally acceptable automatically entails a convergent transformation of their perceptions of the context and, consequently, the harmonisation of the motivations for the use they will make of the norm to which they adhere. A specific activity must be organised in order to organise a common perception of the context. This will in turn make it possible to increase the number of 'possibilities' on the basis of which the solutions deemed the most rational for dealing with the inadequacies of the 'context' will be selected.

This second order of the conditionality of action is usually wiped out it is presented as obvious or assumed to be determinable a priori. If we assume as given this capability for players in the collective action to adjust their common perceptions to the 'requirements of context', problems of governance clearly become less complicated. Such an assumption implies from the outset the assumption that the players have the capabilities to translate their normative expectations into the effectiveness of action through their interactions. The assumption of a mental

capacity (a mentalism) for translating into reality the goals pursued guarantees this equilibrium solution. It is understood that the "content assumed to be given" of the intended goals of the players in an action will be capable of being translated into the effective content of the action. But to assume such a capability as given consists precisely of overlooking the reflexivity of the operation of normative judgement. In contrast, a better construal of the theory of norms entails invalidating this assumption and consequently postulating the need for incentives likely to cause the emergence of this 'capability' of identifying normative objectives to be pursued in common.

It is in order to respect this epistemological requirement (which exists within both theory of judgement and theory of norms) that we have suggested extending Coleman's pragmatist approach to the concept of law and replacing the positivist approach with a genetic approach to the conventionality of law. This would allow for a different way of illuminating both the question of the descriptive or normative status of the theory of law and the analysis by Coleman (and more broadly the positivists) of the conditions for the existence of law within a social group. Granted, we cannot consider subordinating the definition of law to some external 'normativity', as is suggested by classical natural law theory. No one could seriously contest the impossibility for theoreticians to define 'the' rationally desirable way of life. That is not what is at issue here.[90] Moreover, even in its internalist version, Dworkin's critique of positivist 'descriptivism' is hard to accept because in itself it fails to take into account the "reconstructive and descriptive" status of its own analysis of the concept of law. From this perspective, Coleman is right to point out, in Dworkin, "the confusion between the content of the concept of law and the content of the law of a particular community".[91] On the other hand, however, because of his positivist, non-genetic, approach to the conventionality of law, Coleman fails to perceive the normative dimension internal to the content of the concept of law and the irreducibility of this normative dimension to a prescriptive dimension. By "prescriptive" dimension is meant the "distinctive feature of law's governance", which "is that it purports to govern by creating reasons for action".[92] By "normative dimension" is meant the requirement for procedural conditions allowing for an "optimised[93] and common" reconstruction of the representations deployed by the creation of these "reasons for action". These conditions, as we pointed out in analysing the conditions for cooperative activity, are associated with the conditions for realising the common intentionality aimed at by the social practice of recognition that is constitutive of the conventionality of law. Moreover, as we have just seen, an adequately epistemological grasp of the theory of norms entails a proper construal of the nature of the intentional purpose borne by every

norm. After all, is it no symptomatic that Coleman, adopting Bratman's analysis relative to the internal conditions for the satisfaction of the shared intentionality that defines cooperative activity, appears not to adopt Bratman's distinction between 'prepackaged cooperation' and 'shared cooperative activity'?[94] True, Bratman does not entirely reconstitute the normative requirement entailed by his own rejection of any mentalist approach to shared intention. But he does preserve the idea of a possibility of realisation "in variable and progressive extension" of the requirement entailed by such a form of action. This same idea of 'degrees of progressive extension' is just what we wish to radicalise here in order to show that it is entailed epistemologically and in order to draw from it consequences relative to a normative dimension internal to the content of the concept of law. As may be observed, a normativity of this kind is neither substantive nor procedural in the sense given to these terms by Habermas and Rawls. The procedural entailment that is inherent in it remains internal to a conventionalist approach to law and results from a 'descriptive or speculative' grasp of the conditions for possibility of the operation of judgement by which the rule of recognition specific to any social group is defined and interpreted.

Finally, the revelation of this normative dimension specific to the 'content of the concept of law' (and not of the 'content of law of a specific social community') allows for one last extension of Coleman's reasoning. That is, it requires an extension of the conditions that Hart and Coleman define as 'conditions' that must be satisfied in order to satisfy the requirements of social regulation by law. At the same time, this makes possible both the revelation and the transcendence of the somewhat idealised image that the positivist approach results in, which consists of assuming that, right from the moment of setting up of the formal structures of the modern state, there were brought together the conditions required for the regulation of our societies. This supposition is clearly linked to the fact that Coleman, in line with dominant positivist approaches, considers the existence of law, beyond the "practice of recognition of law" by the authorities in charge of applying it, is a function exclusively of the effectiveness of respect for the decisions of these officials by the majority of the population. We will not here repeat our discussion of the inadequacy of the analysis of the "practice of respect for and of adherence to the organisation of a way of life" in terms of simple empirical effectiveness.[95] But it is interesting at this juncture highlight to what extent it also contributes to an idealised representation of the form of collective action by which a group aims to regulate its behaviours. Idealised[96] because the form of empirical effectiveness that Hart and Coleman (and Kelsen) invoke is defined in such a manner that it is assumed to be realised within the very large majority of modern societies. Outside the extreme and transitory

case of revolution, the effectiveness of a political power over a territory is understood by them to reflect the coming together at one time of all the conditions that guarantee the accomplishment of the regulatory function of law. With the exception of crisis situations and times of temporary destabilisation, the conditions for satisfying governance by law are assumed to have been brought together from the moment that the institutional structures of the modern state are set up. This is understood to be independent, of course, of the forms of government or legitimacy - e.g., whether dictatorial or democratic- that they serve. If this is put in somewhat more technical language, it could be said, with Coleman, that "regardless of the diversity of their aims or purposes, the shape and structure of mature legal systems are similar in the ways Hart claims they are: that is, as consisting in primary and secondary rules, including especially a rule of recognition, rules of change, and rules of adjudication".[97] This formal organisation of the state is thus supposed to embody exclusively the institutional conditions for the emergence of the culture of law that the fulfilment of the function of 'guiding conduct' depends on within the social group that defines the law.

Given that the condition for respect for the decisions of officials by the majority of the population are externalised in the form of an empirical effectiveness, they are not analysed as the meaning effect of a collective action with the purpose of a common perception of the 'reasons for action'. The possible "constraints" that would result from an analysis of the conditions for possibility of the operation of judgement deployed by this form of collective action are thus not analysed for their own sake. The result is that the function of regulation ascribed to law is assumed to be effected independently of any specific institutional mechanism that would translate the development of the norm in order to link it to its final addressees, that is, citizens. This question of institutional mechanisms is reflected upon exclusively in connection with the officials in charge of the operations of developing and applying the rules. The question of the necessary adjustment of our current mechanisms of government in order to improve the conditions for citizen participation in these operations cannot be posed or understood as resulting from a correct theoretical construal of their conditions for possibility.

Undoubtedly, as has been seen, a "genetic approach" to the conventionality of law and the 'normative' dimension of the concept of law that it allows for revealing in themselves entail questioning such an idealised image of the conditions for fulfilment of governance of our modern societies by law. But it is not the case that our 'epistemological' reasoning us supported 'sociologically' through the mere observation of the concrete dynamics of our societies? And does an observation of this kind

not oblige us to perform a more nuanced analysis of the conditions required for law to be 'capable of guiding conduct'?[98] We are witnessing in many spheres today an effort to reflect on the rearrangement of the procedures for constructing normative solutions to make up for the inadequacies that our accustomed procedures result in. Where would these inefficiencies come from if not the fact that the use made by the addressees of norms results in these unintended consequences? Let us put it in other words. The meaning given to norms when they are applied in social reality (that is, when they produce meaning effects) tend to make those norms inoperative or ineffective with respect to the normative objective that the authorities wished to achieve. The whole discussion that has taken place in "theory of governance" over the past four decades (whether in economics, with the purpose of strengthening the mechanisms for market coordination and contractual cooperation; or in political science, with the purpose of strengthening participatory and deliberative mechanisms) has without question emerged from this same necessity to adjust our modes of constructing norms in order to better take into account the representations of these norms by their addressees, and thus the "motivations" on which the use that will be made of them depends. In particular, what this current reflection reveals is that wherever divergences are greatest among perceptions of the problem legal norms seek to resolve, accustomed procedures for constructing and applying norms prove "ineffective" for guaranteeing an adequate solution to the problem. The 'capability' of the public authorities to construct the solution and identify the 'expected' meaning of the norm is thus itself dependent on a 'recognition' of this meaning by the ultimate addressees of the norm. In such conditions of marked dissension, one can understand the emphasis increasingly placed by current theory of governance on the necessity to reflect on the mechanisms best suited to incorporating this 'condition of recognition' and make possible the cooperative construction of common meaning. All this makes it clear that the question of 'trust' or "recognition by addressees deprived of the rule of law" cannot be reduced simply to the classic question of the assumed allegiance by these citizens to the officials in charge of a given legal order (in other words, the condition of 'comprehensive' effectiveness identified by Kelsen, Hart, and Coleman). This way of understanding 'recognition' by citizens proves reductive and inadequate to take into account the condition of 'trust', 'motivation', or 'perception' on which the operation of a norm's semantic productivity within social reality depends.

b. The second consequence: The opening up of theory of law to theory of governance

One of the questions asked in this article is whether it is justifiable epistemologically for the conceptual analysis of law to remain watertight in relation to the "normative" issue of the necessary rearrangement of our mechanisms of governance. Is it justified or not for the philosophy of law to remain autonomous from the normative research on the theory of collective action that sits at the heart of present-day research in the social sciences?

It is easy to see that these questions cry out for a response in the negative. However significant the advances brought about by recent hermeneutic approaches to the function of judgement and the pragmatist redefinition of the rule of recognition, a 'more reflexive' extension of the operation of collective regulation that defines law is clearly necessary. True, legal positivism has sought progressively to adapt its definition of law so that it better takes account of the function of the application of rules. As we saw, in the words of L. Green, "by the mid-twentieth century, [...] its emphasis on legislative institutions was replaced by a focus on law-applying institutions such as courts, and its insistence of the role of coercive force gave way to theories emphasising the systematic and normative character of law". Thus, it could be said that the theory of law, by taking into account the reversibility of the operation of application, has sought progressively to take on board the reflexivity of normative judgement by which a social group seeks to act upon itself in order to regulate its behaviours. In internalising the Kelsenian Grundnorm and emphasising the reflexive dimension of the rule of recognition, Hart brought about decisive advances. Similarly, the pragmatist redefinition of the rule of recognition advanced by Coleman and its explicit recourse to the philosophy of action are part of the same trend. Moreover, this 'pragmatist' turn reflects the will to incorporate into the definition of law, in a rigorous manner, the "holism of use" that Dworkin perceives but, as Putnam observed, fails to analyse epistemologically.

However, because it retains a symmetrical approach to reversibility, the theory of reflexivity deployed by these various approaches to law always ends, at some point or another, by ascribing to the social body a 'capability' of satisfying the rational expectations implied by its regulatory purpose. The traces of this 'mentalist' presupposition, which, in the last analysis, is associated with a schematic approach to normative judgement, accounts for the exclusive focus on the function of the application of rules by the judge (or by officials). In his somewhat naive idealisation of the judge as an organ that guarantees the self-adjustment of the requirements of the social group's internal moral code, Dworkin provides an obvious example of this. But Coleman's difficulty penetrating the persisting black box of the conditionality of the 'recognition' of the rules by the members of the social

group reproduces an analogous epistemological error.

From this perspective, both the approaches to economic analysis of law based on Coase and Williams on one hand and the sociological approaches to self-regulation (which are indeed sometimes referred to as 'reflexive') and those based on Habermas's formal pragmatism, on the other, offer an advance in comparison with positivist and hermeneutic approaches to law. This is true even though these last approaches, especially those associated with the discussion raised by analytical positivism, have the advantage of performing a more rigorous construal of the technical issues entailed by an analysis of the concept of law. As well, undoubtedly these various critical approaches of an economic, sociological or (as with Habermas) a philosophical kind, remain hampered by an inadequate epistemological construal of the theory of reflexivity that they seek to deploy. This is very clear when it comes to the economic analyses of law associated with theories of rational choice and the sociological approaches inspired by N. Luhmann's theories of self-regulation.[99] And indeed, Habermas too can be charged with reflexive inadequacy, although of a more subtle and complex kind.[100]

But at least these various 'critical' approaches reflect, whether implicitly or explicitly, the same insight, namely that a better understanding of the concept of law requires going beyond the reflexive inadequacy of the positivist and hermeneutic approaches currently available and proposing that the regulatory function of law requires for its fulfilment an extension of the reflexivity of our institutional mechanisms of governance.[101] Recall the critiques addressed to jurists by economists during the seventies.[102] They consisted of exposing the 'reflexive' inadequacy of the technique of governance by 'rule' (the so-called 'command-and-control' technique of governance) and its inability to take into account the reversibility of the operation of application, that is, the dependency of the effects of a rule on the use that will be made of it by its addressees. This was also the reason why economists recommended more 'decentralised' forms of our mechanisms of governance.[103]

Similarly, Habermas perceives the inadequacy of reducing the conditions of validity of law exclusively to the 'cooperative' organisation of judges' practice. Habermas perceives that the constraints entailed by the fulfilment of the 'function of governance' of modern law require arrangements in our mechanisms of governance that go beyond the mere 'cooperative' organisation that is specific to the judicial apparatus of the modern state, or the putting into place of the somewhat naive 'heroisation' (in Habermas's appropriate coinage) of the judge that Dworkin's hermeneutic approach results in.[104] According to Habermas, the

procedures for developing rules must be adjusted to allow for a better respect for the conditions for possibility of the normative judgement that communicative theory of law and politics reveal.[105]

While we are not prepared to endorse all of Habermas's analyses, this last mentioned approach is one we believe should be pursued. A better understanding of the conditions for realisation of the normative requirement inherent in the concept of law (that is, of the conditions for realisation of law's guiding function) requires a critical assessment of the reflexive inadequacy of our current mechanisms of governance, that is, of our normative modes of production. This does not mean that we reject the descriptivist project of positivism's undertaking or the positivist exposure of the normative impact of the customary forms of adherence to natural law. Possibly what is indicated is the need to rethink the inevitable link between fact and value and take into account what Putnam calls "the collapse between fact and value".[106]

After all, is it not revealing to note the extent to which the analyses of both Hart and Coleman's conceptual analyses of law are pervaded by an invocation of the ideal? True, it is no longer a question as with Dworkin of ideal governance. However, what is now in play is the functionalist ideal of guidance. As was indicated above, Coleman tells us explicitly that, as the result of a kind of process of natural selection or collective learning, our modern legal systems are the result of a 'maturing process' that has reached completion. According to him, the setting up of our modern legal systems reflects the implementation of the conditions necessary to 'satisfying' the guiding function of law. Thus, the idea is that the conditions for satisfaction of the ideal of guidance are already given, even though this state of affairs will now be viewed as the result of social gains or of a lesson learned specifically with the emergence of modern societies. As with Dworkin, although in a different way, the conditions for satisfaction of the realisation of the ideal are assumed to be guaranteed by a play of a formal rule (in this instance, the rule for a process of natural selection or a social learning operation that has been decisively completed). Our own position is exactly the reverse. In our view, what is at issue, for the sake of a better descriptiveunderstanding of the conditions for semantic productivity of normative judgements, is to demonstrate that the conditions for fulfilment of the 'ideal' implied by any rule require a normative and critical approach to our current mechanisms of governance, that is, our normative modes of production. Thus, what is at issue is not to oppose the conventionalism that Coleman rightly adopts in opposition to Dworkin. Rather, in the name of a radical understanding of the holism of usage that underlies this conventionalist approach, the issue is better to understand the reflexive nature of the conditions for

realisation of the form of collective action by which a group proposes to act upon itself within the horizon of what it deems to be rationally acceptable.

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[1] "Real philosophers not only learn the history of their discipline; they internalise it. They are not embarrassed by the fact that there is an important sense in which nothing is new in philosophy. They are not embarrassed working and reworking familiar themes. What distinguishes good philosophers from others is not that they invent new paradigms"; J. COLEMAN, The Practice of Principle. In Defence of a Pragmatist Approach to Legal Theory, Oxford, Oxford University Press, 2001, pp. IX-X.

[2] "Great blues players first make it clear to us that they are playing a blues [...] then they go off, play around and through the familiar, connect dots in unusual, sometimes awe-inspiring ways, then bring us back to the familiar again, thus deepening our understanding and showing us the extraordinary possibilities inherent in what we already know"; Ibid., p. x.

[3] To mention just two of the last century's most influential advances in legal positivism, recall the significance of the links forged by Kelsen with logical positivism and with the late nineteenth century neo-Kantian revival, and those forged thirty years later by Hart with the philosophy of ordinary language.

[4] The term "pragmatist" is often the object of less than rigorous usage in the legal literature, especially that of the USA. It is often used to refer to the "sceptical" or instrumental analysis of law, as in Dworkin and several contemporary writers who make allusions in passing and in an exegetically problematic way to Rorty's pragmatism. This is not how "pragmatist" is used in the present text. Coleman, one of the main initiators of the project of a pragmatist approach to legal theory, says, "legal academics typically draw, for their understanding of philosophical pragmatism, upon the work of Richard Rorty, John Dewey, and William James (and the latter two are themselves often seen through Rorty's interpretation of them). These are not my roots or my sources. The sources I draw from include, most prominently, Wilfrid Sellars (especially his view of semantic content as inferential role), W.V.O. Quine, Donald Davidson, and Hilary Putnam"; J. COLEMAN, The Practice of Principle, o.c., p. 6, note 6. In the "holistic" (i.e., internalist or, to use an expression more directly related to Putnam, pragmatist) perspective opened up by these authors, the meaning of a concept is analysed "in terms of the inferential role it plays in the variety of practices in which it figures"; and at the same time, these "inferential roles our concepts play reveal the holistic web of relations in which they

stand to one another, and it is this web that determines a concept's content"; Ibid., p. 7. For a fuller development of this point, see infra III B 1 a.

[5] Perhaps one of the earliest expressions of this movement was the debate initiated by B. Leiter and J. Coleman with H. Putnam and published in the inaugural issue of Legal Theory [Legal Theory 1995, pp. 5-80]; see also infra III B 1 b for an analysis of Putnam's position in this debate. Besides Leiter's and Coleman's work, that of such authors as S. Perry, S. Shapiro, and B. Zipursky can be placed within this movement, although explicit references to epistemological discussions or the pragmatist approach are not always found there, and despite the existence of certain differences in their methodology and hypotheses. See infra for references to some of this work.

[6] This is the excellent expression proposed by B. ZIPURSKY ["Pragmatic Conceptualism", Legal Theory, 2000, pp. 457-485], which seems to be explicitly endorsed by Coleman [The Practice of Principle, o.c., p. 10, note 12]; recall however that this methodological approach is not shared by all the authors who, to different degrees, participate in the movement identified here. For instance, on the differences between this form of conceptualism as proposed by Coleman and Zipursky and that proposed by Leiter, see: J. LENOBLE and M. MAESSCHALCK, Toward a Theory of Governance: The Action of Norms, London, Kluwer, 2003, pp. 296-ff.

[7] Besides J. Coleman's, B. Leiter's, and S. Shapiro's works on Hart's theory, the importance of Leiter's work on legal realism (which has led to a reinterpretation of its epistemological significance; see B. LEITER, "Legal Indeterminacy", Legal Theory, 1995, pp. 481-ff.; "Legal realism and Legal Positivism Reconsidered", Ethics, 2001, pp. 278-301) and of S. Perry's works on Holmes (see infra note 96) must not be overlooked.

[8] "Reconstitution" because a careful rereading of the legal and political philosophical debates in German Idealism (especially those between Kant and Fichte) reveals, against the usual reductive interpretations, an analogous will to "link" the analysis of the conditions for possibility of governance by law with an analysis of the conditions for possibility of the operation of judgement.

[9] Thus epistemological reflection refers here to a theory of judgement rather than having the more methodological, reductive meaning of "reflection on the method to follow in order to produce scientific knowledge", which it is sometimes assigned in the philosophy science.

[10] On J. Coleman's presentation of these main trends, see infra note 69.

[11] For some representative references to this work, see infra note 26.

[12] And (to go beyond the strict boundaries of philosophy of law) the inadequacies of the anti-foundationalist approach of American legal scholarship.

[13] Note that, in reframing the true implications of recent versions of legal positivism in epistemological terms, authors associated with the pragmatist turn are also clarifying the exact nature of the arguments that must be addressed by anyone who (rightly) wishes to denounce the inadequacies of positivist legal theories, at least as they stand at present

[14] H. PUTNAM, Representation and Reality, Cambridge (Mass.), MIT Press, 1988, p. xii.

[15] This discussion is linked to the search for mechanisms for regulating collective action better suited to "maximising", to the extent possible, the satisfaction of the normative expectations of participants in the action. (For an overview of this debate and a philosophical analysis of it, see J. LENOBLE and M. MAESSCHALCK, Toward a Theory of Governance, o.c.; Beyond Neo-

Institutionalist and Pragmatist Approaches to Governance, synthesis report for the REFGOV research project, REFGOV Working papers series : REFGOV-SGI/TNU-1, 2006, http://refgov.cpdr.ucl.ac.be/?go=publications). The renewal of this research approach during the sixties, which took place essentially in the USA, is reflected in particular in the use of the notion of "governance" to refer to what was traditionally called (in economics and political science) "regulation" or (in law or in political philosophy) "government". As R. Mayntz has said, "governance is the type of regulation typical of the cooperative state, where state and non-state actors participate in mixed public/private policy networks"; R. MAYNTZ, "Common Goods and Governance", in A. HERITIER, Common Goods. Reinventing European and International Governance, Oxford, Rowman & Littlefield, 2002, pp. 15-27, at p. 21. This new orientation in the approach to questions of "regulation" has so far relied on recognition of the inadequacy of both traditional forms of hierarchical control (command-and-control regulation) and that kind of self-regulation that is based exclusively on recourse to market mechanisms (coordination of collective action exclusively by aggregating for individual preferences in a competitive manner). It was mainly developed in economic science, albeit in a close relationship with research in social psychology on bounded rationality. However, it was not without an impact in the field of reflection on law. In effect, reflection on the necessary transformation of the mechanisms of governance found ion our social democracies began developing in the fifties in the USA in relationship with the inadequacy of the institutional mechanisms set up by the New Deal for ensuring effective fulfilment of fundamental rights. To correct this inadequacy, it was initially proposed that recourse be had to judges in order to ensure better effective respect of fundamental rights. Under this approach, the judge takes on the role of therapist to the regulatory process and creates the conditions necessary for the effective fulfilment of the respect due to those rights. In order to dispose of the necessary means for this new style of judicial activism (inaugurated by the celebrated Supreme Court judgement in Brown v. Board of Education in 1954), judges equipped themselves with methods of intervention that resulted in a significant transformation of both the judging function (creating "public law litigation"; on this, see A. CHAYES, "The role of the judge in public law litigation",Harvard Law Review, 1976, pp. 1281-13156; O. FISS, "The Forms of Justice", Harvard Law Review, 1979, pp. 1-30; R. MARCUS, "Public Law Litigation and Legal Scholarship", Journal of Law Reform, 1988, pp. 647-657) and the administrative function. The idea is that the rationality of public policies developed by the administration must depend on the possibility given to all concerned interest groups to enlighten the authorities and take part in the development of regulatory compromises. This would lead the judge to subordinate the legality of administrative intervention to respect for all the procedural conditions that guarantee such participation; R. STEWART, "The Reformation of American Administrative Law", Harvard Law Review, 1975, pp. 1667-1813. This initial response to the perceived need to improve and transform our mechanisms for coordinating collective action has thus been of concern to jurists, because it put the exercise of the judging function in question. This accounts for the fact that in American theory of law, it came to be reflected in an intense critical reflection on legal process theory and the synthesis that the latter sought to put forward to resolve the inadequacies of both of Langdell's formalism and the realism of the thirties in dealing with the operation of the judge; H.M. HART and A.M. SACKS, The Legal Process: Basic Problems in the Making and Application of Law, Westbury, Foundation Press, 1994; and some forms of a recent effort at critical synthesis: E. RUBIN, "The New Legal Process, the Synthesis of Discourse, and the

Microanalysis of Institutions", Harvard Law Review, 1996, pp. 1393-1438. Parallel to this there also developed numerous trends in a sociological and indeed economic and political-scientific perspective seeking to interpret the transformations of law produced not just by this initial response to the crisis in our social democracies but also by subsequent responses prompted in social science research by critiques of the initial reform. In the latter case, legal reflection reflected a closer tie with the discussions then current in the social sciences on the theory of governance. Many legal studies sought to import into legal thinking theoretical models developed by the social sciences. These included the thinking of neo-institutionalist economists in the tradition of Coase, that of sociological theory on self-regulation, that of the communicative theory of Habermas, and "experimentalist" approaches in deliberative democracy as currently expounded by J. Cohen, M. Dorf, and C. Sabel. On this, see infra III B, in particular notes 99, 101 and 105.

[16] As will be shown below (III and note 54), the point of calling our approach genetic is to emphasise the significance of the consequences associated with specific attention to the conditions for possibility of the conventional practice by which a social group produces norms, as well as attention to the epistemological rootedness of those conditions for possibility.

[17] On this, see infra III B 1 c.

[18] N. BOBBIO, "Sur le Positivisme", in Mélanges Paul Roubier, Paris, Dalloz, 1961, Vol. I, pp. 53-73, at pp. 61-62.

[19] L. GREEN, "Legal positivism", Stanford Encyclopedia of Philosophy, 2003, http://plato.stanford.edu/entries/legal-positivism, p. 2. In the same vein, L. Green notes elsewhere that although the earliest positivists, i.e., Bentham and Austin, had, in their approach to the nature of law, emphasised the idea that law is "the command of a sovereign backed by force, by the mid-twentieth century [...] this account had lost its influence among working legal philosophers; its emphasis on legislative institutions was replaced by a focus on law-applying institutions such as courts, and its insistence on the role of coercive force gave way to theories emphasising the systematic and normative character of law"; Ibid., p. 1.

[20] Ibid., pp. 67-68; N. Bobbio also embraces a position expressed by Carnelutti in 1951, according to which it is necessary to recognise, as do sociological theories, that "the decisive moment in the life of law is the judgement" (p. 68).

[21] Ibid.

[22] H.L.A. HART, The Concept of Law, Oxford, Clarendon, 2nd ed., 1994, p. 136.

[23] On this, and on the way this distinction, which emerged from the philosophy of ordinary language, made it possible to deepen the distinctions that Kelsen sought to establish (in particular between the point of view of causal explanation and the constructivist point of view that the science of law must embrace), see H.L.A. HART, "Kelsen Visited", in Essays in Jurisprudence and Philosophy, Oxford, Clarendon, 1983, pp. 286-ff.

[24] H.L.A. HART, The Concept of Law, o.c., at p. 138.

[25] Ibid., pp. 139-140. H. Hart is judicious in pointing out that the fact that our behaviour is often intuitive (and is therefore not the result of an explicit calculation performed in light of the rules) does not prevent it from constituting a true application of a rule. The proof of this is that when our behaviour is challenged, we seek to justify it by referring to the rule.

[26] Among the most interesting approaches within this recent effort at a critical destabilisation of the analytical positivist approaches deriving from H. Hart are certain Wittgensteinian analyses. See D. PATTERSON, Law and Truth, Oxford,

Oxford University Press, 1996; "Law's Pragmatism: Law as Practice and Narrative", Virginia Law Review, 1990, pp. 937-965; "Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement Under Article Nine", University of Pennsylvania Law Review, 1988, pp. 335-429. See also for a less critical perspective: B. BIX, Law, Language and Legal Determinacy, Oxford, Clarendon, 1993; PH. COPPENS, Normes et Fonction de Juger, Bruxelles, Bruylant, 1998; T. ENDICOTT, Vagueness in Law, Oxford, Oxford University Press, 2000.

[27] R. DWORKIN, Law's Empire, Oxford, Oxford University Press, 1986, p. 45.

[28] Ibid., p. 47.

[29] Ibid., p. 87.

[30] Ibid., p. 90.

[31] Ibid., pp. 255-256.

[32] Of course, this new form of the doctrine of natural law in no way reinstates belief in an a priori definable moral content or any sort of moral intuitionism, which in our day has little epistemological acceptability. On the other hand, it is also clear that any judgements about this political morality must have a claim to objectivity. If this condition is not satisfied, Dworkin's theory cannot maintain coherence.

[33] L. GREEN, "Legal positivism", o.c., p. 6. As R. Dworkin writes, "arguments of legal theory are best understood as arguments about how far and in what way past political decisions provide a necessary condition for the use of public coercion"; R. DWORKIN, Law's Empire, o.c., p. 96.

[34] Coleman observes that, "like Dworkin, the pragmatist believes that all legal standards and rules are in principle revisable - what they require or demand of us [is] subject to change". This amounts to one more way of acknowledging the impossibility of reducing meaning to propositional content and the interpretive nature of judicial norms and of law in general. From this perspective, says Coleman, "if we look at Dworkin's theory of legal content as instead an account of how judges should [and do] revise the law rationally when the law needs to be revised, then it is [...] a perfectly attractive and sensible theory"; J. COLEMAN, The Practice of Principle, o.c., pp. 171-172.

[35] "A related point, articulated first by Wittgenstein in his discussion of rule-following, is that the grasp of a rule -the ability to go on- cannot be exhaustively articulated in propositional form. Saul Kripke has explicated this point forcefully, showing that even the apparently hard-and-fast rule for our practice of addition cannot be stated in such a way that it uniquely determines what we all know to be the criteria of correctness for that practice. There is always the possibility of interpreting a propositional expression of the rule of addition in an indefinite number of non-standard ways. Since in fact we all converge in interpreting it in the same way, our understanding of the practice must go beyond propositional knowledge"; Ibid., p. 81.

[36] In this regard, Hart writes of 'soft positivism', Waluchow of 'inclusive positivism', and Coleman of 'incorporationism', in opposition to positivist approaches that defend an exclusivist interpretation of the rule of recognition and that thus view positivism's social thesis as a social source thesis.

[37] This is a feature that Hart takes over from Kelsen. If law exists only on the condition that it is practised comprehensively, the 'validity' of a rule is not a function of whether it is in effect practised and recognised by its ultimate addressee. It is only a function with respect to the practice of the officials in charge of its application. As Coleman writes, "while the rule of recognition can impose an obligation on officials

(to evaluate conduct by applying all those rules that satisfy the criteria of legality set forth in it) only in so far as it is actually practised, this conventional rule in turn grounds the claims of the rules validated under it to regulate conduct regardless of whether or not those subordinate rules are adhered to"; J. COLEMAN, The Practice of Principle, o.c., p. 78. Similarly, "acceptance of the rule of recognition from the internal point of view by officials is a conceptual requirement of the possibility of law; acceptance from the internal point of view by the bulk of the populace is neither a conceptual nor an efficacy requirement. Even if they characteristically do, the majority of persons need not as a conceptual matter adopt the internal point of view toward the behaviour by which officials validate law, nor toward the subordinate rules that are validated under the legal system. Of course, it may be desirable on efficiency grounds that a population treat law as legitimate or obligation-imposing, since fewer public resources might then be required to insure compliance";Ibid., p. 76.

[38] "If I can create a reason by adopting a pattern of behaviour as a norm, then it would seem that I can subsequently extinguish the reason that norm provides simply by withdrawing my commitment to it. Yet it is the nature of duties that those bound by them cannot voluntarily extinguish them as reasons"; Ibid., p. 90.

[39] Ibid., p. 91.

[40] "While Hart was right to identify the normative structure of the practice of officials, he was wrong [...] to conclude that the rule of recognition represents, in effect, a Nash equilibrium solution to a game of partial conflict"; Ibid., p. 97. Recall that we have directed a largely analogous critique against positivist theses, including those of J. Coleman; J. LENOBLE and M. MAESSCHALCK, Toward a Theory of Governance, o.c., p. 283. The reason is that at the time when we were framing this critique we based our analysis on Coleman's works prior to The Practice of Principle. Until that publication, Coleman had continued to defend an interpretation of the rule of recognition framed in the terms of "coordination convention". He nevertheless had already conceded with respect to his construal in terms of coordination convention, "I do not pretend that any of this is obvious or obviously correct"; J. COLEMAN, "Incorporationism, Conventionality and the Practical Difference Thesis", in J. COLEMAN, Hart's Postscript: Essays on the Postscript to the Concept of Law, Oxford, Oxford University Press, 2001, pp. 99-147, at p. 120. It is in pursuing his analysis, in light especially of the work of S. Shapiro and M. Bratman, that Coleman reformulated his argument in The Practice of Principle (on this, see The Practice of Principle, o.c., p. 94, note 29). Thus even if the terms of the critique of Coleman that we ourselves framed are no longer usable, it will be shown below (III) that its content and epistemological tenor continue to be valid and can be used in opposition to the reformulation for Hart's rule of recognition as proposed by J. Coleman in his latest work (as well as by S. Shapiro).

[41] D. LEWIS, Convention, Cambridge (Mass.), Harvard University Press, 1969.

[42] S. SHAPIRO, "Law, Plans and Practical Reason", Legal Theory, 2002, pp. 387-441, at p. 391.

[43] S. Shapiro recalls Lewis's definition of a convention: "A regularity R in the behaviour of members of population P in a recurring situation S is a convention if and only if, in any instance of S:

(1) everyone conforms to R;

(2) everyone expects everyone else to conform to R;

(3) everyone prefers to conform to R on condition that the others do, since S is a coordination problem and uniform conformity to R is a coordination equilibrium in S"
See D. LEWIS, Convention, o.c., p.58.
[44] The relevant reasoning is easy to follow. "Because (1) the choice of an authority structure is a recurring coordination problem; (2) legal officials manage to solve these problems; and (3) conventions are common solutions to such problems, it is plausible to infer that legal officials solve their recurring coordination problems via conventions [...]. The positivist argument concludes with the attempted demonstration that coordination conventions are able to create obligation. As we have seen, when a convention exists, general conformity to it generates expectations that similar behaviour will continue"; S. SHAPIRO, "Law, Plans and Practical Reason", o.c., at pp. 391-392.
[45] These games have a specific structure that is usually described using the model called "Battle of the Sexes" or "partial conflict game". An essential feature of this kind of game (as exemplified by a scenario in which a woman and her husband agree to attend an event together but must choose simultaneously and without collaborating, and where the man would prefer to go to a boxing match and the woman to the opera) is that the players have prior preferences such that "the players, although they have divergent interests, have more gain by agreeing than by disagreeing"; B. GUERRIEN, La Théorie des Jeux, Paris, Economica, 2002, 3rd ed., p. 54. And that agreement must translate into the adoption of an arbitrary convention as defined by Lewis. As Coleman states, "it would place an arbitrary and baseless constraint on our concept of law to stipulate that the social practice among officials necessary for the existence of a rule of recognition must always be representable as a game of partial conflict"; J. COLEMAN, The Practice of Principle, o.c., p. 94.
[46] Ibid., p. 95. As stated by S. Shapiro (whom Coleman cites), "to claim that the choice of an authority structure is a recurring coordination problem commits one to holding that the players will see the solution to the game as arbitrary in the sense just described; but is this assumption plausible? [...] this, I think, is rather doubtful; [...] in fact, I am not even sure that most Americans would view the United States Constitution as an arbitrary solution to a recurring coordination problem; my guess is that many would believe that they had a moral obligation to heed a text that had been ratified by the representatives of the people of the United States, regardless of what everyone else did"; S. SHAPIRO, "Law, Plans and Practical Reason", o.c., p. 393.
[47] J. COLEMAN, The Practice of Principle, o.c., p. 96.
[48] As M. Bratman notes, "shared intention, as I understand it, is not an attitude in any mind. It is not an attitude in the mind of some fused agents, for there is no such mind; and it is not an attitude in the mind or minds of either or both participants; rather, it is a state of affairs that consists primarily in attitudes (none of which are themselves shared intentions) of the participants and interrelations between those attitudes"; M. BRATMAN, "Shared Intention", Ethics, Oct. 1993, p. 107.
[49] "In SCA each participating agent attempts to be responsive to the intentions and actions of the other"; M. BRATMAN, "Shared Cooperative Activity", Philosophical Review, 1992, pp. 327-341, at p. 328.
[50] "In SCA the participants each have an appropriate commitment (though perhaps for different reasons) to the joint activity, and their mutual responsiveness is in pursuit of this commitment" (Ibid.).

[51] "In SCA each agent is committed to supporting the efforts of the other to play her role in the joint activity [...]. These commitments to support each other put us in a position to perform the joint activity successfully even if we each need help in certain ways" (Ibid.).
[52] J. COLEMAN, The Practice of Principle, o.c., p. 97.
[53] This is why we could also call this kind of normativity "transcendental", in the technical sense that Kant and Fichte gave the term. In this perspective, however, it is important to point out that these transcendental conditions are not to be understood as "ideal conditions for the producibility of norms" (which is the perspective adopted by Kant, who thereby restored a mentalist perspective; on this, see below) but rather what one might henceforward call "empirico-transcendental" conditions. Note too that such an approach, based on "empirico-transcendental conditions", addresses B. Zipursky's concern to adopt an epistemological position that "restores a place for conceptualism in law while avoiding the conservative and transcendental tendencies of discredited formalist theories"; B. ZIPURSKY, "Pragmatic Conceptualism", Legal Theory, 2000, pp. 457-485, at p. 459.
[54] By 'genetic' understanding, we mean an understanding that takes into account the conditions "for production" of the convention by which law is defined, i.e., the conditions for possibility of this convention. Note that this obviously does not imply abandoning the conventionality thesis as such. According to this thesis, "legal authority is made possible by an interdependent convergence of behaviour and attitude: what we might think of as an 'agreement' among individuals, expressed in a duty-imposing social or conventional rule (for Hart this is the rule of recognition)"; J. COLEMAN, The Practice of Principle, o.c., pp. 70-71. Conventionality implies that the existence of the rule of recognition not depend "on substantive (moral) argument"; J. COLEMAN, "Incorporationism", in J.COLEMAN, Hart's Postscript, o.c., p. 116. This conception of the authority of the rule of recognition also provides the explanation for the question of legality: "the key idea of the conventionalist picture is that this rule (the rule of recognition) provides reasons because it is adopted by individuals in order that it guide their behaviour: guide their behaviour by directing them to apply certain criteria of validity determining the conditions of membership of other norms in the category 'law' – thus enabling those norms to claim a power to provide reasons for acting in virtue of their being law"; Ibid., p. 118.
[55] In particular, to demonstrate the limitations of deliberative and communicative approaches in the theory of governance. On this, see J. LENOBLE and M. MAESSCHALCK, Toward a Theory of Governance, o.c.; Beyond Neo-Institutionalist and Pragmatist Approaches to Governance, o.c.
[56] "The particular form of interrelated responsiveness constitutive of shared intentions is not important for my purposes"; J. COLEMAN, The Practice of Principle, o.c., p. 97.
[57] Coleman's argument consists of refuting the false opposition that Dworkin sets up between interpretivism and conventionalism. As we have seen, however, Dworkin's difficulty in recognising that interpretivism is not incompatible with, and indeed implies, conventionalism reflects a deeper logical inconsistency that is of an epistemological nature. This inconsistency Coleman unfortunately does not explicate. Thus his argument consists of pointing out that Dworkin is himself, because of his epistemological mentalism, the victim of the semantic error that he believes he is exposing in positivist writings. We will return below (section 2 a) to this epistemological inadequacy of Dworkin's hermeneutic approach.
[58] M. BRATMAN, "Shared Intention", o.c., p. 107.

[59] J. COLEMAN, The Practice of Principle, o.c., p. 96.
[60] On this, see the works cited at note 55.
[61] O. FISS, The Civil Rights Injunction, Bloomington, Indiana University Press, 1978; "The Bureaucratisation of the Judiciary", Yale Law Journal, 1983, pp. 1442-1468.
[62] "So long as the laws which are valid by the system's tests of validity are obeyed by the bulk of the population this surely is all the evidence we need in order to establish that a given legal system exists"; H. HART, The Concept of Law, o.c., p. 114.
[63] "Of course, Coleman continues, it may be desirable on efficiency grounds that a population treat law as legitimate or obligation-imposing, since fewer public resources might then be required to insure compliance"; J. COLEMAN, The Practice of Principle, o.c., p. 76.
[64] On this distinction, see H. HART, The Concept of Law, o.c., p. 88.
[65] Ibid., p. 114.
[66] Ibid.
[67] Ibid., p. 117.
[68] Note the analogy of these reinforced anticipations with Bratman's observation in his analysis of shared intention: "in shared intention the constitutive intentions of the individuals are interlocking, for each agent has an intention in favour of the efficacy of an intention of the other; and the intentions of each involve a kind of reflexivity, for each has an intention concerning the efficacy of an intention of her own"; M. BRATMAN, "Shared Intention", o.c., p. 104. It may also be mentioned here that, as of 796, Fichte had constructed his philosophy of law (Rechtslehre) on the basis of such a construal of the compounded reflexivities that underlie any social interaction. On this, see M. MAESSCHALCK, Droit et Création Sociale chez Fichte, Louvain-la-Neuve, Institut Supérieur de philosophie, 1996.
[69] These four principal characteristics, Coleman indicates, drawing support here from the works of Quine, Sellars, Davidson and Putnam, are as follows: "(1) a commitment to semantic non-atomism; (2) the view that the content of concepts is to be explicated in terms of their inferential role in the practices in which they figure; [...] (3) the view that the way in which a concept figures in one practice influences its proper application in all others, and, in this sense, practices are to be viewed holistically; and (4) a commitment to the in-principle revisability of all beliefs"; J. COLEMAN, The Practice of Principle, o.c., p. 6. We are not considering here Coleman's fifth characteristic (however apt it may be), namely explanation by embodiment, which does not seem to us to be as relevant to our purposes as the others.
[70] O the link between semantic holism and the rejection of mentalism (that is, of a position which consists of thinking "of concepts as scientifically describable - psychologically real- entities in the mind or brain"; H. PUTNAM, Representation and Reality, o. c., p.7), see H. PUTNAM, Chapter 1, 'Meaning and Mentalism', pp. 1-18; M. MAESSCHALCK, Normes et Contextes, Hildesheim, Olms, 2001, pp. 242-ff.
[71] J. COLEMAN, The Practice of Principle, o.c., p. 6.
[72] As J. Coleman suggests, we will leave the question "open whether the whole semantic system enters into the meaning of every concept, proposition, and belief"; J. COLEMAN, The Practice of Principle, o.c., p. 7, note.
[73] We will also leave on one side the question of the criteria of revisability which could possibly be considered as belonging to the specific (empirical, evaluative, etc.)

nature of the various possible representations; J. COLEMAN, The Practice of Principle,o.c., p. 9, note 11.

[74] In this sense, therefore, Putnam ultimately restores a schematic approach to normative judgement; see, on this, M. MAESSCHALCK, Normes et Contextes, o.c., p. 312; J. LENOBLE and M. MAESSCHALCK, Towards a Theory of Governance, o.c., p. 304.

[75] That is, the fact that the conditions of possibility, by reason of being effected in reality, are a function of an exterior, as required by the rejection of mentalism implied by holism.

[76] Thus, as we have seen, M. Bratman's insight about the play of this conditionality is valid. However, since he does not underpin it with the epistemological foundation of the reflexivity of the operation of judgement, he overlooks some of the conditions entailed by the realisation of a Cooperative activity, including, for instance, the condition that makes possible the "reflexive" return of each player on her or his own perception of the context. These conditions must be reflected upon both as regards the institutional setting, which must guarantee that the mechanism for deliberative negotiation provides for effective integration of various perceptions, and as regards the capability of each intentionality of ensuring the adjustment of the perception it deploys.

[77] The term 'inferential' indicates this reflexivity is not "retrospective" and is not enabled by means of a rule 'stored' in the minds of the parties. The reflexive operation is not deductive; rather, it operates in 'inferential' mode, that is, as a condition for the possibility of meaning.

[78] Determining, by means of one's reason, on an action to be accomplished means wishing to 'transform' the world in order to solve a problem, that is, wishing to 'rationalise' the world. But, as is immediately intuitively clear, wishing to rationalise the world implies an existing 'culture', that is, an existing belief or adherence to a way of life: a life guided by reason. The transformation of the world that the action to be accomplished implies is only possible because one has accepted that the world can and should be rationalised. As Fichte says, any operation of reason causes an experience of shock (Anstoss) that derives from the impossibility of its producing effects in reality other than by relying on something that is not it. It is not reason itself that justifies belief in its own capability of transforming reality. Rather the reverse: the application of reason in the world depends on belief in its potential fulfilment. The effectuation of reason relies, in the last analysis, on belief, on insight into the power of reason to transform reason to transform reality. The power of reason thus refers back reflexively to an exterior that is not itself.

[79] That is why, as we have already indicated (see above note 53), we could also call an approach of this kind to law "transcendental", in the technical sense that Kant and Fichte gave this term. Note also the extent to which this shift in relation to the positivist approach constitutes a shift analogous to the one that Putnam identifies as being reflected epistemologically in the "holism of meaning" in relation to the "positivist attempts to show that every term we can understand can be defined in terms of a limited group of terms (the 'observation terms')"; H. PUTNAM, Representation and Reality, o.c., p. 8.

[80] It is true that Dworkin's position was less clear in Taking Rights Seriously [London, Duckworth, 1977]. On the evolution in Dworkin's theory of one right answer, see: J. COLEMAN, "Truth and Objectivity in Law", Legal Theory, 1995, pp. 48-54.

[81] Note that this description by Putnam of Dworkin's position is corroborated by something Dworkin himself says explicitly in Law's Empire [o. c., p. 412]. Having

said that he had obviously never "devised an algorithm for the courtroom", Dworkin continues as follows: "I have not said that there is never one right way, only different ways, to decide a hard case".

[82] That is, the kind of bivalence associated with the thesis "that for an answer to be right just is for it to be the answer that is best supported by reasons"; H. PUTNAM, "Are Moral and Legal Values Made or Discovered. Replies to Brian Leiter and Jules Coleman", Legal Theory, 1995, pp. 69-81, at p. 76.

[83] H. PUTNAM, "Are Moral and Legal Values Made or Discovered", o.c., pp. 76-77. This questioning by Putnam of the principle of bivalence obviously does not imply his acceptance of a sceptical position. On this score, Putnam, while critiquing Dworkin philosophically, shares his opposition to Rorty, or to what Dworkin somewhat inappropriately calls "legal pragmatism"; Law's Empire, o.c., p. 151. This shared opposition to a "nihilist" scepticism also explains why Putnam makes the following statement about Dworkin: "far from seeing himself as more 'metaphysically realist' than Rorty, Dworkin, if I am right, would see himself as more metaphysically innocent (in a good sense) than Rorty; but Dworkin's innocence is obscured by his almost complete failure to discuss any of the metaphysical issues that Coleman lists", i.e., issues relating to the theory of truth.

[84] This re-formalisation exists in fact in other forms, which Coleman has clearly perceived. As we know, Coleman accepts that law has an interpretive dimension. He explicitly acknowledges the descriptive light shed by hermeneutic approaches. Coleman points out that Dworkin undoubtedly provides an adequate theory of the revision of the meanings of law by judges. But even in connection with the description of the function of judgement, Coleman wishes to radicalise the hermeneutic approach. Dworkin, Coleman says, ascribes to hermeneutics unwarranted powers for determining a single meaning. With his theory of the one right answer, he underestimates the significance of indeterminacy in law. Instead of assuming a holistic rationality in law, as Dworkin does, it would be preferable to ascribe to law a simply local or partial rationality. As Coleman says: "Understanding what the law is or means is not the same kind of project as understanding an individual's behaviour – linguistic or otherwise. In order to attribute content to law, we do not have to treat all the law as consistent or as satisfying all the basic rules of deductive logic. Again, local rationality may be enough. Local rationality certainly fits better with the phenomenology of judging. Even if Dworkin is right that judges must posit the working hypothesis that there are rights answers to legal disputes, judges find themselves, more often that Dworkin acknowledges, adopting the view that in fact there is no determinate legal answer to the case at hand"; J. COLEMAN, The Practice of Principle, o.c., p. 168. Dworkin's description of legal hermeneutic poses still other difficulties, including that of accounting for the role of "authoritative statements", which in Dworkin are merely "raw materials for the theory of legal content"; Ibid., p. 166.

[85] M. MAESSCHALCK, Normes et Contextes, o.c., p. 179.

[86] Another way of identifying this epistemological inadequacy in Dworkin is to point to the links between his thinking and Quine's theory (to which, in fact, he makes explicit reference at least twice in Law's Empire). As Putnam rightly notes, Quine's position ends by ignoring the link between "meaning holism" and "the holistic character of belief fixation"; H. PUTNAM, Realism with a Human Face, Cambridge (Mass.), Harvard University Press, 1990, p. 283.

[87] As we have seen, acknowledging an autonomous dimension to the interpretive activity of the authorities in charge of applying the rules of law (including the rule of

recognition) has become a truism to which everyone in the field of theory of law makes obeisance.

[88] This turn of phrase was coined by M. MAESSCHALCK, Normes et Contextes, o.c., pp. 180 and 244. On this, see J. LENOBLE and M. MAESSCHALCK, Toward a Theory of Governance, o.c.

[89] Certainly, numerous authors have already incorporated a limit to rationality at that level of formality (for example, Gödel's theorem; procedural rationality in Habermas's sense, allowing for an ever possible renewal of the argument; and procedural rationality in H. Simon's sense). But the limitations of the formalism of reason also exist on a second level and take on a meaning different than that of "limitations in cognitive capabilities". To limit oneself solely to the formal process of the justification for my rule for action is not sufficient to take into account this rule's conditions for semantic productivity.

[90] By referring to evidence, this critical challenge does not intend to contest the conventional nature of the social practice by which the 'trust' and the 'effective respect' accorded to the official authorities in a social group are constructed. It seems to us clear that, for the purposes of the conceptual analysis of law, it is not a question of subjecting law to dependency on some outmoded form of belief in natural law which would seek to define the conditions of legitimacy of the social contract. The issue here is of an entirely different nature.

[91] J. COLEMAN, The Practice of Principle, o.c., p. 180.

[92] Ibid., p. 71.

[93] As was seen above, the optimisation, that is, the extension of representations, does not mean the search for an illusory "optimal representation".

[94] M. BRATMAN, "Shared Cooperative Activity", o.c., p. 339.

[95] As was seen above, no majority practice of respect for an institutional structure can be analysed outside the intention and the perception of a form of common life deemed to be rationally acceptable. We are also in a position to see that Dworkin correctly perceives this inadequacy in positivist thinking among the positivists, even though, because of his own epistemological inadequacy, he fails to construe it adequately. It is just this inadequacy of the positivists that Dworkin seeks to reveal when he says that every legal system is a form of institutional morality. In so saying, his aim is quite rightly to point out that ultimately the existence of law does not depend on a factual practice independent of an intended acceptable way of life, a mode of collective action respecting good reasons to act. But in just the same way that it is astonishing for Coleman to fail to apply his own model of "shared Cooperative activity" to the practice of "effective respect for law by the majority of the population", it is equally astonishing for Dworkin to fail to apply his 'interpretivist' model to the determination of this institutional morality. Dworkin takes as given the institutional morality that it would fall to judges to adjust interpretively in light of the constraints of reality. It is this that accounts for Dworkin's somewhat naïve ascription of omnipotence to the judge in the judge's mission of "saying" what the best possible representation of institutional morality in a constantly changing context would require.

[96] Note that the idealisation characteristic of the positivist approach recalls, for all their differences, the kind of "mentalist" belief that the idealised and illusory omnipotence Dworkin assigns to the judge approximates. Moreover, even though our respective arguments follow different paths and end in distinct approaches to the 'normative' dimension of the concept of law, the observations made here seem to us to have a certain affinity with Stephen Perry's insights in revealing a kinship between the 'normative' presuppositions of the approaches to the concept of law developed

by Hart and Dworkin; ST. PERRY, "Interpretation and Methodology in Legal Theory", in A. MARMOR, Law and Interpretation: Essays in Legal Philosophy, Oxford, Clarendon, pp. 97-135; ST. PERRY., "Holmes v. Hart: The Bad Man in Legal Theory", in ST. BURTON, "'The Path of the Law' and Its Influence", Cambridge, Cambridge University Press, 2000, pp. 158-196.

[97] J. COLEMAN, The Practice of Principle, o.c., p. 145. It is not very significant for our purposes here that Coleman, without specifying other conditions necessary to the exercise of the conduct guidance function that defines law, postulates that these conditions do not prevent the rule of recognition from taking an "inclusive" form which would include "political morality" as a condition of legality [pp. 146-147].

[98] Ibid.

[99] In these "reflexive" approaches to self-regulation, it would appear that everything takes place as if the "capacitation" of players in a "sub-system" is assumed to exist on its own, and thus assumed to be inscribed within the sub-system, a little like the way Teubner, following Luhmann, assumes "codes" to be "given". To assume that merely convening existing players suffices to create the conditions for developing a solution suited to the setting implies that the determination of the solution to the question of "balance" between the sub-system and the context would result in simply applying rules deployed mentally by players in the subsystem. Such a mentalist approach to action entails a denial of the reflexivity that Luhmann's functionalist approach was intended to preserve. For some neo-institutionalist economic approaches, see also: J. LENOBLE and M. MAESSCHALCK, Toward a Theory of Governance, o.c., Chapter 1; M. MAESSCHALCK, Beyond Neo-Institutionalist and Pragmatist Approaches to Governance, o.c. , Section 2, § 2.2.

[100] Ibid., Chapter 3.

[101] In the same vein, they also have the merit of taking into account not just the parallel evolution of the discussion in the social sciences, but also the evolution of positive law. Present-day reflection in the social sciences on the necessary revisiting of traditional forms of coordination by rules has been reflected in significant legal transformations in our way of constructing rules in numerous important sectors where the difficulty of constructing collective choices is more palpably felt. These transformations are directly associated with the search for legal mechanisms that would provide for better cooperation among decentralised players. This accounts for recent reflections, mainly in the scholarly literature in English, on the phenomenon of the contract, especially the line of thought opened up by relational contract theory initiated by I.R. MACNEIL ["Contracting Worlds and Essential Contract Theory", Social and Legal Studies, 2000, pp. 431-438]. An exemplary application of this approach may be found in the current restructuring of the regulation of the public sector. On this, see J. FREEMAN, "Collaborative Governance in the Administrative State", UCLA Law Review, 1997, pp. 1-99; J. FREEMAN, "The Contracting State',Florida State University Law Review, 2000, pp. 155-214; J. FREEMAN "The Private Role in Public Governance", N.Y.U. Law Review, 2000, pp. 543-675; P. VINCENT-JONES, "The Regulation of Contractualisation in Quasi-markets for Public Services",Public Law, 1999, pp. 304-327; P. VINCENT-JONES, "Contractual Governance: Institutional and Organisational Analysis", Oxford Journal of Legal Studies, 2000, pp. 317-351; see also: C. SCOTT, Regulation, Dartmouth, Ashgate, 2002.

[102] As was observed above, many American jurists thought that they had found in the renewal of legal activism a way of compensating for the welfare state's

weaknesses in ensuring the "effectuation" of the fundamental rights inscribed in the Constitution.

[103] This proposal for decentralisation does not necessarily result in the valuing of the mechanism of the market on its own. Economists themselves have increasingly become aware that that mechanism must often be accompanied by other institutional mechanisms in order to better guarantee effective cooperation by the various actors involved in the collective action needing to be regulated.

[104] Or for that matter, in a more communitarian tradition, the heroisation inspired by Gadamer and advanced by M. J. PERRY [Politics and Law, Oxford, Oxford University Press, 1988, pp. 152-ff.], who, as Habermas points out, ascribes to "the constitutional judge in the role of a prophetic teacher, whose interpretation of the divine word of the Founding Fathers secures the continuity of a tradition that is constitutive of the community's life"; J. HABERMAS, Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtstaats; transl. by W. REHG., Between Facts and Norms: Contributions to a Discourse, Theory of Law and Democracy, Cambridge (Mass.), MIT Press, 1996, p. 258.

[105] That is, an approach to democratic will-formation that "does not draw its legitimating force from the prior convergence of settled ethical convictions", but from "on the one hand, the communicative presuppositions that allow the better arguments to come into play in various forms of deliberation and, on the other, procedures that secure fair bargaining conditions"; Ibid., pp. 278-279. This perspective is even clearer in the "experimentalist and multi-centred" approaches to forms of production of norms developed, on the basis of collective learning theories, by M. Dorf, J. Cohen, and C. Sabel, who very clearly perceive the shortcomings of traditional approaches to our modes of governance and of production of norms; see M. DORF and CH. SABEL, "A Constitution of Democratic Experimentalism", Columbia Law Review, 1998, pp. 267-473; J. COHEN and CH. SABEL, "Directly-Deliberative Polyarchy", in CH. JOERGES and O. GERSTENBERG, Private Governance, Democratic Constitutionalism and Supranationalism, pp. 1-30, Proceedings of the COST A7 seminar, European Commission, 1998.

[106] H. PUTNAM, The Collapse of the Fact/Value Dichotomy and Other Essays, Cambridge (Mass.), Harvard University Press, 2002.

A Speech Act Analysis of Judicial Decisions

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I. Introduction

According to the theory of speech acts, speech is a kind of action. He, who says something, does something. Certainly, when a judge or a court makes a decision, he or it says something.[1] He performs some (locutionary) acts like uttering or writing some sentences.[2] However, there is something further he does, namely, by uttering or writing some sentences in the appropriate context, he makes a judicial decision. By a judicial decision I mean an act by a judge adjudicating a case according to the law, with the authority that the state and the legal system confer on him. In a judicial decision the judge says something about the law, the facts of the case, and the consequences that the legal system imputes to the parties, in the most cases, the plaintiff or the prosecutor and the defendant. How does the judge saying the things he does bring it about that he has adjudicated a case? More specifically, what kind of speech acts, or more precisely, illocutionary acts,[3] does he perform, and what is their relation to the adjudication?

As these questions indicate, the aim of this paper is to give an account of judicial decisions from the point of view of the theory of speech acts. This account can contribute to two different projects at the same time. On the one hand, it can help to explain the nature and the structure of judicial decisions, as a set of sentences uttered by the judge which constitute a set of speech acts. The ontology involved in a judicial decision looks quite simple at the first glance. It seems to be the same ontology implicit in every instance of a human act of speaking: a set of sounds or strings, articulated as sentences, pronounced or written respectively by a person or group of persons. However, this ontology is in fact very complex. In a judicial decision the speaker, that is to say, the judge, has a special status and performs a special function. We, the group of citizens of the state, have conferred on the judge this special status: we have given him the power to solve legal disputes according to the law of the state. In John Searle's term, being a judge is having a certain status function, whose reality consists in a broad agreement that a person so designated, by certain performances in an appropriate context and in accordance with appropriate rules, makes certain changes to social, and, in this case, specifically legal, reality.[4]Consequently, the sentences pronounced or written by the judge also have special status functions in the institutional framework of the law. One relevant question for this paper is what these status functions are. The answer to the question about what the judge does

in a judicial decision or what kind of illocutionary acts the judge performs in a judicial decision, can provide an answer to this question about the status functions of the sentences involved in a judicial decision. This promises to be a fruitful way to determine what a judicial decision is and what kind of structure it has.[5] In addition to this, as we will see, a speech act analysis can explain the criteria used to evaluate judicial decisions. This analysis will make clear that a judicial decision is a highly complex logical sequence of illocutionary acts, or to put it in a more precise way, of speech acts with several illocutionary forces.[6] Consequently, it is possible to evaluate these speech acts, from a variety of points of view: truth or falsity, correctness or incorrectness, and validity or invalidity.

On the other hand, this account can also contribute to the theory of the speech acts by providing an analysis of speech acts which occur in the highly institutionalized context of judicial decisions. Such an account can contribute to how the theory of speech acts explains the relationship between language and reality, and in particular how by having certain status functions certain speech acts can not just reflect but change reality.[7]

To achieve this aim, I will explain what kind of illocutionary acts are involved in a judicial decision and what are the necessary and sufficient conditions required for a non-defective performance of a judicial decision. To facilitate my exposition, I will use a particular judicial decision as an example. In my analysis I will use the well known judgment by the New York Court of Appeals in the case Riggs v. Palmer. It will be possible to generalise only some considerations drawn from the analysis of this case. For this reason, I will try to clarify how various considerations will change in other typical cases.

The plan of this paper is the following. In section (I), I will summarise the facts, the justification for, and the decision of the New York Court in the case Riggs v. Palmer. In section (II), I will explain the logical structure of a judicial decision. I will show that two premises and the decision are the structural elements of a judicial decision. In section (III), I will explain the difference between the propositional contents and the illocutionary forces that the utterances of these three structural elements of a judicial decision involve. In section (IV), I will briefly summarise the concepts of the theory of the speech acts that I will use in the final analysis. In section (V), I will use these concepts drawn from the theory of the speech acts to analyse the three basic elements of a judicial decision.

II. THE JUDICIAL DECISION IN THE CASE RIGGS V. PALMER[8]

1. *The facts*

On the 13th of August 1880, Francis B. Palmer made his last will and testament, in which he gave small legacies to his two daughters and the remainder of the estate to his grandson, Elmer E. Palmer. Elmer Palmer knew of the provisions made in his favour in the will. He also knew that his grandfather wanted to revoke such provisions. Elmer Palmer wilfully murdered him in order to obtain the immediate possession and enjoyment of his property. For this crime he was tried, and was convicted of murder in the second degree. At the time of the commencement of the action leading to the New York Court's decision, he was serving out his sentence in the state reformatory. In spite of these facts, he claimed the property, that is to say, the legal recognition of his right to the inheritance.

2. *The justification of the decision*

The question for the Court in this case was whether Palmer had the right to this property. To answer this question, in its reasoning, the Court developed an argument in three steps. First, it determined what legal rule provided the solution for the case. The answer was not obvious. The Court recognised that, according to a literal interpretation of the statutes regulating the making, proof and effect of wills, and the devolution of property, due to the fact that the will had been in force and had not been modified, the law ordered that the property be given to the murderer. The statutes did not prescribe an exception, according to which, if the inheritor murdered the testator, he lost the title to receive the property. Nevertheless, the Court said that this solution was not correct. The Court gave an alternative interpretation of the legal system. It said that the purpose of the statutes,[9]the intention of the law-makers,[10] the application of a rational interpretation,[11] and the principle[12] or general maxim of the common law, according to which: "No one shall be permitted to profit by his own fraud, or to take advantage of this own wrong, or to acquire property by his own crime", which was applied in the precedent case New York Mutual Life Insurance Company v. Armstrong, allowed the conclusion that: if the inheritor had murdered the testator, he would have no title to the property.

Now in a second step, the Court verified that Palmer had murdered the testator, that is to say, his grandfather.

According to the Court, these reasons led to the following decision (the third step of the reasoning): the defendant Palmer could not possess any of the property as heir.

III. THE LOGICAL STRUCTURE OF A JUDICIAL DECISION

Any judicial decision has two parts: the justification and the decision. Now, the justification has two dimensions: one internal, the other external. The internal justification consists of the reasoning whereby a conclusion leading to the decision is inferred from the supporting premises, whereas the external justification is the reasoning which supports the premises that make up the internal justification, and from which the conclusion follows.[13]

In this paper I will focus in the internal justification. In a simple case, the internal justification has the following structure:[14]

(1) (x)(Cx →LCx)
(2) Ca
(3) LCa MP (1, 2)

This corresponds to the structure of a syllogism, namely, it involves the movement from a major premise and a minor premise to a conclusion. The major premise (1) is a general rule. According to this rule, the judge has the power and ought to impute[15] the legal consequence (LC) to every agent (x), whose actions fulfil the conditions (C). Correlatively, this rule also establishes that if an agent (x) performs the action described in (C), the legal consequence (LC) is to be imputed to him. The judge asserts this general rule as a legal interpretation of a statement or a set of statements belonging to the sources of the law (the constitution, the statutes, a contract or a precedent). The minor premise (2), meanwhile, consists of an assertion about a particular. By means of this assertion the judge affirms that, according to the evidences, an action or a set of actions of the agent (a) took place and fulfilled the conditions mentioned in the antecedent of the general rule (1). Finally, the decision (3) is a particular rule, which follows by modus ponens from the major and the minor premises. According to this rule, the judge has the power and ought to impute to the agent, who performed the action (a), the legal consequence (LC) established by the general rule (1). Correlatively, this rule also establishes that the agent (x), who performed the action (a), prescribed by the general rule (1), is subject to the imputation of the legal consequence (LC).

However, the decision (3) goes further. In the decision (3) the judge also orders other officials to impute or imputes himself the legal consequence (LC) to the agent (a). In criminal law, for instance, a typical decision entails also an order of imprisonment. In torts law, the decision involves also the declaration of liability of the agent and the order to pay for the damages he caused. In other cases, like contract law cases or divorce cases, the decision

entails a declaration about the legal status and the legal relationship of the parties. Finally, in some constitutional cases (especially in the continental European system of constitutional review) the decision involves the declaration about the legal status of a legal rule, that is to say, the constitutionality or unconstitutionality of a legal rule.

This schema can explain the logical structure of the judgment by the Court of Appeals of New York in the case Riggs v. Palmer. In this case, premise (1) is the general rule according to which the judge has the power and ought to impute the legal consequence: not to give the property (¬G) to any inheritor (x) having murdered the testator (M). This rule follows from what the Court says in the judgment by means of a chain of restatements of its original sentence:

(i) The Court states the major premise of its reasoning by means of the following sentence: "one cannot take property by inheritance or will from an ancestor or benefactor whom he has murdered".

(ii) It is possible to restate this sentence in the following way without introducing changes in its content: if an inheritor has murdered the testator (an ancestor or benefactor), then the property conferred to him by inheritance or will is not to be given to him.

(iii) However, it is necessary to understand this last sentence in the context of the institutional framework of the law and the state. The law of the state confers on the judge (in this case the Court of Appeals) the institutional authority to give or not to give the property conferred by inheritance or will. Taking this into account, then a further statement runs as follows: if an inheritor has murdered the testator (an ancestor or benefactor), then the judge is empowered by the law and ought not to give to him the property conferred to him by inheritance or will.

(iv) The last step arrives to the sentence: the judge has the power and ought to impute the legal consequence: not to give the property (¬G) to any inheritor (x) having murdered the testator (M).

The logical form of this last sentence is the major premise: (x)(Cx " LCx)

Premise (2) is the assertion that, according to the evidence, Palmer (p) murdered the testator (Mp). The Court states this premise when it says: "He [Elmer Palmer] knew of the provisions made in his favour in the will, and, that he might prevent his grandfather from revoking such provisions, which he had manifested some intention to do, and to obtain the speedy enjoyment and immediate possession of his property, he wilfully

murdered him by poisoning him" [Emphasis added].

From these premises the conclusion follows by modus ponens, namely, the judge ought not to give the property to Palmer (¬Gp). This conclusion is not explicit in the judgment of the Court, but could be inferred from its decision. The decision (D) of the Court is the following:

(D) "that the devise and bequest in the will to Elmer be declared ineffective to pass the title to him; that by reason of the crime of murder committed upon the grandfather he is deprived of any interest in the estate left by him".

Let us express the logical form of this decision by means of the sentence (IWp). From this decision, and with the understanding of some additional elements of the legal institutional framework, it is possible to infer the conclusion of the internal justification, according to which the Court ought not to give the property to Palmer (¬Gp). The declaration of the ineffectiveness of the devise and bequest in the will to pass the title to Elmer Palmer is the way in which the Court fulfils the obligation to not give the property to him. In order to fulfil this obligation the Court has to declare that the devise and bequest in the will to Elmer is ineffective to pass the title to him. Then, it looks like in this case the Court not only achieves the conclusion that it ought not to give the property to Elmer Palmer (¬Gp), but also does not give him the property in the same judgment, by means of the declaration of the ineffectiveness of the devise and bequest in the will to pass the title to him. If we denote this last move with (Ix) (Ineffectiveness of the will), then we have the following structure:

(1)	(x)(Mx → ¬Gx)	
(2)	Mp	
(3)	¬Gp	MP (1, 2)
(4)	(x)(¬Gx → IWx)	
(5)	IWp	MP (4,3)

This argument includes premise (4) to support the conclusion (5). Premise (4) makes explicit the legal rule according to which, if any judge wants not to give the property to an inheritor, it ought to declare the ineffectiveness of the devise and bequest in the will to pass the title to him. The conclusion (5) follows from (4) and (3) by modus ponens and makes it explicit that the Court has to declare the ineffectiveness of the will in the case of Elmer Palmer. This conclusion is the support for the decision (D) of the New York Court of Appeals that in deed declares the

ineffectiveness of the will to pass the title to Elmer Palmer. The sentences (3), (4) and (5) are implicit in the reasoning of the Court. They do not appear in the text of the judgment but could be inferred from (1), (2) and the decision (D).

IV. THE PROPOSITIONAL CONTENT AND ILLOCUTIONARY FORCE OF THE PREMISES AND THE DECISION

This reconstruction of the logical structure of judicial decisions makes clear that a judicial decision implies at least three locutionary acts: the utterance or writing of the premises (1) and (2), and the decision (3). It also clarifies what the propositional content of these acts is.[16] In the case Riggs v. Palmer, the structure of the judicial decision is more complex. It is made at least of the following (explicit and implicit) premises, where now I indicate, at least in part, the force with which they are put forward, using the turnstile to indicate assertion, '⊨':

⊨	(1)	(x)(Mx → ¬Gx)	
⊨	(2)	Mp	
⊨	(3)	¬Gp	MP (1, 2)
⊨	(4)	(x)(¬Gx → IWx)	
⊨	(5)	IWp	MP (4,3)

It is necessary to add also the decision, where I use 'd!' to indicate, in Searle's terms, a declarative speech act, which we will discuss further below (what we might express in ordinary English with a kind of third person imperative, "let it be that this very act makes it the case that," though the effect can be achieved in context without the explicit statement of the intent and will require in addition that the institutional setting be appropriate):

d! (6) IWp

The speech act indicated in (6) is different from that in (5). The assertion of (IWp) states an obligation: the obligation of the Court to declare the ineffectiveness of the will to transfer the property to Palmer. Meanwhile, the speech act indicated in (6) which is performed using the very same sentence as in (5) makes a declaration: the declaration that in deed the will made by his grandfather is ineffective to pass the property to Palmer.

This shows that a judicial decision involves a logical sequence of speech acts. The final speech act is the decision (D). This decision is justified by means of an argument leading from premise (1) to a conclusion (5), through

a finite number of premises (2), (3) and (4). Nevertheless, this structure does not make it explicit what kinds of illocutionary act the judge performs by uttering the premises (1) and (2), and the decision (D) (Let us remember that (3) (4) and (5) are implicit). It is not obvious that these three acts are just assertions. Indeed, it is clear that, in uttering the decision (D) the judge is not merely reporting that the legal consequence of the rule (1) is or will be imputed to the agent. He is actually imputing the legal consequence by a declaration of the ineffectiveness of the will to pass the title to Elmer Palmer. This declaration has a consequence for the legal status of the agent. It not only settles something epistemically, it brings something about, it changes the world by determining the heretofore undetermined legal status of the property in question. In the case of Palmer, the consequence is that he does not have a legal right to the property, or, put in another way, that the legal system does not recognize his right to this property and, correlatively, it recognizes the plaintiffs to have a right to it. In other kinds of cases, the judge performs in its decision analogous sorts of declarations. In criminal law cases, e.g., the judge may convict the defendant of a crime and order his imprisonment. In contract law or torts law cases, the judge may declare there to be a state of legal relations between the parties and give, for instance, compensation for damages.

In uttering premise (1) the judge is not merely reporting that the rule, (x)(Mx " ¬Gx), is a legal rule. He is also stating that this rule is a correct legal interpretation of a sentence or a set of sentences belonging to the sources of law. The judge usually builds the major premise after performing a (literal, teleological, historical or systematic) interpretation of a provision or a set of provisions from the constitution or the statutes, or a sentence or set of sentences from other kinds of sources of law. For instance, in the case Riggs v. Palmer, the New York Court of Appeals gives arguments for and against two different interpretations of the law that could be applied as premise (1). The first interpretation is the rule (x)(Mx " Gx), according to which, in cases of murder of the testator by the inheritor, the judge ought to assign him the property. The Court speaks about the hypothesis when it says: "It is quite true that statutes regulating the making, proof and effect of wills, and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer". The second interpretation is the rule (x)(Mx " ¬Gx) that the Court applied as major premise to the case. According to the Court, on the basis of the arguments from the purpose of the statutes, the intention of the law-makers, the application of a rational interpretation, and the principle or general maxim of the common law, according to which: "No one shall be permitted to profit by his own fraud, or to take

advantage of this own wrong, or to acquire property by his own crime", it is the second and not the first one of these which is the correct interpretation of the law. For this reason, the Court applies as major premise of the case the rule according to which: "one cannot take property by inheritance or will from an ancestor or benefactor whom he has murdered".

There are cases, like Riggs v. Palmer, in which it is clear that this rule did not even exist before in the legal system. Thus, the judge, in exercising his authority, is creating a new legal rule. This new rule is also a precedent for future cases. In addition to this, the judge is also applying this rule to the case. In this sense, he is taking it as the legal basis for resolving the case.

In uttering premise (2) the Court is of course asserting something about the occurrence of the action (a), that is to say, the state of affairs described in the rule (1). There are cases in which the judge is the fact finder and cases in which the jury is the fact finder. Whoever plays this role is doing something further in uttering premise (2). The judge or the jury is creating an institutional fact that entitles the judge to impute the legal consequence to the agent and that is a precedence for future decisions. The occurrence of the action (a) in the world is a natural fact. However, when the fact finder asserts in a trial that the action (a) occurred in world and that it is proved, it creates an institutional fact that has various effects in the law. For instance, in the decision in Riggs v. Palmer the Court takes the fact that Palmer murdered the testator as a fact that has been proved in the criminal procedure in which Palmer has been found guilty.

There are further complexities. In the cases of premises (1) and (2), the judge assigns a function to the utterance of these statements,[17] leading to specific consequences. Both premises accomplish the function of creating institutional facts,[18] which the judge uses as a basis for the justification of the judicial decision and which modifies the legal system. In this sense, the creation of these institutional facts and the role they play presuppose a particular kind of collective intentionality[19] and certain constitutive rules. There is a qualitative difference between the fact that a professor utters the rule (x)(Mx " ¬Gx) as an interpretation of the sources of the law in the classroom and the fact that the Court of Appeals of New York utters it as main premise for the justification of the decision in the case Riggs v. Palmer. The second case makes a legal difference, the first does not. It is like the difference between a commentator at a football game judging there has been a foul and the umpire so judging. The second case presupposes a whole institutional network of rules and authorities correlated by means of collective intentionality. There is a Court of Appeals of New York because there

is a set of statutes creating it, establishing the procedures for the trials and the substantive rules to resolve cases. Now there are such kinds of statutes because the Constitution created a Congress and empowered it to create them. Naturally, the Constitution also sets conditions for the procedures for the creation of the statutes and establishes some restrictions on the exercise of powers by the Congress, for instance, by establishing certain basic rights. Finally, the Constitution presupposes also the existence of a rule of recognition[20] or a basic norm[21] or a certain kind of appropriate we-intention[22] about having a state and a legal system among the sovereign people of the country. A rule, a norm or the appropriate set of we-intentions of this kind can justify the rule according to which we ought to obey what the Constitution commands or forbids. This institutional network is behind a constitutive rule[23] according to which, for instance, the interpretation of the statutes performed by the Court of Appeals of New York in the context of the trial leading to the resolution of a particular case like Riggs v. Palmer counts as main premise for the justification of the decision and as precedence for future cases.[24]

This institutional network can also explain why, concerning the premise (2), there is a difference between the fact that somebody says that Palmer poisoned his grandfather and the fact the Court of Appeals of New York declares that this fact was proved and counts as murder. Uttering premise (2) there is more than a mere assertion.

Now, this first approach shows that the reconstruction of the logical structure is not enough to achieve a complete analysis of a judicial decision. This analysis should entail also an explanation of what kind of illocutionary acts the judge performs by uttering premises (1) and (2) and the decision (D). I will develop this explanation in section V. However, before I turn to that I would like to summarise some concepts of the theory of speech acts that I will apply in the following section.

V. SOME ELEMENTS OF SPEECH ACT THEORY

An analysis of the illocutionary acts that are the elements of a judicial decision presupposes to state a taxonomy of illocutionary acts. Any taxonomy must acknowledge, first, that there are at least five types of illocutionary acts and, second, that they may differ in along at least seven dimensions of illocutionary force, and in direction of fit and perlocutionary effect. On the one hand, the types of illocutionary acts are: assertives (e.g., a statement), directives (e.g., an order), expressives (e.g., thanks), commissives (e.g., a promise) and declaratives (e.g., a firing).[25] On the other hand, according to Searle and Vanderveken, the seven dimensions of

illocutionary force are: the illocutionary point, the degree of strength of the illocutionary point, the mode of achievement, the propositional content conditions, the preparatory conditions, the sincerity conditions and the degree of strength of the sincerity conditions.[26] It is necessary to add the satisfaction conditions and the intended and actual perlocutionary effects to these components.

The illocutionary point is the basic component of the illocutionary force. It is the point or purpose which is internal to every illocutionary act, that is to say, "a successful performance" of a certain type of illocutionary acts necessarily achieves that purpose. To put it differently, it could not be a successful act of that type if it did not achieve that purpose.[27] The point of an assertive is "to describe the world", the point of a directive is "to direct one's hearer to perform a certain king of act", the point of expressives is "to express the speaker's emotion or attitude", the point of commissives is "to commit the speaker to doing something" and the point of declaratives (for instance, of the declaration that p) is "to make it the case that p".[28]

Different illocutionary acts may achieve "the same illocutionary point with different degrees of strength",[29] because of several causes. Searle and Vanderveken give good examples of this property: "if I requestsomeone to do something my attempt to get him to do it is less strong than if I insist that he do it", or: "both pleading and ordering are stronger than requesting, but the greater strength of pleading derives from the intensity of the desire expressed, while the greater strength of ordering derives from the fact that the speaker uses a position of power or authority that he has over the hearer".[30]

The mode of achievement is the way in which an illocutionary act achieves its purpose. For instance, an order achieves its purpose "by way of invoking the position of authority of the speaker" in issuing the order. Another example is the following: "a person who makes a statement in his capacity as a witness in a court trial does not merely make a statement, but he testifies, and his status as a witness is what makes his utterance count as testimony".[31]

The propositional content conditions are the conditions that the content of a speech act has to fulfil because of its illocutionary force. For instance, in commissives, the speaker commits himself to doing something. This kind of speech act sets a condition on its content: that the speaker does something in the future. For example, anyone who makes a promise commits himself to doing something in the future.

The preparatory conditions are conditions that it is necessary to fulfil for a successful and non-defective performance of an illocutionary act. For instance, "all acts whose point is to get the hearer to do something -orders, requests, commands, etc.- have as a preparatory condition that the hearer is able to do the act directed".[32] For example, unless we have a time machine, a judicial decision would be defective, if the judge gives the defendant the order to travel to the past and to stop the performance of some prior action of his.

The sincerity conditions are the conditions that the psychological states of the speaker have to fulfil for the illocutionary act to be non-defective. The utterance of an illocutionary act implies certain psychological states related to the content of the act. Thus, "an insincere speech act is one in which the speaker performs a speech act and thereby expresses a psychological state even though he does not have that state".[33] For instance, "an insincere promise is one where the speaker does not in fact intend to do the things he promises to do".[34]

The last of the seven dimensions of illocutionary force is the degree of strength of the sincerity conditions. As Searle and Vanderveken make explicit, "just as the same illocutionary point can be achieved with different degrees of strength, so the same psychological state can be expressed with different degrees of strength".[35] For instance, "the speaker who makes a request expresses the desire that the hearer do the act requested; but if he begs, beseeches, or implores, he expresses a stronger desire than if he merely requests."

Now, as Ludwig and Boisvert explain: "assertives, directives, commissives and declaratives have satisfaction conditions, which come in two varieties: those with word-to-world direction of fit, and those with world-to-word direction of fit".[36] They also explain the difference between the illocutionary acts from this point of view: "Assertives have word-to-world direction of fit, since their point is to make the words match the world; directives and commissives have world-to-word direction of fit, since their point is to make the world match the words. Declaratives have at least world-to-word direction of fit since their point is to bring the world to match their contents [...], and arguably, in some case, word-to-world direction of fit as well".[37]

Finally, when an illocutionary act is successfully and non-defectively performed, it produces an effect in its addressee. This effect is the perlocutionary effect of the speech act and refers to the impact it aims to have (intended perlocutionary effect) or really has (actual perlocutionary effect) on the "feelings, attitudes, and subsequent behaviour of the person

or persons to whom it is addressed".[38]

VI. Illocutionary acts in the justification and decision

Taking into account these concepts of the theory of speech acts, it is possible to analyse the three elements of a basic judicial decision: major and minor premise and decision. However, before looking at this, it is necessary to explain two general preparatory conditions that the judicial decision has to fulfil.

1. *General preparatory conditions*

The judicial decision as a sequence of speech acts has to fulfil at least two general conditions to be successful and non-defective. The first concerns the authority of the judge. It is necessary for the judge to have the legal power or competence to make the decision. Concretely, a rule of the legal system must confer this competence on the judge. This rule must be valid. As we say, it is necessary to understand the validity of this rule in the institutional framework of the legal system as a hierarchical structure of valid norms (rules and principles). Only in this framework it is possible to understand the rule conferring power to the judge as a constitutive rule according to which the decision (that is to say a certain chain of speech acts) of the judge (a certain speaker) counts as a judicial decision.[39] If the speaker does not have the power to make a judicial decision at all or the judge does not have the specific power to resolve the case at issue, then the chain of speech acts he performs would not count as a judicial decision and would be void.

Now the second general condition relates to the form and the environment of judicial decisions. The judge has to make the decision in a trial. The trial has to fulfil the forms that the law establishes and the judicial decision as such has to fulfil certain formalities as well. A serious procedural irregularity or a serious irregularity in the form of the decision can make the judicial decision void. For instance, in the case Riggs v. Palmer, the validity of the decision presupposed that the New York Court of Appeals had competence to provide a decision for the case and that its judgment took place at the end of a procedure with all the legal formalities of an appeal. The decision by the Court fulfilled all these conditions.

Having stated these conditions it is now possible to analyse the structure of the main elements of a judicial decision from the point of view of the theory of speech acts.

2. *Premise (1): The general rule*

By uttering premise (1), that is to say, the general rule "R", the Court is doing at least the following things. First, he asserts that "R" is the correct interpretation of the law to apply in the actual case. Second, since this rule did not exist before, at least as a rule in the legal system, the Court creates it as a rule of law. Third, the Court set this precedent for analogous future cases. Fourth, the Court uses the rule as a major premise in resolving the case.

These four things clearly appear in the case of Riggs v. Palmer. The New York Court of Appeals asserted that the rule (x)(Mx " ¬Gx) is the correct interpretation of the law for cases like this. Second, since this rule did not exist before, the Court creates the rule. Third, the Court set this precedent for analogous future cases. Fourth, the Court uses the rule as a major premise in resolving the case.

These four things correspond to three different illocutionary forces of the judicial speech act of uttering premise (1). The first one corresponds to a special kind of assertive. Let me call this special kind: declarative judgement. On the one hand, the declarative judgement is an assertive, because by saying that "R" is the correct interpretation of the law to rule the actual case, the judge is describing the world. This is its illocutionary point. However, he is not describing something in the physical realm but in the normative (more precisely: legal) realm of the world.[40] The judge is saying that "R" is valid under description of the legal system.[41] Let us remember that in the decision Riggs v. Palmer the New York Court of Appeals gives some arguments about the purpose of the statutes, the intention of the law-makers, the application of a rational interpretation, and the principle or general maxim of the common law, according to which: "No one shall be permitted to profit by his own fraud, or to take advantage of this own wrong, or to acquire property by his own crime", in order to ground the claim that the rule "one cannot take property by inheritance or will from an ancestor or benefactor whom he has murdered" is the right interpretation of the law for cases like that of Elmer Palmer. This argumentation entails a description of the legal realm, or put in another way, of the legal practice. The statutes, the intention of the law-makers, the methods of interpretation and the general maxims of the common law are elements of this legal practice.

In addition to this, this description of the normative realm has an evaluative component. The judge utters premise (1) as the correct interpretation of what the statutes and the other sources of the law establish for the actual case. This interpretation depends on objective and

subjective factors. The words of the statements are an objective factor and the attitudes of the judge about the moral values grounding the statutes are subjective factors. Consequently, the utterance of premise (1) is not merely an assertion, but an assertion that presupposes an evaluation. Since the assertion has a normative propositional content, the following name is appropriate: judgement. Thus, in the case Riggs v. Palmer, the New York Court of Appeals performs a normative assertion that the rule, (x)(Mx " ¬Gx), belongs to the legal system.

Now a special preparatory condition of this illocutionary act is that the judge has reasons for "R". A propositional content condition is that "R" is a possible interpretation of what the legal system establishes for the actual case.

A sincerity condition is that the judge believes that "R" is correct. A further question is about the standard of correctness. The question is whether it is enough that "R" be correct under the legal system or whether"R" has to be correct also in general, that is to say, according to justice. Certainly, the sincerity condition refers to correctness under the legal system. However, it is possible to ask whether, in order to be non-defective it is also necessary that the judge believe that "R" is correct from the point of view of justice. Let us image a case in which a statute establishes an evil rule "ER" and the judge has simultaneously two different psychological states related to the content of the act: on the one hand, he believes that "ER" is a correct interpretation of the law; on the other hand, he believes that "ER" is unjust. If we use the strategy of stating "R" and simultaneously denying the psychological state related to correctness from the point of view of justice,[42] then we get the following result: "ER" is the correct interpretation of the law, but "ER" is unjust. At this point, the answer to the question whether the utterance of "ER" by a judge is non-defective depends on the answer to the question whether there is a conceptually necessary connection between law and justice, or law and morality. A legal positivistic theorist would deny this connection and say that the utterance of "ER" is non-defective.[43] A non-legal positivistic theorist would endorse this connection and say that the utterance of "ER" is defective.[44] The reason for the defectiveness would be the paradox between, on the one hand, the sentence that we get when we contrast the content of the speech act with the psychological state of the judge, that is to say: "ER" is the correct interpretation of the law, but "ER" is unjust, and, on the other hand, the sentence stating that there is a conceptually necessary connection between law and justice. If, due to this connection, genuine law can never be unjust, "ER" cannot be at the same time "the correct interpretation of the law" and "unjust".

In any case, it is necessary to say that the direction of fit of the illocutionary act of uttering premise (1) is word-to-world, since its point is to make the justification of the judicial decision match the correct interpretation of the normative (legal) realm. Its intended perlocutionary effect is to persuade the parties in the process, the legal community and the community in general, that "R" is the correct interpretation of the law in the actual case.

The second illocutionary force of the utterance of premise (1) is declarative. For this reason, the speech act involved in uttering premise (1) has been called declarative judgement. By the utterance of this premise, the Court creates the rule "R". The illocutionary point of uttering this declaration is to bring about the state of affairs that it represents. The Court is actually introducing a modification in the legal system. He is adding a new rule. By uttering the premise (1) he is bringing about this state of affairs. From this moment, the new rule appears in the legal system. This is the creation of a new institutional fact. It also explains why this rule is valid as a precedent for future cases and why the judge can apply it as major premise to resolve the actual case. This is the way in which the New York Court of Appeals creates the rule (x)(Mx " ¬Gx). The Court set this rule as precedent for future cases and applies it as major premise for the case Riggs v. Palmer.

Nevertheless, this application of the rule "R" as major premise implies another different illocutionary force. This is again a declarative, but it is different from the creation of the rule "R". In the application of the rule"R" the judge is bringing about the state of affairs that the actual case, for instance, Riggs v. Palmer is going to be adjudicated under the rule "R". This is also the creation of a new institutional fact.

Now the direction of fit of these declarations is world-to-word, precisely: normative realm-to-word, since the point of the first is to introduce a new rule in the legal system and the point of the second to introduce the major premise in the justification of the case. They aim to bring about those new legal facts.

3. *Premise (2): The subsuntive statement*

Premise (2), that is to say: (Ca), is a subsuntive statement. By uttering it, the judge is doing at least the following things. First, he is asserting that the facts described as conditions of the rule "R" took place, according to the evidence. In the case Riggs v. Palmer the subsuntive statement is (Mp). According to this statement, Palmer (P) murdered his testator and, in this way, this event is an instantiation of the conditions described in the

antecedent of the rule: (x)(Mx " ¬Gx). Of course, since it is a judgment by the New York Court of Appeals, this Court does not evaluate directly the evidence in order to assert that (Mp). The Court takes this assertion for granted, that is to say, its point of depart is the assertion by the criminal jury, according to which Palmer murdered his grandfather. It is well known that in the American System of Justice, in certain cases the judge is the fact finder and the other cases the fact finder is the jury. In the first kind of cases is the judge who asserts that the conditions described in the antecedent of the rule took place. In the second sort of cases, the jury asserts it and the judge departs from the assertion made by the jury. In what follows I will speak about the cases in which the judge is the fact finder.

Second, by uttering premise (2) the judge is also creating this institutional fact, and setting it as precedence. Third, he is also including this sentence (Mp) as minor premise in the justification of the decision.

These three things correspond to three different illocutionary forces of the judicial speech act of uttering premise (2). The first one corresponds to a special kind of assertive. Let me call this special kind: empirical declarative judgement. The empirical declarative judgement is an assertive, because by saying, for instance, that (Ca) (in the case Riggs v. Palmer: "Mp"), that is to say, that the action (a) (What Palmer "p" did) fulfilled the conditions (C) (to murder the testator: "Mx") of the rule "R", (x)(Mx " ¬Gx), the judge is describing the world. This is its illocutionary point. However, he is not describing directly something in the empirical world, because the judge actually does not have any direct contact with the performance of the action (a).[45] Therefore, the judge is just able to assert indirectly that (a), at least probably, took place and fulfilled the conditions(C). The judge is directly describing something about the proofs taken into account in the process. He is asserting that the proofs show that (a). Nevertheless, the judge adds an evaluative component to this assertion. The judge does not merely describe what the proofs show, but evaluates it according to normative criteria related to their relevance and reliability. For this reason, (Ca) is not a mere empirical assertion but an empirical ascription.[46]

A special preparatory condition of this illocutionary act is that the judge has reasons for the truth of (Ca). These reasons derive from the evaluation of the proofs. Now there are at least two kinds of sincerity conditions for this illocutionary act. According to Austin,[47] in criminal law cases it is arguable whether the judge has to believe ("really feel") "that the defendant is guilty" or to believe "that one is justified ('feel justified'), on the evidence adduced at the trial, in accepting that he is guilty". At

the first glance it looks like the second hypothesis of Austin is true, that is to say, that the sincerity conditions of asserting premise (2) presupposes that the judge believes that he is justified on the evidence in accepting that (Ca). Nevertheless, this does not seem to be enough. Premise (2) also presupposes that the judge believes that the defendant is indeed guilty, that is to say, that an action performed by the defendant indeed took place and is an instantiation of the conditions described in the antecedent of the rule "R". If we use again the strategy of stating (Ca) and simultaneously denying the belief of the judge that the defendant performed (a) and that this action is an instantiation of the conditions described in the rule,[48] then the result is the following paradox: (Ca) is proved, but this statement is false, because(a) did not actually take place or did not actually fulfilled the conditions (C). Now the direction of fit of this illocutionary act is word-to-world, since its point is to make the minor premise of the justification of the judicial decision match the evidence and the empirical world. Its intended perlocutionary effect is to persuade the parties in the process, the legal community and the community in general, that, according to the evidence, (a) indeed took place and fulfilled the conditions (C) of the rule "R".

As in premise (1), the second illocutionary force of the utterance of premise (2) is declarative. For this reason, it has been called: empiric declarative judgement. By the utterance of this premise, the fact finder (the judge or the jury) creates a new institutional fact. It declares that "Ca". The illocutionary point of uttering this declaration ("a" officially took place and fulfilled the conditions "C" of the rule "R") is to bring about the state of affairs that it represents. The fact finder is actually introducing a modification in the legal system. He is officially adding a new fact to the set of facts officially recognised by the legal system and he is changing the status of the agent of the action (a). From this moment, this action (a) is officially imputed by the legal system to the agent and it is officially declared that this action (a) fulfilled the conditions (C) of the rule "R". The judge declares with his authority that the agent's behaviour took place and fulfilled the conditions described in the general rule. By doing this, the accusations of the plaintiff became official fact. There is a difference between this institutional fact and the brute facts. This institutional fact is a "legal certification"[49] that the brute fact took place. Only the fact finder (judge or jury), with his competence, after a judicial procedure and with the right legal forms can give this legal certification. The legal certification makes the brute fact relevant to the legal system. All this also explains why this declaration has precedential force for future cases and why the judge has to (or can) apply it as minor premise to solve the actual case.

Nevertheless, this application of the statement "Ca" as minor premise implies another different illocutionary force. This is again a declaration, but it is different from the creation of the official declaration that "Ca". In the application of "Ca" to the case, the judge is bringing about a state of affairs, namely, that the actual case, for instance, Riggs v. Palmer is going to be adjudicated under the premise "Mp". This is also the creation of a new institutional fact.

Now the direction of fit of these declarations is world-to-word, more precisely, normative realm-to-word, since the point of the first is to introduce a new official fact into the legal system and the point of the second to introduce the minor premise in the justification of the decision in the case.

4. *The decision (D)*

Finally, by uttering the decision (D), that is to say, the imposition of the legal consequence (LCa) to the agent, the judge is doing one of two things or both. First, he is changing or settling the legal positions, that is to say the legal status or relationships of the parties. Second, he is giving an order addressed to other competent authorities or to the parties.

The first thing clearly appears in the case Riggs v. Palmer. The New York Court of Appeals imputes directly the sanction (¬Gp), that is to say, does not give the property to Palmer and, correlatively, gives this property to the plaintiffs. Nevertheless, in other cases the judge can also give an order to other competent authorities. In criminal judgments, for instance, the judge can give an order of imprisonment of the defendant, and in tort law cases the judge can order the payment of damages to a party. In these last cases, the decision has also a declarative component. If a judge convicts an agent of a crime and orders his imprisonment, he is also changing the legal status of this agent.

These two things correspond to two different illocutionary forces of the judicial speech act of uttering the decision (D). The first one is declarative. By uttering the decision (D) the judge is creating a new institutional fact. He is changing the legal positions of a party or of the parties. The illocutionary point of uttering this declaration (the actual imputation of the sanction "S" to the agent "a") is to bring about the state of affairs that it represents. The judge is actually introducing a modification in the legal status of the agent. He is officially adding a new institutional fact to the set of institutional facts that the legal system associates with the agent (a). It is possible to see very clearly this point in cases like divorce decisions. With the decision, the judge actually changes the legal status of

the agent and this change has certain consequences (for example, the agent can get married again).

Now the second illocutionary force of the decision corresponds to a directive. Its point is to direct the addressees of the order to perform the imputation of the sanction (S) to the agent of the action (a). The judge has to use directive speech acts when he does not have the competence to impute the sanction by himself. For instance, in the criminal cases, when a sanction of imprisonment is a stake, the judge clearly does not have the power himself to bring the defendant to prison. Consequently, he gives the order to impute this sanction to the competent authority. A special propositional condition of this speech act is that the sanction has not yet been imputed to the agent. The imputation of the sanction must be a future act. A special preparatory condition is that the addressee of the order is empirically and legally able to impute the sanction (S) to the agent of the action (a) and that the judge believes it. A special sincerity condition is that the judge actually intends to impute the sanction (S) to the agent of the action (a). Finally, an essential condition is that the order counts as an attempt of the judge to make the competent authority impute the sanction (S) to the agent of the action (a). The direction of fit of this speech act is world-to-word, since its point is to make the world (the act of imputing the sanction) match to the decision.

Finally, in some cases (e.g., in certain criminal and tort law cases) the decision has also an expressive force. It expresses (in the speech act sense) a negative attitude towards the agent. According to Ho,[50] in criminal law cases the decision entails a condemnation or censure that aims "to bring about a sense of shame in the defendant as a first step towards repentance and reform." Some decisions in tort law have a similar expressive force. However, this is not always the case. In many cases a judicial decision solves a social problem without any formal expression of any negative attitude toward the parties.

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[1] At the beginning of this paper I will talk about judges performing speech acts. However, this account of the logical and speech act structure of judicial decisions can also explain a judicial decision made by a Court, with some modifications concerning the collective intentionality of an act performed by various judges.

[2] Following J.L. Austin, I will use the concept of locutionary act as the act of "saying something". See J.L. AUSTIN, How to do Things with Words, Oxford, Oxford University Press, 1976, p. 34. John Searle speaks about "utterance acts". He says that "utterance acts" consist "simply in uttering string of words". See J. SEARLE, Speech Acts, Cambridge, Cambridge University Press, 1969, p. 24. For the purpose of this paper it is necessary to take into account that writing a sentence is also a "locutionary act" or an "utterance act".

[3] Following Austin, I will use the concept of illocutionary act as an act performed "in saying something". See J.L. AUSTIN, How to do Things with Words, supra note 2, p. 98. A more complete definition of an illocutionary act is the following: "An illocutionary act is a complete speech act, made in a typical utterance that consists of the delivery of the propositional content of the utterance and a particular illocutionary force, whereby the speaker asserts, suggests, demands, promises or vows"; Summer Institute of Linguistics, 10 Apr., 2007, http://www.sil.org/linguistics/GlossaryOfLinguisticTerms/WhatIsAnIllocutionaryAct.htm

[4] According to John Searle, "social reality" is constructed out of status functions. See, on the concept of status function, J. SEARLE, The Construction of Social Reality, London, Free Press, 1995, pp. 40-ff.

[5] The theory of speech acts has been fruitfully used in the analysis of legal concepts in the past. See, e.g. the analysis of rules conferring powers by D.W.P. RUITER, Legal Institutions, Dordrecht, Kluwer, 1993; id., "Legal Powers", in S. PAULSONand B.L. PAULSON, Normativity and Norms, Oxford, Oxford University Press, 1998, pp. 471-492; id., "Institutional Legal Facts: Legal Powers and Their Effects", Artificial Intelligence and Law, 1997, pp. 377-385. See also the analysis of contracts byJ. CONISON, "The Pragmatics of Promise", Canadian Journal of Law and Jurisprudence, 1997, pp. 273-ff; J. YOVEL, "What Is Contract Law 'About'? Speech Act Theory and a Critique of 'Skeletal Promises'", Northwestern University Law Review, 2000, pp. 937-ff. See also the analysis of a verdict by H.L. HO, "What Does a Verdict Do? A Speech Act Analysis of Giving a Verdict", International Commentary on Evidence, 2006, pp. 1-ff.; and the analysis of the judicial overruling by P.H. DUNN, "How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis", Yale Law Journal, 2003, p. 493.

[6] The illocutionary force is a property of speech acts, which results of the "combination of the illocutionary point of an utterance, and particular presuppositions and attitudes that must accompany that point, including the strength of the illocutionary point, preparatory conditions, propositional content conditions, mode of achievement, sincerity conditions, and strength of sincerity conditions", Summer Institute of Linguistics, 10 Apr. 2007, http://www.sil.org/linguistics/GlossaryOfLinguisticterms/WhatIsIllocutionaryForce.htm. Now, depending on their illocutionary force, it is possible to distinguish among the following types of acts: asserting, promising, excommunicating, exclaiming in pain, inquiring and ordering. See also J. SEARLE and D. VANDERVEKEN, Foundations of Illocutionary Logic, Cambridge, Cambridge University Press, 1985, pp. 1, 7-9 and 20-21.

[7] Thinking about the law has contributed for developing the theory of speech acts. See, e.g. the explicit references to the law in the works by J. SEARLE, The Construction of Social Reality, supra note 4, pp. 82-ff.; and J.L. AUSTIN, How to do Things with Words, supra note 2, pp. 7-ff. In this book Austin also recognised the influence of H.L.A. Hart's ideas about the law in the development of his theory.

[8] Court of Appeals of New York, Riggs v. Palmer, 8 Oct. 1889, http://www.courts.state.ny.us/reporter/archives/riggs_palmer.htm

[9] According to the Court, this purpose was to "enable testator to dispose of their estates to the objects of their bounty at death and to carry into effect their final wishes legally expressed".

[10] According to the Court, this intention was that: "the donees in a will should have the property given to them. But it never could have been their intention that a donee who murdered the testator to make the will operative should have any benefit under it".

[11] The rational interpretation or equitable construction tries to correct the impossibility of the law makers ruling on every particular case in which a rule applies, and allows the Court to restrain or to extend the meaning of the word of a statute to avoid irrational outcomes. In this case, the Court enhanced the exceptions to the inheritance of the property by including among the exceptions the case in which the inheritor murdered the testator.

[12] This case is well known because R. DWORKIN used it to show (against Hart's concept of law) that the legal system is not only made of rules but also of principles; Taking Rights Seriously, London, Duckworth, 1977, pp. 23-45.

[13] On the concepts of internal and external justification, see R. ALEXY, A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification, transl. [by N. MACCORMICK and R. ADLER, Oxford, Clarendon Press, 1989]; J. WRÓBLEWSKI, "Legal Decision and its Justification", in J. WRÓBLEWSKI, Le raisonnement juridique, Brussels, Hubien, 1971, p. 412; N. MACCORMICK, Legal Reasoning and Legal Theory, Oxford, Oxford University Press, 1978, p. 100.

[14] On this kind of logical reconstruction of judicial decisions, see R. ALEXY, "Die Logische Analyse Juristischer Entscheidungen", in R. ALEXY, Recht, Vernunft, Diskurs. Studien zur Rechtsphilosophie, Frankfurt, Suhrkamp, 1995, p. 20.

[15] On the concept of imputation, see S. L. PAULSON, "Hans Kelsen's Doctrine of Imputation", Ratio Juris, 2001, pp. 47-ff.

[16] For the concept of propositional content, see J. SEARLE, Speech Acts, supra note 2, pp. 29-30. Searle says: "A proposition is what is asserted in the act of asserting, what is stated in the act of stating". The propositional content remains constant, despite changes in the illocutionary force of the speech act.

[17] On the assignment of a function, see J. SEARLE, The Construction of Social Reality, supra note 4, pp. 14-ff and 23.

[18] On the concept of institutional fact: Ibid., pp. 17-ff.

[19] On the concept of collective intentionality: Ibid., pp. 23-ff.

[20] On the concept of rule of recognition, see H.L.A. HART, The Concept of Law, Oxford, Clarendon, 1997, mainly Chapter V.

[21] On the concept of basic norm, see H. KELSEN, Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law, transl. [by B. LITSCHEWSKI PAULSON and S.L. PAULSON, Oxford, Clarendon, 1997], pp. 58-ff.

[22] On the concept of we-intention and its role in collective intentionality, see K. LUDWIG, "Foundations of Social Reality in Collective Intentional Behaviour", in S.L. TSOHATZIDIS, Intentional Acts and Institutional Facts: Essays on John Searle's Social Ontology, Dordrecht, Springer, 2007.
[23] On the concept of constitutive rule, see J. SEARLE, The Construction of Social Reality, supra note 4, pp. 27-ff. According to Searle, a canonical formulation of this kind of rules is: "X counts as Y in context C".
[24] In this sentence, the interpretation of the canonical formulation of the constitutive rule "X counts as Y in context C" is:
Domain: The set of all the human actions
X: The interpretation of the statutes
Y: Major premise for the justification of the decision and precedence for future cases
C: X is performed by the Court of Appeals of New York in the context of the trial leading to the solution of a particular case
[25] See J. SEARLE, Speech Acts, supra note 2, pp. 31-ff and 64-ff. See also D. GONZÁLEZ LAGIER, The Paradoxes of Action: Human Action, Law and Philosophy, Dordrecht, Kluwer, 2003, pp. 73-ff.
[26] See J. SEARLE and D. VANDERVEKEN, Foundations of Illocutionary Logic, supra note 6, pp. 12-ff.
[27] Ibid., p. 13.
[28] See K. LUDWIG and D. BOISVERT, "Semantic for Nondeclaratives", in E. LEPORE and B. SMITH, Oxford Handbook of the Philosophy of Language, Oxford, Oxford University Press, 2006, Chapter 34.
[29] See J. SEARLE and D. VANDERVEKEN, Foundations of Illocutionary Logic, supra note 6, p. 15.
[30] Ibid., p. 15.
[31] Ibid., p. 16.
[32] Ibid., pp. 17-18.
[33] Ibid., p. 18.
[34] Ibid., p. 18.
[35] Ibid., p. 19.
[36] See K. LUDWIG and D. BOISVERT, "Semantic for Nondeclaratives", supra note 28, p. 3.
[37] See J. SEARLE and D. VANDERVEKEN, Foundations of Illocutionary Logic, supra note 6, p. 3.
[38] See K. LUDWIG and D. BOISVERT, "Semantic for Nondeclaratives", supra note 28, p. 11.
[39] On the analysis of the rules conferring powers as constitutive rules, see D.W.P. RUITER, "Legal Powers", supra note 5, pp. 471-ff.
[40] This corresponds to the third realm of Frege. See G. FREGE, "The Thought: A Logical Inquiry", transl. [by A. M. QUINTON and M. QUINTON, in P. F. STRAWSON, Philosophical Logic, Oxford, Oxford University Press, 1967], p. 29.
[41] The legal system is part of the normative realm.
[42] See J. SEARLE and D. VANDERVEKEN, Foundations of Illocutionary Logic, supra note 6, p. 19.
[43] See E. BULYGIN, "Alexy's Thesis of the Necessary Connection between Law and Morality", Ratio Juris, 2000, pp. 133-ff.

[44] See R. ALEXY, The Argument form Injustice: A Reply to Legal Positivism, transl. [by B. LITSCHEWSKI PAULSON and S. L. PAULSON, Oxford, Clarendon Press, 2002], pp. 40-ff.
[45] However, this could be the case in exceptional circumstances, when the judge makes a direct inspection of certain things.
[46] On the concept of ascription in this context, see H.L. HO, "What Does a Verdict Do? A Speech Act Analysis of Giving a Verdict", supra note 5, p. 19.
[47] See J.L. AUSTIN, How to Do Things with Words, supra note 2, p. 41.
[48] See J. SEARLE and D. VANDERVEKEN, Foundations of Illocutionary Logic, supra note 6, p. 19.
[49] H.L. HO, "What Does a Verdict Do? A Speech Act Analysis of Giving a Verdict", supra note 5, p. 13.
[50] See H.L. HO, "What Does a Verdict Do? A Speech Act Analysis of Giving a Verdict", supra note 5, p. 25.

FACES OF JUDICIAL ANGER : ANSWERING THE CALL*

Marie-Claire Belleau, Rebecca Johnson and Valérie Bouchard*

I. INTRODUCTION

> *"Anger is an impediment to reason, as it is to justice."*
> (J. FERRON, Cotnoir)

> *"One is tempted to define man as a rational animal who always loses his temper when he is called upon to act in accordance with the dictates of reason."*
> (O. WILDE, The Critic as Artist)

Accounts of the mythical foundations of law, in written or spoken form, are Manichaean stories in which emotion plays the role of the viper and reason that of the saviour. Law is not the only discipline to adopt this way of thinking: the tendency to mark the dichotomy between reason and emotion and to favour the first over the second runs deep in western thought. Whether in Freud's primal horde[1] or Rousseau's social contract,[2] emotion is linked to decadence, is figured as a seductive femme fatale obscuring man's ability to deploy reason. Overtaken by passion, man is no better than beast: fiery, reckless, relying on base instincts, constrained only through law, with its cold voice of reason. Justice, level-headed, witnessing the torments of human passion, dampens the fire through objective and disciplined thought. In delivering judgement, the judge does not love, hate, weep or laugh. Justice does not founder. It assesses, reflects, decides and imposes, not to the beat of its own heart, but to the demands of reason untainted by emotion.

This dominant story of reason and passion has, of course, been contested all along.[3] As Bandes notes, "emotion pervades law, and always has. It's just that sometimes it's more visible than others".[4] In fact, justice requires passion.[5] The evacuation of passion creates a distance from persons and emotions that precludes the dialogue required by justice itself.[6] Emotions like anger, despair, disgust, fear and compassion play a fundamental role in the art of persuasion,[7] an art central to justice, law and decision making. Furthermore, justice, that which states that something "is unjust", is itself a feeling. Georges Gurvitch notes that "law is fundamentally expressed as a spontaneous and intuitive feeling that justice has been served" [our translation].[8]

In this article, we consider the presence in law of one particular emotion:

anger.[9] We do so in the context of the judicial treatment of a criminal incest case, a location in which one might expect anger to be present and be taken seriously. Admittedly, criminal law is often the site of pain-wracked, sometimes veiled, anger; law functioning as a bastion against the dangerous consequences of wrath. Criminal courts are popularly understood a sites of sin and anger. But wrath does not attend to the reasoned boundary said to separate public from private law. The face of wrath is often highly visible in the exchanges between disputants embroiled in any number of private law struggles: divorce actions, custody battles, labour disputes, environmental protests, tort claims, and struggles between shareholders in closely held corporations. In all these contexts, law acknowledges and even anticipates individual and collective anger: the anger of those who do harm, of those who are harmed, of those who witness the harm, of those who seek a (sometimes bloody) re-resettling of accounts.

Certainly, whether this particular emotion bubbles up in the context of 'public law' or 'private law' disputes, wrath is understood as a significant danger that must be managed. Law, with its focus on reason, steps in to buffer the edges of people's unruly and sinful anger. The judge -charged with the singular obligation to do justice, an obligation that cuts across the many divisions and categories of law- is to safeguard society from the disruptive and deadly consequences of wrath, must channel wrath's excesses away from vengeance, vigilantism and blood feud. [10] Through law, the courts channel excess and ennoble the fight for justice.

Here, we are interested less in the anger of disputants before the law, than in the anger of judges themselves. We are challenging the claim that emotion, particularly anger, is contrary to the process of rendering judgement. To do so, we focus on the faces of judicial anger, using a Canadian Supreme Court[11] criminal law case, R v. F.F.B.,[12]. The issue to be resolved in F.F.B. was fact specific. Had the jury in a childhood sexual abuse case been properly instructed about their ability to use some highly prejudicial testimony? If not, what was the appropriate remedy? Should the court affirm the jury's decision to convict, order a new trial or simply confirm the conviction by applying 'remedial provision' 686(1)(b)(iii) of the Criminal Code?[13]

Settling the matter required the judges to individually decide whether the specific case before them involved a 'miscarriage of justice'. This case involved no policy conflicts, addressed no emergent legal concept, and produced no precedent setting principle of law. And yet, the case was highly divisive, leading the 5 judges hearing the case[14] to generate four different opinions.[15] Our focus is on how the judges occupied that

moment of decision, and how wrath is there manifested. Judicial wrath can appear in many faces. It can involve personal angers between judges, anger about the actions of the Court as an institution, anger towards parties before the Court, anger at competing visions of justice and injustice. The rulings in F.F.B. invite us to consider this double-edged relationship of anger to justice, and to ask, in effect, whether the doing of justice might not sometimes require anger.

We interrogate the practices of judgement that reveal (and fail to reveal) judicial anger. In Part I, we lay the foundation of our exploration of judicial anger. We introduce the complex edges of anger (part I.A), then analyse the tools available to reveal the presence of judicial emotion: the conventions of judicial language (part I.B). Our goal is to begin elaborating a method for rendering anger visible. In Part II, we put this method to work in an analysis of the four opinions generated by the Supreme Court of Canada judges who heard case F.F.B. We begin with a brief overview of the facts (part II.A), consider the production and publication of judicial opinions (part II.B), continuing with a search for hints of anger in the four opinions (part II.C). To conclude, we offer some observations about judicial calls to anger and the ways in which readers might respond.

II. Searching for Traces of Judicial Anger

In common language, anger is defined as a "passing violent state, stemming from a feeling of having been attacked or offended".[16] This emotion is a layered phenomenon. As Masters points out, anger can be an affect, a feeling, or an emotion: "Affect is a given; feeling involves our conscious experience of that given; and emotion is how we frame and what we do with that given".[17] It is the presence of anger as an emotion within the legal system that is of interest to us.

1. *Unjustified anger and righteous anger against injustice*

Despite the heated situations that give rise to legal proceedings, and perhaps because of these, the law often presents itself as a world in which such emotions, creators of disorder, are set to the side in the interests of well thought-out, objective rulings. In fact, in R. v. C.A.M.,[18] the Canadian Supreme Court asserts that it is the presence of 'emotion and anger' that distinguishes 'vengeance' (unacceptable) from its (legitimate) cousin, 'retribution'.[19] Retribution is a legitimate ground of legal punishment.[20] Retribution, unlike vengeance, is readily accepted by law, which can find in it a foothold for reason in truth. But anger, the Court argues, interferes with the "objective, reasoned, measured

determination of an appropriate punishment".[21] Consequently, although the individuals appearing before the law are likely to experience strong emotion, including blinding anger, it seems that wrath is not an appropriate legal or judicial emotion. Wrath may make frequent appearances in the courts of law, but wrath remains something for the judge to tame, not something for the judge to feel. After all, law is a sphere in which steady logic intervenes to dull the sharp edges of turbulent and uncontrolled anger and to ensure that justice, while possibly altered by emotion, is nonetheless tempered by reason. Moreover, temperance and justice are two of the four cardinal virtues.[22] Temperance dampens desire and primal instincts, and justice is a reasoned quest for fairness. These two virtues are often represented by balanced images: water flowing from one receptacle to another, water in the wine of temperance[23] and the scales of justice.[24]

However, anger can have constructive value.[25] Anger is not exclusively sin.[26] It can emerge not only out of experiences of jealousy, betrayal, hatred, or loss, but also out of experiences of injustice.[27] In fact, one of the facets of wrath is 'righteous anger', a type of anger that can prompt people to defend the cause of justice. Righteous anger can be a powerful resource that makes possible the restoration of integrity or intimacy. Author bell hooks maintains that anger, properly channelled, can illuminate, heal, and make redemptive struggle possible. Under the banner of 'righteous anger', it may operate as the fuel that pushes people to action in the cause of justice itself. As the Reverend Kenneth Lysons notes, "when we read biographies of people who have been leaders in the struggle for justice and reform, we find that often they have been motivated by righteous anger, shame, and indignation".[28] If anger is tied to both injustice and justice, it is crucial that we understand how it is interwoven.[29]

Biblical texts capture this dual face of anger. Some passages position anger as sin: [30] "Ye have heard that it was said to them of old time, Thou shalt not kill; and whosoever shall kill shall be in danger of the judgment: but I say unto you, that every one who is angry with his brother shall be liable to judgement"[31] (Matt. 5:21-22). However, wrath can be justified if expressed by God, the absolute judge:[32] "For the wrath of God is revealed from heaven against all ungodliness and unrighteousness of men who suppress the truth in unrighteousness"[33] (Romans 1:18). In this case, wrath is seen as an appropriate emotion (and action) in response to injustice, malice or an attempt to hide or deny the truth. These two passages draw a distinction between those who may and those who may not rightfully feel or express anger, denying the articulation of wrath to humankind. God says to Job,

who, poor and unhappy, laments being the victim of an unfair divine judgement: "Where were you when I created the earth? Speak now if you are all-knowing" [our translation].[34] From a religious point of view, God is the only one who can make a fair judgment that distinguishes good from evil. Indeed, it is His duty as a just and all-knowing being. And yet, the distinction between anger as virtue or vice doesn't necessarily turn on the divide between the sacred and the profane. In Western law, impregnated with religious concepts of judgement, the expression of anger is linked to questions of authority, particularly the authority to stand in judgement. Authority is manifest in the figure of the impartial judge, and also in the figure of the jury, who, in taking an oath, throw off the cloak of human frailty and robe themselves in the authority conferring garb of judgement.[35]

Here, it is also noteworthy that the virtuous wrath (of God) is revealed: it is not simply a thing felt, it is a thing performed;[36] it involves action. 'Righteous' judgment seems to require the public display of the powerful anger demanded by grave injustice. In fact, the act of rendering of judgement is deeply relational and thoroughly 'public', an act designed to be witnessed: justice must not only be done, and it must also be seen to be done. The restoration of balance would seem, at least on some occasions, to require that injustice be met with the visible expression of wrath.

In short, law and justice clearly have a complicated and paradoxical relationship to anger. On the one hand, law seeks to suppress anger, and on the other hand, tries to channel it. Judicial anger may reveal itself as improper excess. And yet, the evacuation of anger from judgement -the failure to give voice to wrath- may deprive law's witnesses of adequate markers of justice, may prevent justice from being seen to be done. But this leaves us with a puzzle. What is the relationship between wrath and the judge? When is anger not justified? When does anger serve justice?

2. *Retracing anger in judicial texts*

Judges are not simply neutral tools of justice. Their subjectivity and lives have an impact on the decisions they make. Although biographical studies could shed light on certain manifestations of anger by judges, that is not our focus. There are important limits to using someone's personal history as a core vehicle for reflection on anger. Traces of personally felt angers are often minimally present in judgements or are difficult to detect. As such, biographies are a useful resource when considered in parallel to the judgements, but also serve as a reminder that personal anger that arises in

the context of judicial work does not always visibly alter judicial texts. There are both pragmatic and theoretical limits to an approach focusing on such stories about anger. First, in the absence of rich biographical accounts (generally done long after the judge in question has stepped down from the bench), knowledge about actual anger is simply not easy to find. This is not to say that stories don't exist. They do. Within the legal community, there are always some with insider knowledge and insider stories. But although they may provide context or colour, these 'insider observations' travel in selective ways, and are not easily verifiable. For the most part, such stories help us flesh out angers felt rather than angers performed. They provide very little in the way of theoretical frameworks for thinking about judicial anger.

The stability and authority of law is in large measure a product of the replicability of legal texts. Though almost all texts are available for interpretation and re-interpretation, interpreters in various locations are required to grapple with 'the same' texts. This is a point both obvious, and yet of great significance. As Dorothy Smith reminds us, in our text-mediated societies, texts are far more than simple 'ideas'. They enter into the construction of social and physical environments by coordinating activity: they are "key devices in hooking people's activities in particular local settings and at particular times into the transcending organisation of the ruling relations".[37] Legal texts are key documents in the construction and maintenance of justice. Though it is interesting to explore the stories behind the scenes, these stories do not generally travel with the text. Whether or not those stories are 'true', or have explanatory power, there are nonetheless good reasons to restrict one's consideration of judicial anger to those angers visible in judicial texts – to those traces of anger that are textually inscribed and thus constantly replicable in the moment of judgement performed each time a reading of the text links together judge and witness/reader. So it is to judicial texts that we look, and to the language in which those texts are crafted.

Conventions of judicial writing establish the terrain against which one should search for evidence of anger. These conventions tend, in general, towards a writing style that aspires towards objectivity, rationality, logic, and which makes minimal use of language explicitly carrying a weight of passion or anger. The pressure towards 'dispassionate' decision-making encourages judges to articulate their angers in the language of judicial rhetoric, a language highly inflected with the discourse of abstract rationality. This impartiality, says Léon Husson, "does not only assume that the judge's personal interests do not come into play in this instance and that he or she strives to remain impartial before the parties involved. It also assumes that the judge works to keep his or her feelings under

control and his or her prejudices in check" [our translation].[38] In reading judicial opinions for anger, one must be attuned to what might otherwise appear as subtle variations from the norm. [39]

Furthermore, it is useful to ask a number of questions about how anger emerges in judicial language, and particularly about differences in: 1) the nature of the concern; 2) the target of anger; and, 3) the form of the anger. On the first of these, one can ask if the anger seems to be about context or concept. That is, does the anger seem to emerge in response to people and what they do? Is the anger linked with commitments to ideas and principles?[40] Second, who (or what) is the target of judicial anger? The target is frequently an identifiable individual, such as an adulterous husband or wife in a divorce action, the executor of a will, the accused in a criminal case, or a corporate officer in a tort litigation case. But judicial anger can also spill out against a number of other individuals indirectly implicated in a case: at parents who failed to put a stop to abuse taking place right under their nose, at loans officers or social workers or doctors who failed to do their jobs; at the strategy adopted by a lawyer; at another judge who admitted or failed to admit certain evidence.[41] Third, what form does the anger take? Some forms of expression of anger are seen as more common or more acceptable than others. Anger can be red hot and explosive, but it can also be white hot and channelled. That is, anger can also be expressed coldly or even in a passive-aggressive manner. Indeed, one might argue that the techniques of legal rhetoric make this latter form of anger particularly prevalent in legal writing. The point is simply that variations in the form do not necessarily deprive various language moves of their grounding in anger.

Judicial texts, particularly majority opinions, have legal force, exercise legal judgement and inscribe the law.[42] But, as Robert Gordon so aptly put it, the true power of a legal regime lies less in the relations of force it inscribes and brings to bear, than in "its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live".[43] The judge not only inscribes the law, but also seeks to persuade the reader/witness to see things as does the authoring judge. For Perelman, "[law], which presents itself as democratic, a work of persuasion and reason, must attempt to attract reasoned support through motivation" [our translation].[44] It is thus different from "authoritarian law, which imposes itself through respect and majesty" [our translation].[45] Readers of a judicial text are thus called to position themselves with or against the authoring judge. The latter, to retain the power granted by his or her role, must reach and persuade the largest number of people. "To give reasons for a judgement is to justify it, not base it on something impersonal and demonstrative, as it

were. It is persuading an audience one must get to know to ensure that the decision meets their expectations" [our translation].[46] Consequently, there is also an interest in examining the relationship between the judicial text and its implied readers, as well as the different ways in which anger can emerge in this relationship. Anger is a tool of persuasion. When used by a judge, it can become a judicial invitation to share this anger. Readers either welcome or resist it. They may also reject it because they, in turn, are angry at the judge for not addressing apparently obvious injustices.

Appreciating the degree of support for judicial anger is still more complex in non-unanimous judgments. The collection of opinions does not necessarily tell a coherent story through linear narration. This is the difficulty that emerges in F.F.B.: a judgement comprised of four opinions,[47] which do not flow in a chronological and continuous order. Quite the contrary. In the Supreme Court Reports, one first encounters the reasons of Chief Justice Lamer. But in those reasons, he responds to the (as of yet unread by the reader) reasons of Justice L'Heureux-Dubé. In order to understand the reasons of Justice L'Heureux-Dubé, one needs to read the reasons of Justice Iacobucci (to which she is responding). But even here, one would need to know what was written by Chief Justice Lamer, since the last several paragraphs of Justice L'Heureux-Dubé's judgement are a response to Chief Justice Lamer's response to her response to Justice Iacobucci. All this to say, full judgement is possible only when one has not only read the various component pieces, but has also picked back and forth between them to get the fullest possible account of what is captured by the whole.

This of course creates additional complexities for anyone attempting to retrace anger through the judgment. Because the case itself is composed of multiple opinions, a reader does not have the full picture until all the pieces are in front of him or her. The reader is positioned very much as a judge: the reader takes in all the opinions, considers their persuasive impact, and then is forced to a moment of judgement. Does the reader then agree with the majority, the dissenting opinion or neither? Legal readers will be familiar with the experience of reading one opinion in a case and being persuaded by it, followed by the reading another opinion in the same case, and having one's view completely change. It is often difficult to suspend judgement until the end of the process, and experience of reading is filled with moments of seduction and betrayal. In the context of teaching first year law, our own experience has been one of seeing many expressions of outrage as students move from one judgement (feeling persuaded) to another (feeling newly persuaded in the opposite direction) with a sense of shame at having held the first position which they now feel cannot be maintained, a feeling of anger and a sense that they have been

manipulated or betrayed by one author or the other, but also at seeing that there appear to be multiple truths and that the law does not give a final, objective, certain answer. The reader's reaction therefore needs to be considered. And, with Barthes having killed the author, we are reminded that the reader must be located in the text's written space.[48]

In brief, when interrogating judicial texts for the presence of anger, one of course must pay close attention to language. But it is also important to consider the structure of the reasons as published, to see if the order of production of the judges' reasons and the conventions of publication can give further information about the operation of anger. It also remains important to ask about the emergence of anger in the relationships constructed between the text and its implied readers. With these issues foregrounded, let us turn to R. v. F.F.B. to see what it might make visible about the faces of judicial wrath.

III. Performance of the Method: Discovering the Faces of Anger

In judicial decisions, the facts are recounted first and are presented as an objective given, a sure foundation upon which the legal analysis can be built. We follow the same narrative structure (separating fact from opinion) to facilitate an understanding of the discussion that will follow. That being said, as will be evident in the upcoming sections, it is clear that fact and opinion are related; accounts of the facts, far from being neutral, are themselves the bearers of opinion.

1. *A. The facts*

Let us begin with the account of the case provided in the head note of the Supreme Court Reports:

> "Appellant [F.F.B.] was alleged to have sexually assaulted his niece [P.A.L.] from when she was six to eight years old through to age sixteen. The complainant had been in his care as a child during the fifties and sixties and only left her parents' household in 1964 after being discovered in the act of intercourse with her. The alleged assaults were reported to the police in 1990 and appellant was charged with rape, assault and procuring an abortion."
>
> "During the course of the trial, the judge decided on a voir dire not to admit the evidence of the complainant's sister that she too had been sexually assaulted by the appellant, on the ground that it fell within the similar fact evidence rule and its prejudicial effect

> was not outweighed by its probative value. However, testimony of the complainant's brothers and sisters was admitted with respect to the violent control that the appellant exerted within the household. Appellant was convicted of rape and assault and was unsuccessful in his appeal to the Nova Scotia Court of Appeal. He had sought to have declared inadmissible those parts of her brothers' testimony relating to assaults by the appellant on the complainant's siblings. Given a dissenting opinion, an appeal as of right arose on this point".

Evidence heard and admitted at trial[49] included the testimony of P.A.L.,[50] F.F.B., P.A.L.'s mother, and several of the brothers and sisters in the family. There were also hospital records documenting internal injuries suffered by P.A.L. as a child, and social services documents concerning the two children P.A.L. gave birth to before the age of 16.

Through his lawyer, F.F.B. issued a blanket denial that any of the incidents described had occurred. The jury acquitted F.F.B. of the charge of having procured an abortion, but found him guilty on all of the other counts. He was sentenced to thirteen years in prison.

F.F.B. appealed the guilty verdict on a number of grounds. He maintained that a testimony given by one of the victim's brothers was prejudicial and should have been excluded from evidence. Two of the three judges from the Nova Scotia Court of Appeal[51] rejected this request as unfounded. However, the third stated that the trial judge should have instructed the jury as to the limited use of the testimony given by the victim's brother.[52] This dissent allowed F.F.B. to appear before the Supreme Court of Canada.

At the Supreme Court, there were three questions:

Should the evidence of the brother L.L have been excluded because its prejudicial value outweighed its probative value?[53]

If that evidence was admissible, did the judge err in failing to give the jury special instructions to warn them about how they should use that evidence?

If the judge erred, could the error be 'cured' by s. 686(1)(b)(iii)[54] , or was a new trial necessary?

The five judges of the court split into two camps. The majority (Justices Lamer, Sopinka and Iacobucci) concluded that:

> The evidence of the brother was admissible, but...;
>
> The judge should have given better instructions to the jury about how to use the evidence;
>
> The failure to give better instructions was an error that could be cured only by ordering a new trial: s. 686(1)(b)(iii) did not apply.
>
> The dissenters (Justices L'Heureux-Dubé and Gonthier) concluded that:
>
> The evidence of the brother was admissible, and...;
>
> The judge did give adequate instructions to the jury;
>
> Any error was technical at best: s. 686(1)(b)(iii) should apply and the original conviction should be affirmed.

And so, in accordance with the decision of the majority, a new trial was ordered. As an aside, when a court sends a case back for a new trial, it is not inevitable that a new trial will be held. A number of issues are in play, including the deployment of resources, and the availability witnesses (who may move, die, or simply refuse to participate a second time). A trial is sometimes forestalled where an accused chooses that moment to enter into a negotiated agreement with the Crown to enter a guilty plea in exchange for a joint submission on sentence. And that is exactly what happened in this case. The day the second trial was scheduled to start, F.F.B. pled guilty to one count of rape and one count of indecent assault in exchange for a sentence resolution that was better than the original: 7 years instead of the original 13. One might also add, for the sake of factual closure, that F.F.B., long an alcoholic, had suffered deteriorating health for some time; he died in jail within a few months of the new sentence resolution.

On the surface, the case seems to involve a fairly straightforward form of factual disagreement between the judges - disagreement about the 'fact' of the specific address to the jury; about the 'fact' that a second jury would come to the same conclusions as the first. But though one might divide the judges into two camps on the facts, the reasons make visible a court that is far more fragmented: four judges authored reasons in this case (Justices Gonthier, Iacobucci, Lamer, L'Heureux-Dubé). We will look in more detail at the language used by each of these judges. As Perelman emphasises, "more often than not, a judge is less likely to exercise power

through an explicit reinterpretation of the law than through his or her manner of qualifying the facts" [our translation].[55] But first let us consider what can be seen by attending to some larger structural matters related to the order of production and publication of those reasons.

2. *The order of the reasons: Publication and production*

It is sometimes possible to read something about judicial anger by attending to the conventions around the production of judicial reasons, and to variations from what one might expect in light of those conventions. This is one way to make visible the kinds of exchanges and emotions which may be operating around judicial deliberations. Indeed, in this case, some of the dialogues between the judges are made visible in the order of production and publication of their different sets of reasons.

First, one needs to distinguish 'order of publication' from the 'order of production'. Before 2005 and following the British tradition, written reasons in the Supreme Court of Canada Reports were published by order of seniority: from the most to the least senior of the (authoring and signing on to the judgement) judges. Thus, where a more senior judge has written (or signed on to) a dissent, or concurrence, those reasons would appear ahead of majority reasons written by a less senior judge.

So, in our case, the five judges on the court had seniority as follows: Justices Lamer, L'Heureux-Dubé, Sopinka,[56] Gonthier, and Iacobucci. Following the general conventions, the reasons appeared in this order: Justices Lamer (Sopinka); L'Heureux-Dubé; (Sopinka) Iacobucci; Gonthier.[57] The order of publication marks out patterns of seniority, rather than anything about order of production, or indeed, the status of an opinion as part of the majority or the dissent.

This rule of seniority did not apply to the head note. The head note, a summary of the reasons in the case, begins with the majority holdings, then summarises the dissenting ones.[58] In this case, the head note gives the order of reasons as follows: Iacobucci (Sopinka); Lamer (Sopinka); L'Heureux-Dubé; Gonthier. Note that in the head note, the reasons of Justice Iacobucci come ahead of the reasons of Chief Justice Lamer. The head note suggests that there are two sets of 'majority' reasons, but it marks out the 'central' majority reasons as those of Justice Iacobucci. Again, this does not tell us anything about the order of production, but it does give some indication about the status of an opinion as closer to or further from the 'ratio', or 'holding' of the case. What is of interest here is that the head note directs us towards the Justice Iacobucci text.

To learn more about the possible order of production, we can move to the texts themselves. We begin with the caveat that it is not always possible to make inferences about the order of production simply from reading a text. There are a number of considerations that can lead judges to craft their texts in specific ways, and it is not always the case that the structure of the judgement can tell you about the dialogues behind the scene. However, sometimes, the texts give us express information allowing us to track additional dimensions of judicial anger. F.F.B. is just such a case.

We know the order of production in part due to the interaction between the texts. Chief Justice Lamer begins his reasons by stating that he has already read the reasons of Justices Iacobucci and L'Heureux-Dubé. Justice L'Heureux-Dubé begins her reasons by saying that she has read the reasons of Justice Iacobucci. In an addendum to her reasons, she tells us that, since finishing her reasons, she has had a chance to read the reasons of Chief Justice Lamer. Justice Iacobucci's reasons engage directly with the case, making no reference to any other reasons. In a final addendum, he tells us that, since writing his reasons, he has read the reasons of Lamer, and agrees with them. He does not mention the reasons of Justice L'Heureux-Dubé, but presumably has read them, since he agrees with the reasons of Chief Justice Lamer (which are in large measure a discussion of the reasons of Justice L'Heureux-Dubé). Justice Gonthier tells us that he has read the reasons of both Justices L'Heureux-Dubé and Iacobucci. He does not mention the reasons of Chief Justice Lamer.

In brief, the texts themselves tell us that the order of production was something like this:

> draft majority reasons of Justice Iacobucci circulate[59];
>
> draft dissenting reasons of Justice L'Heureux-Dubé circulate (responding to Justice Iacobucci's reasons);
>
> draft reasons of Chief Justice Lamer circulate (responding to L'Heureux-Dubé's dissent);
>
> second draft reasons of Justice Iacobucci circulate (responding to Chief Justice Lamer's reasons);
>
> ·second draft dissenting reasons of Justice L'Heureux-Dubé circulate (responding to Chief Justice Lamer's reasons);
>
> dissenting reasons of Justice Gonthier (mentioning reasons of Justices Iacobucci and L'Heureux-Dubé).

Our inclination was to place Justice Gonthier's reasons as number 6, but his text may have been produced at one of several possible moments between numbers 3 and 6. Because he refers to the reasons of both Justices Iacobucci and L'Heureux-Dubé, and not to the reasons of the Chief Justice, his reasons could have been circulated as early as position number 3. However, the failure to mention the reasons of the Chief Justice needn't lead us to conclude that Justice Gonthier had not read those reasons. Justice Gonthier's text could also have been produced after the Chief Justice circulated his reasons, or after either of the second draft reasons of Justices Iacobucci or L'Heureux-Dubé. We will return later to the implications that can be drawn from this uncertainty about order of production. At this point, it is sufficient to note that the order provides us with some useful information.

The texts suggest that, before the reasons of Justice L'Heureux-Dubé circulated, the judges had anticipated two set of reasons, a majority of three, and a dissent of two. But it appears that the Justice L'Heureux-Dubé reasons then generated a response by Lamer. In 1993, Lamer was both the Chief Justice and the most senior judge. Some would say that one of the roles of a Chief Justice is to foster agreement between judges in the interest of the authority and of the legitimacy of the court. In this particular case, it is surprising to note that not only does he fail to achieve this kind of agreement, but in fact, his reasons seem to have provoked an even greater division among the judges. Instead of what would have been one majority opinion signed by three judges, the decision of Chief Justice Lamer to write creates a situation where Justice Sopinka signs on with two different 'reasons', each of which express agreement with the other. Further, had Lamer simply signed on to the Justice Iacobucci reasons, they would have appeared first in the published record, followed by the L'Heureux-Dubé dissent. Chief Justice Lamer's decision to write means that Justice L'Heureux-Dubé's dissent appears before the Iacobucci reasons. What is more, this specific situation shows us that the manifested anger is directed toward the dramatic case as well as the positions held by the other judges.

3. *The language of the individual texts*

We are interested in displays of emotion in judicial texts, especially the emergence of anger. As such, we feel it is best to begin by studying Justice Claire L'Heureux-Dubé's dissenting opinion. According to Pillsbury, it is in dissent that emotion is most apparent[60] because dissent expresses a difference in opinion.[61]

a. Dissenting reasons of Justice L'Heureux-Dubé[62]

Justice L'Heureux-Dubé's dissenting opinion begins in language that 'feels' quite consistent with what a legal reader would expect; the text is fairly dry or detached and analytical in traditional ways. She seems to avoid using strong or passionate language, preferring to make a predictable comment about the first and second matter at issue (the admissibility of the testimony and the instructions given to the jury) by referring to relevant cases and assessing the relative value of the matters at issue in a language that bears the customary markings of law. However, the fact that she reproduced a long passage from the opinion written by Justice Hallet of the Nova Scotia court of appeal[63] (relating to the F.F.B. case), presenting the judge's reasons in their near entirety, is not insignificant and must be included in the analysis. All texts are made up of pieces of text. Julia Kristeva wrote, "A text is therefore a "productivity", meaning [...] a permutation of text, intertextuality. In the space of a text, several statements, taken from other texts, cross and cancel each other out" [our translation].[64] Barthes agrees. "The concept of intertextuality is what brings the volume of sociality to the text theory. Not on a path to a traceable relationship, a voluntary imitation, but a path to dissemination" [our translation].[65] Quotations are but a more obvious form of this intertextuality. They cannot be isolated, separated from the text because of their 'foreignness'. They are not more foreign than any other phrase. As such, the quoted passage in the judge's text, which did not need to be reproduced as a whole for coherence of the reasons and could have been shortened, even summarised, reveals a choice. It shows the judge's intent to legitimise her opinion and her anger through outside support. In fact, Justice L'Heureux-Dubé steps into a genealogy of anger. She calls upon the anger expressed by Justice Hallett, who herself refers to the reasons given by her two colleagues in the Court of Appeal: the dissenting opinion that the accused did not receive a fair trial[66] and the majority opinion that supports the sentence passed down in the court of first instance.[67] Three judges from the Nova Scotia Court of Appeal who nevertheless agree on the judicial grounds for appeal[68] and who entrench the emotion stirred up by the case in the presentation of facts in the court of first instance. It is in this jumble of anger that Justice L'Heureux-Dubé reiterates her own. Anger that she holds in check, but which is already mounting.

Justice L'Heureux-Dubé then turns, however, to the question of defence counsel tactics. She discusses the defence counsel's strategic decision not to object to this evidence at the time of trial. She includes a large segment from the Court of Appeal transcript, where the defence lawyer was explaining his failure to object.[69] The transcript section

makes it clear that this was not a slip, a mistake, or a problem of inadvertence. On the contrary, counsel was of the opinion that the introduction of the most heinous evidence might open up the possibility in the minds of the jury that the witnesses were fabricating or inventing.

In this context, she asks why the failure to address, in a context where counsel may well have opposed a limiting instruction, should be seen as an error of law. Here, you can see some anger beginning to emerge, anger at a practice of strategic lawyering. Certainly, her use of transcripts, including sections where counsel himself was of the view that his client was likely to be convicted even without the evidence, tends towards a more explicit articulation of anger as an emotion.

However, having expressed this irritation (if not quite full blown anger) with the conduct of counsel, she goes on to say that, even if she were wrong, she would apply the curative provision "without hesitation".[70]However, she does not truly believe that she is wrong and marks her growing anger, about to shift targets, by beginning the next phrase with a "quite frankly" that looks down on the other opinion.[71]

After stating that there is no dispute about the test, she moves to consider the totality of the evidence before the court, directly related to the facts. This is the move one expects at this point because the central question here is whether or not an affirmation of the jury's conviction would cause a miscarriage of justice. This question can only be answered through a review of the facts before the court.

In the language used to describe the facts, we see rhetorical formulations which mark out anger in inescapable ways. The first thing to note is her use of words which carry emotive weight, words which are sometimes difficult for a reader to read, and which serve to keep broken and damaged bodies firmly in the view of witnesses encountering the text.[72] Indeed, it is arguable that the passage performs some of the violence of the facts, making the reader an actual witness to a traumatic encounter:[73]

> "It is thus critical to consider all the evidence that was available to the jury. There was, of course, the evidence of P.A.L. She told a nightmarish story of physical and sexual abuse. She spoke of sexual molestation as a child, of forcible rape at 10 years of age, and of being rushed to the hospital because of the resulting haemorrhaging. She told of the appellant grinding her face into the ground with his foot, holding her head under the water in a bathtub and threatening to bury her with her dead brother, cutting her legs with knives, burning her with cigarettes

> and cigarette lighters. She told of having a broken bottle stabbed into her leg, and silence and compliance obtained through threats to burn down the houseand kill her family, of giving birth twice before the age of 16" [our emphasis].[74]

Justice L'Heureux-Dubé uses evocative and explicit terms when referring to the victim's body and the emotions felt. She refers to a "nightmarish story" of abuse, "sexual molestation as a child", "forcible rape at 10 years of age, and of being rushed to the hospital because of the resulting haemorrhaging." She is not simply using highly emotive words, but is also making use of verbs in an active form: rushed, grinding, holding, threatening, cutting, burning. These words tend to focus our attention on the events as having a solid reality, rather than on the act of testifying about those events. In the paragraph which follows, Justice L'Heureux-Dubé goes further in her account, directing the reader towards corroboration coming from the mother, from siblings, from hospital records verifying internal injuries, and from remaining scars on adult bodies providing additional evidence of abuse. She therefore chooses rhetorical formulations that suggest solidity, stability, reliability and credibility:

> "This disturbing evidence was supported by other witnesses. T.B. saw the accused have intercourse with P.A.L. when she was 16. D.M.L. confirmed seeing the accused smash P.A.L.'s face into the side of a car. She also was a witness to years of sexual abuse. There was the evidence from Mrs. L. which corroborated elements of both P.A.L.'s and T.B.'s testimony. Mrs. L. also told of breaking the lock on a cabinet belonging to the accused, and finding items which belongedto P.A.L. but which had gone missing. There was evidence of P.A.L.'s two pregnancies, and hospital records verifying the internal injuries sustained by P.A.L. when she, according to the accused, fell on a stick. There were remaining scarson her body which provided additional evidence of physical abuse" [our emphasis].[75]

The verbs in this passage are also active and direct: supported, saw, confirmed, witness, corroborated, told, finding, verifying. The only place where the verb use suggests any ambiguity is, significantly, in the phrase we have put in italics: "according to the accused". Indeed, the only words that suggest any level of epistemic uncertainty are attached to the passage in which the accused story is recounted.

It is only after putting all this evidence in front of the reader, that Justice

L'Heureux-Dubé turns to the 'problematic' evidence of one of the brothers, evidence that addressed not the specific assaults against his sister, but which spoke rather to the climate of fear that had been created by the uncle, a climate that kept the children silent. This testimony, "outrageous and unbelievable as it seems" -in her words- was supported by the evidence of other witnesses. She then goes on to say:

> "The totality of evidence in this case produces a strong sense of moral revulsion, and it would not be surprising if the jury were to conclude that the appellant was in fact a bad person. Such a conclusion does not, in itself, create a problem. The problem arises where a jury uses this conclusion to make the further conclusion in the absence of evidence of guilt, that the accused is guilty because he is the type to do such atrocious acts" [our emphasis].[76]

This passage is interesting for its drawing of a distinction between 'deciding that a person is a bad person', and 'deciding that there is sufficient proof of guilt'. Here, Justice L'Heureux-Dubé claims that juries are able to make the distinction between moral and legal judgement, and that the fact that moral judgement may also be operating needn't lead us to conclude that juries are unable to distinguish between moral judgements and their obligation to satisfy themselves that legal judgement is also appropriate.

Incidentally, she continues by expressing her own opinion that even had the evidence in question been completely excluded, the remaining evidence was so compelling as to necessitate a finding of guilt. Up to this point, the language has been strong, made so through the addition of emotion marking words: 'nightmarish', 'disturbing', 'grinding', 'smash', 'rushed', 'threatening', 'violent', 'revulsion', 'atrocious'.[77] But much of the emotional weight of the reasons[78] is carried in the words of the witnesses themselves: she reproduces large portions of the transcript which produce their own effects in a reader. For example, she includes the testimony of a younger sister who tells of seeing the abuse, but saying nothing and pretending she was asleep to avert the possibility that she herself would be victimised.[79] If anger is spilling out in Justice L'Heureux-Dubé's reasons, it is focused on the horror of the abuse. It is an anger that makes visible the hidden and terrible experiences of P.A.L. and her siblings.

Justice L'Heureux-Dubé's dissenting opinion is, until this moment in her reasons, focussed on the facts of the case and on its actors, in particular, on telling the story on the complainant through her own voice, through the testimonies of those who had witnessed the crimes committed by the

accused and on the material evidence. The judge's anger is made visible in the text through the narrative she reproduces and the way she chooses to reproduce it (using the voices of the victims), as well as through the choice of words carrying her own emotions.

But at this point in the judgement, Justice L'Heureux-Dubé begins to engage with Justice Iacobucci's reasons. Here, the emotional tone of her response is made explicit, but the target of anger begins to shift. We reproduce here two paragraphs in their totality:

> "For these reasons, I find myself startled that, after remarking, at p. 737, that 'the evidence was not so overwhelming that the jury would have inevitably convicted the appellant'; my colleague concludes, at p. 737, that 'this is not an appropriate case to invoke the curative provision'. Quite frankly, if the curative provision cannot be applied here, I do not know where it can be applied. The weight of evidence in this case is staggering. To refuse to apply the provision in these circumstances is to render the curative provision impotent and enfeeble the meaning of the word 'justice'. This Court must give substance to the term 'miscarriage of justice'. Justice requires that all fairness be accorded an accused, but where, as in this case, the accused has in fact been treated with fairness, justice also requires a consideration of the public interest."
>
> "The Court cannot be blind to the ramifications of sending this matter back for re-trial. Apart from the time and expense to the public purse in terms of courts, prosecutors and defence lawyers, the complainant and her family have already lived through an experience of unspeakable violence as well as the trauma of a trial. A new trial will require them to once again re-live experiences that should not be experienced even once. Given that there was no miscarriage of justice in the first trial, this would be more than 'regrettable'. In the circumstances of this case, a new trial would itself, in my view, be a miscarriage of justice, the very type of miscarriage that the curative provision of the Code was meant to prevent" [our emphasis].[80]

The tone of these two paragraphs is significantly different from the tone of the initial paragraphs, and the language here is explicit in invoking the emotional registers of shock, dismay, and outrage. Consider the phrases we have emphasised above: "I find myself startled", "quite frankly," "the weight of the evidence in this case is staggering", "render the curative provision impotent", "enfeeble the meaning of the word justice", "the

court cannot be blind to the ramifications", "experience of unspeakable violence", "trauma". She deploys the language of s. 686(1)(b)(iii) of the Criminal Code, language of a "miscarriage of justice", but in a way that focuses attention less on 'the case' than on 'the Court'.

As such, in paragraphs 45 and 46, the target of Justice L'Heureux-Dubé's anger shifts. Her anger is now directed not at the accused, but at the Court itself, and at its unwillingness (in her language) to see the complainant and her family. Her anger serves as a photographic developer (révélateur), revealing and denouncing P.A.L's invisibility in Justice Iacobucci's reasons. She implies that they have been erased in a way that makes the Court responsible. The purpose and fundamental role of the courts is to render 'justice'.

Note also the number of times that she expresses anger by invoking the concept of 'justice'. Here, blind justice is invoked, but in combination with violence and trauma. This is not 'Justicia', blindfolded and holding the scales in balance. Justice L'Heureux-Dubé is evoking a quite different picture, asserting that the majority is unwilling or even refusing to see the carnage before them. By referring six times to the word "justice" and four times to the expression "miscarriage" or "miscarriage of justice" in these two paragraphs, Justice L'Heureux-Dubé's expression of anger directly targets her colleagues, suggesting that they are culpable in perpetuating the environment of silence and erasure. Her decision to put scare-quotes (placing the meaning of the term in issue) about the word "regrettable" and the word "justice", indicate further levels of anger. She therefore adopts a Kantian view of justice based on human dignity. Justice "becomes a duty that, in order to be fulfilled, involves referring to a court of one's conscience or: [...] acting in such a way as to treat humanity as well within oneself as toward others, always as an end and not a means" [our translation].[81] Justice is the end result of law, not its means.

The law can also be seen as a target of Justice L'Heureux-Dubé's anger. When she discusses the jury's use of the testimony, she uses logical reasoning stemming from a "quasi-syllogism", which prevents all interpretation to the contrary without seeming illogical.[82] She writes: "If the jury had found the accused guilty on all charges, I would not necessarily conclude that the jury had used the evidence of L.L. improperly. However, the fact that the jury did not convict on all grounds supports the conclusion that the jury understood the principles of law, that they properly followed the instructions of the trial judge, and that they found the accused guilty of specific charges based solely on the evidence before them".[83] This reasoning contains a third proposal, one that is silent, but carries serious portent. The logical sequence of the judge's

affirmations can therefore be inferred:

> If the jury finds the accused guilty of all charges, it does not make improper use of the testimony.
>
> If the jury finds the accused guilty of some of the charges, it makes proper use of the testimony.
>
> If the jury does not find the accused guilty, it makes incorrect use of the testimony (?).

Shining through this self-contained, well thought-out justification of her reasons is the judge's insistence on the lack of doubt concerning the alleged events as well as the jury's abilities and the soundness of the instructions they received. Furthermore, she lays before the readership her certainty of the accused's guilt after having discussed the case's moral aspect, which is not mandatory in the judgement. Consequently, the structure on which her reasoning is built seems to express a refusal to believe that the law can counter morals, that is, that the instructions given to the jury do not respect judicial standards while the accused is nonetheless guilty. The majority opinion is not without a judicial basis, but it is perhaps less sensitive to the rules of morality, as attached as these rules are to those of law. L'Heureux-Dubé's refusal to entertain doubt therefore reveals anger against this judicial possibility, perhaps substantiated, which leads to a result that is contrary to moral standards. The conflict between morality and the law is also clear in her description of the jury's role, in which she repeats an affirmation made by Chief Justice Dickson,[84] "The very strength of the jury is that the ultimate issue of guilt or innocence is determined by a group of ordinary citizens who are not legal specialists and who bring to the legal process a healthy measure of common sense".[85] In a word, she believes the shortcomings of the legal system can be balanced by common sense. And so must they be. Justice is the end result of the law and truth is the end result of justice.[86]

In the paragraphs that follow this, she comments on reasons of the Chief Justice Lamer. But before looking at those comments, let us turn first to the reasons of Justice Iacobucci (to which she is responding). We will then turn to the reasons of Chief Justice Lamer, which are in large measure themselves a response to the two paragraphs above.

b. Majority reasons of Justice Iacobucci[87]

The classical structure of Justice Iacobucci's reasons give further support to the textual indicators that his draft was the first to circulate, and that it

was expected to be a majority. He first sets out the facts of the case and the relevant legislation. He then summarises the judgements of the lower courts and sorts out the issues involved before turning to his legal analysis. What can we see in his account of the facts, given our knowledge that he will conclude the evidence of guilt before the jury was not overwhelming?

Here, we can note that Justice Iacobucci's language (like Justice L'Heureux-Dubé's) shows a certain rhetorical force. But the words chosen here do a different sort of work. Consider the language he uses in his account of 'the facts' of the case:

> "P.A.L. testified that the appellant began abusing her";[88] "P.A.L. testified that the sexual abuse began";[89] "The first incident of sexual intercourse allegedly resulted in P.A.L.'s hospitalisation";[90] "P.A.L. gave birth to two sons at ages fifteen and sixteen, allegedly as a result of the sexual abuse by the appellant. Stories were apparently fabricated as to how these pregnancies occurred";[91] "she testified that the appellant used constant threats";[92] "she testified that the appellant used constant threats"[93] [our emphasis].

Terms like "allegedly", "testified", "apparently" -neutral from one perspective- are verbs which qualify, which introduce elements of uncertainty. They thus do a certain kind of semiotic work, and serve as reminders to legal readers that tales told are not always full descriptions of reality, therefore making credibility a larger issue than it had been initially. Such language serves to de-emphasise the importance of any given account of the facts, drawing allegiances away from individual parties, and towards (more abstract) legal principles, which are presented as being more reliable. Though the effect is subtle, such formulations insert distance between the parties/facts and the reader. While one might argue that Justice Iacobucci's language is more 'neutral' than L'Heureux-Dubé's, it can also be noted that his language performs a non-neutral task: it turns credibility into an issue, and serves to call the evidence of the complainant and her family (and the hospital and its record keeping practices) into question.

Iacobucci concludes that the evidence was not overwhelming. His use of language tends to draw the reader in a similar direction. Justice Iacobucci points out that "the appellant denied that any of the incidents described by P.A.L. occurred".[94] If credibility was at issue here, it was at issue in the following sense. Against F.F.B.'s blanket denial, the complainant testified to the assaults; her sister testified to seeing an assault, a brother testified to seeing an assault, a mother testified to finding physical objects

in possession of F.F.B. Then there was corroboration in the form of hospital records and bodies. This is the way in which credibility was in issue: for F.F.B.'s denial to be credible, all the other witnesses must be lying.

But, again, in the context of the appeal to the Supreme Court, the only evidence 'at issue' was the evidence of the brother on the specific question of the climate of fear produced in the children by F.F.B.. All the judges agreed that there had been no problems with all the other evidence that had been given about the sexual and physical assaults against the complainant herself. The evidence being challenged here, evidence which did not make F.F.B. look particularly good, was evidence called in response to F.F.B.'s assertion that none of these events could have happened without notice.

However, in the language used and problems foregrounded, attention is taken off the relevance of the evidence, and is instead placed on the credibility of P.A.L. Justice Iacobucci notes that P.A.L.'s credibility and her long delay in coming forward were put in issue by the appellant. While he does not himself suggest that P.A.L. was not credible, his many references to credibility do serve to pull the question to the forefront of a reader's mind:

> "The same question may be asked in the context of whether the jury in the instant case could have had a reasonable doubt as to the appellant's guilt had they been properly charged with respect to how they might use the testimony of L.L. and T.B. In my opinion, the evidence was not so overwhelming that the jury would have inevitably convicted the appellant if the judge had properly instructed them as to the use they could make of that testimony. Credibility was a large issue at trial, and it is impossible to know what was in the minds of the jurors and how they were affected by the unrestricted admission of the evidence in question" [our emphasis]. [95]

This formulation suggests that, properly instructed, the jury should have seen the witnesses as less credible. But in making this move, Justice Iacobucci does not slip over into showing any sympathy for F.F.B. as an individual. On the contrary, he makes a quite strong statement about F.F.B.'s character: "It is indisputable that the evidence of L.L. and T.B. tends to show that the appellant is a person of bad character, with a propensity for violence". [96] It is unclear, however, whether this assertion functions simply as an acknowledgement that bad stuff may have happened, or to again raise questions of credibility (ie. it is indisputable

that the evidence tends to show bad character, but the evidence might not be credible?). As such, when he presents the facts at the beginning of his reasons, he writes: "She testified that she decided then to report the alleged assaults to the police". The use of "She testified" and "alleged" emphasise the related character of the events and raises doubt that the crimes took place.

One should also note that, at the end of his reasons, Justice Iacobucci does show a moment of sympathy for P.A.L, deploying language carrying some markers of emotion:

> "It should be stated that it is highly regrettable that P.A.L. and her family, as well as the appellant, will be forced to undergo a new trial. However, we must be inexorably vigilant to ensure that courts properly follow the rules which provide fair trials to all those charged and tried under the Criminal Code" [our emphasis].[97]

Justice Iacobucci acknowledges a level of regret at the outcome. This is the "regrettable" that L'Heureux-Dubé puts in scarequotes in her own reasons.[98] But the centre of focus in Justice Iacobucci's moment of sympathy is with the fairness of the trial. He foregrounds the demand for the court to be "inexorably vigilant" to follow the rules to provide fair trials. The primary commitment here is to 'justice' and 'a fair trial'. Said differently, the commitment to 'justice' is to 'a fair trial'. While (writing for a majority) it is not necessary for Justice Iacobucci to use strong language, we do have the sense that he believes it would be an outrage for the conviction to stand. The trial judge was in error and must be corrected in the interests of justice. Justice Iacobucci seems to be demonstrating that a true passion for justice must not run the risk of being tainted by emotional responses to the 'alleged' horrific facts of the case. His passion for justice rests on a belief that the jury cannot be trusted to make good legal judgements without a more specific form of warning from the judge about how they can use the evidence that has been found to be relevant and admitted. The language here -the neutral sounding language of law- creates a distance from the evidence, portraying it as only one set of 'stories' amongst many possible ones.

c. The concurring reasons of Chief Justice Lamer[99]

One might think that Justice Iacobucci would amend his reasons to respond to the concerns articulated in Justice L'Heureux-Dubé's dissent. But he does not do so. The job of addressing her anger appears to have fallen to - or to have been voluntarily chosen by - the Chief Justice. The

only comment we get from Justice Iacobucci is a line at the end indicating that he has read the reasons of the Chief, and agrees with them. Presumably, this means he has also read the reasons of Justice L'Heureux-Dubé's since, as we shall see below, Lamer's reasons are a direct engagement with her reasons. In adopting the reasons of Chief Justice Lamer, Justice Iacobucci implicitly adopts the Chief Justice Lamer's critique of Justice L'Heureux-Dubé.

Lamer begins with the assertion that the appeal must be allowed and a new trial ordered for the reasons given by Justice Iacobucci. He wishes, however, to further develop his analysis of the law surrounding s. 686(1)(b)(iii). This law, he tells the reader "is clear".[100] One might note that this was not a contested issue. All three judges are in agreement about the meaning of the section, thus, in large measure, the next several paragraphs of Chief Justice Lamer's opinion canvas ground over which there is no dispute. Lamer wishes, however, to foreground a cautionary note: appellate courts should not too quickly resort to the section. Otherwise they run the risk that the verdicts of judges will be substituted for the verdicts of juries. The central question, he asserts, is whether, with the appropriate instructions, "the verdict of guilty would necessarily have been the same". [101]

At this point, Chief Justice Lamer (like Justice Iacobucci in the reasons above) directs his attention to the case before him, stating "in the final analysis, the case turned on questions of credibility".[102] He agrees that there was ample evidence upon which a jury could have convicted, but, like Justice Iacobucci, would not have found it unreasonable had the jury acquitted: since he finds it undesirable to ask why the jury might or might not have accepted various pieces of testimony, he would not find it unreasonable were the jury to have accepted the accused's wholescale denial of any wrongdoing over the evidence proffered against him.[103] Here, by suggesting that this is a case about 'credibility', Chief Justice Lamer subtly calls into question not only the evidence of the brother L.L., but all the other evidence that had been before the jury. One may wonder if such a conclusion suggests that the witnesses had not been truthful and that documents had been doctored. It does imply that the Crown, the judge and jury were duped by conspiring witnesses or even a conspiracy to falsely convict an innocent man.

And yet, while nodding in a direction that distances the readers from the parties, Chief Justice Lamer nonetheless refrains from taking a position as to the believability of any particular witnesses. His focus is not on the parties, but on the jury instructions. His passion is reserved for issues of trial fairness. We see this over the next few paragraphs. The language of

justified anger begins to surface in Chief Justice Lamer's comments about the decision of the trial judge. He says:

> "The theory of the Crown as put to the jury by the trial judge was an invitation to the jury to infer F.F.B.'s guilt of the counts in the indictment on the basis that he was a person with the propensity for cruelty and violence to children. In short, it was an invitation to the jury to do exactly what the law prohibits. Not only was there no instruction that this should not be done, as in my view the law requires; there was, in fact, an invitation to do exactly what the jury ought to have been told, in the clearest possible terms, not to do."
>
> "In these circumstances, it can scarcely be concluded that the verdict of the jury would have been the same had the trial been conducted in accordance with the law. Upon the evidence adduced, a verdict of guilty was justified, but not inevitable. A verdict of acquittal would not have been unreasonable. The absence of the required instruction, in the circumstances of this case and in light of the way the theory of the Crown was put to the jury was a serious error cutting to the heart of the manner in which the jury should approach the evidence. A clearer case for a new trial is difficult to imagine. The application of s. 686(1)(b)(iii) is completely inappropriate"[our emphasis]. [104]

In this passage, the language is getting stronger: "serious error cutting to the heart", "clearer case for a new trial is difficult to imagine", the application of the curative provision "is completely inappropriate". We begin to approach something more passionate – a sense of outrage at actions that are characterised as cutting to the heart of justice. Foregrounding the need to safeguard justice, Lamer finally replies directly to the dissenting reasons of Justice L'Heureux-Dubé. He does so in ways that, on the one hand, use the code words of respect, but on the other hand, do not simply express disagreement, but suggest judicial incompetence. For our purposes, let us focus on this passage:

> "L'Heureux-Dubé J.'s reasons, in my respectful opinion, fall into error with respect to the dangers of prejudice created by the sort of evidence here in issue. She says at p. 719:
>
> 'The totality of evidence in this case produces a strong sense of moral revulsion, and it would not be surprising if the jury were to conclude that the appellant was in fact a bad person. Such a conclusion does not, in itself, create a problem. The problem arises where a jury uses this conclusion to make the further conclusion, in

> the absence of evidence of guilt, that the accused is guilty because he is the type to do such atrocious acts.'
>
> 'With respect, this is not the law. It is precisely the very chain of reasoning against which the jury is to be cautioned; they are not to be told to go ahead and use evidence of propensity as evidence of guilt provided there is other evidence, as my colleague implies in the quoted passage. They should be told, but were not here, to put that chain of reasoning out of their minds'" [our emphasis].[105]

This passage is interesting in several respects. First, the quote reveals the disjuncture between the language of "in my respectful opinion" and the content of that opinion. Chief Justice Lamer's wording goes quite a bit beyond disagreement on legal grounds, and quite a bit closer to an assertion of judicial incompetence. He writes, "in my respectful opinion", and "with respect", but the tone of the language reveals a gap between respect felt and respect expressed. Consider, for example: "With respect, this is not the law." In this sentence, the words "with respect" function rather as a sign of deep disrespect. This is not, "With respect, I cannot agree" or "With respect, I take a different view". Rather, Chief Justice Lamer claims the right to assert what the law 'is' in a way that suggest it has a visible and objectively clear presence. This also allows him to assert that Justice L'Heureux-Dubé's seeming 'inability to get the law right' is a function of incompetence rather than a disagreement about the content of the law.

Having already expressed the view that juries tend towards excessive reliance on emotion over reason, and are unable to make decisions without very clear directions from a competent judge, Chief Justice Lamer now suggests that Justice L'Heureux-Dubé has shown herself to be even less able to reason than the average jury member: "it is precisely the chain of reasoning against which the jury is to be cautioned". Justice L'Heureux-Dubé, he suggests, is even less able than the (inherently instable) jury to discipline her chains of reasoning. Further, and with an increasing tone of outrage, he asserts that she is implying that the jury should use evidence of propensity as evidence of guilt. Anger is emerging in this judgment, and it has two targets: first, the trial judge who did not stand up for the principles of neutral justice; and secondly (and much more strongly) against Justice L'Heureux-Dubé, who is swayed by passion rather than reason.

The next paragraph reveals another deployment of rhetoric. Chief Justice Lamer adopts the scare quote method (used also by Justice L'Heureux-Dubé in discussing the Justice Iacobucci reasons) to place in question some of the language of anger that had emerged in the Justice L'Heureux-

Dubé reasons, in a manner which bleeds the words of some of their force:

> "In order to reach the conclusion that the evidence of the Crown is "compelling" and its weight 'staggering' my colleague must assume that Crown witnesses are credible and that the evidence of the defence is not. This conclusion appears to be premised on the fact that 'the complainant and her family have already lived through an experience of unspeakable violence' (at p. 720, emphasis added). These are matters which the law, justice and the public interest require to be entrusted to a properly instructed jury" [our emphasis].[106]

One might note at this juncture that the jury did arrive at just this conclusion. But Chief Justice Lamer's comments here assert that their conclusion could well have been undercut had the jury received 'proper' instruction. This chain of logic suggests that the jury's determinations about credibility were in error. The effect is to enhance the credibility of the accused (who had done nothing more than issue a blanket denial through his lawyer), and to undercut the credibility of the many other witnesses who gave evidence. Note also that Chief Justice Lamer has placed his scare quotes not only around words dealing with the weight of evidence, but also around words describing the pain of the violations experienced. In placing these two issues together, Chief Justice Lamer is undercutting not only the weight to be given to the evidence and the credibility of the witnesses, but is also calling into question the notion that there was any experience of violence at all. His anger at L'Heureux-Dubé flows out not only in the form of an attack on his fellow judge, but also in the form of a minimisation of the violence documented in the court, and dismissal of those who testified about the abuse they suffered.

d. Back to the final paragraphs in the reasons of L'Heureux-Dubé

Let us return to the final paragraphs in the dissenting reasons of Justice L'Heureux-Dubé.[107] These last paragraphs are clearly marked as an addition to the judgment. She explicitly begins by telling us that, since writing her reasons, she had had the opportunity to read the reasons of Chief Justice Lamer, and that the subsequent paragraphs are a response to those reasons. It is of some interest that, in this portion of her reasons, she moves back from language resonant with anger or wrath, to language that is articulated in the more traditional of law's ways. She is responding to a strong attack, but answers with language that is sounds measured, cold and detached.

Her responses involve a direct engagement with the reasons of the Chief

Justice. She begins by saying that she agrees with his articulation of the relevant principles, adding that her reasons do not depart from those principles. She then goes on to express her disagreement ("I totally disagree with the Chief Justice") with the idea that the case turned on credibility. She also, using the formulaic phrase, "with respect", adds that she believes him to have misinterpreted her comments concerning the repugnant nature of the evidence in the case. She goes on to point out that her comments concern not the task of a jury, but the task facing an appellate court. The evidence is reviewed in order to determine whether or not a reasonable and properly instructed jury would reach the same conclusion (rather than to figure out what this particular jury may or may not have thought). Here, though the language is much less explicitly emotional, one can see again that she is keeping her attention on the role of the appellate court, making a claim about the justice (or injustice) being performed by those asked to assess the application of s. 686. The closest we get to emotion is her use of the phrase "I totally disagree with the Chief Justice that the case essentially turns on credibility".[108]

e. The reasons of Justice Gonthier[109]

Finally, we turn to the very brief reasons of Justice Gonthier. Gonthier states that he has read the reasons of Justice L'Heureux-Dubé and those of Justice Iacobucci. He writes that he agrees with both of them that the testimony of the brother L.L. was admissible. However, he prefers the reasoning of Justice L'Heureux-Dubé concerning the adequacy of the trial judge's instructions to the jury. He also agrees with Justice L'Heureux-Dubé that the weight of the evidence supporting the guilt of the accused was overwhelming and that this was a proper case for the application of s. 686(1)(b)(iii).

On the surface, there is nothing in the opinion which carries any suggestion of anger. However, as mentioned earlier, anger can take many different forms; silence is one. When reading judicial decisions for traces of anger, one must attend not only to words, but also to gaps and omissions.[110] Is there a silence in a space where words would have seemed in order? In his text, Gonthier explicitly mentions the opinions of both Justice Iacobucci and Justice L'Heureux-Dubé, but says nothing about the opinion of Chief Justice Lamer. What are we to make of this absence? Is Justice Gonthier's silence an eloquent one?

Here, the textual silence forces one into speculation, and a consideration of various possibilities. How should the silence be understood? Does the silence imply merely that he was unaware of or failed to read the reasons of

Lamer? This seems unlikely given the work ethic of the Supreme Court judges. But what then, does the silence suggest? Does it imply that Gonthier disagreed with the Lamer reasons? That Gonthier saw the Lamer's reasons as an irrelevant commentary on the law? Is this a silence of propriety? Or is it a more active response to the visibility of anger directed against L'Heureux-Dubé? Is this an example of one judge giving another judge 'the silent treatment'? Or does the silence mean nothing at all?

The brief reasons of Gonthier may or may not reflect traces of anger in the form of an absence. However, the text, omitting words when words seem to be called for, requires the reader to pose a set of questions which foreground the ways in which anger may be operating in the background. At the same time, that very absence prevents the reader from coming to any kind of authoritative answer.

IV. CONCLUSION

We have explored the faces of judicial wrath to shed light on some of the many ways anger is linked to notions of justice. We have argued that wrath is a persistent judicial emotion, and that it emerges in fashions both appropriate and inappropriate. We also suggest that an interrogation of judicial texts can help make these operations visible in ways that allow us to ask better questions about the linkages of anger and justice. Clues can be found: in the words used by judges; in conventions concerning the publication and production of reasons; in the reading of majority and dissenting reasons against each other; in a consideration of gaps, omissions, and silences; in attention to the ways in which witnesses to judgment interact with the texts of judgment.

Acknowledging our subject position as readers, our voyage through F.F.B. leads us to foreground some of these faces and linkages as follows. In the Justice Iacobucci reasons, we see a text and a vision of justice which seems far removed from the language of anger and wrath. The tools of persuasion here are those of detached, objective, and principled justice. In the moment of exercising judgment, the judge acknowledges (and grieves) the additional suffering which may flow to P.A.L., but implies that this suffering is part of the cost of the demand for justice. Because of these commitments to justice, the text declines to use the language of wrath against the accused. The 'rationality' of Justice Iacobucci's reasons and the language used to describe the harms and the evidence tends to foreground the need to protect the accused while pressing the harmed body offstage. His reasons invite the reader to be complicit in the erasure of the victim's bodies and to embrace a vision of justice that excludes them.

The Justice L'Heureux-Dubé reasons, on the other hand, presume a much different implied reader, and are redolent with the language of anger. Wrath is made visible, and the reader is invited to share it. Through language which foregrounds bodies and violations, she directs her anger at a violent pedophilic abuser, and a lawyer attempting to strategically exploit the law. Furthermore, she directs anger at her colleagues, whom she accuses of perpetuating a grave injustice as well as at the law they use to support their reasons.

As for Lamer's reasons, we maintain that they add nothing of substance to the Justice Iacobucci judgment, and read them primarily through the language of wrath. We see in them a return volley of anger, loaded with projection and displacement, directed back at Justice L'Heureux-Dubé in her capacity as judge. Just as did Justice L'Heureux-Dubé, Chief Justice Lamer calls the audience to experience anger. Chief Justice Lamer indicts Justice L'Heureux-Dubé with failing to properly exercise the office of judge. He posits an objective boundary between 'law' and 'not-law', and invites the reader to share his outrage at her transgression. Again, anger is made visible against injustice, but here, at a judge who has failed to respect the boundaries of judicial propriety and authority.

Under any circumstances, anger is a powerful and universal response to injustice, atrocity and incomprehension. On April 26, 1937, with General Franco's approval, the Condor Legion of the Luftwaffe bombed the small Basque city of Guernica y Luno.[111] A total of 1 654 civilians were killed and the city was almost completely destroyed.[112] The attack weighed heavily on Picasso. In one of his greatest works, entitled Guernica,[113] he cries out in anger and pain at the strategic, political, experimental, gratuitous and inhuman attack on innocents. This work of art enters Guernica y Luno's story into "humanity's collective memory".[114] Reproduced on a wall at the United Nations, it reminds everyone who gazes upon it of the barbarism of war. The artist's anger emanates from the mother holding her dead child in her arms, baying at the sky, from the horse pierced by a lance, with open mouth and flank and the chaos of the cries and anguish. The image is such a strong call to remember this bloody injustice that on February 5, 2003, the mural was covered[115] before Colin Powell's call to arms[116] against Iraq. His speech could not be made before a bitter and persuasive anger such as this,[117] one that demands peace and the righting of wrongs.

Judicial texts, as human creations, are also calls to anger. They are addressed to an audience, they speak from one subjective conscience to another. This understanding is indispensable to giving them meaning.

Anger does the work of persuasion. Judgements call to an audience that needs to be won over, and anger can be a cry that pierces the heart. Some judicial texts use this tool explicitly, and those calls matter, aiming at the relationship between the text and the reader. This relationship involves both the call and our response -acceptance or resistance- to the cry. The call can be heard, answered or welcomed, but can also be hidden, scorned or rejected.

REFERENCES

* An English version of this piece was first published as part of a collection of articles on the Seven Deadly Sins. See M.-C. BELLEAU and R. JOHNSON, "Faces of Judicial Anger: Answering the Call", in M. JÉZÉQUEL and N. KASIRER, Les sept péchés capitaux et le droit, Montréal, Thémis, 2007, pp. 13-56.

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[1] S. FREUD and A. A. BRILL, Totem and Taboo; Resemblances between the Psychic Lives of Savages and Neurotics, New York, Moffat Yard, 1918. See discussion in P. FITZPATRICK, Modernism and the Grounds of Law, Cambridge, Cambridge University Press, 2001.

[2] J.-J. ROUSSEAU, Du contrat social ou principes du droit politique, Paris, Messidor, 1987.

[3] Certainly, scholars have drawn attention to the exclusionary racialised and gendered implications of the understanding of reason and passion at the heart of the dominant story. See, for example, G. CHAKRAVORTY SPIVAK, A Critique of Postcolonial Reason: Toward a History of the Vanishing Present, Cambridge, Harvard University Press, 1999; C. PATEMAN, The Disorder of Women: Democracy, Feminism and Political Theory, Cambridge, Polity, 1989.

[4] S. BANDES, The Passions of Law, New York, New York University Press, 2001, p. 14. The field of moral judgment is another example of similar questioning of the reason/passion dichotomy in moral philosophy, involving the process of rendering a decision. See C. TAPPOLET, "Crimes passionnels et émotions appropriées", Le Magazine littéraire, 1998, pp. 82-83.

[5] See, for example, R. MANGABEIRA UNGER, Passion: An Essay on Personality, New York, The Free Press, 1984; W.J. BRENNAN, "Reason, Passion, and 'The Progress of the Law'", Cardozo Law Review, 1988, pp. 3-23.

[6] For attempts to transform the primacy of "reason" by bringing matters of passion closer to the core of individual, social and legal orders, see P. GOODRICH, Law in the Courts of Love: Literature and Other Minor Jurisprudences, London, Routledge, 1996, p. vii.

[7] D. DESTENO et al., "Discrete Emotions and Persuasion: The Role of Emotion Induced Expectancies", Journal of Personality and Social Psychology, 2004, pp. 43-56, at p. 43.
[8] D. ALLAND and S. RIALS, Dictionnaire de la culture juridique, Paris, Lamy-PUF, 2003, s.v. "pluralisme juridique".
[9] To understand anger as an emotion, we borrow the description by Robert Augustus Masters: "As an emotion, anger is an aroused, often heated state which combines a compellingly felt sense of being wronged or frustrated (hence the moral quality of anger) with a counteracting, potentially energising feeling of power, both of which are interconnected biologically, psychologically, and culturally [...]. Rather than being a single entity with a clear perimeter, anger appears to be a complex process, a shifting, fluxing interplay of many states of mind and feeling. Desire, frustration, aggression, self-pity, righteousness, confusion, hurt, pride, calculation, blame, feelings of abandonment – all these and more may arise and pass or overlap in a very short time, during which we conceive of ourselves as 'being angry'"; R.A. MASTERS, "Compassionate Wrath: Transpersonal Approaches to Anger", The Journal of Transpersonal Psychology, 2000, pp. 31-51, at p. 33.
[10] W.I. MILLER, Bloodtaking and Peacemaking: Feud, Law, and Society in Saga Iceland, Chicago, University of Chicago Press, 1990.
[11] The Supreme Court of Canada, created in 1875, is the highest court in the country. Each year, it hears a hundred or so appeals. As a general court of appeal, it is authorised to determine, in last instance, appeals from all lower courts on all matters, even constitutional. Cases can arrive at the Supreme Court through different channels. The most traditional way is for the Supreme Court to grant leave. For the Court to grant leave, it first makes a determination that the case involves an issue of national importance. The second way applies only in criminal law. In criminal law cases where there is a dissent at the court of appeal, there is an automatic right of appeal; the case will be heard by the Supreme Court even if it is widely agreed that there is no issue of national importance raised by the case.
[12] Supreme Court of Canada, [1993] 1 S.C.R. 697 [following cited: F.F.B.].
[13] Infra, note 55.
[14] There are 9 judges on the Supreme Court of Canada, sitting most frequently in benches of 9 or 7, but sometimes also of 5. That there were only 5 judges hearing this case rather than the more usual 9 or 7 is related to the status of the case as an 'as of right appeal': it was not thought to be of national importance.
[15] At the Supreme Court of Canada, all opinions, whether majority or dissenting, are published. "Majority opinions are those written and signed by the majority (minimum 3 judges out of 5, 4 out of 7 or 5 out of 9). It is this opinion that determines law as it applies in Canada at a precise moment in time. The other opinions are dissenting, divided into two main types. Dissenting opinions based on reasons are those written by a judge who, although in complete agreement with the results of the majority opinion, does not share the arguments behind it. Dissenting opinions based on the result are those written by a judge who is not in agreement with the majority, nor the reasons for the decision, nor the result or conclusion of the decision. Dissenting opinions can sometimes involve the two types, both reasons and result, at once [...]. Finally, dissenting opinions do not make up the law. They do have a certain power of persuasion, however. Furthermore, these opinions can become law if subsequent majority decisions consider the arguments they present" [our translation]; M.-C. BELLEAU and R. JOHNSON, "Les opinions dissidentes au Canada", conference presented at the Cour de cassation de France, October 18,

2005,http://www.courdecassation.fr/IMG/File/18_10_2005_intervention_belleau_johnson.pdf [date accessed, 29 September 2007]. In the 1990s, at the time the ruling we are interested in was passed down, 35.5% of the Supreme Court's decisions involved dissent, 17.1%. based on reasons and 18.4% based on results; M.-C. BELLEAU and R. JOHNSON, "La dissidence judiciaire: Réflexions préliminaires sur les émotions, la raison et les passions du droit / Judicial Dissent: Early Reflections on Emotion, Reason, and Passion in Law", in M.-C. BELLEAU and F. LACASSE, Claire L'Heureux-Dubé à la Cour suprême du Canada, 1987-2002, Montréal, Wilson & Lafleur, 2004, pp. 699-719, at p. 711.

[16] Le petit Larousse illustré, 1999, s.v. "colère" and "strong, stern, or fierce anger; deeply resentful indignation; ire", in Random House Webster's Unabridged Electronic Dictionary, 2nd ed., s.v. "wrath", as a "vehement irritation against an offender. Anger, loss of temper, fury"; [our translation] by Le nouveau petit Robert, 1993, s.v. "courroux". Moreover, Le dictionnaire culturel en langue française notes that there is a historical difference between colère in French, anger in English and ira in Latin. The first refers to the medical spectrum, a physiological state. The second refers to a feeling of anguish and the last to a "strong activity". However, in each case "anger, at least in the Western world, is seen as a disruption, an influx of uncontrolled energy (an 'emotion', a 'movement of the spirit'), a violent, but subdued state ('a passion') that manifests itself in many ways and leads to the desire to cause harm" [our translation]; A. REY, Le dictionnaire culturel en langue française, Paris, Dictionnaires Le Robert, 2005, s.v. "colère".

[17] R.A. MASTERS, supra note 10.

[18] Supreme Court of Canada, [1996] 1 S.C.R. 500.

[19] Ibid., § 80.

[20] Michel Foucault agrees, giving retribution a political aspect. In fact, it is where truth resides in justice, in the moment where the convicted person admits his or her guilt before all by submitting to the punishment and, via his or her tortured body, confessing; M. FOUCAULT, Surveiller et punir, Paris, Gallimard, 1975, pp. 28 and 47.

[21] Ibid. Léon Husson relates Bergson's experience serving on a jury hearing a criminal case and the philosopher's reflections on the laxity of the punishment imposed by the jury. He explains that there are several reasons for this. "The last reason is institutional. It is found in the law, which sets out that juries must base their decision on their deep inner conviction. This influence is reinforced by a sign in the deliberation room that announces in large letters, "The jury may deliberate before making a verdict". "May deliberate" basically means that it is not bound to do so. The jury, believing that it is acting in good conscience, abandons itself to feeling, to thoughtless impulse. There is nothing as harmful to justice as emotion" [our emphasis; our translation]; L. HUSSON, "Les trois dimensions de la motivation judiciaire", in C. PERELMAN and P. FORIERS, La motivation des décisions de justice, Bruxelles, Bruylant, 1978, pp. 69-109, at p. 70.

[22] The two others are prudence and fortitude. See Catechism of the Catholic Church, http://www.vatican.va/archive/ENG0015/_INDEX.HTM [date accessed, June 26, 2007]. See also J. PIEPER, The Four Cardinal Virtues, Notre Dame, University of Notre Dame Press, 1996. It appears that these cardinal virtues originated from the Symposium of Plato in the dialogue questioning Eros' divinity. "He who strives for the greater good with moderation and justice, here as among the gods, possesses the greatest strength, and it is to him that we owe all of our happiness, as he makes life and friendship with our fellow men possible as well as with those who are stronger than us – the gods" (speech by Eryximaque); "It is of the

highest importance to note that among gods and men, Eros commits no injustice, nor is he its victim [...] On this we can agree. The Laws, queens of the city, proclaim it to be just. Besides justice, Eros embodies the greatest temperance. None would disagree that temperance is dominion over pleasures and desires" (speech by Agathon) [our translation]; PLATON, Le Banquet, trad. [M. RENOUARD, Paris, Payot & Rivages, 2005], pp. 70 and 85.

[23] See namely the work of Piero del Pollaiolo, Temperance, 1470, which the Corporation des Marchands de Florence ordered to adorn the hearing room.

[24] See namely the work by Raphaël, Justice, 1509-1511, Vatican. The character of justice dominates those representing the other virtues.

[25] See R.A. MASTERS, "Compassionate Wrath: Transpersonal Approaches to Anger", supra note 10, p. 39: "It is also worth nothing that some feminist writings on anger emphasise the value of anger -as opposed to aggression- as a resource in restoring integrity and intimacy, both personally and socially (e.g., McAllister, 1982; Miller & Surrey, 1997). Though such wrtings do not overtly speak of heart-anger, their aligning of openly expressed anger and compassion as a twin force of great benefit is in the spirit of heart-anger. That spirit may also sometimes be found in rage at injustice, as when such rage moves 'beyond fruitless scapegoating of anay group, [being linked] instead to a passion for freedom and justice that illuminates, heals, and makes redemptive struggle possible' (hooks, 1995, p. 20)".

[26] See R.A.F. THURMAN, Anger, New York, Oxford University Press, 2005, pp. 4 and 17: "We need anger to right wrongs, overturn social evils, revolt against oppression. Anger is only deadly, sinful, or bad when it is unfair, excessive, or self-destructive"; "Then there is righteous anger, against criminality and injustice, slackers and busybodies, luxury and destitution, which ranges from individuals to be punished to communities against whom there are crusades to be waged". See also S. LAPAQUE, Les sept péchés capitaux: 7 anthologies, Vol. 5, Paris, Librio, 2000, p. 6 "Thomas d'Aquin [...] questions the deceptive prestige of anger in Somme théologique (IIa, IIae, qu. 158): anger, the appetite for vengeance, is reinforced by our thirst for justice and honesty and thus takes on a dangerous majesty. 'Succumb to irritation, but do not fish', says the Book of Psalms. After which, the incensed man dreamt of an anger that does not oppose love and justice" [our translation]. See also A.A. SAPPINGTON, "Wrath: Relationships Between Sinful Anger, Blaming Cognitions and Altruism", Journal of Psychology and Christianity, 1998, pp. 25-32.

[27] Le Petit Larousse illustré, 1999, s.v. "colère": "Violent, passing state stemming from a feeling of having been attacked or offended" [our translation]. Psychology also links anger with justice: "Anger: Reaction of tension and hostility aroused by a wide variety of real or imagined frustrations, hurt, slights, threats, or injustices [...]. Anger is ordinarily directed outward". Paradoxically, however, "anger gives rise to injustice (Pr 14, 17; 29, 22; cf Jc I, 19s)" [our translation]; X. LÉON-DUFOUR et al.,Vocabulaire de théologie biblique, 2nd ed., Paris, Éditions du Cerf, 1970, p. 180.

[28] K. LYSONS, "The Seven Deadly Sins Today, III: Anger", Expository Times, 1986, pp. 302-304, at p. 302. And at p. 303: "At one extreme is the man too easily roused, touchy, aggressive. At the other is the meanspirited man who never feels anger because he is never aroused by injustive".

[29] In fact, anger is not always a sin. See A.A. SAPPINGTON, "Wrath: Relationships Between Sinful Anger, Blaming Cognitions and Altruism", supra note 27, p. 26: "Nevertheless, there is a body of work within the literature on the integration of psychology and theology, summarised by Bassett and his colleagues (Bassett, Hill, Hart, Mathewson, & Perry, 1993), which argues that

anger is not always sinful and that it is indeed possible to distinguish between righteous and sinful anger. Bassett et al. (1989) surveyed Christian therapists and found a consensus that righteous anger was characterised as: (a) a response to somebody else being mistreated; (b) attempting to be guided by Godly principles while angry; (c) constructively confronting the person who stimulated the anger; and (d) getting angry slowly. Sinful anger was characterised as: (a) a reflex-like response; (b) a justification as the best response; (c) a form of retaliation; (d) producing initial and long term bad results; and (e) an overreaction. The deadly sin of wrath should thus be identified not in anger in general, but with sinful anger".

[30] In Christianity, wrath is one of the seven deadly sins (the others are pride, gluttony, greed, lust, sloth and envy). According to the Compendium of the Catechism of the Catholic Church published in 1992, sin "creates a proclivity to sin; it engenders vice by repetition of the same acts". And "Vices are the opposite of virtues. They are perverse habits which darken the conscience and incline one to evil". Compendium of the Catechism of the Catholic Church, http://www.vatican.va/archive/compendium_ccc/documents/archive_2005_compendium-ccc_en.html [date accessed, June 26, 2007].

[31] Book of Matthew, c. 5, v. 21-22.

[32] See X. LÉON-DUFOUR, Vocabulaire de théologie biblique, supra note 28, pp. 180-181: "Do not do justice onto yourself, allow anger to act, as it is written: I will be the one to mete out justice, I will be the one to make retribution, said the Lord" [our translation]. And pp. 185-186: "Finally, Jesus expressed the wrath of a judge, as the host of the feast (Lc 14, 21), the master of the ruthless servant (Mt 18, 34), he brings his wrath down on unrepentant cities (Mt II, 20s), chasses the money lenders from the temple (Mt 21, 12s) and curses the barren fig tree (Mc II,21)" [our translation]. Moreover, the duty of rendering a decision grants judges a great deal of power: "The judges deal pain and death. That is not all they do. Perhaps that is not what they usually do. But they do deal death, and pain [...]. In this they are different from poets, from critics, from artists"; R. COVER, "Violence and the Word", Yale Law Journal, 1986, pp. 1601-1629, at p. 1609.

[33] Letter to the Romans, c. 1, v. 18.

[34] Book of Job quoted by R. JACOB, "Le jugement de Dieu et la formation de la fonction de juger dans l'histoire européenne", Archives de philosophie du droit, 1995, pp. 87-104 , at p. 88.

[35] "How did the falling away of divine justice and the reinforcement of traditional regulations modify the practice of law? First, by the invention of the jury. During the XIIth century, calling upon oath-taking juries grew more popular [...]. The appointment of ad hoc judges, sanctioned by their oath, appeared as a substitute for ordeals, used in turn with the latter before replacing it entirely. The word of truth, the verdict, spoken by the 12 members of the jury, directly replaces God's judgment" [our translation]; Ibid., p. 100.

[36] "In Roman times, when a case involved state business, only the sentence (the death sentence) was made public. However, most of the time, the trial was a spectacle, like circus act or a theatre production. A canvas was stretched laterally between the court, the accused and the defence, on which the incriminating facts were painted as they were revealed. On the other hand, from the Middle Ages up until the Revolution, 'the secret, written form of the procedure, says Michel Foucault, goes back to the principle that in criminal law, establishing truth was the absolute right and exclusive power of the sovereign and his judges'. During the Revolution, the oral nature of the debates guaranteed their transparency: 'With testimony, the reinstated speech and debate granted the population newly acquired

sovereignty. Everyone could, at least ideally, stand before a judge – or take the judge's place –with full awareness as a free man to state the reality of a fact or deed'"; D. SALAS, Du procès pénal: Éléments pour une théorie interdisciplinaire du procès, Paris, P.U.F., 1992, p. 86, cited by C. DELAGE, La vérité par l'image: De Nuremberg au procès Milosevic, Paris, Denoël, 2006, pp. 121-122.

[37] D. E. SMITH, "Texts and the Ontology of Organisations and Institutions", Studies in Cultures, Organisations and Societies, 2001, No 7, pp. 159-198, at p. 164.

[38] L. HUSSON, "Les trois dimensions de la motivation judiciaire", in C. PERELMAN et P. FORIERS, La motivation des décisions de justice, supra note 21, pp. 69-109, at pp. 75-76.

[39] On the Canadian legal horizon, it is very rare to see judges expressing anger about other judges within the text of a legal opinion. And even where judges are in serious disagreement with each other, disagreements that may well involve intense feelings of anger, those disagreements are generally expressed in language where the judges continue to refer to the other as "my learned colleague", and to express dissent using neutral sounding phrases like "I must respectfully disagree".

[40] In his comparison of Harlan and Holmes, Pillsbury rejects, for example, the notion that Holmes was dispassionate, arguing rather that Holmes' passions were deeply engaged but generally over principles than over the reality experienced by the parties before him. He argues that the reverse is true of Harlan, for whom the situation of the parties drove his reasons much more than his commitment to any particular principles of law. See S. H. PILLSBURY, "Harlan, Holmes, and the Passions of Justice", in S. BANDES, The Passions of Law, supra note 5, pp. 330-362, at p. 330.

[41] There is an extensive literature about the anger felt by those who are made to be witnesses to the trauma suffered by another. The target of a witness's anger can sometimes end up being the original victim who has -by telling their story- made the witness a sort of party to the trauma itself. On the anger felt by those called upon to witness trauma (that is, those who must hear the stories told by victims of abuse). See O. KAMIR, "Cinematic Judgment and Jurisprudence: A Woman's Memory, Recovery and Justice in a Post-Traumatic Society; A Study of Polanski's Death and the Maiden", in A. SARAT, L. DOUGLAS and M. UMPHREY, Law on the Screen, Princeton, Princeton University Press, 2005, pp. 27-81, at p. 28.

[42] See R. COVER, "Violence and the Word", supra note 33.

[43] R. W. GORDON, "Critical Legal Histories", Stanford Law Review, 1984, pp. 57-125, at p. 109.

[44] C. PERELMAN, "La motivation des décisions de justice, essai de synthèse", in C. PERELMAN and P. FORIERS, La motivation des décisions de justice, supra note 21, pp. 415-426, at p. 425.

[45] Ibid.

[46] Ibid.

[47] The majority reasons given by Justice Frank Iacobucci and Chief Justice Antonio Lamer and the dissenting reasons given by Justice Claire L'Heureux-Dubé and Justice Charles Doherty Gonthier.

[48] R. BARTHES, "La mort de l'auteur", in R. BARTHES, Le Bruissement de la langue: Essais critiques IV, Paris, Seuil, 1984, pp. 63-69.

[49] Of first instance.

[50] In Canada, when the case involves a minor, only the initials are used to preserve anonymity.

[51] Nova Scotia is one of Canada's ten provinces. Each province has courts of first instance as well as a court of appeal. The Supreme Court of Canada, the highest court in the land, is common to all provinces.
[52] Nova Scotia Court of Appeal, R. c. B. (F.F.), 107 N.S.R. (2ème) 231, 69 C.C.C. (3d) 193.
[53] "The basic rule of evidence in Canada is that all relevant evidence is admissible unless it is barred by a specific exclusionary rule. One such exclusionary rule is that character evidence which shows only that the accused is the type of person likely to have committed the offence in question is inadmissible". F.F.B., supra note 13, § 71.
[54] Criminal Code, R. S. C. 1985, c. C-46. Section 686(1)(b)(iii) allows a court to affirm a conviction in the face of a legal error where it is of the view that the conviction (even with the error) involves "no substantial wrong of miscarriage of justice". This provision requires the Court to consider the meaning of a 'fair trial', the importance of giving an accused every benefit of the law, technical errors, and 'the costs' of justice. This section allows a court to acknowledge the presence of an error of law without forcing the state to incur the economic costs of retrial where the final result would be the same.

[55] C. PERELMAN, "La motivation des décisions de justice, essai de synthèse", supra note 45, p. 421.
[56] Justice Sopinka did not write any reasons and signed on to both the reasons given by Justice Iacobucci and Chief Justice Lamer.
[57] In his reasons, Lamer mentions that he agrees that the "appeal must be allowed and a new trial ordered for the reasons given by Justice Iacobucci". However, Lamer did not sign the opinion of Iacobucci because he wrote his own reasons. Therefore, the order of seniority was respected in the publication of the judgment in the Supreme Court Reports.
[58] In 2005, in order to allow for a better reading of their decisions, the Supreme Court adopted a new convention for their judgments. Now the majority holding appears first, the concurring opinions second and the dissenting reasons last. According to the conventions of British publication, the length of the Supreme Court's opinions sometimes resulted in the majority decision by a junior judge being placed last after a number of pages written by a senior judge. The Supreme Court judges made the transition to the conventions of American publication in order to make it easier to read their decisions.
[59] The expression 'circulate' refers to the process in a common law system in which majority and dissenting opinions coexist. Basically, the judges write their reasons and send them to the other judges' chambers for comment and to seek agreement with their opinion.
[60] S. H. PILLSBURY, "Harlan, Holmes, and the Passions of Justice", supra note 41.
[61] M.-C. BELLEAU and R. JOHNSON, "La dissidence judiciaire: réflexions préliminaires sur les émotions, la raison et les passions du droit / Judicial Dissent: Early Reflections on Emotion, Reason, and Passion in Law", in M.-C. BELLEAU and F. LACASSE, Claire L'Heureux-Dubé à la Cour suprême du Canada, 1987-2002, supra note 16, pp. 699-719, at p. 700.
[62] Born in 1927, Justice Claire L'Heureux-Dubé studied civil law and practiced law for 21 years in different firms and on different boards and commissions. Her career as a judge began in 1973, when she was appointed to the Cour supérieure du Québec. In 1979, she was appointed to the Cour d'appel du Québec and finally, the

Supreme Court of Canada on April 15, 1987, where she served before stepping down on July 1, 2002. Justice L'Heureux-Dubé is the first woman in Quebec, a French-speaking Canadian province, to sit on the Supreme Court of Canada and the first woman to sit on the Cour d'appel du Québec.

[63] The quoted passage reads as follows: "In this regard, I agree with Hallett J.A. of the Nova Scotia Court of Appeal who said (1991), 107 N.S.R. (2d) 231, at pp. 255-56:

In my opinion, (L.L.'s) evidence, which was set out in some considerable detail in the decisions of Justices Jones and Chipman, was admissible not as similar fact evidence but simply because it was relevant and highly probative to explain to the jury how these assaults on (P.A.L.) could have occurred and continued over so many years in this crowded household and nothing was ever said. The evidence disclosed that Mr. (L.) was rarely home and Mrs. (L.) was generally at work which left the appellant in charge of these young children. Without the evidence of his cruelty to these captive children and the total domination of them as a result of their fear of him, there is no explanation of why none of the children, including (P.A.L.), ever spoke of what was taking place. It is relevant and probative because without it this horror story, cloaked in secrecy for some 25 years, would not seem credible.

(L.L.'s) evidence was admissible to show the circumstances that existed in the household during the years these assaults on (P.A.L.) took place. I would prefer not to cloak the evidence with the questionable mantle and trappings of "similar fact" evidence to support its admissibility. (L.L.'s) evidence of the appellant's cruelty, although it certainly proves the appellant's disposition to violence and is prejudicial, was, in the peculiar circumstances of this case, admissible for the reason I have stated.

The appellant was certainly entitled to a fair trial and to have excluded evidence adduced solely to show bad disposition. However, (L.L.'s) evidence was not introduced for that sole purpose. The law does not immunise the appellant from having relevant evidence adduced by the Crown to show the circumstances and setting in which the assaults on (P.A.L.) were alleged to have taken place"; F.F.B., supra note 13, § 21.

[64] J. KRISTEVA, Semeiotiké: recherches pour une sémanalyse, Paris, Seuil, 1969, p. 113, cited by Dictionnaire international des termes littéraires, http://www.ditl.info/arttest/art14881.php [date accessed, 8 August 2007].

[65] Ibid.

[66] "Having regard to the highly prejudicial nature of L.L.'s evidence I am forced to the conclusion that a new trial must be ordered. It is impossible to say that this evidence did not have an effect on the minds of the jury. Indeed it could only have had an inflammatory effect. The appellant did not have a fair trial"; R. c. B. (F.F.), supra note 54, p. 15, Justice Jones, dissenting.

[67] "I agree that P.M. has been deprived of a normal childhood and her life has been ruined. The Crown did not cross-appeal the sentence and it is not the practice of this court to increase a sentence where the accused alone appeals seeking a reduction. I have considered the relevant principles which govern this court on an appeal from sentence and I am satisfied that incarceration for 13 years on these five counts could not be said to be excessive having regard to the damage done, and all the other relevant considerations"; Ibid., pp. 28-29, Justice Chipman.

[68] "The two grounds put forth by the appellant in support of the conviction appeal should be rejected for the reasons given by Jones, J.A."; Ibid., p. 16, Justice Chipman; "I have had the opportunity to read the opinions of Mr. Justice Jones and

Mr. Justice Chipman. I agree with Mr. Justice Jones's disposition of the two grounds of appeal raised by the appellant"; Ibid., p. 29, Justice Hallett.

[69] "The failure to object was neither accidental or inadvertent. Counsel was not simply caught off guard, but had a specific strategy. This is clear in comments made by defence counsel to the Justices of the Nova Scotia Court of Appeal, as cited in the reasons for judgment of Chipman J.A., at p. 250:

[Mr. Coady]:But, you know, it's one of those things when you're doing the trial, sometimes the more absurd it sounds, I mean, we were in a difficult situation. We had --

Justice Jones: No question about that.

Mr. Coady: -- a complainant and we had corroboration.

Justice Hallett: Yes, (T.), (D.).

Mr. Coady: (T.). In my mind, the evidence of (T.B.), was, it carried the day. I think his evidence was very very important. He was one of the best witnesses that the Crown could ever hope to have and that . . . so it became a situation where, to some degree, the more bizarre, the more heinous and the more absurd that the allegations in totality were, probably the greater it fed any possible hope that we had for reasonable doubt and they were given great rein by not objecting and they were cross-examined at length about it and it was focused on.

Now, that obviously it wasn't sufficient to erode the conclusion of the Jury, but I just leave it with you. It's one of those things, it's a judgment call you make during the trial when you're in a tough situation.

Justice Hallett: At that point in time, you felt that (F.F.B.) was in great jeopardy of being found guilty, even before (L.L.) was called.

Mr. Coady: No question about that". F.F.B., supra note 13, § 32.

[70] "However, even if I were wrong in my conclusion as to the adequacy of the instructions, I would without hesitation apply s. 686(1)(b)(iii) of the Criminal Code to remedy any defect"; F.F.B., supra note 13, § 34.

[71] "Quite frankly, if the curative provision cannot be applied here, I do not know where it can be applied"; F.F.B., supra note 13, § 45.

[72] Christian Delage stresses the importance of seeing the injuries and staging the crimes in the quest for justice. He uses the Nuremberg Trials as an example. In a memorandum instructing the military personnel called to collect evidence that could be used in the trial: "The first paragraph specifically targets 'atrocities', that is, 'crimes against humanity'. The recommendations, quite specific, concern visual evidence as to the manner in which to photograph or film a dead body. The evidence of brutality that the person has suffered must be shown (hands tied behind the back with electrical wire, evidence of torture, kicks, bayonet, sabre and knife wounds, etc.). If the body is in an advanced state of decomposition and approaching it causes discomfort or poses a threat to health, wearing a gas mask or any other protection is recommended. What is important is to obtain close-ups, regardless of the circumstances. Though it might be best to take a picture or film the body lying on the ground from several angles to emphasise how this person was ill-treated, it is also a good idea to show the entire body, keeping in mind how perspective may be distorted. If there are several bodies (a hypothesis that never materialised), you must show the number of people (wide view), but also capture especially representative shots of the brutality of the methods used" [our translation]; C. DELAGE, La vérité par l'image: De Nuremberg au procès Milosevic, supra note 37, p. 125.

[73] From the point of view of ethical practice, we struggled long and hard with the question of how to discuss the facts in this case, feeling that the replication of the words was a move very fraught with risk. Here, conscious of the burden this places

on the reader, we proceed on the basis that there is no other way to grapple with angers produced in the case.

[74] F.F.B., supra note 13, § 38.

[75] F.F.B., supra note 13, §§ 39-40.

[76] Ibid., § 42.

[77] Ibid., §§ 38-42.

[78] It is interesting to note that in French, the words émotion or émotif and motif share the same Latin root. In fact, émotion originates from the Latin movere, tied to the idea of movement: "a moral movement that troubles and agitates the soul" [our translation]; L. LEBRUN et J. TOISOUL, Dictionnaire étymologique de la langue française, Paris, Librairie Fernand Nathan, 1937, s.v. "émotion". Similarly, the word motif "originates from an old adjective that means 'puts into movement', borrowed from the epic Latin motivus 'mobile' (from movere, 'mouvoir')" [our translation]; O. BLOCH and W. VON WARTBURG, Dictionnaire étymologique de la langue française, Paris, Quadrige/PUF, 2002, s.v. "motif".

[79] Some of the extracts of the transcript reproduced by Justice L'Heureux-Dubé read as follows:

"A. . . . I remember seeing on occasions, [F.F.B..] come in our bedroom and have intercourse with [P.A.L.]. I remember [P.A.L.] saying no, no. He never said an awful lot. He just did as he felt like. I did pretend I was asleep at the time. I didn't . . . I was only young too. I never told [P.A.L.] until later on in the years that I did know this, because I felt . . . I couldn't say anything to my mother about it, in fear and I felt too, that I was . . . I felt bad because I couldn't say anything. I felt that I was doing [P.A.L.] an injustice at the time, because I didn't want it happening to me. So, I pretended I was snoring and not seeing anything, it wouldn't happen to me.

Q.You mentioned you were young. How old were you when you . . . When you remember this, how old do you feel you were?

A.I was around ten, eleven.

Q.Can you remember how often it happened?

A.It happened, well it happened quite often, but I wasn't always awake either, I wouldn't think, but it happened quite often. I mentally in my head, tried to block it out, but I found it hard sleeping at night, knowing what was going on.

Q.Do you know how long it continued?

A.It continued right up until he left"; F.F.B., supra note 13, § 39.

[80] Ibid., §§ 45-46.

[81] A.-J. ARNAUD, Dictionnaire encyclopédique de théorie et de sociologie du droit, Paris, LGDJ, 1988, s.v. "justice".

[82] On syllogism, see V. THIBAUDEAU, Principes de logique, Québec, PUL, 2006, pp. 731-ff.

[83] F.F.B., supra note 13, § 27.

[84] Chief Justice Dickson is Chief Justice Lamer's predecessor.

[85] Supreme Court of Canada, R. c. Corbett, [1988] 1 S.C.R. 670, p. 692, cited by F.F.B., supra note 13, § 25.

[86] According to the Attorney General's prosecutor, Éric Marcoux, "Justice L'Heureux-Dubé used the quest for truth principle in a striking way to support her decisions in criminal law, making her a true standard-raiser for this principle among the members of the Court" [our translation]; E. MARCOUX, "La recherche de la vérité dans les procès criminels: Une question de principe", in M.-C. BELLEAU and F. LACASSE, Claire L'Heureux-Dubé à la Cour suprême du Canada, 1987-2002, supranote 16, pp. 103-117, at p. 104.

[87] Born in 1937, Justice Frank Iacobucci, of Italian descent, first had a private practice, namely in the United States. In 1965, he joined the University of Toronto's Faculty of Law, serving as the dean from 1979 to 1983. He taught at the university until 1985, the year he left academia to become Deputy Minister of Justice. He was appointed Chief Justice of the Federal Court of Canada in 1988 and judge of the Court Martial Appeal Court in 1989. He was appointed to the Supreme Court of Canada on January 7, 1991, where he sat until his retirement on June 30, 2004.
[88] F.F.B., supra note 13, § 52.
[89] Ibid.
[90] Ibid., § 53.
[91] Ibid.
[92] Ibid.
[93] Ibid., § 55.
[94] Ibid.
[95] Ibid., § 89.
[96] Ibid., § 73. This assertion is very similar to the one made by L'Heureux-Dubé and which Lamer countered.
[97] Ibid., § 93.
[98] Ibid., § 46.
[99] Born in 1933, Chief Justice Antonio Lamer studied civil law before working in a private practice for several years. He was appointed to the Cour supérieure du Québec in 1969, then the Cour d'appel du Québec in 1978. He was appointed to the Supreme Court of Canada on March 28, 1980 and became Chief Justice in 1991, serving until his retirement on 6 January 2000. He passed away on the 24th of Novenber 2007.
[100] This means reference to a case, "cited with approval by Lamer J (as he then was) for the court": "Colpitts v. the Queen, [1965] S.C.R. 739 at p. 744, cited with approval by Lamer J. (as he then was) for the Court in Wildman v. the Queen [1984] 2 S.C.R. 311, at p. 328"; F.F.B., supra note 13, § 4. It is interesting to note that the Chief Justice refers to himself in the third person.
[101] He writes: "I therefore approach the question of whether this is a case in which the proviso of s. 686(1)(b)(iii) should be applied by asking whether, if the jury had been properly instructed, the verdict of guilty would necessarily have been the same in the sense that any other verdict would have been unreasonable or not supported by the evidence"; Ibid., § 8.1
[102] Ibid., § 9.
[103] He writes: "However, verdicts of acquittal on all counts on the trial record as it stands would, in my respectful view, not be susceptible to be set aside as being unreasonable.
It is generally undesirable to speculate as to the basis upon which a jury might or might not have accepted certain evidence and rejected other evidence. This is all the more true when there is to be a new trial. Without in any way suggesting that a jury failed, or in fact should have failed, to accept any or all of the Crown evidence in this case, their decision to do so would not have been unreasonable in the circumstances of this case. The allegations were very old because there had been a long delay in bringing the allegations to the attention of the police. The accused testified in answer to the charges and denied everything. The deliberations of the jury were not short. The jury retired just after 12:00 noon, and returned just after 5:00 p.m. that afternoon with a request to re-hear certain parts of the evidence. A verdict was not returned until 10:40 a.m. the following morning. The jury acquitted on the charge of procuring a miscarriage, although there was evidence from

the complainant relating to that charge. None of these considerations, of course, is in any way conclusive, but they underline the dangers inherent in speculating as to what may have been in the jury's mind as it reached its verdicts. Everything depends on what evidence was accepted and what evidence was not accepted in the face of a sworn denial of all charges from the accused in the witness box"; Ibid., §§ 9-10.

[104] Ibid., §§ 14-15.

[105] Ibid., §§ 17-18.

[106] Ibid., § 19.

[107] These final paragraphs read as follow: "Since writing these reasons, I have had occasion to read those of the Chief Justice. I agree with his observation that the key issue before the Court is to determine whether or not the curative provision should apply, and that the exercise (at p. 706) must be conducted with respect for the function of the jury, whose role it is to determine what evidence of which witnesses they accept, the weight it should be accorded and, in the final analysis, whether there exists a reasonable doubt about the guilt of the accused.

The law is well settled, as the Chief Justice notes, at p. 710, that determinations as to credibility of witnesses, and the weight to be given to the evidence 'are matters which the law, justice and the public interest require to be entrusted to a properly instructed jury'. My reasons do not depart from these principles.

I totally disagree with the Chief Justice that the case essentially turns on credibility. In most if not all cases, a jury must make determinations on credibility, but there is nothing here to suggest that credibility was more or less of an issue than in any other case. The issue before us is not one of credibility, but is rather of weighing the evidence in its totality.

With respect, I believe that the Chief Justice misinterprets my comments concerning the morally repugnant nature of the evidence in this case. The law is clear that a jury should be instructed not to use evidence of propensity as evidence of guilt. However, my comments do not concern the instructions to be given by a trial judge to a jury, but rather, the task facing an appellate court. This task is not to consider what the jury may or may not have thought, but to examine whether the entire body of evidence before the jury was such that the court can be satisfied that a properly instructed and reasonably acting jury would reach the same conclusion. The presence of such evidence is thus crucial to a determination that the curative provision can be properly applied. In my view, the evidence before the Court in the present [page722] case is such that the curative provision should apply" [our emphasis]; Ibid., §§ 47-49.

[108] Ibid., § 47.

[109] Born in 1928, Justice Charles Doherty Gonthier worked in a private practice for several years before being appointed to the Cour supérieure du Québec in 1974 and then the Cour d'appel du Québec in 1988. He did not remain there for long as he was appointed to the Supreme Court of Canada on 1st February 1989, where he served until his retirement on 31 July 2003.

[110] See M. CONSTABLE, "The Silence of the Law: Justice in Robert Cover's Field of Pain and Death", in A. SARAT, Law, Violence and the Possibilities of Justice, Princeton, Princeton University Press, 2001, pp. 85-100.

[111] For the history of links between the Franco and Hitler regimes, see: L. RICHARD, "Guernica, un crime franquiste", Le Monde diplomatique, April 2007, http://www.monde-diplomatique.fr/2007/04/RICHARD/14600 [date accessed, 9 August 2007].

[112] V. BROWNE, "Picasso's Shriek against Horrors of War", Sunday Business Post, 27 April 2003, http://archives.tcm.ie/businesspost/2003/04/27/story640995853.asp [date accessed, 9 August 2007].
[113] P. PICASSO, 1937, kept at the Centro de Arte Reina Sofia, Madrid.
[114] V. BROWNE, "Picasso's Shriek against Horrors of War", supra note 114.
[115] W. WALKER, "The Lessons of Guernica", The Toronto Star, 9 February 2003, http://www.commondreams.org/views03/0209-04.htm [date accessed, 9 August 2007].
[116] United States Secretary of State under the presidence of Georges W. Bush.
[117] For the controversy as to the reasons for covering the mural, see: V. BROWNE, "Picasso's Shriek against Horrors of War", supra note 114.