

4

Judges or Hostages?

Sitting at the Court of Justice of the European Union and the European Court of Human Rights

MATHILDE COHEN

INTRODUCTION

Bureaucratic structures and procedures are an integral part of present day courts. Court staff, in particular, occupy a critical position in the administration of justice in many judicial systems around the world. They typically represent a diverse corps of subordinated professionals to whom judges delegate responsibilities for discrete aspects of their adjudicative and administrative functions, be it overseeing pretrial matters, assisting with legal research and drafting or assuming responsibility for court operations. Following Owen Fiss's work on the US federal judiciary, I do not use the word "bureaucracy" with a pejorative connotation, but descriptively to refer to "a complex organization with three features: (1) a multitude of actors; (2) a division of functions or responsibilities among them; and (3) a reliance upon a hierarchy as the central device to coordinate their activities."¹

The two supranational European courts – the Court of Justice of the European Union (CJEU) in Luxembourg and the European Court of Human Rights (ECtHR) in Strasbourg – are no strangers to bureaucracy so defined. The number and variety of their non-judicial personnel is striking, especially compared to domestic courts of last resort. Excluding the service staff not directly involved with cases such as security, building management, cleaning, and so on, domestic supreme or constitutional courts usually depend on a few assistants, be they staff lawyers, law clerks, or research librarians. The ECtHR's registry includes some 672 staff members (274 lawyers and 398 other support staff) for 47 judges, a very high ratio. The CJEU's army of staffers is even more staggering: the 28 judges and 9 advocates general (AGs) rely on some 150

¹ Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 *YALE L.J.* 1442, 1444 (1983).

référéndaires,² 610 lawyer-linguists, about 75 staff interpreters, and dozens of managers and administrative assistants.

While the CJEU and the ECtHR vary in many relevant ways such as institutional design, role, types of cases heard, budget, staff, and so on, they have a great deal in common in terms of general mission and work methods. They are both supranational courts animated by a “pan-European mission and perspective,”³ facing similar organizational challenges, such as how to allocate resources in the face of high dockets. Both courts exhibit a number of traits typical of bureaucracies, such as organization by functional specialty, hierarchical relationships, impersonality, and consistency in decision-making. Their high degree of formalization and specialization leads to a fragmentation of the judicial task. Often the person who translates the briefs and other relevant portions of the record is not the one who studies the issues and drafts the opinion, nor the one who hears the arguments and formally decides the case, nor the one who translates and edits the final version of the opinion before publication.⁴ What can account for this level of bureaucratization? Along institutional design, I single out as explanatory factors the specific constraints imparted by international adjudication which generate various asymmetries between the judges and the staff.

This chapter hypothesizes that the rise of a European court bureaucracy may paradoxically foster elements of non-bureaucratic culture. European judges and staffers are not separated by an invisible and impassable wall. The CJEU and the ECtHR increasingly attract professionals of comparable competence and qualifications across the judge-staff divide. On the one hand, the courts hire domestic judges to work as staffers. On the other hand, a growing number of judges are recruited from among the rank of the courts’ staff. Does this blurring of the line indicate that the judges are at greater risk of being captives to the bureaucracy? Or is the increased homogeneity in backgrounds conducive to less ceremonious mode of organization, where roles and expectations are more loosely defined? While it is perhaps too soon to draw a positive conclusion, there may be benefits to the fluidity between judges and staffers. Professional endogamy may facilitate interactions and exchanges with less formalization of behaviour, thus leading to more opportunities for intra-court debate and deliberation.

This chapter’s methodology is mainly interpretive and conceptual, building upon the emerging sociology of European institutions and European legal actors. The likes of Karen Alter, Antonin Cohen, Mikael Madsen or Antoine

² See *infra*, Part. I.A. ³ NEVILLE MARCH HUNNINGS, *THE EUROPEAN COURTS* 257 (1996).

⁴ See McAuliffe, this volume.

Vaucher have pioneered the field by situating European institutions in their broader social context, focusing on the social means by which legal professionals build their networks and legitimate the supremacy of European law.⁵ I supplement this socio-historical approach with information I gathered over the past few years through qualitative empirical research. More specifically, my argument relies on seventeen in-depth, semi-structured interviews conducted with current or former judges, clerks, staff lawyers and translators at CJEU and the ECtHR.⁶

The chapter begins with an overview of the European courts' bureaucratic features, chronicling the work performed by different categories of personnel and the various forms of hierarchical relationships in place. The second section proposes several explanations for this work organization, both in terms of institutional design and asymmetries of knowledge. The third section describes the growing tangling between judges and staffers, asking whether it leads to a hostage situation, whereby judges would be unduly influenced by the staff.

BUREAUCRATIC COURTS

The European high courts exhibit a number of bureaucratic traits, such as organization by functional specialty, hierarchical relationships, impersonality and consistency in decision-making.⁷

Organization by Functional Specialty

A division of labor based on technical qualification is in place. As a lawyer-linguist at the CJEU put it, "we are part of an organization structured so as to have an organized document flow and very little space is left to

⁵ See, e.g., Karen Alter, *The European Court's Political Power: Essays on the Influence of the European Court of Justice on European Politics* (2009); Antonin Cohen & Antoine Vaucher, *Introduction: Law, Lawyers, and Transnational Politics in the Production of Europe*, 32 *LAW & SOC. INQUIRY* 75 (2007); Mikael Rask Madsen, *Legal Diplomacy: Law, Politics and the Genesis of Postwar European Human Rights*, in Stefan-Ludwig Hoffmann (ed.) *Human Rights in the Twentieth Century: A Critical History* 62 (2011).

⁶ This is not in any sense a representative sample, but simply a reflection of individual judges and court personnel whom I considered particularly interesting for this study and who made themselves available for interview. Beginning with a few contacts at the courts under study, I recruited most of my interviewees through the contacts of previous interview subjects (a practice known as "snowball sampling"). The identity of the interviewees has been kept confidential. They are referred to in this chapter using random letters.

⁷ On the idea of an increasingly centralized decision-making procedure, see Vaucher, this volume.

improvisation.”⁸ In addition to their administrative support, research, documentation and library personnel, both the CJEU and the ECtHR employ two main categories of staffers: the first contribute mostly legal support, and the second provide linguistic assistance (though there are areas of overlap.)⁹

Legal Tasks

In Luxembourg, each judge and advocate general (AG) has a “cabinet,” that is, a team of four personal legal assistants commonly referred to by their French name, *référéndaires*, in addition to interns and secretaries. The *référéndaires* are hired by and work closely with their judge or AG. Their main task is to conduct research analyzing laws and jurisprudence on the cases assigned to their chamber. They prepare memos known as “reports” as well as draft judgments (or “opinions” in the case of *référéndaires* clerking for AGs.)¹⁰

In dealing with applications, ECtHR judges are assisted by a registry comprised of lawyers from all the Member States, officially known as “legal secretaries.” Unlike the CJEU’s *référéndaires*, these lawyers are pooled and available to all the judges.¹¹ Registry lawyers have their own case lists and are responsible for processing cases through all stages of the procedure, working under the dual supervision of senior registry members and the *juge rapporteur*. A lawyer’s tasks may include reviewing the submissions of the parties, legal research, cite-checking, drafting memoranda for the judge summarizing the facts of the case, the litigants’ arguments, a suggested holding and drafting the court’s opinion. Their function is similar to that of the *référéndaires*, with the difference that they are more specialized. ECtHR lawyers typically handle applications originating from their own legal system and in their native language when *référéndaires* attend to whichever cases are assigned to their cabinet.

Linguistic Tasks

The Luxembourg and Strasbourg courts are multilingual institutions, with cases brought in any of the Member States’ official languages. Supported by

⁸ Interview with RY, former *référéndaire* and lawyer-linguist at the CJEU since the late 1990s (July 2, 2014) (my translation).

⁹ For a fine-grained presentation of the CJEU staff, see McAuliffe, this volume.

¹⁰ When their judge is the *juge rapporteur* – the judge who has been assigned the primary responsibility for a case – one of the cabinet’s *référéndaires* drafts a purely internal document, the *rapport préalable*, which summarizes the facts, law and relevant argument, including a suggestion about how to proceed with the case.

¹¹ See Michele de Silvia, *L’administration d’une juridiction internationale. L’exemple du greffe de la cour européenne des droits de l’homme*, 126 *REVUE FRANÇAISE D’ADMINISTRATION PUBLIQUE* 333, 337 (2008).

an army of lawyer-linguists, the CJEU translates all of its judgments in the twenty-four EU languages, while the ECtHR, which issues its judgments in French or English only, relies on a comparatively smaller language unit. At the CJEU, lawyer-linguists, experts in comparative law as well as legal translation, carry out the task of translating.¹² These highly qualified in-house translators are involved in all the phases of case law production. They translate a variety of documents to assist the court's deliberation, from the confidential procedural documents, which form the basis of the submissions, to the court's internal documents (reports, draft judgments, AG opinions), to the final judgments. At every stage, their choice of words may affect the substance.¹³

At the Strasbourg court, registry lawyers do most of the translating work from the record themselves. It is therefore key for the court to hire lawyers originating from all of the Council of Europe Member States, capable of processing petitions in specific languages and keeping abreast on national laws. The ECtHR also counts on two specialized language divisions, one for French and one for English, whose responsibilities are to verify the linguistic quality of judgments and decisions selected for publication in the court's official reports. The majority of the judgments are no longer issued in French *and* English, but only in the language in which they were drafted – either French or English. Only those judgments chosen for publication in the reports are translated into the court's second official language.¹⁴ These select cases are processed bilingually from the outset, with translators playing a crucial role, sitting in on deliberations to assist with the translation of any proposed modification of the court's opinion.¹⁵

This summary list of the general tasks and responsibilities afforded to the support personnel highlights their involvement at every point of the decision-making process.

¹² See McAuliffe, this volume.

¹³ Lawyer-linguists routinely provide indirect legal advice, conducting background legal research on the jurisdiction(s) from which a text originates or on the jurisdiction(s) for which the translation is intended. On the impact of translations on the substance of the case law, see generally Karen McAuliffe, *Language and Law in the European Union: The Multilingual Jurisprudence of the ECJ*, in *The Oxford Handbook of Language and Law* (Peter M. Tiersma & Lawrence M. Solan, eds 2012) 200.

¹⁴ See ECtHR RULES OF COURT, Rule 76. See also James Brannan, *Le rôle du traducteur à la Cour européenne des droits de l'homme*, 202 *TRADUIRE*, 25, 33 (2009). The court's most solemn panel, the seventeen-judge Grand Chamber, however, always issues judgments in the two languages.

¹⁵ See Martin Weston, *Characteristics and Constraints of Producing Bilingual Judgments: The Example of the European Court of Human Rights*, in *Jurilinguistique: entre langues et droits* 445 (Jean-Claude Gémard & Nicholas Kasirer, eds.) (2005).

Hierarchy

The European courts' hierarchical arrangements are complex, providing a differentiated structure of authority. Three types of hierarchical relationships can be identified: staff-staff, judge-staff and judge-judge.

Staff-Staff

The strongest form of hierarchical work organization creeps in via the staff, which is characterized by standardized hiring procedures, responsibilities and qualifications, and is subject to a chain of command. At both courts, appointments and promotions are formalized, with specific titles and tasks, which come from the position assigned to them. Salaries are tied to a pay grade system, with all employees in a certain grade earning similar salaries. At the ECtHR, staffers are employees of the Council of Europe and divided into four categories. Each level controls the level below and is controlled by the level above. A “registrar,” assisted by a deputy registrar, supervises the registry itself.¹⁶ At the Luxembourg court, chambers function as autonomous units. The *référéndaires* are not *fonctionnaires*; they are hired by and report directly to their judge or AG. But their position and salary is defined on a European civil service grid, graded at the level of a head of unit. Other CJEU staffers such as lawyers-linguists are typically permanent members of the European civil service, subject to its rules and division in different function groups and grades. The CJEU too uses a registrar, whose responsibilities include “the management of the staff and the administration” as well as “the preparation and implantation of the budget.”¹⁷

The workflow tends to be rationalized with routine operating tasks and quality control mechanisms. At the ECtHR, junior registry lawyers prepare cases under the supervision of more experienced lawyers, themselves checked by section registrars or deputy registrars. As a division chief explained,

I manage the entire thing, it's a well-oiled machine. . . . Clearly the most experienced lawyers who have an indefinite contract . . . handle the hardest cases . . . and supervise younger lawyers who begin with the simplest cases and handle correspondence. It's a system of hierarchy and supervision, especially for newcomers. . . . In our jargon we call the permanent lawyers “A lawyers” and “B lawyers” those who are on a fixed-term contract.¹⁸

¹⁶ Judges elect the registrar. See ECtHR RULES OF COURT, Rule 15(1) & (3).

¹⁷ CJEU RULES OF PROCEDURE, Art. 18 & 20.

¹⁸ Interview with W, registry lawyer at the ECtHR since the mid 1990s. (July 8, 2014) (my translation).

A similar pattern can be observed at the CJEU, particularly for linguistic tasks. Language units are presided over by chiefs and deputy chiefs overseeing the lawyer-linguists' work and themselves reporting to the court's chief administrative and judicial officers.¹⁹ According to one of the linguistic units' chiefs, all translation "requests are sent by the registry to the central services of the Translation Directorate-General, which centralizes requests, sends us roadmaps identifying the case, and assigns a deadline."²⁰ Within each unit, the translation job is assigned to a junior lawyer-linguist under the control of more experienced lawyer-linguists, sometimes referred to as "revisers." As another lawyer-linguist told me, the reviser "reads your translation in order to check that you didn't miss anything or you didn't misunderstand anything. If you're at the beginning you have a proper mentor."²¹

Judge-Staff

The strongest form of judge-staff hierarchy is that which transpires between CJEU court members and their *référéndaires*. *Référéndaires* are directly recruited by and serve at the pleasure of their judge or AG. Other staffers are more insulated from judges or AGs, working for the institution as a whole rather than exclusively assisting a particular court member. At the ECtHR, the judge-staff hierarchy is weaker than that at the CJEU. The non-judicial personnel forms its own corps, hired and promoted quite independently from judges. Not being assigned to particular court members, individual registry lawyers operate under the loose supervision of the rotating judges with whom they are teamed up for the purpose of deciding certain cases.

At both courts, judges are akin to quality control inspectors. Due to high caseloads, they rarely read the entire case files or draft opinions.²² Rather, they supervise the work of their subordinates. *Référéndaires* or registry lawyers propose case dispositions and reasoning; judges revise, challenge, or accept. Each judge has more or less individualized methods of control, from those scrutinizing the staff's work product from A to Z, including translations, to those focusing their review on select aspects of a case. While there is also considerable variation among ECtHR judges' work habits, a common theme seems to be, as a senior registry lawyer reports, that they typically intervene in the life of a case, if at all, toward the end of a series of quality control checks.

¹⁹ See McAuliffe, this volume.

²⁰ Interview with RY, lawyer-linguist at the CJEU since the late 1990s (July 2, 2014) (my translation).

²¹ Interview with D, lawyer-linguist at the CJEU since the early 2000s (July 2, 2014).

²² See de Silva, *supra* note 11 at 338.

Judge-Judge

In principle, there is no hierarchy among judges on multimember courts. They share equal decision-making authority and are not subject to discipline, demotion or removal. Sitting at courts of last resort, European judges' decisions cannot even be reversed. Accordingly, relationships among judges present the weakest form of hierarchy. That said, the European courts' leaderships arguably exercise more power than other court members. While all courts have chiefs, the CJEU and the ECtHR's leaders enjoy particularly wide administrative and judicial powers, making them more than equals among equals.²³

At both courts, the presidency is divided between a court president and one or more deputies. The CJEU uses a dual leadership structure; because of the president's increasing range of responsibilities, the office of the vice-president was created in 2012.²⁴ At the ECtHR, a "Bureau" chaired by the president leads the court, which includes each of the five sections' presidents (two of which also serve as the court's vice-presidents), the registrar and the two deputy registrars.²⁵ According to former Judge Loukis Loucaides,

during my time the "Bureau" examined and provided solutions to problems and matters concerning the administration of the Court's work. Although it lacks any legal basis in the Convention its decisions have a de facto binding effect. It does not account in a transparent and open way to the other judges. Nonetheless, it behaves as the highest administrative authority of the Court.²⁶

The precise functions and powers of the courts' governing bodies are not exhaustively laid out in their internal rules, but include a few significant prerogatives. At the CJEU, the president and the vice-president are the only permanent members of the Grand Chamber – the court's fifteen-judge

²³ Unlike national courts of last resorts, European high courts lack Departments of Justice, Ministers of Justice, or Attorney Generals to lobby on their behalf for larger budgets, to hire and train the court personnel, to manage their careers, etc. The courts' presidents and registrars must do it all.

²⁴ See Regulation (EU, Euratom) No. 741/2012 of the European Parliament and of the Council amending the Protocol on the Statute of the Court of Justice of the European Union and Annex I, (2012) O.J. L 228/1, 3rd recital. See also CJEU RULES OF PROCEDURE, Art. 10(3). Both are elected for three years by the judges among their number.

²⁵ See ECtHR RULES OF COURT, Rule 9A.

²⁶ Loukis G. Loucaides, Reflections of a Former European Court of Human Rights Judge on his Experiences as a Judge, 1 ROMA RIGHTS. IMPLEMENTATION OF JUDGMENTS 62 (2010).

plenary session – while other judges rotate.²⁷ Likewise, at the ECtHR, the president of the court and the presidents of the five sections sit *ex officio* on the seventeen-judge Grand Chamber.²⁸ A recent empirical study based on the Israeli Supreme Court indicates that multimember courts may be subject to a “presiding justice effect” whereby judges who preside over panels are more likely to vote in their preferred direction and non-presiding judges defer more to a colleague’s view when he or she is presiding.²⁹ Transposed to the European context, this finding suggests that presidents may have greater opportunities to influence their colleagues and make an imprint upon the law, especially considering that they sit as of right on the Grand Chamber, which decides the most important and high visibility cases.

Presidents enjoy another unique opportunity for influence through their role in allocating judges to the courts’ various panels (known as “sections” at the ECtHR and “chambers” at the CJEU). At either court, the president “proposes” the composition of the panels that will remain identical for a period of three years.³⁰ In addition, the CJEU president and vice-president select the *juge rapporteur* for each case.³¹ At the ECtHR the distribution of cases to *juge rapporteurs* is the province of the registry, except for important or sensitive cases, in which the *Bureau* appears to be involved. These assignments have a significant agenda-setting effect given that the identity of a *juge rapporteur* and the composition of a panel significantly affect the court’s product. The breadth and depth of any given decision often depend upon the *juge rapporteur*’s views as well as other panel members’ willingness to go along with him or her.

²⁷ See KOEN LENAERTS, IGNACE MASELIS & KATHLEEN GUTMAN, *EU PROCEDURAL LAW* 20 (2014).

²⁸ See ECtHR RULES OF COURT, Rule 24 and European Convention on Human Rights, Article 26(5).

²⁹ See Theodore Eisenberg, Talia Fisher & Issi Rosen-Zvi, Group Decision Making on Appellate Panels: Presiding Justice and Opinion Influence in the Israel Supreme Court, 19 *PSYCH. PUB. POL’Y & L.* 282 (2013).

³⁰ For the CJEU, see David Edward, How the Court of Justice Works, *EUR. L. REV.*, 539, 542–43 (1995). Most frequently the court sits in five-judge chambers, but it occasionally uses three-judge chambers or the fifteen-judge Grand Chamber when a Member State or an EU institution that is a party to the proceedings so requests, or when the court considers that a case has a particularly important value as a precedent. See also CJEU RULES OF PROCEDURE, Art. 60(1). For the ECtHR, see ECtHR RULES OF THE COURT, Rule 25. Note that at the ECtHR, the president’s proposal is constrained by rules requiring geographical as well as gender balance among judges on each section. See Andrew Drzemczewski, The Internal Organisation of the European Court of Human Rights: The Composition of Chambers and the Grand Chamber, 3 *EUR. HUM. RTS. L. REV.* 233, 236–37 (2000).

³¹ See CJEU RULES OF PROCEDURE, Art. 15.

Uniformity

Supranational courts' decisions need to be drafted in a style and tone likely to persuade national officials, judges, lawyers and the European public generally.³² As Sally Kenney has argued about the CJEU, consistency is key to ensure compliance and legitimacy in multiple jurisdictions.³³ Accordingly, institutional techniques are in place to standardize the decision process at both courts, reinforcing the impression of a bureaucratic apparatus.

Judgment Uniformity

The CJEU and the ECtHR deploy concerted efforts to produce uniform judgments following established templates. As a lawyer-linguist at the CJEU indicated, "the court always has the same way of expressing itself and every unit is in some ways the guardian of these rules of written expression and you need a greater formal rigor."³⁴ A lawyer for the ECtHR's registry described a similar approach: "[W]e have templates and models when we write draft decisions and draft judgments."³⁵ Another ECtHR lawyer pointed out that the court uses automated forms with fill-in fields to guarantee uniformity: "[W]hen we begin drafting, we fill out a judgment skeleton [sic] which is ready-made. Some phrases are repeated, repetitive, and those are always in there."³⁶ In addition, the two courts have designated staff members tasked with verifying compliance with the court's legal and linguistic standards: the "jurisconsult" at the ECtHR and the "*lecteurs d'arrêt*" at the CJEU.³⁷

Since the early 2000s, a group of registry lawyers known as the jurisconsult and their team are responsible for monitoring the court's rulings and preventing conflicting case law.³⁸ The ECtHR sits as panels rather than

³² The two courts must rely on national institutions to carry out their rulings. See de Silvia, *supra* note 11 at 334–35 (discussing the difficulties of executing ECtHR judgments).

³³ See Sally J. Kenney, *Beyond Principals and Agents. Seeing Courts as Organizations by Comparing Référendaires at the European Court of Justice and Law Clerks at the U.S. Supreme Court*, 33 *COMP. LEGAL STUD.* 593, 596 (2000).

³⁴ Interview with RY, former *référéndaire* and lawyer-linguist at the CJEU since the late 1990s (July 2, 2014) (my translation). See also McAuliffe, this volume.

³⁵ Interview with W, registry lawyer at the ECtHR since the mid-1990s (July 8, 2014) (my translation).

³⁶ Interview with M, registry lawyer at the ECtHR since the mid-1990s (June 14, 2011) (my translation).

³⁷ See Vauchez, this volume.

³⁸ The Court created the office of jurisconsult in 2001. The mission of advancing the coherence of the case law was previously carried out by the registrar, but with growing caseloads the court administration felt necessary to create a dedicated unit. Additionally,

in plenary sessions; cases are heard either by a single judge, a three-judge committee, a seven-judge chamber or, exceptionally, by the Grand Chamber.³⁹ Because of these multiple configurations, there is an endemic concern that different panels will develop as seemingly independent courts within the court. To prevent intra-court splits, the jurisconsult's team plays a coordination role across panels. The team meets weekly to review the cases on the docket, scrutinizing all draft opinions for consistency with precedents. The jurisconsult has the authority to intervene at any time in the opinion-drafting process if a departure is spotted. Several options are available. The jurisconsult can initiate a discussion with the lawyer and the reporting judge responsible for the case, alerting them to the discrepancy. They can include a note on the problematic case in their weekly e-mail to judges and registry members, banking on the naming-and-shaming effect. Should these actions fail to elicit the desired response, more drastic means can be employed, such as withdrawing the case from the panel and reassigning it to a different one.⁴⁰

In comparison, and in part due to its smaller size and caseload, the CJEU appears more preoccupied with linguistic uniformity than intra-court splits.⁴¹ The court includes staffers known in French as the *lecteurs d'arrêt* – which literally means judgment readers – whose task is to ensure consistent language and style throughout opinions.⁴² The *lecteurs d'arrêt* are native French speakers who proofread and revise judgments with an eye to consistency of style and terminology, performing a two-step check. Before the *juge rapporteur* circulates their draft to other panel members, the *lecteurs d'arrêt* perform a first round of edits. The second round takes place after the panel deliberates and adopts a final judgment. While mainly stylistic, this review may have

since 2005, the “Case-Law Conflict Prevention Group,” a special committee composed of the President of the Court and each section's presidents, has met to ensure consistency in the case law.

³⁹ The Grand Chamber, the court's largest panel, which decides the most high profile cases, is made up of seventeen judges.

⁴⁰ To complete this legal uniformity check, the court has recently created a special “language check” unit (“contrôle linguistique”), staffed with proofreaders who oversee the linguistic uniformity of the most important judgments. The ECtHR language check unit was created in 2007 and is mostly staffed by professional translators who do not necessarily have a legal background. Their task is mainly linguistic, even though staff lawyers report occasionally getting feedback which affects the substance of the case. See Brannan, *supra* note 14 at 28.

⁴¹ See McAuliffe, this volume.

⁴² The *lecteurs d'arrêt* are usually junior French or Belgium judges posted in Luxembourg for a term of years. French Judge Roger Grass who served as a *référénaire*, a *lecteur d'arrêt*, and the CJEU's registrar from 1994 until 2006 created the function in 1980. They carry all the more weight that they are headquartered in the president's chambers.

repercussions on substance.⁴³ The *lecteurs d'arrêt* are accomplished lawyers, often French or Belgian judges on secondment. As such, they occasionally detect inconsistencies pertaining to substance and recommend changes which may impinge upon the court's reasoning.⁴⁴

Staff Uniformity

The European courts draw judges, *référéndaires*, lawyers, translators and other personnel from a variety of national educational and professional training patterns.⁴⁵ In recent years, the courts have sought to foster their employees' acculturation into a common work culture and drafting conventions through a variety of programs. For a long time judges and other staff members relied on informal networks to familiarize themselves with the court's case law and writing style. Nowadays, training mechanisms and formal communication systems are in place to disseminate and reinforce norms and expectations. The ECtHR provides a formal orientation for newcomers, as well as continuing educational opportunities, including language courses, IT trainings and lecture series on topics related to the case law. At the CJEU, the president's cabinet puts together lectures on the court's functioning and the handling of cases for incoming *référéndaires*. Lawyer-linguists are initiated through a series of workshops. As one of the staff members in charge of the training reported, "when they come here they have a general training, how it works from the IT point of view, you know we have a certain structure for the documents, which we call 'canvas,' and they have to learn how to use all the databases that we use here."⁴⁶

This section has argued that the two European high courts follow a number of patterns typical of bureaucratic organizations. The next section aims at unpacking the supranational context in which these bureaucratic practices unfold on a daily basis.

⁴³ See McAuliffe, this volume.

⁴⁴ See Roger Grass, *Les ressources humaines à la Cour de Justice des Communautés européennes* in *MÉLANGES EN L'HONNEUR DE PHILIPPE LÉGER: LE DROIT À LA MESURE DE L'HOMME* 69, 73 (2006).

⁴⁵ As Antoine Vauchez has argued, international courts "cannot count on the existence of a supranational judicial profession because there is no such thing as a supranational body competent for setting common educational requirement, nor is there an identified breeding ground from which international courts could select and recruit their members." See Antoine Vauchez, *Communities of International Litigators* in *HANDBOOK OF INTERNATIONAL ADJUDICATION* (Cesare Romano, Karen Alter & Yuval Shany, eds 2014) 656, 658. This claim should be nuanced in the case of the CJEU and the ECtHR, which have built a community of professionals around their courts as I argue in the third section of this chapter.

⁴⁶ Interview with D, lawyer-linguist at the CJEU since the early 2000s (July 2, 2014).

EXPLAINING BUREAUCRATIZATION

Two sets of considerations explain the European courts' high level of bureaucratization. The first relates to institutional design and the structure of judicial tenures. The second pertains to various asymmetries enduring between judges and the rest of the staff. Taken together, they raise the question whether judges are hostages to the bureaucracy.

Staff and Judicial Tenure

A common model for domestic courts of last resort is for judges to enjoy long tenures and run their court freely while subordinated, non-judicial personnel assist them for fixed terms.⁴⁷ At the two European courts, this *modus operandi* is somewhat reversed. The judicial turnover is relatively high, while a large proportion of the staff takes root, laying the ground for a potential staff capture.

CJEU

CJEU judges and AGs hold office for a renewable term of six years. During the early days of the court, the judicial personnel were remarkably stable, with some judges serving for up to twenty years.⁴⁸ This changed since the 1980s, especially with the successive enlargements of the European Union. *Référendaires* followed the opposite trajectory. The first *référendaires* commonly spent their entire career at the court, occasionally "outliving" their judge and staying on after their judge's appointment expired to work for another cabinet. Sally Kenney thus wrote in 2000:

During the first two decades, each member had one *référendaire* who was a permanent employee. Each new member would thus inherit his or her successor's *référendaire*. The 2 longest-serving *référendaires* served 34 years each. The legendary Karl Wolf served 33 years, retiring in 1991. Two other

⁴⁷ Anglo-American and commonwealth high courts often combine life tenure for judges with the employment of recent law graduates as clerks for short-term appointments. Justices of the Supreme Court of the United States enjoy life tenure without any restriction, and a number of high courts use life appointment with a mandatory retirement age, e.g., the Canadian Supreme Court (75), the UK Supreme Court (70), the Israeli Supreme Court (70), and the High Court of Australia (70). Judges enjoy non-renewable twelve-year terms at the German Constitutional Court as well as the South African Constitutional Court.

⁴⁸ See Antoine Vauchez, *À quoi «tient» la cour de justice des communautés européennes? Stratégies commémoratives et esprit de corps transnational*, 60 *REVUE FRANÇAISE DE SCIENCE POLITIQUE* 247, 252 (2010).

so-called permanent *référéndaires* served 25 years and 23 years, respectively. Between 1970 and 1972, members freed themselves from, as one member put it, “the burden of inheriting their predecessor’s *référéndaire*.”⁴⁹

These career appointments have given way to term appointments, with terms of office becoming shorter but still significantly longer than at domestic supreme and constitutional courts using term clerks.⁵⁰ While *référéndaires*’ tenures have shortened over the past decades, the rest of the staff, in particular lawyer-linguists, have usually retained their permanent or at least long-term status. By and large, the CJEU remains characterized by the “exceptional stability of ‘internal’ actors.”⁵¹ In contrast, judges and AGs may appear to be temporary passengers.

ECtHR

The split between a relatively high judicial turnover and staff longevity is particularly pronounced at the ECtHR, which only became a permanent court since 1998.⁵² In the court’s early years, when their terms were renewable, judges served for longer terms, sometimes up to twenty years like their Luxembourg counterparts. They maintained activities in their home countries, however, and few resided in Strasbourg.⁵³ Tellingly, they did not earn a salary, receiving instead a per diem allowance and travel reimbursement.⁵⁴ Times have changed: in their application, candidates for judgeships must now respond to the following question: “Please confirm that you will take up permanent residence in Strasbourg if elected a judge on the Court.”⁵⁵

⁴⁹ See Kenney, *supra* note 33 at 605. Paolo Gori (1958–1978) and Roger-Michel Chevallier (1959–1982) top the list of longest-serving clerks. See Vauchez, *supra* note 48 at 252.

⁵⁰ There are variations across cabinets. British and Irish *référéndaires* rarely serve more than a couple years due to professional reasons; they can count on more prestigious and financially rewarding career choices back home as soon as they move on.

⁵¹ See Vauchez, *supra* note 48 at 252 (pointing out to the case of the court’s registrar, the Belgian von Houtte, who stayed in office close to thirty years [1953–1982]).

⁵² Protocol 11, which came into effect on November 1, 1998, set up a single permanent court in place of the original two-tier system of a court and a commission, both of which sat on a part-time basis.

⁵³ See Stéphanie Hennette-Vauchez, *L’Europe au service (du droit) des droits de l’homme. Réalité politique, entreprise savant et autonomisation d’une branche du droit*, 89 *POLITIX* 57, 65 (2010).

⁵⁴ See COUNCIL OF EUROPE, *THE EUROPEAN COURT OF HUMAN RIGHTS – FACTS AND FIGURES* 53 (2011).

⁵⁵ See COUNCIL OF EUROPE, *PARLIAMENTARY ASSEMBLY 1999 ORDINARY SESSION (FOURTH PART)* Doc. 8460 at 27 (September 20–24, 1999).

Despite this new stationary status, according to one of the judges I interviewed, judges still lack the stability and know-how enjoyed by the non-judicial personnel:

That's another problem of independence because the bureaucracy has continuity. When [new Judge ***] comes here, it will take him at least three years to begin to see the ropes. This is completely stupid. Very European if I may say so. The appointments here are to be lifetime . . . You cannot have an independence of the European court if the judges are changed every nine years now, before, they were up for reelection every six years.⁵⁶

The judge was referring to Protocol 14, which amended the rules governing judicial tenures.⁵⁷ In place of six-year, renewable terms like their CJEU counterparts, ECtHR judges now face a non-renewable term of nine years, resulting in an increased turnover.⁵⁸ While there is no retirement age at the CJEU, the ECtHR imposes a mandatory retirement age of seventy,⁵⁹ which means that some judges have not been able to finish their term.⁶⁰ In contrast, about half of the ECtHR registry lawyers are hired on a permanent basis as functionaries of the Council of Europe, often spending their entire career at the court. The rest of the registry's staff is employed on short-term contracts through the assistant lawyers' scheme.⁶¹ Similar to the CJEU, there are historical registry figures who played key roles in the court's development and symbolize the personnel's permanence. These include the likes of Michele de Salvia, who worked for the court in its different manifestations for more than thirty years, serving as its registrar and jurisconsult, or Paul Mahoney, who worked for the Council of Europe in various capacities for thirty-one years, including as the registrar and currently as the British judge.

The personnel's constancy relative to judges' mobility arguably gives staffers a leg up. As Stéphanie Cartier and Cristina Hoss have argued about registries of international courts, more generally, they are the "custodians of the

⁵⁶ Interview with S, judge at the ECtHR since the late 1990s (January 7, 2011) (my translation).

⁵⁷ The Council of Europe's Committee of Ministers adopted Protocol 14 in May of 2004 and it entered in force in 2010.

⁵⁸ See Art. 23(1) ECHR. Under the prior regimes judges were elected for a six-year renewable term.

⁵⁹ Article 23(3) of ECHR, as amended by Protocol 11.

⁶⁰ A recent example is Swiss Judge Giorgio Malinverni, who was elected at the age of sixty-six and served only four years (2007–2011) prior to retiring. See generally Andrew Drzemczewski, Election of Judges to the Strasbourg Court: An Overview, 4 EUR. HUM. RTS. L. REV. 377 (2010).

⁶¹ They are offered an initial one-year contract, which may, depending on their performance, be extended up to a maximum of four years.

‘institutional memory’” of their institution given that “[i]n many judicial bodies the RLS [Registries and Legal Secretariats] will be the only permanent institution of that particular body.”⁶² The CJEU and the ECtHR’s personnel provide not only continuity as court members change but also essential know-how in terms of internal organizational culture, legal expertise and linguistic proficiency.

Asymmetries: Culture, Law, Language

While judges come and go, the support personnel provides a backdrop of consistency. This distinction, along with the cultural, legal and linguistic differences coexisting at the European courts, creates knowledge asymmetries between judges and staffers. Judges are drawn from the judiciaries of Member States, private practice, political office and academia. Unlike their counterparts at domestic high courts, they rarely share a preexisting work culture, a common field of legal expertise or a native language. They may have very different expectation as to how judgments should be produced and structured. Not all are expert in EU or European human rights law.⁶³ Moreover, a great deal of CJEU and ECtHR judges’ work involves interpreting and analyzing Member States’ legal systems. There are only so many jurisdictions a single judge can be familiar with in addition to his or her own. Finally, court members not only lack a common native tongue; they also may be unevenly proficient in their court’s working languages – French at the CJEU and French and English at the ECtHR.⁶⁴

Against this backdrop, the court staff provides a source of collective knowledge, which represents both a resource and a threat for judges. The staff is just as diverse a group as the judges, but thanks to their long tenures, staffers know their institution better. Moreover, they are often subject matter experts in specific areas of the law and usually have superior linguistic skills.⁶⁵ These

⁶² Stéphanie Cartier & Cristina Hoss, *The Role of Registries and Legal Secretariats in International Judicial Institutions*, in *OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION* 711, 721 (Cesare Romano, Karen Alter & Yuval Shany, eds 2013).

⁶³ This is particularly likely for judges coming from countries that have only recently joined the European Union or the Council of Europe and, therefore, can only rely on a small pool of domestic judges, academics or professionals trained in EU law or European human rights law.

⁶⁴ See McAuliffe, this volume.

⁶⁵ See Paul L. McKaskle, *The European Court of Human Rights: What It Is, How It Works, and Its Future*, 40 *U.S.F. L. REV.* 1, 28 (2005) (raising the problem of registrar’s power due to judges’ language deficiencies). See also Norbert Paul Engel, *More Transparency and Governmental Loyalty for Maintaining Professional Quality in the Election of Judges to the European Court*

asymmetries may tip the balance of power in favour of the staff in a way that is unparalleled in national high courts. As Michele de Salvia, who served as the ECtHR's registrar from 1998 to 2000, notes,

[T]he documents contained in the case files may have been drafted in languages and pertain to legal systems about which the assigned judge may not have specific knowledge. . . . The caseloads and the importance of the cases, often very voluminous are such that in practice the judge alone cannot possibly master the facts and arguments submitted to his scrutiny. The judge, therefore, needs the assistance of lawyers whose functions go beyond those normally required by judicial assistants in a purely domestic context.⁶⁶

Language plays a particularly important role in this story.⁶⁷ As judges working in a multilingual environment, CJEU and ECtHR judges must relinquish some of the control domestic judges enjoy over the wording of their opinions. One of my interviewees, who successively worked at the CJEU as a *lecteur d'arrêt* and a *référéndaire* in the mid-2000s, thought that long-term *référéndaires* exert some measure of undue influence upon their judges:

There are old *référéndaires* who have 20 to 25 years of experience and will no longer take editing suggestions. You can send them edits and when it [the draft judgment] comes back, they haven't picked up any. As a result, the judge isn't aware [of the editing suggestions] because he has so much trust in his *référéndaire*.⁶⁸

This power dynamic is also at play at the ECtHR where judges are somewhat removed from the registry lawyers' recruitment and monitoring process and thus, perhaps, less likely to be in a position to control them. As a judge confided, judges' detachment from the registry gives rise to the perception, if not the reality, that the court is run by the registry rather than by the judges.⁶⁹ Another judge echoed this charge, lamenting that “[i]f you have a *juge rapporteur* who does not speak the language or that is not well oriented in the situation or the legal system of the country, it means the registry practically decides the case and the judge has very limited possibility to control it.”⁷⁰

of Human Rights, 32 HUMAN RTS. L.J. 448 (2012) (recounting at 452 that “[a]t the old Court, it was once discovered that five judges were unable to speak to one another without an interpreter, as they only mastered one of the two official language”).

⁶⁶ See de Salvia, *supra* note 11 at 335. ⁶⁷ See McAuliffe, this volume.

⁶⁸ Interview with N, former *lecteur d'arrêt* and later *référéndaire* at the CJEU in the 2000s (July 7, 2014) (my translation).

⁶⁹ Interview with S, judge at the ECtHR since the late 1990s (January 7, 2011) (my translation).

⁷⁰ Interview with L.L., judge at ECtHR in the 2000s (January 7, 2011).

The supranational character of the CJEU and the ECtHR, because of the knowledge asymmetries it creates, is a particularly powerful factor in explaining their bureaucratization. Institutional design has a significant impact as well; CJEU judges appear less subject to a staff capture than ECtHR judges in part because they control the hiring and retention of their *référéndaires*. Going forward, one of the questions facing the two European courts is whether the growing trend for judges and staffers to be drawn from a common pool of professionals will exacerbate their bureaucratization or, instead, foster informality and autonomy.

INTERCHANGEABLE BUREAUCRATS OR AUTONOMOUS PROFESSIONALS?

This section focuses on the circulation of judges between national judiciaries and the European courts on the one hand and the circulation of individuals between European courts' staff positions and judgeships on the other.

When the Bureaucrats Are Judges

A significant proportion of the CJEU and the ECtHR's staffers, especially the *lecteurs d'arrêt*, *référéndaires* and registry lawyers, are likely to be members of the judiciary in their home countries. I do not have precise figures on the extent of the phenomenon, as quantitative data on the European courts' staff is difficult to obtain. Information regarding judges is readily available because their bios and CVs are published at the time of their appointment and accessible on the courts' websites. In contrast, very little is known about the staff.⁷¹

The CJEU *référéndaires*' alumni association used to publish a yearly Bulletin, the *Bulletin de l'Amicale des référéndaires et anciens référéndaires de la Cour*, which offered a treasure trove of information. Based on the *Bulletins* published between 1997 and 2001, Antoine Vauchez was able to establish that thirteen of the seventy-seven *référéndaires* recruited during that period were judges in their country of origin.⁷² I lack a similar data point regarding the

⁷¹ Judges' attitudes may explain this situation. They may be wary of disclosing that information because it would be acknowledging the importance of the staff in the decision-making process. More likely, however, the courts do not see the non-judicial personnel as a topic of public interest. (It does not help that the European regulations of personal data would require contacting each individual staffer before publicly disclosing personal information such as their professional and educational backgrounds.)

⁷² See Vauchez, *supra* note 51 at 255. Unfortunately, the association discontinued its publication after 2001.

lecteurs d'arrêt, but according to two of the interviewees I talked to, their group of about seven “is predominantly composed of French private law and public law judges, with sometimes a few French academics. There are also always one or two francophone Belgians.”⁷³

Until recently, registry lawyers at the ECtHR were not enlisted among national judges, but the court has developed a pattern of hiring national judges on temporary assignments. A registry division head thus explained: “[S]ince a few years ago we have judges on secondment from the different Member States, who work with our divisions for one, two, or three years. For example at this time, in my division, I have three judges from ***.”⁷⁴ I have not been able to find out how many domestic judges the court currently employs, but if every one of the thirty-two registry divisions counts at least a couple, there could be as many as sixty. The arrangement is mutually beneficial. The court has much to gain from the judges’ fresh knowledge of and insider’s perspective on their legal system. In turn, the domestic judges dispatched to Strasbourg benefit from a firsthand experience with European human rights law. This exposure can prove advantageous upon their return in furthering their understanding of the ECtHR jurisprudence and may be the basis for a promotion.

If a substantial part of the CJEU and the ECtHR staffers are themselves judges, does the dichotomy between the courts’ judicial and non-judicial personnel still hold? In other words, does being a former judge make one less of a bureaucrat? The answer probably depends both on the work these domestic judges perform at the European courts and on their national judicial cultures. As for the first consideration, nothing seems to distinguish the domestic judges from the rest of the staff. According to the ECtHR registry division head quoted earlier, the judges on secondment “work like all other lawyers, they are fully integrated in the division, they have a special status, but in reality they are members of the division and work like any other lawyer. They prepare judgment and decision drafts and manage the correspondence.”⁷⁵ As for the second factor, while common law judges are typically appointed “from among practicing advocates at the height of their

⁷³ Interview with M., judge at the CJEU since the early 2000s (July 2, 2014) (my translation). See also Interview with N, former *lecteur d'arrêt* and later *référéndaire* at the CJEU in the 2000s (July 7, 2014).

⁷⁴ Interview with W, registry lawyer at the ECtHR since the mid-1990s (July 8, 2014) (my translation).

⁷⁵ Interview with W, registry lawyer at the ECtHR since the mid-1990s (July 8, 2014) (my translation).

reputation,”⁷⁶ there are substantial similarities between the recruitment of most continental judges and that of bureaucrats. Continental judges typically follow the career path of a civil servant, entering the judiciary “at the beginning of [their] professional life”⁷⁷ and serving among large numbers of other career civil service judges. In sum, the domestic judges working the European courts tend to serve in a support role and originate from bureaucratic judicial cultures. They are thus presumably more likely to contribute to bureaucratization rather than resisting it.

When the Judges Are Bureaucrats

There is a small yet developing trend for European judges to be selected from among their court’s own ranks, i.e., either among the pool of former *référéndaires* at the CJEU or that of registry lawyers at the ECtHR. The phenomenon first began in the late 1980s at the CJEU. In 1988, when he was appointed an advocate general, Francis Jacobs was the first court member who had previously served as a *référéndaire*. Since then more have followed in his footsteps.⁷⁸ Currently, four of the twenty-eight judges and nine AGs formerly worked as *référéndaires* and one as an intern.⁷⁹ With the creation of the first-instance tribunal in 1988 and the civil service tribunal in 2005, clerkship opportunities have multiplied at the Luxembourg courts, allowing for a new career path to develop.

According to the CJEU’s former registrar, Roger Grass, in 2006, one-fifth of the sixty-five judges comprising the three Luxembourg courts had previously served as *référéndaires* at one of the courts.⁸⁰ The trajectory from *référéndaire* to judge or advocate general is just one aspect of this developing professional endogamy. Prior to joining the CJEU, a number of court members already held positions within the European Union or the Council of Europe, ranging from those who had been judges at the general court or community officials

⁷⁶ RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 127 (2d ed. 1978).

⁷⁷ Id.

⁷⁸ For instance, Danish Claus Christian Gulmann was a *référéndaire* for Judge Max Sorensen before serving as an advocate general (1991–1994) and then a judge (1994–2006); Dutch Christiaan Timmermans was a *référéndaire* from 1966 to 1969 before serving as a judge from 2000 to 2010; Dutch Leendert Geelhoed was a *référéndaire* from 1971 to 1974 before returning to the court as an AG from 2000 to 2006; and Italian Antonio Saggio was a *référéndaire* from 1979 to 1984 prior to being an AG from 1998 to 2000.

⁷⁹ These are Judge Jean-Claude Bonichot, Vice-President Koen Lenaert, Judge Alexandra Prechal, Judge Marek Safjan and Advocate General Eleanor Sharpston.

⁸⁰ See Grass, *supra* note 44 at 72.

such as legal advisers at the European commission to members of the European Parliament and those who were ECtHR judges.

At the ECtHR, out of the forty-seven currently sitting judges, seventeen had previously worked for the Council of Europe in different capacities, ranging from registry lawyers to ad hoc judges to members of various Council of Europe commissions.⁸¹ A prominent example is the 2012 election of British Judge Paul Mahoney, who had worked for thirty-one years in various posts at the ECtHR, including as the court's registrar, and who had also served as judge and president of the civil service tribunal in Luxembourg. Judges from newer Member States are less likely to have held a position at the Council of Europe, but there are exceptions. For instance, the sitting Ukrainian judge, Ganna Yudkivska, was elected in 2009 after having worked as a registry lawyer for two years. This recruitment pattern has become controversial both inside and outside the court for exacerbating the court's bureaucratization. The *Daily Mail* called Mahoney a "Eurocrat" and announced his election with the following headline "Meet our new Euro human rights judge . . . who's not even a real judge: Top Strasbourg job for man who's never sat in a British court."⁸² The British tabloid's appraisal has been echoed, albeit not in so many words, by academic commentators describing the rise of a European "juristocracy,"⁸³ and pointing out the democratic deficit of transnational education and careers leading to European judgeships.⁸⁴ But does the growing professional endogamy observable at the European courts work to reinforce or undermine the courts' bureaucratism? The assumption seems to be that it leads to further bureaucratization.⁸⁵ For instance, looking at the Luxembourg court, Sally Kenney worries that expanding an institution's staff "may diminish [its] deliberative capacity" and its ability "as a whole to reach a compromise."⁸⁶

⁸¹ The seventeen judges are Guido Raimondi, Ineta Ziemele, Mark Villiger, Päivi Hirvelä, Mirjana Lazarova Trajkovska, Nebojša Vučinić, Kristina Pardalos, Ganna Yudkivska, Vincent De Gaetano, Angelika Nussberger, Julia Laffranque, Paulo Pinto de Albuquerque, Helena Jäderblom, Paul Mahoney, Faris Vehabović, Robert Spano and Iulia Motoc.

⁸² James Slack, Meet our new Euro human rights judge ... who's not even a real judge: Top Strasbourg job for man who's never sat in a British court, *DAILY MAIL* (June 27, 2012).

⁸³ The term originates from RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004).

⁸⁴ See Vauchez, *supra* note 48 at 252.

⁸⁵ Erik Voeten, for example, noted that "ECtHR judges whose previous careers were primarily as diplomats or bureaucrats are significantly less activist than are judges with other previous career tracks." See Erik Voeten, Politics, Judicial Behaviour, and Institutional Design, in *THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS* 61, 66 (Jonas Christoffersen & Mikael R. Madsen eds 2011).

⁸⁶ See Kenney, *supra* note 33 at 595-596.

While my purpose is neither to defend nor disparage the European courts' hiring practices, bureaucratization and large staffs do not necessarily lead to failures of deliberation and compromise. Tenure and insider knowledge can be sources of power for judges just as they are for staffers. Much like long-term staffers can take advantage of the various asymmetries at play in supranational courts to exert some measure of influence on judges, judges who formerly worked in support role can use their bureaucratic knowledge to push their agenda and keep the staff in checks. Having learned the ropes of the institution, former bureaucrat judges are presumably in a better position to avert a staff capture.

There may be further benefits to the fluidity between judgeships and support positions. Shared experiences may also produce greater epistemic equality – if not social and professional equality – furthering the judges and the staff's capacity to engage in identity switching and thus cultivating collaborative rather than hierarchical rapports. In sum, an optimistic view of European judges' increasing interconnection with staffers is that rather than generating a corps of interchangeable bureaucrats, it may constitute a pool of autonomous court professionals better able to engage in high-level decision-making and deliberation.

CONCLUSION

European judges are not hostages. They are judges working in an increasingly bureaucratic international environment. A court's supranational character may affect its resemblance to a bureaucracy in a way that is either lacking or less powerful at the domestic level. This difference is due to the fact that international judges speak different languages, serve for limited terms, have varied legal trainings and professional experiences and are unevenly versed in the laws they are tasked with applying and developing. Against this variable backdrop, staffers naturally become a stabilizing force and a repository for court practices. The examples of the CJEU and the ECtHR suggest that over time some degree of professional endogamy may develop among the judicial and the non-judicial personnel, blurring boundaries in a way that could either reinforce or undermine judges' potential capture to the staff.

The importance of courts' support personnel has implications not only for the legitimacy of judicial appointments but also for that of the staff's recruitment. On the one hand, accepting the benefits of bureaucratization diminishes concerns over judicial selection. If court staffers provide the backbone for the courts' outputs and institutional memory, individual judges'

idiosyncrasies matter less than ordinarily assumed. The current anguish over judicial appointments at the ECtHR, for example, may be overblown. That a few judges fail to meet expectations for “the highest possible calibre”⁸⁷ may not compromise the court’s quality and productivity thanks to the registry’s dependability. On the other hand, if one properly understands the complicated and fluid aspects of the courts’ bureaucracy, recommendations for appointments for judges as well as staffers are likely to change. Critics of the European courts’ democratic deficit tend to focus on judges. A more nuanced and holistic understanding of the courts, taking into account the staff and its prominent role, would inform a more critical and contextualized understanding of EU law.

⁸⁷ To use the language of the Council of Europe’s Parliamentary Assembly. See Resolution 1726 on the effective implementation of the European Convention on Human Rights: the Interlaken process, adopted on April 29, 2010, Paragraph 7.

PROOF