Upside Down, Inside Out

Searching for « the Political » at the Court of Justice of the European Union

very first draft

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The CJEU in the Age of Politicization

Engaging in a discussion on the political role of any given court is always a risky task (*terrain miné*). To say of a court that it is « political » is not only giving an abstract definition of its role ; it also directly impinges on one the most sensitive element for courts' legitimacy ie their capacity to convince scholars and the general public of the intrinsically judicial quality of their acts and of the ontologically jurisdictional nature of the institutions themselves. Unsurprisingly, courts are very concerned about their reputation –and the Court of Justice of the European Union probably even more that its national counterparts given the more recent and more contested nature of its jurisdiction. In its public appearances, from the Court's press releases to the judges' Jubilees, from judicial Festschriften to public interviews, members of the CJUE keep pointing at their « exteriority » from politics. The study of the various ways and formats through which the CJEU exhibits its apolitical reputation would probably require a whole research[1]. Among them : the insistance on the court's judicial origin through the calling of the founding cases rather than on its political origin/dependence (the inter-governmental negociations, and related treaties from Paris (1951) to Lisbon (2010) that have continuously redesigned the court) ; the distance shown with EU politics marked symbolically with a geographic location far away from Brussels' bubble ; the continuous denegation on the part of the judges of their sensitivity of political or intellectual junctures of any given type[2], etc.

While the CJUE is committed to remaining outside of the political radar, this posture proves harder and harder. The first reason relates to the basic fact that the CJEU inescapably needs to defend itself « as an institution » in the context of EU polity. One has to think about the hard negociations it has to undertake every year with the Parliament and the Council in the

[1] Antoine Vauchez, "Keeping the Dream Alive. The Transnational Fabric of Integrationist Jurisprudence", *European Political Science Review*, vol. 5, n°1, 2012, p. 51-71.
[2] Questioned on whether « l'histoire de la Cour (laissait) apparaître des personnalités qui ont particulièrement influencé sa jurisprudence », Koen Lenaerts (at the time judge at the court of first instance) indicated : « je ne pense pas que ce soit le cas (…) le principe retenu étant celui de la collégialité : il n'est pas question pour chaque magistrat de se démarquer par une conception personnelle de l'issue à donner à l'espèce dont la Cour est saisie » **:** Koen Lenaerts, « Entretien. La Cour assure surtout le respect des droits que les justiciables tirent du droit communautaire », *Europe*, n° 4, Avril 2007.

framework of budget preparation[3] ; or, even more dramatically, in the context of inter-governmental conferences, or during the Convention for the future of Europe[4], when the founding treaties are re-drafted and put the position acquired by the CJEU (as well as the essential pilars of its caselaw[5]) at risk of being contested ; most recently, the president and the Court's administration have drawn into a long and bitter conflict –both internal and external- about the reform of the organization of the Court that has led to heated discussion at the European Parliament in particular[6].

Yet, beyond the institutional dimension, there is another element that continuously threatens the capacity of the CJEU to an appear as an apolitical actor : the public discourse about the « political role » of the Court has become more and more diffuse and banal -to a point that it is almost mainstream today ! While we are still short of a study that would delineate the progressive rise of the CJEU critics ever since the 1990s, it is possible to point at both the elargment of the circles/milieu involved and the diversification of the types of « registre » mobilized (doctrinal, political, media, economic, etc.). Not that there was no criticism of the CJEU before that period but –with very few exceptions[7]- they would remain essentially contained in semi-public circles -from bureaux of national ministries to specific segments of national legal doctrine in the area of international law or constitutional law in particular. Hjalte Rasmussen captured that very well when he said that, given the symbiotic relationship between the Court and its scholarship[8], criticisms were bound to circulate as an « oral tradition »[9].

Ever since the 1990s, both the Court and the context in which it operates have however changed dramatically. The CJEU is certainly not « tucked away in the fairytale Grand Dutchy of Luxembourg » anymore. Suffice it to track the multifaceted controversy over the cases *Viking* and *Laval* amoung law professors, politicians, unionists, think tankers of all blends to ascertain the fact that the Court has entered a political age[10]. It is probably no surprise given the fact that the Court intervenes on literally all the salient political issues of EU politics over the past two decades –from refugees to posted workers, disciminations, secularism or eurozone crisis, etc. Given the historically-built role of « independent » institutions (the European Court, Commission and Central Bank) in embodying nd leading the

[3] Christoph Krenn, « The European Court of Justice's Financial Accountability : How the European Parliament Incides and Monitors Judicial Reform through the Budgetary Process », *European Constitutional Law Review*, vol. 13, n°3, 2017, p. 453-474.

[4] Marie-Pierre Granger, « The future of Europe: judicial interference and preferences », *Comparative European Politics,* 3, 2005, p. 155-179.

[5] See on the Lisbon treaty, the discussions over the desirability of affirming the principle of « supremacy » in the treaty itself or in a mere protocole.

[6] On this long and conflictual saga, see Alberto Alemanno et Thierry Pech, « Thinking Justice Outside the Dock: A Critical Assessment of the Reform of the EU's Court System », *Common Market Law Review,* février 2017, vol. 54, n° 1, pp. 129-176. In terms of press coverage, see the well-informed blog of French journalist Jean Quatremer « Les coulisses de Bruxelles » : « Copinage et clientélisme à la Cour de justice européenne », *Blog Libération*, 8 juin 2015,; « La réforme de la Cour de justice européenne ou l'art de créer une usage à gaz », *Blog Libération,* 7 avril 2015.

[7] Cf. Michel Debré, « Les prétentions inouïes de la Cour de justice européenne », *Le Monde*, 11 janvier 1979.

[8] Antoine Vauchez, "Transnational Communities of Lawyers before International Courts", *in* Karen Alter, Cesare Romano (eds.), *Handbook of International Adjudication*, Oxford, Oxford University Press, 2013 ; J. Bailleux, « Comment l'Europe vint au droit. Le premier congrès international d'études de la CECA (Milan-Stresa 1957) », *Revue française de science politique*, p. 295-318.

[9] Hjalte Rasmussen, *On law and policy in the European Court of Justice*, Dordrecht, Martinus Nijhoff Publishers, 1986.

[10] Jens Arnholz, *A 'Legal Revolution' in the European Field of Posting? Narratives of uncertainty, politics and extraordinary events,* Ph.D in sociology, Université de Copenhagen, 2014, 324 p.

« European project »[11], it's no surprise that the politicization of EU affairs has not hit selectively the institutions that claimed to be « political » (Council, Parliament and to a certain extent the Commission) but *altogether* all EU institutions -including the CJEU and the ECB. While there has not been, to my knowledge, demonstrations on the Plateau de Kirchberg, the way there are in front of the Eurotower in Frankfort, the CJEU is now placed under continuous scrutiny and surveillance.

A Cumbersome yet Resilient Notion

The problem is that our analytical equipment has not followed the pace of this politicization process. The toolbox on which scholars of law or of politics rely on remains rather poor -whether it is because it simply ascribes the Court to stricly « political » standpoints labelling its caselaw as either « neoliberal » or « federalist » (as if judges were acting as ideologues or as politicians), or because it relies on normative categories such as « judicial activism » or « governement des juges » which immediately locate the discussion on the ground of « un-judge like » and dysfunctional behavior[12]. There is no doubt that EU law scholarship has a responsibility in this state of affairs, having long thought of the Court's caselaw as a « constitutional law without politics ». As indicated Martin Shapiro many years ago in a incisive argument, EU lawyers have long thought « the written constitution as a legal truth ; the case law as the inevitable working out of the correct implications of the constitutional text ; and the constitutional court as the disembodied voice of right reason and constitutional teleology »[13]. It would be wrong however to exonerate political scientists from any responsibility. In their efforts to identify the *real* driver behond the caselaw *outside of the law and the legal field* itself, they have left the Court and its political role in a curious deadangle. As noted elsewhere[14], there has been a striking convergence of legal positivism and political science rationalism that has resulted in viewing the Court in an anthropomorphic manner as if it was one unitary actor granted with intentions and acting in a strategic manner. While many EU law professors were trying to assess the underlying legal rationality of the Court's case-law, political scientists were considering its strategies in pursuing pre-existing interests (prestige, independence, etc…) in front of a variety of constraints and interlocutors : in the end, both parts viewed the ECJ as one reified collective pursuing abstract goals and/or institutional interests. Here is not the place to detail how heuristic such approaches may have proved but rather to point at how this convergence has prevented from a fine-grained understanding of « the political » in the Court and how (in lack of the empirical material and an analytical framework) it has led the discussion on (unfertile) ontological grounds as to whether the Court « is » or « is not » political.

It is probalby this shared frustration and difficulty in seizing the « political role » of the CJEU that has motivated the unprecedented series of *interdisciplinary* conferences that have followed one another over the past decade with the aim to enrich not only the analytical

[11] Antoine Vauchez, *Democratizing Europe*, Palgrave, 2016.

[12] Drawing from the "names and known judicial orientations and philosophies" of the four elected presidents, Hjalte Rasmussen actually used to argue that a "federalist coup" occurred during the October 2004 election as three of them were of strict federalist creed, thereby maintaining a strong hold on the Court : Hjalte Rasmussen, « Present and Future European Judicial Problems After Enlargement and the Post-2005 Ideological Revolt », *Common Market Law Review*, Vol. 44, No. 6, 2007, pp. 1661-1688; see also Jean-Pierre Colin, *Le gouvernement des juges dans les Communautés européennes*, LGDJ.

[13] Martin Shapiro, *Southern California Law Rev*iew, 1979-80, p. 537-542, p. 540.

[14] Antoine Vauchez, « Introduction », in Bruno de Witte, Antoine Vauchez, eds., *Lawyering Europe. European Law as a Transnational Social Field*, Oxford, Hart, 2014.

toolbox of EU Law scholarship but also the methodologies and empirical material[15]. Here is not the place to engage in a full inventory of these undertakings. Suffice it to say here that these conferences and related books have all brought EU law in closer contact with new disciplinary developments outside of the field of law stricly speaking : political theory and normative theories of justice in the case of the edited volume *Europe's Justice Deficit* (Dimitri Kochenov, Grainne de Burca)[16] ; sociology and field-theory for *Lawyering Europe. European Law as a Transnational Social Field* (Bruno de Witte, Antoine Vauchez)[17] which attempted to map out the interactions and structural dynamics of the field of EU law actors ; critical legal studies and history in the recent edited volume by Fernanda Nicola and Billy Davies whose case-oriented approach has allowed for thicker description[18] ; last but not least, socio-legal studies and « law-in-context » approaches in the edited volumes directed by Bruno de Witte/Mark Dawson[19], by Michal Bocek[20] or, more recently in France under the lead of Laure Clement-Wilz[21]. Beyond the many differences, all these projects have in common to move the research interest *back into the Court* –rather than to stay at its periphery.

As we follow the tracks of these previous understakings and attempt to identify « the political » in the Court itself, one has to avoid a number of trapings and some possible quiproquos. Working on the politics of the Court does not mean –as many judges would fear- to engage in an inquiry in the « *ventre des juges* » (as former AG Philippe Léger would have it) in a sort of EU version of the « breakfast theory of jurisprudence »[22] that would try to identify the *circumstancial* causes/determinations and the hidden *political* intentions/agenda that lie « behind » the law. This research agenda fails to provide an analytically rich framework to study politics. Not that there cannot be « political » intentions of some sort but rather because the definition of « politics » proves to be a excessively *narrow* as it draws from a distinction between judges « that have » and judges « that have not » an agenda or between judges « who are » and judges « who are not » political. Empirically speaking, the related risk is to drive the research entirely towards the identification of smoking guns (which judge did cast the decisive ballott ?) or of the hidden political intentions. By considering only « intentions » and « agendas », it fails to seize the layer of politics that lies *outside* of the classic ideological categories, and overlooks the more routine, diffuse and ordinary forms of « politics » that can be traced in *all* judicial practices at the Court. In other words, one cannot study the « political role » of the Court with the categories used to study the « political role » of the Council or of the Parliament : most often than not, courts do politics *sans en avoir l'air* namely under forms that are specific the legal world[23]. In the world of law, particularly when it comes to continental law, it is the argument that appears to be the least political that is most

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[15] See also the research programme led by Loïc Azoulai of the « forms of life » of EU law : *Forms of Life and Legal Integration in Europe* (Folie) : http://www.sciencespo.fr/ecole-de-droit/fr/content/le-droit-de-lunion-europeenne-en-tant-que-forme-de-vie.

[16] Dimitry Kochenov, Gráinne de Búrca, Andrew Williams, dir. *Europe's Justice Deficit*, Oxford, Hart publishing, 2015.

[17] Bruno de Witte, Antoine Vauchez, eds., *Lawyering Europe. European Law as a Transnational Social Field*, Oxford, Hart, 2014.

[18] Billy Davies, Fernanda Nicola (eds.), *EU Law Stories. Contextual and Critical Histories of EU Jurisprudence,* Cambridge, Cambridge University Press, 2017.

[19] Bruno de Witte, Mark Dawson, dir., *Judicial Activism*, Edward Elgard, 2013.

[20] Michal Bobek, eds., *Selecting Europe's Judges. A Critical Review of the Appointment Procedures to the European Courts*, Oxford, Oxford University Press, 2015.

[21] Conference on *Le rôle politique de la Cour* organized by Laure Clement-Wilz at the University of Clermont-Ferrand, Bruylant, à paraître, 2018.

[22] Willard King, « A Breakfast Theory of Jurisprudence », *Dicta*, vol. 14, 1936-37, p. 143-147.

[23] Antoine Vauchez, « Introduction », in Bruno de Witte, Antoine Vauchez, eds., *Lawyering Europe. European Law as a Transnational Social Field*, Oxford, Hart, 2014.

likely to gather support. Ceteris paribus, demonstrating the continuity (and not in rupture) of one given legal argurment with the « original principles » and the « founding treaties » is often the safest legal strategy[24]. Quite tellingly, when a judge uses categories directly drawn from the world of partisan politics, it is immediately thought of as a *gaffe*[25]. What is needed therefore as we enter the Court is to get rid of ontological approaches of « the political ». As a way to circumvent this cumbersome notion, the remainder of the paper elaborates on possible methodological and analytical strategies to grasp « the political » in the concrete practices at the court (*le travail politique du droit*) as well as the broader social processes in which it is embedded (*generation and effectuation of EU caselaw*).

I/ Back to the Fabric of EU Law in Luxembourg

1) Le travail politique du droit

If « the political » is to be found within the law –and not simply at its periphery-, then one needs to shape new instruments to successfully grasp it within the Court's caselaw. In particular, one needs to disagregate the notion which would otherwise prove too broad and ambiguous. In crafting the most heuristic and operational definition of « the political », I suggest a broad focus that allows to scrutinize the ways with which « the Court » takes part to the definition (identification and hierarchization) of actors (individuals, groups, institutions) and value objects of public policies and of politics (whether national, European or international). The frame is both extensive and narrow. Extensive as it does not limit the « politics of law » at the Court exclusively to judicial decisions themselves and the « *revirements de jurisprudence* ». Narrow as it does not aim at assessing the political intentions that may or may not lie « behind the law ».

Yet, for this analytical framework to prove empirically efficient in assessing the « travail politique du juge », there is a need for more specifications. As there are more levels through which court participate to the definition of actors and legitimate objects of public policies, one needs to distinguish three different layers : doctrinal, methodological, substantive. Each one of the three levels focuses on different types of choices for the court (in terms of level of generality, presence in daily judicial decision, etc.) ; yet, taken together, they provide a compass to assess the « travail politique » of the Court across domains of EU law and time period[26].

The first level, identified hereafter as « doctrinal », focuses on the « institutional programme » that has solidified around the CJEU, namely the role and the functions that the Court has built for itself in the framework of the « European project » while at the same time

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[24] W. McIntosh, C. Kates, *Judicial Entrepreneurship. The Role of Judges in the Marketplace of Ideas*, Westport, Greeewood Press, 1997.

[25] One call recall the declarations coming from a judge of tribunal of first instance (now director at the Legal service of the Council) in the French-speaking review *Concurrence* on ECJ judges who are placed under the direct influence of their lew clerks who tend to act à propos de ces magistrats de la Cour placés sous la dépendance de leurs référendaires « véritables ayatollahs de la libre concurrence ». This opinion is thought of as having cost the Microsoft case of which he had the charge up until then : Hubert Legal, « Le contentieux communautaire de la concurrence », *Concurrences*, n°2, 2005.

[26] As will be clear from the rest of the paper, the notion of « travail politique du droit » points at the *practical conditions* under which judges and ECJ professionals co-produce ECJ caselaw in Luxembourg as well as at the making of *legal strategies.* In a PhD recently defended at the EUI, Vincent Réveillière brings a similar interest in this with a particular interest in the « travail conceptuel » of the Court : Vincent Réveillière, *Le juge et le travail des concepts juridiques. Le cas de la citoyenneté de l'Union européenne*, Ph.D in Law, European University Institute, Novembre 2017.

defining the « logic », « spirit » and « general economy » of EU treaties. This is what I have been exploring in my book *Brokering Europe*. The general idea was to track the co-production of a legal-political programme of integration (understood as a « grand dessein d'unification »[27] placed beyond member-states) and of a supranational institution –« the Court »- positioned as the guardian of this « Community/Union of law » and its « institutional balance ». In this regard, the Court appears as the « judicial arm » of a broad political project, that of the European Union, built around the « constitutional platform » made of the four economic freedoms and fair competition. This layer of politics that connects the institutional identity of the Court to a supranational reading of the European treaties has concrete jurisprudential consequences. Up until the Lisbon treaty, in conflicts of legal basis, there was a consolidated practice at the Court to favor a very broad definition of issues pertaining to the « first pilar », thereby reinforcing at the same time the jurisdiction of the Court and the jurisdiction of the « *méthode communautaire* ». One can also find traces of this « political jurisprudence » in the many instances in which the Court is defining the respective role and competences of the various EU institutions by reinsering them under the broad roof of the « Union of law »[28].

The second level, labelled hereafted as « methodological », refers to the set of instruments that the Court has gathered to fabricate its supranational caselaw –namely the tools and recipees used to produce EU jurisprudence. In this regard, the Court has historically navigated between two poles : on the one hand, a form of « methodological europeanism », to paraphrase Ulrich Beck's famous expression, which contributes to locate the autonomy and the supremacy of EU legal order beyond the discussion, as a sort of starting point[29] ; on the other hand, an inclination for comparatism as the best methodology to produce authentically European law or caselaw. The first form of EC law was actually comparative in nature –as advocated by one of the two AGs, Maurice Lagrange from the *Conseil d'Etat*. As they were inserting themselves in on a European scene in which sector-specific IOs had blossomed ever since the 1920s (WTO, Economic Commission for Europe within the League of Nations, OEEC, Council of Europe, etc.), the European Communities inherited a conception of European law as the product of a reasoned comparison of national laws and national legal traditions[30]. The emergence in the 1960s, within the framework of the European Court of Justice, of the renowned « teleological interpretation » of the treaties has progressively put in question this comparativist paradigm. Nowadays, the entrenchment of the « autonomy » paradigm at the core of the Court's principles can easily be assessed in politically salient decisions such as the one on the relationship between EU law and the ECHR (Avis 2/13[31]) or the one between EU law and international law (*Kadi*[32]) that have triggered a widespread

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[27] « C'est en tant que représentante de cette idée d'ordre que la Cour de Justice apparaît dans la structure institutionnelle ; c'est à la lumière de ce « grand dessein » d'unification qu'elle a entrepris l'œuvre d'interprétation du DC. Il faut dire que les traités de Paris et Rome formulent beaucoup d'objectifs mais définissent peu de règles de conduites matérielles et ouvrent donc un champ à l'effort constructeur de la juridiction », Pierre Pescatore, *Le droit de l'intégration*, Lgdj (1972), 2005, p. 361-362.

[28] Jean-Paul Jacqué, « L'arrêt Les Verts », in Loïc Azoulai, Miguel Maduro, eds., *The Past and Future of EU law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Oxford, Hart Publishing, 2009.

[29] Antoine Vauchez, « Methodological Europeanism at the Cradle. Eur-lex, the *Acquis* and the Making of Europe's Cognitive Equipment », *Journal of European Integration*, 2015.

[30] Voir ici par exemple : Christos Rozakis, « The European Judge as a Comparatist », *Tulane Law Review*, vol. 80, 2005, p. 257-280 ; ou encore Koen Lenaerts, « Interlocking Legal Orders in the European Union and Comparative Law », *International & Comparative Law Quarterly*, vol. 52, 2003.

[31] CJUE, Ass. Pl. 18 Decembre 2014, Avis 2/13.

[32] CJUE 18 July 2013, Kadi, aff. n° C-584/10 P.

criticism of the Court's « legal solipsism »[33]. Howver this does not however impede the Court to adopt a more comparative outlook as exemplified in the « respect » paid to « national constitutional identities » or the importance given to « sensitive national interests » on other occasions[34].

The third and last level, hereafter identified as « substantive », points at the sector-specific domains of EU law. This is undoubtedly the terrain of intervention whereby the Court affects more directly the daily life of the European Union : he deals with the definition of the value objects of EU law. This is the most ordinary form of the politics of law, that which happens on the ground of identifying, prioritizing and mediation notions of EU law. One can think about the domain of jurisdiction of the four freedoms or fair competition through the delimitation of their basic principles (« entrave », « abus de position dominante », « pratiques anti-concurrentielles », « aides d'Etat », etc.) and specific exceptions. One can also think about all the sector-specific developments made by the ECJ in defining the « objectives of public service », in erecting « financial stability » as a superior objective for the EMU, in identifying the « finalités » of the « aides d'Etat » within the framework of Europe's competition policy, in containing the « principes du droit social communautaire revêtant une importante particulière », etc. It also covers all the hundreds of key words whose *European* definition has in large part been given by the Court of justice (« firm », « worker », « produit similaire », « marché pertinent », etc.) and which constitute de facto the basic lexicon of EU politics[35].

2) Authorship and Judicial Decision-Making at the Court

Now that we know *what* is « the political » that we are looking for, we need to identify *where* to move our research focus. Here again, one has to move past another analytical obstacle, one that lies at the very core of the notion of « judgment » when understood as a unique moment of decision (*judicial fiat*) whereby a group of free-floated sovereign minds deciding over a case. The « decisionist » bias that structures most scholarship on courts impedes to seize the making of the law as a complex and collective process of writing. The equivalency put between « the production of a judgement » and « the moment of the *délibéré* » overlooks the fact judges are not engaged in a deliberation *in abstracto*. As is indicated in the case of the CJEU by recent scholarship[36], judges do not write on a « blank page »[37]. In her exploration of the « career » of a single dossier within the Court, from the opening to the judging, one can identify a whole process of co-production. As American sociologist Howard Becker has it about musicians and their related « art worlds » (1982), judges (even less so European judges) do not operate in an empty vaccum : rather, they are part and parcel of an wider « social world » made of support groups and broader networks of cooperation that may compete with each other but do share a number of conventions. In this framework, the « judicial decision » is the outcome of the cooperative and competitive activity of a variety of groups. Within the CJEU itself, this means looking at the many hands that manipulate/frame the case before it even gets to be seen by « judges ». As we know,

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[33] Voir, entre autres exemples, Martti Koskenniemi, « International law between fragmentation and constitutionalism », Cambrera Univ., 27 November 2006 (accessible : http://www.helsinki.fi/eci/Publications/Koskenniemi/MCanberra-06c.pdf).

[34] Loïc Azoulai, « The ECJ and the duty to respect sensitive national interests" in Mark Dawson, Bruno De Witte, Elise Muir, dir., *Judicial Activism at the European Court of Justice*, *op. cit.*

[35] On this, Philippe Maddalon, *La notion de marché dans la jurisprudence de la Cour de justice*, Lgdj, 2007.

[36] Karen McAuliffe, « Behind the Scenes of the Court of Justice », in Billy Davies, Fernanda Nicola (eds.), *EU Law Stories, op. cit.,* p. 35-57

[37] *Ibid*., p. 47.

judges deliberate *on the basis* of a « *projet de décision* » which is presented to the chamber ; the amendments and rewriting only take place on this terrain. Far from being circumscribed into one « critical moment » of decision, the production of judicial decision is a long process of selecting and framing to which the 150 référendaires, the 600 and more lawyers-linguists and the hundreds of lawyers and EU law professors participate.

As might to clear from the reference to Howard Becker, the purpose is not here to go look for the « femmes and hommes de l'ombre »[38] who *really* decide « à la place des juges » - as is often done in the literature on CJEU *référendaires*[39]. Described as « legal Rasputins » of Europe, to paraphrase judge Rehnquist famous quote on US Supreme Court's law clerks, *référendaires* are often granted with an (unduly) decisional role. This perspective however overlooks the fact that *référendaires* are equally (if not more) taken into the set of constraining relations and conventions that structures the long internal process of producing judgements in Luxembourg. As the first drafters of the « *projets de décision* », they are actually particularly exposed to the weight of organizational routines in Luxembourg and the rigid writing formats and templates : this is what comes out clearly from the interviews undertaken by Karen McAuliffe with *référendaires* who seem to feel a continuous « pressure to cite previous judgments 'word-for-word' or even 'paragraph-for-paragraph' ». As another CJEU law clerk indicates : « because we are writing in a foreign language, there is a tendency to do a lot of 'cutting and pasting' and so the style (in which the CJEU's judgements are written) reproduces itself ». In all in all, the judicial decision is not just « this abstraction built by law » but is best understood as the outcome of a set of routines, practices, and « micro-procédures » that weight on the *dossier* and shape its actual content[40].

Here, the profound transformation of the Court of justice along the six decades (and more) of its existence has to be taken into account. There is no denying the fact that « the Court » we refer in 1952 (a quasi-aristocratic club of gentlemen helped by half a dozen of référendaires and sitting in the small Villa Vauban) has very little to do with the large and often conflictual organization of more than 2.000 employees this is « the Court » today. It is not here the place to engage in a sociology of the Court's organization (a domain that is still very much lacking[41]) that would document the centrifugal forces that challenge the capacity of « the Court » to maintain a consistent jurisprudence : heterogeneity of the process and criteria of nomination across countries, departure of the first generation of judges and référendaires on 1970s, progressive waves of enlargement leading a rapid increase in the number of judges and *référendaires*, creation of a Court of first instance, now General Court (1991), increasing turnover of *référendaires* that rarely stay more than 3 years, etc.

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[38] Martin Johansson, « Les référendaires de la Cour de justice des Communautés européennes. Hommes et femmes de l'ombre », *Revue des affaires européennes*, n°3, 2008, p. 563-568.

[39] C'est ce que semblait indiquer Hubert Legal, à l'époque juge du tribunal de première instance et … ancien référendaire quand il disait sans ménagement que : « une bonne part du pouvoir réel d'élaboration des décisions du Tribunal est entre les mains des référendaires qui sont des collaborateurs des juges et sont de plus en plus jeunes depuis l'élargissement, frais émoulus des collèges européens et sans expérience juridictionnelle, administrative ou diplomatique » : Hubert Legal, « Le contentieux communautaire de la concurrence », *Concurrences*, *ibid.* The best reference on the issue remains : Sally Kenney, « Beyond Principals and Agents. Seeing Courts as Organizations by Comparing Référendaires at the European Court of Justice and Law Clerks at the US Supreme Court », *Comparative Political Studies*, 2000, vol. 33, p. 593-625.

[40] See for an example : Bruno Latour, *La fabrique du droit : une ethnographie du Conseil d'État*, La découverte, 2002.

[41] See however Maria Cristina Reale, *Il tribunale di primo grado delle Comunità europee : un'analisi sociologico-giuridica*, Ph.D, , European University Institute, 1998.

More interesting to our purpose here is the reaction to these centrifugal forces and in particular the double movement of rationalization and centralization of the court's judicial activities that has occured. It all occurs as if, in light of these risks, a rising concern for « consistency » had emerged within the Court itself, leading to a variety of counter-moves aimed at maintaining the « *acquis jurisprudentiel* » and entrenching it in the routines of the Court's organization and operating standards. Under the guise of « centralization » (around of the Court's presidential office), one can identify old elements (the fact that the composition of the Court's chambers is provided by the president him/herself, or that he/she chooses the rapporteurs case by case) or new ones ever since the Nice treaty preparing the EC for enlargement (the institution of the *Grande Chambre* in which the president and vice-president are the only two permanent members –the other judges rotating, the creation in 2012 of the office of the vice-president of the Court, the advisory committee auditioning candidates for CJEU judicial office, etc.)[42]. Under the cap of « rationalization », one can identify the development of *vademecum* (1976), writing softwares, cases' databases and vocational trainings[43] aimed at mainstreaming the production of judicial decision (and their preparatory documents) ; but also the rise of new professional figures within the Court such as the lawyers-linguists and the lecteurs d'arrêts who are in charge of avoided « defaults » in the process of fabricating judgements. In the end, the *délibéré* itself is deeply embedded in this thick network of specialists and of instruments that continuously impinge on the dossier progressively turning it into « decidable » EU law case for CJEU judges. In lack of an ethnographical work at the Court that would allow open up this blackbox and explore it from a closeup, it remains difficult to move beyond general working hypotheses. What appears clearly however is that « judicial decisions » at the CJEU hare best understood as a collective framing/writing workshop that goes all the way through from the filing the case to its actual publication on the Court's website.

II/ Between Generation and Effectuation of ECJ Caselaw. A Processual Analysis of the Politics in the Law

The analytical *parti pris* of a process-oriented framework should however be brought further : while « the Court » may be analyzed as a self-standing fabric[44], it is not operating in an empty territory. An inquiry into « the political » in CJEU caselaw cannot remain circumscribed to the Court itself. Chronologically speaking, the process of formation of EU caselaw starts way before and continues way later. Understanding the position of the Court requires to consider more broadly « where from » in the social space of Europe do EU law cases emerge and « where to » they may actually have a structuring effect.

1) Generating an Interest in Europe's Judicial Arena

While there is no denying the fact that the scope of EU legislation and caselaw is more and more widespread, it would be misleading to consider that ECJ *equally* concerns and affects all EU citizens –even though the ECJ is keen on appearing as the « Court of the

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[42] On all this, see Mathilde Cohen, « Judges or Hostages ? Sitting at the Court of Justice of the European Union and the European Court of Human Rights », in Billy Davies, Fernanda Nicola (eds.), *EU Law Stories, op. cit.,* p. 58-80.

[43] Interestingly, Mathilde Cohen refers to the recent creation of vocational trainings at the ECJ aimed at socializing the new *référendaires* to the customs of the Court, to the « langue du délibéré » (ie french), as well as to the usage of legal and caselaw databases: *Ibid.*

[44] Pascal Mbongo, Antoine Vauchez, eds, *Dans la fabrique du droit européen*, Bruylant, 2009.

people »[45]. In this broad perspective, the making of ECJ caselaw is embedded in a two-fold process that make up the social dynamics of EU caselaw : on the first hand, the contingent and complex movement of transformation of the countless social claims and grievances that continuously rise from society into « EU law complaints » (« generation » of ECJ caselaw) ; on the other hand, the symetric process of transformation of the Court's decisions into legal, political as well as social effects within (and outside) the European Union (« effectuation » of ECJ caselaw). This two-fold process of *generation* and *effectuation* of ECJ caselaw has nothing spontaneous or natural : it is a highly selective process : while arguably EU legal issues could be found virtually everywhere amongst social complaints and claims, very few happen to be framed in such manner and make their way to the Court ; similarly, not all ECJ decisions have the same effect/posterity across countries, sectors and social class. It is in this selective process of filtering of types of causes and types of clienteles that the social and political identity of the European Court of Justice may be assessed.

Unfortunately, we still know very little about the conditions under which specific claims are turned into EU law issues. There are a number of reasons for such state of affairs. One relates to the fact that this classic socio-legal question has long seemed to stand beyond the remits of both EU law scholarships. The other one has to do with the fact that neo-fonctionalist or neo-institutionalist political scientists interested in the ECJ have overlooked the issue : in a paradigm where « empowerment through ECJ caselaw » (of national judges, transnational firms, etc.) was considered as the essential trigger for the dynamics of judicialization of Europe, the « no-hypothesis » has never been given much interest. As the « interest in EU law » has been taken as a starting point, cases and instances of not-identifying and not-taking up EU law and rights have been in large part overlooked[46].

However, a new generation of studies is now emerging that questions this deadangle of EU law studies. As such, they stand in the continuation of but develop further some early socio-legal inquiries into access to EU judiciary[47]. Coming from a variety of places, this new stream of scholarship reflects a form of frustration for the abstract and disincarnated narrative of EU legal integration that has consolidated as a result of this bias. Together, these studies demonstrate the interest in seizing EU law not just as a never-ending success story progressively spilling over all social sectors and all actors. Over the years, the number « holes », « backlashes », « resistances » or « spheres of indifference » to EU law have put the realism of this « integration-through-law » narrative into question. As this paradigm seems to be producing decreasing outputs, the need for an alternative research entrypoint has emerged. Instead of assuming an « interest in EU law or caselaw »[48], this new stream of studies starts from the no-hypothesis (failed attempts or non-attempts to use EU law) and studies local discrepancies, cases of not-taking EU law, of abandoning it, etc. This allows for a fine-

[45] Harm Schepel & Rein Wesseling, *The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe*, 3, *European Law Journal*, 1997.

[46] In this tradition of research, see Van Oorschot W. 1991. "Non take-up of social, security benefits in Europe", *Journal of European Social Policy*, vol. 1, n° 1 ; Philippe Warin, « Le non-recours aux droits », *SociologieS* [En ligne], Théories et recherches, mis en ligne le 15 novembre 2012, consulté le 05 février 2018. URL : http://journals.openedition.org/sociologies/4103

[47] Voir notamment Harm Schepel et Ehrard Blankenburg, « Mobilizing the European Court of Justice », Grainne De Burca et Joseph Weiler, dir., *The European Court of Justice*. Oxford: Oxford University Press, p. 9-42.

[48] As Jos Hoevenaars indicates, research tend : "Not only are we not seeing failed attempts, or non-attempts, these studies also fail to consider that preliminary references may not always constitute a 'demand' for a ruling, nor an attempt at participation or expecting a net gain from invoking EU law. A related critical observation is the fact that these studies have a significant methodological problem in focusing on examples of successful mobilization of EU law in the past : *A People's Court? A Bottom-Up Approach to Litigation Before the Court of Justice of the European Union*, Ph. D in law, Université de Radboud Universiteit Nijmegen, 2018, 333 pages.

grained analysis of the social and economic conditions that locally determine recourse to EU law. In a PhD that maps out the usage of preliminary rulings tribunal by tribunal in France, Germany and Italy, Tommaso Pavone provides an understanding of what conditions the unequal spatial distribution of *recours*[49]. By providing an in-depth analysis of idiosyncracies of local configurations both in terms of legal, judicial and economic infrastructure, he is able to identify what structures the uneven inclination to frame social complaints into issues of EU law. This research complements the (now old) statistical data gathered by Takis Tridimas and Gabriela Gari which demonstrated the structural advantage of firms and interest groups regarding their capacity to bring their complaints to the ECJ. On a total of 340 cases brought before the court of first instance onver the 2000-2005 period, 87% had been submitted by legal persons (for the most part firms and business interest groups), while only 9% (30 cases) had been brought by individuals[50].

This type of data calls for more work on the ground the way Jos Hoevenaars recently did in his excellent Ph.D which provides an in-depth localized and contextual approach to 40 preliminary rulings logded in the Netherlands between 2008 and 2012[51]. Drawing from a rich set of interviews with the plaintiffs and their lawyers, Jos Hoevenaars has described the heavy and lengthy process of translating / coding social complaints into EU legal issues. Under this light, the emergence of an « interest in EU law » looks like a rather unlikely -if not somewhat irrational- event, both for the plaintiffs and for the lawyers and the local judges themselves. Filing a complain in the terms of EU law most often means taking the risk of slowing down the procedure and introducing a additional element of uncertainty in the midst of already costly/lengthy national procedures. If litigants are potentially more inclined to consider their coming to Court in Luxembourg as an legal opportunity (and a professional distinction), they often prefer to avoid this extra workload in a domain of law that they very rarely master.

Choosing to work on a limited corpus of cases, one is able to take a local viewpoint to consider how *in practice* individuals, local interests, NGOs, legal expertise and judicial politics concretely articulate. Given this very selective process of generation of ECJ case, one understands how critical legal entrepreneurs (lawyers, law professors) and ONGs prove to be in generating cases between the court –in particular when it comes to domains of EU law that are of particular concern for individuals (asylum, labor law). Given the extra-time and extra-cost involved for both lawyers and plaintiffs, it's no surprise that NGOs and professors play a critical part in keeping EU litigation alive, alerting for new opportunities. As they bring their support structure and legal expertise to the ground, most often as pro bono, these repeat players of EU law as critical actors in the process of enroling specific social claims and social groups on EU judicial arena. In lack of these repeat players who have a specific long-term interest and agenda in EU law, the structural trend of selection in EU law cases proves heavily asymetrical.

On the whole, this localized and context-rich approach allows to demonstrate what are the odds for a 'social complain' to end up been framed as a EU law issue. Pointing at the many difficulties and costs involved when one gets involved in a preliminary ruling, one can

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[49] Tommaso Pavone, « The Origins of Preliminary References to the European Court of Justice: Legal Pioneers, Judicial Practices, and the Mobilization of Specialized Knowledge », Paper presented at Luiss, March 2017.

[50] In the same vein : while half of complaints filed by individuals before the court of first instance are declared inadmissible, only 30% of the legal persons are. While 10% of individuals succeed, it is the case of the 35% of legal persons : Takis Tridimas, Gabrile Gari, « Winners and Losers in Luxembourg: A Statistical Analysis of Judicial Review Before the ECJ and the CFI (2001 – 2005) », *European Law Review,* n°2, 2010.

[51] Jos Hoevenaars, *A People's Court? A Bottom-Up Approach to Litigation Before the Court of Justice of the European Union*, Ph. D in law, Université de Radboud Universiteit Nijmegen, 2018, 333 pages.

show the complex/contingent 'cocktail' of individual entrepreneurship of the plaintiffs, personal commitment of its lawyer as well as support from of a variety of collectives (unions, association of landowners, in particular capable of financing the costs of the trial) that is necessary to pursue a European litigation. This view from the bottom re-opens taken for granted assumptions about the dynamics of litigation at the ECJ. By using the microscope, we are able to providing in-depth analysis of ECJ cases in a field that has long been dominated by macro perspectives and large-n databases. Rather than considering their *ex-post* rationales for cases and attributing to the plaintiffs EU law interests/motivations with the hindsight, it proves heuristic to simply look at the cases from the perspective of the plaintiffs and the legal actors themselves, *following* them from the generation of the litigation up to the trial itself at the ECJ and back again to its legal, social and political consequences on the ground.

2) Turning ECJ Decisions into Effects

Symetrically, one should also consider the variegated *effects* of ECJ decisions on the ground. Contrarily to what a legalistic vision could have, ECJ raw judicial decisions have no intrinsic or immediate effects on actors of EU polity. The legal meaning and the political/social effects of a given decision are highly dependent on the multiple social and political ramifications and relays of the EU law. This brings us back to the work of agregation and solidification of ECJ caselaw that is continuously happening within the « Court's world », at the core of its support groups and networks of cooperation (cf. supra)[52] ; it also leads us to question how national social, political, economic and bureaucratic actors take up, ignore, compromise with court's decisions and make use of them in their daily practices. It is not place here to delving more into what remains at this stage a research agenda. What is important here is to have identified the « political role » of the Court right there at the crossing between input and output, in-between the socially-selective structuration of a *demand* coming from civil society "parties" (the narrowing down of social complaints into EU law claims) and the making of an effective *answer* (from raw judicial decisions to effective "jurisprudence").

To be developed further !

Conclusion

This emerging research agenda calls for new methodologies and empirical material. After decades during which political scientists have accumulated large n databases in order to identify the (inter-governmental or supranational) trend of the ECJ, often failing to provide cumulative results, the research interest is moving towards "thick description" methodologies that provide localized and fine grained observation of EU law *in action*[53]. This proves very promising. Not only because the local and contextual detour is the best antidote to teleological

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[52] For a more complete argument on this, see Antoine Vauchez, « EU Law Classics in the Making. Methodological Notes on *Grands Arrêts* at the European Court of Justice », in Billy Davies, Fernanda Nicola (eds.), *EU Law Stories. Contextual and Critical Histories of EU Jurisprudence,* Cambridge, Cambridge University Press, 2017. See also Mikael Madsen, Urska Sadl, « A 'Selfie' from Luxembourg: The Court of Justice and the Fabrication of the Pre-Accession Case-Law Dossiers », *The Columbia Journal of European Law*, 2016.

[53] Clifford Geertz, "Thick description: toward an interpretive theory of culture', in *The Interpretation of Cultures: Selected Essays*, New York, Basic Books 1973, pp. 3-30. En un sens différent, voir néanmoins aussi Anne Orford, « In Praise of Description », *Leiden Journal of International Law*, vol. 25(3), 2012, 609–625 (2012).

narratives of the “rise and rise” of the Cour; but also because it allows to describe very precisely how social interests, legal actors and the CJEU are connected to one another. By articulating micro, meso and macro levels of analysis, one escapes ontological discussions about the nature of the Court (neo-liberal, “political”, “federal”, etc.) and of “the political” (as being the “thing” of specific institutions such as the Parliament, or the Council, etc.) in Europe. Instead, the process-oriented approach allows to provide a research strategy to empirically measure what “the Court” does to the “European society” (and vice versa).