

COMMENTARY

DYNAMICS AT PLAY IN THE EU PRELIMINARY RULING PROCEDURE

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“It is the pervading law of all things organic and inorganic, of all things physical and metaphysical, of all things human and all things superhuman, of all true manifestations of the head, of the heart, of the soul, that the life is recognizable in its expression, that form ever follows function. This is the law.” Louis H. Sullivan, American architect (1896).¹



§1. INTRODUCTION

Form follows function is a principle associated with modernist architecture and industrial design in the 20th century. The principle is that the shape of a building or object should be primarily based upon its intended function or purpose. However, in the eyes of many national judges and legal practitioners, the EU judicial architecture lacks comprehensibility. To them, the EU ‘building’ is reminiscent of the alienating drawings

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¹ ‘The Tall Office Building Artistically Considered’, *Lippincott’s Magazine* (1896), p. 403–409.

of the famous Dutch graphic artist M.C. Escher ('Strange Loops'). They cannot find the entrance (nor the exit) and fall through ceilings on staircases that only go up. The EU architecture seems to shout at judges to keep out, instead of welcoming them to enter the building. Hereafter I will further elaborate on these impressions (Section 2.B.) that are indeed alarming, especially because national judges enforce EU law at the first and last instance. Misunderstandings about the interpretation and validity of primary and secondary EU law can seriously hamper the effective application of EU law (*'effet utile'*) at the national level.

The key instrument to ensure uniform interpretation and application of EU law by national courts and tribunals is the preliminary ruling procedure. This procedure² was designed in the 1950s in the context of the European Coal and Steel Community, which was quite different from the current Union. Therefore the question is justified if the preliminary ruling procedure takes sufficiently into account the current dynamics at play.

In 2014, the Maastricht Journal of European and Comparative Law published a Legal Debate on reforming the operation of the Court of Justice of the EU. The debate contained contributions by five authors. Eleanor Sharpston (Advocate General, CJEU) wrote about how to make the Court of Justice more productive without encroaching on the quality of its decision-making. Sacha Prechal (Judge, CJEU) reflected on the '*responsabilization*' of the national courts when submitting their requests to the Court of Justice. Michal Bobek (Professor of European Law, College of Europe) wrote about the experiences of the judiciary in the Central and Eastern European Countries. Eric Gippini-Fournier (Legal Service, European Commission) drew attention to the operation the General Court. Finally, Professor Monica Claes of Maastricht University drew the different pieces together and provided her concluding remarks on this topic.

In this essay I will discuss the preliminary ruling procedure from the viewpoint of a national appeal court judge, from time to time using my own experiences with (and appreciation of) the procedure.

§2. NATIONAL JUDGES' EXPERIENCES WITH EU LAW

A. THE WALLIS REPORT (2008)

In a 2008 Resolution 'on the role of the national judge in the European judicial system'³ (based on the 'Wallis Report'),⁴ the European Parliament called for a reinforced dialogue

² Article 41 of the Treaty establishing the European Coal and Steel Community: 'When the validity of acts of the High Authority or the Council is contested in litigation before a national tribunal, such issue shall be certified to the Court, which shall have exclusive jurisdiction to rule thereon'.

³ European Parliament Resolution of 9 July 2008 on the role of the national judge in the European judicial system (2007/2027(INI)).

⁴ Report INI/2007/2027 on the role of the national judge in the European judicial system (Rapporteur Diana Wallis) adopted by the European Parliament on 9 July 2008 ('the Wallis Report').

between national judges and the Court of Justice. A survey among national judges carried out for the purposes of the Resolution highlighted significant disparities in national judges' knowledge of EU law across the European Union. The survey indicates that many judges perceive EU law as excessively complex and opaque. Judges also lack familiarity with the preliminary ruling procedure, partly as a result of difficulties in accessing specific and up-to-date information on EU law. Therefore, the initial and life-long training of national judges in EU law must be intensified and improved. The survey also found the urgent need to enhance the overall foreign language skills of national judges.

B. JUDGES' DIFFICULTIES WITH EU LAW

There is good reason to assume that national judges who (as the Wallis Report shows) consider themselves 'lost' in the EU building, will consequently make incorrect use of EU law. In my view, however, this assumption needs some refinement.

It is remarkable that in most European countries, judges seem more at ease with the application of case law from the European Court on Human Rights in Strasbourg (ECtHR). Most difficulties that are mentioned in the 2008 Resolution of the European Parliament also apply to the European Convention on Human Rights (ECHR). The ECtHR's judgments are only⁵ available in English (and French) and national judges cannot (yet)⁶ ask the Court for explanation about the meaning and the right application of the Convention in individual cases.⁷ And while the Court of Justice with its rulings aims at a very precise and *erga omnes* explanation of the application or validity of a specific EU law provision, the ECtHR rather focuses on the factual circumstances of the parties involved. Only seldom can the judges of the ECtHR be seduced to rule in such a general way that the right application of the Convention is self-evident to other Contracting Parties. Consequently, the ECtHR's case law contains many black holes and uncertainties.

For a better understanding of national judges' difficulties with EU law, we should distinguish between judges' problems that relate to the infrastructure of the EU judicial system, and judges' problems with the application of *substantive* EU law. Unlike

⁵ Although translations of (excerpts) are sometimes available in other languages, provided for by national institutions like the Supreme Court of Georgia.

⁶ On 2 October 2013, the Committee of Ministers of the Council of Europe opened up Protocol no. 16 to the European Convention on Human Rights for signature. This new Protocol, which has been referred to as the 'Protocol of the dialogue', creates the possibility for the highest courts of the Contracting States to the Convention to request an advisory opinion from the ECtHR on 'questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto'.

⁷ For a good comparison see J. Gerards, 'Advisory opinions, preliminary rulings and the new Protocol No. 16 to the European Convention of Human Rights, A Comparative and Critical Appraisal', 21 *MJEC* (2014), p. 630–651.

the ECHR, the EU judicial system presents itself rather poorly to legal professionals. This is in my belief a core problem that must be addressed by the EU architect who should provide for better routing in the judicial system. The basic tools alone that legal professionals must work with (the Treaties) need constant renaming and renumbering. We have underestimated that in a complex and ongoing federalizing law system such as the EU, the first thing that national judges and lawyers need is structure, overview and legal certainty.

Having said that, it is probably not the application of *substantive* EU law by national judges that is most worrisome. Judges who specialize in intellectual property, labour, tax, and immigration law are in general rather positive about the clear guidance of the Court of Justice in concrete cases.⁸ Considering the small number of inadmissibility decisions⁹ of the Court, national judges seem to work quite effectively with the preliminary ruling procedure. Judges may not have a good overview of the EU judicial system, but they seem to manage relatively well on the *micro* scale when they apply EU law to specific areas of law. It is true however that the style and content of the Court's judgments is of particular concern to many judges.¹⁰

C. THE NEED FOR A REINFORCED DIALOGUE

There is however room for improvement of the preliminary ruling procedure. Much has been written about the need for cooperation and a (reinforced) dialogue between the Court of Justice and national courts. National judges consider the procedure very much a one-way Q&A procedure that lacks timely exchange of new relevant information. For this reason, the 2008 European Parliament Resolution calls on the Court to consider all possible improvements to the preliminary ruling procedure which would involve the referring judge more closely in its proceedings, including enhanced possibilities for clarifying the reference and participating in the oral procedure.¹¹ (In the Netherlands, we call the silent period between a court's reference and the Court of Justice's ruling the 'black hole'.) Misunderstandings about a reference often come to light in the Advocate General's Opinion. Unlike the government and the parties involved, judges cannot

⁸ It follows from the 2008 Wallis Report (p. 23) that a large majority of respondents (89%) found the CJEU's ruling readily applicable to the facts of the case, thus enabling a reasonably unproblematic conclusion to the preliminary reference procedure.

⁹ In 2014, the Court of Justice declared 26 references inadmissible (Hungary 8; Italy 4; Poland 3; Bulgaria 2; France 2; Romania 2; Slovakia 2; Croatia 1; Germany 1; Portugal 1). In six cases, the reference did not contain the relevant findings of fact as determined by the referring court or tribunal, or an account of the facts on which the questions are based. In the other cases, the Court of Justice had no jurisdiction to hear and determine a case (19) or the application was manifestly inadmissible because of the hypothetical nature of the reference (1).

¹⁰ The reasoning of the Court of Justice is often considered too general or abstract to be properly applied to the facts of national cases. Wallis Report, p. 26.

¹¹ European Parliament Resolution of 9 July 2008 on the role of the national judge in the European judicial system (2007/2027(INI)).

communicate with the Court and they have no other recourse to *damage control*. Considering the average time of 16 months taken by the Court to answer a reference, this is a missed opportunity in terms of the efficiency and effectiveness of both the procedures at the Court and at home. In return, Sacha Prechal, from the perspective of the Court, points at the numerous vicissitudes in judicial proceedings, such as settlement by the parties, the applicant's withdrawal or a setting aside of the reference on appeal.¹² Unfortunately, this information does not always come to light in time to prevent time-consuming and unnecessary effort on the Court's part.

From the standpoint of the national court (and the Court of Justice) it is important that they can, in a timely fashion, exchange new relevant information, especially in case of misunderstandings about the referred questions. To date, the *Rules of Court* do not provide for a formal opportunity for comments from the referring judge. It would be most helpful if this possibility was introduced. Before the Court of Justice reformulates any part of a reference ('the referring court seeks, in essence, to ascertain whether (...)') this might be a ground for the Court to consult the referring judge.

1. *The problem of extended argument*

The need for better communication between national courts and the Court of Justice during the time that a case is pending in Luxembourg will probably become even more pressing in future. In her contribution, Advocate General Sharpston expresses concern with the quality of preliminary rulings because the authority of the Court depends on the quality of its output.¹³ The continuing drive for speed has come at a cost. In her view, a 'productive' court produces 'well-reasoned judgments that are consistently of high quality delivered within a reasonable time'.¹⁴ As the EU is expanding its ambit to areas that used to belong to the realm of national law (like criminal and immigration law), we may expect more rulings from the Court that will not lend themselves to an immediate clarification and will not ensure a uniform interpretation and application of EU legislation. EU law in new – and politically controversial – areas relatively often gives rise to difficulties in interpretation at the national level. In the field of immigration law, the EU is now grappling with highly controversial concepts to prevent misuse of asylum claims. In *A, B, C v. Staatssecretaris van Veiligheid en Justitie*, the Dutch Council of State asked the Court of Justice what proof may be taken into account to 'establish' the

¹² S. Prechal, 'Communication Within the Preliminary Rulings Procedure – Responsibilities of the National Courts', 21 *MJECL* (2014), p. 757–760.

¹³ I disagree with Achim Hurrelmann and Martin Manolov who argue that increased criticism of Court of Justice decisions will not weaken the Court's role because Member States only 'profit' from a strong court. A. Hurrelmann and M. Manolov, 'The Court of Justice of the European Union: Federalizing Actor in a Multilevel System', *SCC Working Papers* (2011), www.queensu.ca/iigr/pub/archive/DemocraticDilemma/ReformingTheSCC/SCCpapers/HurrelmannFINAL.pdf.

¹⁴ E. Sharpston, 'Making the Court of Justice of the European Union More Productive', 21 *MJECL* (2014), p. 767.

declared sexual orientation of an applicant for asylum.¹⁵ The need to refer the question was unavoidable in the light of Article 4(3)(c) of Directive 2004/83/EC.¹⁶ Yet the very ‘concept’ of homosexuality is historically and sociologically dubious.¹⁷ Consequently, it has been argued that Europe’s asylum determination authorities already know what procedures are lawful and what they are prohibited from doing, but the Court’s judgment did not guide them in any way on how to lawfully prove a gay asylum claim.¹⁸ For this reason, in 2010, Storey advocated the engagement of national judges in a ‘transnational dialogue’ in asylum cases because the Court’s judges – ‘who are not specialized in this matter’ – would be unfit to deal with cases related to the Refugee Convention. It would take too long before national judges are afforded with a significant (and convincing) body of Court of Justice case law.¹⁹ Also, the Wallis Report encourages the specialization of Court of Justice judges and to create specialized chambers to make the Court’s judgments more ‘acceptable’ to specialized national judges.²⁰

2. Application of EU law under pressure

In my opinion, the mere fact that a Court of Justice judgment may occasionally produce extended argument does not mean that the Court is not satisfactorily discharging the function of assisting the national court. To a certain extent, further adjustment of its case law will be unavoidable. However, the phenomenon of extended argument can become problematic because it bears the risk that national judges will refrain from asking for further clarification for the sake of expedience (a requirement set by both national and international (also EU) law).²¹ National judges will consider this as responsible thinking under the Rule of Law (which may indeed lead to an occasional *in dubio pro reo* approach of EU law). This is all the more true in cases that involve detainees (whether they are suspects in pretrial detention or after conviction, or asylum seekers (including children)

¹⁵ Joined Cases C-148/13 to C-150/13 A, B, C v. *Staatssecretaris van Veiligheid en Justitie*, EU:C:2014:2406.

¹⁶ Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, [2004] OJ L 304/12.

¹⁷ J. Weeks, *Sex, Politics and Society, The regulation of sexuality since 1800* (Pearson Education Limited, 1981); M. Foucault, *The History of Sexuality: An Introduction Vol. I* (Éditions Gallimard, 1976); P. Johnson, ‘Court of Justice of the European Union judgment on “gay asylum seekers” will have implications for the European Court of Human Rights’, *ECHR Sexual Orientation Blog* (2014), <http://echrso.blogspot.de/2014/12/court-of-justice-of-european-union.html>.

¹⁸ S. Chelvan, ‘C-148/13, C-149/13 and C-150/13, A, B and C v *Staatssecretaris van Veiligheid en Justitie: Stop Filming and Start Listening – a judicial black list for gay asylum claims*’, *European Law Blog* (2014), <http://europeanlawblog.eu/?p=2622>.

¹⁹ H. Storey, ‘It takes two to tango’, *Seminar of the Association of the Councils of State and the Supreme Administrative Jurisdictions of the European Union*, Brussels 16–17 December 2010.

²⁰ Wallis Report, p. 27.

²¹ The reasonable time obligation follows from Articles 6 ECHR; Article 47 of the Charter of Fundamental Rights of the European Union; Article 14(3)(c) International Covenant on Civil and Political Rights.

pending immigration procedures).²² This tension between the correct application of EU law and the need for a speedy decision is materialized in a (much criticized) *memo* addressed to the lower administrative courts of the Netherlands in 2013. Dutch judges are being asked to send a reference for a preliminary ruling first to the relevant administrative Supreme Court, suggesting some informal monitoring by higher courts. In practice, however, neither the lower courts nor the supreme Dutch courts comply with the procedure laid down in the *memo*.²³

§3. MISUSE OF THE PRELIMINARY RULING PROCEDURE?

I will briefly mention – as an aside – the supposed misuse by judges of the preliminary ruling procedure that is referred to in the legal debate. Different authors have argued that, since EU law is primarily based on decentralized enforcement, the most powerful – and for the Court of Justice the most dangerous – means whereby the national courts can show their *dissatisfaction* is by ignoring the ECJ's rulings.²⁴ The way national courts understand the preliminary procedure and the way they use it, or abstain from using it, is sometimes viewed as a 'barometer' of their support of the Court of Justice's case law.²⁵ In academia, we find different reasons for non-compliance with the preliminary ruling procedure. As early as in 1987, Dausés argued (under the Article 177 procedure of the EEC Treaty) that national courts of last instance 'shelter' behind the *acte clair* doctrine and that lower courts justify their inclination to decide cases on their own by citing the optional nature of the reference procedure. This tendency 'to avoid where possible' the procedure would be encouraged by the attitude of the parties to the proceedings that fear 'unnecessary' prolongation of the proceedings or an additional element of uncertainty.²⁶

Also, Tridimas argued in 2003 that the Court is increasingly facing a problem of national 'judicial pluralism': national judges sometimes apply their national internalized

²² Of course, there is recourse to the urgent preliminary ruling procedure. And although that procedure can bring back delays considerably, it does not take into account an important side-effect of a national reference; a lack of clarity of EU legislation in one case will probably affect many other cases that will also be put on hold.

²³ From the Court of Justice's case law it is clear that higher courts cannot call into question a lower court's discretion to make a reference for a preliminary ruling; recently: Case C-416/10 *Krizan and Others*, EU:C:2013:8. In addition, the 2008 European Parliament Resolution urged the Commission to investigate whether any national procedural rules constitute an actual or potential hindrance to the possibility for any court or tribunal of a Member State to make a preliminary reference and to pursue vigorously the infringements which such hindrances represent. European Parliament Resolution of 9 July 2008 on the role of the national judge in the European judicial system (2007/2027(INI)).

²⁴ M. Broberg and N. Fenger, *Preliminary References to the European Court of Justice* (Oxford University Press, 2014), p. 6.

²⁵ T. Tridimas, 'Knocking on heaven's door, Fragmentation, Efficiency and defiance in the preliminary reference procedure', 40 *CMLRev* (2003), p. 37.

²⁶ M.A. Dausés, 'Practical Considerations Regarding the Preliminary Ruling Procedure under Article 177 of the EEC Treaty', 10 *Fordham International Law Journal* (1987), p. 576.

notion of EU law or do not always share the Court's view that EU law reigns supreme over the national constitutions.²⁷

Bobek adds a new dimension to the debate. In a number of cases in new Member States like Poland and the Czech Republic, the reference procedure would be misused as a 'tool' for direct attack and rebellion of national judges vis-à-vis their national superior courts.²⁸ This final category of cases also rather indicates an internal problem in the Member States.

I find it difficult to value suggestions of judges' avoidance and disobedience of EU law, or national rebellion. The Wallis Report does not mention disobedience of EU law as a problem – let alone a major problem for EU law. From the report it follows that judges throughout Europe on the whole are well aware (and convinced) of the need and obligation of Article 267(3) of the TFEU and of the exceptions that have been established in (and after) the well-known *Cilfit* judgment.²⁹ Second, we must be careful when extrapolating experiences with a few high profile cases to the vast body of the Court of Justice's case law. Most of the reported cases of 'rebellious' judges involve sensitive constitutional issues in the Member States.³⁰ Looking however at the number and nature of references made by national courts to the Court, the majority involve highly detailed (and often extremely boring) questions about substantive EU legislation (like the *tariff classification of frozen camel meat from farm-raised animals*).³¹

§4. FORM FOLLOWS FUNCTION: CONCLUDING REMARKS

I return to Louis Sullivan's 'pervading law' that form ever follows function. If today the *function* of the preliminary ruling procedure is indeed to enable the courts and tribunals of the Member States to ensure uniform interpretation and application of EU legislation, then what *form* should the procedure take, considering the dynamics at play? It is safe to presume that the architects who designed the preliminary ruling procedure in the 1950s did not foresee that the Court of Justice would ever be asked to rule on, for example, the level of evidence needed to 'establish' an asylum seeker's sexual orientation,³² or if an organism 'which is incapable of developing into a human being may be patented for industrial or commercial purposes.'³³ In other words, the subject matter of the questions

²⁷ T. Tridimas, 40 *CMLRev* (2003), p. 47.

²⁸ M. Bobek, 'Talking now? Preliminary Rulings in and from the New Member States', 21 *MJECCL* (2014), p. 786.

²⁹ Case 283/81 *Cilfit*, EU:C:1982:335.

³⁰ For a good overview, see V. Trstenjak, 'National Sovereignty and the Principle of Primacy in EU Law and Their Importance for the Member States', 4 *Beijing Law Review* (2013), p. 71–76.

³¹ Case C-559/10 *Deli Ostrich NV v. Belgische Staat*, EU:C:2011:708.

³² Joined Cases C-148/13 to C-150/13 A, B, C v. *Staatssecretaris van Veiligheid en Justitie*.

³³ Case C-364/13 *International Stem Cell Corporation v. Comptroller General of Patents, Designs and Trade Marks*, EU:C:2014:2451.

referred by national judges to the Court has changed dramatically over time (Section 2.C.1). With more high profile cases involving human rights protection coming up we may expect more debates surrounding EU law in the Member States, more visibility of EU legislation and, as a result, more active involvement of national judges and also more use of the preliminary ruling procedure. What did *not* change is that national judges expect clear, 'digital' answers from the Court of Justice on the application or validity of EU law. If we do not want these expectations to become unrealistic (Section 2.C.), then we must start with making the dialogue between national judges and the Court of Justice of the EU an effective and timely exchange of relevant information.