COUR DE CASSATION

UNIVERSITÉ TOULOUSE 1 CAPITOLE — EUROPEAN SCHOOL OF LAW TOULOUSE

The role of the judge and the European Law

Summary of the 6th conference of the "Thinking the office of judge" conference cycle
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As attacks on the Rule of Law are multiplying within the European Union itself, and the independence of the judiciary is being challenged, does a European judicial area exist? How does European law transform the role of the judge and does it influence his legitimacy? Is the dialogue which exists between domestic judges and the Court of Justice of the European Union likely to strengthen this legitimacy and the dialogue between domestic courts? These questions were put to Antoine Vauchez, researcher at the crossroads between sociology, political and legal studies, and to Ian Forrester, extremely well versed in common law culture, former barrister and judge at the General Court of Justice of the European Union.

Questions linked to law and justice were not at the heart of the construction of the EU, however the idea of a "judges' Europe" put forward by Robert Lecourt gradually took shape and the European judicial area emerged as the natural consequence of the creation of the common market. Europeanisation is no longer a top-down process, based on political or diplomatic-type agreements, but is now bottom-up, based on the law and decisions by judges in the ordinary courts, and the need for the Court of Justice has therefore come to the fore.

Paradoxically, identifying a standard for the European judge is not possible: the appointment of judges to the Court of Justice by each Member State is not uniform despite the creation of the panel defined by Article 255 of the TFEU which is tasked with interviewing and then giving an opinion on candidates for the role of CJEU judge, which certainly constitutes a first step towards greater institutionalisation and Europeanisation of the appointment process.

Nevertheless, as judges' Europe is increasingly under discussion through the questioning of the independence of justice, the Court of Justice plays a fundamental role in preserving the Rule of Law to protect the principle of an independent judiciary, granting this a constitutional value through the link to articles 2 and 19 of the TFEU.

For the domestic judge, the judge of European law, the increasing influence of European law leads him to ask questions relating to interpretation or interaction with domestic standards. In a monistic system, with the application of European law, the judge is led to develop his line of legal reasoning justifying the interaction so as to affirm the legitimacy of his decision. The situation is different in common law countries where international and European standards form an integral part of the "law" which is applied and interpreted by the domestic judge. In the United Kingdom, in the Miller case relating to the suspension of Parliament in the context of Brexit, the courts demonstrated their

role as a rampart against arbitrariness and the UK Supreme Court recalled that all common law courts have an obligation to uphold the law and the Constitution. Ian Forrester encourages French judges, in the context of the EU, to help their counterparts in the defence of the value of the Rule of Law.

If the question of the legitimacy of the courts to set aside the law in the name of European law becomes politicised, this shows that the domestic judge is not faced with a binary relationship of compatibility or incompatibility between domestic legislation and European law: by upholding European law, the judge does not censure the law but rather applies a safeguard clause or proceeds with a compatible interpretation.

Through the institutionalisation of transnational networks, through the creation of a European public prosecution department on judicial matters, in a judicial space where decisions of justice are intended to be discussed beyond a domestic context, leading Supreme Courts to base their legitimacy, according to Antoine Vauchez, beyond their national judicial and political space, the legitimacy of the European judge is renewed. Within this complex space, the Court of Justice has in any case a responsibility to settle questions where there is potential disagreement, as it did with the van Gend en Loos decision, so as to give unanimous treatment to the primacy of EU law.

The keystone of this whole system if the preliminary ruling mechanism. The dialogue between judges is therefore a vital tool which domestic judges must not hesitate to use, on condition that they include in-depth and detailed reasoning in their decisions and, above and beyond the request for clarification, proposed interpretations or the invitation issued to the EU Court of Justice to review its case law or to confirm exceptions.

This tool for dialogue of course has structural limits due to the considerable increase caused to the length of the procedure and to the parties being exposed to an uncertain outcome, and it is not always easy or well viewed for a domestic judge to put a question to the EU Court of Justice.

This dialogue can moreover reveal and consolidate opposition. The reciprocal influences between the European courts are therefore a vehicle for movements challenging the very legitimacy of the CJEU as shown by the dialogue maintained between this court and the German Constitutional Court which, through its famous *ultra vires* doctrine, taken up by its foreign counterparts, and its positions with regard to fundamental rights with the “Solange” rulings, positions itself as representing the criticisms made of the EU Court of Justice’s integrationist bias. Antoine Vauchez suggests building forms of mediation around the question of the division of jurisdiction so as to remedy these polarities which could take the form of a mixed chamber within the EU Court of Justice, composed of constitutional judges and CJEU judges. A body of this kind would offer the advantage of standing apart from the integrationist tendencies of the Court and thereby settle disputes in a legitimate manner.

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