Circles of Coherence: On Unity of Case-Law in the Context of Globalisation

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Arcelor ruling – Legal pluralism in European integration – Judicial law-making transcending hierarchy – Role of courts for legal unity – Autonomy of courts under different mandates – Joint responsibility for legal coherence – Councils of State Report 2008 – Reversal of method of reference – *Cilfit* and *Köbler* prevent headway – Horizontal cooperation between national judges

INTRODUCTION[1]

In December 2008 the European Court of Justice (hereafter: ECJ) gave judgment in a case between, on the one hand, Arcelor, formerly a French-Luxembourg steel concern that has since been taken over by an Indian steel magnate, and, on the other, the French Prime Minister and the French Ministers for Ecology and the Economy.[2] The case came before the ECJ on a reference for a preliminary ruling under Article 234 EC[3] from the French Conseil d'Etat (Council of State). It sought to ascertain whether the European directive requiring the member states to introduce a greenhouse gas emission allowance-trading scheme is compatible with the principle of equal treatment. It was submitted that, whilst the scheme applied to the steel sector, it did not apply to the sector of aluminium and plastics although

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[1] This contribution is based on the inaugural lecture the author gave on 29 May 2009 as G.J. Wiarda visiting professor for European Public Law for the year 2009 at Utrecht University. He is grateful to Norton Sims for his assistance in translating the lecture from the original Dutch. [This article is to be followed in our next issue (Volume 6, Issue 2) by a contribution by Prof. Dr. Andreas Voßkuhle, President of the German Federal Constitutional Court, on multilevel cooperation of European constitutional courts – *EuConst*]

[2] Judgment of 16 Dec. 2008, after Opinion of AG Poiares Maduro, Case C-127/07, *Arcelor*, nyr. The reference was made by the French Conseil d'Etat, ass. 8 Feb. 2007, *Juris Data* n° 2007-071436, final decision by the Conseil d'Etat on 3 June 2009, *Juris Data* n° 2009-075505.

[3] Since the Lisbon Treaty: Art. 267 TFEU.

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those industries operate on the same markets and compete with one another to a considerable extent. The ECJ found that the two sectors were in fact in a comparable situation as regards the scheme. However, it held the difference in treatment to be justified. With regard to non-ferrous metals it found that the CO_2 output of the aluminium industry was a fraction of the output of the steel sector. With regard to the chemical sector it considered, perhaps slightly less persuasively, that in the running-in phase under the new scheme the Community legislature was at liberty to take the view that it was not administratively feasible to include in the scheme from the outset the enormous number (34 000) of chemical factories and works that we have in the EU.

Why is this judgment of interest in relation to the theme this contribution purports to address? That has to do with another aspect of the case. It was submitted before the *Conseil d'Etat* that the French legislation implementing the European directive was inconsistent with the French Constitution. Thereupon the French court, following a new approach developed under French constitutional law, first examined whether European Community law afforded protection that is equivalent to that under the French constitutional principle of equal treatment. That was not very difficult; indeed if there is one general principle of law that has taken firm root in the EU it is the principle of equal treatment. Had that not been the case, the French court would have assessed the French implementing measure in the light of the French principle of equal treatment. Since protection did seem to be equivalent and, moreover, there appeared to be a serious problem of equal treatment, the French court requested the ECJ to test the European directive against the European principle of equal treatment. Entirely in line with the French approach, I place the testing of the French measure by the French court against the French principle next to, but separate from, the testing of the European directive by the European Court in light of the European principle.

The directive at issue is the EC instrument to implement the Kyoto protocol which, under European law and, for that matter, under French constitutional law,[4] must be fully and accurately transposed into French law. We are looking here at two legal systems that are engaged with the same problem and are, as it were, competing to have the last word. In Advocate-General Maduro's view, expressed in his Opinion in this case, this is a manifestation of the legal pluralism that is characteristic of the European integration process. The French court resolved the potential conflict between application of the French Constitution in the French legal order and the uniform application of EC law, notwithstanding member states' constitutional requirements, by referring to the equivalent European principles.

For old-fashioned lawyers like myself and, I expect, for some readers, too, who like to think in terms of hierarchy and precedence in order to resolve conflicts

[4] Cf. Art. 88-II of the French Constitution.

between legal rules, it may be surprising to find that on closer inspection there appears to be absolutely no conflict but rather communication, discussion and influence being exerted reciprocally by autonomous legal orders.

The issue of emission allowance trading rights has also come before the German Constitutional Court in two cases, also with regard to the principle of equal treatment but in connection with the allocation of emission allowance trading quotas.[5] The German Constitutional Court made a specific distinction between the case where German legislation has given effect to mandatory European provisions and the situation in which EU legislation allows the member states discretion to make their own choices. In the latter situation the German court is on home ground and applies without ado the German basic law within the area left to the discretion of the member states. In the former case it will only intervene under the well-known *Solange II* doctrine if the applicant shows that EU law does not afford more or less equivalent protection. There are also a large number of cases pending before the General Court of the EU brought by member states and undertakings against Commission decisions concerning national allocation plans.[6]

Where so many proceedings are brought in different fora the question remains as to whether the unity and uniform application of the law is sufficiently guaranteed. I will come back to this issue. First, there is a further case.

That is the well-known case in which the Wadden Sea Society was successful in obtaining from the Administrative Jurisdiction Division of the Netherlands Council of State the annulment of cockle fishing licences in the Wadden Sea following a preliminary ruling by the ECJ to the effect that the Habitat Directive had been incorrectly applied, that is to say in an insufficiently strict manner. This case also gave rise to a complaint to the European Court of Human Rights (ECHR) because the association representing the fishermen engaged in mechanical cockle dredging was not given an opportunity in the preliminary ruling proceedings before the ECJ to respond to the Advocate-General's Opinion. Nor is that usual, but it was alleged to be required under the Strasbourg case-law on the right to a fair trial under Article 6 of the European Human Rights Convention.

In that case, then, the tricky question arose as to how the highest court in matters of human rights in Europe would interact with its European Union coun-

[5] Bundesverfassungsgericht 13 March 2007, 1 BvF 1/05 and 14 May 2007, 1 BvF 2036/05.

[6] Cf. Order in Case T-130/06 *Drax Power et al.* v. *Commission* [2007] *ECR* II-0067; judgment in Case T-374/04 *Germany* v. *Commission* [2007] *ECR* II-4431and, more recently, judgments of 23 Sept. 2009 in Case T-183/07 *Poland* v. *Commission*, nyr, and T-263/07 *Estonia* v. *Commission*, nyr, as well as, concerning the scheme for greenhouse gas emission allowance trading itself, judgment of 2 March 2010 in Case T-16/04, *Arcelor* v. *European Parliament and Council of the EU*, nyr. By virtue of the Lisbon Treaty the Court of First Instance has been renamed General Court, cf. Art. 19 TFEU, but the reference system by the letter T (of Tribunal) has not been changed.

terpart, even though those courts have nothing to do with each other, as regards organisation or hierarchy, except that they sometimes claim jurisdiction over the same problem. The question had never been posed as acutely as in this case, in which what was at issue were the actual proceedings pending before the Luxembourg Court itself. The Strasbourg Court applied an approach that it had employed earlier and that is very akin to that employed by the French *Conseil d'Etat* and the German Constitutional Court.[7]

The first question raised by the ECHR was whether the EC legal order in principle affords a level of protection of fundamental rights that is equivalent to that of the European Convention on Human Rights. In an earlier case, that had been presumed to be the position.[8] The second question was then whether the presumption that such equivalent protection is afforded was rebutted in the case before the Court.

Recently, a former Netherlands judge at the Strasbourg Court asserted, in an academic article, that in order to ensure coherence in the administration of justice it is important for the highest national and European courts to have regard to what the others are doing and as far as is possible to align themselves to one another.[9] This was illustrated by a judgment of the ECJ revising earlier case-law and following Strasbourg case-law to the effect that business premises are to be classified as residential for the purposes of protection under Article 8 of the European Human Rights Convention.[10] Interestingly it may now be noted that in the case of the cockle fishermen Strasbourg distinguished its earlier case-law and accepted the view of the Luxembourg Court that Article 6 of the Convention does not imply that a party concerned in preliminary ruling proceedings before the ECJ must automatically and always be afforded an opportunity to respond to the Opinion of the Advocate-General. It is sufficient for there to be a case-by-case examination of whether there are grounds for reopening the proceedings.

This ECHR judgment is a further illustration of how courts belonging to different legal orders succeed in maintaining a certain coherence in the administration of justice in areas where they have concurrent jurisdiction. Yet conflict prevention is a fairly negative way of safeguarding unity of the law. In order to gain perspective over the evolution of the classic notion of unity of the law, I propose first to examine the concept itself, both in general and from a European perspective. Subsequently, the mechanism provided to safeguard the uniform ap-

[7] ECtHR 20 Jan. 2009, Appl. No. 13645/05, *Kokkelvisserij*.

[8] ECtHR 30 June 2005, Appl. No. 45036/98, *Bosphorus* v. *Ireland*.

[9] W. Thomassen, 'Judicial Legitimacy in an Internationalized World', in N. Huls et al. (eds.), *The Legitimacy of Highest Courts' Rulings* (The Hague, T.M.C. Asser Press 2009) p. 399 et seq. and p. 405, referring to a 'dialogue des juges'.

[10] Case C-94/00 *Roquette Frères* [2002] *ECR* I-9011.

plication of EU law by national courts is examined, in order, then, to look briefly at emerging forms of horizontal cooperation between national judges.

Unity of the Law

General aspects and developments

The idea of unity of the law is closely connected with the nation-state. Except for common law countries, a constitution and uniform codes for large areas of the law were and are significant attributes of the nation-state and of the legal order embodied by the state. Those attributes help administrators and courts to deal with comparable cases in the same way; they also help to ensure that legal relationships retain a certain degree of predictability and foreseeability; unity of the law, equality before the law and legal certainty are closely interconnected.[11]

In most Western European countries the judiciary is hierarchically organised in one or more pyramids or columns of courts, alongside a constitutional court in one form or another. The highest courts safeguard the unity of the law, perform the function of judicial protection by correcting errors of the lower courts, and to a greater or lesser extent guide the development of the law on the basis of the cases that come before them. Yet cassation jurisdiction is older than the nineteenth century nation-state. Long before, the French king had attributed to himself jurisdiction to 'quash' deviant decisions by regional 'parliaments'[12] acting in a judicial capacity.

G.J. Wiarda's inspirational work decades ago revealed the courts' increasing inclination to decide questions of law on their own where statute law made (and makes) inadequate provision.[13] The more the highest courts contribute in that manner to the development of the law, the greater is the effect of their decisions as precedents not only within their own pyramidal or columnar hierarchy, but also beyond it. This phenomenon is particularly prominent with regard to European case-law. The ECJ, together with the national courts under the preliminary ruling procedure, has from the outset played a central role in the development of a European legal order and a European system of judicial protection.

In the Netherlands, in the years since the beginning of the review of judicial organisation and with the setting up of the Council for the Judiciary, much atten-

[11] Cf. J.B.M. Vranken, *Asser-serie, Algemeen Deel* [Asser series, General Part] (Zwolle, Tjeenk Willink 1995) nos. 185-186.

[12] J. Ellul, *Histoire des Institutions, Tome 4/XVIe-XVIIIe siècle* (Paris, Presses Universitaires de France 1998) p. 170 et seq., and p. 270. *See also* D.J. Veegens et al., *Cassatie in burgerlijke zaken* [Cassation in civil cases], 4th edn. (Deventer, Kluwer 2005) p. 1 et seq.

[13] G.J. Wiarda, *Drie typen van rechtsvinding* [Three types of legal discovery], 4th edn. (T. Koopmans) (Deventer, Tjeenk Willink 1999).

tion has been paid to organisational endeavours to ensure unity of the law, specifically in the field of administrative law.[14] It does not seem to me to be a bad thing that the debate centred primarily on organisational structure has somewhat died down.

In the meantime quite different developments are under way, that call for the issue of unity of the law to be examined in a different light.

This sketch of unity of the law in the nation state, admittedly much too brief and in too general terms, is doubtless more serene than reality justifies. One may wonder whether the role of the courts in the nation state in shaping the law and also in safeguarding unity of the law has not in some sense assumed mythical proportions. An American court observer has commented in connection with the Supreme Court: 'Judicial decisions are not what they seem. Their claims are often vastly disproportionate to their effects.'[15] Accordingly, in comparison with other actors, the impact of judicial decisions on developments in society appears relative. To that extent the judiciary remains 'the least dangerous branch'.

From a European perspective, an additional factor of rapidly increasing importance is that the law to be interpreted and applied by the courts to an appreciable extent no longer originates from national codes and laws. The examples with which I began, advisedly, concerned climate control and environmental protection, which are both areas governed by law originating from outside the nation-state. Both cases concerned the application of European directives, which in turn derive in large part from international treaties. These situations of triple-layered policy and regulation are no exceptions; in the context of globalisation they may be encountered in everyday practice in almost all sectors of the law. From the perspective of national courts, it is important in such complex situations of multi-layered regulation to reconstruct in each case how the layers relate one to the other and what the courts' position may be in regard to each of the layers. To return to the example of the cockle fishermen, were the courts entitled to take the EC directive as their basis in order to conclude that licences ought not to have been issued?

Viewed in this light, neither national supreme courts nor constitutional courts, or, for that matter, the international courts themselves, stand in lonely eminence

[14] A.F.M. Brenninkmeijer, 'Rechtseenheid' [Unity of the law], in P.T.T. Bovend'Eert et al. (eds.), *Grensverleggend staatsrecht – opstellen aangeboden aan Prof. Mr. C.A.J.M. Kortmann* (Deventer, Kluwer 2001) p. 49 et seq., p. 58; P.T.T. Bovend'Eert, *Rechterlijke organisatie, rechters en rechtspraak* [Judicial organisation, judges and adjudication] (Alphen aan de Rijn, Kluwer 2008) p. 90 et seq. *See also* R.J.N. Schlössels et al. (eds.), *In eenheid – Over rechtseenheid en uniforme rechtstoepassing in het bestuursrecht* [In unity – On legal uniformity and uniform application of the law in administrative law] (The Hague, Sdu Uitgevers 2007).

[15] P.W. Kahn, *The Cultural Study of Law*, 2nd edn. (Chicago, University of Chicago Press 1999) p. 128.

atop a unitary structure, if that ever were the case even in the halcyon days of the nation state. Instead of forming a part or the apex of a single hierarchical system, the courts have now become mediators or brokers of legal claims from different sources and orders. This has radically changed the nature of their functions. The usual problem-solving methods are no longer adequate. The structure conceived to preserve unity of the law, that used to provide orientation, no longer holds good. New instruments are required that are tailored to the new sources of law and attendant claims; in addition to preliminary ruling proceedings, centres of expertise are called for and, as will be seen, systems of cross-border communication for the exchange of information. Moreover, the position of the courts in a pluralistic legal environment requires an increasing degree of institutional autonomy to provide them with the basis for carrying out different mandates[16] at the same time and for reconciling those roles, if necessary, that is to say in the event of a conflict or inconsistency as between the layers from which the applicable law originates. In order to reassure judges, I would straight away add that none of this means that the existing structures for safeguarding unity of the law at national level have become redundant; on the contrary, they have acquired an additional function, namely that of acting as a conduit for external influences in respect of which they may not have the last word but do bear joint responsibility for ensuring the greatest degree of coherence possible.

Specific aspects of unity of the law in the European Union

Meanwhile, the law of the European Union is characterised by two particularities in regard to unity of the law that go appreciably further than the needs for legal certainty and predictability. The legal order of the European Union has its own policy-making and rule-making institutions, and indeed its own judicial authorities with fully fledged procedures. For the rest, numerous attributes are lacking that we normally associate with a legal order. It does not have its own territory distinct from that of the member states, it has barely its own executive and no army or police force; a great part of the administrative and also judicial functions are performed by the member states. Rather unsubtly, European Union law could be said to be parasitical in nature. For its implementation, it makes maximum use of the national institutions of the member states in which it has settled with self-confidence. Viewed in that light, European law had, as it were, to capture its own position from the laws of the member states. Against that background it may be understood that great emphasis has come to be placed on the autonomy, precedence and direct effect of that law in regard to the laws of the member states. If

[16] Cf. M.L.H.K. Claes, *The National Courts' Mandate in the European Constitution* (Oxford, Hart Publishing 2006).

those characteristics have been essential to it in asserting its full effect, its uniform application throughout the whole of the European Union is an existential precondition.

The second particularity, closely connected with the first, is that the substantive core of EU law comprises the creation and operation of a single European internal market, as if it were a national market. All activity and regulation of activity on that market is affected by EU law which safeguards the unity of the market. Unity of the law is essential to the unity of the market and thus for ensuring equivalence of conditions for market operators. That does not mean that there may be no differentiation depending on the circumstances. It is merely that differentiation according to criteria that distinguish on the basis of a person's nationality or residence, the place of origin of goods and services, or that otherwise impede freedom of movement, are by definition suspect.[17] In the relatively new sector of the European Union's area of freedom, security and justice an analogous 'market' dynamic is discernible in which legal concepts familiar from the economic sphere may possibly be of use.[18]

It goes without saying that in that connection cooperation between the ECJ and national courts by way of the preliminary ruling procedure has been and will continue to be of crucial importance.

Uniform case-law in the European Union

From the perspective of constitutional pluralism

Traditionally, and also in the case-law of the ECJ, the preliminary ruling procedure, whereby a national court refers a question of European law arising in a case pending before it to the ECJ, is viewed as a method of cooperation between partners that are equal and not in a hierarchical relationship. A small complication is the fact that the principle of primacy of European law over national law is indeed based, according to the ECJ's conception, on a hierarchical relationship between European and national legal orders in order to ensure that national law in conflict with European law is rendered inoperative. The controversy concerning that view of the matter between the ECJ and some national courts, as well as in academic circles, has never completely disappeared. Yet in the examples with which I began a certain change of direction is discernible that is described as legal pluralism.

[17] *See* for elucidating comment R. Barents, *The Autonomy of Community Law* (The Hague, Kluwer Law International 2004) p. 193-215.

[18] Cf. S. Prechal, *Juridisch cement voor de Europese Unie* [Legal cement for the European Union] (Groningen, Europa Law Publishing 2006) p. 17 et seq.

Legal pluralism is not a new phenomenon. Before the development of the nation-state it was normal for different legal traditions to exist side by side.[19] Hence we often still speak of the study of 'laws' (as in the LL.M. degree: Master of Laws). The notion of legal pluralism has in recent years become quite fashionable and is used to describe very diverse phenomena. This has resulted in it becoming something of a 'container concept' which is a friendly way of saying that it has little distinguishing power. Its significance for European law has been attracting attention for a somewhat longer period.[20] It has recently come to be used mainly in the sense of constitutional pluralism in order to describe European and national legal systems as autonomous systems standing shoulder to shoulder and each being its own ultimate frame of reference with the result that the question as to a normative hierarchy of precedence does not arise. In short, 'each being its own ultimate frame of reference' means that Strasbourg and Luxembourg are followed by national courts, or by each other, not because they are Strasbourg and Luxembourg but because their arguments carry conviction. In an instructive and compelling learned article on this subject Barents recently referred to the supporters of the ECJ's classical theory of precedence, with some irony, as 'neocoms'. Conversely, Besselink in his inaugural lecture at Utrecht University observed that a serious conflict between legal systems cannot be dismissed by alleging that the problem does not as a matter of theory exist.[21]

For present purposes the discussion is interesting only in order to see whether in light of the specific requirement of the European Union for legal unity, on the one hand, and a pluralistic approach to the relationship between the European and national legal orders, on the other, there is anything further to say about cooperation under the preliminary ruling procedure between the European and national courts. I approach this, for obvious reasons,[22] from a perspective with which I have continued to feel close affinity over the last ten years, namely that of the national judge.

An initial preliminary finding may be that, in the pluralistic view of autonomous legal systems, national courts are autonomous with regard not only to the

[19] H.R. van Gunsteren, 'De rechtsstaat bedreigd? Over de rechtsstatelijke kwaliteit van bestuurlijk handelen in een Europeaniserende context' [The rule of law under threat? About the rule of law quality of administrative behaviour in Europeanised context], in U. Rosenthal et al. (eds.), *De rechtsstaat onbegrensd? Geschriften van de Vereniging Bestuurskunde* (The Hague, VUGA 1991) p. 87 et seq., p. 91.

[20] T. Koopmans, 'Sources of Law: the New Pluralism', in *Festskrift til Ole Due (Liber Amicorum)* (Copenhagen, Grad 1994) p. 189 et seq.

[21] R. Barents, 'The Precedence of EU Law from the Perspective of Constitutional Pluralism', *EuConst* 2009 (5) p. 421-446; L.F.M. Besselink, *A Composite European Constitution* (Groningen, Europa Law Publishing 2007) p. 9. *See also* M. Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker, *Sovereignty in Transition* (Oxford, Hart 2003) p. 501 et seq.

[22] Note the disclaimer in footnote 2.

functions conferred on them under the cooperation procedure but also to the responsibilities attendant on the exercise of those functions. I would emphasise the responsibility part; otherwise, drawing attention to the autonomy of the national courts might too easily be seen as imperilling the unity of EU law.

In 2008, a report was brought out on the operation of the preliminary ruling procedure. Instigated by the Netherlands Council of State, it was drawn up by the Association of Councils of State and Supreme Administrative Courts of the EU and by the Network of the Presidents of the Supreme Judicial Courts in the EU.[23] This report is a striking manifestation of the autonomy and responsibility of the national courts. The report comes up with a series of practical suggestions for improving the procedure, and gives great weight to the contribution that national courts can make. This is not the place to discuss it in detail but it is interesting to note that the suggestions and recommendations follow generally accepted best practice, attach much significance to knowledge of European law, and repeatedly encourage national courts making references to provide their proposed replies in their orders for reference to the questions submitted to the ECJ. The ECJ responded to the challenge by organising a conference on that report with all the supreme courts of the member states at the end of March 2009.[24]

Duty to refer and common sense

A second observation on the position of national courts relates to the central topic of discussion at this conference. Inspired by judges of member states' courts present at the conference, this concerned the *Cilfit* doctrine on the circumstances in which supreme national courts may refrain from making a reference to the ECJ for a preliminary ruling and may themselves determine a question of European law raised before them. Even if no prevailing *communis opinio* has as yet emerged, there has been strong pressure for a substantial relaxation of the doctrine. On this point the report suggests that the *Cilfit* criteria should be applied in a rational and reasonable way and with 'common sense' in order to prevent the cooperation procedure from becoming burdened with 'questions that are of minor impor-

[23] The report has been edited by a working group under chairmanship of P. van Dijk, President of the Administrative Jurisdiction Division of the Council of State of the Netherlands, and it has been published in Newsletter no. 20 (2008) of the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union, available through <www.juradmin.eu>.

[24] *Réflexion autour de la procédure préjudicielle. Actes du symposium réunissant les présidents des Cours constitutionnelles et suprêmes des Etats membres*, Luxembourg, 30 et 31 mars 2009, ISBN 978-92-829-0939-3. An instructive review of the report by P.J.G. Kapteyn, 'Een wegwijzer naar een zo efficient mogelijk verloop van de prejudiciële procedure', *SEW* 2009(82) p. 200-207; *see also* D. Sarmiento, 'Amending the Preliminary Reference Procedure for the Administrative Judge', 2 *Review of European Administrative Law*, 2009(1), p. 29-44.

tance with a view to the unity, the coherence and development of EU law.' In itself that does not perhaps help much yet because rational, reasonable and full of common sense is what courts always want to be. The unsuspecting reader may wonder whether the authors of the report had just taken cognizance of the Hammerstein Commission's report on reinforcing the law-making role of the Netherlands Supreme Court (*Hoge Raad*).[25] Indeed, that commission is proposing not to admit for cassation suits which do not require responses to legal questions in the interest of unity of the law or development of the law and where – I summarise – no significant problem of judicial protection arises.[26]

At first sight, the terms in which these two reports are couched bear strong similarities to one another. But on a closer look one realises that they are drawn up from entirely different perspectives. Although there is a reference to European and international law in the report of the Hammerstein Commission, it may be inferred from the fact that there is no mention of coherence that it was written from the perspective of a single legal order in which problems of pluralism and coherence are not at the forefront of preoccupations. On the other hand, it may be seen from the terms used in the European report that judicial protection forms a self-explanatory part of the problems of unity, coherence and development of the law, there being a constant danger of fragmentation and incoherence as a result of the decentralisation of judicial protection across 27 member states.

More interestingly, contrasting the formulations used by the two reports raises the question whether the time has not come to reverse the European method. More specifically: under Article 234 of the EC Treaty (Article 267 TFEU), as soon as a question of European law arises that needs to be answered in order for the dispute to be resolved, the question may, or if it is raised by the highest court, must be referred to Luxembourg. The highest court may refrain from making a reference only where the above-mentioned *Cilfit* criteria are satisfied, that is, to put it briefly, first, where the question has been answered in a previous case, secondly, where the answer may be deduced from existing case-law or, thirdly, where there can be no reasonable doubts concerning the answer. If questions in these categories are still referred, the Court can dispose of them in a simplified procedure.

It is noteworthy that this system presupposed a threat to unity of the law and therefore confers a monopoly for the answering of any question of European law

[25] *Versterking van de cassatierechtspraak*, Report of the Commission 'normstellende rol Hoge Raad', 2008, named after the Commission's chairman A. Hammerstein (hereafter: Hammerstein Commission); *see* for comment J.B.M. Vranken, 'Consequenties van een versterking van de rechtsvormende taak van de Hoge Raad: talrijk, divers en soms vergaand' [Consequences of a strengthening of the law-making capacity of the Supreme Court : numerous, diverse and sometimes far-reaching], *NJB* 2009, 806, p. 1082 et seq.

[26] Report Hammerstein Commission, p. 44.

on the Court. There was every reason for such conferral at the outset where a law without the backing of a state had to apply initially in 6, later in 9, 12, 15 and henceforth 27 member states. Now, around fifty years later, the situation is different, at least in the old member states where courts have gained wide experience in the application of European law. Such national courts are as a matter of principle conversant with their European mandate, well-equipped and provided with ready knowledge of the tests to be applied under the case-law of the ECJ by means of which they can recognise questions of European law, and are able to parry potential threats to the unity of EU law.

As regards the third *Cilfit* criterion, namely the *acte clair* doctrine, the highest courts in the Netherlands usually inquire whether there are reasonable doubts as to the correct interpretation of European law requiring questions to be referred to the Court for a preliminary ruling. Indeed, such inquiry would appear to reverse the perspective of Article 234 EC (Article 267 TFEU) by not *a priori* proceeding on the basis that a question must be referred if it needs to be answered in order to determine the dispute. In the above-mentioned order for reference in the *Arcelor* judgment, the French *Conseil d'Etat* takes as its point of departure that a reference must be made whenever there is a 'serious difficulty'. From their autonomous position under the pluralistic model, national courts could very naturally place the inquiry as to existence or absence, depending on the case, of reasonable doubts concerning the correct interpretation in the context of the unity, coherence and development of EU law. The above-mentioned report also refers, unlike the Hammerstein Commission, to the importance of coherence. Whilst it is not certain what is meant by that term, it is most probably also referring to the tension that may result from conceptual divergences in the legal traditions of the member states in the course of the development and uniform application of European concepts of law.[27]

The Councils of State report suggests that the ECJ should not be burdened with questions that, from the point of view of unity, coherence and development of EU law, are of minor importance. Strictly speaking, that is not an *acte clair* or reasonable doubt criterion.[28] By conducting the inquiry on the basis of existing case-law, yardsticks and methods of interpretation, and by placing its decision to refer or not to refer on that footing, the national court is to a large extent operating within the structure established by the *Cilfit* criteria. Nonetheless, the practice here referred to is emphatically pushing at the frontiers of the original Treaty conception of cooperation under the preliminary ruling procedure. That pres-

[27] Cf. S. Prechal and B. van Roermund (eds.), *The Coherence of EU Law – The Search for Unity in Divergent Concepts* (Oxford, Oxford University Press 2008).

[28] Cf. Kapteyn, *supra* n. 24, at p. 204.

sure, it would seem, will increase further with national supreme courts operating autonomously on the basis of a pluralistic approach under which they take an active part in the process of the formation of European law. The objection to this is less, as will be seen, than appears at first sight as long as such an approach is informed by proper knowledge of European law and displays a keen awareness of the European implications.

A further question is whether, for the inquiry as to reasonable doubt or a serious difficulty concerning the correctness of an interpretation, it may be helpful to specify in greater detail the criteria from the perspectives of unity, coherence and development of union law. An initial yardstick that has been proposed would be whether and to what extent differences in interpretation between courts from different member states may give rise to differences in judicial protection, and, in the terms used by the Hammerstein Commission, how significant those differences are. A second yardstick may be provided by the grounds on which, as European Union law stands from time to time, a new step in the development of the law is justified. In either case, it is also important that any questions are conceived in sufficiently abstract terms in order to permit grounds for the reply that may be generalised – some may say universalised – and are therefore suitable for use in an analogous case by a fellow court in another member state.[29]

A recent example chosen more or less at random shows how the global nature of Community legislation will allow for divergent solutions. In that case, a person whom I shall refer to as a European citizen in Rotterdam wished to know to whom personal data held on him by the municipal authorities had been disclosed over a number of years.[30] In accordance with Netherlands law, data on 'recipients' were kept only for one year and the EC directive to which the law gave effect itself lays down no time-limit. That reference for a preliminary ruling – from the Administrative Jurisdiction Division of the Council of State – was useful, in my view, more for its eliciting from the ECJ ruling the test to be applied than for the determination itself that the period of one year is too short. The ECJ applies the typical test that may be applied by an administrative court to determine whether, in light of the interests served by access to disclosure data, the long period of retention for basic data is in balance with the relatively short period during which the person concerned must be informed of the use made by the municipality of his

[29] Cf. G. Hirsch, 'Das Vorabentscheidungsverfahren: mehr Freiraum und mehr Verantwortung für die nationale Gerichte', and F. Jacobs, 'References to the Court of Justice – the way forward?', in N. Colneric (ed.), *Une communauté de droit: Festschrift für Gil Carlos Rodriguez Iglesias* (Berlin, Berliner Wissenschafts-Verlag 2003) p. 601 resp. p. 639-640. *See also* M. Broberg, 'Acte Clair revisited: Adapting the Acte Clair Criteria to the Demands of Time', 45 *Common Market Law Review* (2008) p. 1383-1397. *See* for the latter issue M.A. Loth, 'Rechtseenheid in veelvoud' [Unity of law in plurality], *Ars Aequi* 54 (2005) 9, p. 676 et seq. and Poiares Maduro, *supra* n. 21, p. 529 and 534.

[30] Judgment of 7 May 2009, C-553/07, *Rijkeboer*, nyr.

personal data. The referring court suggested in that case that the principle of proportionality should be applied. The ECJ followed that suggestion but described the test in terms of the balance of interests without indicating how long the period should then be. Would a Netherlands administrative court, or for that matter, any administrative court, do that any differently itself? In the absence of any fixed period in the directive, the balance of interests test is entirely capable of being applied generally and therefore of being used by a court in another member state.

This leads me to a third observation and to an idea I have put forward before, namely that the national courts may well perform their autonomous role of being jointly responsible for the coherent application of the law in the European Union. This they might do by making their own assessment in any case, first, because only then will they be able to give proper focus to the European law issues arising; secondly, because, if a reference is accompanied by a full assessment, the ECJ can make maximum use of the simplified and accelerated procedures that have in the meantime been developed for disposing of cases, or may itself be prompted in the long term to introduce a green-light system, as the Councils of State report also suggests. It seems to me that the *Rijkeboer* case to which I have just alluded came close to falling within that category. For its part it is only after the national court has clearly elucidated the problem before it in a comprehensive judicial assessment that it is in a position to make maximum use of its discretion not to refer under a relaxed application of the *Cilfit* criteria. At the conference at the end of March there appeared to be a certain apprehension on the part of national courts in regard to liability under the *Köbler* case-law for erroneous judicial decisions on issues of European law, that is to say decisions in respect of which it later appears that the ECJ takes a different view. I would say that liability under *Köbler* is appreciably less stringent than is supposed. Under strict *Cilfit* criteria and fear of *Köbler* liability, the ECJ and the national courts are locked into a relationship which permits no headway to be made. Under a pluralistic model based on autonomous responsibility, national courts can themselves release such deadlock.

Practical elements

In any event I would point to two further practical matters. In the first place it is certainly true that the ECJ has been wonderfully successful in reducing the duration of preliminary ruling proceedings to roughly 17 months on average for 301 cases disposed of in 2008 (on a total of 567 cases in 2008) and equally for 259 cases disposed of in 2009 (on a total of 588 cases). That is an impressive performance. Yet, whilst welcoming that favourable development we cannot ignore a threat on the horizon. For there are limits to what can be achieved by maximising efficiency in order to increase productivity. At the same time the courts of the member states that acceded in 2004 and 2007 are increasingly discovering Euro-

pean law and the preliminary ruling procedure. Furthermore, new areas of European Union law will prompt new questions. Seen in that light, it would appear to be only a question of time before the pipeline is affected by another blockage.

Secondly, the time is not ripe for a fundamental change in the system since the reception and effective application of EU law cannot be assumed to have been attained in all member states in like manner and to an adequate extent. The courts of the more recently acceded member states are entitled to acquire their own experience by referring questions to the ECJ, mapping out the consequences of European law for their own legal systems and absorbing the tests and yardsticks under European case-law whereby potentially suspect national measures can be identified and investigated. Plainly, therefore, courts from the new member states will for a considerable time still have need of the classic model of cooperation by means of the preliminary ruling procedure based on a strict obligation on the part of the highest courts to make references.

Conversely, courts from the old member states should have less need to seek shelter behind the ECJ in order to have their national laws tested against European law. Ultimately, only a dynamic approach on the part of well equipped national courts can save the system. This has been called 'co-actorship'.[31]

Circles of coherence

Even where courts operate from a position of autonomy and take a dynamic approach the question remains as to where they are to seek their inspiration when the existing case-law of the ECJ does not directly offer a solution or a connecting factor. Protagonists of constitutional pluralism assert that the unity of the European legal order is not merely dependent on the organisation of vertical coherence between the ECJ and national courts but just as much on horizontal coherence between national courts.[32] To that end they need to speak the same conceptual legal language, contrast and compare one another's conceptual parameters and identify common ground. The concept of coherence being employed in this connection is factual and empirical and is to be distinguished from the normative coherence postulated by the case-law of the ECJ in order to ensure the effective protection to be afforded by national courts to claims under European law.

In the last decade a multitude of networks of judges of the member states has been created in order to exchange information, experiences and increasingly also judgments, to a large extent using the modern digital means of communication available. The Association of Councils of State and Supreme Administrative Courts

[31] E.M.H. Hirsch Ballin and L.A.J. Senden, *Co-actorship in the Development of European Law-making* (The Hague, T.M.C. Asser Press 2005).

[32] Cf. Poiares Maduro, *supra* n. 21, p. 519 and p. 527 et seq.

with its Jurifast network is a prominent example. In more or less every area of law, whether it be competition law, environmental law, commercial law or criminal law, such networks have been set up or are under development. Moreover, a European Judicial Training Network in which the national establishments for the education of judges cooperate is developing common training and exchange programmes.[33]

Informal networking is not of course sufficient to develop and safeguard coherence. None the less, those networks are essential in order to develop the horizontal function mentioned above.

In a certain way judges are here following a pattern that has long been a commonplace for other professional, scientific and cultural disciplines, namely that of international cooperation. This is noteworthy because, unlike the other disciplines, the administration of justice is traditionally tied in with the nation state. By participating in such horizontal, cross-border networks the state official who is the national judge begins to a certain extent to loosen himself from the nation state as his sole frame of reference in order to seek common connecting factors with colleagues from other countries. The principles of the rule of law under which he operates and the legal rules which he applies are no longer solely those of his State.[34]

A further step may be to apply these horizontal coordination and orientation networks in order to bring about a streamlining of the vertical cooperation with the ECJ under the preliminary ruling procedure. In regard to unity of the law and coherence a joint comparative study of tests and yardsticks to be applied will be important and may partly be conducted on the basis of academic studies carried out for some time. 'Communities of judges' established and cooperating on substantive matters will enable the *Cilfit* criteria to be fleshed out in those areas; perhaps, then, it will be possible in the long run for a part of what originally were exclusive functions of the ECJ to be shared with national supreme courts collaborating in the manner described. Such 'circles of coherence' are of course not a panacea for the problem of the unity of the law in the European Union but certainly an instrument with prospects for the future.

The international context is rather less rosy. The well-known *Kadi* judgments of the ECJ and the, at the time still, Court of First Instance have operated as a wake-up call. As I myself was involved in the case I will merely point to two matters. In the first place, the absence of any procedural or substantive direction in the law of the UN makes it painfully clear that the international legal order remains in a rather archaic stage of development in regard to judicial protection of the individual, even though citizens may, conversely, be the subject of so-called

[33] Resolution of the EU-Council on Justice and Home Affairs of 24 Oct. 2008.

[34] *See also* A. Potocki, 'Les réseaux juridictionnels en Europe', in C. Baudenbacher et al. (eds.), *Liber Amicorum en l'honneur de / in honour of Bo Vesterdorf* (Brussels, Bruylant 2007) p. 141.

targeted 'smart sanctions'. Secondly, it is plain from the divergent approaches of the ECJ, its Advocate-General and the Court of First Instance and the wealth of academic commentary produced in the meantime, that there were few connecting factors favouring an unambiguous and coherent approach.[35] The approach of the ECJ in *Kadi* may perhaps be viewed as a manifestation of a pluralistic approach in which autonomy is at the forefront and the European conception of fundamental rights features prominently as the core of the rule of law.

Former President Higgins of the International Court of Justice also pleads in an international context for a pluralistic approach in which courts counter fragmentation and strive for unity by studying each other's judgments with respect and by taking account of them.[36]

It is not easy to predict how coherence and unity of the law will evolve in Europe, let alone in an international context. I will merely say in the words of a quote from a biography of John Maynard Keynes, who is again being much cited these days: it is not wise to look too far ahead; our powers of prediction are slight, our command over results infinitesimal.[37]

Conclusion

We have seen that the courts are no longer exclusively part of a nationally oriented hierarchical pyramid but have instead become mediators of legal claims arising from different sources and legal orders. In the European Union there is an apparent paradox between the fact that the inherent need for unity of the law remains as pressing as ever and the fact that the mechanism for safeguarding and implementing that unity is at risk of becoming clogged up. National courts and judges are forming horizontal networks for the exchange of information, decisions and ideas that support and complement the mechanism of vertical cooperation with the ECJ and are evolving into circles of coherence.

I would like to end with a footnote. In the case concerning the trade in greenhouse gas emission allowances with which I began, the *Conseil d'Etat* followed a line of constitutional reasoning on the implementation of EU directives set out previously by the French Constitutional Court.[38] In the network of constitutional courts, German and French colleagues were able to exchange experiences and

[35] Cf. D. Halberstein and E. Stein, 'The United Nations, the European Union and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order', 46 *Common Market Law Review* (2009) p. 13-72, and S. Besson, 'European Legal Pluralism after Kadi', *EuConst* 2009 (5), p. 237-264, both with numerous further references.

[36] R. Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench', 55 *International and Comparative Law Quarterly* (2006) p. 791 at seq., p. 804.

[37] R. Sidelsky, *John Maynard Keynes: the economist as saviour* (London, Penguin 1992) p. 62.

[38] E.g., Conseil Constitutionnel, 27 July 2006, Décision n° 2006-540DC .

ideas concerning these problems. For these and other reasons it is high time for the Netherlands, alongside constitutional review, also to establish a constitutional court. The Netherlands sets itself apart by not having a constitutional court that can take a full part in the European circle of constitutional coherence. In the context of European constitutional coherence, the judgment of the *Bundesverfassungsgericht*[39] on the Treaty of Lisbon is rather to be seen as a challenge to European constitutional discourse than as a threat to the process of integration.

[39] BVerfG 30 June 2009, 2BVE 2/08, *NJW* 2009 (62), 2267.

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