Judicial dialogue, preliminary reference procedure, and the idea of a European Legal Method

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What makes the Union Treaties Special

1 – The notion of the Union as ‘based on the Rule of Law’
2 – The enforcement mechanism established on the Union and on the national level
The two foundation stones of EU law

- Direct effect (Van Gend en Loos)
- ... neither Members States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty, ... (Les Verts vs Parliament)
- Supremacy (Costa v ENEL)
- Jurisdiction to the ECJ to review the legality of UE acts (action of annulment)
- Infringement proceeding
- Action for damages
- The key-role of preliminary reference

Enforcement mechanisms at the Community level
1. Application of teleological method as justification in interpretation
2. Reference to uniformity in the EU law as the goal of interpretation under Article 267 TFEU
3. Application of article 4 TEU as justification in interpretations
4. Application of general principles and fundamental rights as justifications in interpretations

Classical Doctrinal Assumptions
1. Teleological method as justification in interpretation

- Legislative intent
- Divining the spirit of the Treaty and gain inspiration from it (Lord Denning in Bulmer v Bollinger SA)
- Objective-driven
- The teleological method has roots in national law, in some more than in others
- Possibly, the main goals are the establishment of an internal market and integration
• Art. 19 TEU and art. 267 TFEU
• Closely related to the use of teleological method as a means to build a common internal market
• Uniformity and stare decisis
• From uniformity to coherence?
Application of art. 4 of TEU

- Four general obligations:
  1. UE and MS shall assist each other in carrying out tasks which flow from the Treaties
  2. On MS to take any appropriate measure and
  3. To facilitate the achievement of Union’s tasks,
  4. And to refrain from any action which could jeopardise the attainment of the EU’s goals
• General principles have increasingly been a major source of EU law
• Deriving-principle sources:
  ◦ Legal systems of the MS
  ◦ International conventions (ECHR)
  ◦ Treaties (to a lesser extent)
  ◦ The Charter (rights, freedoms, and principles)
• Art 267 TFEU
  ◦ Validity of acts of EU institutions
  ◦ Interpretation of Treaties and acts of EU institutions
  ◦ Any national court may refer a question if necessary to enable it to give judgment - discretion
  ◦ Highest court shall refer – duty [but exceptions]
  ◦ Any court must refer if matter relates to validity of EU act – 314/85 Firma Foto Frost
  ◦ National court raising EU law of its own motion

• From horizontal to vertical relationship with national legal systems
• Courts or tribunals which must refer
• Highest court “against whose decisions there is no judicial remedy under national law” shall refer – unless...
  ◦ “Materially identical” to a matter already decided (‘acte éclairé’)
  ◦ Answer is “so obvious as to leave no scope for any reasonable doubt” (‘acte clair’) CILFIT ... But, only if “the matter is equally obvious to the courts of the other Member States and to the Court of Justice” (CILFIT para 16)
  ◦ National law in breach of EU law and prior ECJ rulings

The Existence of a Question: Development of Precedent
a) The relationship between national courts and the ECJ has been transformed by the development of precedent, acte clair, and sectoral delegation of responsibility.

b) These developments have made national courts EU courts in their own right. They can dispose of cases without the need for a further reference to the ECJ. They can do so where there is an EU precedent on the point, where the matter is so clear as to obviate the need for a reference, or where more general responsibility has been delegated to them in a particular area.

c) The combined effect has been to make the relationship more vertical and multilateral than it was at the inception of the EU.

The ‘Acte Clair’ Doctrine as the epitome of a more complex relationship between the ECJ and domestic courts
National judges required and empowered to:
  ◦ Give effect to EU law in their own courts
  ◦ Interpret national law in line with EU law
  ◦ Set aside national provisions which conflict with EU law

“The construction of a constitutional rule of [EU] law has been a participatory process, a set of constitutional dialogues between supranational and national judges”.
Main action and preliminary reference:
CJEU interprets, national court applies?
CJEU’s “increasing tendency to give highly fact-specific rulings rather than abstract interpretations of general principle” (Broberg)
the more fact-specific a ruling is, the less it is likely to be genuinely useful for the purposes of application in other disputes
Deterring final court references?
Lacking research on how CJEU’s interpretative ruling applied by the national judge in the dispute between the parties

Division of labour and some issues
Implications of national courts as EU courts

- Why have national courts accepted supremacy of EU law?
  - Partners in law making
  - Convinced by legal (‘neutral’?), rather than political, arguments for integration (Alter)
  - Empowers lower courts in national hierarchy
    ◦ E.g. enabled national courts to question governmental action on grounds not previously recognised by national law (Tridimas)
  - EU law as foreign or domestic law? Judicial preferences in different Member States (Slaughter, Stone Sweet, Weiler)
    ◦ Some national judiciaries finding national constitutional basis for supremacy of EU law (e.g. Factortame; Internationale Handelgesellschaft)
• Delaying proceedings
• Importance of EU point in the case between the parties
• How doubtful is interpretation of EU issue

• Only this latter point is taken into account in CILFIT (Broberg)

• AG in Schul – CILFIT criteria should be adapted to “demands of the times”

**Tensions in national court’s decision to refer**
Courts of last instance

Suggests adjusting criteria. Should only refer:
- where there is a general question going beyond the main action before the national court and
- where there is a genuine need for uniform interpretation

Wider margin of discretion

Cases that ‘got away’

Swedish model: court of last instance to give reasons why it has not made a reference whenever one of the parties argues that a clarification of EU law point is required to decide the action
Suggests limiting national lower courts’ power to send preliminary references:

1. Limiting preliminary ruling procedure to courts of last instance as a rule;
2. Exception to 1: ruling necessary on validity of EU act
3. Possible exception to 1: Council can decide which EU law measures may be subject to preliminary references from lower courts.
   ◦ Appropriate political-judicial relationship?
Why this proposal?
- Meaning of ‘uniformity’
- National judicial hierarchy
- Efficiency
- Need for more trust in national courts, if they are to be truly considered as Union courts
How to reform

- limiting the national courts empowered to make a reference
- a filtering mechanism based on the novelty, complexity, or importance of the question
- the national court proposes an answer to the question
- towards an appellate system
- creation of decentralized judicial bodies
- general court to have jurisdiction to give preliminary rulings
• Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2012/C 338/01)

Conclusions and further issues

- Why does the preliminary reference procedure exist?
  - coherent interpretation of EU law
  - involving national courts in development of EU law - legitimacy
  - administration of justice/effective protection of EU rights – assisting national courts in deciding disputes
  - institutional balance at EU level – political institutions and judiciary
  - Binding advice
  - Indirect access to ECJ for individuals - national courts as gatekeepers

- The troubled relationship with ‘Other’ Constitutional Courts
  - Open or hidden dialogue?
References

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