80th Anniversary of the End of World War II International Workshop on "Accountability of the Supreme Court and Constitutional Court in Digital Justice and AI Analysis of Judgment Databases"

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How an International Supreme Court adapts to modern trends

Remarks of Sir Ian Forrester

The institutional context

The origins of the European Union are political and diplomatic: delegates of the former combatants in World War II discussed as early as 1948 how to achieve the structures of a permanent peace. In Western Europe, Dutch, Belgian and French representatives explored the idea of making peace permanently. The idea was to make war impossible by fusing the means of making war under the competence of a single European High Authority . First Coal and Steel and then a few years later, the European Economic Community and now the European Union. Thus, the former enemies had to cooperate in designing structures and in deciding how to solve disagreements. The Court was located in Luxembourg in the division of the various institutions around the six founding states (Belgium, France, Germany, Italy, Luxembourg and the Netherlands). When I started European practice there were nine (Denmark, Ireland and the UK as of January 1973). When I joined the Court in 2015, there were 28 countries, 24 official languages and one working language. The Court's caseloads evolved from a small number of questions (some rather fundamental admittedly, like primacy – whether EEC la prevailed over national law in case of differences; and direct effect – whether the Treaty could be invoked directly by citizens in domestic courts) to two thousand cases per year to two courts (the Court of Justice and the General Court) and nearly 100 Judges and Advocates General).

The Court of Justice is becoming more and more a court of fundamental rights. It also checks, by the "pourvoi" route (an appeal from the General Court) the conduct of the institutions and their respect for the law. It gives guidance to the Member States via the infraction cases (of which there are many fewer than in the past). All that said, it is generally said to be not a federal court as it cannot annul an action by a member state or an institution of a member state. But it can declare a breach, and then it is for the state to remedy matters. Each entity is master in its own realm.

As to sanctions, it examines the propriety of fines imposed upon enterprises. These have reached (personal view) absurd levels, with billions of Euros. For sanctions imposed on States, you might be surprised to learn that it was the UK which pressed for the inclusion of sanctions upon states, in the Maastricht Treaty, since the UK felt (correctly) that states bore no adverse consequences for evident breaches. (Some countries, notably Italy, were notorious in failing to comply with obligations established by Directives.) France has – I think - only once been hit with a penalty. That was € 20,000,000 for an infringement by the state relating to fish quotas. After debate at civil service and ministerial levels, the decision was that the penalty had to be paid out of the fisheries ministry's budget, not central government funds. Lessons were learned!

The EU judges have the mission to check that EU rights are as equally available and equally valid and equally useful as national rights. States must ensure that there are routes by which rights can be readily asserted. That is the goal, though we should not assume there are lapses. And we should not underestimate the challenges going to court to assert theoretically available rights.

There are, it is true, big constitutional problems of non-compliance. It is fine and natural for criticism of EU policies to be expressed by national governments. But the law has to be respected. Hungary has failed to respect the rules on migration, refugees and asylum. It was subject to a penalty of Euro 200 million and 1 million of daily fines until compliance. Now, Article 7 of the TFEU allows measures to be taken against member states for manifest and grave breaches, even expulsion. The campaign against LGBTQ in Hungary is such a case, according to Advocate General Capeta. I note that the French Conseil d'Etat has become more "souverainiste" (more sympathetic to patriotic independent arguments). But infringers can still win. Hungary and Poland won a case on state aid on the grounds that there was no selectivity (no discrimination in favour of some operators). So the court tries to be neutral in considering politically sensitive matters.

These are social and democratic fundamental values. There may not be a single rule – for example about whether and how employers may regulate the wearing of the Islamic veil. There is no clear EU rule as yet. Primacy may imply that there will be no single EU rule – as in the case of the veil. Art 9 of the Charter of Fundamental Rights tells us that there may be no common principle (It recognises national law as the source of family law principles).

Today the General Court is taking care of the legality of acts of EU institutions (the facts as proven, formal procedural adequacy, in conformity with the law). It is handling a large number of challenges to the legality of many kinds of administrative action. Quite precise and narrow sometimes, quite broad and consequential at other times. Its judgements are often very lengthy, the fruit of many factual questions of details. Lengthy: 500 paragraphs is not unusual. 'Le juge est la bouche de la Loi.' (The judge is the mouthpiece of justice). By contrast, the Court of Justice is considering the validity of acts of the legislator; and is being less deferential to national arguments.

The questions put to the Court of Justice by national courts seeking guidance on how to apply EU law can range in terms of political sensitivity from customs classification (is Corian an artificial stone or a filled plastic when deciding what level of customs duty to impose on imports?) to whether the UK's announced departure from the EU could be withdrawn if parliamentary procedures were followed, or whether Hungary's reforms of its judicial system were consistent with the fundamental values of the European Union.

The Court had therefore to confront from the beginning doubts about its constitutional status. Did EEC law override inconsistent national law? Was EEC law effective in national courts only once implemented into national law? When there was a doubt about the answer, was there an option or an obligation to make a reference to Luxembourg ? What intensity of judicial review was appropriate in a factually rich case? To what degree should the Court extend deference to the administration's findings? The Court's approach to these questions has evolved in terms of confidence.

But it remains the case that the two EU Courts are located in a small country which may be literally thousands of kilometres away and figuratively far away from, shall we say, a local court in the charming Portuguese town of Obidos. Often there is public confusion between the EU courts in Luxembourg and the ECHR Court in Strasbourg. The Strasburg Court (ECtHR) interprets the Human Rights Convention; easily criticized as being out of touch; and similar reproaches. No court should be as sensitive to criticism as politicians!

Both courts have been exploring how to be more accessible to lawyers, litigants, teachers, and the general public. The Court of Justice has been more adventurous than the General Court.

In replying to questions from national courts it faces a number of particular challenges, in terms of encouraging a public awareness of its judicial output. The questions which arise can be straightforward (what is the correct classification for customs purposes of a bathroom tile?) or extremely nuanced (does imposing a minimum price for alcohol in order to deter alcoholism enjoy justification on public health grounds or deserve condemnation as hindering trade between Member States?) There will almost always be qualifying language: the judgment will be the fruit of compromise between 3, 5 or 15 drafters, such that several approaches will shape the final text. It is also true that the vocabulary and grammar of the final judgement are often rather obscure. Not natural oral language, more like a formulaic, even algebraic statement. See for example paragraph 186 of Google Shopping.

> *185. It follows from the assessment of the first and second parts that the third part of the third ground of appeal cannot succeed either. This alleges that, in paragraph 572 of the judgment under appeal, the General Court erred in law in assessing the effects of, and objective justification for, the alleged practices.*
> *186. On the contrary, in paragraph 572, the General Court was able, without erring in law, to conclude from its findings on the inseparability of the two elements of the alleged conduct that the potential harmful effects of that conduct on competition and on consumer welfare cannot be counteracted solely by any efficiency attributed to only one of those elements, that is to say, the special algorithms. This is true whether specific efficiency gains from the use of the special adjustment algorithms per se are demonstrated or not.*

In addition, while the working language of the court is French, there are 23 other official languages. If the language of the case is German or English or Spanish, it is easier to verify that the official authentic response to a question is exactly what the chamber had in mind. Where the language is Finnish or Lithuanian, the task is more of a challenge. The judges agree on the French text of the judgement, which will then be translated into the language of the case. The Court's linguists are very skilled, and checks are made rigorously, but imperfections can creep in.

The journalists and commentators who cover the cases are specialists, but they are writing for two different readerships. One is the "technical" community of practitioners, academics, officials and (sometimes) politicians. The other is the wider

public who need simplicity. However, the danger of a short and basic account of a judgement of 200 pages is that it may give a broadly accurate description of what has been decided, but that version may gloss over some of the nuances about which legal experts are vitally concerned. For example, there has recently been interest in the topic of "self-preferencing": the dominant player favours a different part of its own business rather than offering a commercial opportunity to everyone. Google's search screen favoured Google shopping over other comparative shopping sites. Was that an abuse of a dominant position ? If so, what is the element which is critical? Is it normal that a successful hotel will buy vegetables from its own farm, or that a supermarket will give prominence to its own goods? I observe that the word "self-preferencing", although widely used by commentators on the Google case, does not appear in the judgement.

Likewise the term "essential facilities" can be found in scholarly books, but less commonly in EU judgements: better avoid the baggage of associated meanings which may be imprecise. What is the limiting factor for the future? I personally remember feeling, as the advocate, that in this case the client deserved to win, but uncertain as to how the outcome should be justified. Normally the copyright holder has the right to authorise or not to authorise publication: what was it that made it illegal for the publishers of a weekly television guide to forbid the weekly, but not the daily, reproduction of the times of future programmes? What is the limiting principle for the future? After the first case in which a compulsory licence over copyright material was upheld, a German professor stated that it was "the end of copyright". He was wrong!

One more example: when Microsoft included a media player as a standard feature of its operating system, was that "tying" which could damage the suppliers of other media players, or was it giving to the customer more features for the same price? Adding extra features could clearly not be a per se infringement, so it would be necessary to describe the new situation cautiously. Each big case is different; each case has strong arguments for an against. There are no dissents, which can express doubt about the wisdom of the outcome, thereby reducing its scope and impact.

The court may have decided not to address all the implications: one step at a time. So a short summary should not imply more than the judgment decided. The court's press releases therefore need to be drafted with great circumspection, going no further than is appropriate,

There is thus a tension between accessibility and accuracy. In past years the French 'Cour de Cassation' was famous for its decisions of three or four sentences: truly impossibly dense for anyone except the few who had argued the case. The judgements have since improved in terms of comprehensibility.

The two EU courts have taken different approaches to the explanation of their respective judgements. The General Court speaks "through its judgements". Sometimes there will be a press release, which is carefully debated between the 'juge rapporteur', the various cabinets of other judges, and the communications specialists. Its mission is judicial review of the acts of the EU institutions, rather than shaping the constitutional pillars of the Union.

The Court of Justice has been rather bolder, in that the individual judges have made in some cases video clips in which the judge explains to the camera what has been decided. Having watched one or two such videos, I can report that the judge's remarks appear to be very carefully scripted. Possibly a spokesman might convey the essence in a more relaxed way, since evidently the comments do not carry the putatively definitive weight of a judge's remarks; the spokesman or commentator might add comments on future implications, which the judge would certainly not do.

The initiative is interesting: I wonder what other courts use judicial videos?

There have been other initiatives at the CJEU. Live streaming of the oral argument and of the delivery of the judgement is well established. The oral argument is recorded and transmitted the following day, but the judgement is accessible live. Again, watching an argument on a screen is likely to be of only anthropological interest to watching citizens, but it certainly confirms openness.

The Court of Justice of the European Union has a substantial communications team. Its constant challenge is how to achieve public awareness and understanding of its judicial output. Some of its efforts are - I suppose - similar to other supreme courts' practices. There is a presence on Instagram, LinkedIn, Blue Sky and X, among others. It publishes through these platforms press releases, descriptions of big decisions, and news about the Court, anniversaries of past milestones, appointments and the like. The Court tries to match the style and content of the subject to the style and audience of the platform. It is not sensational, and it is accurate.

The press communiqué is rather more helpful about complex cases: there is more storytelling, more background. But (I suppose) the danger is that a difficult and finely balanced case with strong arguments on both sides may be presented as straightforward. And the summary may thereby diminish the considerations on one side, and give a slightly misleading impression of the confidence with which the Court reached its judgement.

Separately, the format of CJEU judgements is evolving. Headings, and layout are changing, in the same way as the font and layout of newspapers are adapted from time to time.

The sensitivity of the job of the communications team should not be underestimated. If a Member state is being reproached by the commission for failing in its Treaty obligations, news of the bringing of the case will emerge immediately, while normally the Court has not yet drafted its summary of the case to be published a few weeks later in the official journal. What is the case about? What are the arguments? What are the prospects? Who will speak when? Urgency, urgency. The court has to be careful to be very accurate throughout, and not to "favour" one outcome or another. The caseload of the two courts is maybe 900 (of which 500 or 600 are references from national courts seeking guidance) for the Court of Justice and 2000 for the two courts combined. Some of them are not exciting (the stagiaire was not wrongly dismissed) and for some the result can be easily summarised (the bathroom tile is a filled plastic for customs purposes). But others are immensely controversial or economically consequential.

As to the use of AI by the EU courts, the most obvious advantage is for translation: 24 official languages, one working language, and very finely drafted judgments. I can report that there is a case in which the issue is whether content generated by AI can be regarded as a normal breach of copyright of the author of a "traditionally drafted" work like Company v Google case 250/2025.

Because the output of the court is the wording of its judgements, it is evident that there is a risk of oversimplification or error or omission in any description, or summary, or "FAQ's (frequently asked questions)". But at the same time, few non-specialists are likely to plough through three hundred paragraphs for an understanding of why a behaviour of a technology giant could properly described as an abuse of a dominant position. That said, digital platforms are increasingly the sources of news for people under fifty: and it is more reliable to deliver news "from

the horse's mouth" rather than through propagandists of one colour or another. So the Court of Justice (though not the General Court) has been experimenting with short videos in which the 'juge-rapporteur' describes a recent judgement as well as its consequences. As noted above, the tone of these videos is – no surprise- very prudent, measured, carefully, certainly not in the slightest sensational.

I can also record that the court's website was recently updated and modernised and altered substantially, part of the drive to enhance understanding. The new architecture was meant to help lawyers track down themes and prior instances, as well as giving citizens a better chance of discovering the law. However, the new website was criticized by practitioners and academics, and has been withdrawn for further work. The debate will probably result in a website which is both accessible to the layman and useful to the expert researcher, but that will take some more time. The old search engine has been restored while the designers reconsider how best to structure the searching.

I end by commending the hospitality of the institution. It welcomes students, teachers, judges and ordinary people. Listening to a hearing can be a fascinating prelude to an interesting lunch. I encourage visitors to Europe to pay a collegiate visit.