What the European Court of Justice is for – Making Sense of the ECJ's Procedural and Organisational Law

Paul Dermine*

*Université libre de Bruxelles, Belgium, email: paul.dermine@ulb.be

Christoph KRENN, *The Procedural and Organisational Law of the European Court of Justice – An Incomplete Transformation* (Cambridge University Press 2022)

The European Court of Justice is the object of close and constant academic inquiry. EU lawyers scrutinise its case law on a daily basis, and comment on the quality of its reasoning, the consistency of its rulings, their impact on the legal order, and their wider institutional, political, social or economic repercussions. Social scientists too have grown increasingly interested in the institution and have examined the wider role it plays in the European integration process,[1] and how various actors managed to mobilise the Court to advance the cause of integration.[2] In his book, Krenn's focus lies elsewhere. He examines an aspect of the Court which remains rather overlooked[3] in the literature: the rules and processes which organise its internal functioning, what he calls its 'organisational and procedural law'. More specifically, the book concentrates on three main issues: (1) the selection of judges to the Court and the regulation of their conduct in office; (2) the participation of external actors to proceedings; and (3) the decision-making process of the Court (deliberation and drafting). His approach to these

[1]*See* for example, A. Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004); K. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2001); or the seminal E. Stein, 'Lawyers, Judges and the Making of a Transnational Constitution', 75 *American Journal of International Law* (1981) p. 1.

[2]Most notably, *see* A. Vauchez, *Brokering Europe – Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press 2015). More recently, *see also* T. Pavone, *The Ghostwriters – Lawyers and the Politics behind the Judicial Construction of Europe* (Cambridge University Press 2022).

[3]*See*, however, M. Madsen et al. (eds.), *Researching the European Court of Justice – New Methodologies and Law's Embeddedness* (Cambridge University Press 2022).

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matters, far from being purely descriptive or practical, is boldly conceptual. That is arguably the main strength of the book: how it manages to unveil what this specific type of law – well-known to Court practitioners and insiders, but often neglected by academics – tells us more fundamentally about the Court, and its changing role in the EU polity.

This review essay provides a critical overview of the book's argument and of its main claims. It then offers additional thoughts on potential new lines of research which the book unveils, and other issues to which its conceptual framework could be applied.

Towards the first normative theory of ECJ decision-making

With his book, Krenn has ambitions to develop the first 'normative theory of ECJ decision-making'.[4] In order to do so, the book seeks to conceptualise the various roles that the Court has successively taken on, and investigates how its procedural and organisational law has adjusted to the Court's evolving status, mandate and functions within the EU legal and institutional order.

The book essentially argues that, over its 70 years of existence, the Court's mandate has undergone a gradual transformation.[5] Initially designed to provide judicial protection to the main subjects of the Community's legal order, i.e. the member states, the Court has refocused its mandate on the preservation of the effectiveness and uniformity of Union law. Over the past two decades, the Court has also taken up, so the argument goes, a more direct, proactive role in the conduct of EU affairs, and has become a 'democratic organ of the EU polity'.[6] According to Krenn, to each of these ideal-typical roles corresponds a particular model of procedure, organisation and decision-making: a liberal model, a 'rule of law' model and a discursive model. Consequently, the gradual transformation of the Court's mandate normatively calls for a consonant adjustment of its procedural and organisational law. The book claims that if the Union (broadly conceived as encompassing the political institutions and the Court itself) has been quite successful in adapting the Court's organisation and procedure to its new role as guardian of EU law's effectiveness and uniformity, its latest mutation into a political/democratic organ has not been accompanied by the necessary adjustments towards the consolidated responsiveness this new status calls for. Unless a number of important reforms are undertaken, the Court's transformation will thus, according to Krenn, remain incomplete.

This book strives to explore the inner workings of the Court. This creates methodological challenges, considering the secrecy of judicial deliberations on the

[4]At p. 4.
[5]At p. 5.
[6]At p. 102.

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Kirchberg, and the relative opacity around the activities of the Court.[7] These difficulties did not prove insurmountable however, as the book quite successfully meets its ambitions. The methodology relied upon is primarily doctrinal, as the book heavily draws on the various documents that organise the Court's work: the Court's Statute and Rules of Procedure, of course, but also internal documents, largely unknown outside the relatively small circle of ECJ practitioners, such as the *Guide pratique relatif au traitement des affaires*.[8] Doctrinal work is punctually complemented by statistical evidence and datasets, usefully illuminating specific aspects of the Court's work (case assignment, participation to Grand Chamber rulings, EU institution and Member State participation to proceedings, etc). Quite surprisingly, but without it being detrimental to the quality of the research, the book does not directly draw on interviews with, or any other form of immediate input gathered from, 'ECJ insiders' (judges, advocates general, *référendaires*, members of the administrative services). Considering the book's ambition to provide 'a vivid picture of ECJ decision-making',[9] these elements could have proven a valuable methodological complement.

What are courts for? An ideal-typical approach to judicial roles and mandates

Krenn's normative assessment of ECJ decision making relies on an elaborate theoretical framework, consisting of three ideal-types, presented in Chapter 2. Each relates to a specific strand of modern legal and political theory, is associated with one single (German) scholar, and embodies a particular vision of the role, the mandate courts fulfil in a polity, and of the model of organisation and decision-making which should support such role.

The first draws on liberal constitutionalism and the work of Christoph Möllers.[10] It has a narrow understanding of the judicial mandate, as structured around the protection of the rights and liberties of litigants. Courts are conceived as relatively passive, reactive institutions, and the trial is approached as a self-contained episode dominated by litigants.

The second ideal-type relies on Luhmann's system theory,[11] which has brought about a rule of law model of courts and judicial decision-making. Under such an approach, courts fulfil a systemic role in societies, and are primarily tasked with

[7]Krenn equates his endeavour with researching 'a black box' (p. 7).

[8]Practical guide for the handling of cases (my translation).

[9]At p. 8.

[10]*See*, most notably, C. Möllers, *The Three Branches – A Comparative Model of Separation of Powers* (Oxford University Press 2013).

[11]*See*, most notably, N. Luhmann, *Law as a Social System* (Oxford University Press 2004).

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providing normative certainty and stability through legal interpretation. As a consequence, it is essential that court decisions are consistently accepted, and applied, through the entire system, and that court proceedings and judicial decision-making is organised accordingly. The key in this regard lies, for Luhmann, in conceiving the judicial process as a process of socialisation. Krenn identifies three essential mechanisms or devices which can support such socialisation and induce acceptance of court decisions: the neutrality of the judge; the active involvement of parties and other actors in the judicial process; and the consistency of case law.

The third ideal-type is based on Habermas' discourse theory of law,[12] and the democratic approach to courts and judicial decision-making he has developed. Courts are approached as organs of the political community, whose essential role is to transform the will of the democratic legislature into individual decisions, which can thus be considered just and right. As a consequence, judicial decision-making needs to guarantee a strong connection to the public sphere, and meaningful responsiveness. Habermas puts the judge at the centre of the judicial process and insists on procedural rules which ensure the open and participatory nature of proceedings.

From the Court's liberal roots to its Luhmannian turn

The remainder of the book moves on to investigate the roles and mandates endorsed by the ECJ, and the related evolution of its procedural and organisational law.

Chapter 3 goes back to the very origins of the EU judiciary, and claims that the initial Court created by the Treaty of Paris in 1951 fits, although embryonically, the liberal model. The 'Coal and Steel' Court was primarily destined to preserve the rights and interests of the Community's member states. As a consequence, its organisational law was, as is traditional for international courts, clearly state-centred, and dominated by the concern for equal state representation. To Krenn, such focus on the parties, and on the member states, transpires very clearly from several aspects of the Court's original body of procedural law: its rules of standing, which immediately favoured member states as privileged applicants, the effects of its rulings, strictly circumscribed to the parties to the case, the rigid rules on third-party intervention, and the relative passivity of the bench and the general control exercised by the parties over the conduct of the proceedings. As to the judges themselves, Krenn finds that their selection was very much left at the discretion of individual member states, contrary to what Article 32 of the ECSC Treaty, and its

[12] *See*, most notably, J. Habermas, *Between Facts and Norms – Contribution to a Discourse Theory of Law and Democracy* (MIT Press 1996).

reference to the 'common accord' of the member states, might suggest. Judges of the initial ECJ could best be considered, along the lines of the international law tradition and the practice at the International Court of Justice, as 'State representatives'.[13] In a similar way, Krenn shows that although rules were already in place to regulate Court members' conduct while in office, they failed, in practice, to meaningfully insulate those members from their home state. Finally, the original Court relied on rules of deliberation primarily aimed at guaranteeing the equal involvement and influence of all judges in all cases. If cases were already assigned to reporting judges by the President of the Court, rapporteurship was evenly distributed among members, since case assignment was based on pre-defined rules, and thus conducted in a quasi-automatic manner. The possibility to rule in chambers was not exploited in practice, and decisions were exclusively made in the Court's plenary, involving all seven members. Finally, if French was already the dominant language within the Court, multilingualism was guaranteed and other official languages of the Community could be resorted to for the purpose of drafting or deliberating.

Chapter 4 first recalls the story of how the Court has quickly broken free from its original mandate as an international administrative court with liberal roots. With *Van Gend*, *Costa* and the like, the Court turned EU law into an authoritative, autonomous and directly effective legal system, and established itself as the logical guardian of its uniformity and effectiveness, substantially boosting its role in the overall European integration process. The remainder of the chapter then moves to showing, very convincingly, how the Court, turning Luhmannian, prompted a necessary, and far-reaching,[14] recast of its procedural and organisational law along the lines of a 'rule of law' model, to better fit the Court's new role.

First, Krenn shows that a number of reforms have significantly impacted the status of the ECJ judge, cutting him/her off his natural, national biotope, and turning him/her into a supranational figure, that of the neutral expert with enhanced independence. Most significantly, Krenn shows how the reform of the selection process of ECJ judges after Lisbon, and the creation of the '255 Committee', has altered the dynamics and character of ECJ appointments, which are today less of 'an exercise in diplomacy' and more of an 'expertise-driven process'.[15] A careful inquiry into the profile of Committee members, and into the features of the selection process before it (evidence-based, neutral and confidential) also brings him to conclude that, although the Committee has validated a fairly diverse set of profiles to be represented at the Court, its

[13]At p. 29.
[14]Krenn speaks of a 'wholesale transformation' (p. 40).
[15]At p. 46.

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procedures, selection criteria and activities over the past 15 years show an inclination towards a certain profile, that of 'the internationally minded, senior judge with an academic inclination', most likely to generate trust at the supranational level. There is certainly space for reasonable disagreement as to the degree to which the establishment of the '255 Committee' has depoliticised appointments to the Court. After all, pre-selection of candidates at the national level remains very much at the discretion of member states. It is, however, hardly debatable that this new body has contributed to rationalising the process, and has considerably strengthened the Union's, and the Court's, grip on the choice of its Justices, thereby precipitating a shift toward 'judicial self-government'.[16] In the same vein, turning to the rules framing the conduct of Justices while in office, Krenn shows that if the substance of the rules (for example on conflicts of interest or external activities) has not substantially evolved, their enforcement has become much stricter and more systematic, for the main reason that it is now ensured by the Court itself.[17] Similarly, ECJ members now manage their institutions independently, through various committees, which contributes to strengthening their independence and image of impartiality to the outside world. As to the Court's relationship with the outside, Krenn describes how the institution has progressively developed a careful and complex strategy towards the press. I should add that courts' public relations have always been a delicate issue. On the one hand, courts should only speak through their rulings, and nurture their image of neutrality, which might command minimalist communication. On the other hand, outreach can increase the intelligibility of judicial decisions, enhance their acceptability, and consolidate the trust a court generates. Interestingly, the Court of Justice has, under the presidency of Koen Lenaerts, strengthened its presence in the media, as part of a wider strategy to reassert, in the face of serious challenges coming from national supreme courts and legal orders, its position and authority in the European legal space.[18]

Second, Krenn very craftfully demonstrates how the Court, following Luhmann's intuition that participation to proceedings, if properly tailored, 'can

[16]A. Alemanno, 'How Transparent is Transparent Enough? Balancing Access to Information against Privacy in European Judicial Selections', in M. Bobek (ed.), *Selecting Europe's Judges – A Critical Review of the Appointment Procedures to the European Courts* (Oxford University Press 2015) p. 204.

[17]As a token of this trend, each member of the Court now has to make a declaration of interests public, available on the Court's website.

[18]This is best illustrated by the press release No. 58/20, which the Court issued in reaction to the *Weiss* ruling of the German constitutional court, thereby derogating from its practice of not commenting on judgments of national courts. The multiple interviews given by President Lenaerts over the past few years to national newspapers (such as *Knack*, *Les Echos*, *Le Monde*, *Financial Times* or *Politico*) also embody this trend.

contribute to the acceptance and dissemination of court decisions',[19] has progressively opened up its gates, and created, beyond direct litigants, an inner circle of participants, namely the European Commission and the member states, which have become repeat players. Mobilising ample statistical evidence, Krenn shows how the Commission first, and the member states next (although very unequally), have come to exploit the new opportunities opened by the Treaty of Rome, which granted them an unconditional right to intervene in direct actions and preliminary ruling procedures. With this in mind, Krenn moves on to offer a highly enlightening and convincing conceptualisation of the various functions which Commission and, most importantly, State participation in proceedings can fulfil under a rule of law theory of judicial decision-making. First, participation guarantees due information of the Court as to its rulings' potential effects, and the anticipation of potential implementation problems. Second, participation in proceedings acts as a learning process, which supports acceptance and compliance with ECJ rulings. Krenn relies on Luhmann's image of the 'procedural funnel'[20] to describe how participants in court proceedings, by contributing to the procedural sequence of events and detailing their disagreements, somehow already pre-commit to accepting the court's ruling, and find it harder to resist the final verdict. Finally, Krenn argues that participation requires administrative structures, which in turn enhance follow-up and ultimate compliance with the Court's case law. Logically, the emergence of an inner circle of repeat players implies that other players stay outside and are only sporadically involved in proceedings in Luxembourg. To Krenn, that is most importantly the case for other EU institutions, such as the Parliament or the Council, whose right to participate through written observations very much depends on the Court's goodwill, and for private litigants, who face even more restrictive rules when contemplating participation in direct actions and preliminary reference proceedings. Krenn finally examines participatory measures which the bench can proactively mobilise to 'complement the inner circle': the so-called measures of organisation,[21] the power to invite member states or EU institutions or bodies to submit observations or intervene in a case,[22] and reliance on the research and documentation department's input. Although not evoked by Krenn, the possibility for the Court, in the context of the preliminary ruling procedure under Article 267 TFEU, to address requests for clarification (*demandes d'éclaircissements*) to the referring

[19]At p. 58.

[20]N. Luhmann, *Legitimation durch Verfahren*, 10th edn. (Suhrkamp 2017) p. 115.

[21]Arts. 61 and 62 of the Rules of Procedure. They cover, among others, requests for additional documents or information, questions to be answered, invitations to concentrate pleadings.

[22]Art. 24 of the Court's Statute.

court,[23] also contributes to enhancing participation, information-gathering and, ultimately, the quality and acceptability of decision-making.

Third, Krenn shows how the advent of a Luhmannian Court has prompted an overhaul of its internal decision-making procedures, initially structured around the equality of judges and the centrality of state representation, to rationalise case handling and, most importantly, ensure the consistency of its case law. If Krenn sometimes seems to downplay very practical considerations related to the massification of litigation before the Court,[24] and the purely managerial and logistical measures they called for, he very aptly demonstrates how the progressive rationalisation and verticalisation of the Court's inner workings fits the Luhmannian rule of law model of court decision-making. It is not that judges' nationality ceased to matter. Internal rules – such as the custom that, under the preliminary ruling procedure, judges may not be assigned files emanating from their home jurisdiction – tend to indicate otherwise. Nationality can, moreover, still emerge in certain extreme, politically-loaded cases. However, it is a fact that Court members can no longer be conceived as state representatives, but very much fit the figure of the supranational, neutral expert. Delving into the Court's working methods, Krenn focuses on three mechanisms.

He first examines the rise of the chambers system, and how it has largely made the idea of member state representation obsolete. As another mechanism embodying the Luhmannian turn of the Court's decision-making procedures, Krenn considers the Court's general meeting (*reunion générale*) and its role as an inclusive platform for coordination, a collective agenda-setter, responsible for the case law's key orientations.

The most interesting developments, in my opinion, are devoted to the evolution of the practice of case assignment to reporting judges (*juges rapporteurs*). Krenn describes the professionalisation of the role of reporting judge, driven by a logic of efficiency and rationalisation. He goes on to provide a rather compelling analysis of the practice of case assignment over the past two decades, supported by ample numerical evidence. He unveils strong disparities among judges, and most importantly, the existence, within the Court, of informal hierarchies and of an 'elite group of rapporteurs'[25] which hold the pen in the most important cases (i.e. those leading to Grand Chamber rulings).[26] While Krenn underlines the

[23]Art. 101 of the Rules of Procedure.

[24]As documented in the judicial statistics published by the Court of Justice. *See* https://curia.europa.eu/jcms/jcms/Jo2_7032/en/, visited 22 January 2024.

[25]At p. 85-86. At the top of this informal hierarchy, over the 2003-2021 period, Krenn places Koen Lenaerts, Lars Bay Larsen, Marko Ilesic, Allan Rosas, Thomas von Danwitz and Sacha Prechal (on the basis on their average number of Grand Chamber cases assigned each year).

[26]It would be interesting to know whether similar dynamics can be observed among Advocate Generals, where the First Advocate General enjoys a power of assignment comparable to that of the President of the Court.

geographical heterogeneity of this elite group, he does not further explore the factors which might explain why certain judges make it to this group, or not. Legal skills, quality of the cabinet, reputation and longevity within the institution, performance in managing past cases, personal motivation and involvement in the function certainly constitute important variables. For Krenn, this elite group fulfils an important, very Luhmannian, function by ensuring the stability and consistency of the case law. Krenn concedes that such practice of case assignment has a number of additional advantages: it structures a learning process and supports the integration of new judges; it guarantees that key judgments are drafted by the highest authorities within the Court; and it can even strengthen the Court's independence vis-à-vis member states, especially in the context of reappointments. But he also seems rather sceptical of the turn case assignment has taken, its cooptative nature, and the power of the President over the entire process, which makes him/her the *de facto* gatekeeper of this club. I do not entirely share such scepticism. First, going back to Krenn's conceptual framework, one could argue that this trend clearly reveals the Court has moved beyond the logic of equal state representation, and consolidates the figure of the supranational judge. More fundamentally, is it not simply natural that, as in any human group working together, with differences in experience, intellectual capacities, interpersonal skills, and personal motivation and ambition, certain individuals would stand out, and take on a more prominent role? One could also wonder if it could at all be otherwise in a judicial environment as heterogeneous as that of the Court, where background, profile and training of members differ more sharply than in national courts. As a last remark, I should also mention that while Krenn's exclusive focus on rapporteurship seems perfectly warranted, considering the fact that it is the sole measurable variable, the role of the *rapporteur* in the Court's decision-making process should not be overstated either. The reporting judge 'carries the case' and has the important responsibility of preparing the preliminary report and a first draft of the decision. However, in all formations of the Court (and especially so before the Grand Chamber and five-judge chambers), the input from other 'sitting' judges (*juges siégeants*), although not discernible (and thereby not quantifiable) to the external observer, is crucial, and can have a major impact on the final version of a ruling.

From Luhmann to Habermas – reform prospects for a more responsive Court of Justice

The last chapter of the book adopts a more prospective approach and intends to show why the transformation of the Court's procedural and organisational law remains unfinished, and how it could be completed. Chapter 5 relies on an

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important premise: the evolution of the EU polity, of the EU legal order and of the Court's own case law in the post-Lisbon era has brought the institution beyond the Luhmannian rule of law model and turned it into a democratic organ of the EU system, entrusted with a clearer political mandate. Such a transformation would in turn call for stronger ties with the EU citizenry, and increased legitimacy through appropriate changes to the Court's procedural and organisational law, which the Union has so far failed to enact. To put it in Krenn's words: 'a dose of Habermas is needed to increase the Court's procedural responsiveness to the European public. The Court as an institution has become somewhat ill adapted to the political environment and the normative demands that its decisions helped to create.'[27] This is a bold, not entirely straightforward, yet, in my view, legitimate premise. Next to its Luhmannian mission to preserve EU law's uniformity and effectiveness, the Court indeed seems to be moving closer to the political arena, as it is increasingly brought to rule on the delicate societal and ethical issues of our time, or to intervene in the major policy debates going on in the Union (be it the evolution of the EU's economic powers, the issue of migration, the preservation of privacy or the protection of the EU's fundamental values). The careful reader will nonetheless deplore that this important premise is only weakly substantiated by Krenn. He indeed limits himself to referring to the increasing sensitivity of the cases the Court decides, the expansion of EU competences and the normative demands flowing from Articles 9–12 TEU since Lisbon.[28] Considering its centrality in Krenn's overall argument, one would have expected a more elaborate and robust examination of the Court's recent metamorphosis, and of the subsequent insufficiencies of the Luhmannian rule of law model. On a related note, Krenn does not really take an explicit normative stance on the judicialisation of EU affairs, and the related politicisation of the Court, of which he takes stock. While he seems generally supportive of the phenomenon, he could, however, have engaged more meaningfully with the literature on the matter.[29]

The remainder of the chapter explores concrete proposals and reform avenues which might boost the Court's democratic legitimacy and responsiveness. Following the structure favoured throughout the book, Chapter 5 successively examines the democratisation of the selection process of ECJ judges, ways to enhance openness and participation in Court proceedings, and measures to enhance the quality of deliberation and decision-making. These sections sometimes read a bit like an

[27]At p. 155.

[28]At p. 103-104.

[29]On the critical side, *see*, most prominently, D. Grimm, 'The Democratic Costs of Constitutionalisation: The European Case', 21 *European Law Journal* (2015) p. 460; R. Hirschl, *Towards Juristocracy* (Harvard University Press 2007).

inventory *à la Prévert*, the overarching logic of which fails to appear clearly. Some items are fairly classic and have already been widely debated in the literature. That is, for example, the case of measures supporting gender balance on the Court's bench,[30] the opportunity to introduce an *amicus curiae* procedure before the Court,[31] the desirability of a practice of separate opinions,[32] or the possibility to end the monopoly of French as a working language and switch to bilingualism.[33] Other items, however, present a much higher degree of originality. That is, for example, the case of Krenn's proposals to enhance the transparency of the '255 Committee' activities and strengthen the connection between the Committee and the European Parliament, his suggestion to enhance the Parliament's and Council's participatory rights by putting them on equal footing with the Commission and the member states, or his recommendations on the involvement of the Advocate General in deliberations, the future of the chamber system and a tighter framing of the President's prerogatives.

Krenn's reform proposals are overall well-crafted, and fairly balanced and reasonable. As an example, he offers a very convincing case against the introduction of separate opinions at the Court of Justice. To the principled and practical objections Krenn puts forward,[34] I would add that the possibility for justices to pen separate, potentially dissenting, opinions would divide the Court along national lines, bringing it back to the old days where, as Krenn showed, Court members primarily acted as State representatives. It would, moreover, weaken the Court's authority and the power of its messages, and partly renationalise EU law, a development which seems particularly undesirable at a time when the essential attributes of EU law are being challenged in several member states. Interestingly, Krenn suggests alternatives to enhance the openness and transparency of Court deliberations. Most notably, he argues that parties' submissions should, as a matter of principle, be made public after the closure of a case, to foster institutional accountability and bring the diversity of legal opinions

[30]*See*, most recently, J. Guth and S. Elfving, *Gender and the Court of Justice of the European Union* (Routledge 2019); J. Guth, 'The Court of Justice of the European Union, Gender, and Leadership', in H. Müller and I. Tömmel, *Women and Leadership in the European Union* (Oxford University Press 2022) p. 273.

[31]*See* for example J. Krommendijk and K. van der Pas, 'To Intervene or Not to Intervene: Intervention before the Court of Justice of the European Union in Environmental and Migration Law', 26 *International Journal of Human Rights* (2022) p. 1394.

[32]Beyond the literature quoted by Krenn, *see* S. Turenne, 'Advocate Generals' Opinions or Separate Opinions? Judicial Engagement in the CJEU', *CYELS* (2012) p. 723.

[33]Next to the literature quoted, *see*, for example, A. Arnull, 'The Working Language of the CJEU: Time for A Change?', *ELR* (2018) p. 904.

[34]To Krenn, such possibility for separate opinions would, on the one hand, harm the effectiveness of the Court's rulings, and the uniform application of its law, and could, on the other, be instrumentalised by a member state to pressurise its judge in the context of their reappointment.

into the open. Strikingly, in the context of the ongoing negotiations on the reform of the preliminary ruling procedure,[35] two members of the European Parliament, René Repasi (SPD) and Patrick Breyer (Pirate Party Germany), have tabled amendment proposals to that effect.[36] Although not expressly evoked by Krenn, I would argue that the Court's decision in 2022 to start livestreaming hearings of the Grand Chamber equally contributes to enhancing accessibility, transparency and openness.[37] Precipitated by the Covid-19 pandemic, this evolution brings the Court closer to the citizen, and makes judicial debates and the diversity of views defended before it more visible.

Some proposals nonetheless appear a little far-fetched. For example, Krenn's claim that more cases decided by chambers of three judges should be subject to an Advocate General opinion reads somewhat oddly. Many of these cases (in fields such as VAT, customs or tariff classification) are fairly technical, and do not raise any complex legal question. They can thus be treated quite swiftly, and that is precisely the reason why they are assigned to a three-judge chamber and why, in most instances, it is collectively decided not to 'waste' time and resources with an opinion. Krenn argues that the Advocate General's role is not only to discuss new points of law, but also 'to support the quality of the decision-making process more generally'.[38] One could retort that such a statement proceeds from a misconception of the Advocate General's role,[39] as said function is to be fulfilled by the two other sitting judges, who will comment, build on, and improve the draft judgement prepared by the reporting judge. From this perspective, one could find Krenn's proposal to increase the number of Advocate Generals from 11 to 27 unwarranted and excessive (while sharing his legitimate criticisms

[35]See *infra*.

[36]Committee on Legal Affairs, Proposed amendments to Protocol No. 3 on the Statute of the Court of Justice of the European Union, 6 July 2023, *see especially* Amendment 1, available at https://www.patrick-breyer.de/wp-content/uploads/2023/07/CJEU-Statute-AMs.pdf, visited 22 January 2024.

[37]In February 2022, the Court streamed, for the first time in its history, the delivery of its judgements on the rule of law conditionality mechanism (C-156/21 and C-157/21). On this evolution *see* P. Lombardi, 'Nerdflix – EU Courts Start Livestreaming', *Politico*, 22 April 2022, https://www.politico.eu/article/eus-top-court-embraces-digital-age-with-streaming-service/, visited 22 January 2024. *See also* M. Kianicka, 'Streaming of Hearings – a Tough Call from the Court of Justice', *EULawLive*, 17 April 2020.

[38]At p. 142.

[39]The exact functions of the Advocate General in the judicial process remain subject to academic discussion, and primary law is admittedly quite open on the matter. My view, however, is that his/her role is primarily of a reflexive and structural nature. As a critical thinker, the Advocate General is to inspire case law, ensure its consistency and, when necessary, challenge it. For seminal work on the Advocate General, *see* L. Clément-Wilz, *La fonction de l'avocat général près la Cour de Justice* (Bruylant 2011).

towards the practice of 'permanent' Advocate Generals for France, Germany, Spain, Italy and Poland).

A final theme I wish to offer a few comments on is that of specialisation within the Court. Krenn is, overall, very sympathetic to increased specialisation within the Court, as a way to rationalise the Court's work, and enhance the quality of its deliberations. Most notably, he proposes to revisit the current 'discretionary system'[40] of case assignment, and to circumscribe the President's prerogatives through a system of specialised fields to which judges would be assigned, and on the basis of which cases would then be distributed. Such a proposal, if it proceeds from an analysis of the President's role as a case assigner which is, in my view, excessively critical and suspicious, has nonetheless the merit of opening up the debate about the future of case assignment. More fundamentally, it also begs the wider question of the desirability of deeper specialisation at the Court of Justice. Informal, spontaneous specialisation among judges has always been going on at the Court.[41] Judges each have their own profile, experience, expertise and areas of interest. It would obviously be a loss not to capitalise on that, and to assign cases without due regard for such personal variables. Whether such specialisation within the Court should be further formalised and systematised nonetheless remains to be seen. Specialisation certainly presents a number of benefits.[42] But the Court has always seemed, quite legitimately in my opinion, wary of over-specialisation, and has sought to preserve transversality and the diversity of its members' activities; not only in the name of case law consistency, but also to avoid that some judges would come to 'own' specific areas of law, meaning that their mark on certain lines of case law would become excessive.

Krenn's book as a basis for new lines of research

Like any ambitious conceptual work, Krenn's sometimes has to force reality to perfectly fit its conceptual categories. Some might argue that the 'Coal and Steel' Court never perfectly matched the liberal model, and was always more than a purely international court, with distinctive features already announcing the Luhmannian turn. Similarly, some of the organisational changes accompanying

[40]At p. 145.

[41]A prominent example is that of Judge Bay Larsen and his activism in the area of financial and monetary law. Judge Bay Larsen has indeed acted as *rapporteur* in most of the recent important cases concerning the powers and competences of the European Central Bank. *See*, most notably the *Gauweiler* (C-62/14), *Weiss* (C-493/17), *Banka Slovenije* (C-45/21) and *Crédit Lyonnais* (C-389/21P) cases.

[42]For a plea in favour of specialised chambers, *see* M. Jacobs et al., 'Subject Matter Specialization of European Union Jurisdiction in the Preliminary Ruling Procedure', 20 *German Law Journal* (2019) p. 1214.

the transition to the rule of law model which Krenn investigates, such as the establishment of the 255 Committee, only occurred decades after said transition, and therefore do not sit easily with the overall timeline of the book.

The picture painted by Krenn, if at times a bit broad-brush, remains nonetheless highly convincing. The book covers many key developments undergone by the Court's organisational and procedural law. Some of the issues examined, such as those related to the selection of judges, have already been well debated in the literature. Krenn is in my view at his best, and his analyses are most enlightening and compelling, when he takes the reader off the beaten tracks, into the internal kitchen of the Court, to discuss matters such as case assignment and rapporteurship, the powers of the Court's President, or the role of the general meeting and preliminary reports.

Even more fundamentally, this book provides us with a conceptual toolbox with which to make sense of the evolution of the Court within the EU polity, and of any aspect or reform of its organisational and procedural law. It could thus by all means be mobilised beyond the very subject matter of this book, to address future evolutions of the Court's inner working, or other aspects of the Court's procedural law which the book could naturally not consider.

One such aspect is that of standing for non-privileged applicants in the context of direct actions, most notably under Article 263 TFEU. As is well known, Article 263(4) TFEU mainly enables natural or legal persons to challenge Union acts which are of 'direct and individual concern' to them. The Court has, quite consistently, ever since the famous *Plaumann* ruling, favoured a highly restrictive reading of this standing requirement. This approach has been widely criticised,[43] as contrary to the principle of effective judicial protection and on the basis of fundamental rights considerations. Krenn's work offers new angles to approach this rather classic theme of EU procedural law. Standing rules operate as a filtering device, and support a certain vision of a judicial system, and of its legitimate interlocutors. From this perspective, one might argue that the position historically granted to the individual under Article 263 TFEU and the *Plaumann* doctrine embody a state-dominated approach to EU justice, where national and supranational institutional actors constitute the main direct interlocutors of the Court. One could go on that the Court's Luhmannian turn did not prompt, beyond timid openings, a major overhaul of the rules on standing for individuals. On the contrary, the state-dominated template of Article 263 TFEU was

[43]Seminally, *see*, for example, A. Arnull, 'Private Applicants and the Action for Annulment under Article 173 of the EC Treaty', 32 *CML Rev.* (1995) p. 7; D. Waelbroeck and A.-M. Verheyden, 'Les conditions de recevabilité des recours en annulation contre les actes normatifs communautaires', 31 *Cahiers de droit europeen* (1995) p. 399. More recently, with specific regard to environmental law, *see* M. Pagano, *Overcoming Plaumann – Environmental NGOs and Access to Justice before the CJEU* (PhD thesis, EUI 2022).

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confirmed, as consistency of EU law, and the protection of the individual, were deemed sufficiently guaranteed by the preliminary ruling procedure of Article 267 TFEU. But still, following Krenn's typology, would the increasingly central, and political, role of the Court in the EU polity not call for the overruling of *Plaumann*, and a relaxation of standing requirements under Article 263 TFEU? EU policy-making has become more judicialised, and strategic litigation is increasingly relied upon to prompt social and political change in the Union.[44] It might thus seem warranted that the Court opens its 'inner circle' (as Krenn might put it), diversifies its interlocutors and ensures easier direct access to its courtrooms for private litigants. Would it not make European judicial decision-making more participatory, responsive and, ultimately, more Habermassian?

Another important aspect of the Court's organisational law Krenn's work could shed new light on is the division of work within the Court, and the interactions between the Court of Justice and the General Court. The way a judicial institution manages its caseload and is, or is not, willing to delegate case management to new levels of jurisdiction tells us a great deal about how a court sees itself, the position it occupies in the institutional system, and the functions it seeks to embody in the legal order. As is well-known, the Court of Justice was a monolithic institution until 1989, and the creation of the Court of First Instance (now General Court) by the Council happened in reaction to the ever-increasing number of cases before the Court.[45] Most notably, the General Court was put in charge of direct actions by private litigants and actions for damages brought against the Union. As the massification of litigation kept accelerating, the decision was made, in 2014, to double the number of judges at the General Court, thereby further strengthening its position in the EU judiciary.[46]

As I write, the General Court is about to be entrusted a new responsibility. In November 2022, the Court proposed reforming the preliminary ruling procedure under Article 267 TFEU.[47] The initiative potentially stands as the most fundamental transformation the European judiciary has undergone since the

[44]On this trend, *see* L. Conant et al., 'Mobilizing European Law', 25 *Journal of European Public Policy* (2018) p. 1376; A. Hofmann and D. Naurin, 'Explaining Interest Group Litigation in Europe: Evidence from the Comparative Interest Group Survey', 34 *Governance* (2021) p. 1235.

[45]Krenn's exclusive focus lies on the Court of Justice. The General Court and, more generally, the division of labour within the Court are aspects of the institution's organisational law he chose not to consider.

[46]On this reform process, *see* D. Sarmiento, 'The Reform of the General Court – An Exercise in Minimalist (but Radical) Institutional Reform', *CYELS* (2017) p. 236.

[47]Request submitted by the Court of Justice pursuant to the second para. of Art. 281 TFEU, with a view to amending Protocol No. 3 on the Statute of the Court of Justice of the European Union (2022 Reform Proposal), https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-12/demande_transfert_ddp_tribunal_en.pdf, visited 22 January 2024.

creation of the General Court some 35 years ago. If it goes through,[48] it will significantly affect the internal organisation of judicial work at the Court. It is also deeply symptomatic of the evolving role and functions which the Court of Justice wants to embody in the EU legal order. In a nutshell,[49] the Court proposes that the General Court be granted jurisdiction to deal with preliminary references from national courts falling 'exclusively' in the following four areas: value added tax; excise duties, customs and tariff classification; passengers' rights; and greenhouse gas emission allowance trading.[50] The proposal is based on Article 256(3) TFEU which, since the Nice Treaty (2003), makes it possible to enable the General Court to answer preliminary references in 'specific areas' laid down in the Court's Statute. The Court's lack of readiness to delegate portions of the preliminary ruling procedure had left the provision dormant until now.[51] The rising number of references, the lengthening of proceedings before the Court (and the related fear that national judges might turn away) and the completion of the General Court's internal reforms are among the key factors which led the Court to finally activate the clause.

The proposal relies on a complex procedural set-up, which seeks to clearly circumscribe the transfer, and make sure that those cases related to the transferred areas of law which raise more structural, constitutional questions will remain within the remit of the Court. All references will still land on the docket of the Court, and only those falling exclusively within the specific areas of law will be transferred to the General Court. The General Court will, moreover, have the option to send back to the Court those cases which require 'a decision of

[48]In December 2023, the Parliament and the Council reached a provisional agreement on the reform, which can be expected to be formally adopted before the June 2024 European elections.

[49]For first analyses, *see* D. Sarmiento, 'On the Road to a Constitutional Court of the European Union', Croatian Yearbook of European Law and Policy (2023) p. VII; D. Petric, 'The Preliminary Ruling Procedure 2.0', *European Papers* (2023) p. 25; S. Iglesias Sanchez, 'Preliminary Rulings before the General Court – Crossing the Last Frontier of the Reform of the EU Judicial System', *EULawLive Weekend Edition*, 17 December 2022.

[50]To identify possible areas of law which could be transferred to the General Court, the Court has mobilised four criteria: the sufficient identifiability and separability of the field considered; the technical nature of the area and the limited questions of principle it tends to raise; the existence of a developed body of case law organising the area; the number of preliminary references the area tends to generate. The implementation of this methodology, and the selection made by the Court, has been one of the main aspects of the reform commentators have focused on, some wondering why areas such as intellectual property or public procurement were left out (for example, Petric, *supra* n. 48, pp. 31-32).

[51]*See* Court of Justice of the European Union, Report submitted pursuant to Art. 3(2) of Regulation 2015/2422 of the European Parliament and of the Council amending Protocol No. 3 on the Statute of the Court of Justice of the European Union, https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-01/en_2018-01-12_08-43-52_183.pdf, visited 22 January 2024.

principle likely to affect the unity or consistency of Union law' (Article 256(3) TFEU). Last but not least, the same provision also foresees, although on an exceptional basis, that General Court decisions on preliminary references might be reviewed by the Court 'where there is a serious risk for the unity or consistency of Union law being affected'. The reform will also imply a number of changes to the internal organisation of the General Court to facilitate its handling of this new type of dispute. Preliminary references will be assigned to specialised chambers designated for that purpose. Each reference will be assigned an Advocate General, to be selected among the judges of the specialised chambers. Finally, preliminary references will be heard by different formations (five-judge chamber, Grand Chamber, intermediate formation), depending on their importance or difficulty.

At first sight rather technical, the importance of this reform should not be understated. According to the statistical data produced by the Court, the specific areas transferred amount to roughly a fifth of the workload of the Court over the 2017–2022 period. This is already significant in itself but, with this reform, the General Court gets a foot in the door and, if successful, it might pave the way for additional transfers in the future. As such, the initiative is symptomatic of the evolving relationship between the Court of Justice and the General Court, marked by increased trust and collegiality. More fundamentally, this reform also tells us something deeper about the Court of Justice as an institution, its ongoing mutations, the way it conceives itself, and the position it seeks to occupy in the EU legal and institutional system. This reform signals a clear willingness on the part of the Court of Justice to refocus its activities around high-profile cases with a principled or constitutional dimension. It wants to devote more time and resources to the cases which, in its view, matter most, and the price for that is to delegate chunks of preliminary references (the bread and butter) to the General Court. As such, the reform would create another filter mechanism, and contribute to the emergence of a proper docket policy[52] (an embryo of *certiorari*?), thereby enabling the Court to sort cases out, and focus on what it deems most essential.[53] As such, the reform would certainly further the metamorphosis of the Court into a constitutional jurisdiction, while in parallel empowering and autonomising the General Court. Krenn's normative framework offers a useful analytical lens through which to make deeper sense of this reform, and of the division of labour within the Court as an important aspect of its organisational law. On the one hand, the changes contemplated certainly confirm the Court's Luhmannian turn, as they would further rationalise the Court's work, through increased delegation and hierarchisation. On the other, as it would enable the Court to refocus on the

[52]On this theme, *see* A. Dyevre et al., 'Raising the Bar – The Development of Docket Control on the Court of Justice', 76 *ZöR* (2021) p. 523.

[53]An ambition supported by Krenn, *see* p. 141.

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most sensitive and constitutionally salient cases, and would complete its transformation into a constitutional court, the reform stands as an implicit recognition of the political role of the Court, and certainly enhances its legitimacy and responsiveness to the wider public, thereby instilling another 'dose of Habermas'.

Interestingly, the ongoing legislative procedure initiated by the Court's formal request for an amendment to its Statute reveals a proactive involvement of the European Parliament and its Legal Affairs Committee.[54] This suggests, on the one hand, (legitimate) institutional concern that the evolution of the Court's internal functioning remains under firm political control. On the other hand, it signals the Parliament's willingness to use the reform proposal as an opportunity to push for wider reforms of the Court's procedural and organisational law,[55] thereby further contributing to its politicisation and democratisation, and the consolidation of its legitimacy.[56]

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The trajectory of the EU's institutional system is one of constant evolution and adaptation, to the Union's expanding powers and responsibilities and to the growing societal demands from the European citizenry. As an independent judicial body, the Court of Justice might very well occupy a peculiar position in the EU polity; it is certainly no exception to this long-term trend. As best illustrated by the ongoing reform of the preliminary ruling procedure, the Court's prerogatives and its organisational and procedural law will inevitably evolve in the years to come. In this context, Krenn's book stands as a precious compass. Not only does it offer a valuable conceptual framework to make sense of the Court's changing roles and functions in the EU polity, but it also outlines a clear way forward, fit for the challenges ahead.

Paul Dermine is Professor of European Union Law at the *Université libre de Bruxelles*, and a former *référendaire* at the Court of Justice of the European Union.

[54]On 9 May 2023, the JURI Committee devoted an entire hearing to the reform, and exchanged views with the Presidents of the Court of Justice, Koen Lenaerts, and of the General Court, Marc van der Woude, who had been invited on the occasion.

[55]Numerous amendments have been proposed on a wide diversity of matters, such as the publicity of parties' submissions (as seen *supra*), the creation of a conciliation mechanism between the Court of Justice and national courts to avoid clashes, for example on *ultra vires* cases, or the development of an *amicus curiae* practice.

[56]*See* p. 156-157.

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