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### Luxembourg Judicial Style With or Without the UK

Fernanda Nicola

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## Luxembourg Judicial Style With or Without the UK

Fernanda G. Nicola\*

ARTICLE  
LUXEMBOURG JUDICIAL STYLE WITH OR  
WITHOUT THE UK

*Fernanda G. Nicola\**

ABSTRACT.....	1506
I. INTRODUCTION .....	1507
II. GLOBAL CONSTITUTIONALISM AND LUXEMBOURG JUDICIAL STYLE: FROM OUTDATED TO DIPLOMATIC?.....	1511
III. HOW THE LUXEMBOURG JUDICIAL STYLE HAS CHANGED AFTER THE UK ACCESSION .....	1515
IV. ACT I: THE RULE OF RECOGNITION AND THE CHALLENGE OF THE EUROPEAN COURT OF JUSTICE .....	1518
V. ACT II: IS PARLIAMENTARY SOVEREIGNTY IN DANGER? THE RESISTANCE TO PURPOSIVE INTERPRETATION IN BRITISH COURTS.....	1523
VI. ACT III: THE EROSION OF PARLIAMENTARY SOVEREIGNTY THROUGH PRELIMINARY REFERENCES .....	1527
VII. ACT IV: PARLIAMENTARY SOVEREIGNTY REINSTATED: HOW MILLER SAVES THE DAY ..	1531
VIII. CONCLUSION: THE PERSISTENCE OF THE LUXEMBOURG JUDICIAL STYLE AFTER BREXIT.....	1533

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*ABSTRACT*

“Were the Court to leave the world, the world would continue without our participation,”<sup>1</sup> writes Justice Breyer to explain that global constitutionalism will survive regardless of the more or less isolationist role that the US Supreme Court chooses for itself. In an era of increasing relevance of international treaties, Breyer explains, the Supreme Court has acquired a deeper knowledge of other legal systems and its judges welcome exchanges with foreign judges, bar associations and students.<sup>2</sup> The parallel with the US context is that even if the United Kingdom leaves the EU and “Brexit means Brexit,” in its harder or softer version, its domestic courts will not become secluded nor change their judicial style as soon as a new Treaty between the UK and the EU is concluded. Similarly, the transnational judicial style of the Court of Justice of the EU (“CJEU”) interpreting European law is unlikely to change because of Brexit. The influences of EU law on UK law and vice-versa will endure. If French remains the working language of the Court of Justice, there is no doubt among lawyers and judges that English will remain the most common spoken language for working at or with the Court. So even if the Luxembourg judicial style will not change much more than it already did in incorporating a common law jurisdiction in its predominantly continental legal style, the biggest consequence of Brexit is the end of flux of preliminary references coming from the UK lower courts to Luxembourg.<sup>3</sup> Since 1973 the judicial dialogue between UK courts and Luxembourg has transformed the judicial hierarchy and the legal practice of domestic courts. Terminating the “direct” jurisdiction<sup>4</sup> of the CJEU on UK courts, as Prime Minister Theresa May has forcibly demanded, will not end the more indirect influence of EU law on UK courts and its lawyers.

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1. STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* 245 (2015).

2. *Id.* at ch. 11.

3. See Takis Tridimas, *Knocking on Heaven’s Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure*, 40 *COMMON MARKET LAW REVIEW* 9, 36 (2003).

4. See *Britain cannot escape the long arm of European Law*, *THE ECONOMIST* (Aug. 26, 2017), <https://www.economist.com/news/britain/21727039-though-government-may-pretend-otherwise-european-court-justice-will-have-role-after>.

### I. INTRODUCTION

While being initially *sui generis*, the judicial style of the European Court of Justice (“CJEU”) has become increasingly relevant within and beyond EU borders as a transnational adjudication model for global constitutionalism.<sup>5</sup> Since the adoption of the Nice Charter of Fundamental Rights, bound to mark the beginning of a new European era, scholars have appraised the Luxembourg style for its low judicial transparency due to its *per curiam* deliberations compared to other transnational courts.<sup>6</sup> For instance in defying the practice of citing foreign judgments the CJEU appeared timid *vis à vis* the rest of the world, especially when compared to its regional counterpart, the European Court of Human Rights in Strasbourg.<sup>7</sup>

In the aftermath of the many European crises, however, the Luxembourg judicial style has become more visible due to a number of different factors including the expansion of EU competences on which the CJEU should give its uniform interpretation, the reduction of its enormous docket due to its efficient distribution of workload among its two courts, and its less formalist yet eclectic legal reasoning coupled by a less convoluted but still minimalist style. For instance, the Court’s jurisprudence interpreting human rights regimes and international trade agreements have important global implications beyond EU borders. In addition, its judicial dialogue with national courts and their resistance to Luxembourg’s primacy have become part of a unique European legal space.<sup>8</sup> In short, all eyes are on Luxembourg and its dialogue with domestic, constitutional and international courts.<sup>9</sup>

Since its accession to the European Economic Community in 1973, UK judges, lawyers and legal scholars over time have

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5. Anne Peters, *The Merits of Global Constitutionalism*, 16 INDIANA J. GLOBAL LEGAL STUD. 397, 397-98 (2009) (“Global constitutionalism is an academic and political agenda that identifies and advocates for the application of constitutionalist principles in the international legal sphere in order to improve the effectiveness and the fairness of the international legal order.”).

6. See Jeffrey L. Dunoff & Mark A. Pollack, *The Judicial Trilemma*, AMERICAN JOURNAL OF INTERNATIONAL LAW (forthcoming 2017) (available at <https://ssrn.com/abstract=2955172>).

7. See Christopher McCrudden, *Using Comparative Reasoning in Human Rights Adjudication: The Court of Justice of the European Union and the European Court of Human Rights Compared*, 15 CAMBRIDGE Y.B. EUR. LEGAL STUD. 383 (2013).

8. See ARMIN VON BOGDANDY, *THE TRANSFORMATION OF EUROPEAN LAW: THE REFORMED CONCEPT AND ITS QUEST FOR COMPARISON* (Max Planck Institute for Comparative Public Law & International Law, 2016).

9. See Koen Lenaerts, *La Vie Après L’avis: Exploring the Principle of Mutual (Yet Not Blind) Trust*, 54 COMMON MARKET LAW REVIEW 805, 805–840 (2017).

contributed through its common law traditions to influence the legal reasoning and the judicial style of the CJEU. By the same token, UK legal elites and, in particular, judges have continued to adapt or resist the Luxembourg judicial style back home. Several scholars have explained how UK courts had to adapt to the Community legal order with its new judicial architecture and legal reasoning without knowing how they would become an integral part of it.<sup>10</sup> While judicial adaptation happened through the inclusion of doctrines such as proportionality and legitimate expectation, for instance, in UK administrative law,<sup>11</sup> some judges remained faithful to a more formalist interpretation of statutes more in tune with the parliamentary sovereignty tradition as a way to resist the primacy of EU law and maintain the British tradition challenge by the “incoming tide” of the EU Treaty.

The central legal fiction in the post-accession legal order was that Community law was only directly applicable in national law through the European Communities Act adopted by the UK Parliament in 1972. This fiction allowed maintaining the centrality of parliamentary sovereignty while taming the fear of a necessary erosion of sovereignty expressed especially by politicians in the Labor Party.<sup>12</sup> Without departing from the principle of parliamentary sovereignty, UK courts were now asked to review and possibly set aside the Westminster’s laws when incompatible with Community law. In doing so, national judges were given broad discretion to interpret or refer to Luxembourg domestic laws.<sup>13</sup> Not all UK judges were able to exercise such discretion and instead they expressed their resistance to primacy of EU law by setting aside incompatible national law recognizing, but at the same time, reinstating, the hierarchy of parliamentary sovereignty in the UK legal order.<sup>14</sup>

With the UK exodus from the EU, there is some questioning among lawyers about whether the Luxembourg style will continue and

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10. See John Bridge, *National Legal Tradition and the Common Law: Legislative Drafting and Juridical Interpretation in England and the European Community*, 19 J. OF COMMON MKT. STUD. 351, 353 (1981).

11. See Jonathan E. Levitsky, *The Europeanization of the British Legal Style*, 42 AM. J. OF COMPARATIVE L. 347, 375 (1994).

12. See *Labor and Common Market*, Report on the Exchange with UK Lawyers in 1962 at 51 (on file with author).

13. See *Simmmenthal S.P.A. v. Amministrazione Delle Finanze dello Stato*, Case 106/77, 1978 E.C.R. I-0629.

14. *Thoburn v. Sunderland City Council*, 195 EWHC Admin (2002), ¶ 67.

the English will remain a language of wide use, together with French, among judges, *référendaires* and lawyers linguists as well as those solicitors and barristers litigating the many riddles of EU law in Luxembourg. However, little attention has been given to how the repeal of the European Communities Act by the Great Repeal Bill impacts domestic courts and their institutional functions.<sup>15</sup> In the aftermath of the *Miller* judgment, EU law as held by the Supreme Court “through the conduit pipe”<sup>16</sup> of the European Communities Act, remains an integral part of the UK legal system from which domestic courts might find it hard to disentangle. The more interesting question would be how post-Brexit the national court will treat the CJEU case law ranging from precedent, persuasive or no authority whatsoever.<sup>17</sup> The harder question though is whether once precluded from making preliminary references and setting aside national law, British courts will return quietly to their pre-accession style rather than exercising the extensive power of judicial review on legislative and executive acts they enjoyed in the EU judicial space. As some have noticed, however, the Human Rights Act 1998 may well also empower the courts in a similar way, though here all the courts can do is declare national law incompatible with the HRA 98 and not display it as in EU Law.<sup>18</sup>

This contribution will proceed by first showing the relevance of the Luxembourg judicial style in global constitutionalism. The UK influence through its judges, advocate generals and lawyers participating to the process of “Europeanization of domestic law” has changed and added common law features to the CJEU style. Then I will address in four Acts the Brexit drama in the complex interplay between Community and UK law. Even though the drama over Brexit has been

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15. Thomas Horsley, *Brexit and UK Courts: Awaiting Fresh Instruction*, in THE UK AFTER BREXIT LEGAL AND POLICY CHALLENGES 74 (Michael Dougan ed.) (July 2017).

16. Jeffery Miller, A View from the Trenches: Lessons from *Coleman v. Attridge Law* (May 9, 2017) (unpublished dissertation, European University Institute) (on file with author).

17. See *The Government's Negotiating Objectives*, House of Commons White Paper, HC 1125, at ¶ 30 (4 April 2017) <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmexeu/1125/1125.pdf> (“Once the European Communities Act 1972 is repealed, UK courts will no longer be bound by decisions of the Court of Justice of the European Union (CJEU). . . . [h]owever, the extent to which UK courts continue to take account of CJEU case law remains to be decided.”).

18. See generally RICHARD GORDON QC AND ROWENA MOFFATT, BREXIT: THE IMMEDIATE LEGAL CONSEQUENCES 30-31 (2016). Gratitude and credit to Giorgio Monti for this contribution.

described in either six or three acts by prominent EU Law academics,<sup>19</sup> the focus on the Luxembourg judicial style and the “legal irritation”<sup>20</sup> of the UK legal profession having to adjust to EU law and the interpretation of the Court of Justice has not been central to this debate. This is evident from the documents of the Commission’s Legal Service many showing that lawyers and the Commission’s civil servants had, since 1962, found several elements for legal irritation in the clash between different methods of statutory interpretation and in the new judicial architecture that through the preliminary ruling allowed UK court to refer cases directly to the Court of Justice. This created a dangerous liaison outside the scope of the darling parliamentary sovereignty tradition in the United Kingdom.

In Act I this article shows the concerns lawyers and the Commission had on reconciling the UK with the Community legal system since the early 1960s. In relying on archival materials from both the Commission’s legal services files as well as in the Prime Minister Harold Wilson’s speeches it becomes clear that the principle of parliamentary sovereignty plays a central role to the UK accession to the EEC. Act II shows how the acceptance of and resistance to European law happened among British high Court judges in the 1970s. Act III explains how later in time the preliminary reference to Luxembourg allowed domestic courts to maintain their a textualist interpretation of the CJEU decisions and repeal UK law without departing from parliamentary democracy. In Act IV the *Miller* judgment by the Supreme Court reappraises how parliamentary supremacy was reconciled with the primacy of EU law in a UK dualist legal system without really focusing on oddity of the existence of a preliminary ruling mechanism. In conclusion, after this four act drama, the Luxembourg judicial style might not change much yet Brexit will create more turmoil within UK courts. These will have the hard task to operationalize the international Treaty that will be in place within the short timeframe of Art. 50 TEU but this time without the possibility of referring questions on its interpretation to Luxembourg.

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19. See Paul Craig, *Brexit – A Drama in Six Acts* 41 *EL REV.* 447 (2016); Tamara Čapeta, *Brexit and the EU constitutional order: a Three Act Tragedy* 42 *Croatian Yearbook of European Law and Policy* 1 (2016).

20. See Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences*, 61 *MODERN LAW REVIEW* 11, 11-32 (1998).

*II. GLOBAL CONSTITUTIONALISM AND LUXEMBOURG JUDICIAL STYLE: FROM OUTDATED TO DIPLOMATIC?*

The constitutional debate on the use of foreign law and practice in domestic courts remains a hotly contested issue, especially so in a Trump-Brexit era when the reaffirmation of national sovereignty through the rise of extremist values and political and economic introspection are in the ascendency. Famously, just over a decade ago, Justices Stephen Breyer and Antonin Scalia debated the use of foreign law by the Supreme Court of the United States,<sup>21</sup> with Scalia's more insular approach seemingly winning the day, despite the opposing preferences of other Justices, such as Breyer, Ginsburg<sup>22</sup> and Kennedy.<sup>23</sup> Since then, Justice Breyer has restated the case for the judge to also be a "diplomat" and to learn from foreign legal ideas, for instance the European constitutional concept of proportionality when adjudicating on the First Amendment.<sup>24</sup>

The CJEU has resisted to the use of foreign legal citations when these do not arise from the common legal traditions of its 28 Member states and with the increasing relevance of the cross citation of the ECtHR jurisprudence that creates a sort of cross-pollination.<sup>25</sup> Given nature of its transactional jurisdiction *vis-à-vis* twenty-eight EU member states the foreign influence remains relevant to the Court but in a rather indirect manner.<sup>26</sup> For instance no direct citation to the United States Supreme Court appears from the judgments of the CJEU even though the opinions of its advocates general sparsely cite the U.S. jurisprudence.<sup>27</sup> This is in sharp contrast from its regional counterpart, the European Court of Human Rights based in Strasbourg that openly cites in its decisions the judgments of other constitutional and

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21. Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justices Antonin Scalia and Stephen Breyer*, 3 INT'L J. CONST. L. 519-531 (October 1, 2005).

22. Lyle Denniston, *Ginsburg on Kagan and Foreign Law*, SCOTUS BLOG (July 30th, 2010), 6:19 PM, <http://www.scotusblog.com/2010/07/ginsburg-on-kagan-and-foreign-law/>.

23. *Roper v. Simmons* 125 U.S. 1183 (2005) (plurality opinion)

24. Breyer, *supra* note 1, at ch.15.

25. See McCrudden, *supra* note 7; Siniša Rodin, *Constitutional Relevance of Foreign Court Decisions*, 64 AM. J. COMPARATIVE L. 815, 815-840 (2016); GÁBOR HALMAI, *THE USE OF FOREIGN LAW IN CONSTITUTIONAL INTERPRETATION* 1328-48 (M. Rosenfeld & A. Sajó eds., 2012).

26. See Koen Lenaerts & Kathleen Gutman, *The Comparative Law Method And The European Court Of Justice: Echoes Across The Atlantic*, 64 AM. J. OF COMPARATIVE L. 841 (2016).

27. Refer to AG Saggio and AG Jacobs.

international courts.<sup>28</sup> Due to the self-restraint of the CJEU, looking into citations might not be the best way to assess the influences coming from foreign courts and vice-versa. Rather, as suggested by Justice Breyer, there are ways to encourage judicial diplomacy by exchanging views that will influence the legal reasoning of the judges in understanding how the CJEU has used the doctrine of proportionality to enhance precision and transparency in their judgments<sup>29</sup> and created the primacy of EU law on domestic law even though national courts retain their final word on it.<sup>30</sup>

Scholars of global constitutionalism have assessed how constitutional law making is increasingly relevant in an international context and in particular through the lenses of transnational dialogue among domestic and supranational courts,<sup>31</sup> through the concept of migration of constitutional ideas,<sup>32</sup> and the notion that judicial comparativism can be a form of judicial diplomacy.<sup>33</sup> Scholars of global constitutionalism seek to highlight how courts are in permanent dialogue with foreign judges, international members of the bar and even students of law so that some of these exchanges of ideas might end up influencing the constant evolution of judicial lawmaking.<sup>34</sup>

In this context, the CJEU's opaque and meticulous judicial style has been criticized by commentators for its lack of transparency and consistency, characterized by the secrecy of its deliberations and informal procedures.<sup>35</sup> In the 1960s, the judicial style of the Court was clearly embedded in different civil law traditions, as its German,

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28. See *Oliari and Others v. Italy*, App. No. 18766/11, 36030/11 Eur. Ct. H.R. § 4 (2015).

29. Breyer, *supra* note 1, at 262.

30. *Id.* at 245.

31. See Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L. J. 487 (2005) (cited by U.S. Supreme Court Justice Antonin Scalia in his concurring opinion in *Kansas v. Marsh*, 126 S.Ct. 2516 (2006)).

32. SUJIT CHOUDHRY, *THE MIGRATION OF CONSTITUTIONAL IDEAS* (2008).

33. David Law, *Judicial Comparativism and Judicial Diplomacy*, 163 U. PENN. L. REV. 927 (2015).

34. RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* Ch. 4-6 (2014); *but see*, Armin von Bogdandy, *Comparative Constitutional Law As a Social Science? A Hegelian Reaction to Ran Hirschl's Comparative Matters*, MAX PLANCK INST. COMP. PUB. L. & INT'L L. (2016).

35. See Alberto Alemanno & Oana Stefan, *Openness at the Court of Justice of the European Union: Toppling a Taboo*, 51 COMMON MKT L. REV. 97 (2014); Angela Huyue Zhang, *The Faceless Court*, 38 U. PA. J. INT'L L. 71 (2016); J.H.H. Weiler, *Epilogue: Judging the Judges – Apology and Critique*, in *JUDGING EUROPE'S JUDGES: THE LEGITIMACY OF THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE* 235 (Maurice Adams et. al., eds., 2013).

French, Italian, and Benelux judges' Romano-Germanic traditions were the predominant legal culture among judges. In the best civil law tradition, judges should have been mere interpreters of the EEC Treaty and write their judgments in a succinct and overly structured fashion. By the same token, their succinct style, allowed them to exercise more discretion in interpreting the gaps, conflict and ambiguities in the Treaty than common law judges. In fact, when it came to follow or overrule their precedents, without saying so, continental judges used teleological interpretation subverting the classic international law interpretative method.<sup>36</sup>

From 1973 onwards civil lawyers were no longer the prominent legal tradition in the CJEU and the EEC accession of the United Kingdom, Ireland and Denmark brought significant new judicial styles to Luxembourg. In particular, several authors highlighted how, initially modeled on the French *Conseil d'Etat*, the Court shifted to more eclectic style in interpretation ranging from the use of civilian general principles to common law tools such as *stare decisis* and an argumentative style driven by policy considerations.<sup>37</sup> As Justice David Edwards explained the civil law tradition provided a strategic tool to judge-made law requiring fewer justifications: "Perhaps the Court has brought an apparently "civilian" approach to bear simply because it is a sensible way to think about law, which neither consciously nor unconsciously reflects the civilian upbringing of most of the judges."<sup>38</sup> What is important to highlight, is that common law discursive style, however, was more formalist than its civil law counterpart with respect to statutory interpretation. In this realm UK judges who were not interpreting the common law rules based on precedents but rather Parliamentary acts, expressing the will of Westminster, had much less discretion than its civilian counterparts to depart from the literal or plain meaning of the statutes.

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36. See *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, 1963 E.C.R. I-2 (in which the ECJ subverts the order of Treaty interpretation starting from the goal rather than the textual meaning of its words).

37. See Takis Tridimas, *Precedent and the Court of Justice. A Jurisprudence of Doubt?*, in PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 307, 308 (Julie Dickson et. al. eds. 2012); MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 203 (2004).

38. See David Edward, *The Role and Relevance of the Civil Law Tradition in the Work of the European Court of Justice*, in THE CIVILIAN TRADITION AND SCOTS LAW: ABERDEEN QUINCENTENARY ESSAYS at 14 (D.L. Carey Miller et. al., eds. 1997).

In Weiler and De Búrca's edited volume, appraising the Court's new judicial architecture *après Nice*,<sup>39</sup> the amount of scholarly work focusing on the CJEU increased exponentially. There was then, and in part continues nowadays, a common howling regarding the Luxembourg judicial style that, despite its increasing prominence and relevance in Europe, received relatively little scholarly attention outside the EU or globally.<sup>40</sup> Some scholars remain unhappy with the lack of transparency in the Court's decisions that takes away from its clarity in judicial reasoning. This quest for transparency remains unsatisfied for those who point at the lack of dissenting and concurring opinions,<sup>41</sup> and the non-explicit use of comparative legal sources on which the Court relies.<sup>42</sup>

Thus, Luxembourg's outmoded flair, mostly derived from the continental "cryptic, Cartesian style"<sup>43</sup> should be abandoned, according to Weiler, in favor of a "more discursive, analytic and conversational style associated with the common law world."<sup>44</sup> To Weiler the civil law style does not serve the needs of constitutionalism because: "[it] is not a basis of confidence-building European constitutional relations between the European Court and its national constitutional counterparts."<sup>45</sup> On the one hand, this statement is a premonition of the current primacy epics such as *Gauweiler*,<sup>46</sup> *Ajos*<sup>47</sup> and *Taricco*<sup>48</sup> characterized by the resistance of national constitutional courts. In all these cases constitutional law scholars have criticized the cryptic style of the CJEU and its indifference to the legal national

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39. Weiler, *supra* note 34.

40. See Daniela Caruso, *European Union Law in U.S. Legal Academia*, 20 *TUL. J. INT'L & COMP. L.* 175 (2011).

41. See V.F. Perju, *Reason and Authority in the European Court of Justice*, 49 *VA. J. INT'L L.* 307 (2009); Jeffrey L. Dunoff & Mark A. Pollack, *International Judicial Dissent: Causes and Consequences* (2015), <https://eustudies.org/conference/papers/download/84> (unfinished draft paper prepared for presentation at the European Union Studies Association Biennial Conference, Mar. 5–7, 2015).

42. Gráinne de Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, 20 *MAASTRICHT J. EUR. & COMP. L.* 168 (2013); McCrudden, *supra* note 7.

43. Weiler, *supra* note 34.

44. *Id.* at 219.

45. *Id.*

46. *Gauweiler and Others*, Case C-62/14, EU:C:2015:400 [2015].

47. *Dansk Industri v. Rasmussen*, Case C-441/14, EU:C:2016:278 [2016].

48. *Taricco and Others*, Case C 105/14, EU:C:2015:555 [2015].

traditions.<sup>49</sup> On the other hand, Weiler's statement is limited by its own constitutional framework for which the Court is no longer an international tribunal, but rather a constitutional actor at the center of European legal evolution.<sup>50</sup> In contrast to such a view, scholars have characterized the CJEU as a constitutional as well as administrative jurisdiction<sup>51</sup> through which the dialogue with a wide variety of international courts and international organization characterizes the global reach of EU law.<sup>52</sup>

In the aftermath of the Brexit referendum the Court has a slimmer docket, a reformed architecture and it has shown new interpretative guidance especially in the area of international investment with the opinion of UK advocate general Eleanor Sharpston,<sup>53</sup> or the interpretation of international free trade agreements potentially having third party effects beyond the contracting parties.<sup>54</sup> Because of this awareness of its global role, the minimalist Luxembourg judicial style appears more functional to maintain the interplay between law and diplomacy,<sup>55</sup> thus serving a strategic purpose rather than reflecting a civil law outlook. Caught by the Brexit dilemma of a UK that should be at the same more inward looking but aspire to a global influence, British courts will no longer be in direct dialogue with Luxembourg but will continue to closely monitor the jurisprudence of the CJEU.

### III. HOW THE LUXEMBOURG JUDICIAL STYLE HAS CHANGED AFTER THE UK ACCESSION

With the accession of Denmark, Ireland and the United Kingdom in 1973, the predominance among civil law traditions was no longer the status quo in Luxembourg with the entrance of common law and Scandinavian legal systems in the Community. The influence of the common law style began showing its effects in the CJEU's more

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49. GIUSEPPE MARTINICO & ORESTE POLLICINO, THE INTERACTION BETWEEN EUROPE'S LEGAL SYSTEMS: JUDICIAL DIALOGUE AND THE CREATION OF SUPRANATIONAL LAWS 227 (2012) (citing Bin and Fabbrini)

50. See Weiler, *supra* note 34.

51. PETER LINDSETH, POWER AND LEGITIMACY: RECONCILING EUROPE AND THE NATION-STATE (2010).

52. ELAINE FAHEY, THE GLOBAL REACH OF EU LAW (2016).

53. See Sharpston Opinion 2/15 on Singapore- EU Free Trade Agreement

54. See *Council v. Front Polisario*, Case C-104/16P, 2016 E.C.R. 677.

55. See Mikael Madsen, *From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics*, 32(1) LAW AND SOCIAL INQUIRY 137-159 (2007).

careful analysis of its own precedents, which by the 1980s, were also of greater number.<sup>56</sup> In asserting the influence of precedent in famous cases such as “Buy Irish”<sup>57</sup> and through expressions such as “as the Court repeatedly held,”<sup>58</sup> the use of the common law tradition was also a strategy to assert the legitimacy and coherence of the Court’s jurisprudence, showing to a newcomer (the Republic of Ireland in that case) that even advertising measures promoted by a private body could fall under the restrictions of Article 34 TFEU.

The UK legal system through its barristers, advocate generals, judges and civil servants now into the Community institutions managed to influence the Luxembourg’s procedure. For instance, UK lawyers were advocating in favor of expanding the rights of parties, such as in the infringement procedure that the Commission can bring before the Court against the member states under Article 258 TFEU. Throughout the Commission’s proceedings, states are considered litigants with procedural rights of notification and information rather than “a sinner who ought to repent.”<sup>59</sup> As a result, the Court held that when the Commission fails to fulfill an essential procedural requirement, such defect will taint the judgment in favor of the state.<sup>60</sup>

The UK style in Luxembourg became more prominent through the opinions of its advocate generals, such as the half-French Jean-Pierre Warner (1973-81) then Francis G. Jacobs (1988-2006) replaced by Eleanor Sharpston (2007-present), the first UK woman to take this position. It is worth noticing that historic UK judges such as Alexander Mackenzie Stuart (1973-1988) and David Edwards (1992-2004) were both Scottish; not by chance the government had named Scottish judges coming from a hybrid legal system resenting both civil and common law influences.

For instance, the role of A.G. Jacobs was central with respect to the protection of individuals through an effective judicial review that ensures the observance of the rule of law the CJEU did not fully change

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56. See Tridimas, *supra* note 37.

57. See Case 249/81, *Comm’n v. Ireland*, 1982 E.C.R. 4005.

58. See Thijmen Koopmans, *The Birth of European Law at the Crossroads of Legal Traditions*, 39 AM. J. COMP. L. 493, 504 (1991)(citing Case 113/80, *Comm’n v. Ireland*, 1981 E.C.R. 1625, 1639).

59. See Tim Koopmans, *The Court of Justice and National Legal Traditions*, in LA COUR DE JUSTICE DES COMMUNAUTÉS EUROPÉENNES 1952–2002: BILAN ET PERSPECTIVES; ACTES DE LA CONFÉRENCE ORGANISÉE DANS LE CADRE DU CINQUANTIE ME ANNIVERSAIRE DE LA COUR DE JUSTICE 15, 22 (2004).

60. See *Comm’n v. Germany*, Case C-431/92, 1995 E.C.R. I-2189, ¶ 45.

this aspect of its jurisprudence.<sup>61</sup> The tension, however, arose around the narrow avenue in judicial review for individuals to challenge general measures became clear with the 1998 *Greenpeace* case, in which the environmental organization was denied standing, and led to the subsequent opinion delivered by advocate general Francis Jacobs in the *UPA* case,<sup>62</sup> now a classic among EU lawyers,<sup>63</sup> advocating a flexible approach in the interpretation of the test for standing, without departing from the notion that individual concern would fully protect individual rights.<sup>64</sup>

Despite a short-lived victory when the opinion was adhered to by the General Court, the Court of Justice ultimately rejected advocate general Jacobs's expansive interpretation.<sup>65</sup> As a result, when there is no remedy for private individuals, the Court "puts the onus on the national courts to do all they can to create one."<sup>66</sup> Jacobs also noted that his opinion stirred a vigorous debate, not only among academics, but also in relation to the new drafting of the Lisbon Treaty. Yet the new formulation of Article 263(4) TFEU did not create a smoother avenue for individual applicants. Rather, because of a slip in the wording of the Lisbon Treaty, it required further judicial interpretation, ultimately causing the CJEU to hold that judicial review of "regulatory acts" is nearly precluded for private applicants.<sup>67</sup>

Under the influence of UK lawyers and judges in favor of having more of an adversarial and oral character to the litigation in Luxembourg,<sup>68</sup> the CJEU reformed its oral procedure, allowing judges

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61. See Angela Ward & Locus Standi, *Under Article 230(4) of the EC Treaty: Crafting a Coherent Test for a Wobbly Polity*, 22 Y.B. EUR. L. 45 (2003).

62. See *Unión de Pequeños Agricultores v. Council*, Case C-50/00 P, 2002 E.C.R. I-06677, ¶¶ 59–72.

63. See Catherine Barnard, *Studying EU Law: A Law Student's Guide*, EU LAW ANALYSIS (Oct. 2016), <http://eulawanalysis.blogspot.com/p/studying-eu-law-catherine-barnard.html>

64. See Rosa Greaves, *Commentary on Selected Opinions of Advocate General Jacobs*, 29 FORDHAM INT'L L.J. 690, 712–14 (2006).

65. See *Unión de Pequeños Agricultores*, Case C-50/00 P, ¶¶ 41–45 (deferring to member states the creation of a system of legal remedies and procedures that ensure the right to effective judicial protection).

66. See Francis G. Jacob, *Effective Judicial Protection of Individuals in the European Union, Now and in the Future*, in THE TREATY OF NICE AND BEYOND 335 (Mads Andenas & John Usher eds., 2003).

67. See Roberto Mastroianni & Andrea Pezza, *Access of Individuals to the European Court of Justice of the European Union Under the New Text of Article 263*, ¶ 4, TFEU, 5 RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO 923 (2014).

68. R. DANIEL KELEMEN, EUROLEGALISM: THE TRANSFORMATION OF LAW AND REGULATION IN THE EUROPEAN UNION (2011).

to entertain possible hearings of submissions from interested parties and, if appropriate, from the advocate general.<sup>69</sup> This change was not favored by all judges or advocate generals coming from a legal tradition in which oral hearings are not crucial to their deliberation and might only lengthen the time of the procedure in Luxembourg.<sup>70</sup>

In exceptional cases, the Court could even reopen a case for oral arguments if it had a sense that a decision could not be made without a full discussion of the issues at stake.<sup>71</sup> Such oral hearings are not always a pleasant experience for civil law judges, advocate generals and lawyers in Luxembourg; at times, they lengthened the procedure or augmented confusion, instead of providing clarity to the case.<sup>72</sup> However, the oral procedure shaped the legal culture in a way that enabled Luxembourg to coagulate its dialogue with the bar and to require that lawyers be prepared to engage judges in discussion.

Some advocate generals, not surprising the UK ones, take more advantage of this oral discussion than other, to better understand the factual circumstances of each case and their distributive consequences. For instance I have argued elsewhere that A.G. Sharpston's common law background made her more sensitive to these types of considerations especially when EU law could impact the powers and resources of differently situated groups.<sup>73</sup>

#### *IV. ACT I: THE RULE OF RECOGNITION AND THE CHALLENGE OF THE EUROPEAN COURT OF JUSTICE*

The fact that the UK would join the European Economic Community (EEC) was already raising some concerns in the Brussels circles in the early 1960s. The UK applied twice to become a member of the EEC and both applications in 1961 and 1967 under Prime Minister Harold Wilson were vetoed by French President Charles de Gaulle worried that UK membership could weaken the community and

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69. See *Transocean Marine Paint Ass'n v. Comm'n*, Case 17/74, 1974 E.C.R. 1063 (the first case in which the Court of Justice recognized the right to an oral hearing).

70. See Matilde Cohen, *Ex Ante Versus Ex Post Deliberations: Two Models of Judicial Deliberations in Courts of Last Resort*, 62 AM. J. COMP. L. 951 (2014).

71. See *Comm'n v. United Kingdom*, Case 170/78, 1980 E.C.R. 417; Koopmans, *supra* note 58, at 503 (citing the opinion of Advocate General VerLoren van Themaat).

72. See Koopmans, *supra* note 58, at 505.

73. See Fernanda Nicola, *Conceptions of Justice from Below: Distributive Justice as a Means to Address Local Conflicts in European Law and Policy* (American University, WCL Research Paper No. 2014-42, August 19, 2014), <https://ssrn.com/abstract=2483032> (referencing AG Sharpston's opinion in Belgium Insurance Scheme).

enhance the influence of the United States on Europe. Finally in 1973 the conservative Prime Minister Edward Heath took the UK into the Community with the strong support of the Confederation of British that published several industrial appraisals showing how the benefits to join the community outweighed the costs. When the opposition Labor leadership came back into power with the mild socialism of Harold Wilson, he launched a referendum that confirmed with over 65% in 1975 the continued membership of the UK to the Community.<sup>74</sup>

Another concern was the fact that the UK was after WWII a reluctant European country,<sup>75</sup> and even more worrisome was the different legal culture. This was based on two central premises: on the one principle of parliamentary sovereignty entailing the constant although formalist dialogue between courts and parliament and the other was the common law style foreign among the six founding members of the ECC. In particular, the common law style entailed both stylistic and legal reasoning differences in judicial law making including the binding use of precedents, *stare decisis*, the wide-use of facts, an open engagement with policy considerations and the textual interpretation of statutes avoiding manufactured interpretations by judges based on the legislative history of the statutes. In the absence of a constitution, English judges were striving to a “work-fidelity” in the interpretation of statutes, keen to look at facts to induce their legal reasoning while constrained by their own legal precedents.<sup>76</sup> The common law remained highly formulaic and, despite its medieval writ system has been eliminated this model left in place procedural restraints and guarantees through which the presentation of legal claims or legal defenses became central to protect individual rights.<sup>77</sup>

Once the Crown had ratified the treaty of accession it was clear among lawyers in the Commission, the Assembly and in the UK that Community law could become English law treated as such by English courts only with an Act of Parliament due to the limited powers of the Crown to sign the Treaty of Rome in the dualist UK legal system. In an explanatory memorandum the Commission explained how without the

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74. PHILIP ZIEGLER, WILSON: THE AUTHORIZED LIFE (1993).

75. DAVID GOWLAND AND ARTHUR TURNER, RELUCTANT EUROPEANS: BRITAIN AND EUROPEAN INTEGRATION 1945-1998 (2014).

76. See McCrudden, *supra* note 7, at 64.

77. See Michele Graziadei, *Rights in the European Landscape: A Historical and Comparative Profile*, in *The Coherence of EU Law* 63, 87 (Sacha Prechal & Bert van Roermund eds., 2008).

Act of Parliament there was a twofold problem: some of the Treaty articles would not have had self-executing effect, national courts could have not referred preliminary references to Luxembourg based on Article 177 and regulations would have had to be implemented by an Act of Parliament thus foregoing the annulment proceeding before European institutions in Luxembourg.<sup>78</sup> Even though the Act of Parliament could [insert] some of the legal implications of the UK accession the central principle that remained a problem was the notion of parliamentary sovereignty.

This notion implied that without a constitution Parliament is completely “unfettered and free to make or unmake any law it wishes.” Such doctrine lead to two distinct and interrelated problems for Community law, first was the fact that if parliamentary sovereignty could not bind its successors there was no statute of such nature that could not be repealed later by a simple Act of Parliament. Second, courts were bound to give effect to Parliamentary sovereignty so that any subsequent act of parliament contrary to previous inconsistent legislation meant an implied repeal of the earlier statute.<sup>79</sup>

In practice, however, the British legal system provided some *escamotages* especially with respect to international Treaty obligations for which a parliamentary convention provided that “the Parliament must not pass legislation which is inconsistent with the treaty obligations of the United Kingdom” otherwise such Act would be illegal and even if adopted, would have to be enforced by domestic courts. Paradoxically, in order to respect the doctrine of parliamentary sovereignty, a *praxis* rather than a statute, created a presumption that Courts were bound to the textual interpretation even of an illegal statute.<sup>80</sup>

Since 1962 the Legal Service of the Commission had organized different meeting to have the opportunity of discussing with British lawyers about some of the fundamental problems they envisaged in the EEC accession. At the center of their concerns there was the same need to reconcile parliamentary sovereignty and the need of an enabling legislation by the Parliament of the Treaties and Community regulation to make these self-executing. Yet even more pressing was the question

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78. See Memorandum from M. Mathew, Rapporteur for the Commission des Affaires Generales, Assembly of the Western European Union (1962), at 3-4.

79. *Id.* at 4.

80. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 292 (1915) (commenting on the power of conventions on UK constitutional law).

of judicial hierarchy in the UK and the new role to be played by the Court of Justice *vis à vis* English courts:

In General the British lawyers were anxious to ascertain to what extent the judicial remedies available and the procedure before the Court of Justice differ from the practice and standards of the English judicial system. In particular the British lawyers assessed the vital importance of a uniform interpretation of the Community law by the Court of Justice, as provided by the EEC Treaty Art 177.<sup>81</sup>

Due to these concerns, the Commission was eager to mobilize the UK bar and in a second report in June 1962 the Legal Services had a meeting at the Europa Institute at Leyden, this time also with members of the bench, practicing lawyers and academics. Similar problems were raised at this second meeting with respect how to reconcile the UK rule of recognition of parliamentary supremacy and also how to maintain the traditional judicial hierarchy of their legal system:

British lawyers were particularly anxious to clarify the meaning of the court of law instance as provided for by Article 177, paragraph 3. [...] Generally the British lawyers seemed to favor in one way or another the view that for all practical purposes the Court of Appeal should be considered as the Court of last instance.<sup>82</sup>

The breakthrough, however, was that not only problems but possible solutions were presented on how to reconcile the English legal system with Community law. Even though the Parliament would adopt a law transposing the Rome Treaty several conflicts were bound to arise between Community and UK law that will be solved either by the legislatures or by the court. Bound by the doctrine of parliamentary supremacy the majority of British lawyers anticipated having the legislature, rather than the courts through litigation, resolve the possible conflicts. The solution presented was that the Parliament would draft additional legislation “clearing up such conflicts”<sup>83</sup> between the Treaties and UK law, and in case of future regulation this could be timely informed by the government so “it could prepare the necessary modification to the English law.”<sup>84</sup>

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81. Legal Service of the European Commission, First Report on the Exchange of Views with British Lawyers JUR/1263/62 at 4 (May 29, 1962).

82. See Legal Service of the European Commission, Second Report on the Exchange of Views with British Lawyers JUR/1522/62 (June 22, 1962).

83. See First Report on the Exchange of Views with British Lawyers, *supra* note 81.

84. *Id.*

The solution found to the parliamentary sovereignty dilemma in 1962, was according to Norman Marsh a legal fiction to avoid recognizing a partial surrender of parliamentary sovereignty and let the post-accession legal system in a state of legal uncertainty:

The difficulty here would be practical. It would place an heavy burden on judges, they would have to decide how much of our law was inconsistent with the Treaty and therefore, by implication, repealed. They would have to interpret a Treaty to which this country was originally not a party and which was drafted in languages other than English; [...] What is more, the law would be left for a long time in a great state of uncertainty, and those unfortunate guinea-pigs, the litigants, would be put to trouble and expense in order to provide the cases on which the judges could give their rulings.<sup>85</sup>

This fictional solution, in support of parliamentary sovereignty with the exceptional role of Community law, also reappeared in Wilson's speech at the House of Common in 1967 explaining that:

[a]ccession to the Treaties would involve passing the United Kingdom legislation. This would be an exercise of course, of Parliamentary sovereignty, and it is important to realize that Community law existing and future, would derive its force as law in this country from that legislation passed by Parliament. It would be implicit in our acceptance of the Treaties that the United Kingdom would, in future refrain from enacting legislation inconsistent with Community law.<sup>86</sup>

Even though such legal fiction was central to the UK for the purpose of the accession, this argument was later used to fuel the resistance against Brussels. For instance in 1978 in an infringement procedure initiated by the Commission, *Commission v. UK*, the new Labor government in upholding the labor union interests expressly denounced a transport safety regulation adopted by the prior government that burdened lorry drivers with unnecessary and expensive safety features. In this context, labor secretary of Transport Rodgers openly addressed newspapers explaining that Community harmonization provisions were not binding on the UK since these were not laws adopted by parliament.<sup>87</sup>

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85. NORMAN S. MARSH, *THE COMMON MARKET AND THE COMMON LAW* 455-56 (1962).

86. See Speech to the House of Commons, Harold Wilson, Prime Minister, United Kingdom (1967), at 1089.

87. See *Commission v. Parliament*, C 128/78, Dossier de Procedure (1979).

The European Court of Justice reiterated that Member States were prohibited to apply provisions of Community law in an incomplete or selective manner, effectively annulling the aspects of Community legislation it opposes or deems contrary to national interests.<sup>88</sup> The court further noted that even implementation difficulties cannot preclude Members to opt out of fulfilling its obligation.<sup>89</sup> The court pronounced that a Member States' failure in the duty of solidarity undermines Community legal order.<sup>90</sup>

*V. ACT II: IS PARLIAMENTARY SOVEREIGNTY IN DANGER? THE RESISTANCE TO PURPOSIVE INTERPRETATION IN BRITISH COURTS*

One of the characteristics of the doctrine of parliamentary sovereignty as the Hartian rule of recognition of the British judicial style is that courts are not to go beyond the plain meaning of Westminster's statutes. Thus legal change, with some important exceptions in the common law, albeit limited by precedents, occurs slowly, and legislative law reforms are the preferred avenues of reform.<sup>91</sup> In 1962 when the Commission's legal services began its meeting with British lawyers they were adamant that a central problem of the accession was statutory interpretation because:

In their statutory construction English courts avail themselves in many instances of a literary interpretation, disregarding entirely the intention of the law-makers as expressed for example by hearings, various drafts or "*Travaux préparatoires*". [...] Following his rule of statutory construction an English judge might interpret a Treaty provision in an entirely different manner from his Continental colleagues.<sup>92</sup>

Despite the predominant use of the plain meaning rule by English courts, some well-known judges like Lord Denning on the Courts of Appeal, were in favor of adopting, instead, a purposive interpretation that was less formalistic and open to the scope and goals of a statute in question.<sup>93</sup> Even though the Court has done very little use of the *travaux préparatoires* and according to a traditional view these have

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88. *Id.* at 11-12.

89. *Id.* at 12.

90. *Id.* at 13.

91. Levitsky, *supra* note 11, at 350.

92. See First Report, *supra* note 81, at 3.

93. See Bridge, *supra* note 10, at 365.

played little importance in its interpretation until the mid-1990s,<sup>94</sup> others have pointed at this change in treatment in the use of the *travaux* as among other reasons the prominence of a Scandinavian legal tradition in Luxembourg. Yet with the increasing use of the travaux not only by the AGs<sup>95</sup> but also by the Court itself in recent judgments such as *Pringle* or *Gauweiler* has to be carefully analyzed as some scholars have explained “Reference to the drafters’ intent does not necessarily support dynamic interpretation, and may potentially even ossify historical interpretations.”<sup>96</sup>

For instance, Lord Denning explained that when faced with a legislative gap the judge must:

“set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give ‘force and life’ to the intention of the legislature.”<sup>97</sup>

The Luxembourg court since the 1960s in some of its iconic cases such as *Van Gend* or *Costa* had relied on a heterodox approach in which judges used literal and historical interpretations as well as teleological and comparative interpretations.<sup>98</sup> The possible reconciliation between Luxembourg’s teleological and comparative interpretation of the Treaty and the UK’s plain meaning approach, was through the use of the purposive interpretation advocated by Lord Denning. While this could create a strategic alliance between Lord Denning’s followers and Luxembourg, by the same token it could also trigger enormous resistance from the judges bound by textual interpretation of English law.<sup>99</sup>

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94. See S. Schonberg & K. Frick, *Finishing, Refining, Polishing: On the Use of travaux préparatoires as an Aid to the Interpretation of Community Legislation*, 28 EL REV. 149 (2003).

95. See for instance AG Kokott’s opinion in *INUIT* explaining that the Court should make greater use of the Treaties preparatory works as a supplementary means of interpretation.

96. See SAMULI MIETTINEN & MERITA KETTUNEN TRAVAUX, PREPARATORY WORK AS A SOURCE OF EU LAW 1-23 (CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES, SEPTEMBER 2015).

97. See *Seaford Court Estates Ltd v. Asher* [1949] 2 K.B. 481, 499.

98. Bridge, *supra* note 10, at 366.

99. Eleonor Sharpston, *The shock troops arrive in force: horizontal direct effect of a treaty provision and temporal limitation of judgments join the armoury of EC law*, in *THE PAST AND FUTURE OF EU LAW: THE CLASSICS OF EU LAW REVISITED ON THE 50TH ANNIVERSARY OF THE ROME TREATY* (Miguel Poiaras Maduro and Loïc Azoulay eds., 2010) (showing brilliantly the

Lord Denning had already expressed clearly that the new Treaty, just like an “incoming tide” would produce a large transformation of English law that would require new effort from lawyers and judges to learn from a new system.<sup>100</sup> Lord Denning on the Court of Appeal managed to convince others about the necessity of a purposive interpretation to address the new challenge:

What a task is... set before us. The treaty is quite unlike any of the enactments to which we have become accustomed. The draftsmen of our statutes have striven to express themselves with the utmost exactness. They have tried to foresee all possible circumstances that might arise and provide for them. [...] How different is this Treaty! It lays down general principles. It expresses its aims and its purposes. All in sentences of moderate length and commendable style. But it lacks precision.<sup>101</sup>

Lord Denning brought two interesting battles that show both the acceptance and the resistance to an openly purposive interpretation of UK law in light of the provisions of the EEC Treaty.

With respect to the acceptance pattern Lord Denning was adamant about the fact that UK judges, when interpreting Community law, should embrace teleological interpretation:

They must divine the spirit of the Treaty and gain inspiration from it. No longer must they examine the words in meticulous detail. If they find a gap they must fill it as best they can. They must do what the framers of the instrument would have done if they had thought about it. So we must do the same.<sup>102</sup>

The differences between the members of the Court of Appeal became clear in *Macarthy's Ltd v. Smith* when Lord Denning favored a teleological approach to article 119 EEC to expand the reach of the Equal Pay Act of 1970 limiting equal pay to men and women in contemporaneous employment situations. By moving away from the plain meaning of the statute, Lord Denning interpreted the broad and subsequent principle of the Treaty of Rome as stating that equal pay for men and women should be applied to both contemporaneous and successive employment. Due to the difference in visions with two other

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frustration of some of the UK scholarship with the teleological interpretation of the CJEU). Thanks to Claire Kilpatrick for pointing this to me.

100. *H. P. Bulmer Ltd v. J. Bollinger S.A.* [1974] RPC 96 (10), 418-19.

101. See Bridge, *supra* note 10, at 370.

102. See *H. P. Bulmer Ltd v. J. Bollinger S.A.* [1974] RPC 96 (10), 418-19; see also Bridge, *supra* note 10, 373.

members of the Court of Appeal more inclined to follow Lord Mildeu's dictum forbidding the use of legislative history or "no English judge looks under the bed,"<sup>103</sup> the case was referred to Luxembourg.

The European Court of Justice undeniably concurred with Lord Denning's interpretation showing that the English textual interpretation to Community law would run out especially if Luxembourg was the final arbiter.<sup>104</sup> In this sense teleological interpretation also served as an incentive for progressive lawyering when solicitors and barristers alike understood that through the preliminary rulings they could win cases for which English courts were still bound to the plain meaning of statutes<sup>105</sup> and would not likely interpret antidiscrimination directives by expanding the rights of their plaintiffs.<sup>106</sup>

With respect to the resistance to Community law, judges had learned from McCarthy that purposive interpretation found a powerful ally in Luxembourg and that this was the final arbiter for community law if the UK court referred the preliminary questions. In a series of cases in the late 1970s when the Court of Appeal was asked to interpret norms on the harmonization of trans-continental road transport that were not Community norms but part of a European Treaty, Lord Denning together with other four judges argued in favor of a teleological interpretation. The House of Lords rejected such invitation due to a lack of authority coming from the parliament. Lord Dilhorne held "[t]o base our interpretation... on some assumed, and unproved, interpretation which other courts are to be supposed likely to adopt, is speculative as well as masochistic."<sup>107</sup>

The purposive interpretation of English law in light of the general principles of Community law had empowered some judges yet it was clear that for others it provided a dangerous avenue that could put in danger the doctrine of parliamentary sovereignty.

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103. Bridge, *supra* note 10, at 374.

104. *Id.* at 375.

105. See *Torfaen County Borough Council v. Douglas Willis Limited* [2013] UKSC 59 (appeal taken from [2012] EWHC 296).

106. See Miller, *supra* note 16 at 9.

107. See *James Buchanan & Co. Ltd. v. Babco Forwarding & Shipping (U.K.) Ltd.* 119781 1 C.M.L.R. 156, 161 (cited by John Bridge, note 10, at 376).

*VI. ACT III: THE EROSION OF PARLIAMENTARY SOVEREIGNTY  
THROUGH PRELIMINARY REFERENCES*

Another challenge to the UK legal system that the lawyers addressed in 1962 when discussing with the Commission's Legal Services was the challenge of preliminary reference requiring the uninformed interpretation of EU law.<sup>108</sup> Their starting point was that Community law should be treated merely like an act of Parliament thus its interpretation required very little assistance from Luxembourg.<sup>109</sup> UK lawyers were very anxious to clarify the meaning of a court of last instance for the purpose of Art 177, 3 ECC (267 TFEU) requiring a court of last instance to refer a case to Luxembourg. Since an appeal was exercised as a privilege rather than a right, British lawyers were puzzled by which court should be considered the Court "against whose decisions there is no judicial remedy under national law."<sup>110</sup> As the Commission explained they generally agreed that the Court of Appeal should be considered such court for the purpose of Art 177 with the result of empowering such Court to determine the interpretation and validity of Community acts.<sup>111</sup>

A different group of lawyers argued instead that:

Legislation should designate a higher English court to which all English court, irrespective of their instance, would be obliged to submit any such preliminary question. This court itself would then determine which preliminary questions should be submitted to the Court of Justice.<sup>112</sup>

Clearly the ability of lower courts to trigger directly and without centralized supervision the preliminary reference procedure before the European Court of Justice was something that neither groups even

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108. See Second Report on the Exchange of Views with British Lawyers, JUR/1522/62 at 6-8 (June 22, 1962).

109. Bridge, *supra* note 10, at 372.

110. Consolidated Version of the Treaty on the Functioning of the European Union art. 267, 2012 O.J. C 326/47 (The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon; Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. [...]).

111. See Second Report, *supra* note 101, at 7.

112. Second Report on the Exchange of Views with British Lawyers JUR/1522/62 (June 22, 1962), at 7.

considered in 1962. These documents highlight the revolutionary role of the ECJ for the UK judicial hierarchy enabling through the preliminary reference a direct dialogue between lower courts and Luxembourg.

The centralizing approach to preliminary references expressed by UK lawyers was a way to make sure that parliamentary supremacy would not be challenged by every single judge who could open UK legislation to the review of the ECJ. Yet the justification to such centralization was to avoid “frivolous requests,” achieve more uniform references to facilitate the work of the ECJ, and create a UK court with greater knowledge and experience about preliminary questions. Such Court maintaining the monopoly of preliminary references could have even the power to refer questions *ex-officio* if the parties didn’t raise them and if this was decisive for the resolution of the case at hand.<sup>113</sup>

The preliminary reference was a sticky issue that even in an official note by the United Kingdom it was clear that ought to be resolved in a technical way by lawyers without upsetting the two legal systems. In Mathew’s report to the parliamentary Assembly he stressed the need to draft specific legislation by the parliament in conjunction with judges and practicing barristers and solicitors specifying in detail “at what point in the proceeding, and on what conditions, and by what procedure such a reference could be made. Rules would also be required in this respect for the County Courts.”<sup>114</sup> Even though politicians made great efforts to ensure that there would be parliamentary control on the way preliminary questions would go to Luxembourg, the self-restraint came first of all from the legal culture of the judiciary that had internalized the doctrine of parliamentary supremacy.

In fact, the resistance of English courts to opening the floodgates to refer preliminary questions to Luxembourg was well entrenched until the House of Lords in the 1980s reassured English courts on seeking and accepting the guidance of the European Court of Justice.<sup>115</sup> Almost a decade later, the House of Lords in *Factortame*<sup>116</sup> reassured British courts about the notion of primacy of Community law and their

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113. *Id.* at 8

114. See Mathew *supra* note 78, at 5.

115. See *D.P.P. v. Henn and Darby* [1981] 2 CMLR 229, 233; see also Bridge, *supra* note 10, at 372.

116. *Regina v. Secretary of State for Transp. Ex parte Factortame Ltd (N.2)*, C-213/89, 1990 1 App. Cas. 602, 659.

duty to repeal any national legislation that was in direct conflict with a rule or principle of Community law.

Due to the British legal culture, Article 177:

“served as an effective escape-valve for British courts [and . . . ] the European Court’s decisions usually leave little discretion to the courts of the member states. The importance of this outlet is demonstrated not only by the circumstances under which the British courts use it but by the difficulties they face when the European Court’s response is insufficiently precise to provide the desired clear rule.”<sup>117</sup>

For instance in *Barber*<sup>118</sup> both the Industrial and the Appeal Tribunals rejected the claim of Mr. Barber claiming discrimination against its female counterparts that could receive immediate pensions at a younger retirement age. When the Court of Appeal finally referred the case to Luxembourg asking whether pensions could be considered as “pay” and thus controlled by ART 119 EEC, the ECJ replied in the affirmative in relying on its famous *Defrenne* judgment. Yet the ECJ discussed the temporal effect of the case in order to allow some leeway to national courts to limit the retroactive effect of this decision due to the huge financial implications for the British pension system.<sup>119</sup>

Cases like *Barber* show how the notion of parliamentary sovereignty was in fact being eroded as British courts, even lower ones, were becoming more successful in using preliminary references. In posing the preliminary questions to Luxembourg “the British judiciary has been able to avoid what on some occasions would otherwise be an almost explicit policymaking role. Such a task would have been impossible to reconcile with their formal tradition.”<sup>120</sup> Yet what remained challenging for British courts was not so much applying, in almost a mechanical way, the guidelines provided by Luxembourg, but rather when the ECJ was not clear and increasingly left hard case or proportionality analyses to be done by local courts.

The Luxembourg technique to ask national courts to apply the test elaborated in a very contested issue back home, even though was stroke

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117. See Levitsky, *supra* note 10, at 360.

118. See *Barber v. Guardian Royal Exchange Assurance Group*, C-262/88, 1990 E.C.R. I-1889; see also D. Curtin, *Scalping the Community Legislator: Occupational Pensions and Barber*, 27 COMMON MKT. L. REV. 475, 476 (1990).

119. Levitsky, *supra* note 11 (explaining that the cost of Barber to the pension Industry for around 76 billion dollars).

120. *Id.* at 363.

of genius of ECJ not to meddle with domestic issue, became a huge problem back home. This was the case of the *Sunday trading* saga that began with the *Torfaen Borough Council v. B&Q plc* when two parallel importers challenged the 1983 Shops Act as a restriction of the free movement of goods and Article 30 EEC (34 TFEU). After a long and convoluted judicial battle the only solution came when, on a second referral from the House of Lords asking a clear question, it obtained a clear answer from the ECJ that Article 30 EC's prohibition did not apply to domestic retailers from allowing them to keep their shops open on Sundays.<sup>121</sup> Many other countries faced a similar problem in applying correctly Luxembourg's rulings, especially when striking a balance between free movement and social rights protected at the local level. For instance, the Sunday trading case triggered a decade of domestic litigation in England. As some have explained this was due, at the same time, to the manipulation of the preliminary reference by the Sunday traders as well as the misunderstanding of the ECJ proportionality test by British administrative judges.<sup>122</sup>

Preliminary references to Luxembourg liberated UK courts from the plain meaning of statutory interpretation, allowing UK courts to become policy innovators vis-à-vis judicial interpretation.<sup>123</sup> Preliminary references allowed lower courts to ask *ex-officio* a preliminary question to Luxembourg in the hope of a mechanical application of the ECJ ruling to the case at hand. This became central to British lawyers in their advocacy for greater equality in the interpretation of antidiscrimination provisions. Cases like *Colman* show that in broadening the scope of an anti-discrimination directive by extending it to a woman whose son suffered a disability this proved to be a successful lawyering strategy driven by a creative solicitor rather than disabilities rights NGOs.<sup>124</sup>

Even though the Court of Appeal did not become a centralized system as the early British politicians were hoping this would become a gate keeper for preliminary references, the High Court became much more at ease with a European, purposive and teleological interpretative

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121. See *Council of the City of Stoke-on-Trent and Norwich City Council v B & Q plc*, C-169/91.

122. HANS-W. MICKLITZ, *THE POLITICS OF JUDICIAL CO-OPERATION IN THE EU: SUNDAY TRADING, EQUAL TREATMENT AND GOOD FAITH* (2005).

123. See Horsley, *supra* note 15, at 87-88.

124. *Coleman v. Attridge Law*, C-303/06; see also Miller *supra* note 16, at 12 (interviews with Colman's lawyers).

style. The approach of the Court of Appeal as highlighted by Levitsky shows that it “reflects a European-style search for deep underlying purpose that goes beyond the positivistic language with which these decisions are framed. The search for legislative purpose is necessarily a far less determinative endeavor than the traditional British focus on plain meaning.”<sup>125</sup>

The common use of purposive interpretation together with an *ex-officio* use of preliminary references by British courts raised among politicians fears of *gouvernement des juges* transforming the doctrine of parliamentary sovereignty into a legal fiction aiming to hide the erosion of Westminster’s absolute law making authority.

VII. ACT IV: PARLIAMENTARY SOVEREIGNTY REINSTATED:  
HOW MILLER SAVES THE DAY

On January 24, 2017 the British Supreme Court decided from an Appeal of the Divisional Court of England and Wales the *Miller* case to answer the question posed by the plaintiffs on whether the Government was able to trigger unilaterally Article 50 of the TEU and in particular the formal notice of withdrawal from the Union without the approval of the Parliament.<sup>126</sup>

The majority opinion is written by eight of the eleven justices of the Supreme Court, three of which wrote the dissenting opinion. At the core of the decision there is the question of whether the prerogative to terminate a Treaty lies with the executive and the Secretary of State who does not have the power to change UK domestic law that remains a prerogative of an Act of Parliament.<sup>127</sup> In answering this question the majority reappraised first the relationship between the UK and the EU from 1971 to 2016, putting emphasis on the 1972 European Communities Act by Parliament that followed the UK accession to the EEC in 1973. Without the Parliament’s Act the court holds that in a dualist system the Accession Treaty would not have been binding in national law unless it was formally ratified by the legislature.<sup>128</sup>

The second move of the Court is to reaffirm through the UK constitutional background the principle of parliamentary sovereignty

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125. Levitsky, *supra* note 11, at 371.

126. Under Article 50 TFEU a member state of the EU can decide to trigger the withdrawal procedure ‘in accordance with its own constitutional requirements’ before the negotiation and the rest of the Article’s provisions will take effect.

127. See *Miller supra* note 16, at ¶ 5.

128. *Id.* at ¶ 14-17.

as a limitation on both the Royal Prerogative of the Crown with the development of parliamentary democracy and the rule of law. By the same token, the majority explains that the independence of the judiciary is not unbound but constrained in the courts' discretion and freedom they enjoy in the common law by parliamentary statutes.<sup>129</sup> Here the majority even mentions Professor Dicey's statement that "no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament."<sup>130</sup>

So here is the hard task for the majority to justify: what happened during almost forty years of membership when Courts were asked to set aside UK law in name of the primacy and direct effect of Community law? But the majority explains:

It is also true that EU law enjoys its automatic and overriding effect only by virtue of the 1972 Act, and thus only while it remains in force. That point simply reflects the fact that Parliament was and remains sovereign: so, no new source of law could come into existence without Parliamentary sanction - and without being susceptible to being abrogated by Parliament. However, that in no way undermines our view that it is unrealistic to deny that, so long as that Act remains in force, the EU Treaties, EU legislation and the interpretations placed on these instruments by the Court of Justice are direct sources of UK law.<sup>131</sup>

The way through which the majority justifies the survival of parliamentary supremacy is through a rather traditional dualist restatement of constitutional law.<sup>132</sup> According to this vision, the content of rights and duties introduced with the 1972 Act is a matter for EU law, whereas the constitutional processes by which UK law is made is a pure matter of domestic law.<sup>133</sup> A final metaphor, the "conduit pipe," helps this formalist interpretation presented by the majority to explain how in forty years politicians and courts could maintain such dualist vision between EU and domestic law:

In our view, then, although the 1972 Act gives effect to EU law, it is not itself the originating source of that law. It is, as was said on behalf of the Secretary of State echoing the illuminating analysis

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129. *Id.* at ¶ 42.

130. *Id.* at ¶ 43.

131. *Id.* at ¶ 61.

132. Thomas Poole, *Legitimacy, Rights and Judicial Review*, 25(4) OXFORD J. LEGAL STUD. 697 (2005) (paper by Tom Poole on the divisional court case).

133. See Miller, *supra* note 16, at 62.

of Professor Finnis, the “conduit pipe” by which EU law is introduced into UK domestic law. So long as the 1972 Act remains in force, its effect is to constitute EU law an independent and overriding source of domestic law.<sup>134</sup>

This balanced decision by the Supreme Court reinstates the full parliamentary supremacy and it is contrasted by Lord Reed’s dissent, arguing that a mere notification of withdrawal under article 50 TFEU together with its negotiation falls squarely under the prerogative power of the Court, advised by its Ministers that was not altered by the 1972 Act.<sup>135</sup>

#### VIII. CONCLUSION: THE PERSISTENCE OF THE LUXEMBOURG JUDICIAL STYLE AFTER BREXIT

After the outcomes of the Brexit referendum, some legal academics are openly monitoring and exposing the political and economic changes that leaving the EU entails for UK citizens.<sup>136</sup> This public role for scholars and judges has not spared them from being called ‘enemies of the people’ or from more violent threats. Michael Dougan’s new edited volume calls for scholars’ political and professional responsibility to fully engage with the outcomes of Brexit because the “UK withdrawal is not just about finding a new relationship with the EU. It is also about opening our own legal and political systems to processes of far-reaching change.”<sup>137</sup> The extent of such change is also the topic at the core of this symposium tackling how UK law has influenced EU law.<sup>138</sup> To better understand the challenges of “de-Europeanization,”<sup>139</sup> my contribution revamps some of the early history of the UK accession showing that the relation between continental and common law lawyers was initially tainted by deep skepticism and later on by mutual-influence as well as resistance to Europeanization.

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134. *Id.* at ¶ 65.

135. *Id.* at ¶¶ 159, 177.

136. See The Citizen Brexit Observatory, <http://ecas.org/services/citizen-brexit-observatory/>.

137. See Michael Dougan, *Editor’s Introduction*, in *THE UK AFTER BREXIT. LEGAL AND POLICY CHALLENGES* 1-12, 5 (Michael Dougan ed. 2017).

138. See Gelter *supra* p. 1329.

139. *Id.* p. 1330.

After a forty years relationship between London and Luxembourg, it remains unclear how much the inner workings of the CJEU will change by losing their UK members, including three judges and one advocate general. Some features of the common law style as well as the use of English as a *lingua franca* in oral conversations have transformed, in an irreversible way, the Luxembourg judicial style. By the same token, beyond the uncertainties of the Brexit negotiations, there is no doubt that the Luxembourg jurisprudence will continue to be closely monitored by UK judges and lawyers as to whether it will become a foreign law with an indirect impact on their legal system or it will continue to be cited as a valid precedent in the UK legal system.

Yet those UK judges and lawyers that after the initial “incoming tide” have internalized a more purposive and teleological style *vis à vis* statutory interpretation will be precluded to refer preliminary references to Luxembourg under TFEU 267.<sup>140</sup> As Thomas Horsley has explained, de-Europeanization will reduce the space created by the preliminary reference procedure between UK domestic courts and Luxembourg, thus reducing the activism of lower courts that have been the engine of policy innovation in areas such as employment discrimination and equal treatment law.<sup>141</sup> By re-centralizing, under traditional judicial hierarchies, the role of lower courts it is unlikely that the Withdrawal Act will undermine the freedoms and equality guarantees that lawyers and judges alike have achieved through their legal struggles both at home and in Luxembourg.

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140. See Chapter 6 of The European Union Withdrawal Bill of July 13, 2017 on the Interpretation of retained EU law <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/18005.pdf>.

141. See Thomas Horsley, *Brexit and UK Courts: Awaiting Fresh Instruction* in THE UK AFTER BREXIT. LEGAL AND POLICY CHALLENGES 73-94, 78-79 (Michael Dougan ed. 2017).