Dumb and no More Here
An inquiry into impact of rulings of the CJEU ¹

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But when he's dumb and no more here,
Nineteen hundred years or near,
Clau-clau-claudius shall speak clear.

Robert Graves, I Claudius, pp. 7-8

Introduction

The paper will problematize, from perspective of EU law, the difference between the immediate impact of "living" judgments of the Court of Justice, that is, judgments which make part of the living judicial dialogue between EU and national judges, and impact of "well settled case law". While the former arguably affects judicial decision making in the Member States the latter has a potential of long term influence on national legal culture.

Following the introduction, Point 1 will set the methodological framework of my

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analysis. In **Point 2** I will address criticism targeting the problem of coherence of the case law of the Court of Justice of the EU, alleged inability to control its own docket, lack of dissenting opinions, cryptic language of its judgments and legitimacy of its rulings. I will argue, that critique of adjudication sometimes fails to identify functional comparators on which the very critique is based and claim that the Court of Justice delivers similar goods as other model courts, just in a different guise. In **Point 3** I will suggest that immediate impact of judicial decisions dramatically differs from their transcendental impact, partly due to the change of context and utterer and partly due to the change of audience targeted by a decision. I will try to explain the difference between original and transcendental subjectivity and argue that law/policy conundrum, i.e. the tension between fidelity to law and undeniable contribution to policy of European integration can be explained by two shifts in analysis of its case law. First, the temporal shift from creative to interpretative moment and, second, the shift of the interpretative subject from the original subject, i.e. the Court itself to the transcendental subject i.e. external and posterior user of its case law.

1. **By Medium of Posterity**

In the famous Robert Graves’ novel, 2 Claudius, the Roman emperor suffering from a speech impairment condition received a prophecy 3 which was, by no means, self-explanatory. 4 According to Clayton Koelb, in order to understand the prophecy and find out how a dumb and absent person can possibly speak clear, one has to recourse to two shifts. First, the speech has to be addressed not to the present audience but to the future one. And, second, there has to be some divine intervention which, according to Koelb, entailed the change of the utterer. It is not Claudius himself speaking, knowing that, as a matter of fact, his historical writings were lost, but the future author – Robert Graves, who resurrected the life and times of the long dead emperor. Thus it is Graves, not Claudius who tells the narrative. Claudius, being unable to speak clearly to his contemporaries, addresses, by divine intervention of Apollo, the future audience, this time in a clear way, however, through medium of history and through a pen of a modern writer. So does, I suggest, the Court of Justice.

Notice, there is a double shift. A shift in time, and a shift of the utterer. The original subjects, Claudius and the Court stammer. They address their respective contemporary audiences with unease and confusion. However, at the end of the day, a reader of the future receives a this-time-clear message from a different, transcendental, subject. The process in which unclear speech of the original utterer becomes clear comprises the following elements:

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2 Robert Graves, I Claudius

3 The relevant part of the prophecy reads: "But when he's dumb and no more here, Nineteen hundred years or near, Clau-Clau-Claudius shall speak clear."

- utterances of the original subject;
- temporal change from then to now;
- emergence of the transcendental subject; ⁵
- objectification of the original subject by agency of the transcendental subject;
- transformation of the original utterances from unclear to clear.

In brief, the original meaning of the Court's judgments is transformed and the posterity comes to understand them from their interpretation by a future and transcendental subject or, as Graves has put it, by divine intervention of Apollo. The divine intervention entails not just a shift from the original subject to the future one, but also an inversion of subject and object. While Claudius/Court act as a subject in the first stage, they become an object in the transcendental stage.

This inversion has two consequences. First, in order to judge Claudius' actions, or to present a critique of a given social phenomenon, such as adjudication or administration of justice, one needs to be immersed into the original and not transcendental narrative. One needs to criticize Claudius and not Graves. One needs to realize the difference between the original and transcendental origin of the narrative and recognize that a critique of the original subject entails synchronicity with the original subject itself. This means that interaction with the original subject is taking place in "real time" and according to the rules of engagement (e.g. the Statute of the Court and the Rules of Procedure). However, the results of that interaction crystallized as judgments often do not have a self-explanatory meaning but have to be rendered clear by the divine intervention of Apollo. Second, I believe that the change of the analytical angle entailed in the objectification of the original subject makes it possible to explain the tension between two prima facie irreconcilable claims – claim that the Court of Justice decides exclusively on grounds of law and the claim that European integration owes to the large extent to the judicial policy-making. I will return to these issues in Point 3.

2. The Original Subject: Functional Equivalents and Judicial Symbolism

At the Annual Rhyme Dance Ms. Cat dances with Mr. Hat, Ms. Ball with Mr. Wall and Ms. Log with Mr. Dog, while Ms. Orange attends alone without her rhyme. It would be too banal to claim that one court of justice is similar to another just by the rhyme of the word court or because of the similarity of their principal function which is to settle disputes between parties. ⁶ Actually, in many respects, courts of different jurisdictions ARE similar. They settle disputes, interpret and apply rules of law, claim authority, aspire to be independent, to speak clearly and reasonably, to be transparent in what they do. In that respect, a critique can take


⁶To take another example of similarity, a table and a cow are similar due to the fact that the both stand on four legs.
into account any of the above mentioned parameters and put it on the scale. Court A is more independent then court B. Judgments of court C are better reasoned then judgments of court D. Nevertheless, there is something deeply disturbing in the described approach. First, the critique is addressed to the wrong address. Courts are not living subjects that have will of their own, that speak (clearly or cryptically), that reason, or settle disputes. There are always real people behind, that is, judges, law clerks, administrators and other individuals that operate within certain social and legal context.

A court itself, like any other institution, has no will of its own. It is neither capable of understanding critique nor of enjoying the aesthetics of a rhyme. Courts could not care less about how other courts act, whether they are reasonable, transparent or clear. In fact, courts do not care about anything. Individual people do. And when an individual judge is set to work on a case, there are a number of contextual elements that direct her work. And those contextual elements are often beyond individual powers of a judge. On the other hand, being human as they are, judges do have their personal beliefs and preferences. They have different social and educational backgrounds and different understanding of the world. This is not to say that it is not reasonable to impose any social expectations on their work, such as expectations of reasonableness, impartiality, clearness or coherence. This is only to say that the problem is much more complex then it looked at the beginning. It is not about how much of a given ingredient can be found in a court, it is about what is really happening and in what social and legal context. I am not trying to say that there are not and cannot be functional comparisons of courts and judges. The fact is just that they operate in contexts so different that functional comparators are not apparent.

2.1. Appointment of Judges

Quality of judicial reasoning is one of the common places of critique addressed to the Court of Justice of the European Union. Within this context, lack of dissenting opinions stands out. Joseph Weiler relates their absence with the re-appointment of judges every six years which is, according to him, “an ongoing scandal unknown in all respectable jurisdictions.” The logic of this line of critique is not isolated and does not appear to be unfounded. According to the argument, in the face of prospective re-appointment judges refrain from speaking clearly and hide behind the collegial unanimity. Therefore, no dissenting opinions! To further extend the claim, even if adjudication in shadow of re-appointment is of no consequence for quality of judgments, it surely contributes to cryptic reasoning and lack of transparency. The Court speaks unclear!

Nothing appears to be wrong with this argument. Non-renewable of life

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appointment of judges is standard in many jurisdictions, to mention just European Court of Human Rights and the US Supreme Court. So are dissenting opinions. It is not my call and intention to engage into debate about which system is better, but to suggest that there are functional equivalents that blunt the edge of the critique.

My principal proposition that I will explain in this part is that specific method of appointment of judges to the Court of Justice does not necessarily affect the quality of judicial reasoning but, instead, generates a symbolic speech of the Court understanding of which requires an additional effort. Before being understood, symbolic language of the Court has to be deciphered. Therefore, sparse reasoning and lack of clarity are, arguably, not a systemic failure but the usual method of the Court’s expression which is neither better nor worse than the USSC style of reasoning but, simply, different. I will proceed by explaining the method of appointment of judges, continue by giving my take on the symbolic expression of the Court and conclude by suggesting a clue for understanding the relationship between the two.

Is the possibility of reappointing judges and advocates general at the end of their term of office an “ongoing scandal unknown in all respectable jurisdictions” as Weiler suggested? The argument relies on a premise of causality between Member State preferences and judicial independence. Is there a causal link?

First of all, since February 2010 there is a special screening procedure before the now well known and respected 255 Committee. The Committee issues non binding opinions on national nominations for the Court to the ministers of the Member States who appoint judges by common accord and its scrutiny is substantial. While its work is confidential, it is known that a number of national nominations have been withdrawn based on its opinions.

Second, procedural rules of the Court establish the protocol and rank that have strong persuasive power on the nominating authorities in the Member States. Judges are ranked in order of seniority which is omnipresent in the protocol. Judges who were appointed most recently take the last seat around the table, they enter the grande salle d’audience last, they are last to ask questions at the hearing and they do not have priority for election to administrative functions. The protocol demands that presidents of the Court’s chambers mature to certain seniority which can only exceptionally be reached within the first six-year term, and functions of the president and vice-president of the Court pertain to most senior judges with long experience at the Court. In this way, it becomes irrational for the Member States to erode their credibility by replacing a prospering judge.

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9 Id. at p. 251

9 The Committee was established by Arts. 255 of the TFEU and started to work pursuant to the Council Decision No. 2010/124/EU of 25 February 2010 relating to the operating rules of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union, O.J. 50/18 of 27. 02. 2010 and the Council Decision No. 2010/125/EU of 25 February 2010 appointing the members of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union. For further information see http://curia.europa.eu/jcms/jcms/P_64268/
Finally, presidents of the chambers the vice-president and the president of the Court are elected by all twenty-eight judges for period of three years. Nine advocates general elect, among themselves the First Advocate General for period of one year what re-enforces the incentive for the Member States to prefer continuity. In that way, collegial approval interacts with scrutiny of the 255 Committee and national appointment procedures. In other words, even admitting that the reappointment system not ideal, presence of procedural and substantive safeguards, notably internal (judicial college) and external (255 Committee) peer scrutiny disrupts the causality between Member States’ preferences and actual appointments. 10

2. 2. Symbolic Language of the Court

Another sting of critique suggests interrelationship of appointment procedure and lack of clarity and dissenting opinions. In absence of irrevocable mandate, it is suggested, judges refrain from speaking clear, while anonymity of deliberations serves to protect judges from national political whim. While the Court of Justice is, indeed, based on the somewhat cryptic French judicial culture, we have already learned that lack of transparency does not necessarily mean the absence of legal reasoning. Writing about the French judicial system Mitchell Lasser has revealed the rich internal debate within the Cour de Cassation as contrasted to scarce language of its decisions. 11 Bruno Latour, on the other hand, disclosed the method of work of the Conseil d’Etat. 12 My argument here is different from Lasser’s. Instead of contrasting internal and external life of the Court, I claim that the CJEU, even in absence of dissents, and in spite of the sparse reasoning, speaks its own language. The language is symbolic and its grammar is procedure.

An incoming case is first allocated to a reporting judge by the president of the Court, and is required to write a preliminary report and, in agreement with an Advocate General allocated to the case by the First Advocate General, present it to the Reunion Generale - the plenum of the Court comprising all judges and advocates general. In the report, the reporting judge needs to briefly present the case and make several proposals to the RG. While the report remains confidential and is disclosed to judges and advocates general only, the decisions of the RG are public.

10 One more note. The Court of Justice is designed by the founding fathers of the European Union as a guardian of its legal system. Regardless of their national nominations judges act as European judges, not as national judges. Lack of dissents also avoids the clash of today 28 national legal traditions. Law of the EU cannot ignore them but the result often ends to be an amalgam of more national traditions then one. Whether public dissents would result in certain degree of competition between national traditions is highly speculative but cannot be dismissed as a problem.

11 Mitchell Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, Oxford University Press 2004

12 Bruno Latour, LA FABRIQUE DU DROIT. UNE ETHNOGRAPHIE DU CONSEIL D’ETAT, Paris, La Découverte, 2002
The particulars of the preliminary report are alphabet of the Court's symbolic speech. First, a formation of the Court needs to be decided. It can be a chamber of three, five, a grand chamber of fifteen judges, or the full court. Second, it will propose whether a judgment is needed or whether the case can be decided in a summary way by an *ordonnance*. Third, judge rapporteur may propose a hearing to be held, as well as to specify the issues of law and fact which need to be addressed in a hearing, in order to restrict the scope of the hearing to certain points only. Fourth, there will be a proposal whether an opinion of the advocate general is indicated or not, and if it is, as to which legal issues. Finally, a report will mention the agreement (or absence of it) between the reporting judge and the advocate general, on all mentioned points.

The reporting judge may also propose a number of other procedural steps to be taken, depending on the relevant procedure. In a preliminary reference procedure additional clarifications may be required from the requesting national court, and in any case a research note may be requested to be produced by the Court's Research and Documentation Department, a legal service composed of lawyers specialized in law of the Member States.

The report is circulated to 28 judges and all nine Advocates General before the RG. While the procedure is one of the tacit approval, each judge or advocate general can submit a note in which case the preliminary report will be automatically placed at list A and discussed by the RG. There is a variety of possible outcomes.

Allocation of a case to a chamber of three judges indicates that law governing the case is clear and that the case will be handled according to the existing case law. Nevertheless, a hearing may be convened if the facts of the case are complex, if the Court does not feel sufficiently informed, or if it considers that it may be otherwise useful to resolve a contradiction existing between the parties. Conversely, there will be no hearing if the facts and legal positions of the parties were sufficiently clarified already, during the written procedure. In a chamber of three, there will, normally, be no need for an opinion of an advocate general. Instead delivering a judgment, chambers of three judges may decide by an *ordonnance* if the case is manifestly inadmissible or manifestly unfounded. In such a case, a reporting judge will specify so in the preliminary report and, following the RG quickly present a draft *ordonnance*.

Chambers of five judges decide cases that require more reflection, either on grounds of complexity of facts, either on grounds of complex legal issues. It can be said that five-judge chambers are a default formation of the Court. A chamber of five can follow existing law and extend scope of the existing case law to new situations. It can clarify previously decided cases, harmonize case law decided by the General Court or, sometimes, by chambers of three judges. Hearings are rather a rule than an exception since complexity of facts and law may require oral explanations of the parties. Indeed, parties will often request a hearing themselves but such requests are not binding for the Court. While the reporting judge has a privilege of proposing whether a hearing is indicated or not, the RG
will have the final say. Indeed, decision whether a hearing is indicated or not will often bring a case to the list A and make it subject to discussion at the RG. The same holds for the decision whether to ask for an opinion of the advocate general, though, his or her position on its necessity has a strong persuasive force. Nevertheless, a chamber of five judges can also decide by an ordonnance, without a hearing and without an opinion.

A grand chamber of fifteen judges is convened to decide about major legal issues that require intervention into existing law, either in order to develop new case law, to overrule the existing, or to extend its scope to new areas. It will also be indicated where the Court has not previously expressed itself on a certain legal rule or a point of law. According to the Rules of Procedure 13 a grand chamber will have to decide upon a request of a Member State or in disputes between institutions of the EU. A grand chamber can also decide with or without an opinion of the advocate general and with or without a hearing. In this respect all considerations previously mentioned in respect of a chamber of five apply. However, decisions of the grand chamber without a hearing and an opinion are not frequent. The possibility of deciding a case by an ordonnance is also not excluded. However, it is exceptional and, as I will explain, usually bears certain symbolic meaning.

The Full Court decides only in exceptional situations. According to the Statute, the Court shall sit as a Full Court where it decides on dismissal of the Ombudsman, 14 compulsory retirement of a member of the European Commission 15, or of a member of the Court of Auditors 16 or, where it considers that a case before it is of exceptional importance. 17 What represents exceptional importance can be inferred from the recent cases, notably, Pringle. 18 Usual suspects for the full court judgments are also requests for Opinions pursuant to Article 218(11) TFEU where the Court is called to rule whether an international treaty to which EU plans to commit is compatible with the Treaties. 19

While, undeniably, the procedure before the Court serves its own functional rationality which is the backbone of what Koen Lenaerts calls "internal legitimacy", 20 it also emits messages to other actors, such as the Member States,

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13 Case C-370/12 (reference for a preliminary ruling from the Supreme Court — Ireland, Stability mechanism for the Member States whose currency is the euro)
14 Article 228(2) TFEU
15 Article 245(2) and 247 TFEU
16 Article 286(6) TFEU
17 Article 16 of the Statute and Article 60 of the Rules of Procedure
18 Case C-370/12 Thomas Pringle v Government of Ireland, Ireland and the Attorney General, judgment of 26. October 2012, not yet reported in the ECR
19 The latest instance of a full court Opinion was on occasion of the request for Opinion concerning accession of the EU to the European Convention for Protection of Human Rights and Fundamental Freedoms
20 Koen Lenaerts, The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice, in Adams M., de Waele H Meeusen J. and Straetmans
national courts, parties and, ultimately, everyone capable of understanding them. However, it must not be underestimated that the procedure is structured in the way to generate information scarcity. Among the multiplicity of actors, starting from the reporting judge, the advocate general, to the RG, the chamber deciding a case, a national court, parties to the original dispute, Member States, and so on, each one of them, except the formation deciding the case, will be in possession of only some information. The remaining part will have to be reconstructed from the symbolic language of the Court. In other words, the fact that the Court, the original subject, is not "speaking clear" to the contemporaries is a logical and, most likely, inevitable consequence of the role playing and information scarcity.

For example, in a preliminary reference procedure, a referring national court will have no information about the proposal of the reporting judge to the RG and the discussions within the RG are protected by secrecy. However, once the case is allocated to a, say, grand chamber, and that an advocate general was seized to write an opinion, it will become clear that there is a major legal issue at stake and that the intention of the Court was to decide the case accordingly. It will be a signal to the parties to the original dispute to dig deep into their arguments, to re-assess the law that governs the case and to be prepared to develop their arguments beyond the existing case law. They will have no clue about the directions the Court is considering to explore, but they will have known that a window of opportunity has opened.

Communication between the Court and other actors is not a one-way street. A thoughtful party to a national dispute will try to convince a national judge to formulate a preliminary reference in a way that will resonate at the Court. It will try to identify loose ends in the existing case law and to provoke the desired formation to decide the case. Again, the information will depend to the circumstances of each individual case, will be restricted to the relevant actors and to relevant issues of law and fact and will, due to scarcity of information, remain unclear to the wider audience. While for the parties and other actors to the proceedings information will be sufficient to avoid a situation where "ignorant armies clash by night", an outside observer might have had an impression that the Court did not speak clear. However, the information scarcity and the corresponding lack of clarity is precisely a source of legitimacy for the Court. Scarcity of information and symbolic speech are deliberate, not accidental. It safeguards the very core of internal legitimacy of the deliberations.

2.3. Sound of Silence

However, despite of absence of the dissenting opinions, it is not impossible for an outside observer to identify the diverging legal positions. The process of


21 Jean-Claude Bonichot, Le Rôle des parties au principal dans le traitement des questions préjudicielles, Gazette du Palais, No 277, 4-5 octobre 2013, p. 16

22 Matthew Arnold, Dover Beach
detection is somewhat similar to detection of exoplanets which cannot be seen by a telescope but have to be imagined on grounds of oscillations of stellar gravity centers. So the differences in reasoning can be detected on grounds of opinions of advocates general, formation of the Court and absence of certain elements of reasoning.

To start with, it has often been suggested that the role of advocates general is remedial to lack of clear reasoning of the Court and absence of dissents. According to the argument, an advocate general can go beyond the immediate legal controversy and her opinion can shed light on considerations that have not been openly disclosed in the published judgment. While this explanation is certainly plausible, reality is more complex and has to be revealed by a transcendental subject. The easy part is when the Court decides to follow an opinion and explicitly says so. However, the Court does not always follow AG’s opinions. When it chooses not to follow one, the judgment usually ignores the argument. In such situations it can be inferred that prevailing arguments went against the position of the AG, or at least that a different line of reasoning was chosen.

Second, as I have already explained, the choice of formation deciding a case is also telling. Allocation to a chamber of three judges already indicates that existing case law will be followed. Such an allocation performs a similar role to a writ of certiorari in the legal system of the United States. On the one hand it allows a certain degree of docket control since the case will be decided in an expedient way and on the other hand it communicates the agreement of the majority of the court that certain legal issue does or does not deserve more substantial discussion. Admittedly, this will rarely reveal why the Court has undertaken certain course of action, but in context of earlier “well established” case law can be telling why it has not. For example, the Court has always been reluctant to recognize horizontal direct effect of directives but has, on the other hand, developed remedial causes of action for injured parties.

Third, there is always a temporal dimension that contributes to clarity of reasoning. For an outside observer it is often not enough to look into a single judgment to discover what the Court is saying. It is possible that, due to a variety of reasons, usually because of disagreement of judges within a chamber, certain legal issues are omitted from the final text. In such a case, where there is pre-existing case law on the point, it is reasonable to assume that the silence of the Court on the point is a symbolic recognition that the earlier case law remains valid. On the other hand, where there is no earlier case law on the point, the omission of the Court to address a legal issue can be interpreted as an act of tacit deference to either political branch or to national judiciary. The full significance of such deference will become obvious only in future judgments. It is also possible that the lack of agreement within a chamber reflects the differences among the sitting judges and that they will be settled by a larger formation of the

23 See e.g. Opinion of AG Cruz Villalon in Elchinov

24 Francovich damages, see joined cases C-6/90 and C-9/90, Andrea Francovich and Danila Bonifaci and others v Italian Republic
Court at a later date and with a different majority. In such a way a minority opinion that was invisible in an earlier case may become visible in a later grand chamber case. Sometimes, referring courts themselves provoke re-interpretation of law already settled by a smaller formation of the Court. For example, in the grand chamber Nelson and Others v. Deutsche Lufthansa\(^{25}\) case the referring court asked the Court of Justice to answer whether certain provisions of a Regulation, as interpreted by the five-judge Fourth Chamber in the earlier Sturgeon and Others case\(^{26}\) are valid in the light of the principle of legal certainty. In such cases comparison of answers to the same legal issues may provide additional clues about motivation of respective chambers.

3. Emergence of the Transcendental Subject

My second line of argumentation suggests that immediate impact of judicial decisions has to be distinguished from their future impact, due to the change of context, of the utterer and of the audience targeted by a decision.

From perspective of actors to the proceedings and, more importantly, from the perspective of the Court itself, judicial interactions take place in present, during the proceedings, and not after. The Court speaks as the original subject and the critique of its work is synchronous, that is, takes place in real time, within the procedure. On the one hand, there is ex post critique targeting the perceived problems of adjudication and judicial legitimacy. As I have already pointed out, the usual targets of the critique are transparency, clarity, coherence, dissents, docket control. What I would like to suggest at this place is, not only that the two types of critique are incommensurable, but that it is not possible to accept arguments of the ex post critics without subverting the effectiveness of critique delivered during adjudication. In other words, if the Court starts to speak clear to everyone, that would compromise allocation of information in the proceedings and subvert legitimacy of adjudication which is the very objective that the ex post critique is advocating.

The difference between immediate (unclear) and transcendental (clear) impact of judicial decisions becomes relevant once the Court has spoken and a judgment is published. This is because of fact that the context of judicial deliberations is dramatically different from the context in which the future audience operates. Due to allocation of information that I described in Point 2, the synchronous audience (other then direct actors taking part in the proceedings) is barely capable of seeing the subtleties of ongoing judicial work. It is not surprising at all that, in eyes of a direct observer, the picture can be blurred and the voice of the court can be stammering. The prophecy will be fulfilled only be by agency of some future actor, historically distanced and alien to the source. It will be Graves and not Claudioius who will speak clear.

\(^{25}\) Joined cases C-581/10 and C-629/11, Emeka Nelson and Others v. Deutsche Lufthansa AG and TUI Travel plc and Others v. Civil Aviation Authority, para. 61 of the judgment

\(^{26}\) Joined cases C-402/07 and C-432/07 Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon v. Condor Flugdienst GmbH and Stefan Böck and Cornelia Lepuschitz v. Air France SA
To better explain the difference between synchronous and *ex post*, let me return to the issue of clarity of the Court’s rulings. By clarity I understand the style of judgment that is reasoned, legally founded and which clearly states reasons for the decision. Yet, clarity is a subjective criterion and a claim for more clarity always begs a question – to whom.

Admittedly, as a minimum requirement a judgment should make sense to those to whom it is addressed. And it is not sufficient that a party winning an argument is comfortable with the decision since the winning party will be satisfied by the very fact of winning. The reasoning should be equally clear to the loosing party. But, save in case of strategic litigation and repeat players, there is no easy way to know whether the parties are happy. It is quite possible that a party loosing on the merits will still be comfortable with the reasoning of the Court on a select point of law and will have achieved the desired statement of law that may become relevant for future litigation. However, it must not be forgotten that in all future situations, the original statement of law, the utterance of the Court as the original subject will be re-interpreted by future, transcendental subjects and that any future application will take place in different factual and legal interpretative context. The court can not envisage what is going to happen in the future even if it were its task to do so. What a court can do, at best, is to try to rationalize the complexity of a present case in order to minimize need for future litigation. As Nassim Nicholas Taleb suggested, human ability to understand is encumbered by a number of factors, including the retrospective distortion. In his own words, “we can assess matters only after the fact, as if they were in a review mirror” where earlier chaos appears to look more organized and clear then at the actual time. Briefly, men are "just a great machine for looking backward.” There appears to be a significant difference between a real-time claim for clarity and the posterior one the latter always being interpreted by a transcendental subject in retrospect.

Having said this, it goes without saying that the request for clarity of the original

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27 To extent one can speak about "parties" before the Court of Justice, having in mind that the list of "actors" before the Court is much wider and includes national courts, parties to the original dispute, EU institutions, intervening Member States and other participants.


29 Ehrlich made a similar argument about parliamentary regulation. "The law-giver can, by means of his statutes render decisions only in those types of legal cases which come to his attention. Therefore no decisions can be derived from a statute as to legal cases of which the legislator has never thought or been able to think." *An Appreciation of Eugen Ehrlich*, By Roscoe Pound, 36 HARV. L. REV. 140

30 For example, judgment of the Court of Justice in case C-341/05 *Laval en Partneri Ltd v Svenska Byggnadsarbetareförbundet avd. 1 Byggetan, Svenska Elektrikerförbundet*, caused the parties in the case C-438/05 *International Transport Workers Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti* to settle the case.

31 Nassim Nicholas Taleb, *THE BLACK SWAN*, Kindle edition at 656

32 *Id.* at 716
subject at time of actual deliberation would only be detrimental for legitimacy of adjudication which is, as I have already said, based on information scarcity. Reduction of complexity or, as Pierre Schlag has put it reduction of “pluralistic messes into singular conclusions” 33, can work only if the complexity is reduced to symbolic speech.

It has to be reiterated that it is not only the Court that generates the symbolic speech, it is a two-way process in which “[t]he parties are compelled to “translate” their stories and claims in the idioms of law. They are compelled to adopt law’s ontology, its categories, its networks of causality and symbolic associations.” 34 Indeed, active cooperation of participants to the proceedings significantly determines the shape of judgments to come. Preliminary references are provoked by the parties, formulated by a referring judge, defended before the court by legal representatives, and all of their interventions are translated in legal idioms that ultimately crystallize as the symbolic language of the Court. But, as I have already said, that language will be understood only by posterity.

3.1. Judicial Legitimacy and Law/Policy Conundrum

In the 2013 volume on the legitimacy of the case law of the CJEU, Joseph Weiler presented a strong critique of views of Koen Lenaerts’ on internal and external legitimacy of the Court. 35 According to Weiler, there is an inherent contradiction between two Lenaerts’ contentions: first, that the internal legitimacy of the Court is, in essence, guaranteed by self-restraint and, second, that the Court’s legitimacy is not affected by its historical jurisprudence which “... aimed to safeguard the core of European integration set out in the Treaty by providing solutions to problem that were expected to be tackled by the EU political institutions...”. 36 The gist of this section is my proposition that the tension between the two can be reconciled. In other words, the question is whether it is possible that judicial self-restraint and judicial policymaking can co-exist within the same referential framework of judicial legitimacy. I suggest it is.

In order to substantiate my claim I will invoke the three analytical steps of the divine intervention that convert unclear into clear: the temporal change from then to now, the emergence of the transcendentental subject and objectification of the original subject by agency of the transcendental subject.

3.2. Judgment and the Myth


34 Schlag, id. at p. 817


36 Id. at p. 241
Judicial decisions are man-made artifacts. They are a design of a subject. However, once there, they assume life independent of their creator. Nothing explains it better than the Lafontaine’s fable 37 brought to my attention by Bruno Latour: 38

A block of marble was so fine,
To buy it did a sculptor hasten.
“What shall my chisel, now It’s mine –
A god, a table, or a basin?”
“A god,” said he, “the thing shall be;
I’ll arm it, too, with thunder.
Let people quake, and bow the knee
With reverential wonder.”

One reading of these verses, anticipated by Pierre Schlag well before Latour’s publication, 39 suggests that, in a formalist world a subject creates an object (a legal rule) that assumes life of its own and becomes a transcendental subject. The legal rule becomes personified and takes command of the original subject itself. The law does things and does all by itself. 40 My own reading suggests a different angle. First, the original subject (a court) creates an artifact, an object (a judicial decision). Second, the decision becomes an object of critique of future, transcendental, subjects. 41 In that way, I suggest, judicial decisions, forged in the judicial proceedings and coined in minds of their authors, once pronounced and published, start to live their independent lives by agency of future, transcendental, subjects. 42 Gradually, a judgment can transform into a landmark, 43 and possibly into a myth. 44

Notice that word "landmark" implies an objectification. A judgment can become a

37 Sculptor and the Statue of Jupiter
39 Schlag, supra note 5
40 Schlag supra note 5 at p. 1646. This is a bit like a dr. Frankenstein's Creature that took command of its creator. See. S. Rodin, In the Classroom and the Courtroom, 4 Maastricht Journal (2013) 475, 477
41 I use expression transcendental subject in different sense then Schlag. For Schlag it is a legal norm which becomes transcendental subject and “talks”. Here it is a future utterer who is transcendental subject.
42 I do not exclude eventual personification of a judicial decision along lines explained by Schlag where future transcendental subjects (in my sense) would engage into a dialogue with transcendental subject (in Schlag's sense). In fact, isn’t it usual to say that judgments tell us something, that they explain, clarify or settle.
43 According to the Cambridge Advanced Learner’s Dictionary a landmark is described as “a building or a place that is easily recognized, especially one that you can use to judge where you are”.
44 Merriam-Webster defines a myth as "a usually traditional story of ostensibly historical events that serves to unfold part of the world view of a people or explain a practice, belief, or natural phenomenon"
landmark only by joint effort of the original and transcendental subject. In Point 2 I have described how rules of procedure and internal practices of the Court select cases to be decided by different formations of the Court. In that sense, a potential of a case to become a landmark case has to be recognized by the Court in advance and that is what the Court does. It is not likely that an ordonance decided by a chamber of three judges would ever develop to be one. However, provided a case has certain landmark potential, there is still no guarantee that it will indeed be recognized as such. For example, the Empire State Building was surely conceived by its architects to be a landmark at the time of its construction. But it became a landmark not only because it was meant to be one but because the future observers recognized its distinctive features. Today, the building is surrounded by a forest of similar ones and its distinctiveness has faded. Nevertheless, thousands of visitors visit the Empire State and not any other building instead.

What I am trying to say is that landmark judgments can not be produced exclusively by design of the Court but only in synergy with their users, external actors. While it would be esagerated to say that, from perspective of a judge, every judgment is just a judgment, a judge may, indeed, have an ambition to create a landmark. As witnessed by Paulo Gori talking about circumstances in which "landmark" Van Gend en Loos case was decided and, according to whom, the Court was aware of the general importance of the coming decision. However, the full scale of effects that developed from the judgment were neither contemplated nor caused by the Court.

a. Van Gend en Loos

Judgment of the Court of Justice in the Van Gend en Loos case is a starting point of analysis for every scholar of EU law. Yet, the judgment itself had to resolve a limited controversy of customs classification. If it not were for other reasons, it would have not been remembered at all.

(To be continued ...)

b. Digital Rights Ireland

A more recent example of landmark building is provided by a 2014 case Digital Rights Ireland in which the Court was invited to annul the Data Retention Directive for being contrary to Articles 7, 8 and 11 of the EU Charter of Rights. The case has a clear potential of becoming a landmark being decided by the Grand Chamber and introducing analysis establishing an important method of interpretation that restricts regulatory discretion beyond the plain wording of the Charter, the crucial phrase in the judgment being "strictly necessary".

45 Conference proceedings 50th anniversary of the judgment in Van Gend en Loos, Court of Justice of the European Union, 2013, at p. 30

46 Joined cases C-293/ and C-594/12, judgment of April 8, 2014

47 Directive 2006/24
In paragraph 48 of the judgment, the Court held that:

"... in view of the important role played by the protection of personal data in the light of the fundamental right to respect for private life and the extent and seriousness of the interference with that right caused by Directive 2006/24, the EU legislature's discretion is reduced, with the result that review of that discretion should be strict." (emphasis added)

And in paragraph 52, the Court continued:

"So far as concerns the right to respect for private life, the protection of that fundamental right requires, according to the Court's settled case-law, in any event, that derogations and limitations in relation to the protection of personal data must apply only in so far as it is strictly necessary..." (emphasis added)

The landmark potential of the case obviously lies in a possibility of drawing parallels to strict scrutiny test as applied in the United States. However, whether it will indeed become a landmark depends not exclusively on the Court but on the future interpreters of its judgments.

This is not to say that the role of the Court in creating landmarks is marginal. Digital Rights Ireland builds on earlier case law, notably on a case decided by the Third Chamber (a chamber of five) on November 7, 2013, where it was held that "protection of the fundamental right to privacy requires that derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary." 48 The cited case refers, again, on 2008 Grand Chamber case law 49 where the Court stated that:

"In order to take account of the importance of the right to freedom of expression in every democratic society it is necessary, first, to interpret notions relating to that freedom, such as journalism, broadly. Secondly, and in order to achieve a balance between the two fundamental rights, the protection of the fundamental right to privacy requires that the derogations and limitations in relation to the protection of data provided for in the chapters of the directive referred to above must apply only in so far as is strictly necessary."

Apparently, if there is anything landmarkworthy in the most recent Digital Rights Ireland Case, it must have been developed by the Court of Justice in an extended period of more then five years during which the case law was forged, argued by the parties and commented by transcendental subjects. It is at least fair to say that landmarkness of a case is a product of interaction of multiple

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48 Case C-473/12 Institut professionnel des agents immobiliers (IPI), para. 39
49 Case C-73/07 Tietosuojavaltuutettu, para. 56
actors, lawyers, judges and commentators. In this process the Court and its judges indeed started to forge out the shapes of the landmark out of a block of marble, but, in order to become a landmark, the end result has to be recognized as such by transcendental subjects.

This brings me to the problem of *ex post* critique. Since judgments are subject to critique of the posterity, the critique will be based not exclusively on the judgment itself, but also on construction of the posterior social context. There will be a temporal shift from actual time of adjudication to posterior time of interpretation. And future, transcendental, subjects will incline to decipher and explain the product of the original subject in a way that makes sense, clearly and coherently. And they will typically refer to a posterior context and not the original one in which the decision has been made and which has been visible to direct participants to the proceedings. Gradually, a difference will emerge between a judgment and its myth.

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