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The Constitutional Governance of Supreme Judges in the European Union: Theoretical and Empirical Prolegomena

A study on the extra-legal mechanisms of the regulation between national and EU legal orders by the example of the judicial dialogue between the French supreme courts and the European Court of Justice

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Table of Contents

I. Introduction: The Socio-political Study of Legal Systems' Relations in the EU

A. The Study of the EU Legal Integration and the 2000s turn

1. Legal integration: from the origins to the 2000s
2. The empirical renewal of the 2000s

B. The Constitutional Dialogue of Supreme Judges: Legal Integration Studied at its Ultimate Level

1. The judicial dialogue between the ECJ and the national supreme courts
2. The constitutional dialogue of supreme judges in the EU
3. The paradigmatic aporia and the practical threat of an open constitutional conflict between EU law and national constitutional law

II. The Theoretical Model: The Three Cultures of Anarchy and the Security Community

A. What International Relations bring to Legal Integration Studies: the Notions of Legal Sovereignty and Jurisdictional Anarchy

1. Legal Sovereignty
2. Jurisdictional Anarchy

B. The Judicial Dialogue Viewed Through the Culture of Anarchy's Approach

1. Alexander Wendt and the three cultures of anarchy
2. The three cultures of anarchy applied to the constitutional dialogue of supreme judges
3. A shift towards the Kantian culture of the judicial dialogue

C. The Common Management of Systems Relations by the Establishment of a Security Community

1. The notion of security community
2. The notion of epistemic community

III. Empirical Study: A Shift towards the Kantian Culture of the Judicial Dialogue and the Establishment of a Jurisdictional Security Community in the EU

A. The Emergence of a Kantian Culture of the Judicial Dialogue: The Recognition of the Other and the Discourse of Friendship

1. The recognition of the Other
2. The actors' paradigmatic pattern evolution and the discourse of friendship: from hierarchy of norms to constitutional pluralism

B. The Establishment of a Jurisdictional Security Community within the EU

1. The development of an extra-legal regulation system on the relationship between legal orders
2. The institutionalisation of supreme judges' socialisation in the EU
3. The emergence of an epistemic community: the cognitive convergence by the comparative law approach
4. The advent of a "Community of judges" within the EU

IV. Conclusion

This paper is based on my current research work – still in progress – about the extra-legal mechanisms created and implemented by the supreme courts in the EU in order to regulate the relationship between the European legal systems (national and EU legal orders). I try to develop the notion of “constitutional governance of supreme judges” in order to qualify et study these extra-legal mechanisms.

Worried by the potential constitutional conflict between EU law and national constitutional law, a conflict that may destroy the EU according to the supreme judges of the EU (the ECJ and the national supreme courts – NSC), those jurisdictional actors have to find a solution to handle it. But on one side, it appears to them that it is theoretically impossible, in the legal paradigm of hierarchy of norms, to fully conciliate EU law and national constitutional law. Indeed, nor the ECJ neither the NSC can admit the superiority of the other’s supreme norm (the national Constitution or the EU treaties). It would indeed pertain to give up its own legal sovereignty. But on the other side, the risk of an open constitutional conflict is not bearable. Here is our research question: how do the ECJ and the NSC manage this systemic risk, knowing that they cannot solve the problem within the legal level.

My main hypothesis is that those jurisdictional actors understand the necessity to go out of the classic legal way and to find and use extra-legal means (mainly political means) to cope with this legal problem. More than that, I argue that these jurisdictional actors change their political culture (understood as culture of anarchy). They move from a Lockean culture of anarchy (rivalry) to a Kantian culture of anarchy (friendship) and establish a jurisdictional security community wherein the regulation of legal orders relationship is collective and made of solidarity.

I won’t study in this paper the kind of logic which explains this cultural change (logic of consequentialism, logic of appropriateness or logic of argumentation). I won’t study the internal mechanisms of the constitutional governance of supreme judges, but only its theoretical and empirical prolegomena, in a word its genesis. How do I come to it: the International Relations’ notions of cultures of anarchy and security communities. The constitutional governance of supreme judges is no more than the internal regulating system of the jurisdictional security community established by the ECJ and NSC and which takes root in their new Kantian culture of judicial dialogue.

I. Introduction: The Socio-political Study of Legal Systems' Relations in the EU

A. The Study of the EU Legal Integration and the 2000s turn

After an initial period of shadow, the ECJ and its action began to be studied by political scientists in the 1980s and mostly in the 1990s. This part of the European integration, called “legal integration” (Weiler, 1995) – the role of EU law and the ECJ in the European construction – strikes most of us. From an international treaty, we discovered some years later an autonomous legal order based on the ECJ’s “constitutional doctrine” (constituted by the well-known principles of direct effect and supremacy of EU law over national law). Some talk about a quasi-federal legal order where the ECJ possesses the legal or judicial sovereignty (Stone Sweet, 2004 ; Weiler and Haltern, 1998).

1. Legal integration: from the origins to the 2000s

The first preliminary rulings received by the ECJ were sent by ordinary national courts. They allowed the ECJ to pronounce its famous *Van Gend en Loos* (1963) and *Costa v. ENEL* (1964) decisions. The national supreme courts (NSC) were more reluctant to activate this preliminary mechanism and took time to engage a judicial dialogue with the ECJ. This process could be described as an evolving relationship, from direct hostility to loyal cooperation.

The French Conseil d’Etat (State Council, the supreme administrative court) offers us the perfect example. Its position vis-à-vis the ECJ’s principle of EU law supremacy was a ruthless refusal with its decision *Fabricants de semoules* (1968). It also refused to recognise the direct effect of European directives with its decision *Cohn-Bendit* (1978). But, from the end of the 1980s, the French Conseil d’Etat softened its position and eventually accepted the supremacy of EU law over national law with its decision *Nicolo* (1989). With its decision *Alitalia* (1989), it neutralised its principled refusal of direct effect of European directive – but without at this time formally abandon its jurisprudence *Cohn-Bendit*.

Still, the ECJ and the NSC maintained an open disagreement on the hierarchy between EU law and national constitutional law. The ECJ, with its decision *Internationale Handelsgesellschaft* (1970), understands the principle of EU law supremacy as absolute, suffering no contradiction, even with a national constitutional norm. The French Conseil d’Etat, with its decision *Sarran* (1998), explicitly said that the national Constitution is above all, even EU law.

2. The empirical renewal of the 2000s

However, in the context of the Treaty establishing a Constitution for Europe (the ‘European Constitution’), the NSC modified their jurisprudential position towards the constitutional doctrine of the ECJ. Indeed, the European Constitution contained the article I-6 which clearly enshrined the principle of supremacy of EU law. The national constitutional courts had to control the compatibility of this provision to their own national constitution.

The French Conseil Constitutionnel (the French constitutional court), in its decision of the 10th June 2004 *Loi pour la confiance dans l'économie numérique*, changed the legal basis for the recognition of the supremacy of EU law over national law. It abandoned article 55 of the French Constitution (international law supremacy over national law) and now refers to article 88-1 (specific for the EU law). This move allowed to change the French NSC's conception of the hierarchy of norms (see below figures 1 and 2). The rightfully transposition of an EU directive in the national legal order is now a constitutional obligation. That pertains to say that EU law is now equal to national constitutional law, in normative terms. But still, an EU norm cannot prevail over a "rule or principle inherent to the constitutional identity of France". Legal scholars call it a "counter-limit".

This jurisprudential move was also adopted by the French Conseil d'Etat with its decision *Arcelor* (2007). Moreover, in few years, it abandoned the last points of discord with the ECJ. With its decision *De Groot* (2006), the Conseil d'Etat, against its previous decision *ONIC* (1985), now accepts the authority of EJC's preliminary rulings which exceed the scope of the preliminary question posed by the national court. With its decision *Perreux* (2009), it now recognises the direct effect of EU directives and, in doing so, withdraws its infamous *Cohn-Bendit* decision of 1978.

Here are four figures representing the different actors' views of hierarchy of norms:

Fig.: the hierarchy of norms according to French national supreme courts before the 10th June 2004 Conseil constitutionnel decision

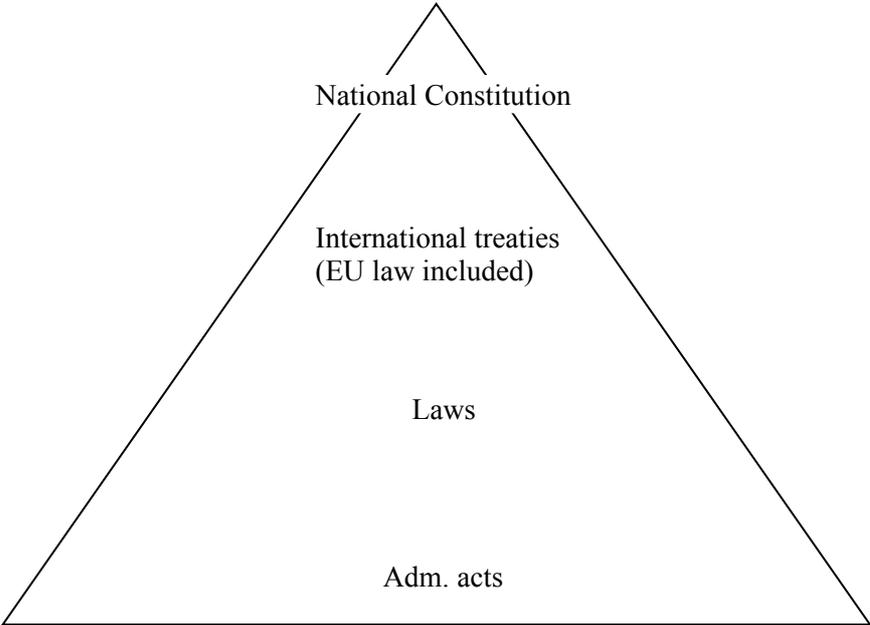


Fig. 2: the hierarchy of norms according to French national supreme courts after the 10th June 2004 Conseil constitutionnel decision

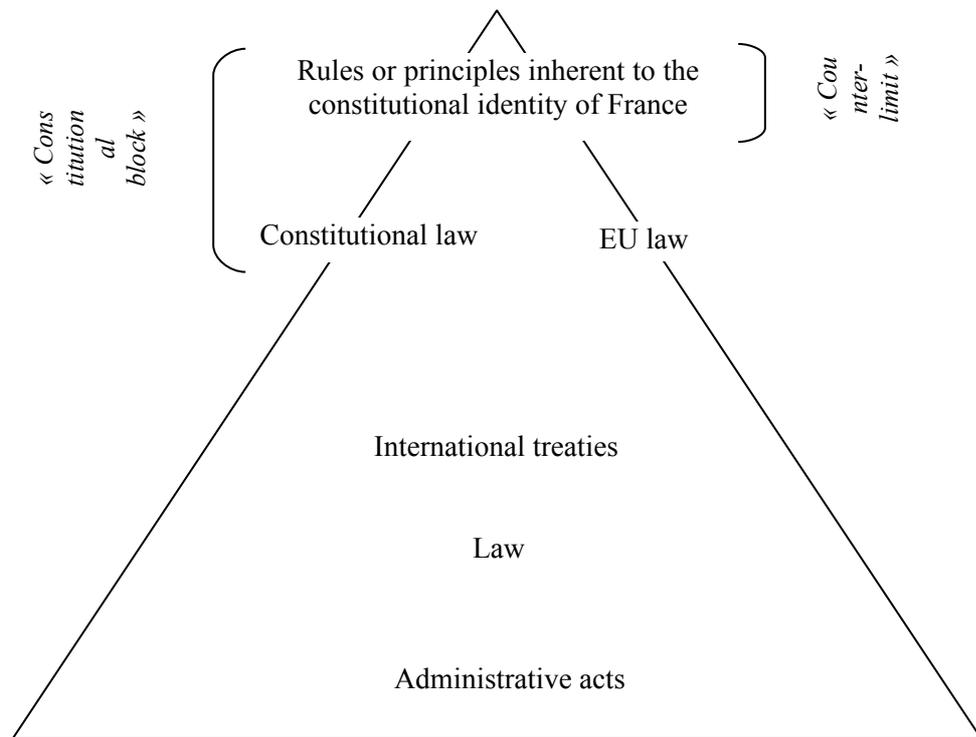


Fig. 3: the hierarchy of norms according to the ECJ

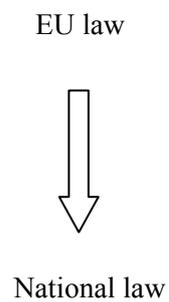
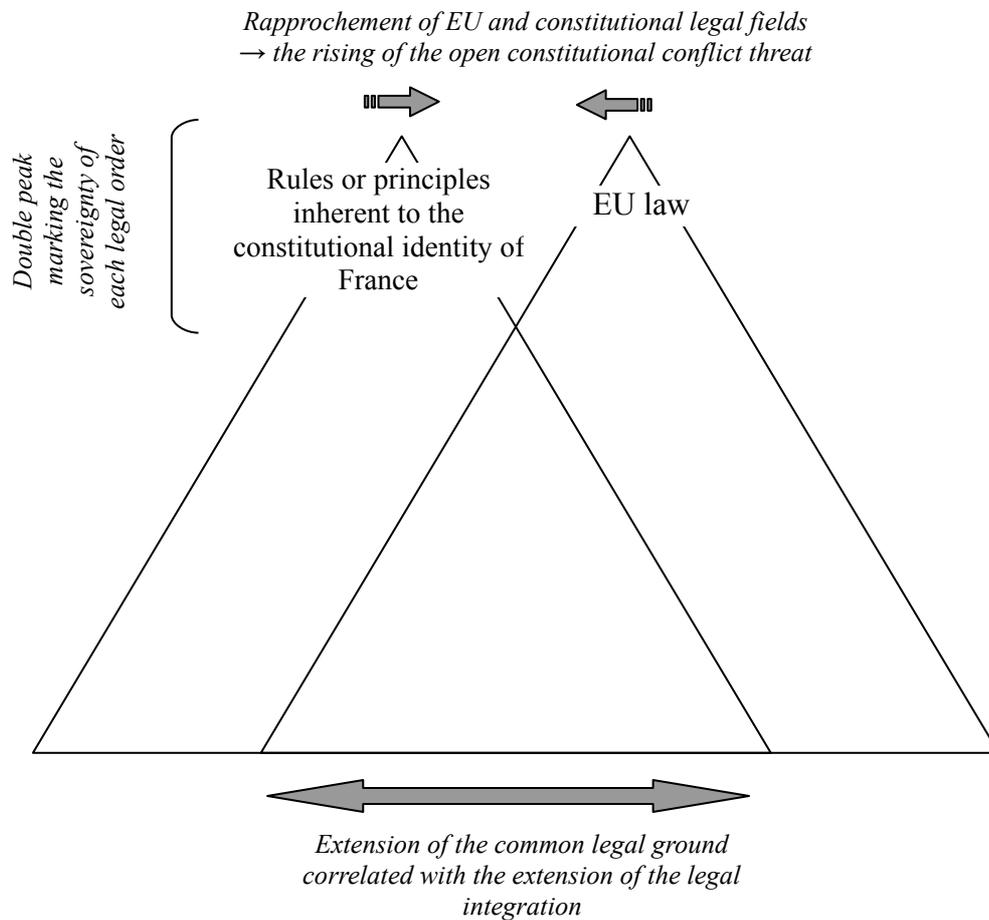


Fig. 4: the global view of the European normative space: the double pyramid with a common base



B. The Constitutional Dialogue of Supreme Judges: Legal Integration Studied at its Ultimate Level

1. The judicial dialogue between the ECJ and the national supreme courts

The dialogue of judges could be defined as the non-hierarchical relationship between courts (without formal or legal subordination of one on another). In other words, there is no jurisdictional hierarchy when a court cannot overturn the legal decisions of another court in the legal order of the later, but can only in the best case engage the responsibility of the State whom the later court belongs.

The judicial dialogue between the ECJ and the NSC offers a peculiar feature. It involves supreme courts at the top of their own legal orders, but those legal orders are highly enmeshed. And there is no formal body in charge of solving conflicts that may arise between those supreme courts. Thus, the relationship between the ECJ and the NSC implies *in fine* a horizontal dimension made of loyal cooperation but also of power relationship.

A plenty of political science studies have analysed this game between cooperation and rivalry. The neofunctionalist (and dominant) approach explains the evolution from rivalry to cooperation by the mechanisms of mutual empowerment (Burley and Mattli, 1993). The national courts have accepted the ECJ's "constitutional doctrine" because it empowered them towards their national government and parliament (with the possibility to overturn a national law by an EU rule). The intergovernmental approach says the opposite (Garrett, 1995). According to the Principle-Agent model, the national governments (Principals) fully control the ECJ (Agent). But this approach doesn't resist to the empirical test. The ECJ appears to be highly independent from national governments and it is very hard for them to overturn an ECJ's decision because it simply requires amending by unanimity the EU treaty.

2. The constitutional dialogue of supreme judges in the EU

The rich political science literature has not however studied in itself the judicial dialogue between the ECJ and the NSC at its constitutional level and the specific political problems it raises for those jurisdictional actors. By "constitutional dialogue of judges", I mean the judicial dialogue focused on the relationship between EU law and national constitutional laws (what legal scholars call "systems relationship"). This constitutional level of legal integration raises new problems which could, I believe, reveal the nature of the global system of judicial dialogue in the EU and the legal integration process as a whole.

At this level, we observe that the loyal cooperation is replaced by a principled opposition between the ECJ and the NSC. There is an irreducible disagreement on the question of the fundamental norm standing at the top of the legal hierarchy: the national Constitution ("rules or principles inherent to the constitutional identity of France") for the NSC or the EU treaties for the ECJ. Figure 2 shows the impossibility for NSC to fully recognize the absolute superiority of EU law. Because of national legal sovereignty, the "identity core" of the national Constitution must stand at the top of the national legal order.

3. The paradigmatic aporia and the practical threat of an open constitutional conflict between EU law and national constitutional law

The impossibility to fully articulate EU law and national constitutional law was for a long time merely viewed as a theoretical matter. Legal scholars clearly express this theoretical stalemate:

« (...) the Constitution and the bodies in charged of its interpretation have not the possibility to place the Constitution below international law. Asserting subordination implies the superiority on what we submit, a superiority that cannot depend on what is subordinated. Yet, all the ingenuity of the world could not find a mean for a Constitution or one of its constituted body to place international law above it. Where could such a levitation power allowing a norm to pull itself out of reach of its own scope come from? » (Alland, 1998, p. 1101)¹

Bruno Genevois, former president of the Conseil d'Etat's legal department and former general secretary of the Conseil constitutionnel, also known as the « inventor » of the expression « dialogue of judges », sets out the problem in similar words:

¹ Translated from French by me. All the other quotations are translated from French by me. Denis Alland speaks about international law, but his reasoning applies to EU law as well.

« The elements of the debate are known. On one side, since the *Costa v. ENEL* case of 15 July 1964, the ECJ has (...) posed the premise that the Rome treaty, unlike ordinary international treaties, has established a proper legal order integrated to member States' legal systems, and has concluded the impossibility for member States to make their national law prevail against a legal order accepted by them on the basis of reciprocity. » From this founding case, the ECJ expresses “a true federalist profession of faith”. On the other side, it is difficult for national jurisdictions, especially constitutional courts, to not give priority to constitutional provisions that rule their actions, even if these jurisdictions exert also the function of ordinary EU judges.” (Genevois, 2004)

Thus, the judicial dialogue cannot solve, within the legal field, the problem of articulating EU law and constitutional law. This situation of paradigmatic stalemate (or paradigmatic aporia) leads inevitably to an unsatisfying “normative disorder”. Guy Canivet, former First President of the French Cour de cassation (the supreme private law court) and current member of the Conseil constitutionnel, raises the unsatisfying side of this situation:

« It is more about a power conflict than a normative conflict. (...) The national judge cannot see the branch on which he sits, since it is the Constitution which gives him his legitimacy: if he moves away from the Constitution, he would find himself in a situation of “weightlessness” and would not be able to fulfil his mission. We come then to a situation of stalemate: shall we stay there, take it as a symbol of the system deadlock, or shall we instead find solutions » (Canivet, 2007)

Figure 4 shows that because of the increasing overlapping between EU and national legal orders, the risk of an open constitutional conflict is no longer theoretical but has become a real and practical threat. That is at least the common analysis shared by the ECJ and the NSC. Frédéric Lenica et Julie Boucher, from the documentation centre of the Conseil d'Etat, evoke the perspective of this open constitutional conflict:

« (...) What is important to highlight is that, beyond theoretical debates, the practical consequences of this 'fundamental contradiction' of 'two exclusive and sovereign systems looking to each other' (...) depend essentially on the conditions of implementation, in each legal order, domestic and international, of its own rule of conflict of norms, and the judicial remedies to enforce it. (...) the handling without nuance of the principle of supremacy of international law by international courts might degenerate in an open conflict with national courts all the more so as the latter will recognise in their own scope of competences the function which enables them to guarantee the supremacy of the national Constitution over international treaties in the domestic legal order. (...) » (Lenica et Boucher, 2007)

The official comment on the decision of the Conseil constitutionnel about the European Constitution, published in the *Cahiers du Conseil constitutionnel* (the journal of the French Conseil constitutionnel), spells out this threat of a major crisis:

« If the Conseil constitutionnel censor a national legal provision directly implementing an EU directive, it would be as if it obstructs the rightful transposition of this EU directive (...). Then, a totally new crisis of the EU legal order would be open (...). » (Cahiers du Conseil constitutionnel, 2004, n° 18)

The *Kreil* case (2000) exemplifies the reality of the threat. In this case, the ECJ makes prevail the EU provision on equal treatment between men and women against a German constitutional provision which forbids women to have access to some specific German military jobs. The condemnation by the ECJ of this old-fashioned German constitutional provision did not arouse so much domestic contestation. But let's just imagine what would it be if the ECJ condemn the French principle of secularism or the anti-abortion law in Ireland

and Poland? Vassilios Skouris, the current ECJ's president, does not leave aside this hypothesis:

«Is this question not of practical relevance today? We cannot rule it out. When national Constitutions, when protecting fundamental rights, does not limit themselves to the protection of those fundamental rights but insert the same rules of limitation or prohibition for historical, economic or social reasons; if guaranties and limits exist at the same time in the national Constitution, then the question could be asked. » (Skouris, 2007b)

Facing this fundamental threat, the ECJ and the NSC understand both the limits of the formal mechanisms of juridical cooperation and the need to invent and use pragmatic and informal tools for cooperation.

II. The Theoretical Model: The Three Cultures of Anarchy and the Security Community

A. *What International Relations bring to Legal Integration Studies: the Notions of Legal Sovereignty and Jurisdictional Anarchy*

If legal integration studies opens itself to classic political science approaches (judicial and comparative politics, public policies...), they have not yet look towards International Relations (IR). Yet IR theory allows to fully take into account the fundamental dimensions of state sovereignty and anarchy that are still at the core of the EU system. The constitutional dialogue of supreme judges in the EU is constituted by these two fundamental features: legal sovereignty and jurisdictional anarchy.

1. Legal sovereignty

According to the definition of state sovereignty, a State possesses sovereignty only if it possesses legal sovereignty. According to the legal theorist Hans Kelsen, State and legal order are the same entity. A State could be viewed as a sovereign (or autonomous) legal order. A legal order is sovereign when no external legal norm can be superior to the fundamental norm of that legal order (the famous *Grundnorm*) in that legal order and by extension before the jurisdictions of that legal order. A State is sovereign only if its legal order's *Grundnorm* (its Constitution) is supreme, standing at the ultimate top of the domestic legal order. The legal sovereignty of the member States' legal order is easy to understand. The analogy is less direct for the EU legal order, but still works.

What did the ECJ with the *Van Gend en Loos* and *Costa v. ENEL* cases was to “autonomize” the EU legal order by building a proper, distinct and eventually autonomous legal order from international law and national legal orders (but integrated to member States' legal orders). That is the assertion of this famous quotation from *Costa v. ENEL*:

« (...) By contrast with ordinary international treaties, the EEC treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply (...) »

Both the ECJ and EU law scholars claim that this EU legal order autonomy *and* authority into member States' legal orders (via the principles of EU law direct effect and supremacy) are “existential” conditions. Without them, there is no effective EU law, thus no proper common market, thus no viable European Union. That was called the 'ruin argument' and this was more or less accepted by national courts. Thus, the EU legal order has become a true autonomous legal order, with at its top the supreme authority of its *Grundnorm*, the EU treaties. The EU legal order is sovereign, legally speaking.

2. Jurisdictional anarchy

Anarchy is the absence of a common government between the units of a system. Anarchy is the structural feature of international relations. Anarchy in itself tells nothing on the means used by units to reach their aims. It only tells us that there is no superior authority which can forbid units to use means at their disposal. Anarchy does not exclude the possibility of a ruling system, as long as those rules are not set up by a superior unit which would then possess *de facto* an authority over other units.

The system of supreme jurisdictions in the EU is in that way anarchic. If it *contains* rules that link supreme jurisdictions (*e.a.* preliminary ruling mechanism), those rules does not *bind* them. And even if there could be some rules that shall bind supreme jurisdictions (*e.a.* the obligation for national supreme courts to send to the ECJ a preliminary question anytime they face a new or unclear EU law matter), there is no superior jurisdictional authority empowered to make those rules binding and effectively followed. If legal orders are sovereign, jurisdictions at their top are also sovereign. The system of judicial relationship involving supreme jurisdictions in the EU is structurally anarchic.

B. The Judicial Dialogue Viewed Through the Culture of Anarchy's Approach

1. Alexander Wendt and the three cultures of anarchy

Alexander Wendt, building his constructivist approach against the neoliberalism of Kenneth Waltz, rejects the materialist conception that anarchy is structurally a self-help system of power equilibrium implying necessary egoist and defensive state behaviours. According to Wendt, anarchy is a social construction that could be realized in different cultures.

Culture is understood as a « general set of cognitive rules and recipes in terms of which agents, institutions, and structures are constituted » (Berger et Luckmann, quoted in Swidler, 2001, p. 3064) or a « shared cognitive pattern » (Douglas, 2001, p. 3149). Culture refers to socially shared knowledge, a knowledge both common and collective (Wendt, 1999, p. 141). Against Hedley Bull who sees the increase of shared knowledge as the factor explaining the shift from an anarchic system to an anarchic society wherein cooperation is possible (Bull, 1977), Wendt distinguishes culture (shared knowledge) from society (state of cooperation opposed to state of nature). To Wendt, shared knowledge is analytically neutral. It does not implied *per se* cooperation nor prevent from conflict. A cultural norm could be “good” or “bad”. War could be culturally seen as legitimate and good (*e.a.* war values). The

level of cooperation does not depend on the degree of internalisation of culture or the amount and depth of shared knowledge.

Wendt distinguishes three cultures of anarchy according to three collective representations or figures of the Other: 1) the Hobbesian culture and the figure of Enemy, 2) the Lockean culture and the figure of Rival, and 3) the Kantian culture and the figure of Friend. Each culture refers to a specific position vis-à-vis violence. With the Hobbesian culture, the Other is seen as a potential threat of being killed. There is no limit to violence. Kill or being killed is the motto. With the Lockean culture, violence is allowed but cannot imply the total destruction of the Other. The recognition of the right of existence of the Other is the limit. With the Kantian culture, violence is forbidden. Conflicts must be solved by peaceful means and solidarity between members is required (Wendt, 1999, p. 258).

Each culture of anarchy could be realized in multiple ways (“multiple realizability”). A cultural norm could be followed by three reasons which refer to three degree of internalization: coercion, individual interest and legitimacy (“taken-for-grantedness”). This three degree of internalization correspond to three different modes for the production of the same structure: force, price and legitimacy (Wendt, 1999, p. 250-254). The Hobbesian culture of anarchy can be realized by coercion (external constraint), by interest and even by legitimacy. It goes the same for the two other cultures of anarchy. The Kantian culture cannot be realized only by legitimacy, but also by coercion and interest.

2. The three cultures of anarchy applied to the constitutional dialogue of supreme judges

The dialogue of supreme judges in the EU, as an anarchic system, is made of different behaviours in which we can find the three cultures of anarchy. The Hobbesian culture of judicial dialogue refers to the deny of the recognition of the other legal order. Historically, some national supreme courts adopted that position: for instance, the French Conseil d’Etat’s position with its decisions *Semoules* (1968) and *Cohn-Bendit* (1978). It denied to the EU legal order any autonomy from international law. Then, the Lockean culture of judicial dialogue implies the recognition of the Other, its right to exist. Cooperation becomes possible, even if there is still a game of rivalry. The *Nicolo* decision (1989) of the French Conseil d’Etat which recognises the supremacy of EU law over national laws (but not over constitutional norms) follows that way. The Kantian culture of judicial dialogue implies the full cooperation of jurisdictional actors. Those see themselves as part of a same community wherein conflicts are solved by peaceful means and solidarity between members in case of individual or collective threat is required. The Kantian culture of judicial dialogue seems to characterize the evolution of judicial dialogue between supreme courts in the EU since the 2000s.

C. The Establishment of Jurisdictional Security Community

1. Security communities

In the Kantian culture of anarchy, the notion of “security community” is a powerful tool to analyse phenomenon of non aggression by cooperation and socialization between sovereign actors in an anarchic system. Karl Deutsch *et al.*, in their seminal book *Political*

Community and the North Atlantic Area (1957), define the notion of security community as a group of individuals integrated by a sense of community² and which share the certainty that they won't solve their conflicts by violence, but only by peaceful means ("dependable expectation of peaceful change") (Karl Deutsch *et al.*, 1957, p. 5). A security community is a "non-war community" (Wæver, 1998, p. 71). Deutsch distinguishes two kinds of security communities: amalgamated security communities (with formal fusion of the units in a wider entity) and pluralistic security communities (without formal fusion of units, each one remaining autonomous). The later preserve the legal independence of units meanwhile gathering them by a common core of values and institutions, a sense of 'we-ness' and a certain level of integration which allows dependable expectations of peaceful change.

In the second half of the 1990s, Emanuel Adler and Michael Barnett did a major renewal of security community studies, refining them with the constructivist approach and the notion of "cognitive region" inspired by the Benedict Anderson's "imagined communities" (Adler and Barnett, 1996, 1998). The notion of cognitive region is defined as a regional system of meaning, not necessary geographically determined, and constituted by people sharing common understandings and normative principles beyond territorial sovereignty. They actively communicate and interact beyond borders, are involved in the regional political life toward regional goals, and incite States of the region to act as agent of the common interest, and rely on a regional system of governance (Adler, 1997, p. 253).

According to the level of trust and the kind of institutionalisation of the governance system, the existence of an anarchic situation or the transformation of it, Adler and Barnett distinguish two categories of pluralistic security communities: the loosely-coupled pluralistic security communities and the tightly-coupled pluralistic security communities (Adler et Barnett, 1996, p. 73). The first category refers to the minimal definition of pluralistic security community: transnational regions constituted by sovereign states whose people maintain dependable expectations of peaceful change. The second category adds two conditions: 1) a society of mutual help in which States establish a system of collective arrangements, and 2) a post-sovereignty governance system as a halfway between a sovereign State and a centralised-regional government, and based on supranational and transnational institutions. In that system, States are still formally sovereign, but their authority and legitimacy depends on the security community in two ways: 1) the more the security community is characterised by dense links, the more its members are transformed, and 2) a State is accepted to be part of a security community and is given rights and duties according to its ability to conform itself to the normative structure of the security community. Members of a security community remain "free" to follow their own preferences to the extent that those are cognitively shaped by their common understanding (Adler, 1997, p. 266).

Adler and Barnett build a life-cycle theory of security communities in three stages (Adler et Barnett, 1998, p. 38, fig. 2.1):

² The terms « sense of community » is define as « a belief on the part of individuals in a group that they have come to agreement on at least this one point: that common social problems must and can be resolved by processes of peaceful change. » (Deutsch *et al.*, 1957, p. 5)

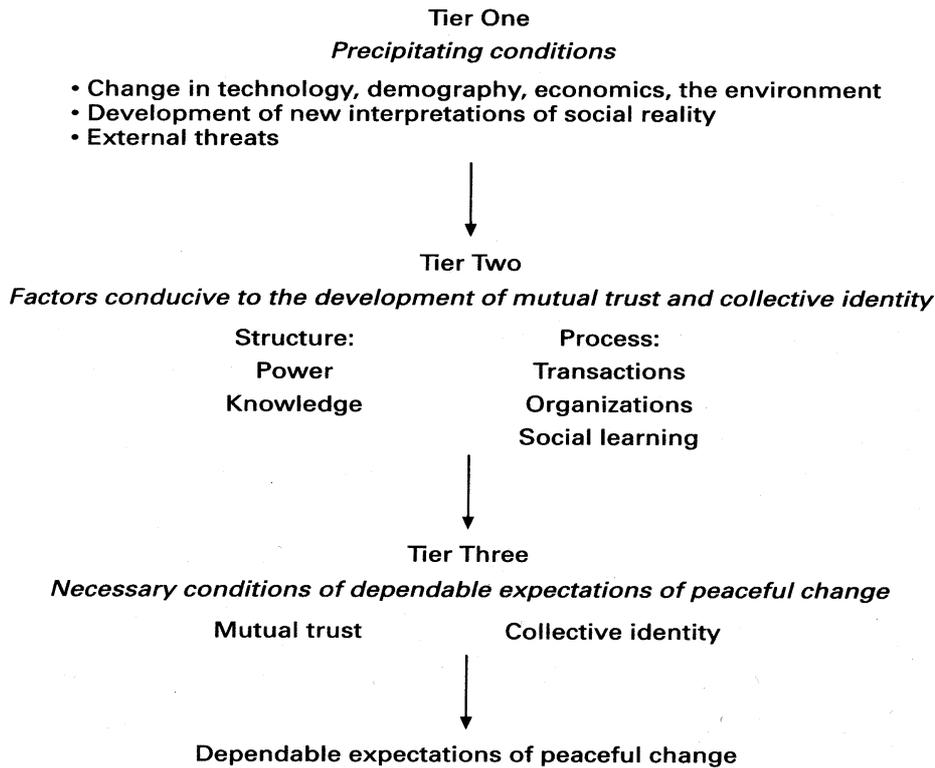


Figure 2.1 The development of security communities

2. Epistemic communities

The notion of “epistemic communities” is also a powerful tool to catch phenomenon of production of collective meaning and social reality. Epistemic communities can be seen as the vehicle for scientific paradigm of a specific field, its interpretations and meanings (Adler, 1997b, p. 343). Peter Haas defines it as a group of specialists who share the same criterion of scientific validity and more generally the same values and principled and causal beliefs (Haas, 1992).

The study of epistemic communities raises the fundamental question of the conditions of the emergence of a new dominant view inside a scientific community, or, more largely, a social group. This question refers to the process of cognitive change. This new dominant view is, according to constructivism, the product of social interactions, diffusion and institutionalization of constitutive norms which construct in return identities, interests and practices of the community.

III. Empirical Study: A Shift towards the Kantian Culture of the Judicial Dialogue and the Establishment of a Jurisdictional Security Community within the EU

A. The Emergence of a Kantian Culture of the Judicial Dialogue: The Recognition of the Other and the Discourse of Friendship

1. The recognition of the Other

The recent decisions of the French Conseil constitutionnel and Conseil d'Etat show a break in their understanding of what is EU law. They formally recognise the specificity of EU law, as it is asserted by the ECJ for 40 years. Indeed, with its decision of 10 June 2004, the Conseil constitutionnel controls EU law no longer according to article 55 but to article 88-1 of the French Constitution. This shift formally symbolise this new recognition of the *sui generis* nature of EU law, in a Kantian mood. The Other exists for what he is and without perceived as a potential threat. He is no longer denied.

2. The actors' paradigmatic pattern evolution and the discourse of friendship: from hierarchy to pluralism

Counscious of the theoretical stalemate stemming from the hierarchy of norms, legal scholars have begun to think about a new legal paradigm. New theories bloomed: "blurred law" (Delmas-Marty, 1986), "network paradigm" (Ost and Van de Kerchove, 2002), "ordinated pluralism" (Delmas-Marty, 2006) or "constitutional pluralism". All these theories are based on the idea of a horizontal logic (against the vertical logic of the kelsenian paradigm) and a decentred legal and judicial power. Members of supreme jurisdictions in the EU increasingly listened to that new theoretical trend and began to use it in their own legal productions. More than that, they seem to see in it the solution to the problem of the relationship between EU law and national constitutional law. Mathias Guyomar, rapporteur public (similar to a general advocate) of the Conseil d'Etat, clearly expresses this trend:

« The Kelsenian pyramid does not fit anymore to take into account the relationship between different legal orders: national laws, EU law and European convention on human rights law. The legal pluralism is good, but only if ordinated. The judge's responsibility to guaranty the coherence between these normative networks is a major stake. » (Guyomar, 2008)

In the same way, Jean-Marc Sauvé, current Vice-Président (the chief) of Conseil d'État, synthetises the reasons of such shift to a logic or legal orders articulation:

« Remain the question (...) of articulation between constitutional law, national and EU ones. It would be insoluble if we tackle it in terms of supremacy because there would be no proper solution because of these two legal orders: the national legal order where is seated national judges and the EU legal order. I believe that if we leave that supremacy approach to adopt an approach based on articulation, that could be the true loyal cooperation between jurisdictions, there are solutions all the easier to reach that it exists the preliminary ruling mechanisms. » (Sauvé, 2007b)

More than an analysis of the current situation, Guy Canivet, former First president of the French Cour de cassation and current member of the Conseil constitutionnel, adopts a prescriptive discourse on constitutional pluralism:

« The overlapping between state and supra-state legal spaces probably leads to abandon the classic metaphor of the pyramid of norms in favour of another, more innovative, more dynamic, more authentic which evokes the interconnexions of ‘networks’ » (Canivet, 2004, p. 133)

« If we conceive that the EU does not lead inescapably to uniformisation, if we admit that the principle of subsidiarity makes sense for the respect of national judicial traditions, then only dialogue can avoid the reduction of differences to an empty and fatal consensus, only dialogue can foster integration, without assimilation, of European judicial systems, only dialogue can lead to an authentic European judicial culture, strong of its diversity. » (Canivet, 2003)

Mathias Guyomar of the Conseil d’Etat follows that same prescriptive line:

« To those who fear the multiplication of legal sources and the plurality of judges in charge of implementing them as a factor of legal insecurity, we answer that it is an enrichment of the rule of law which fears no more than the monopoly – one of a legal system which leads to sclerosis or one of a judge which leads to arbitrary. But this blooming normative system requires a solid organisation: the convergence or complementarity of legal orders must be correlated with cooperation between jurisdictions. Nothing would be worse than an instrumentalisation of the French Conseil d’Etat to oppose two legal orders that we must on the contrary try to combine. » (Guyomar, 2008)

Jean-Marc Sauvé, Vice-président of the Conseil d’État :

« We are in a double hierarchy with two triangles, a same ground and two tops.³ We must dedicate our times to avoid contradictions. So long as we won’t be in a federal state structure, there will be possibilities of divergence between the EU and national legal orders. Strategies of avoidance exist. (...) It also exists in reality, from national and EU judges, reasonable interpretations of EU norms, in a perspective of true collaboration. (...) The dialogue and cooperation of judges are no longer incantations but realities. » (Sauvé, 2007)

The paradigm of constitutional pluralism can fit with the supreme jurisdictions’ interests. Indeed, its horizontal logic allows rejecting any form of hierarchy among the ECJ and the NSC. It makes possible a true dialogue of judges, avoiding any form of subordination (at least formally) and thus allowing a true mutual confidence and the lessening of potential tensions between courts that could lead to open conflicts. Vassiolios Skouris, the current president of the ECJ publicly affirms that:

« The ECJ is not in a situation of hierarchy towards national jurisdictions. (...) Within the framework on this unique judicial cooperation, the ECJ works hands in hands with the national jurisdictions in a climate of mutual trust and complementarity. » (Skouris, 2007a)

More than avoiding a trend to subordination, the French Conseil d’Etat understands that it is its only chance to not be let aside in the legal construction of Europe. The Vice-président of Conseil d’État, Jean-Marc Sauvé, says so about the decision *De Groot* (2006) of the Conseil d’Etat which:

« (...) takes all the consequences of our affiliation to two legal orders which are intergrated to each other, but not totally organised into hierarchy. The administrative judge takes fully into account both its constitutional basis which established its powers and legitimacy, and the integration of the EU legal order into domestic law. (...) What it must be is to involve the Conseil d’Etat in the building of a European justice. » (Sauvé, 2007)

3 See figure 4.

By its decision *Perreux* (2009), the French Conseil d'Etat abandons its Cohn-Bendit jurisprudence, symbol of non cooperation with the ECJ. 30 years later, the Conseil d'Etat at least recognises the direct effect of EU directives. This was maybe the last significant bone of contention with the ECJ. The vast majority of legal scholars and judges analysed the decision as a perspective revolution (Liéber and Botteghu, 2009; Ritleng, 2009) or as an European aggiornamento for the Conseil d'Etat (Cassia, 2009).

The French Conseil constitutionnel and Conseil d'Etat have recently changed their fundamental position towards the ECJ by recognizing the full integrity of EU law in their own national legal order. More than that, jurisdictional actors developed a new culture of their judicial dialogue, a Kantian culture filled with full cooperation and mutual trust, and even an explicit discourse of friendship.

B. The Establishment of Jurisdictional Security Community

1. The development of an extra-legal regulation system of the relations between legal orders

The preliminary ruling mechanism is a formal tool for judicial cooperation, but deemed not fully adequate at the constitutional level or relationship between EU and national legal orders. Jurisdictional actors understand that and expressly ask for extra-legal mechanisms of judicial cooperation for a true dialogue of judges. Guy Canivet, current member of the Conseil constitutionnel and former First president of the Cour de cassation, says that it exists a clever mode of judicial cooperation: an “extra-jurisdictional collaboration” (Canivet, 2007). Jean-Marc Sauvé, head of the Conseil d'Etat, shares the same line of thoughts. According to him, the institutional cooperation is essential, but cannot fully answer to the challenges raised by the game of reciprocal influence between the ECJ and the NSC (Sauvé, 2007b).

The true distinction between the Lockean culture and the Kantian culture of judicial dialogues rests on that “extra-jurisdictional collaboration”, in other words the extra-legal mechanisms of judicial cooperation. With the Kantian culture of judicial dialogue, actors enter in a socio-political sphere of interactions. It has always been some connexions between courts and their members, at least through official meetings. But it is only since the 2000 years that a deep process of socialization has been launched, with an increasing rate of formal meetings and a new practice of informal meetings and workshops at the top level.

The main function of these meetings is to anticipate and prevent potential constitutional conflicts. By this informal judicial dialogue, they can “co-manage” the articulation of EU and national legal orders. If there is a conflict, it must be kept in this extra-legal sphere. How do the jurisdictional actors co-manage is a question that won't be answered in this paper. This is the question of the kind of this collective governance (that I call the “constitutional governance of supreme judges”).

Guy Canivet talks about this new kind of judicial cooperation:

« The deadlock point is the conflict between constitutional norms and EU norms. There is a potential crisis situation which has necessitated other methods of judicial collaboration. (...) The solutions are drawn by the former ECJ's president, Rodriguez Iglesias, who makes clear that the system leads to a deadlock situation henceforth they apply their system and come in that way to that unsolved contradiction. Mr. Iglesias remarks that among EU obligations there is the obligation

of “loyal cooperation” and learns from it that the role of both national and EU judges is to avoid taking these systemic contradictions to a deadlock point. In other words, to find pragmatic solutions to avoid a mechanical opposition in a peculiar litigation. » (Canivet, 2007)

Jean-Marc Sauvé adopts a similar position:

« One should put in place, besides institutional or vertical judicial cooperation between supreme jurisdictions (through preliminary questions before the ECJ for instance), an informal, horizontal cooperation between administrative supreme judges of the EU. » (Sauvé, 2008).

Eventually, the formal obligation of “loyal cooperation” is really achieved through an “extra-legal collaboration”, the socialisation of supreme judges. By extension, one could even say that the extra-legal judicial collaboration is a legal obligation to overcome the shortages of the European legal integration.

2. The institutionalisation of supreme judges’ socialisation in the EU

Guy Canivet defines its community of judges as essentially relying on “a European judges network” and “the creation of a European multilingual legal decisions search engine” (Canivet, 2007). The administrative supreme jurisdictions of Europe have established in May 2000 an association gathering them and the ECJ: Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union⁴. The general aim of that association is to confront different public law approaches to make them converge towards common practices. Jean-Marc Sauvé explains it:

« We must, between judges, confront our working methods, our jurisprudences, our results in order to reach a shared vision of the implementation of European law and to converge our public power control in the light of its law: so was the aim of the first seminar organised on the initiative of France through the Association of Conseils d'Etat and administrative supreme jurisdictions of the EU the 28th January 2008 on the topic “The administrative judge and the EU environmental law”.» (Sauvé, 2008)

This association even organises judge exchanges between courts. It has also fostered bilateral working meetings. For instance, a number of new member states' judges were received by elder member states' jurisdictions. Since 2008, this judge exchange is more systematic. The association indeed participates to the European Judicial Training Network (EJTN) “the principal platform and promoter for the training and exchange of knowledge of the European judiciary.”

“EJTN develops training standards and curricula, coordinates judicial training exchanges and programmes, disseminates training expertise and promotes cooperation between EU judicial training institutions.” (<http://www.refj.eu/en/About/About-EJTN/>)

Private law supreme courts of the EU did the same and gathered themselves (but without the ECJ) in the The Network Presidents of the Supreme Judicial Courts of the Member States of the European Union⁵. It follows a pure transnational judicial dialogue.

4 <http://www.juradmin.eu>

5 <http://www.reseau-presidents.eu/rpcsjuje/?lang=en>

Lastly, on the initiative of Guy Canivet, the Network Presidents of the Supreme Judicial Courts of the Member States of the European Union launched in April 2007 a mega-search engine on national case-law.⁶ It gathers and crosses national case-law search engines and offers the possibility to get on a peculiar legal point the state of the member states jurisprudences. It is a powerful tool for applied comparative law which is part of the new trend of judicial collaboration in the EU. Judicial dialogue has also a transnational (between national supreme jurisdictions) dimension.

Thus, the socialisation of supreme judges has been recently institutionalised. It is no longer something random and personal, but systemic, supra- and trans-national.

3. The emergence of an epistemic community: the cognitive convergence by the comparative law approach

Comparative law has been progressively adopted by judges in Europe. Each supreme jurisdiction is influenced by other supreme jurisdiction's case-law. This tends to shape a common conception of what it is the law: a "community of law". The cross-fertilisation effect (Slaughter et Mattli, 1998, p. 265) is become reality.

The members of the Conseil d'Etat often evokes the *Société Techna* case (2003) as the perfect example of cross-fertilisation and the community of judges (Stirn, 2006). Facing a question of legality of an EU directive, the London High Court sent to the ECJ a preliminary question. The French Conseil d'Etat faced a same legal question few days after. It then suspended the national act of transposition of that EU direction, waiting for the answer of the ECJ to the British court's preliminary question.

Koen Lenaerts, member of the ECJ, says the following about comparative law:

« This method of interpretation of EU law aims at question national laws or to confront the EU legal order to one or several legal orders' point of view to improve the rule of law in the EU (...). It is not only to fill up dead angle of the European construction by injecting some comparative law, but to find (...) a solution which both fits, according to specificities of national legal orders, the objectives of the EU and is perceived by national legal orders as offering an equivalent protection to their own national system. » (Lenaerts, 2001)

This comparative law approach creates a community of law based on a same substantial conception of fundamental legal principles. According to Miguel Maduro, former first general advocate at the ECJ:

« the EU and national legal orders are based on the same fundamental legal values. Whereas it is the responsibilities of national judges to guaranty the respect of those values in the fields of their constitutions, it is the responsibilities of the ECJ to do the same within the EU legal order. » (Maduro, 2008)

According to Jacques Biancarelli, member of the European law delegation of the French Conseil d'Etat and former member of the Tribunal of First Instance of the EU, until the mid-1980s, the French Conseil d'Etat didn't do any comparative law. Since the mid-1980s and during the 1990s, it began to do comparative law in its reports and official publications, but not in its case-law. It is only since the 2000s that it really began to naturally do comparative law in its judicial decisions (Biancarelli, 2007).

6 <http://www.reseau-presidents.eu/rpcsje/>

A community of law has been shaping for few years and it tends to shape an epistemic community of supreme judges in the EU, sharing the same conception and concerns about the peaceful articulation between EU and national legal orders.

4. The advent of a “Community of judges” in the EU

Since the 2000s, supreme judges of the EU tend to realise and claim their belonging to a same group sharing a common conception of law and problems stemming from their European legal space. We can observe a structural move from separate and impermeable legal orders to a fusion in a European community of judges, exceeding formal jurisdictional patterns. It is difficult to date this structural change. The pace of this change is probably different among member states supreme courts. For the French supreme courts, the context of the European Constitution in the mid 2000s seems to be the turning point. Jean-Marc Sauvé expresses the deepness of that change:

« Public law, which is the legal branch the more sovereign, before less permeable to external influences, has been totally renewed, transformed, even 're-founded' by EU law. » (Sauvé, 2008)

The expression “Community of judges” is often used by Jean-Marc Sauvé in its public speeches:

« One can observe the emergence of a community of judges and a deeper convergence of national laws. It is possible to think of new progresses in the uniform application of EU law, as for instance the harmonisation of judicial working methods and mechanisms of jurisdictional control. I think that exchanges of informations, experiences of case-laws but also of judges, within bilateral situation or European associations of supreme judges, constitute major ways for this coming evolutions. » (Sauvé, 2007b)

In his speech for the constitutive assembly of the Network Presidents of the Supreme Judicial Courts of the Member States of the European Union, Guy Canivet said that:

« We now belong to the same jurisdictional organisation; through our own procedures, we apply the same law, a law uniformly interpreted thanks to the preliminary ruling mechanisms which links us to the ECJ, and through general procedural principles that we elaborate in common (...). There is definitely a justice in Europe, a European justice with shared values which gather us in a common legal culture (...). » (Canivet, 2004)

*

The study of recent decisions and discourses made by supreme jurisdictional actors of the EU allows me to describe the constitution, on the ground of a Kantian culture of judicial dialogue, of a jurisdictional security community in the EU, accordingly with the theoretical model of Adler and Barnett. The observation of this new empirical data on European legal integration allows me to trace, step by step, the emergence of this peculiar security community.

At the level of the “precipitating conditions” (tier one), one can observe the development of a new interpretation of the legal reality. The relationship between legal orders

within the EU are perceived as highly risky. Actors fear the Damocles sword of an open constitutional conflict, which is no longer seen as a theoretical risk, but as a real and practical threat. Moreover, this threat is viewed as a collective one. Actors understand their interdependence and begin to think in terms of a global European jurisdictional and legal system.

At the level of the “factors conducive to the development of mutual trust and collective identity” (tier two), about the structure, the absence of hegemon and mutual dependence lead to a collective diagnosis of the common situation and the elaboration of a shared theoretical discourse explaining the situation and offering directions to solve it. About the process, the reinforcement of socialisation networks allows social learning and the emergence of a shared knowledge.

Lastly, at the level of the “necessary conditions of dependable expectations of peaceful change” (tier three), the discourse and the practice of the community of judges generate and institutionalise mutual trust and collective identity. Actors of the community of judges know that the other members know that everyone bet on the mutual trust and a collective and peaceful management of systemic threats they collectively face.

IV. Conclusion: the constitutional governance of supreme judges as an internal mode of regulation for the EU jurisdictional security community

The study of extra-legal mechanisms regulating the relationship between legal orders via the notions of culture of anarchy and security community allows to seize the structural mutation of judicial dialogue within the EU. This judicial dialogue has been transformed both in its mechanisms (extra-legal collaboration) and in its foundations (Kantian culture, jurisdictional security community).

The governance of supreme judges emerges from the observation of this structural change. Indeed, the establishment of a security community entails a system of internal conflict regulation which is non hierarchical. This mechanism is the constitutional governance of supreme judges that I am studying in my ongoing research work. But it is already possible to say that this constitutional governance of supreme judges relies on a horizontal and informal functioning; that socialisation, cognitive convergence, and solidarity between members are its main features. Hence, the use of the notion of governance, unfamiliar to legal integration studies, but very promising.

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