11

Researching Judicial Cultures in the European Union

Lessons from John Bell

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John Bell has conducted ground-breaking research on courts. Central qualities of his work are an original angle of research questions, a broad comparative scope combined with a strong analytical view, attention paid to legal cultures and societal contexts, and the use of team collaborations with scholars in other countries. These publications as well as conversations with John have inspired much of my own research. Moreover, I am indebted to him for his guidance with regard to the design and realisation of my research projects. For a volume in honour of John, it seems appropriate to put a spotlight on the lessons which can be learnt from his work by scholars who, like me, are interested in understanding the role and functioning of judiciaries in evolving legal and societal contexts.

With this aim in mind, my contribution outlines main insights from John's comparative analysis in his book *Judiciaries within Europe*,[1] regarding the factors which shape the character of a judiciary. I discuss how further research on courts can benefit from these insights, drawing examples from a current research project on judicial cooperation in the European Union.[2] At the same time, this chapter aims to provide some thoughts on legal scholarship in contemporary societal and academic contexts. In particular, I will address the phenomenon of legal

[1] J. Bell, *Judiciaries within Europe: A Comparative Review* (Cambridge: Cambridge University Press, 2006).

[2] This chapter integrates parts of a published analysis, presented in E. Mak, N. Graaf and E. Jackson, 'The Framework for Judicial Cooperation in the European Union: Unpacking the Ethical, Legal and Institutional Dimensions of "Judicial Culture"' (2018) 34(1) *Utrecht Journal of International and European Law* 24. The research was conducted with the help of a Vidi grant (2016) from the Netherlands Organisation for Scientific Research (NWO).

globalisation and how to study this, expanding on John's analysis of this topic.[3] Besides paying tribute to the lessons that John has taught me, I hope that this chapter also provides some useful 'food for thought' for current law students and early career legal scholars.

The analysis in this chapter focuses on the concept of 'judicial culture'. John described this concept in *Judiciaries within Europe* and applied it in a comparative analysis regarding the judicial systems of France, Germany, Spain, Sweden and England. In his words, this notion concerns the 'features that shape the way in which the work of a judge is performed and valued within particular legal systems'.[4] It is a central notion for understanding the role and practices of judiciaries. Whereas John's analysis concerned national legal systems, increased judicial interactions beyond national borders give rise to new questions for legal research. A distinction can be made between different types of legal development which affect national judiciaries: 'international' for the binding obligations of states under treaties developed in the framework of international organisations, 'supranational' for the *sui generis* legal order of the EU, and 'transnational' for interaction between (actors in) different legal orders on a voluntary basis, e.g. concerning the exchange of ideas and best practices. In this respect, the EU is particularly interesting as an object of study, because of its combination of supranational and transnational legal development and the important role of judiciaries in both respects. The analysis in this chapter will highlight conceptual and methodological challenges which need to be addressed when conducting research on national judiciaries in this evolving European context.

This chapter is structured around some central methodological considerations of legal research on judicial cultures. The analysis in each section starts with a summary of insights from the research of John Bell, which is then commented and expanded on. Section 11.1 addresses the definition of judicial culture and Section 11.2 continues with the operationalisation of this concept in legal research. Section 11.3 concerns the design of research on judicial cultures in Europe in relation to current developments. Section 11.4 contains brief concluding remarks.

[3] J. Bell, 'Researching Globalisation: Lessons from Judicial Citations' (2014) 3(3) *Cambridge Journal of International and Comparative Law* 961.

[4] Bell, *Judiciaries within Europe*, 2.

11.1 Defining 'Judicial Culture'

John Bell's conceptualisation of judicial culture brings to the fore the interplay of values and practices when it comes to the development of judiciaries as institutions (Section 11.1.1). We can gain a better understanding of this conceptualisation if we analyse it in relation to the concept of legal culture (Section 11.1.2). Taking into account the trend of legal globalisation (Section 11.1.3), the conceptualisation of judicial culture can be refined in order to make it suitable for an analysis of judiciaries in a transnational legal context, such as the EU (Section 11.1.4).

11.1.1 Judicial Culture as Values and Praxis

In John Bell's definition, judicial culture encompasses both a set of ideas and a praxis, particular to the legal community, the institutions of government and the wider community.[5] This conceptualisation addresses judicial functioning as a whole, i.e. both the primary process of judging and the judicial organisation. Ideas regarding judicial culture are expressed in the moral and social values of a specific community and in the legal rules concerning judicial organisation and the judgment of cases. The praxis that is a part of judicial culture concerns the approaches to judging that have developed over time in a specific legal system. This includes approaches to legal interpretation, i.e. the content of the judicial activity, and the handling of court procedures, i.e. the context in which judicial decisions are made.[6]

This notion of judicial culture encompasses a contextual element. After all, the values and praxis relating to the judicial functioning cannot be considered separately from the community or communities in which they developed. As such, the notion can be used as a starting point for legal research, which will need to take into account relevant legal sources and institutions as well as contextual aspects (e.g. legal, sociological, political and economic) regarding their meaning and functioning.[7]

[5] Ibid., 2.
[6] Ibid.
[7] From a methodological point of view, this approach fits with the analysis of S. Taekema, 'Relative Autonomy: A Characterisation of the Discipline of Law', in B. van Klink and S. Taekema (eds.), *Law and Method: Interdisciplinary Research into Law* (Tübingen: Mohr Siebeck, 2011), pp. 33–52.

In his book *Judiciaries within Europe*, John Bell analysed the institutional features of judiciaries, which 'provide the framework not only for stability, but also for continuity and change'.[8] The professional role of individuals is shaped in part by this institutional setting, e.g. through initial training and the opportunity to accumulate professional experiences. Judiciaries as institutions can be understood in different ways: as decision-making bodies in a hierarchical structure, as constitutional institutions in a balance of powers, as social institutions which help solve societal issues, and as a group of legal professionals within legal and professional communities. Only through an analysis which addresses both formal and informal aspects of judicial functioning, e.g. organisational arrangements as well as networks, can we obtain insights that connect these different dimensions.[9]

11.1.2 Understanding the Concept of Judicial Culture

The presented conceptualisation of judicial culture connects with a concept that is probably more familiar to many legal scholars: that of legal culture. The concept of legal culture is the classic tool used within legal scholarship to describe patterns of legally oriented social behaviour and attitudes. It enables demonstrating the significant effects of social pressures on legal change.[10] However, the concept is not without criticism. It has been argued that the term is too vague and impressionistic as a concept to be useful in finding explanations of the patterns and processes of change in specific legal contexts.[11] In particular, the concept of legal culture can be divided into many different elements – such as attitudes, knowledge, expectations and values – which are not so easy to reassemble.[12] Furthermore, no straightforward answer exists to the question on how to operationalise legal culture in an analysis of specific elements, their interrelations and the connection with other types of cultures (for example, religious, political or economic culture).[13]

[8] Bell, *Judiciaries within Europe*, 350.
[9] Ibid., 350–1.
[10] D. Nelken, 'Thinking about Legal Culture' (2014) 1 *Asian Journal of Law and Society* 255.
[11] R. Cotterrell, 'The Concept of Legal Culture', in D. Nelken (ed.), *Comparing Legal Cultures* (Abingdon: Routledge, 1997), p. 13. See also S. Engle Merry, 'What Is Legal Culture? An Anthropological Perspective', in D. Nelken (ed.), *Using Legal Culture* (London: Wildy, Simmonds and Hill, 2012), pp. 52–76.
[12] Nelken, 'Thinking about Legal Culture', citing Von Benda Beckmann.
[13] Ibid.

Despite this criticism, specific conceptualisations of legal culture can be helpful for 'finding a common language to understanding and evaluating differences in patterns of legally oriented behaviour'.[14] Based on such a common language, elements of coherence and change can be analysed.[15] In this regard, conceptualisations that focus on attitudes and values can be criticised for being static and for presupposing the existence of unchangeable cultures.[16] By contrast, a conceptualisation of legal culture as something that is learnt – a view elaborated by Dutch sociologist Geert Hofstede – seems particularly useful for the analysis of developments in legal cultures.[17]

The concept of judicial culture has not yet been used with the same frequency in the academic literature as legal culture and, most likely as a consequence, has not yet been conceptualised in an in-depth manner.[18] Further attention to this concept is essential, however, for enabling sound and thorough studies on judiciaries as institutions in evolving legal and societal contexts. Moreover, this conceptualisation could contribute to the theoretical understanding of the broader concept of legal culture. Let us have a closer look at both of these aspects.

11.1.3 Integrating the Trend of Judicial Globalisation

Cross-border legal-cultural elements have become prominent in recent years. Gunther Teubner has argued that national laws have been downgraded to 'mere regional parts of [a global] network which are in close communication with each other'.[19] Anne-Marie Slaughter has attached a more positive connotation to the changing role of courts, which according to her have become involved in a 'global community of

[14] Ibid.
[15] Ibid.
[16] J. Smits, 'Legal Culture as Mental Software', in T. Wilhelmsson, E. Paunio and A. Pohjolainen (eds.), *Private Law and the Many Cultures of Europe* (Alphen aan den Rijn: Kluwer Law International, 2007).
[17] Ibid.
[18] John Bell is one of the few authors who have conducted such a conceptual analysis. See further K. Å. Modéer, 'From "Rechtsstaat" to "Welfare-State": Swedish Judicial Culture in Transition 1870–1970', in W. Pue and D. Sugarman (eds.), *Lawyers and Vampires: Cultural Histories of Legal Professions* (Oxford: Hart, 2003), p. 153.
[19] G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 16.

courts'.[20] Their analyses classify a perceived increase of interconnections between legal systems and actors in these systems as indicative of a trend of legal globalisation.

From a normative-theoretical perspective, this idea of 'globalisation' of laws and legal systems corresponds with an assumption of universality, meaning the equal and indiscriminate application of supranational or international law in national legal systems. This view on globalisation also corresponds with a cosmopolitan outlook, i.e. a conception of 'the world as a single entity, with resonances between people irrespective of their location, nationality and culture' and a conception which involves concern for the way in which 'legal actors can access legal regimes beyond their state's domestic framework'.[21]

John Bell has nuanced the views expressed by some scholars regarding the pervasiveness of legal globalisation. Based on an analysis of available research on transnational judicial citations, notably studies by Michal Bobek and by me,[22] he argues that signs of converged practices of national courts in solving common problems for now mostly concern areas of mandatory cooperation, i.e. cooperation based on international or supranational laws, and that 'global' mindsets of judges are harder to find.[23] Yet, regardless of one's view about legal globalisation, it is clear that legal actors, including judges, can no longer delimit their focus to one legal culture only. This certainly is the case in the sphere of mandatory judicial cooperation created by the EU.

Regarding judiciaries in Europe, this trend of legal globalisation prompts research on the effects of the EU legal integration on the judicial function in member states. The development of EU law and judicial mechanisms for its application has added additional tasks to the function of national judges, in particular the role of national courts as EU judges. Furthermore, the judicial function in the EU context is valued not only on the basis of national constitutional values but also on the basis of fundamental European legal values, such as democracy and the rule of

[20] A.-M. Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191.

[21] Bell, 'Researching Globalisation', 961.

[22] M. Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford: Oxford University Press, 2013); E. Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Oxford: Hart, 2013).

[23] Bell, 'Researching Globalisation', 980.

law, and the social values of pluralism and solidarity.[24] From within the member states, moreover, many judges have knowledge of, and sometimes experience with, the laws of other national systems, which informs their decision making. In this way, 'top-down' supranational as well as 'bottom-up' transnational influences on judicial functioning in the EU invite a rethinking of the notion of judicial culture.

11.1.4 Refining the Concept of Judicial Culture

As an epistemological tool, judicial culture connects with Patrick Glenn's definition of 'legal tradition', which he has described as the received information from the past that governs current laws and legal practices.[25] 'Culture', for the purpose of studying influences on judicial systems and professionals in these systems, can be connected with the 'mental software' possessed by those belonging to a specific community.[26] This term 'mental software' was coined by Geert Hofstede and defines culture as 'the collective programming of the mind which distinguishes the members of one group or category of people from another'.[27] This conceptualisation acknowledges the susceptibility of culture to change, related to the development of the meaning attached by the individual to facts and behaviour.[28]

With regard to judging, the development of the views and approaches to judging of judges in national highest courts provides a helpful example for understanding what a judicial culture is and how it can develop. To start with, highest court judges can be classified as belonging to different groups with each group having its own 'mental software'. Indeed, in the contemporary legal context, where international, supranational and comparative legal sources are increasingly relevant, some judges – who could be called 'globalist' judges – have opened up to the possibility of finding persuasive arguments for the judgment of cases in non-binding foreign legal sources. By contrast, others – who could be called 'localist' judges –

[24] Article 2 Treaty on European Union.
[25] H. P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford: Oxford University Press, 2014).
[26] Smits, 'Legal Culture as Mental Software'.
[27] G. Hofstede, *Cultures and Organisations: Software of the Mind* (New York: McGraw-Hill, 1997), p. 5.
[28] Smits, 'Legal Culture as Mental Software', referring to C. Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973).

have shown themselves reluctant to walk this path.[29] Factors which influence the adherence to one or the other of these groups include a judge's personal interest in comparative legal studies as well as personal encounters with foreign legal systems through legal education, working experiences abroad or the judge's personal life.[30] In this sense, the development of the views and practices of new members of a community, such as law students with an ambition to enter the judicial profession, is influenced by the existing 'mental software(s)' to which they are exposed. The appropriation of a specific culture could therefore be said to consist of a process of individual learning. At the same time, the culture that is learnt is a 'moving target' in the sense that it will keep evolving based on the meaning that all members of the group attach to facts and behaviour in the context in which they interact with each other.

In addition to this possibility of different judicial views and approaches in different groups of judges, the geographical aspect of culture also requires a further clarification. Culture in Hofstede's definition does not necessarily correspond with national territory. One country can encompass more than one legal culture and specific legal cultures might be a part of more than one national legal system.[31] With regard to judging, this is illustrated by the geographical distribution of the common law and civil law traditions. The common law model, in which the judge has a leading role in the development of the law through precedents, has spread throughout the English-speaking world. Meanwhile continental-European countries as well as countries in Latin America and Asia have adopted the civil law perspective in which the judge is conceptually constrained to the task of applying the laws enacted by the legislative authorities.[32] At the same time, these two traditions can co-exist within one legal system. One such example is Canada, where the common law tradition is dominant, but the civil law tradition underlies specific areas of law in the province of Québec.[33] Besides these possibilities of cross-

[29] Mak, *Judicial Decision-Making in a Globalised World*.

[30] Ibid. Regarding the importance of experience abroad for the development of individual views, see also M. Goodwin, 'The Importance of Elsewhere', inaugural lecture Tilburg University, 29 April 2016, www.youtube.com/watch?v=TsjO4NNSxuc

[31] Smits, in 'Legal Culture as Mental Software', criticises conceptualisations of legal culture, which connect primarily with nation states.

[32] Glenn, *Legal Traditions of the World*, also describes how the differences between these legal traditions have become less pronounced in the course of their development over time.

[33] See www.justice.gc.ca

national and coexisting legal cultures, differences can develop due to local interpretations, as demonstrated by the connection of a legal tradition with a specific national legal system. For example, the style of judicial reasoning in the French legal system is still apodictic in nature, whereas judges in the French-inspired Dutch legal system have developed a more elaborate way of reasoning.[34] The relevance of nationality in this context can be explained by the connection of the judicial style of reasoning with the role of the judiciary as a national institution with a developed homogenous approach to judging cases within its jurisdiction.

Based on this conceptual analysis, it appears that the views and approaches to the judicial function among judges are open to differentiation. In this regard, individuals do not belong to one culture only, but to a variety of cultures simultaneously.[35] Judges – as well as other legal professionals and policy makers – can sometimes connect with cultural elements related to their national legal system, such as the national conception of 'good faith' in contract law or of the 'rule of law' principle. They can at other times connect with cross-border cultural elements such as principles of *lex mercatoria* or the conception of a 'fair trial' under the European Convention on Human Rights.[36]

Fundamentally, the analysis in this section demonstrates that the development of a shared judicial culture across national borders could be a natural next step in the evolution of 'mental software' of judges in member states of the EU. An alignment of national judicial cultures would consist of the development of a critical mass among legal professionals in favour of an approach of consistent reference to shared cross-border legal-cultural elements rather than only national legal-cultural elements (in as far as divergence exists between these elements). How, then, can we study such a process of possible alignment?

11.2 Operationalising Judicial Culture

If we want to gain more insight into the characteristics and development of judiciaries in relation to a judicial culture, we will need to identify variables which can be described and compared. In other words, the concept of judicial culture needs to be operationalised. According to John

[34] Mak, *Judicial Decision-Making in a Globalised World*.
[35] Smits, 'Legal Culture as Mental Software', referring to A. Sen, *Identity and Violence: The Illusion of Destiny* (New York: Norton, 2006).
[36] Ibid.

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Bell, four main factors come to the fore, which shape the character of a judiciary.[37] In this section, I will analyse how these factors can be fine-tuned for research of judicial cultures in the EU context. These factors are: relevant historical developments (Section 11.2.1), the task relating to the judicial role (Section 11.2.2), the organisational structure of the judiciary (Section 11.2.3) and values for the judiciary (Section 11.2.4).

11.2.1 History

In his analysis of European judiciaries, John Bell starts out from the idea that judicial tasks and judicial organisation are shaped in the practices which develop over time in countries. The development of judiciaries as social groups concerns a process of historical experience rather than the implementation of a design based on constitutional theory.[38] This process can be related to the model of the reflective practitioner, in which 'reflection is a problem-solving exercise' and 'experience leads to reflection and change'.[39] In this regard, the development of judiciaries over time more often consists of a gradual adjustment of judges to conjunctural events rather than of changes based on institutional planning.[40]

According to John Bell, an historical influence on the development of the five judiciaries examined in his book is visible with regard to the shape of procedures relating to specific judicial tasks, such as the inclusion of lay judges or juries in procedures in some areas of the law.[41] He observes that a notable historical influence concerns judicial law making. This role has developed and gained authority to a larger extent in legal orders where judges were involved in pre-legislative processes than in systems where this was not the case. Previous experiences formed an important motor behind the development of this judicial involvement.[42]

Developed patterns regarding the judicial function tend to persist because of path dependence, meaning that 'established legal approaches to the solution of issues will determine the way in which new situations or new problems are handled in the present and in the future'.[43] Legal

[37] Bell, *Judiciaries within Europe*, 351.
[38] Ibid., 351.
[39] Ibid., 354.
[40] Ibid., 378.
[41] Ibid.
[42] Ibid., 352–3.
[43] M. Siems, *Comparative Law* (Cambridge: Cambridge University Press, 2014), p. 239, cited by Bell, 'Researching Globalisation', 962.

scholarship which pays attention to path dependence is able to explain specific developments of legal systems, including developments regarding judicial institutions.

My own approach corresponds with this view. As an illustrative example, I mention here my research focus on the specific feature of constitutional (in-)flexibility for explaining the development of legal systems and their institutions. This feature concerns 'the relative openness of the constitutional framework of a specific legal system as concerns the expression of normative change'.[44] The '(in-)flexibility' of a constitution is the parameter which explains to what extent this constitution allows for the integration of normative changes, based on evolving societal views, into the legal framework for government.[45] The degree of (in-)flexibility of a constitutional framework depends on the detail of constitutional rules and the possibility for modification of these rules as well as on the approach to judicial interpretation of the constitution and the influence of external legal sources (e.g. international law) on the legal system.[46] Taking into account these factors in an analysis of the development of legal systems, e.g. with regard to 'global' interactions of judges, can assist us in understanding similarities and differences between countries.

In research regarding judiciaries in the EU, it is relevant to pay attention to the origins and goals of the EU and to look for connections with national histories when analysing developments. With regard to judicial culture, current developments tie in with the European Commission's agenda for judicial cooperation. The ambition to strive for a shared judicial culture was first articulated in April 2010 by Viviane Reding, then Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship. Reding underlined the necessity for further alignment between judicial systems after the entry into force of the Lisbon Treaty (2009).[47] This treaty has increased the EU's competences regarding judicial cooperation in civil and criminal matters (Title V of the Treaty on the Functioning of the European Union) and has given legal force to the Charter of Fundamental Rights of the EU (2000). In this context, the objectives of providing effective legal remedies and human

[44] E. Mak, 'Understanding Legal Evolution through Constitutional Theory: The Concept of Constitutional (In-)Flexibility' (2011) 4(4) *Erasmus Law Review* 196.
[45] Ibid., 197.
[46] Ibid., 197–202.
[47] V. Reding, 'A European Law Institute: An Important Milestone for an Ever Closer Union of Law, Rights and Justice', speech at the European University Institute, 10 April 2010, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_10_154

rights protection in the EU create a strong impetus for alignment of national judicial values and procedures. Her successor, Commissioner Věra Jourová, adopted this agenda and focused on the enhancement of mutual trust between the judiciaries of member states through European judicial training and improved access to information.[48]

More unity between European judicial systems is also promoted from another direction. Beside the 'top-down' developments from the European Commission, we can identify a 'bottom-up' tendency of alignment between the judicial systems of EU member states. Aspects of these systems have converged under the effects of European legal integration and globalisation of laws and legal systems. On the one hand, EU harmonisation has occurred with regard to substantive laws and procedures and institutional aspects of judicial organisation.[49] On the other hand, judiciaries in Europe have aligned their interpretations of legal concepts and their working methods to a certain degree through the institutional dynamics of transnational judicial communication, entailing the finding of inspiration in foreign legislation, case law and scholarship and in informal exchanges, for example in networks.[50]

When designing research on the current development of judicial cooperation in the EU, it is worthwhile to refer to John Bell's analysis of the gradual adjustments which judiciaries have made in previous stages of the EU legal integration. In *Judiciaries within Europe*, he makes the following observations:

> Adjustments in the absence of planning are a feature of the European dimensions of the judiciaries discussed here. The doctrines of direct effect and the supremacy of European Community law were not clearly stated in the original treaties of the European Communities or in the British accession through the European Communities Act 1972. It was therefore for the judges to adjust to the values put in place by the European Court of Justice in 1963–4. Whereas the French Cour de cassation responded in 1975, the Conseil d'Etat and the Conseil constitutionnel both took until after the end of the Gaullist era and after the Single European Act of

[48] V. Jourova, 'Answers to European Parliament Questionnaire' (2014), https://ec.europa.eu/commission/commissioners/sites/cwt/files/commissioner_ep_hearings/jourova-reply_en.pdf

[49] Concerning judicial organisation, see for example the 'Copenhagen criteria' for accession to the EU by new member states (2003), https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria_en

[50] E. Mak and D. S. Law, 'Transnational Judicial Communication: The European Union', in D. S. Law (ed.), *Constitutionalism in Context* (Cambridge: Cambridge University Press, 2022), pp. 236–60.

> 1986 before they adopted more similar positions in 1989 and 1988 respectively. The German courts had similar hesitations. Developing a sense of direction in such changed circumstances requires a political sense among the judges of what is going to last. Developing such a collective sense among the members of a supreme court, let alone among the lower judges, requires much internal discussion. The decision is often prepared by what Lord Devlin called 'rumblings from Olympus' – there were musings that indicated a potential change of direction. Without a formal debate, there was a gradual realisation of 'the spirit of the times', often coinciding with changes in key personnel.[51]

11.2.2 Task

The character of the judicial role is influenced by the tasks that are assigned to the judiciary. John Bell has rightly observed that adjudication is a 'major defining task' of judiciaries in Western legal systems. Still, using adjudication is a social decision, as 'the involvement of judges in the resolution of social problems through their core task of adjudication is only one option among many for handling social problems'.[52] Reasons for assigning certain tasks to the judiciary include the mission of the legal system, e.g. to be leading in a certain area of law or to resolve problems of citizens, and the availability of other institutions to pick up certain tasks, taking into account inter alia expertise and reputation.[53] Also, serendipity plays a role, e.g. the availability of resources or generalisable models at a moment of reform.[54]

Bell observes that '[t]he particular tasks of judges will involve them in different relationships with other social actors. Constitutional adjudication will bring to the fore relations with politicians, whilst criminal law will bring close connections with the media'.[55] Whereas judicial tasks are not directly connected with the organisational structure of the judiciary, there is a relationship with procedural arrangements. In this regard, Bell points out differences between criminal procedures. For example, judges will prepare and act differently depending on whether they are functioning in an adversarial system or dealing with an inquisitorial trial.[56]

[51] Bell, *Judiciaries within Europe*, 379.
[52] Ibid., 356.
[53] Ibid., 356–7.
[54] Ibid., 357.
[55] Ibid.
[56] Ibid., 358.

A look at judiciaries in the EU confirms the variety in 'social decisions' which have been made regarding judicial tasks. Indeed, judicial cooperation remains complicated because of differences between views on the judicial function and the developed practices of judging in different EU member states. For instance, a judge in the Netherlands can be a member of a political party.[57] This judge should take a monist view on the relationship between EU law and domestic law,[58] and might be reluctant to execute a judgment from another EU member state where corruption within the judiciary is still a recognised problem.[59] By contrast, judges in some other EU member states are not allowed to be a member of a political party.[60] They should take a dualist approach to the relationship between EU law and domestic law,[61] and they may still be struggling to bring their judicial system up to standard in terms of realisation of the principle of the rule of law.[62]

It is helpful to keep in mind these aspects when conducting research on judiciaries. Rather than looking for a set of shared characteristics, it is more feasible to compare judicial systems in terms of 'family resemblances'.[63] Furthermore, a contextual analysis should pay attention to developing normative views on the judicial function. An example concerns the increased emphasis on procedural justice in some legal systems, e.g. concerning the rights of crime victims to speak during a trial. Another example is the call in some countries for T-shaped legal professionalism – i.e. a combination of 'deep' legal knowledge and skills and 'broad' interdisciplinary insights – to address contemporary legal issues.[64] In this respect, John Bell's reference to external expectations with regard to the judiciary is pertinent. Such expectations can come

[57] *NVvR-Rechterscode* (Judges' Code) (2011) para. 2.3.2, https://nvvr.org/uploads/documenten/nvvr-rechterscode.pdf

[58] M. Claes, *The National Courts' Mandate in the European Constitution* (Oxford: Hart, 2006), p. 205.

[59] See Transparency International, *Corruption Perceptions Index* (2019), www.transparency.org/en/cpi#

[60] See codes of conduct for judges in inter alia Estonia, Finland, Hungary, Latvia, Lithuania and Portugal as well as former member state the United Kingdom (England and Wales).

[61] E.g. Germany, Italy. See Claes, *National Courts' Mandate*, 198–9.

[62] See further Section 11.2.4.

[63] See also M. M. Shapiro, *Courts: A Comparative and Political Analysis* (Chicago, IL: University of Chicago Press, 1981).

[64] E. Mak, *The T-Shaped Lawyer and Beyond: Rethinking Legal Professionalism and Legal Education for Contemporary Societies* (The Hague: Eleven International Publishing, 2017), pp. 7–8.

from other legal professionals, e.g. advocates, or from the wider societal and political community, e.g. in media debates or proposals for legal reform. These expectations stand in connection with expectations raised by members of the judiciary, e.g. senior judges with a high profile in debates on the profession.[65] Attention paid to these expectations can help clarify which actors have been influential in the normative debate on judicial tasks in a legal system and provide insight into the dynamics between professional and societal expectations regarding the judiciary.[66]

11.2.3 Organisational Structure

The way in which a judiciary is organised has an influence on individual judges. In the words of John Bell, '[i]ndividuals become judges by becoming part of an organisation that has its own ethos and range of activities and procedures'.[67] He identifies the nature of the judicial corps as the most important organisational factor that shapes the character of the judiciary. This 'corps' is 'the socially and institutionally defined group to which a judge belongs and in which she operates'.[68] An important feature concerns the number of divisions in the judicial corps and related aspects such as the function and formation of specific groups and their relations with other professional groups inside and outside of the judicial corps. In case of more radical separations, e.g. between administrative judges and other groups (France) or between judges and the bar (France, Sweden, Spain), there is less of a basis for mutual understanding between groups and less space for joint reflections on the development of the law.[69] The organisation of professional education and training is often linked to divisions in the judicial corps and thereby reinforces separations into distinct groups.[70]

John Bell discusses the particularities of hierarchy and leadership within a judicial organisation. Because of the particularities of the judicial function, '[t]here has to be a combination of the exercise of authority to

[65] Bell, *Judiciaries within Europe*, 380–2.
[66] See also E. Mak, 'Het gezag van de juristen: een normatieve reflectie', in A. Berlee, M. Bovens, J. Buiting, A. R. Mackor, E. Mak, J. Silvis and E. Tjong Tjin Tai, *De toekomst van de jurist, de jurist van de toekomst (Handelingen Nederlandse Juristen-Vereniging)* (Deventer: Wolters Kluwer, 2020), pp. 19–25.
[67] Bell, *Judiciaries within Europe*, 359.
[68] Ibid.
[69] Ibid., 360–2.
[70] Ibid., 364.

ensure tasks are performed properly with a significant element of collegiality which respects the independent professional status of those being managed'.[71] Bell points out types of leadership which can develop in relation to specific roles. He distinguishes between institutional leadership, e.g. of highest courts in shaping legal development, and individual leadership relating to professional status or personal authority.[72] Bell also discusses managerial roles regarding the organisation of courts and judicial careers. In this regard, the relationship with a ministry is an important element that shapes the character of a judiciary. Within the diverse landscape of national approaches, a common feature seems to be the ministerial influence on available resources.[73]

I share John Bell's observation that '[t]he extent to which management in relation to judicial activity is contentious depends on the aspect of the judicial role over which it is exercised'.[74] Insightful comparative research on experiences with judicial self-governance in Europe, in particular the role of judicial councils, has been conducted by David Kosař in a collaboration with legal scholars from a broad selection of countries.[75] He has emphasised 'the liquid nature of judicial self-governance and its responsiveness to political, social, and cultural changes'.[76]

John Bell further notices the features of social diversity in the judicial corps, the structure of contacts and influence, and collective action by judges through professional associations.[77] Among these features, the structure of contacts and influence has come to the fore as important in my own research. The role of judicial networks in Europe has been explored in more detail, and with the use of empirical legal methods (participant observation and interviews), by Erin Jackson.[78] In a similar vein, Niels Graaf conducted a 'longue durée' analysis of cross-references in German, French, and Italian public law scholarship in order to trace possible signs of alignment regarding national legal thinking on EU

[71] Ibid., 365.
[72] Ibid., 366.
[73] Ibid., 367.
[74] Ibid., 368.
[75] D. Kosař (ed.), 'Judicial Self-Governance in Europe' (2018) 19(7) *German Law Journal*, special issue.
[76] D. Kosař, 'Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe' (2018) 19(7) *German Law Journal* 1571.
[77] Bell, *Judiciaries within Europe*, 368–72.
[78] See Mak, Graaf and Jackson, 'The Framework for Judicial Cooperation in the European Union'. *Inside European Judicial Networks*, dissertation to be defended in 2023.

law.[79] John Bell has noticed the importance of research on these 'informal' aspects. An understanding of changes of 'period style', i.e. the defining characteristics of a judiciary at a certain moment in time, can only come about if we study both the role of formal institutions in legal development and the role of informal systems which contribute to the development of the collective view. This insight calls for an analysis of legal sources such as court decisions as well as research on 'the fora in which judges are able to discuss potential developments'.[80]

11.2.4 Values

Based on his research, John Bell has concluded that '[t]he dominant values of the judicial role at any one period are actually a compromise between historically received ideas, external views of the political, social and legal communities, and internally generated ideas within the judiciary itself'.[81] In his book, he discusses the values of judicial creativity in law-making, judicial independence and conceptions of the judicial role as a public office or as a bureaucratic job.

With regard to law-making creativity, firstly, Bell's analysis of continental legal systems as well as the English legal system clarifies that 'there has been a "period style" about the degree of creativity in interpreting legislation that is thought appropriate'.[82] Currently, the judicial creation of norms is accepted to some degree, although we should keep in mind that most court cases concern 'routine legal questions and routine solutions'.[83] Secondly, the value of judicial independence gets shaped into institutional arrangements as a response to identified threats to that independence in a particular country. This contextual development explains why conceptions of judicial independence and developed practices can differ between countries.[84] Bell's contextualised analysis and comparison of a number of European legal systems is insightful as a means for understanding similarities and differences in this regard. The value which concerns the judicial role as such, finally, connects with the

[79] N. Graaf, *Judicial Influencers: Scholarly Use of Foreign Law and the Convergence of German, Italian and French Ideas on the Position of National Constitutional Courts in the EU Legal Context, 1989–2012* (PhD dissertation, Utrecht University: 10 October 2022).
[80] Bell, *Judiciaries within Europe*, 380.
[81] Ibid., 372.
[82] Ibid.
[83] Ibid., 373.
[84] Ibid., 374.

legitimacy of the judiciary. A role of judges as public office holders, e.g. in constitutional cases, provides legitimacy in the form of an independent role next to the other branches of government. A role of judges as bureaucratic functionaries, relating to professionalism in conformity with the rule of law principle, provides an instrumental legitimacy where judges uphold standards of justice.[85] An interesting observation concerns the development of codes of ethics for judges. While written codes existed in only a few countries when Bell conducted his research in the early 2000s,[86] a proliferation has occurred since then.[87] Although we can see a lot of similarities between standards, differences exist in specific areas and can be traced back to 'the tradition of the judicial community, reinforced by both training and discipline'.[88]

Bell's analysis confirms that the development of judicial cultures, in a national as well as in a multi-level legal system, takes place within a specific normative framework. Beside these values, the societal trends in a specific day and age shape laws and legal institutions. Lord Thomas of Cwmgiedd has described this interplay between fundamental values and contemporary trends with reference to Thomas Jefferson's adagium: 'On matters of style, swim with the current, on matters of principle, stand like a rock'.[89]

For the EU, the basic framework for the judicial function is set by the principle of the rule of law.[90] Relevant contemporary trends are the 'top-down' and 'bottom-up' developments and connected challenges for achieving unity between judicial systems in the EU. Against the background of these trends, questions arise as to how European and transnational tendencies in judicial cooperation can develop further in the 'post-Lisbon era'. From a political and societal perspective, conflicting postures of support and resistance regarding the process of European

[85] Ibid., 377.
[86] Ibid., 377–8.
[87] G. Di Federico, 'Judicial Accountability and Conduct: An Overview', in A. Seibert-Fohr (ed.), *Judicial Independence in Transition* (Berlin: Springer, 2012), pp. 87–118; E. Mak, 'Researching Judicial Ethical Codes, or: How to Eat a Mille-Feuille?' (2018) 9(3) *International Journal for Court Administration* 55–66.
[88] Bell, *Judiciaries within Europe*, 378.
[89] Lord Thomas of Cwmgiedd, 'The Centrality of Justice: Its Contribution to Society and Its Delivery', in J. Cooper (ed.), *Being a Judge in the Modern World* (Oxford: Oxford University Press, 2017), pp. 166–7.
[90] Article 2 Treaty on European Union.

legal integration are likely to influence the balance that is struck in EU legislation and governance between the unity and diversity of laws and judicial systems.[91] Indeed, events such as the euro crisis, the refugee crisis, the 'rule of law' crises in Hungary and Poland and the Brexit vote underline the vulnerability of the European project, which started out with the goal of achieving an 'ever closer union'.[92] However, transnational issues, including the sheltering of refugees and combating terrorism, have simultaneously prompted a call for increased cooperation between states in Europe.[93] Judges are likely to be influenced by these political and societal developments in their shaping of domestic laws[94] and possibly also in their alignment of practices towards a shared European standard for the sound and fair administration of justice.[95]

Against the background of these developments, conceptual clarity and comparative reflections on judicial culture have become more pertinent. They can help us explain and assess systemic threats to the rule of law in EU member states, in particular the political pressure on judiciaries in Poland and Hungary.[96] Indeed, the developments in these member states make clear that a common ground in Europe regarding the principles of the rule of law and judicial independence is shaky, to say the least. Moreover, these developments are illustrative of the persistent influence of historically developed views and practices regarding the judicial function in national legal systems, in this case the continued influence of communist political ideologies.

The process of legal integration in the EU has become even more complex and multi-faceted after the Brexit referendum in 2016. The United Kingdom's departure from the Union raises numerous legal questions. From the perspective of the development of legal systems,

[91] For a conceptual clarification on postures of support and resistance of transnational influences, see V. C. Jackson, *Constitutional Engagement in a Transnational Era* (Oxford: Oxford University Press, 2009).

[92] See J. Peet, 'The Future of the European Union: Creaking at 60', *The Economist* (25 March 2017), www.economist.com/news/special-report/21719188-it-marks-its-60th-birthday-european-union-poor-shape-it-needs-more

[93] Ibid.

[94] Jackson, *Constitutional Engagement in a Transnational Era*, outlining the influence of the views of judges on the development of domestic constitutional law.

[95] Mak, *Judicial Decision-Making in a Globalised World*, 237–9.

[96] See e.g. P. Gyöngyi, 'The Obligation of Judges to Uphold Rules of Positive Law and Possibly Conflicting Ethical Values in Context: The Case of Criminalization of Homelessness in Hungary' (2020) 49(2) *Netherlands Journal of Legal Philosophy* 196–217.

Brexit can be expected to have consequences for the development of substantive laws as well as legal institutions in the European Union and in the United Kingdom. In the new constellation, there is no longer any sphere of mandatory interaction between legal actors and therefore no automatic 'cross-pollination' in legal interpretation or in the development of organisational arrangements and procedures. Still, the issue of retained EU case law is one example of a continued formal connection between the United Kingdom and the EU leg system.[97] With regard to legal research, analyses based on a sound conceptual framework can provide useful insights for understanding and guiding the development of judiciaries in this new context.

11.3 Designing Further Research on Judicial Culture(s) in Europe

Besides starting-points for the conceptualisation and operationalisation of judicial culture, John Bell's research provides insights regarding methodological design of research on judicial cultures in Europe. For further research, we can learn useful lessons regarding the design of an analytical framework (Section 11.3.1), the choice of topics and research approaches (Section 11.3.2), and the engagement in team collaborations (Section 11.3.3).

11.3.1 Analytical Framework

John Bell's comparative analysis of European judiciaries provides explanatory insights into the development of judiciaries as institutions in national legal systems. With regard to a possible alignment of national judicial cultures towards in the EU, an added component is that research will have to consider the normative foundation which could allow for the development of a shared 'European judicial culture'.

After all, a constitutional normative framework for the judicial function is still under construction at the EU level. Indeed, constitutional consensus currently does not exist regarding the main requirements for judicial functioning under the rule of law. At present, such consensus between EU member states holds challenges related to differences in main areas relating to the judicial role and functioning, these being: (1) the judiciary's

[97] See the regulations on retained EU case law and the UK courts: European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020, www.legislation.gov.uk

position in the political balance of powers;[98] (2) the conception of the judicial role in law development and law enforcement;[99] and (3) societal values regarding justice and rights protection.[100] Moreover, the European Commission's ambitions reach further than the realisation of a basic consensus, as do specific 'bottom-up' processes of transnational borrowing developed by national courts in the EU member states. The achievement of a 'true' European judicial culture, as envisaged by these actors,[101] demands striving for alignment of values, rules and practices for judicial functioning beyond the minimum level of compliance with the rule of law, defined here as the prevention of the arbitrary use of power.[102]

In this regard, liberal-democratic constitutional norms provide a foundation for judicial cultures in the EU and set conditions for change.[103] At the core, the national judiciaries in member states have a dual role to play. On the one hand, they are the institutions in the rule-of-law framework that embody the principle of access to justice and the protection of fundamental rights in a national legal order. On the other hand, they are the 'linchpins' between their domestic legal order and international and supranational legal orders, in particular in their role as 'decentralised' EU courts.[104] Research on the development of judiciaries in the EU context should address both roles and connect with an external normative framework, e.g. derived from constitutional theory, in order to assess the possibility of alignment between different views and practices which have developed in the member states. An ambition in my current research project is to develop such a normative-theoretical assessment.

[98] See A. Seibert-Fohr (ed.), *Judicial Independence in Transition* (Heidelberg: Springer, 2012). See also Bell, *Judiciaries within Europe*, 375.

[99] M. van Hoecke and M. Warrington, 'Legal Cultures, Legal Paradigms, Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47 *International and Comparative Law Quarterly* 495; R. A. Posner, *How Judges Think* (Cambridge, MA: Harvard University Press, 2008); M. de Visser, *Constitutional Review in Europe: A Comparative Analysis* (Oxford: Hart, 2013).

[100] D. Schraad-Tissler and C. Kroll, *Social Justice in the EU: A Cross-National Comparison* (Gütersloh: Bertelsmann Stiftung, 2014); A. Williams, *The Ethos of Europe: Values, Law and Justice in the EU* (Cambridge: Cambridge University Press, 2010).

[101] See Reding, 'A European Law Institute'.

[102] See E. Mak and S. Taekema, 'The European Union's Rule of Law Agenda: Identifying Its Core and Contextualizing Its Application' (2016) 8(1) *Hague Journal on the Rule of Law*, 25–50.

[103] Mak, *Judicial Decision-Making in a Globalised World*, 14–35.

[104] B. de Witte et al. (eds.), *National Courts and EU Law: New Issues, Theories and Methods* (Cheltenham: Edward Elgar, 2016), p. 5.

11.3.2 Topics and Research Approaches

John Bell's research provides a reflection on the object of legal research in a globalised context. He has argued that 'the national (or sub-national) legal system remains an important feature of legal experience and needs to be factored into any project on globalisation'.[105] Bell indicates the 'enduring effects' of the legal systems developed in nation states.[106] Firstly, these effects encompass the professional formation of lawyers, which influences the way in which they will approach legal problems. Secondly, these effects include the phenomenon of path dependence.

With regard to legal research in a globalised context, Bell argues that 'a more sectorial approach to the place of international and comparative law is the way forward, rather than focusing on grand scale claims about globalisation'.[107] After all, the globalised legal context is characterised by variety in the loci of problem-solving, including roles for national actors, supranational and international actors, and private as well as public actors. Moreover, national legal systems contain specific frameworks which demarcate the scope of action of these actors.[108]

Keeping this advice in mind, research on judiciaries in the EU can benefit from comparative as well as interdisciplinary approaches to legal research. Research which demonstrates the benefits of these approaches has been developed by inter alia Mitchel Lasser and Ran Hirschl, who have combined legal, sociological and historical elements in their research on judiciaries in different countries.[109]

Furthermore, the scope of examined objects could be broadened. As Bell has pointed out, '[m]uch of the recent evidence adduced to demonstrate globalisation comes from the analysis of judicial decisions'.[110] Further insights on the development of legal and judicial cultures can be obtained by considering other issues, e.g. cross-references in legal scholarship, exchanges in transnational judicial networks or the influence of codes of ethics on judicial functioning.[111]

[105] Bell, 'Researching Globalisation', 961.
[106] Ibid., 962.
[107] Ibid., 965.
[108] Ibid.
[109] M. de S. O. l'E. Lasser, *Judicial Transformations: The Rights Revolution in the Courts of Europe* (Oxford: Oxford University Press, 2009); R. Hirschl, *Comparative Matters* (Oxford: Oxford University Press, 2014).
[110] Bell, 'Researching Globalisation', 967.
[111] See further Section 11.3.3.

11.3.3 Team Collaborations

A final important topic which John Bell has addressed in his work concerns teamwork in legal research. In his words:

> A lone scholar can tackle a universal problem in broad terms without worrying about the specific circumstances in which it is instantiated. But if the problem involves the interaction of a multiplicity of levels of legal regulation and those multiple levels may have differential results between countries, then it becomes difficult for a single scholar to undertake the necessary research.[112]

This analysis certainly applies to the study of judiciaries in the evolving EU context. Citing John Bell again: 'A fuller picture of globalisation requires both coverage of a wide variety of countries and a variety of analyses, statistical, interview-based, and the reading of texts, and an understanding of the contexts out of which these materials are all arising.'[113] Interestingly, the Dutch academic context seems to offer good starting points for building such collaborative research. First of all, law schools have recently joined forces to collaborate on a number of selected themes, which include the development of conflict-solving institutions, such as courts, and empirical legal studies.[114] Moreover, training for students regarding doctrinal, comparative and empirical legal research methods is increasingly becoming mainstream in the law schools, preparing a next generation for collaborative comparative and interdisciplinary legal scholarship. Finally, a national debate on recognition and rewards for academic work has brought arguments to the fore in favour of a change of research funding schemes aimed at consortia rather than at single scholars with 'star status'.[115]

It should be noted that increased team collaboration in legal scholarship gives rise to new reflections on academic practices, e.g. regarding the authorship of publications. In this respect, lessons can be learnt from developed practices in other disciplines, for example the social sciences, where team work has been the standard for a longer time.[116]

[112] Bell, 'Researching Globalisation', 981.
[113] Ibid., 982.
[114] Law Sector Plan 2018.
[115] VSNU Recognition & Rewards, https://vsnu.nl/recognitionandrewards/recognition-and-rewards/index.html
[116] E. Mak and K. van den Bos, 'Van super(wo)man naar teamprestaties? Over auteurschap in de rechtswetenschap' (2019) 68(10) *Ars Aequi* 804–8.

11.4 Concluding Remarks

In the final pages of *Judiciaries within Europe*, John Bell writes:

> The tools of analysis of organisational theory and in particular of institutional culture enable one to identify the features shaping particular judicial institutions. By immersing oneself in the way a judiciary works, one can identify the interplay of features, before then moving to compare. Of course, one's initial hypotheses are informed by initial comparative research, giving a pre-understanding of what might be useful from a comparative perspective and not merely to those from a particular jurisdiction. But that pre-understanding has to be revised in the light of further research. The reader will hopefully take this work as the starting point for her own pre-understanding and improve upon its analysis.[117]

My aim in this chapter has been to describe how John's work has indeed been a starting point and inspiration for much of my research. His analysis has helped me to gain a pre-understanding of the legal systems covered in his study. Also, his work has inspired me to explore the perspectives of organisational theory and institutional culture as helpful angles for contextualised legal research on judiciaries. With the modest aim of expanding on John's work, rather than improving on his very clear and complete analyses, I hope to be able to further contribute to our understanding of the development of judiciaries in Europe and to continue discussions on this topic with John for as long as he finds these interesting!

[117] Bell, *Judiciaries within Europe*, 382–3.