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The preliminary reference procedure: challenge or opportunity?

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Access to justice is a fundamental pillar of western legal culture [...]. Therefore the right to effective legal protection is one of the general principles of Community law, in accordance with which access to justice is organised [...]. Access to justice entails not only the commencement of legal proceedings but also the requirement that the competent court must be seized of those proceedings.

Advocate General Ruiz-Jarabo Colomer, Opinion in Case C-14/08.

1 Introduction

Post-war efforts in Europe to establish an economic and political union have transformed Europe from an international into a supranational semi-federal constellation. The legal integration of Europe preceded the political integration and facilitated the economic integration. Many factors have contributed to the evolution of the EU legal-political constellation, but because of its constitutionalizing doctrines and its autonomous power *vis-à-vis* the Member States, the Court of Justice of the European Union (ECJ)¹ is widely considered to be largely responsible for the unprecedented European integration – first and foremost of its legal system but by extension of political and social spheres as well. These developments have changed the relationship between citizen and authority, shifting the political centre from the national to the supranational and making citizens subject to new international norms, with far-reaching implications for the legal position of the citizen. On the one hand, this development has resulted in critical evaluations of the EU's democratic deficits focusing particularly on the lack of representation. On the other hand, a fast growing discourse sees this federalizing aspect of the EU as transforming the relationship between citizen and state, possibly in favour of the former.

In this contribution, I focus on the meaning of access to justice in this supranational setting and the role of the ECJ in providing legal remedies through its most significant instrument; the preliminary reference procedure. To this end, the formal and practical possibilities for individuals to invoke their rights based on EU law will be considered. Access to the ECJ will be framed in the broader perspective

1 The Treaty of Lisbon introduced changes in the names of EU judicial institutions. The Court of Justice of the European Communities is now officially known as the 'Court of Justice' – but informally it is still customary to refer to it as the European Court of Justice or ECJ. The former Court of First Instance is now called the General Court. The EU's judiciary as a whole – including the ECJ, the General Court and the Civil Service Tribunal, are collectively referred to as the Court of Justice of the European Union (or ECJ).

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of supranational rule of law and individual empowerment. I will critically evaluate prevailing themes in the literature on the position of the European citizen in the EU and the state of access to justice in a supranational context. The insights of this contribution are based on a combination of a study of the literature on European integration and the ECJ as well as on empirical analysis, consisting of interviews with litigants and their counsellors (35 interviews in total), in the context of my PhD research into individual litigation before the ECJ.

2 The promise of EU law

The legal order of the EU functions as an important unifying factor in European society in that it regulates relations between Member States, EU institutions, and citizens as subjects of EU law. These interrelations are 'legalized' to a high degree. In this sense, European society is above all a 'community based on law'. Through the proliferation of binding legislation at the EU level more and more aspects of life in Europe are regulated at the supranational level and ultimately fall under the jurisdiction of the Court of Justice of the European Union, which has the task to 'ensure that in the interpretation and application of the Treaties the law is observed'.² With the significant characteristic that not only the Member States, but also individuals, are subject to that law. The expanding scope of EU law, penetrating national legal systems and framing national policy to a large extent, has increased the significance of the EU legal system in the lives of EU citizens. Article 2 of the Treaty on the European Union (TEU) states that

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Furthermore, Article 3 of the TEU stresses that the Union not only promotes the well-being of its people but it shall also offer its citizens an 'area of freedom, security, and justice without internal frontiers'. This is the formulation of the promise made by the European Union directly to the people of Europe, highlighting the nature of the Union as going beyond mere intergovernmental politics. In addition, a strong focus on individual rights is manifest in the EU's legislation and was reiterated in 2010 in the so-called 'Stockholm Programme', which states that "Priority should be given to mechanisms that facilitate access to justice, so that people can enforce their rights throughout the Union."³ The EU thus formulates a promise to its citizens focusing on rights and justice. Apart from a legitimizing discourse, the formulating of individuals rights also serves a more pragmatic function in ensuring the application and enforcement of EU legislation. The

2 Article 13 of the Treaty on European Union.

3 European Council 2010, p. 4.

EU, with its limited administrative capacity, has always struggled to ensure compliance by the Member States. One of the ways this has been resolved has been by relying on the legal system in revealing and addressing breaches of EU law obligations by Member States. One can read these rights as promises of the protection of individuals against Member States' trespasses with regard to the unification of areas of movement, work, migration, and related areas of social life.

This European 'language of rights' or 'rights-based regime' – the notion that the EU legal system functions by formulating (enforceable) rights – stood at the basis of much change within Europe. Through the jurisprudence of the ECJ in judgements on preliminary references and the efforts of the Commission in holding Member States accountable for their failure to comply with EU law, the EU has been able to extend the reach of supranational influence on national policy. Schepel describes this idea of 'emancipatory functionalism' as one of the apparent self-legitimizing descriptions of the role of EU law by lawyers of the 'European persuasion'.⁴ It is what he calls "a stunning assertion of the power of European law liberating civil society from the shackles of parliamentary democracies."⁵ This self-description is essential in understanding, on the one hand, the success of the European legal system (in that it effectively worked as described, most notably in curtailing the power of the nation states), and on the other hand, the ways in which this system has been justified and legitimized by its propagators, by reference to the individual empowerment and benefit that allegedly resulted from it. The assumption being that "Law belongs to civil society, and civil society finds in European law the framework for its cross border dynamism."⁶ The sole authority of the ECJ to interpret EU legislation combined with a growing focus on individual rights seems to signal a shift towards greater empowerment of the individual within the European legal system. In the famous words of Federico Mancini – one of the most influential ECJ judges in the history of the institution – "taking law out of the hands of bureaucrats and politicians and giving it 'back to the people'".⁷

3 The 'Dual Vigilance' of the EU legal system

Over the years, the ECJ has been fairly successful in enforcing compliance with EU legislation and its judgements. One ally for the Court in this respect has been the European Commission that can bring Member States before the Court on charges of not complying with the relevant requirements of EU law. Since *Van Gend en Loos*⁸ it has also become clear that the Court also, and arguably predominantly, relies on private parties to enforce EU law by mobilizing their rights.

4 Schepel & Chalmers 2004, p. 3.

5 Ibid, p. 2.

6 Ibid.

7 Mancini & Keeling 1994, p. 183.

8 *Van Gend en Loos* (C-26/62) was the landmark case in which the ECJ established the principle of Direct Effect, giving both natural and legal persons the ability to enforce legal rights derived from the Treaties before the courts.

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Private parties were, however, never given the same amount of opportunities to activate the European legal system to this end. Whereas the European Commission and the Member States can resort to Articles 258 and 259 of the Treaty on the Functioning of the European Union (TFEU) respectively,⁹ private parties were provided no 'European level' judicial control over Member States' violations of Treaty obligations. They in turn have to rely on 'national level' control by means of invoking the direct effect of EU law in national court proceedings. Whereas the first of the two was clearly marked out in the Treaty from the outset, the second route to rights enforcement was developed some years later by the ECJ itself in its landmark decision *Van Gend en Loos*. In this judgement, the Court effectively established the legal means for private parties to hold Member States accountable for any violations on rights conferred upon them by the Treaty, albeit in a less direct form than the procedures available for Member States and the European Commission. In addition, addressing objections by Member States who argued that Articles 258 and 259 (then 169 and 170) of TFEU already provided a system for exercising supervision of Treaty violations, the Court proclaimed:

The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States.

Thus, a second avenue for challenging the breach of EU law, one that included private parties as possible benefactors of EU law, was called into existence. This 'Dual Vigilance'¹⁰ not only made it more likely for Treaty provisions to be observed by contracting states, it also stood at basis of the transformation of the entire European legal system. Private parties were now able to invoke EU law and rights conferred upon them before national courts, the effects of which would prove to be significant.

4 The magic triangle of EU law: empowering citizens?

The doctrines of direct effect and primacy of EU law have dramatically diminished domestic authorities' possibility of relying on national law to justify national policy.¹¹ National judges, in their capacity as EU judges, are required to resolve any conflict between national and EU law by ruling in favour of the latter. Whenever doubt is raised on the interpretation of EU law and possible conflict between national legislation or policy and EU principles, national judges may, and in some cases must, refer the matter to the ECJ via a reference for a preliminary ruling. The rulings given by the ECJ in these preliminary references have the force of *res judicata*. This means that they effectively function as vertical precedent and that

9 In practice, due to the obvious political sensibility of such proceedings, Member States have proven very reluctant to use Article 259 against another Member State. To date, this has in fact only occurred four times (Cases: C-141/78, C-388/95, C-145/04, C-364/10).

10 Weatherill 2014, p. 86.

11 Alter 1998, p. 121.

the Court's decision provides an explanation on the basis of which the case at hand is to be decided by national judges. They also have horizontal effect in that the Court's decisions apply in all Member States and its rulings establish the principles on which all national courts are to rule in similar cases in future.

Because of the ground-breaking effects of preliminary rulings in the history of the ECJ, the preliminary reference procedure is the widely considered the central mechanism, or backbone, of the European legal system and moreover is put forward as the main means by which individual rights can be (and have been) invoked, consolidated, and expanded. With reference to Dworkin, a rapport published by the European Parliament expresses this view on the preliminary reference procedure:

Thus, individuals may use EU law both as a 'shield' (to defend themselves from action by national authorities which infringes EU rights) and as a 'sword' (to challenge national measures on the grounds of incompatibility with EU laws). Consequently, the preliminary ruling procedure provides an opportunity for individuals and national courts to question governmental actions.¹²

Jurisprudence of the ECJ, and especially the influential precedential function and ground-breaking effects thereof, leads to the conclusion that 'the magic triangle' of the doctrines of primacy and direct applicability in combination with the preliminary reference procedure give individuals and civil society a stake in the transformation of Europe's political and legal order as well as the opportunity to defend their rights, and leads some scholars to conclude that this is in fact an avenue for empowerment for individuals and civil society.¹³ The argument being as follows: fragmentation of political power transforms democratic structures and diminishes national sovereignty. When political power is mediated to a large extent by legal structures, access to these structures could be seen as a way of influencing the political process. The ECJ is seen as the place where citizens and civil society can challenge national policy and are thus in a sense 'empowered' against their government, because this mechanism enables them to 'outflank' the national jurisdiction.

This theory of 'empowerment through EU law' focuses on the preliminary reference procedure with the assumption that it gives firstly, the power to influence the course and pace of European legal and political development, and secondly, the possibility of having national legislation, policy, and acts reviewed by a higher judicial authority, the ECJ. The basic premise of this approach is that because the course and pace of legal integration in Europe is very much driven by litigation at and adjudication of the ECJ, the possibility for citizens to petition the Court provides them with the means to influence this process of unification, and thus gives them a stake in Europe's democratic process. In light of the purported democratic

12 Batta 2007.

13 Cichowski 2007.

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deficit of the EU as a whole this is even be considered by some as providing a remedy for Europe's lack of transparency and representative governance.

5 The Court of Justice of the European Union: a 'People's Court'?

Alongside the doctrines of supremacy and direct effect of recent developments in EU citizenship law and the area of freedom security and justice are giving more and more substance to the idea of true European rule of law. One element strongly connected with the concept of the rule of law is what can be determined as 'public power', which entails the possibility of non-state actors, most notably individuals, to invoke judicial authority against the abuse of power by the state. One approach of the political role of the ECJ as 'Supreme Court' of the EU contends that, since the Court has jurisdiction over the legality of (both national and supranational) governmental action in light of EU law, it effectively enforces the power of semi-constitutional judicial review. The EU legal system has thus forged a novel possibility for private parties that are now permitted to subject government acts which impinge on their interests to judicial scrutiny.¹⁴ The primacy and direct applicability of EU law have served as federalizing instruments altering the status of states in international law and introducing private parties as subjects of international law.¹⁵ And this in turn implies the establishment of 'European rule of law', with a common judicial tribunal with sole jurisdiction over EU law, the ECJ.

Access to courts from a supranational rule of law perspective thus brings with it elements of scale and impact not found at the national level.¹⁶ Access to justice in this supranational setting can be seen as empowering citizens to influence national policy, and by extension the scope of international constitutionalism,¹⁷ through the opportunity to invoke the reviewing powers of a (new) higher judicial authority. In case of the EU, this judicial authority is the ECJ, which is charged with the task of ensuring a uniform interpretation and application of EU rules and norms. When ECJ adjudication is viewed as neutral arbitration in a political sphere that is characterized more by bargaining and negotiation than by democratic representation, access to the ECJ might thus provide the individual a stake in a game in which he/she is structurally disadvantaged.

14 With restrictions of course, see Scheingold 1965, p. 41-48.

15 Cf. Weiler 1998, p. 380, on the actual status of individuals as subjected but not subjects. On understanding the relation between law and democracy in Europe: 'Individuals, not only States, are thus subjects. Semantically, in English, "subjects" is often synonymous with citizenship. The Queen's subjects of old are the present citizens of the Realm. It could seem, thus, that in the very articulation of one of the principle "constitutionalizing" doctrines – direct effect – the condition was provided by elevating individuals to the status of full subjects alongside Member States. [...] But note, individuals are "subjects" only in the (direct) effect of the law. In this sense alone is Europe a new legal order. [...] Enjoying rights created by others does not make you a full subject of the law.'

16 It should be noted that – while not in the Netherlands – a number of EU countries have constitutional courts that can resolve some of these questions.

17 Kumm 2011.

The main question that arises, is whether all this taken together constitutes an actual empowerment of the individual or whether it can more accurately be considered part of an ongoing legitimizing rhetoric? In other words, the question is whether this idea of individual empowerment through EU law is placing too much emphasis on ‘possibilities’ for individuals, and has too little regard for the ways this plays out in practice. In EU (legal) studies, there has been little micro-sociological analysis into these opportunities, and most conclusions in this direction are based on macro-analysis and broad developments in ECJ jurisprudence. The next section therefore deals with access to the ECJ from a practical point of view, in line with AG Colomer’s requirement of access to justice that ‘the competent court must be seized’. In other words, I focus on the procedural as well as socio-legal aspects of access to the ECJ, challenging the notion of individual empowerment by critically examining access to justice in the European context.

6 Seizing the Court of Justice of the European Union

Considering access to the ECJ there are three principal mechanisms through which individuals may seize the Court. First, there are the action for annulment¹⁸ and the preliminary reference procedures that involve individual court cases, either directly before the ECJ in case of the former, or indirectly via the national legal system in case of the latter.¹⁹ Additionally, there is the possibility for individuals to address the European Commission with a complaint about the non-compliance of a Member State with EU legislation. These complaints may urge the Commission to start infringement proceedings against the Member State, thus indirectly providing a judicial remedy before the ECJ. Before considering the preliminary reference procedure, I will briefly consider the other two avenues from an individual’s perspective.

6.1 Direct access to the Court of Justice

Direct access to the ECJ for private parties is limited to contesting the validity of measures adopted by EU institutions, and from an individual’s perspective to the relationship citizen/EU. Furthermore, the strict interpretation of standing rules for private parties by the ECJ means that EU measures can only be contested if and when they *directly* affect the individual. In practice this means that only a small minority of private parties may be eligible to access the ECJ via this route and therefore, as a legal remedy these procedures are practically less relevant. Individual claimants therefore make up only a fraction of these direct actions. Additional to strict standing rules, *Costa* describes a few elements that can be dissuasive for potential litigants in deciding to start these kinds of proceedings: Length of the proceedings, legal costs, and needed expertise combined with the

18 Actions for Annulment are dealt with by the General Court and can be appealed before the Court of Justice.

19 The EU also offers non-judicial mechanisms, such as the European Ombudsman, to whom one can file complaints about maladministration within the EU institutions and bodies. The focus of this contribution is, however, on judicial mechanisms.

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risks of losing. Based on interviews with its judges and clerks, and by studying the Courts case law as well as its internal structural reforms, Costa concludes that

[t]he [ECJ] seems to consider that broader dissemination of the Court's jurisprudence and the principle of supremacy of Community law over national law contribute more to democracy in the Union and better protection of fundamental rights than easier access to the Court.²⁰

This is in line with the conclusion drawn by Rasmussen decades earlier that the Court made efforts to channel questions of judicial review through preliminary references.²¹ When looking at the possibility of direct petitioning of the Courts authority vis-à-vis the EU he concludes:

There is therefore a strong discrepancy between the restrictive attitude of the [General Court] which limits possibilities of bringing direct actions to a privileged minority, and the ambitions of the Member States which consider law and access to law as essential to further legitimacy and democracy in the Union.²²

The restrictive interpretation of standing for individual claimants as well as the aforementioned practical barriers all diminish the significance of these procedures as a possible remedy for individual claimants. Although in essence a remedy against invalid measures by EU institutions, in practice, this mechanism thus is reserved for a small minority and a particular kind of litigant.

6.2 *Complaining to the European Commission*

The European Commission summarizes its own role as stimulating the Member States to comply with Union law as quickly as possible, for which it has the infringement procedure at its disposal. The Commission's White Paper²³ on European governance emphasized the vital role played by the numerous complaints the Commission receives from citizens of the Member States in signalling infringements on Union law. However the Commission has, in both practice and policy, shown a preference for more cost-effective, non-litigious rule enforcement through informal resolution. The Commission enjoys discretion in whether or not it chooses to act on those complaints and initiate Article 258 proceedings against a Member State suspected of trespassing Treaty obligations – its hand cannot be forced. Although infringement actions are numerous, the Commission brings alleged infringements before the Court in only a minority of cases. Both Commission and Member States can be seen to make efforts in resolving allegations without Court procedures. In fact, even during the formal part of proceedings discussions between Commission and Member States continue and a significant part of

20 Costa 2003, p. 754.

21 Rasmussen 1986.

22 Costa 2003, p. 755.

23 European Commission 2001, p. 428.

infringements are settled without Court intervention. In 2012, for instance, a total of 1062 infringement cases were closed by the Commission before Court proceedings, either after the initial letter of formal notice (661 cases), after the issuing of a reasoned opinion by the Commission (359 cases) or cases were withdrawn from the court (42 cases). In 2012, only 46 infringement cases were resolved through a Court judgement. Therefore, since the Commission has discretion over whether or not to initiate actions against a Member State, from an individual complainants' perspective there is little certainty as to whether this strategy will yield the desired result. Also this mechanism provides no form of individual redress or any form of interim measures. Only after infringement proceedings have been brought with a successful outcome may one claim damages following the *Francovich* doctrine, before the national courts.

6.3 Preliminary references

The preliminary reference procedure is rightfully heralded as the backbone of the European legal system. Under Article 267 of the TFEU, a national judge may request the ECJ to provide an interpretation of a provision of EU law that is needed to resolve a dispute pending before its court. Historically the most far-reaching judgements by the ECJ have resulted from preliminary references, and in various cases they were the result of active litigating efforts by the parties involved.²⁴ Although there is a general consensus on the pivotal role played by the preliminary reference system, literature on the procedure has resulted in an either/or image of the possibilities resulting from it. Either the procedure is viewed mostly as a technical solution to the question of effective governance of a differentiated European legal landscape, or the procedure is part of a legal realm that provides private parties with the opportunities to play an active part in European governance through litigation before the ECJ. Both approaches yield a different focus of analysis as well as different blind spots, with the former focusing on high-impact cases and the interest politics and pressure groups often found to be behind the litigation, and the latter investigating mainly the relationship and collaboration between the ECJ and national judges. While the former, in its selective focus on successful litigation and opportunities often fails to describe the obstructions and social inequality in opportunities, the latter fails to recognize any active role played by private actors and litigants altogether. These shortcomings are now being recognized and in recent years we see a shift in the research focus from a legalistic perspective to more embedded and interdisciplinary analysis, with a socio-historic turn²⁵ as the most prominent example. It is submitted, that focusing on landmark cases alone may overestimate the success potential of the procedure as a true remedy. Like in the case of direct actions, considering the preliminary reference procedure as an opportunity for justice should not be taken at face

24 Apart from the two foundational judgments *Van Gend en Costa*, the famous example of Belgian feminist lawyer Vogel-Polsky's prolonged efforts in mobilizing the dead letter of Article 119 in the Treaty of Rome through the *Defrenne* cases (I, II, and III), is a case in point. The success of cases seminal like these has been largely responsible for the proliferation of the European law rights-narrative.

25 See especially the work done by Rasmussen 2012.

value. In order to truly evaluate the empowering potential of this legal procedure we cannot merely draw our conclusions based on successes in the past. We need to look at the practice of the procedure and who is able (and maybe more importantly who is not able) to employ the procedure as a means to realize (individual) rights.

6.4 *Empirical findings*

Based on interviews with litigants and their supporters (counsellors and others) who have been involved in preliminary references I have distinguished some mitigating effects on the use of the preliminary reference procedure as a legal remedy. The next section deals with some of the practical obstacles to considering preliminary references in this manner. Respondents were selected from all references for a preliminary ruling from Dutch courts involving individual litigants over a 5-year period, between 1 January 2008 and 31 December 2012. Of 25 out of the total 38 cases in the selection at least one of the parties involved (litigant or counsel) was traced and interviewed. Cases that reach the ECJ span a host of different areas of law, but since EU law mainly addresses administrative issues the vast majority concern conflict between private parties and the state. In the case selection for my research, only one case was between two private parties. Contrary to what one may assume based on newspaper articles and other publications on ECJ cases, and contrary even to some of the empowerment rhetoric of EU institutions and legal scholars, the preliminary reference procedure is not a form of appeal nor is it a mechanism that can be employed as such by litigating parties.²⁶ It is always the national judge who can, and in some cases must, refer a case to the ECJ, whenever he or she is uncertain on the interpretation of EU legislation. This sounds very passive from a justice seeker's perspective, and in many cases it is, however it can also be, and several ground-breaking cases have shown it to be, a viable way of reaching the ECJ and actively evoking a judgement on a principle issue. Therefore, first of all, a distinction has to be made between 'proactive' and 'reactive' litigants.²⁷

Selecting cases based on their reaching the ECJ through a reference captures both successful attempts at harnessing the procedure as a judicial strategy, as well as numerous cases where neither party was actually seeking a referral. In these latter cases, it was merely the considerations of the national judge that lead to a referral. Considering the average time of 20 months it takes the ECJ to decide these cases, it should be obvious that for these litigants this is usually not greeted with great enthusiasm. In this sense the preliminary reference procedure itself may actually be considered a procedural obstacle in a practical sense. An often-over-

26 Formulations in newspapers are often along the lines of: 'the claimant has brought the matter before the Court of Justice.'

27 Harlow & Rawlings 1992.

looked yet important aspect of the procedure, which can lead litigants to drop their case due to extended duration of the proceedings.²⁸

In a significant number of the cases, however, interested players can be found to aim proactively for references when contesting national policy or seeking to resolve principle questions of law. These actors can be further divided into two categories, based on whose interests are being served. First there is the very select group of active individual litigants, often acting *pro se*, who seek to employ every remedy possible in their legal claim. Since in these cases their claim includes an EU law element one such remedy is the referral of the case to the ECJ. However, since this requires significant legal expertise from a party, this group is very small indeed (only three such examples were found). The second category encompasses actors with more agency, including accountancy firms seeking to get a principle judgement on matters of interest to their clientele, so-called cause lawyers individually seeking to get an answer to a principle question and the more strategically motivated alliances of interest groups, lawyers, and academics proactively contesting national policy.

The empirical research into litigation through the preliminary reference procedure reveals several practical obstacles to the proactive use of the preliminary reference procedure as a litigation strategy. In the case of preliminary reference procedure as an empowering tool this breaks down to expertise and opportunity; the expertise that is necessary to make use of opportunities provided by these legal structures. First of all there has to be an EU law or principle on which to litigate, but one also needs the know-how to signal a discrepancy between EU law provisions and national policy. Which, of course, not every lawyer, let alone litigant will possess? This lack of know-how also plays a role once a case gets referred to the ECJ. In a large portion of the cases investigated we see lawyers, even once their case is referred to the ECJ, seeking assistance from experts in EU law, usually academics. Which confirms the lack of expertise of these practitioners in the field of EU law? This can be explained by the fact that because of the rare occasion of references to the ECJ it is not easy, let alone commercially interesting for lawyers to develop expertise in this area.

The extra effort and expertise that goes in to these cases of course is accompanied by additional costs. From the interviews, I conducted it is clear that it is usually the lawyers themselves who 'pick up the bill', motivated by the fact that a referral usually concerns a principle issue and they are effectively litigating on behalf of more people than merely their direct clients. There are even examples of lawyers continuing their case after their client has in fact given up, or when they have lost contact with their client all together. From a strategic perspective, the uncertainty of whether or not a case is referred to the ECJ makes it hard to prepare a case, or anticipate the necessary extra work. Moreover, in case of an unexpected referral it is often too time-consuming, and thus expensive, to rework the case or

28 It is important to realize in this respect that the average time of 20 months it takes the ECJ to complete a case is additional to the time one has already spent in the national legal system. The total time of which, in some cases, mounted to up to 12 years; a significant burden on any individual.

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to hire a specialist in order to work a case extensively. From a general practitioner's point of view, specializing in EU law, because of its sporadic occurrence in their practice, is well-nigh impossible. This lack of experience greatly diminishes lawyers' effectiveness once their case is brought before the ECJ where they find themselves up against (often several) representatives of Member States who litigate before the Court on a regular basis.

The more strategic players, however, are able to muster the needed expertise beforehand. We therefore see efforts in proactively soliciting a reference being made by actors like interest groups and other social action organizations who can employ the necessary expertise. In these cases the matter is framed as an EU law issue and the whole litigation strategy can be tuned towards a possible reference. This means, however, that if you wish to contest certain policies via this route there is a need to have a case, or find one. This requires access to potential litigants, because you need a willing litigant who provides a case on which to go to court.²⁹ Therefore interest groups and other strategic actors actively employ EU law and litigation as one of their modes of contesting policies by bringing together specific strategic actors like scholars and legal practitioners and trying to find ways to resolve the constraints mentioned. Practitioners are the ones who potentially have cases, and scholars usually have the needed expertise.³⁰

An obstruction to using the preliminary reference procedure, and possibly the most problematic obstacle from a public power perspective, which greatly diminishes the effectiveness of the whole procedure, is the fact that the Member State government in fact has the opportunity to prevent a judgement from the ECJ. Since references regularly deal with questions of national legislation or policy's legality in light of EU legislation, a judgement by the ECJ may threaten national policy. From the perspective of the national government, references can therefore be very undesirable, and the state will put in efforts to prevent a reference or a judgement. Those lawyers that were interviewed who were trying to aim for references stated that it is not unusual for the government to curtail possible negative judgements this way. A recent Dutch example can be found in the *Imran* case,³¹ where the Dutch Ministry of Justice was quick to provide a residence permit to the claimant once the case was referred the ECJ, in order to prevent an unfavourable judgement on the policy on integration requirements for migrants. To this strategic action by the state there is no remedy because the case is resolved before the principle question gets answered, and the ECJ has an established policy of not

29 The famous *Defrenne* cases are also a case in point, showing Eliane Vogel-Polsky's (the main driver behind the litigation) troubles in finding a willing individual on whose account she could address the issue of equal pay.

30 A recent example is the almost 15-year battle between the Dutch Government and private actors on the subject of raises in administrative fees for residence permits for migrants (*leges*). One Dutch interest group formed a working group together with lawyers, academics and other interest groups in order to attack the policy via legal means. The group initiated several legal proceedings, including preliminary references and infringement proceeding by the European Commission to fight the policy (successfully) via the courts.

31 Case C-155/11.

answering hypothetical questions. Of course, in these instances, research into the ECJ's track record will never reveal these dynamics at the national level. All these elements taken together thus reveal some significant practical challenges to considering the preliminary reference procedure as a tool of empowerment.

7 Conclusions

The so-called 'emancipatory functionalism' of EU law, as a legitimizing rhetoric, creates high expectations for European citizens by offering individual empowerment and the 'liberation of civil society from the shackles of parliamentary democracies'.³² However, one critical aspect to this individual rights rhetoric is the truism that the mere proclamation of rights does not necessarily mean actual change in one's situation. On what he famously called 'the myth of rights', Scheingold states in this respect:

The assumption is that litigation can evoke a declaration of rights from courts; that it can, further, be used to assure the realization of these rights; and, finally, that realization is tantamount to meaningful change. The *myth of rights* is, in other words, premised on a direct linking of litigation, rights and remedies with social change.³³

The legal perspective on the subjects of rights, remedies, social change and litigation from an EU law perspective encourages a focus on judicial decisions and their implementation, hence, the extensive literature on the ECJ's track record. The findings presented in this article critically examine these assumptions of macro-approaches to the preliminary reference procedure as a judicial remedy in light of the debate on access to justice. They shed light on the practicality of the preliminary reference procedure as a so-called 'shield' and a 'sword', empirically complicating the rights rhetoric and the narrative of empowerment by showing the constraints on the use of this procedure as a means to an end.

Considering the preliminary reference procedure as an empowering tool it comes down in large part to the mitigating effects of the expertise that is necessary to make use of opportunities provided by the structures of EU law. The nature of the preliminary reference procedure makes deliberately aiming for the ECJ via this route an uncertain endeavour indeed. The distinct nature of the EU legal system compared to traditional national forms of litigation strategies makes for an enhanced opportunity to circumvent the national judiciary and thus increased chances. However, the ability to make use of this procedure for underprivileged parties is, next to structural barriers, greatly hampered by an unequal distribution in legal agency and the ability to employ experts. Although the development of the European legal system has provided new avenues for individuals to seek jus-

32 Schepel & Chalmers 2004, p. 2.

33 Scheingold 1974, p. 5.

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tice, and the ECJ has been an important ally for private interest and judicial politics in recent decades, the rhetoric surrounding it may be an overstatement of the actual empowering effects of EU law for individual litigants.

The emancipatory functionalism of the procedure has made the preliminary reference procedure a target for interest litigation by pressure groups. The rhetoric around the preliminary reference procedure as described above is based in large part on some prime examples of successful interest litigation and mobilization of EU law, fostering the ideal of the preliminary reference procedure as a particularly viable route to justice and rights granting tool. However, the practice of this is more about macro-legal developments and a form of extended political negotiation than about access to a meaningful form of justice. On the one hand, it does provide new possibilities for ‘trumping’ the domestic legal system whenever the supranational legislation provides opportunities against national legislation, giving interest groups an incentive to use the procedure, on the other hand, from a litigant’s perspective, as a form of remedy the PRP remains a difficult ‘sword’ to harness, and the active use of it is therefore largely reserved for a minority of ‘Eurolawyers’ with the necessary credentials, means, and expertise.³⁴ When considering the ideal of a veritable rule of law in the EU the nature of the PRP is thus closer to its original intended function as an aid to national judges in their adjudication than as a ‘shield’ and ‘sword’ for citizens to use. Thus, the system of preliminary references as a remedy for private parties, in its current form, does provide opportunities not available at the national level, yet the possibility of proactively seizing these opportunities is not equally distributed. It requires significant amounts of capital, both financial and legal, to successfully make use of this procedure. Therefore focusing, in line with AG Colomer’s argument, on the practice of access to justice in the European judicial system, all the successes of the procedure notwithstanding, we should be wary of considering the preliminary reference procedure as a veritable form of access to justice from a litigant’s perspective.

References

- Alter, K.J., ‘Who are the “Masters of the Treaty”? European Governments and the European Court of Justice’, *International Organization*, 1998-52(1), p. 121-147.
- Alter, K.J., *The European Court’s Political Power: Selected Essays*, Oxford: Oxford University Press 2010.
- Batta, D., *The Relation between National Courts and the European Court of Justice in the European Union Judicial System Preliminary Ruling Regimes According to Articles 234 EC, 68 EC, and 35 EU*, 2007, available at: <http://edz.bib.uni-mannheim.de/daten/edz-ma/ep/07/pe378.291-en.pdf>.
- Brunell, T.L., C. Harlow, & A. Stone Sweet, *Litigating the Treaty of Rome: The European Court of Justice and Articles 226, 230, and 234*, NewGov rapport 1–27. 2008, available at: http://www.eu-newgov.org/database/DELIV/DLTFIID06a2_Litigating_Treaty_of_Rome.pdf.

34 Vauchez 2008a, p. 450.

- Cichowski, R.A., 'Courts, rights, and democratic participation', *Comparative Political Studies*, 2006-39(1), p. 50-75.
- Cichowski, R.A., *The European Court of Justice and Civil Society. Litigation, Mobilization and Governance*, Cambridge: Cambridge University Press 2007.
- Costa, O., 'The European Court of Justice and democratic control in the European Union', *Journal of European Public Policy*, 2003-10(5), p. 740-761.
- Dworkin, R., *Law's Empire* (18th ed.), Cambridge: Belknap Press 1986.
- European Commission, *European Governance – A White Paper*, COM (2001) 428, 2001, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52001DC0428>.
- European Council, *The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens* 2001, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF>.
- Harlow, C. & R. Rawlings, *Pressure through Law*, London: Routledge 1992.
- Kumm, M., *How Does European Union Law Fit into the World of Public Law? Costa, Kadi and Three Conceptions of Public Law*, NYU School of Law Public Law Research Paper No. 11-16, New York 2011.
- Mancini, G.F. & D.T. Keeling, 'Democracy and the European Court of Justice', *The Modern Law Review*, 1994-57(2), p. 175-190.
- Rasmussen, H., *On Law and Policy in the European Court of Justice*, Dordrecht: Martinus Nijhoff Publishers 1986.
- Rasmussen, M., 'Establishing a constitutional practice of European Law: The history of legal service of the European executive, 1952-65', *Contemporary European History*, 2012-21(3), p. 375-383.
- Scheingold, S., *The Rule of Law in European Integration: The Path of the Schuman Plan*, New Haven, CT: Yale University Press 1965.
- Scheingold, S., *The Politics of Rights: Lawyers, Public Policy and Political Change*, New Haven, CT: Yale University Press 1974.
- Schepel, H. & D. Chalmers, 'Law and European integration: Socio-legal perspectives', *EUSA Review*, 2004-17(4), p. 1-4.
- Schmidt, S.K., 'Who cares about nationality? The path-dependent case law of the ECJ from goods to citizens', *Journal of European Public Policy*, 2012-19(1), p. 8-24.
- Vachez, A., 'Democratic empowerment through EU law?' *European Political Science*, 2008a-7(4), p. 444-452.
- Vachez, A., 'Integration-Through-Law': *Contribution to a Socio-history of EU Political Commonsense*, EUI Working Paper RSCAS 2008/10, 2008b.
- Vachez, A., 'Introduction. Euro-lawyering, transnational social fields and European polity-building', in: B. de Witte & A. Vachez (ed.), *Lawyering Europe: European Law as a transnational social field*, London: Hart Publishing 2013, p. 1-17.
- Weatherill, S., *Cases and Materials on EU Law* (11th ed.), Oxford: Oxford University Press 2014.
- Weiler, J.H.H., 'Epilogue: The judicial après Nice', in: G. de Búrca & J.H.H. Weiler (ed.), *The European Court of Justice*, Oxford: Oxford University Press 2001, p. 215-226.
- Weiler, J.H.H., 'Epilogue: The European Courts of Justice: Beyond 'Beyond Doctrine' or the legitimacy crisis of European constitutionalism', in: A.M. Slaughter, A. Stone Sweet & J.H.H. Weiler (ed.), *The European Courts and National Courts – Doctrine and jurisprudence*, Oxford: Hart Publishing 1998, p. 378-383.
- Weiler, J.H.H., 'The transformation of Europe', *The Yale Law Journal*, 1991-100, p. 2403-2484.