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Judicial Dialogue in Times of European (Dis)Integration

Sir Jeremy Lever Lecture, Oxford Law Faculty, 8 March 2019.

Outline

I. High time in the 2000s

II. Outflow of liberalism

III. Cases

IV. The European triangle in particular

V. Functions of dialogue

VI. Critique of the liberal approach

VII. Neo-nationalism

VIII. Conclusions

I. High time

1. The phenomenon

- Courts in different jurisdictions referencing each other: Judicial dialogue
- Judges from different jurisdictions meeting each other (“wanderlust of judges”): Extrajudicial dialogue
- Since the 2000s on everyone’s lips
- Feature of a liberal and neo-liberal era
- Belief that regional and global problems can be tackled by international organisations and courts
- Global approach, but Europe as a special case

I. High time

2. Essential contributions of two women

Today is the International Women's Day.

Justice Claire L'Heureux-Dubé in 1998:

In the past Britain and France, and later the U.S. were the most influential sources of foreign authority on most matters.

Today, "cross-pollination and dialogue between jurisdictions is increasingly occurring [….] mutual respect and dialogue are fostered among appellate courts. Judges around the world look to each other for persuasive authority, rather than some judges being 'givers' of law while others are 'receivers'."

Professor Anne-Marie Slaughter in 2000:

Vision of a global community of law, "established by national courts working together around the world [….]. "[S]hift from deference to dialogue, from passive acceptance to active interaction, from negative comity to positive comity."

3. Judicialisation

Other side of the coin: Judicialisation of politics and law

- Proliferation of international courts after 1918, 1945 and 1989
- European continent in ruins after WW II; determination not to let atrocities to be committed again (ECtHR, ECJ)
- Victory of market economy and democracy in the Cold War (WTO AB, EFTA Court, ICC)
- Encroachment of the ideas of free trade and of economic (and political) integration

Development fostered through regionalisation and globalisation.

Permanent international and European courts replaced diplomatic systems of dispute resolution and ad hoc arbitration mechanisms.

3. Judicialisation

More precisely two evolutions:

(1) Rise of adjudication by international courts

(2) Privatization of disputes by integration of non-state actors, in particular in Europe

Non-state actors may enter the stage as parties or as third parties, for instance as *amici curiae* or as interveners.

At the same time, national courts were facing more and more problems of international law.

3. Judicialisation: Research and networks

- 1997: Project on International Courts and Tribunals (PICT) established
  - Initially, NYU Center on International Cooperation (CIC)
  - London-based Foundation for International Environmental Law and Development (FIELD)
  - Subsequently ,Centre for International Courts and Tribunals, UCL
- Handbooks
- 2003-2009: Conference series Texas/ Salzburg/ St. Gallen, documented in TILJ and in books published by GLP
- Judges' networks
- National supreme and constitutional courts are part of the game

II. Outflow of liberalism

1. What was the zeitgeist that spurred the debate?

- Globalisation on the rise
- Emergence of a global community
- Liberalism, free trade, competition, open markets, human rights
- Globalisation leads to identical or similar problems.
- EU/EEA with supranational courts, WTO with permanent Appellate Body, NAFTA (now USMCA) with bilateral arbitration panels
- Fields of the law:

  Corporate governance, accounting law, human rights law, environmental law, fight against terrorism, competition law (vitamin cartel, marine hose cartel, mega mergers), IP law, administrative law etc.

2. Most important idea givers

U.S. Supreme Court, ECtHR, ECJ

Main exporter: U.S. Supreme Court
(fundamental rights, federalist system, antitrust, IP, corporate governance, compliance, accounting principles, strict liability, money laundering, whistleblowing etc.)

Anthony Lester in 1988:

"When life or liberty is at stake, the landmark judgments of the Supreme Court of the United States [….] are studied with as much attention in New Delhi or Strasbourg as they are in Washington, D.C., or the State of Washington, or Springfield, Illinois."

Reluctance of American courts to take ideas (but see, e.g., U.S. Supreme Court *Lawrence vs. Texas, 2003*, citing the ECtHR)

II. Outflow of liberalism

3. Important idea takers, willing to discuss foreign solutions

- Canadian Supreme Court
- German Federal Supreme Court
- Swiss Federal Supreme Court
- House of Lords and UK Supreme Court
- Indian Supreme Court
- High Court of Australia
- ECtHR
- ECJ (Advocates General)
- EFTA Court
- Inter-American Court of Human Rights

III. Cases

1. Benetton shock advertising

Since the 1990s

Showing horrifying events:

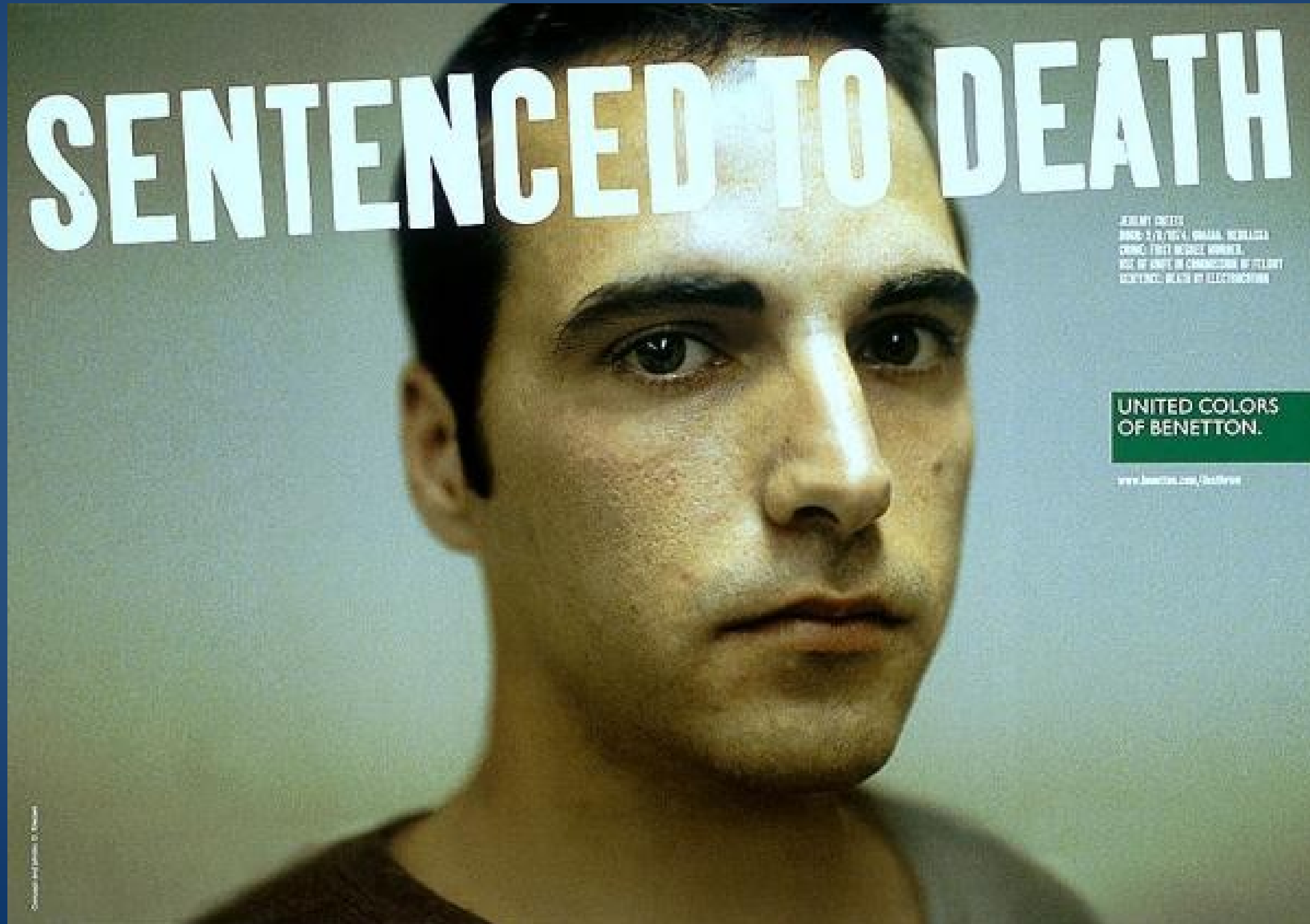
- A duck covered in oil after a crash of an oil vessel
- The uniform of a soldier killed in the Bosnian war with the bullet hole and the blood stains around it
- A human upper arm with an “HIV positive” stamp on it
- Convicted prisoners on U.S. death rows
- Latest ad: a vessel containing people trying to flee their country

III. Cases

Source: weareneo.com

Source: telegraph.co.uk

III. Cases



Source: davidscottwritings.com

III. Cases

1. Benetton shock advertising

Germany:

- Supreme Court: HIV stamp constituted a violation of the dignity of mankind
- Constitutional Court: annulled the decision
- Other German courts: ruled that it was indecent to profit from the misery of others

Norway:

- *Markedsradet* followed German Supreme Court and decided accordingly

Sweden/Finnland:

- Courts dismissed unfair competition lawsuits

Switzerland:

- No action was never brought

2. Patentability of the Harvard *oncomouse*

- Harvard researchers: Implanting an isolated gene into a mouse, which makes it susceptible to cancer
  - Patent for the gene, the engineering process, and the engineered mouse (U.S. 1988 and Japan 1994)

Source: genetargeting.com

2. Patentability of the Harvard *oncomouse*

- 2002 Canadian Supreme Court: Higher life form not patentable because it was not a “manufacture” or “composition of matter” within the meaning of the Canadian Patent Act (5-4 decision)
  - Reference to the U.S. Supreme Court’s 1980 *Diamond v. Chakrabarty* ruling (biotechnological inventions are patentable; “anything under the sun that is made by man.”)
- 2004 EPO: Usefulness of the *oncomouse* in furthering cancer research satisfies likelihood of substantial medical benefit, and outweighs (European) moral concerns about suffering caused to animals.

3. Antitrust/competition law

- Countless cases
- ECJ Advocates General reference foreign judgments.
- Gateway function for foreign judgments

Eg:

Is proof of recoupment of losses a precondition to making a finding of predatory pricing?

Discussion of U.S. Supreme Court *Brooke Group v Brown & Williamson Tobacco* by AG Ruiz Jarabo Colomer in C-333/94P *Tetra Pak II*.

See also AG Ján Mazak in C-202/07P *France Télécom*: “[W]here there is no possibility of recouping losses, consumers and their interests should, in principle, not be harmed.” (para. 74)

4. Colour and form as trade marks

German Supreme Court, 10th December 1998 *Gelb/Schwarz*:

- Concrete combination of the two colours yellow and black is, as a matter of principle, able to obtain trademark protection

- Reference to U.S. Supreme Court judgment *Qualitex Co. v. Jacobson Products Co.* (1995)

5. Protection of LEGO bricks

- System of basically unlimited demand
- Competitors adopted all sorts of copying strategies
- Courts: Unfair competition or trademark infringement, when copying Lego bricks in a one-to-one manner
- Competitors then created their own bricks with a different brand and different colours, but in exactly the same size so that their bricks could be built together with the Lego bricks

5. Protection of LEGO bricks

- Lego brought action in at least ten different jurisdictions including the U.S.
  - Norway/Switzerland: Lost.
  - German Supreme Court: Most important victory (2004). Held: This is not just about creating confusion or a likelihood of confusion.

    A competitor who uses exactly the same size profits from a demand that has been created by somebody else ("*Einschieben in fremde Serie*", "inserting one's bricks into a series created by another") → unfair competition
  - Supreme Court of Hungary: Ruled in Lego's favour (indirect reference to German law)
  - Later, German Supreme Court: Protection limited in time

6. International exhaustion of IP rights

Swiss Supreme Court in *Nintendo* (1998): Copyright is subject to international exhaustion

- Copyright is exhausted upon first sale anywhere in the world
- Indirect reference to U.S. Supreme Court *Quality King v. L'anza* (1998)

Swiss Supreme Court in *Kodak* (1999): International exhaustion did not apply in patent law (3 : 2 votes)

- Reversal of the decision of the Zurich Commercial Court
- Reference to ECJ case law and discussion of a range of other foreign jurisdictions

6. International exhaustion of IP rights

German Supreme Court (1999) confirmed that patents are not subject to international exhaustion

- Discussed rulings of the Tokyo Court of Appeal and the Supreme Court of Japan in the *BBS* case, as well as the judgment of the Zurich Commercial Court in *Kodak*
- Japanese courts came to the opposite result
- But this was no reason to deviate from earlier case law.

7. Tort law

House of Lords *White v Jones* (1995): Case concerning professional negligence

- Referred to cases from New Zealand, Australia, the U.S., and Germany
- Due to the complexity of the case, Lord Steyn also referred to academic writings on foreign law, stating that

  "such material, properly used, can sometimes help to give one a better insight into the substantive arguments."

- Lord Goff expressed reservations over using materials from Germany's civil law system:

  "Exceptionally, however, in the present case, thanks to material published in our language by distinguished comparatists, German as well as English, we have direct access to publications which should sufficiently dispel our ignorance of German law and so by comparison illuminate our understanding of our own.

Learning German would be an option.

7. Tort law

House of Lords *Fairchild* v *Glenhaven Funeral Services Ltd. (*2002): Asbestos case, the claimant, due to insufficient evidence, was unable to identify which of several employers had caused his harm.

- Discussion of the legal situation in some 20 jurisdictions and even Roman law
- Held: Appropriate test in this situation was whether the defendant had materially increased the risk of harm toward the plaintiff
- The employers were joint and severally liable against the plaintiff.

UK Supreme Court *Montgomery v Lanarkshire Health Board* (2015): Case concerning medical negligence

- Considered authorities from the U.S., Canada and Australia

8. Contract law

Indemnity payment to terminated authorized dealers:

- Tripartite conversation among the Supreme Courts of the German speaking countries Germany, Switzerland, and Austria
- Respective law concerning agents originated in Austria in 1925, was exported to Switzerland in 1949, and taken over by Germany in 1953
- Relevant provisions: A terminated commercial agent may, in certain circumstances, claim an indemnity payment for the stock of customers that he or she leaves to the principal ("*clientele*").
- Extended to authorized dealers under the leadership of the German Supreme Court.

UK Supreme Court *Cavendish Square Holding BV v Makdessi* (2015):

- Reviewed the English law governing the enforcement of contractual penalty clauses and referenced French and German law.

9. Relationship WTO AB - ECJ

ECJ C-245/02 *Anheuser-Busch v. Budějovický Budvar* (2004):

- Expressly followed rulings of the AB concerning the TRIPs Agreement ("consistent interpretation")

Other cases:

AGs referenced AB practice

Eg: AG Yves Bot in C-511/13 *Philips Lighting v. Council* (2015)

ECJ: followed the AG in substance without mentioning the AB

IV. The European triangle in particular

1. General

Originally, the ECHR aimed to protect classical human rights

(e.g. the rights to life, to privacy or to freedom of expression)

Over the past decades, the jurisprudence of the ECtHR has attained a high degree of economic relevance:

> Antitrust law, unfair competition law, property law, law of collective bargaining and industrial action, IP law

At the same time, fundamental rights have become more and more important in the ECJ (Charter!) and the EFTA Court (case law)

IV. The European triangle in particular

2. Relationship ECJ – ECtHR

- Both courts cite each other on a regular basis
- Dialogue at a 'vertical' level

  Goal: Avoiding conflicts about jurisprudence

  ECtHR *Bosphorus* (2005)
- Dialogue at a 'horizontal' level

  Goal: Drawing inspiration from the other court

  ECtHR *Pellegrin;* Notion of civil servant – reference to C-140/79 *Commission v. Belgium*

  ECJ C-94/00 *Roquette Frères*: Protection of business premises – reference to ECtHR *Colas Est*

IV. The European triangle in particular

3. Relationship EFTA Court – ECtHR

Landmark cases:

ECtHR *Menarini* on scope of judicial review:
Fully accepted by the EFTA Court in E-15/10 *Posten Norge* (partly by the Union courts?)

ECtHR *Sørensen/Rasmussen* on negative freedom of coalition:
EFTA Court E-14/15 *Holship* – Norwegian Supreme Court – ECtHR

Reference to EFTA Court E-16/11 *Icesave I* in ECtHR *Àlišić*

IV. The European triangle in particular

4. The role of ECJ AGs

- AGs cite the ECtHR
- ECtHR cites AGs
- Dialogue AGs - EFTA Court (gateway function; two way street)

<u>Eg</u>:

AG Francis Jacobs in E-67/96 *Albany*: Limits of the antitrust immunity of collective bargaining; broad comparative study

Opinion disregarded by ECJ in *Albany*, expressly followed by EFTA Court in E-8/00 *LO* and E-14/15 *Holship*

In substance also followed by Norwegian Supreme Court in *Holship*; case currently pending before ECtHR (brought by Norwegian unions)

V. Functions of dialogue

1. Enhancing rationality and quality of judgments

Obvious.

2. Indicating the origin of the considerations underlying the judgment

A matter of intellectual honesty

- Element of interpretation like text, history, purpose, and overall scheme of a given provision?
- Additional tool that would allow a court to confirm a result?
- Dialectic use: In *White v Jones*, Lord Nicholls noted that "courts in other jurisdictions had reached opposite conclusions."
- Majority decides based on domestic law considerations; dissenter refers to foreign judgments

  Eg.: Justice Breyer dissenting in U.S. Supreme Court *Printz* (1997)

V. Functions of dialogue

3. Giving support to the referred court

Important for small courts:

- ECtHR references Inter-American Court of Human Rights case law
- ECJ references EFTA Court case law

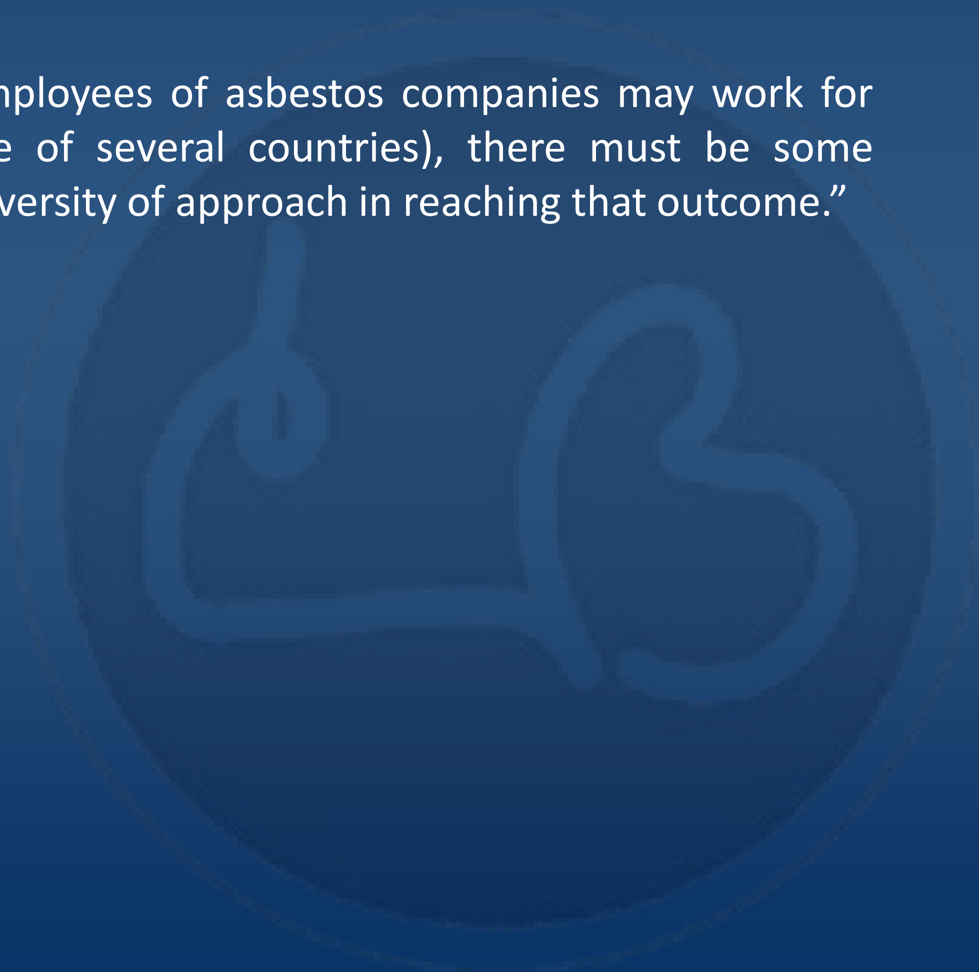
Also a powerful court may appreciate support by a small court in certain cases

If the powerful court is split, this may tip the balance

4. Avoiding judicial conflicts

Lord Bingham in House of Lords *Fairchild*:

> "In a shrinking world (in which the employees of asbestos companies may work for those companies in any one or more of several countries), there must be some uniformity of outcome, whatever the diversity of approach in reaching that outcome."



V. Functions of dialogue

5. Friendly citation

- Citation of another court (or judge) because of a friendly relation
- In most cases, this will happen to scholars
- U.S. Supreme Court *Raines vs Byrd*: Constitutionality of the Line Item Veto Act

  Chief Justice Rehnquist, delivering the opinion of the Court, cited, inter alia, French constitutional law professor Louis Favoreu

V. Functions of dialogue

5. Friendly citation

Professor John S. Baker Jr. explained:

"One of the late Chief Justice's first trips to teach abroad was to our summer law school in the south of France. When he arrived, a prominent faculty member from the host university, a teacher on comparative constitutional law, quickly attached himself to the Chief Justice. Even though the French professor probably was on the liberal side of things, he was absolutely thrilled to befriend the Chief Justice. He entertained and established a good relationship with the Chief Justice. The next term, in *Raines v. Byrd*, the Chief Justice's opinion cited his new foreign friend. That was a nice gesture. What was his motive? Well, friendship. After that, the French law professor's star undoubtedly rose. He must have shown that footnote to all of his colleagues. In this, the French law professor would have been acting like law professors in the United States. American law professors cite their friends in footnotes if it fits. What's the motive? Is it the quality of the cited article? Friendship with the author? Hope of being cited in return? Or a mix of these motives? Such are the human variables that motivate different people."

5. Friendly citation

What we don’t know is whether the Chief Justice spent more summers in southern France after this nice gesture.

VI. Critique of the liberal approach

1. **Empowering the judiciary**

- Judges as decision makers like politicians?

- Legislating from the bench; lacking legitimacy

2. Overcoming the "majoritarian impulse"? (*Roger P. Alford*)

- Majoritarianism asserts that a majority is entitled to a certain degree of primacy in society
- International majoritarian impulse may not be consistent with domestic majoritarian impulse
- Misuse of foreign sources

VI. Critique of the liberal approach

3. Foreign judgments must be understood in context

- Theory of legal transplants (*Watson – Kahn-Freund* controversy)
- Selectivity and 'bricolage' (*Mark Tushnet, Roger P. Alford, Claude Lévi-Strauss*)

4. Experiences from traditional comparative law

- Only comparable issues can be compared
- No comparing of provisions or judgments as such
- Comparing real life problems that lead to legal implications
- Comparative analysis on its own motion?
- Non legal factors
- The language issue

VI. Critique of the liberal approach

5. Ronald Reagan's conservative revolution

- Judges ought to use judicial restraint
- Fights over judicial appointments to the Suprem Court (Robert Bork, Clarence Thomas)
- Do courts have the right to look to foreign jurisdictions? No
- Candidates for the U.S. Supreme Court subject to bizarre questioning
- Reluctance of the U.S. Supreme Court to look abroad

VI. Critique of the liberal approach

5. Ronald Reagan’s conservative revolution

Critical stance vis-à-vis international courts

Eric Posner und John Yoo in 2005:

- Only dependent tribunals are effective international tribunals:

  That means ad hoc tribunals staffed by judges closely controlled by governments through the power of reappointment or threats of retaliation.

- Independent tribunals pose a danger to international cooperation:

  They are likely to allow moral ideals, ideological imperatives or the interests of other states to influence their judgments.

But still basic commitment to free trade and WTO (including AB).

VII. Neo-nationalism

1. Donald Trump’s America

- Opposition to free trade
- Starting trade wars
- Disintegration of the world economy
- Anti-EU talk
- Increased fight over judicial appointments (Neil Gorsuch, Brett Kavanaugh)
- Putting an ax to the WTO AB

2. Europe in the Trump Era

Fragmentation of the EU:

- Brexit
- Eastern EU Member States
- Austria
- New Hanseatic League
- Italy

2. Europe in the Trump Era

Mercantilism, corporatism

- Already in the past (ECJ C-355/96 *Silhouette*: International exhaustion of trademark rights ruled out; ECJ C-452/04 *Fidium Finanz* (Swiss financial operator is denied access to the single market)
- This tendency could be strengthened

After the Brexit referendum: French President François Hollande suggest an adjusment of European competition policy: Taking into account growth, jobs and investment.

2. Europe in the Trump Era

Mercantilism in EFTA?

EFTA Court E-16/16 *Fosen-Linjen*: A simple breach may be sufficient to trigger the liability of the contracting authority.

Principle of liability is a constituent principle of a market economy. Avoiding moral hazard.

Against UK Supreme Court *Nuclear Decommissioning Authority (Appellant) v EnergySolutions* (see https://www.monckton.com/efta-court-contradicts-uk-supreme-court-public-procurement-damages-test/

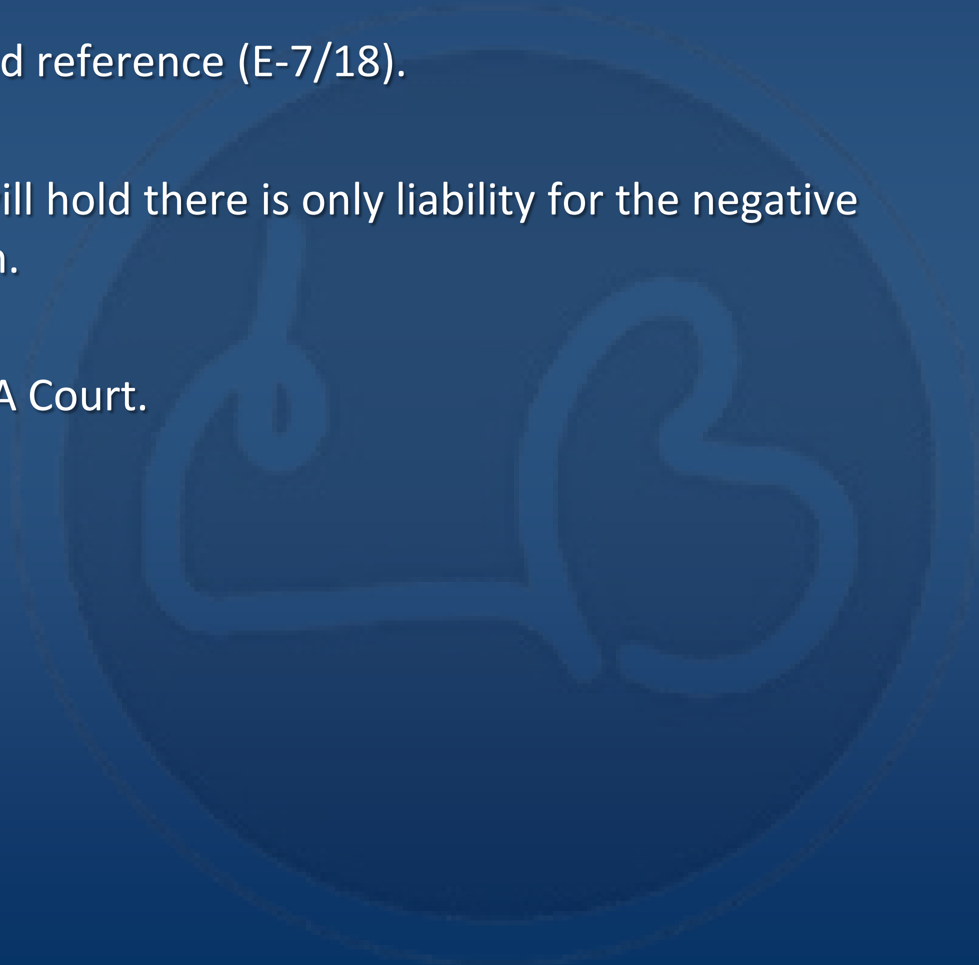
2. Europe in the Trump Era

Mercantilism in EFTA?

Norwegian Supreme Court makes a second reference (E-7/18).

Government hopes that the EFTA Court will hold there is only liability for the negative contract interest → Mercantilist approach.

Background: New composition of the EFTA Court.



VII. Neo-nationalism

2. Europe in the Trump Era

Sec. 6 European Union (Withdrawal) Act 2018

<u>Interpretation of retained EU law</u>

A court or tribunal "may have regard to anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal" (para. 1).

"But [….] the Supreme Court is not bound by any retained EU case law." (para. 4a)

"In deciding whether to depart from any retained EU case law, the Supreme Court [….] must apply the same test as it would apply in deciding whether to depart from its own case law." (para. 5)

2. Europe in the Trump Era

Compare Article 4(2) Draft Institutional Agreement EU – Switzerland

Principle of uniform interpretation

> “Insofar as their application involves concepts of European Union law, the provisions of this Agreement and the agreements concerned and the European Union legal acts referred to therein shall be interpreted and applied in accordance with the case law of the Court of Justice of the European Union, before or after the signature of the agreement concerned.” (*Unofficial translation.*)

3. Will the Trump Era last?

Previous eras lasted two to three decades

Lack of a moral foundation

Future of judicial dialogue: Will it continue, evolve, change or in certain fields end?

4. Identity and similarity of problems remain

Eg: The red soles of Christian Louboutin’s high-heeled shoes have been the subject of trade mark cases around the world.

Source: khws.wharton.upenn.edu

4. Identity and similarity of problems remain

Eg: Regulation of digital platforms by competition law

- European Commission June 2017, *Google Shopping* (COMP.Case AT.39740):
  - €2.42 billion fine on Alphabet (Google) for abusing its dominance as a search engine by giving illegal advantage to its own comparison shopping service
  - Ordered it to comply with the principle of giving equal treatment to rival comparison shopping services and its own service
- U.S. Federal Trade Commission 2013:
  - Decided unanimously to close the portion of its investigation relating to allegations that Google unfairly preferences its own content on the Google search results page and selectively demotes its competitors' content from those results

4. Identity and similarity of problems remain

Eg: Regulation of digital platforms by competition law

Source: europa.eu

VII. Neo-nationalism

5. Judicial appointments are crucial

U.S. Supreme Court:

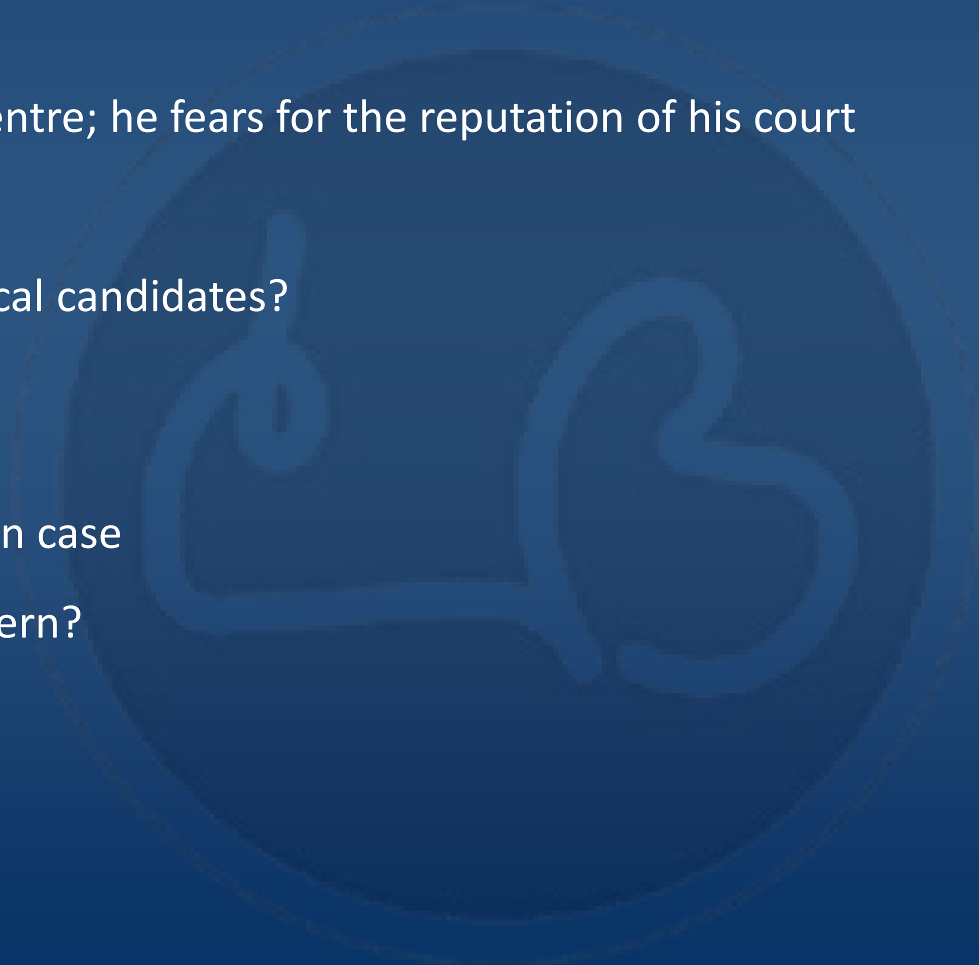
- New Justices Gorsuch and Kavanaugh
- Move of Chief Justice Roberts to the centre; he fears for the reputation of his court

Europe:

- Integration-friendly or integration-critical candidates?
- Political appointees in Eastern Europe
- Luxembourg; Norway

Austria: The Franz Marhold/Andreas Kumin case

Italy: The Guido Berardis case. A new pattern?



VIII. Comclusions

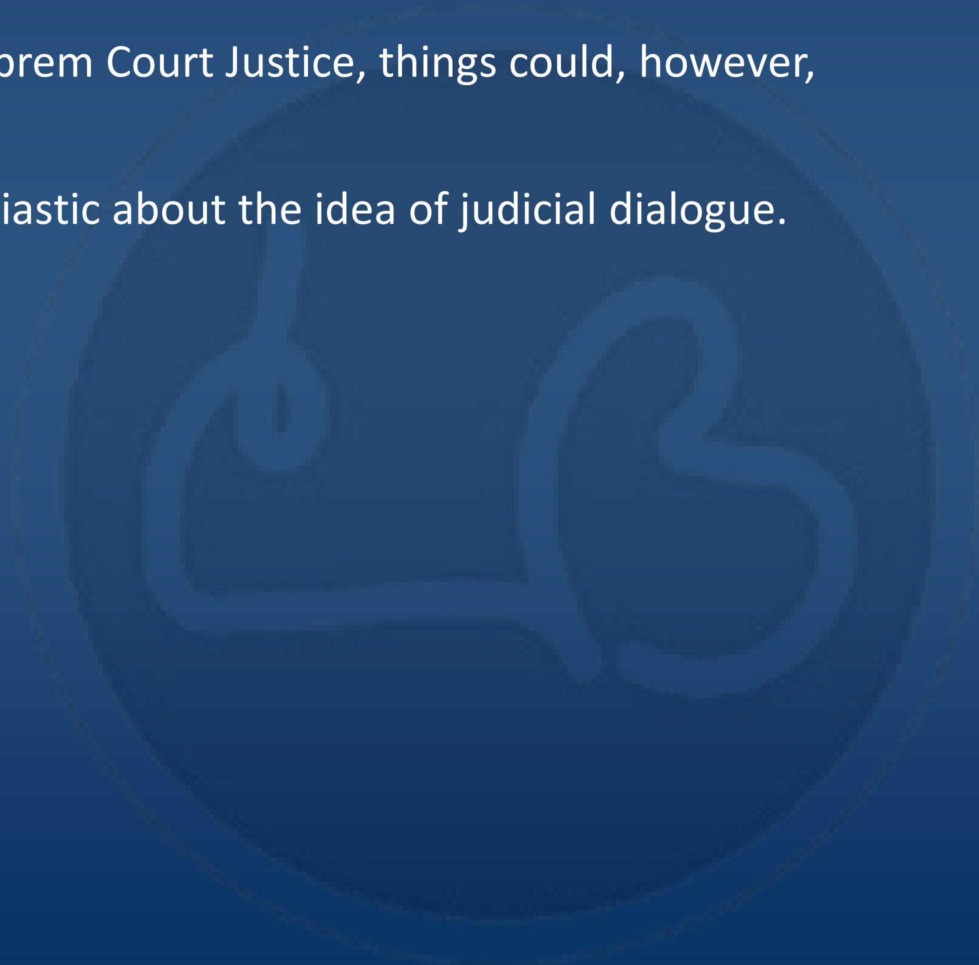
The judiciary is a governance function that is designed for the long term.

I do not expect any fundamental changes in this area in Europe.

If President Trump were to pick a third Suprem Court Justice, things could, however, change fundamentally.

American courts were never really enthusiastic about the idea of judicial dialogue.

And yet there could be repercussions.



VIII. Conclusions

I share Lord Reed’s view (in 2017):

“Whatever the future may hold, comparative law will remain an important tool in the judge’s toolbox. The UK Supreme Court will remain one of the leading courts in the common law world. The influence of other common law systems on our law, and vice versa, is of long standing and shows no sign of diminishing.

The Supreme Court will also continue to share with other leading European courts a cultural heritage, and some important legal concepts and principles.

European influence on the legal systems of the United Kingdom, and vice versa, did not begin with our entry into the EU, and it will not end with our withdrawal.”

This will also apply to other high courts all over Europe.