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#### **Courts as Catalysts: Re-Thinking the Judicial Role in New Governance**

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## Summary

This Article offers a step forward in developing a theory of judicial role within new governance, drawing on the emerging practice in both the United States and Europe as a basis for this reconceptualization. The traditional conception of the role of the judiciary--as norm elaborators and enforcers--is both descriptively and normatively incomplete, and thus needs to be rethought. There is a significant but limited role for courts as catalysts. In areas of normative uncertainty or complexity, courts prompt and create occasions for normatively motivated and accountable inquiry and remediation by actors involved in new governance processes. Catalysts thus facilitate the realization of process values and principles that are crucial to new governance's legitimacy and efficacy by the institutional actors responsible for norm elaboration within new governance. The relationship between courts and governance is dynamic and reciprocal: courts both draw upon the practice of governance in their construction of the criteria they apply to their judgments; and provide an incentive structure for participation, transparency, principled decision-making, and accountability which in turn shapes, directly and indirectly, the political and deliberative process. This Article elaborates three crucial aspects of the catalyst role, drawing on examples from the European Union ("E.U.") to illustrate how courts can exercise their decision-making authority to enhance the capacity of other actors to make legitimate and effective decisions. First, courts prompt new governance institutions to provide for full and fair participation by those affected by or responsible for new governance processes. We focus in this Article upon the courts' role in evaluating standing in the European courts (*locus standi*). Second, courts monitor the adequacy of the epistemic or information base for decision-making within new governance. We explore this role through the example of the European court's construction and interpretation of benchmarks for legality in judicial review. Finally, courts foster principled decision-making in new governance processes through requiring transparency and accountability as an essential element of enforceability. We illustrate this role through examples where the European courts evaluate the adequacy of deliberative processes by whether they have identified, justified, and applied criteria guiding their decisions.

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## I. Introduction ♦

As new governance forms proliferate, so have the debates about their legitimacy, accountability and relationship to law. These debates have devoted comparatively little attention to the role of the courts, as compared to other institutions of government and governance. Courts' limited appearance in new governance scholarship is understandable. New governance moves away from the idea of specific rights elaborated by formal legal bodies and enforced by judicially imposed sanctions. It locates responsibility for law-making in deliberative processes which are to be continually revised by participants in light of experience, and provides for accountability through transparency and peer review. Accountability through judicially-imposed mandates thus appears to contradict the premises and practices of new governance. Viewed from the lens of the traditional role of courts as norm elaborators and enforcers, judicial involvement signals a return to traditional, top-down regulation. Judges' traditional, rights-enforcement role would transform or supplant the new governance processes themselves. According to this view, courts should occupy at best the peripheral role of stepping in when new governance fails, and they bear uneasy and potentially contradictory relationship to new governance.

We argue that, notwithstanding the judiciary's de-centered role in new governance, rethinking courts' role is an important part of the new governance project. One reason for this is purely pragmatic: Under current institutional arrangements, courts already entertain challenges to new governance forms and the enforceability of norms generated by them.<sup>1</sup> Thus, courts can and do limit or supplant new forms of public engagement. They are a concrete location where new governance and law must be reconciled. Normative considerations provide a second reason for rethinking the judicial role in new governance regimes. Courts' gate-keeping function place the judiciary in a position to shape a practice of legitimacy and accountability within new governance institutions. Equipped with a broader conception of their role, courts can operate as simultaneously de-centered and pivotal actors in the project of making new governance work. Courts are poised to act as arbiters of interaction across different levels of governance and institutional roles. They can facilitate much-needed information sharing across the diverse domains encompassing new governance. They can operate as a crucial but limited source of new governance's accountability in relation to the participatory and deliberative values upon which its legitimacy rests. They also can foster the language and practice of legitimacy across institutional boundaries, and thus enhance new governance's legitimacy in relation to shared values justifying the elaboration and implementation of public norms. An examination of judicial practice reveals that, in certain domains, courts are already playing a more dynamic role than the stock narrative acknowledges. But they are doing so incompletely and without necessarily recognizing or making explicit the nature of their role.

Courts require a theory of judicial function to help navigate their course within new governance systems. This article offers a step forward in developing this theory, drawing on the emerging practice in both the United States and Europe as a basis for this reconceptualization. We see a significant but limited role for courts as catalysts. In areas of normative uncertainty and complexity, courts prompt and create occasions for normatively motivated and accountable inquiry and remediation by actors involved in new governance processes. Catalysts thus

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<sup>1</sup> For examples, see Part II below.

facilitate the realization of process values and principles that are crucial to new governance's legitimacy and efficacy by the institutional actors responsible for norm elaboration within new governance. The relationship between courts and governance is dynamic and reciprocal. Courts both draw upon the practice of governance in their construction of the criteria they apply to their judgments, and provide an incentive structure for participation, transparency, principled decision making, and accountability which in turn shapes, directly and indirectly, the political and deliberative process.

In this article, we elaborate three crucial aspects of the catalyst role, drawing on examples coming out of EU experience to illustrate how courts can exercise their decision making authority to enhance the capacity of other actors to make legitimate and effective decisions. First, courts prompt new governance institutions to provide for full and fair participation by those affected by or responsible for new governance processes. We focus in this article upon the courts' role in evaluating standing in the European courts (*locus standi*). Second, courts monitor the adequacy of the epistemic or information base for decision making within new governance. We explore this role through the example of the European court's construction and interpretation of benchmarks for legality in judicial review. Finally, courts foster principled decision making in new governance processes through requiring transparency and accountability as an essential element of enforceability. We illustrate this role through the examples where the European courts evaluate the adequacy of deliberative processes by whether they have identified, justified and applied criteria guiding their decisions.

Part I describes the traditional view of the judicial role, showing why this view needs to be rethought, and sketching out the role of court as catalyst. Part II uses examples from the EU context to elaborate the meaning of the catalyst role in enhancing participation, epistemic validity, and principled and accountable decision making. The article then concludes by considering further applications and flagging dilemmas and potential objections.

## **II. Re-Conceptualising the Role of Courts**

We suggest here that the traditional conception of the role of the judiciary is both descriptively and normatively limited. This section makes explicit and then critiques the often tacit understandings of the judicial role that have framed the discourse concerning the courts and their relationship to new governance institutions. It then describes the catalyst role, which strives toward enabling judges to enhance the legitimacy, accountability, and efficacy of new governance institutions, and yet remain consistent with deeply held understandings of appropriate judicial action.

### **II.1 The traditional understanding of judicial role**

According to the traditional view, law is about rule elaboration and enforcement with the judiciary bearing a distinctive institutional responsibility for elaborating and enforcing public norms, and applying those norms to facts filtered through formal adjudicative process.<sup>2</sup> Normative and factual activities from other domains operate as inputs to be processed and then outcomes to be judged.

A legal norm thus operates under this view as a code of conduct that gives rise to clear obligations to address well-understood problems with clear normative implications. Such a rule must be sufficiently clear, concise, and general to justify attaching coercive consequences to

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<sup>2</sup> For an effort to re-conceptualise the judicial role in the context of addressing complex workplace bias, see Susan Sturm, *Equality and the Forms of Justice*, 58 U. Miami. L. Rev. 51 (2003).

the rule's violation. Courts use analogy, logic, and moral intuition to define the problem at the core of the relevant authoritative principle, to formulate or apply a standard or rule to address that problem, and then to construct a hierarchical relationship between the judiciary and other public bodies to implement those specified rules. Legal pronouncements should settle disagreements or uncertainties about the nature and scope of problematic activity and its relationship to the generally articulated constitutional or statutory principles calling for judicial interpretation. Less formal and definitive norms, such as those produced through judicially accountable agreements or emerging from administrative- or expert-facilitated problem solving, do not count as legal norms. Legal norms are the substantive product of post-adjudicatory deliberation by a court, adoption of enforceable regulations by an administrative agency, or statutory enactment by the legislature.

Judicial pronouncements resulting from formal adversary process are the hallmark

of legitimate and effective judicial intervention. Judges react to factual evidence and legal argument presented through formal proof in court. They receive inputs (evidence arguments, or records on appeal) and produce outputs (legal rules, judgments, and sanctions for non-compliance). Paradigmatic judicial involvement takes place in the courtroom through receiving evidence and argument, and in chambers through detached deliberation and unilateral judgment. This type of norm elaboration presupposes the judiciary's responsibility and capacity to define and redress the problem through centralized articulation of an appropriate legal rule. Complex, poorly understood or normatively uncertain problems strain judicial capacity to craft and justify robust legal rules.

Experts and affected stakeholders do not participate in elaborating norms; their role is to supply facts, interpretations, and legal arguments, which are then processed by the judicial decision maker. Interactions outside of those stylized spaces and forms lack the imprimatur of the adversary process, and thus adjudication's presumption of accountability, transparency, and legitimacy. Even in cases involving other public bodies involved in some norm-generating role, such as administrative agencies, the focus is primarily on evaluating whether the agency got it right, or at least whether they acted within their authority in interpreting and enforcing the applicable norm. Once a court rules on the applicability of legal norms in a particular case, extended interaction (either with the court or within the relevant institution) questioning the meaning and implementation of the legal norm suggests failure – failure to articulate a precise enough rule, failure to embody the ideal of dispassionate adjudication, or failure to achieve compliance with the applicable rule.

According to this conception, the exercise of the traditional judicial function would necessarily supplant the decision making role of the administrative, political, and deliberative bodies charged with responsibility for elaborating norms within the EU framework. The court thus would defer to those new governance bodies if they were operating within their authority, and if not, the court would substitute its judgment. The decision about who should participate in a proceeding would thus turn on whether a party has a legal claim that, if upheld, would warrant judicial imposition of relief. The court's application of the abuse of discretion standard is essentially a determination of whether this outcome is within the range of outcomes that a reasonable decision maker could reach, with a strong thumb on the scale for the factual assessments of the Community institutions. The purpose of the inquiry is to allocate primary decisional authority, and then to defer to that institution's judgments, as long as the court determines that the decision could be justified. In areas of normative uncertainty and factual complexity, courts are reluctant to superimpose an outcome, because it is operating at the border of judicial legitimacy derived from the court's authority and competence as a Socratic oracle.

This conception of judicial role treats the relationship between the judicial and administrative bodies as a static one. The court either accepts the outputs of the Community institutions or directs a different outcome. The judicial role is focused largely inward, toward using its own processes and standards to reach those determinations.

## **II.2 The limitations of the traditional judicial conception**

Treating rule elaboration and enforcement as the only legitimate mode of judicial interaction discounts much of courts' actual practice. The traditional conception does not fully account for what courts actually do in a multi-level governance system. As the discussion in the next section illustrates, courts are called upon to participate in decisions under conditions of complexity and uncertainty, when deferring to another body seems to abdicate responsibility but where adjudicative tools are inappropriate to the task. The traditional conception fails to provide adequate criteria for evaluating the court's role in such cases or for shaping the court's aspirations to legitimacy and efficacy. Courts face a wider range of choice about their role than to either defer or dictate outcomes. In areas of normative uncertainty and complexity, courts are still involved. And, the judiciary does not operate in a vacuum. Courts are in a dynamic relationship with other bodies involved in normative practice. They are actively constructing and being influenced by those practices. They can (and we argue that they should) choose to structure that relationship explicitly, both to influence the way normative activity occurs in other arenas, and the capacity of the judiciary and other normative actors to learn from (and sometimes to incorporate) the process and outcomes of normative activity in other arenas. This is a reciprocal process of interaction, rather than one where the causal arrows go only in one direction.

There is an additional reason to broaden the conception of judicial role beyond rule enforcement. Many problems of public concern result from social practices, and the dynamic interaction between culture, cognition, and context. Their remediation cannot be reduced to a single explanatory theory or rule violation. They involve a combination of scientific and political judgment. Reflective, participatory deliberation, evaluated in relation to benchmarks of participation, epistemic adequacy, transparency, impartiality, and principled decision making, can be better suited than detached logical consideration for producing the situated knowledge needed to determine the normative significance of complex or novel problems, as well as how they can be remedied. The legitimacy and efficacy of normative elaboration may well depend upon the interaction of multiple decision bodies, using different forms of normative elaboration, which accountable to each other.

So, courts asked to review the adequacy of new governance decisions are not merely deferring to the outputs of other bodies. They are signaling the benchmarks for normative activity in these other domains, and thus influencing how normative activity will take place in subsequent iterations. It is also articulating a different currency of legitimacy, one that is not derived solely from the court's position as oracle or its justification in relation to derived authority.

## **II.3 Reconceptualizing the courts as catalysts**

Rethinking the judicial role is not just a question of making sense of what is already happening, but also of supplying some sort of framework for thinking about, and evaluating that role, such as would help the judiciary in being more reflexive about fostering and holding accountable normative activity across domains. 'Proceduralization' does not fully capture the idea of what courts are doing in their interactions with the decisions of other normative bodies. It suggests that the judicial accountability extends only to the processes used to reach decisions.

We want to argue that robust proceduralization implies a more radical re-thinking of the role of the judiciary, and its relationship to other actors, both those formally constituted by law (e.g. an administrative agency) and those where have emerged as informal norm communities (such as social dialogue participants and experts informing new governance processes<sup>3</sup>). This inquiry moves beyond formalistic notions of law and judicial role. Courts could and do structure an integral relationship between procedure and substance when norms are uncertain by, for example, requiring entities to justify their particular conception of a norm both in relation to the processes they use to produce that norm and in relation to a more general normative commitments that must be articulated in context to assume meaning. The full range of norm-generating activity in which the courts and legal actors participate must be included, as well as the array of actual and potential channels for making that normative activity transparent, public, and precedential.

This new role requires consideration of how courts can participate in this norm elaboration and capacity building process, consistent with judicial practices, competencies, self-conceptions, and institutional relationships. If courts are not acting as unilateral interpreter and enforcer of legal rules, what are they doing? Are there ways, in addition to formal adjudication, for courts to participate in public norm elaboration? How can they engage in a less directorial relationship with non-legal actors in the norm generation process and still act like judges?

We suggest that, in areas of normative and remedial uncertainty and complexity, the function of judicially articulated legal norms is not to establish precise definitions or boundaries of acceptable conduct which, if violated, warrant sanction (or to abdicate any role at all). Instead, the judicial function is to prompt - and create occasions for - normatively motivated inquiry and remediation by relevant non-judicial actors in response to signals of problematic conditions or practices. Law thus operates as a catalyst by facilitating the elaboration and implementation of public law norms by other actors, and the productive engagement of normative inquiry among relevant institutional actors, including the judiciary itself. Law imposes an obligation to articulate the basis for determining that a condition is sufficiently problematic to warrant public attentiveness, and to justify the adequacy and appropriateness of public actions. This attenuation (but not elimination) of coercion relieves the pressure for a clear, before-the-fact rule (which is needed to justify sanctions for failure to comply) and still maintains incentives and opportunities to elaborate robust norms in context.

Judicial involvement sustains the normative dimension as a relevant and legitimate part of the problem solving process. It creates occasions and incentives for relevant stakeholders to convene, thereby solving collective action problems. Courts and other public institutions also provide the architecture to compare and build on the outcomes of this contextual problem solving. Courts become a way of publicizing and making visible the diversity of governance forms which have emerged, and the diversity of the ways in which governance values are being realized. New governance invites cross-fertilization within in two different arenas, both of which courts have the capacity to bring together. One is within particular problem areas, with repeat players who have deep knowledge within those domains. The other is across domains

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<sup>3</sup> None of this is to deny the importance of the issues arising about the jurisdiction of the courts in relation to these informal processes. In OMC, for example, there would seem to be no observably legal act susceptible to challenge under Article 230 EC. The same might be true in the Water Framework Example, though here the soft norms emerging are implementing an ostensibly hard law (but vague) obligation, and so could be used as benchmarks against which to assess the adequacy of Member State implementation responses. The Water Framework example also shows that there can be a link between hard and soft norms. Here it is contemplated that guidelines could ultimately be adopted as binding comitology decisions.

employing new governance methods, each of which is generating strategies for enacting the underlying principles and practices that make new governance legitimate. Without a legitimate public intermediary, the opportunity to share information is likely to remain within particular problem areas, and even there, to be segmented in specialized areas within those domains. For example, water experts don't necessarily talk to air or nature specialists. And environmental experts surely don't talk to those working in employment or financial services. And yet, there are principles and practices that are transportable across these domains, and that can assist in the development of legitimate and accountable practices in each of them. The courts then become a source of communicating ideas and experience, without being the source of their creation, and without being specifically prescriptive in relation to any particular form. Over time, this process promotes the development of binding legal norms if clear, recurring patterns and normative consensus emerge.

This dynamic interaction introduces “rule of law” values (such as participation, transparency, and reasoned decision making) to deliberations by non-judicial actors, although it need not dictate the form through which those values are realized. We are not setting out to establish what those values are or to claim that they have enduring value. Instead, we are drawing on the body of literature laying out these tenets of legitimacy and efficacy as foundational for new governance. That literature converges around a series of principles, including participation, impartiality, principled decision making informed by an adequate factual foundation, and accountability. Those principles are also reflected or embodied in the constitutional and legislative framework of the EU. We are taking these principles for granted, but also building in to the theory the contingent character of those values. They are themselves open to revision through the process of reflection and justification, both in terms of their manner of realization and the range of foundational values that are conceived as necessarily underpinning new governance.

It is fruitful to think about the exercise of judicial power to prompt inquiry as on a continuum. Each phase of the conflict resolution process offers an occasion for bringing together affected and potentially responsible stakeholders to deliberate, albeit with different levels of legal obligation to take action on what is learned from that inquiry. This is a more reflexive and self-reflective approach to the process of developing mediating principles to actualize public law norms. The objective is to calibrate the scope and method of judicial involvement to the type of problem under consideration. The factors shaping the court's approach to norm elaboration would include: the simplicity and certainty of the legal norm in the abstract and in relation to the circumstances posed by the case, the complexity and novelty of the problem under consideration, the scope of participation needed to address the problems, and the capacity and willingness of responsible and affected actors to participate in and generate criteria for evaluating the adequacy of problem solving.

As the European experience discussed below shows, liability determinations are not necessarily the most frequent or necessarily the preferred occasions for judicial participation in norm elaboration. Courts participate in deliberations about the meaning and scope of norms as a necessary part of reaching other decisions less directly tied to coercive imposition of rules or liability, such as reviewing the adequacy of expert determinations or of the level of participation in a deliberative process. In both roles, courts participate in and foster normative development in a more open-ended and exploratory posture. Judicial involvement can also influence the way non-legal actors negotiate and deliberate by focusing on the methods of inquiry and governance structures that produce informal norms and agreements, and by weighing more heavily those outcomes that result from principled, accountable, and participatory practices.

It is important to emphasize that this does not necessarily mean requiring informal processes that mirror the features of formal adjudication, but rather encouraging a more principled and context-specific approach to due process. As Kenneth Winston has argued, "the form [due process] should take depends crucially on the setting in which it finds its application. Specific norms or rules should depend on the purpose of the enterprise and even its stage of development".<sup>4</sup> Insisting on an adversarial process as the only measure of fair and effective process would defeat the deeper values motivating due process, such as participation, information generation, and effective problem solving, by importing the previously discussed limitations of a rule enforcement approach into the informal arena. Courts should instead encourage parties to develop (and the court would then assess the adequacy of) functional criteria of adequate process in light of the purposes and attributes of the particular project. Processes or outcomes could be precedential (in the sense of providing a normative or remedial solution that others can learn from) even if they are not formally binding. Full and fair participation could be achieved through creative institutional design and governance. Decisions could be public and norm generating, even if they are not liability determinations. Courts could develop standards for evaluating informal agreements and expert opinions and reward those that give general legal norms concrete meaning in the particular context, articulate criteria by which their agreements can be evaluated, and generate the information needed to evaluate resulting normative assessments and agreements.

The judicial process builds in a variety of decision points that invite less binding norm elaboration. These types of questions cast the court in a role beyond the determination of whether to impose liability for violation of a rule. Courts either consciously or unwittingly craft process frameworks that potentially shape the capacity and incentives of non-legal actors to engage in effective problem solving and accountable norm elaboration. These non-binding occasions for normative elaboration have the potential to be public, norm generating, accountable, and precedential (if these terms are given principled rather than formalistic meaning).

Norm elaboration occurs as part of a decision about who can legitimately participate in the problem solving process. Through its application of standing rules, the court provides a mechanism for deciding who may or must participate if new governance is to be treated as legitimate and binding. Courts as catalysts create incentives for new governance institutions to carry through on the participation values afforded by and basic to the legitimacy of the new governance arrangements.

The catalyst role also functions when courts make decisions reviewing the adequacy of expert evidence or of the factual record upon which a decision is based. This sometimes entails assessments of the type and quality of information needed to participate in the problem solving process or to justify reaching a particular outcome. An example will help illustrate the idea. Experts play a crucial intermediary role in the formation and translation of norms. Many of the experts who appear in litigation also conduct research and consult with organizations about the adequacy of their practices. They play a key role in translating legal principles into organizational norms and vice versa. They are repeat players who work across the boundaries of legal regulation and practice. It is crucial, but not always the case, that these professional intermediaries articulate and satisfy criteria of methodological and process accountability.

Courts can structure processes for the admissibility and evaluation of expert testimony that foster transparency and professional accountability for these norm intermediaries. Courts

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<sup>4</sup> Kenneth Winston, *Lessons from the Right of Silence*, in *Legality and Community: On the Intellectual Legacy of Philip Selznick* 389, 391-92 (Robert Kagan et al. eds., 2002)

evaluating expert evidence must assess its persuasiveness, methodological validity, and generalizability. They also consider the degree to which expert evaluation develops replicable methodologies that receive review and validation within the relevant professional community. This review could be conducted with more explicit attention to the crucial intermediary role being played by experts. Ideally, courts could also review administrative agency decision making with this concern about effective norm intermediation and capacity building as a guiding principle.

Finally, when courts decide whether to uphold outcomes produced by new governance institutions, they shape norms by prompting effective and legitimate problem solving and conflict resolution by non-legal actors, and then developing points of permeability between legal and non-legal arenas so that public norms can emerge out of that local norm generation process. Courts play an important role in influencing how governmental actors (such as regulatory agencies) and nongovernmental actors (such as experts and lawyers) mediate the relationship between formal law and informal norms and practices. These mediating actors play a normative role within both the judicial and workplace domains. They translate legal norms to non-legal actors, and they educate courts about non-legal normative activity. Courts review the activities and outcomes of these mediating actors (such as the comitology committee and the scientific experts) who participate in normative elaboration and capacity building. This review process affords the opportunity to prompt the development of standards and processes of accountability governing the role of these norm intermediaries.

Legal norms thus develop through legally structured occasions for deliberating about the relationship between norms and practice. These practices cast courts in a crucial but limited role in addressing problems that implicate public norms but are insufficiently understood and/or resistant to centralized rule enforcement. They emphasize law's role in structuring focal points of intra- and inter-institutional normative activity.<sup>5</sup> This does not signal a retreat from rules of proper conduct, but rather it structures a dialogue among different institutional locations about those rules, when they cannot be legitimately or fully formulated in one institutional location. This process creates an important tension among normative spaces that have to be engaged with each other. It also explicitly puts on the table the question of the circumstances under which normative dialogue will carry public weight.

This role, as an important concomitant of the court's more traditional rule elaboration and enforcement function, enables the judiciary to participate in addressing normative questions in areas of uncertainty and complexity without compromising its legitimacy or overstepping its capacity. It also highlights and creates accountability for the many occasions beyond formal liability adjudication in which courts prompt elaboration of norms under conditions of uncertainty. The impetus for normative engagement could come from various institutional locations, but we are arguing that this normative catalyst role is a crucial aspect of the judicial role. This pragmatist analysis also takes seriously the impact of courts' concurrent and, for many judges, core function as adjudicators on their non-adjudicatory activities, and how that identity constrains judicial role development. The legitimacy (and, in our view, long term efficacy) of a judge who assumes direct responsibility for imposing a standard in the face of normative and scientific uncertainty differs markedly from that of a judge who uses the tools and processes of the judiciary to prompt responsible actors to engage in effective problem solving. Judges' willingness to participate in problem solving under conditions of complexity turns on the availability of a role that is consistent with their tools, practices, and relationships.

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<sup>5</sup> (Charny 1996:1841)

### III. Courts as Catalysts: The Example of the European Courts

In the previous section, we provided a framework ascribing a catalyst role to courts in new governance. This framework is more than merely aspirational. It reflects elements of the current practices of courts in a variety of jurisdictions and settings. We want now to highlight some such elements in the case law of the European courts, and specifically in the performance of their judicial review function. The elements we point too emerge in the European courts' construction of their rules for standing (*locus standi*), and in their elaboration of benchmarks for legality in judicial review. This section lays bare an important aspect of our methodology. Our framework is both reflective of real world experience, and offers a tool to evaluate it. The relationship between theory and practice is iterative. Practice informs theory, and theory informs practice. Our conception of courts as catalysts combines elements of fact and elements of will; actuality and aspiration.

Our framework for thinking about courts as catalysts specified three over-lapping judicial functions. These concerned full and fair participation in governance, enhancing the epistemic or informational basis for decision-making, and ensuring principled decision making through transparency and accountability. The European courts are active in relation to each. We will both exemplify this, and think critically about the catalyst function of the courts in the light of the framework we outlined above.

#### III.1 Full and Fair Participation

A cross-cutting element providing support for attempts to unify new governance's diverse forms under a single rubric is broad participation by non-governmental actors.<sup>6</sup> As the role and capacity of representative parliaments diminish in governance, more direct forms of public participation are seen as key to legitimacy and effectiveness in new governance. Participation is justified in democratic and epistemic terms.<sup>7</sup> It enhances direct citizen participation, and ensures the input of more, and better, information. As Gráinne de Búrca has explained,

The intrinsic value of self-governance is premised on the idea of moral autonomy and of individual dignity. The instrumental reasons include not just the popular demand for greater democracy, but also the self-interest of bodies and organizations wishing to maximize their reputation and their authority, as well as to generate useful information with a view to more effective decision-making and to securing greater compliance.<sup>8</sup>

One key challenge for new governance theories is to arrive at a better understanding of how to identify participants, and how to organize their participation, in a manner which is consistent with these underlying values. Various experiments in participatory governance are underway. And, as contributions to this volume show, these are imbued with a deep self-consciousness about the importance of participation, and about the challenge of continually interrogating the adequacy of participation as a means of attending to the democracy requirements upon which legitimate public norm elaboration depend.<sup>9</sup>

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<sup>6</sup> See J. Scott & D. Trubek, 'Mind the Gap: Law and New Approaches to EU Governance' (2002) ELJ 1, and the contributions to G. de Búrca & J. Scott, *Law and New Governance in the EU and the US* (Hart Publishing, 2006).

<sup>7</sup> For a discussion, see M. Lee, *EC Environmental Law* (Hart Publishing, 2005), chapter 5.

<sup>8</sup>

<sup>9</sup> Ibid.

Courts as catalysts can hold new governance institutions accountable for providing adequate participation, based upon the criteria specified or implicit within the new governance framework. These are principles established by legislation, administrative framework, or general principles of community law. Through its application of standing rules, the court provides a mechanism for deciding who may or must participate if new governance is to be treated as legitimate and binding. This is different from but complementary of the orientation to standing that characterizes legal and scholarly discourse. That orientation focuses on the question of whether the party seeking participation has a rights-based claim on influencing the normative outcome within the judicial arena. The catalyst court is asking the Commission or other government bodies to address explicitly and justify the judgment of who should be able to participate and what form that participation should take.

The catalyst function of courts in relation to participation is illustrated, in striking if controversial manner, by the *UEAPME* case.<sup>10</sup> This case presented the question of whether UEAPME could require its participation in the deliberations, conducted as part of the EU's social dialogue, that produced a European directive on parental leave. As with the other cases under discussion here, the catalytic opportunity arises at the admissibility stage, in assessing the standing of the applicant association. UEAPME is a European organization representing the interests of small and medium-sized businesses. It is recognized by the European Commission as a cross-industry organization representing certain categories of workers or undertakings. It is included on the Commission's list of organizations entitled to be consulted at the initial stage of 'social dialogue' due to the 'representativity' of its views. This participation requirement assures that the varying perspectives of diverse workers concerned about work-family issues will have a voice in the deliberative process. Representativity is the benchmark according to entitlement to participate in new governance processes will be assessed.

UEAPME sought to challenge the legality of a European directive concerning parental leave.<sup>11</sup> This piece of legislation was adopted on the basis of a framework agreement agreed by certain 'social partners' as part of the European social dialogue. Though consulted at the initial stage, UEAPME was not given a place at the negotiating table by those representatives of management and labour which initiated the negotiations. It did not enjoy a clearly specified right to participate notwithstanding its inclusion on the Commission's consultative list. However, the Commission and the Council had, at a minimum, to verify the collective representativity of the signatories to the framework agreement. 'This obliges them to ascertain whether, having regard to the content of the agreement in question, the signatories, taken together are sufficiently representative. Where that degree of representativity is lacking, the Commission and the Council must refuse to implement the agreement at Community level.'<sup>12</sup> Hence while no organization has a clearly identified right to participate in negotiations, any organization whose presence at the table is necessary to guarantee collective representativity must be included. To this end, the Council and the Commission are required to oversee the self-selection practices of the social partners.

The question then arises as to the role of the courts in relation to this new governance form (social dialogue). Significantly, in assessing the standing of UEAPME to challenge the legality of the parental leave directive, the court turned to this issue of representativity. In essence, it agreed to confer standing on UEAPME to the extent that its participation in the negotiations could be regarded as indispensable to meet this benchmark of collective representativity. As

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<sup>10</sup> Case T-135/96 *UEAPME*.

<sup>11</sup> Directive 96/34 on the framework agreement on parental leave.

<sup>12</sup> Case T-135/96 *UEAPME*, para. 90.

such, the court was required to ascertain whether UEAPME's participation was required to raise collective representativity to the required level.<sup>13</sup> Where it was, UEAPME could gain access to the court and, it seems fair to assume, provoke an annulment of the directive as being in breach of an essential procedural requirement.<sup>14</sup>

The court is entirely conscious of what it is doing in construing its standing requirements in this way. It notes that the legislative procedure at issue in this case does not provide for the participation of the directly elected European Parliament. As such, 'the participation of the people' must be otherwise assured; through parties which are sufficiently representative of management and labour<sup>15</sup> This is required by 'the principle of democracy on which the Union is founded'.<sup>16</sup> Here, we see the judiciary cast in the role of creating incentives for participation adequate to produce fair and legitimate results that respond to concerns about democracy. By creating participation rights in the judicial arena (*locus standi*), standing doctrine structures incentives to participation. By refusing to honour a process that inappropriately denies participation, the courts require participants to adhere to these values. By conferring standing on those entitled to participate, but whose participatory rights have not been respected, the silencing of actors in the political process is not such to prevent them from challenging their exclusion from that process. What is important here is that the court will not review the outcome of the flawed process, but simply send it back for a deliberation which meets the participation requirement. They still enjoy a capacity to contest the legality of resulting measures. This generates an incentive in favour of including those actors in the political process, in order to mitigate the threat of subsequent challenge. Likewise, it creates an incentive to treat these participants with respect, and to regard their interventions as more than time-consuming formalities.

In UEAPME, we see a striking illustration of the court operating as a catalyst for full and fair participation in governance. It does so on the basis of a standard which is internal to legal framework constructing the governance regime in question (representativity). The court does not itself establish the criteria for adequate participation. It does, however, require the deliberative process to define and apply those criteria. However, it is willing in turn to construe to this standard, and to require its application, in such a manner to ensure respect for constitutional principles, such as the constitutional principle of democracy.<sup>17</sup> Thus, the court is not merely policing respect for clearly established participation rights, but is construing the proper scope of these rights, in the light of the constitutional framework and values in which governance occurs. The court's is not merely a passive, policing role, because it is elaborating participation requirements in the light of a broad standard. But though it plays an active part in construing what democracy demands, it does so in a manner which is responsive to the internal premises of new governance. The court's commitment to democracy does not imply a commitment to any one particular conception of how this might be realized. On the contrary, the court is open to being persuaded that a given conception, unorthodox perhaps, is such to reach the standard of protection required. It is apparent in the light of this, that the catalyst function of courts in new governance implies the construction of a relationship between law and politics which is dynamic and interactive, not static and top-down. As we will discuss later, the courts do seek to influence normative activity in other settings, but they are also

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<sup>13</sup> It decided that it was not.

<sup>14</sup> Article 230 EC.

<sup>15</sup> Case T-135/96 *UEAPME*, para. 89.

<sup>16</sup> *Ibid.*

<sup>17</sup> Article 6 TEU.

open to being influenced by experience in these other settings in the construction of incentives for full and fair participation.

In one important respect, the approach of the court in *UEAPME* is typical of a broader trend in the case law. Though the European courts are notoriously, and scandalously, restrictive in their interpretation of standing requirements for ‘non-privileged’ (namely, private) actors,<sup>18</sup> they have developed a doctrine which may be viewed as giving rise to a participation exception. By contrast to the early years,<sup>19</sup> the courts adopt a ‘rights-based’ approach in construing this exception. That is to say, a person will enjoy standing to sue before the European courts, where they enjoy ‘specific procedural guarantees conferring upon them a right to participate in the political process’.<sup>20</sup> These guarantees may be laid down in legislation or arise by virtue of general principles of Community law, such as that conferring a right to be heard in certain administrative proceedings.<sup>21</sup> Anti-dumping investigations may be offered as an example, where specific provisions in the general regulation confer on certain traders, a specific role in the procedure leading to the imposition of anti-dumping duties.<sup>22</sup> Different levels of participation may be afforded to participants. These may include a right to be notified or consulted, or a formal legal right to set at the negotiation table. The judiciary will play a role in holding new governance processes accountable for providing participation in these different forms.

Our framework for conceiving courts as catalysts in new governance provides a tool for understanding and evaluating the existence and scope of this participation exception. Viewed from this perspective, the exception is easy to understand and seems normatively sound. By granting standing to those entitled to participate in the political process, even where their participation rights have not in practice been respected, the court is able to play a role in the construction of these rights, in accordance with the principle of democracy, and to create an incentive for them to be respected, as seen in the *UEAPME* example. From this perspective the critique of the participation exception which wonders at the perversity of granting standing to those who have already enjoyed the privilege of political participation, as opposed to those who have not, seems misconceived.<sup>23</sup> It is not simply or even principally a case of giving these actors ‘another bite in court’,<sup>24</sup> but rather of encouraging respect for participatory rights, and respect for participants in the practice of governance. If there is a public, as well as a private, interest in full and effective participation, the European courts’ recourse to standing rules as a means of creating an incentive in favour of this is to be welcomed.

While our theoretical framework leads us in the direction of favouring this participation exception in the construction of opportunities for *locus standi*, and indeed as exemplary of the kind of approach we favour, it also offers us a tool to evaluate the adequacy of judicial intervention in this sphere. . The point here is not to do so in endless detail, but simply to exemplify how a theoretical perspective which has been developed with a close eye on practice,

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<sup>18</sup> See D. Chalmers et al, *European Union Law*, chap. 10 for a full discussion.

<sup>19</sup> Previously the courts adopted a ‘fact-based’ approach, whereby the fact of participation, independent of a legal right, was enough to confer the advantages of the participation exception. See Cases 67, 68, 70/85 *Van der Kooy B. V. & Others v. Commission*, para. 22. See also Case C-313/90, *Comité International de la Rayonne dt des Fibres Synthétiques & Others (CIFRS) v. Commission*, paras. 29-30

<sup>20</sup> Case T-339/00 *Bactria*, para. 51.

<sup>21</sup> Case T-109/97 *Molkerei*, paras. 60 & 68. For a good and accessible discussion of the scope of this right to be heard in EU law, see D. Chalmers et al, *European Union Law* (CUP, 2005).

<sup>22</sup> Case T-109/97 *Molkerei*, para. 69.

<sup>23</sup> See D. Chalmers et al, *European Union Law*, supra n. 21, p. 435.

<sup>24</sup> *Ibid.*

can serve as a source of critical inspiration in relation to that self same practice. This is consistent with our methodology alluded to above.

In *Bactria*,<sup>25</sup> the court was faced with a challenge to a legal act adopted within the framework of comitology procedures. The legislation delegating the power of decision to the Commission and comitology committee in this way required that decisions be reached following ‘close cooperation between the Commission, the Member States, and *applicants for authorization* [or biocidal products]’.<sup>26</sup> At the admissibility stage, the court concluded without reasoned justification that the procedure in question provided an appropriate basis for such cooperation. It did not examine the role of the applicant in this process, or consider whether the applicant’s participation rights had been unduly curtailed. This is illustrative of a failure on the part of the court to embrace its catalyst function in relation to participation.

Similarly, from the perspective of our framework, the court’s rights-based approach to the participation exception, which insists upon a formal legal entitlement to participate, seems to be unduly narrowly construed. It is appropriate that a party with a right to participate enjoy standing to challenge, regardless of whether participatory opportunities have or have not in fact been accorded. But in a new governance setting, it would seem likewise appropriate to acknowledge standing even where a party’s entitlement to participate is not legally mandated. We can take a single example by way of illustration. We have written elsewhere about the Water Framework Directive and its associated Common Implementation Strategy, as a clear and developed example of new governance.<sup>27</sup> As with so many examples, this is premised upon the participation of diverse non-governmental stakeholders in the implementation process. These participation opportunities are, however, not guaranteed by law, be it through legislation or general principle. But neither are they ad hoc or purely contingent. They arise by virtue of settled procedures and practices, which are laid down and affirmed in documentary form. Over time, the fact of participation, comes to be consolidated as a provisionally settled entitlement to participate, and the parameters of participation acknowledged as sound by all interested parties. This entitlement is self-consciously presented as a key element to new governance’s claim to legitimacy in this setting. Such is the nature of new governance, with its emphasis upon experimentation and evolution in institutional form, that standards for participation, or specific entitlements to participate, will often be recognized in a form which is not strictly legal. Such entitlements should nonetheless suffice to grant access to the participation exception.<sup>28</sup>

The scope of the participation exception arises similarly in the apparently obscure but fascinating case of *Schmoldt*.<sup>29</sup> Here the Commission adopted a decision *not* to withdraw standards on the basis that they failed to meet essential (substantive) requirements laid down in a

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<sup>25</sup> Case T-339/00 *Bactria*.

<sup>26</sup> Here the close cooperation requirement was laid down in the preamble to the relevant legislation. The CFI (upheld by the ECJ) found that this was not such to confer specific procedural guarantees on individuals, and was not as such capable of sparking the participation exception into play.

<sup>27</sup> J. Scott & J. Holder, ‘Law and New Environmental Governance in the EU’ in de Búrca & Scott, *supra* n. 6.

<sup>28</sup> This raises the broader issue of the wisdom of the courts’ shift from a fact-based to a rights-based approach to the construction of this exception. We certainly, for reasons given, favour a rights based approach, but think that this might sensibly supplement rather than replace a fact-based approach. At the very least, a rights-based approach should be capable of embracing situations in which a formally recognized entitlement to participate nonetheless falls short of being a procedural guarantee recognized in law.

<sup>29</sup> Case T-246/03 *Schmoldt, Kaefer Isolirtechnik GmbH & Co. KG, and Hauptverband der Deutschen Bauindustrie e. V.* and dismissed on appeal in Case C-242/04P.

‘new approach’ framework directive.<sup>30</sup> The contested decision stated that information received in the course of consultations with CEN (the standardization body with responsibility for drawing up the standards in question) and with the relevant standing committee disclosed no evidence of the alleged risk associated with the standards in question.

Mr Schmoldt was Chair of that part of CEN with responsibility for the adoption of the standards in question. Nonetheless he disagreed with the Commission’s Decision not to withdraw these standards, and attempted to challenge the legality of that decision. The courts denied standing, based on the conclusion that Schmoldt was acting in a personal capacity and not on behalf of CEN. This decision may have been motivated by Mr Schmoldt’s close industry connections and by fears that he was acting in the private rather than the public interest.<sup>31</sup> If so, the court did not make this concern explicit. Nonetheless, the court seems to presuppose that had Schmoldt been acting on behalf of CEN he would have benefited from the participation exception. But this is not at all clear. Although the decision explicitly claimed to have taken account of the results of consultation with CEN, CEN did not appear to have a legal right to participate in the process leading to the adoption of this decision. The relevant provision accords such rights to the standing committee and to the so called notification committee, but not explicitly to CEN.<sup>32</sup> And so we have a quandary.

Where a party does not enjoy a legal right to participate, but is named (specifically or by reference to a standard such, for example, as the representativity one discussed above) as having been involved in the process leading to the adoption of the contested decision, ought that party to benefit from the participation exception? The position of the courts is not clear. The catalyst approach warrants a positive response. Where a decision maker seeks to undergird the legitimacy of its decision by allusion to the processes according to which that decision was reached, individuals and organizations apparently implicated in these processes, ought to enjoy standing to challenge the result. And they ought to do so regardless of whether they enjoyed any legally constructed participation rights. The transparency and integrity of the decisional process requires that decisions which rest upon spurious claims about who was involved, and on what basis, be susceptible to contestation on the part of those whose knowledge or reputation has been (mis)used to enhance the legitimacy of governance processes and outcomes.<sup>33</sup> If we think about courts in terms of their capacity to act as catalysts to full and fair participation, at the least authorities should be bound to ensure that their own claims to legitimacy, based upon the ostensible fact of participation, are susceptible to contestation in court. We will return to the transparency dimension, and to Mr Schmoldt’s case in the analysis below. There, we will consider also the wisdom of denying his standing due to his acting in a personal as opposed to an institutional capacity.

In thinking about the catalyst role of courts in relation to participation, we have focussed here upon the issue of standing. Of course this does not exhaust the possibilities. Equally, in their

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<sup>30</sup> For an overview of the ‘new approach’, and the adoption, role and contestation of standards, see paras. 11-22 of the CFI’s judgment.

<sup>31</sup> He was manager of Hauptverband der Deutschen Bauindustrie (the second applicant), and ‘[a]t the hearing he said, finally, that he played an active part in the activities of Kaefer Isoliertechnik [the second applicant]’ (Case T-246/03R (application for interim relief), *Schmoldt*, para. 40. Recall para. 101 (Case T-264/03 *Schmoldt*) where the CFI notes that Article 5(1) of Directive 89/106 lays down such guarantees for CEN, among others.

<sup>32</sup> See Article 5(1).

<sup>33</sup> See D. Chalmers et al construction of the notion of transparency in *European Union Law*, supra n. 21, p. 317. This is taken to include transparency how who decides and on what basis.

construction of benchmarks for legality in judicial review, the courts can further create incentives for appropriate participation. The grounds for review are set out in the treaty, and included among them is breach of an essential procedural requirement. Where a party has a right to be heard, for example, a failure to respect this right will justifiably lead to an annulment of the contested decision. In *UEAPME*, for example, the standing dimension was just a first step. Had the *locus standi* of this body been conceded, by virtue of the indispensable contribution it could make in attaining collective representativity, the failure to include it at the negotiation stage would be a ground for vitiating the directive in question. The task of constructing benchmarks for legality, like the task of construing rules for standing, provides an opportunity for courts as catalysts in new governance.

### III.2 Enhancing the Information Base

The second function that we see the European courts playing which is consistent with our framework above is that of scrutinising the information base according to which decisions have been reached. They do so in their construction and interpretation of benchmarks for legality in judicial review, be it by reference to the proportionality principle or through the articulation of a specific procedural requirement. The courts seek to ensure that decision-makers have at their disposal the type, and quality, of information which they need to reach a decision which is consistent with the underlying objective, and with applicable legal norms. This guards against the possibility that decisions may be justified by reference to reasons which though acceptable on their face are not credible in fact. In addition, it seeks to promote reflexivity on the part of decision-makers, challenging settled but untested assumptions or prejudices, and exposing them to the full consequences of their decisions. Information has long since been used as a tool in regulation, and there is considerable evidence that decision makers will reach different decisions, depending upon the stock of information available to them.<sup>34</sup>

The catalyst function of courts in relation to information creates an incentive for decision makers to integrate the findings and opinions of relevant experts into the decision making process, and to conduct or draw upon studies which address the kinds of questions which require an answer before an agency can credibly claim a proper fit between instrument and underlying objective. Here, the role of the courts is to prompt new governance actors to generate reliable and testable knowledge. It is also to encourage the experts themselves to take account of the legitimacy and reliability of their methodology. In so far as it requires the participation of experts in the decisional process, it overlaps with the participation function above. As with the participation example, the court is responsive to governance context in construing the parameters of the information which will be required as a foundation for decision making. It relies upon the new governance actors in question to ascertain and then to hold themselves accountable in relation to the categories and quality of information which must be made available.

In the recent case law of the European courts we see them conducting a quite searching review in terms of adequacy of informational base. This may be illustrated by reference to cases

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<sup>34</sup> Environmental impact assessment is a good example of this. This embodies a purely procedural approach to regulation, simply requiring that certain kinds of environmental information be gathered before a decision is reached. This includes information about direct and indirect environmental impacts, information about public attitudes to the development in question, and information about possible alternatives to the development proposed. See for a good discussion and clear examples of this procedural mechanism having a substantive impact on decisional outcomes, J. Holder, *Environmental Assessment: The Regulation of Decision Making* (OUP, 2004).

involving law and science, and more specifically law's response to scientific uncertainty. *Pfizer* is exemplary in this respect.<sup>35</sup> This long and complex case is concerned with a challenge to a regulation withdrawing authorization for certain antibiotic substances in animal farming. Withdrawal was said to be motivated by concern that the use of such substances might generate antibiotic resistance in animals, and that this resistance might in turn be transferred to humans. The decision was explicitly justified on public health grounds.

In *Pfizer* the court speaks the language of deference. 'It follows that in this case, in which the Community institutions were required to undertake a scientific risk assessment and to evaluate highly complex scientific and technical facts, judicial review of the way in which they did so must be limited. The Community judicature is not entitled to substitute its judgment of the facts for that of the Community institutions...'.<sup>36</sup> The court recognizes, rightly, that on its own it has neither the epistemic capacity nor authority to conduct an in-depth review findings of fact. But the court's role goes beyond simple deference. The court assumes the catalyst function of assessing the adequacy of the decision-making procedure in terms of its capacity to generate the kind and quality of information required to reach a decision in the policy domain in question.

To illustrate: The court insists that where decisions are based upon complex scientific and technical assessments, as here, a scientific risk assessment must be carried out before protective measures are adopted.<sup>37</sup> This risk assessment task must be entrusted to experts, and the advice which they provide must match up to the standards of 'excellence, independence and transparency'.<sup>38</sup> In this case, questions were raised about the latter two principles, with the court concluding that a standing committee, comprising scientific experts acting as political representatives of Member States, did not satisfy these standards. The committee is not independent due to its close associations with government. Neither is it transparent in its operation, given its failure to publish its scientific analysis, and its failure to make available minority scientific viewpoints expressed on the committee.<sup>39</sup> While, for reasons of democratic legitimacy, a decision maker is not regarded as being bound by the advice of any given expert, that decision maker must at the least give reasons for disregarding that advice, and those reasons must operate at a scientific level at least commensurate with that of the opinion in question.<sup>40</sup> The clear implication here is that an agency disregarding a certain body of scientific advice, must have at its disposal conflicting advice which likewise meets the standards outlined above.

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<sup>35</sup> Case T-13/99 *Pfizer*.

<sup>36</sup> *Ibid*, para. 169.

<sup>37</sup> *Ibid*, para. 155.

<sup>38</sup> *Ibid*, paras. 157 & 159.

<sup>39</sup> *Ibid*, para. 285. The emphasis here on the availability of minority scientific opinions is reflected in the constitutional framework for risk regulation in the EU, particularly since the BSE crisis. This reflects the current wisdom that it is better to acknowledge and confront scientific difference, than conceal it behind a veneer of scientific consensus. To confront it is to acknowledge that possibility that the majority might be wrong, and to encourage scientists to look for signs that this might be so, and to share information in so doing. This observation has relevance also to Mr Schmoldt's case discussed above. He was refused standing on the basis that he was acting in a personal capacity and not on behalf of the institution of CEN as a whole. It seems he disagreed with committee's conclusions regarding the standards in question, at the time or later. To silence Mr Schmoldt is to ignore the lessons of the past in relation to risk regulation, and the importance of confronting difference in the manner suggested above, and wisely recognized by the court in *Pfizer*.

<sup>40</sup> *Ibid*, para. 199.

The excellence principle was not applied by the court in *Pfizer*. Elsewhere though we see striking evidence of the court's willingness to look behind the veneer of apparent expertise, to check its adequacy in relation to the matter at hand. In *Technische Universität München*, the court insisted that a group of experts could properly carry out its task unless it is composed of persons possessing the necessary technical knowledge in the various fields concerned by the issue, or was advised by persons having the requisite knowledge.<sup>41</sup> To this end, the court engaged in an assessment of the range of scientific disciplines of the persons represented on the committee, or consulted by it. It concluded that neither the minutes of the Commission's meeting with experts, nor oral proceedings before the court, showed that the members of the expert group possessed the necessary knowledge in the necessary fields, or that the Commission has consulted persons with such knowledge.<sup>42</sup> The fields cited by the court included chemistry, biology and geographical sciences. The implication of the court's approach is that the burden rests on the decision-maker to show that it has turned its mind to the range of expertise required, and to ensure that this is reflected in the choice of experts offering advice.

On the basis of this failure, the court struck down the decision on the basis that the Commission had infringed its obligation to examine carefully and impartially all relevant aspects of the case.<sup>42</sup> Likewise, the decision was vitiated by virtue of the failure of the Commission to hear the institution which was seeking duty-free importation of the scientific instrument in question. In the circumstances of this case, this right to a hearing was construed in terms of the information which the applicant could bring to bear on the decision in question. The institution in question is 'best aware' of the technical characteristics of the product, its intended use, and its comparability with products originating within the EU. It must therefore be allowed to explain its position to the scientists advising the Commission, or to comment on the information before the group, or to take a position on the scientists' recommendation.<sup>43</sup> The failure to hear the institution in question in one form or another is treated as creating an epistemic gap, and one which was fatal to the decision given the peculiarly privileged position of the applicant in terms of access to relevant information. In this sense the court is seeking to catalyze a process whereby Commission appointed scientific experts enter into discussions with other parties in possession of information which may reasonably be thought to be indispensable in answering the question with which they have been presented.

Before returning to other elements of the court's judgment in *Pfizer*, it is important to be aware that the benchmarks for legality constructed by the court (the independence, excellence and transparency of scientific advice) are not inventions of the court. On the contrary, these are standards which are internal to governance processes in the EU. Thus, the court points to relevant Commission Communications on the Precautionary Principle, and on Consumer Health and Food safety, as well as to the preamble to the decision establishing scientific committees in the field of consumer health and food safety, in extrapolating these principles as applicable standards for judicial review.<sup>44</sup> Of course the court plays an important role in elaborating these standards, which are defined in the broadest of terms, but even there the court seems to draw implicitly upon later legislation in other spheres, which expressly ac-

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<sup>41</sup> Case C-269/90 *Technische Universität München-Mitte*, para. 22.

<sup>42</sup> *Ibid*, para. 22.

<sup>43</sup> *Ibid*, para. 23.

<sup>44</sup> Case T-13/99 *Pfizer*, para. 159. These principles are also now clearly enshrined in the framework for food safety regulation in the EU, including in relation to the functioning of the European Food Safety Authority. See Regulation 178/2002, Article 30.

knowledges the indispensability of recording minority scientific opinion.<sup>45</sup> Here we can see signs of the possibility to which we alluded in the framework above. There, we suggested that one valuable role for courts in new governance is to act as a bridging institution, facilitating learning across different policy domains, not least in terms of the governance processes which experience reveals to be most adequate in achieving legitimate and effective outcomes. The principles deployed by the court are internal to the process of governance, but their elaboration may be inspired by experience in different policy domains, thus encouraging collaboration and learning across otherwise segmented policy spheres.

Returning to *Pfizer*, a careful reading of the dense and complex judgment reveals many points of intersection between the case and our understanding of the role of courts as catalysts, including in terms of their assessment of the soundness of the underlying epistemic base. For the purpose of this argument, one other point may be usefully highlighted. The court was insistent not only upon the expertise upon which the decision maker was obliged to draw in reaching its decision, but strict also on the decisional methodology which it obliged to apply. In particular, the court found that in the context of risk management, the proportionality requirement encompasses a cost-benefit dimension. ‘The Court considers that a cost/benefit analysis is a particular expression of the principle of proportionality in cases involving risk management.’<sup>46</sup> As such the court was willing to verify that the decision maker had access to documents which contained a cost/benefit assessment of this kind, though it did not insist on any autonomous procedural requirement that the decision maker conduct this analysis itself.<sup>47</sup> It was also willing to review whether the decision maker had made any manifest error in weighing up the various options available.<sup>48</sup> In so doing it looked closely at the consequences of the regulation, particularly in the light of the existence of alternatives to the banned substance, and the narrow scope of the contested regulation. The court’s analysis of the substantive reasonableness of the contested regulation, in cost/benefit terms, was greatly assisted by the richness of the informational record. We see here an illustration of the futility of trying to distinguish procedure and substance in judicial review. Procedural requirements relating to the adequacy of the informational basis for decision making ensure the availability of sufficient information to permit the court to engage in a meaningful review of substance, albeit on the basis of a standard of review which is deferential. Courts are informational catalysts. This serves not only to improve the decision making process, but also to facilitate substantive review of the plausibility of the outcome reached.

*Pfizer* is not an isolated instance. Even in areas not involving risk management, we see the courts performing their catalyst function by creating incentives for the generation of adequate information. We will offer one more example to substantiate this claim. This involved a different court (ECJ not CFI), a different policy context (environment not public health), and an actor at a different level of governance (Member State not EU). The case is *Commission v. Austria*.<sup>49</sup>

The Commission brought an action against Austria claiming that it was in breach of the free movement rules (the European equivalent to the dormant commerce clause). Its alleged wrong-doing took the form of a decision to ban heavy lorries carrying certain goods on a sec-

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<sup>45</sup> Regulation 178/2002, *ibid.* .

<sup>46</sup> Case T-13/99 *Pfizer*, para. 410.

<sup>47</sup> *Ibid.*, para. 469.

<sup>48</sup> *Ibid.*, para. 470.

<sup>49</sup> Case C-320/00.

tion of a motorway in the Inn Valley in Austria. This road is one of the main land communication routes between Southern Germany and Northern Italy. The court accepted that this ban was a restriction on the free movement of goods, and was simply concerned to consider its justifiability. While it accepted that the ban pursued a legitimate aim (environmental protection and in particular a reduction in air pollution), it condemned it for being in breach of the proportionality principle. It did not consider that it was necessary and appropriate in relation to this objective.

The court adopted a reading of proportionality which placed the emphasis upon information. It expressly desisted from ruling on whether there were less trade restrictive alternatives available to Austria to achieve its objective. Adopting a procedural approach to proportionality, the court insisted that before adopting ‘a measure so radical as a total traffic ban’, it was incumbent upon Austria ‘to examine carefully the possibility of using measures less restrictive of freedom of movement, and [to] discount them only if their inadequacy, in relation to the objective pursued, was clearly established’.<sup>50</sup> Austria had not done so. Similarly, Austria explicitly justified the measure by claiming that it was designed to promote a transfer of goods from road to rail. This was its declared objective.<sup>51</sup> Again, the court did not rule upon the availability of this rail alternative. It pointed out simply that Austria itself had not ‘sufficiently studied’ this question.<sup>52</sup>

In this case, the court does not substitute its judgment on the facts for that of the Member State in question. Instead, it uses the proportionality principle as a means of ensuring that the Member State had established an adequate informational base for its decision. In the absence of studies demonstrating the existence of the supposed rail alternative, and in the absence of evidence of an inquiry into the existence of less trade restrictive alternatives, the Member State was not in a position to assess the consequences and effects of its measure. As suggested above, and we will discuss this point again below, the catalyst function of the court here emerges as a mechanism to check the authenticity of reasons put forward by the decision maker in seeking to bolster the legitimacy of the decision which it reached. It is not enough to give reasons. These reasons must be supported by the informational record.

### **III.3 Principled Decision Making: Transparency and Contestation**

The transparency function of the European courts is multi-faceted. Among other things, it encompasses creating sufficient access to information about the proceedings to enable outsiders to ask questions about and seek justifications for the decisions reached. Transparency could include access to information used as part of the decision, including documents and proceedings. It also includes a reason giving dimension, and encourages accessibility in relation to the nature of the political process.<sup>53</sup> The transparency dimension of the framework we articulated above may be exemplified by reference to existing case law, and again used as a basis for critique of judicial role.

In the Austrian case, the reasons given to justify the measure were not supported by the informational base. The court took the reasons seriously, but also took seriously its task of verifying their authenticity.

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<sup>50</sup> Ibid, para. 87.

<sup>51</sup> Ibid, para. 88.

<sup>52</sup> Ibid, para. 89. This language applies both to the rail alternative point and to the investigation of less trade restrictive alternatives, as discussed above.

<sup>53</sup> See D. Chalmers et al. *European Union Law*, supra n. 21, p. 317 where the authors elaborate the various dimensions inherent in transparency.

With *Schmoldt*, a transparency perspective offers critical insight into the case. Mr Schmoldt was denied standing on the basis that he was acting in a personal, not an institutional, capacity in bringing the case. Evidently, Mr Schmoldt disagreed with the institutional stand-point adopted by CEN. His minority viewpoint was nowhere recorded. As noted above, the importance of acknowledging different positions, including minority positions, in policy spheres characterized by scientific complexity and scientific uncertainty, is widely and increasingly recognized.<sup>54</sup> Courts may perform a valuable function in ensuring transparency in this respect. The court was mistaken in focussing upon Mr Schmoldt's personal interest in bringing proceedings. He may have been motivated, as the court supposed, by a desire to protect his reputation. But this private interest should not have been allowed to conceal the valuable public function served by transparency of the kind that Mr Schmoldt was concerned to promote. Similarly, the Commission sought to bolster the legitimacy of its decision by claiming that it was based upon consultations with CEN among others. Mr Schmoldt alleged that it was not. As Chalmers et al observe, transparency pertains also to the availability of accurate information about participants and processes in decision making.<sup>55</sup> By granting standing to Mr Schmoldt, and by invoking transparency as a benchmark for legality in judicial review, the court would have created an incentive in to ensure a proper fit between the presentation and practice of political process.

Reason-giving, as with information, further attests to the impossibility of separating out the procedural and the substantive in the conception of benchmarks for legality in judicial review. The courts will not merely check the availability of properly articulated reasons, but will act also to exclude reasons which are invalid in view of the objectives pursued by the institution in question. Reason giving is not merely a procedural requirement, but a substantive requirement as to the kind of justification which can legitimately be put forward. We see this clearly in *Pfizer*. Here the court rejected a claim that the Council had acted for reasons of political expediency, and not in fact to guard against risk.<sup>56</sup> The clear implication is that reasons expressed in terms of placating media or public opinion would not be such to fulfil this requirement, however clearly articulated or apparently compelling.

We will conclude this section by reference to one last, highly controversial, case. It is a case which is, in one respect, consistent with our framework, but ultimately falls short in its implementation. In this, it is illustrative of the kind of dangers which inhere in the courts lack of awareness of the catalyst function that they might usefully serve in governance. The *Yusuf* case, currently pending on appeal to the ECJ, is concerned with the legality of a regulation imposing sanctions on individuals as part of the 'war on terror'.<sup>57</sup> This regulation was adopted to implement an EU 'common position' which was, in turn, adopted to give effect to a UN Security Council Resolution. The court declined to review the legality of the regulation in the light of established Community law principles relating to the protection of fundamental human rights. It did so on the basis that any such review would imply, indirectly, a concomitant review of the Security Council Resolution. It emphasized the binding nature of the UN Charter and its primacy over domestic and EU law.

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<sup>54</sup> As discussed above, at fn. 45.

<sup>55</sup> Ibid.

<sup>56</sup> Case T-13/99 *Pfizer*, paras. 127 & 207.

<sup>57</sup> Case T-306/01 *Yusuf*. See also Case T—315/01 *Kadi* delivered on the same day.

While the court has been accused of ‘judicial abdication’,<sup>58</sup> a charge which is in large part fair, its abdication is more contingent than it at first glance appears. While the court was not willing to use the EU’s human rights standards as benchmarks for legality in judicial review, it was willing to assess the lawfulness of the contested regulation (and hence, by its own admission, indirectly the Security Council Resolution) on the basis of human rights norms which originate in the international rather than the EU legal order. In so doing, it turned its mind to the question of whether the contested regulation was compatible with human rights norms in customary international law, in the form of inviolable *jus cogens*.<sup>59</sup>

Leaving aside the detail of the court’s analysis, one point is pertinent in exemplifying the application of the framework we outlined above. In assessing the lawfulness of the regulation, the court placed great emphasis upon certain procedural guarantees put in place at the level of the UN.

Concerning the applicants’ right to make use of their property, the CFI pointed out that the Security Council resolutions provide a means for reviewing, after certain periods, the overall system of sanctions, and there is established ‘a procedure enabling the persons concerned to present their case at any time to the Sanctions Committee for review, through the Member State of their nationality or that of their residence’.<sup>60</sup>

Concerning the alleged absence of any right to a fair hearing, the CFI again laid emphasis upon this procedure to re-examine individual cases, whereby the persons concerned may address a request to the Sanctions Committee, through their national authorities, in order either to be removed from the list of persons affected by the sanctions or to obtain exemption from the freezing of funds.<sup>61</sup> Guidelines for the Sanctions Committee had been adopted to this end. In so doing, the CFI, concluded, ‘[t]he Security Council intended to take account so far as possible, of the fundamental rights of the persons entered in the Sanctions Committee’s list, and in particular their right to be heard’.<sup>62</sup>

As regards the absence of an effective judicial remedy, the CFI remained on the same terrain. It emphasized that the sanctions are not imposed indefinitely, but are subject to periodic re-examination.<sup>63</sup> It likewise concluded that the establishment of the Sanctions Committee, and the associated procedure for re-examining individual cases, ‘constitute another reasonable method of affording adequate protection of the applicants’ fundamental rights as recognized by *jus cogens*.<sup>64</sup>

The message is each time the same. The emphasis of the court is upon the possibility for questioning the adequacy of a decision in light of articulated criteria and adequate information, and on the provisional nature of decisions and the possibility of recursive review. It is flexible as to the form that this might take, and it crucially guards against the danger of isomorphism by accepting that administrative frameworks for contestation may differ from those in place in the judicial arena, but still be capable of achieving an ‘adequate’ level of protection.

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<sup>58</sup> P. Eeckhout, ‘Does Europe’s Constitution stop at the water’s edge? Law and policy in the EU’s external relations’ at: [http://www.law.kuleuven.ac.be/ccle/activities\\_detail.php?number=17](http://www.law.kuleuven.ac.be/ccle/activities_detail.php?number=17)

<sup>59</sup> Case T-306/03 *Yusuf*, paras. 277-282.

<sup>60</sup> *Ibid*, paras. 300-301.

<sup>61</sup> *Ibid*, para. 309.

<sup>62</sup> *Ibid*, para. 312.

<sup>63</sup> *Ibid*, para. 344.

<sup>64</sup> *Ibid*, para. 345.

In our view, the court is on the right track, but moves too hesitantly along it. Its intervention seems little more than symbolic, given the palpable deficiencies inherent in the UN system in question. There is no possibility of submitting an individual application to the Sanctions Committee. All applications are mediated through national governments. Any individual not enjoying the support of his or her government will be excluded. Add to this the fact that the review is conducted by the very same body as the one adopting the initial decision, and the degree of protection afforded emerges as so slim to be manifestly inadequate. The court asked the right question – does the governance system internal to the UN guarantee an adequate level of protection for individuals? – but adopted a softly softly approach and arrived at the wrong conclusion. To the extent that the court is performing a catalyst in this case, the nature of the incentive it constitutes is disappointing in the extreme. There is an incentive merely to create the appearance of a possibility for contestation, even where that possibility is undercut by practical restrictions. Even in an area characterized by political sensitivity and deep security concerns, the degree of individual protection provided is manifestly inadequate.

The case serves as a useful reminder that it is one thing to conceptualize the role of courts in new governance in terms of their relationship with other actors, it is quite another to ensure a role for the judiciary which is capable of promoting positive political change. This is especially true in settings in which individual liberty is diminished in the name of collective security. But though the outcome here is disappointing, the circumstances of the case nonetheless strengthen rather than undermine our overall argument. It is self-evidently the case that there are circumstances in which it will not be appropriate for judges in open court to balance the claims of individual liberty and collective security. What they can do, however, is scrutinize the institutional framework according to which this balance is being struck, initially and over time. In so doing they can listen to the claims of the political authorities that the framework provided is appropriately respectful of individual liberty, in the context of the specific problem being addressed. In essence, they can evaluate, in the light also of comparable experiences from other spheres and other times, whether that framework provides for maximum feasible respect for the values outlined above; participation, transparency and adequate information. Consistent with our observations above, it would not be for the courts to arrive at a blueprint for what counts as good governance in a setting such as this. Rather, courts must be open to being persuaded that any given institutional manifestation is appropriately respectful of the values identified by the court, and of the court's contextualized elaboration of these.

Before concluding this section, it may be helpful to address explicitly an issue which has been lurking in the discussion above. This concerns the origins of the values embraced by the courts in the performance of their catalyst function, and of the benchmarks for review selected to give expression to them. In *UEAPME*,<sup>65</sup> for example, the underlying value was democracy, and 'representativity' the benchmark for review.

Article 230 of the EC Treaty establishes the legal grounds for review, but does so only in the broadest of terms. These include infringement of the Treaty or of any rule of law relating to its application. Included among the latter would be legislation and general principles of law. Looking to these sources, a range of values emerge as embedded in the constitutional framework of the European Union, and as available to the courts in judicial review. Prominent among them are those articulated in Article 6 TEU. Included here, among the values on which the European Union is said to be founded, is that of democracy relied upon by the court in *UEAPME*, together with liberty, respect for fundamental rights, and the rule of law. Other

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<sup>65</sup> Case T-135/96.

such values are given expression in the treaty, including that of transparency,<sup>66</sup> and in the form of general principles, such as that pertaining to proportionality.

While there is no shortage of values in the Treaty to support the courts in their catalyst review function, these values are barely elaborated, and leave the courts considerable room for manoeuvre in giving substance to them, and in tailoring them to the particular circumstances of a given case. The values of democracy and support for the rule of law are notably vague, and yet of high salience in contemplating the role of courts in relation to our three categories above (participation, information and principled decision making). Thus, while there is a constitutional foundation upon which this catalyst function may rest, it is one which empowers the courts as creative interlocutors in governance.<sup>67</sup>

The identification of values is the first step. Thereafter, the courts are required to give expression to these by framing benchmarks for judicial review, and by assessing the adequacy of specific institutional arrangements put in place to ensure respect for these. There is one additional dimension of our framework which merits particular emphasis in this regard. We have argued, and exemplified in the European context, that in performing this catalyst function in relation to new governance, the courts are acting as collaborative participants rather than overlords in giving expression to constitutionally established values such as democracy or the rule of law. More particularly, we have suggested that the courts are not engaged in an act of abstract interpretation, devoid of context, or independent of the experience of governance. On the contrary, there is much evidence that the European courts look to the practice of governance in arriving at the benchmarks for review. Courts are not entirely passive in this regard, in that it is their responsibility both to evaluate internally-generated benchmarks in the light of overarching constitutional requirements, and to scrutinize institutional arrangements in the light of these value-sustaining benchmarks for review. But nor are they closed or prescriptive as to the range of benchmarks which may be considered acceptable. Courts are critical interlocutors, but open to being persuaded as to the normative worth of diverse processes born of the diverse experiences of governance.

Again, *UEAPME* can be used to illustrate.<sup>68</sup> Democracy is an open-ended value. The court did not arrive at a blue-print of what this demands. Instead it looked to the normative framework constituting the practice of social dialogue and extrapolated representativity as the key concept in sustaining its claim to democratic legitimacy. Having done so, the court asserted the adequacy of this concept in relation to the underlying value of democracy (rightly or wrongly and of course there is much room for argument), and scrutinized the institutional arrangements put in place to ensure respect for it. The court is open to the idea that the underlying constitutional value may require different things in different settings, and to working with rather than against the experience of governance in articulating benchmarks for review, and in contemplating the adequacy of specific institutional forms.

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<sup>66</sup> See Article 255 EC and Regulation 1049/2001 as regards the access to documents dimension of transparency. See also the discussion in P. Craig & G. de Búrca, *EU Law, Text, Cases and Materials* (OUP, 2002), chap. 9, on transparency as a general principle of Community law.

<sup>67</sup> It is thus important to note that we are not claiming that our conception of courts as catalysts offers an easy way out of the counter-majoritarian corner. As Waldron has argued (*Law and Disagreement*, (OUP, 1999) chap. 12), courts articulation of process values is just as politically laden as their articulation of substantive values, and anyway we have suggested that the distinction cannot even be neatly drawn. What we would suggest though is that the catalytic function of courts presented here plays better to the institutional capabilities of courts, as it does not involve detailed second-guessing of substantive policy choices.

<sup>68</sup> Case T-135/99.

## IV. Conclusion

This paper forms part of a broader project examining the role of courts in new governance. It sets out a framework for thinking about the judicial function, and illustrates its application in an EU context. As our earlier work has shown, this framework has purchase in other diverse settings; the United States and the World Trade Organization prominent among them.<sup>69</sup> In thinking about accountability in governance, sharp distinctions are often drawn between judicial and political mechanisms. It is often suggested that political mechanisms are more appropriate in a new governance setting. There are often good reasons for this, such as impediments to access to courts where, for example, there is no clearly defined norm with sufficient binding force to acquire the identity of a challengeable legal act. These are issues which need to be addressed. Here though we have argued that the line between judicial and political mechanisms for accountability is not a sharp one, and that the judicial function may be conceived in relation to the political process rather than as sharply antagonistic to it. The judicial function ought to be (and in some important respects already is) to work collaboratively with other actors in devising and promoting governance structures which are at once effective and legitimate in problem-solving. Judges are not equipped in circumstances of uncertainty and deep value contestation to proclaim as Socratic oracles. And nor should they seek to do so with respect to the nature of the political process. What they are equipped to do is to listen to, and evaluate, diverse explanations as to why any given political process is (or is not) such to satisfy core constitutional requirements, including that of democracy, and to ensure the existence an adequate fit between normative explanation and political practice. One advantage of this approach is that courts emerge as a site for increasing transparency about experimentation in governance, and for comparing more or less successful institutional manifestations of constitutional commitments.

We have sketched out the catalyst role for courts. There is still much work to be done, both theoretically and empirically. We must also consider the institutional constraints on fully implementing the catalyst model. It would be important to consider its applicability in different institutional contexts and to different types of problems. Further work is needed to consider its relationship to more traditional forms of judicial intervention. How do courts work out the blend? Further thought must be given to the consequences of using the threat of reversal as a motivator for deliberation. What impact does this have on the deliberative process?

For example, there is a risk if courts were take on directly a searching review of the processes, before the governance bodies have themselves elaborated or devised those processes or internalized that they will be held accountable according to these standards. New governance institutions might then focus their attention on satisfying the courts upon a later review, rather than on developing the processes that will satisfy the goals of the project. Judicial superintendence of process could then foster a static compliance mentality rather than a more fluid development mentality. In the process dimension as well as the substantive norm dimension, the court has to pay explicit attention to the dialogic character of its relationship with these other bodies. Courts could minimize the risk of stifling innovation by signaling that new governance bodies must assume responsibility for giving institutional expression to the values undergirding their legitimacy. This may be challenging in a system that currently provides only two dichotomous choices – uphold outcomes or strike down the outcome of the process—either choice will be incomplete. The court would not lay down a blueprint for what constitutes good governance in a particular setting. Instead, it would prompt the actors to revisit the

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<sup>69</sup> Sturm, *supra* n. , J. Scott, ‘European Regulation of GMOs: Thinking About ‘Judicial Review’ in the WTO’ Jean Monnet Working Paper 4/04 at: <http://www.jeanmonnetprogram.org/papers/04/040401.html>

processes and the legitimacy upon which they rest. Courts would catalyze government process by reference to values, without any strongly articulated preconception of how those values should be implemented.

There is a more general question about the relationship between traditional orientation accompanying the judicial role and the more dynamic/catalyst understanding of that role.

Will courts be able to overcome their tendency to reproduce themselves in the way they evaluate/structure non-judicial normative processes? Can they evaluate other institutional processes by standards that differ from those governing their own processes?

We also have to address how to square traditional adjudicative conceptions of formality, principled decision making and accountability can be used to evaluate the adequacy of more deliberative and participatory forms. We see intermediary institutions and actors, such as experts and institutional deliberative bodies as crucial buffers and mediators of these different modes of practice. They can place explicit emphasis on translation across domains.

Finally, one could ask the question, why courts? Are we asking too much of courts? Is this too demanding a set of tests? Are we constructing an empire of law? Can we expect law to govern everything? Our answer to these questions depends on whether we are able to broaden the conception of what we mean by law itself. In its more dynamic sense, to live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate the "is," the "ought," and the "what might be."<sup>70</sup> We think that new governance provides the opportunity and the expectation that courts are not the only institutions grappling with questions of legitimacy and accountability, and that courts will and should be part of the process of enabling new governance institutions to practice law in this broader sense.

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<sup>70</sup> Cover, *supra* n.