

RESEARCH ARTICLE

The Framework for Judicial Cooperation in the European Union: Unpacking the Ethical, Legal and Institutional Dimensions of 'Judicial Culture'

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Possibilities and constraints for achieving legal unity in the context of the European Union (EU) manifest themselves in multiple and illustrative ways in the development of cooperation between judges in EU Member States. For example, recent discussions on judicial independence in Hungary and Poland underline that we are still quite far removed from the realisation of a shared European normative basis for judicial functioning, that is: a shared 'judicial culture'. These discussions simultaneously emphasise the importance of such a basis for the realisation of the ideal of the 'rule of law'. As a stepping stone for future interdisciplinary legal research, this article provides a theoretical analysis of the concept of 'judicial culture' and three of its core dimensions (ethical, legal, institutional), which has not been available in legal scholarship so far. Our analysis demonstrates that by carefully establishing in which types of sources we can locate the respective dimensions, and by designing a methodology for analysing these sources, scholars can analyse judicial cultures in a more in-depth and systematic manner. In this way, specific conceptual 'lenses' become available for the collection of relevant information and empirical data, for the theoretical analysis and comparison of these results and eventually for a normative assessment of the possibility and desirability of convergence of judicial cultures. From this perspective, this analysis aims to contribute to further insight into questions on legal unity and its realisation in a context of diverging social pressures.

Keywords: judicial culture; European Union; judicial ethics; judicial trust; judicial role perceptions; legal unity

I. Introduction

Political measures taken against judges in Hungary and Poland in recent years have drawn criticism from European governmental and judicial bodies – such as the European Commission, the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) – as well as from groups of national actors from different Member States of the European Union (EU) – such as European judicial networks. As an example, the 'rule of law crisis' in Hungary led to the dismissal of Justice András Baka, who had expressed criticism on intended judicial reforms, from his position as President of the Supreme Court (Kúria) in 2012. This dismissal was later held by the ECtHR to violate Article 6 paragraph 1 and Article 10 of the European Convention on Human Rights.¹ Baka also received support from his peers in the Network of Presidents of the Supreme Courts of the EU, of which he was the elected President at the time of the termination of his judicial mandate.² This example clearly underlines that the guarantee of judicial

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¹ *Baka v. Hungary* [2016] EHRC 2014/177.

² Simone Benvenuti, 'Building a Common Judicial Culture in the European Union through Judicial Networks' (2013), paper presented at the Conference the RC09 2013 Interim Meeting on 'The Changing Nature of Judicial Power in Supranational, Federal, and Domestic systems', 22–24 July 2013, Dublin, 1–47, 18. <https://www.academia.edu/4477091/Building_a_Common_Judicial_Culture_in_the_European_Union_through_Judicial_Networks> accessed 23 March 2018.

independence of judges in European States no longer is purely a matter of national concern.³ At the same time, it clarifies that national interpretations of and the *de facto* respect for the principle of 'judicial independence' vary in connection with views and traditions on the judicial function that have developed over time in national legal orders. Therefore, it seems that we are still quite far removed from the realisation of a shared European normative basis for judicial functioning – or using another term, which will be clarified in this article: a shared 'judicial culture'. Realising such a normative basis is important, as it would serve the achievement of legal unity in conflict resolution, law enforcement and the protection of rights in the EU as well as cooperation between judges in EU Member States on the basis of "mutual confidence and trust".⁴ What these developments in Poland and Hungary share, therefore, is that they direct attention to the following question: can a 'European judicial culture' between Member States of the EU be achieved? This, in turn, leads on to the question of how we might measure a 'judicial culture': what does this concept mean and how can we contextualise it with regard to judicial systems in the EU?

Before embarking on our theoretical analysis, we will first sketch the factual background of cultural aspects that emerge in relation to the evolving judicial cooperation in the EU. This preliminary investigation clarifies the importance of judicial cultures in the EU and introduces our research design for answering the above mentioned research questions (II.). The analysis in this article then addresses the meaning of the concept of 'judicial culture' as a theoretical notion (III.). Next, we analyse the contextualisation of this concept with regard to judicial systems in the EU, focusing on the three main dimensions of judicial culture that emerge from our theoretical analysis: ethical, legal and institutional (IV.). Finally, some concluding remarks are made regarding the added value of this conceptual framework for future research on judicial systems in the EU and their possible alignment (V.).

II. Why Judicial Culture Matters

The above mentioned questions tie in with the European Commission's agenda for judicial cooperation. The ambition to strive for a shared judicial culture was first articulated in April 2010 by Viviane Reding, then Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship. Reding underlined the necessity for further alignment between judicial systems after the entry into force of the Lisbon Treaty (2009).⁵ This Treaty has increased the EU's competences regarding judicial cooperation in civil and criminal matters (Title V of the Treaty on the Functioning of the European Union) and has given legal force to the Charter of Fundamental Rights of the EU (2000). In this context, the objectives of providing effective legal remedies and human rights protection in the EU create a strong impetus for alignment of national judicial values and procedures. The current Commissioner, Věra Jourová, has adopted this agenda and focuses on the enhancement of mutual trust between the judiciaries of Member States through European judicial training and improved access to information.⁶

More unity between European judicial systems is also promoted from another direction. Beside the 'top-down' developments from the European Commission, we can identify a 'bottom-up' tendency of alignment between the judicial systems of EU Member States. Aspects of these systems have converged under the effects of European legal integration and globalisation of laws and legal systems. On the one hand, EU harmonisation has occurred with regard to substantive laws and procedures and institutional aspects of judicial organisation.⁷ On the other hand, judiciaries in Europe have aligned their interpretations of legal concepts and their working methods to a certain degree through the institutional dynamics of 'transnational'⁸

³ The Court of Justice of the EU has confirmed that the guarantee of judicial independence falls within the sphere of EU law as a requirement to ensure effective judicial protection. Case C-64/16 *Associacao Sindical dos Juizes Portugueses* [2018] ECLI:EU:C:2018:117.

⁴ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Building trust in EU-wide justice: a new dimension to European judicial training (13 September 2011) 2. <<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0551:FIN:EN:PDF>> accessed 23 March 2018.

⁵ Viviane Reding, 'A European Law Institute: An Important Milestone for an Ever Closer Union of Law, Rights and Justice' (2010) speech European University Institute, 10 April 2010 <http://europa.eu/rapid/press-release_SPEECH-10-154_en.pdf> accessed 23 March 2018.

⁶ Věra Jourová, 'Answers to European Parliament Questionnaire' (2014). <https://ec.europa.eu/commission/commissioners/sites/cwt/files/commissioner_ep_hearings/jourova-reply_en.pdf> accessed 23 March 2018.

⁷ Concerning judicial organisation, see for example the 'Copenhagen criteria' for accession to the EU by new Member States (2003) <https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/acquisition-criteria_en> accessed 23 March 2018.

⁸ This article uses the following terminology in connection with legal interaction beyond national borders: 'international' for the binding obligations of States under treaties developed in the framework of international organisations; 'supranational' for the *sui generis* legal order of the European Union; 'transnational' for interaction between (actors in) different legal orders on a voluntary basis, e.g. concerning the exchange of ideas and 'best practices'.

borrowing', entailing the finding of inspiration in foreign legislation, case law and scholarship and in informal exchanges, for example in networks.⁹

However, judicial cooperation remains complicated because of differences between views on the judicial function and the developed practices of judging in different EU Member States. For instance, a judge in the Netherlands can be a member of a political party.¹⁰ This judge should take a monist view on the relationship between EU law and domestic law,¹¹ and he or she might be reluctant to execute a judgment from another EU Member State where corruption within the judiciary is still a recognised problem.¹² By contrast, judges in some other EU Member States are not allowed to be a member of a political party.¹³ They should take a dualist approach to the relationship between EU law and domestic law,¹⁴ and they may be still struggling to bring their judicial system up to standard in terms of realisation of the principle of the rule of law.¹⁵

Against the background of these 'top-down' and 'bottom-up' developments and connected challenges for achieving unity between judicial systems, questions arise as to how European and transnational tendencies in judicial cooperation can develop further in the 'post-Lisbon era'. From a political and societal perspective, conflicting postures of support and resistance regarding the process of European legal integration are likely to influence the balance that is struck in EU legislation and governance between the unity and diversity of laws and judicial systems.¹⁶ Indeed, events such as the euro crisis, the refugee crisis, the 'rule of law' crises in Hungary and Poland and the Brexit vote, underline the vulnerability of the European project, which started out with the goal of achieving an "ever closer union".¹⁷ However, transnational issues, including the sheltering of refugees and combatting terrorism, have simultaneously prompted a call for increased cooperation between States in Europe.¹⁸ Judges are likely to be influenced by these political and societal developments in their shaping of domestic laws¹⁹ and possibly also in their alignment of practices towards a shared transnational standard for the sound and fair administration of justice.²⁰

In this context, institutions of government (that is: legislatures, executive authorities and judiciaries) have a central role in guaranteeing the proper functioning of societies on the basis of the 'rule of law' principle, defined here as the prevention of the arbitrary use of power.²¹ The national judiciaries, as a part of this institutional framework, have a dual role. On the one hand, they are the institutions in the rule-of-law framework that embody the principle of access to justice and the protection of fundamental rights in the national legal order. On the other hand, they are the 'linchpins' between their domestic legal order and international and supranational legal orders, in particular in their role as 'decentralised' EU courts.²² Besides this continued relevance of institutions, the 'bottom-up' tendency of convergence of laws and judicial systems is likely to continue even in the absence of specific stimuli from a supranational EU legal order. An example of this is seen in the use of legal comparisons in national legislative and judicial decision-making in Western legal systems.²³ This practice is prompted *inter alia* by the motive of achieving consistency and soundness in the interpretation of legal concepts, which derive from the shared liberal-democratic background of these

⁹ Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 University of Richmond Law Review 99. See also Elaine Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Hart Publishing 2013).

¹⁰ NVvR-Rechterscode (Judges' Code) (2011) par. 2.3.2 <<https://nvvr.org/uploads/documenten/nvvr-rechterscode.pdf>> accessed 23 March 2018.

¹¹ Monica Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing 2006) 205.

¹² See Transparency International, *Corruption Perceptions Index* (2017) <https://www.transparency.org/news/feature/corruption_perceptions_index_2017> accessed 23 March 2018.

¹³ See codes of conduct for judges in *inter alia* England and Wales, Estonia, Finland, Hungary, Latvia, Lithuania, and Portugal.

¹⁴ E.g. Germany, Italy. See Claes (n 11) 198–199.

¹⁵ See further below 3.3.

¹⁶ For a conceptual clarification on postures of support and resistance of transnational influences, see Vicki C Jackson, *Constitutional Engagement in a Transnational Era* (OUP 2009).

¹⁷ See John Peet, 'The Future of the European Union: Creaking at 60' *The Economist* (25 March 2017) <<https://www.economist.com/news/special-report/21719188-it-marks-its-60th-birthday-european-union-poor-shape-it-needs-more>> accessed 23 March 2018.

¹⁸ *ibid*. The EU has opened up further debate on its future on the basis of a White paper. This debate will be closed at the election of the European Parliament in 2019 <https://ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf> accessed 23 March 2018.

¹⁹ Jackson (n 16), outlining the influence of the views of judges on the development of domestic constitutional law.

²⁰ Mak (n 9) 237–239.

²¹ See further below 3.3.

²² Bruno de Witte and others (eds), *National Courts and EU Law: New Issues, Theories and Methods* (Edward Elgar 2016) 5.

²³ Nicola Lupo and Lucia Scalfardi, *Comparative Law in Legislative Drafting* (Eleven International Publishing 2014); Mads Andenas and Duncan Fairgrieve (eds), *Courts and Comparative Law* (OUP 2015).

Western systems.²⁴ Legal comparisons have also been taken up by courts in new EU Member States with the aim of strengthening the quality of judicial decision-making in their legal systems.²⁵ The interest for courts to engage in this ‘transnational communication’ remains pertinent in a globalised legal context characterised by increased exchanges between actors (for example individuals, businesses and governments) and increased systemic interconnections between legal orders.

Against this background of top-down and bottom-up developments of alignment between judicial systems, the question arises: to what extent can the judicial systems in the EU Member States converge further and to what extent is this convergence desirable with an eye to the promotion of legal unity, on one hand, and the respect for diversity between Member States, on the other hand? As a first step in our descriptive and normative research on this question – which combines (comparative) legal doctrinal, legal-theoretical and legal-philosophical and socio-legal research methods – this article explores the main concept connected with this research: the concept of ‘judicial culture’. Our approach consists of a legal-theoretical analysis of relevant literature regarding this concept, the related concept of ‘legal culture’ and literature on three core dimensions of judicial culture in the European context: ethical, legal and institutional.²⁶ Furthermore, we elaborate a methodology for the more systematic and in-depth analysis of judicial cultures, which can be used as a ‘toolkit’ in research on judicial cultures, also beyond the EU context. As we are dealing with a large and as yet under-theorised topic, our analysis is of an exploratory nature and raises further questions rather than bringing immediate answers. To provide readers of this article with a clear overview, the disciplinary angles that come together in the methodological design for our research are summarised in **Table 1**.

Table 1: Overview of methodological design.

Project	Ethical dimension	Legal dimension	Institutional dimension
Concepts and theories	Law, legal theory, legal ethics, sociology of law	Law, legal theory, sociology of law, conceptual history	Law, legal theory, sociology of law
Sources	Legal rules and concepts, ‘soft law’, case law, (socio-)legal scholarship, policy documents, empirical data	Legal rules and concepts, legal scholarship, travaux préparatoires, judicial rhetoric	Legal rules and concepts, case law, (socio-)legal scholarship, policy documents, empirical data
Methods	Qualitative text analysis, (legal) comparison, survey, interviews	Qualitative text analysis, (legal) comparison, interviews, consideration of the longue durée (historical perspective)	Case study (legal), discourse analysis, participant observation, interviews

III. The Concept of ‘Judicial Culture’

When now taking up our theoretical investigation, an analysis of relevant scholarship clarifies that the concept of ‘judicial culture’ refers to different elements relating to the judicial function, including values, rules and practices; and it relates to the more often used concept of ‘legal culture’. Judicial culture is expressed in the ‘mental software’²⁷ of a specific category of people in a society: the judges. We will see that different types of ‘mental software’ (that is: different cultures) among judges can be identified. Nonetheless, one common feature unites judicial cultures in the EU from a normative perspective: the principle of the ‘rule of law’.

A. ‘Judicial Culture’ and Its Relation to ‘Legal Culture’

The term ‘judicial culture’ has been defined by John Bell as concerning the “features that shape the way in which the work of a judge is performed and valued within particular legal systems”²⁸ In this definition, judicial culture encompasses both a set of ideas and a praxis, particular to the legal community, the institutions of government and the wider community.²⁹ This concept addresses judicial functioning as a whole, i.e. both the primary process of judging and the judicial organisation. Ideas regarding judicial culture are expressed

²⁴ Aharon Barak, *The Judge in a Democracy* (Princeton University Press 2006).

²⁵ Michal Bobek, *Comparative Reasoning in European Supreme Courts* (OUP 2013).

²⁶ Although our focus is on the European Union, we will also take into account rules and other instruments developed in the framework of the Council of Europe.

²⁷ See below 3.2.

²⁸ John Bell, *Judiciaries within Europe: A Comparative Review* (CUP 2006) 2.

²⁹ ibid.

in the moral and social values of a specific community and in the legal rules concerning judicial organisation and the judgment of cases. The praxis that is a part of judicial culture concerns the approaches to judging that have developed over time in a specific legal system. This includes approaches to legal interpretation – that is: the content of the judicial activity – and the handling of court procedures – that is: the context in which judicial decisions are made.

This conceptualisation of ‘judicial culture’ connects with a concept that is probably more familiar to readers of this article: that of ‘legal culture’. The concept of ‘legal culture’ is the classic tool used within legal scholarship to describe patterns of legally oriented social behaviour and attitudes. It enables demonstrating the significant effects of social pressures on legal change.³⁰ However, the concept is not without criticism. It has been argued that the term is too vague and impressionistic as a concept to be useful in finding explanations of the patterns and processes of change in specific legal contexts.³¹ In particular, the concept of ‘legal culture’ can be divided into many different elements – such as attitudes, knowledge, expectations and values – which are not so easy to reassemble.³² Furthermore, no straightforward answer exists to the question on how to operationalise ‘legal culture’ in an analysis of specific elements, their interrelations and the connection with other types of cultures (for example religious, political or economic culture).³³ Despite this criticism, specific conceptualisations of ‘legal culture’ can be helpful for “finding a common language to understanding and evaluating differences in patterns of legally oriented behaviour”.³⁴ Based on such a common language, elements of coherence and change can be analysed.³⁵ In this regard, conceptualisations that focus on attitudes and values can be criticised for being static and for presupposing the existence of unchangeable cultures.³⁶ By contrast, a conceptualisation of legal culture as something that is learned – a view elaborated by Dutch sociologist Geert Hofstede – seems particularly useful for the analysis of developments in legal cultures.³⁷

The concept of ‘judicial culture’ has not yet been used with the same frequency in the academic literature as ‘legal culture’ and, most likely as a consequence, has not yet been conceptualised in an in-depth manner.³⁸ Further attention to this concept is essential, however, for enabling sound and thorough studies on the alignment of judicial systems in Europe. Moreover, this conceptualisation could contribute to the theoretical understanding of the broader concept of ‘legal culture’. How, then, can we understand the concept of ‘judicial culture’?

B. The Development of Judicial Cultures

As an epistemological tool, ‘judicial culture’ connects with Patrick Glenn’s definition of ‘legal tradition’, which he has described as the received information from the past that governs current laws and legal practices.³⁹ ‘Culture’, for the purpose of studying influences on judicial systems and professionals in these systems, can be connected with the ‘mental software’ learnt by those belonging to a specific community.⁴⁰ This term ‘mental software’ was coined by Geert Hofstede and defines culture as “the collective programming of the mind which distinguishes the members of one group or category of people from another”.⁴¹ This conceptualisation acknowledges the susceptibility of culture to change, related to the development of the meaning attached by the individual to facts and behaviour.⁴² With regard to judging, the development of the views and approaches to judging of judges in national highest courts provides a helpful example for

³⁰ David Nelken, ‘Thinking About Legal Culture’ (2014) 1 Asian Journal of Law and Society 255.

³¹ Roger Cotterrell, ‘The Concept of Legal Culture’ in David Nelken (ed), *Comparing Legal Cultures* (Routledge 1997) 13. See also Sally Engle Merry, ‘What is Legal Culture? An Anthropological Perspective’ In: David Nelken (ed), *Using Legal Culture* (Wiley, Simmonds and Hill 2012) 52–76.

³² Nelken (n 30), citing Von Benda Beckmann.

³³ ibid.

³⁴ ibid.

³⁵ ibid.

³⁶ Jan Smits, ‘Legal Culture as Mental Software’ In: Thomas Wilhelmsson, Elina Paunio and Annika Pohjolainen (eds), *Private Law and the Many Cultures of Europe* (Kluwer Law International 2007).

³⁷ ibid. See below 2.2.

³⁸ Bell is one of the few authors who have conducted such a conceptual analysis. See further Kjell Å Modéer, ‘From ‘Rechtsstaat’ to ‘Welfare-State’: Swedish Judicial Culture in Transition 1870–1970’ In: Wesley Pue and David Sugarman (eds), *Lawyers And Vampires: Cultural Histories Of Legal Professions* (Hart Publishing 2003) 153.

³⁹ Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (OUP 2014).

⁴⁰ Smits (n 36).

⁴¹ Geert Hofstede, *Cultures and Organisations: Software of the Mind* (McGraw-Hill 1997) 5.

⁴² Smits (n 36), referring to Clifford Geertz, *The Interpretation of Cultures* (Basic Books 1973).

understanding what a 'judicial culture' is and how it can develop. To start with, highest court judges can be classified as belonging to different groups with each group having its own 'mental software'. Indeed, in the contemporary legal context, where international, European and comparative legal sources are increasingly relevant, some judges – who could be called 'globalist' judges – have opened up to the possibility of finding persuasive arguments for the judgment of cases in non-binding foreign legal sources. By contrast, others – who could be called 'localist' judges – have shown themselves reluctant to walk this path.⁴³ Factors which influence the adherence to one or the other of these groups include a judge's personal interest in comparative legal studies as well as personal encounters with foreign legal systems through legal education, working experiences abroad or the judge's personal life.⁴⁴ In this sense, the development of the views and practices of 'new' members of a community, such as law students with an ambition to enter the judicial profession, is influenced by the existing 'mental software(s)' to which they are exposed. The appropriation of a specific culture could, therefore, be said to consist of a process of individual learning. At the same time, the culture that is learnt is a 'moving target' in the sense that it will keep evolving based on the meaning that all members of the group attach to facts and behaviour in the context in which they interact with each other.

In addition to this possibility of different judicial views and approaches in different groups of judges, the geographical aspect of culture also requires a further clarification. Culture in Hofstede's definition does not necessarily correspond with national territory. One country can encompass more than one legal culture and specific legal cultures might be a part of more than one national legal system.⁴⁵ With regard to judging, this is illustrated by the geographical distribution of the common law and civil law traditions. The common law model, in which the judge has a leading role in the development of the law through precedents, has spread throughout the English-speaking world. Meanwhile continental-European countries as well as countries in Latin America and Asia have adopted the civil law perspective in which the judge is conceptually constrained to the task of applying the laws enacted by the legislative authorities.⁴⁶ At the same time, these two traditions can co-exist within one legal system. One such example is Canada, where the common law tradition is dominant, but the civil law tradition underlies specific areas of law in the province of Québec.⁴⁷ Besides these possibilities of cross-national and co-existing legal cultures, differences can develop due to local interpretations, as demonstrated by the connection of a legal tradition with a specific national legal system. For example, the style of judicial reasoning in the French legal system is still apodictic in nature, whereas judges in the French-inspired Dutch legal system have developed a more elaborate way of reasoning.⁴⁸ The relevance of nationality in this context can be explained by the connection of the judicial style of reasoning with the role of the judiciary as a national institution with a developed homogenous approach to judging cases within its jurisdiction.

Based on our conceptual analysis, it appears that the views and approaches to the judicial function among judges are open to differentiation. In this regard, individuals do not belong to one culture only, but to a variety of cultures simultaneously.⁴⁹ Judges – as well as other legal professionals and policy-makers – can sometimes connect with cultural elements related to their national legal system, for example the national conception of 'good faith' in contract law or of the 'rule of law' principle. They can at other times connect with cross-border cultural elements such as principles of *lex mercatoria* or the conception of a 'fair trial' under the European Convention on Human Rights.⁵⁰

Indeed, cross-border legal-cultural elements have become prominent in recent years due to the effects of globalisation, meaning the increased interconnections between legal systems and actors in these systems. Gunther Teubner has argued that national laws have been downgraded to "mere regional parts of [a global] network which are in close communication with each other".⁵¹ Anne-Marie Slaughter has attached a more positive connotation to the changing role of courts, which according to her have become involved in a

⁴³ Mak (n 9).

⁴⁴ ibid. Regarding the importance of experience abroad for the development of individual views, see also Morag Goodwin, 'The Importance of Elsewhere' (inaugural lecture Tilburg University, 29 April 2016).

⁴⁵ Smits (n 36) criticises conceptualisations of legal culture, which connect primarily with nation-States.

⁴⁶ Glenn (n 39) also describes how the differences between these legal traditions have become less pronounced in the course of their development over time.

⁴⁷ See <www.justice.gc.ca> accessed 25 January 2018.

⁴⁸ Mak (n 9).

⁴⁹ Smits (n 36), referring to Amartya Sen, *Identity and Violence: The Illusion of Destiny* (Norton 2006).

⁵⁰ ibid.

⁵¹ Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 Modern Law Review 16.

'global community of courts'.⁵² Regardless of the classification one gives to this development of globalisation, it is clear that legal actors, including judges, cannot anymore delimit their focus to one legal culture only.

Fundamentally, this analysis demonstrates that the development of a shared judicial culture across national borders could be a natural next step in the evolution of 'mental software' of judges in EU Member States. The alignment of national judicial cultures would consist of the development of a critical mass among legal professionals in favour of an approach of consistent reference to shared cross-border legal-cultural elements rather than only national legal-cultural elements (in as far as divergence exists between these elements). As a framework for the creation of this critical mass, we will consider the normative foundation of judicial cultures in the European context, which can be found in the principle of the 'rule of law'.

C. Normative Foundation of Judicial Cultures

Which restrictions, if any, apply to the development of judicial cultures in Europe? Possible directions which this development can take are: convergence, continuation of the *status quo* or divergence of judicial cultures. From a normative legal perspective, choices connecting with each of these directions are constrained at a fundamental level by the principles of State organisation, which underpin a specific legal system. For legal systems based on liberal-democratic principles, the core principle in this regard is the principle of the 'rule of law'. This can be seen also in the EU legal order.⁵³ On a conceptual level, the principle of the 'rule of law' can be understood as a 'master ideal' for the practice of law, in the sense that law is oriented towards the realisation of this ideal.⁵⁴ In the value-based conceptions developed by Selznick and by Krygier, to which the current analysis will refer, the ideal of the 'rule of law' concerns the reduction of the arbitrary use of power. Legal instruments, including rules, should impose constraints on the use of power by those holding that power in order to prevent arbitrariness in legislation and administration.⁵⁵ With regard to the assessment of legal instruments from this perspective, a complicating factor is that the rule of law is closely connected to other values, such as justice and equality. In theory as well as in practice, it might not always be easy to clearly distinguish dividing lines between these values.⁵⁶ Therefore, we adopt the point of view that 'it is not enough to check whether a threshold of guarantees against arbitrariness is passed, but that the potential for further realisation of the rule of law as also contributing to values with which it has affinity, such as democracy and human rights, is investigated as well'.⁵⁷

It is possible to identify several specific requirements connected with the ideal of the rule of law.⁵⁸ Firstly, the prevention of arbitrariness should be achieved by reasoned decision-making, meaning decisions made on the basis of sound arguments. Secondly, rules should meet the requirement of predictability. Thirdly, decisions in individual administrative or judicial cases should be fair, taking into account the context in which the case has occurred. Finally, those exercising power should be accountable to those affected by this power. In this regard, there should be a possibility to express arguments or complaints. These basic requirements connect with specific forms of State organisation. These include democratic representation and arrangements for citizen participation in policy making and the separation of powers between the branches of government, including the independence of the judiciary.⁵⁹

The development of judicial cultures in a multi-level legal order, such as the EU legal order, can take place within the normative framework set by the principle of the rule of law. In this regard, liberal-democratic constitutional norms provide a foundation for judicial cultures and set conditions for change.⁶⁰

⁵² Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191.

⁵³ Article 2 TEU.

⁵⁴ Philip Selznick, 'Sociology and Natural Law' (1961) *Natural Law Forum* 84, 94; Philip Selznick, Philippe Nonet and Howard M. Vollmer, *Law, Society and Industrial Justice* (Russell Sage Foundation 1969) 8–11; Martin Krygier, 'Four Puzzles About the Rule of Law: Why, What, Where? And Who Cares?' In: James E Fleming (ed), *Getting to the Rule of Law* (New York University Press 2011) 75. This conceptualisation has been developed previously in Elaine Mak and Sanne Taekema, 'The European Union's Rule of Law Agenda: Identifying Its Core and Contextualizing Its Application' (2016) 8 *Hague Journal on the Rule of Law* 25–27.

⁵⁵ Selznick (n 54); Selznick and others (n 54) 12; Philip Selznick, 'Legal Cultures and the Rule of Law' In: Martin Krygier and Adam Czarnota (eds) *The Rule of Law After Communism* (Ashgate 1999). Compare Krygier (n 54) 75.

⁵⁶ Selznick (continuum); Krygier (some values which can be distinguished, at least analytically).

⁵⁷ Mak and Taekema (n 54) 28.

⁵⁸ *ibid*, 29–30.

⁵⁹ *ibid*.

⁶⁰ Mak (n 9) 14–35.

When applying this theoretical framework to the EU legal context, a first observation is that a constitutional normative framework for the judicial function is still under construction at the EU level. Indeed, constitutional consensus currently does not exist regarding the main requirements for judicial functioning under the rule of law. At present, such consensus between EU Member States holds challenges related to differences in main areas relating to the judicial role and functioning, these being: 1) the judiciary's position in the political balance of powers;⁶¹ 2) the conception of the judicial role in law development and law enforcement;⁶² and 3) societal values regarding justice and rights protection.⁶³ Moreover, the European Commission's ambitions reach further than the realisation of a basic consensus, as do specific 'bottom up' processes of transnational borrowing developed by national courts in the EU Member States. The achievement of a 'true' European judicial culture, as envisaged by these actors,⁶⁴ demands striving for alignment of values, rules and practices for judicial functioning beyond the minimum level of compliance with the rule of law.

In sum, the analysis in this section clarified how the term 'judicial culture' can be defined as well as the main characteristics of the normative context of the EU, in which judicial cultures can develop. In the next section, we further unpack some of the core dimensions of judicial cultures in Europe, on the basis of which a shared 'European' judicial culture might emerge. We will also present methodologies for analysing each of these dimensions.

IV. Dimensions of Judicial Cultures in Europe

Based on the definition presented in the previous section, three dimensions regarding the content of judicial cultures can be identified: 1) an ethical dimension, encompassing professional values and standards for judicial performance; 2) a legal dimension, encompassing judicial role perceptions regarding the interpretation of legal rules and concepts in the judgment of cases; and 3) an institutional dimension, encompassing the organisational framework for judiciaries, including developed practices and interaction between judges. These dimensions correspond with the moral, legal and social contexts in which judicial systems operate. We will describe the main ideas and elements of judicial practice relating to these dimensions. An analysis of the sources in which each dimension can be located will provide a stepping stone for the operationalisation of these dimensions in further research on judicial cultures.

A. The Ethical Dimension of Judicial Culture

The ethical dimension of judicial culture focuses on the normative points of reference for 'good' judicial conduct.⁶⁵ What do individual judges, the judiciary as an institution and the wider society consider to be the characteristics and competences connected with the judicial function in a legal system governed by the rule of law principle? How should judges solve professional dilemmas related to their functioning inside and outside of the courts? Developing a point of view and specific practices regarding these professional ethical questions is an essential element of judicial culture. This is the case at the level of national legal systems, where guidelines for professional conduct can assist judges in gearing their ethical choices to the demands of a pluralist and dynamic society. Such guidelines can also clarify to the general public what the judiciary stands for and can be used as a frame of reference in disciplinary procedures against judges.⁶⁶

When reflecting on the development of a European judicial culture, we will need to consider to what extent a common point of view and shared practices regarding professional ethics can develop for the even more pluralist and dynamic EU context. The core concept for analysing this ethical dimension of judicial culture is the concept of 'professional values and standards'. In the next sections, we outline the meaning of this concept and clarify how an analysis through the 'lens' of professional values and standards can contribute to our understanding of the development of judicial cultures in Europe.

⁶¹ See Anja Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012).

⁶² Mark van Hoecke and Mark Warrington, 'Legal Cultures, Legal Paradigms, Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47 International and Comparative Law Quarterly 495; Richard A Posner, *How Judges Think* (Harvard University Press 2008); Maartje de Visser, *Constitutional Review in Europe: A Comparative Analysis* (Hart Publishing 2013).

⁶³ Daniel Schraad-Tissler and Christian Kroll, *Social Justice in the EU: A Cross-National Comparison* (Bertelsmann Stiftung 2014); Andrew Williams, *The Ethos of Europe: Values, Law and Justice in the EU* (CUP 2010).

⁶⁴ See Reding (n 5).

⁶⁵ On legal ethics, see generally David Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press 1988); Jonathan Soeharno, *The Integrity of the Judge* (Routledge 2016).

⁶⁶ Giuseppe Di Federico, 'Judicial Accountability and Conduct: An Overview' In: A. Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012) 92–93.

1. The Concept of 'Professional Values and Standards'

Professional values, firstly, present a view of what correct judicial conduct is and, in this way, provide the normative underpinning for professional-ethical choices of judges in a specific legal order.⁶⁷ In legal orders based on the 'rule of law' principle, these values usually encompass the broad categories of independence, impartiality, professionalism and integrity, and they concern conduct of judges in the performance of their judicial tasks as well as outside of the courtroom.⁶⁸ The practical elaboration of values takes the form of guidelines regarding quality and accountability, and of disciplinary regimes. In general, these guidelines are morally but not legally binding, which may have consequences for their enforcement.⁶⁹

Professional standards for judicial performance, secondly, are minimum norms for the good judgment of court cases.⁷⁰ These standards are connected with the idea of 'judgecraft', which encompasses the minutiae of procedural arrangements in courts.⁷¹ Professional standards concern the required knowledge and experience for ensuring adequate judicial performance as well as the way in which to give time and attention to the handling of cases and the communication of judgments. The content of these standards can range from court etiquette to break times or the processing of requests for adjournment of hearings.⁷² Professional standards are a concretisation of more fundamental norms (for example concerning judicial independence) contained in legislation, judicial codes of conduct and procedural regulations.⁷³ In general, professional standards are not legally binding.

2. Understanding Judicial Culture(s) Through Professional Values and Standards

How can we operationalise the concept of 'professional values and standards' in an analysis of the development of judicial cultures? First, we need to establish in which types of sources the professional values and standards for judges in specific national legal orders and at the European level can be located. Second, a methodology needs to be designed that enables analysis of the views and experiences of stakeholders – in particular individual judges, court managers and policy-makers – regarding the implementation and further development of these professional values and standards in a comparative perspective.

3. Locating Professional Values and Standards

Professional values have developed in different sources and at a different pace when compared with professional standards for judges in Europe. Therefore, we will address both categories separately.

Professional values and related guidelines for judges, firstly, can be located in codes of conduct developed at the national, European or international level. Judicial codes of conduct are official documents developed within the judiciary or by judicial governing bodies. For the analysis of the development of judicial culture(s) in Europe, the focus can be on codes of conduct developed in national legal systems and at the European level. However, it should be kept in mind that some of these codes have been inspired by more 'global' sources. In particular, the Bangalore Principles of Judicial Conduct (2002),⁷⁴ developed at the international level, have become very influential in countries all over the world.⁷⁵

In national legal systems in Europe, judicial codes of conduct have proliferated in the last decades. This development is visible in 'old' EU Member States, such as France, the Netherlands, and the UK, as well as in 'new' EU Member States, such as Hungary and Romania.⁷⁶ In the European context, shared professional values for judging are being formulated as well. Since 2013, the European Commission annually publishes the EU Justice Scoreboard,⁷⁷ in which data regarding the judicial systems of the EU Member States are presented and compared. Based on this data Member States receive recommendations on the improvement of

⁶⁷ Bell (n 28).

⁶⁸ Many current codes were modelled on the *Bangalore Principles of Judicial Conduct*, formulated by an international expert group of judges under the auspices of the United Nations (2002) <<https://www.unodc.org>> accessed 25 January 2018.

⁶⁹ But see Di Federico (n 66).

⁷⁰ See Mirko Noordegraaf and others, *Professionele standaarden: een vergelijkend perspectief* (Raad voor de rechtspraak 2014).

⁷¹ Richard Moorhead and David Cowan, 'Judgecraft: An Introduction' (2007) 16 Social & Legal Studies 315.

⁷² *ibid.*

⁷³ See for example the standards formulated by the National Consultation Bodies (LOVs) of judges in specific areas (criminal, civil, administrative and small claims cases) in the Netherlands.

⁷⁴ See *supra*, note 68.

⁷⁵ Di Federico (n 66).

⁷⁶ *ibid.*

⁷⁷ <https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/effective-justice/eu-justice-scoreboard_en> accessed 23 March 2018.

the efficiency, quality and independence of their judicial systems. The Council of Europe is also concerned with the improvement of judicial systems in Europe, in particular through the European Commission for the Efficiency of Justice (CEPEJ),⁷⁸ the Consultative Council of European Judges (CCJE)⁷⁹ and the Venice Commission.⁸⁰ Furthermore, the European Network of Councils for the Judiciary (ENCJ) is active in this field.⁸¹ Each of these actors bases its activities on specific professional values for judicial systems and judges, which generally reflect a specific conceptualisation of the principle of the 'rule of law' as well as more economically oriented 'managerial' principles.⁸²

In Europe, published national and European professional ethical codes for judges reveal a set of shared key values regarding independence, impartiality, professionalism and integrity.⁸³ However, the guidelines developed on the basis of these values are diverse. For example, membership of a political party is allowed in some EU Member States but not in others.⁸⁴ Furthermore, differences between national conventions are persistent. In particular, judges in 'old' Member States, who are critical towards centralised judicial management, approach the value of individual autonomy within the judicial organisation differently than those in 'new' Member States, who are still adjusting to a greater degree of self-governance.⁸⁵ It is unclear to what extent more unity can be achieved between these national values. It also remains to be seen to what extent this is desirable, which could be the case for example if shared professional values were proven to enhance judicial cooperation between EU Member States based on mutual trust.⁸⁶

Professional standards, secondly, were formulated only recently by national judiciaries in Europe. The Netherlands and the UK are at the forefront in developing these sources.⁸⁷ Due to the non-codified nature of these standards in many EU Member States, it is difficult to gain a complete overview that can be used as a starting-point for harmonisation or an exchange of 'best practices'.

It is important to realise that the legislative and executive branches of government in a specific legal system are responsible for providing an institutional setting for judicial conduct in accordance with professional values and standards.⁸⁸ Therefore, a study of these values and standards should also take account of the characteristics of the institutional framework in which judges make their professional ethical choices. In particular, the rule of law principle requires that institutional independence of the judiciary in relation to the other branches of government is guaranteed, as well as the individual autonomy of judges in the judicial organisation.⁸⁹ A comparative analysis of professional values and standards for judges in the EU, therefore, needs to address the concretisation of the rule of law principle in institutional and organisational arrangements for national judiciaries.

Finally, judicial ethics are influenced by changes in the underlying values for judging and judicial organisation. In this regard, the increased emphasis since the 1980s on values of New Public Management – such as effectiveness, efficiency and a 'client-oriented' approach – has affected the elaboration of classic values connected with the rule of law, in particular the values of judicial independence and impartiality.⁹⁰ At the level of national judicial systems, the balancing of these two sets of values in many States has led to the introduction of more centralised court management and increased pressure on courts and judges to handle cases in a swift and economic manner.⁹¹ For individual judges, this normative development entails the need to develop a stronger 'organisational awareness' and a yardstick for deciding on their professional autonomy within the judicial organisation.⁹²

⁷⁸ <http://www.coe.int/T/dghl/cooperation/cepej/default_en.asp> accessed 23 March 2018.

⁷⁹ <http://www.coe.int/T/DGHL/cooperation/ccje/default_en.asp> accessed 23 March 2018.

⁸⁰ <<http://www.venice.coe.int/webforms/events/>> accessed 23 March 2018.

⁸¹ <<https://www.encj.eu>> accessed 23 March 2018.

⁸² Elaine Mak, 'The European Judicial Organisation in a New Paradigm: The Influence of Principles of "New Public Management" on the Organisation of the European Courts' (2008) 14 European Law Journal 718.

⁸³ Julie Allard, Antoine Garapon and Frederic Gros, *Les vertus du juge* (Dalloz 2008).

⁸⁴ See above, note 10.

⁸⁵ Seibert-Fohr (n 61). Academics have criticised the 'transplant' of models of central judicial management in post-communist States, see David Kosar, *Perils of Judicial Self-Government in Transitional Societies* (CUP 2016).

⁸⁶ See below 4.3.

⁸⁷ For the Netherlands, see www.rechtspraak.nl. For the UK, see inter alia 'Judgecraft' in Equal Treatment Bench Book, November 2013 <<https://www.judiciary.gov.uk>> accessed 25 January 2018.

⁸⁸ Noordegraaf (n 70).

⁸⁹ See above 3.3.

⁹⁰ Mak (n 82).

⁹¹ ibid.

⁹² For the Netherlands, see Sietske Dijkstra, *De rechter als evenwichtskunstenaar* (Boom juridische uitgevers 2016).

4. Analysing Views and Practices

In order to analyse the development of views and practices regarding judicial ethics in the EU legal context, it is necessary to combine the research of relevant published sources, such as codes of conduct and published professional standards, with a qualitative empirical analysis regarding views and experiences in judicial practice. After all, a gap can exist between the 'law in the books' – here: codified professional values and standards – and the 'law in action' – here: the conduct of judges when faced with professional-ethical dilemmas. Such a gap might occur, in particular, because of the vague wording or non-binding nature of judicial codes of conduct and professional standards.⁹³ The effect of these values and standards in practice then depends on the willingness of judges to comply, or in other words: on their ethical mind-set.

This interdisciplinary methodology entails, firstly, that relevant sources containing professional values and standards are studied. These sources concern the codes of conduct and similar guidelines and the codified professional standards for judges in specific legal systems. Secondly, surveys and interviews can clarify how such values and standards are perceived and implemented by judges, court managers and policy-makers (for example in Ministries of Justice). Similarities and differences between national judicial cultures and the possibilities and constraints regarding alignment can thus be analysed in terms of both the normative content of professional values and standards and their function and effects.

If investigated by a single researcher, a delimitation of the comparative research to three or four legal systems seems in order with an eye to the feasibility of this research.⁹⁴ Within the EU context, the first relevant factor in the selection of Member States for the analysis concerns the distinction between 'old' Member States, where liberal-democratic values for judging and judicial organisation generally are more strongly embedded, and 'new' Member States, which have made a transition from communism. The level of development of judicial ethics is thought to correspond with the familiarity and experience of judges and other relevant actors with rule-of-law based institutions and practices.⁹⁵ Secondly, the selection of States for a comparison should pay attention to the distinction between common law and civil law systems. This is important because of the different view on the role of judges in both traditions. Whereas the judge in the common law tradition generally acts as a referee between parties in an adversary trial, a judge in the civil law tradition generally acts in a more inquisitorial manner.⁹⁶ Still, shifts in this logic can be identified in national legal orders belonging to each of these traditions.⁹⁷ This difference might affect views, and connected practices, on what 'good' judging and 'good' professional conduct demands. Finally, factors such as language, population size and the prestige of specific legal systems might influence the extent to which judicial codes of conduct and standards in one Member State take inspiration from other Member States or from legal systems outside of the EU.⁹⁸ For this reason, the selection of Member States for the analysis should contain States that are more likely to be 'followers' as well as Member States that are more likely to be 'early adopters' in the development of professional values and standards for judges.

In sum, the concept of 'professional values and standards' provides a conceptual lens for analysing the content of professional-ethical norms for judges in a specific legal order. It enables analysis of the connection of these norms with each other and with the larger context of ethical norms in the society, and the comparison of views and experiences in different national legal systems. Based on such an analysis, it will be possible to establish to what extent alignment of judicial cultures across national legal borders is taking place or has taken place with regard to this ethical dimension, and whether further convergence between national views and practices is possible and desirable.

B. The Legal Dimension of Judicial Culture

The legal dimension of judicial culture focuses on legal rules and concepts regarding the judicial role. What do individual judges, the judiciary as an institution and the wider society believe that it takes, in terms of legal ideas, to be a judge? This question is usually represented in the form of concrete questions, such as: Are judges mandated to carry out some form of judicial review of laws passed by a normal parliamentary majority? Are they creating law or do they give 'merely' an interpretation of the legislation? Of course, answers to these questions may vary widely and may not accord with the actual role of a judge.

⁹³ Di Federico (n 66) 98–99.

⁹⁴ On comparative legal research methodology, see Mathias Siems, *Comparative Law* (CUP 2014).

⁹⁵ Seibert-Fohr (n 61).

⁹⁶ Glenn (n 39).

⁹⁷ See inter alia John Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (CUP 2014).

⁹⁸ Cp Martin Gelter and Mathias Siems, 'Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations between Ten of Europe's Highest Courts' (2012) 8 Utrecht Law Review 88.

If we are interested in the development of a possible European judicial culture, we need to understand how these how-to-do-what ideal-typical legal concepts in judicial cultures are deployed, and, ultimately, sensitive to change. Importantly, what judges, the judiciary and other voices in society think is the role of a judge, or ought to be the role of a judge, are not merely descriptive answers; they are prescriptive as well. They function in the present and influence the reception of 'formal' changes to legal rules and concepts regarding the judicial role.⁹⁹ For example, the constitutional empowerment in 2008¹⁰⁰ of the Conseil constitutionnel [the French 'constitutional court'] to review the constitutionality of laws after their enactment was seen as "revolutionary"¹⁰¹ because, among other things, the Conseil could now clearly interfere with the legislative function. This was a break with the Gaullists' judicial role perception, which defined the role of the Conseil constitutionnel as guaranteeing the dominance of the executive over a weak parliament.¹⁰² The following sections introduce the concept of judicial role perceptions, defined as a model embodying ideal-typical legal ideas that shape the role of the judge, to offer legal scholars a vocabulary for analysing this dimension of judicial cultures.

1. The Concept of 'Judicial Role Perceptions'

The application of 'judicial role perceptions' to the study of judicial culture is neither new nor untried. Since the 1970s, scholars, influenced by the work of sociologists, social psychologists and anthropologists, have applied the role concept to the judicial branch. This perspective draws from the idea that "the concept of role by its very definition is an attempt to link the functioning of institutions with their respective cultures. It denotes the expectations of a society as to how a particular incumbent ought to behave or his perceptions of these expectations".¹⁰³

In the legal context, the concept finds its use especially in contributions to the analysis of judges' role perceptions, i.e. how judges "felt obliged to make law whenever the opportunity occurs".¹⁰⁴ However, judicial role perceptions stand not only for the self-perception of individual judges or the judiciary as an institution, but also for other voices in society.¹⁰⁵ In a constantly changing world, judicial role perceptions emerge and disappear within specific contexts and are cast by, among others, the judiciary, popular media, politics and academics. The research agenda proposed here limits the study of judicial role perceptions to a collection of legal ideas that, at a given time and place, shape perceptions of the judicial role.

As already indicated, judges do not operate necessarily at the level of these ideal-typical collections of ideas, but the analysis of judicial role perceptions shows how judges in the past and present found themselves torn between different, incompatible legal ideas and wove their way between them. At the same time, this also means that newly invented (and popular) judicial role perceptions carry the power to change judicial culture(s) in distinctive ways and, at the same time, change the position and role of courts and individual judges. From this perspective, Diana Kapiszewski has pointed out that judicial decision-making "can be a direct outcome of judicial 'role perception' as it relates to their general position in society".¹⁰⁶ Judicial role perceptions thus serve as cultural templates to which judges are invited to conform. These new judicial role perceptions can change opinions about judicial review, but also such things as the view

⁹⁹ Jan-Werner Müller, 'On Conceptual History' In: Darrin M McMahon and Samuel Moyn (eds), *Rethinking Modern European Intellectual History* (OUP 2004) 74, 84.

¹⁰⁰ Loi constitutionnelle 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République, art. 1, *Journal Officiel* (July 24 2008) 11890.

¹⁰¹ Mak (n 9) 49; Patrick Roger, 'Trois ans de QPC, la révolution juridique' *Le Monde* (1 March 2003) <http://www.lemonde.fr/politique/article/2013/03/01/trois-ans-de-qpc-la-revolution-juridique_1841162_823448.html> accessed 23 March 2018.

¹⁰² Xavier Philippe, 'La question prioritaire de constitutionnalité: à l'aube d'une nouvelle ère pour le contentieux constitutionnel français. Réflexions après l'adoption de la loi organique' (2010) 82 *Revue française de droit constitutionnel* 273.

¹⁰³ Joel B Grossman and Austin Sarat, 'Political Culture and Judicial Research' (1971) Washington University Law Quarterly 177, 195.

¹⁰⁴ Howard, Jr., J. Woodford. 'Role Perceptions and Behavior in Three US Courts of Appeals' (1977) 39 *Journal of Politics* 916; see further: Thomas D. Ungs and Larry R. Baas, 'Judicial Role Perceptions: A Q-Technique Study of Ohio Judges' (1972) 6 *Law & Society Review* 343, Adalmir Gomes, Tomas Guimaraes and Eda Souza, 'Judicial Work and Judges' Motivation: the Perceptions of Brazilian State Judges' (2016) 38 *Law & Policy* 162; Tomas Aquino Guimarães, Adalmir Oliveira Gomes, 'Role Conflict and Role Ambiguity In the Work of Judges: the Perceptions of Portuguese Judges' (2017) 51 *Revista de Administração Pública* 946.

¹⁰⁵ See for an interesting example: Hiroshi Itoh, *The Supreme Court and Benign Elite Democracy in Japan* (Ashgate 2010) 242–243. Itoh understands judicial role perceptions in terms of approaches to judicial activism and judicial restraint.

¹⁰⁶ Diana Kapiszewski, 'How Courts Work: Institutions, Culture and the Brazilian Supremo Tribunal Federal' In: Javier Couso, Alexandra Huneeus and Rachel Sieder (eds), *Cultures of Legality: Judicialization and Political Activism in Latin America* (CUP 2010) 60.

that judicial law making is possible and legitimate.¹⁰⁷ In the European context, for example, judicial role perceptions shape ideas regarding the existence or non-existence of 'decentralised Community courts', i.e. national courts as agents of the Union within the Member States.¹⁰⁸ Furthermore, it has been argued that judicial role perceptions are one of the primary variables influencing the judicial defence of human rights.¹⁰⁹

Even within a single legal system, there need not be complete normative consensus regarding judicial role perceptions. For example, in the case of the premature termination of András Baka's mandate as president of the Hungarian Supreme Court, two competing judicial role perceptions are visible. On the one hand, in the amendment that changed the rule for nominating Constitutional Court judges which gave Hungary's ruling Fidesz party the ability to select its own 'judges', we recognise the role perception of constitutional courts as loyal and subordinate to legislatures and executive authorities. On the other hand, in András Baka critical remarks on the new laws on the judiciary, a strong belief in the independence of the judiciary is visible.¹¹⁰ Indeed, judicial role perceptions draw on available – and sometimes competing – ideas within a particular judicial culture. Moreover, these ideas can change over time. Within the French judicial culture, for example, the eighteenth century legacy that glorified the legislator and distrusted the judge never totally faded away and still shapes French judicial role perceptions.¹¹¹

The presented notion should not be misunderstood: the approach of the concept of judicial role perceptions implies nothing about the preferences of the researcher. Rather it is a neutral device to illuminate changing, questioned or even partly abandoned judicial ideas. But how can we track changing perceptions of what it meant to be a judge in a particular judicial culture? How and at what level can we 'mine' judicial role perceptions? And to what extent can judicial role perceptions contribute concretely to the understanding of the legal dimension of judicial cultures?

2. Understanding Judicial Culture(s) Through Judicial Role Perceptions

To begin with the last question, by addressing the world of judicial role perceptions, scholars are able to compare the legal dimensions of judicial cultures from a deeper and broader perspective. Judicial role perceptions are not only visible in all judicial cultures, but also in all periods. Distinct as legal approaches are in different judicial cultures, they are all embodying and expressing judicial role perceptions.

A judicial role perceptions research agenda, thus, puts forward a type of analysis that differs from traditional legal scholarship by stating that there is a level of abstraction at which legal dimensions of several judicial cultures can be formally compared. This is at the level of the underlying legal ideas used. At this level, we can decontextualise ideas from the concrete problems for which they were used and 'recontextualise' them within the field of judicial role perceptions. In doing so, it is possible to show that legal ideas themselves can be different, but the underlying judicial role perceptions in which these rules are expressed are not. If we do not make use of such a prism, we will only find differences and no commonalities.

As an example, a focus on judicial role perceptions can enable demonstrating that judicial cultures may involve the transmission of judicial role perceptions from one court to another.¹¹² The French Conseil constitutionnel, for instance, followed in 2004,¹¹³ in a different context and in a less explicit way, the idea employed by the French Conseil d'État (the supreme administrative court) that the review of secondary EU law is possible.¹¹⁴

¹⁰⁷ For judicial role perceptions as a major independent variable in the judicial process see: Woodford Howard, *Courts of Appeals in the Federal Judicial System: A Study of the Second, Fifth, and District of Columbia Circuits* (Princeton University Press 2014) 374, n 23.

¹⁰⁸ John Temple Lang, 'The Duties of National Courts under Community Constitutional Law' (1997) 22 European Law Review 3.

¹⁰⁹ Brian Turner, 'Judicial Protection of Human Rights in Latin America: Heroism and Pragmatism', In: Mark Gibney and Stanislaw Frankowski (eds) *Judicial Protection of Human Rights: Myth or Reality?* (Praeger 1999) 90.

¹¹⁰ Kim Lane Schepppe, 'Understanding Hungary's Constitutional Revolution' In: A. von Bogdandy and P. Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Hart Publishing 2015) 111–124.

¹¹¹ Glenn (n 39).

¹¹² Olivier Dupéré, 'Le contrôle de constitutionnalité du droit dérivé de l'Union européenne. Lectures croisées par le Conseil d'état et le Conseil constitutionnel' (2005) 61 Revue française de droit constitutionnel 147–169.

¹¹³ Decision 2004–496 DC (CC 10 June 2004).

¹¹⁴ Decision n. 368282 (CE 26 September 2002) However, a member of the Conseil d'État pointed out that the Conseil constitutionnel did not follow the proper line of argumentation, see: Jacques Arrighi de Casanova, 'La décision n° 2004–496 DC du 10 juin 2004 et la hiérarchie des normes' (2004) AJDA 1534–1537.

3. Locating Judicial Role Perceptions

Those employing the vocabulary of judicial role perceptions, however, need to pay careful attention to questions of demarcation. The concept of ‘judicial role perception’ is one of the ‘mega concepts’, in Clifford Geertz’s terms, where focus and actuality are needed to make it possible to write about it.¹¹⁵ In particular, as exemplified by the discussion on the concept of legal culture, what matters is how such a term might be useful as a framework for analysis.

Firstly, in order to be able to engage in analysing judicial role perceptions, it is necessary to solve some methodological problems. What sources would one need in order to study ideal-typical legal ideas that shape the role of the judge within a judicial culture? What would one need to look for in such sources? And at what point in time would one start to research judicial role perceptions?

The sister concept of ‘judicial ideology’ is a useful starting-point for answering these questions. In the 1970s Jerzy Wroblewski coined this concept to refer to a field of study concerned with the collection of values that define the general direction and the attitude of courts to the law in force. These values refer to modes of decision-making rather than to the more general normative and professional underpinning for judicial conduct. Wroblewski suggested that we can distinguish three ‘ideal types’ of judicial ideology: 1) the ideology of bound judicial decision-making in the history of legal thought (for example the school of Begriffsjurisprudenz and the école exégétique); 2) the ideology of free judicial decision-making (*inter alia* libre recherche scientifique and the Freirechtsbewegung); and 3) the ideology of legal and rational judicial decision-making.¹¹⁶

Leading the field away from this narrow object of research, Zdenek Kühn has implicitly championed the concept’s potential to reveal more than modes of decision-making.¹¹⁷ According to his perspective, judicial ideology determines and prescribes the proper method for the judicial interpretation of law as well as the ideal role that a judge should have in society. This last theme connects clearly with the concept of judicial role perceptions as a model embodying ideal-typical legal ideas that shape the role of the judge.

The few published contributions using ‘judicial ideologies’ deal mainly with the concept as an ideal model in discerning the impact of judges in decision-making. The question of how to ‘mine’ judicial ideologies has rarely been considered. Nonetheless, the subject gives rise to a complex methodological debate.

Raimo Siltala, for example, argued that judicial ideologies tend to be the product of three categories: 1) legislation (including *inter alia* travaux préparatoires, administrative decrees and international legal conventions); 2) judicial decisions; and 3) the societal conception of law and justice as given effect in ‘the established usages of customary law’.¹¹⁸ Kühn, by contrast, detached the study of judicial ideologies from formal judicial sources, opening the way to approaches and methods that were inspired by different disciplines and separate fields. He pointed out that judicial ideology can be found not only where we would expect it – in the official written output of judges and legislators – but also where we would perhaps not expect it: in academic teachings, political rhetoric, judicial self-perceptions, writings of the legal community and the prevailing opinions of society as a whole.¹¹⁹

Following these lines of inquiry, the approach advanced in this article is to bridge both perspectives by focussing on three concrete categories of sources in which the construction and transformation of judicial role perceptions have taken place. These categories of sources are: 1) case law; 2) legislation; and 3) academic scholarship.

These categories of sources are not abstract intellectual entities, but concern the voices of certain groups of people within a judicial culture expressing particular judicial role perceptions. The ground-breaking works of legal historian Raoul van Caenegem have demonstrated how various European countries have seen the control of the law pass through various hands, those of the judiciary, the legislature, or the law schools. This is not to say that there were periods or countries where one of these types of sources controlled judicial role perceptions exclusively; there has always been some case law, some legislation and some writing about the role of the judge.¹²⁰

¹¹⁵ Clifford Geertz, *The Interpretation of Cultures* (Basic Books 1973) 26.

¹¹⁶ See also Raimo Siltala, *Law, Truth, and Reason: A Treatise on Legal Argumentation* (Springer 2011) 79.

¹¹⁷ Zdenek Kühn, *The Judiciary in Central and Eastern Europe. Mechanical Jurisprudence in Transformation?* (Martinus Nijhoff Publishers 2011) 67.

¹¹⁸ Raimo Siltala, *Law, Truth, and Reason: A Treatise on Legal Argumentation* (Springer 2011) 247.

¹¹⁹ Kühn (n 117) 67.

¹²⁰ Raoul van Caenegem, *Judges, Legislators and Professors* (CUP 1987).

The corpus of knowledge that legal scholars have created and cultivated is part of judicial culture. Judicial role perceptions are sometimes literally mentioned in the works produced by legal scholars, while at other times they remain implicit and should be extracted from the texts. To make this idea more concrete, references to case law and practices of foreign or international courts sometimes function as a tool for explaining, promoting or defending a particular judicial role. In the European context, for example, references to the ECJ's Simmenthal¹²¹ case can function as a way to defend the idea that ordinary courts have the ability to set aside conflicting national law inconsistent with EU law without waiting for a declaration of unconstitutionality by constitutional courts.

While these ideas are created in 'the world of the mind', they manifest themselves in the form of, among other publications, journal articles and monographs, and are just as open as other objects to empirical research and the development of hypotheses.¹²² Questions of referencing and copying might seem circumstantial, yet, these practices of legal research are of utmost importance, as these expressions of judicial role perceptions inform many essential aspects of the broader judicial culture, above all the future generations of students.

An important cue to meet this new horizon of legal inquiry can be found in Ran Hirschl's *Comparative Matters*, which can be seen as a plea for a 'qualitative comparative historical social science' in the study of comparative law, "which comparative lawyers, trapped in their 'academic introversion', have failed to pursue".¹²³ This 'qualitative historical social science' aims to analyse legal institutions through a combined use of comparative, socio-legal and historical research methods to permit a dialogue between theoretical expectations and detailed evidence of an intensity and diachronic scope that is rare in existing legal scholarship.

As is now routinely accepted, socio-historical analyses can be especially useful for understanding how legal elements came into being or evolved accidentally or rationally. Furthermore, this type of research approach makes it possible to analyse 'path dependence': the manner in which established legal approaches determine how new situations will be handled in the future.¹²⁴ For example, regarding the crisis of constitutional democracy in post-Communist Europe, socio-historical analysis pointed out that rule-of-law institutions were all too often created in the 1990s 'from above', without the support of various political groups and civil society associations, and ignoring the 'socialist baggage' of important stakeholders.¹²⁵

In short, research on judicial role perceptions has the potential of opening up new perspectives. It can trace and compare judicial cultures through time and across (legal) borders.¹²⁶ A *longue durée* perspective can add much-needed nuance to theoretical generalisations and show in concrete detail how, why and under what circumstances judicial role perceptions are deployed, changed or rejected.

4. Judicial Ideological Moments

In order to analyse judicial role perceptions in the broader framework of judicial cultures it is necessary to select areas where such perceptions crystallise and are more visible than usual. Expanding the notion of 'ideological moments', the analysis in this paragraph argues that judicial role perceptions can be analysed productively in the context of 'judicial ideological moments'.

What, then, are 'ideological moments'? Ideological moments capture the intellectual world of a time and place. These moments are shaped by the dominant questions that engage a generation and include the language of the debate, the competing solutions and actors.¹²⁷

One can usefully merge this notion with Bruce Ackerman's concept of 'constitutional moments', i.e. "historic moments of successful constitutional politics".¹²⁸ This concept is founded on the idea that there is a difference between routine legal activity and 'higher law making', including formal constitutional adaptation (for example in the EU's case: the Treaty of Lisbon) and informal constitutional change (in the US

¹²¹ Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA Case 106-77 [1978] ECR 629.

¹²² Rens Bod, *A New History of the Humanities: The Search for Principles and Patterns from Antiquity to the Present* (OUP 2013) 2.

¹²³ Anna de Robilant, 'Big Questions Comparative Law' (2016) 96 Boston University Law Review 5.

¹²⁴ Oona Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' (2001) 86 Iowa Law Review 606.

¹²⁵ Bojan Bugarić, 'A Crisis of Constitutional Democracy in Post-Communist Europe: "Lands in-Between" Democracy and Authoritarianism' (2015) 13 International Journal of Constitutional Law 219–245.

¹²⁶ Lawrence Friedman, 'Some Thought on Comparative Legal Culture' In: David S Clark, *Comparative Law and Private International Law, Essays in honour of John Merryman* (Duncker & Humblot 1990) 49.

¹²⁷ For an interesting example see: Timothy Cheek, *The Intellectual in Modern Chinese History* (CUP 2015).

¹²⁸ Bruce Ackerman, 'Constitutional Politics and Constitutional Law' (1989) 99 Yale Law Journal 453.

context: the New Deal). Within this conceptual framework, 'judicial ideological moments' are best classified as 'constitutional moments *sui generis*'. Instead of focussing on constitutional change, a 'judicial ideological moments' research agenda concentrates on key judicial decisions. These decisions affect judicial cultures. They offer an opportunity to debate, reconstruct and redefine existing legal ideas in a manner that changes the role perceptions of judges. The already mentioned Simmenthal case, for example, not only gave ordinary national courts the mandate to set aside conflicting national law inconsistent with EU law, but also placed constitutional courts at the margins of the everyday application of EU law. As a consequence, this decision caused a debate over the judicial role of constitutional courts in the EU.¹²⁹ In short: judicial ideological moments sometimes trigger debates, possible reform, and, ultimately, foster shifts in authority and relations between courts. They are able to reshape judicial role perceptions within courts, politics, scholarship and the media. In this way, they rework the very nature of judicial cultures.

C. The Institutional Dimension of Judicial Culture

The institutional dimension of judicial culture looks specifically at the judiciary as a collective and examines "the way in which the structures of and ... organization of judges as well as legal processes, affect the judiciary as a social institution".¹³⁰ In the European context, certain questions arise from an institutional perspective about how a 'European judicial culture' is formulated, implemented and encouraged. If we consider what a 'European judicial culture' might look like, a harmonised European judicial culture would arguably require some type of convergence of the mind-set of judges on a transnational level. As outlined by Bell, each judge works within an 'interpretive reality' of common norms and practices and thus the "approach of the judge is as an institutional legal actor, whose role and authority is defined not just by rules, but by an overall institutional culture".¹³¹ As Zetterholm points out: "The social group creates, through the interaction of its members and their communication and acculturation processes, the coherence necessary for individual mental and cognitive development and day-to-day cooperation".¹³² Though there are many intertwining aspects that affect judges as institutional actors, one important, often overlooked aspect in scholarship is judicial trust or trust between judges. Yet, trust has been recognised in discourse as crucial for the success of judicial cooperation and harmonisation. This leaves a gap between generalised importance of trust in scholarship as regards individual or group relations and the vague and often assumed notion of trust as applied to the judiciary in certain contexts.

The European Commission points to understanding and mutual trust as crucial for mutual recognition, necessary to furthering cooperation between judges and other institutional actors in the European legal area. In the 2011 plan 'Building trust in EU-wide justice: a new dimension to European judicial training', the Commission emphasises: "A good understanding of the different national legal systems is necessary to ensure recognition of judicial decisions, cooperation between judicial authorities and swift execution of decisions. This is also central to building mutual confidence and trust".¹³³ Still, it is unclear whether such trust is formed and how. As stated by former Vice-President Viviane Reding, "Trust is not made by decree. It grows with knowledge".¹³⁴ The points where this 'knowledge' might be learned or shared by judges in Europe are, therefore, worthy of closer inspection.

In addition, the Commission's current plan to train half of all legal practitioners by 2020 has been subject to criticism. At the outset, Herman van Harten questioned what legal basis the Commission has for such a judicial training strategy and if the "end (a true European judicial culture – whatever that may be) justifies the means".¹³⁵ Moreover, the Commission is vague about the concept of 'trust', and equally 'mutual trust', choosing to "refrain from defining it and instead focus on its apparent manifestations".¹³⁶ Nonetheless, there

¹²⁹ Darinka Piqani, 'The Simmenthal Revolution Revisited: What Role For Constitutional Courts?' In: Bruno de Witte and others (eds), *National Courts and EU Law: New Issues, Theories and Methods* (Edward Elgar 2016) 26–48.

¹³⁰ John Bell (n 28) 4.

¹³¹ ibid 8.

¹³² ibid 7–8, citing Staffan Zetterholm (ed), *National Cultures and European Integration: Exploratory Essays on Cultural Diversity and Common Policies* (Berg Publishers 1994) 71.

¹³³ European Commission (n 4).

¹³⁴ European Commission, 'Getting the priorities for future Justice policies right: European Commission boosts judicial training to foster mutual trust' (26 June 2014) <http://europa.eu/rapid/press-release_IP-14-745_en.htm> accessed 23 March 2018.

¹³⁵ Herman van Harten, 'Who's Afraid of a True European Judicial Culture? On Judicial Training, Pluralism and National Autonomy', Working Paper presented at Pluralism in European Administrative Law research forum, Groningen (3 February 2012) 19.

¹³⁶ Evelien Brouwer and Damien Gerards, 'Mapping Mutual Trust – An Introduction' In: Evelien Brouwer and Damien Gerards (eds), 'Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law' (2016) 1 EUI working papers.

remains a clear underlying assumption in the continued reiteration of the notion that trust will lead to cooperation and the formation of a European judicial culture. Though a number of studies and reports have looked at public trust in the judiciary or judges' trust in judicial councils,¹³⁷ an analysis of the formation of a shared 'European' judicial culture by way of (mutual) trust between judges themselves seems to be lacking.

1. The Concept of 'Judicial Trust'

Trust is a concept widely studied (and contested) across many disciplines, including political science, sociology, cultural anthropology, economics and psychology. This widespread scholarship has led to varied and numerous definitions of trust (in general terms): for instance, "the intention to accept vulnerability to a trustee based on positive expectations of his or her actions".¹³⁸ Or, phrased differently, "When we say we trust someone or that someone is trustworthy, we implicitly mean that the probability that he will perform an action that is beneficial or at least not detrimental to us is high enough for us to consider engaging in some form of cooperation with him".¹³⁹

Although trust in general is a concept studied in many areas, there is a gap in the study of 'judicial trust', that is the trust *among* members of the judiciary, as opposed to trust of the judiciary by citizens or *vice versa*. However, the study of judicial trust is slowly expanding, and authors have put forward various working definitions in their study of judicial trust. Researchers at KU Leuven examining judicial trust use the working definition: "Trust is the aggregation of the collective shared willingness to accept vulnerability based upon positive expectations of another in the face of uncertainty".¹⁴⁰ This definition is based on the often-cited and broader definition of 'trust' formulated by Rousseau in the late 1990s as well as the more recent definition of Fulmer and Gelfand.¹⁴¹

More recently, Juan Mayoral, studying judicial trust specifically in the context of the international courts (in this case the CJEU), put forward the definition of judicial trust as "national judges' belief about whether the CJEU will follow an expected course of action under conditions of uncertainty".¹⁴² In his study, Mayoral draws on broader trust literature and breaks down four relevant aspects of trust that can also be applied when defining judicial trust: subjective belief, relational nature, conditional nature and particularly relevant in conditions of uncertainty.

While Mayoral's definition is useful in the context of assessing national judges' trust in the CJEU, it lacks the breadth necessary to examine the more convoluted relationships or bonds formed informally between national judges on the European landscape – which includes not only interaction with the Court(s) but also with each other through, *inter alia*, training programmes and networks.

If we focus on the trust that (can) exist(s) between judges as individuals, we might broaden the definition so as to better encapsulate trust in any professional scenario. For example: judicial trust is a subjective belief comprising the accepted vulnerability of a judge based on positive expectations of the intentions or actions of another judge.

From this point of departure, some initial questions arise. What structural aspects of institutions help to promote trust? What effect can the nature of initiatives – top-down or bottom-up – have in realising trust-building efforts? What role does networking or training on EU law and the legal systems of other Member States play in building, maintaining or dissolving trust between judges?

¹³⁷ See for example Jonathan Jackson et al, 'Trust in Justice: Topline Results from Round 5 of the European Social Survey' (European Commission December 2011); Pablo José Castillo Ortiz, 'Councils of the Judiciary and Judges' Respect to Their Independence in Europe' (2017) 9 Hague Journal on the Rule of Law 315–336; European Network of Councils for the Judiciary Working Group, 'Measurement of National and Transnational Public Confidence' (ENCJ 2010–2011) <https://www.encj.eu/images/stories/pdf/workinggroups/final_report_public_confidence_2010_2011.pdf> accessed 23 March 2018; Nina Persak and Jose Strus, 'Legitimacy and Trust-Related Issues of Judiciary: New Challenged for Europe' In: Nina Persak (ed), *Legitimacy and Trust in Criminal Law, Policy and Justice: Norms, procedures and outcomes* (Routledge 2016).

¹³⁸ Jason A Colquitt, Brent A Scott, and Jeffery A LePine, 'Trust, Trustworthiness, and Trust Propensity: A Meta-Analytic Test of Their Unique Relationships With Risk Taking and Job Performance' (2007) 92 Journal of Applied Psychology 909.

¹³⁹ Diego Gambetta, 'Can We Trust Trust?' In: Diego Gambetta (ed), *Trust: Making and Breaking Cooperative Relations* (Basil Blackwell Ltd 1990) 218 <https://www.nuffield.ox.ac.uk/users/gambetta/Trust_making%20and%20breaking%20cooperative%20relations.pdf> accessed 23 March 2018.

¹⁴⁰ See 'Judicial Trust' (2012–2017), Public Governance Institute <<https://soc.kuleuven.be/io/english/research/project/research-project-judicial-trust>> accessed 23 March 2018.

¹⁴¹ Denise Rousseau and others, 'Not So Different After All: A Cross-Discipline View of Trust' (1998) 23 Academy of Management Review 393; Ashley Fulmer and Michele Gelfand, 'At What Level (and in Whom) We Trust: Trust Across Multiple Organizational Levels' (2012) 38 Journal of Management 1167–1230.

¹⁴² Juan A. Mayoral, 'In the CJEU Judges We Trust: A New Approach in the Judicial Construction of Europe' (2017) 55 Journal of Common Market Studies 552.

From a broader, European-level perspective, looking at judicial trust is interesting in at least two areas: 1) trust *between* individual judges who interact with one another in a transnational environment – a professional trust between two judges; and 2) trust between judges as developed through interaction in a formal institutional mechanism. The first is a 'social' trust that comes from (repeated) formal or informal interaction. The second comes, among others, from interaction within the institutional system of the Court, i.e. through some engagement with its case law or procedures.

2. Understanding Judicial Culture(s) Through Points of Judicial Interaction

The operationalisation of the concept of judicial trust in an analysis of European judicial culture, similar to the other dimensions of this research, first requires location of potential sources of trust formation among judges in the EU and then a research design that facilitates investigation of the concept through legal analysis as well as the personal and professional insights of judges themselves.

When looking at the development of a European judicial culture through the lens of 'judicial trust', the question arises: where can we examine trust-building efforts? Where do judges interact or engage in dialogue that could build trust? In line with the view that cooperation can lead to trust,¹⁴³ as opposed to trust primarily preceding cooperation, an analysis of trust might start with potential points of judicial interaction. For a broad overview of how trust-building affects the harmonisation of European judicial culture, we can look to three prominent sources of (and mechanisms for) promoting transnational dialogue between judges, information-sharing and creating greater understanding of EU law: judicial networks, judicial training programmes and the case law of the CJEU. While analysis of judicial trust has been carried out in the national context or in relation to EU Courts,¹⁴⁴ there is thus far lack of an overview that maps the formation or presence of judicial trust through several far-reaching informal structures where judges directly interact.

3. Locating Judicial Trust

Research pertaining to a broad overview of trust among judges still necessitates several choices be made in regard to analysing all three parts.

First, judicial networks increase personal contact between judges and formal connections between legal systems, and, in theory, may contribute significantly over time to the harmonisation of European judicial cultures. They may be seen as both a cause and consequence of trust among judges. An analysis of different types of interaction between judges from different Member States and European Courts is, therefore, interesting to examine in terms of the institutional autonomy of the judiciary and the individual autonomy of judges, both of which are important for judicial independence. Such a study could also highlight the nature and outputs of both top-down and bottom-up initiatives of judicial networking in Europe. For example, the Consultative Council of European Judges (a consultative body) was created by the Committee of Ministers of the Council of Europe,¹⁴⁵ whereas the Network of the Presidents of the Supreme Judicial Courts of the EU¹⁴⁶ was created at the initiative of judges themselves. Such differences in formation may impact structural organisation, membership and the institutional reach or impact of judicial networks, as well as the motivation of the participating judges. A selection of judicial networks can be analysed as illustrative of both types of initiatives as well as differences in context, scope and formal (institutional) power.

The two remaining areas of study – judicial training and the case law of the CJEU – also lend themselves to both top-down and bottom-up approaches. As part of the 'Building trust in EU-wide justice' plan, training is to be provided "through the use of all available resources at local, national and European level, in line with the objectives of the Stockholm Programme".¹⁴⁷ From a top-down perspective, the Commission funds judicial training through the European Judicial Training Network (EJTN). The Network is "the principle

¹⁴³ Toshio Yamagishi and others, 'Separating Trust from Cooperation in a Dynamic Relationship: Prisoner's Dilemma with Variable Dependence' (2005) 17 *Rationality and Society* 275.

¹⁴⁴ For example, in the Belgian context, the KU Leuven project 'Judicial Trust' <<https://soc.kuleuven.be/io/english/research/project/research-project-judicial-trust>> accessed 23 March 2018; see also, in the Polish context, Urszula Jaremba, *National Judges as EU Law Judges: The Polish Civil Law System* (Martinus Nijhoff Publishers 2014).

¹⁴⁵ Council of Europe, Consultative Council of European Judges <http://www.coe.int/t/DGHL/cooperation/ccje/default_en.asp> accessed 23 March 2018.

¹⁴⁶ Networks of the Presidents of the Supreme Judicial Court of the European Union <<http://network-presidents.eu>> accessed 23 March 2018.

¹⁴⁷ European Commission (n 4).

platform and promoter for the training and exchange of knowledge of the European judiciary".¹⁴⁸ However, the Commission also relies on "existing structures at national, regional and local level" to reach the judicial training goals set out in the Commission's plan. This reliance gives way to bottom-up initiatives from Member States and national organisations.

Similarly, analysis of the case law of the CJEU can reveal trust in terms of the legitimacy of the Court among national judges created through consistency in judgments or the trust judges have in approaching the Court as a means of pushing particular issues at the national level. In particular, trust appears significant in solidifying mutual trust in Member States in the execution of European Arrest Warrants (EAW) in the EU, whereby judicial cooperation is underpinned by mutual trust in the other's national system and judicial authority.

The EAW relies on 'mutual trust' between States as a part of mutual recognition between one Member State and another regarding the surrender of individuals within the boundaries of the EU. It is based on mutual recognition of criminal decisions and a "simplified system of surrender between judicial authorities".¹⁴⁹ However, the case law of the CJEU has shown that the system based on mutual recognition (and the mutual trust therein) is not as simple as it may seem. Indeed, the more than 20 judgments of the CJEU from 2007 onward show otherwise. Among others, Member States have referred questions about the EAW to the Court on the basis of fundamental rights, discrimination and prison conditions.¹⁵⁰ It is, therefore, interesting to examine the trust aspect of 'mutual trust', that is, the 'subjective belief' that is trust, or social trust, which is arguably a crucial element for mutual trust. Thus, this research will examine 'mutual trust' from the conceptual basis that mutual trust, in the absence of social 'trust', is merely obeying the rules and, therefore, not a form of trust at all.

4. Analysing Views and Practices

Similar to the ethical dimension, the study of trust between judges as a part of a potentially converging judicial culture will also rely on socio-legal analysis and empirical research methods. The use of empirical research methods in legal research is increasingly used in legal scholarship and is a valuable tool in detecting influences on judicial decision-making that can go unnoticed in a strictly legal analysis.¹⁵¹ In the case of the institutional dimension, semi-structured interviews of judges working on the European level can give insight into the inner workings of judicial networks, judicial training programmes and the CJEU. It can reveal the presence (or absence) of trust as perceived by the judges therein. Furthermore, for the study of judicial networks, participant observation allows for insights to be drawn by the researcher on the functioning of judicial networks in this regard.

In addition, the formation and existence of trust between individuals and groups is a social phenomenon and thus it is useful to use social scientific theory to approach the study of trust within the legal sphere. In particular, EU socialisation theories are useful to apply in regard to the relationship between 'trust' and harmonisation of cultures or ideas. These theories examine whether or not participation within European institutions leads to a convergence of the identities and views of those participating. Socialisation entails "the process of initiating individuals into the norms, rules and beliefs of a given community",¹⁵² and the underlying assumption is that prolonged engagement with the institution leads to the internalisation of its values, whether "unconsciously or instrumentally".¹⁵³ Socialisation can depend on various institutional factors and the socializing potential of an institution is generally expected to increase and the members' views to align more if there is a high frequency, duration and intensity of interaction between its members.¹⁵⁴ From this perspective, it can be considered whether repeated interaction at the European level can therefore influence whether a judge becomes more 'European' in outlook.

¹⁴⁸ Simone Benvenuti, 'The European Judicial Training Network and its Role in the Strategy for the Europeanisation of National Judges' (2015) 7 International Journal for Court Administration 60.

¹⁴⁹ Council Framework Decision 2002/584 on the European Arrest Warrant and the Surrender Procedures between Member States (2002) 002/584/JHA <<http://www.refworld.org/docid/3ddfcf495.html>> accessed 3 January 2018.

¹⁵⁰ See for example, Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] ECR I-0000; Case C-123/08 *Wolzenburg* [2009] ECR I-09621; Case C-452/16 *Poltorak* [2016] ECR I-13179; Case C-477/16 PPU *Kovalkosas* [2016] ECLI:EU:C:2016:858.

¹⁵¹ Urszula Jaremba and Elaine Mak, 'Interviewing Judges in the Transnational Context' (2014) 5 Law and Method.

¹⁵² Femke van Esch and Eelke de Jong, 'National Culture Trumps EU Socialization: the European Central Bankers' Views of the Euro Crisis' (2017) Journal of European Public Policy 1468.

¹⁵³ ibid; see further Jeffrey Checkel, 'International Institutions and Socialization in Europe: Introduction and Framework' (2005) 59 International Organization 801.

¹⁵⁴ ibid; see further Jan Breyers, 'Multiple Embeddedness and Socialization in Europe: the case of council officials' (2005) 59 International Organization 899.

In addition, it is important to recognise that not all judges in the EU are equally interested in or engaged in work at the EU level. It is those judges who *do* engage or participate in interaction at the European level who are interesting from the perspective of shared concerns and values or common mind-sets. Judges might be thought of in this way as an 'epistemic community', or a "transnational network of knowledge-based experts who help decision-makers to define the problems they face, identify various policy solutions and assess the policy outcomes".¹⁵⁵ By classifying judges within such groups as an 'epistemic community', differences in functional titles (i.e. Council, Network and so on) can be surpassed and there is room to focus on specific communities of judges within Europe and the output and impact of their work. Applying the concept of trust to judges in an epistemic community might help to explain how transnational cooperation among this group of actors on the European level might contribute to their own 'Europeanisation' through shared professionalism, shared culture or professional learning.

A combined socio-legal analysis of these three aspects or different 'points of interaction' (judicial networks, training and engagement with and through the CJEU) offers the potential to assess broadly the notion of trust between judges in the EU on the transnational level. It may also illuminate the nature and outputs of both top-down and bottom-up initiatives pertaining to harmonisation in relation to these communities and activities, if indeed a true 'European judicial culture' is to be formed.

V. Conclusion

In conclusion, we return to the question posed at the very beginning of this article: can a 'European judicial culture' between Member States of the EU be achieved? Research along the lines proposed in this article has the potential to provide an answer to this question by focusing on core dimensions relating to the concept of 'judicial culture' and using a mixed-method approach for analysing objects and developments in these dimensions. Furthermore, this outlined conceptual framework and research approach provides a helpful vocabulary for analysing judicial culture(s) more generally, also beyond the EU context.

In addition to the established literature on the concept of legal culture, the primary goal of this analysis has been to explore a systematic approach to the concept of 'judicial culture' and its operationalisation in interdisciplinary legal research on judicial systems. Based on Bell's definition, this article identified three core dimensions regarding the content of judicial cultures: 1) an ethical dimension, encompassing professional values and standards for judicial performance; 2) a legal dimension, encompassing judicial role perceptions on the interpretation of legal rules and concepts; and 3) an institutional dimension, encompassing the building of trust between judges.

The analysis in this article has demonstrated that by carefully establishing in which types of sources we can locate the respective dimensions, and by designing a methodology for analysing these sources, scholars can analyse judicial cultures in a more in-depth and systematic manner. In this way, specific conceptual 'lenses' become available for the collection of relevant information and empirical data, for the theoretical analysis and comparison of these results and eventually for a normative assessment of the possibility and desirability of convergence of judicial cultures. The three presented lenses of 'professional values and standards for judges', 'judicial role perceptions' and 'judicial trust' provide promising starting points for analysing both firmly established and developing judicial cultures in Europe. This analysis could contribute to further insight into questions on legal unity and its realisation in a context of diverging social pressures. Amidst these pressures, judges or judicial networks cooperating on a transnational level can give voice to the role of the judge or maintaining the rule of law, and make unified statements as regards related issues such as, for example, the independence of the judiciary in Hungary and Poland.¹⁵⁶ In the current EU context, we believe this research is timely in response to the crises described at the outset of this article as well as necessary at a more fundamental level of balancing aspects of legal unity and (legal-)cultural diversity.¹⁵⁷

¹⁵⁵ Peter M. Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46 *International Organization* 1–3.

¹⁵⁶ Concerning Hungary, see above 1. Concerning Poland, see Consultative Council of European Judges, Statement as regards the situation on the independence of the judiciary in Poland (Strasbourg 10 November 2017) <<https://rm.coe.int/statement-as-regards-the-situation-on-the-independence-of-the-judiciary/1680765391>> accessed 29 March 2018; Consultative Council of European Judges, Statement of the CCJE Bureau on the Polish Parliament's recent adoption of two Acts on the Polish judiciary and on the Draft Act on the Polish Supreme Court (Strasbourg 17 July 2017) <<https://rm.coe.int/statement-of-the-ccje-bureau-on-the-polish-parliament-s-recent-adoptio/1680739ed9>> accessed 29 March 2018.

¹⁵⁷ See above 1 and 2.

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The authors have no competing interests to declare.

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