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‘Stop the ECJ’?: An Empirical Analysis of Activism at the Court

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Abstract: *This article uses a disaggregated approach to study the role of the Advocate General in the European Court of Justice (CJ). It presents original empirical material based upon interviews with Advocates General (AsG) and referendaires at the CJ to assess the question of activism at the Court. Using answers to specific questions, I conclude that while the AsG are entrepreneurs, neither they nor the Court can be described as ‘activist’ per se.*

I Introduction

The European Court of Justice is manifestly no longer ‘tucked away in the fairyland Duchy of Luxembourg’. The new *Palais*, inaugurated on December 4, 2008, is a complex collection of buildings that, quite literally, consume the original *Palais* within a ring-like structure, alongside the original Court of First Instance and, most prominently, two high-rise towers (making unfortunate allusions to Tolkien difficult to suppress). The overall visual impact is one of enormous scale; but also, seeing the mismatched structures that differ from one another in almost every way—size, materials, scale—dysfunction. Within the Court of Justice, another striking image comes from the cavernous room in which the full court holds its *r union g n rale*. In particular, to accommodate 27 judges, eight Advocates General and the Registrar, the long table in that room is, quite simply, vast. What that picture suggests is that the possibility for organic, unstructured discussion is impossible to reconcile with the present size of this judicial college.¹

Originally comprising just one court with seven judges and two Advocates General, the Court of Justice of the European Union (CJEU) now comprises three courts—the Court of Justice (CJ), the General Court (former Court of First Instance) and the Civil Service Tribunal (CST)—with 61 judges in total and eight Advocates General. All courts are on the same site in Luxembourg. Given its initial size, it is not surprising that the CJ was studied as a monolithic institution. The salience of this approach has been challenged, however, as the European Union judicial infrastructure has grown: in 1997 Weiler argued that it would be erroneous to imagine the CJ as a ‘homogenous actor free of internal factions, disagreements and internal conflicted views on many issues’²; Craig and de Burca subsequently emphasised that ‘the Court is not a single unitary actor, but a collection of individual judges, Advocates General and other influential legal

¹ N. Nic-Shuibne, ‘Editorial’, (2009) *European Law Review* 1.

² J. Weiler, ‘The Reform of European Constitutionalism’, (1997) 35 *Journal of Common Market Studies* 95–131, 106.

personnel³; Grainger has likewise asserted ‘that the Court is not a unitary actor with monolithic preferences, but a complex social entity, where individual and collective preferences regarding the future of Europe are subject to transformation as a result of internal and external interactions’.⁴ These perspectives on the CJ have created new avenues for research, such as disaggregated studies.

This paper takes a disaggregated approach to the CJ, focusing in particular on the Advocate General (AG). According to Borgsmidt, there is no equivalent to the AG in any legal system of the member states.⁵ This may explain why, despite being a full and influential member of the CJ, the AG is chronically understudied.⁶ In exploring their world, the paper also draws attention to the influence of another understudied group in the CJ: the referendaires, or legal clerks. In the following pages, using original data gathered during interviews with these groups, I consider whether it is possible to understand the AG as a ‘cause lawyer’. In brief, cause lawyers can be described as lawyers who lobby, either on behalf of the strengthening of democratic and legal principles, or in pursuit of political and redistributive goals.⁷ They are activists, like Yvonne Hossack, a British solicitor whose campaign to highlight the mistreatment of elderly care home residents resulted in charges of serious professional misconduct. Three local council authorities—Northamptonshire, Hull and Staffordshire lodged complaints with the Law Society that her encouragement of the elderly to challenge the closure of their care homes wasted council time and money.⁸ Upon review of the facts, the authorities lost and Hossack was voted ‘Times Lawyer of the Week’.⁹

By linking the Advocate General to cause lawyering, I seek to explore the controversial question of activism at the CJ. Judicial activism is not a new idea, but is increasingly applied as a criticism of judicial behaviour.¹⁰ There is broad agreement that the expansion of judicial review (‘juridification’¹¹) via protection of human rights has spurred the development of a ‘juristocracy’—the transfer of power from representative bodies to judiciaries.¹² Yet judges are increasingly perceived as using their independence

³ P. Craig and G. de Burca, *European Union Law* (Oxford University Press, 2003), at 87.

⁴ M.P. Grainger, ‘The Future of Europe: Judicial Interference and Preferences’, (2005) 3 *Comparative European Politics* 155, 175.

⁵ K. Borgsmidt, ‘The Advocate General at the European Court of Justice: A Comparative Study’, (1988) *European Law Review* 106.

⁶ Only one book and a few articles focus on the Advocate General: N. Burrows and R. Greaves, *The Advocate General and EC Law* (Oxford University Press, 2007); T. Tridimas, ‘The Role of the Advocate General in the Development of Community Law: Some Reflections’, (1997) *Common Market Law Review* 1349; C. Ritter, ‘The Role and Impact of the Advocate General’, (2006) 12 *Columbia Journal of European Law* 3, 751; I. Solanke, ‘Diversity and Independence in the ECJ’, (2009) 15 *Columbia Journal of European Law* 1, 89. They are briefly mentioned in V. Perju, ‘Reason and Authority in the European Court of Justice’, (2009) 49 *Virginia Journal of International Law* 307.

⁷ A. Sarat and S. Scheingold (eds), *Cause Lawyering—political commitments and professional responsibilities* (Oxford University Press, 1998).

⁸ F. Gibb, ‘Yvonne Hossack cleared of professional misconduct’ *Times Online*, 18 September 2009. Available at <http://business.timesonline.co.uk/tol/business/law/article6840205.ece> (accessed 9 January 2010).

⁹ L. Tsang ‘Lawyer of the Week: Yvonne Hossack’ *Times Online*, 8 October 2009, available at <http://business.timesonline.co.uk/tol/business/law/article6863798.ece> (accessed 9 January 2010).

¹⁰ C. Green, ‘An Intellectual History of Judicial Activism’, (2009) 59 *Emory Law Journal* 5, 1195.

¹¹ L.C. Blichner and A. Molander, ‘What is juridification?’ (March 2005) ARENA Working Paper No. 14. Available at http://www.arena.uio.no/publications/working-papers2005/papers/wp05_14.pdf (accessed 18 March 2010).

¹² R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004).

to further their own policy preferences rather than protect citizens.¹³ Rasmussen first drew explicit attention to activism in the CJ in 1986.¹⁴ The label has stuck—despite its growth, the CJ as a whole continues to be described as an inherently ‘constructionist court that wants to advance the frontiers of European competence’¹⁵ on all occasions. More recently, eminent German jurists raised a battle cry to ‘Stop the ECJ!’—the *Mangold*¹⁶ ruling was taken as ‘only one of many judgments significantly interfering with competences of the member states’. Herzog and Gerken furthermore called for a judicial watchdog to oversee the CJ.¹⁷ Yet this vision of a ‘runaway court’ is not recognised by insiders—former CJ-judge David Edwards argues that there is at the Court ‘no propensity one way or the other (to stand back or creep forward)’.¹⁸

Given that the member states are responsible for nomination and appointment of the members of the CJ,¹⁹ and each state has its own vision of European integration, is a unified approach to EU law at the CJ really possible, or is the reality more differentiated, similar to the mismatched physical setting? Furthermore what level of evidence is proffered to support this criticism? Beyond the study of collective decisions of the Court, little empirical evidence exists to substantiate, moderate or refute these claims of CJ activism. The monolithic approach has discouraged micro-level studies but the lack of transparency in decision-making at the Court has also made detailed observation of the internal workings of the CJ near impossible. This paper attempts to fill this gap by presenting the individual perspectives of a specific group of members at the Court. Putting the idea of cause lawyering together with data collected during interviews with 20 Advocates General may shed new light on claims of activism. If the Court is intrinsically activist as charged, then the members must by definition be cause lawyers, using every opportunity to pursue an expansionist agenda. Thus, the information from these insiders will be revealing: it will tell us something important about the nature of the Court if we can describe the Advocates General—the only individually visible members of the CJ—as cause lawyers.

I begin in Section I with a background on the Advocate General, discussing the establishment of this role in the Court created for the European Coal and Steel Community (ECSC) by the Treaty of Paris, and their role in the ECSC and the subsequent European Court of Justice (Court) in the European Economic Community (EEC). In Section II, I sketch the present role of the Advocate General. Section III discusses cause lawyering in more detail, presenting examples in the UK and the EU. Having set the background, Section IV explains the layout and logic of the questionnaire and presents the findings. The reader should note that I use the pronouns ‘she’ and ‘he’ at whim in order to protect the identity of the study participants. Section V concludes that the evidence does not support assertions of constant activism: while

¹³ K. Bybee, *Bench Press: The Collision of Courts, Politics and the Media* (Stanford University Press, 2007).

¹⁴ H. Rasmussen, *On Law and Policy in the European Court of Justice* (Martinus Nijhoff, 1986).

¹⁵ Sir Stephen Wall in House of Lords European Union Committee, (2008) ‘The Treaty of Lisbon: an impact assessment’, *10th Report of Session 2007–2008* [4.168].

¹⁶ C-144/04 *Werner Mangold v Ruediger Helm* [2005] ECR 19981. For a less emotional response to the *Mangold* ruling see C. Toeblér, ‘Putting Mangold in Perspective’, (2007) *Common Market Law Review* 44, 1177.

¹⁷ R. Herzog and L. Gerken, ‘Stop the European Court of Justice’ Published in German on 8 September 2008 in the *Frankfurter Allgemeine Zeitung* (FAZ). Also available at *euobserver*, 10 September 2008 at <http://euobserver.com/9/26714/?rk=1> (accessed March 2010).

¹⁸ Sir David Edwards in House of Lords Report 2008 [4.168].

¹⁹ I. Solanke, ‘Diversity and Independence in the ECJ’, (2009) 15 *Columbia Journal of European Law* 1, 89.

some members may sometimes encourage the Court to move in a particular direction, no AG appears a committed cause lawyer by virtue of motives, method or mission. I suggest that if a single descriptor is to be applied to the CJ, it is more empirically accurate to call it entrepreneurial. However, given its current size, such labels might better be avoided altogether.

II The Advocate General in the ECSC and EEC

Although unique, the Advocate General (AG) is no novelty in EU law. Article 31 of the Treaty of Paris, which established the European Coal and Steel Community, provided for a Court to ‘ensure that in the interpretation and application of this Treaty, and of rules laid down for the implementation thereof, the law is observed’.²⁰ No further guidance of the character of judicial power at the CJ was given. Article 10 of the Protocol attached to the Paris Treaty set out that ‘the Court shall be assisted by two Advocates-General and a Registrar’. Under Article 11, the AG was mandated to act with ‘complete impartiality and independence’ and make ‘in open court, oral and reasoned submissions on cases brought before the Court, in order to assist the Court in the performance of the task assigned to it . . .’ This role of assistance excluded participation in ultimate judicial decision-making: the AG could help the Court find a decision, but not actually decide. This was left to the judges.

Even as non-decision making members of the Court, the Treaty of Paris subjected the AG to many of the same rules as judges: they were to be appointed in the same manner by ‘common accord of the Governments of the Member States for a term of six years from persons whose independence and competence are beyond doubt’; they were also subject to a partial replacement every three years, and eligible for re-appointment.²¹ As with judges, the Council could increase their number by unanimity and their duties terminated upon resignation, or death, in the case of the former continuing to hold office until a replacement was in post.²² They had to make an oath to perform ‘duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court’²³, enjoyed immunity from legal proceedings during and after office and Community privileges in all of the Member States,²⁴ were prevented from holding any political or administrative post or gainful occupation,²⁵ and were remunerated in a similar fashion.²⁶

However, there was a crucial difference in relation to removal from office. Under Article 7 of the Protocol, judges could be removed from office ‘only if, in the unanimous opinion of the other judges, he no longer fulfils the requisite conditions’.²⁷ Yet the decision to remove an AG was to be taken by ‘the Council, acting unanimously, after the Court has delivered its opinion’.²⁸ This suggests that initially the AsG were more susceptible to political pressure, being ultimately accountable to the government in their member states, rather than the—at that time—small and unestablished EU

²⁰ Art 31, Treaty establishing the European Steel and Coal Community, Paris, 18 April 1951.

²¹ Art 32 ECSC Treaty.

²² Protocol on the Statute of the Court of Justice (hereafter ‘Protocol’), Art 12, ECSC.

²³ Protocol, Art 2.

²⁴ Protocol, Art 3.

²⁵ Protocol, Art 4.

²⁶ Protocol, Art 5.

²⁷ Protocol Art 7.

²⁸ Protocol Art 13.

judiciary. At present both judges and AsG are removed from the CJ—primarily by non-renewal of tenure—by the member states.

The judicial structure designed for the EEC had a broader mandate and a more specific composition. Article 164 of the Treaty of Rome (EC)²⁹ similarly gives the Court the duty to ‘ensure that in the interpretation and application of this Treaty the law is observed’. In addition Article 177 EC³⁰ gives the CJ jurisdiction over the interpretation of the Treaty and the validity and interpretation of acts of the institutions.³¹ Article 166 EC (now Article 252 TFEU) incorporated the two AsG from the ECSC and gave them the same task—to assist the Court in its duties of interpretation and application of the Treaty.

The EEC created a Court that had a wider jurisdiction, and was more judicial in its authority. By 1957, the person specifications for members of the Court were slightly amended to define the meaning of ‘competence’: not only should they be persons of unquestionable independence, but also ‘possess the qualifications required for appointment to the highest judicial offices in their respective countries or be juriconsults of recognised competence’.³² This specification conferred a more judicial character on the EEC court in contrast to the more administrative nature of the ECSC Court. The development of a judicial profile enhanced the independent image of the CJ and its legal authority, although the Treaty has never explicitly excluded non-lawyers from CJ-membership.³³

The number of Advocates General increased with the enlargements of 1973, 1981 and 1986, as new seats were created to accommodate acceding states. Apart from a brief period in the 1990s when their number increased to nine, there have been eight AsG for the last two decades. The Lisbon Treaty has provided for this to change: Article 252 TFEU³⁴ states that the Court should be ‘assisted by eight Advocates General’ but Article 19(2) TEU³⁵ removes any numerical limit. Under Article 252 TFEU the number of AsG can be increased following a request of the Court of Justice and a unanimous decision by the Council. A longer table may soon be required: it would not be surprising if their number were to be increased as of the current 27 member states, only five—France, Italy, Germany, Spain and the UK—have a permanent AG. The remaining 22 countries share three seats which are allocated on an alphabetical rotating basis.³⁶

These changes were undoubtedly a response to the Polish demands for flexibility in the number of AsG, and in particular a permanent Polish AG.³⁷ The latter was not achieved, yet what did Poland seek to gain? The AG still has no judicial decision-making power in the CJ or elsewhere. Their duty remains to act with ‘complete impartiality and independence’ in making ‘in open court, reasoned submissions on cases which. . . require his

²⁹ Now Art 19(1) of the Lisbon Treaty on the Functioning of the European Union (hereafter ‘TFEU’) OJ C115/158, 9 May 2008.

³⁰ Now Art 267 TFEU.

³¹ Under Art 41 ECSC, the Court had ‘sole jurisdiction to give preliminary rulings on the validity of acts of the High Authority and of the Council where such validity is an issue in proceedings brought before a national court or tribunal’.

³² Art 167 EC (now 223 TFEU).

³³ Judge Vesterdorf, House of Lords EU Committee, 2006-7, HL 75 [99].

³⁴ Formerly Art 222 TEC.

³⁵ Treaty on the European Union, OJ C115/13, 9 May 2008.

³⁶ I. Solanke, ‘Diversity and Independence in the ECJ’, (2009), 15 (1) *CJEL*.

³⁷ M. Beunderman, ‘Poland seeks EU court adviser post in treaty talks’, *Euobserver* 3 August 2007, available at <http://euobserver.com/9/24684> (accessed 15 February 2010).

involvement'. It could be argued that their role has declined: as these last three words suggest, the AG need no longer give an Opinion on every case that comes before the CJ³⁸ and only rarely provides an Opinion for the General Court. In order to comprehend Poland's insistence, it is necessary to understand the influence of the AG on EU law.

III The Role of the Advocate General

Although full members of the Court, the work of the AsG is in some respects more akin to that of a lawyer than a judge, in so far as they research and develop lines of argument to enable resolution of legal questions, which may be accepted or rejected by judges. However, there are at least three important differences: firstly, unlike lawyers, the AsG do not have clients—they represent nobody but themselves and especially not the parties to a case. Second, they do not choose their own cases—these are assigned to each AG by the First Advocate General, an internal role that rotates on an annual basis. Third, they enjoy a large amount of autonomy as to the scope of issues that they pursue thus the Opinions sometimes include discussions beyond the factual circumstances of the case.³⁹ The Opinion produced by the AG is an independent and impartial assessment of the facts in a case assigned to them.⁴⁰ The Opinion has no set format: the linguistic style, length and content are determined solely by its author, the AG. The personal nature of this document is underlined by the fact that it is neither amended nor corrected by anybody other than the AG, it is not negotiated,⁴¹ and the AG signs her name beneath it. Such autonomy could hardly be imagined in the four words describing their formal task—'to assist the Court'.

The secrecy surrounding judicial deliberations makes it difficult to ascertain the extent to which the Opinion in fact 'assists' the Court. While it has been asserted that all decisions begin with the AG Opinion, this does not mean that its contents are the focus of discussions—the opinion may be brought to the fore to ask if any judge is in agreement with it, only to be swiftly swept aside if the answer is unanimously negative. There is no way of knowing what might happen if, for example, the chamber prefers the approach of the *juge rapporteur* (JR)—is the AG Opinion then put aside? Or vice versa, is the JR report put aside in favour of the AG Opinion? If all judges agree with the AG Opinion, will the JR present a draft in line with AG? If, however, the JR disagrees with the AG, will she or he submit a contrary draft? How do the judges then reach a decision—will each argument will be voted on separately? Sadly, answers to these intriguing questions will only be found when there is more transparency at the CJ.

Nonetheless, these four words belie the considerable influence of the AG, both in relation to individual cases and the long term development of EU law. It has been argued that the AG Opinion is often followed.⁴² Various methods have been used to

³⁸ In addition, the AG Opinion is not published when provided in a case dealt with under the accelerated procedure. See C. Barnard, 'The PPU: is it worth the candle? An Early Assessment', (2009) 34 *European Law Review* 2, 281.

³⁹ For example in Case 338/95, *Wiener S.I. GmbH v Hauptzollamt Emmerich* [1997] ECR I-6495 AG Jacobs discussed a rationalisation of cases dealt with under Art 234; in Case 413-01, *Franca Ninni Orasche v Bundesminister fuer Wissenschaft, Verkehr und Kunst* [2003] ECR I-13187, AG Geelhoed discussed the consequences of economic inactivity in relation to European Union citizenship.

⁴⁰ Online at http://curia.europa.eu/jcms/jcms/Jo2_7024/ (accessed 10 January 2010).

⁴¹ Case C17/98, *Emesa Sugar (Free Zone) N.V v Aruba* ECR [2000] I-675.

⁴² A. Arnall, A. Dashwood, M. Ross and D. Wyatt (eds), *Wyatt and Dashwood's European Union Law* (Sweet & Maxwell, 2000), and 195.

reach this conclusion: an immediate influence was highlighted by Tridimas whose statistical analysis found that in the first six months of 1997, the CJ ruling followed the opinion in 88% of cases.⁴³ In addition, an incremental influence⁴⁴ was identified by Ritter: he compared the number of times an opinion is cited in the corresponding judgment and concluded that the AG influence on ‘evolutions and reversals in the case law is beyond doubt . . . even where it is not followed, an opinion may influence the case law in the long term, in cases other than the case at hand’.⁴⁵

This evolutionary influence of the AG can be seen in case law on EU citizenship,⁴⁶ a concept created by the Member States in the Treaty of Maastricht in 1992, but developed primarily by the CJ.⁴⁷ For example, the idea that the right to equal treatment on the grounds of nationality in Article 12 EC (now Article 18 TFEU) was a citizenship right was one promoted by the Advocates General. In *Faccini Dori*⁴⁸ AG Lenz argued that ‘the introduction of citizenship of the Union raises the expectation that citizens of the Union will enjoy equality, at least before Community law’. Two years later AG Leger stated in *Boukhalfa*⁴⁹ that ‘taken to its ultimate conclusion, the concept (of EU citizenship) should lead to citizens of the Union being treated absolutely equally, irrespective of their nationality’. A year later, AG La Pergola suggested in *Piosa Pereira*⁵⁰ that ‘their (*Art 8-8e*) ultimate purpose is, after all, to bring about increasing equality between citizens of the Union, irrespective of their nationality’. Their arguments arguably created the pathway to adoption by the CJ: in *Martinez Sala*⁵¹ the Grand Chamber of the CJ finally stated that:

Article 8(2) of the Treaty attaches to the status of citizen of the Union the rights and duties laid down by the Treaty, including the right, laid down in Article 6 of the Treaty, not to suffer discrimination on grounds of nationality within the scope of application *ratione materiae* of the Treaty.

In *Bidar*⁵², AG Geelhoed added potency to the idea of EU citizenship by suggesting that the economically inactive person who moves to another member state and subsequently decides to undertake study (as compared with those who move for the purpose of study) should also profit from the protection of the Treaty.⁵³ The AsG continue to pioneer the content of EU citizenship—in *Metock*, AG Sharpston invited the CJ to address the problem of ‘reverse discrimination’ by applying Article 21 TFEU to

⁴³ T. Tridimas, ‘The Role of the AG in the Development of Community Law: Some Reflections’, (1997) *Common Market LawReview* 1349.

⁴⁴ J. Bengoetxea, *The Legal Reasoning of the European Court of Justice: towards a European jurisprudence* (Clarendon Press, 1993). For example, in relation to citizenship: Burrows and Greaves, (2007).

⁴⁵ C. Ritter, ‘The Role and Impact of the Advocate General’, (2006) 12 *Columbia Journal of European Law* 3, 751, 770.

⁴⁶ J. Shaw, ‘The Interpretation of European Union Citizenship’, (1998) 61 *Modern Law Review* 3, 293; S. Douglas-Scott, ‘In Search of Union Citizenship’, (1998) 18 *Yearbook of European Law* 29; N. Reich and S. Harbacevica, ‘Citizenship and Family on Trial: A Fairly Optimistic Overview of Recent Court Practice with Regard to Free Movement of Persons’, (2003) 40 *Common Market Law Review* 615.

⁴⁷ M. Aziz, ‘Implementation as the Test Case of European Union Citizenship’, (2009) 15 *Columbia Journal of European Law* 282.

⁴⁸ Case 91/92, *Paola Faccini Dori v Recreb Srl* [1994] ECR I-03325.

⁴⁹ Case 214/94, *Ingrid Boukhalfa v Bundesrepublik Deutschland* [1996] ECR I-02253.

⁵⁰ Case 4/95 and 5/95, *Fritz Stöber and José Manuel Piosa Pereira v Bundesanstalt für Arbeit* [1997] ECR I-00511.

⁵¹ Case 85/96, *Martinez Sala v Freistaat Bayern* [1998] ECR I-2691.

⁵² Case 209/03, *The Queen on the application of Dany Bidar v London Borough of Ealing Secretary of State for Education* [2005] ECR I-2119.

⁵³ *Bidar* at [12]–[19].

nationals of a Member State who had never exercised their free movement rights under EC law.⁵⁴ Without these inputs, it is likely that EU citizenship would be significantly weaker than it is today. The development of the concept of state liability followed a similar pattern—suggestions in the AG Opinion for *Francovich*⁵⁵ were not followed completely, but were later adopted in *Brasserie du Pecheur* and *Factortame*.⁵⁶

As put by AG-04, the Advocate General can show the way even if not followed immediately. The AG is an important figure for Poland because these personal pronouncements on EU law, whether or not followed by the Court, have ‘persuasive weight’.⁵⁷ Even when not commented upon by the CJ, the Opinion becomes an integral part of the *acquis jurisprudentiel*⁵⁸ and may even be used in future cases.⁵⁹ The influence of the AG therefore extends beyond the specific case at hand. As Ritter concludes ‘even where it is not followed, an opinion may influence the case law in the long term, in cases other than the case at hand’.⁶⁰ This gives the AG a central role in the evolution of EU law and European integration in both the long and short term. Yet does this make her an activist cause lawyer?

IV Putting the Advocate General in Context

While disaggregation allows focus to be placed specifically upon the AG and their referendaires, an interdisciplinary approach allows this role to be explored in a broader context. I have chosen to use the idea of cause lawyering as a standard against which to evaluate the prevalence of activism at the CJ. Cause lawyering is appropriate because it is a practice which utilises litigation to pioneer legal reform. Despite not being litigants, litigation is also the key tool of the AG and as shown above, it is used to develop and reform EU law. The motives, working methods and sense of mission separates cause lawyers from conventional lawyers: the former use litigation to promote certain values, explicitly allowing personal convictions and legal principles to inform their work.⁶¹ It can help to think of two key categories of cause lawyering: ‘rule of law’ and ‘political’. These categories are of course sensitive to issue and place: human rights activism would be seen as ‘rule of law’ in most Western democracies, but as political lawyering in a state where human rights values are perceived to threaten state authority.

Rule of law cause lawyering is the most common, perhaps because the most acceptable to the mainstream legal profession. This form of lawyering activity focuses on the use of legal tools to secure and enhance the values of liberal legal systems: equal rights,

⁵⁴ See N. Cambien, ‘Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform’, (2009) 15 *Columbia Journal of European Law* 321.

⁵⁵ Case 6 and 9/90, *Francovich and Others v Italy* [1991] ECR I-5357.

⁵⁶ Case 46/93, *Brasserie du Pecheur SA v Germany* and Case 48/93, *R v Secretary for Transport ex p Factortame Ltd and Others* [1996] ECR I-1029.

⁵⁷ Z. Yaqub, ‘Lawyers in the European Community Courts’, in A. Tyrell and Z. Yaqub (eds), *The Legal Profession in the New Europe* (Blackwell Publishers, 1993), at 41.

⁵⁸ T. Tridimas, ‘The Role of the AG in the Development of Community Law: Some Reflections’, (1997) *Common Market Law Review* 1349, 1385.

⁵⁹ A. Arnall, A. Dashwood, M. Ross and D. Wyatt (eds), *Wyatt & Dashwood’s European Union Law* (Sweet & Maxwell, 2000), at 196.

⁶⁰ Ritter (2006, 770–771).

⁶¹ A. Sarat and S. Scheingold, ‘Cause lawyering and the reproduction of professional authority’, in A. Sarat and S. Scheingold (eds), *Cause Lawyering—political commitments and professional responsibilities* (Oxford University Press, 1998), at 3.

due process, building civil society, promotion of transparency and accountability. The work of many human rights activists would fall into this category. Those using law and litigation to uphold and strengthen democracy are usually lauded for going beyond the requirements of private practice to improve the lot of society as a whole. In contrast, political cause lawyering can be more controversial: it is often ideologically informed and includes redistributive goals. This type of lawyering activity involves a deeper solidarity with clients and can include overt lobbying, establishment of interest groups as well as the use of the media, marches and other forms of direct action to draw attention to issues. Unlike rule of law cause lawyering, lawyers who politicise their legal practice via deployment of non-legal methods and tools may suffer marginalisation by the profession.

These two forms of lawyering thus have very different outcomes for the participants. While the former type of lawyering can enhance careers, the latter can potentially harm them. Rule of law lawyering finds more credence with legal professionals. Michael Mansfield could count upon much support for his work in routing out institutional racism within the Metropolitan Police and was praised for his work on the case of murdered black teenager Stephen Lawrence. By contrast, Imran Khan, a lawyer who used the media to sustain attention on the case of Stephen Lawrence for years until the government agreed to hold a public enquiry, was seen to transgress professional codes for his pursuit of justice using explicitly political tools.⁶²

Is cause lawyering present within the EU? At least two examples—one rule of law and the other political—stand out. The case of *Defrenne*⁶³ was the result of a long and lonely campaign fought by a Belgian lawyer, Elaine Vogel-Polsky. In a series of cases, Vogel Polsky had the CJ deliberate upon whether Article 141 EC (now Art 157 TFEU) created direct effects, such that the right to equal treatment on the grounds of gender could be claimed before a national court.⁶⁴ Her mission began with an article written in 1967, where she compared the direct effect of Article 95 EC (now Art 114 TFEU) on discriminatory taxes with Article 141 EC.⁶⁵ In the face of opposition from the trade unions, she was finally able to test her theory via litigation for equal pay brought by air-hostess Gabrielle Defrenne against her employer, Sabena Airlines. Vogel-Polsky's crusade turned Article 141 EC into the fulcrum for the expansion of gender equality rights in EU law.⁶⁶ Following on from her success, the Commission encouraged groups in the member states to pursue a similar strategy.⁶⁷

A second example is the case of the footballer *Bosman*.⁶⁸ Marc Bosman's campaign for freedom from the tyranny of football transfer rules was championed by Belgian lawyer Jean-Louis Dupont. Dupont successfully argued before the CJ that any third-

⁶² A. Boon, 'Cause Lawyers in a Cold Climate', in A. Sarat and S. Scheingold (eds), *Cause Lawyering and the State in a Global Era* (Oxford University Press, 2001), at 153.

⁶³ Case 43/75, *Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena* [1976] ECR 455.

⁶⁴ See K.J. Alter and J. Vargas, 'Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy', in C. Harlow and R. Rawlings *Pressure Through Law* (Routledge, 1992), at 283.

⁶⁵ C. Hoskyns, *Integrating Gender: Women, Law and Politics in the European Union* (Verso, 1996), at 68.

⁶⁶ R.A. Cichowski, 'Women's Rights, the European Court, and Supranational Constitutionalism', (2004) 38 *Law and Society Review* 3, 489.

⁶⁷ K. Alter, 'The European Court's Political Power Across Time and Space', Northwestern Law and Econ Research Paper no 09-03. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1334328.

⁶⁸ Case 415/93, *Union Royale Belge des Sociétés de Football Association ASBL and Others v Jean-Marc Bosman and Others* [1995] ECR 4921.

party (ie club) control of the movement of players between jobs breached the Treaty rules on free movement. The radical changes to FIFA's rules made the regime for player transfer compatible with Article 39 EC (now Art 45 TFEU) on free movement of workers. Dupont is credited with 'turning football on its head'⁶⁹ by empowering players: collective bargaining subsequently became a feature in professional football and the minimum wage for players doubled.⁷⁰ The impact of the case continues to pervade the sport: last year Argentinean striker Carlos Tevez was said to be considering a 'Bosman-style transfer'⁷¹ to Manchester United Football Club.

Cause lawyering with or within state institutions is not a contradiction in terms⁷²—it is not by definition distant from the state, although it tends to be more prevalent in polities tolerant of democratic pluralism.⁷³ It can also be applied to those working for official authorities. This is, however, most likely to occur where the public and/or the governing administration support the reforms pursued. Bob Hepple QC, for example, who was a key advocate for the British Race Relations Acts, worked closely with the Labour Government to achieve this. It is also possible for cause lawyers to work within networks linked to or maintained by governing authorities. At the European level, for example, the Starting Line Group⁷⁴ worked closely with the European Commission and European Parliament to develop a provision prohibiting discrimination for insertion into the Treaty of Rome at Amsterdam. The Starting Line Group comprised a number of national statutory bodies, such as the Commission for Racial Equality⁷⁵ in the UK, the Dutch National Bureau Against Racism, and the Churches Commission for Migrants in Europe. It is therefore not contradictory to speak of lawyering with or within government institutions, but is it possible to use the idea to assess behaviour within a court? It might be argued that the idea of lawyering is misplaced in a judicial context. Here too, however, there are examples in Europe and in the CJ.

Baltasar Garzon, a judge in Spain's National Court, is an example of an activist judge. He is perhaps most famous abroad for issuing the international arrest warrant in 1998 that led to the detention in London of Chilean dictator General Pinochet. Garzon was also responsible for the trials and incarceration of Al-Qaeda operatives in Madrid. He has waged a series of battles against organised crime, narcotics traffickers, counterfeiting and corruption at a national and regional level. In 2008 he re-opened a national taboo by launching an investigation into the 'crimes against humanity' of the Franco regime. However, his planned excavation of mass graves caused huge public outcry and the

⁶⁹ P. Chapman, 'Transfer accord certain to face challenge, says Bosman lawyer', *European Voice*, 8 March 2001.

⁷⁰ A. Caiger and S. Gardiner, *Professional Sport in the European Union: Regulation and Re-Regulation* (TMC Asser Press, 2000).

⁷¹ B. Glendenning, 'Football transfer rumours: Carlos Tevez to stay put or go to Milan?' *The Guardian*, Wednesday 13 May 2009. Available online at <http://www.guardian.co.uk/football/2009/may/13/football-transfer-rumours-tevez-milan> (accessed 4 March 2010).

⁷² A. Sarat and S. Scheingold (eds), *Cause Lawyering and the State in a Global Era* (Oxford University Press, 2001), at 390.

⁷³ *ibid*, at 400.

⁷⁴ There is also evidence of cause lawyering beyond the ECJ. The Starting Line Group—a pan-EU coalition of lawyers and NGOs which in the 1990s lobbied for a formal Treaty prohibition of racial discrimination—provides a good example of this. See, I. Chopin, 'The Starting Line Group: A Harmonised Approach to Fight Racism and to Promote Equal Treatment', (1999) 1 *European Journal of Migration and Law* 111.

⁷⁵ Renamed the 'Equality and Human Rights Commission' by the Single Equality Act 2006.

investigation was subsequently abandoned.⁷⁶ Garzon, who wanted to be a missionary, has been called a ‘Superjudge’ but simply sees his work as necessary for society: for him ‘social commitment is very important, almost vital’.⁷⁷ His campaigns have led to death threats and more recently to accusations of abuse of judicial authority. A series of writs before the Supreme Court⁷⁸ now threaten to end his career at the National Court.

Cause lawyering in the CJ can be seen in the earlier discussion outlining the development of the substance of citizenship in Article 21 TFEU. A further example is the promotion by members of the EU judiciary of less restrictive rules on direct access for non-privileged parties under Article 230 EC (now Art 263 TFEU). In 2000, citing concerns with access to justice, AG Jacobs called upon the Court to change the strict test that it had devised to determine standing for individuals in actions for annulment under Article 230(4). Many parties had been unable to seek a remedy under EU law because they could not show that they were individually concerned by the measure that they sought to challenge.⁷⁹ According to the traditional test of individual concern, laid down by the CJ in *Plaumann*,⁸⁰ for natural or legal persons to be regarded as individually concerned by a measure not addressed to them, it must ‘affect their position by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee’.⁸¹

AG Jacobs used his Opinion in *UPA*⁸² to raise concerns that the *Plaumann* test limited access to justice in a way which was unnecessary and damaging: unless an individual were willing to break the law, she had little opportunity for a direct hearing before the CJ.⁸³ Challenging the traditional interpretation of the Court, he argued that there was ‘no compelling reason to read into the notion of individual concern “a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee”’.⁸⁴ He proposed a more subjective test which recognised potential impact:

... a person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests.⁸⁵

The response is evidence that the court does not always agree with its AsG: this idea was roundly rejected by the judges, who argued that it was incumbent upon the member states ‘if necessary, in accordance with Article 48 EU, to reform the system currently in

⁷⁶ ‘Profile: Judge Baltasar Garzon’, available at <http://news.bbc.co.uk/1/hi/3085482.stm> (accessed 12 March 2010).

⁷⁷ ‘Biography of Baltasar Garzon’, available at <http://www.rfkcenter.org/sttp/country/spain> (accessed 12 March 2010).

⁷⁸ G. Tremlett, ‘Spain’s “superjudge” Garzon faces rightwing backlash’, *The Guardian*, 12 March 2010, available at <http://www.guardian.co.uk/world/2010/mar/12/spain-garzon-superjudge-rightwing-backlash> (accessed 15 March 2010) 24; G. Tremlett, ‘Don Quixote—or a superhero?’ *The Observer*, 19 October 2008, available at <http://www.guardian.co.uk/world/2008/oct/19/spain-franco> (accessed 15 March 2010).

⁷⁹ C. Koch, ‘Locus Standi of Private Applicants Under the EU Constitution: Preserving Gaps in the Protection of Individuals’ Right to an Effective Remedy’, (2005) 30 *European Law Review* 4, 511.

⁸⁰ Case 25/62, *Plaumann v Commission* [1963] ECR 95, 107.

⁸¹ *Plaumann* [27].

⁸² Opinion of AG Jacobs delivered on 21 March 2002, Case C-50/00P, *Union de Pequeños Agricultores v Council of the European Union* [2002] ECR I-06677.

⁸³ *Plaumann* [43].

⁸⁴ *Plaumann* at [59].

⁸⁵ AG Jacobs in *UPA* at [60].

force'.⁸⁶ It repeated its adherence to the *Plaumann* test—albeit less robustly—in the subsequent case of *Jégo-Quèrè*.⁸⁷ Clearly the CJ did not see itself as a public interest court—in these cases, it clearly indicated that increased access was to be granted via legislative rather than judicial action.

AG Jacob's Opinion in *UPA* engaged in rule of law cause lawyering: the values he espoused prioritised respect for the traditional legal principle of access to a remedy. It is clear that the AG was not demonstrating solidarity with any particular cause or ideology but a concern for the integrity of the EU legal system. It can be argued that those AsG who promoted the idea of equal treatment in relation to citizenship were pursuing a similar cause. Does this demonstrate that Jacobs and these others were activists in the CJ? The empirical evidence must now be explored.

V Activism Assessed—Is the Advocate General a Cause Lawyer?

Interviews were conducted between July 2006 and February 2007. I spoke with 20 former and (then) current AsG at the CJ. I also spoke to ten referendaires. The questionnaire contained a mixture of attitudinal and organisational questions, designed to assess motives, methods and the idea of a mission. The 38 questions were split into eight themes: Recruitment, The Role of the AG, The Opinion, Working Norms, Referendaires, Enlargement, Communication and Sources of Information, Chambers, and Judgments. The questions upon which this paper is based came from the sections on the Role of the AG, Working Norms and the Referendaire. These questions give some indication of the motive of the AsG, their working methods and their reaction to the concept of a mission. The empirical data focuses on attitudinal and organisational information given in response to four specific questions: first, 'Does the Advocate General provide a service? If so, who benefits?' second, 'For whom does the Advocate General write the Opinion—the CJ or the Chamber?' third, 'How do you organise your Chamber?' and fourth, 'Does the Advocate General have a mission?'

A Understanding the Motives of the Advocates General

Two specific questions were designed to identify the motives of the AsG. First, they were asked how they see their role. The questionnaire contained an item which asked: 'Does the AG provide a service? If yes, to whom?' I hoped to discover the attitude with which the AsG approached their task. My hypothesis was that the more oriented towards service and mindful of the impact of law beyond the CJ, the higher the

⁸⁶ Case 50/00, *Union de Pequeños Agricultores v Council of the European Union* [2002] ECR I-06677 [44]. The member states did agree to change the rules on *locus standi* in direct actions before the ECJ—the new Art 263(4) TFEU provides that an individual has standing to challenge a 'regulatory act which is of direct concern to them and does not entail implementing measures'. A 'regulatory act' has, however, not been defined.

⁸⁷ Another alternative test was proposed by the Court of First Instance in Case T-177/01, *Jégo-Quèrè & Cie SA v Commission of the European Communities* [2002] ECR II-02365 [51]: 'a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner that is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard'. It was also rejected by the ECJ in Case 263/02P, *Commission of the European Communities v Jégo-Quèrè et Cie SA* (Opinion written by AG Jacobs, 1 April 2004 [45]).

likelihood of an activist motivation. A positive answer could infer awareness of the public impact of judicial decisions. The responses displayed a range of emotions from distaste with the idea of service to emphatic acknowledgement of it. Those who agreed can be separated into two groups—those for whom service was provided to the CJ, and those who identified a wider audience.

Only one AG answered in the negative, stating that the AG does not provide a service because the CJ has no clients.⁸⁸ Most answered ‘Yes’, some with qualifications. A couple of AsG expressed disquiet with the word ‘service’—AG-07 preferred ‘working for’ as service could give the impression of ‘serving’ which would undermine the mandatory independence of the AG. For him, the AG worked as a teacher, developing EU law and educating lawyers.⁸⁹ AG-23 also qualified the word: ‘If provision of justice is seen as a “service” then yes. Otherwise no: the AG is part of the process of justice. S/he provides justice in specific cases’⁹⁰ Activist motivation cannot be assumed of these Advocates General.

The idea of service had more resonance for a second group, but service was only provided to the CJ. Of those who answered yes without qualification, AG-08 was the most emphatic, exclaiming ‘of course! What else?’⁹¹ For all who agreed with the question, the main service recipient was the CJ: the key task was to help the Court. For AG-12, the AG had to be ‘helpful to the case’ by using the time given ‘to structure the problem, weigh arguments, make considerations which the judges can’t make such as ethical and political implications’.⁹² For AG-19, the AG provides a basic service to the Court to further develop EU law by building stepping stones between case law: the role demanded ‘a sense of entrepreneurship’.⁹³ For one AG, the Court was the only body to which the AG provided a service: as the work of the judges was ‘the most important so AsG should try to be as great a help to the judges as possible’.⁹⁴ For this group, service was taken for granted and for one AG at least, entrepreneurship was central to this service. However, this service was provided to the CJ rather than to a wider audience.

A third group looked beyond the CJ to mention service to the parties to the case, the legal community and academics. AG-04 said that the AG has a duty towards parties, member states and the CJ ‘to say what he is convinced of even if he knows that he won’t be followed’.⁹⁵ For AG-13, the AG also provided a service to the academic community and judges in the member states.⁹⁶ A few mentioned the general public, European citizens and the media. AG-05 said that the AG ‘helps the Court in its reflections and to make up its mind by analysing the arguments of the parties, the soundness of arguments and studying precedents’. Secondary beneficiaries included legal professors and the public who were likely to better understand the judgment after reading the Opinion.⁹⁷ AG-22 spoke of service to the Court, the public and the academic community while stressing that the main task was to be a co-operative

⁸⁸ AG-18, November 2006.

⁸⁹ AG-07, December 2006.

⁹⁰ AG-23, October 2006.

⁹¹ AG-08, January 2007.

⁹² AG-12, February 2007.

⁹³ AG-19, October 2006.

⁹⁴ AG-10, February 2007.

⁹⁵ AG-04, January 2007.

⁹⁶ AG-13, August 2006.

⁹⁷ AG-05, November 2006.

member of the CJ, providing an alternative independent perspective on cases. AG-03 shared this broad perspective—the most immediate service was to the Court and to the lawyers; but beyond this to academics, the media and the general public.⁹⁸ AG-17 mentioned service to the legal community in the EU and—given that the Opinions are available in 20 different languages—to the world.⁹⁹ Although their purview was wider than the second group, a sense of an activist agenda was missing from this group. The purpose of the wider outreach appears to be one of disseminating understanding rather than influence.

A subsequent question approached motivation from another perspective. I asked ‘For whom do you write the Opinion—the CJ or the judicial chamber?’ This question focused more directly on a putative audience. With it, I hoped to discover whom the Advocate General wanted to reach in their work—who did they think of as they wrote? An AG who wrote for a broader audience might be assumed to want to influence public opinion thus the answers could highlight awareness of the public impact of their work. The answers gave a good indication as to how relevant the AsG imagined their work to be within and beyond the Court but did not suggest a broad motivation as associated with cause lawyers. The responses demonstrated a limited sense of audience and a surprising level of introspection, given the previous answers.

While all said that they wrote for the Court, some wrote only for the case, others for the parties,¹⁰⁰ or even for the judges.¹⁰¹ For example, AG-10 felt her task was to make the case understandable for the judges, especially in technical cases where a risk existed that the judge might miss something. Writing for other groups was less important.¹⁰² One AG recalled writing an Opinion to persuade a particular judge in a three person chamber.¹⁰³ Only five AsG mentioned awareness of a larger ‘audience’—academics, MS judges and practitioners.¹⁰⁴ AG-12 said that the Opinion was a document to ‘convince the Court how the case should be solved’ but also for the wider legal community.¹⁰⁵ AG-18 said for ‘the Court, for the judges, for academics and MS judges’ and AG-22 simply said ‘everybody’. AG-07 wrote for the ‘CJ, knowing that it would be published and read by all’.¹⁰⁶ For AG-17 the Opinion had no specific audience—‘he who wants benefits’.¹⁰⁷

Taken together, the responses to these questions on motivation seem to suggest that for most AsG, their role is one of service, primarily to the Court but also to EU law in general. An activist motivation might be assumed for AG-12 and AG-19 but both recognised a limited audience for their work. One can conclude from this that the motivation of the majority is to develop EU law rather than pursue a policy agenda. The larger group which acknowledged a broader audience for the Opinion, did not display the motivation linked to activism. Only three AsG (AG-07, AG-12 and AG 17) were present in both groups: these AsG may be more likely to engage in activism. Would observation of their working methods confirm this?

⁹⁸ AG-03, January 2007.

⁹⁹ AG-17, October 2006.

¹⁰⁰ AG-15, February 2007.

¹⁰¹ AG-02, November 2006.

¹⁰² AG-10, February 2007.

¹⁰³ AG-03, January 2007.

¹⁰⁴ AG-20, October 2006.

¹⁰⁵ AG-12, February 2007.

¹⁰⁶ AG-07, December 2006.

¹⁰⁷ AG-17, October 2006.

B The Organisation of the Advocate General Chamber

The above answers do not give enough information to determine if the Advocates General are cause lawyers. To explore further I delved into the working methods of the AsG. My assumption is that the more the AG works in isolation from her referendaires, the less likely she will be a cause lawyer. This is because according to the theory, cause lawyers work in co-operation with others, either in an ad hoc organisation or an established non-governmental organisation. Reformers must work with others if they hope to promote their ideas. So how do the AsG organise their work? What is life like in their Chambers?

The working patterns in a Chamber are very much determined by the AG who leads it—there is no single culture imposed by the Treaty. Management style is a mixture of personality and experience, and is also influenced by the different writing habits and stylistic preferences. It was therefore surprising to discover that the organisation within the Chambers was very similar, differing only in degree. In most chambers the drafting would be left to the referendaires while the AG undertook edits. The more stylistic the Opinion, the heavier the editing by the AG. In all cases the ultimate decision remained with the AG—changes are made until she is happy to sign her name beneath it. In each Chamber referendaires were responsible for the preparation of drafts. This was accepted as best practice—I was told: ‘If cabinet is a well functioning machine, referendaires can prepare a draft’.¹⁰⁸ However, the referendaires rarely begin with a blank sheet. The AG retained control in two ways: via distribution of the case-files¹⁰⁹ and establishment of the approach that the referendaire must follow. This was the most common pattern, which differed only in the extent to which the referendaire could contribute to the approach. Few were given this freedom.

AG-15 explained the typical pattern: cases would be distributed to the referendaires when they arrived in the Chamber, and after identification of the problem, he gave the general direction so that the referendaires could prepare a draft for editing. Likewise AG-02, AG-05 and AG-10 would set out the structure for the referendaires to work with. AG-02 would, however, depart from this if the case was more complex. Referendaires were then left to conduct their own research, using library materials and documents from the Commission and Member States.¹¹⁰ The same applied in the Chamber of AG-01: each clerk took a case to work on independently but if it were identified as an important case the AG would assert more control. AG-12 described the process as ‘sparring’—his directions to the referendaires would be open to debate. Sparring was also the practice in the Chamber of AG-23: ideas would be discussed, making the Opinions a mixture of the AG and referendaires, albeit in line with the legal reasoning set down by the AG. However, if the legal point was more intricate, AG-23 would give the referendaire the exact text. AG-18 brought all referendaires together to discuss cases, sent them away to draft and then edited these to suit his style.

Some referendaires were given more scope to innovate. AG-07, after distribution, began by asking the referendaire to read the file and make a draft. After correction, the draft would be returned and re-worked. This was an intensive procedure, repeated every two days and involving the whole Chamber: all referendaires would see and comment upon the work of their colleagues. This made the Opinion a ‘collective

¹⁰⁸ AG-20, October 2006.

¹⁰⁹ Within the Court, the First AG distributes cases between the eight AG Chambers.

¹¹⁰ AG-02, November 2006.

work'.¹¹¹ Similarly, AG-19 described the chamber as a 'small atelier' and the production of the Opinion as a 'joint venture from beginning to end'. Cases were distributed according to the qualities, interests and existing workload of the referendaires. A first discussion generated an initial direction and analysis. This was followed by discussion of a solution and the creation of a first draft. This co-operation was vital for meeting deadlines. AG-17 also saw referendaires as colleagues crucial to his own success, to the extent that he had not written a paragraph of any of his 400 Opinions. This is indeed possible if, as in this case, the referendaires are treated as jurists in their own right. He would discuss cases and lay down the direction to be taken but the referendaires would always write the Opinion.

What do these working methods tell us? First, it seems rare for an AG to draft an Opinion from start to finish. This did sometimes happen, if the AG had strong views on a case or if there were new points to be made.¹¹² AG-04 also said that if it were a difficult case he would personally write a draft. AG-06 and AG-08 would also do this if they liked the case. This, however, was the exception—a 'delibere' with the referendaires on cases was the norm. Second, and perhaps more importantly, these details highlight that without exception, the AG places huge trust and reliance upon their referendaires. All depend on them almost exclusively for input. Discussion with the referendaire was described as 'an important dialogue'¹¹³ that improves the quality of work in a well-functioning Cabinet.

This suggests that the referendaire is in a pivotal position to shape EU law: theirs is an 'informal privilege'.¹¹⁴ While the AG need not convince other members or make concessions to them, the same is not true of the relationship with the referendaires who in most cases is the only interlocutor for the AG. The AG not only makes concessions, but in some cases will adopt the line of the referendaire, not always without later regret.¹¹⁵ While close interaction between the AG and referendaire may have been easier in the smaller Court, it is perhaps more important in a larger court. As AG-04 put it the two work together in close co-operation and 'the AG must adapt to the personality of the referendaire but the referendaire must also adapt to AG'. Very experienced referendaires could be a mixed blessing. On the one hand they could relieve the AG of management duties: AG-13 for example would discuss the case allocation and direction with a senior referendaire. However, if the AG has less knowledge of EU law than the referendaire, this can be a disempowering scenario: a less well-informed AG might become at best dependent or at worst dominated. In these cases it is necessary for the AG to 'emancipate' themselves.¹¹⁶

These are important observations but what do they tell us about activism at the court? It is very difficult to draw any firm conclusions from the reported working methods, which seem to be fundamentally similar, differing only in degree of review and control. AsG-07, 12 and 17, who were the most likely activists in relation to motivation, all appear to occupy different positions on the spectrum of scrutiny: AG-07 and AG-17 sit at opposite ends, with the former working intensively with the referendaires and the latter adopting an extreme 'hands-off' approach while AG-12 sits in the

¹¹¹ AG-07, December 2006.

¹¹² AG-23, October 2006.

¹¹³ AG-02, November 2006.

¹¹⁴ AG-15, February 2007.

¹¹⁵ AG-07, AG-08, AG-15.

¹¹⁶ AG-03, January 2007.

middle, enjoying the sparring but maintaining both distance and control. The clearest conclusion may be drawn from alterations to the normal working procedure—such departures could indicate that the Advocate General intends to develop a particular principle or policy. An AG departure from this norm could be taken to infer that there were indeed moments when she took on the mantle of a cause lawyer and sought to make specific points. Thus, one might surmise from the response to this question that an AG is a sporadic cause lawyer, an activist when an opportunity presents itself. This conclusion is to some extent supported by the responses to the following question.

C Does the Advocate General have a Mission?

A final question I put to the AsG was more direct. I asked: ‘Does the Advocate General have a mission?’ The responses fell into three clear categories: yes, no and perhaps. One particular response illustrates the equivocal nature of the replies received. AG-10 initially objected saying ‘mission is not a nice word’. She went on to explain that former judge Mancini was reprimanded when he said that the Court had a mission. However, she then noted that the word has a different nuance in French, suggesting a task rather than a fixed goal. In her opinion, EU law was about creating integration and ever closer Union, thus if two different interpretations are possible, then ‘the route should be chosen which furthers integration’. This is clearly not said in any judgment, but I was told that this is in the minds of the judges. However, she then said that the AsG did not have a mission *per se*, but a goal to interpret according to the ‘*effet utile*’, to create a coherent legal system and develop it as well as possible.

The mission of the AG was clearer for others. Some gave a narrower interpretation of this than others. For example, AG-03 told me that the mission of the AG was ‘none other than that mentioned in the Treaty—to assist the Court in the application of EC law’. AG-02 also answered in the positive: the AG mission is to enforce and guard the Treaty. According to AG-04 ‘we all have missions—*je fait que j’ai peut*’.¹¹⁷ For him, one mission of the AG was educational: to help newer AsG find their way in the CJ and EU law. A much broader interpretation was given by three AsG. For AG-06 it was clear that the AG had a mission, and the nature of this depended upon the period of the CJ: ‘In changing times, the AG may or may not be able to give a decisive contribution to the evolution of EC law but the AG can open new ways. Sometimes she is successful at the first attempt, sometimes not. If the AG is unsuccessful, the next could succeed’.¹¹⁸ The AG had a mission to assist and advise the Court so as to be useful to its decision making, but also to ‘pave the way’ by taking risks. However, the AG had to be strategic: if Court refuses the AG line twice, then rather than insist the AG could alternatively write academic articles to generate a following beyond the Court. A good academic reception would enable the AG to push for this to be considered by Court the next time. AG-05 also stated that the role of the AG is to ‘show the way forward... The mission of the AG is to develop jurisprudence. The AG must find a just and equitable solution but also has a mandate to open new avenues’. The AG is able to take on this developmental task because she can situate the case in both the court history and case history. AG-13 mentioned the citizenship case law as an example of where the AG had taken on a pioneering role. In such areas the AsG essentially tell the Court that

¹¹⁷ ‘I did what I could’.

¹¹⁸ AG-06, December 2006.

its previous answer was not good enough and the Opinion is used to prod it to think again.

Other AsG were more equivocal. AG-19 also did not think that the AG had a mission, but qualified this with ‘as such’. He told me that the AG has to look at the evolution of society and how the economy is changing, and ask whether EU law is moving along with it because ‘EU law is not only a set of fixed rules but must adapt to change in society . . . Situations can arise where the Court must deal with tomorrow but law deals with yesterday’. As an example he mentioned the jurisprudence of the CJ in relation to free movement of persons: the Treaty provisions in this area had been designed to cater for ‘Sicilian farmers going to work in the Luxembourg steel industry’ who had a job for life. Divorce or issues involving non-EU spouses were unimaginable. Yet these were situations now facing the CJ.¹¹⁹ In his opinion, the Court had failed to respond to these social challenges confronting EU law. It was reluctant and therefore slow to develop solutions for these new questions. Where law was outdated and the legislature slow to renew it, the AG was to help the Court step in to fill the gap.

AG-18 found the word mission ‘over-stated’. He preferred the French interpretation of ‘task’ or function. The function of the AG is to ‘provoke the jurisprudence of the CJ’. A good opinion served multiple functions: first, it could help the CJ to change; second, it could prevent change—the AG sometimes was the guardian of EU law by helping the Court to avoid mistakes; and third, the opinion forced the judges to refine their reasoning—if the Opinion is well reasoned and argued then the judges have to justify their departure from it even more.¹²⁰ Likewise AG-07 and AG-08 thought the word mission, respectively, ‘too loaded’ and ‘too zealous’. AG-08 preferred the idea of ‘service’ but went on to explain that ‘if you think that the AG contributes to a higher objective, then EU integration could be that objective. If AG contribution is to EU integration rather than just the cases then it is something more than a service’.¹²¹ AG-07 told me that the AG had a duty to clarify issues for the Court by putting them in context as well as educating lawyers by teaching them how to balance values and interests.

The remaining AsG rejected this idea. AG-15 said that although the AG is engaged and pro-European integration, she does not bend law towards this.¹²² For AG-12 the AG had neither mission nor a goal or an objective. He told me that the AsG simply provides ‘through the opinions a practical tool for the Court and for the evolution of EC law’.¹²³ For him the AG had to be objective in every way, not thinking in a political way but working with legal texts without imposing personal convictions in the Opinions. His fear was that if this were not so, a member from a small member state with strong personal convictions could overturn a majority in the chamber. AG-01 acknowledged that AsG had their own ‘philosophies, predilections, principles, preferences, and ideas’ but never an agenda. He did, however, concede that an agenda might arise during a case. He told me that he did not go to Luxembourg with a mission, but to ensure that the voice of his member state on EU rules was heard’.¹²⁴ AG-09 felt that

¹¹⁹ Case 267/83, *Aissatou Diatta v Land Berlin* ECR [1985] 567; Case 413/99, *Baumbast v Secretary of State for the Home Department* ECR [2002] I-7091.

¹²⁰ AG-18, November 2006.

¹²¹ AG-08, January 2007.

¹²² AG-15, February 2007.

¹²³ AG-12, February 2007.

¹²⁴ AG-01, July 2006.

the pursuit of a mission was more possible for the AG because collective judgments prevent judges from becoming 'stuck' on any particular platform.¹²⁵ Finally, AG-20 answered that the AG did not have a mission but could be more courageous than the Court because the Court has to decide. This demonstrates that even those who answered 'no' acknowledged the pioneering element of the AG role.

VI Conclusion

What does this information contribute to the debate on an activist CJ? Is it possible to confirm, moderate or refute this definition using the results of interviews with Advocates General, the only individually visible members in the Union judicial system? I believe that based on the limited questions discussed here, the results can moderate the terms of the debate by adding important internal insights to the characters in this institution, none of whom display a crusaders zeal similar to Hossack, Vogel-Polsky, Dupont or Garazon. A quick summary of the main points may help.

When asked whether the AG provides a service, most answered positively. Only a handful identified their work as important only to those within the Court. Yet those who said that their work was relevant to lives beyond Luxembourg seemed to prioritise the dissemination of understanding rather than the promotion of policies. In relation to working methods, it was interesting to identify the level of reliance upon the referendaire in the AG Chamber despite the firm control of the AG. The answers showed that while the AsG do not collaborate, they nonetheless take note of each others work and pick up on ideas already on paper or floating in the corridors. The spirit of co-operation appears fundamental to the effective functioning of the Court. Given the increasing administrative tasks of the AsG, it is highly likely that it is the referendaires who facilitate this, reading other opinions and gleaning from their colleagues the resonance of similar ideas. The interaction between referendaires is also critical because it allows the AsG to remain independent.¹²⁶ Finally, the idea of a mission had a negative resonance for most Advocates General. For those who replied positively, it is clear that activism took on different targets: to assist the court, to protect the Treaty, to educate as well as to be a pioneer for EU law.

Only a few Advocates General displayed the combination of motivation, working methods and sense of mission characteristic of cause lawyers. AsG-07, 12 and 17 seemed to display the correct motivation; AsG-07 and 17 seemed to also use commensurate working methods; but all three rejected the idea of a 'mission'. The concept of the AG as 'pioneer' was stated explicitly by AG-13, who also displayed a motive by identifying a broad audience but seemed to run his Chamber at arm's length: day to day organisation of the Chamber was delegated to a senior referendaire and he gave no indication of team-oriented working methods. AsG-05 and 06 were clear that the Advocate General had a mission, but AG-05 focused on the CJ as a service recipient and seemed to leave less scope for the referendaires to innovate. AG-06, on the other hand, explained that he sometimes wrote a draft suggesting a desire at times to promote particular ideas.

It would be naïve to claim that the CJ plays no role in policy making in the EU, yet the results show that most of the AsG are not activists: they either lack the motivation

¹²⁵ AG-09, July 2006.

¹²⁶ At one time during the 1980s, the six AsG did all meet together to discuss their work. AG-04, January 2007.

or adopt inimical working methods and are ambiguous about a sense of mission. The results suggest that activism may be present at the Court but does not dominate it because at an individual level, there is much ambivalence about activism, more than might be assumed by general observation. It is clear that some AsG—and probably some referendaires—do consider the policy of EU law and its wider impact, but it is perhaps over-stated to describe the CJ as activist or expansionist as a consequence. This is a simplification of the dynamics that pervade the CJ and inform its decision-making. Another explanation is required for this complex judicial system that involves interactions within the Chambers, between them, between the different EU Courts and between these bodies and national courts and tribunals. A number of external factors also have to be taken into account: the diverse visions of the members of the CJ, the member state dominated method of appointment of members, the six-year mandate of members, the expansion of the EU legal system and mandate of the CJ. In the face of these variables, the evolution of a stable system of law would have been impossible were activism the constant priority for the CJ.

The evidence not only suggests that activism is not endemic among the AsG but highlights the individual nature of the role—it is what the holder makes it. A more entrepreneurial AG might describe his job as a ‘ploughman’ with the problems coming before the Court representing ‘unploughed land through which the AG must trace a furrow’.¹²⁷ This individualism of the AG further undermines the idea of an activist CJ—many members may choose not to innovate new legal approaches. One reason for this may be fear of reprisals: both Imran Khan and Baltasar Garazon demonstrate the negative consequences that cause lawyering can have on careers. Innovation is a risk-laden activity that must be undertaken with care—there is no guarantee of success. The entrepreneurial AG must be willing to shoulder the risk to promote an idea that ‘... according to the law of averages, will likely fail’.¹²⁸ Additionally, resources at the CJ are finite—time, research assistance and personal influence are limited and such scarce resources cannot be abused.¹²⁹ No AG would want to be seen as reckless or ridiculed thereby undermining her own and the Court’s authority. She need therefore be able and ‘willing to invest the resources and assume the risks necessary to offer and develop a genuinely unique legal concept’.¹³⁰ Furthermore, timing is also crucial: the entrepreneurial AG must be alert for opportunities to innovate. Some AsG mentioned that they identify specific moments to express ideas that have been ‘incubating’.¹³¹ Yet those with a will and courage face another constraint: the inability to choose their own cases, meaning that those with the conviction may simply lack the opportunity.

An activist court would arguably *always* go beyond legal conflicts to attempt to make policy. Clearly, the frequency of activism at the CJ is limited by individual commitment, the case and opportunity—it is only when these elements meet that the AG can propose to move the Court and EU law in a new direction. Taken together, these considerations suggest that the AG and the CJ cannot be activist. The contingency of their ability to reform suggests otherwise—they do not and cannot innovate all the time. Is it therefore accurate to label the CJ as activist and criticise it as a whole

¹²⁷ AG-04, January 2007.

¹²⁸ W. McIntosh and C.L. Cates, *Judicial Entrepreneurship: The Role of the Judge in the Marketplace of Ideas* (Greenwood Press, 1997), at 12.

¹²⁹ W. Murphy, *Elements of Judicial Strategy* (University of Chicago Press, 1973), at 35.

¹³⁰ McIntosh and Cates (1997, 5).

¹³¹ McIntosh and Cates (1997, 3).

for its 'expansionist'¹³² philosophy? I suggest not: if a single label must be used for such a multi-faceted body, it may be appropriate to describe it and its members as 'entrepreneurial'.

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¹³² Lord Rannoch of Pearson, *House of Lords 2008* [4.168].