

# The European Judicial Organisation in a New Paradigm: The Influence of Principles of 'New Public Management' on the Organisation of the European Courts

Elaine Mak\*

## Abstract

Recent developments regarding the organisation of the European Courts beg the question to know in which way 'new public management' principles influence the judicial organisation on the European level and how a balance is struck between these principles and classic 'rule of law' principles. The paper presents and extrapolates results acquired in a research on the judicial organisation of Member States in the light of the organisation and reform of the European judiciary. On the basis of the analysis of a number of dilemmas of judicial organisation, some remarks are made concerning the grounds for legitimacy of the European judicial organisation.

## I Introduction

In 'liberal democracies', it is possible to distinguish a number of principles which reflect the constitutional core of the judicial organisation. This constitutional framework limits the choice of solutions for the judicial organisation in the balance between 'autonomy' and 'responsiveness' of the law,<sup>1</sup> through which it is aspired to legitimise the judicial organisation vis-à-vis the legal order and society at large.<sup>2</sup> Recent developments regarding the organisation of the European Courts beg the question to know which principles influence the judicial organisation on the European level and how a balance is struck between these principles.

In the present-day context, debates regarding the legitimacy of the judiciary in Member States of the European Union focus more and more on the realisation of a 'transparent', 'effective' and 'efficient' judicial organisation, while putting in second place the guarantee of the 'achieved' values of an 'independent' and 'impartial' judiciary.<sup>3</sup> Recent reforms include the transfer of cases from the judiciary to alternative methods of dispute resolution (ADR), the introduction of new management structures in the judicial organisation, and the tendency of 'specialisation' with regard to the allocation of cases and judges to courts. Debates and reforms concerning the Courts of the European Union seem to follow this trend. The Courts' quest for legitimacy<sup>4</sup> takes place in the light of the concern for 'effective judicial remedies', inciting reflections on the judicial competences available to the Courts and on the institutional organisation of these competences.<sup>5</sup>

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\* Elaine Mak is a PhD candidate at the Erasmus University Rotterdam and at the University of Paris I Panthéon-Sorbonne.

<sup>1</sup> cf P. Nonet and P. Selznick, *Law and Society in Transition: Toward Responsive Law* (Transaction Publishers 2005).

<sup>2</sup> M.A. Loth, *Recht spreken recht doen. Over de functies en het functioneren van burgerlijke rechtspraak* (Kluwer 1998), especially pp 16-19.

<sup>3</sup> cf E. Mak, *De rechtspraak in balans. Een onderzoek naar de rol van klassiek-rechtsstatelijke beginselen en 'new public management'-beginselen in het kader van de rechterlijke organisatie in Nederland, Frankrijk en Duitsland* (publication forthcoming).

<sup>4</sup> cf M.A. Loth, 'Courts in Quest for Legitimacy: A Comparative Approach', in M. Malsch and N. van Manen (eds), *De begrijpelijkheid van de rechtspraak* (Boom Juridische uitgevers 2007).

<sup>5</sup> See for example L. Heffernan, 'Effective Judicial Remedies: The Limits of Direct and Indirect Access to the European Community Courts', (2006) 5 *LPICT* 285; H. Cameron, 'Establishment of the European Union Civil Service Tribunal', (2006) 5 *LPICT* 273.

From the perspective of constitutional theory, this development demands an inquiry into the principles underlying debates regarding the European judicial organisation, and into the possibilities of making the ‘new’ principles for the judicial organisation compatible with classic ‘rule of law’ principles. On the European level, as on the level of Member States’ judicial organisations, principles for the regulation of power have to be made compatible with principles regarding the realisation of an ‘optimally transparent, effective and efficient’ public administration.

The object of the present paper is to clarify which types of principles play a role with regard to the organisation of the European Courts and to determine to what extent these types of principles have an influence on the European judicial organisation in the present-day context. To that purpose, results acquired in a research on the judicial organisation of several Member States<sup>6</sup> will be presented and extrapolated in the light of the organisation and reform of the European judiciary. An analysis will first be made of the principles for the organisation of the European Courts (II). Secondly, the balance of principles in the shifting paradigm for the discussion will be analysed with regard to three dilemmas of judicial organisation on the European level (III). The paper will conclude with some remarks concerning the grounds for legitimacy of the European judicial organisation in the light of the ‘new public management’ paradigm (IV).

## **II Principles for the organisation of the European Courts**

When looking at the discussions concerning the judicial organisation on the level of States, a set of principles can be distinguished, that play a role in the discussion on solutions for the judicial organisation. In the same manner, these principles also underlie the organisation of the ‘judiciary’ on the level of the European Union. To obtain a better view on the content of this set of principles, it has to be determined in which ‘paradigm’ discussion is taking place, *ie* which coherent set of norms, principles, values, convictions and legal practices are at the basis of the discussion concerning the judicial organisation in a legal order at a given moment.<sup>7</sup> Two paradigms for the discussion on the judicial organisation can be distinguished: the classic ‘rule of law’ paradigm and the ‘new public management’ paradigm. We will now see in which way the characteristics of these paradigms present themselves in the light of the organisation of the European Courts. It will be argued that discussion originally took place on the basis of the classic ‘rule of law’ paradigm (A). In recent times, this paradigm has lost its predominant position with regard to the discussion on the judicial organisation and has given way to a discussion in the light of the ‘new public management’ paradigm (B).

### *A The European Courts in the classic ‘rule of law’ paradigm*

Following an analysis of the principles featuring in the classic ‘rule of law’ paradigm, it shall be established to what extent the organisation of the European Courts qualifies for an analysis in the light of this paradigm.

The ‘rule of law’ paradigm has developed with the coming into existence of the concept of ‘liberal democracy’, at the end of the 18<sup>th</sup> century. At the basis of the development of the ‘liberal democracy’, on the level of States, are the revolutions in the United States and in France. Both the Declaration of Independence of 1776 and the *Déclaration des droits de l’homme et du citoyen* of 1789 express the principle of ‘liberalism’ and the requirements

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<sup>6</sup> Mak, note 3.

<sup>7</sup> cf T.S. Kuhn, *The Structure of Scientific Revolutions* (The University of Chicago Press 1996).

which flow from this principle with regard to the protection of the private sphere of the individual vis-à-vis the State.<sup>8</sup>

The idea of the 'liberal State' has its origins in the search for a *modus vivendi* in 16<sup>th</sup> century Europe.<sup>9</sup> The realisation of 'justice' in society forms the central theme in this context. The source and the nature of this concept of 'justice' have been conceptualised in different theories concerning the modern 'liberalism'. The two main branches to be discerned concern the deontological approach and the Utilitarian approach, which correspond respectively to Kant's theory of 'rightness' located in human capacities and Mill's theory of 'goodness' located in human desires.<sup>10</sup> The concept of 'liberalism' is closely related to the concept of 'toleration'. Two views collide in this respect. In the view which presents 'toleration' as the 'ideal' *modus vivendi* for the 'liberal State', the 'liberal institutions' form an application of universal principles. If 'toleration' is qualified as the search for conditions to establish peace among different ways of life, the 'liberal institutions' form a means to guarantee the peaceful coexistence of these ways of life.<sup>11</sup>

In the course of history, the theory underlying the classic 'rule of law' paradigm has been used as a starting-point for the perfection of the regulation of power within the State. 'Liberalism', in the evolution of the concept of the 'rule of law', has been connected with several concepts which were developed later. The search of new solutions regarding the elaboration of the principle of the 'rule of law' thus has led to the construction of a number of 'floors' on top of the 'house of the liberal State'.<sup>12</sup> First of all, during the 19<sup>th</sup> century the principle of 'democracy' has been integrated in the existing concept. 'Democracy' concerns the relations between the State and the citizens, and entails a 'system of political and societal arrangements designed to offer the necessary procedural means to self-determination on an individual and collective level'.<sup>13</sup> Thus, a new dimension was added to the basic idea of the protection of the individual against the ruling power: the participation in the Government. To the extent that the acceptance of administrative acts by the citizens has become obligatory for the organisation of the State and thus for the judicial organisation, the principle of 'democracy' has become a central notion in the evolution of the organisation of the 'liberal State'. With the rise of the concept of the 'social welfare State', in the 20<sup>th</sup> century, the idea of protection of the citizen by the State has entered the concept of 'liberal democracy'. Not only is the Government held to abstain from infiltrating the private sphere of the citizens. The Government also has to take action in order to guarantee education, work and housing for all citizens. At the beginning of the 21<sup>st</sup> century, a new 'floor' of the 'house of the liberal State' is under construction. The evolution of the 'information society' demands the regulation of new possibilities of infiltration in the personal sphere of citizens. In that context, the term 'digital liberal State' has been introduced,<sup>14</sup> a concept which includes the elements of 'deterritorialisation', 'turbulence', 'horizontalisation' and 'dematerialisation'.<sup>15</sup>

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<sup>8</sup> cf T. Paine, *Rights of Man, Common Sense, and Other Political Writings* (Oxford University Press 1998).

<sup>9</sup> J. Gray, *Two Faces of Liberalism* (Polity Press 2000), p 1.

<sup>10</sup> B.A. Hudson, *Justice in the Risk Society. Challenging and Re-affirming 'Justice' in Late Modernity* (SAGE Publications Ltd 2003), p 5.

<sup>11</sup> Gray, note 9, p 2.

<sup>12</sup> The metaphor has been formulated by M.A.P. Bovens, *De digitale rechtsstaat: beschouwingen over informatiemaatschappij en rechtsstaat* (Samsom 1999), p 3.

<sup>13</sup> A.I. Pottakis, 'Legitimacy v Efficiency. The Democratic Constitutional Future of the European Union', (2005) 3 *ERPL/REDP* 1109, 1110.

<sup>14</sup> Bovens, note 12; Franken Commission, *Grondrechten in het digitale tijdperk* (Commission Grondrechten in het digitale tijdperk 2000).

<sup>15</sup> Bovens, note 12, p 9.

The concept of the ‘liberal democracy’ thus does not offer a fixed model for the organisation of States, but it forms a ‘set of *topoi*, (...) a mansion filled with principles and arguments’.<sup>16</sup> This ‘house’ is different from one moment to another, from one legal order to another:

‘To begin with, there is not one, unchanging core of the liberal State, but the liberal State is a relatively organic set of arguments which grows in reaction to developments in society. (...) There is, moreover, not one typical house of the liberal State. The different national legal traditions show clear differences of style. As, when travelling, one can immediately recognize from the differences in architecture that one has passed the border, so the architecture of the British, American or French house of the liberal State clearly differs from the Dutch house.’<sup>17</sup>

The arguments which are put forward on the basis of the theory of ‘liberalism’, in order to support specific solutions concerning the judicial organisation, thus are a product of the context, both with regard to the temporal aspect and with regard to the place where those arguments emerge in the discussion on the judicial organisation.

The paradigm of the classic ‘rule of law’ encompasses the principles presented above and offers a specific perspective for the discussion on the judicial organisation. The content and the effects of the paradigm are expressed in the requirements for the application of principles in the light of the organisation of ‘liberal democracies’.<sup>18</sup> These principles indicate several solutions or ways of solving dilemmas concerning the organisation of the legal order’s institutions. The principle of ‘liberalism’, first, requires that a space is guaranteed where the citizen is free from the influence of the Government. In that context, power has to be established in a legal way, that power has to be exercised in a legal way with regard to the addressees of norms, and the settlement of disputes between addressees of norms has to be organised in a legal way.<sup>19</sup> To realise that objective, the power of the public institutions has to be restricted and fundamental rights – meaning ‘negative’ rights or ‘freedoms’ (*droits-libertés*<sup>20</sup>) – have to be awarded to the citizens, which they can invoke against these institutions. The role of the judicial power is of great importance: this power forms a counterbalance with regard to the political powers, and by its characteristic aspects of ‘independence’ and ‘impartiality’ provides for an effective protection of the citizen vis-à-vis the Government. The requirements resulting from the concept of classic ‘liberalism’ with regard to the realisation of these principles concern the ‘legality’ of acts of the Government, the separation of powers, the protection of fundamental rights, and the guarantee of judicial review of administrative acts.<sup>21</sup> The principle of ‘democracy’ adds a number of requirements to this set. In modern ‘democracies’, the factual sovereignty belongs to the State, and the central characteristic of the concept of ‘democracy’ is ‘participation’. The citizen has the possibility to participate in the political arena by exercising political rights like the right to vote and the right to be elected, the right of petition, and the right of assembly and association.<sup>22</sup> The legitimacy of the law and of the Government, as a result of the integration

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<sup>16</sup> Bovens, note 12, p 3.

<sup>17</sup> Bovens, note 12, p 5; translation EM.

<sup>18</sup> *cp* T. Koopmans, *Courts and Political Institutions. A Comparative View* (Cambridge University Press 2003), pp 7-8.

<sup>19</sup> Hudson, note 10, p 5.

<sup>20</sup> *cf* L. Favoreu et al, *Droit des libertés fondamentales* (Daloz 2002), p 164.

<sup>21</sup> M.C.B. Burkens et al, *Beginnelsen van de democratische rechtsstaat: inleiding tot de grondslagen van het Nederlandse staats- en bestuursrecht* (Tjeenk Willink 2001), pp 16-23.

<sup>22</sup> Among the Member States of the European Union, see for example the catalogues of fundamental rights which are included in the Dutch Constitution of 1983, in the German Fundamental Law of 1949 and (through

of the principle of ‘democracy’ in the concept of the ‘liberal State’, has been given an explicit basis in the acceptance of policies by the citizens. The other way around, provisions of positive law contribute to the realisation of the principle of ‘democracy’: the democratic majority, through legislation, has an effective means to rapidly conform the law to changing economic and social interests.<sup>23</sup> The elaboration of the principle of the ‘social State’, in the third place, is characterised by the appearance of social rights (*‘droits-créances’*)<sup>24</sup> and ‘principles of good governance’, which are guaranteed through the possibility of a judicial recourse against administrative acts. The application of the concept of the ‘liberal State’, until the end of the 20<sup>th</sup> century, thus manifests itself in a set of freedoms, participative rights and social rights, which express ‘the characteristic objectives of the liberal State which are (social) equity, legal certainty and participation’.<sup>25</sup> At the beginning of the 21<sup>st</sup> century, the idea of the ‘digital liberal State’ has come to add to this set of rights the so-called ‘information rights’, which include the digital access to public documents; categorical distribution of information; access to the Internet; and a virtual notion of the law.<sup>26</sup>

Now, as regards the research of the European judicial organisation in the ‘rule of law’ paradigm, a preliminary question concerns the definition of the legal system of the European Union in the light of the concept of ‘liberal democracy’. This concept is traditionally connected with the qualification of a legal entity as a ‘State’, *ie* an entity characterised by the elements of a defined territory, a population and the effective control by a government.<sup>27</sup> The many difficulties in evaluating the European Union on the basis of this criteria<sup>28</sup> can be left aside, for present purposes, by taking the Union – or at least the part of it formed by the European Community – on its merits as a (‘supranational’) legal order qualifying as an entity *sui generis*.<sup>29</sup> The qualification of the European Community as a ‘legal order’<sup>30</sup> presupposes the regulation of competences, rights and obligations of the Community and her subjects and provides for the necessary procedures to determine and sanction possible violations of Community law.<sup>31</sup> In order to legitimise the existence of this supranational legal order towards the Member States and their subjects, the European Union has to give proof of its allegiance to the principles supporting the legitimacy of the Member States’ legal orders, *ie* the principles of the ‘rule of law’. Through its Member States, the European Union can thus be said to subscribe to the principles represented in the ‘rule of law’ paradigm. Article 6(1) TEU states this most clearly:

‘The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.’

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the preamble of the Constitution of 1789) in the French *Déclaration des droits de l’homme et du citoyen* of 1789.

<sup>23</sup> *cf* R. Berkowitz, ‘Democratic Legitimacy and the Scientific Foundation of Modern Law’, (2004) 1 *Theoretical Inquiries in Law* 1; J. Habermas, *Between Facts and Norms: contributions to a discourse theory of law and democracy* (MIT Press 1998); J. Waldron, *Law and Disagreement* (Clarendon 1999).

<sup>24</sup> Favoreu *et al*, note 20, p 242.

<sup>25</sup> R. de Lange, *Publiekrechtelijke rechtsvinding* (W.E.J. Tjeenk Willink 1991), p 234, translation EM; *cf* E.M. Hirsch Ballin, *Rechtsstaat, grondrechten en subsidieverhoudingen* (Samsom H.D. Tjeenk Willink 1988).

<sup>26</sup> Bovens, note 12, p 17.

<sup>27</sup> P. Malanczuk, *Akehurst’s Modern Introduction to International Law* (Routledge 1997), p 75.

<sup>28</sup> Concerning the problem of defining a European ‘population’, see for example T. Thiel, ‘Fehlt Europa das Volk? Überlegungen zum Zusammenhang von Integration und Verfassung’ (publication forthcoming).

<sup>29</sup> *cf* Malanczuk, note 27, p 96.

<sup>30</sup> Case 26/62 Van Gend en Loos [1962] ECR 1; case 6/64 Costa v ENEL [1964] ECR 585.

<sup>31</sup> P.J.G. Kapteyn and P. VerLoren van Themaat, *Inleiding tot het recht van de Europese Gemeenschappen* (Kluwer 1995), p. 49; *cf* Cases 90-91/63 Commission v Luxemburg and Belgium [1964] ECR 625.

Through the years, these characteristics have become more and more apparent in the organisation of the European Union's institutions. The 'democratic deficit' caused by the restricted sphere of competences of the European Parliament is dealt with through continuous reforms of the decision-making procedures. The subject matter competence of the European institutions has gradually been enlarged and now encompasses not only matters related to economic cooperation but also political issues and a growing care for the protection of human rights.<sup>32</sup> Although the qualification of the Union as a 'State' is a bridge too far – judging also from the rejection of a further 'constitutionalisation' of the Union in the French and Dutch referenda on the 'European Constitution' – it has generally been accepted that the Union forms a legal order whose institutions incorporate the basic principles represented in the 'rule of law' paradigm.

With regard to the judicial organisation in legal orders ascribing the concept of 'liberal democracy', the principles of the classic 'rule of law' paradigm then establish reference norms which have to be taken into account by the normative powers.<sup>33</sup> In this light, the classic 'rule of law' principles interact in different ways. Most often, these principles complete and reinforce each other. Democratic participation through elections gives a stronger legitimisation to the exercise of the legislative function by the legislator. The guarantee of '*droits-créances*' forms a complementary legitimisation of the judicial competence regarding the protection of fundamental rights. In certain cases, however, the principles of the classic 'rule of law' seem to collide with each other. With regard to the presence, in a legal system, of a mechanism of constitutional review, the elaboration of the principle of judicial review of acts of the Government collides with the principle of the validity of laws produced in accordance with a democratic legislative procedure. The principles for the judicial organisation which are distinguished in the classic 'rule of law' paradigm thus show internal incoherencies; the paradigm, in this sense, does not form an entity. The existence of these incoherencies is marked out here, but for the purposes of the present research will not be analysed further. In fact, the principal point of inquiry of the research concerns the relation between the principles underlying the classic 'rule of law' paradigm and a set of principles which have surfaced in a new paradigm for the discussion on the judicial organisation: the 'new public management' paradigm. The time has come to turn our attention to the particularities characterising this paradigm.

### *B The European Courts in the 'new public management' paradigm*

The development of the 'new public management' paradigm has important consequences for the research of solutions for the judicial organisation, both on the level of the European Union and on the level of its Member States. The partial transposition of the classic 'rule of law' paradigm by the 'new public management' paradigm has been triggered by two developments. First, the development of 'new public management' theories has led to the creation of a perspective which is 'sufficiently unprecedented' to attract an enduring group of adherents away from competing 'ways of seeing' the public sector. Secondly, these theories are 'sufficiently open-ended to leave all sorts of problems for the redefined group of practitioners to resolve'.<sup>34</sup>

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<sup>32</sup> *cp* the Charter of Human Rights for the European Union [2000] C-364, 1-22.

<sup>33</sup> Regarding specific questions dealt with in discussions concerning the modernisation of judicial organisations, see *infra*, III.

<sup>34</sup> *cf* Kuhn, note 7, p 10.

Theories of ‘new public management’ first emerged during the eighties and nineties of the 20<sup>th</sup> century.<sup>35</sup> These theories were developed as conceptual instruments to structure the ‘scholarly discussion of contemporary changes in the organization and management of executive government’.<sup>36</sup> The elaboration of theories of ‘new public management’ has led to the current leading conception, which contains two aspects: on the one hand, ‘new public management’ is considered to be an ‘administrative argument’, consisting of a point of view on organisation design in the public sector, on the other hand ‘new public management’ is defined as an ‘administrative philosophy’, consisting of a leading set of opinions which determine policies.<sup>37</sup> By specifying the theory for a specific field of research, ‘new public management’ can acquire the qualification of ‘paradigm’. Barzelay, for example, in the context of an inquiry into the government in the State of Minnesota (United States), has developed a comparison of ‘bureaucratic’ and ‘post-bureaucratic’ paradigms, in which the latter contains a specification of the ‘new public management’ concept as an ‘administrative argument’.<sup>38</sup> In the context of research on the judicial organisation, the ‘new public management’ paradigm forms a similar specification of the concept of ‘new public management’.

The main aspect of the concept of ‘new public management’ concerns ‘quality’, *ie* ‘achieving the full potential that one is capable of with the resources one has’.<sup>39</sup> The aim is to realise an organisation which functions in an ‘optimal’ way, meaning an organisation which fulfils the requirements concerning the ‘quality’ of the supplied service. The main thesis of ‘new public management’ theories puts emphasis on ‘efficiency’ and ‘effectiveness’, and on a ‘customer-oriented’ approach: ‘(N)ot only should an organisation be able to fulfil its tasks in an efficient and effective manner, but it should also be customer or client-oriented’.<sup>40</sup>

During their still short existence, ‘new public management’ theories have developed into reference norms for reforms in a large number of fields related to public administration. The application of these theories, initially, did not concern the judicial organisation. However, the growing attention for ‘new public management’ in other domains has had repercussions in the field of the judicial organisation. Recent debates in Western-European legal orders show a concern for the realisation of goals of ‘effectiveness’, ‘efficiency’ and ‘transparency’ in the context of the judicial organisation, which can be led back to the development of the ‘new public management’ paradigm. We will see that this development is beginning to show itself on the European level too.<sup>41</sup>

The content and the effects of the ‘new public management’ paradigm reveal themselves in the conditions which are imposed with regard to the application of the principles of ‘effectiveness’, ‘efficiency’ and ‘transparency’. The principle of a ‘customer-orientated’

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<sup>35</sup> The term ‘new public management’ was introduced by British and Australian political scientists working in the field of public administration; M. Barzelay, ‘Origins of the New Public Management. An International View from Public Administration/Political Science’, in K. McLaughlin, S.P. Osborne and E. Ferlie (eds), *New Public Management. Current Trends and Future Perspectives* (Routledge 2002), p 15; cf G.Y. Ng, *Quality of Judicial Organisation and Checks and Balances* (Intersentia 2007), p 11.

<sup>36</sup> Barzelay, note 35, p 15.

<sup>37</sup> cf Barzelay, note 35, pp 29-30; C. Hood and M. Jackson, *Administrative Argument* (Aldershot 1991).

<sup>38</sup> Barzelay, note 35, p 24.

<sup>39</sup> Ng, note 35, p 29; R.M. Pirsig, *Zen and the art of motorcycle maintenance: an inquiry into values* (Bantam Books 1984); R.M. Pirsig, *Lila: an inquiry into morals* (Bantam Press 1991).

<sup>40</sup> Ng, note 35, pp 11-12; cf J.B.J.M. ten Berge, ‘Contouren van kwaliteitsbeleid voor de rechtspraak’, in P.M. Langbroek, K. Lahuis and J.B.J.M. ten Berge (eds), *Kwaliteit van rechtspraak op de weegschaal* (W.E.J. Tjeenk Willink 1998), pp 21-40.

<sup>41</sup> See *infra*, III.

approach demands a modification of the organisation in order to satisfy the wishes of 'customers' with regard to the 'quality' of the supplied product or service. Moreover, the organisation should be accountable for the quality of the product or service and it should adopt a 'customer-friendly' approach.<sup>42</sup> The 'quality' of the service can be measured by taking into account factors like time, timeliness, completeness, courtesy, consistency, accessibility, accuracy, and responsiveness.<sup>43</sup> Concerning public institutions, the fulfilment of 'quality requirements' can contribute to the legitimisation of government toward the public.<sup>44</sup>

The transition from the classic 'rule of law' paradigm to the 'new public management' paradigm can be summarized as follows. As we have seen, the concept of the 'rule of law' has its origins in the idea of the regulation of public power by the creation of a mechanism of 'checks and balances'. This idea forms the basis for discussion in the light of the classic 'rule of law' paradigm. In the 'new public management' paradigm, the main point of interest on the level of the state institutions concerns the 'optimal' functioning of the Government. The principles of the classic 'rule of law' are confronted, in the 'new public management' paradigm, with the principles of 'transparency', 'effectiveness' and 'efficiency'. In this new paradigm, the two types of principles form 'quality requirements' for public administration, including the judicial organisation. In the context of the judicial organisation, 'quality' then includes the principles of the classic 'rule of law', like 'independence' and 'impartiality' of the judicial function,<sup>45</sup> but also the principles of 'new public management', which can be classified in the categories of 'political principles', 'economic principles' and 'social principles'.<sup>46</sup> The 'new public management' paradigm thus holds a redefinition of the classic 'rule of law' principles in order to make these principles compatible with new 'quality requirements' like 'transparency', 'effectiveness' and 'efficiency' considering the 'optimisation' of public administration.

The principles of 'transparency', 'effectiveness' and 'efficiency', in return, have acquired a new status in their application in the context of the judicial organisation. They impose new requirements with regard to the relations between law and society. Examples concern the requirements of 'subsidiarity' and 'proportionality'; the requirement of judgement within a reasonable time; and the distribution of judicial competences on the basis of the principle of 'functionality'. The effects of the 'new public management' paradigm show themselves in 'directions' for solving questions concerning public administration and more specifically the judicial organisation. An example of this development is formed by the connection between the financing of courts and the 'returns' of these courts in the Dutch legal system (the 'Lamicie' system), a mechanism which was introduced in order to guarantee the judgement of cases within a reasonable time.<sup>47</sup>

As is the case concerning the classic 'rule of law' paradigm, internal incoherencies can be detected within the 'new public management' paradigm between the principles which are

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<sup>42</sup> cf Ng, note 35, p 12.

<sup>43</sup> W.A. Lindsay and J.A. Petrick, *Total Quality and Organization Development* (St. Lucie Press 1997), p 55; Ng, note 35, p 26.

<sup>44</sup> Ng, note 35, p 12.

<sup>45</sup> cf H. Kerkmeester and L. Visscher, 'De prijs van het civiele proces. Rechtseconomische inleiding' (2007), p 8.

<sup>46</sup> cf I.Th.M. Snellen, *Boeiend en geboeid: ambivalenties en ambities in de bestuurskunde* (Samsom 1987), p 1, who distinguishes four 'rationalities' for public administration, ie 'closed systems of criteria to act in a considered manner'.

<sup>47</sup> P. van der Knaap and R. van den Broek, 'Recht van spreken. Een resultaatgericht sturingsmodel voor de rechtsprekende macht', (2000) 7 *Bestuurskunde* 313, 319-320.

represented in this paradigm: ‘effective’ solutions are not always ‘transparent’. However, the most striking incoherencies are those which exist between the classic ‘rule of law’ principles on the one hand and the ‘new public management’ principles on the other hand. In the discussion on the basis of the ‘new public management’ paradigm, a question which has arisen for example concerns the extent in which the new principles of ‘transparency’, ‘effectiveness’ and ‘efficiency’ are compatible with values like ‘equity’ and ‘equality’.<sup>48</sup>

Regarding the judicial organisation, on the level of States as well as on the level of the European Union, the most important ‘quality requirement’ in the present-day context concerns the guarantee of ‘effectiveness’ and ‘efficiency’. With regard to Member States of the European Union, these principles form the central point of debates on the reform of the judicial organisation in France and in Germany, but most of all in the Netherlands. Solutions to guarantee the ‘quality’ of the judicial organisation, in this context, concern the creation of ‘accountability for the effective delivery of justice’.<sup>49</sup> Mechanisms aimed at improving the ‘quality’ of the judicial organisation thus add a dimension of ‘goal-orientation’ to the set of principles expressing ‘values’ for the judicial organisation. The discussion in the ‘new public management’ paradigm tries to neutralise the bureaucratic and inflexible effects which correlate with principles classifying as ‘values’.<sup>50</sup> We will now see how this new perspective influences the debate regarding the organisation of the European Courts.

### **III A new balance of principles in the light of shifting paradigms: three dilemmas of judicial organisation**

The balance of principles for the European judicial organisation can be mapped by analysing dilemmas which have revealed themselves in recent debates concerning the organisation of the European Courts. A connection can be made to discussions on the level of the Member States. The analysis will be used to show in which way classic ‘rule of law’ principles and ‘new public management’ principles interact in different fields of the judicial organisation. Themes that will be discussed concern the demarcation of the judicial domain (A); the management of the Courts (B); and the distribution of judicial competences (C).

#### *A The demarcation of the judicial domain*

A central question regarding the judicial domain concerns the demarcation of the judicial activity in the public domain, and the demarcation of the judicial activity vis-à-vis the private domain. In other words, regarding legal systems ascribing to the principles of the ‘liberal democracy’, it has to be established what role is played by the judicial power vis-à-vis the political powers in the legal order and what role is played by judicial dispute resolution and methods of alternative dispute resolution (ADR).

In the public domain of the relations between powers, the discourse originating in the classic ‘rule of law’ paradigm links the legitimacy of the judicial power to the promise of political neutrality which forms the essence of judicial ‘independence’. The discourse originating in the ‘new public management’ paradigm links the legitimacy of the judicial power to the acceptance of responsibility which is related to the qualification of the judicial activity as an element of the public service provided by the State. Complementing and reinforcing effects of principles come to light in constructions concerning the guarantee of responsibility of the

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<sup>48</sup> cf J. Harrow, ‘New Public Management and social justice. Just efficiency or equity as well?’, in K. McLaughlin, S.P. Osborne and E. Ferlie (eds), *New Public Management. Current Trends and Future Perspectives* (Routledge 2002).

<sup>49</sup> Ng, note 35, p 392.

<sup>50</sup> Ng, note 35, p 393.

judicial power for the exercise of its function.<sup>51</sup> A collision of principles occurs when ‘new public management’ principles come into conflict with the principle of political neutrality of the judicial activity. The limits set by the classic ‘rule of law’ paradigm concern the establishment of courts by law; the guarantees regarding the legal status of judges; and the minimum guarantees for a ‘fair trial’.<sup>52</sup>

In the demarcation of the judicial activity vis-à-vis the extra-judicial domain of dispute resolution, the legitimacy based on classic ‘rule of law’ principles is linked to the status of the judicial activity as a public and regulated method of dispute resolution, which aims at the legal protection of citizens. The ‘new public management’ paradigm offers a basis for the legitimacy of the judicial organisation by accentuating the specific guarantees of judicial dispute resolution compared to ADR. Dispute resolution before a court is thus represented as a ‘reasonable option’ on the spectrum of methods of dispute resolution. Complementing and reinforcing effects of principles are revealed in the positioning of the judicial activity as a ‘transparent’, ‘effective’ and ‘efficient’ method of dispute resolution which at the same time offers the guarantees of a ‘fair trial’. The possibilities of concretisation of ‘new public management’ principles on the level of the organisation of dispute resolution find a limitation in the guarantees of classic ‘rule of law’ principles, which are especially important in the light of the public character of judicial dispute resolution.<sup>53</sup>

The European legal order, in this respect, distinguishes itself in an important manner from ‘liberal democracies’ which qualify as States. The role of the European Courts, after all, is of a very specific nature. The allocation of subject matter competence to the Courts is not so much dependent on the horizontal interaction between powers – as is the case in national legal systems – but instead depends on the willingness of the Member States to place their national institutions under the jurisdiction of the European Courts, thus surrendering part of their sovereignty with regard to the interpretation and application of European rules which have come to form part of the national legal system. In this light, it can be understood that the Courts, compared to national courts, enjoy only a limited sphere of competences. As a result of this limitation, furthermore, the demarcation of the judicial activity vis-à-vis methods of ADR is of negligent importance on the level of the European judicial organisation.

The European judicial domain then is demarcated, on the one hand, by the competences transferred to the European institutions on the basis of the principle of subsidiarity and, on the other hand, by the instruments of review awarded to the Courts.

The competences of the European Courts are determined by the EC Treaty. As regards the subject matter, the Courts’ competences are limited to ensuring ‘that in the interpretation and application of this Treaty [*ie* the EC Treaty – EM] the law is observed’.<sup>54</sup> Regarding the competences of the European Community, the Treaty states that ‘(t)he Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein’.<sup>55</sup> It is further established that ‘(i)n areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be

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<sup>51</sup> cf H. Franken, *Onafhankelijk en verantwoordelijk* (Gouda Quint 1997), p 34.

<sup>52</sup> cf Article 6 ECHR.

<sup>53</sup> cf M.A. Loth, ‘Met openbaar gezag bekleed; over het publieke karakter van rechtspraak’, in N.J.H. Huls and M.A. Loth (eds), *Het domein van de rechter* (Kluwer 2004).

<sup>54</sup> Article 220(1) EC.

<sup>55</sup> Article 5(1) EC.

sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community'.<sup>56</sup> The TEU has created competences for the European Union in additional fields, but these competences have been accompanied by a limitation of the Courts' power of judicial review. Important topics which fall under the competence of the European Union but are excluded from judicial review by the Courts concern the provisions on foreign and security policy and most provisions on justice and home affairs.<sup>57</sup> The reluctance of the Member States to allocate jurisdiction to the Courts in these areas is explained by Arnall as revealing 'a certain ambivalence on the part of the Member States about the role (the Court of Justice) was henceforward to play' and thus as a 'rebuke to the Court'.<sup>58</sup> The alleged activist approach of the Court of Justice, a view which is connected with the Court's sometimes controversial decisions, only contributes to the hesitance of some Member States to attribute too much power to the European judicial organisation.<sup>59</sup>

Also, the Courts' instruments of review are limited in comparison with the competences of national courts. A first striking difference between the European judicial system and national judicial systems concerns the absence, on the supranational level, of direct access for private applicants other than through the restricted procedure of Article 230(4) EC.<sup>60</sup> The most important instrument available to the Court of Justice is the mechanism of preliminary references. Article 234 EC allows courts or tribunals of Member States to request the Court of Justice to give a ruling on questions of Community law if a decision on a question of this type is considered necessary to enable the national court to give judgement. If a question of this kind is raised in a case pending before a national court of last resort, submission of the question for preliminary ruling is mandatory. The Court of Justice, for the confirmation of its judicial authority, thus is largely dependent on the willingness of the national courts of the Member States to refer cases for judgement by the Court.<sup>61</sup>

Regarding the demarcation of the European judicial activity vis-à-vis ADR, the discussion as conducted in Member States<sup>62</sup> is as good as non-existent on the European level. First, the fields of competence of the Courts are only remotely linked to the traditional areas of dispute resolution associated with ADR, like for instance family law.<sup>63</sup> Furthermore, the specific structure of the Courts' review mechanisms stands in the way of an inquiry, in pending cases, into the possibilities of ADR. The mechanism of preliminary references, after all, presupposes the existence of judicial proceedings on the national level.

It can be concluded that the influence of 'new public management' principles does as yet not play a role of great importance with regard to the demarcation of the domain of the European Courts. The position of the European judiciary vis-à-vis the legislative and executive powers is considerably different from the structures of 'checks and balances' on national levels. The Courts' independence is not as securely anchored as the independence of courts in national

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<sup>56</sup> Article 5(2) EC.

<sup>57</sup> Article 46 TEU.

<sup>58</sup> A. Arnall, *The European Union and its Court of Justice* (Oxford University Press 1999), pp 552-553.

<sup>59</sup> cf Arnall, note 58, p 1.

<sup>60</sup> This characteristic of the European judicial system is the topic of current debates. See Heffernan, note 5.

<sup>61</sup> cf Arnall, note 58, p 559.

<sup>62</sup> See Mak, note 3.

<sup>63</sup> However, it has to be noted that the Court of Justice can itself operate as an ADR organ: Article 238 EC states that '(t)he Court of Justice shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Community, whether that contract be governed by public or private law'.

legal systems, with judges in both the Court of Justice and the Court of First Instance being subject to a temporary mandate, and the selection and appointment of judges – under conditions – being left to the discretion of the governments of the Member States.<sup>64</sup> On the other hand, the Courts are not confronted with the same requirements of accountability which regard national courts.<sup>65</sup> This has led the former British Prime Minister Thatcher to put into question the legitimacy of the European judiciary, claiming that the Court of Justice ‘does not have constitutional checks and balances to temper its power’.<sup>66</sup> As concerns the ‘effectiveness’ and ‘efficiency’ of the instruments of judicial review, especially the instrument of preliminary references is a topic of ongoing debate. Proposals have been made with regard to the improvement of access to the European Courts, for the moment however without yielding concrete results.<sup>67</sup> The problem of the ever-increasing case load of the European Courts has instigated reforms regarding the distribution of competences.<sup>68</sup> To uphold the legitimacy of the European judicial organisation, the effectiveness of judicial remedies is of the utmost importance, both from the ‘new public management’ point of view and from the classic ‘rule of law’ perspective. The Courts’ quest for legitimacy in this respect demands for a combined guarantee of access to justice, in the form of a right to appeal, and of an effective remedy, *ie* a judgement handed down in a reasonable time.

### *B The management of the Courts*

Questions regarding the balance of principles for the European judicial organisation not only present themselves with regard to the legal basis for the judicial activity. The organisational structure for the exercise of the judicial function in legal systems qualifying as ‘liberal democracies’ also has to be considered in the light of requirements for legitimacy. The ‘management’ of the courts, in the first place, concerns tasks which have to be accomplished in order to ensure the (continuing) existence and the functioning of the courts: the making available of means and buildings, the management of human resources, and the general administration of the courts.<sup>69</sup> A second element of court ‘management’ encompasses the care and responsibility for the working methods and the conduct of cases within the courts: control of court administrations, case loads, delays for judgement, promotion of uniform application of the law, care for the quality of judgements.<sup>70</sup>

With regard to classic ‘liberal democracies’, the historically developed practice by which a large number of competences concerning the management of the courts was allocated to the legislator and above all to the executive power, in present-day discussion has to be re-evaluated in favour of the possibility of judicial ‘self-management’. An element which is at least as important with regard to the guarantee of the constitutional and social legitimacy of the judicial organisation regards the concretisation of the distribution of competences over the powers. Aspects of the possible structures for the management of the courts, especially the choice of a ‘flat’ or ‘hierarchical’ structure and the possible establishment of a Council for the Judiciary as an intermediary between the courts and the executive power, in ongoing

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<sup>64</sup> Articles 223 and 224 EC. A special regime is applied to the selection and appointment of judges in the Civil Service Tribunal, a judicial panel attached to the Court of First Instance; see *infra*, III-C.

<sup>65</sup> See *infra*, III-B.

<sup>66</sup> HL Deb, 7 June 1993, col 560, cited by Arnall, note 56, p 1.

<sup>67</sup> See Heffernan, note 5, 300.

<sup>68</sup> See *infra*, III-C.

<sup>69</sup> *cf* for example Article 91(1) of the Dutch Judiciary Organisation Act.

<sup>70</sup> W. Voermans, ‘Kwaliteitsbevordering van rechtspleging via een Raad voor de rechtspraak?’, (2000) 12 *Nederlands Juristenblad* 641, 642-643.

debates are evaluated in the light of principles originating in the two paradigms for the judicial organisation.<sup>71</sup>

A comparative analysis of the management structure for the judicial organisation in the Netherlands, France and Germany reveals that the confrontation of classic ‘rule of law’ principles and ‘new public management’ principles in some cases produces complementing or reinforcing effects concerning the legitimacy of the judicial organisation, while in other cases this confrontation results in a collision of principles.<sup>72</sup> On the institutional level of the State, hierarchisation turns the judicial power into an organ holding a strong position vis-à-vis the executive power and holding an inherent accountability. On the level of the dispute resolution in individual cases, however, recent debates in which ‘bureaucratic’ aspects have been put to the fore show a predominant concern for the realisation of the principles of ‘effectiveness’ and ‘efficiency’ in spite of the judge’s commitment with regard to the act of settling disputes. The judge, in this way, is confronted with a large number of actors who try to influence the exercise of the judicial activity. These influences entail positive effects – the promotion of the uniform application of the law is beneficial to the unity of the law, to the equality before the law and to the legal certainty, and in that way to the ‘effectiveness’ and ‘efficiency’ of the judicial system – but they form a limitation of the judge’s individual autonomy.

The search for a balance of principles for the judicial organisation on State level takes place in the interaction between constitutional norms, legislative norms and norms of professional conduct. When extrapolating this analysis to the European Courts, an inquiry can be made into the structure of the management of the European judicial organisation and into the influence of ‘new public management’ principles in this respect.

The European judicial organisation reveals itself to enjoy a relatively autonomous status concerning court management when compared with the judicial organisations in Member States like France, Germany and the Netherlands. In the national legal systems, the management of the judicial organisation is a task of the executive power – most often represented by the minister of Justice – complemented by a duty to account for measures taken in the light of this competence.<sup>73</sup> On the level of the European judicial organisation, management tasks are attributed to the Registrar. The Court of Justice itself is competent to appoint this functionary and to lay down the rules governing his service.<sup>74</sup> The Registrar fulfils the function of secretary general of the Court of Justice and manages the Court’s departments under the authority of the President of the Court.<sup>75</sup> The Registrar, who is appointed for a renewable term of six years, is responsible for the administration of the Court, and for its financial management and its accounts.<sup>76</sup>

Regarding the financing of the European Courts, the legal arrangements are more similar to those existing on the level of the above-mentioned Member States. As is the case for national judiciaries, the Court of Justice has to draw up an estimate of its expenditure for each

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<sup>71</sup> See for example W. Voermans, *Councils for the judiciary in EU countries* (European Commission/TAIEX Tilburg 1999).

<sup>72</sup> cf Mak, note 3. See also E. Mak, ‘De structuur van effectiviteit en onafhankelijkheid. Een analyse van de herziening van de Nederlandse rechterlijke organisatie in het licht van het beginsel van onafhankelijkheid’, (2006) 9 *Trema* 373.

<sup>73</sup> Mak, note 3, chapter 5.

<sup>74</sup> Article 223(5) EC.

<sup>75</sup> <http://curia.europa.eu>.

<sup>76</sup> cf Instructions to the Registrar of the Court of Justice.

financial year.<sup>77</sup> The executive power – *ie* the Commission and the Council together – establishes a preliminary draft budget for all institutions,<sup>78</sup> which has to be adopted by the Parliament.<sup>79</sup> Like on the national level, the final word regarding the financing of the judicial organisation thus belongs to the legislative power. This entails a certain vulnerability in the relations of the judicial power vis-à-vis the political powers in the legal order. Where in the national legal system the courts' negotiating position can be strengthened by making the care for the financing of the courts a task of a specific management organ – *eg* the Council for the Judiciary in the Netherlands<sup>80</sup> – the small scale of the European judicial organisation does not justify a similar choice.

The balance of classic 'rule of law' principles and 'new public management' principles on the European level of court management in this way yields different dilemmas than court management on State level. On the internal level of the Courts, the political powers' competences are far more restricted than is the case in certain Member States. On the external level of the Courts' position among the institutions of the European Community, the financial position of the Courts may be slightly less well protected than is the case for courts in Member States.

The management of the European Courts, until now, has however not made it to the centre stage of reform discussions. The same cannot be said for a third dilemma of judicial organisation, regarding the distribution of judicial competences.

### *C The distribution of judicial competences*

This dilemma concerns the internal demarcation of domains of judicial competences. Although the European judicial organisation is small and little specialised in comparison with national judicial organisations, the main questions that arise are surprisingly similar.

Unlike the aspects regarding the organisational prerequisites for the exercise of the judicial activity, the distribution of judicial competences deals with the organisation of the judicial activity itself. In that context, the question arises as to the role of 'specialisation' within the judicial organisation in the form of a division of labour or a differentiation, *ie* the establishment of specific courts and chambers within courts for the settlement of specific types of cases.<sup>81</sup> In present-day 'liberal democracies', the distribution of cases fluctuates, on the basis of the principles of 'territoriality'<sup>82</sup> and 'functionality',<sup>83</sup> between the establishment of 'general' courts, which fulfil the classic 'rule of law' condition of 'accessibility', and the establishment of 'specialised' courts, which fit into the idea of 'new public management' and aim at the optimisation of the effectiveness and efficiency of the judicial system through 'specialisation'. In the structure for the distribution of judicial competences which is thus established, it is necessary to find a balance between dispute resolution by 'generalist' judges (the principle of the classic 'rule of law') and dispute resolution by 'specialised' judges (the exception of 'new public management').

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<sup>77</sup> Article 272(2) EC.

<sup>78</sup> Article 272(2) and 272(3) EC.

<sup>79</sup> Article 272(6) EC.

<sup>80</sup> Mak, note 72, pp 374-375.

<sup>81</sup> Regarding 'specialisation' in Dutch judicial organization, see A.M. Hol and M.A. Loth, 'Beter weten; specialisatie in de rechterlijke macht', (2002) 10 *Trema* 486; M.J. Kroeze, 'The Companies and Business Court as a specialized court', (2007) 3 *Ondernemingsrecht* 86.

<sup>82</sup> C. Cointat, *Quels métiers pour quelle justice? Rapport d'information du Sénat no 345* (Sénat 2002); P. Albers *et al*, 'De territoriale verdeling van rechtsmacht in Nederland', (2004) 1 *Trema* 16.

<sup>83</sup> Hol and Loth, note 81; Kroeze, note 81.

A comparative analysis of the legal systems of the Netherlands, France and Germany reveals that the producer of norms for the judicial organisation has to respect certain constitutional prerequisites when choosing 'specialisation' in the context of the distribution of judicial competences, and when determining the form of that 'specialisation'.<sup>84</sup> Complementing and reinforcing effects of classic 'rule of law' principles and 'new public management' principles come to light in the solution of a division of labour as such, and in solutions related to that division of labour, which concern for example the guarantee of the unity of the law and the settlement of conflicts of jurisdiction. Concerning the preservation of the 'autonomous' legitimacy of the law regarding the judicial organisation, comparative research shows that 'specialisation' should not go as far as to cross the boundary set by the principles of 'independence' and 'impartiality'.<sup>85</sup> This limitation makes it possible to indicate specific limits to the realisation of 'specialisation' in the context of the distribution of cases and in the context of the allocation of judges to courts.

On the level of the European Union, judicial competences are allocated to the Court of Justice and the Court of First Instance.<sup>86</sup> Furthermore, the EC Treaty allows for the creation of judicial panels attached to the Court of First Instance, which can exercise judicial competences in certain specific areas determined by the Treaty.<sup>87</sup>

The Court of First Instance was created in order to relieve the Court of Justice of part of its increasing case load, and more specifically 'in order to maintain the quality and effectiveness of judicial review in the Community legal order, to enable the Court to concentrate its activities on its fundamental task of ensuring uniform interpretation of Community law'.<sup>88</sup> The Court of First Instance has received competence to deal with most direct actions – 'with the exception of those assigned to a judicial panel and those reserved in the Statute for the Court of Justice'<sup>89</sup> – and with specific categories of preliminary references.<sup>90</sup> The latter possibility of transfer of jurisdiction, which has as yet not been effectuated, is controversial in the light of the traditionally made connection between the mechanism of preliminary references and the Court of Justice's constitutional function with regard to the uniform interpretation of Community law.<sup>91</sup>

The insertion in the EC Treaty of the possibility to create judicial panels originates in the Nice Intergovernmental Conference and is based on persistent problems regarding the case load of the European Courts. In accordance with the conclusions of the Report by the Working Party on the Future of the European Communities' Court System (the Due Report), the problems of the rising number of cases, the increasing backlogs and the lengthening of the time to deal with cases have been handled by introducing the possibility of the treatment of certain categories of special cases on the basis of special rules.<sup>92</sup> Reasons for the transfer of cases to specialised treatment can be that these categories of cases 'are brought in large numbers, or their link to Community law is only indirect, or they require highly specialised

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<sup>84</sup> *cf* Mak, note 3, chapter 6.

<sup>85</sup> Mak, note 3, chapter 6.

<sup>86</sup> Article 220(1) EC.

<sup>87</sup> Article 220(2) EC and Article 225a EC.

<sup>88</sup> Council Decision 88/591, preamble.

<sup>89</sup> Article 225(1) EC.

<sup>90</sup> Article 225(3) EC.

<sup>91</sup> *cf* Heffernan, note 5, pp 297-298.

<sup>92</sup> Report by the Working Party on the Future of the European Communities' Court System (Due Report), January 2000, p 29. See also Cameron, note 5.

judges to deal with them, or because any other general-interest consideration requires it'.<sup>93</sup> The Civil Service Tribunal, established in 2004<sup>94</sup> and exercising its functions since 2006,<sup>95</sup> forms the first specialised panel instituted according to the new provisions. This judicial panel has competence to judge disputes between the Community and its servants.<sup>96</sup> The Due Report further suggested the creation of specialised regimes for the treatment of cases in the fields of intellectual property; judicial cooperation in civil matters; police and judicial cooperation in criminal matters; and competition cases.<sup>97</sup>

The case load problem of the European judiciary has in this manner favoured a tendency of 'specialisation' within the European judicial organisation. Leaving untouched the territorial competence of the Court of Justice, this tendency has had important consequences for the distribution of subject matter competence on the European level.

With regard to the territorial competence of the European Courts, the accession of new Member States to the European Union entails an enlargement of the Courts' territorial jurisdiction. The distribution of competences between the Courts is however solely based on considerations regarding subject matter. Dilemmas concerning the balance between 'territoriality' and 'functionality', which occur on the level of national States, therefore lack relevance on the supranational level. As regards the distribution of subject matter competence, in the actual structure the subject matter competence of the Court of Justice has been narrowed. As we have seen, a part of the Court's competences has been transferred to the Court of First Instance. The creation of specialised judicial panels, in its turn, was a necessary step in avoiding the overloading of the Court of First Instance.<sup>98</sup> The principle of 'specialisation' has thus been applied in order to restore the effectiveness of the European judicial system.

When evaluating this 'new public management' development in the light of classic 'rule of law' principles, questions that arise concern the guarantee of 'independence' and 'impartiality' of judges belonging to the different European judicial bodies. In fact, the European judicial bodies qualify as courts with exclusive competence to deal with certain categories of cases. The distribution of judicial competences on the European level, in this way, engenders problems which surface in national debates with regard to 'concentration' of cases, *ie* the mechanism through which one or more courts on the territory – on the basis of legal provisions or through agreements between courts – are allocated the exclusive competence to deal with certain categories of cases.<sup>99</sup> The main consideration behind the choice for this form of 'specialisation' is the idea that concentrated treatment of similar cases will enhance the quality and the timeliness of judgements because (i) expert judges can be appointed to deal with specific categories of (complex) cases,<sup>100</sup> and (ii) judges can acquire expertise by dealing with a constant stream of similar cases.<sup>101</sup> Dangers lie, however, in the risk of (the appearance of) partiality, which becomes more real in the case of small settings

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<sup>93</sup> Due Report, p 29.

<sup>94</sup> Council Decision 2004/752/EC.

<sup>95</sup> The Tribunal heard its first case on 28 March 2006, C-16/05 *Falcione v. Commission*; *cf* Cameron, note 5, p 282.

<sup>96</sup> Cameron, note 5, p 274.

<sup>97</sup> Due Report, pp 29-35.

<sup>98</sup> Cameron, note 5, p 275.

<sup>99</sup> R.C. Hartendorp, *Notitie rechterlijke concentratie* (Raad voor de rechtspraak 2003).

<sup>100</sup> *cp* the procedure for the appointment of judges in the Civil Service Tribunal; Cameron, note 5, pp 279 and 282.

<sup>101</sup> *cf* Hartendorp, note 99.

for specialised litigation like the Civil Service Tribunal.<sup>102</sup> Guarantees to prevent this danger from realising itself can be found, with regard to the Civil Service Tribunal, in the limited mandate of the judges,<sup>103</sup> in the requirement of collegial judgement,<sup>104</sup> and in the possibility to bring an appeal against the Tribunal's judgement before the Court of First Instance.<sup>105</sup>

#### **IV Concluding remarks**

At the beginning of the 21<sup>st</sup> century, 'new public management' principles have acquired legal status in a constitutional frame of reference which does not only underlie the legal systems of Western-European States qualifying as 'liberal democracies', but which extends its influence – albeit to a lesser extent – to the discussion concerning the organisation of the European Courts. To the extent that the European legal order embraces the characteristics of the modern 'liberal democracy', the legitimacy of the judicial organisation on the European level is dependent on the realisation of a balance of principles which is supported by the European legal order and society.

Future developments are likely to include an ongoing tendency towards the realisation of 'new public management' principles on the European level. In the search for solutions for the European judicial organisation, dilemmas arising on the level of national legal systems can *mutatis mutandis* be used as a background for the discussion. In this way, workable solutions can be formulated with regard to the demarcation of the judicial domain, the management of the Courts and the distribution of judicial competences.

Underlying questions to be dealt with in the discussion concern the relation between the European Union and its Member States. These questions regard the role assigned to the European Courts as much as the envisaged future development of the European cooperation in a supranational structure. From the perspective of constitutional theory, a judicial architecture constructed on a well-considered balance of classic 'rule of law' principles and 'new public management' principles is able to provide the European Courts with sufficient grounds to support their claim to legitimacy.

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<sup>102</sup> Concerning the pertinence of this risk on the national level (*in casu* concerning the Netherlands), see Y. Buruma, 'Concentratie en specialisatie: een inleidende beschouwing', in J.W.M. Tromp *et al* (eds), *Concentratie en specialisatie van rechtspraak: noodzaak of overbodig?* (Kluwer 2006), p 16.

<sup>103</sup> The Tribunal is composed of seven judges, which are appointed for six years; Article 2 Statute of the Court of Justice.

<sup>104</sup> Cases are judged by Chambers of three judges, and in certain cases by a Chamber of five judges or by a single judge; Article 4(2) Statute of the Court of Justice.

<sup>105</sup> Article 9 Statute of the Court of Justice.