Why do the European Court of Justice judges need legal concepts?

1. Introduction

The aim of this paper is to explain why the European Court of Justice judges need legal concepts when they reason on issues of EU law and deliver their judgments. The answer I am going to provide is not, of course, a conclusion drawn from psychological inquiry into the desires and motivations of judges. Nor is it a sociological observation, which would also require proper experimental data. More properly, this paper bases on a rational reconstruction of the ECJ judges motivational processes. This rational reconstruction takes into account the institutional and political environment in which the Court functions, as well as the goals and objectives that are reasonable to be ascribed to the ECJ as an institution. I believe that the reasons why the Court as an institution needs legal concepts are rather stable and do not alter with every change in the composition of the Court. Thus, the question which I will attempt to answer in this paper is not so much why particular ECJ judges, given the views they have expressed and personal and institutional desires they may be regarded to posses, actually have needed legal concepts, but rather what reasons there are for judges of the Court of Justice to need legal concepts.

However, before I move on to set out those reasons I need to talk for a while about legal concepts in general. This is because, what a legal concept is is in itself a very contentious question. On the one hand, legal concepts are argued to be real entities which posses an inherent meaning. On this understanding of legal concepts it is possible to explain why they are able to prescribe conduct and bind legal officials as to what has to be done with disputes they are required to solve. On this view, legal concepts are distinguished from legal terms, which perform a purely descriptive function: they describe concepts. The task of judges is simply to apply the concept in relevant situations and by mere logic all legal consequences will follow. Those who argue that concepts have inherent meaning usually deny the existence of judicial discretion. Judges are obliged to arrive at the “proper” meaning of the concept and they are therefore bound by what the concept inherently refers to, which leaves them no scope of manoeuvre. The process of application and drawing legal conclusion is thus automatic and fully determined. Judges are bound by rules employing legal concepts.

The above view of what legal concepts are has been dominant especially in the continental Europe until very recently. Probably one of the factors that made the subsequent

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groups of lawyers to apprehend that legal concepts may also be looked at in a different light was what is often called the judicial activism of the Court of Justice. However, the proposition that legal concepts are not necessarily comparable to objects of physical world has a long history in legal philosophy. Already Jeremy Bentham noticed that legal concepts are “fictitious entities”\(^2\). As a result, legal concepts began to be conceived as pure intellectual constructs, whose ontological status may be questioned\(^3\) and which should be denied the possession of any essence or semantic reference\(^4\). As such they were even considered redundant, their presence being justified only by legislative economy due to the fact that they decrease the number of rules\(^5\). The view that legal concepts have no semantic reference gave obviously rise to rule-skepticism. A rule which is formulated by the use of legal concepts which do not really mean anything is hardly capable of regulating people’s conduct. Also judges cannot be then considered to be governed by legal rules and thus possess unlimited discretion how to decide cases. They can put in any meaning they want into the concepts included in already existing rules\(^6\).

A middle ground between those extreme views is occupied by those who disagree that each legal concept has some necessary, pre-determined, clearly-defined meaning but who nevertheless maintain that rules which make use of those legal concepts are capable of directing human behaviour. One of the most prominent supporters of the middle ground view is HLA Hart. He sides with those who believe that concepts do not “really” exist and that terms which we find in legal pronouncement cannot just describe. In his article ‘The Ascription of Responsibility and Rights’\(^7\) he classifies legal statements, and consequently legal concepts, as sentences whose primary function is not to describe things. He thinks that the principal function of legal concepts, or sentences including them, is the ascription of responsibility and rights. Because he believes that the role of concepts is also, although less essentially, to describe, in *The Concept of Law*, he maintains that legal concepts do have semantic reference and only a penumbra of uncertainty\(^8\). To the extent they have semantic reference they can describe. For Hart the semantic reference of legal concepts is established by reference to their ordinary usage. In order to define the concept we should study linguistic practices of a given community which provide instances of its application\(^9\). There is, however, a controversy to what extent the use of discretion arising from the fact that legal concepts have penumbra of uncertainty is regulated. Hart seems to have believed that this discretion resides beyond the boundaries of the law and may be governed by morality, but what it is really governed by depends on the choice made by judges in the exercise of this discretion\(^10\).

\(^3\) Behind the question of the “existence” of concepts lies the old problem of universals and entities. Those who deny the existence of universals must logically also deny the existence of legal concepts. G Williams, ‘Language and the Law – I’ (1945) 61 Law Quarterly Review 71, 81.
\(^4\) A Ross, ‘Tu-tu’ (1956-1957) 70 Harvard Law Review 812, 820. However, legal concepts, even if they are devoid of meaning have been considered capable of performing a deductive function. L Lindahl, ‘Deduction and Justification in the Law. The Role of Legal Terms and Concepts’ (2004) 17 Ratio Juris 182, 190. Alternatively, the meaning of legal concepts has been argued to arise from the inferential links in which the concepts enter. See G Santor, ‘The Nature of Legal Concepts: Inferential Nodes or Ontological Categories?’ EUI Working Papers Law 2007/08.
\(^5\) This conviction has been held by American realists and members of the critical studies movement.
\(^8\) Which explains why rules have a „fringe of vagueness” or „open texture”. See HLA Hart, *The Concept of Law* (Clarendon Press Oxford 1997) 123 and 135.
Dworkin, on the other hand, believes that judicial choice is not unlimited and is governed by the requirement of the best “fit”\textsuperscript{11}. The choice made by judges is only then valid when it presents the law in its best light and takes into account both the history of the legal system and current moral concerns.

2. Why do national judges need legal concepts?

Before I will explain why the ECJ judges need legal concepts I will first outline why national judges may be considered to need legal concepts. On this point legal theory literature is rather prolific. Since legal concepts are continuously held to be the building-blocks of rules, whenever judges make use of rules, they also make use of legal concepts.

First of all, legal rules is something that judges apply to assess the behaviour of the parties to the case and to establish what conclusion should follow. Famously, legal rules constitute the major of the premises courts use, facts of the cases being the minor premise. Facts are subsumed to the rule and the prescribed consequences follow. In this context, legal concepts perform primarily a descriptive and classificatory function\textsuperscript{12}. They describe some fragment of reality to establish the scope of the application of rule. Whenever the fact pattern of the case includes the circumstances described by the concept which a given legal rule uses, the possibility of using the rule for the purpose of solving the case becomes activated. By making use of legal concepts codified in pre-existing rules judges may decide whether a given legal rule is or is not relevant to the case. If it is relevant, judges are then guided by this rule as to how the case should be decided.

However, it is not enough for judges only to be guided by a relevant legal rule when they make judicial decisions. Equally important in their job is the justification of the decision in which they show that they have been indeed guided by a legal rule when they arrived at the outcome of the case. It is the use of legal concepts, the presence of particular words in the judgment which appear in a statute, constitution or earlier case-law that gives the judgment the appearance of conformity with law (that law was actually taken into account). The judgment could conform to what the law says but without the usage of the distinctively legal vocabulary that one can find in pre-existing authoritative statements we would not be able to say that it has been properly justified. Moreover, what judges say in the courtroom and the context of a judicial decision are in themselves statements of law. In order for those pronouncements to be indeed recognized as statements of law, judges need to use legal concepts to make what they say, if they so intend, look like a statement of law.

Judges are also law-makers. Every judgment involves some interpretation of the rule it applies and therefore it adds to the legal material that can be used to establish the meaning of the rule in future cases. This judicial law-making, as any law-making activity, has to be done with the participation of legal concepts because they are necessary in expressing legal rules. They also ensure that the requirement of universalizability is satisfied\textsuperscript{13}. The use of a legal concept ensures that the legal rule will not catch just one particular item but the whole bunch of items sharing some relevant characteristic.


\textsuperscript{12}“[L]egal categories (…) mediate between a factual situation and the law applicable”. G Samuel, Epistemology and Method in Law (Ashgate Aldershot 2003) 173.

\textsuperscript{13}For the discussion of the requirement if universalizability see N MacCormick, Legal Reasoning and Legal Theory (Clarendon Press Oxford 1978) 75, 78-79.
Pronouncing judgments by setting out legal rules which apply to the case in question, and in consequence by indicating which legal concepts are relevant for the analysis of the case, is also a useful way to proceed for national judges because only in this way they can give expression to the values they think the legal system should promote in a given situation. What values will be strengthened or incorporated by a judicial pronouncement partially depends on what concepts they will actually choose; whether they will decide to refer to individual or general interest, freedom of expression or the right to private life, social solidarity or individualism, etc.

Finally, the usage of legal concepts as opposed to casuistic regulation also ensures that the norm which has been created by a judge is flexible and may be further developed in the future. After all, judges are generally aware that a legal system may only be relatively stable. It is necessary to leave some potential for its development. Legal concepts serve this aim perfectly, because they can extend or transform. New content may be put into the same term and the question whether the content is indeed new and has given rise to an emergence of a new concept, only called in the same way, or whether there is a continuity of the same concept can never be given a clear answer in the legal context.

3. Do the ECJ judges also need legal concepts?

In the previous section of this paper I have set out a number of reasons why national judges may need legal concepts. It is reasonable to assume that the needs of the ECJ judges are not dramatically different. After all, they are also guided by pre-existing rules which are expressed by a means of legal concepts. The ECJ is arguably guided by the Treaties, secondary legislation and the rules expressed by its earlier case-law. It also needs to justify its judgments to show to all other actors (national courts, Member States governments, other institutions, the parties to the case, the wider public) that their reasoning is governed by the law and that they have made use of it when they were arriving at the decision. In the same as national courts the ECJ wants its statements to be recognized as statements of law and when it legislates it is logical to assume that it wants to communicate successfully the results of its law-making enterprise. Endorsing particular ideas of Europe, justice, governance, politics and culture the ECJ also needs concepts to express the values of those ideas. No doubt the Court also wants to be left with means of further development of EC law and introduce some flexibility into the system.

However, this convergence of reasons for needing legal concepts between national judges and the ECJ judges should not lead us to the conclusion that the strength of reasons or, in other words, the intensity of the need is the same in both cases. Every court, whether national or European, functions in a different institutional and political setting. Consequently, every court may have some very specific reasons for needing legal concepts. Among those, which seem common, some may be more urgent that the other. Given the characteristic features of the ECJ and the political environment in which the Court functions, it will be argued that the reasons why the ECJ judges resort to extensive use of concepts are more powerful than those faced by any group of national judges.
4. Why do the ECJ judges need legal concepts?

4.1. The reality in which the ECJ functions

a) institutional setting

Before we answer the question why the ECJ judges need legal concepts it is necessary to sketch out the reality in which the Court and its judges function. The first aspect of the ECJ’s reality, which I would like to point to, is the fact that the Court of Justice is called a court. Moreover, the ECJ officials are called judges, which makes us further believe that the power the Court of Justice exercises is in fact judicial power. The choice of words is significant because by being named in this way the institution which interprets the Treaties and decides on the legality of acts adopted by other institutions the ECJ inherits the baggage of our understanding of what courts are.

Such denomination of the institution may be, however, contentious. It is widely agreed that the ECJ possesses certain features of a constitutional court. Depending on the constitutional position of national constitutional courts the classification of a constitutional court as a court may be seem more or less adequate. Of course, it all depends on what definition we will ascribe to the term court, but if we accept, as it is most often held, that the main function of courts is to resolve disputes we may then draw an easy conclusion that neither some national constitutional courts nor the ECJ should be regarded as a court. It is difficult to regard the interpretation of the Treaty or of a national constitution as administration of justice. The Court of Justice, under its most often exercised jurisdiction, is expressly denied the power of fact determination and norm-application to facts (categorization of factual circumstances under the headings of concepts present in legal rules). Article 234 the Treaty envisages that the ECJ shall just interpret it and in this way aid national courts in resolution of disputes by them. If we look at the tasks assigned to the ECJ by the Treaty, it is only Article 226, 227 and Article 230 EC that provides for some form of dispute resolution.

Despite these reservations, the fact that the ECJ is indeed called a court has some important consequences for our understanding of its role and functions. We have certain conceptions of judicial power formed on the basis of national legal system’s experiences. For example, it is commonly believed that judging is something very different from “politics”. Judges are not supposed to be politicians and even if they pronounce their views on issues that have earlier been an object of a political debate, they are expected to invoke only those reasons which are recognized by law. This shows that the choice of a name for the ECJ imposes substantive and methodological constraints. Since national courts are still perceived to do simply what the law prescribes the ECJ is also expected to present its acts in such a way. EC law developments have to be thus portrayed as inevitable consequences of the EC Treaty rules and not the result of policy choices made by the ECJ.

From the Treaty provisions that provide for powers of the Court of Justice the most important is Article 234. This Treaty provision determines that despite some hierarchical features of the European judicial system, the ECJ may still not be equated with an appellate court in relation to national courts whose questions it receives. That there is no strict hierarchy

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15 It has to be remembered, however, that a significant amount of Article 230 jurisdiction is held by the Court of First Instance, which, on the other hand, is not permitted to give preliminary rulings.
17 It is the ECJ itself that places the greatest emphasis on its jurisdiction arising from Article 234.
between the ECJ and national courts stems from a number of circumstances. First, national courts preserve quite a broad scope of discretion whether or not to ask the ECJ the preliminary ruling question. Second, the effectiveness of solutions offered by the Court of Justice depends on national judiciary. National judges may choose not to give effect to the ruling of the ECJ as no immediate sanctions for the national court will not follow. This dependence on the cooperation of national judges entails the necessity of seeking their acceptance of legal propositions pronounced by the ECJ. This, in consequence, elevates the importance of persuasion in the process of justifying the Court’s decisions. Of course, in a national context judges also strive to persuade their peers as well as the broader legal audience and the public. Yet, Member States’ judiciaries are far less dependant on “lower courts”. National supreme court judges do not need to invite lower courts to pose questions of interpretation. Difficult cases will eventually reach them regardless of whether lower courts will be willing to ask.

The institutional setting in which the ECJ functions also determines what kind of legal concepts the Court may be using and needing. First of all, the ECJ uses and needs those concepts that have been incorporated into the Treaty. Even if we consider some of Treaty concepts non-legal and derived from technical vocabulary of those fields they regulate it is undisputable that the moment they may provide ground for legal decisions they acquire a “legal” status. Moreover, they serve as material for the ECJ’s interpretational activity. Since the validity of Treaty provisions cannot be challenged Treaty rules and indirectly concepts that they employ provide absolute reasons of authority. To use a Treaty concept is to supply a very powerful argument for the decision’s validity.

Due to the fact that the ECJ possesses an ipso facto law-making power the Court may also create concepts. So, along Treaty concepts we also have judge-made concepts, whose practical efficacy depends on their utility value. Both Treaty concepts and judge-made concepts may be divided into distinguishingly EC concepts, that have been especially made for the purpose of the European legal order and are not present in national or international legal orders and those which have been borrowed from national or public international law. For reasons that I will explain below national law concepts are much more interesting for the ECJ.

b) the politics of European integration

Another aspect of reality in which the ECJ functions is that of European politics. The Court is not sealed from the political climate. Quite the opposite. It is very willing to step in and resolve situations where there is insufficient political will to deepen integration. In the same time, however, it cannot simply replace the Member States and integrate independently. Moreover, it needs to rely on the Commission, national courts and on the individuals for monitoring the compliance of Member States with its integrationist rulings. Therefore, it may

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18 The decision not to follow the ECJ’s case-law has to constitute a sufficiently serious breach to attract Member States’ liability. Even in this situation, however, the question of liability will be decided by a national court. That the Commission will start proceeding against a Member State because its court has not followed the ECJ case-law is unlikely.


sometimes choose to use purposively ambiguous concepts to give voice to the political consensus struck at the lower level. Concepts’ content can be filled by national courts and other bodies with shades of meaning depending on the particular balance struck by a given legal system on the issue in question. This is sometimes necessary not to upset the Member States governments and courts.

c) the Court’s goals and objectives

Against the background of its institutional setting and the politics of European integration the ECJ may be regarded to have positioned the following goals and objectives for its activity. The Court and its judges clearly have a very strong sense of mission when it comes to the objective of furthering integration. In the past this has exemplified in its active role in creating the common market by case-law. It has also designated the task of enhancing involvement of individuals in the legal system it is trying to create.

As any institution, it also has objectives determined by its “institutional interest”. Thus, it the objective of the Court to increase the institutional power and the prestige of the Court. In this context it also strives to secure its position as the final arbiter of the Community acts’ legality. For this purpose it has developed the doctrine of supremacy and stressed its functional indispensability.

However, the most important task that the ECJ has set for itself, which is that of legal system-creation or legal-system building. It has often been emphasized that the Court of Justice, by its case law, aim at creating the European federation. Its judgments has frequently been regarded as designed to constitute some form of European polity. It has also rarely been questioned that the objective of the ECJ is to further integration. As a step in the attainment of this objective or indeed as an goal in its own right the ECJ is also striving to build a Community of law, a European legal system.


\[22\] That the ECJ has such institutional or corporate interests is derived from the assumption that legal actors are instrumentally rational and pursue their own interests. A Stone Sweet, The Judicial Construction of Europe (Oxford University Press 2004) 37. They may be thus expected to seek to maximize such corporate values as the enhancement of their legitimacy by portraying their own rule-making as meaningfully constrained by the law and of the salience of judicial modes of reasoning. In fact, the ECJ has been often regarded to have been guided by “its determination to enhance and protect the authority and legitimacy of the Community’s institutions, in particular of the Court itself, and to fortify the legal structure of the Community”. H Rasmussen, European Court of Justice (Gadjura Copenhagen 1998) 24.

\[23\] Whether the ECJ is also engaged in the process of state-building does not have to be resolved here. The two processes, of legal system-building and of state-building, are often regarded as intertwined. See P Eleftheriadis, ‘Begging the Constitutional Question’ (1998) 36 Journal of Common Market Studies 255, 259.

\[24\] It does not matter here whether this objective has been realised within or outside the realm of the Treaty. Those supporting the view that the ECJ is an activist (creative) court openly admit that its activism (creativity) is driven by the desire to accelerate and deepen integration processes. On the other hand, those who argue that the ECJ has not overstepped the boundaries of the Treaty and simply realises the principles laid down in it, ground their reasoning in the fact that the Treaty envisages as one of the Union’s objective, the attainment of the “ever closer Union” and being based on the concept of objectives necessary requires integrationist interpretation. T. Tridimas, ‘The Court of Justice and judicial activism’ (1996) 21 ELRev 199, 203-205.
4.2. Indispensability of legal concepts

a) interpretation not application

The first reason why legal concepts are more indispensable for the ECJ judges that they are for national courts is the fact that the ECJ’s judges are denied the power to apply the law to facts and to determine the outcome of the case in the context of which the question arose\(^{25}\). This means that the ECJ judges need to portray their judgments’ conclusions solely as products of interpretation and not as the results of subsuming the facts of the case into a legal provision. Although the Court takes account of the facts of the case in order to arrive at a legal norm that covers those facts, legal norms have to be formulated in universal terms, which means that they may not refer directly to facts and therefore need to use legal concepts as necessary intermediating tools. This allows the ECJ judges to stop short of actually applying the law to the facts of the case or deciding on the validity of national law in the light of Community law. It follows that it is by a means of the application of legal concepts, that the ECJ judges are able to justify that they are not overstepping the mandate they have been entrusted with.

b) justification

Legal concepts also allow the ECJ to portray its decision as the decision right in law. The application of Treaty concepts as well other terms which national judges are otherwise familiar with allows the judgment to be perceived as faithful to the methodological constraints of the legal process\(^{26}\). More specifically, the judgment should not appear policy-based, because policy decisions are not considered to fall within the realm of courts. “The (…) emphasis is that each individual judgment must on its face appear to be politics-free. Abidance of this requirement is not possible without strict judicial allegiance to prevailing canon for legal reasoning, judicial methodology and logics of presentation”\(^{27}\). All these three elements, legal reasoning, judicial methodology and presentation, in order to accord with the canon must recognize the rightful place of legal concepts.

What follows from the Court’s practice of observing the canon is that national courts are more easily persuaded that a given judgment is correct. And if we hold that view that successful justification involves persuasion we may further understand why the use of legal concepts contributes to the justification of a given Court’s decision\(^{28}\). The ECJ ruling is then perceived to be legitimate, thereby also making it very difficult for the national judge to

\(^{25}\) H Rasmussen argues that “the Court’s insistence on respectful non-interference with the exclusive competence of the referring national court was always dictated by considerations of judicial tactics. Indeed, as soon as the Court admitted to applying Community law to the judicial facts of the cases, it would become quite defenceless of accusation of assuming judicial superiority”. *European Court of Justice* (Gadjura Copenhagen 1998) 152.

\(^{26}\) JHH Weiler observes that „formalism” has contributed to the overall enlistment of the national judicial branch to the ECJ’s vision. ‘A Quiet Revolution: The European Court of Justice and its Interlocutors’ (1994) 26 Comparative Political Studies 510, 520.

\(^{27}\) H Rasmussen, *The European Court of Justice* (Gadjura Copenhagen 1998) 335.

ignore. Moreover, judgments, which are perceived as properly justified legitimize the Court as an institution.\textsuperscript{29}

c) norm-creation

Historically, the biggest challenge for the institutions we traditionally call courts (national courts) has been to portray their activity as something different from law-making, while they were considered perfectly legitimate to apply the law to facts. Indeed, this has been their primary role. What they have not been allowed to do, due to the principle of separation of powers, is to legislate, to make decisions that should be more properly be made by democratically elected representatives. However, this does not seem to be the difficulty which the ECJ is confronted by. It has been implicitly accepted that the ECJ has the power to make law in the process of Community law interpretation. After all, it is empowered to “ensure that in the interpretation and application of [the] Treaty the law is observed”.

Thus, in the case of the ECJ, law-making does not have (cannot) be disguised as mere application of the law, the method used by national courts, but has to be portrayed as Treaty-interpretation. Numerous consequences follow from this fact, the most important being that the ECJ when effectively law-making needs always to trace back the introduced rules to some principle or concepts present in the Treaty. However, the necessity of showing connection between legislative statements of law and the Treaty does not abolish the possibility of introducing new legal concepts without which any law-making would be unfeasible. Quite the opposite, the incomplete character of the Treaty invites the ECJ judges to fill it it with more particular content by bringing in new concepts. Given the fact that ECJ judges are first trained as national lawyers, national concepts often serve as the source of inspiration.\textsuperscript{30}

The importance of legal concepts also arises from the ECJ’s desire to maintain a strong doctrine of precedent within Community law as applied by national courts. The doctrine of precedent requires both the ratio and the facts to which this ratio applies so that future courts will be able to evaluate whether the case before them is the same or different and to decide whether they should follow or distinguish the precedent. The ECJ is, however, in a very awkward position. On the one hand, it aims to establish a precedent-like system, where its case-law should be followed by national courts, on the other hand, however, it does not apply the law to facts. So it lacks the necessary competence by the exercise of which it could contextualize the rule pronounced.\textsuperscript{31} The ECJ may, however, and it does, introduce into the rule legal concepts of a relatively narrow scope which closely fit the facts of the case.\textsuperscript{32}


\textsuperscript{31} The ECJ is of course presented with the facts against the background of which the preliminary question has been posed by a national court and to which the rule that it will formulate will later apply. Being aware of the importance of facts for successfully functioning doctrine of precedent it tries to bring them into the judgment as far as possible. First, judgments always include a section where the “main action” or “the dispute in the main proceedings” is described and the relevant facts highlighted. Second, relevant facts are entwined in the legal analysis by the application of legal concepts that closely match those facts.

\textsuperscript{32} The example of such a concept seems to be that of “national provisions restricting or prohibiting certain selling arrangement” as used by the ECJ in Joined Cases C-267/91 and C-268/91, Keck and Mithouard to cover “national prohibition of sale at a loss”.
d) dialogue with national courts

The importance of the dialogue with national courts have been already explained above. It follows from those consideration that it is against the best interest of the European legal system and the ECJ as an institution of this system to upset national courts. Consequently, the importance of dialogue is far greater than in the context of different levels of judicial power within a state.

The Court of Justice is clearly aware of the importance of cooperation with national courts since the beginning of its existence. As it has been stated above, Article 234 EC provides the procedural mechanisms for the dialogue. However, the ECJ needed to create a medium of communication, namely the language in which the dialogue will take place. It also needed to create a set of assumptions without which no conversation can meaningfully occur. All this tasks were performed by means of application of legal concepts. The discussion between national courts and the ECJ is now taking place on the terms regulated by the ECJ. If national judges do not understand the rules of the game (how the Community legal concepts should be used) they can ask the ECJ for “interpretation”. A formalized discourse clearly invites question for clarification of its specific aspects and gives the ECJ the possibility to further uniformise the discourse.

Legal concepts may also be tools of mitigating national judges’ concerns and facilitating the approval of innovative and far-reaching doctrines. Every doctrine, such as that of supremacy or liability of Member States, is supported by a particular conceptual structure which make the doctrine workable. If, however, the concepts creating the structure are not exhaustively defined by the ECJ and leave much of its content to be filled by national judges in the process of their application, national judges may be more willing to accept the new development. This is because in such a situation the introduction of a new doctrine does not cause a major decrease in the scope of national judiciaries’ authority and makes the change less turmoilous for national legal systems.

e) system-building and coherence

I would like now to approach the most significant of reasons why the ECJ may need legal concepts. It is the most significant because all reasons mentioned above may be considered to fall within this grand project which I am going to focus now and which I will call “system-building”.

In Van Gend en Loos and Costa v ENEL the ECJ famously held that the Treaty creates a new legal order. The judgments were formulated as if the project has been completed the moment the Treaty entered into force. This was, however, only part of the Court’s rhetoric.
which could not openly admit that what it was in fact doing was to embark on the long project of legal system-creation or legal system-building. In that respect the objective state of affairs as to whether the Community has or does not have a legal system has been less important. What seems to have been crucial is whether the conviction is formed that the Community indeed has a legal system. The formation of this conviction has been facilitated by statements such as that in Van Gend, Costa and Les Verts, as well as those made by authors of textbooks and academic writers who began to refer to the Treaties and to norms created on their basis as well as to ECJ jurisprudence as “Community law”. However, mere application of particular terms, such as “law”, “legal order”, “legal system”, “constitutional charter” would not have been sufficient. Whatever was called by those terms had to remind what lawyers understood by those terms, it needed to be reminiscent of the concept of law, in its most familiar to lawyers form.

Of course, there is no agreement in legal theory what is the most relevant feature that makes law “law”. Some theorists, such as Hart, stress that it must be made of rules, which is a requirement Community law can easily satisfy. More problematic for Community law are those accounts of what law is which stress its coercive or authoritative character. Community law is not particularly coercive as it was born from the initial good will of Member States and still bases, to the large extent, on the Member States voluntary compliance. The deficiencies in its coercive function have been partially remedied by the Court’s case law introducing the doctrine of direct effect and Member State liability for breaches of Community law. However, as far as other subjects of the polity are concerned, namely the citizens, Community law has no coercive power whatsoever. Criminal law, with some exceptions is outside the Community competence. Citizens’ compliance monitoring has to be performed by national authorities and very often by means of national law (national implementing legislation, national remedies and sanctions, and national procedures). Unless one incorporates into the picture these national institutions and rules, one is not able to defend the position that Community law has a coercive character and therefore reminds us what we often understand by “law”.

37 On the question of whether the ECJ is diagnosing the present or representing the past when it maintains that a European legal order exists, see H Lindahl, ‘Acquiring a Community: The Acquis and the Institution of European Legal Order’ (2003) 9 European Law Journal 433, 440.
39 M Cappelletti, M Seccombe and J Weiler provide the following list of criteria of the “legality” of the system: formal legitimacy, “rule of law”, “morality” of law, the system’s federal viability and validity, efficiency, democratic basis, ‘General Introduction’, in M Cappelletti, M Seccombe and J Weiler (eds), Integration through Law. Vol 1: Methods, Tools and Institutions. Book 1 (Walter de Gruyter Berlin 1986) 25.
However, it seems that Community law has the greatest problem with the question of its authority. Most commonly, legal systems derive its authority from the fact that they function in the context of a state. Yet, the European Community is not a state. It is also fiercely debated whether it deserves the status of a polity and whether it has a constitution in a political sense of the word. Even more questionable is the existence of the European demos, without which, according to some, no polity may ever exist. In light of those difficulties the authority of Community law and therefore the proof that the Community has a legal system has to deduced from other sources, for example from the fact of observance of the rule of law or from the coherence of the system.

The role of legal concepts is especially important in those theories that relate the authority of law to its coherent, systematic character. Interestingly, however, in the context of state law, coherence is often presupposed. Interpretation of law should take place so as to further coherence, because it is assumed that a national legislator intended to create a piece of legislation which is coherent with the remaining body of the law. The existence of irreconcilable propositions, even in large numbers, does not lead to the denial of the “legal” character of state law. The situation looks different in the context of Community law. Coherence in EC law can not be presupposed as it is the case with national law, it has to actually exist, because other sources of the system’s validity are not present. More accurately, the Community legal order needs to appear as coherent in order to be regarded as a legal system. The more “the public” is convinced of its coherence the more likely it is it will be ready to call it “law”.

However, this coherence is not easily achievable. The European legal order functions in very different circumstances from that of national legal orders. EC law is applied by courts of 27 legal traditions which condition these courts’ reasoning. This means that it is applied in 27 different institutional settings, by means of different procedures, by judges which are selected by diverging selection processes, who may put forward very different arguments because the role of particular justificatory elements in the judgment is also different. Moreover, Community law is rarely self-sufficient and in most cases it needs to be supplemented by rules of national law.

What the ECJ may do in order to reduce horizontal as well as vertical divergences is to introduce concepts that will serve as focal points of reasoning, which every national court must touch upon in order to show that it effectively applied EC law in its reasoning. This may

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41 The view that authority is necessary for the legal system to exist or that it is the system’s essential claim is supported by J Raz. See The Authority of Law (Clarendon Press Oxford 1979).
42 The ECJ maintains that the Community has a “constitutional charter”. See case 294/83, Parti Ecologiste “Les Verts” v European Parliament [1986] ECR 1339. Whether it means that the Community law is, as a result a legal system with its independent claim of authority is, however, highly contentious. See for example, TC Hartley, ‘The constitutional foundation of the European Union’ (2001) 117 Law Quarterly Review 225.
43 Coherence governs our view of the legal system as a system. J Bengoetxea, N MacCormick and L Moral Soriano, ‘Integration and Integrity in the Legal Reasoning of the European Court of Justice’ in G de Burca and JHH Weiler, The European Court of Justice (Oxford University Pree 2003) 43, 47.
46 Inconsistencies between different national Community laws (horizontal divergence) and between Community Community law and national Community laws (vertical divergence).
be regarded as ensuring only formal coherence but since the uniformity of vocabulary (even if expressed in different languages) invites uniformity of thought, substantive coherence may follow.

5. Conclusion

The importance of legal concepts in state-focused legal theories is rarely doubted. Important studies have been done on the role of legal concepts in reasoning of judges, on their meaning, nature and functions. This paper is an attempt to transpose these deliberations onto the European scene. The rational reconstruction offered in this paper supports the view that also “supranational” judges need legal concepts and the role of legal concepts is not markedly different from that ascribed to them in national contexts. The paper suggested, however, that there are some reasons why the importance of legal concepts may be greater in the context of the European Court of Justice. This arises from the particular setting in which the ECJ functions as well as its prescribed or self-imposed goals and objectives. The most important of these is that of building a new legal order on the normative desert. The Court of Justice judges have not inherited a legal system in which they had pre-determined roles and which was composed of well-developed concepts grounded in the system’s tradition and backed up by homogenous linguistic practices. The legal system was to be created and endowed with authority conventionally ascribed only to state laws. Clearly the usage of legal concepts which create a pretence of a legal discourse national lawyers are familiar with had a significant share in the attainment of this objective. The fact that Community law now has its distinct conceptual structure by which new issues may be approached and which serves as a framework of communication between the ECJ and national judges as well as allows of further development of the legal system is the consequence of the decision to charge the European legal discourse with legal concepts. Undoubtedly, they are designed to provide reasoning tools on matters falling within the ambit of Community law not only for future ECJ judges but primarily for national courts. The extent to which they govern not only the form but also the substance of national judges’ reasoning is the measure of the Court’s success.