Oxford Journal of Legal Studies, Vol. 29, No. 4 (2009), pp. 805–826
doi:10.1093/ojls/gqp026
Published Advance Access October 29, 2009

Questioning Judicial Deliberations[†]

JAN KOMÁREK*

Abstract—Mitchel Lasser's *Judicial Deliberations* compares the argumentative practices of the French Cour de cassation, the US Supreme Court, and the European Court of Justice (ECJ), and examines how they achieve judicial legitimacy. In this review I firstly question the models of judicial legitimacy presented by Lasser. I believe that the French 'institutional' model relies far more on the interplay between the Cour de cassation and the legislature than on the system of selection of those who take part in the judicial discourse or on their conception of law which would deny judicial decision a place among the sources of law. I also have doubts about the lack of institutional means of judicial control and the emphasis on 'argumentative transparency', which lies at the core of Lasser's presentation of the US system. Finally the ECJ, somewhat included rather as an afterthought in the book's central analysis, in my opinion faces rather different problems from those identified in the book. Secondly, I discuss a deeper problem of *Judicial Deliberations*: its lack of conceptual clarity and the rather scant evidence it provides for some of its bold claims. In conclusion I make the case for a 'comparative jurisprudence' approach, suggested some time ago by William Ewald, which in my view *Judicial Deliberations* follows only in name.

Mitchel Lasser's *Judicial Deliberations* compares the argumentative practices of the French Cour de cassation, the US Supreme Court, and the European Court of Justice (ECJ), and examines how they achieve judicial legitimacy.[1] The book's reputation, and the fact that a paperback edition has been published this year, provides justification for the writing of this review five years after its initial publication. In this review I aim to challenge what Lasser says about each of the three courts under discussion and also to discuss his overall approach.[2]

[†] A review of Mitchel De S.-O.-L'E Lasser, *Judicial Deliberations. A Comparative Analysis of Judicial Transparency and Legitimacy* (OUP, New York 2004 (hardback) and 2009 (paperback)).

* D. Phil. candidate, University of Oxford (Somerville College, Invited Fellow, Tilburg Institute of Comparative and Transnational Law). E-mail: jan.komarek@some.oxon.org. I would like to thank Maurice Adams, Michal Bobek, Gráinne de Búrca, Zdeněk Kühn and Stephen Weatherill for their comments and suggestions on earlier drafts of this review. All errors, of course, remain mine.

[1] Any attempt to illustrate the richness of the book in just one sentence must perforce be only very approximate. A more satisfactory account can be found in ch 1 of the book.

[2] Previous reviewers have made only mild criticisms and all appreciated the book's method. See in particular John Bell's review in (2005) 30 Eur L Rev 446–50, Jacco Bomhoff's in (2005) 42 CMLR 1205–7, Hannes Rösler's in (2006) 55 ICLQ 774–6 and Amalia Kessler's in (2006) 18 Yale J L & Human 327–36. See however, N Huls, M Adams and J Bomhoff (eds), *The Legitimacy of Highest Courts' Rulings: Judicial Deliberations and Beyond* (T.M.C. Asser, The Hague 2009), a collection of articles focusing on Lasser's book, some of them very critical.

The book's opening paragraph states: 'In the United States, legal theory has long associated transparently reasoned individual judicial opinions with judicial control and accountability, democratic debate and deliberation, and ultimately judicial legitimacy itself.'[3] According to Lasser, this emphasis on transparent judicial reasoning had for long been thought fundamentally to differentiate common law from civil law systems, where, according to 'the American comparative story', judicial decision making 'lack[ed] appropriate legitimacy precisely because it lack[ed] sufficient transparency'.[4] The book 'seeks to offer a major reassessment'[5] of this traditional account and to make 'a self-conscious intervention in the debates over comparative law methodology'.[6] At the same time, *Judicial Deliberations* 'grapple[s] with many issues central to the concerns of contemporary legal theory and jurisprudence, [in particular] the theory and practice of judicial interpretation and justification'.[7]

Lasser introduces the concept of 'particular problematic' in order to challenge the traditional comparative accounts. A legal system's particular problematic 'shapes (and is shaped by) the judicial system that addresses it, thereby conceptually creating and recreating that system's particular argumentative, conceptual, and institutional universe'.[8] Since such problematic is different in each of the systems, a comparatist cannot achieve a correct understanding of another system if she fails to comprehend that system's problematic and keeps looking at it through the prism of her own system. For example, John Dawson, who criticized French courts for their extremely concise decisions and the lack of any meaningful use of case law,[9] wrongfully viewed the French system through the US realist prism, insisting that judges make law.[10] Had Dawson correctly understood the French conceptual universe, which (according to Lasser) denies that judges make law in the proper sense of the word, he would never have made such a criticism.

Unlike many previous comparatists,[11] Lasser goes beyond judicial opinions to explain that the emphasis on argumentative transparency, championed by the US theorists, is only one possible approach to judicial control and legitimacy. The French system represents a competing model: the institutional, which grounds judicial legitimacy outside the text of judicial decisions. Lasser argues that there is a circular and self-reinforcing relationship between '(i) the local understanding of the normative and legal status of judicial decisions (and of the arguments that surround them)', which 'profoundly affects (ii) the need

[3] Mitchel De S.-O.-L'E Lasser, *Judicial Deliberations. A Comparative Analysis of Judicial Transparency and Legitimacy* (OUP, New York 2004 (hardback) and 2009 (paperback)) 3.
[4] Ibid 4.
[5] Ibid 5.
[6] Ibid 13.
[7] Ibid.
[8] Ibid 298.
[9] JP Dawson, *The Oracles of the Law* (The University of Michigan Law School, Ann Arbor 1968) 413.
[10] Lasser (n 3) 153, 176–7 and 330.
[11] But surely not all of them. See particularly J Bell, *French Legal Cultures* (Butterworths, London 2001).

to grant and have access' to them, which then supports (iii) argumentative practices which reflect and impact on (i), which profoundly affects (ii) etc.[12] This circular relationship explains, on the one hand, the need for argumentative openness of US judicial opinions and their integration of formalist and policy-oriented discourses, since judicial decisions form official 'sources of law', and, on the other hand, the brevity of official French decisions and the existence of the hidden discourse, which is only partially revealed through unofficial means, particularly doctrinal notes.

If the book's main aim was to undermine traditional US comparative accounts of the French legal system, it has certainly succeeded and presented it as far more interesting and sophisticated than labels like 'the French deviation'[13] suggest. However, I believe that the 'institutional' model works rather differently in France, relying far more on the interplay between the Cour de cassation and the legislature than on the system of selection of those who take part in the judicial discourse or on their conception of law which would deny judicial decision a place among the sources of law. I also have doubts about the lack of institutional means of judicial control in the United States, which lies at the core of Lasser's presentation of the US system. Finally the Court of Justice, somewhat included rather as an afterthought in the book's central analysis, in my opinion faces rather different problems from those identified in the book. I set out these criticisms in part 1 of this article. Part 2 then focuses on a deeper problem of *Judicial Deliberations*: its lack of conceptual clarity and the rather scant evidence it provides for some of its bold claims. The concluding part, part 3, makes the case for a 'comparative jurisprudence' approach, suggested some time ago by William Ewald,[14] which in my view *Judicial Deliberations* follows only in name.[15]

1. *Problematizing 'Particular Problematics'*

A. *The French Cour de cassation: Of Courts and the Legislature*

The doctrine of the sources of law, 'radical discursive bifurcation', and the institutional structure of the French legal process lie at the core of the French 'particular problematic', identified by Lasser as 'how to maintain legislative supremacy while simultaneously encouraging and yet controlling judicial interpretative authority.'[16]

[12] Lasser (n 3) 306.
[13] See Dawson (n 9) 263–373, or John H Merryman, 'The French Deviation' (1996) 44 Am J Comp L 109–19.
[14] W Ewald 'The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats"' (1998) 46 Am J Comp L 701–7.
[15] Lasser (n 3) 11, fn 29.
[16] Ibid 300.

According to Lasser, the French republican ideology insists that '[j]udges in some important sense cannot usurp [the] legislative law making power because law is defined categorically as legislative in origin.'[17] This idea goes back to the French revolution, which learned its lesson from the Ancien Régime's Parlements' (the pre-revolutionary courts') usurpation of power and has been duly reflected in many standard comparative accounts. It is true that Lasser stresses that 'the French are by no means blind to the fact that judges play a significant role in the elaboration, development, and modification of normative rules', and that their awareness of this is 'hardly recent'.[18] Lasser recalls Portalis, the primary author of the French Civil Code, who highlighted the inability of the Code's drafters 'to predict and settle everything' and who expressly referred to 'the judge and the jurisconsults, penetrated by the general spirit of the [codified] laws, to direct their application'.[19] Nevertheless, Lasser contends that the French conception of law is 'above all a legal rule (or a set of legal rules) that has been formally adopted by the legislature in the form of "loi" (legislation)'.[20]

French courts therefore must produce extremely short, syllogistic decisions which pretend merely to apply existing (legislated) norms. This, however, does not mean that the French judges do not engage in a self-conscious creative activity. But this activity is 'hidden'. Judicial discourse is 'bifurcated'; beyond judicial decisions there is another discursive sphere, 'well hidden' or 'unofficial', to be found in reporting judges' reports and advocate generals' opinions not accessible to the public, which openly discuss various interpretive options, supported by arguments of substantive justice and equity.

How can the French radical discursive bifurcation be maintained, 'both practically and conceptually *in good faith*'?[21] Apart from its conception of sources of law, it is upheld through the institutional structure of the French legal process.[22] Not just the members of the highest courts, but also advocates appearing before them and academics producing doctrinal notes, are all carefully selected on a meritocratic basis by means of constant competition with their peers and all have undergone centralised education and training. The legal system is then 'managed by a number of specialized, elite, and highly informed institutional players who engage in an ongoing, detailed, and high-level dialogue about how to deal with pressing or merely budding legal problems'.[23]

[17] Ibid 169.
[18] Ibid.
[19] Ibid 171, quoting (in Lasser's translation) Jean-Étienne-Marie Portalis, *Discours préliminaire du premier projet de Code civil* (1801). The complete *Discours*, together with a number of essays dealing with different topics concerning the Civil Code, was published as F Terré (ed), *Le discours et le code: Portalis deux siècles après le Code Napoléon* (LexisNexis Litec, Paris 2004).
[20] Lasser (n 3) 169.
[21] Ibid 168.
[22] Lasser explicitly refers to MR Damaška, *The Faces of Justice and State Authority. A Comparative Approach to the Legal Process* (Yale UP, New Haven and London 1986).
[23] Lasser (n 3) 192.

This institutional structure is for Lasser the key to control, accountability and the legitimacy of the French judiciary, which he calls 'institutional'. The Cour's decisions are legitimate not because of the way in which they are justified, but because of who adopts them: the French republican elites.

Below I present a critique of this account (Section 1A(i)) and offer an alternative picture, which stresses the role of the Cour de cassation as a guardian of the separation of powers, itself controlled by the legislator (Section 1A(ii)). The Cour is constrained in a different way from what Lasser (and the previous comparatists) believed to be the case, namely, by the brevity with which it speaks (Section 1A(iii)). I also stress the distinct role of the lower courts in this construction, which was ignored by *Judicial Deliberations* (Section 1A(iv)).

(i) *Two cornerstones questioned*

Koen Lemmens has recently questioned Lasser's analysis of the French institutional structure and its legitimating function. He asks whether 'the actual political and social institutions are [still] capable of realizing [the] ambitious ideals' of the French Republic[24] and shows that they are contested even from within—by prominent French lawyers. This is well documented by the transformation of the Cour de cassation, especially with a view to its greater openness to citizens, which was already in train when Lasser was writing his book.[25] As early as 1989 the Cour's First President was calling for its greater openness to the external world.[26] It is remarkable that Lasser himself abandoned his position of an outside observer and actually intervened to argue against these trends.[27]

I will not deal in more detail with this strand of criticism; instead I will focus on another cornerstone of Lasser's analysis: the French system's concept of sources of law. I will contend that, contrary to what Lasser says in *Judicial Deliberations*, they have for quite some time included judicial decisions (or more precisely, *la jurisprudence*)[28] and it is certainly no taboo to accord *la jurisprudence* the 'exalted status of a true "source of law".'[29]

[24] 'But Pasteur Was French: Comments on Mitchel Lasser's *The European Pasteurization of French Law*' in Huls, Adams and Bomhoff (n 2) 155.

[25] See in particular the contribution to Huls, Adams and Bomhoff (n 2) by Guy Canivet, a former First President of the Cour (1999–2007), currently at the Conseil Constitutionel, 'Formal and Informal Determinative Factors in the Legitimacy of Judicial Decisions: The Point of View of the French Court of Cassation.'

[26] Pierre Drai, 'Pour la Cour de cassation' (1989) JCP I.3374.

[27] 'Les récents modifications du processus de décision à la Cour de cassation. Le regard bienveillant, mais inquiet d'un comparatiste nord-américain' (2006) RTD civ. 691–706.

[28] I use the original French term *la jurisprudence* to emphasize its difference from the common law notions of precedent or stare decisis. See also Lasser (n 3) 37.

[29] Lasser (n 3) 173. It is true that Lasser mentions in fn 15 on the same page that 'this position—as all theoretical positions tend to be—is by no means universally adopted' and admits that '[c]ontemporary mainstream French *doctrine* therefore does yield academic authors who argue that *[jurisprudence]* is a true source of law.' Lasser mentions 'the renowned—and hardly subversive' professor François Terré, who in his *Introduction générale au droit* (4th ed Dalloz, Paris 1998) 235–51 according to Lasser '*appears to* classify *[jurisprudence]* as a veritable source of law (along with legislative and administrative enactments and custom), albeit *in terms so tactfully measured* as to border on the equivocating' [emphasis added]. I must say that I do not see anything 'tactful' in Terré's exposition. Then Lasser adds another example, perhaps as a curiosity—Sadok Belaid, professor at the University of Tunis (Lasser explicitly mentions Belaid's institutional affiliation, while he does not do so in

Contrary to what *Judicial Deliberations* says, one French civil law treatise observes: 'In the contemporary doctrine, the majority of authors recognize *la jurisprudence* as a source of law.'[30] Although this statement may be exaggerated, since there is still considerable debate about *la jurisprudence*, nobody equates enacted law *(la loi)* with the concept of law *(le droit)*. Philippe Jestaz, another renowned French civilist, introduces his book on the sources of law in the following way: 'For centuries, the designation "sources of law" has served to mark *la loi*, *la jurisprudence*, *la coutume*, etc.'[31] This speaks for itself. Jean Carbonnier, to whom Lasser refers as 'the great flag-bearer of progressive French sociology', is today rather an exception in denying *la jurisprudence* a place amongst the sources of law.[32]

All this, of course, depends on how we define 'the law'.[33] The real debate in France centres on this, together with the role of *la jurisprudence* and the judiciary in general within the French legal system. It deals with the legitimacy of judicially created norms and their normative effects beyond particular cases—but in this respect it is not very different from the debates going on in other legal systems. Lasser is nevertheless uninterested in such conceptual debates and derives his understanding of the status of *la jurisprudence* from a selective 'literary analysis' of the rhetorical use of the term, disentangled from its conceptual meaning.

He is right that '[o]ne need hardly call judicial decision-making "law" in order to stress that judges make normative choices and thus exercise highly significant normative authority'.[34] But that is exactly how the French refer to it—*la création du droit par le juge*,[35] which can safely be translated as 'judicial lawmaking'. Of course, they do not say that judges create *legislated* law *(la loi)*, but does anybody in the United States or elsewhere maintain this about any judge?[36]

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the case of other French-speaking professors—perhaps to stress Belaid's outsider status?), who in *Essai sur le pouvoir créateur et normatif du juge* (Librairie générale de droit et de jurisprudence, Paris 1974) 'argued explicitly . . . that *[jurisprudence]* constitutes an important part of French positive law, in the strictest sense of the term'.

[30] P Malaurie and P Morvan, *Droit civil: introduction générale* (2nd ed Defrénois, Paris 2005) 265, with further references. See also J Ghestin, G Goubeaux and M Fabre-Magnan, *Traité de droit civil. Introduction générale* (4th ed Librairie générale de droit et de jurisprudence, Paris 1994) 192–204, P Jestaz, *Les sources du droit* (Dalloz, Paris 2005).

[31] Jestaz (n 30) 1.

[32] J Carbonnier, *Droit civil. Introduction* (21st ed Presses Universitaires de France, Paris 1992) 263–82 (1st ed 1955).

[33] See Malaurie and Morvan (n 30) 264–6; Ghestin and others (n 30) 451; Jestaz (n 30) 1–8.

[34] Lasser (n 3) 172.

[35] Which is eg a title of 50 Archives de Philosophie du droit (2007).

[36] See n 108, below.

How do the French conceive of this creative activity of judges, if neither what Lasser says about the institutional means of legitimation nor the conception of sources of law is correct?[37]

(ii) *Cour de cassation as a 'secular arm of the legislated law'*

While Portalis presupposed a creative role for judges and their *jurisprudence*,[38] he also said: 'It is necessary for the legislator to keep an eye on [*la jurisprudence*]. He can learn from it and he can, for his part, correct it'.[39] In the words of today's commentator, this is 'essential', since 'while it was not possible to keep the system which reserved interpretation of the law to the legislator by way of *référé legislatif*, the democratic principle commands recognizing the legislator's power, and even a duty, to erase *la jurisprudences* which it considers erroneous, shocking or inappropriate'.[40] This is why the Cour produces its annual reports, although their role has changed since, while '[i]nitially conceived as an instrument of the subordination of the [Cour de cassation] to the legislative power, it became an instrument of diffusion of the jurisprudential innovations and the normative policy of the supreme court'.[41]

Fréderic Zénati, the author of an influential study of *la jurisprudence*,[42] contends that the Cour de cassation is erroneously seen as a judicial body and suggests that it was originally conceived as an institution *outside* the judiciary, whose mission was not, in Robespierre's words, 'to judge the citizens, but to protect enacted laws'. In other words, the Cour was created to protect the sovereign will of the people, embodied in the law, against encroachments on it by the courts.[43] According to Zénati, the Cour de cassation has therefore had two principal tasks: to protect the unity of the legislation, and to be a guardian of the principle of the separation of powers. The latter task can seem contradictory (how could a court be a protector against other courts?)—but that is precisely Zénati's point. It is contradictory only if we think of the Cour as a judicial body and not as a quasi-legislator.

Cassation, then, is conceived as a sanction, imposed on lower judges for their disobedience to the legislator. The Cour de cassation is a 'secular arm of the legislated law' *(le bras séculier de la loi)* and therefore does not need to justify its

[37] The following is based on my article, 'Judicial Lawmaking and Precedent in Supreme Courts: The European Court of Justice Compared to the US Supreme Court and the French Cour de cassation', forthcoming in (2008–2009) 12 Cam Ybk Eur Leg Stud.

[38] See n 19, above.

[39] Terré (ed) (n 19) xxix. The translation was taken from AT von Mehren and JR Gordley, *The Civil Law System: An Introduction to the Comparative Study of Law* (2nd ed Little, Brown, Toronto 1977) 55.

[40] Jean Foyer, 'Loi et jurisprudence' in Terré (ed) (n 19) 28.

[41] Fréderic Zénati, 'La nature de la Cour de cassation', Bulletin d'information de la Cour de cassation No. 575, 15 April 2003, available at <http://www.courdecassation.fr/>. (The printed version was not available to me, so I could not provide more precise references.) Lasser (n3) 199–200, notes the annual reports, but does not come to the same conclusion as me.

[42] F Zénati, *La jurisprudence* (Dalloz, Paris 2001). Most studies of *la jurisprudence*, published after Zénati's book came out, refer to it.

[43] Zénati (n 41).

interpretation of it; doing so would only weaken it—'*imperatoria brevitas* of the supreme judgments borrows the concise and closed style of enacted laws'.[44] Does this mean that the Cour de cassation is virtually unconstrained by being freed from the duty to reason in the same way common law judges do?

(iii) *Brevity constrains*

Here we come to a paradoxical, but I believe sound, response to the US comparatists' concerns about the lack of 'case law technique' in the Cour de cassation: it is the very brevity of its judgments which limits its lawmaking activity! Because the Cour is constrained in what it can say far more than is the US Supreme Court, it can produce far fewer statements which could be taken as authoritative pronouncements of law. Some authors[45] even mention that dicta, which the Cour nevertheless occasionally utters, would breach the prohibition on deciding cases submitted to it by way of general and regulatory provisions embodied in Article 5 of the Civil Code.

This conception of the reasoning of decisions also explains why the Cour, after it had started to make public far more materials relating to its decision, including the opinion of its *avocat général* and the report of the *conseiller rapporteur*, did not make them part of the official decision and published them separately—as *travaux préparatoires* (a title which, by the way, is reminiscent of legislation rather than a process of judicial deliberation—again something which reminds us of the characterization of the Cour as an adjunct to the legislator).

(iv) *The role of the lower courts*

The lower courts play another important role in the Cour de cassation's *jurisprudence*. In contrast to the Cour, they face 'real-life' situations and see how the abstract rules are applied.[46] When an abstract rule contained in the Cour de cassation's *jurisprudence* produces results which do not fit the conception of justice which would correspond to the situation before the lower courts, they can always try to press for it to be changed. The kind of discourse before these courts is then very different from that before the Cour de cassation, which undermines Lasser's claim to 'typicality'—that 'the conclusions that [*Judicial Deliberations*] advances with respect to the three examined courts can legitimately be generalized (within reason, needless to say) to cover those courts' respective judicial systems as a whole'.[47] The fact that the Cour de cassation's

[44] Ibid.

[45] See Malaurie and Morvan (n 30) 280. This feature of brief judgments is well noted in French comparative scholarship. See in particular Horatia Muir Watt, 'La motivation des arrêts de la Cour de cassation et l'élaboration de la norme', in N Molfessis (ed), *La Cour de cassation et l'élaboration du droit* (Economica, Paris 2004) 61.

[46] Zenati-Castaing (n 41).

[47] Lasser (n 3) 271.

jurisprudence is not *officially* binding on the lower courts is of crucial importance here. French lower courts are always free to depart from the Cour de cassation's *jurisprudence* and invite the Cour to change it so as to update it to reflect the needs of society.

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To sum up, the Cour de cassation's legitimacy depends neither on a conception of law denying *la jurisprudence* the status of a source of law, nor on the institutional structure of the French legal process as Lasser presents it. Instead, it is supported by a rather idealized vision of the permanent control of the Cour by the legislator. The Cour's contact with reality is then maintained through its extensive control of the lower courts, which (unlike the Cour) deal with 'real-life' situations.

B. *The US Supreme Court: Looking Beyond Judicial Opinions*

'[H]ow to engage publicly in a comprehensive mode of argument that both legitimates and controls judicial lawmaking'[48] is, according to Lasser, the 'particular problematic' of the US system. Just as in the case of France, Lasser sees a direct causal relationship between the status of judicial decisions and the duty to reason in a transparent way: '[w]hen a legal system posits that its judicial decisions carry not only normative authority but also the force of *law* [which is according to Lasser the case of the US[49]], the explanatory burden borne by those decisions changes dramatically'.[50] This is important in particular because, according to Lasser, '[w]ithout the kind of help afforded by the French institutional structure, the full weight of legitimating American judicial decision-making falls overwhelmingly on a single document—the judicial decision'.[51] The model of judicial legitimacy adopted by the US system is therefore 'argumentative'.

I doubt whether there is such a relationship between judicial law making and the need for transparency and, if there is, whether it is at the core of the United States 'particular problematic' (Section 1B(i)). More importantly, I believe that

[48] Ibid. 300.

[49] I will not discuss here *in what sense* this is true. *Judicial Deliberations* contends [Lasser (n 3) 303] that in the United States it is 'traditionally accepted that in the common law process, judges *make law*, plain and simple.' This already leaves open the question to what extent this holds in the context of *constitutional* adjudication. Just as with the French debate (see n 29, above), Lasser mentions this highly controversial and widely debated issue only in a footnote, where he says that 'a handful of American legal academics are currently engaged in vigorous debates over the interpretive supremacy of the American Supreme Court' and refers to Larry Kramer, Mark Tushnet, Neil Devins and Louis Fisher. But that is based on a misunderstanding: these scholars do not debate the question whether the Supreme Court 'makes law' but a different issue: whether its interpretations of the Constitution should be binding on other branches of government and, if so, to what extent. As we have seen in relation to the Cour de cassation (see n 47, above), these are two separate questions: one concerning judicial law making, the other the binding force of such pronouncements on others.

[50] Lasser (n 3) 303.

[51] Ibid 339.

Judicial Deliberations overlooks a whole range of institutional means of control of the judiciary, which are arguably far more effective than those employed in France (Section 1B(ii)). Finally, the 'explanatory burden' borne by the US Supreme Court's decisions is not as heavy as Lasser suggests (Section 1B(iii)).

(i) *Judicial law making and the (alleged) need for transparency*

Judicial Deliberations does not prove that there is a direct causal link between granting judicial decisions the force of law and courts' duty to reason. I have tried to show that in the case of the Cour de cassation it is exactly the opposite: because everything the Cour says in its decisions has some normative relevance (regardless of whether or not it is considered as a source of law), the Cour is allowed to say very little.[52] Moreover, it does not seem to me that the US legal or political environment is so much troubled by the fact that courts 'make law' and that this places on their decisions some special justificatory burden. It would require extensive research into the existing literature to disprove this thesis (something Lasser does not carry out in order to support it), but I think it is something else. Something which Alexander Bickel first dubbed 'counter-majoritarian difficulty' in 1962[53] and, forty years later, Barry Friedman renamed 'countermajoritarian obsession'[54]—'reconciling judicial review with popular governance in a democratic society'.

It is true that even if I am right about this it could still be argued that 'the full weight of legitimating American judicial decision-making falls overwhelmingly on . . . the judicial decision',[55] because the US system lacks 'the kind of help afforded by the French republican institutional structure'.[56] It does not matter whether what has to be justified is the power of judicial review (as I believe) or the law-making power of courts (as Lasser suggests). However, I would question the alleged lack of institutional means of control and legitimation of the US legal process.

(ii) *Institutional dimension*

First, consider the system of judicial appointments, which Lasser mentions only in passing and apparently does not consider an appropriate means of institutionalized legitimation.[57] The process of judicial appointments is highly politicized, in the case of candidates not only for the Supreme Court, but for the federal bench ('Article III courts') in general.[58] It is a political process

[52] See n 45, above.
[53] *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill, Indianapolis 1962).
[54] B Friedman 'The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy' (1998) 73 NYU L Rev 333–433, 333, containing abundant references to other works.
[55] Lasser (n 3) 339.
[56] Ibid.
[57] Ibid 311, 346.
[58] The literature is truly abundant. See eg Symposium, 'Jurocracy and Distrust: Reconsidering the Federal Judicial Appointments Process' (2005) 26 Cardozo L Rev 331–709.

par excellence,[59] not a rather miraculous process of selecting elites on a meritocratic basis, which Lasser finds in France. It can be argued that federal judges have a far longer democratic pedigree than their French counterparts.

Secondly, as a matter of positive theory, scholars have long been observing that in its decisions the Supreme Court reacts to the political majority's preferences or public opinion.[60] Even the iconic decision in *Brown v Board of Education*[61] was not truly 'countermajoritarian', because the Court only followed the opinion of the national (in the meaning of 'federal') majority. This majority had been condemning racial segregation but could not impose its view on the whole nation by means of the political process, since the Southern states could effectively block such a move.[62] Many scholars turn these findings into a normative theory, and argue that the pressure which the political process[63] or public opinion[64] can exercise on the judiciary can, under certain conditions, support judicial legitimacy and provide a means of control over the courts.

Thirdly, the Congress has significant control over the jurisdiction of the federal judiciary and its overall design. The 'jurisdiction-stripping' legislative proposals the aim of which is to 'deny the lower federal courts jurisdiction over certain controversial issues of constitutional law, and forbid the Supreme Court from exercising appellate jurisdiction over those same issues'[65] are examples of this.

Finally, one must not forget the so-called 'legal process school', which focused on institutional features of the judicial process, its advantages, limitations, and constraints.[66] According to Adrian Vermeule, 'for two generations of American lawyers after World War II the most influential treatment of legal interpretation';[67] yet *Judicial Deliberations* does not mention it at all—let alone Vermeule himself who, together with Cass Sunstein, focuses on the institutional

[59] And I leave aside the fact that '[a] majority of all cases in the United States are decided by judges whose continued tenure is contingent upon elections'. Steven P Croley, 'The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law' (1995) 62 U Chi L Rev 689–794, 690.

[60] See especially Barry Friedman, 'The Politics of Judicial Review' (2005) 84 Texas L Rev 257–337, 308–29 with further references. Friedman expressly addresses possible connections between the positive and normative theories of adjudication.

[61] 1347 US 483 (1954).

[62] See eg Jack M Balkin, 'What *Brown* Teaches Us About Constitutional Theory' (2004) 90 Va L Rev 1537–1577, 1538–41.

[63] These views are represented particularly by theories of constitutional dialogue. For an overview of them see Christine Bateup, 'The Dialogic Promise. Assessing the Normative Potential of Theories of Constitutional Dialogue' (2006) 71 Brook L Rev 1109–80.

[64] Cass R Sunstein, 'If People Would Be Outraged by Their Rulings, Should Judges Care?' (2007) 60 Stan L Rev 155–212.

[65] James E Pfander, 'Federal Supremacy, State-Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation' (2007) 101 Nw U L Rev 191, 192.

[66] WN Eskridge and PP Frickey (eds), HM Hart and AM Sacks, *The Legal Process. Basic Problems in the Making and Application of Law* (Foundation Press, Westbury NY 1994).

[67] A Vermeule, *Judging under Uncertainty. An Institutional Theory of Legal Interpretation* (Harvard UP, Cambridge, Mass 2006) 26.

dimension of interpretation today.[68] Lasser seems to omit the rich debate concerning legitimation of the judiciary through institutional means completely.

(iii) *Ethic of argumentative transparency*

Lasser cites Wesley Hohfeld, Karl Llewellyn and Ronald Dworkin as authors who 'to [his] mind best represent the core of what high-level American jurists understand American legal and judicial praxis to be'.[69] Drawing on Dworkin, Lasser asserts that, according to this understanding, the judge 'must propose and justify his (necessarily personal) interpretive choices in terms of how they best promote a coherent and principled treatment of all of society's members', and he calls it the 'ethic of argumentative transparency'.[70]

However, one should not disregard the entirely different philosophy behind the transparency requirement according to Dworkin and Llewellyn. Unlike those of Dworkin, Llewellyn's concerns were pragmatic and not ethical: these were to provide true reasons motivating the judge in taking the decision in order to achieve predictability and, consequently, to adopt better rules, which would reflect the true reality in the courts.[71] For some scholars, pragmatism (or instrumentalism) represents a distinctive feature of US legal culture.[72] Legitimacy of courts is then measured in entirely different terms from 'argumentative ethics', corresponding to the functions the courts have in the legal and political system of the United States.

I cannot go into these various theories of judicial legitimacy (or, more precisely, the legitimacy of judicial review), but let me mention 'judicial minimalism', which prescribes that judges *should avoid* precisely what Lasser understands to be the 'ethic of argumentative transparency' (which is indeed, very close to Dworkin's philosophy). According to Cass Sunstein, a proponent of this theory,

> [a] minimalist court settles the case before it, but leaves many things undecided. It is alert to the existence of reasonable disagreement in a heterogeneous society. It knows that there is much that it does not know; it is intensely aware of its own limitations. It seeks to decide cases on narrow grounds. It avoids clear rules and final resolutions.[73]

[68] Ibid, which contains work previously published together with Cass Sunstein, particularly 'Interpretation and Institutions' (2003) 101 Mich L Rev 885–951. On the persisting relevance of the legal process school see eg Edward L Rubin, 'The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions' (1996) 109 Harv L Rev 1393–438.

[69] 'Transforming Deliberations' in Huls, Adams and Bomhoff (n 2) 38.

[70] Ibid.

[71] See eg B Leiter, *Naturalizing Jurisprudence. Essays on American Legal Realism and Naturalism in Legal Philosophy* (OUP, Oxford and New York 2007) 87–93.

[72] See eg B Tamanaha, *Law as a Means to an End. Threat to the Rule of Law* (CUP, New York 2006) 1: 'An instrumental view of law—the idea that law is a means to an end—is taken for granted in the United States, almost a part of the air we breathe.'

[73] CR Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard UP, Cambridge, Mass, London 1999) ix.

Judicial minimalism has been under fire from many sides, but even those who disagree with it acknowledge that it has gained 'increasing popularity in the United States in recent decades;'[74] one scholar even dubbed the approach preferred by the current Supreme Court Chief Justice 'Robertsian minimalism'.[75]

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To summarize my critique of *Judicial Deliberations*' account of the US system, contrary to what it says, the US system employs its own method of institutional control of the judiciary, of which all participants—judges themselves, politicians and academics—are very well aware. Furthermore, 'argumentative transparency' can be sought on pragmatic, and not ethical, grounds, a fact which can sometimes lead to opposite results to those suggested by Lasser: courts are required to say less than they actually do.

C. *The ECJ: In Search of Self-Understanding*

According to *Judicial Deliberations*, the Court of Justice faces a problematic of 'how to maintain and adjust the French model to the European Union's publicly controverted environment'.[76] Because it 'lack[s] much of the fundamental *institutional* structure, the ECJ . . . adds to the French model a far more *argumentative* mode of judicial justification and legitimation'.[77] It is represented by the simultaneous publication of both of its bifurcated discourses—one employed by its advocates general, another present in the Court's decisions. Advocates general 'deploy grand and systematic arguments about what must be the appropriate nature and structure of the Community legal system';[78] something which Lasser calls 'meta-teleological arguments': effectiveness, uniformity, legal certainty and legal [judicial] protection. The Court, 'surrounded . . . by vehement interpretive disagreement between the Community's other major institutional players' resorts to the same kind of arguments, although presented in a much more magisterial and authoritative tone.[79] However,

> although the [Court] adopts a decidedly more argumentative approach than does the traditional French prototype, it does so without sufficient discursive controls or personal accountability to generate an appropriate degree of interpretive trust or judicial legitimacy. Too often, the Court's meta-teleological argumentation instead

[74] Owen Fiss, 'The Perils of Minimalism' (2008) 9 Theoretical Inq L 643–64, 643.
[75] J Greene, 'Selling Originalism' (2009) 97 Geo LJ 657–721, 717 (although this approach was concerned with deciding, not saying as little as possible).
[76] Lasser (n3) 300.
[77] Ibid 349.
[78] Ibid 228–9.
[79] Ibid 238.

> resembles shorthand slogans that do little more than cut debate short with a false sense of necessity.[80]

I think this is a very accurate description of the problem the Court has confronted since its very establishment—as far as its argumentative practices are concerned. It is also true that the Court was modelled on the Conseil d'Etat; its internal organization, for example, confirms that. On the other hand, from its very establishment it has been exposed to various and very diverse influences, so that to emphasize the French influence today can be rather an exaggeration.[81] The particular problematic of the Court could therefore be slightly reformulated and the emphasis should be placed on the diversity the Court faces—both internally and externally (Section 1C(i)). Furthermore, I think that Lasser overestimates the Court's exposure to the 'publicly controverted environment' (Section 1C(ii)) and the problematic of openness of its judicial deliberations (Section 1C(iii)). Finally, I have doubts, similar to those I have already expressed in relation to the US Supreme Court, about the lack of institutional means of control of the Court (Section 1C(iv)).

(i) *Diversity*

On the internal level, the Court is composed of judges who come from very different backgrounds—legal, political and also cultural. I think that this internal diversity—which increased when 12 new member states, most of them with a totalitarian past, joined the EU in 2004 and 2007—has had profound effects on the Court's argumentative practices, greater than the Court's alleged desire to remain faithful to its French origins.

Some people, for example, believe that it was only after common law lawyers from the United Kingdom and Ireland joined the Court in 1973 that its decisions became more discursive and the references to its previous case law became more extensive.[82] Similarly, the Court's proportionality analysis or the principle of legitimate expectations is believed to have been 'borrowed' from Germany.[83] All these influences go somewhat unnoticed by *Judicial Deliberations*, as if the Court operated as a homogeneous entity composed of 'European' lawyers.

Moreover, internal diversity can effectively prevent the establishment of a shared understanding of the Court of Justice's mission among its members, based on the function the Court has to fulfil in the European Union legal system. Various legal systems differ profoundly as regards the model of control

[80] Ibid 359.

[81] See eg J-M Galabert, 'The Influence of the Conseil d'Etat Outside France' (2000) 49 ICLQ 700–9, 707–9.

[82] See eg Anthony Arnull, 'Interpretation and Precedent in English and Community Law: Evidence of Cross-Fertilisation?' in M Andenas (ed), *English Public Law and the Common Law of Europe* (Key Haven, London 1998).

[83] Koen Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law' (2003) 52 ICLQ 873–906, 894.

which their supreme courts should adopt. Drawing on Mirjan Damaška's work,[84] Michal Bobek observes that in a coordinate model, existing in common law jurisdictions, 'supreme courts can rely not only on shared values but also on more important systematic tools that have developed alongside this ideal: the continuous observance of already decided cases by virtue of the stare decisis doctrine and the force of precedents'.[85] Courts like the French Cour de cassation, admittedly the best representative of an opposite, hierarchical model, are 'mostly concerned with errors in law in the individual cases, not the creation of precedents. . . . The orientation of decision-making is mostly retrospective: these courts review and correct tens of thousands of past individual decisions annually'.[86] While I do not fully agree with this characterization of the work of supreme courts in civil law jurisdictions, it shows the difference in self-understanding which exists between members of the Court coming to it from these different systems. It is not the desire to remain faithful to the French model, but rather the impossibility of the disparate Court to agree on some model which would fit all the various demands and expectations.

But the Court is also acting in a very diversified environment, perhaps more so than any other court in the world. That is, in my opinion, the main reason it defers to the 'meta-teleological' argumentation, which often resembles only 'shorthand slogans'. This is a phenomenon well known in international law. As Simon Chesterman observed, '[t]he rule of law is almost universally supported at the national and international level. The extraordinary support for the rule of law in theory, however, is possible only because of widely divergent views of what it means in practice'.[87] Similarly in the European Union everybody agrees that uniformity, legal certainty or judicial protection and other systemic values of the legal order are laudable goals which should be achieved to the greatest extent possible—until their practical implications, such as the reopening of final judicial decisions, become clear.

Furthermore, the Court must produce its judgments in 22 different languages. The need to translate its decisions prolongs the procedure considerably. One of the consequences is the use of 'cut and paste' reasoning: large parts of the Court's reasoning reproduce previous decisions verbatim. The Court also uses some established formulations, which are moreover controlled by the *lecteur d'arrêt*, an administrator at the Court's Registry who checks the final text of the French (in which all decisions are drafted) version of decisions for style. It is interesting that the language dimension goes unnoticed by *Judicial Deliberations*, which claims to rely so much on 'literary analysis'.

[84] Used also by Lasser (n 22).
[85] M Bobek 'Quantity or Quality? Reassessing the Role of Supreme Jurisdictions in Central Europe' (2009) 57 Am J Comp L 33–65, 42.
[86] Ibid 42–3.
[87] S Chesterman 'An International Rule of Law?' (2008) 56 Am J Comp L 331–61, 331.

(ii) *'Controverted' environment*

The language dimension of the work of the Court has profound consequences for the way in which it drafts its decisions. A recent measure announced by the current Court's president, Vassilos Skouris, was to shorten the judgments and omit the parties' arguments from them.[88] They are now sometimes omitted completely or sometimes dealt with very selectively.[89] This has become a more obvious trend since the publication of *Judicial Deliberations*, but was just another step in downplaying the importance of different voices which had started with the Court's decision in 1994 not to publish reports for the hearing in its official case reports.[90]

Moreover, as those with regular access to the parties' submissions know well, the summaries of the parties' arguments made in the report for the hearing (and sometimes reproduced in the text of the judgment)[91] are very different from the actual arguments of the parties. The contention that 'in every case, the Court publishes the interpretive approaches and positions advanced not only by the Court and its AGs, but also by any and all parties to the case, including, most importantly, the arguments of the institutions and Member States of the European Union', which makes its discourse 'permanently, thoroughly, and publicly controverted'[92] thus seems rather exaggerated.[93]

The burden which the Court of Justice's decisions (together with the published opinions of advocates general) bear is, according to Lasser, increased by the fact that the Court has removed (or, one should rather say, has not established) 'the diversity of professional perspectives produced by publishing an academic argument alongside the judicial one'.[94] Lasser admits that academic arguments are not removed completely, since advocates general refer to them extensively in their opinions, but he stresses that they are significantly 'filtered' by them.

However, to insist that only by publishing the doctrinal notes alongside the judgment in a single medium are those made visible to the public is

[88] Vassilios Skouris, 'Self-Conception, Challenges and Perspectives of the EU Courts' in I Pernice, J Kokott and C Saunders (eds) *The Future of the European Judicial System in a Comparative Perspective* (Nomos, Baden Baden 2006) 21–2.

[89] A good example is the Court's judgment in *Joined Cases C-392/04 and C-422/04 i-21 Germany and Arcor* [2006] ECR I-8559. Here the Court in answering the second question reproduced only the arguments of the applicant in the main proceedings and the Commission, which approved its analysis while totally ignoring the arguments presented by governments arguing against its conclusion.

[90] A change, which one judge of the Court characterized as an 'unavoidable sacrifice', compelled by the delays in translations. See David Edwards, 'How the Court of Justice Works' (1995) 20 Eur L Rev 539–58, 547.

[91] Usually one or two paragraphs long.

[92] Lasser (n 3) 237.

[93] In a highly controversial case, Case C.440/05 *Commission v Council* ('marine pollution') [2007] ECR I-9097 (concerning EU competences in criminal matters), the Court summarizes arguments put forward by the Commission and the Council and then all it says about arguments presented by no fewer than 19 Member States is: 'The arguments put forward by the Member States which have intervened in the present proceedings are largely similar to those relied on by the Council' (para 51). I venture to say (having seen its submission) that the United Kingdom in particular would find its arguments quite distinct from the Council's. This is not a critique of the Court; rather, I want to show that access to the parties' arguments is highly selective and superficial.

[94] Lasser (n 3) 354.

rather exaggerated. First, each of the leading EU law journals (both general and specialized in certain fields) has its case comments section; these are closely followed by those who practise European law. Secondly, and more importantly, the Court itself provides a list of doctrinal notes relating to its judgments, which complement the case information available on the official legal information website, Eur-lex. It is only logical for the notes not to be published together with the judgments—if only because of the diversity of publication media in 27 Member States. By providing its semi-official list, the Court connects them in a way which effectively supplements the single medium. It therefore seems to me to be unjustified to say that the Court 'effectively possesses a monopoly of published argumentation.'[95]

(iii) *Transparency*

Judicial transparency is one of the core phenomena Lasser examines in relation to the three courts and the environment in which they operate. Throughout the book Lasser is quite critical of US concerns for openness of judicial deliberations, and asks whether the bifurcation of the French judicial discourse into a 'hidden' and 'unofficial' sphere does not in fact promote a more serious consideration of equity, substantive justice and socially responsive legal adaptation than the integrated argument of the US Supreme Court (and the Court of Justice in its modified form) allows for.

Lasser seems to believe that opening judicial deliberations to the public harms them. However, this ignores other communication channels existing internally among the judges beyond officially published documents—both in the United States and the Court of Justice. So even if the scope of arguments revealed by US judicial opinion is much wider than that of the Court of Justice, the Supreme Court's justices produce conference notes which are only rarely revealed long after the event.[96] Similarly the judges of the Court of Justice prepare rather formalized reports for the general meeting of the Court in the cases in which they are reporting judges;[97] they also communicate with each other during their deliberations. Thus to argue that the Court's publication practice, which makes opinions of advocates general public, 'effectively violates the sanctity of the internal judicial argumentative space' is unwarranted: there

[95] Ibid 355.

[96] See eg Del Dickson, 'State Court Defiance and the Limits of Supreme Court Authority: Williams v. Georgia Revisited' (1994) 103 Yale LJ 1423–81, who provides a very good example. On the basis of these internal documents (together with interviews and other archived materials), Dickson discusses the Supreme Court of Georgia's refusal to order a new trial in the case of a black person sentenced to death in violation of the US Constitution, as the US Supreme Court decided in *Williams v. Georgia*, 349 US 375 (1955). The Georgian court stated that the Supreme Court did not have jurisdiction. On a further appeal in *Williams v. Georgia*, 350 US 950 (1956) the Supreme Court denied certiorari to avoid further conflict and the plaintiff was executed. The internal documents reveal that one of the Supreme Court's main concerns—of course, never stated publicly—was to preserve its authority and avoid further disobedience from a state supreme court.

[97] These reports very much resemble reports for the hearing, but contain an additional part which summarizes the reporting judge's own view of the case and his suggestion on how to proceed with it.

remain communications never revealed to the public, where judges can put forward precisely the kind of arguments Lasser wishes them to.

(iv) *Institutional dimension*

Lasser emphasizes the burden which the Court of Justice's decisions bear in the absence of institutional means of judicial control and legitimation, similarly to the United States. But, again, I do not understand why the 'political appointment process governed by the Treaty and controlled by the Member States'[98] would not provide such means of control. For some reason Lasser considers the French model of meritocratic selection and promotion to be the only possible institutional means of achieving judicial control, accountability and the legitimacy of courts. But how can this be true? Does not the system in which judges can be re-appointed every six years achieve far more effective control?

Moreover, it is generally believed that it is exactly for this reason that dissenting opinions are not allowed in the Court of Justice. By allowing them the Member States could even more closely control the behaviour of 'their' judges. For the same reason, advocates general almost never write opinions which relate to the states they come from. If there were no institutional link between the State and the members of the Court who come from it, all these concerns would be immaterial.

Lasser mentions that the Court of Justice's 'approach to democratic debate, deliberation, and justification represents the French model forced to confront the kind of fragmentation of *demos* increasingly overtly seen in the French context' and suggests that 'the republican French model . . . cannot really cope with the multiplicity of different, nationally-based identities that operate in the EU context'.[99] But that is exactly the point: so long as nationally-based identity is primary in the EU context, control by the Member States, exercised through their appointments, is crucial for keeping the Court under some kind of control.

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In sum, the Court of Justice's problem is not how to maintain the French model but rather how to respond to the diverse environment which exists inside it and surrounds it. In my view the Court does not complicate its situation by its greater transparency and openness to its allegedly 'controverted' (the term used by Lasser) environment, since this environment is far more moderated by the Court than Lasser suggests. Finally, there are important (albeit only limited) institutional means which help to keep the Court under the control of the Member States.

[98] Lasser (n 3) 353.
[99] Ibid 348.

2. *Limitations of* Judicial Deliberations' *Approach*

Having made a number of substantive criticisms, it is the right time for me to move to the method employed by *Judicial Deliberations*. According to Lasser, 'the best method to gain insight into how foreign jurists speak or even think is to deploy a rigorous literary analysis of the discourses deployed in and by those jurists' legal systems'.[100] Lasser advocates expanding the range of materials for study, which should include 'academic writings, practitioner's arguments, and/or internal judicial or other governmental documents',[101] and suggests that '[b]y widening the field of materials for discursive study, the comparatist . . . gains access not only to different discourses, but also to the underlying conceptual structures that gird the legal culture as a functioning—and potentially dysfunctional—whole'.[102]

The promise of literary analysis should, according to Lasser, lie in its 'intellectual neutrality'. Because US scholars have always approached the French legal system with their own conceptual mindset, responding to their own system's particular problematic, they have failed to see that the French system is constructed in a very different way. This is true and Lasser convincingly shows it throughout his book. However, is it really the literary theory which allows for the making of such findings?

In *Judicial Deliberations* Lasser does not attempt to explain what he actually means by literary analysis apart from in a short passage in the introductory chapter, according to which 'the basic idea is to approach the documents or arguments produced by a legal system as if they were serious literary works, and thus treat them with a similar degree of careful, detailed, and almost exhaustive attention'.[103] This does not tell us much: are not lawyers expected to treat legal texts with a similar degree of careful, detailed, and almost exhaustive attention?

In his earlier article Lasser used the literary method more explicitly, borrowing from authors who indeed were literary theorists: Roman Jacobsen and Roland Barthes.[104] With extensive references to their work, Lasser shows what it is lawyers could probably overlook: the distinctive ways in which both the US and French courts *present* their decision-making as both stable and socially responsive, and shows how *the way* in which the decisions are written assists those courts to achieve that goal. However, in that article Lasser explicitly admits that 'the use of literary theory shifts the analytic biases from

[100] Ibid 11.

[101] Ibid 12. Lasser argues that the comparatist must refuse 'a positivist conception of legal materials', but it is not clear in what sense expansion of analysed materials beyond those 'legally binding' implies 'the anti-positivist injunction.' I believe, to the contrary, that the positivist conception of law makes this distinction—between official and unofficial documents—possible.

[102] Ibid 13.

[103] Ibid 11. See also n 100, above.

[104] Mitchel De S.-O.-L'E Lasser, '"Lit. Theory" Put to the Test: A Comparative Literary Analysis of American Judicial Tests and French Judicial Discourse' (1998) 111 Harv L Rev 689–770.

the biases of a particular legal tradition to those of another discipline'.[105] *Judicial Deliberations* seems to forget this warning.

When reading the book one cannot help but feel that Lasser's analysis remains superficial and does not want seriously to engage with the conceptual framework on which arguments are being built. We have seen this in relation to Lasser's analysis of the status of case law in different jurisdictions, in which he does not try to explain what the French conceptual framework of sources of law is. When Lasser finds an author who considers *la jurisprudence* to be a source of law, he merely states that that author '*appears to* classify [*jurisprudence*] as a veritable source of law (along with legislative and administrative enactments and custom), albeit in terms so *tactfully measured* as to border on the equivocating'.[106]

On the other hand, Lasser's main argument that US judges 'make law' rests on the fact that US discourse employs 'the deeply revealing term "case law" (for which there is, quite tellingly [according to Lasser], no true French equivalent)'.[107] However, it is also in the United States that the idea of 'judicial lawmaking' is more complicated than Lasser suggests. This is well illustrated by the following passage from Justice Scalia's concurring opinion in *James B. Beam Distilling Co. v Georgia*:

> I think, '[t]he judicial Power of the United States' conferred upon this Court and such inferior courts as Congress may establish, . . . , must be deemed to be the judicial power as understood by our common-law tradition. That is the power 'to say what the law is', . . . , not the power to change it. I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it *as judges make it*, which is to say *as though* they were 'finding' it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow be*.[108]

But *Judicial Deliberations* leaves the problem of distinguishing legislative and judicial lawmaking entirely unexplored as if it existed only in France. 'Case law' means simply 'law' without further examination.

Apart from lacking conceptual clarity,[109] Lasser makes empirical or sociological claims for which he provides either only anecdotal evidence or no evidence at all. For example, when he describes the decision-making process within the Cour de cassation, he claims that in its 'closed dossiers'

[105] Ibid 693–4.
[106] See n 29, above.
[107] Lasser (n 3) 303.
[108] 501 US 529, 549 (1991) (Scalia concurring).
[109] See also some contributions in Huls, Adams and Bomhoff (n 2), which note a similar lack of conceptual clarity concerning other notions central to Lasser's analysis: formalism (Jacco Bomhoff, 'Comparing Judicial Reasoning on a Formalism/Policy Axis: Problematizing and Contextualizing 'Formalism' in Mitchel Lasser's *Judicial Deliberations*' and Harm Kloosterhuis, 'Formal and Substantial Justification in Legal Decisions: Some Critical Questions from an Argumentative Perspective') or legitimacy (Maurice Adams and Fernand Tanghe, 'Legitimacy and Democracy through Adjudication: Comparative Reflections on the Argumentative Practice of the French and Belgian Cour de cassation', particularly 208–14).

'the *conclusions* and *rapports* can routinely be *fifty* pages long'.[110] Now remember that annually the Cour decides tens of thousands of cases. Is it really the case that such long reports are 'routinely' produced? Hardly, since this would be physically impossible for the around 100 judges and 30 advocates general who write these reports.[111] Interestingly, Lasser is well aware of these numbers but does not seem to take them into account.

There must be some way of sorting cases according to their relative importance, and allocating the Cour's resources to them accordingly. Alain Lacabarats, a member of the Cour and the Head of its Service of Documentation and Studies *(Service de documentation et d'études)*, pointed to the diversity among cases to be reported in different publication media, according to their importance.[112] Although this article was published after *Judicial Deliberations*, it clearly reflects developments at the Cour which had then been happening for quite a while. Lasser highlights the fact that conclusions of the Cour de cassation's advocates general and the reports of reporting judges are published only in 'a microscopic percentage of the tens of thousands of cases'[113] decided by the Cour. However, he omits the fact that only a tiny percentage of these thousands of cases is of any significance and deserves any attention.[114]

Fred Bruinsma in his contribution to *The Legitimacy* is even harsher as regards some evidence provided by *Judicial Deliberations*. When Lasser assures his readers that 'in [his] fairly extensive experience interviewing and debating with members of the French *magistrature*, [he] never [came] away from such discussions with an impression of insincerity',[115] Bruinsma comments that 'Lasser is unforgivably silent about his empirical methodology.... This lack of transparency affects the legitimacy of his book, and the validity of his portrait of the Cour de cassation'.[116] Lasser introduces his comparative method as 'a vague but strong belief that through prolonged exposure and detailed analysis, the comparatist can in fact gain a certain fluency and eventually insight into the linguistic and conceptual universe of foreign legal systems'.[117] But how do we know how long and detailed Lasser's exposure was? In that respect it is surprising that there is no list of cases, otherwise usual in such publications.

[110] Lasser (n 3) 49.
[111] Ibid 180.
[112] [2007] Dalloz, Chr. 889–91. See also Andrea Pinna, 'Filtering Applications, Number of Judgments Delivered and Judicial Discourse by Supreme Courts: Some Thoughts Based on the French Example' in Huls, Adams and Bomhoff (n 2).
[113] Lasser (n 3) 159.
[114] Lasser notes in a mere footnote (fn 61 at 48) that the Cour increasingly publishes these documents on its website, which further undermines their 'hidden' quality.
[115] Ibid 168.
[116] Fred Bruinsma, 'A Socio-Legal Analysis of the Legitimacy of Highest Courts' in Huls, Adams and Bomhoff (n 2) 64.
[117] Lasser (n 3) 10.

It seems to me that Lasser exhausted the possibilities of literary analysis in those works of his which preceded *Judicial Deliberations* and that the book's aim, to explain the relationship between judicial argumentation and transparency on the one hand, and judicial control, accountability and legitimacy on the other, cannot be achieved with such an analysis.

3. *Conclusion: Towards Comparative Jurisprudence*

Despite the criticism I have raised throughout this review, *Judicial Deliberations* is certainly one of the main contributions to comparative studies of courts and judicial argumentation, if only because they are still so few, the reasons for that lying in their complexity, clearly illustrated by *Judicial Deliberations* itself.

First, Lasser constantly, and quite rightly, emphasizes that comparatists must take into account a much wider set of materials when they study foreign legal systems. However, that is something Lasser showed a long time ago in his truly pioneering work on French courts, 'Judicial (Self-) Portraits: Judicial Discourse in the French Legal System'.[118] When it comes to *Judicial Deliberations*, one must sometimes wonder how deeply Lasser actually dug into the European Union legal process or what kind of evidence he finally collected for his statements concerning the French system.

This brings me to a second point. *Judicial Deliberations* aspires to contribute to the debates about contemporary legal theory and jurisprudence, concerning the theory and practice of judicial interpretation and justification.[119] In that respect, however, it largely omits significant theoretical debates current in the legal systems in question, as I showed in relation to the concept of law and judicial lawmaking. Lasser made an extremely important point: that one cannot approach a foreign legal system burdened by the conceptual framework of one's own. However, instead of carrying out a superficial search, which literary analysis allows, one needs to go deeply into these debates and try to understand the other legal system *on its own terms*. That is something William Ewald called a 'jurisprudential approach to comparative law'[120]—digging deeper into the minds of lawyers, and particularly those of legal thinkers, in foreign legal systems to see how *they* understand their practice and its place within their legal systems. And despite its high ambition, this has not been fully achieved by *Judicial Deliberations*.

[118] M Lasser 'Judicial (Self-) Portraits: Judicial Discourse in the French Legal System' (1995) 104 Yale L J 1325–410.
[119] Lasser (n 3) 13.
[120] See n 14, above.