

What is juridification?

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Abstract

“Juridification” is an ambiguous term, both descriptively and normatively. In this paper we propose five ways in which “juridification” may be understood; constitutive juridification, juridification as laws expansion and refinement, as increased conflict solving with reference to law, as increased judicial power and as legal framing. In the first part we clarify the five understandings. In the second part we discuss the relationship between the five understandings, and in a third and concluding part we briefly comment on some of the challenges we are faced with from a normative point of view.

Introduction

“Juridification is an ugly word - as ugly as the reality which it describes.”¹ Maybe, but first of all juridification is an ambiguous and contested concept. The ambiguous meaning of the concept relates both to its descriptive and normative content. In descriptive terms some see juridification as “the proliferation of law” or as “the tendency toward an increase in formal (or positive, written) law”²; others as “the monopolization of the legal field by legal professionals”³, the “construction of judicial power”⁴ or as “legal domination”⁵; and some quite generally link juridification to the

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¹ Günther Teubner, “Juridification. Concepts, Aspects, Limits, Solutions”, in Teubner, G. (ed), *Juridification of Social Spheres. A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law*, Berlin/New York: Walter de Gruyter, 1987, p. 7. As we write the word juridification is not listed in the Oxford English Dictionary, yet gives about 1600 hits at Google.

² J. Habermas, *The Theory of Communicative Action*, Vol. 2, Boston: Beacon Press, 1987, p. 359.

³ See Penny Brooker, “The Juridification of Alternative Dispute Resolution”, *Anglo American Law Review*, Vol. Xx (1999), pp. 1-36, p.1 n.1.

⁴ See Alec Stone Sweet, “Judicialization and the Construction of Governance, in Martin Shapiro and Alec Stone Sweet *On Law Politics and Judicialization*, Oxford, Oxford University Press, 2002, p.71: “I will use the term ‘judicialization’ as shorthand for... the construction of judicial power.”

⁵ Cf. James Bohman, “Constitution Making and Democratic Innovation: The European Union and Transnational Governance” (forthcoming ARENA): “I argue that the problem the constitution has to solve is *juridification*, or the possibility of legal domination in the face of institutions that cannot organize a singular and unified popular sovereignty. Such legal domination is not simply tyranny, but rather the imposition of a cooperative scheme upon others who cannot influence or revise its terms.”

spread of rule guided action or the expectation of lawful conduct, in any setting, private or public.⁶ These are but a few of the shorthand definitions presented in the “juridification literature”.

In normative terms juridification is sometimes seen as the hallmark of constitutional democracy, the triumph of the rule of law over despotism; at other times as undermining not only efficiency, but also democracy, civil society, and eventually the rule of law itself.⁷ The question of juridification is actualised through the emergence of new democracies at an unprecedented scale; the proliferation of rights discourses globally, regionally, and nationally; and the growth of international law generally and the use of international courts and war crimes tribunals more specifically. Simply put the twin ideals of the rule of law and legally assured human rights have conquered and continue to conquer new ground world wide.

In the following, we will try to make sense of these ambiguities in analytical terms. We propose a broad, five-pronged classification of juridification where we still limit the concept to cases of national, international or supranational legal systems, thus excluding cases where juridification is not linked in some way to sovereign states or cooperation between such.⁸ In the first part, we clarify the five understandings in descriptive terms; in the second part we discuss the relationship between them at a general level in order to better understand the conceptual complexities involved; and in a third and concluding part we briefly comment on some of the challenges we are faced with from a normative point of view.

⁶ See for example Harry W. Arturs and Robert Kreklewich, “Law, Legal Institutions, and the Legal Profession in the New Economy”, in *Osgoode Hall Law Review*, Vol. 34 (1996), No. 1, p. 29. : “This process of extrapolating expectations of lawfulness and fairness from state courts to other public agencies, and from the state sphere to private institutions, we will refer to as juridification.”

⁷ See for example Jean Cohen, *Regulating Intimacy. A New Legal Paradigm*, Princeton and Oxford: Princeton University Press, 2002, and the discussion of liberal and welfare state models of law in Bernhard Peters, *Recht, Rationalität und Gesellschaft*, Frankfurt am Main: Suhrkamp 1991. Cf. the statement by Otfried Höffe in *Vernunft und Recht*, Frankfurt am Main: Suhrkamp 1996, pp. 41-42.

⁸ Meaning, for example, that we will not cover cases where a voluntary organization or a business organization becomes more regulated by the autonomous adaptation of formal rules to guide action within the organization or between organizations. Furthermore our focus is on legal rules “as opposed to rules produced by administrative or political decision-making” (Barbara Mauthe, “The Notion of Rules and Rule-Making in the Central Local Government Relationship”, *Anglo American Law Review*, 2000, p. 317.

Forms of juridification

Juridification is related to two alternative concepts, “judicialization” and “legalization”, concepts that are sometimes used more or less synonymously with “juridification”. Thus before going any further, a brief note is in order. By judicialization we generally understand what we below will define as juridification D, linked to the increased power of the judiciary.⁹ Legalization, we understand as a process of de-juridification, where a previously forbidden activity is permitted. Kenneth W. Abbott et al. offer an alternative conceptual understanding of legalization in relation to the development of international law.¹⁰ The authors define legalization as a possible property of institutions. Legalization of an institution takes place along three dimensions, obligation, precision and delegation. A highly legalized institution would be one that is obliged to follow certain rules that are precisely stated and where the final judgement is being made by a third party. Legalization in terms of obligation, precision and delegation, seems to be derived from a basic definition of a legal rule¹¹, and as such may describe the establishment of what may be termed legal institutions, but not its further development. According to the classification the EU, for example, scores high on all three dimensions presumably exhausting any possibility for further legalization. The EU has passed the threshold of legalization, so to speak, and in order to describe its further development a different conceptualisation is needed.

This in view we will propose five ways in which “juridification” may be understood. First, constitutive juridification is the process where constitutive rules and principles relating to a political system are established or changed to the effect of adding to the competencies of the legal system. Second, juridification is a process through which law come to regulate an increasing number of different activities. Third, juridification is a process whereby problems and conflicts increasingly are being solved by or with

⁹ Much in line with Sweet Stone (2002) (n.4) and Joachim Nergelius, “North and South: Can the Nordic States and the European Continent Find Each Other in the Constitutional Area – or are They too Different?”, in Scheinin, Martin (ed.), *Welfare State and Constitutionalism – Nordic Perspectives*, Nordic Council of Ministers, Copenhagen, 2001: “Judicialisation... refers to judicial power in general”, p. 79; “It may be seen as symptomatic for judicialisation that courts get more powers at the expense of political institutions”, p. 83.

¹⁰ See Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, “The Concept of Legalization”, *International Organization* 54, 3, Summer 2000, pp 401-419.

reference to law. Fourth, juridification is a process by which the legal system and the legal profession get more power as contrasted with formal authority. Finally, juridification as legal framing is the process by which people increasingly tend to think of themselves and others as legal subjects and as bearers of rights.

1. Constitutive juridification (A)

According to the first definition, juridification is a process where norms (rules and principles) constitutive for a political order are established or changed to the effect of adding to the competencies of the legal system. Roughly one may distinguish between constitutive norms concerning procedures, the acceptable uses of state power and the separation of powers. A constitutional state (*Rechtsstaat*) is characterised by procedural rules on how to pass and effectuate political acts, content rules that limit political power and protect individual rights, and institutional rules that give one part of a political system exclusive competencies relative to an other.¹²

The establishment of a constitution is the most clear-cut case of juridification A. Still, constitutive norms may be articulated both inside and outside a formal constitution in the form of legal doctrines¹³, legal or jurisprudential regimes¹⁴ or legal paradigms¹⁵, to

¹¹ See for example Friedrich V. Kratochwil, *Rules, Norms and Decisions*, Cambridge: Cambridge University Press, 1989, ch. 7

¹² Juridification here means what J. Habermas refers to as *Verrechtsstaatlichung* (constitutionalization of the state), *The Theory of Communicative Action*, Vol 2, Boston: Beacon Press, 1987, p. 359. Dieter Grimm uses *Verrechtlichung* in much the same way. "Braucht Europa eine Verfassung?", in *JuristenZeitung*, 50. Jahrgang, 16. Juni, 1995, p. 582-85. The English translation of Grimms article uses "legalization" for *Verrechtlichung*, *European Law Journal*, Vol. 1, No. 3, November 1995. Juridification in this sense roughly relates to what Hart refers to as secondary rules: "primary rules are concerned with the actions that individuals must or must not do"; secondary rules "are concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined". See H.L.A. Hart, *The Concept of Law*, Oxford University Press 1972 (1961), p. 92.

¹³ Michelman states that "Every incomplete constitution is in that way always on the road to completion. (Every mature legal system is 'thick' with doctrine.)" (p13). Frank Michelman, "Constitutional Legitimation for Political Acts", *Modern Law Review*, Volume 66 (2003), Issue 1, Page 1-15. Such change, to the degree that it defines the competencies of the legal system, may either imply juridification A, when it adds to the competencies of the judiciary, or dejuridification A, when it infringes on these competencies. See also Mark J. Richards and Herbert M. Kritzer, who sums up the literature relative to the concept of regime; "the Court not only functions within constitutional regimes but also is central in creating those regimes", "Jurisprudential Regimes in Supreme Court Decision Making", *American Political Science Review*, Vol. 96 (2002), No. 2.

¹⁴ See Mark J. Richards and Herbert M. Kritzer (n.10): "Jurisprudential Regimes structure Supreme Court Decision making by establishing which case factors are relevant for decision making and /or by setting the level of scrutiny or balancing the justice are to employ in assessing case factors" p.305.

mention some of the concepts used to depict relatively stable systemic fundamentals that structure legal decision making. Some of these, for example deference doctrines¹⁶, may change quite a bit over relatively short periods of time. Informed by public debate they may either change through political intervention or through interpretations or adaptations made by the legal system, or through a combination of both as when existing legal doctrines are constitutionalized. The ECJ referred to the EC treaty as “the basic constitutional charter” as early as 1986¹⁷ and the current process of constitutionalization may in the words of Jo Hunt¹⁸ be seen as “attempts to formalize and concretize certain constitutional doctrines which formerly existed in the Court’s jurisprudence ... and which had never, as such, been held up to a binary accept/reject determination on part of Member State governments”. Such formal constitutionalization is juridification (A) according to our definition only to the extent that it adds something new to the competencies of the legal system.

Changing the constitutive norms may imply juridification as well as dejuridification¹⁹. Judicial review is a case in point. First, judicial review of legislative acts may be expanded, as seems to have been the case in most European countries, not least as a result of the success of the European Court of Justice (ECJ), implying juridification A. Still, establishing principles limiting the courts competencies in interpreting legislative acts relative to constitutional provisions may reverse the process.²⁰ Second, the vast expansion of the administrative state has implied that the legislature has conferred decision-making authority to the administration making judicial review of administrative acts necessary in order to decide the limits of administrative discretion (juridification A). In general these limits have been fairly wide, based on the premise that specialised agencies are better equipped to interpret regulatory ambiguities, or for

¹⁵ Jürgen Habermas, *Between Facts and Norms*, Cambridge, Mass.: MIT Press, 1996, Chap. 9, “Paradigms of Law”. Jean Cohen, in line with Habermas, defines a paradigm of law as “an integrated set of cognitive and normative background assumptions about the relationship the law should establish between the state and society, and the form legal regulation must take”, *Regulating Intimacy*, p. 143.

¹⁶ Tolley, M. C., “Judicial Review of Agency Interpretation of Statutes: Deference Doctrines in Comparative Perspective”, *The Policy Studies Journal*, Vol. 31 (2003), No. 3.

¹⁷ Case 294/83, *Parti Ecologist “Les Verts” v Parliament* [1986] ECR 1339, at 1365.

¹⁸ Hunt, J., “Legal developments”, in *Journal of Common Market Studies*, Volume 41 (2003), pp. 79-95.

¹⁹ Dejuridification A takes place when constitutive rules and principles in some way limit the former competencies of the legal system.

²⁰ Keith E Whittington, for example, talks about the “road not taken” in his discussion of the case of *Dred Scott*, referring to the dissenting views of Associate Justice Benjamin Curtis, that “laid out the argument that some constitutional questions were best left unanswered by the Court.”

sheer efficiency reasons. Thus one may establish constitutive rules limiting the competencies of the judiciary relative to the administration. For example, according to one possible doctrine, a Court would be reluctant to take on cases involving regulations securing social rights, but find it appropriate to take on cases where civil rights are involved.²¹

One may also distinguish between formal constitutive provisions and the actual use of those provisions. 150 years after the Danish constitution was signed the Supreme Court for the first time struck down a law passed by parliament. The question is if the Court then did something principally new and thereby established a new constitutive principle. Since it is sometimes difficult to interpret what competencies legal systems actually have, the concept of juridification as understood here may well apply to such cases. The more ambiguous the relationship between established practises and a new decision the more reason to speak of juridification in this regard. The ECJ decided to take on the *Costa v. ENEL* and thereby established the principle that the ECJ competencies cover cases where EC law and member state law might be in conflict. They might have argued that this is a matter for the member states to decide, since any clear reference to this were lacking in the treaties.²² Thus one may argue that the court expanded its competencies by interpreting the treaty in a certain way. The court then went on to “make law” (the doctrine of supremacy). This increased the competencies of the ECJ not only relative to the other EU institutions, but also relative to the national courts as interpreter of national legislation and the national legislatures in their capacity of both lawmakers and constitution makers.

As already indicated legal systems do not necessarily seek to expand their competencies. There are many examples of how courts not only turn down an

²¹ See Michael C. Tolley, “Judicial Review of Agency Interpretation of Statutes: Deference Doctrines in Comparative Perspective”, *The Policy Studies Journal*, Vol.31 (2003), No. 3.

²² Teleological reasoning on part of the Court is provided for in the Treaty relative to attaining the objectives of the treaty. For a thorough discussion, see for example Stefan Enchelmaier’s critical review of Karen J. Alter. Enchelmaier states, “mere silence on part of the Treaty does not mean anything in particular” and “the intentions of the founder Member States of the Community are revealed, and sufficiently so, in the Treaty itself” (p.289). Stefan Enchelmaier, “Supremacy and Direct Effect of European Community Law Reconsidered, or the Use and Abuse of Political Science for Jurisprudence”, *Oxford Journal of Legal Studies*, Vol. 23 (2003), No. 2, pp 288-289. Karen J. Alter, 2001, *Establishing the Supremacy of European Law*, Oxford: Oxford University Press.

opportunity,²³ but also make decisions that imply a process of dejuridification. An interesting EU case is the Jérgo-Quééré judgement, where the Court of First Instance (CFI) ruled according to a new and less restrictive test inspired by recommendations made by the Advocate General Jacobs, in relation to the possibility to get cases tried in court at the European level.²⁴ The ECJ, however, in a subsequent case held back, arguing that the question of a more liberalized test was for the Member States to decide by way of treaty amendments. The CFI in subsequent cases has made no reference to the Jérgo-Quééré decision.

2. Juridification as laws expansion and refinement (B)

A different conception is that of juridification as the process by which an activity becomes subjected to legal regulation or more detailed legal regulation.²⁵ We will make a distinction between two aspects of juridification B, laws horizontal and vertical expansion (B1), and laws vertical and horizontal differentiation (B2). Laws expansion is the core element in juridification as defined above, when law conquers fertile ground so to speak. Laws vertical differentiation means that a law is specified in order to differentiate between an increasing numbers of cases. Laws horizontal differentiation means that one law is divided into two or more laws.

This distinction between expansion and vertical and horizontal differentiation is important as it adds a qualitative element to juridification B. One conspicuous development of modern law, in particular welfare state law, is the expansion of materialized law with relatively low levels of vertical differentiation, or in the words

²³ For example the Courts cautious approach to the principle of subsidiarity, be it for strategic integrationist or technical legal reasons (the difficulty of making sense of the principle in legal terms)²³. For a discussion see Phil Syrpis, "In Defence of Subsidiarity", *Oxford Journal of Legal Studies*, Vol.24 (2004), No. 2, pp. 323-334. p.326

²⁴ For a more detailed account see Jo Hunt, pp 85-86, op. cit.

²⁵ See Rüdiger Voigt, "Gegentendenzen zur Verrechtlichung", i *Jahrbuch für Rechtssoziologie und Rechtstheorie*, Band 9, Opladen: Westdeutscher Verlag 1983, p. 17: "Der Prozess der Verrechtlichung, d.h. die Ausdehnung des Rechts zulasten rechtlich bisher nicht erfasster Bereiche einerseits und die Detalierung und Spezialisierung des Rechts anderseits." This is also the way Jürgen Habermas uses "juridification" in *The Theory of Communicative Action*, Vol 2, Boston: Beacon Press, 1987, p. 359: "The expression 'juridification' [*Verrechtlichung*] refers quite generally to the tendency toward an increase in formal (or positive, written) law that can be observed in modern society. We can distinguish here between the *expansion* of law, that is the legal regulation of new, hitherto informally regulated social matters, from the *increasing density* of law, that is, the specialized breakdown of global statements of the legally relevant facts [*Rechtstatbestände*] into more detailed statements."

of Jean Cohen²⁶; “The type of law it uses is thus more particularistic than classical formal law, yet often involves vague and open ended directives.” The quantitative imagery of a flood of norms tends to conceal the ensuing qualitative changes in the structure of law where laws expansion means that more discretionary power comes to be vested in the administrative system²⁷.

Examples of laws expansion may be cases where law is applied in new areas; family law²⁸, labour law²⁹, environmental law³⁰, laws regulating intimacy³¹, and so on. Since one may discuss the degree to which law was previously absent from these areas, laws expansion should also include instances where an activity that is not legally regulated within a legally regulated area becomes regulated. In cases where a governmental activity is subjected to “local” standardized rules, laws expansion may also mean that legal rules established at a higher level are imposed on a lower level, examples being central government imposing legal norms on local government³², the EU imposing

²⁶ See Jean Cohen, *Regulating Intimacy*, p. 152. The thematization of the distinction between equality before the law and substantial equality, mark the transition from a liberal legal paradigm to a welfare state paradigm of law. “The welfare paradigm (of law) deploys a particular form of law; substantive, purposive, goal oriented, and implemented through regulations, standards, and rules. This materialized law aims at achieving specific goals in concrete situations.” See also J. Habermas, *Between Facts and Norms*, pp. 392-409. Teubner’s main thesis is that juridification “does not merely mean proliferation of law”, but “signifies a process in which the interventionist social state produces en new type of law, regulatory law...characterized by material rationality as opposed to formal rationality” (“Juridification. Concepts, Aspects, Limits, Solutions”, in Teubner, G. (ed), *Juridification of Social Spheres. A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law*, Berlin/New York: Walter de Gruyter, pp. 18-19).

²⁷ For instance through a de facto process of dejuridification (A) in the form of deference doctrines. See Tolley, M. C., “Judicial Review of Agency Interpretation of Statutes: Deference Doctrines in Comparative Perspective”, *The Policy Studies Journal*, Vol. 31 (2003), No. 3. On administrative discretionary power see D. J. Galligan, *Discretionary powers: A Legal Study of Official Discretion*, Oxford, Clarendon, 1986.

²⁸ Habermas with reference to S. Simitis and G. Zenz, n. 36 p. 432, in *The Theory of Communicative Action*, Vol. 2, pp. 368-.

²⁹ According to Habermas *Verrechtlichung* was first introduced into German academic discussion by Otto Kirchheimer with reference to labour law during the Weimar Republic.

³⁰ See Eric W. Orts, “Reflexive Environmental Law”, *Northwestern University Law Review*, Vol. 89 (1994-95), No 4: “juridification applies more broadly to any area of social life that the regulatory impulse of modern states deems worthy of “controlling” through enactment of highly technical and specific laws. Increasingly, juridification extends to the natural environment, a phenomenon some commentators refer to ironically as ‘legal pollution.’” (p. 1239 and n.47).

³¹ Jean Cohen, *Regulating intimacy. A New legal Paradigm*.

³² Barbara Mauthe, “The Notion of Rules and Rule-Making in the central local Government Relationship”, *Anglo American Law Review*, Vol. xx (2000), p.317: “The process of ‘legalization’ represents a ‘transformation’ in the “control” of local authority decision-making. The control alters from a basis of ‘authority’ to control based on the exercise of a ‘power’, specifically legal powers.”

legal norms on national government³³, or the UK government imposing legal norms on the military³⁴. Accordingly, even juridification as laws expansion may be said to have a vertical as well as a horizontal dimension.

No doubt a process of juridification B has dominated the development of the welfare state and it is easy to overlook the parallel process of dejuridification B that has taken place in some areas. For instance when it comes to regulating intimacy juridification and dejuridification (B) have gone hand in hand, as in the area of family law. In relation to the EU, “negative integration”, the obligation on part of member states to remove national legal obstacles to integration, amount to dejuridification, paralleled by juridification B, “positive integration”, through the development of law at the European level³⁵. Juridification B within the EU has taken place both by expansion and refinement. As Karen J. Alter writes, “many European rules are extremely specific, unambiguously defining how states must comply with their European obligations”, and she adds that “when there is doubt, the ECJ is there to give a precise meaning to the rules” indicating the “lawmaking” role of the ECJ.

3. Juridification as increased conflict solving by reference to law (C)

In a third sense juridification means that conflict in a society increasingly is solved by way of law, either by engaging the legal system directly or by reference to law. We may distinguish between non-judicial conflict solving with reference to law (C1) and judicial conflict solving (C2). This implies that a society may be highly juridified in this sense even if the courts are relatively seldom directly involved in conflict solving. Even if a conflict does not end up in court the law may be instrumental in solving conflicts. Non-judicial juridification C may be institutionalized in different ways as proposed by the reflexive procedural legal paradigm.³⁶

³³ For a recent account see for example Stefan Enchelmaier, “Supremacy and Direct Effect of European Community Law Reconsidered, or the Use and Abuse of Political Science for Jurisprudence”, *Oxford Journal of Legal Studies*, Vol. 23 (2003), No. 2.

³⁴ The military has always been governed by strict rules, but these have gradually been subjected, first by the autonomous adaptation of rules guiding the legal system, and second by juridification where “external legal norms where ... being imposed on the armed forces in situations where such legal norms had hitherto been absent”. G. R. Rubin, “United Kingdom Military Law: Autonomy, Civilianisation, Juridification”, *The Modern Law Review*, Vol. 65 (2002), No. 1, January, p. 37.

³⁵ See Stone Sweet, 2000, *Governing with Judges*, Oxford: Oxford University Press, p.157.

³⁶ For example: lay conflict solving, public conflict solving, professional legal conflict solving, administrative conflict solving or conflict solving by committees. The reflexive procedural legal

Examples of dejuridification C are cases where a particular law becomes irrelevant or “goes out of fashion” so to speak. Laws regulating soft drugs throughout Europe, have over time been interpreted less restrictively, and for the police to pick up a drug addict with a needle in his arm, on a regular base, is hardly a relevant option anymore. Laws are interpreted within socially constructed contexts, and as these contexts change, the application of law may change, sometimes resulting in dejuridification C, at other times juridification C.

It is important to make the distinction between juridification B and C as juridification B not necessarily brings on juridification C. Some laws are seldom or never evoked and the degree to which single laws are used may change over time. This is not the place to discuss the complicated relationship between juridification B and C, suffice to suggest that legal regulation (juridification B) at some point may reach a point where dejuridification C would be a likely outcome, be it for efficiency reasons or out of reasoned contempt. The critique levelled at the EU for excessive regulation may be a case in point. Within the EU, the degree of compliance with EC law by member states; efforts by individual EU citizens, cooperations or civil society organizations more generally to get their cases heard at the EU level; and the increased tendency by national courts to refer cases to the ECJ³⁷, can be seen as examples of juridification C.

4. Juridification as increased judicial power (D)

A fourth meaning of juridification refers to the increased power of the judicial system.³⁸ We will distinguish between two sources of this power, ambiguity and complexity. The first, interpretive power arise either when it is ambiguous what law or principle to apply to a certain case or when ambiguity is linked to how a certain

paradigm on this account refers to institutionalized non-judicial conflict solving. See Jean Cohen, *Regulating intimacy. A New Legal Paradigm*.

³⁷ See Alec Stone Sweet and Thomas Brunell, “The European Court and Integration”, in Martin Shapiro and Alec Stone Sweet, *On Law, Politics and Judicialization*, Oxford: Oxford University Press, 2002, pp 258-291. See also Karen J. Alter, 2000: “with individual litigants raising cases and national courts sending these cases to the ECJ, states are less able to exploit legal lacunae and interpret their way out of compliance with European law”, p. 492.

³⁸ Joachim Nergelius, “North and South: Can the Nordic States and the European Continent Find Each Other in the Constitutional Area – or are They too Different?”, in Scheinin, Martin (ed.), *Welfare State and Constitutionalism – Nordic Perspectives*, Nordic Council of Ministers, Copenhagen, 2001: “Judicialisation...refers to judicial power in general”, p. 79; “It may be seen as symptomatic for judicialisation that courts get more powers at the expense of political institutions.”, p. 83.

law is to be interpreted. In short, the more ambiguity concerning the application of norms to a specific case, the more power the legal system may be said to have. The second source of power derives from increased complexity. Complexity increases the power of those that master the complexity relative to those that do not. Both ambiguity and complexity increases the power of the legal system (and the experts inside or outside the legal system). Thus ambiguity and complexity increases the importance and dependence on legal advice and in court settlement.

The often told story of the important role played by the ECJ in the development of European cooperation, be it as hero or villain, may partly be analysed from juridification D and at the same time illustrate the elusive character of this form of juridification, in particular when it comes to international law. The mandate given to the ECJ,³⁹ together with its own interpretation of this mandate (juridification A), the continuous expansion and refinement of law within the EC (juridification B), and the increased tendency to use Community law (juridification C), all have added to the power of the ECJ. EC law has been and still is complex and in need of interpretation. Still it is hard to assess and even harder to predict the interpretive and expert power of the ECJ since the court itself play a major role in deciding this. This holds true whether we look at the ECJ as an interpreter of a constitutional text, as a vehicle of integration or, with Kenneth A. Armstrong (inspired by Habermas), as a mediator between law and its environment. With the constitutional texts of the EU still in the making, the meandering integration processes and most importantly, the coming of age of law's environment in a European context⁴⁰, none of these visions are very helpful, for the time being, in estimating the current or future state of affairs.

Still, it is or might be a somewhat paradoxical property to juridification D. The way the legal system operates; interpretations made are established as law according to the principle of precedence,⁴¹ meaning that the more interpretations made the less room

³⁹ Supported by the institutional voting rules that made it difficult for member states to formally change or clarify this mandate.

⁴⁰ By this, we mean the heightened awareness of the important role played by the legal system within the EU in particular with reference to the social subsystems. See Kenneth A. Armstrong, "Legal Integration: Theorizing the Legal Dimension of European Integration", in *Journal of Common Law Review*, Vol. 36 (1998), No. 2, p. p.156

⁴¹ This implies juridification A or B, and may be affected by juridification C. Juridification D relates to A when interpretive power is used to establish or change constitutive rules and principles. Juridification

for further interpretation given that there is a limit to the number of interpretations that may be made.⁴² Thus making use of the interpretative power may limit the possibility for further interpretation leading to dejuridification D. In theoretical terms we may think of juridification D as continuously oscillating “local” processes of juridification and dejuridification depending on factors such as the specification of new laws, the tendency on part of the judiciary to make new and possibly innovative interpretations and the number of interpretations actually carried out.

5. Juridification as legal framing (E)

Juridification is the process by which people increasingly tend to think of themselves and others as legal persons and as bearers of rights. Thus juridification E implies that individuals will increasingly tend to see themselves as belonging to a community of legal subjects with equal legal rights and duties. Following Jellineck’s influential theory of status⁴³, we may distinguish between four aspects of juridification as legal framing related to the passive, the negative, the positive and the active status of a legal person. First, juridification takes place when the subjection under a state and the acceptance of legal duties replaces other allegiances and loyalties. Second, juridification takes place when individuals increasingly understand themselves as persons entitled to do what is not forbidden, and entrust the protection of this personal freedom to the legal system. Third, juridification takes place when individual and social well-being are thought of in terms of legally based provisions, not for example in terms of private obligations, charity or political decision-making. Finally, juridification takes place when democratic participation increasingly is thought of in legal terms, not for example in terms of civic virtues.

D relates to juridification B when interpretative power is used to refine a particular law. Juridification D relates to juridification C when interpretative power is used to reject a case.

⁴² This in line with Kenneth A. Armstrong’s more elaborate institutional argument: “while ECJ possesses agency, nonetheless, over time as processes of institutionalization within law becomes pervasive, the action of the ECJ (together with those of other actors seeking to steer law) are themselves structured by law. Importantly, path-dependencies are created which both limit and facilitate action. Past action may create unintended or undesirable consequences which frame the possibility for future institutionbuilding and future intermediation by the ECJ between law and its environment” p.156. See also Mark J. Richards and Herbert M. Kritzer, “Jurisprudential Regimes in Supreme Court Decision Making”, *American Political Science Review*, Vol. 96 (2002), No. 2.

⁴³ Georg Jellinek, *System der subjektiven öffentlichen Rechte*, 2. Aufl. Tübingen, 1905. See Robert Alexy, *Theorie der Grundrechte*, Frankfurt am Main: Suhrkamp, pp. 229-243.

In sociological terms juridification E can be described as a process of formalization of social relations. They are torn out of their living context, the *Lebenswelt*, and transformed into more abstract relations between legally constituted persons. In political terms it can be described as a tendency to attach more weight to the notions of rights than to communal bonds and personal responsibilities.

From the point of view of juridification E the basic question concerning the EU is to what degree individual citizens do in fact think of themselves as legal subject and bearers of rights under a European legal order. Whether the question is framed in terms of a common European culture or constitutional patriotism, the decision to establish a European charter of rights; the ideal of openness and transparency sought in the process, and the way the EU have presented and tried to make people aware of this event, clearly indicate that the EU consider juridification E important. The ensuing constitutional process and the way it has been carried out, speak to the same conclusion. Procedures that simply treat citizens as mere addressees of law are not a conceivable option are we to believe the current rhetoric.

Models of juridification

The number of implied or more developed models of juridification in the literature is substantial and furthermore in much of the literature on juridification the relationship between different forms is often taken more or less for granted. To take but one commonly used example, laws expansion and differentiation (B) is often seen to increase the interpretive power of the legal system (D) at the expense of democracy in general and the legislature in particular. This may be correct but then again it does not have to. Sometimes laws are made or specified in order to make less room for interpretation, thus juridification D may induce juridification B that again leads to dejuridification D.

To drive the point home we will make two propositions: First, the five forms of juridification is not necessarily linked, meaning that a link have to be substantiated empirically. We argue that, although it is almost inconceivable to imagine a society

based on law where some juridification have not taken place on all five dimensions, the five different understandings are distinct in the sense that one type of juridification may gather speed, halt or be turned around without a parallel effect on the others. Second, the relationships between the five types of juridification may be linked in any which way, positively or negatively, meaning that any model has to be substantiated empirically. Relating to this second proposition a likely model would be that there is a positive relationship between the forms of juridification, e.g. in the following way: (B → C → D → A) → E.⁴⁴

This simple model suggests that law's expansion and differentiation (B), makes for more conflict solving with reference to law (C), which again gives the judiciary more power (D). This development in turn triggers the establishment of new constitutive principles (A) in order to cope with the new complexity. As a consequence of these juridification processes one may expect that people in general will have an increased tendency to understand themselves and others in legal terms (E)

What we on principle argue is, for example, that laws expansion not necessarily lead to more problem or conflict solving with reference to law, and that the relationship may be turned around. C may positively affect B if we presume that negative experience with C (unsatisfying legal conflict solving) trigger B in an effort to alleviate the negative effects of C. If conflicts are increasingly being solved through the legal system this may trigger legislative initiatives to expand and refine laws in order to reduce ambiguity. This again may give the courts less interpretive power. Similarly constitutive principles may be established to keep some issues off the agenda of the courts. Thus A may lead to more or less legal conflict solving depending on whether a legal system, for example, develops principles in order to avoid judicial review (Danish case) or principles in order to open up to this possibility (EC case). Furthermore, if juridification A, B, C and D where to take place it does not follow that we would also get juridification E. On the contrary heavy juridification ABCD may trigger a countermovement where claims making based on law, together with the ubiquitous use of law, may be scolded with reference to moral, ethical or

⁴⁴ The arrow means "lead to" and denotes a positive relationship. A negative relationship will be indicated by a – sign in front of the letter referring to a specific form of juridification (e.g. –A).

instrumental standards, leading to a reaction against framing every issue in legal terms and thinking of oneself and others in such terms.

One may go on like this, and even if some combinations seem less likely than others, there are few (we have found) that may be ruled out completely while still keeping an open mind. Consequently, rather than a simple cause-effect relationship, we would expect a dynamic and complex relationship among the five forms of juridification, where one form may or may not affect changes in the others. Lacking empirical support it is not possible to say anything about these relationships other than in hypothetical form, and even then it would be difficult to establish any general trends.⁴⁵

If the two propositions presented are accepted it means that the number of theoretically possible models of juridification is enormous. If we limit ourselves to linear models (e.g. $A \rightarrow B \rightarrow C \rightarrow D \rightarrow E$) where all the forms of juridification are included and the forms of juridification can be either positively or negatively related, the numbers of possible models are 1920.⁴⁶ If we, based on our first proposition include models where one or more forms of juridification may be unrelated, the number of models increases to 9720, and if we include models of the type $(A+B) \rightarrow (C+D) \rightarrow E$, the number explodes. If the five basic forms of juridification covers the forms presented in the juridification literature it is no wonder that the literature seems chaotic without further formalization. If we are right in claiming that our five forms are at least the most important basic forms of juridification we may at least start to compare the different proposals presented. If this way of conceptualising juridification has any merit it should be able to catch the essence of most arguments about juridification and specify to what degree different forms of juridification is involved.

⁴⁵ Thus our way of thinking has a lot in common with Jon Elsters view on the relationship between laws and mechanisms. See Elster, "A Plea for Mechanisms", in P. Hedström and R. Swedberg (eds.), *Social Mechanisms. An Analytical Approach to Social Theory*, Cambridge: Cambridge University Press, 1998.

⁴⁶ $(n! \cdot 2^{n-1}) \cdot 1 \cdot 2 \cdot 3 \cdot 4 \cdot 5 \cdot 2^{5-1} = 1920$

Østerud (et al.)⁴⁷ for example identify juridification as (1) the increase in legal regulation (juridification B) and (2) the increased tendency to solve conflicts by reference to law (juridification C). This in turn, they claim, (3) has given the judiciary more formal authority and power (juridification D). This model $(B+C) \rightarrow D$ is presented without much systematic empirical support and with little discussion of alternative interpretations. Stated more or less as facts, the approach misses the point that this model is just one possibility among many.

An alternative model would be: $C \rightarrow (A+B) \rightarrow -D$, implying that a growth in conflict solving with reference to law (C), induce the legislature and the judiciary to define more precise constitutive norms and try to reduce the ambiguity in law through specification (A+B), resulting in dejuridification D. We are not arguing that this model is better able to describe or reconstruct what has been going on. Most likely, both models may help us understand the dynamics involved in the process of juridification, but by focusing on one, or two, unconditionally and without reservations, we deceptively loose sight of the complexities involved. The authors do not make a clear distinction between authority (juridification A) and power (juridification D). They indisputably conclude that the judiciary have gained power on account of the legislature especially as a result of the proliferation of international law. Again this may be correct, but without a clear distinction between authority based on constitutive norms and interpretive powers we risk replacing the ideal of constitutional democracy with adhocracy. If someone has the power to impose rules on others and the resources to have experts decide if and when the rules are actually broken, one would presume that this someone has some powers. To say that the real power resides with those that make the rulings is, within this simplistic language, to reduce the issue to a principle/agent problem, and as such one where the agent always prevail. To argue the opposite is of course as wide of the mark; to view law as an unambiguous instrument of political will. While the first creates a loophole for the legislators to escape responsibility, the second equivalently gets the judiciary of the hook.⁴⁸

⁴⁷ Øyvind Østerud, Fredrik Engelstad and Per Selle, *Makten og demokratiet*, Oslo: Gyldendal, in particular p. 33 and p. 126.

A different and more theoretically elaborate example is Stone Sweet⁴⁹ who defines judicialization as “the process through which: (1) a TDR mechanism develops authority over the normative structure in place in any given community; and (2) the third party’s decisions – what I will call triadic rulemaking – come to shape how individuals interact with one another”. The first part of this definition may include roughly what we have defined as juridification A and B, and the second part may roughly include what we have defined as juridification C and E. Juridification D however, is not part of the definition as it appears here. As we understand it, a basic point is that this judicialization implies or will lead to judicial power. The section in which the definition appears is called “The Construction of Judicial Power” and elsewhere Stone Sweet equates judicialization with the construction of judicial power⁵⁰. Thus Stone Sweet’s model in our terms may be presented as (A+B) + (C+E) → D, but D seems to refer to both formal authority and power. Later on in the same book, Stone Sweet discusses judicialization of lawmaking. He states, “By judicialization, I mean (a) the production, by constitutional judges, of a formal normative discourse that serves to clarify, on an ongoing basis, the constitutional rules governing the exercise of legislative power, and (b) the reception of these rules, and the terms of this discourse, by legislators.” This is included in what we define as juridification A.

Stone Sweet then exemplifies, with these three different (not necessarily incompatible) definitions of judicialization, the conceptual confusion and ambiguity we generally find in much of the literature. Much of this may be explained if we include *what* Stone Sweet argues is being judicialized, be it “dispute resolution”, “politics” or “law making”. The definition of judicialization here, as seems to be the case in much of the literature, appears as generalizations of empirical conclusions and this may explain the different definitions. To the degree that these different definitions are merged the complexity increases, but the result in conceptual terms becomes

⁴⁸ See Kenneth A. Armstrong, 1998, “Legal Integration: Theorizing the Legal Dimension of European Integration”, in *Journal of Common Law Review*, Vol. 36 (1998), No. 2, p. 158.

⁴⁹ Alec Stone Sweet, *Governing With Judges, Constitutional Politics in Europe*, Oxford: Oxford University Press, 2000, p.13. TDR means Triadic Dispute Resolution, “a triad which is comprised of the two parties to the conflict and the dispute resolver” p. 12.

⁵⁰ In Martin Shapiro and Stone Sweet, *On Law Politics and Judicialization*, Oxford: Oxford University Press, p 71.

increasingly difficult to understand. As in Bonini's paradox, as models approach "reality" they become as difficult to grasp⁵¹.

Conclusion

The ambiguity and need for clarification regarding the normative meaning of juridification is no less than the ambiguity concerning what kind of practise juridification refers to. The question is, however, far more difficult to answer and this is not the place to elaborate on this, but we believe our descriptive concept may make it somewhat easier to address, be it in terms of arguments from efficiency, the rule of law, democracy, civil society or combinations of these.

As indicated juridification ABCDE can be seen as a precondition for constitutional democracy. On the other hand juridification carried too far may move the very same political order towards total legal domination. At a certain level juridification may in deed turn ugly as Teubner claims. Saying that too little is as bad as too much, is not exactly a ground-breaking statement, but we may at least postulate a breaking point, or maybe rather a breaking zone, that a society enters at a certain level of juridification. Such a zone may be seen as delimited by a point beyond which the benefits of further juridification is questionable or indeterminate and a further point where juridification is carried so far that the effects are clearly detrimental from any independent standard. Even though different strains of political and legal theory would define this zone differently, they would all assert that modern west is now squarely occupying it, with little near future hope of slipping away. The increased and widespread scholarly interest in law and legal theory may be seen a symptomatic of this state of mind.

⁵¹ "...Bonini's paradox -- the more realistic and detailed one's model, the more the model resembles the modeled organization, including resemblance in the directions of incomprehensibility and indescribability." Starbuck, W.H, "Organizations and Their Environments", in M.D. Dunnette (ed.), *Handbook of Industrial and Organizational Psychology*, Chicago: Rand, 1101.

At the same time it is difficult, based on our conceptualization, to establish an ideal model of juridification. The closest we can get at this stage is to argue that the forms of juridification defined here will have to balance each other off. We can establish some rules of thumb, some “stop and think” signs of the type; if juridification B without juridification C something is wrong; or if juridification D without juridification A+B something is dead wrong; or juridification ABCD without juridification E something is going to break, to use but a few possible examples.

We argue then that different forms of juridification will have to develop hand in hand, but this alone is not sufficient. There is not only a tension between the different forms of juridification, but also an inner tension within each. The logical endpoint of juridification A for example, is a society run by the judiciary. At some point in moving towards such circumstances, the existing self understanding and legitimacy base of the legal system would be undermined. In the same way juridification B carried to far would undermine the very freedoms law is supposed to protect. Juridification C may in the end internalize moral, ethical and instrumental concerns to a degree where the responsibility for solving political disputes becomes indistinguishable from the application of law. With juridification D, the legal system is dependent on a the continued construction of a relatively coherent working legal order, a coherence that will be increasingly difficult to sustain as the scope of interpretation and the degree of complexity increases, not least with the development of international law. Finally, juridification E may proceed at the expense of or subsuming other conceptions of self and others, conceptions which the status as a legal person presupposes and is meant to protect.

Talking about juridification in normative terms we first have to know what it is. Our interest in trying to clarify the concept of juridification stems from what we experienced as the tangled sometimes oversimplified and normatively charged conceptions we came across in the literature. We set out to present a classification that was complex enough to grasp the different conceptualizations used and still simple enough to work as an intersubjective standard. This in order to be able to present models of juridification in a way that is understandable across different approaches and more ambitiously, different disciplines. We should be able to tell stories of

juridification using roughly the same language. Our hope is that our five pronged classification will help fulfil these requirements.