The Role of the Court of Justice in the Course of European Integration

Emergence, development, and perspective of the judiciary of the European Union

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Since the beginning of European Integration, the case law of the Court of Justice of the European Union (Court of Justice) has undoubtedly had a lasting impact on the economic, societal and political development of Europe.[1] As a result, the Court of Justice has become one of the prominent voices in the choir of the supreme and constitutional courts. Seventy years after the Court of Justice took up its judicial activity, this year's *Irving Tragen Lecture* at the University of California, Berkeley, provides a welcome opportunity to take a look back to the Court of Justice's mission as it was laid down in the founding Treaties and the main topics that have continuously shaped its case law since 1952.

This seems all the more appropriate as the public reactions to the Court of Justice's seventieth anniversary rarely focus on these topics. Instead of examining the Court of Justice's contribution to the consolidation of the European peace order and to the protection of rights and freedoms of the Union's citizens, some

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1. Robert Lecourt, *Quel eut été le droit des Communautés sans les arrêts de 1963 et 1964?, in* L'EUROPE ET LE DROIT, MÉLANGES EN HOMMAGE À JEAN BOULOUIS, 349 (1991) (Fr.); Monica Claes, *The impact of Van Gend en Loos beyond the scope of EU law, in* 50TH ANNIVERSARY OF THE JUDGEMENT IN VAN GEND EN LOOS, 1963–2013, ACTES DU COLLOQUE, 103 (Antonio Tizzano, Juliane Kokott, & Sacha Prechal eds., 2013).

reactions simply bear witness to the "old" political conflict, which has persisted since the founding of the European Community of Coal and Steel. That is, the conflict between the proponents of the integrated Europe of the Treaties and their opponents, the latter waging a continuous struggle to maintain the judicial sovereignty of the nation-State.[2] Against this backdrop, I examine the original intent of the Founders of the Treaties to clarify the mission of the Court of Justice and to trace, in the light of this mission, the foundations of its jurisprudence.

I. A COMMUNITY OF LAW INSTEAD OF A PRIMACY OF POLITICS

The task of the Court of Justice as it is described in the founding Treaties was preceded by the special importance that was attributed, at the founding of the European Community for Coal and Steel, to the compliance with the law. In this vein, Massimo Pilotti, the first president of the Court of Justice declared on the occasion of the first sitting of the Court of Justice on December 10, 1952, that "the creation of a judicial authority that issues binding decisions seems today as an ideal to cope with situations in which states are contesting each other's rights."[3]

In his speech on the same occasion, Jean Monnet, the first president of the High Authority, highlighted in a visionary fashion: "The establishment of the Court [of Justice] also puts in place the sovereign existence of the law within the community. It safeguards the guarantees of the law for all involved in the community. […] The extent of its judicial powers makes it in every respect the guardian of the law of the treaty."[4]

With utmost clarity, Joseph Bech, the foreign minister of the Grand Duchy of Luxembourg, emphasized that same day "that the creation of the European Community for Coal and Steel constitutes a new development, and I am inclined to speak of a revolutionary development in the field of international law. This institution, whose protection is entrusted to the Court [of Justice], is from a legal perspective surely one of the most original and progressive institutions."[5]

This revolutionary development was described as the establishment of a community of law by Walter Hallstein, the first president of the European Commission in March 1962 during his famous speech at the University of Padua,

2. *Cf.*, among others, Ferdiand Weber, *Die Identität des Unionsrechts im Vorrang*, 77 JURISTENZEITUNG 292, 299 (2022) (Ger.); Christian Hillgruber, *Vom souveränen Nationalstaat zur souveränen Europäischen Union?–Zur Souveränitätsverlagerung durch supranationale Rechtsprechung*, 77 JURISTENZEITUNG 584, 587 *et seq*. (2022) (Ger.).

3. *Ansprache von H. Massimo Pilotti, Präsident des Gerichtshofs in* DOKUMENTE ZUM EUROPÄISCHEN RECHT, VOL. 2, 169, 170 (Reiner Schulze & Thomas Hoeren eds., 2000) (Ger.) (translation provided by the author).

4. *Ansprache des Präsidenten der Hohen Behörde, M. Jean Monnet in* DOKUMENTE ZUM EUROPÄISCHEN RECHT, VOL. 2, 168, 169 (Reiner Schulze & Thomas Hoeren eds., 2000) (Ger.) (translation provided by the author).

5. *Ansprache des luxemburgischen Außenministers Joseph Bech in* DOKUMENTE ZUM EUROPÄISCHEN RECHT, VOL. 2, 171, 172 (Reiner Schulze & Thomas Hoeren eds., 2000) (Ger.) (translation provided by the author).

in which he elaborated: "[t]his Community was not created by military power or political pressure, but owes its existence to a constitutive legal act. It also lives in accordance with fixed rules of law and its institutions are subject to judicial review. In place of power and its manipulation, the balance of powers, the striving for hegemony and the play of alliances we have for the first time the rule of law. The European Economic Community is a community of law . . . because it serves to realize the idea of law."[6]

II. FOUNDING MISSION OF THE COURT OF JUSTICE

These general commitments to the importance of the law and the necessity of its judicial guarantee find their sustained confirmation in the documents that are available from the debates that led to the establishment of the Court of Justice.

The famous Schuman Declaration confined itself to "suitable arrangements" that should be designed to guarantee the possibility of appeal against decisions of the High Authority. The first preliminary drafts remained silent on the institutional arrangement for a possible review procedure,[7] while later drafts considered the International Court of Justice (ICJ) or a system for mediation and arbitration for this role.[8] However, the Dutch,[9] Belgian, and German delegations in the negotiations soon fought for the establishment of an autonomous and independent Court. Hallstein, then head of the German negotiation team, proposed the creation of a permanent court that could guarantee a healthy development of the law and act as a disciplinarian for the High Authority. He supported this proposal by a reference to the fact that the United States would be particularly satisfied with it, as they would see it as the "beginning of a separation of powers in the nascent European political system."[10] Consequently, the concept of a permanent court for the community quickly prevailed in the negotiations. The obligatory nature of the Court of Justice's jurisdiction for both Member States

6. Walter Hallstein, *Die EWG – Eine Rechtsgemeinschaft. Rede anlässlich der Ehrenpromotion (Universität Padua, 12. März 1962), in* EUROPÄISCHE REDEN 341, 343 (Walter Hallstein & Thomas Oppermann eds., 1979) (Ger.); *Cf.* Robert Lecourt, *Rôle de la Cour de justice dans le développement de l'Europe*, REVUE DU MARCHÉ COMMUN 273 (1963): "Peut-on concevoir une Europe sans pouvoir et un pouvoir sans juridiction?".

7. *See Schéma de traité de Pierre Uri* (06/07/1950) *in* DOKUMENTE ZUM EUROPÄISCHEN RECHT, VOL. 2, 8 (Reiner Schulze & Thomas Hoeren eds., 2000) (Fr.).

8. *See Schéma de traité: recours contre les décisions de la Haute Autorité par Pierre Uri* (6/12/1950) *in* DOKUMENTE ZUM EUROPÄISCHEN RECHT, VOL. 2, 19 (Reiner Schulze & Thomas Hoeren eds., 2000) (Fr.).

9. *See Gecombineerde vergadering van de Commisses voor Buitenlandse Zaken en voor de Handelspolitiek* (07/07/1950) *in* DOKUMENTE ZUM EUROPÄISCHEN RECHT, VOL. 2, 31 (Reiner Schulze & Thomas Hoeren eds., 2000) (Nl.).

10. *Cf. Protokoll über die Zusammenkunft der deutschen Delegation mit Monnet in Houjarray* (07/02/1950), *in* DOKUMENTE ZUM EUROPÄISCHEN RECHT, VOL. 2, 29 (Reiner Schulze & Thomas Hoeren eds., 2000) (Ger.).

and companies was seen as its special feature,[11] while the extent of its powers remained the subject of discussions.

Despite the lamenting of the Court of Justice's limited powers during the ratification debates,[12] a great future was foreseen upon its first sitting. It was again Monnet who stressed: "[f]or the first time there has been created a sovereign European court. I foresee in it also the prospect of a supreme federal European court."[13] Similarly, Luxembourg's foreign minister Joseph Bech elaborated: "The Court [of Justice] will, where necessary, apply the objective legal norms in the face of conflicting interests. […] Beyond its purely adjudicatory functions, the Court [of Justice] will, under specific circumstances, perform political tasks in the proper meaning of the word, specifically when it is necessary to adapt the provisions of the treaty to changed circumstances."[14] From today's perspective, it also seems quite remarkable that—in the very first annulment proceedings before the Court of Justice—the parties emphasized their respect for and trust in the Court of Justice as the final instance for the decision of their dispute. The representative for the plaintiff, the French Republic, emphasized that the decision of the Court of Justice, whatever its outcome, would be regarded by the French government as definitive. Similarly, the representative of the High Authority stated that it was in no better position before the Court of Justice than "an ordinary litigant."[15]

The commencing reception of this new European legal development has been followed in academic literature with lasting interest, especially by American legal scholars. This scholarly contribution is inseparably associated, in particular, with the names of Eric Stein, Peter Hay, Richard Buxbaum, and Stuart Scheingold. Early on, the Court of Justice was perceived as the "most remarkable of all the Community's institutions"[16] and found itself at the center of academic interest. Early scholarly contributions discussed the "judicial process" that unfolded within the project of European integration,[17] the "federal jurisdiction of the Common Market Court,"[18] or broader topic of the "Rule of Law in European

11. *See* Bech, *supra* note 5, at 174 *et seq*.

12. *See* DONALD GRAHAM VALENTINE, THE COURT OF JUSTICE OF THE EUROPEAN COAL AND STEEL COMMUNITY 10 *et seq*. (1955) (referring to the ratification debates in the Netherlands, Belgium, and Italy. In particular, many members of the Dutch Parliament "believed that the Court of the Coal and Steel Community to be nearly the same in competence as the Supreme Court of the United States").

13. Monnet, *supra* note 4, at 168.

14. Bech, *supra* note 5, at 172 *et seq*.

15. Quoted from Eric Stein, *The European Coal and Steel Community: The Beginning of its Judicial Process*, 55 COLUMBIA L. REV. 985, 990 (1955) (referring to the minutes of the oral arguments that the Court held on the 28th, 29th, and 30th of October 1954, pts. 8 and 80).

16. Raymond Vernon, *The Schuman Plan—Sovereign Powers of the European Coal and Steel Community*, 47 AM. J. INT'L L. 183, 199 (1953).

17. *Cf.* The title of Stein, *supra* note 15.

18. Peter Hay, *Federal Jurisdiction of the Common Market Court*, 12 AM. J. COMP. L. 21 (1963).

Integration."[19]A review of these early writings reveals a remarkable grasp of the law of the founding Treaties and, in particular, a striking focus on the essential features of the federalization of the old continent, which are inherent in the project of European integration. The conferral of powers which, in continental legal systems, are attributed to ordinary and administrative courts, had earned the Court of Justice, from a French perspective the designation of a "veritable European Council of State."[20] But the Court of Justice was given even more important powers which would domestically correspond to those of a constitutional court. Those wide-ranging powers of the Court of Justice were precisely understood[21] as the basis for the constitutionalizing of the European legal system. In this context, legal scholars also recognized that the legal protection offered under the Treaties "must achieve more than in any normal state governed by the rule of law,"[22] in order to achieve acceptance in the supra-national community of Member States and to compensate at least partially for the democratic imperfections of the community.

This brief overview of the history of the Court of Justice's origins shows with utmost clarity that the rule of law has been given a very specific weight under the founding Treaties reflecting the Union's historical origins in post-war Europe and designed to preserve peace on the old continent. The founding Treaties thus granted the rule of law a particular value going beyond the respect for the legality and constitutionality guaranteed within the domestic legal systems. The guarantee of the rule of law is part of the DNA of the European Union and requires the Court of Justice to act with judicial prudence and wisdom, while being committed to the objective nature of the law.

Above all, the undoubtedly most important practical instrument that the Court of Justice has at its disposal to fulfill its judicial mandate is the innovative jurisdiction in the preliminary ruling procedure granted by the Treaty of Rome, establishing for the first time a direct cooperation between the courts of the Member States and the supranationally constituted Court of Justice. Under the Treaties, the courts of the Member States are entitled, and courts of last instance

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19. STUART SCHEINGOLD, THE RULE OF LAW IN EUROPEAN INTEGRATION: THE PATH OF THE SCHUMAN PLAN (1965).

20. Lecourt, *supra* note 6, at 274.

21. *Id.*; Bastian van der Esch, DER GERICHTSHOF ALS VERFASSUNGSGERICHT 564 (1965) (Ger.); Eric Stein, *Judges and the Making of their Constitution*, in FESTSCHRIFT FÜR KONRAD ZWEIGERT, 771 *et seq.*, (Herbert Bernstein et al. eds., 1981) (Ger.); Hans Peter Ipsen, *Die Verfassungsrolle des europäischen Gerichtshofes für die Integration*, in DER EUROPÄISCHE GERICHTSHOF ALS VERFASSUNGSGERICHT UND RECHTSSCHUTZINSTANZ 20 *et seq.* (Schwarze ed., 1983) (Ger.).

22. ERNST STEINDORFF, RECHTSSCHUTZ UND VERFAHREN IM RECHT DER EUROPÄISCHEN GEMEINSCHAFTEN: AUSGEWÄHLTE PROBLEME 39 (1964) (Ger.); Walter Hallstein, *Zu den Grundlagen und Verfassungsprinzipien der Europäischen Gemeinschaften*, in ZUR INTEGRATION EUROPAS: FESTSCHRIFT FÜR CARL FRIEDRICH OPHÜLS 1, 12 *et seq.*, (Walter Hallstein & Hans-Jürgen Schlochauer eds., 1965) (Ger.); Otto Riese, *Über den Rechtsschutz innerhalb der Europäischen Gemeinschaften*, ZEITSCHRIFT EUROPARECHT 24 *et seq.* (1966) (Ger.).

are required, to refer questions on the interpretation or the validity of EU law to the Court of Justice whenever the answer to those questions is necessary to resolve a dispute pending before national courts. The judicial collaboration brought about by this procedure was perfectly resumed by Robert Lecourt, later President of the Court of Justice, in the early 1960s as a *focal point* for the entire integration project of the founding Treaties: "[i]n this way, the uniform interpretation of the [founding] Treaties throughout Europe can be ensured and conflicting decisions between the various courts of the six countries can be avoided. Through this role as a coordinator and unifier of the various national jurisdictions, the Court of Justice of the European Communities, which can already be described as both a court of administrative and ordinary law and a constitutional court, is also entrusted with the mission of establishing, at the request of national courts—in binding judgments—the official interpretation of the Treaty and of the acts of the Community institutions."[23]

Today, the legal and practical importance of this instrument for the uniform interpretation and thus binding nature of EU law for and in the Member States can hardly be overemphasized, as the Court of Justice is tasked to deal with more than five-hundred references for preliminary rulings from Member States' courts every year[24] Already in 1969, Richard Buxbaum described the fundamental insight into the special importance of the preliminary ruling procedure for the progress of integration in an inimitably precise way, when he coined the term "federalizing device" for this procedure.[25]

As far-sighted and prophetic as this early insight may seem today, the question of the allocation the judicial competence-competence was already being addressed when the preliminary ruling procedure was first introduced, even though the debates on the nature of integration and the federal question of the ultimate allocation of powers in the European Union still culminate today in this crucial question[26] The exclusive jurisdiction of the Court of Justice to make the final decision on the interpretation of European Union law is, in legal practice, the cornerstone of the uniform application of EU law in Europe. Without this, the

23. *See* Lecourt, *supra* note 21, at 274 (Translation provided by the author).

24. *See* COURT OF JUSTICE, ANNUAL REPORT 2022, *Statistics concerning the judicial activity of the Court of Justice* 2, https://curia.europa.eu/jcms/jcms/p1_3889613/en/.

25. Richard Buxbaum, *Article 177 of the Rome Treaty as a Federalizing Device*, 21 STAN. L. REV. 1041 (1969).

26. *See* without using the terms "competence-competence," Lecourt, *supra* note 6, at 274 , and Buxbaum, *supra* note 25. On the German term of "Kompetenz-Kompetenz", *see* already CARL SCHMITT, VERFASSUNGSLEHRE 386 *et seq*. (1928) (Ger.) and—using instead the term "Kompetenzhoheit" (illimitable competence)—Hans Kelsen, Allgemeine Staatslehre (1925), 208 (Ger.). As for more contemporary contributions, *see* J.H.H. Weiler and Ulrich R.Haltern, *The Autonomy of the Community Legal Order—Through the Looking Glass*, JEAN MONNET WORKING PAPER 10/96, sub. III., https://jeanmonnetprogram.org/archive/papers/96/9610-The-2.html; David Preßlein, *Der absolute Anwendungsvorrang des Unionsrechts als Garantie der Gleichheit der Mitgliedstaaten in der Europäischen Union?* EUR 688 (698 *et seq*.) (2022) (Ger.).

equality of the Member States before the Treaties would not be ensured.[27] Once again, it is fascinating from today's perspective to notice the clarity with which the early literature allocated this judicial competence-competence to the Court of Justice[28], while taking into account the practical obstacles to enforcement and the potential for circumvention that exist in practice for the Member States' courts within the framework of the preliminary ruling procedure. However, with the spirit of genuine and loyal cooperation characterizing this procedure, these practical obstacles have not been unsurmountable.[29] Furthermore, in the medium and long term, circumvention strategies have not proved worthwhile, since preliminary references designed as "rail shots" to bypass their national highest court[30] or, in extreme cases, infringement proceedings against the member state concerned can lead to the clarification of the EU law question at issue.[31]

In light of these observations, it is hardly surprising that some of the main features of European Union law was developed by the Court of Justice in this procedure. The result was a conflict-laden case law that started with the dispute with the Italian *Corte Costituzionale* in *Costa/ENEL* over the primacy of European Union law[32], a dispute that continued in *Simmenthal II* over the

27. *Cf.* in particular joined cases C-357, C-379, C-547& C-840/19, Euro Box Promotion u.a., ECLI:EU:C:2021:1034, ¶¶ 249, 254 (Dec. 21, 2021); Cf.C-430/21, RS, ECLI:EU:C:2022:99, ¶¶ 52, 55, and 72 (Feb. 22, 2022).

28. *See* without using the terms "competence-competence", Lecourt, *supra* note 6, at 274, and Buxbaum, *supra* note 25.

29. *See* Hans-Wolfram Daig, *Die Gerichtsbarkeit in der Europäischen Wirtschaftsgemeinschaft und der Europäischen Atomgemeinschaft*, 83 ARCHIV DES ÖFFENTLICHEN RECHTS 134, 159 (1958) (Ger.); GERHARD BEBR, DEVELOPMENT OF JUDICIAL CONTROL OF THE EUROPEAN COMMUNITIES 214 (1981); PIETRO CASSANO, *Sulla nuova disciplina delle intese che limitano la concorrenza*, RIVISTA DI DIRITTO INTERNAZIONALE 1963, 255 (256 e*t seq*.); Hay, *supra* note 18, at 31–38; CHRISTIAN TOMUSCHAT, DIE GERICHTLICHE VORABENTSCHEIDUNG NACH DEN VERTRÄGEN ÜBER DIE EUROPÄISCHEN GEMEINSCHAFTEN, 196 *et seq*. (1964) (Ger.)

30. The German Federal Constitutional Court had in its so-called "Chief Physician"-decision (BVerfGE 137, 273) not made use of the possibility to refer the case to the Court of Justice to seek clarifications on the application of EU anti-discrimination law in establishments run by the church. After the case was remanded back to the Federal Labor Court, this court asked those questions instead by an order in the case 2 AZR 746/14 (A) (July 28, 2016) as well as in the so-called "Egenberger"-case [8 AZR 501/14 (A) (March 17, 2016)] These preliminary questions led to judgments by the Court in cases C-414/16, Egenberger, ECLI:EU:C:2018:257 (April 17, 2018) and case C-68/17, IR, ECLI:EU:C:2018:696 (Sept. 11, 2018).

31. In this vein, the French *Conseil d'État's* failure to submit a reference for a preliminary ruling on tax issues that came before it resulted in infringement proceedings against France in which a violation of the Treaties was found, see case C-416/17, Commission v. France, ECLI:EU:C:2018:811 (Oct. 4, 2018). However, the Commission enjoys a wide margin of discretion to initiate or end infringement proceedings, *cf.* its press release on ending the infringement proceedings against Germany because of the decision of the Federal Constitutional Court on the ECB's PSP-Program (BverfGE 154, 17—PSP Programm der EZB): https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201?fbclid=IwAR1w6wbHhdcA5vxlqXTohUjxcgF7mJbpSBxTXjxaNWXpMJ0Mizb9Zyuwv7I (Jan. 2, 2023).

32. *See* Case 6/64, Costa v. E.N.E.L, ECLI:EU:C:1964:66, 1269 and 1270 (Jul. 15, 1964), as well as the decisions by the Italian *Corte Costituzionale* n. 183/1973 Frontini, ¶ 9 (Dec. 18, 1973);

question whether an ordinary court had the authority to disapply provisions of national law that conflicted with EU law.[33] The Court of Justice reached the necessary clarification on the broadest possible discretion of national courts to refer cases to the Court of Justice in the case of *Melki and Abdeli*[34] and finally led to the most recent conflicts with the constitutional courts of Poland[35] and Romania[36] concerning the domestic applicability of EU law. This jurisprudence displays a consistent and necessary development designed to give effect to the integration project that was agreed upon in the founding Treaties.

III. LINES OF DEVELOPMENT IN THE CASE LAW IN VIEW OF DEEPER INTEGRATION

Today we find ourselves seventy years after the first sitting of the Court and almost sixty years after its groundbreaking judgments on the direct effect of EU law in the case *Van Gend & Loos*[37] and on the primacy of EU law over the law of the Member States in the case *Costa/ENEL*.[38] Eric Stein has so influentially described these features of EU law as core elements of the constitutionalization of the European Union.[39] The good intentions and noble declarations of intent of

n.232/1989, Fragd, ¶ 3 (Jun. 5, 1984); and n.170/1984, Granital, para. 7 (Apr. 13, 1989) on the so-called *controlimiti*-Doctrine.

33. Case 106/77, Simmenthal II, ECLI:EU:C:1978:49, 644, 645 (Mar. 9, 1978).

34. Joined cases C-188 & C-189/10, Melki und Abdeli, ECLI:EU:C:2010:363 (Jun. 22, 2010).

35. With its order C-204/21 R, Commission v. Poland, ECLI:EU:C:2021:593 (Jul. 14, 2021), the Court ordered Poland by way of an interim injunction to disapply certain provisions relating to the newly introduced Disciplinary Chamber for Judges while the Court considered their compatibility with EU law. In a judgment of the same day, the Polish Constitutional Tribunal in case P 7/20, responded by ruling that such an interim injunction violated the Polish Constitution. In case C-791/19, Commission v. Poland, ECLI:EU:C:2021:596 (Jul. 15, 2021), which also concerned the Disciplinary Chamber, the Court found in an infringement procedure that certain rules of the Polish disciplinary law for judges violated article 19(1)(2) TEU. As a reaction to this ruling and the ruling in case C-824/18, A.B. and Others (Appointment of judges to the Supreme Court—Actions), C-824/18, ECLI:EU:C:2021:153 (Mar. 2, 2021), the Constitutional Tribunal decided in case K 3/21, (Oct. 7, 2021) that, among other things, it would violate the Polish Constitution if Polish courts were to review the appointment procedure for judges in application of art. 19(1)(2) TEU.

36. By judgment in the case Euro Box Promotion et al., *supra* note 27, the Court affirmed in a Romanian case, among other things, the primacy of EU law also over the constitutional law of member states and over binding decisions of national constitutional courts and ruled that EU law precludes national rules that bar national courts under the threat of disciplinary sanctions, from disapplying decisions of a national constitutional court that themselves violate EU law. In a press release dated Dec. 23, 2021, the Romanian Constitutional Court subsequently expressed its criticism of this part of the Court's judgment and felt compelled to "clarify" that this case law of the Court would amount to a constitutional amendment, which could only be carried out by domestic courts after the national constitution had been formally revised, https://www.ccr.ro/wp-content/uploads/2021/12/Comunicat-presa-23.12.2021.pdf.

37. Case 26/62, van Gend & Loos, ECLI:EU:C:1963:1, 24-27 (Feb. 5, 1963).

38. Case 6/64, Costa v. E.N.E.L, ECLI:EU:C:1964:66, 1269 *et seq*. (Jul. 15, 1964).

39. Eric Stein, *International Integration and Democracy. No Love at First Sight*, 95 AM. J. INT. L. 489 *et seq*. (2001).

those times have in the meantime given way to a different—at times much harsher—tone in which representatives of the Member States seek to assert their interests before and even against the Court of Justice and its jurisprudence. Involuntarily, they remind the observer, time and time again, of *Goethe*'s sorcerer's apprentice, whose dictum, "[s]pirits I have conjured no longer pay me heed," exemplifies the classic dilemma in which national governments find themselves in proceedings before the Court of Justice.[40]

For generations, the Member States have pushed ahead with a rather far-reaching communitarization of central areas of State action within the European Union in order to counter the marginalization of their national statehood in the context of globalization and digitalization in the twenty-first century. As a result, they now are in danger of failing to assure that EU law is not a mere law on the books but remains a law in action that is effectively applied in daily practice—and even against national political and economic interests, traditions, sensitivities, and domestic political disputes.

In this context, it may be true that, to put it in the words of Hermann Hesse, the magic charm inherent in any beginning[41] has somewhere been lost since the early days of European integration, when the creation of a European Federation seemed to be within reach. However, it is worth remembering that it was the Member States whose joint decisions triggered the major developments that significantly deepened and broadened European integration over the past thirty years and at the same time changed the nature of integration itself. Thus, the integration project has further developed from the Coal and Steel community to a single market which has now existed for over thirty years, followed by the establishment of an economic and monetary union with the Euro as its currency, and the creation of an area of freedom, security, and justice[42] without internal frontiers in which the free movement of persons is guaranteed in conjunction with the necessary measures on external border control, asylum, immigration, and the prevention of and fight against crime. These developments have nowadays the effect of extending the European Union's claim to integration to almost all major areas of government action, albeit with varying degrees of intensity.[43] The expansion of the European Union's tasks by the successive treaty reforms since the 1960s has not only extended European integration into new fields of action. Furthermore, many provisions of the Treaty on the Functioning of the European Union and, in particular, the provisions of secondary law adopted on the basis of

40. *See* JOHANN WOLFGANG VON GOETHE, DER ZAUBERLEHRLING (1797) (Ger.) (Translation provided by the author).

41. *See* HERRMANN HESSE, STUFEN (1941) (Ger.) (Translation provided by the author).

42. The creation of an "Area of Freedom, Security and Justice" derives from the eponymous Title V of the Treaty on the Functioning of the European Union (Articles 67–89).

43. *Cf.* Ulrich Everling, *Die Europäische Union als föderaler Zusammenschluss von Staaten und Bürgern in* EUROPÄISCHES VERFASSUNGSRECHT, 75 *et seq.* (Armin von Bogdandy & Jürgen Bast eds., 2009) (Ger.).

it, have achieved a level of detail[44] that regularly surprises even knowledgeable observers. These provisions bear witness of the fact that EU law's claim to integration is capable of encompassing entire legal areas in their full complexity.[45] The reason for this development lies in the simple logic of a single

44. As an example, *cf*. the European regulation of the financial markets, that encompass legal provisions on **deposit protection** [Directive 2014/49/EU of the European parliament and the Council of 16 April 2014 on deposit guarantee schemes (recast), OJ L 173/149] and on **capital adequacy** [among others: Regulation (EU) No 575/2013 of the European Parliament and the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ L 176/1 and Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176/338)], **rules on investment services and trading centers** [*cf*., among others, Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast), OJ L 173/349) and Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 may 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, OJ L 173/84; as well as Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ L 201/1], on **banking oversight and their resolution** [among others, Directive 2013/36/EU of the European Parliament and the Council of 26. June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/877EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176/338; Council Regulation (EU) No 1024/2013, of 15 October 2013 conferring specific tasks on the European Central Bank relating to the prudential supervision of credit institutions OJ L 287/63, and Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ L 225/1] as well as provisions on sustainable finance [*see*, for example, Regulation (EU) No 2019/2089 of the European parliament and the Council of 27 November 2019 amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks, OJ L 317/17].

45. According to the case law of the Court of Justice, the legislator was able to adopt legal acts based on the internal market competence enshrined in art. 114 TFEU that were as varied as they were detailed, like Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, OJ L 86/1 [*cf*. Case C-270/12, United Kingdom v. Parliament and Council, ECLI:EU:C:2014:18, ¶ 97 *et seq*. (Jan. 22, 2014)], Commission Regulation (EU) No 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products, OJ L 216/1 [*cf*. Case C-398/13 P, Inuit Tapiriit Kanatami et al. v. Commission, ECLI:EU:C:2015:535, paras. 26-32 (Sep. 3, 2015)], or Directive (EU) 2017/853 of the European Parliament and the Council of 17 May 2017 amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons, OJ L 137/22) [*cf*. Case C-482/17, Czech Republic v. Parliament and Council, ECLI:EU:C:2019:1035, paras. 33 *et seq*. (Dec. 3, 2019)] Beyond these examples, *see* the European data protection law that was adopted on the basis of art. 16 TFEU, among others Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data protection Regulation), OJ L 119/1 and the Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119/89.

market without internal frontiers, which aims precisely at creating a level playing field for companies, including those from third countries, throughout the entire European Union. The creation of this level playing field, however, is only to a very limited extent compatible with national reservations or residual national competences, since these might lead, for example, to location based advantages, which would inevitably cause a fragmentation of the internal market.[46] In the same way, the rights guaranteed by EU consumer law should lead to comparable protection of the individuals in all Member States as regards their scope and extent.[47] The logic of a single market without internal frontiers might eventually apply to all areas of law that appear particularly prone to conflict, such as areas of law characterized by very different legal traditions and in particular by very different levels of legal protection offered in the Member States.[48] A similar development can be observed, in the context of progressing globalization, for differences in legal standards between the European Union and non-member countries,[49] a development which has prominently been described as the "Brussels effect."[50]

The measures inherent in the creation of an area of freedom, security, and justice[51] without internal borders have an even more direct impact on the nature of integration, since their realization requires a substantial communitarization of the laws of the Member States in matters of the free movement of persons, asylum law, and the fight against crime. These areas, which are traditionally perceived to

46. *Cf*. recital 9 of the General Data Protection Regulation and European Commission, Impact Assessment, SEC(2012) 72 final, 11–20 (Jan. 25, 2012); *see also* Jan Philipp Albrecht, *Einleitung,* in DATENSCHUTZRECHT, ¶ 186 (Spiros Simitis et al. eds., 2019) (Ger.) and Martin Selmayr & Eugen Ehmann, *Einführung,* in DATENSCHUTZ-GRUNDVERORDNUNG, ¶ 43 with further references (Eugen Ehmann & Martin Selmayr eds., 2018).

47. *See, e.g.*, Case C-452/13, Germanwings, ECLI:EU:C:2014:2141, paras. 26 *et seq*. (Sep. 4, 2014); Case C-826/19, Austrian Airlines, ECLI:EU:C:2021:318, ¶¶ 20, 28 (Apr. 22, 2021) on Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation of flights, and repealing Regulation (EEC) No 295/91 OJ L46/1, but also specifically joined cases C-15415, C-307/15 and C-308/15, Gutiérrez Naranjo et al., ECLI:EU:C:2016:980, ¶¶ 65 *et seq*., 70 *et seq*. (Dec. 21, 2016) on Directive 93/13/EEC of the Council of 5 April 1993 on unfair terms in consumer contracts, OJ L 95/29.

48. As in European data protection law, see recitals 7–9 of Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OF L 281/31 and recitals 9–13 of the General Data protection Regulation.

49. On the application of the level of protection as guaranteed by Articles 7 and 8 of the Charter to the transfer of personal data in third countries, *see* Case C-362/14, Schrems v. Data Protection Comm'r, ECLI:EU:C:2015:650 (Oct. 6, 2015) and Case C-311/18, Data Protection Comm'r v. Facebook Ireland und Schrems, ECLI:EU:C:2020:559 (Jul. 16, 2020), as well as Opinion 1/15, PNR EU-Canada, ECLI:EU:C:2017:592 (Jul. 26, 2017).

50. *See generally* ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD (2020); *see also* Elisabeth Christen et al., *The Brussels Effect 2.0: How the EU Sets Global Standards with its Trade Policy*, FIW-RESEARCH REPORTS NO. 07 (2022).

51. *See*, for the creation of this area, *supra* note 42.

be "sovereignty-sensitive" are particularly determined by traditional legal concepts, some with deep roots in national constitutions. Therefore, the influence of EU law in these areas is at times perceived as an intrusion into reserved areas of national law.[52]

Since the entry into force of the Lisbon Treaty, the dynamics of integration have experienced a profound boost, emanating from the binding force of the Charter of Fundamental Rights of the European Union (Charter). As a genuine bill of rights of EU law, the Charter applies to the institutions, bodies, offices and agencies of the European Union as well as to the Member States exclusively when implementing EU law. Specifically, as regards the Member States' commitment to the respect of the fundamental rights guarantees in the Charter, some difficulties have arisen in the case law with respect to the various legal traditions of the Member States and to sometimes remarkable differences in the level of fundamental rights protection that is guaranteed by their respective national Constitutions. In accordance with the guarantees enshrined in the Charter and in the provisions of EU statutory law, the Court of Justice has so far aimed at ensuring a high level of protection.[53]

With a view to the current evolution of integration, it is important to point to a remarkable but not yet fully recognized change in the way in which the institutions of the European Union exercise their powers. This change consists, on the one hand, in the sustained reduction of infringement proceedings brought by the European Commission as guardian of the treaties against Member States before the Court of Justice.[54] It corresponds, on the other hand, to the *continuing increase* in preliminary ruling proceedings before the Court of Justice. Taken

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52. For example, in Case C-742/19, B.K. v. Ministrstvo za obrambo, ECLI:EU:C:2021:597 (Jul. 15, 2021), Member States argued that Art. 4 (2) TEU would exclude on-call duty within the armed forces from the scope of Directive 2003/88 of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of working time, OJ L 299/9.

53. *See* for the interpretation of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (e-privacy-Directive) in the light of Articles 7 and 8 of the Charter joined cases C-203/15 and C-698/15, Tele2 Sverige und Watson et al., ECLI:EU:C:2016:970 (Dec. 21, 2016); joined cases C-511/18, C-512/18 and C-520/18, La Quadrature du Net et al., ECLI:EU:C:2020:791 (Oct. 6, 2020), Case C-140/20, Commissioner of the Garda Síochána et al., ECLI:EU:C:2022:258 (Apr. 5, 2022) and joined cases C-793/19 and C-794/19, SpaceNet und Telekom Deutschland, ECLI:EU:C:2022:702 (Sep. 20, 2022); for an interpretation of Directive (EU) 2016/681, of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offenses and serious crime in the light of articles 7 and 8 of the Charter, *see* case C-817/19, Ligue des droits humains, ECLI:EU:C:2022:491 (Jun. 21, 2022).

54. In the period from 1999 to 2003, the Commission introduced between 214 and 157 infringement procedures per year. This number dropped to 57 to 18 procedures introduced in the period from 2018 to 2022. *See* Court of Justice, Annual reports respectively for 2003 and 2022, both available on www.curia.europa.eu/jcms/jcms/Jo2_7000/en/. In individual cases, these developments have even led to a revival of inter-state cases under art. 259 TFEU which Member states argue over their compliance with EU law, see case C-591/17, Austria v. Germany, ECLI:EU:C:2019:504 (Jun. 18, 2019) and case C-457/18, Slovenia v. Croatia, ECLI:EU:C:2020:65 (Jan. 31, 2020).

together, these developments show that the task of upholding the law of the European Union in the interpretation and application of the Treaties increasingly shifts from centralized to decentralized enforcement and is largely placed in the hands of the judiciary. As a consequence, these developments are not only strengthening the role of the citizens of the European Union and the Member States' courts in ensuring compliance with EU law in practice, but they also lead to a judicial review of the legal issues at stake that is, in comparison to infringement proceedings, more comprehensive and less politically framed. Depending on the legal question and the self-perception of national courts, requests for preliminary rulings can sometimes even come close to veritable pleadings that argue for a specific interpretation of EU law and the compliance of a given national law with EU law.[55]

Against this background, the importance of preserving the rule of law to guarantee the functioning of the preliminary reference procedure and the uniform application of EU law in the Member States becomes apparent. Recent tendencies observed in some Member States to reduce the protection of judicial independence of their national judiciary in favor of new ways for political influence do have repercussions on EU law, which are not merely marginal. The weakening of judicial safeguards entails the particular risk of undermining a fundamental component of European Integration since upholding EU law can only work in practice as a cooperative enterprise of the Court of Justice and the courts of the Member States in order to safeguard the uniform application of EU law. In view of the dysfunctionality of the mechanism under Article 7 TEU, which was designed to prevent serious threats to the values of the European Union,[56] the Court of Justice has used the direct effect of the obligation under Article 19(1)(2) TEU[57] conveying standing to individual litigants to clarify that the effective legal protection in areas covered by EU law, required by this provision, can only be ensured under generally recognized requirements of the rule of law. In so far as those requirements are binding on Member States as a matter of EU law, they

55. The Member States' courts submitted between 255 and 210 references for a preliminary ruling per year within the period from 1999 to 2003. The number of these references increased to 641 to 546 in the period from 2018 to 2022. *See* Court of Justice, Annual reports respectively for 2003 and 2022, *supra* note 54. Like the reference for a preliminary ruling that led to the judgment in case C-42/17, M.A.S. and M.B., ECLI:EU:C:2017:936 (Dec. 5, 2017) in the aftermath of the judgment in case C-105/14, Taricco et al., ECLI:EU:C:2015:555 (Sep. 8, 2015). Likewise the reference of the French *Conseil d'État* that led to the judgment in La Quadrature du Net et al., *supra* note 53, as well as the two references emanating from the German Federal Constitutional Court in after which the Court issued judgments in cases C-62/14, Gauweiler et al., ECLI:EU:C:2015:400 (Jun. 16, 2015) and in case C-493/17, Weiss et al., ECLI:EU:C:2018:1000 (Dec. 11, 2018).

56. Article 7 TEU establishes a specific procedure, granting the EU institutions the power to examine, determine the existence of, and, where appropriate, impose penalties for breaches of the principles of the rule of law in a Member State.

57. Article 19(1)(2) TEU reads as follows: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

foster the European Union's capacity to guarantee the rule of law[58] in the best tradition of the long-standing jurisprudence since *Les Verts*.[59] From a distance, a certain parallel to the United States Supreme Court's case law on the state's obligations under the Due Process clause of the 14th Amendment might be discerned.[60]

IV. THE ROLE OF THE COURT IN FACING THE PHENOMENA OF DISINTEGRATION

In some contrast to this increasingly judicially enforced integration, the factors and features of a possible disintegration of Europe have been overly present in recent academic discussions. In that respect, it should first, in today's perspective, be borne in mind that the European Union "imported" considerable stability risks in economic, financial, political, and constitutional terms going along with the successive enlargements of 2004, 2007, and 2013. These enlargements were mainly carried out on the basis of a historical and geopolitical perspective, although the European Union's treaty foundations—specifically by retaining the unanimity requirement in important areas of decision-making procedures—were not sufficiently adapted to an enlargement of this magnitude. No less significant is the fact that the smooth functioning of the European institutions, especially in their attempt to speak with one voice at the global level, has not been idly accepted by large and smaller powers in other parts of the world, but has been actively fought against. This has become painfully apparent by the latest in the first year of the Russian war against Ukraine. On top of that, it might be that some globally operating companies in the European Union have not constructively accompanied the regulation of their business activities by EU law with a readiness for the best possible compliance.

In recent years, the newly awakened and strengthened nationalism, which has manifested itself in quite a number of European countries and worldwide, appears also to be a direct challenge to the values the European Union is based on, enshrined in Article 2 TEU. In legal terms, it appears to be decisive that Article 2's commitment to respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights—including the rights of persons belonging to minorities—has been ratified by all Member States in accordance with their constitutional requirements and has thus become binding law of the European Union. This applies equally to the broader statement in this provision that these values are common to all Member States in a society characterized by

58. The foundational judgment was issued in case C-64/16, Associação Sindical dos Juízes Portugueses, ECLI:EU:C:2018:117 (Feb. 27, 2018); since then, *see, e.g.*, Euro Box Promotion et al., *supra* note 27, ¶¶ 217 *et seq*. and RS, *supra* note 27, ¶¶ 37 *et seq*.

59. Case 294/83, Les Verts v. Parliament, ECLI:EU:C:1986:166 (Apr. 23, 1986).

60. *Cf*. most notably cases like *Hurtado v. California*, 110 U.S. 516 (1884); *McDonald v. City of Chicago*, 561 U.S. 742, 759 *et seq*. (2010); *cf*. Ronald D. Rotunda, John E. Nowak, J. Nelson Young, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE (VOL. 2) §14.2 (1986).

pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men.

The Court of Justice is not immune against the complexities of these times, which are characterized by difficult realities, external shocks, insufficient possibilities for action on the part of the European Union, diverging interests among the Member States, and a considerable degree of uncertainty among the population about the future of Europe. In such a situation, the stability of the case law is just as fundamental as the requirement of judicial wisdom and pragmatism to find solutions that can count on the broadest possible acceptance in the Member States' legal systems. In such a situation, the constant repetition of accusations since 1966 that, through its case law the Court of Justice is developing a "*gouvernement des juges dans les Communautés européennes*"[61] unquestionably deserves attention. In particular when they are—in substance—taken up by supreme and constitutional courts of the Member States[62] in order to use Article 4(2) TEU as a new basis for the protection of what they regard as belonging to national identity.

The emergence of crisis-like phenomena of disintegration has already given rise to various speculations as to whether and how the Court of Justice should react to these difficulties.[63] As understandable as the logic of this argument may seem from a political perspective, there appears to be little evidence that the development of the case law of the Court in the past has been shaped according to the political expediencies of the day.[64] Such modulation of judicial review or

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61. *See* JEAN-PIERRE COLIN, LE GOUVERNEMENT DES JUGES DANS LES COMMUNAUTÉS EUROPÉENNES (1966) (Fr.), whose general conclusion at 513 does not support this thesis. *See also* the famous critique against the judgment in case 22/70, Commission v. Council (AETR), ECLI:EU:C:1971:32 (Mar. 31, 1971) as an "arrêt politique" in the French newspaper Le Monde (Apr. 27, 1971), 19 *et seq*. Under the headline: "La Cour de Justice de Luxembourg – a-t-elle outrepassé ses compétences?".

62. Recently, these courts have not limited themselves to indicating the constitutional limits to the primacy of Union law, but have applied those limits, *cf*. French Conseil d'État, French Data Network et al., Décision Nr. 393099, ¶¶ 4–7, 58 (April 21, 2021); Polish Constitutional Tribunal, K 3/21, (Oct. 7, 2021) Romanian Constitutional Court, Nr. 390/2021, ¶¶ 81 *et seq*. with further references BVerfGE 140, 317, ¶¶ 40 *et seq*., 83, and 109 *et seq*. (June 8, 2021). European Arrest Warrant; BVerfGE 154, 17, ¶¶ 117 *et seq.)*—PSP-Programm. Other supreme and constitutional courts indeed follow for example the case law of the Court of Justice on data retention, *cf.* French Conseil constitutionnel, Collecte des données personnelles de connexion et al., 976/977 QPC (Feb. 25, 2022); Belgian Constitutional Court, Ordre des barreaux franciphones et germanophones, No. 57/2021 (Apr. 22, 2021); Supreme Court of Cyprus, joined cases on data retention, No. 97/18 (Oct. 27, 2021); Constitutional Court of Portugal, No. 268/2022 (Apr. 19, 2022). In this respect, it is remarkable that the Supreme Court of Ireland, despite having been overtly critical of the established case law of the Court of Justice in its reference that led to the judgment in the case of Commissioner of the Garda Síochána et al., *supra* note 53, dismissed the case after the Court of Justice gave its ruling, *see* Dwyer v. The Commissioner of an Garda Síochánam S:AP:2019:000018 (Jul. 13, 2022).

63. *See, e.g.*, the ideas of a former Justice of the German Federal Constitutional Court, Peter M. Huber, WARUM DER EUGH KONTROLLE BRAUCHT, 29 *et seq*. (2022) (Ger.).

64. The dynamic development of case law in the early 1990s, before the completion of the internal market, does not reveal a legal or constitutional policy program, but responded to the difficulties in Member State enforcement of Union law that became apparent in the 1980s, *cf*. Case C-

even the cultivation of such a self-image would fundamentally conflict with the institutional founding mission entrusted to the Court of Justice, which was precisely to preserve the objectivity of the law vis-à-vis the conflicting interests of Member States and private individuals,[65] but not to reduce EU law to the standard of what is politically acceptable or desirable.[66] Accordingly, in view of the strongly diverging interests, the Court of Justice has repeatedly emphasized in its recent case law the importance of the autonomy of the EU legal order and the effectivity of legal protection for the realization of the community of law constituted in the European Union.[67]

Against this background, it is important to bear in mind that in the course of its entire judicial activity, the Court of Justice has never adopted a "political questions doctrine"[68] or recognized "*actes de gouvernement*"[69] to exclude or limit judicial control over the actions of the institutions or that of the Member States. Accordingly, the Court has also exercised its judicial control in politically sensitive areas. Thus, in its line of case law emanating from the first *Kadi* case, the Court of Justice subordinated the exercise of the sanctioning powers of the European Union against private entities to the requirement of effective legal protection, even if these sanctions correspond to sanctions adopted by the United Nations.[70] Similarly, the *ZZ* case pointed out the need to strike a balance between

213/89, Factortame et al., ECLI:EU:C:1990:257 (Jun. 19, 1990); joined cases C-143/88 & C-92/89, Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest, ECLI:EU:C:1991:65 (Feb. 21, 1991); joined cases C-6/90 & C-9/90, Francovich et al., ECLI:EU:C:1991:428 (Nov. 19, 1991); joined cases C-46/93 & C-48/93, Brasserie du pêcheur and Factortame, ECLI:EU:C:1996:79 (Mar. 5, 1996).

65. Cf. Houjarray, *supra* note 10, at 29 and Bech, *supra* note 5, at 172.

66. This is ignored by the recent criticism against the judgment issued in case C-396/21, FTI Touristik, ECLI:EU:C:2023:10 (Jan. 12, 2023). While the reduction of the cost of travel granted to travelers affected by the COVID-19 pandemic may seem unsatisfactory, Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and Repealing Council Directive 90/314/EEC, OJ L 326/1 simply did not provide the Court of Justice with a normative basis for a more balanced solution.

67. *See* Opinion 1/17, CETA, ECLI:EU:C:2019:341, ¶¶ 107–111 (Apr. 30, 2019); Case 741/19, Republic of Moldova, ECLI:EU:C:2021:655, ¶¶ 42–46 (Sep. 2, 2021); Joined Cases C-924/19 PPU and C-925/19 PPU, Országos Idegenrendészeti Főrigazgatóság Dél-alföldi Regionális Igazgatósák, ECLI:EU:C:2020:367, ¶¶ 138–146 and 289–291; joined cases C-562/21 PPU and C-563/21 PPU, Openbaar Ministerie (Tribunal established by law in the issuing Member State), ECLI:EU:C:2022:100 (February 22, 2022), ¶¶ 40–46 and 50–52.

68. *See Coleman v. Miller*, 307 U.S. 433, 450 (1939); *Baker v. Carr*, 369 U.S. 186, 217 (1962); Lawrence H. Tribe, AMERICAN CONSTITUTIONAL LAW 105 (2d ed., 1988); Ronald D. Rotunda, John E. Nowak, J. Nelson Young, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 2.16 (Vol. 1, 1986).

69. *Cf*. French Conseil d'État, Association Les Verts, Nos. 54359&54360, (Nov. 23, 1984); Préfet de la Gironde c. Mhamedi, No. 120461 (Dec. 18, 1992); G.I.S.T.I., Nos. 120437&120737 (Sep. 23, 1992); *see René Chapus,* DROIT ADMINISTRATIF GÉNÉRAL ¶¶ 1152 *et seq*. (Vol. 1, 2001).

70. Joined Cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat International Foundation v. Council and Commission, ECLI:EU:C:2008:461 ¶¶ 321–326 and 334 *et seq*. (Sep. 3, 2008); Joined Cases C-584/10 P, C-593/10 P and C-595/10 P Commission et al. v. Kadi, ECLI:EU:C:2013:518, ¶ 67 with further references and ¶¶ 97 *et seq*. (Jul. 18, 2013).

national security requirements and the fundamental right to effective judicial protection.[71] Even the highly politically charged questions surrounding the interpretation of Article 50 TEU in the context of Brexit have not prevented the Court of Justice in the *Wightman* case from announcing the answer to the questions referred to it during the ongoing negotiations on a withdrawal agreement.[72]

Of course, this is no more than a starting point for the sometimes highly complex task of the Court. In recent case law, there are instructive examples of the Court of Justice recognizing a high level of individual rights' protection as laid down in EU statutory law in the sense of "taking rights seriously,"[73] even when such a decision necessitated considerable changes for individual Member States and were therefore met with fierce resistance. Examples include the case law since the judgments in *Digital Rights Ireland*[74] and *Schrems*[75] on the fundamental right to respect for private and family life and to the protection of personal data under Articles 7 and 8 of the Charter as well as under the E-Privacy Directive 2002/58, the General Data Protection Regulation 2016/679, and the PNR Directive 2016/681. But no less is true for the case law on non-discrimination on the grounds of ethnic origin, sexual orientation, or disability,[76] for judgments on working time law[77] and the right to international protection.[78]

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71. Case C-300/11, ZZ, ECLI:EU:C:2013:363, paras. 57 and 64 (Jun. 4, 2013).

72. Case C-621/18, Wightman et al., ECLI:EU:C:2018:999 (Dec. 10, 2018).

73. *See* Jason Coppel & Aidan O'Neal, *The European Court of Justice: Taking Rights Seriously*, 29 CML REV. 669 (1992); Joseph H. H. Weiler & Nicolas J. S. Lockhart, "*Taking Rights Seriously" Seriously: The European Court of Justice and its Fundamental Rights Jurisprudence—Part I*, 32 CML REV. 51 (1995).

74. Joined Cases C-293/12 and C-594/12, Digital Rights Ireland, ECLI:EU:C:2014:238 (Apr. 8, 2014) .

75. *See* for the judgements in cases Schrems v. Data Protection Comm'r and Data Protection Comm'r v. Facebook Ireland und Schrems, *supra* note 49.

76. For a judgment on racial discrimination, *see* Case C-30/19, Braathens Regional Aviation, ECLI:EU:C:2021:269 (Apr. 15, 2021); for judgments on gender discrimination, *see* Case C-451/16, MB v. Secretary of State for Work and Pensions, ECLI:EU:C:2019:839 (Jun. 26, 2018), and Case C-171/18, Safeway, ECLI:EU:C:2019:839 (Oct. 7, 2019) ; for judgments on discrimination based on disability *see* Case C-356/12, Glatzel, ECLI:EU:C:2014:350 (May 22, 2014) and Case C-16/19, Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie, ECLI:EU:C:2021:64 (Jan. 26, 2021).

77. For an application of the Working Time Directive, *supra* note 52 to military personnel, *see* B.K. v Ministrstvo za obrambo, *supra* note 52 and for an application to other professions, *see* case C-580/19, Stadt Offenbach am Main, ECLI:EU:C:2021:183, ¶¶ 28, 38 (Mar. 9, 2021); case C-344/19, Radiotelevizija Slovenija, ECLI:EU:C:2021:182 ¶¶ 27, 37 (Mar. 9, 2021); on working time recording *see* case C-55/18, CCOO, ECLI:EU:C:2019:402, ¶¶ 43, 48, 50, 56, 60, 6 (Apr. 14, 2019).

78. Joined cases C-391/16, C-77/17 and C-78/17, M et al. ECLI:EU:C:2019:403, (May 14, 2019) applying Directive 201/95/EU of the European Parliament and of the Council of 13 December 2011 on standards fort he qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337/9; joined cases C-71/11 and C-99/11, Y, ECLI:EU:C:2012:518 (Sep. 5, 2012) applying Council Directive 2004/83/EC of 29 Aril 2004 on minimum standards for the qualification and status of third country nationals or stateless

Focusing on an interpretation of EU statutory law in conformity with fundamental rights, the Court of Justice is supporting its reasoning by reference to the values inherent in the relevant legal acts themselves, a technique which also enhances the legitimacy of the court's case law. While the application of this method usually leads to a uniform solution, especially in the case of harmonization realized at a high level of protection, it may well offer the possibility for a plurality of legal solutions consistent with EU law. Thus, in its decision *Centraal Israelitisch Consistorie van Belgie*, the Court of Justice decided—partly relying on the recitals of the relevant secondary law—that in implementing the European legal framework on ritual slaughter, the Member States may adopt diverging regulations that vary in the way they balance the interests of animal protection and religious freedom without violating the freedom of thought, conscience, and religion protected in Article 10 of the Charter.[79] Similarly, in cases relating to the wearing of religious symbols the Court of Justice has accepted a margin of appreciation of the Member States to resolve arising conflicts between the fundamental rights to freedom of religion and non-discrimination protected under Articles 10 and 21 of the Charter.[80] In this case law, the Court of Justice has not only ensured that a system of strict State neutrality in matters of religious confession is possible across Europe, but has also supported non-discriminatory systems based on the protection of the plurality of religious confessions.

Recently, Member States have repeatedly invoked the protection of national identity under Article 4(2) TEU, which posed particular challenges for the Court of Justice. According to this provision, the European Union is obliged to respect both the equality of the Member States before the EU Treaties and their respective national identities, as expressed in their fundamental political and constitutional structures, including regional and local self-government. The case law to date indicates above all the extent to which the Court of Justice must separate the wheat from the chaff when dealing with such claims. It is settled that Article 4(2) TEU can lead the Court to examine whether an obligation under EU law fails to take account of the national identity of a Member State.[81]

But as an exception to the fundamental freedoms guaranteed by the Treaty, Article 4(2) TEU must be interpreted narrowly and, therefore, cannot be invoked, for example, to escape the obligation to recognize the marriage of two persons of

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persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304/12; Case C-163/17, Jawo, ECLI:EU:C:2019:218 (May 19, 2019) applying Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or stateless person (recast) (so-called: Dublin III Regulation), OJ L 180/31.

79. Case C-336/19, Centraal Israëlitisch Consistorie van België et al., ECLI:EU:C:2020:1031, ¶¶ 65–71, 79 *et seq*. (Dec. 17, 2020).

80. Joined cases C-804/18 und C-341/19, WABE and MH Müller Handel, ECLI:EU:C:2021:594, ¶¶ 84–88 (Jul. 15, 2021).

81. RS, *supra* note 27, ¶ 69.

the same sex that was legally concluded in another Member State[82] or to issue a passport or identity documents to descendants of parents of the same sex for the purpose of the freedom of movement.[83] In particular, Article 4(2) TEU cannot be invoked against the obligation of the Member States to guarantee the principles of the rule of law following from Article 2 TEU[84] and cannot allow this obligation to vary from one Member State to another.[85] Finally, this provision does not empower the constitutional court of a Member State to exclude the application of a rule of EU law on the ground that this rule disregards the identity of the Member State concerned, as defined by that constitutional court.[86] In contrast, the Court of Justice has recognized the protection of the official language of a Member State as a matter of national identity, which may justify necessary and proportionate restrictions on the freedom to provide services.[87]

The complexity of some EU legislation, which is increasingly adopted in times of crisis, regularly conceals dilatory formulaic compromises behind its façade. Under these circumstances, only judicial review by Court of Justice years later will gradually reveal whether and to what extent these measures comply with the rights of EU citizens, guaranteed by the Treaties and the Charter. Moreover, there is also an increasing shift of the European Union lawmaking into areas with considerable implications for the fundamental rights of EU citizens and business operators. Therefore, the Court of Justice's task in ensuring respect for the law in the interpretation and application of the Treaties resembles more and more that of a constitutional court and will continue to pose a very special challenge in the future. For the members of the Court of Justice, this challenge consists, above all, in fulfilling, on a daily basis, its founding mission as expressed by the foreign minister of Luxembourg *Joseph Bech* in 1952 "to give effect, in complete independence, to the objective legal norms in the face of conflicting interests."[88] In the European Union, which is based on the rule of law, the governments of the Member States should bear the common good of the peoples of Europe in mind, even after having "lost" a case, and put their own interests, however legitimate,

82. Case C-673/16, Coman, ECLI:EU:C:2018:385, ¶¶ 42 *et seq*. (Jun. 5, 2018).

83. Case C-490/20, Stolichna obshtina, rayon "Pancharevo," ECLI:EU:C:2021:1008, paras. 54 *et seq*. (Dec. 14, 2021).

84. Case C-157/21, Poland v. Parliament and Council, ECLI: EU:C:2022:98, ¶¶ 98 *et seq.* (Feb. 16, 2022).

85. Case C-156/21, Hungary v. Parliament and Council, ECLI:EU:C:2022:97, ¶ 233 (Feb. 16, 2022).

86. RS, *supra* note 27, ¶ 70.

87. Case C-391/09, Runevič-Vardyn and Wardyn, ECLI:EU:C:2011:291, ¶¶ 81 *et seq*. (May 12, 2011); C-202/11, Las, ECLI:EU:C:2013:239, ¶¶ 25–27 (Apr. 16, 2013); Case C-15/15, New Valmar, ECLI:EU:C:2016:464 ¶ 50 (Jun. 21, 2016); Case C-391/20, Cilevičs et al., ECLI:EU:C:2022:638, ¶¶ 66–70 (Sep. 7, 2022).

88. As it was put by Joseph Bech, *supra* note 5, at 172.

in the right perspective of the added value that European integration brings undeniably to each and every Member State.[89]

Finally, we should remember the conventional wisdom metaphor that we are all dwarfs sitting on the shoulders of giants when we are dealing with issues of European integration. Insight and progress emerge only when we add our own contribution to the treasure trove of knowledge we have found. This allows us, like dwarfs, to stand on the shoulders of giants who laid the foundation of the European Union.

89. Andrew Atkinson, *Brexit Is Costing the UK £100 Billion a Year in Lost Output*, Bloomberg Economics Report (Feb. 1, 2022), https://www.bloomberg.com/news/articles/2023-01-31/brexit-is-costing-the-uk-100-billion-a-year-in-lost-output.