

# The History of the Court of Justice of the European Union Since its Origin

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**Abstract** This article deals with the history of the Court of Justice of the European Union since its foundation in 1952 as a court of the European Coal and Steel Community. In an introductory chapter the Court is described on a comparative basis with other supreme courts. The European spirit of the Court is described as are the first years of its existence. In the first part the foundation and the juridical architecture of the Court are explained. In the second part the history of the Court is followed from the landmark cases of 1963 and 1964 through the most important cases of the 1970s and 1980s up to a number of cases in recent decades marked by important changes in the Treaties on which the jurisdiction of the Court is founded.

## 1 Introduction

The history of the Court of Justice of the European Union is the narrative of the founding and, later, the transformation of a new court in its own right in post-war Europe. It is the history of what became a unique institution inspired by great visions in a specific atmosphere. The Court has now existed under different names for 60 years and undeniably has made itself famous. The now three scores of its existence provide a welcome opportunity for reflections on how and why it came into being and how it

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managed in a surprisingly short time to pave its own way towards a position as the *Areopagos*<sup>1</sup> of modern Europe, creating a new legal order in a process that has attracted the attention of lawyers from all over the world. It is, however, not only a history of an institution. The history of the Court of Justice reflects the history of the European Union and it is closely linked to European politics in the same period of time.

Determining what the historian's task is when it comes to the history of the Court of Justice is thus not straightforward. Is it the story of how the Court was founded and a chronological description of some of the main institutional changes and reforms that took place? Is it the story of persons, judges and Advocate Generals and others who took a decisive part in the development of the Court? Or is it just the story of the many cases, especially those classified as landmark cases which have received as much or perhaps sometimes even more attention than the most famous landmark decisions of the US Supreme Court? Does the history of the Court include the extensive scholarly work on the leading cases and the opposing attitudes as to the role the Court plays in promoting European Union law? All these questions may be answered in the affirmative. Much important scholarship has been dedicated to these questions and they must be kept in mind when we, in the following, restrict the history to the foundation of the Court and some of the milestones on its legal path.

## 1.1 Courts, Courts, Courts

The Court of Justice has been compared to national supreme courts and to federal constitutional courts<sup>2</sup> and it has been placed among the increasing number of globally or regionally active courts that have emerged in the last decades ranging from the International Court of Justice in The Hague over international criminal courts, courts of human rights and courts within international organisations to the Court which we today know as the Court of Justice of the European Union. Some of these courts have been modelled on the Court of Justice. Some of them may be considered as sister courts or as more distant cousins, but they all have their own history which at some point links them to some basic idea of justice.

Solving conflicts in myriads of courts is an important part of the history of Europe. The Court of Justice rests on a strong European tradition.<sup>3</sup> To include a permanent court with a purely legal competence in a political construction such as the European Coal and Steel Community (ECSC) founded in 1952 and, later, the broader European Economic Community (EEC)—even if other constructions were at hand—was a natural result of centuries of institutional thinking in the West.

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<sup>1</sup> The famous High Court of Athens in classical times.

<sup>2</sup> See e.g. Hinarejos 2009 who mentions examples of ordinary courts' tasks such as ensuring uniform application of the law, the endeavour to make a coherent legal system, ensuring vertical boundaries between powers and the protection of individual rights.

<sup>3</sup> See also on the idea of "courtiness" or "the root concept" of "the Triad in Conflict Resolution", Schapiro 1981, p. 1 and Schapiro 1999.

However, a court generally known as the European Court of Justice (ECJ) with a competence to make law on a level considered as European is something which may well be and often is described as a legal revolution.<sup>4</sup> The history of the Court of Justice and of the law developed by the Court thus combines elements well known in European legal history with something groundbreaking, and in that way the Court has added a new dimension to our traditional concept of what a court is.

In the Middle Ages, papal courts ruled (and the papal *Rota Romana* still does) according to a universal canon law on hearing appeals from local ecclesiastical courts. There are interesting parallels between the way in which both canon law, since what has been called the papal revolution<sup>5</sup> in the Middle Ages, and today's European Union law have had direct effect and demanded supremacy over national law. Canon law, however, even if considered to be above the national law was separate from national law. It was not, as is the law of the European Union, part of the national legal order and therefore handled by national courts. The ecclesiastical courts did not interact with national courts as does the Court of Justice, but they did contribute to the creation of a *ius commune* which, as a legal phenomenon, may be compared to the law made by the Court of Justice, taking into consideration the important differences between then and now.<sup>6</sup>

G. F. Mancini, himself a judge of the Court, has said that "few supreme courts in the world are so lacking in links, direct or indirect, with the symbols of democratic governments".<sup>7</sup> Still, the Court of Justice and its way of acting has drawn attention and provoked both acclamation and fierce opposition rarely seen when it comes to national courts in Europe. The question as to why this has happened must necessarily puzzle a legal historian. Or, to put the question more bluntly, how is it that a handful of judges, generally unknown by the public and without further legitimacy than their being chosen by their respective governments,<sup>8</sup> saw

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<sup>4</sup> Even when compared to the other "European" court—the European Court of Human Rights, Cohen and Vauchez 2011.

<sup>5</sup> The expression was coined by Berman 1983.

<sup>6</sup> See Grilli 2008 on differences between European law and traditional *ius commune* as to the restricted field of European law and its origin in national law. The similarities between European law and the Medieval *ius commune* are captured by Temple Lang 1997, p. 16: "...we are gradually building what has not existed for fifteen hundred years, a common law for much of Western Europe." Fischer Lescano and Teubner 2008

<sup>7</sup> Mancini and Keeling 1994, p. 176.

<sup>8</sup> The judges are persons "whose independence is beyond doubt" and they are appointed by "common accord of the governments of the member states". There has been little discussion about the judges of the Court outside scholarly circles and very little has been known about the procedures that lead to the nomination of the single judges. The important question of course is that of loyalty of the judges towards their own country and to the Union. The European pattern of rather anonymous judges who guard their reputation as independent by not publishing too much is however the image presented by the European Court of Justice even though several judges regularly publish academic articles and books or appear at conferences presenting papers on their work in the Court. You may speculate—and many have done so—as to who means what, but until now nothing substantial to illuminate what actually happens behind closed doors when the Court is deliberating has come out. As the decisions of the Court do not include dissenting opinions, a judge of the European Court of Justice has fewer possibilities than a judge of the US Supreme Court to stand out with a personal profile and there will of course be less speculation as to

themselves as authorised to turn what many would consider just some general principles of some treaties into “a new legal order”, which we now know as European law? As insiders know, in the answer to that last question lies hidden most of the history of the European Court of Justice.

Those who drafted the founding provisions of the Court did well in not being too liberal in permitting individuals in general to bring cases directly before the Court. The Court has avoided being trapped by too many facts and has maintained a role as the supreme interpreter of what European Union law is. In ancient Rome the praetor similarly concentrated on questions of law, creating his own system known as the *ius honorarium*. In the history of the Court of Justice, legal questions which are highly technical, even tedious to explain and obviously sometimes of minor significance have been those that the new legal order was built upon.

Sixty years is not a great age for a court but is—as we now know—sufficient to establish a leading and uncontested position within its field. Some supreme courts in Europe can date their establishment way back to pre-constitutional times as is the case in Denmark or Sweden.<sup>9</sup> The French judicial system with its clear distinction between ordinary and administrative justice was established in Napoleonic times, as it was in other countries that came into being after 1814. The US Supreme Court was established by the American Constitution in 1789 and inherited many principles from European constitutional thinking. The Austrian Constitutional Court was set up after the First World War. This is just to mention a few of the courts that constitute the wider family of courts to which also the Court of Justice belongs.<sup>10</sup>

Most national supreme courts in Europe have a past linked to the main changes in the history of a country. The original Court of Justice, the Court of the ECSC, was born as part of what we now see as the “transitional justice” after the Second World War which also included the setting up of international courts in completely different fields such as the Nuremberg Court for the trial of war crimes and the other “European” Court, the European Court of Human Rights (ECtHR).<sup>11</sup> Our Court is also a contemporary of two important national supreme courts, the Italian Constitutional Court, the *Corte Costituzionale*, and the German Constitutional Court, the *Bundesverfassungsgericht*, and with both of these courts it has been in “competition and cooperation”<sup>12</sup> and held remarkable dialogues which have left

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(Footnote 8 continued)

the standpoint of the individual judges. However, the question is still discussed as to who are or were the driving forces behind the Court’s expansive practice.

<sup>9</sup> Tamm 2012.

<sup>10</sup> The German Constitutional Court has been a model for European constitutional courts. It is worth mentioning how, with the changing political pattern a constitutional court was set up in Spain in 1978, in Portugal in 1983 and how a whole new wave of courts followed in the wake of the fall of communist regimes in Eastern Europe. Even a country as eager to keep traditions as the UK in 2009 made a radical change in its judicial system by establishing a new Supreme Court as a substitute for the judicial House of Lords.

<sup>11</sup> The Court was founded in 1949. The ECtHR’s reach now extends to more than 800 million people in 47 countries and it suffers from a very high case-load.

<sup>12</sup> Baquero Cruz 2010, p. 51.

their mark on the Court of Justice as the two national courts eventually let themselves be convinced that the Court of Justice shared their values and at last more or less reluctantly accepted its supremacy within its field.<sup>13</sup>

## 1.2 *The Spirit of the Court*

The founding of the Court of Justice, intrinsically connected with the idea of creating a new European spirit in politics, law and justice, was supported by the great vision that conflicts in a future Europe should not be the cause of war or subject to political and economic struggles but should be solved by common institutions using legal means or negotiation in an atmosphere of collaboration between former enemies. These basic facts are often repeated, and much can be considered common knowledge given the leading cases and the function of the Court whose anniversary we are celebrating this year. However, we still need to keep them in mind in order to understand and judge properly the work of the Court.

Being a young court has both its advantages and disadvantages. A new court may have to struggle for its position. Courts with a longer history are sometimes ashamed to look back on decisions you might want to forget.<sup>14</sup> Even if the role of the Court of Justice is far from uncontroversial, more disputed decisions are discussed as contributions to constructive thinking in relation to European integration and as completely opposite to the upholding of segregation, discrimination or a refusal to recognise social rights.

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<sup>13</sup> For this well-known story, see in general Alter 2001 and for Germany Davis 2012. The question of fundamental rights in the Community gave rise to a legally fruitful dialogue with the German Constitutional Court. The case of *Solange I* was an answer to *Internationale HG* (1970) and stated that Community law did not ensure a standard of fundamental rights corresponding to that of the German Constitution. The later *Solange II* was based on the presumption of equivalent protection. Later decisions by the German Constitutional Court on, e.g. the Maastricht Treaty and the Lisbon Treaty judgments have again shown a more critical attitude towards the EU. On the Italian development see Draetta 2009, pp. 316–339. The Italian Constitutional Court has recognised since the case of *Frontini v. Finanze* (1973) the supremacy of the law of the Community even if it conflicts with the Italian Constitution. Also, the Polish Constitutional Court, the Czech and other national constitutional courts have had their reservations as to the supremacy of the Court of Justice and have intensively deliberated the question of compatibility of the new European Treaties with their respective constitutions. In a recent decision of February 14, 2012, the Czech Constitutional Court decided not to follow the judgment of the Court of Justice of the European Union in the *Landtová* case (C-399/09) and maintained its role as the supreme guardian of constitutionality.

<sup>14</sup> It may suffice to think of two infamous cases in the history of the US Supreme Court, the *Dred Scott* case, the famous slavery case, which denied black people the right of citizenship (1857) and the *Lochner* case (1905) on working conditions. Needless to say also that the supreme courts of the Member States have good reasons to be rather low profile as to their position taken on legal issues in the last century especially perhaps with regard to decisions made during and just after the Second World War.

The Court of Justice has functions similar to those of a national supreme court or constitutional court but it is not a national court. Nor is it an international court. It is a court *per se*, a supranational court. You may therefore ask to whom the Court actually belongs,<sup>15</sup> fundamentally linked as it is, not to a country or any other tangible unit, but to an abstract idea of Europe. The history of the Court cannot be correctly understood without constantly having in mind how the Court has conceived itself as a part of a political project on the shaping of Europe and has defined its position by broadly interpreting the provisions of the treaties that brought it into being. Those provisions were sufficiently open to enable the Court to develop new principles of law which, in order for European law to fulfil its task, must have direct effect and supremacy in relation to national law.

This is where the important question of how the Court has taken to what is known as teleological interpretation based on the “telos” of the European Community/Union comes in. The Court is not just one of several organs within an institution. It is part of a vision forged in the mind of those founding fathers of the new Europe who dedicated their effort, after the Second World War, to the construction of supranational institutions believing in a “Europe” above the national states that needed an institutional framework in order not to fall apart in a region in which the creation of a political union or a defence union had proved an illusion.<sup>16</sup> For the historian, there is nothing surprising in the fact that the Court actually took advantage of the legal possibilities offered by the European treaties to further the project once it was started on a less ambitious scale. The sometimes pompous rhetoric used by the Court itself or its judges reflects this “preference for Europe”, which has even been described as a specific “genetic code”.<sup>17</sup> It is this story that has become a fashionable theme among legal scholars under the heading of the judicial constitutionalization of the European Community/Union.<sup>18</sup>

The Court of Justice was not always “European” in the geographical sense of the word. Europe was never constituted by just “the Six”, the original member states of the EEC, even though, admittedly, the history of these countries since the Middle Ages has in many ways been the core of European history. For a long time the

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<sup>15</sup> Essentially, of course, to those with European citizenship even though access to the Court is not reserved to European citizens and even if access to the Court for individuals most of the time takes place indirectly through a preliminary reference from national courts.

<sup>16</sup> The idea of establishing the European Defence Community and the European Political Community was given up in 1954.

<sup>17</sup> See Mancini and Keeling 1994, p. 186: “The preference for Europe is determined by the genetic code transmitted to the Court by the founding fathers, who entrusted the task of ensuring that the law is observed in the application of a Treaty whose primary objective is an ‘ever closer union among the peoples of Europe.’”

<sup>18</sup> See now Tuori 2010, p. 17. The intellectual history of how the Treaties of Rome have been “constituzionalized” since the landmark decisions of 1963 and 1964 and how especially American scholars have been instrumental in categorizing what happened as “constitutionalization” is a fascinating story of how scholars create a new field. The names of Eric Stein and Mauro Cappelletti shall be mentioned as well as the next generation of scholars such as Alec Stone Sweet and Joseph Weiler with his famous article on The Transformation of Europe 1991 and later works, see also Stone Sweet 2000 and Schlaugther et al. 1998.

European periphery, especially the Nordic countries and Eastern Europe, was neglected, when it came to the essence of European history. In a well-known classic of European legal history published by the German Paul Koschaker shortly after the war,<sup>19</sup> the concept of “Europe” was restricted to those parts that had been governed by the Romans and later Roman law, remained Catholic and thus eventually became the original “Six”. Later expansions of the original European Community which initially included Denmark, United Kingdom and Ireland (1973) were therefore not only extensions to countries not placed at the heart of Europe and thus outside the narrow concept of Europe, but also meant the inclusion of countries with different legal traditions. The first enlargement was followed later by Greece (1981), Spain and Portugal (1986), Austria, Sweden and Finland (1995), Malta, Cyprus, Estonia, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Slovenia, Hungary (2004) as well as Bulgaria and Romania (2007). These enlargements did change the Court from being supranational in relation to a restricted number of European countries with a common history into a real European Court.

The change from being just the Court of “the Six” to the status of being the “true” European Court of Justice happened at a time when the Court had taken the decisive steps in defining its role. What Eric Stein so distinctly wrote in 1981 about the Court in the 1960s as “tucked away in the fairyland Duchy of Luxembourg and, until recently, with benign neglect by the powers that be and the mass media”<sup>20</sup> may have been true as long as the Court was only the Court of one of the European Communities<sup>21</sup> but it does not correspond to the position of the Court after the Community had expanded.

## 2 The Foundations

The reconstruction of the origins of the Court was for some time hampered by the lack of official sources or access to historical archives.<sup>22</sup> Silence, as to divergent opinions and the compromises that had to be made when the new Europe was shaped, was always a guiding principle. Historians have been able, however, from

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<sup>19</sup> Koschaker 1947. Pierre Pescatore, former judge of the Court, had been an assistant to Koschaker in Tübingen where, in the early 1940s, Roman law was still studied even in the unaccepting atmosphere around Roman law created by the Nazi-Regime, see Wilson 2008, pp. 52, 97.

<sup>20</sup> Stein 1981, p. 1.

<sup>21</sup> There is still the Court of Justice of the European Free Trade Association (EFTA) which exercises competences similar to those of the Court of Justice of the European Union with regard to the surveillance procedure of EFTA states and appeals concerning decisions taken by the EFTA authorities. Both courts based on the principle of homogeneity are aware of the need to ensure a uniform interpretation of those rules of the European Economic Area (EEA) and EU Treaties that are identical. This goes especially for the EFTA Court when interpreting fundamental freedoms and principles in the EEA Treaty. On the other hand, it is disputed to what extent the EU Courts should have regard to the EFTA Court case law. See Fenger 2005, pp. 73–74.

<sup>22</sup> Valentine 1965, p. 2 as compared to Grilli 2009 and now Boerger-De Schmedt 2012.

available material to reconstruct *grosso modo* the basics of the founding history of the Court and its formative years. Such knowledge is a welcome companion for the understanding of the revolutionary transformations that have taken place within the 60 years of the Court's existence.

## 2.1 *The Treaty of Paris*

The Court of Justice of the European Union is a continuation on a considerably wider scale of the Court established by the Treaty of Paris (1951) as part of the first supranational organisation, the European Coal and Steel Community. “The child is father of the man”, Wordsworth tells us.<sup>23</sup> If we apply those words to the relationship between the child court of the years 1952–1958 and the court that, shortly after the Treaties of Rome (1957) (which established the EEC and Euratom), entered the scene with a new strong personality, we may seriously ask whether the potential of the adult court really was visible from the activities of the child court. A critical mind might even ask whether the Court of Justice can be considered as just a continuity of the ECSC court, or whether it should rather be seen as a novel institution of its own. The fact that most of the judges and Advocate Generals continued to exercise their functions in the same geographical place does not necessarily establish an identity between the institutions. Again, we shall turn to the fundamental vision of Europe to acknowledge the continuity that links the Coal and Steel Community to the European Community as the start, on a smaller scale, of what finally became the European Union. What is remarkable is that the Court was able to avoid the temptation of looking back or getting stuck in routine but managed to define for itself a much more central role than could have been expected from its earlier history.

A step-by-step investigation into the early history of the Court will find that a court rather than an arbitral institution was accepted only hesitantly. In Jean Monnet's first draft of the so-called Schuman Plan, only a weak ad hoc appeal system was envisaged for the decisions made by the central executive institution of the ECSC, the High Authority. On the other hand, the German delegation headed by Walter Hallstein and his legal advisor Carl F. Ophüls were in favour of a permanent court of justice.<sup>24</sup> A committee led by Jean Monnet's legal counsellor Paul Reuter<sup>25</sup> set up a memorandum in August 1950 on the institutional questions which referred to a permanent court of justice to balance the High Authority as a strong executive body. This proposal was especially supported by Germany and the Benelux countries.

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<sup>23</sup> From the poem “My Heart leaps up”, 1802.

<sup>24</sup> Boerger-De Smedt 2008, p. 7 and 2012. Rasmussen 2010a, b, p. 641 mentions how the German delegation during negotiations in 1950–1951 had wanted a European Supreme Court comparable to the American Supreme Court, p. 639 quoting correspondence from 1957 between Michel Gaudet, from the legal service of the ECSC, and the American lawyer Donald Swatland on the question as to why the Court had not been successful in establishing a federal interpretation of the Treaty of Paris.

<sup>25</sup> About him Wilson 2008, p. 35.



The right to bring an action against the High Authority was seen as an important legal guarantee against arbitrary decision-making and as such it eventually became a decisive part of the Treaty. It was a wish from the Benelux countries that the court could determine questions both of legality and of discretion (*opportunité*), and that only member states, but not individuals, should have access to it. The Germans however wanted a court more similar to a constitutional court and as such accessible to private enterprises, with jurisdiction to hear cases relating to conflicts between the Community's organs and with the monopoly of interpreting the treaty. Seen from the French side, the question of the court determining more than the legality of decisions or even the right for private litigants to sue in the court was a step too far. Especially Monnet was restrictive, whereas Reuter had been more open to the German ideas. In a later phase Monnet was assisted by Maurice Lagrange<sup>26</sup> who in the autumn of 1950 replaced Reuter and helped Monnet to keep the plans for the court on a level well known from French administrative law.

Lagrange thus came to play a central role in the way the Court was constructed on the institutional model of the French *Conseil d'État*. From the French system stemmed also the office of Advocate General as an independent legal advisor to the judges of the Court.<sup>27</sup> The decision to create such a central legal position within the Court proved to be of the utmost importance for the later development of a European law based on the judgments of the Court of Justice. The opinions of the Advocate General have been most useful both as guidelines for the Court itself and as information on legal questions for national courts. The final result of the deliberations as they were laid down in the Treaty of Paris was a court based on the French model, but with some openness to the German wishes, such as for the right, though limited, for natural and legal persons to have recourse to the Court. Even if in the end the result was more French than German a large step had still been taken away from the initial French proposal.

During further discussions on July 24–25, 1952 it was planned that the Court should begin its activities in August 1952, but this date was later postponed to December. As a preliminary agreement that in the end became permanent, it was decided that the Court should start its work in Luxembourg. Robert Schuman remembers how it was “at six o'clock in the morning owing to general exhaustion that an outsider won this Derby – Luxembourg”.<sup>28</sup> As to the language of the future court the decision was to use the language of the plaintiff. The four official languages were French, Italian, German and Dutch that were considered equal.<sup>29</sup> The ECSC Treaty was drawn up in a single original, in the French language, and French was from the beginning and still is the working language of the Court in its internal deliberations.

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<sup>26</sup> Wilson 2008, p. 47.

<sup>27</sup> Lagrange 1979. Maurice Lagrange (1900–1986) who had been a member of the French *Conseil d'Etat* and was considered “the father of the Advocate-General” of the ECSC Court was appointed as the first French Advocate General and continued as such until 1964. On his importance for the Court, see Burrows 2007, pp. 57–89, Greaves 2003/04.

<sup>28</sup> Valentine 1965, p. 2.

<sup>29</sup> See Rules of Procedure of March 4, 1953. The basic principle was to conduct the case in one language with some flexibility.

A most important question also debated at the last moment was whether dissenting opinions of the judges should be published. In favour of publishing a dissenting opinion was the fact that a legal theory could in that way be more openly developed. On the other hand, both the authority of the Court and the independence of the judges were considered better protected if dissenting opinions were kept secret. That the opinions of the Advocate Generals should be published was not challenged and on that basis it was decided that dissenting opinions could be kept secret without too much detriment to the understanding of the legal issues at stake as the opinion of the Advocate General offered a legal point of view that could be contrasted with that of the Court.

On December 1, 1952 the composition of the first court was also decided and took effect from December 4.<sup>30</sup> The president was to be an Italian, the Netherlands appointed two judges in order to make an uneven number and both France and Germany appointed an Advocate General. In this way parity was achieved between the two biggest member states, which was not written down in the Treaty but conceived as an unwritten fundamental principle.

The first meeting of the Court took place in the Villa Vauban on December 10, 1952 with speeches by the President of the Court, Massimo Pilotti, and Jean Monnet who used words that may seem exaggerated as to the “European” anchoring of the court and somewhat astonishing considering his own position about the Court, but which proved to be almost prophetic as to the later history of the Court:

For the first time there has been created a sovereign European Court. I foresee in it also a Supreme Federal European Court.<sup>31</sup>

The cases to be heard by the Court were necessarily of a technical nature that did not attract too much attention from the outside world. The first case brought before the Court in April 1953 concerned the decision by the High Authority on certain concessions given to German railways, electricity and gas companies.<sup>32</sup> The judges got what may be considered a rather relaxed start as the

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<sup>30</sup> The first president from 1952 to 1958 was the president of the Italian Court of Cassation Massimo Pilotti (1879–1962). One of the two Dutch members was Petrus Serrarens (1888–1963), a former Secretary General of the World Confederation of Labour. The German Otto Riese (1894–1977) had been professor at the University of Lausanne and vice-president of the German Constitutional Court. He continued as judge until 1963. Louis Delvaux (1895–1976) was a Belgian lawyer, journalist and politician, who served as a judge until 1967. The French Jacques Rueff (1896–1978) was a professor of economics, member of the French Academy. He continued as judge until 1962. Charles Léon Hammes (1898–1967) from Luxembourg was a judge and professor in Brussels. He continued as judge of the Court till 1967, in the period between 1964 and 1967 as President of the Court. The second Dutch member Adrianus van Kleffens (1899–1973) was a high civil servant. He was a judge of the ECSC Court in 1952–1958. The first Advocate Generals were Maurice Lagrange and the German Karl Roemer (1899–1984) who was a lawyer and economist. He was Advocate General in 1953–1973 and played an important role in the development of the Court.

<sup>31</sup> *Chronique de politique Etrangère*, Jan. 1953, quoted by Valentine 1965 l.c.

<sup>32</sup> *Union des Armateurs Allemands and others v. The High Authority* Valentine 1954.

case was withdrawn, and it was not until December 1954 that a judgment was given in the first of three other cases brought before the Court in 1953. None of these initial cases became as famous as later cases in the history of the European Court of Justice, but it is still worth noting that the Court already at that time used such expressions as the “Charter of the Community” and “constitutionality”<sup>33</sup> that in later practice came to have a specific significance.

## 2.2 *The Treaties of Rome*

The negotiations that led to the Treaties of Rome (1957) did not carry with them a radical change in the position of the Court of the ECSC in the new communities. In November 1956 the French accepted that the two new communities should adopt the existing Court of the ECSC. Still, nothing pointed at that time towards anything like the “government by judges” feared by Jean Monnet. The Court should act as an arbiter between the EU’s institutions with the right to annul the latter’s legal acts if they act outside their powers. National courts, according to the EC Treaty, should apply European law on a national level and Article 173 limited access for private individuals to claim annulment of European decisions and legislation.<sup>34</sup>

What was not at that time to be foreseen was the importance of a suggestion put forward by Nicola Catalano, later a judge of the Court. According to his proposal inspired by Italian law, national courts should submit questions of interpretation of Community law to the Court which thus had the task of securing uniformity. The possibility of a preliminary ruling as it was laid down in Article 177 of the EC Treaty proved to be the Court’s most important tool for the development of Community law.<sup>35</sup> The effectiveness of the system obviously depended on the collaboration of the national courts. Their confidence and willingness to submit questions of European Community law to the Luxembourg Court were crucial for

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<sup>33</sup> See Rasmussen 2008 and 2010b, p. 640 on case 8/1955.

<sup>34</sup> Rasmussen, 2010b, p. 642. See Paris Treaty Article 33, cf Rome Treaty Article 173. Rules in case of infringement were found in Articles 169–171 without Article 177 being seen in this light. Also the new Article 189 on binding and directly applicable legal acts became an important tool in the court’s development of future European law.

<sup>35</sup> See about the deliberations leading to Article 177 EC Treaty, Boerger-De Smedt 2012. Article 41 of the ECSC Treaty provided for a preliminary reference procedure concerning questions on the validity of acts of the High Authority. The idea of preliminary rulings on questions of law stemmed from Italian constitutional law, and Nicola Catalano, later a judge of the Court, was honoured for this contribution to the jurisdiction of the Court by Lord Mackenzie-Stuart in his address in commemoration of Nicola Catalano, Court’s formal sitting of October 18th 1984: “Fortified by the experience of the Constitutional Court of Italy, Mr Catalano made the suggestion that ... references should be extended to questions of interpretation. Was he able to foresee at the time the exceptional judicial evolution which would be made possible on that basis? At all events we can only recognize that, without that procedure, the greatest judgments of our Court would never have seen the light of day”.

the influence of the Court of Justice. In this way cases brought before the Court made it possible, as early as the first half of the 1960s, to establish the fundamental principles of direct effect and supremacy of European Community law.

The position of the Court in the Treaties of Rome was the result of a compromise that did not itself pave the way for a new constitutional court. But sensing the spirit of the Treaties and using the tools given in those articles proved to be a sufficiently effective way forward for judges who possessed the will to create a European Court based, in the words of Pierre Pescatore, on “*une certaine idée de l’Europe*.”<sup>36</sup>

### 2.3 The New Judicial Architecture

An important change in the judicial architecture of the Court was the creation in 1989 of the Court of First Instance (CFI) as part of the Court of Justice of the European Union, the name the Court now uses for itself as an institution. Since 2009 the CFI has been known as the General Court.<sup>37</sup> A third Court was added, the new European Union Civil Service Tribunal, which began its activities in October 2005 and gave its first judgment on April 26, 2006. The judicial architecture of the Court has thus changed considerably in the last two decades as well as the procedure of the Court and the diversity of cases brought before it.

The General Court was established in order to lighten the case load of the Court of Justice. It has jurisdiction in competition cases and cases of intellectual property. Since 1989, in accordance with the 1989 Single European Act, the General Court (former Court of First Instance) has heard and determined at first instance, subject to appeal to the Court of Justice, direct actions brought by individuals.

The 1990s saw the first female judge in the Court of Justice when Fidelma O’Kelly Macken was appointed as Irish judge in 1999. The first female Advocate General was Simone Rozès back in 1981–1984. In 2000 a German female judge and an Austrian Advocate General were appointed. As regards the Court of First Instance, both Sweden and Finland appointed women as judges in 1995. Although the number of female judges has increased, male judges are still dominant as in most national supreme courts.<sup>38</sup>

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<sup>36</sup> Pescatore 1983, p. 157.

<sup>37</sup> Lenaerts 2000. No permanent Advocate Generals are attached to the General Court which is divided into eight chambers of three or five judges. The Presidents of chambers assign a Judge-Rapporteur from amongst the judges in the chamber, whose clerks draft a preliminary report. The General Court in principle hears and determines at first instance all direct actions brought by individuals and the Member States, with the exception of those to be assigned to a ‘judicial panel’ and those reserved for the Court of Justice. Today also the Court of Justice may decide in certain cases not to have the opinion of an Advocate General.

<sup>38</sup> At the moment (2012) there are four female judges at the Court (Spain, Romania, Austria and Netherlands) and three female Advocate Generals (Germany, Slovenia, United Kingdom). The General Court counts seven women judges (Portugal, Malta, Poland, Czech Republic, Estonia, Latvia and Bulgaria).

A pivotal year in the history of the European Court of Justice was 2004 when, after the enlargement of the EU, 20 new judges were appointed at the two EU Courts. In 2008 a more expeditious procedure was introduced for cases within the area of freedom, security and justice. This area gave rise to new categories of cases. The Treaty of Lisbon entered into force in 2009 and resulted in a series of major changes also for the judiciary. From then on the EC was replaced by a new legal person, the European Union. The three-pillar system disappeared and the Court since then has had general jurisdiction to give preliminary rulings also in the area of freedom, security and justice. With certain exceptions and after a transitional period,<sup>39</sup> any national court can request a ruling within the field of police and judicial cooperation. Such cases referring to different “policies” are already playing a role in the work of the Court. In addition, since 2009 the Charter of Fundamental Rights of the European Union has been recognised as a legally binding instrument with the same status as the Treaties. Within the Court the conditions for individuals to bring an action have also been eased.<sup>40</sup>

The number of judges has increased with the number of member states. However, the latest expansion of the number of member states does not seem yet to have led to a corresponding swelling of the number of cases<sup>41</sup> even though there has been a steady growth in the number of cases, the record being 2011 with 1,518 completed cases, 618 of which were decided by the Court of Justice. At the same time, the number of preliminary references has increased especially from Bulgaria and Romania but still none of the new member states can compete on the number of such cases with the old member states such as Italy, Germany, Belgium and the Netherlands. From the original court of seven judges the Court of Justice has grown to 27 judges as the principle was kept in the Treaty of Nice that each state has the right to appoint one member of both the Court of Justice and the General Court. The increasing number of judges raises problems of language, background and legal *habitus* which are inherent in such an institution. The Court, however, is discreet. We can only guess that it may be more difficult to deliberate, to agree and to handle an increasing case load in a Court of 27 than it was in a Court of 7, 11 or 15. The number of cases handled by the grand chamber had increased to about 14 % of all cases in 2010 from approximately 8 % in 2009; 58 % of the cases were heard in chambers of five judges and only 27 % in chambers of three.

Even in a time of major changes some elements of the Court's life have remained untouched. A figure in the history of the Court which has continued to play a significant role is the Advocates General even if the Court today may decide certain cases without requesting an opinion from an Advocate General. Maurice Lagrange and Karl Roemer laid a solid foundation for the position of the Advocate

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<sup>39</sup> See Articles 275 and 276 TFEU and Protocol no. 36 on Transitional Provisions.

<sup>40</sup> The European Union is even currently in the process of acceding to the European Convention on Human Rights. A point of discussion is to ensure that the Court of Justice will decide first on questions that fall within its field.

<sup>41</sup> Bell 2010 *passim*.

General. From a later period there is great respect for Francis Jacobs, who served the Court for 18 years (1988–2006) and made himself especially known for his proud words about the holder of European citizenship, saying that ‘he is entitled to say “civis europeus sum”, and to invoke that status in order to oppose any violation of his fundamental rights.’<sup>42</sup> Another former Advocate General Miguel Poiares Maduro (2003–2009), both before and after holding office, published several important studies of the Court.<sup>43</sup> The Court of Justice today is assisted by eight Advocate Generals.<sup>44</sup>

The Court of Justice today has around 2000 employees, half of who however work in the translation and interpretation units. Each judge has a small number of *référéndaires*. The role of these employees who are often deeply involved in the preparation of each case may well be substantial. Many former *référéndaires* have later pursued academic careers and through their experiences in the Court contributed to the scholarly discussion on the work of the Court.

A significant sign of continuity in a changing judicial world is that French, which was always the lingua franca used by the Court in its deliberations, still is. Even if the importance of French internationally may be declining, French is still, the working language of the much larger Court, and lawyers will still have to consult the French version of a judgment if they want to come the closest to the original text. The language question is still one of great importance for the work of the Court. Today there are 22 (23) official languages of the Court, but the interaction between the different language versions is far from clear.<sup>45</sup>

### 3 The Transformation

The history of how the Court of Justice has changed over the years may be divided into different periods. One way of doing it is to stress the importance of certain judgments from the beginning of the 1960s, and the structural changes around 1989 and after new treaties as turning points. With a division into three periods, the first period may be said to stretch from the founding of the Court in 1952 until the landmark decisions of the 1960s. The second period runs from that time until the end of the 1980s when a time of rethinking the structure of the Court began,

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<sup>42</sup> See for his biography Moser and Sawyer 2008. Jacobs wrote more than 450 opinions in a variety of cases. The quotation is from the case C-168/91 *Christos Konstantinidis v. Stadt Altensteig-Standesamt* decided in 1993.

<sup>43</sup> See e.g. Maduro 1998 and Maduro and Azoulai 2010.

<sup>44</sup> Five of the eight Advocate Generals are nominated by the five big member states of the European Union: Germany, France, the United Kingdom, Italy and Spain. The other three positions rotate in alphabetical order between the 22 smaller member states. The Court can sit in a plenary session of 27 judges, as a grand chamber of 13 judges, or in chambers of 3 or 5 judges. Plenary sittings are now very rare, and the Court mostly sits in chambers of three or five judges.

<sup>45</sup> See Bengoetxea 2011, Derlén 2009.

followed by new treaties—Single European Act (1986), Treaties of Maastricht (1992), Amsterdam (1997), Nice (2001) and Lisbon (2007).<sup>46</sup>

### 3.1 *The Tables of the Law*

In the Hall of Fame of the Court of Justice first place must be given to the case of *Van Gend en Loos*<sup>47</sup> decided in 1963 and honoured as “The Foundation of a Community of Law”.<sup>48</sup> It was this case that ushered in a “new order of international law” and it was to this case that the President of the Court referred when he, in 2002, summarized the influence of the Court on the occasion of its 50 years’ anniversary. “We recognize”, he said, “how by its judgments the community judiciary has over the years brought to light the fundamental principles which were implicit in the wording and the structure of the founding treaties and by giving judicial expression to those principles has defined the characteristic features of the community legal order.”<sup>49</sup>

These words are a precise description of how the Court in 1963 on the basis of Article 12 of the EEC Treaty argued that the Treaty and norms issued according to that treaty have immediate and direct effect within the different national legal orders.

The Court based its decision on “the objective of the EEC Treaty”, it referred to “the preamble” and underlined how the Treaty referred to the “peoples” and “citizens” and also took Article 177 itself as an indication that the “states have acknowledged that Community law has an authority which can be invoked by their nationals”. Thus in a fundamental phrase the Court stated that “the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the member states but also their nationals”. The judgment also included a reference to the Community law conferring “rights which become their legal heritage” and it was stressed that such rights arise also when they are “not expressly granted by the Treaty”. The image bestowed on the reader of this text is of the Court that has found in documents, until then not sufficiently understood, what was the real meaning and which now sees it as its first task to have this truth written down as general principles on which the new law can be built. The language of the judgment is solemn and spoken

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<sup>46</sup> Bengoetxea 1993 dates a change in the role of the Court to 1986 when the period of “moderation or minimalism” begins. According to Arnulf 2006, p. 639, the first phase started in 1958 until the early 1980s with a prominent place for the Court; the second phase with some decline from the early 1980s to 1992, the third period from that time until 2003 characterized by the case-law on the European Union citizen and the suggestion that the Treaty of Nice (2001) marks a new fourth phase.

<sup>47</sup> Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963).

<sup>48</sup> Mayer 2010, p. 16.

<sup>49</sup> President Carlos Rodríguez Iglesias in the Annual Report 2002. These words could well be seen as an answer to what Mrs. Thatcher said of the Court in the House of Lords in 1993, that it has “greatly extended the powers of the centralised institutions against the nation state” and that it is “busy reinterpreting so many things to give itself and the Community more power at our expense”, see Arnulf 2006, p. 3.



with an authority that comes close to the biblical legislator we meet in the Torah. As Moses received the tables of the Law on Mount Sinai so the judges of Mount Kirchberg told the “peoples” of Europe that the era of a new legal order had begun after the discovery of what was actually meant by the Treaties of Rome.

The reference in the text to “peoples” or to “legal heritage” is of course not lost on historians of law or others familiar with the German Historical School of the early nineteenth century that explicitly built on the idea of what came to be known as the “*Volksgeist*”, according to which law is a living law among people which is found and interpreted on a more developed level by lawyers. However, the difference that should not be overlooked is that F.C. von Savigny and his school looked back to Roman law and Roman lawyers who were then seen as the “oracles of the law” whereas the judges of the Court of Justice reserve this place for themselves.

The case of *Van Gend en Loos* is the first decision of the Court of Justice which is today recorded among the “famous trials” in history, those we consider as “classic” decisions, the knowledge of which is part of something we may define as a legal “*Allgemeinbildung*” or common knowledge in the community of lawyers. This case, together with one or two others, are today listed on the European lawyer’s canon and their notoriety among lawyers has given them a status which can probably best be compared in literature to Shakespeare’s best dramas or to the “Eroica”, the 5th and the 9th symphonies of Beethoven when it comes to music. The case of *Van Gend en Loos*, from which come the words quoted above, as well as the *Costa v. ENEL* case (1964) mark the transformation of the Court of Justice from just an institution within the EEC into something new and dynamic with a clear understanding of its particular role.<sup>50</sup>

In the rather technical and in itself unspectacular case of *Van Gend en Loos*, a Dutch transport firm brought a complaint against Dutch customs for increasing the duty on a product imported from Germany. How it really happened that the Court in this case took the opportunity to formulate the basic principle of direct effect is the subject of conjecture.<sup>51</sup> The legal service of the Commission headed by the French lawyer Michel Gaudet was strongly in favour of such a decision and had in fact been active in promoting it since the mid 1950s<sup>52</sup> and recent changes in the Dutch Constitution also paved the way.<sup>53</sup> A decisive part of the story is that two

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<sup>50</sup> See e.g. Waele 2010: “two pristine heralds of a court treading higher ground leaving behind traditional conceptions of what international courts do and are capable of”.

<sup>51</sup> Rasmussen 2010b and 2012b.

<sup>52</sup> Rasmussen 2010b.

<sup>53</sup> See Leeuwen 2012.



new judges had entered the Court in 1962, the French Robert Lecourt<sup>54</sup> and the Italian Alberto Trabucchi, and both were in favour of the Court taking such a step. Among the other judges we may deduce from other sources that Hammes and Donner were both against as were Advocate General Roemer and the governments of Germany, Belgium and Netherlands. A qualified guess based on oral testimony is that Lecourt and Trabucchi were followed by the Italian Rossi and the Belgian Delvaux thus making a narrow majority.<sup>55</sup>

### 3.2 Other Early Landmark Cases

*Van Gend en Loos*, universally celebrated as perhaps the most important case of the Court,<sup>56</sup> was followed in 1964 by the *Costa v. ENEL* case which corroborated this “new legal order” stating that this direct effect could not be limited by the member states. In the *Costa v. ENEL* case the Court ruled that member states had definitively transferred their sovereign rights to the Community and Community law could not be overridden by domestic law. The judgment has been seen as the completion of a revolution.<sup>57</sup>

The two landmark decisions made at the time of the “Six” became part of a legal tradition of the Court that new member states could not ignore and they were subjected to scholarly scrutiny of an intensity almost never seen before. The third

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<sup>54</sup> Robert Lecourt, former French Minister of Justice, a friend of Jean Monnet and known for his European engagement served on the Court from 1962 to 1976 after the first French judge Jacques Rueff. It might not be a coincidence that the important cases of *Van Gend en Loos* and *Costa v. ENEL* were decided shortly after his arrival at the Court. A close reading of his book “*L’Europe des juges*”, Lecourt 1976 also gives good hints as to his opinion on the role of the Court as an active player in the Community. Another high-profile judge was Pierre Pescatore from Luxembourg, a scholar and a civil servant in the foreign service of his country, who served on the Court from 1967 to 1985 and thus was one of those who ensured that the train did not stop once it had started. His memories from the Court and knowledge of its tradition have been a source for historians.

<sup>55</sup> See now Rasmussen 2012a, b. The position of the German judge Otto Riese is supposed to coincide with that of the German Advocate General and his government.

<sup>56</sup> Craig and de Búrca 2011, p. 183, that the Court articulated its doctrine of direct effect in 1963 “in what is probably the most famous of its rulings.” Or in the words of G.F. Mancini: “But if the European Community still exists 50 or 100 years from now, historians will look back on Van Gend en Loos as the unique judicial contribution to the making of Europe”, see Mancini and Keeling 1994, p. 183. Or Vauchez 2010: “Among Europe’s foundational myths, *Van Gend en Loos* and *Costa v. ENEL* ... can easily claim a very special position”.

<sup>57</sup> See Rasmussen 2010a: “With the *Costa v ENEL* in 1964 the Court of Justice completed what can only be termed a revolution in European law”. Later he talks of “the history of the European legal revolution...” He also argues that the Court by its judgments in 1963 and 1964 made an “ideological push for federalising the EC”. He stresses the importance of the decision in the Italian *Costa v. ENEL* case of the Italian Constitutional Court and mentions how the director of the legal service Michel Gaudet tried to convince the Italian Constitutional Court to change its standpoint in the Italian *Costa v ENEL* case.

founding case of “the new legal order”, the *Internationale Handelsgesellschaft*<sup>58</sup> in 1970, has been seen as a necessary consequence of the two former cases, a case “typical of a period when, after the autonomous, supranational framework of Community law had been established, it had to be endowed with the principles inherent in the rule of law.”<sup>59</sup> The case was about the forfeiture of a deposit lodged in connection with the issue of export licenses for maize meal. According to German law the deposit was lost if exportation did not take place as required. This effect was considered by the plaintiff as a violation of his right of action and economic liberty. The case “occupies a distinct position”<sup>60</sup> or marked the “rights of passage” as the Court in 1970 declared that “respect for fundamental rights forms an integral part of the general principles of law” protected by the Court of Justice. This decisive step in the constitutionalization of the Rome Treaties<sup>61</sup> was taken by the Court at a moment when fundamental rights protection and the general legal “atmosphere” surrounding such rights in the member states were different from today.

In the later case of *Nold* (1974)<sup>62</sup> the Court stated that it was “bound to draw inspiration from constitutional traditions common to the member states, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States.” An autonomous system of protection of fundamental rights was gradually built up by the Court based on the constitutional principles of the member states and international conventions. After direct effect and supremacy had been established, the “constitutionalization of fundamental rights” was the completion of the constitutional arch initiated in 1963. In both fundamental cases, *Internationale Handelsgesellschaft* and *Nold*, the Court, however, stated that there was no violation of a fundamental right as there was no question of a disproportionate burden.

### 3.3 The Court in the Late 1970s and 1980s

The history of the Court after 1973 is the history of a Court which came to include judges from Denmark, Ireland and UK with legal backgrounds which were different from those of the sitting judges. It is to some the history of a still all-male Court<sup>63</sup> deciding basically on economic issues or a Court that followed on a less

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<sup>58</sup> Case 11/70 *Internationale Handelsgesellschaft v Einfuhr und Vorratsstelle für Getreide und Futtermittel* (1970).

<sup>59</sup> Cunha Rodrigues 2010, p. 93.

<sup>60</sup> Tridimas 2010, p. 98.

<sup>61</sup> Since 1974/75, the Court refers explicitly to the ECtHR and since 1989 the ECtHR has a “particular significance”. From 1990 the Court cites decisions from the European Court of Human Rights.

<sup>62</sup> Case 4/73 *J Nold, Kohlen- und Baustoffgrosshandlung v the Commission* (1974).

<sup>63</sup> Cp. Jo Shaw 2001, p. 116.

spectacular scale a line once laid down, and it is also the history of a Court that politically under the presidency of Robert Lecourt (1967–1976) and Hans Kutscher (1976–1980) and with Pierre Pescatore as a very active member of the Court stuck firmly to a line of furthering the Community.

It has been noted as a contrast to the style of the Court in the 1960s that “in the course of the seventies the Court of Justice seems to have become increasingly cautious about laying down general principles and has concentrated to a greater extent on the problem to be solved in the individual case.”<sup>64</sup> You may however argue that some important principles or formulae of lasting importance were actually forged at that time as a consequence of the leading decisions from the beginning of the 1960s. A few examples of more well-known judgments from the late 1970s and 1980s can in no way paint a full picture of or do justice to the activities of the Court but they may still be representative of the ongoing work of the Court.

A case about importation of scotch whisky from Belgium to France led to the pronouncement of the so-called *Dassonville* formula,<sup>65</sup> the importance of which has made the case at issue one of the candidates for the Court’s “Hall of Fame”<sup>66</sup>:

All trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.<sup>67</sup>

The case(s) of the Belgian stewardess, Mrs. Defrenne, again show(s) the importance of the preliminary rulings system and how individuals who fight for their rights have also been instrumental in the development of Community law. In this case, the Court recognised the direct effect of Article 119 of the Treaty of Rome on equal pay.<sup>68</sup> Her case may be seen as a late illustration of what the German scholar Rudolph Jhering said in a famous lecture in 1872 in which he highlighted the decisive role for the upholding of law and justice played by the individual who did not accept injustice or compromise but defended his rights in Court.<sup>69</sup>

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<sup>64</sup> Schepel and Blankenburg 2001, p. 38.

<sup>65</sup> Case 8/74 *Procureur du Roi v Benoît et Gustave Dassonville* (1974). The *Dassonville* formula was later restricted in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* (1993). See now Article 36 TFEU that exempts quantitative restrictions which are justified on grounds of “public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property”. The restrictions must not, in any case, “constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States”.

<sup>66</sup> Rosas 2010, p. 435.

<sup>67</sup> Case 8/74 *Procureur du Roi v Benoît et Gustave Dassonville* (1974) based on Article 28 of the EC Treaty on the so-called MEQRs (measures equal to quantitative restrictions).

<sup>68</sup> Case 43/75 *Defrenne v Sabena* (1976). Another woman whose name had been linked to a famous judgment from this period on the free movement of persons is a Mrs. Van Duyn who opposed the British immigration authorities who denied her entry permit because of her affiliation to the Scientology movement, a decision that was seen as an expression of public policy and therefore not infringing Community law, see Case 14/74 *Van Duyn v Home Office* [1974].

<sup>69</sup> Jhering 1872.

The principle of supremacy even when it comes to national legislation adopted at a later date than the Treaties was clearly expressed in the famous case of *Simmenthal* of 1978.<sup>70</sup>

Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legal provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law.

The establishment of the so-called principle of mutual recognition has attracted much attention. The atmosphere evoked in this peculiar case of nice garden parties where chilly drinks are served has added to the attractiveness and fame of the *Rewe* case<sup>71</sup> better known as the *Cassis de Dijon* case, which is often seen as a step further on the way to getting rid of restrictions upon trade than the previous case of *Dassonville* of 1974. The rather down-to-earth question in the case had to do with alcohol percentages and arose because products sold as fruit liqueur according to German law should contain no less than 25 % alcohol by volume. As *Crème de cassis* only contains 15–20 %, the German alcohol authorities (*Bundesmonopolverwaltung für Branntwein*) did not allow Mr. Rewe to import the Cassis de Dijon into Germany and market it as a fruit liqueur. The Court held that the German legislation represented a measure having an effect equivalent to a quantitative restriction on imports, and that the law was in breach of Article 30 of the EC Treaty (now Article 34 TFEU):

The concept of measures having an effect equivalent to quantitative restrictions on imports contained in article 30 of the EEC treaty is to be understood to mean that the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a member state also falls within the prohibition laid down in that provision where the importation of alcoholic beverages lawfully produced and marketed in another member state is concerned.

The *CILFIT* case of 1982 (Case C-283/81) defined and limited the duty for national courts to bring preliminary questions concerning Community law before the Court of Justice and gave instructions as to the way in which EU law should be interpreted (the *CILFIT* exception). It also referred to the language question stating that: “community law is drafted in several languages... the different language versions are all equally authentic. An interpretation of a provision of community law thus involves a comparison of the different language versions.” Another “classic” of this period, the case of “*Les Verts*” (Case C-294/83) of 1986 based on an audacious interpretation of the Treaties included the European Parliament in the constitutional framework and referred to the Treaty as “the basic constitutional charter” of the Community.

The *Wachauf* case of 1991<sup>72</sup> pronounced an important principle of the protection of fundamental rights based on rather unspectacular facts. The question was

<sup>70</sup> Case 106/77 *Amministrazione Delle Finanze dello Stato v Simmenthal Spa* (1978).

<sup>71</sup> Case 120/78 *Rewe-Zentral v. Bundesmonopolverwaltung* (1979).

<sup>72</sup> Case C-5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* (1989).

whether Hubert Wachauf as a tenant farmer could be excluded from enjoying the same right as that of an owner who had to be compensated economically when he gave up milk production. The Court stated that "...Community rules which, upon the expiry of the lease, had the effect of depriving the lessee, without compensation, of the fruits of his labor and of his investments in the tenanted holding would be incompatible with the requirements of the protection of fundamental rights in the Community legal order. Those requirements are also binding on the Member States when they implement Community rules."

In the *ERT* case of 1989 concerning a Greek television monopoly, it was stated that national measures within the field of EC law "must be interpreted in the light of the general principles of law and in particular of fundamental rights" and the Court referred expressly to the "freedom of expression, as embodied in Article 10 of the European Convention on Human Rights, as a general principle of law the observance of which is ensured by the Court."<sup>73</sup>

### 3.4 *An Activist Court?*

Most questions addressed by the Court of Justice are unlikely to attract general attention. The Court itself has cultivated an anonymous image and only a few judges have been known to the public. It is therefore understandable that a debate on how the Court functions has been limited to insiders. Whether a Dutch company should pay a certain tax, whether a tenant is entitled to some compensation or even which restrictions can be made upon the import and export of whisky or cherry brandy are not questions of the same general interest as those of choice of school, abortion, death penalty or the right to carry a weapon. Even if we are supposed to accept the Court of Justice as the voice of the European "peoples", we must recognise that many of the questions that the Court has decided are not those which immediately appeal to some basic sense of right or wrong. It is not the facts of the cases but the reasons given and the agenda behind them that have focussed attention on the Court of Justice which therefore, as a rule, does not evoke the same strong emotions as those courts which, like the US Supreme Court, make decisions which immediately affect American citizens.

With the extension of the Community in 1973, the Court not only made an important step towards being a "European" Court, it also started to become an object of discussion. In the 1980s and 1990s the question of "activism" was raised and scholars began to seriously debate, sometimes in a heated tone, whether the Court should be seen as "running wild"<sup>74</sup> or interpreting the Treaties "contrary to

<sup>73</sup> Case C-260/89 *Elliniki Radiophonia Tileòrassi etc. v Dimotiki Etairia Pliroforissis et al.* (1991).

<sup>74</sup> Cappeletti (1987) in his review of Rasmussen 1986. Cappeletti distances himself from Rasmussen's fierce criticism of the Court, see Rasmussen 1986. The Danish scholar Hjalte Rasmussen was probably the first who, with a criticism of the Court that, even if to many colleagues it seemed exaggerated and not too well founded, raised a question of legitimacy that since then has been a theme in the debate about the Court, every now and then popping up again.

the natural meaning of words”<sup>75</sup> or was at least going too far in promoting their concept of Europe, and in the debate the traditional arguments of the limited legitimacy of judges were put forward. This discussion has today partly moved from a scholarly discussion on the legitimacy of some of the Court’s landmark decisions towards a political discussion on the role of the Court in forming a new concept of European citizenship that runs contrary to national interests.<sup>76</sup> The historian may well be a little puzzled over this debate. The Court of Justice is not a national court that has to find its role in a national constitutional system. It may be that the Court historically has felt a particular obligation to be a motor in a stagnant Community. The Court finds itself in the peculiar situation that it functions within and responds to the European Union in the creation of which it has taken such an active part itself.<sup>77</sup> Its constant use of earlier decisions as steps forward and only rarely stopping or moving back must be considered in this light, a view that seems generally to have been accepted by scholars and the national courts which form part of the European law system. Scholars often take greater intellectual pleasure in reading and discussing supreme court decisions than just reading the plain text of a directive or another general norm. The discussion of whether the Court of Justice is too “active” or not may well be an academic discussion which has been noted by the Court and can be of some interest to the judges, perhaps even seen as flattering, but whether it has been of any influence upon the work of the Court is a difficult question to answer with any certainty.

### 3.5 *The Court Since 1989*

Since the 1990s the discussion of the Court and its practice has acquired a social dimension. Human rights play an increasing role and the question is raised also about the social sensitivity of the Court. The Court for a long time has been acknowledged as the economic court of Europe which, since the 1960s, has paved the way for the free movement of persons, goods, services and capital. Today the Union is different from what it was in the time of “the Six”, not only concerning the number of members but

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<sup>75</sup> Hartley 1996, p. 95.

<sup>76</sup> In Germany, former President Roman Herzog 2008 criticised the Court after the Mangold judgment (C-144/04 *Werner Mangold v Rüdiger Helm*), which gave a negative answer to the question whether a statutory provision exempting employees of 52 years of age and older from limitations to the conclusion of fixed-term contracts was compatible with Community law. The Court held that “the principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law”. Herzog warned that “the ECJ deliberately and systematically ignores fundamental principles of the Western interpretation of law”, that “its decisions are based on sloppy argumentation”, that “it ignores the will of the legislator, or even turns it into its opposite, and invents legal principles serving as grounds for later judgments.

<sup>77</sup> For the debate on the activism of the Court, see for the time until 2002 the references by Douglas-Scott 2002, p. 210 and now Waele 2010, worried that the Court “does not manage to curb its enthusiasm for promoting further integration a little more.”

also as to the function of the Union which includes more areas than the creation of a common market and seems to give more importance to the position of the individual as a citizen of the Union. This role is a challenge to the Court which sometimes is seen as living its own life far from and above social realities, conflicts and necessities which are reflected in the politics of the member states. It is too early to say which cases in the long run will be seen as decisive. Here, only a selection will be presented in order to give an impression of the range of matters treated by the Court today.

The responsibility for the member states to implement Community law has been a concern both for the Commission and the Court. The 1990s opened with a very outspoken statement in 1991 in the case of *Francovich* as to the right for citizens to be compensated by their respective member state if the state has not complied with Community law: “Rarely has the Court been called upon to decide a case in which the adverse consequences for the individuals concerned of failure to implement a directive were as shocking as in the case now before us.”<sup>78</sup>

A popular decision especially among football enthusiasts was given in the *Bosman* case (C-413/93) of 1995 where the Court applied the Treaty rules on free movement of workers to professional football players with the effect that clubs cannot ask for money when a football player at the end of his contract changes from one club to another.

The many decisions of the Court in the last decade lie in some way outside the scope of the historian. However, it is important to note the important changes in the case load and the diversity in the cases brought before the Court. New fields are covered and the Court seems still to move fast. A look in the Annual Reports and at the list of subjects put before the Court show how the Court decides, among others, questions of constitutionality and fundamental rights, access to justice, European citizenship,<sup>79</sup> free movement of goods, persons, services and capital, consumer protection, competition, state aid, taxes, trademarks, social policy including equal treatment, age discrimination etc., asylum and visas, judicial cooperation in civil matters and private international law, including child custody, police and judicial cooperation, European Arrest

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<sup>78</sup> Quotation from the Opinion of the Advocate General in Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Republic of Italy* (1991).

<sup>79</sup> After the entry into force of the Treaty of Maastricht in 1993 cases of European citizenship have played an increasing role in the Court's practice and have been a constantly developing field. The leading cases of *Martinez Sala* (C-85/96) of 1998 and the case of *Baumbast* (C-413/99) of 2002 on the right to reside in a member state have been followed in the case of *Carpenter* (C-60/00) of 2002 that included the principles of respect for family and private life as guaranteed by Article 8 of the European Convention on Human Rights in its analysis of the rights of Union citizens. It established a corollary right for the mother to reside in a member state with a minor child in the case of *Zhu and Chen* (C-200/02) decided in 2004. It ruled on the basis of Article 18 EC Treaty (now Article 21 TFEU) that, as an EU citizen, a child, Catherine Zhu, has an inalienable right to reside and that this right's “*effet utile*” implied also the right for her mother to reside in the same member state. Another example of how the Court protects citizens is the case of *Grzelczyk* (C-184/99) in which it was stated that excluding a French student in Belgium from social aid would be discrimination based on nationality. These cases have been followed in the case of *Zambrano* (C-34/09) of 2011 and in the recent joined cases of *Ibrahim and Maria Texeira* (C-310/08 and C- 480/08). The Court decided that a parent caring for a child of a migrant worker who is in education in the host member state has a right of residence in that state, and thus confirmed the rule in the *Baumbast* case.



Warrants and security policy and social aid. Some of these decisions on European citizenship have been considered rather generous in bestowing social rights or rights of residence within the Union on grounds that may look feeble to many or come into conflict with national immigration law and politics. At the same time, however, they fit perfectly into the line of interpretation of the Treaties and other directives and regulations of the Union that was laid down in the 1960s.

The *Metock* case of 2008 (C-127/08) based on Directive 2004/38 drew attention of especially Danish and Irish politicians to the significance of national immigration policies and the Court's practice that granted a person who had illegally entered the Union a right to reside and move freely within the Union. The Court has in later years given judgment in cases that involve both criminal law and civil law especially within the field of consumer protection and contracts in general. Also, other fields of law that have not traditionally been considered as falling within the scope of the Court have been analysed as to their possible effects for the law of the Union. The case of *Garcia Avello* (C-148/02) decided in 2003 by the Court is thus an example of how the Court is willing to go rather far in considering which kinds of measures constitute restrictions on the freedom of movement.<sup>80</sup>

Two cases, the cases of *Laval* and *Viking* (C-341/05 and C-438/05), both decided in 2007, had to do with the question whether collective action can be taken to resist social dumping within the EU. These cases have raised questions as to whether the broader scope of achieving an economic community can come into conflict with rights of collective action, social security and respect for trade unions.

The attention paid to the cases of *Kadi* and *al-Barakat* (joined cases C-402/05 and C-415/05) have to do with the position the Court took in this case to measures originally taken by other international organisations, in this case the UN Security Council. The Court reviewed in the light of fundamental rights the validity of a Community measure, namely the freezing of bank accounts of people placed on the list of terrorist suspects set up by the UN Security Council and consequently put on a similar list made by the EU. The Court held that the fundamental right to be heard must be respected and that Community law was an autonomous legal system that could not be prejudiced by international agreements.

## 4 The Killy-loo Bird Reversed

Often the law and courts are reproached for lagging behind the general development of society. In 1939 the American professor Rodell<sup>81</sup> used the image of the "killy-loo bird" to illustrate his view of law as being backward and lawyers as

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<sup>80</sup> The Court held that Belgian law on names which did not allow persons with dual nationality to have surnames according to the law of both countries, was not in accordance with Community law.

<sup>81</sup> Rodell 1939.



people who live in the past and who have difficulties in accommodating the law to present realities. The invention of the “killy-loo bird” was his way of illustrating legal conservatism. This bird in his imaginary world always flew backwards and was more interested in where it had been than where it should go.<sup>82</sup> Such an image may have been representative for the law between the wars but it seems outdated in today’s legal world.

The Court of Justice of the European Union as it has developed over the years is the definitive negation of the “killy-loo bird”. Its critics may even say that it looks back too little. The Court seems to use its older decisions as a springboard in a continuous move forwards leaving the latest decision behind when a new jump is made. The Court is today also a historical object and a very challenging one. It is a demanding exercise for national judges to just follow its practice and find out when to ask for its interpretation or when to be sure as to what European law is. Much can be said and is said in its praise as a *laudatio* or as a criticism of its leaving the member states of the Union and their “peoples” behind in its making of the new legal order. But it should not be said that mapping the Court and its decisions is boring or not sufficiently intellectually stimulating. The existence of the Court is a challenge to the modern lawyer as it is to the historian or the legal historian who tries to keep track of the Court. In this way the Court may be somewhat like a bird. The moves can be difficult to follow. Whenever you try to grasp or catch it, it is not there anymore. Whether it has moved too high up in the air or just out of reach is a question of taste. That the catching is a good exercise and worth trying is beyond question.

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<sup>82</sup> “The law is the killy-loo bird of the sciences. The killy-loo, of course, was the bird that insisted on flying backward because it did not care where it was going but was mightily interested in where it had been”. Rodell 1939, Chap. II.

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