

CONSTITUTIONALISM OF THE EUROPEAN UNION: JUDICIAL LEGISLATION AND POLITICAL DECISION-MAKING BY THE EUROPEAN COURT OF JUSTICE

DR. CHRISTOPH HENKEL, LL.M.

I. INTRODUCTION

Since the end of the Cold War and, indeed, at the beginning of this century, the European Union is being challenged with both an increasing number of members and by those countries who aspire for future membership. Established among six Member States as the European Coal and Steel Community, the European Union now consists of fifteen Member States and is faced with the application for membership of at least thirteen additional countries.¹ President Clinton, when presented with the prestigious Charlemagne Prize for promoting European unity in June 2000, even called for the full inclusion of Russia into the European Union.² He stated: "No door can be sealed shut to Russia, not NATO's, not the European Union's."³

As this message demonstrates, the ever-changing character and definition of Europe remains today as it has in past centuries.⁴ Moreover, it proves that in an age of constitutionalism, European integration and the European Union in particular cannot avoid such development. The European Community Treaties do not provide a template for a constitution in the typical sense of the law. Furthermore, the institutional framework of the Union was laid out by the European Community Treaties in the 1950's, only to be partially amended in the 1980's and 1990's. Accordingly, it is highly questionable whether the European Union will be able to meet the challenge of future enlargement. An increase to thirty members may jeopardize the achieved European integration among the fifteen Member States and aggravate the already existent deficit in democratic decision-making. Aware of this danger, the Member States of the European Union have entered into

¹ Austria, Finland and Sweden were admitted to the European Union in 1995. Since early 1998, the European Union has been negotiating on membership with Poland, Hungary, the Czech Republic, Slovenia, Estonia and Cyprus. Other countries who have applied for membership are: Turkey, Malta, Lithuania, Latvia, Romania, Slovakia and Bulgaria. Applications by Switzerland and Norway have been withdrawn.

² See, e.g., Clinton hält Plädoyer für Moskau: US-Präsident bejaht EU-Beitritt/Putin regt gemeinsame Raketenabwehr an, Frankfurter Rundschau, June 3, 2000, at A1.

³ Elaine Sciolino, Clinton Urges United Europe to Include Russia, N.Y. TIMES, June 3, 2000, at A6.

⁴ See, e.g., J.G.A. Pocock, *What Do We Mean by Europe?*, WQ, Winter 1997, 12-29.

a renewed debate on the constitutionalism of the European Union and the amendment of its treaties.

In late May of 2000, the German Foreign Minister, Joschka Fischer, presented his vision for future constitutionalism of the European Union in a speech at the Humboldt University in Berlin.⁵ As the final goal, Mr. Fischer called for a European federation of nation-states, with a two-house parliament and the option of a directly elected president, to be underwritten by a new treaty and a European Constitution. He stated that a European Constitution should include fundamental, human and civil rights. Furthermore, Mr. Fischer pledged that constitutionalism of the European Union must not put an end to the European nation-state. He said, "in a [European federation] we will remain British and German, French and Polish."⁶

The focus of this article shall be the case law of the European Court of Justice. Despite recent proposals as well as other actions of the Member States to reform the Community Treaties, the expansion of judicial review by the European Court of Justice remains the driving force behind the development of constitutionalism of the European Union.⁷ In fact, the European Court of Justice and its case law play the most dominant and consistent role in the integration process. In doing so, the case law of the Court of Justice in part reflects the judicial activism comparable to early U.S. Supreme Court assertions of federal power.⁸ With the doctrines of direct applicability, direct effect, supremacy of Community Law, fundamental rights, and implied powers, the Court of Justice indicates a bias toward deeper European integration and centralized governance. To be sure, the establishment and subsequent elaboration of these doctrines provide a primary example for the role of the European Court of Justice in the European Union. The precedents of the Court, which in many cases were

⁵ Charlemagne: Joschka Fischer, Germany's flighty foreign minister, *The Economist*, May 20th-May 26th, 2000, at 66; Vorwärts bis zur Vollendung vom Staatenbund zur Föderation: Mit seiner Rede in der Berliner Humboldt Universität leitet der Außenminister Joschka Fischer neues Nachdenken über Europa ein, *Frankfurter Rundschau*, June 17, 2000, Dokumentation, at A7.

⁶ *Id.*

⁷ RENAUD DEHOUSSE, *THE EUROPEAN COURT OF JUSTICE: THE POLITICS OF JUDICIAL INTEGRATION* 36-66 (St. Martin Press) (1998); Leila Sadat Wexler, *The Role of the European Court of Justice on the way to European Union*, in *EUROPE AFTER MAASTRICHT: AMERICAN AND EUROPEAN PERSPECTIVES* 159-175 (Paul Michael Lützeler ed., 1994); J.H.H. Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403, 2413 (1991); Francois Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, 56 *MOD.L.REV.* 19-54 (1993); L. NEVILLE BROWN & TOM KENNEDY, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* 295-375 (1995); G. F. Mancini, *The Making of a Constitution for Europe*, 26 *COMMON MKT. L. REV.* 595-614 (1989); Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 *AM. J. INT'L L.* 1-27 (1981).

⁸ HJALTE RASMUSSEN, *ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE: A COMPARATIVE STUDY IN JUDICIAL POLICY MAKING* 115-143 (Martinus Nijhoff) (1986).

initiated by the Member States themselves or a direct result of their failure to comply with obligations under the Treaties, prove a consistent reliance on the Court to regulate political conflict throughout the European integration process. But aside from its role in European integration, it should also be noted that the activism of the European Court of Justice as an international court may provide general insight into the greater picture of international jurisprudence. That is, the possible influence of international jurisdiction on the sovereignty of nation-states bound by international agreements and international organizations.

II. CASE LAW AND DOCTRINES OF THE EUROPEAN COURT OF JUSTICE

A. COMPOSITION OF THE EUROPEAN COURT OF JUSTICE

Before discussing the different doctrines developed by the European Court of Justice, it is necessary to describe the broad structure and composition of the Court. The Court consists of the Court of Justice and the Court of First Instance.⁹ The jurisdiction of the Court of First Instance is limited to certain classes of actions or proceedings brought by natural or legal persons and is primarily meant for establishing facts.¹⁰ The interpretation, validity and application of Community Law is only judged by the Court of Justice.¹¹

Since the admission of Finland, Sweden and Austria as new members to the European Union in 1995, the Court of Justice is comprised of fifteen judges; one judge per Member State.¹² The deliberations of the Court must be held with an uneven number of members. Certain issues can be decided by a Chamber of the Court. Issues deliberated outside the Chamber require a minimum quorum of seven judges.¹³ The judges are appointed by common accord of the governments of the Member States,¹⁴ which requires a unanimous decision.¹⁵ The mandate of a common accord

⁹ EC Treaty, art. 225 (ex. art. 168a).

¹⁰ EC Treaty, art. 225 (ex. art. 168a); *See also* The Rules of Procedure of the European Court of First Instance 1991 O.J. (L 136).

¹¹ EC Treaty, art. 220 (ex. art. 164).

¹² *Act Concerning the Conditions of Accession of the United Kingdom Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden*, 1994 O.J. (C 241) 24. Bull. EU "1995, at 130, point 1.9.19. - 1.9.20. Note that Norway, after a negative referendum did not join the European Union in 1995.

¹³ HENRY G. SCHERMERS & DENIS F. WAELEBROECK, *JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES* 447 § 771 (Kluwer Law and Taxation) (5th ed. 1992).

¹⁴ EC Treaty, art. 223 (ex. art. 167).

¹⁵ DEHOUSSE, *supra* note 7, at 7.

suggests a greater independence of the judges, and it prevents them from being considered mere representatives of their state.¹⁶ Yet, in practice each Member State proposes a candidate of its own nationality and it has been demonstrated that appointed judges are inclined to support their own States,¹⁷ thus clearly manifesting a political aspect in the recruitment procedure of the members of the Court.¹⁸ The judges are appointed for six years and can be reappointed without term restriction.¹⁹ The appointments are made every three years, for a group of six or seven judges, in order to ensure that the Court operates in an undisturbed manner.²⁰

B. THE EFFECTIVENESS OF COMMUNITY LAW

The European Court of Justice promoted the effectiveness of Community law through the doctrines of direct applicability and direct effect.²¹ Often used in the same context, both doctrines should be distinguished.²²

The doctrine of direct applicability refers to Treaty provisions or regulations, while the doctrine of direct effect, noted particularly in the latest case law by the Court,²³ primarily applies to directives.²⁴

The wider legal concept of direct effect is the basis for the distinction between the doctrine of direct applicability and direct effect.²⁵ While sharing the terminology with one doctrine, the concept of direct effect is inherent to

¹⁶ *Id.*

¹⁷ SCHERMERS & WAELEBROECK, *supra* note 13, at 451 § 774.

¹⁸ DEHOUSSE, *supra* note 7, at 7-8.

¹⁹ SCHERMERS & WAELEBROECK, *supra* note 13, at 451 § 779.

²⁰ *Id.* at 452 § 780.

²¹ In terms of U.S. case law, both doctrines may be best compared to U.S. Supreme Court decisions dealing with the issue of intent and purpose. One such example is *Arlington Heights v. Metropolitan Housing Corporation*, 429 U.S. 252, 264-268 (1977).

²² BENGT BEUTLER ET AL., *DIE EUROPÄISCHE UNION: RECHTSORDNUNG UND POLITIK* 206 (Nomos) (1993).

²³ Joined Cases C-6/90 and C-9/90, *Francovich and Others v. Italian Republic*, [1991] E.C.R. I-5357; Case C-392/93, *The Queen v. H. M. Treasury, ex parte: British Telecommunication plc*, [1996] ECR I-1631; Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, *Erich Dillenkofer and Others v. Federal Republic of Germany*, [1996] E.C.R. I-4845.

²⁴ Along with decisions, recommendations, and opinions, regulations and directives are the main legislative tools of the Community. Regulations become effective in their entirety, without any intervention by Member States and automatically become part of national law. Directives, in contrast, require transformation into national law by the Member States. By definition directives are only binding as of the result to be achieved and leave the choice of form and methods to the national authorities of each Member State. See EC Treaty, art. 189.

²⁵ Case 26/62, *N. V. Algemene Transport - en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie Der Belastingen*, [1963] E.C.R. I, 11-13: "The very nature of [Article 12] makes it ideally adapted to produce direct effects in the legal relationship between the Member States and their subjects"

both doctrines. In the understanding of the Court, direct effect generally relates to the fact that Community law provisions, regardless of their character as a regulation, directive or Treaty provision, contain the possibility of creating individual rights for natural and legal persons which may be protected by national courts. Therefore, provisions which are directly applicable under the doctrine of direct applicability constitute direct effect.²⁶

Having made this conclusion, the need for a clear distinction between both doctrines appears somewhat questionable. However, despite being the connecting link between the two doctrines, the general concept of direct effect furnishes an independent and fundamental importance of its own.²⁷ This proves more imperative as even the Community Treaties fail to provide a uniform and unambiguous basis on the scope and the binding obligations of the Treaties as well as the law enacted thereafter.²⁸ While the Community Treaties indicate that Community law is directly applicable within the domestic legal order of the Member States,²⁹ some Member States contest this notion and consider a separate act of incorporation to be required. The concept of direct effect tries to solve this controversy by establishing specific guidelines under which Community laws become the law of the land without a formal act of incorporation.³⁰ The doctrines of direct applicability and direct effect are the utilization of these guidelines under different circumstances. These differences will now be discussed in detail.

1. Direct Applicability

The doctrine of direct applicability postulates that the adoption of legal norms by Community institutions is sufficient to integrate them into the legal orders of the Member States.³¹ Community enactments of that kind need not be transposed or incorporated into a Member States law to become the law of the land.³² Moreover, direct applicability means that the rules of Community law must be fully and uniformly applied in all the Member States from the date of their entry into force for as long as they continue in force.

²⁶ Case 34/73, *F.lli Variola Spa v. Amministrazione Italiana delle Finanze*, [1973] E.C.R. 981, 990-991, ¶ 8-10.

²⁷ See, e.g., J. A. Winter, *Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law*, 9 COMMON. MKT. L. REV. 425, 425-426 (1972).

²⁸ BEUTLER ET AL., *supra* note 22, at 206; A. J. Easson, *The "direct effect" of EEC directives*, JCLQ 319 (1979).

²⁹ EC Treaty, art. 249 (ex. art. 189).

³⁰ See the different cases as referred to in the different paragraphs below.

³¹ George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 348 (1994).

³² Case 34/73, *F.lli Variola Spa v. Amministrazione Italiana delle Finanze*, [1973] E.C.R. 981, 991, ¶ 10.

These provisions are a direct source of rights and duties for all those affected thereby, whether Member States or individuals.³³

The concept of direct applicability is most clearly demonstrated by the legislative tool of regulations, which, according to the European Community Treaty, "have general application. [A Regulation] shall be binding in its entirety and directly applicable in all Member States."³⁴ The meaning of the concept of direct applicability is not limited however to regulations. It also applies to provisions of the Founding or Community Treaties. Above all, the Community Treaties entitle and obligate Member States and their institutions as well as the European Community and their different organizations.³⁵

The rule of direct applicability was established by the Court in the case *Van Gend en Loos*³⁶ in 1963. A Dutch businessman objected to the imposition of a certain duty tariff by Dutch customs authorities on a quantity of products imported from Germany.³⁷ He claimed that this would violate Community law.³⁸ The European Court of Justice found that "[t]he implementation of Article 12 does not require any legislative intervention on the part of the states. The fact that under this Article it is the Member States who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation."³⁹ The Court did not limit the application of the doctrine of direct applicability to provisions entailing negative obligations or obligations to omit restriction by the Member States.⁴⁰ The Court ruled it sufficient if the Treaty provisions impose an ample obligation to act upon Member States.⁴¹ Such obligation might even exist in cases in which Treaty provisions remain vague or contain an indeterminate concept of law.⁴²

Since the end of the transitional period of the European Communities, the doctrine of direct applicability took on additional importance. The Founding Fathers intended to establish the common market

³³ Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* (II), [1978] E.C.R. 629, 43-644, ¶ 13-24.

³⁴ EC Treaty, art. 249 (ex art. 189).

³⁵ EC Treaty, art. 5 (ex art. 3b), art. 10 (ex art. 5); TEU art. 6 (ex art. F).

³⁶ Case 26/62, *N. V. Algemene Transport - en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie Der Belastingen*, [1963] E.C.R. 1.

³⁷ *Id.* at 4, ¶ 5.

³⁸ *Id.*

³⁹ *Id.* at 13, ¶ 2.

⁴⁰ *Id.* at 13, ¶ 1.

⁴¹ *Id.* at 13, ¶ 3; See also Case 57/65, *Alfons Lütticke GmbH v. Hauptzollamt Saarlouis*, [1966] E.C.R. 205, 210-211; Case 33/70, *SpA Sace v. Ministry for Finance of the Italian Republic*, [1970] E.C.R. 1213, 1221-1223; Case 45/75, *Rewe-Zentrale des Lebensmittel - Großhandels GmbH v. Hauptzollamt Landau/Pfalz*, [1976] E.C.R. 181, 193, ¶ 9; 197, ¶ 24.

⁴² BEUTLER ET AL., *supra* note 22, at 208.

during a transitional period of twelve years ending on December 31, 1969.⁴³ The goal of establishing a common market was never fully achieved during this period, and as a result, the European Court of Justice moved forward to grant direct applicability to those Treaty provisions which were determined to adjust or abolish discriminations and restrictions in the course of the transitional period.⁴⁴ This included not only the four freedoms of the Community, the free movement of goods, persons, services and capital,⁴⁵ but also those provisions which specify a clear legislative aim, such as the principle that men and women should receive equal pay for equal work.⁴⁶

The standards by which the European Court of Justice established its case law, however, remained inconsistent. This is apparent in the cases *Reyners* and *Van Binsbergen*.⁴⁷ Both cases dealt with the abolition of restrictions in two areas of Community law: discrimination based on nationality between workers of Member States and the freedoms of establishment and service.⁴⁸ Although the aim of the Treaty is clearly defined in both areas, the European Court of Justice found that a distinction is necessary. While discrimination against nationals of other Member States was prohibited on the basis of directly applicable Treaty provisions, the concept of direct applicability was not extended to Treaty provisions on the freedom of establishment and service. The Court held that the freedom of

⁴³ EEC Treaty, art. 7.

⁴⁴ EEC Treaty, art. 37(1): "Member States shall progressively adjust any State monopolies of a commercial character so as to ensure that when the transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exist between nationals of Member States."; EEC Treaty, art. 48(1): "Freedom of movement shall be secured within the Community by the end of the transitional period."; EEC Treaty, art. 52: "[R]estrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages in the course of the transitional period. . . ."

⁴⁵ See, e.g., Case 2/74, *Jean Reyners v. Belgian State*, [1974] E.C.R. 631, 648-652, ¶ 3-32; Case 33/74, *Johannes Henricus van Binsbergen v. Bestuur van de Bedriffsvereniging voor de Metaalnijverheid*, [1974] E.C.R. 1299, 1310-1312, ¶ 18-27; Case 59/75, *Publico Ministero v. Flavia Manghera and Others*, [1976] E.C.R. 91, 101, ¶ 14-16; Case 45/75, *Rewe-Zentrale des Lebensmittel - Großhandels GmbH v. Hauptzollamt Landau/Pfalz*, [1976] E.C.R. 181, 197-198, ¶ 22-24; Case 91/75, *Hauptzollamt Göttingen und Bundesfinanzminister v. Wolfgang Miritz GmbH & Co.*, [1976] E.C.R. 217, 229-231, ¶ 7-12.

⁴⁶ EC Treaty, art. 119: "Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work. . . ."; See also Case 43/75, *Gabrielle Defrenne v. Societe Anonyme Belge De Navigation Aérienne Sabena*, [1976] E.C.R. 455, 471-480, ¶ 4-68.

⁴⁷ Case 2/74, *Jean Reyners v. Belgian State*, [1974] E.C.R. 631; Case 33/74, *Johannes Henricus van Binsbergen v. Bestuur van de Bedriffsvereniging voor de Metaalnijverheid*, [1974] E.C.R. 1299.

⁴⁸ EC Treaty, arts. 43-55 (ex arts. 52-66). EC Treaty, art. 39(2) (ex art. 48(2)) states: "[The] freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment."

establishment and service depend on a simplification of national laws and administrative rules which would require a previous qualification through Community directives.⁴⁹

Another example of inconsistency can be found in the *Defrenne*⁵⁰ ruling of the Court. Defrenne, a flight attendant with Sabena Airlines, was required by her contract to cease employment for reasons of her age.⁵¹ Defrenne brought action against Sabena in a Belgian labor court and invoked the right to equal pay for equal work under the provisions of the Community Treaty.⁵² The European Court of Justice held:

that the principle of equal pay contained in [EC Treaty] Article 119 may be relied upon before the national courts and that these courts have the duty to ensure the protection of the rights which this protection vests in individuals, in particular as regards those types of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which men and women receive unequal pay for equal work which is carried out in the same establishment or service whether private or public.⁵³

Affirming direct applicability with this ruling, the Court limited direct applicability with regard to the legal consequences of its judgment. The Court found that under considerations of legal certainty affecting all the interests involved, no direct applicability should be given in support of claims prior to the date of the Court's judgment.⁵⁴

2. Direct Effect

As described above in the case of regulations and certain Treaty provisions, it is not necessary for Member States to pass any domestic laws in order to implement them. Community law of that kind is directly applicable by the Member States and legally binding in its entirety. Thus, regulations and parts of the Community Treaty are creating enforceable legal

⁴⁹ Case 2/74, *Jean Reyners v. Belgian State*, [1974] E.C.R. 631, 648-652, ¶ 6-32; Case 33/74, *Johannes Henricus van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, [1974] E.C.R. 1299, 1309-1310, ¶ 12-14.

⁵⁰ Case 43/75, *Gabrielle Defrenne v. Societe Anonyme Belge De Navigation Aérienne Sabena*, [1976] E.C.R. 455.

⁵¹ *Id.* at 457.

⁵² *Id.* at 457-458.

⁵³ *Id.* at 476, ¶ 40.

⁵⁴ *Id.* at 480-481, ¶ 69-75.

obligations, making them directly effective between the Member States and individuals or among individuals. While the vertical category of effectiveness refers to rights that an individual may invoke against a Member State, the horizontal effect allows a person to bring an action against other individuals or corporations.⁵⁵ Such effect, however, is not limited to regulations and parts of the Community Treaties. The European Court of Justice has long held that directives may also have direct effect. This is referred to as the doctrine of direct effect.⁵⁶

At first glance, the introduction of direct effect for directives seems questionable and contradictory. The Community Treaties clearly define directives as "binding, as of the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form or methods."⁵⁷ As a result, directives can create little more than a framework while their effectiveness and content would depend on national transformation and discretion.

In contrast to regulations, the application of direct effect to directives is more problematic. The Community Treaties do not provide for a distinctive answer, which was also recognized by the European Court of Justice. In the case of *Van Duyn v. Home Office*,⁵⁸ the Court held that

[S]ince Article 189 of the Treaty distinguishes between the effects ascribed to regulations, directives, and decisions, it must . . . be presumed that the Council in issuing a directive rather than making a regulation, must have intended that the directive should have an effect other than that of a regulation and accordingly that the former should not be directly applicable.⁵⁹

Despite this conclusion, the Court at the same time furnishes the idea that other categories of acts as well as directives might have similar effects.⁶⁰ With regard to the binding effects of directives as to the result to be achieved, the Court found it incompatible "to exclude, *in principle*, the possibility" that directives may be invoked by those concerned.⁶¹ The Court emphasized the possibility of direct effect where Community authorities impose an obligation

⁵⁵ BEUTLER ET AL., *supra* note 22, at 211.

⁵⁶ DEHOUSSE, *supra* note 7, at 39-40.

⁵⁷ EC Treaty, art. 249(3) (ex art 189(3)).

⁵⁸ Case 41/74, *Yvonne van Duyn v. Home Office*, [1974] E.C.R. 1337.

⁵⁹ *Id.* at 1348, ¶ 11.

⁶⁰ *Id.* at 1348, ¶ 12.

⁶¹ *Id.* Emphasis added.

on Member States to pursue a particular course of conduct.⁶² In the view of the Court, the useful effect of directives would be weakened if both individuals were prevented from relying on directives before national courts and national courts were hindered from taking directives into consideration as an element of Community law.⁶³ Accordingly, the Court held that "it is necessary to examine, in every case, whether the nature, general scheme and wording of the provision in question are capable of having direct effects on the relations between Member States and individuals."⁶⁴

While establishing the general possibility of direct effect for directives, the Court continued to lay down conditions under which a directive may have such effect. Remaining somewhat ambiguous in *Van Duyn*,⁶⁵ the Court qualified those conditions later in *Becker v. Finanzamt Münster-Innenstadt*.⁶⁶ There the Court ruled that "wherever the provisions of a directive appear . . . to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive"⁶⁷ As it stands, the three conditions under which directives may have direct effect in the case law of the European Court of Justice are: (a) unconditionality, (b) sufficient clarity and precision, and (c) nonexistence of discretion for national implementation.

In a further step, the Court also established the rule that a Member State which has not adopted the implementing measures required by a directive in the prescribed period may not rely on its own failure to perform the obligations which the directives entail. This failure includes the prohibition against Member States to apply their internal law which has not yet been adapted in compliance with the directive, which will apply even if the law in question is provided with penal sanctions.⁶⁸ On the other hand, a

⁶² *Id.*

⁶³ As an additional argument, the Court notes the very characteristic of judicial review through preliminary rulings by the Court (EC Treaty, art. 177), "which empowers national courts to refer to the Court questions concerning the validity and interpretation of all acts of the Community institutions" thus "impl[ying] . . . that these acts may be invoked by individuals in national courts." *Id.* at 1348, ¶ 12.

⁶⁴ *Id.*

⁶⁵ The Court thereby relied on two main conditions: "First, the [directive] lays down an obligation which is not subject to any exception or condition and which, by its very nature, does not require the intervention of any act on the part either of the institutions of the Communities or of Member States. Secondly, because Member States are thereby obliged, in implementing a clause which derogates from one of the fundamental principles of the Treaty in favor of individuals, not to take account of factors extraneous to personal conduct, legal certainty for the persons concerned requires that they should be able to rely on this obligation even though it has been laid down in a legislative act which has no automatic direct effect in its entirety." *Id.* at 1348, ¶ 13.

⁶⁶ Case 8/81, *Ursula Becker v. Finanzamt Münster-Innenstadt*, [1982] E.C.R. 53.

⁶⁷ *Id.* at 71.

⁶⁸ Case 148/78, *Pubblico Ministero v. Tullio Ratti*, [1979] E.C.R. 1629.

directive may not be legally effective before the expiration of the period prescribed for its implementation.⁶⁹

That said, it is important to note that direct effect of directives poses a problem. Directives have no horizontal direct effect. Consequently, they cannot directly impose obligations on private parties. As stated above, they are addressed to Member States and can only constitute obligations for Member States and their organs.⁷⁰ Hence, an individual can only bring an action against a publicly owned or publicly run enterprise which must be "[s]ubject to the authority or control of the states or had special powers beyond those which results from the normal relations between individuals."⁷¹ The rejection of horizontal direct effect seems arbitrary and unfair, as it distinguishes between rights of State employees and those of private employees. The Court of Justice found no merit in this argument. It held that such a distinction may easily be avoided if a Member State concerned has correctly implemented the directive into national law.⁷²

However, the limitation of direct effect by the Court does not completely preclude rules of directives from being invoked against a Member State. A private party may even use the disregard of directives by Member States as a defense in a lawsuit pending in national court. In fact, the Court of Justice created an interpretive obligation which requires national courts to interpret national law in conformity with Community law,⁷³ thus indirectly conferring horizontal direct effect upon directives.⁷⁴

(A). *The Subsequent Elaboration of Direct Effect*

The European Court of Justice has elaborated the doctrine of direct effect in its most current case law. This is of importance in demonstrating the Court's continuing effort toward judicial legislation.

⁶⁹ In the words of the Court: "[I]t is not possible for an individual to plead the principle of 'legitimate expectation' before the expiry of the period prescribed for its implementation." *Id.* at 1645, ¶ 46.

⁷⁰ Case 152/84, M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching), [1986] E.C.R. 723, 749, ¶ 48; Case 91/92, Paola Faccini Dori v. Recreb Sre, [1994] E.C.R. I-3325, 3355-3358, ¶ 19-30.

⁷¹ Case 188/89, A. Foster and Others v. British Gas plc., [1990] E.C.R. I-3313, 3348, ¶ 18.
⁷² *Id.*

⁷³ Case 106/89, Marleasing SA v. La Comercial Internacional de Alimentación SA, [1990] E.C.R. I-4135, 4158-4159, ¶ 7-9; Case 91/92, Paola Faccini Dori v. Recreb Sre, [1994] E.C.R. I-3325, 3357, ¶ 26; Case 14/83, Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen, [1984] E.C.R. 1891, 1909, ¶ 26.

⁷⁴ LEONARD JASON-LLOYD & SUKHWINDER BAJWA, *THE LEGAL FRAMEWORK OF THE EUROPEAN UNION* 47 (Cromwell Press) (1997); Christiaan W.A. Timmermans, *Application of Community Law by National Courts: (Limits to) Direct Effect and Supremacy, in EUROPEAN AMBITIONS OF THE NATIONAL JUDICIARY* 29 (Rosa H.M. Jansen et al. eds., 1997).

Under the case law of the Court, certain conditions of a directive might grant enforceable rights upon individuals despite the fact that the directive as a whole does not satisfy the conditions of direct effect. This is true with regard to claims of state liability arising from the failure of Member States to implement directives. Significantly, Community law entitles a person to whom such failure causes injury to recover damages from the state in national courts.⁷⁵

The case of *Francovich v. Italy* illustrates this development.⁷⁶ Two Italian workers found themselves unable to collect salary owed to them by their bankrupt employers.⁷⁷ After unsuccessfully attempting to enforce a judgment by national courts, the workers eventually brought proceedings against Italy in which they claimed, in view of the obligation and the failure to implement a Community law directive, Italy should be ordered to pay them their arrears of wages or, in the alternative, to pay compensation.⁷⁸ The directive in question was aimed at giving protection to workers affected by the insolvency of their employers.⁷⁹

In its decision, the Court repeated its language in *Becker v. Finanzamt Münster-Innenstadt*⁸⁰ and further considered whether the provisions of the directive were unconditional and sufficiently precise.⁸¹ Affirming this test, the Court turned to the third condition of *Becker*, addressing the question of Member State discretion for the national implementation of directives.⁸² The Court found that the directive gave the Member States some discretion with regard to the means of establishing workers protection against their bankrupt employers.⁸³ Rather than concluding that the directive does not satisfy the third condition under *Becker*, the Court noted that "the right of a State to choose among several possible means of achieving the result required by a directive does not preclude the possibility for individuals of enforcing before national courts rights whose contents can be determined sufficiently precisely on the basis of

⁷⁵ Marc Fierstra, *The Significance of the Francovich Jurisprudence for the National Courts*, in EUROPEAN AMBITIONS OF THE NATIONAL JUDICIARY 111 (Rosa H.M. Jansen et al. eds., 1997).

⁷⁶ Joined Cases 6/90 and 8/90, *Francovich and Others v. Italian Republic*, [1991] E.C.R. I-5357.

⁷⁷ *Id.* at 5360, ¶ 3-4.

⁷⁸ *Id.*

⁷⁹ In a previous law suit before the Court of Justice, Italy had already been recorded to be in default for failure to transpose a directive into national law. See Case 22/87, *Commission of the European Communities v. Italian Republic*, [1989] E.C.R. 143. The directive in question, Directive 80/987, particularly aimed to set up a system of salary protection. See 1980 O.J. (L 283) 23.

⁸⁰ Case 8/81, *Ursula Becker v. Finanzamt Münster-Innenstadt*, [1982] E.C.R. 53, 72.

⁸¹ Joined Cases 6/90 and 8/90, *Francovich and Others v. Italian Republic*, [1991] E.C.R. I-5357, 5408, ¶ 11-14.

⁸² *Id.* at 5409, ¶ 15.

⁸³ *Id.* at 5409-5410, ¶ 17.

the provisions of the directive alone."⁸⁴ In other words, the Court emphasized the importance of the first two conditions of unconditional and sufficient clarity under the *Becker* ruling, while at the same time diluting the significance of the third, Member State discretion for the implementation of directives. The fact that Member States might have discretion with regard to the means for the transposition of directives does not affect the precise and unconditional nature of the result required. Consequently, it is the first two conditions under the *Becker* ruling which confer enforceable individual rights.

In examining the question of liability, the Court established the rule of state liability for the failure to implement Community directives.⁸⁵ Ruling that the directive in question also leaves broad discretion to the Member States for the organization of protection from bankrupt employers, the Court held that the directive does not provide a sufficient basis for liability against the state.⁸⁶ The Court did, however, rule that the principle of state liability for harm caused to individuals is inherent in the system of the Treaty.⁸⁷ The Court determined the failure of Member States to transpose directives constituted a breach of Community law under which the Member States are obliged to pay compensation for harm suffered by individuals.⁸⁸ In the view of the Court,

[T]he full effectiveness of Community rules would be impaired and the protection of the rights they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible. The possibility of obtaining redress by the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before national courts the rights granted to them by Community law.⁸⁹

In establishing the general rule of state liability, the Court enumerated three conditions required for compensation under Community

⁸⁴ *Id.* at 5410, ¶ 17.

⁸⁵ *Id.* at 5413-5416, ¶ 28-46.

⁸⁶ *Id.* at 5412, ¶ 25.

⁸⁷ *Id.* at 5414, ¶ 35.

⁸⁸ *Id.* at 5415, ¶ 37.

⁸⁹ *Id.* at 5414, ¶ 33-34.

law.⁹⁰ First, the result prescribed by the directive should entail the grant of rights to individuals.⁹¹ Second, it should be possible to identify the content of those rights on the basis of the provisions of the directive.⁹² Third, a causal link should exist between the breach of the states obligation and the harm suffered by the injured parties.⁹³

(B). *The Brasserie and Dillenkofer Judgments*

The principle of state liability has been further extended by the European Court of Justice in the cases *Brasserie*⁹⁴ and *Dillenkofer*.⁹⁵ The *Brasserie* case concerned the liability of a Member State as a result of breaching directly applicable Treaty provisions,⁹⁶ while the *Dillenkofer* judgment again dealt with a complete failure of a Member State to implement a directive in due time.⁹⁷

In the *Brasserie* judgment, the Court of Justice answered the question of whether state liability arises when damages suffered by an individual for breaches of Community law are the result of an act or an omission on the part of the national legislature. The Court ruled that the principle of state liability "holds good for any case in which a Member State breaches Community law, whatever be the organ of the State whose act or omission was responsible for the breach."⁹⁸ More importantly, the Court drew a parallel between the conditions of liability through actions or omission of Member States and Community authorities. In the Court's view, and with respect to the breach of Community law, both Member States and Community institutions must be held liable to the same conditions when exercising legislative powers.⁹⁹ Not only does this guarantee equal treatment of injured parties irrespective of responsibility, it also makes the case law on the issue of liability of Community institutions fully applicable for state liability.

⁹⁰ *Id.* at 5415-5416, ¶ 38-43.

⁹¹ *Id.* at 5415, ¶ 40.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Joined Cases 46/93 and 48/93, *Brasserie du Pêcheur SA v. Federal Republic of Germany and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd. and Others*, [1996] E.C.R. I-1029.

⁹⁵ Joined Cases 178, 179, 188 and 190/94, *Erich Dillenkofer and Others v. Federal Republic of Germany*, [1996] E.C.R. I-4845.

⁹⁶ Joined Cases 46/93 and 48/93, *Brasserie*, [1996] E.C.R. I-1029, 1035-1039.

⁹⁷ Opinion of Advocate-General Tesaro, in Joined Cases 178, 179, 188 and 190/94, *Erich Dillenkofer and Others v. Federal Republic of Germany*, [1996] E.C.R. I-4848-4850, ¶ 3-5. On the function and duties of the Advocate-General see EC Treaty, arts. 222-223 (ex art. 166-167).

⁹⁸ Joined Cases 46/93 and 48/93, *Brasserie*, [1996] E.C.R. I-1029, 1145, ¶ 32.

⁹⁹ *Id.* at 1147, ¶ 42.

Pursuant to these findings, the Court now distinguishes between two different situations of breach of Community law by Community or Member State institutions. A Member State is not only liable under the obligation to achieve a particular result but also to act in a field where it disposes of wide discretion.¹⁰⁰ Concerning the latter of the two, the Court added the premise of a "sufficiently serious breach"¹⁰¹ which must appear in addition to the preconditions established in *Francovich*.¹⁰² A sufficiently serious breach exists where "the Member State or Community institution concerned has manifestly and gravely disregarded the limits on its discretion,"¹⁰³ one of which, of course, is the degree of clarity and precision of the rule breached.¹⁰⁴

The Court continued to expand its measures of establishing a sufficient serious breach of Community law in the *Dillenkofer* judgment.¹⁰⁵ Returning to the breach of failing to implement a directive in due time, the Court noted that when a Member State "was not called upon to make any legislative choices and had only considerably reduced, or even no discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach."¹⁰⁶ The Court concluded that where "a Member State fails . . . to take any measure necessary to achieve the result prescribed by a directive within the period it lays down, that Member State manifestly and gravely disregards the limits on its discretion."¹⁰⁷

In conclusion, the concept of direct effect has changed. Direct effect can be achieved in different ways. If measures set in former precedents of the Court are violated, individual rights may still be conferred based on the

¹⁰⁰ *Id.* at 1148, ¶ 46-47; See also Walter van Gerven, *The ECJ's recent Case -Law in the field of Tort Liability: Towards a European Ius Commune?*, in EUROPEAN AMBITIONS OF THE NATIONAL JUDICIARY 91, 99 (Rosa H.M. Jansen et al. eds., 1997).

¹⁰¹ Joined Cases 46/93 and 48/93, *Brasserie*, [1996] E.C.R. I-1029, 1149, ¶ 51.

¹⁰² *Id.* at 1149-1155, ¶ 52-74. The individual who has suffered damages has a right to reparation where the three following conditions are met: (a) the rule of law infringed must have been intended to confer rights on individuals, (b) the breach must be sufficiently serious, and (c) there must be a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties. See also the so-called "Schöppenstedt-test", Case 5/71, *Aktien-Zuckerfabrik Schöppenstedt v. Council of the European Communities*, [1971] E.C.R. 975, 984-985, ¶ 11-16.

¹⁰³ Joined Cases 46/93 and 48/93, *Brasserie*, [1996] E.C.R. I-1029, 1150, ¶ 55.

¹⁰⁴ See, e.g., case 392/93, *The Queen v. H.M. Treasury, ex parte: British Telecommunications plc*, [1996] E.C.R. I-1631, in which the Court on the basis of the "clarity and precision" rule decided that the Member State in question, by incorrectly interpreting a directive, had not committed a sufficiently serious breach of Community law. *Id.* at 1668-1669, ¶ 42-45.

¹⁰⁵ Joined Cases 178, 179, 188 and 190/94, *Erich Dillenkofer*, [1996] E.C.R. 4845, ¶ 23-25; See also Thomas M.J. Möllers, *Doppelte Rechtsfortbildung contra legem?*, *Europarecht [EuR]* 20, 21 (1998).

¹⁰⁶ Joined Cases 178, 179, 188 and 190/94, *Erich Dillenkofer*, [1996] E.C.R. 4845, ¶ 25; See also Case 5/94, *The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd.*, [1996] E.C.R. I-2553, 2613, ¶ 28.

¹⁰⁷ Joined Cases 178, 179, 188 and 190/94, *Erich Dillenkofer*, [1996] E.C.R. 4845, ¶ 26.

principle of state liability. It appears that direct effect, regardless of vertical or horizontal effect or other limitations, may be obtained through the punishment of Member States that fail to comply with Community law. This leaves open much room for uncertainty or deeper involvement of the European Court of Justice, the most significant of which might be the question of what measure is enough to fulfill the "granting of rights" condition as developed by the Court.¹⁰⁸ Despite this dilemma, it is important to realize that the case law of the European Court of Justice is primarily based on cases in which the Member States failed to comply with their duty to take all appropriate measures, whether general or particular, to ensure fulfillment of their obligations under Community law. Out of this failure, adverse consequences, damages and other harm had been suffered by individuals, which, in turn, has led to the establishment of the case law of the Court.¹⁰⁹

C. SUPREMACY OF COMMUNITY LAW

Supremacy of Community law is a well-established principle in the Court's case law. The principle is fundamental to the maintenance and application of Community law. Nevertheless, the supremacy of Community law continues to be controversial and remains under attack from the Member States. Many national courts have refused to apply the principle or have done so reluctantly. Until today, in Great Britain¹¹⁰ and Germany,¹¹¹ the idea of supremacy has been viewed with suspicion and unease. Similar tendencies are evident in other Member States as well.¹¹²

Unlike the U.S. Constitution, the different European Community Treaties do not contain an explicit Supremacy Clause favoring federal over state law. Moreover, the Treaties fail to provide a general order of precedence or definition of the relationship between Community and national law. The closest reference to be found in the Treaties is the general

¹⁰⁸ Walter van Gerven, *The ECJ's recent Case -Law in the field of Tort Liability: Towards a European Ius Commune?*, in EUROPEAN AMBITIONS OF THE NATIONAL JUDICIARY 91, 99-100 (Rosa H.M. Jansen et al. eds., 1997).

¹⁰⁹ Opinion of Advocate-General Jean Misdo, in Joined Cases C-6/90 and 8/90, Francovich and Others v. Italian Republic, [1991] E.C.R. I-5357, 5370.

¹¹⁰ Timmermans, *supra* note 74, at 29, 35 with further references.

¹¹¹ Bundesverfassungsgericht [Federal Constitutional Court] [BVerfG], BVerfGE 37, 237 ("Solange I"); BVerfGE 52, 202 ("Vielleicht"); BVerfGE, in NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1258 (1983); ("Mittlerweile"); BVerfGE 73, 339, 387. ("Solange II"); BVerfGE, decision of Oct. 12, 1993, Case No. 2 BvR 2134/92 ("Maastricht"); See also DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 95 (The University of Chicago Press) (1994).

¹¹² Opinion of Advocate-General Léger, in Case 473/93, Commission of the European Communities v. Grand Duchy of Luxembourg, [1996] E.C.R. I-3207, 3220-3222.

obligation of loyalty which can also be called the principle of Community Comity.¹¹³ The principle constitutes a general obligation of cooperation between the Member States and the Community.¹¹⁴ Nevertheless, it cannot be enforced and is only able to create a stigma of noncompliance, lack of commitment or inadequate loyalty. As a powerful tool in international law, the latter may sufficiently serve as an incentive for Member States to cooperate and fulfill their obligations. However, the principle of Community Comity does not constitute a particular rule on the supremacy or primacy of Community law.

The European Court of Justice derives the primacy of Community law from the direct applicability and purview of the law or the entering into force of Community Treaties. Fundamental in this determination was the Court's ruling in the case *Costa v. ENEL*.¹¹⁵ Italy nationalized its electricity industry and transferred their property to a new organization, *Ente Nazionale per L'Energia Elettrica (ENEL)*.¹¹⁶ The nationalization took place in 1962, after the Community Treaties entered into force. *Costa*, an Italian national and lawyer, challenged a utility bill in the amount of roughly \$3.08 which was issued to him by the new organization, *ENEL*.¹¹⁷ He argued the nationalization of the electricity industry violated the Italian Constitution and the EC Treaty.¹¹⁸ The Italian court commissioner of venue presented the case to the Italian Constitutional Court which rejected the argument by *Costa*.¹¹⁹ Despite this outcome, *Costa* continued to challenge the utility bills issued to

¹¹³ EC Treaty, art. 10 (ex. art. 5): "Member States shall take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community tasks. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty."; See also CARL OTTO LENZ, KOMMENTAR ZU DEM VERTRAG ZUR GRÜNDUNG DER EUROPÄISCHEN GEMEINSCHAFTEN art. 5 (Bundesanzeiger-Verlagsgesellschaft) (1994); John Temple Lang, *Article 5 of the EEC Treaty: The Emergence of Constitutional Principles in the Case Law of the Court of Justice*, 10 FORDHAM INT'L L.J. 503 (1987); John Temple Lang, *Community Constitutional Law: Article 5 EEC Treaty*, 27 COMMON MKT. L. REV. 645 (1990).

¹¹⁴ Case 78/70, *Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Großmärkte GmbH & Co. KG*, [1971] E.C.R. 487, 499, para. 5; Joined Cases 209-213/84, *Ministère public v. Lucas Asjes and Others, Andrew Gray and Others, Andrew Gray and Others, Jacque Maillot and Others and Léo Ludwig and Others*, [1986] E.C.R. 1425, 1471, ¶ 70; Case 213/89, *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and Others*, [1990] E.C.R. I-2433, 2473, ¶ 19; Case 217/88, *Commission of the European Communities v. Federal Republic of Germany*, [1990] E.C.R. I-2879, 2907, ¶ 33.

¹¹⁵ Case 6/64, *Flaminio Costa v. Ente Nazionale per L'Energia Elettrica (ENEL)*, [1964] E.C.R. 585.

¹¹⁶ *Id.* at 588.

¹¹⁷ *Id.* at 588; See also ERIC STEIN ET AL., *EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE: TEXT, CASES AND READINGS WITH VOLUME OF DOCUMENTS 202* (Bobbs-Merrill Co.) (1976).

¹¹⁸ Case 6/64, *Flaminio Costa*, [1964] E.C.R. 585, 588-591.

¹¹⁹ *Id.* at 589.

him. On his second appeal, the court commissioner sought a preliminary ruling from the European Court of Justice on the proper interpretation of the Treaty provisions in dispute.¹²⁰ While finding that Community law has primacy over conflicting Member State law,¹²¹ the Court ruled that the nationalization of the electricity industry in Italy violated Community law.¹²² On the subject of the primacy of Community law, the Court held:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became the integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves¹²³ It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.¹²⁴

¹²⁰ *Id.* at 592.

¹²¹ *Id.* at 593-594.

¹²² *Id.* at 597-598.

¹²³ *Id.* at 593, ¶ 7.

¹²⁴ *Id.* at 594, ¶ 4-5. Note that misconceptions seem evident when the Court states that "[the legal system of the EEC Treaty] became an integral part of the legal system of the Member States" This conveys the impression that Community law was directly transformed into the legal systems of the Member States, standing in clear contrast to the doctrine of direct applicability and direct effect. The Courts further reasoning in the case, however, indicates that this wording

In its ruling, the European Court of Justice refused to question the motivation of the plaintiff to challenge a utility bill of minor amount. Moreover, the Court did not answer all preliminary questions brought to its attention and predominately focused on the relationship between Community and national law. Thus, while establishing the basis for judicial review, the Court, analogous to the U.S. Supreme Courts ruling in *Marbury v. Madison*,¹²⁵ did not apply its ruling in a consequent manner. The European Court of Justice did not fully exercise its standard of judicial review. Consistent with the character of preliminary rulings before the European Court of Justice, the case ultimately had to be decided by national courts. There the litigation on behalf of the plaintiff ended without a result on the merits. *Costa* was denied standing to challenge the nationalization of the Italian electricity industry.¹²⁶

The European Court of Justice expanded Community law primacy in cases following *Costa v. ENEL*. For example, the Court ruled much later that Community law enjoys primacy over national constitutional law in *Internationale Handelsgesellschaft*.¹²⁷ In this case, the Court held that "the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principle of a national constitutional structure."¹²⁸

Indeed, the failure by the founding Member States to include an explicit Supremacy Clause in the Community Treaties did not prevent the Court from inferring one. The Court thereby constitutionalized the legal structure of the Community while continuously emphasizing legal unity in the Community.¹²⁹

refers to the procedural obligation of the Member States to directly apply Community law where necessary. *Id.* at 594, ¶ 2.

¹²⁵ *Marbury v. Madison*, 5 U.S. 137 (1803).

¹²⁶ GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* 195 (West) (1993).

¹²⁷ Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] E.C.R. 1125, 1134, ¶ 3-4.

¹²⁸ *Id.* at 1134, ¶ 3.

¹²⁹ Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA (II)*, [1978] E.C.R. 629, 640-645; Case 213/89, *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd. and Others*, [1990] E.C.R. I-2433, 2467-2475.

D. IMPLIED POWERS

As one interpretation, direct applicability, direct effect, and supremacy stand in the context of increased efficiency of the Community and its ability to perform.¹³⁰ Pursuant to this interpretation, the Community requires corresponding instruments and powers, that is, additional and extended powers. By their very nature, these powers must be established by the European Court of Justice itself. Considering that direct applicability, direct effect and supremacy are primarily based on precedents set forth by the Court, these doctrines, in their application, drive the extension of Community law. In other words, employing these doctrines essentially commands the coherent adaptation of Community powers by the Court.

The definition of powers through precedent does not follow a typical mode for a federal state. With few exceptions, powers in a federal state are allocated asymmetrically.¹³¹ While the federal level is empowered to exercise only specifically enumerated powers, the constituent units are left with an unspecified residuum of powers. In theory, this arrangement is meant to protect the lower level by creating a constitutional presumption in their favor. Although the Community Treaties constitute conferred powers or *compétences d'attribution* which can be interpreted as enumerated powers, the Treaties do not include a detailed definition of powers or their limits.

The European Community Treaty merely determines that "[t]he tasks entrusted to the Community shall be carried out by [their] . . . institutions. . . Each institution *shall act within the limits of powers conferred upon it by this Treaty*."¹³² In addition, the Treaties include an universal authorization of powers, such as the approximation of laws¹³³ and an equivalent to the necessary and proper clause found in the Constitution of the United States of America. The "necessary and proper clause" of the Community Treaties states that

[i]f action by the Community should prove *necessary* to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after

¹³⁰ Weiler, *supra* note 7, at 2415.

¹³¹ The best exception is Canada. See Michael Burgess, *Canadian Federalism: Past, Present and Future* (Leicester University Press) (1990).

¹³² EC Treaty, art. 7 (ex art. 4). Emphasis added.

¹³³ EC Treaty, arts. 94-95 (ex arts. 166-167).

consulting the European Parliament, take *appropriate* measures.¹³⁴

The European Court of Justice expansively interpreted Community powers and developed an implied power theory which closely resembles that of the U.S. Supreme Court in *McCulloch v. Maryland*.¹³⁵ The European Court of Justice, in particular, did not rely on any implied power explicitly found within the Treaties. Rather, the Court determined that "[t]he rules laid down by an international treaty or a law presupposes the rules without which that treaty or law would have no meaning or could not be reasonably and usefully applied."¹³⁶ The Court held that the institutions which are responsible for ensuring the application of such rules enjoy "independence in determining the implementing measures necessary" and accordingly have the "assumed" power to adopt corresponding measures.¹³⁷ Later, the Court more specifically noted that

where an article of the EEC Treaty . . . confers a specific task on the Commission, it must be accepted, if that provision is not to be rendered wholly ineffective, that it confers on the Commission necessarily and *per se* the powers which are indispensable in order to carry out that task.¹³⁸

The treaty-making powers and the powers on external relations of the Community provided the basis for the Court's doctrine on implied powers. In the *ERTA* case,¹³⁹ the question before the Court was whether the Member States lose their individual legislative power on a particular issue if the Community had already legislated on the subject matter and that matter was not part of a conferred power to the Community. In *ERTA*, five of the then six Member States entered into a European Road Transport Agreement (ERTA) with other European states. The agreement on the harmonization of labor regulations in road transport never came into effect.¹⁴⁰ As a result, the negotiations on the agreement were later reopened with all Member States.

¹³⁴ EC Treaty, art. 308 (ex art. 235). Emphasis added.

¹³⁵ *McCulloch v. Maryland*, 17 U.S. 316 (1819).

¹³⁶ Case 8/55, *Fédération Charbonnière de Belgique v. High Authority* (Fédéchar), [1954-1956] E.C.R. 245.

¹³⁷ *Id.*

¹³⁸ Joined cases 281, 283-285 and 287/85, *Federal Republic of Germany v. Commission of the European Communities*, [1987] E.C.R. 3203, 3253, ¶ 28.

¹³⁹ Case 22/70, *Commission of the European Communities v. Council of the European Communities* (ERTA), [1971] E.C.R. 263.

¹⁴⁰ *Id.* at 265-266.

The Member States decided to negotiate on their own behalf and become individual parties of the agreement.¹⁴¹ In the meantime, before the negotiation had been reopened, the European Council of Ministers had adopted a regulation on the same general subject.¹⁴² This caused the Commission to challenge the intended negotiations of the European Road Transport Agreement outside the framework of the Community.¹⁴³ The Commission claimed that since the Community had enacted a regulation and legislated on the same subject matter, the negotiations no longer could be left to the Member States.¹⁴⁴ The Commission contended that the Community's internal powers on common transport policy would apply to external relations as well.¹⁴⁵ Any other interpretation would jeopardize the powers conferred on the Community.¹⁴⁶ The Commission argued that even if this power were not part of the sphere of transport, it would tend to become an exclusive Community power by the time a common policy is implemented by the Community.¹⁴⁷

The Council, as the defending party, held the opposite position. It argued that since the Community only has such power as had been conferred on it, authority to enter into agreements with third countries could not be assumed in the absence of an express provision in the Treaty.¹⁴⁸ Assuming the opposite were true, such authorities at best could be determined concurrent powers to be shared with the Member States.¹⁴⁹

The Advocate-General in the *ERTA* case¹⁵⁰ stated that the authors of the Treaty of Rome intended to strictly limit the Community's authority in external matters to cases explicitly stated.¹⁵¹ The Advocate-General argued that any other interpretation by the Court would exceed the bounds of judicial

¹⁴¹ *Id.* at 266.

¹⁴² *Regulation No. 543/69 on the Harmonization of Certain Social Legislation relating to Road Transport* (March 25, 1969), 1969 O.J. (L 77) 49.

¹⁴³ *Case 22/70, Commission of the European Communities v. Council of the European Communities (ERTA)*, [1971] E.C.R. 263, 266.

¹⁴⁴ According to the Commission "Member States retain their power only so long as the Community has not exercised its own; that is, has not in fact adopted common provisions. Conversely, where and to the extent to which the Community actually laid down such regulations, Member States lose their authority to legislate at the same level, and can only be called upon to take such measures as may be necessary to implement the Community provisions." *Id.* at 270.

¹⁴⁵ *Id.* at 269-271.

¹⁴⁶ *Id.* at 270.

¹⁴⁷ *Id.* at 271-272.

¹⁴⁸ *Id.* at 273, ¶ 9.

¹⁴⁹ *Id.* at 274, ¶ 11.

¹⁵⁰ Opinion of Advocate-General Alain Dutheillet de Lamothe, in *Case 22/70, Commission of the European Communities v. Council of the European Communities (ERTA)*, [1971] E.C.R. 263, 284-295.

¹⁵¹ *Id.* at 293.

review.¹⁵² Furthermore, the Advocate-General noted that the recognition of an extended Community authority in external matters would implicate the existence of implied powers.¹⁵³ Implied powers of that kind would be similar to those with which the Supreme Court of the United States supplemented the powers of the federal bodies in relation to those of the confederated States.¹⁵⁴

The Court of Justice ultimately decided in favor of the Commission's argument. The Court ruled that the entire scheme of the Treaty must be considered.¹⁵⁵ The authority in external treaty-making powers would arise not only from an express conferment by the Treaty, but may equally flow from other provisions of the Treaty or measures adopted by the Community institutions.¹⁵⁶ It concluded that

[a]lthough it is true that [the Treaty does] not expressly confer on the Community authority to enter into international agreements, nevertheless the bringing into force . . . of [a] regulation . . . necessarily vest[s] in the Community power to enter into any agreements with third countries relating to the subject matter governed by [the] regulation.¹⁵⁷

According to the Court, the negotiations on the European Road Transport Agreement fell within the scope of the regulation the Council had enacted on the same general subject matter.¹⁵⁸ The Community therefore had been empowered to negotiate and conclude the agreement and the Member States were excluded from the possibility of concurrent powers.¹⁵⁹

Hence, the Court in *ERTA* held that the grant of internal powers must be read as implying an external treaty making power. This finding is of

¹⁵² The Advocate-General raised the hypothetical question: "Is it not the case that to recognize that the Community has implied powers with regard to negotiations with third countries would far exceed the intentions of the authors of the Treaty and of the States which signed and accepted it? This is my view, and it is the principle reason which brings me to propose to the Court a relatively strict interpretation of the Treaty in this sphere. Such, then, are the reasons why I consider that the contested proceedings of the Council were not conducted within the context of a Community authority established by the Treaty and that consequently they do not constitute a Community act which may be reviewed by the Court . . ." *Id.* at 294.

¹⁵³ *Id.* at 293.

¹⁵⁴ *Id.* at 293; *Compare also* *Missouri v. Holland*, 252 U.S. 416 (1920), 40 S.Ct. 382; *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

¹⁵⁵ Case 22/70, *Commission of the European Communities v. Council of the European Communities (ERTA)*, [1971] E.C.R. 263, 274, ¶ 15.

¹⁵⁶ *Id.* at 274, ¶ 16.

¹⁵⁷ *Id.* at 275, ¶ 28.

¹⁵⁸ *Id.* at 275, ¶ 30.

¹⁵⁹ *Id.* at 276, ¶ 31. In fact, the Court further substantiated its reasoning with the remark that any step taken outside the framework of the Community institutions would be incompatible with the unity of the common market and the uniform application of Community law. *Id.*

importance as it goes well beyond the issue of treaty-making power. The decision was subsequently applied in a variety of contexts which demonstrates the extensive meaning of the Courts implied power doctrine.¹⁶⁰ The Court applied its doctrine of implied powers through a teleological and result-oriented perspective. Powers are implied in favor of the Community whenever such powers are found necessary to serve a legitimate purpose. As such, this interpretation includes the deliberate abandonment of minimized preemption of state sovereignty as a standing rule of interpretation in international law.¹⁶¹

E. FUNDAMENTAL AND BASIC RIGHTS

Similar to its lack of a Supremacy Clause, the Community Treaties contain no Bill of Rights. Although the Member States recently adopted a Charter of Fundamental Rights at the European Council Meeting in Nice in December 2000,¹⁶² until today, the establishment of fundamental and basic rights has remained under the auspices of the European Court of Justice. Since the 1960s, the Court has reviewed Community measures for any

¹⁶⁰ See, e.g., Joined Cases 281, 283-285 and 287/85, *Federal Republic of Germany v. Commission of the European Communities*, [1987] E.C.R. 3203, 3248-3257; See also Antonio Tizzano, *Les Compétences de la Communauté in Trente ans de droit Communautaire* 45, 49-52 (European Commission, Perspectives Européennes) (1982).

¹⁶¹ See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 289-299 (Clarendon Press) (1998). With regard to the doctrine of exclusivity and preemption, See M. Waelbroeck, *The Emergent Doctrine of Community Pre-emption, Consent and Redelegation*, in *COURTS AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE* 548-580 (Terrance Sandalow & Eric Stein eds., 1982). On the relationship between Community and Member State powers, the Court held that the power of the Community in the field of economics and common commercial policy are exclusive, thus precluding Member States from taking any legislative actions which might have discriminatory or equivalent effect. See, Case 5/74, *Procureur du Roi v. Benoît and Gustave Dassonville*, [1974] E.C.R. 837, 852, ¶ 5; Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, [1979] E.C.R. 649, 664, ¶ 8-15. For the most recent development, See Joined Cases 267 and 268/91, *Criminal Proceedings against Bernard Keck and Daniel Mithouard*, [1993] E.C.R. I-6097. The latter cases cast into doubt the premises of the *Cassis* ruling and overrule *Dassonville* while setting qualifying standards. *Id.* at 6131, ¶ 16. Most interesting is the motivation expressed by the Court. The Court stated that "[i]n view of the increasing tendency of traders to invoke Art. 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter." *Id.* at 6131, ¶ 14.

¹⁶² See Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1. Note, however, that the matter of the legal status of the Charter of Fundamental Rights remains yet to be decided by the Member States, See Presidency Conclusions Nice European Council Meeting 7, 8 and 9 December 2000, http://europe.eu.int/council/offi/conclu/dec2000/dec2000_eu.pdf, page 1, point 2. For previous legislative initiatives and amendments through the Treaty of Maastricht and the Treaty of Amsterdam, See 1977 O.J. (C 103) 1; 1982 O.J. (C 304) 253; 1989 (C 120); 1989 (C 158); See also TEU art. 6 (ex art. F); EC Treaty, arts. 18-22 (ex arts. 8a-8e).

violation of fundamental rights. By adopting constitutional traditions common in Germany and Italy as well as the principles of international human rights conventions, the Court has set precedents under which the protection of basic rights became an inherent part of the Community law.¹⁶³

In *Stauder v. City of Ulm*,¹⁶⁴ the European Court of Justice held that fundamental human rights are enshrined in the general principles of Community law which are to be protected by the European Court of Justice.¹⁶⁵ In *Internationale Handelsgesellschaft*, the Court added that "[t]he protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community."¹⁶⁶ Since *Nold v. Commission*,¹⁶⁷ the Court has referred directly to the International Human Rights Convention and the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁶⁸ On the basis of these international conventions the Court established the right of property,¹⁶⁹ the right to a fair trial,¹⁷⁰ the inviolability of the home,¹⁷¹ the prohibition of retroactive criminal law,¹⁷² and the right to free speech.¹⁷³ In addition, the Court's case law on equal protection¹⁷⁴ and the

¹⁶³ See, e.g., DEHOUSSE, *supra* note 7, at 62-69; Paul Leleux, The Role of the European Court of Justice in Protecting Individual Rights in the Context of the Free Movement of Persons and Services, in *COURTS AND FREE MARKET: PERSPECTIVES FROM THE UNITED STATES AND EUROPE* 385, 386-387 (Terrance Sandalow, Eric Stein eds., 1982).

¹⁶⁴ Case 29/69, *Erich Stauder v. City of Ulm, Sozialamt*, [1969] E.C.R. 419, 424-426.

¹⁶⁵ *Id.* at 425, ¶ 7.; See also Case 130/75, *Vivien Prais v. Council of the European Communities*, [1976] E.C.R. 1589, 1597-1599, ¶ 8-18.

¹⁶⁶ Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] E.C.R. 1125, 1134, ¶ 4.

¹⁶⁷ Case 4/73, *J. Nold, Kohlen- und Baustoffhandlung v. Commission of the European Communities*, [1974] E.C.R. 491.

¹⁶⁸ *Id.* at 507-508, ¶ 12-14; See also Case 36/75, *Roland Rutili v. Minister of the Interior*, [1975] 1219, 1232, ¶ 32. The International Human Rights Convention and the European Convention for the Protection of Human Rights and Fundamental Freedoms had been signed and ratified by all Member States.

¹⁶⁹ Case 44/79, *Hauer v. Land Rheinland-Pfalz*, [1979] E.C.R. 3727; Joined Cases 41, 121, and 796/79, *Testa et al.*, [1980] 1979.

¹⁷⁰ Case 98/79, *Pescostaing*, [1980] E.C.R. 691; Case 222/84, *Maguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, [1986] E.C.R. 1651, 1681-1683, ¶ 13-21.

¹⁷¹ Case 136/79, *National Panasonic (UK) Ltd. v. Commission*, [1980] E.C.R. 2033; Joined Cases 46/87 and 227/88, *Hoechst AG v. Commission of the European Communities*, [1989] E.C.R. 2859, 2922-2924, ¶ 10-19.

¹⁷² Case 62/83, *Regina v. Kent Kirk*, [1984] E.C.R. 2689, 2718, ¶ 21-23; See also Case 61/79, *Amministrazione delle Finanze dello Stato v. Denkavit Italiana*, [1980] E.C.R. 1205, on the retroactive effect of the European Court of Justice rulings.

¹⁷³ Case 100/88, *Augustine Oyowe and Amadou Traore v. Commission of the European Communities*, [1989] 4285, 4305-4310.

¹⁷⁴ Case 43/75, *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] E.C.R. 455, 471-480, ¶ 4-68; Case 262/88, *Douglas Harvey Barber v. Guardian Royal Exchange Assurance Group*, [1990] E.C.R. I-1889, 1948-1955, ¶ 10-39; Joined Cases 103, 145/77, *Royal Scholten-Honig (Holdings) Limited v. Intervention Board for Agricultural*

corresponding Treaty provisions is of commensurate importance.¹⁷⁵ The Court's application of common legal principles, such as proportionality,¹⁷⁶ legal certainty,¹⁷⁷ and legitimate expectations,¹⁷⁸ are clearly classified as fundamental rights.

In the past, the European Court of Justice refused to review Member State laws for possible violations of fundamental rights.¹⁷⁹ However, with the continuing elaboration of fundamental rights through its case law, the Court, in the application of such rights, has once again set the premise for the expansion of its jurisdiction to review Member State laws.¹⁸⁰ The fundamental and basic rights inherent in the principles of Community law therefore became significant for the interpretation of different Treaty provisions. Likewise, these principles indirectly influenced the judicial review of national legislation by the European Court of Justice.¹⁸¹

The judicial development of fundamental and basic rights in the case law of the European Court of Justice provides a sufficient safeguard for all Community citizens.¹⁸² It can be argued that the Court created an effective instrument to check the arrogation of powers to the Community implicit in its own doctrines. This is all the more significant, as the Community does not provide for an adequate and fully effective democratic body with the power to check the lawfulness of Community legislation. Nevertheless, the example of fundamental rights in the case law of the European Court of Justice demonstrates the continuing activism of the Court. Described by other commentators as "audacious self-perception,"¹⁸³ the Court, by way of creative interpretation of the Treaties, has progressed in a manner similar to a

Produce, Tunnel Refineries Limited. v. Intervention Board for Agricultural Produce, [1978] E.C.R. 2037, 2072, ¶ 26-27.

¹⁷⁵ See, e.g., EEC Treaty, Art. 7; EC Treaty arts. 39, 43, 49, and 141 (ex arts. 48, 52, 59, and 119).

¹⁷⁶ Case 114/76, Bela-Mühle Josef Bergmann KG v. Grows-Farm GmbH & Co. KG, [1977] E.C.R. 1211, 1220-1221, ¶ 5-7.

¹⁷⁷ Case 108/81, G. R. Amylum v. Council of the European Communities, [1982] E.C.R. 3107, 3130, ¶ 4.

¹⁷⁸ Case 112/77, August Töpfer & Co. GmbH v. Commission of the European Communities, [1978] E.C.R. 1019, 1032-1033, ¶ 18-20; Case 169/80, Administration des Douanes v. Société Anonyme Garancini, [1981] E.C.R. 1931, 1942, ¶ 17-18; Case 368/89, Antonio Crispolti v. Fattoria Automata Tabacchi di Città di Castello, [1991] E.C.R. I-3695, 3719-3720, ¶ 13-17.

¹⁷⁹ Case 60 and 61/84, Cinéthèque SA and Others v. Fédération Nationale des Cinémas Français, [1985] E.C.R. 2605, 2627, ¶ 26; Case 12/86, Meryem Demirel v. Stadt Schwäbisch Gmünd (Association Agreement between the EEC and Turkey, Freedom of Movement for Workers), [1987] E.C.R. 3719, 3754, ¶ 28.

¹⁸⁰ Case 260/89, Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas, [1990] E.C.R. I-2925, 2963-2964, ¶ 41-44.

¹⁸¹ Case 222/84, Maguerite Johnston v. Chief Constable of the Royal Ulster Constabulary, [1986] E.C.R. 1651, 1682, ¶ 18.

¹⁸² Bundesverfassungsgericht [Federal Constitutional Court] [BVerfG] (F.R.G.), Case BvR 197/83, BVerfGE 73, 339 (Solange II).

¹⁸³ Weiler, *supra* note 7, at 2417.

constitutional court in a constitutional polity or state-like forum.¹⁸⁴ Despite the controversial perception of such case law, the background of the continuous growth of the Court's jurisprudence must be taken into account. Triggered by the failure of Member States to fulfill their obligations, the Court developed a rule of law based on its case law and the development of precedents. This development set into motion the preemption of national powers and legislation. At the same time, the Court continued to establish checks and balances on newly established Community powers. By invoking fundamental rights and constitutionalizing the legal structure of the Community Treaties, the Court prevented the unrestricted application of the concepts of law established in its own precedents.¹⁸⁵

III. CONCLUSION

The European Court of Justice has been and remains a major integration force for the European Communities. The Court is particularly responsible for the development and elaboration of the relationship between Community law and Member States and has delineated it much like the relationship in a constitutional federal state. Furthermore, the Court has distinctly set forth a definition of separation of powers and the primacy of Community law. Clearly, the failure of the Member States as the signing parties of the Community Treaties to include such definitions did not prevent the Court from introducing them.

Indeed, the role of the European Court of Justice, with minor exceptions, shares close resemblance with the constitutional role of courts in the United States of America. The debate by constitutional scholars in the United States¹⁸⁶ has been conducted in much the same manner as with regard

¹⁸⁴ *Id.*

¹⁸⁵ The development of fundamental and basic rights in the case law of the European Court of Justice once again shows resemblance with that of the U.S. Supreme Court, particularly the doctrine of incorporation and the substantive content of the Fourteenth Amendment due process clause. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). The doctrine of incorporation is most clearly described in a dissenting opinion of Justice Harlan in *Poe v. Ullmann*. He stated: "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points picked out in terms of the taking of property; the freedom of speech, press, and religion; . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, . . . that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement." *Poe v. Ullmann*, 367 U.S. 497, 543 (1961) (Harlan J., dissenting). See also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §11-2 to §11-5, 772-784 (The Foundation Press) (1988).

¹⁸⁶ See, e.g., W. Lawrence Church, *History and the Constitutional Role of Courts*, 1990 WIS.L. REV. 1071.

to the European Court of Justice. In both cases, the question remains whether the courts should be allowed to make law or simply be limited to the interpretation of law according to the intent of the legislative body which enacted it. The issue is inseparable from the question of the proper role of courts in a democratic system. Furthermore, as in the United States, the role of the Court of Justice in Europe includes consideration of encroachment and preemption of separate sovereign entities by a higher authority. It contemplates the centralization of governance and the fact that courts are too powerful, making policy decisions best left to others.

However, the European Community, with six Member States, has expanded to a Union with over 380 Million citizens and fifteen Member States, notwithstanding further membership considerations. Moreover, since the Founding Treaties, communism has descended, Europe is no longer divided, and the role of globalization, an economically and politically interdependent world, has greatly increased. Without a doubt, the face of the European Communities has changed. The European Union has become increasingly political, more state-like, and not limited to economic cooperation.

At the same time, the Member States have proven responsible for many of the cases brought before the Court. The Member States have not only failed to fulfill their obligations under the Community Treaties but also failed to expeditiously amend the Treaties in a manner analog to the challenges encountered by the Communities. Thus, the European Court of Justice in many cases was left with making political decisions and law through creative interpretation of Treaty provisions. That is not to justify judicial legislation by the Court. Instead, the Member States have often simply relied on the Court to regulate political conflict or solve their own inability to find political compromise.

To be sure, Member States have always remained hesitant to confer additional powers on the Community or to establish a European Parliament consisting of a democratic legislative body similar to those of national parliaments. The progress of constitutional development or efficient advance in European integration is cumbersome, and with respect to national interests, too erratic to answer rapid changes in global societies. Nevertheless, as long as the Member States are or at least pretend to be committed to European political and economic integration, it remains their responsibility to make the necessary political and legislative decisions in the appropriate forum. The Member States cannot rely on the judicial branch to make unpopular decisions.