Separation of Powers in the European Union

ALLAN ROSAS*

I. Introduction

Historically, the European approach to the separation of powers and the role of the judiciary has been far from uniform. Following the French Revolution of 1789, notions of popular sovereignty in Europe often reduced the role of the judge to the application rather than the interpretation of the law and promoted the concept that the law should ideally be a written and often detailed code enacted by the people or through its representatives.

Charles de Secondat Montesquieu, a French political thinker, and others paid more attention to a separation of powers. Montesquieu held that "[t]here would be an end of everything, were the same man or the same body, whether of the nobles or of the people," to exercise the three government powers: enacting laws, executing the public resolutions, and adjudicating crimes and disputes between individuals. It should be added, however, that Montesquieu does not seem to have been a great believer in what was later called judge-made law, much less judicial activism.[1] In Jean-Jacques Rousseau's Social Contract, the judge and the judicial branch do not play any prominent role, although Rousseau was not necessarily against an independent or semi-independent role for the judge.[2]

Gradually, an increasing emphasis developed on the *Rechtsstaat* (rule of law) and the role of independent and impartial courts. Starting after the second World War and leading up to the creation of the European Communities and later the EU, national developments—such as the adoption of the German and Italian Constitutions and the case law of their constitutional courts —as well as the European Convention on Human Rights of 1950 (ECHR), with its judicial control system, undoubtedly played an important role.

---

* Judge, European Court of Justice. This article was written as part of a symposium following a summit between the Supreme Court of the United States and the European Court of Justice organized by the SMU Dedman School of Law. The summit was held in Spring, 2007.

1. *See* CHARLES DES MONTESQUIEU, DE L'ESPRIT DES LOIS, TOME I, LIVRE XI 64 (Gonzague Truc ed., Éditions Garnier Frères 1961) (1748).

2. *Compare* JEAN-JACQUES ROUSSEAU, DU CONTRAT SOCIAL OU PRINCIPES DU DROIT POLITIQUE (Chez Marc-Michel Rey ed., 1762), *with* JEAN-JACQUES ROUSSEAU, *Considérations sur le Gouvernement de Pologne et sur sa Réformation projetée* (1772), *in* 3 EUVRES COMPLE?TES 347 & 951 at 1000-03 (1964) (observing the governance of Poland).

Today, there seems to be broad consensus around a system founded on "the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law," as expressed in Article 6, paragraph 1 of the Treaty on European Union (the "EU Treaty").[3] These principles include the idea of a separation of powers, although there may still be national differences in this regard between the EU's twenty-seven Member States.

At the EU federal level, that is, horizontally between the EU institutions, the separation of powers is less clear-cut than that within many of the Member States, especially as far as the distinction between the legislative and executive branches is concerned. In other words, legislation in the form of regulations and directives is passed by the EU Council, which consists of a representative from each Member State at the ministerial level; thus, it is often called the "Council of Ministers."[4] In many cases, the Council acts jointly with the European Parliament, which consists of representatives from the Member States, elected by direct universal suffrage. The European Commission is closer to an executive power, generally responsible for the implementation of the rules laid down by the Council. But, it is also entrusted with the task of proposing new legislation and ensuring that the common rules are applied (the "Guardian of the Treaties"). Additionally, the European Commission enjoys certain decision-making powers of its own, for example, in the fields of antitrust and state aid law.[5]

The European Court of Justice (ECJ)[6] includes both a Court of First Instance (CFI) since the late 1980s and a Civil Service Tribunal as of 2005. According to Article 220 of the Treaty Establishing the European Community (the "EC Treaty"), the ECJ shall ensure that "the law is observed."[7] The law in this case includes: 1) the basic Community treaties, i.e. the EC Treaty, the Euratom Treaty,[8] and parts of the EU Treaty (collectively,

3. Treaty on European Union, July 29, 1992, 1992 O.J. (C 191) 1.

4. The "Council of Ministers" would have become the official name if the Treaty Establishing a Constitution for Europe, signed on October 29, 2004, in Rome, had entered into force. Treaty establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) 1. After negative outcomes of referenda held in France and the Netherlands, this Treaty was abandoned in favour of a "Reform Treaty", that is, Treaty amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon on 13 December 2007 (not yet published in the O.J. and not yet entered into force). The latter Treaty preserves the existing name ("the Council").

5. For a general overview and analysis of the EU institutional framework, see, e.g., KOEN LENAERTS & PIET VAN NUFFEL, CONSTITUTIONAL LAW OF THE EUROPEAN UNION (Robert Bray ed., 2d ed. 2005).

6. The official name of the Court is still, somewhat misleadingly, the Court of Justice of the European Communities (the jurisdiction of the Court is no longer strictly limited to the law of the two Communities—the European Community and the European Atomic Energy Community—but also extends to certain parts of the EU Treaty that go beyond Community law in the strict sense). If and when the Reform Treaty of 2007 (*supra*, note 4) enters into force, the name of the institution would be changed to the "Court of Justice of the European Union". This institution would consist of the "Court of Justice", the "General Court" (currently the Court of First Instance) and "specialised courts" (the only specialised court existing in 2007 is the Civil Service Tribunal).

7. Consolidated Version of the Treaty Establishing the European Community, Dec. 24, 2002, 2002 O.J. (C 325) 122 [hereinafter EC Treaty].

8. Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957 [hereinafter Euratom Treaty]. The Community law founded on the EC Treaty and the Euratom Treaty is often referred to as the First Pillar of the EU. The Second and Third Pillars refer to the more intergovernmental forms of cooperation (e.g., in the field of security and defense) that have been instigated since the 1990s by the EU Treaty. For the sake of simplicity, the term "EU law" will be used in this contribution to cover both EU law in the narrow sense (matters only covered by the EU Treaty) and Community law (First Pillar matters regulated in

Treaties) as well as other written primary EU law; 2) the general principles of Community law; and 3) written secondary law, mainly in the form of international agreements binding on the Communities and legislation in the form of regulations and directives.

EU law shall have supremacy (i.e. primacy) over the domestic law of the Member States, "however framed."[9] In most cases, it is directly applicable, and in many cases has direct effect ("self-executing" norms). In other words, EU law can be invoked directly by private parties before courts and authorities both at the EU federal level and also by legal orders of the Member States.[10] Violations of EU law by a Member State may, *inter alia*, lead to the Member State being taken to court by the Commission (see below) and to the national Government being held liable for damages.[11]

EU Member States and their national administrations and courts play an important part in the application, implementation, and enforcement of EU law.[12] When problems of interpretation or validity of EU laws arise, the national courts of the Member States have a right, and in some instances an obligation, to request a preliminary ruling from the ECJ. These rulings may only address questions regarding the interpretation of rules and principles of EU law and the validity of secondary EU law but not issues solely related to the domestic law of Member States. ECJ rulings are binding on national courts and, in a broader sense, the entire EU.[13] National courts are barred from declaring an act of EU law invalid.[14] At the same time, the EU principles of access to courts and effective judicial protection may require the creation of legal remedies at the national level, which beforehand did not exist under domestic law.[15]

The written primary law—the basic Treaties—are formal international agreements concluded by the Member States in accordance with their respective constitutional requirements and become effective, along with any amendments, when they have been ratified by all the Member States. The Communities only enjoy powers conferred upon them (the principle of conferral)[16] under Article 5, paragraph 1 of the EC Treaty, which states that

---

the EC Treaty). If and when the Reform Treaty of 2007 (*supra*, note 4) enters into force, the Third Pillar will disappear as such and the content be integrated into what is still today called the First Pillar, while the Second Pillar (Common Foreign and Security Policy) will be developed and brought closer to the First Pillar.

9. Case 6/64, Costa v. E.N.E.L., 1964 E.C.R. 585; Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal (Simmenthal II), 1978 E.C.R. 629.

10. The launch of extensive case law on this subject was provided by Case 26/62, Van Gend & Loos v. Netherlands Inland Revenue Administration, 1963 E.C.R. 1 (English ed.).

11. The principle of liability for damages caused by violations of Community law is based on the ECJ's case law. *See* Joined Cases 6/90 & 9/90, Francovich, Bonifaci v. Italy, 1991 E.C.R. I-5357; Joined Cases C-46/93 & C-48/93, Brasserie du Pêcheur v. Germany, The Queen v. Sec'y of State for Transp. *ex parte* Factortame, Ltd., 1996 E.C.R. I-1029; Case C-224/01, Gerhard Köbler v. Austria, 2003 E.C.R. I-10239.

12. *See, e.g.*, MONICA CLAES, THE NATIONAL COURTS' MANDATE IN THE EUROPEAN CONSTITUTION (2006).

13. The interpretation that the ECJ gives to a rule of EU law "clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force." Case C-292/04, Wienand Meilicke v. Finanzamt Bonn-Innenstadt, judgment of Mar. 6, 2007, para. 34.

14. Case 314/85, Foto-Frost v. Hauptzollant Lubeck-Ost, 1987 E.C.R. 4199.

15. *See, e.g.*, Case 222/84, Marguerite Johnston v. Royal Ulster Constabulary, 1986 E.C.R. 1651; Case C-253/00, Antonio Muños v. Frumar, Ltd., 2002 E.C.R. I-7289; Case C-432/05, Unibet v. Justitiekanslern, 2007 O.J. (C 095) 9-10; *see also* HENRY G. SCHERMERS & DENIS F. WAELBROECK, JUDICIAL PROTECTION IN THE EUROPEAN UNION (6th ed. 2001).

16. This concept can be found in Article I-11, paragraphs 1-2 of the Treaty Establishing a Constitution for Europe and in Article 5 of the EU Treaty, as modified by the Reform Treaty of 2007, *supra* note 4.

Member States "shall act within the limits of the powers conferred upon [the European Community] by this Treaty and of the objectives assigned to it therein."[17] On the other hand, the field of application of the EC Treaty has been greatly expanded over the years. Article 308 gives the EU Council of Ministers the power, when acting unanimously, to take appropriate measures "[i]f action by the Community should prove necessary to attain . . . one of the objectives of the Community, and this Treaty has not provided the necessary powers."[18]

Given the special features of the Community Treaties and Community law, the ECJ held in the early 1960s that the EC Treaty had created "its own legal system":

> By contrast with ordinary international treaties, the [EC] Treaty has created its own legal system which, on the entry into force of the Treaty, became an 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 and have thus created a body of law which binds both their nationals and themselves.[19]

In subsequent judgments, the ECJ has also characterized the Community Treaties as a constitutional charter of "a Community based on the rule of law."[20] Given these special features of EU law, including the principles of supremacy, direct applicability and direct effect, respect for fundamental rights and Member States' responsibility, and liability for violations of EU law, it is quite appropriate, even if the idea of a Treaty "establishing a Constitution for Europe" was abandoned in 2007 in favour of a "Reform Treaty"[21] to speak of the "constitutionalization" of the EU.[22]

The main tasks of the ECJ, apart from giving preliminary rulings requested by national courts, include reviewing the legality of acts adopted by the EU institutions (actions for annulment) and adjudicating infringement actions brought by the Commission against a Member State for alleged failure to fulfill an obligation under Community law or for alleged failure to comply with a judgment of the ECJ upon finding such failure to fulfill an obligation. Regarding actions for annulment, litigation brought by private parties and by Member States against Commission decisions are currently handled by the CFI. Thus, the latter Court may occasionally be called upon to deal with issues of constitutional importance, although such issues are much more likely to arise before the ECJ. All preliminary ruling requests are still handled by the ECJ.

The following remarks will be limited to some general observations about the role of the ECJ in a separation of powers context, notably issues of judicial activism versus judicial

17. EC Treaty, *supra* note 7, art. 5.

18. *Id.* art. 308.

19. Case 6/64, Costa, *supra* note 9; *see also* Case 26/62, Van Gend & Loos, *supra* note 10.

20. Case C-294/83, Parti écologiste "Les Verts" v. Parliament, 1986 E.C.R. 1339, para. 23.

21. *Supra* note 4.

22. Christiaan Timmermans, *The Constitutionalization of the European Union*, *in* 21 YEARBOOK OF EUROPEAN LAW 1, at 3 (2001-2002); *see also* Allan Rosas, *The European Union as a Federative Association*, *in* DURHAM EUROPEAN LAW INSTITUTE, EUROPEAN LAW LECTURE (2003).

restraint, the question of controlling respect for fundamental rights, and, finally, some issues relating to the independence of the EU courts.

II. Judicial Activism or Judicial Restraint?

The ECJ has often been criticized for judicial activism and, more precisely, for favoring, by applying teleological methods of interpretation, an integration agenda, and the broad objectives expressed in the Community Treaties at the expense of the explicit rules of those Treaties.[23] It is true that the broad constitutional principles mentioned above—supremacy, direct effect, respect for fundamental rights, monopoly of the ECJ to declare Community legislation invalid, and Member States' liability for violations of Community law—can be seen as judge-made law rather than expressions found in the text of the basic Treaties.

On the other hand, these principles have been and can be considered necessary ingredients of a system that nevertheless provides for far-reaching, unique, and explicit integration objectives as well as supranational powers (EU legislation by qualified majority voting, an elected Parliament, an independent Commission, powers of the EU courts, etc.). The Community Treaties, supplemented in 1992 by the EU Treaty and also modified in 1997 and 2001, along with a number of protocols and accession treaties, present a mishmash of general objectives, institutional provisions, and substantive provisions—some of considerable detail and with questions left unresolved.[24] In its capacity as a constitutional court, the ECJ has contributed to making this collection a more coherent system. Many of the findings of the ECJ have later been incorporated in either the basic Treaties or secondary Community law. [25]

The question of judicial activism relates to a broad range of issues, such as the theories and methods of interpretation followed by the EU courts.[26] It also includes the constitutional and institutional relations between the EU institutions and the Member States as well as issues of federalism. The following presentation is limited to the "federal level," that is, the relations between the EU legislative and executive branches, on the one hand, and the EU judiciary, on the other.

As previously noted, the EU judiciary is called upon to review the legality of acts adopted by the political and administrative EU institutions, notably the European Parliament, the EU Council, the Commission, and the European Central Bank, including legislative acts and decisions to conclude international agreements. The relevant text of Article 230 of the EC Treaty speaks about "grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers."[27] Notably, such actions for annulment

23. *See, e.g.*, HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE (1986).

24. *See, e.g.*, ALLAN ROSAS, *EU Primary Law as Substantive Law*, *in* FESTSCHRIFT FOR MICHAEL BOTHE (Hans-Peter Gasser, Thilo Marauhn & Natalino Ronzitti eds., 2008, forthcoming).

25. *See, e.g.*, Allan Rosas, *The European Court of Justice and Fundamental Rights: Yet Another Case of Judicial Activism?*, *in* EUROPEAN INTEGRATION THROUH INTERACTION OF LEGAL REMEDIES 33 (Carl Baudenbacher & Henrik Bull eds., 2007).

26. *See, e.g.*, Allan Rosas, *The European Court of Justice: Sources of Law and Methods of Interpretation*, *in* THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM 482 (Giorgio Sacerdoti et al. eds., 2006). *See also* the contribution of Koen Lenaerts in this issue of *The International Lawyer*.

27. EC Treaty, *supra* note 7, art. 30.

can be brought by a Member State or an EU institution while the right of private parties to attack acts of a legislative nature is limited.[28] In addition to actions for annulment, the question of the validity of Community acts may arise, notably, within the context of preliminary rulings requested by Member States' national courts.

In accordance with the principle of conferral, a Community legislative act requires a specific legal basis, that is, an explicit provision providing for the necessary powers of the Community to legislate in the field in question and the procedures to be followed (mandating adoption either with or without the European Parliament, qualified majority voting, or unanimity in the Council, etc.). The control by the ECJ aims to ensure that the act in question has an appropriate legal basis without any particular deference to any margin of appreciation of the legislator. There are numerous instances where the ECJ has annulled or invalidated legislative acts or decisions to conclude international agreements for lack of a correct legal basis.[29]

The "general principles of Community law" are an important primary source of law for the EU judiciary.[30] They include fundamental rights (see below) and administrative law principles, such as legal security, legitimate expectations, equal treatment, and rights of defense. Acts found to contravene the general principles of Community law will also be annulled or invalidated by the ECJ.[31]

In the field of supranational Community law,[32] external relations do not seem to constitute any special domain immune from judicial scrutiny, particularly if the rights of individuals seem to be in danger. Decisions to conclude international agreements have, in many instances, been annulled due to lack of appropriate legal basis. This occurred most recently with respect to an agreement between by the European Community (EC or the "Community") and the United States and an accompanying Commission decision relating to the transfer of passenger data containing travelers' identities.[33] On the other hand, Community legislation may be annulled or invalidated if found to be in conflict with an

28. According to Article 230 of the EC Treaty, natural or legal citizens may institute proceedings against a decision addressed to that person or against an act that, although addressed to another person or not addressed to anyone, "is of direct and individual concern" to the person. EC Treaty, *supra* note 7, art. 30; *see, e.g.*, Case C-500/00, Unión de Pequeños Agricultores v. Council, 2002 E.C.R. I-6677; ANGELA WARD, JUDICIAL REVIEW AND THE RIGHTS OF PRIVATE PARTIES IN EC LAW (2000).

29. For recent examples, see Joined Cases C-453/03, C-11/04, C-12/04 & C-194/04, The Queen v. Sec'y of State for Health, 2005 E.C.R. I-10423; *see also* Case C-376/98, Germany v. Parliament & Council, 2000 E.C.R. I-8419 (annulling a tobacco advertisement directive); *but see* Case C-380/03, Germany v. Parliament & Council, 2006 E.C.R. I-11573 (upholding the legality of Directive 2003/33/EC relating to tobacco advertising, which replaced the earlier directive).

30. *See, e.g.*, TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EC LAW (2d ed. 2006); XAVIER GROUSSOT, CREATION, DEVELOPMENT AND IMPACT OF THE GENERAL PRINCIPLES OF COMMUNITY LAW: TOWARDS A *Jus Commune Europaeum* (2005).

31. *See, e.g.*, Case C-395/00, Distillerie Fratelli Cipriani v. Ministero delle Finanze, 2002 E.C.R. I-11877 (holding as invalid a provision of Council Directive 92/12/EEC relating to products subject to excise duties as a deadline provided for therein did "not satisfy the principle of respect for the rights of defence"); Case C-313/04, Franz Egenberger GmbH Molkerei & Trockenwerk v. Bundesanstalt für Landwirtschaft & Ernährung, 2006 E.C.R. I-6331 (declaring a provision of a commission regulation relating to import arrangements for milk and milk products discriminatory and thus invalid).

32. Here, we are referencing the First Pillar of the EU regulated by the EC and Euratom Treaties. *See* Euratom Treaty, *supra* note 8.

33. Joined Cases C-317/04 & C-318/04, Parliament v. Council & Comm'n, 2006 E.C.R. I-4721.

international agreement binding on the Community.[34] The ECJ is also empowered to give an opinion as to whether an international agreement "envisaged" is compatible with Community law, including whether such an agreement falls exclusively within Community jurisdiction, shared jurisdiction with Member States, or the exclusive jurisdiction of Member States.[35]

In contrast with those provisions that form the Community law framework in a strict sense (the "First Pillar"), the parts of the EU Treaty pertaining to a Common Foreign and Security Policy (the "Second Pillar") fall largely outside the jurisdiction of the EU judiciary. Parts of the EU Treaty concerning Police and Judicial Cooperation in Criminal Matters (the "Third Pillar") limit the powers of the EU courts more than those under the First Pillar. But in a recent a case involving the fight against terrorism and an EU act taking the form of a "common position" adopted by the EU Council on the basis of the Third Pillar, the ECJ stressed the importance of the rule of law and the principle of effective judicial protection.[36] The Court ruled that such common positions, adopted under the framework of the Third Pillar, cannot constitute measures intended to produce legal effects for private parties because they cannot be the subject of actions for annulment or preliminary ruling requests to the EU judiciary, thus falling outside the jurisdiction of the ECJ. A common position that would purport to produce legal effects for private individuals would be a false common position. The position could be brought before the ECJ, which would accord it "its true classification" as another type of instrument and accept to give a preliminary ruling or to review the lawfulness of the act.[37]

In some instances, the ECJ will show deference to the Community legislator. An obvious case in point is the application of the "principle of proportionality," a general principle of Community law,[38] which demonstrates that the ECJ has often underscored the broad discretion of the Community legislature. For example, the Court recently stated the following about a directive prohibiting tobacco advertising:

> With regard to judicial review of the conditions referred to in the previous paragraph [concerning the principle of proportionality], the Community legislature must be allowed a broad discretion in an area such as that involved in the present case, which

34. For a recent example, see Case C-344/04, The Queen v. Dep't for Transp., 2006 E.C.R. I-403 (upholding the validity of Council and Parliament Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights). World Trade Organization agreements, on the other hand, have been held by the ECJ to lack direct effect, and thus the validity of Community legislation cannot normally be questioned for alleged failure to comply with WTO rules. *See, e.g.*, Case C-377/02, Léon Van Parys v. Belgisch Interventie- en Restitutiebureau, 2005 E.C.R. I-1465. On the status of international agreements and international case law in the EU legal order, see Allan Rosas, *With a Little Help from My Friends: International Case-Law as a Source of Reference for the EU Courts*, 5 THE GLOBAL COMMUNITY Y.B. INT'L L. & JURISPRUDENCE 203 (2005).

35. For a recent example, see Opinion 1/03, 2006 E.C.R. I-1145, relating to the competence of the Community to conclude a convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The ECJ held that the conclusion of this convention belonged entirely to the exclusive competence of the Community.

36. Cases C-354/04 P, Gestoras Pro Amnistía v. Council & C-355/04 P, Segi v. Council, judgments of Feb. 27, 2007 (concerning a Council common position listing a certain organization as a terrorist entity).

37. Case C-355/04 P, Segi, at paras. 52-55.

38. This principle is also expressed in the EC Treaty itself. According to Article 5 of the EC Treaty, "[a]ny action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty." EC Treaty, *supra* note 7, at art. 5.

> entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. The legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue.[39]

Similar reasoning can be found, *inter alia*, in the field of the common agricultural policy. This fact does not imply, however, that agricultural legislation could never be struck down for failure to respect the principle of proportionality.[40]

The need for judicial review of Community acts applies, *a fortiori*, to acts of an administrative rather than legislative nature. In this field, however, the EU courts may also show deference to the decision-maker, often the European Commission, with regard to the assessment of complex economic, technical, or scientific realities and the difficult choices to be made in this respect. The standard of review applied does not provide a *carte blanche* to the executive branch, which can be illustrated by the following excerpt from an ECJ judgment that upheld a CFI judgment annulling a Commission decision to prohibit a merger between two companies with "conglomerate" effect:

> Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. Such a review is all the more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate effect.[41]

Thus, the factual support in the record for administrative decisions can certainly be reviewed by the EU judiciary. The judicial restraint exercised with respect to assessments of complex economic, political, technical, or scientific realities always comes with the caveat that clear errors of assessment or judgment may cast doubts on the legality of the decision at issue.

III. Fundamental Rights

The original Community Treaties were more or less silent on the question of respect for human rights or fundamental rights. With the broadening of the integration agenda and the supranational features of Community law confirmed by the ECJ in 1963 through 1964, national constitutional circles began expressing concerns about the relationship between the Member States' Bills of Rights and a supranational Community law. The latter

39. Case C-380/03, Germany v. Council & European, 2000 E.C.R. I-8419, para. 145; *see also* Case C-236/01, Monsanto Agricultora Italia v. Presidenza del Consiglio dei Ministeri, 2003 E.C.R. I-8105, para. 135 (concerning genetically modified maize).

40. *See, e.g.*, Case C-310/04, Spain v. Council, 2006 E.C.R. I-7285, paras. 95-135 (where the ECJ, on the one hand, underlined the "wide discretion" enjoyed by the Community legislature but, on the other hand, annulled certain parts of a Council regulation concerning support schemes for farmers because of infringement of the principle of proportionality).

41. Case C-12/03 P, Comm'n v. Tetra Laval, 2005 E.C.R. I-987, para. 39.

prevailed over national law, "however framed" (thus arguably including the national Constitution), but omitted a system of fundamental rights. The ECJ's answer to these concerns was to declare, in 1969, that fundamental rights form part of the general principles of Community law, the observance of which the Court ensures.[42]

The ECJ subsequently specified that in determining the content of fundamental rights as general principles of Community law, it draws inspiration from "constitutional traditions common to the Member States" and also uses as guidelines "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories."[43] The ECJ later declared that the ECHR has "particular significance,"[44] and in the 1990s, the Court started to cite individual judgments of the European Court of Human Rights in Strasbourg to back up its interpretations.[45] The Court's case law is reflected in Article 6, paragraph 2 of the EU Treaty, which refers to the ECHR and the constitutional traditions common to the Member States. The focus on the ECHR does not prevent the ECJ from making occasional references to other international human rights instruments as well.[46] Notably, neither the EU nor the EC is a contracting party to the ECHR or to any other international human rights convention.[47]

In December 2000, the European Parliament, the Council of Ministers, and the Commission gave a "solemn proclamation" termed the Charter of Fundamental Rights of the European Union (the "Charter").[48] Like the above-mentioned Treaty establishing a Constitution for Europe,[49] the Charter was prepared in a constitutional convention consisting of representatives of the national parliaments and governments of the Member States, the European Parliament, and the Commission. While the CFI and the Advocates General of the ECJ began to cite the Charter almost from its proclamation, the ECJ itself was more reticent. In a recent judgment, however, the ECJ cited the Charter for its control over the legality of Directive 2003/86 EC, which dealt with the rights of third-country nationals to family reunification.[50] The directive mentions the Charter in its preamble. The ECJ stated the following:

> The Charter was solemnly proclaimed by the Parliament, the Council and the Commission in Nice on 7 December 2000. While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance by

42. Case 29/69, Erich Stauder v. City of Ulm, 1969 E.C.R. 419; *see also* Case 11/70, Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 1970 E.C.R. 1125; Case 4/73, J. Nold, Kohlen- und BaustoffgroBhandlung v. Commission, 1974 E.C.R. 491; Allan Rosas, *Fundamental Rights in the Luxembourg and Strasbourg Courts*, *in* THE EFTA COURT: TEN YEARS ON 163 (Carl Baudenbacher et al. eds., 2005).

43. Case 4/73, Nold, para. 13.

44. *See, e.g.*, Joined Cases 46/87 & 227/88, Hoechst v. Comm'n, 1989 E.C.R. 2859, at para. 13.

45. *See* Case C-13/94, P v. S & Cornwall County Council, 1996 E.C.R. I-2143, para. 16.

46. For a recent example, see Case C-540/03, Parliament v. Council, 2006 E.C.R. I-5769, paras. 37, 39 (referring to the International Covenant on Civil and Political Rights of 1966, the Convention on the Rights of the Child of 1989, and the European Social Charter of 1961).

47. But according to Article I-9, paragraph 2 of the Treaty Establishing a Constitution for Europe and Article 6 of the EU Treaty as amended by the Reform Treaty of 2007, *supra* note 4, the EU "shall accede" to the ECHR.

48. Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 2000 O.J. (C 364) 1 [hereinafter Charter of Fundamental Rights].

49. *See* Treaty Establishing a Constitution for Europe, *supra* note 4.

50. Case 540/03, Parliament v. Council.

> stating, in the second recital in the preamble to the Directive, that the Directive observes the principles recognised not only by Article 8 of the ECHR but also in the Charter. Furthermore, the principal aim of the Charter, as is apparent from its preamble, is to reaffirm "rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court . . . and of the European Court of Human Rights."[51]

This judgment, given in June 2006, has been followed by other judgments also citing the Charter of Fundamental Rights.[52] According to Article 6 of the EU Treaty, as amended by the Reform Treaty of 2007, the Union "respects the rights, freedoms and principles" set out in the Charter, "which shall have the same legal value as the Treaties".[53]

The 2006 judgment offers an example of review of the conformity of Community legislation with fundamental rights. The European Parliament argued that some of the provisions of the directive on family reunification do not respect fundamental rights, particularly the rights to family life and non-discrimination. The ECJ concluded that the new directive neither required nor authorized, expressly or impliedly, Member States to legislate in violation of fundamental rights. The court also found that the directive left the Member States sufficient latitude to apply it and national legislation in conformity with fundamental rights. According to settled case law, the fundamental rights of the Community legal order are also binding on the Member States when they implement Community rules. The Member States, therefore, are under an obligation to do so in conformity with fundamental rights when applying and interpreting the directive.[54] Consequently, the attempts of Parliament to annul the directive were dismissed.

As illustrated in the aforementioned cases involving the transfer of passenger names to the United States and the Council common position identifying a certain organization as a terrorist entity,[55] the EU Courts may be confronted with cases relating to measures taken to combat terrorism. In the passenger names case, the ECJ did not address the question of respect for fundamental rights, such as the right to privacy, because the relevant decisions of the EU Council and the Commission were annulled on the more technical ground of lacking a legal basis. But, in other cases recently decided or still pending, issues of fundamental rights have come to the forefront. The CFI recently annulled a Council decision on the freezing of funds of a person listed as a terrorist[56] while the ECJ recently quashed an order of the CFI declaring a similar action for annulment inadmissible and

51. Case 540/03, Parliament v. Council, at para. 38. *See also* the contribution of Koen Lenaerts in this issue of The International Lawyer.

52. Case C-432/05, Unibet, judgment of 13 March 2007, at para. 37; Case C-438/05 International Transport Workers' Federation, judgment of 11 December 2007, at paras. 43-44; Case C-341/05 Laval un Partneri, judgment of 18 December 2007, paras. 90-91.

53. *Supra*, note 4.

54. *Id.* ¶ 105. One of the early cases in this strand of case law is Case 5/88, Hubert Wachauf v. Germany, 1989 E.C.R. 2609.

55. *See* Joined Cases C-317/04 & C-318/04, *Parliament v. Council, Comm'n*; Case C-354/04 P, *Gestoras*; Case C-355/04 P, *Segi*.

56. Case T-228/02, Organisations des Modjahedines du people d'Iran v. Council, CFI judgment of Dec. 12, 2006.

referred the case back to the CFI for judgment on the merits.[57] In two judgments in September 2005, the CFI held that only a limited judicial review was possible concerning Community decisions to give effect to binding sanctions resolutions adopted by the UN Security Council,[58] although these cases are pending on appeal before the ECJ.[59] While most measures taken in the context of the fight against terrorism present a blend of Community law First Pillar measures and measures taken under the Second or Third Pillars, some of the cases brought before the ECJ or the CFI raise the differences that exist concerning the jurisdiction of the EU courts in this respect.[60]

IV. Independence of the Judiciary

It is easy to agree with the Universal Charter of the Judge, adopted by the Council of the International Association of Judges in 1999, that "[t]he independence of the judge is indispensable to impartial justice under the law."[61] But, agreement is less likely on exactly what requirements are necessary for an independent judicial system. National systems display somewhat differing solutions in this regard. If account is taken of international and regional courts and tribunals as well, the picture is even more diverse.

As far as the EU federal courts are concerned, the hybrid character of the entire EU project must be taken into consideration. Despite the "constitutionalization" of the EU referred to above, it is still true that the basic Treaties are formal international agreements ratified by the Member States. It also is true that inter-state disputes between the Member States on points of Community law can be brought before the ECJ,[62] and, more generally, that the Member States are in many respects independent actors whose "national identities" should be respected by the EU (Article 6, paragraph 3 of the EU Treaty). This explains the rules expressed in Articles 221 and 224 of the EC Treaty, which state the ECJ "shall consist of one judge per Member State" while the CFI "shall comprise at least one judge per Member State."[63] Thus, the ECJ and the CFI today are comprised of twenty-seven judges each; additionally, eight advocates-general assist the ECJ.

57. Case C-229/05 P, Osman Ocalan v. Council, judgment of Jan. 18, 2007.

58. Case T-306/01, Ahmed Ali Yusuf v. Council & Comm'n, 2005 E.C.R. II-3533; Case T-315/01, Yassin Abdullah Kadi v. Council & Comm'n, 2005 E.C.R. II-3649; *see also* Case T-253/02, Chafiq Ayadi v. Council, 2006 E.C.R. II-2139; Case T-362/04, Leonid Minin v. Comm'n, CFI judgment of Jan. 31, 2007.

59. Case C-402/05 P, Yassin Abdullah; Case C-415/05 P, Ahmed Ali Yusuf.

60. As noted above, jurisdiction is practically excluded in the Second Pillar of matters concerning a Common Foreign and Security Policy and is limited in the Third Pillar regarding Police and Judicial Cooperation in Criminal Matters. An example is offered by Case C-354/04 P, Gestoras and Case C-355/04 P, Segi.

61. Council of the Int'l Ass'n of Judges, *Universal Charter of the Judge*, at art. 1 (Tapei, Taiwan, Nov. 17, 1999); *see also, e.g.*, 7th UN Cong. on the Prevention of Crime & the Treatment of Offenders, *UN Basic Principles on the Independence of the Judiciary* (Milan, Italy, Aug. 26 to Sept. 6, 1985); Study Group of the Int'l Law Assn' & Procedure of Int'l Courts & Tribunals, in association with the Project on Int'l Courts & Tribunals [PICT], *The Burgh House Principles on the Independence of the International Judiciary*, (Burgh House, Hampstead, London, Apr. 23-24, 2004).

62. EC Treaty, *supra* note 7, at art. 227; *see also id.*, at art. 292. Such disputes are extremely rare in practice, however. For a recent example, see Case C-145/04, Spain v. United Kingdom, 2006 E.C.R. I-7917 (concerning the right to vote and be elected for British Commonwealth citizens who are not EU citizens in the elections of the European Parliament organized in Gibraltar, a colony under the British Crown but situated on the Iberian mainland.

63. EC Treaty, *supra* note 7, arts. 221, 224.

Article 223 of the EC Treaty contains the following basic rule on the election of judges and advocates-general:

> The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence; they shall be appointed by common accord of the governments of the Member States for a term of six years.[64]

Retiring members may be reappointed without any formal age or other limits. Similar rules apply to the CFI (Article 224 of the EC Treaty). The new Civil Service Tribunal, however, consists of only seven judges. They are appointed for six years by common accord of the governments of the Member States based on the recommendation of a special committee comprised of former members of the ECJ and the CFI and other "lawyers of recognised competence."[65]

For the ECJ and the CFI, neither the basic Treaties nor the Protocol on the Statute of the Court of Justice (the "Statute") annexed to them provide for any special procedures relating to the appointment of judges by common accord or to the nominations made by the national governments. Following the expansion of the EU in 2004 and 2007, most new Member States provided for certain procedures involving, for example, a national parliament and/or national bodies for the appointment of judges. Similar developments can be seen in some of the "old" Member States. In the context of the preparation and drafting of the Treaty Establishing a Constitution for Europe,[66] proposals were made to change the system of appointment of judges, including the idea of a fixed single term of nine or twelve years. However, the only modification contained in the treaty as signed in October 2004 is the requirement of an expert panel to "give an opinion on candidates suitability" to perform the functions of judge or advocate-general.[67] This provision is repeated in Article 224a of the EC Treaty (renamed "Treaty on the Functioning of the European Union"), as modified by the Reform Treaty signed on 13 December 2007.[68]

The Statute and the Rules of Procedure of the ECJ (similar rules apply to the CFI) contain a number of provisions designed to enhance, directly or indirectly, the indepen-

64. *Id.* art. 223.

65. Council Decision 2204/752/EC, Euratom, Establishing the European Union Civil Service Tribunal, 2004 O.J. (L 333) 7; Council Decision 2005/577/EC, Euratom, Appointing Judges of the European Union Civil Service Tribunal, 2005 O.J. (L 197) 28. Article 225a of the EC Treaty enables the EU Council to also create other such "judicial panels" (i.e. specialized tribunals). EC Treaty, *supra* note 7, art. 225a. Such tribunals may be established in the future for fields such as intellectual property rights, notably trademarks and patents.

66. Treaty Establishing a Constitution for Europe, *supra* note 4. Like the Charter of Fundamental Rights, *supra* note 48, the constitutional treaty was prepared in a convention consisting of representatives of the national parliaments and governments of the Member States as well as the European Parliament and the Commission.

67. Treaty Establishing a Constitution for Europe, *supra* note 4, art. III-357. The panel shall be chosen from among former members of the ECJ and the General Court (new name for the CFI), members of national supreme courts, and "lawyers of recognised competence," one of whom shall be proposed by the European Parliament. Note that this panel resembles the committee set up to propose the seven persons to be appointed judges of the Civil Service Tribunal (see note 65).

68. *Supra*, note 4.

dence of the Court and its members, including the advocates-general.[69] These include provisions on the oath to be taken and the declaration to be signed before taking up duties, immunity from legal proceedings that can only be waived by the Court, and the prohibition against holding "any political or administrative office" and engaging in "any occupation, whether gainful or not" (the latter prohibition can exceptionally be waived by the Court).[70] Notably, a member of the Court may not take part in the examination of a case if he has been involved in the same case at an earlier stage. A judge or advocate-general may not be deprived of his office or of his right to a pension unless he, in the unanimous opinion of the other members, no longer fulfils the requisite conditions or meets the obligations arising from his office. The judges elect among themselves the President of the Court as well as the Presidents of Chambers.

The Court shall sit in a Grand Chamber (comprised of thirteen judges), a Chamber of five, or a Chamber of three judges. On rare occasion, judges may sit together as a full Court. Unlike many international courts, there is no system of *ad hoc* judges. A judge may or may not sit on a case concerning his own country, depending entirely on formal procedural rules. According to the Statute of the Court, Article 18, a party may not apply for a change in the composition of the Court on the grounds of either the nationality of a judge or the absence of a judge representing the nationality of a party.[71]

The Statute of the Court provides for the secrecy of the deliberations of the Court.[72] The judgments shall contain the names of the judges who took part in the deliberations (in practice, the name of the judge-rapporteur[73] is also indicated). Dissenting or separate opinions are not accepted. This rule, in my opinion, is a necessary corollary to the rather short term of office of the judges, the possibility of reappointment, and the lack of procedural requirements at the EU law level on the screening of candidates. Apart from the question of independence, the lack of separate and dissenting opinions tends to enhance the authority of the judgments, particularly the preliminary rulings. Recall that in a preliminary ruling, the ECJ provides an authoritative interpretation of a principle or rule of EU law, applicable throughout the whole EU area and from the time the norm enters into force.[74] At least at the present stage of European integration, it seems necessary to continue to provide for single collegial rulings, enhancing the search for consensus or near-consensus, rather than allowing collections of individual opinions.[75]

Be that as it may, lack of independence is not a criticism that is often levelled at the ECJ. Rather, some of the criticism tends to focus on a perceived judicial activism and seems to suggest, at least implicitly, that the Court is *too* independent. The EU courts

69. *See* Protocol on the Statute of the Court of Justice (annexed to the Treaties), arts. 2-8, 18 [hereinafter Statute]; Rules of Procedure of the Court of Justice of the European Communities, 1991 O.J. (L 176) 7, arts. 2-11 [hereinafter Rules of Procedure].

70. Statute, *supra* note 69, art. 4.

71. Statute, *supra* note 69.

72. According to Article 35 of the Statute, the deliberations of the Court "shall be and shall remain secret." Statute, *supra* note 69; *see also id.* art. 2.

73. The judge-rapporteur, appointed by the President of the Court for each case, together with the advocate-general assigned to the case, plays an important role in the preparation of a case.

74. Case C-292/04, Meilicke, at para. 34.

75. The pros and cons with respect to dissenting opinions are discussed, *e.g.*, in EC ADVISORY BD., BRITISH INST. OF INT'L & COMP. LAW, THE ROLE AND FUTURE OF THE EUROPEAN COURT OF JUSTICE 119-21 (1996). The EC Advisory Board is chaired by The Rt. Hon. Lord Slynn of Hadley.

should, of course, be mindful of the limits to judicial interpretation that must exist, especially in relation to the delicate and sometimes controversial partition of competence and powers for which the EU stands. On the other hand, the "law" they are called upon to apply and interpret consists mainly of the objectives, principles, and rules of the basic Treaties and the extensive secondary legislation accompanying them rather than of second-thoughts and concerns not expressed in legal texts.