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**Constitutional Reasoning in the European Court of Justice**

A. Legal, Political, Institutional and Academic Context

1. *The jurisdiction of the Court. A constitutional court?*

Determining whether the Court of Justice of the European Union is a constitutional court or not is not a straightforward matter of course.[[1]](#footnote-1) To qualify it in such a way requires some introductory terminological and conceptual considerations for at least two separate reasons.

The first is as much obvious as contingent. It lies in the fact that a consequence of the constitutional debate launched at Leaken in 2001, culminating with the failed Constitutional Treaty and with the approval of the Lisbon Treaty in 2007, is a definite political bias influencing the response to questions such as ‘Does the EU have a constitution?’ and ‘Does it need one?’. These questions have been addressed to the European peoples and for the time being they have received a negative answer. Following the results of the French and Dutch referenda, the European Council expressly decided that the new European Treaties ‘will not have a constitutional character. The terminology used throughout the Treaties will reflect this change: the term “Constitution” will not be used’.[[2]](#footnote-2)

The second reason is perhaps more interesting from a theoretical view point because it does not relate to the contingent political vicissitudes of the EU, but to one of its most salient features – what the legal doctrine constantly refers to as the its *sui generis* nature. The *sui generis* nature is the result and the synthetic formulation of several institutional novelties that have characterised the European Communities since the beginning: directly applicable regulations, majority voting in the Council, independency of the Commission, and – last but not least – the jurisdiction of the Court of Justice. Since the establishment of the European Coal and Steel Community in 1951, the legal scholarship has always qualified the EC institutions as *sui generis* entities in order to express the fact (and to endorse the project) that they lie (and should lie) somewhere in between international law and constitutional law, and between interstate organisation and federal construction.[[3]](#footnote-3)

The *sui generis* nature has never been, so to say, a brute fact – a state of things capable of being simply observed and described in a detached and objective manner. It is a complex institutional fact or, to put it differently, a “narrative” with notable consequences for several legal issues of European integration. In any case, the institutional self-understanding and the political project expressed by the *sui generis* formula have deeply affected the semantics of European law. As a consequence of the *sui generis* nature of the Community, several fundamental concepts of public law, once they are applied to the European institutions, have undergone significant transformation and adaptation.[[4]](#footnote-4) And the concepts of ‘constitution’ and ‘constitutional’ are no exceptions in this regard.

The Court of Justice is a particularly salient exemplar for illustrating this point. Its jurisdiction is atypical in several respects. First of all, the Court of Justice of the European Union is at present composed of three judicial organs: the Court of Justice properly called, whose legal reasoning is the subject of our inquiry, the General Court, formerly Court of First Instance, and the specialised courts, of which at the moment there is only one, the Civil Service Tribunal. Secondly, and most importantly, the matters upon which the Court of Justice is competent to adjudicate are so diverse and the grounds of its jurisdiction are so miscellaneous that the Court has no analogue at national or international level.

The Court of Justice ensures ‘that in the interpretation and application of the Treaties the law is observed’ (Article 19 TEU): it reviews the legality of the acts of the EU, interprets EU law at the request of the national courts and ensures that the Member States comply with it. In performing these tasks, it may be useful to distinguish between the Court of Justice operating (i) as the *sensu stricto* constitutional court of the EU legal order, (ii) as one *sensu lato* constitutional court of the European legal space, (iii) as an international tribunal, and (iv) under other headings of jurisdiction.

(i) First of all, the Court of Justice is by all means a constitutional court – let’s call it a *sensu stricto* constitutional court – if we adopt the Kelsen-inspired concept of constitution proposed by András Jakab and stipulate that a constitution is ‘a norm or a group of norms which are of the highest rank in a legal order in the sense that the validity of all other norms is measured on them’.[[5]](#footnote-5) If we adopt this concept of constitution, the Court of Justice would wear its constitutional hat mainly in annulment proceedings, where the Court is competent to review the legality of EU acts. The action can be brought by certain preferential plaintiffs (the Member States, the Council, the Commission and the Parliament), directly by individuals with an interest in taking action against measures that address them or that directly and individually concern them, and by certain specialised bodies such as the Court of Auditors, the European Central Bank and the Committee of the Regions for the purpose of protecting their prerogatives. Moreover, the Court of Justice would serve as a constitutional court in the preliminary proceedings on the validity of EU law: under Article 267(1)(b) TFEU, where a question on the validity of acts of the EU institutions is raised before a national court, that court may (or must, if it is a court of last instance) request the Court of Justice to give a ruling thereon.

With regard to annulment proceedings and preliminary proceedings on the validity of EU law, one can safely say that the Court of Justice is a *sensu stricto* constitutional court. It is the highest court of the EU legal order which has the task of adjudication on the validity of all norms of that legal order by reference to its highest law – the Treaties; its jurisdiction is exclusive as no other court (except the General Court, which is subject to review by the Court of Justice) has the competence to annul EU legislation.[[6]](#footnote-6)

(ii) According to a widespread and well-grounded opinion, however, it is not in annulment proceedings that the Court has exercised or has acquired its constitutional status, nor is it in preliminary ruling proceedings on the validity of EU law. The Court of Justice has become a *sensu lato* constitutional court, or a *sui generis* constitutional court, mainly thanks to the powers it exercises in preliminary ruling proceedings on the interpretation of Community law. Under Article 267(1)(a) TFEU, when a national court has any doubt about the meaning of EU law, it may (or must, if it is a court of last instance) initiate a preliminary ruling proceeding referring the question of interpretation to the Court of Justice.

Thanks to this kind of proceedings, the Court of Justice has been able to develop a constructive and mutual relationship (a ‘dialogue’, as it has become customary to say) with the national courts, which means that the European and the national courts have collaborated in shaping the content and Community law “in action” without establishing a formal hierarchical relationship between themselves; the Court of Justice has initiated a process of “constitutionalisation” of the European Treaties making it acceptable to the national courts.[[7]](#footnote-7) Thanks to the preliminary ruling proceedings the Court of Justice has gradually laid the basis and eventually established its most authentic and significant constitutional status.

When we speak here of the constitutional status of the Court of Justice in the preliminary interpretative rulings, the word ‘constitutional’ is not employed in its non-technical sense – the Court of Justice as a ‘very important’ judge – but in its technical meaning, and the legal order whose norms are evaluated against the constitution is no longer limited to the legal order of the EU strictly conceived, as it happens in annulment proceedings and in preliminary proceedings on the validity of EU law, but is inclusive of the legal order of the Member States. In fact, once the national courts in principle accepted the doctrines of direct effect and supremacy of European law, the Court of Justice became *de facto* empowered to assess, by means of the preliminary ruling proceedings, not only the validity of EU law but also the conformity to EU law of Member States’ legislation and practices.[[8]](#footnote-8)

In preliminary ruling proceedings the Court of Justice is not competent to assess the validity of national legislation. However, by interpreting EU law it can indirectly but unequivocally rule on Member States’ compliance. Thanks to the enduring cooperation of the national courts, their willingnessto refer questions for preliminary rulings and their acceptance of supremacy of EU law, the Court of Justice evaluates the ‘European validity’ of national legislation and practises: its interpretativejudgments of the Court of Justice can render national law inapplicable in the case at hand and, indirectly, *erga omnes*. Therefore, the Court of Justice is not only the constitutional court of the EU, but is the constitutional court – or, to say it better, *a* constitutional court: one among many – of the European ‘legal space’; a legal space that is comprehensive both of the EU legal order and of the legal orders of the Member States, and that is not hierarchically structured.

The *sensu lato* constitutional jurisdiction of the Court of Justice is not exclusive, because the competence to annul national legislation belongs primarily to national courts. Moreover, national courts are also generally competent, if not to annul EU legislation, at least to suspend its applicability when it is deemed to be incompatible with fundamental domestic constitutional provisions or with the national legislators’ explicit decision of withdrawing from their European obligations. Thus, in its capacity as *sensu lato* constitutional court of the European legal space, the Court of Justice is not alone but shares its responsibility with other courts – with the constitutional courts of the Member States and, indirectly, with the European Court of Human Rights. It is not the highest court of the legal order, but it is one of several high courts of justice of the European constitutional space. To put it in the usual irreplaceable way, it is a *sui generis* constitutional court.

(iii) With regard to its functions as an international court, the Court of Justice has an exclusive and mandatory jurisdiction on the controversies arising between the Member States of the EU. However, Member States have used very rarely their power to bring a case against other Member States[[9]](#footnote-9). In practice, infringement proceedings are almost always initiated by the Commission which acts *motu proprio* or at the solicitation of individuals, businesses and associations, and which enjoys a full discretionary power to assess whether the action is appropriate and suitable from a political as well as legal point of view. The convicted Member States are under the obligation to comply with the Court of Justice’s rulings, although the judgments of the court are declaratory in nature, not self-executing, and therefore do not give rise to any immediate legal consequence in Member States.

In order to give the Member States an incentive to abide by the judgments of the Court, the Treaty of Maastricht gave the Court the power to impose financial sanctions on the Member State concerned. Moreover, the Court of Justice has held in the *Francovich* case (1995) that the Member States are liable to compensate individuals and companies for damage caused by breaches of EU law. So, if the Court of Justice can be considered as an international court, then we must conclude that it is an extraordinarily effective, *sui generis* one.

(iv) Other forms of jurisdiction of the Court of Justice that can be associated with the action for annulment – and thus with the *sensu stricto* constitutional competences of the Court – are the actions for failure to act and the advisory jurisdiction to give opinions on the lawfulness of the international agreements concluded by the EU. Both cases consist of forms of judicial review on the (in)activity of EU institutions made in accordance with the standards established by the highest law, the Treaties. Note that the opinions of the Court are binding upon the institutions of the EU and, where they are adverse, the international agreements cannot enter into force unless the Treaties are amended. Thus, the powers of the Court in this respect are identical to those of a preventive and abstract constitutional review.

Moreover, the Court of Justice is an appellate court (on point of law only) against the decisions of the GC, which has jurisdiction, amongst other matters of minor importance, over actions for annulment and failure to act brought by individuals and by the Member States against the Commission and in certain cases against the Council.

There is no doubt, however, that the most important competence of the Court of Justice is the power to give a preliminary ruling on the validity and interpretation of EU law when requested by a national court. The preliminary ruling procedure is the central instrument for judicial control of the EU. This procedural channel between the Court of Justice and the national judges is vital in order to achieve the uniform application of EU law over all of Europe. Moreover, the viability of the preliminary ruling procedure transforms all citizens into potential guardians of compliance with EU law, therefore contributing not only to the uniformity but also to the effectiveness of EU law enforcement.

The Court of Justice has given most of its landmark judgments under this head of jurisdiction. It is revealing in this regard that in the sample of Great Cases analysed by this research, 32 are preliminary rulings on the interpretation of Community law, two are preliminary rulings on its validity, one is a preliminary ruling both on the interpretation and the validity of EC law, three are decisions on annulment proceedings, one is an opinion and one is an appellate decision. No judgment gathered in the Sample was rendered in an infringement procedure.

2. *Access to the Court and workload, procedure and evidence*

The Court of Justice does not have the discretionary power to refuse to review a case and must rule on all the cases lodged with its registry. As consequence, the Court has a very limited capability to determine autonomously its workload.[[10]](#footnote-10) Following the constant expansion of EU competences and the successive enlargements of the EU, the judicial activity of the Court has steadily increased over time. In the 1950s the Court had less than 50 new cases each year, in the 1970s usually between 100 and 200 new cases each year; in the 1990s between 300 and 500 cases, and since 2001 there have been between 400 and 600 new cases each year (632 in 2012).[[11]](#footnote-11) This increase has had an adverse effect on the Court of Justice’s ability to deliver its judgments within a short timeframe. In 1975 it took the Court of Justice an average of six months to deal with preliminary references, and in 1983 12 months; in 2003 the average period reached a peak of 25.5 months and then it started to decrease to 15.7 months in 2012.[[12]](#footnote-12) Preliminary references represent by far the greatest source of the caseload of the Court: in the four years from 2009 to 2012, 60% of the proceedings before the Court of Justice were references for a preliminary ruling.

In order to respond to the increasing workload, the Court has benefited from the autonomy it enjoys in devising its own rule of procedure and in organising and managing the cases. In recent years the statute of the Court of Justice and its rules of procedure have been amended several times in order to secure greater organisational autonomy, flexibility and efficiency. Without going into much detail, it is worth mentioning that the use of chambers has evolved considerably and has been gradually extended to the current situation in which cases are assigned to the Full Court or to the Grand Chamber only exceptionally. At present, the Court of Justice is divided into eight chambers consisting of either three or five judges, and cases are assigned to chambers ‘so far as the difficulty or importance of the case or particular circumstances are not such as to require that it should be assigned to the Grand Chamber’ (Article 44(3) Rules of Procedure).

The procedure followed by the Court is essentially written, inquisitorial, and from the viewpoint of a jurist accustomed to the proceedings before the national courts it is marked by great flexibility and informality. The Court of Justice may require the parties, the Member States’ governments and the EU institutions to produce all documents and to supply all information the Court considers necessary, and at any time it may entrust individuals or organisations it chooses with the task of giving an expert opinion. The judge-rapporteur can chair informal preparatory meetings with the parties and theCourt can decide to dispense with the oral part of the procedure.

The language of the case is chosen by the applicant among the official languages of the EU, except where the defendant is a Member State, in which case the language of the case is the official language of that State. In preliminary ruling proceedings the language of the case is the language of the referring court. The internal working language of the Court, however, is French: it is the language in which the judges deliberate and the language in which preliminary reports and judgments are drafted.

Summaries of judgments of the Court of Justice are published in the ‘Official Journal of the European Union’ (C Series) and all judgments are published in full together with opinions of the Advocates-General in the ‘European Court Reports’, except some minor decisions, which are nonetheless accessible on the Court’s internet site.

3. *Composition of the Court. The judges*

Another response to the growing workload of the Court of Justice was the increase in the number of the members of the Court of Justice. Following several incremental enlargements, today’s Court of Justice of the EU is composed of the Court of Justice’s 27 judges, of the General Court’s 27 judges and of the Civil Service Tribunal’s seven judges, all appointed by the common accord of the governments of the Member States for a renewable term of six years.

With regard to appointments of the judges, the basic rule is ‘one State, one judge’: the Court of Justice consists of one judge from each Member State. Each judge is proposed by their country of origin, and in practice the choice made by the national government is never disputed by other national governments. To a limited extent, therefore, the Court of Justice is a representative jurisdiction whose members have always been appointed by common accord of the Member States without any formal assessment of their appropriateness at European level. ‘It is in the muffled atmosphere of ministerial cabinets and diplomatic meetings, sheltered from the public gaze, that the members of the Court of Justice are appointed’.[[13]](#footnote-13) As the mandate of the judges is renewable, the system of appointment gives national authorities a means of applying pressure on the Court, and this raises concerns for its independence.

In order to meet these concerns, the Lisbon Treaty modified the appointment procedure and required the Member States to consult a panel before appointing the members of the Court of Justice and the General Court so as to obtain a non-binding opinion on candidates’ suitability for office[[14]](#footnote-14). The strongest guarantee of the Court’s independence, however, lies in the fact that decisions are taken collegiately and that judges’ deliberations remain secret. Judgments contain no indications of the votes taken nor do they contain any dissenting opinion. Obviously, if the judges’ votes and opinions were published, the governments would be able to check and control their nominees. In addition, it seems that a guarantee is provided by the strong group identity and institutional culture that the Court has been able to develop and consolidate over the course of time,[[15]](#footnote-15) which hinders – although cannot fully prevent – the risk of a judge acting as a docile instrument of his or her government of origin.

Little information exists, however, about how Member States select their members for the Court of Justice; no thorough study has ever been conducted on who the judges of the Court of Justice are, their social backgrounds, and their political preferences.[[16]](#footnote-16) We know that the judges of the Court of Justice are chiefly professors, often of community, comparative, or international law; most of them have previous judicial experience in their Member State of origin, often as judges of the supreme courts or constitutional courts; not infrequently they have professional backgrounds as higher civil servants, politicians and lawyers. We also know that while the very first Court of Justice included members that were lacking any prior judicial experience (e.g. a trade unionist and an economist) and low-profile and soon-to-retired jurists, today the technical expertise of the members of the Court is generally high, with a predominance of the academic component. The prestige of the judges of the Court is generally superior to that of the EU law professors, and their annual salary is approximately € 250,000.

But about the judges of the Court of Justice we do not know much more. Notwithstanding the ‘contextual’ and political-science inspired approach of many of today’s legal studies on the EU, their tendency to abandon a purely legal-dogmatic approach to their subject, the mainstream legal doctrine has been largely unresponsive to Martin Shapiro’s call for ‘exposing ... the human flesh of its [the Court of Justice’s] judges’.[[17]](#footnote-17)

4. *The Advocates General*

The Court of Justice is assisted by eight Advocates General. Their presence is an original feature of the Court of Justice inspired by the *Commissionaires du government* who appear before the French *Conseil d’Etat*. They do not directly take part in the Court’s deliberations, but are subject to the same conditions of recruitment and are appointed by means of the same process as the judges, are subject to the same duties of impartiality and independence, receive the same salary and, according to the Court of Justice, ‘have the same status as the Judges, particularly so far as concerns immunity and the grounds on which they may be deprived of their office’.[[18]](#footnote-18) They act as a kind of institutionalised *amicus curiae* – an *amicus curiae* which is internal to the Court – and deliver a written opinion after the hearing and before the judgment. In the opinion, the Advocate General reviews the facts of the case, evaluates the arguments of the parties, reports the existing law and case law, and finally expresses a view on how the Court should decide.

Although it is difficult to assess the overall influence of the Advocates Generals’ opinions on the deliberations of the Court,[[19]](#footnote-19) their importance for its legal reasoning is beyond question. As shown by the analysis of the Sample of Great Cases of the Court, the arguments of the Advocates Generals are often upheld and reiterated by the Court using formulas such as ‘as the Advocate General correctly observed/noted/pointed out at paragraph … of her/his opinion’[[20]](#footnote-20). Most importantly, the opinions are indispensable for understanding what arguments might have influenced the Court without being explicitly endorsed in the final judgment and what arguments have been implicitly rejected. The judgments of the Court of Justice should be a self-sufficient text, but if we want to fully grasp their meaning we must make reference to the opinions of the Advocates Generals. Their legal reasoning is much more open and candid than that of the Court and it often takes into account factors such as budgetary and economic considerations, pragmatic concerns, policy issues, arguments based on equity, foreign judgments and doctrinal articles that might exercise a persuasive force upon the Court’s deliberations without being explicitly endorsed in the final judgment. We cannot appreciate the specific features of the Court’s legal reasoning without taking into consideration what Mitchel Lasser calls its ‘bifurcated structure’.[[21]](#footnote-21)

B. Arguments in Constitutional Reasoning

*1. ‘Constitutional Reasoning’ at the Court of Justice*

For the reasons outlined above, there are two possible ways in which the expression ‘constitutional reasoning’ can be understood. First, the Court of Justice engages in constitutional reasoning when it interprets the Treaties in order to rule on the validity of EU secondary legislation. In annulment proceedings and in preliminary proceedings on the validity of EU law, the Court of Justice is the *sensu stricto* constitutional court of the EU, at least according to the definition of ‘constitution’ here adopted, and the Treaties are, as the same Court of Justice solemnly declared, the ‘basic constitutional charter of a Community based on the rule of law’.[[22]](#footnote-22) In that context, the expression ‘constitutional reasoning’ could refer exclusively to the reasoning that is based on the text of the Treaties or that is intended to expound and develop its meaning.

Secondly, the Court of Justice engages in *sensu lato* constitutional reasoning when it evaluates the ‘European validity’ of national legislation and practises in preliminary ruling proceedings on the interpretation of EU law. Here the object of interpretation is not limited to the Treaties but comprises the whole body of EU law. As already mentioned, this kind of constitutional jurisdiction of the Court is not exclusive, nor supreme, nor direct – the intervention of national courts is necessary for removing the conflict between national law and EU law.

The indirect nature of the review exercised by the Court of Justice has one significant consequence for our research. In almost every preliminary ruling of the Court, it can be dubious whether it is exercising its *sensu lato* constitutional jurisdiction by indirectly controlling the compliance of Member States with EU law, or is simply doing what it says it is doing, that is, interpreting EU law in order to answer the questions referred by the national court. Thus, for the purposes of this study the *sensu lato* concept of constitutional reasoning is definitely too broad, as for every case analysed by the research the difficult question would be open, ‘Is this really a case of constitutional reasoning or is it just ordinary interpretation of the EU legislation?’. The answers to that question cannot be anything but speculative and controversial.

Therefore, this study did not take into consideration the arguments adopted by the Court of Justice for interpreting EU secondary legislation and analysed only the arguments adopted by the Court of Justice for interpreting the Treaties: what can be called *sensu stricto* constitutional reasoning, although it is a kind of reasoning that can be employed not only in case of action for annulment and preliminary questions on the validity of EU law but also in every other kind of judicial proceeding before the Court.[[23]](#footnote-23)

2. *The structure of constitutional arguments*

We found that the majority of the judgments (16) have a cumulative parallel structure,in which distinct, autonomous considerations lead to the same conclusion; a robust minority (14) exhibits one-line conclusive arguments – a self-standing structure,in which every premise is presented as a necessary component of the argument; 10 judgments contain parallel, individually inconclusive, but together conclusive arguments. It is worth noting that often the one-line conclusive arguments consist in one single argument, or even in no argument at all, when the Court limits itself to straightforwardly stating the interpretative conclusion of its (implicit) reasoning[[24]](#footnote-24).

Often the judgments do not make clear if the arguments they employ are *per se* sufficient to sustain the conclusion of the reasoning. However, in some cases the distinction between conclusive and inconclusive arguments is relatively easy, either because there is some textual basis available – e.g., the Court states that a conclusion ‘is confirmed’ by another argument, which presumably would not have been self-sufficient, and that an interpretation is ‘reinforced’ by a certain consideration[[25]](#footnote-25) –, or because the content and nature of the argument put forward by the Court makes it clear that it is not self-sufficient but merely reinforces other arguments.

It must be stressed that parallel, individually inconclusive, but together conclusive arguments do not imply that the judgment is ‘dialogical’ in the sense of adopting a discursive style of reasoning. By all means the style of the Court of Justice is not discursive; at times, however, the Court considers it appropriate to reinforce its line of reasoning by adding some further considerations in support of the conclusion. Thus, a decision such as *Van Gend en Loos* (1963) that is renowned not only for its importance in the development of Community law but also for the laconic and magisterial tone, exhibits parallel, individually inconclusive, but together conclusive arguments (‘This view is confirmed by the Preamble ... It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights ... Furthermore, it must be noted that the nationals of the states ... are called upon to cooperate in the functioning of this community...’).[[26]](#footnote-26)

3. *Analogies*

We found seven judgments in which the Court had recourse to analogical reasoning.

In *Bosman* (1995) the Court took into consideration the argument by analogy simply in order to dismiss it as irrelevant for the case. It held that ‘[t]he argument based on points of alleged similarity between sport and culture [could not] be accepted” because the issue of the case focused “on the scope of the freedom of movement of workers … which is a fundamental freedom in the Community system’.[[27]](#footnote-27)

In the broad majority of cases of recourse to analogy, the Court simply made reference to a precedent of its case law that could have been applied to the case at hand only ‘by way of analogy’, as the Court explicitly acknowledged: there was no identity between the prior decision and the issue of the case but still there were some similarities that suggested that the prior decision could have been extended to cover the new case. Reasoning through precedents and reasoning by analogy are of a different kind.[[28]](#footnote-28) Therefore, we considered as analogy only those cases in which the Court did not simply apply a precedent but declared explicitly that it was resorting to an analogical reasoning based on precedents.[[29]](#footnote-29)

One interesting case of analogical reasoning not based on precedents is *Brasserie du Pêcheur* (1996).[[30]](#footnote-30) Here, we actually have two different analogies. First, the Court held that a rule of international law on state liability applies ‘*a fortiori* in the Community legal order’ (*argumentum a fortiori* can be considered as a case of analogical argumentation). Secondly, it maintained that ‘the conditions under which the State may incur liability … cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances’.[[31]](#footnote-31)

4. *Establishing/debating the text of the Treaties*

We have not found any arguments dealing with this kind of issue.

5. *Applicability of the Treaties*

It is not surprising that we found no less than one-quarter of the judgments of the Sample (11 judgments precisely) discussing the applicability of the Treaties to the case at hand, or ruling on the matter without providing explicit arguments. The competences of the EU are governed by the principle of conferral and the EU legal order is a sectional legal order that does not claim to be complete in the sense of providing a solution for every possible controversy: certain matters fall outside the scope of EU law. Therefore, the issue of the applicability of the Treaties is quite common in EU law litigation. On the one hand, the so-called ‘vertical’ distribution of competences between the EU and the Member States is an object of frequent controversies upon which the Court may be called to adjudicate; on the other hand, in almost every legal proceeding before the Court of Justice the referring court, the private parties or the intervening Member States may find it appropriate to raise the question whether the matter falls within the province of EU law and challenge the jurisdiction of the Court of Justice or the competence of the EU.

In all cases except one the Court of Justice ruled that the issue of the case did not fall outside the scope of EU law.[[32]](#footnote-32) The arguments supporting that conclusion do not share any structural features and can be very diverse among themselves – teleological considerations, harmonisation arguments, implicit principles, and so on. However, in the case law of the Court of Justice there is one peculiar way of supporting the decision favourable to the applicability of the Treaties, a traditional argument that Loïc Azoulai calls ‘retained powers formula’ and that is virtually capable of eliminating or overcoming every positive limit to the applicability of EU law.[[33]](#footnote-33) While the classical formulation of this doctrine can be found in the *Schumacker* (1995) case and in the ‘British fishing vessels’ caseof 1991[[34]](#footnote-34) and its origins can be traced back to the *Steenkolenmijnen* (1961) and *Casagrande* (1974) cases[[35]](#footnote-35) (decisions not included in the Sample), in our study we found it in *Viking* (2007):

even if, in the areas which fall outside the scope of the Community’s competence, the Member States are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence, the Member States must nevertheless comply with Community law.[[36]](#footnote-36)

6. *Ordinary meaning of the words*

We found only six judgments in which reference to the wording of the Treaty was made in order to provide an argument in favour or against a certain interpretation of the Treaty, and in three of them the literal argument was taken into consideration and ultimately rejected by the Court on the basis of prevailing teleological and harmonising considerations.[[37]](#footnote-37)

According to many scholars and critics of the Court of Justice, the relative unimportance of text-based arguments is a remarkable feature of the legal reasoning of the Court of Justice that can be found also in its less important, judgments.[[38]](#footnote-38) However, given the nature of the Sample analysed by the research, the significance of this finding cannot be emphasised. The 40 judgments of the Sample were selected because of their impact on the legal culture of the Member States (e.g. *Lütticke*, *Simmenthal*, *Factortame*), because of their contribution to the completion of the common market (e.g., *Dassonville* and ‘Cassis de Dijon’), or because of their influence on the development of Community law. Therefore, the fact that literal arguments are almost absent from the Sample cannot be regarded as indicative of a general feature of the Court’s legal reasoning.

7. *Domestic harmonising arguments*

This argument is fairly common in the judgments of the Sample: we found 19 judgments which contained it. Actually this category comprises more than one argument as it identifies a family of arguments that share the structural feature of supporting a certain interpretation by referring to other legal.

Thus, under the heading ‘harmonising arguments’ we grouped, first of all, the cases in which the Court makes some generic reference to the ‘spirit of the Treaty’, ‘the whole scheme of the Treaty’, the ‘system’ established by the Treaty or by a Treaty provision or group of provisions, the ‘general system of the Treaty and its fundamental principles’, and so on, without specifying which are the provisions that articulate the system and embody the spirit. The case law of the Court of Justice is not short of generic references of this kind.[[39]](#footnote-39)

Secondly, we found numerous cases in which the Court clarifies the relationships between different provisions of the Treaty and constructs the rule of the case by reading a plurality of provisions ‘in conjunction’ with one another. In these cases, the scheme of the Treaty is not merely evoked by the Court but is concretely constructed by reference to the systematic reading of a group of Treaty provisions.[[40]](#footnote-40)

Thirdly, we found cases in which the Court states that a certain interpretation of the Treaty is ‘confirmed’ or ‘supported’ by other provisions of the Treaty, or in which it declares to be following considerations dictated by ‘the necessary coherence’ of the provision to be interpreted with other provisions of the Treaty, or in which it reads one provision in the light of some ‘fundamental principle’ of Community law in order to avoid internal conflicts and inconsistencies.[[41]](#footnote-41)

Fourthly, we considered instances of harmonisation argument to be those cases in which the Court adopts a certain interpretation in order not to ‘render meaningless’ other principles of Community law by depriving them of their ‘essential effectiveness’ or by compromising the achievement of the objectives set out in the Treaties.[[42]](#footnote-42) These cases differ from the former ones in that they assess the practical effects of the proposed interpretation and have reference to the objectives set out by the Treaty. Thus, this kind of harmonising argument is mixed in nature and can be regarded also as an instance of teleological argumentation: it is a teleological argument in which the Court declares that it intends to prevent a conflict with the objectives pursued by the Treaty as a whole or by certain Treaty provisions.

Finally, we considered instances of harmonising arguments as those arguments that make reference to the *sedes materie*, that is, arguments that are based on the internal systematic structure of the Treaties, as designed by the legislator.[[43]](#footnote-43)

8. *Harmonising with international law*

We found 14 cases in which the Court makes reference to international law sources in order to support the interpretation of the Treaty. The vast majority of references consist of a literal or almost literal quote from the *Nold* formula:

international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories can supply guidelines which should be followed within the framework of Community law.[[44]](#footnote-44)

In six cases the Court of Justice makes reference to the European Convention of Human Rights[[45]](#footnote-45) and in four cases we found references to the case law of the European Court of Human Rights.[[46]](#footnote-46) Moreover, we found references to International Labour Organisation conventions[[47]](#footnote-47) and to general principles of international law and customary international law.[[48]](#footnote-48) It is worth noting, however, that particularly in the cases in which the Court mentions the *Nold* formula, it is far from obvious whether the reference to international legal material has any direct bearing on the outcome of the case, or is merely rhetorical and declamatory in nature.

9. *Precedents*

The Court has made reference to its previous case law since the very beginning of its activity: the first example can be found as early as in a case of 1955[[49]](#footnote-49) and in 1956 the Court quoted a precedent as authority for the proposition that certain provisions of the ECSC Treaty were of a ‘fundamental character’.[[50]](#footnote-50) References to its case law became increasingly frequent in the 1970s and especially in the 1980s, possibly as a consequence of the accession of the United Kingdom and Ireland in 1973.[[51]](#footnote-51) Today the practice of relying on precedents is firmly established. Almost every decision of the Court contains extensive references to the case law and copy-and-paste quotations from earlier judgments.

Such evolution is reflected in the analysis of the 40 important judgments that we have undertaken. The first argument based on precedents that we found is a generic and unnamed reference to the previous case law in *Defrenne* (1976)[[52]](#footnote-52), and the first explicit reference is in *Ratti* (1979).[[53]](#footnote-53) From *Ratti* onwards we found only two judgments in which the Court does not make explicit reference to its case law[[54]](#footnote-54) while all other cases contain extensive and detailed references to previous rulings. In one case the Court (almost) explicitly overruled a previous decision.[[55]](#footnote-55) Overall we found 27 judgments in which the Court employs the argument from precedents.

10. *Implicit concepts and principles*

We found 20 judgments invoking concepts and principles not mentioned in the text of the Treaties as operative arguments supporting a certain constitutional interpretation. Such concepts and principles are the outcome of doctrinal construction on the part of the Court: they are not the product of the interpretation of the Treaty (they are not expressed in any given provision) but result from a heterogeneous set of (often implicit) non-interpretative argumentations. Some such concepts and principles constitute the ‘living constitutional law’ of the EU and the reason why the EU is often thought of as being international in origin but constitutional in nature.

Thus, the Court famously established that ‘[b]y contrast with ordinary international treaties, the EEC Treaty has created its own legal system’[[56]](#footnote-56) and that ‘fundamental human rights [are] enshrined in the general principles of Community law and protected by the Court’.[[57]](#footnote-57) The Court invented the principles of ‘uniformity and efficacy of Community law’, it held that ‘the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law’,[[58]](#footnote-58) and that ‘the right to reparation is the necessary corollary of the direct effect’.[[59]](#footnote-59) It laid down the keystone of the common market – the principle of mutual recognition[[60]](#footnote-60) – and theorised the existence of an ‘institutional balance’ among the different Community institutions – a balance that the Court is entitled to maintain by reviewing the observance of the various institutions’ prerogatives.[[61]](#footnote-61) Finally, the Court has created the rule according to which in case of a legal gap in the Treaties

it is for the Court … to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States.[[62]](#footnote-62)

In addition, since the beginning of its activity the Court has created a value-laden (‘axiological’) hierarchy between some of the provisions of the Treaty, qualifying as ‘fundamental’ the corresponding right or principle (e.g. the principle of equal pay for men and women, free movement of workers, free movement of goods, and so on); then, based on such a hierarchy, the Court has ruled that principles of fundamental nature must be interpreted broadly while exceptions and derogations must be interpreted strictly.[[63]](#footnote-63)

11. *Linguistic-logical formulae based on silence*

As is well known,[[64]](#footnote-64) the Court of Justice is very reluctant to adopt *a contrario* reasoning and in some of its earliest decisions it even theorised explicitly this attitude: ‘an argument in reverse is only admissible when no other interpretation appears appropriate and compatible with the provision and its context and with the purpose of the same’.[[65]](#footnote-65)

In the Sample we found five judgments employing the *argumentum a contrario*, and in four of them the argument was explicitly rejected. The Court held, for instance, that the existence of the infringement procedure does not exclude that individuals can plead the violation of Community law before the national courts,[[66]](#footnote-66) and that it does not follow from the fact that according to Article 189 EEC regulations are directly applicable that ‘other categories of legal measures mentioned in that article can never produce similar effects’.[[67]](#footnote-67)

The only case analysed by the research in which the argument was actually adopted by the Court is *Faccini Dori* (1994), in which the Court held that directives cannot have direct effect because the Community can enact obligations for individuals with immediate effect ‘only where it is empowered to adopt regulations’.[[68]](#footnote-68)

12. *Teleological arguments referring to the purpose of the text*

In the 40 judgments analysed by the research the teleological argument was used in no less than 27 cases, thus emerging as the most frequently employed argument in the Sample.

This finding is hardly surprising. Although in EU law there is no commonly accepted doctrine on the relative weight of arguments, teleological interpretation enjoys a distinguished record and a particularly strong standing before the Court of Justice. It is indicative in this regard that the ‘spirit’, that is, teleological argumentation, comes first in the list of interpretative methods formulated in *Van Gend en Loos* (‘...it is necessary to consider the spirit, the general scheme and the wording of those provisions’[[69]](#footnote-69)). The Court of Justice is well-known for having adopted the teleological method and the hallmark of the Court is to interpret the Treaties in the way that best fits their overall objectives. While it may be true that in the everyday activities of the Court recourse to teleological interpretation is less common than we are accustomed to think, nonetheless it cannot be denied that teleological interpretation is fairly important in those judgments that ‘have “famous status” and are continuously referred to in the literature’.[[70]](#footnote-70) Several judges of the Court have explained and justified that method in numerous writings and journal articles, in which they claim that the most appropriate way of fulfilling their office is to contribute to the achievement of the goals of the Community by bearing them in mind when interpreting the open-ended Treaties provisions and when filling the gaps of the Treaties[[71]](#footnote-71).

Particularly in the case of the Treaties, it is often impossible to sharply distinguish between teleological argumentation and systematic interpretation (‘domestic harmonising arguments’). The Treaties are imbued with teleology from top to bottom, as they are functional to a project of transformation of the legal orders of the Member States (‘an ever closer union among the peoples of Europe’, as is stated in the Preamble of the Treaty on European Union); they are ‘designed along functional lines’ and are ‘structured with a view to the Community’s achievement of the various objectives’ they establish.[[72]](#footnote-72) Systematic interpretation is meant to achieve coherence and consistency between the rules of the system; if these rules set forth goals and policy objectives, then systematic interpretation implies and includes teleological argumentation.

The distinction between teleological argumentation and systematic interpretation is therefore blurred in those cases in which the Court assumes that a provision of the Treaty must be interpreted in a way which is coherent with the goals and purposes established by the Treaty. For instance the Court held that

the objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the Contracting States.[[73]](#footnote-73)

And the Court also held that

[s]ince the Community has thus not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy.[[74]](#footnote-74)

In these examples, teleological interpretation and systematic construction are indistinguishable.

The distinction is clearer when the Court takes into consideration the practical consequences of the interpretive decision, which in turn it assesses in light of the objectives of the Union and of the principles of effectiveness and uniform application of EU law. This is a special kind of teleological interpretation: the guiding goal is the effectiveness of the provision the Court is about to interpret, or of other provisions of the Treaty, and therefore the Court examines the foreseeable extra-systematic consequences of the legal decision. For instance the Court held that ‘[t]he executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty’.[[75]](#footnote-75) It held that

[p]articularly in cases where … the Community authorities by means of a decision have imposed an obligation … to act in a certain way, the effectiveness (‘l’effet utile’) of such a measure would be weakened if the nationals of that state could not invoke it in the courts and the national courts could not take it into consideration as part of Community law.[[76]](#footnote-76)

The goals that the teleological argument may take into account can vary from being more or less determinate objectives set out in given Treaty provisions or groups of provisions to more abstract and indeterminate general principles such as the ‘social purpose of the Community’, the effectiveness of EU law, its uniform application, the goal of securing effective judicial protection, and so on. Sometimes, the goal that guides the teleological reasoning of the Court is totally indeterminate and unnamed: ‘the spirit of the Treaty’, ‘the objectives of the Treaty’, ‘the obligations undertaken under the Treaty’, ‘the framework of the structure and objectives of the Community’.

13. *Teleological arguments referring to the purpose of the Treaty-maker*

We found only one case in which perhaps it is possible to sustain that the Court has made reference to the subjective intentions of the framers of the Treaty, although the point is uncertain and open to different qualifications.[[77]](#footnote-77) References to the Preamble of the EC Treaty (‘... which refers not only to governments but to peoples ...’)[[78]](#footnote-78) can in no way be considered as instances of subjective teleological reasoning because the Court is not at all interested in what the framers had in mind – they are essentially devoted to reinforcing objective teleological argumentation by providing the Court with a supplement to all-encompassing goals and insights into the deep *raison d'être* of the Union.

Indeed, some early rulings by the Court resolutely denied any binding or even persuasive force to the original intentions of the (representatives of) the Contracting Parties, and this view was further articulated by some of the most authoritative judges of the Court in public speeches and journal articles.[[79]](#footnote-79) The reason publicly given is that the Court cannot rely on documents which have not been published and which are not, therefore, accessible to the general public.[[80]](#footnote-80) It is likely, however, that the guiding consideration is that the Court does not want to tie the future developments of EU law to the past intentions of the representatives of the Contracting Parties. Besides, international treaties are not usually interpreted in this way, by having recourse to the original intentions of the States’ representatives. The Vienna Convention on the Law of Treaties establishes a different criterion of subjective interpretation which the Court of Justice, however, does not follow: the Court does not make reference to the subsequent agreements between the parties nor to their subsequent practice in the application of the treaty.

Thus, subjective criteria of treaty interpretation are almost entirely absent from the legal reasoning of the Court. One may wonder whether things will change as a consequence of the increasingly frequent Treaties revisions in recent years,[[81]](#footnote-81) but for the time being we can conclude that the Treaties are interpreted like a constitution with no framers, or like an international treaty with no parties.

14. *Non-legal arguments*

We did not find any non-legal (moral, sociological, economic) arguments in the Sample. We found, however, some cases in which the Court dismissed a non-legal argument not because of it being unfounded and substantially wrong – which would count as a (negative) instantiation of non-legal argumentation and as such would have been recorded by the research – but because of it being non-pertinent to the case or *per se* irrelevant. In *Grogan*, for instance, the Court held that

Whatever the merits of those arguments [against abortion] on the moral plane, they cannot influence the answer to the national court’s first question. It is not for the Court to substitute its assessment for that of the legislature in those Member States where the activities in question are practised legally.[[82]](#footnote-82)

Moreover, on several occasions the Court of Justice made explicit profession of legal positivism and referred to a doctrine that might be called *dura lex sed lex*. In *Defrenne*, in *Bosman* and in other cases the Court held that

[al]though the practical consequences of any judicial decision must be carefully taken into account, it would be impossible to go so far as to diminish the objectivity of the law and compromise its future application on the ground of the possible repercussions which might result, as regards the past, from such a judicial decision.[[83]](#footnote-83)

In other cases not included in the Sample the same point was expressed even more clearly:

although … [the issue of the case] is a very sensitive social issue in many Member States, marked by their multiple traditions and value systems, the Court is not called upon … to broach questions of a medical or ethical nature, but must restrict itself to a legal interpretation of the relevant provisions.[[84]](#footnote-84)

It is interesting to note that the Court insists on the *dura lex sed lex* principle not only when it wants to reject arguments based on moral, economic or pragmatic considerations, but also when it actually wants to accept such non-legal arguments by introducing an exception to a legal rule, such as a limitation of the temporal effect of its ruling. So, in *Defrenne*, in *Bosman* as well as in *Barber* and in other cases the Court adds to the *dura lex sed lex* formula that it

may, by way of exception, taking account of the serious difficulties which its judgment may create as regards events in the past, be moved to restrict the possibility for all persons concerned of relying on the interpretation which the Court, in proceedings on a reference to it for a preliminary ruling, gives to a provision.[[85]](#footnote-85)

In this kind of cases, when the Court limits the temporal effects of its decisions on account of the practical consequences that they would have, it might be argued that it is having recourse to explicit moral (that is, non-legal) reasoning.[[86]](#footnote-86) However, the Court always mentions the principle of legal certainty – which is by all means a legal principle – as the determining ground of that limitation: ‘important considerations of legal certainty affecting all the interests involved, both public and private, make it impossible in principle to reopen the question as regards the past’.[[87]](#footnote-87)

Thus, it is debatable whether at present the legal reasoning practised by the Court leaves any room for arguments that are explicitly non-legal in nature.

It can be particularly difficult to distinguish non-legal arguments from arguments based on implicit principles, that is, principles not mentioned in the text of the Treaty but constructed by the legal doctrine and the case law. For instance, in *Faccini Dori* the Court held that ‘it would be unacceptable if a State, when required by the Community legislature to adopt certain rules … were able to rely on its own failure to discharge its obligations so as to deprive individuals of the benefits of those rights’.[[88]](#footnote-88) If that sentence were interpreted as stating that it is ‘morally’ unacceptable, then the sentence would be a case of a non-legal argument; if it were interpreted as stating that it is ‘legally’ unacceptable, then the Court would be relying upon an implicit principle, a sort of implicit doctrine of estoppel that would prevent the Member States from benefiting from their own breach of Community law.

Both interpretations are plausible, and the distinction between non-legal arguments and implicit principles seems thus to rely not on certain distinctive structural features of the reasons provided for by the Court but on the interpretation of the legal materials that we are ready to accept: the distinction between what is implicit in the law and what is external to the law is a matter of (normative) interpretation and thus cannot simply be observed as if it were a matter of fact.

15. *References to scholarly works*

While references to scholarly works are quite common in the opinions of the Advocates General, they are absent from the rulings of the Court.

16. *References to foreign law*

We found 13 references to foreign law, that is, to the law of the Member States. The vast majority of the references were ornamental and mechanical quotes from the *Internationale Handelsgesellschaft* formula: the protection of fundamental rights by the Court of Justice is ‘inspired by the constitutional traditions common to the Member States’.[[89]](#footnote-89) Thanks to the bridge provided by the ‘common constitutional traditions’, in the cases included in the Sample the Court has accepted as general principles of Community law the social function of the right to property,[[90]](#footnote-90) freedom of expression,[[91]](#footnote-91) freedom of assembly,[[92]](#footnote-92) human dignity,[[93]](#footnote-93) the principle of the non-contractual liability of the Community and of the Member States for loss and damage caused to individuals,[[94]](#footnote-94) the right to a fair trial,[[95]](#footnote-95) the principle of non-discrimination on grounds of age,[[96]](#footnote-96) the principle *nullum crimen, nulla poena sine lege,*[[97]](#footnote-97) the right to take collective action,[[98]](#footnote-98) and the right to be heard and right to effective judicial review.[[99]](#footnote-99)

However, we found only two cases in which the Court did not limit itself to declare that a certain rule results from the common constitutional traditions but engaged in an explicit comparison between the laws of the Member States[[100]](#footnote-100).

C. Key Concepts

1. *Form of state, form of government, federalism, democracy*

In the judgments of the Sample we did not find any reference to the ‘form of state’ (monarchy or republic) nor to the ‘form of government’ (parliamentary or presidential). These concepts can hardly be applied to the EC/EU and probably there is no significant reference to them in the whole case law of the Court of Justice. However, we did not find any reference even to analogous concepts that in political theory and in legal scholarship are intended to express some distinctive features of the EU or some normative expectations relating to the EU – notions that are current in the theoretical debate such as ‘constitutional pluralism’, ‘mixed constitution’, ‘multilevel governance’, or even the evergreen notion of the *sui generis* nature of the Community. Generally speaking, we did not find any reference to concepts that refer to the EC/EU as a political community in its own right – while we are not short of references to concepts that relate to the Community as autonomous legal order.

We considered nonetheless that ‘federalism’ was mentioned in one judgment in which the Court rejected an argument by the German Government based on the principle of subsidiarity.[[101]](#footnote-101) We did not consider that ‘federalism’ was mentioned when the Court made reference to the principle of loyal cooperation based on Article 4(3) TEU (former Article 5 TEC), although it is interesting to note that the label ‘loyal cooperation’, which is obviously a *calque* from the German concept of *Bundestreue*, appeared for the first time in 1991[[102]](#footnote-102) and, among the judgments analysed in the research, was employed in *Pupino* (2005)[[103]](#footnote-103). Prior to that judgment, the Court had used the expression ‘principle of cooperation’[[104]](#footnote-104) or the ‘obligation to cooperate’,[[105]](#footnote-105) or had simply quoted the text of Article 5 TEC (‘Member States shall take all appropriate measures ... to ensure fulfilment of the obligations...) without adding any ‘federalist flavour’ to that formula.[[106]](#footnote-106)

The Court of Justice tends to refrain from having recourse to concepts that refer to the EC/EU as a political authority. It is revealing in this regard that in the Sample there are only two cases in which the Court mentioned the democratic principle and it did so only in passing, in *obier dicta* that were irrelevant to the decision of the case.[[107]](#footnote-107)

It is true that, starting from the ‘Isoglucose judgments’ of 1980,[[108]](#footnote-108) the Court has often upheld the prerogatives of the Parliament on the basis of what it calls ‘the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly’.[[109]](#footnote-109) The participation of the Parliament in the legislative process constitutes, according to the Court of Justice, ‘an essential formality disregard of which means that the measure concerned is void’.[[110]](#footnote-110) Recently, the Court has even made reference to the ‘importance of the Parliament’s role in the Community legislative process’.[[111]](#footnote-111)

However, in the case law of the Court of Justice appeals to the democratic principle are the exception rather than the rule. Maybe this is due to the fact that in the context of the EU they run the risk of being intrinsically divisive and cannot easily be employed to strengthen the role of the European Parliament. Indeed in the EU it is far from clear where the locus of democracy lies – whether in the representative institution of the European Parliament, in the intergovernmental institutions of the Council of the EU and the European Council, in the indirect control exercised by the national parliaments and by other national authorities, or whether the legitimacy of the EU is essentially an ‘output legitimacy’ provided by technical bodies such as the European Commission, the Court of Justice and the European Central Bank. No institution can claim a monopoly on democratic legitimacy, and therefore in the case law of the Court of Justice references to democratic legitimacy provide little more than a rhetorical flourish in a small number of judgments not included in the Sample.

2. *Sovereignty and Nation*

What we have just said about the difficulty of the Court of Justice in employing concepts that imply or refer to the political nature of the EC/EU – concepts that therefore are liable of having a divisive effect in the context of the Union – applies *a fortiori* to the concept of (political) sovereignty and to the concepts of nation and supranational.

With regard to sovereignty, it can be safely said that the Court is very conscious of the political environment in which it operates and often takes into consideration the political dimension of the sovereignty of Member States – the salience of national interests and identities involved in the controversies before the Court and the autonomy of the national political authorities. Even before the Treaties of Maastricht and Lisbon introduced the obligation of the Union to respect the national identities of the Member States (Article 4(2) TEU), deference to national sovereignty has made its way into the explicit legal reasoning of the Court by means of a (rather rudimentary, in comparison with the case law of the European Court of Human Rights) margin of appreciation doctrine.[[112]](#footnote-112) The Court of Justice acknowledged that

depending on the circumstances, the competent national authorities have a certain degree of discretion when adopting measures which they consider to be necessary in order to guarantee public security in a Member State.[[113]](#footnote-113)

The Court employed the concept of *marge d'appréciation* in order to show respect for the political sovereignty of the Member States in areas such as public policy,[[114]](#footnote-114) public morality,[[115]](#footnote-115) public health,[[116]](#footnote-116) and fundamental rights protection.[[117]](#footnote-117)

However, the concept of sovereignty as such does not play a decisive role in the legal reasoning of the Court, as demonstrated by the fact that we were able to find only three references to this concept in the Sample. This probably depends on the intrinsically polemical nature of the concept: the question ‘who is (still) sovereign in the EU?’ has produced a growing body of scholarship, but it is not the kind of question that can be easily addressed and solved *ex cathedra* within the confines of the legal process. For the Court of Justice to declare the sovereign nature of the Community would be as pointless and counterproductive as declaring the definitive abandonment of Member States’ sovereignty. Declarations of this sort would stir up harsh controversy and certainly could not contribute to the persuasive force of the judgment.

Thus, the discourse on the limitation of Member States’ sovereignty appears in a few foundational judgments of the 1960s and early 1970s,[[118]](#footnote-118) and soon tends to disappear from the case law of the Court. In the Sample we found it solely in *Van Gend en Loos* (1963), in *Costa* (1964) and in Opinion 1/91 on the incompatibility with Community law of the EEA: ‘the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights’.[[119]](#footnote-119) Even in these judgments, however, it is clear that the Court is using the word ‘sovereignty’ in quite a broad and generic sense, as synonymous with a bundle of competences and powers that the States are free to limit and transfer to the Community.

When the Court intended to establish the principle that Community law does not derive its binding force from the law of the Member States and is not subordinate to their constitutions and statutes – which can be called the legal concept of sovereignty, as opposed to the political concept – it reasoned in terms of *primauté* (primacy, supremacy) of Community law and autonomy of the Community legal order, and carefully avoided the lexicon of sovereignty. Therefore, we have considered these concepts as being corollaries of the concept of rule of law (see below) rather than instances of the concept of sovereignty: maintaining that *Kadi* revolves around the sovereignty of the EU would be overly emphatic, bizarre and confusing, while it is fair to say that the issue at stake under the label of ‘autonomy of Community law’ was the respect for the rule of law.

Similar considerations apply to the concept of nation and to the characteristically European neologism of ‘supranational’. Given their potentially divisive nature, these concepts are not frequently used in the legal reasoning of the Court[[120]](#footnote-120). They are not mentioned in the judgments analysed in the research, with the sole exception of *Bosman* (1995), in which the Court dismisses the argument that the ‘nationality clauses’ (rules restricting the extent to which foreign players can be fielded in a match) are justified on non-economic grounds by arguing that there is nothing qualitatively distinct about the kind of belongingness conveyed by the concept of nationality in comparison with other kinds of links, such as locality, town and region.[[121]](#footnote-121)

It can be argued that the kind of reasons expressed by the concept of nation are already partially conveyed by the above-mentioned notion of margin of appreciation and by other tools that allow the Court to show deference for national values and identities. Sometimes the Court accepts that principles of national constitutional law provide a sufficient ground for the restriction of fundamental freedoms under EU law but it usually avoids making reference to the concept of national constitutional identity as justification. The Court has acknowledged that ‘the preservation of the Member States’ national identities is a legitimate aim respected by the Community legal order’,[[122]](#footnote-122) but it has made reference to that concept only in a few occasions and always in passing.[[123]](#footnote-123)

3. *Substantive legal principles, fundamental rights, equality and basic procedural rights*

We found no reference to the concepts of secularism in the Sample. The right to respect for family life, which can be considered an aspect of the right to privacy, is relevant in *Carpenter* (2002), and the concept of human dignity is crucial in *Omega* (2004). Moreover, we found two other in passing references to the concept of human dignity which both are immaterial for the case,[[124]](#footnote-124) and four references to freedom of expression. Of these four references, one is a mere *obiter dictum*[[125]](#footnote-125), two are substantive and relevant for the case,[[126]](#footnote-126) and the last one is relevant because it allows the Court to discharge the case by holding that it is outside the scope of the Treaty and relates exclusively to principles of domestic constitutional law.[[127]](#footnote-127)

References to the principle of equality and to basic procedural rights such as the right to judicial review, the right to a fair trial, the rights of the defence and the principle of the legality of criminal offences and penalties are much more common in the Sample (10 and 5 respectively). In some cases these are the main substantive principles, or one of the main substantive principles, that the ruling of the Court takes into consideration: they have immediate operative force on the judgment and are employed, or at least could be employed, in order to guarantee some fundamental individual liberty.[[128]](#footnote-128) In other cases, however, the principle of non-discrimination and the procedural rights (in particular, the need to guarantee effective judicial protection) are used by the Court first and foremost for affirming not individual rights but certain structural principles of Community law such as direct effect and supremacy.[[129]](#footnote-129)

Finally, with regard to the substantive legal principles and fundamental rights referred to by the Court of Justice in the Sample, it is worth noting the relatively high number of cases that dealt with or mentioned correlative notions such as proportionality (10 judgments[[130]](#footnote-130)) and the ‘very substance’ (*Wesengehalt*) of fundamental rights (three judgments[[131]](#footnote-131)). In these judgments the fundamental rights discourse of the Court exhibits certain features that, as Mattias Kumm notes, are remarkably new and distinct from the traditional conception of fundamental rights[[132]](#footnote-132): fundamental rights stop being thought of as indefeasible rules that work as ‘trumps’ against any illegitimate exercise of public authority and come to resemble generic and defeasible reasons that the Court of Justice, in the same way as every other authority, should take into consideration when adjudicating on public policy issues.

4. *Rule of Law*

It comes as no surprise that among the key concepts taken into consideration by the analysis of the 40 important judgments of the Court of Justice, the rule of law occupies the dominant position. No less than 14 judgments invoke the concept either explicitly or implicitly by having recourse to notions that are identical to or implied by the principle of the rule of law, such as legal certainty, legality, non-retroactivity and – particularly important in the context of the EU – uniform application of EU law and autonomy of its legal order.

In fact, as Bogdandy rightly noted, most of the Court’s great judgments are not meant to implement substantive legal principles, but focus instead on “furthering integration through ensuring that the results of the political process, i.e. primary or secondary law, are enforced”.[[133]](#footnote-133) Instead of human dignity and fundamental rights at the centre of the case law of the Court of Justice we find the principles of the rule of law, direct effect and supremacy, legal certainty and legitimate expectation, uniform application and effective judicial protection. ‘There seems to be a mismatch between the range and depth of the EU activities and the tiny number of human rights cases involving EU intrusion brought – or the even smaller number which are successful’.[[134]](#footnote-134)

This can be shown by comparing the scarce and somewhat subdued references to fundamental rights with the references to the notion of the rule of law. From the beginning, the ECs were conceived as communities based on the rule of law in order to express the idea that, as they were lacking the means of physical coercion, voluntary compliance with Community law was the only basis upon which their objectives could be achieved. The rule of law was the first classical constitutional principle to be claimed for Community law, and today it is commonly regarded as one of the foundational principles legitimating the constitutional order of the EU.[[135]](#footnote-135)

The principle of the rule of law plays a crucial role in strengthening the authority of the EU institutions, and in particular the authority of the Court of Justice, *vis-à-vis* the Member States, as clearly expressed in the often-quoted maxim from *Les Verts*:

the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. In particular ... the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions.[[136]](#footnote-136)

According to the Court of Justice, respect for the principle of the rule of law implies that Community law cannot be overridden by domestic legal provisions,[[137]](#footnote-137) and ‘imposes upon all persons subject to Community law the obligation to acknowledge that regulations are fully effective so long as they have not been declared to be invalid by a competent court’.[[138]](#footnote-138) The validity of Community law can only be judged in light of the Treaties and cannot be affected by its alleged incompatibility with domestic constitutional rights[[139]](#footnote-139) or with domestic rules as to the division of powers between constitutional authorities.[[140]](#footnote-140) The national courts do not have the power to declare acts of the Community institutions invalid[[141]](#footnote-141): only the Court of Justice can do so and, when needed, it can also limit the temporal effects of its judgments taking into account ‘overriding considerations of legal certainty’.[[142]](#footnote-142)

In this respect, the principle of the rule of law seems to undergo a significant transformation once it is applied to the European institutions. While, in the national setting, the rule of law is generally conceived as a principle that limits the pre-existing coercive powers of the state, at the European level it appears to be a principle that constitutes and justifies the authority of the Community institutions.

D. The Context of Constitutional Reasoning

1. *Academic context: legal scholarship as context for constitutional reasoning*

The attitude of legal scholarship towards the Court of Justice changed over the course of time. As Joseph Weiler noted, until the publication in 1986 of Hjalte Rasmussen’s *On Law and Policy in the European Court of Justice*, in virtually all books on the Court of Justice ‘the underlying ethos [was] one of praise and admiration’ and criticism of the Court was ‘muted and on most occasions confined to specific cases or areas of jurisprudence and not the overall posture of the court’.[[143]](#footnote-143) The legal doctrine surrounding the Court was highly supportive of its constitutionalising efforts. All the landmark decisions of the Court in the 1960s and 1970s were welcomed by the enthusiastic support of a ‘comprehensive transnational network of European minded jurists’[[144]](#footnote-144): a relatively small group of scholars, often professionally involved in the EC institutions, who were very active in terms of publications as well as very homogeneous in terms of professional ethos and value choices. Dissenting voices were usually confined to the few writings of the traditional academic jurists, who were more prestigious in terms of cultural legitimacy but ultimately un-influential on the developments of the case law.[[145]](#footnote-145)

Following the Maastricht Treaty (1992), the attitude of the legal doctrine started to change fast. As the political relevance of the European institutions significantly increased, the academic interest and the quantitative dimension of the EU legal scholarship grew enormously. The composition of the EU legal scholarship changed and became more internally differentiated both with regard to the methodological perspectives (traditional expository jurisprudence and legal dogmatics were now joined by the new ‘law in context’ tendencies of a legal scholarship informed by political science, by the new constitutionalist and ‘principled’ approaches characteristic of a normatively oriented jurisprudence, and by cultural and critical legal studies) and with regard to normative assessments of the Court of Justice’s role and case law.[[146]](#footnote-146) Today’s legal doctrine is far less deferential towards the Court than it used to be. Indeed, it seems fair to say that almost every piece of legal doctrine dealing with the Court must now contain, in order to be appealing and publishable, a normative (better, critical) assessment of certain aspects of its case law.

2. *Legal and political culture as context for constitutional reasoning*

In the 1990s, political science and international relations theory engaged in a debate on the degree of responsiveness of the Court of Justice to perceived national interests and to other environmental factors. Theorists inspired by realism (or intergovernmentalism)opposed a neo-functionalist interpretation of the Court’s role in European integration according to which the driving forces of the constitutionalisation process successfully initiated by the Court in the 1960s and 1970s were to be traced not in the national interests but in the inputs coming from private litigants (mainly private companies and professional associations) and from lower-ranked national courts.[[147]](#footnote-147) While the debate did not reach any firm conclusions, it is undeniable that the Court exercised its most active and creative role after the ‘Empty Chair Crisis’ (1965-1966), which provoked the end of any ambition of political protagonism by the Commission (until the Delors presidency in 1985-1994), a long-lasting legislative gridlock at European level and the so-called ‘Eurosclerosis’ – the perceived stagnation of the Community project. According to a famous interpretation by Jospeh Weiler, the end of the ‘institutional supranationalism’ determined by the Empty Chair Crisis triggered the Court to strengthen ‘normative supranationalism’ by pursuing the politics of the judicial constitutionalisation of the EC Treaties.[[148]](#footnote-148) In turn, following the Maastricht Treaty and the beginning of the ‘semi-permanent Treaty revision process’,[[149]](#footnote-149) the approach of the Court changed significantly: it became more cautious and sometimes committed to self-restraint.[[150]](#footnote-150) The closer scrutiny on the Court exercised by an enlarged and not always friendly legal community is likely to have had an influence on the changing attitude of the Court.

E. General characteristics of the constitutional discourse

The general style of the Court’s legal reasoning[[151]](#footnote-151) depends on a series of factors which will be briefly presented here: the collegiate nature of the judgments of the Court of Justice, their subject matter, the declining but persisting influence of the French model, the need for translation and informatisation, the extensive use of precedents and literal self-quotations, and the contradictory and unsettled status of the Court of Justice as *sensu lato* constitutional court of the European legal space.

1. *The collegiate nature of the judgments*

The first factor consists in the committee decision-making procedure adopted by the Court, which is typical of European civil law jurisdictions. The collegiate nature of the judgment implies that dissenting opinions are not allowed and the decision is the outcome of the collective work of the whole collegium. Moreover, within the Court the attempt is usually made to achieve the broadest possible consensus. This affects the quality of the legal reasoning developed by the Court: in the words of one of its judges, Pierre Pescatore,

the system of collegiate deliberation adopted by the Statute of the Court has the consequence of ‘laminating’ the grounds of the judgment up to the point that they lose every relief. We are far away from the colour of the judgments of the English judges.[[152]](#footnote-152)

Especially to common law eyes, the Court seems to confirm the old saying that a camel is a horse designed by a committee.[[153]](#footnote-153) As another judge of the Court once noted, the ‘need to render judgments that are acceptable to all the signatories’ frequently forces the Court to adopt a ‘oracular tone’ and to express ‘stunted reasoning’.[[154]](#footnote-154) Thus, when there are two lines of reasoning leading to the same conclusion and there is disagreement within the Court as to what are the best arguments for the case, the Court often adopts a middle-ground solution that, however, might be unsatisfactory for both sides.[[155]](#footnote-155)

2. *The subject matter of the judgments and their non-constitutional tone*

The second element affecting the general style of the judgments of the Court depends on their subject matter. The majority of the Court’s judgments deal with the daily management of the internal market and thus with detailed and highly technical regulations. The judgments that present a constitutional tone are quite rare. In turn, it is not unusual to find judgments that are concerned with interpretative questions such as “

whether the words ‘emballés séparément’ (packaged separately) refer to ‘morceaux désossés’ (boned or boneless cuts) or whether they refer on the contrary to the exception made for les ‘joues, les abats, le flanchet et le jarret’ (the chaps, the offals, the thin flanks and the shin).[[156]](#footnote-156)

The Court has ruled on the distinctive features of slide fasteners[[157]](#footnote-157) and has carefully reconstructed the manufacturing process of xanthan gum.[[158]](#footnote-158) On more than one occasion it has been called to expound the concept of pyjamas.[[159]](#footnote-159)

True enough, the case law of the Court is not short of decisions of the greatest importance, and the Sample analysed by the research includes cases of the utmost constitutional significance. However, generally speaking, the grounds that the Court employs in order to decide the constitutional issues upon which it is sometimes called to adjudicate are characterised by a certain understatement. The Court might well be one of the many constitutional courts of the European legal space, but it tends to conceal its status as far as possible. Occasionally in the judgments of the Court it is possible to find declamatory political statements such as the often-cited *dictum* in *Grzelczyk* (‘Union citizenship is *destined* to be the fundamental status of nationals of the Member States’[[160]](#footnote-160)), but in principle the Court sticks to a legalistic and unpretentious understanding of the way in which its reasoning ought to be framed.

The traditional understatement of the Court might well be due to pragmatic reasons. As the authority of the Court depends upon the continuing collaboration of the national courts, it is understandable that, in order to avoid offending their constitutional (national) sensibilities, the Court might be willing to keep a low profile, highlight the strictly technical grounding of its rulings and eschewing constitutional rhetoric. After all, in preliminary ruling proceedings on the interpretation of EU law the Court of Justice is a constitutional court only *sensu lato* and its rulings enjoy a supremacy that is conditional and negotiated. However, the approach of the Court may also have its drawback in terms of legitimacy, as it can easily be interpreted as a lack of constitutional awareness or sensibility. In its characteristic role of promoter and guardian of the internal market, the Court may well appear to disregard the constitutional traditions of the Member States and, more generally, any non-market based legal principles.

 “The cryptic, Cartesian style which still characterizes many of its decisions” and “its pretence of logical legal reasoning and inevitability of results” may not be, according to the critics of the Court, “conducive to a good conversation with national courts”.[[161]](#footnote-161) According to this criticism, by eschewing constitutional rhetoric the Court falls short of its role of *sensu lato* constitutional court of the European legal space. In contrast, in order to broaden and deepen the constitutional dialogue with the national courts, the Court should attempt as much as possible to identify and develop the general principles of a common European legal culture.

3. *The influence of the French model*

The traditional understatement of the Court and its tendency to avoid constitutional rhetoric and bold political statements are certainly linked to the diminishing but still present influence of the French model.

At the beginning of its activity the Court of Justice adopted a style of legal reasoning based on that of the French courts: “formal, terse, and abstract”;[[162]](#footnote-162) “a terse and opaque summary of the outcome and the reasons for it”, expressed in a “strictly deductive form”.[[163]](#footnote-163) The French version of the judgments was written according to the typical French and syllogistic model of the *attendus que*. As a result, the Court reached “a stern, authoritarian style, expressed in a single-sentenced statement in which shines a single subject (the Court)”.[[164]](#footnote-164)

In 1979 the Court abandoned the model of the *attendus* in order to favour a more discursive style of argumentation, but its judgments remained strongly structured and somewhat rigid. Arguments are introduced with standard phrases such as “it must be observed that”, “it must be pointed out that”, “it is clear that” and “it follows from the foregoing that”. According to their critics, the decisions of the Court still tend to be “short, terse, and magisterial decisions that demonstrate tremendous interpretative confidence and suggest a certain logical compulsion”.[[165]](#footnote-165)

However, the importance of this factor affecting the general style of the Court of Justice’s legal reasoning should not be overemphasised. The influence of the French model has gradually declined and the judgments of the Court have started to deal with possible counter-arguments raised by the parties to the proceedings as a matter of course.[[166]](#footnote-166) The change has been rightly described as a “stylistic earthquake” that occurred when the Court, in order to communicate more effectively with the national judges through the vehicle of the preliminary ruling procedure, embraced a more dialogical style of legal argumentation, “testing its reasons with a more thoughtful motivation and exposing itself to the controversial debate of scholarship”.[[167]](#footnote-167) It is indicative in this regard that the average length of the Court’s decisions has increased in the course of time: from the laconic brevity of its first judgments it reached the 380 paragraphs and 29,000 words of the *Kadi* judgment of 2008.[[168]](#footnote-168)

4. *Impersonality: translation, informatisation and the use of precedents*

Written in French, the judgments of the Court of Justice are designed to be translated into every official language of the EU.[[169]](#footnote-169) This has significant consequences for the kind of prose that the Court is able to employ: “Write simple and uncluttered sentences, use the simplest possible vocabulary, avoid abstract and learned terms”,[[170]](#footnote-170) recommends the *Vade-mecum* that Pierre Pescatore wrote for his colleagues at the Court of Justice. His suggestion has been generally followed by the practice. The Court of Justice tends to avoid rhetorically shaped, ornate language, elegant and brilliant prose, as well as abstract conceptualism and academic thoughtfulness. It prefers plain terms, a simple and compact style and, above all, impersonality.[[171]](#footnote-171)

Even if it were true that “over the years, the Court of Justice has developed not just its own style, but undoubtedly a unique way of looking at and interpreting Union law”,[[172]](#footnote-172) the style of the Court would be unique but certainly not characteristic. Even from the viewpoint of a civil law lawyer, let alone from the viewpoint of a common law lawyer, one of its striking aspects is the high degree of impersonality that it strives for and is able to achieve in its judgments.

Impersonality is a consequence of the need for translation as much as of the need for informatisation. The *rationes decidendi* of the Court of Justice’s rulings tend to be standardised in order to be stored and retrieved using database queries so as to be easily quoted by subsequent judgments. Already in the 1980s the Court of Justice began to show ICT awareness, recognised the need for informatisation and begun to draft its judgments accordingly, taking into consideration the requirement for information retrieval: according to Pescatore’s *Vade-mecum*, “legal reasoning, even when it is complicated, should eventually be reduced ... to simple options that are compatible with the work of the machine”.[[173]](#footnote-173)

Another remarkable feature of the legal reasoning of the Court of Justice is the extensive use of copy-and-paste quotations from the previous case law. The Court wants to avoid originality at all cost. The reason for this is not economic in nature – it is not a matter of preventing waste of time or the hard intellectual labour of thinking anew about the best arguments for the case. Copy-and-paste quotations create (an appearance of) consistency in the case law or – to put it in a more precise way – they create redundancy[[174]](#footnote-174): they show that the decision of the case is deeply embedded in a long line of decisions repeating the same legal principle and, by doing so, they provide legitimacy for the judgment and the Court. Thus, the extensive use of precedents, literal self-quotations and typical formulas by the Court of Justice has much to do with the need for standardisation and self-legitimation of a court that operates in a pluralistic legal space and that is actively engaged in a constitutionalisation process. Redundant self-quotations create the perception of stable reference points in a highly uncertain legal and political environment.

In any case, copy-and-paste quotations tend to eliminate any personal or idiosyncratic elements in the justification of the judgment. As noted by Loїc Azoulai, it is as if the judgments of the Court were “the result of a complex kind of ‘collage’ of judicial formulas”, i.e. of doctrines and *rationes decidendi* formulated in the landmark decisions of the Court of Justice: “This collage effect is typical for Community case law – to such an extent that in some cases it may seem as if it is the formulas which are speaking, instead of the Court and the preferences of its members”.[[175]](#footnote-175)

5. *Framing the constitutional issues as non-constitutional issues*

Of the 40 cases included in the Sample, 14 dealt with fundamental rights issues, four with issues relating to the organisation of the Community and in particular to the “horizontal” division of competences between the institutions of the EC/EU, and 24 dealt with other issues such as the system of sources and the legal effects of European legal acts, the interpretative duties incumbent upon national judges, the civil liability for the violation of European law and the governing principles of the common market. Two cases (*Defrenne*, 1976, and *Mangoldt*, 2005) can be regarded as involving both fundamental rights issues (non-discrimination on the grounds of sex and age) and issues relating to the effects of the rules of European law.

The significance of the relatively high number of important judgments that deal with or mention fundamental rights can easily be misunderstood. EU legal scholarship tends to consider as more important those judgments that exhibit and refine some sort of doctrine of fundamental rights and principles. The frequency of important judgments on fundamental rights issues should be regarded as much more revealing of the prevailing constitutionalist tendencies of EU legal scholarship than it is of the features of the legal reasoning usually adopted by the Court. In fact, from the 1960s onwards there has been an increasing doctrinal and institutional pressure on the Court for it to embrace what might be called – no irony is meant – “constitutional rhetoric”: a narrative style of reasoning and argumentative form that resembles that of other constitutional courts and rights-based jurisdictions such as the US Supreme Court, the German Constitutional Court and the ECtHR.

The institutional pressure on the Court results from a series of initiatives that can be traced back to the “Declaration on the European Identity” of 1973, which created the notion of the “special rights” of European citizens, and which became increasingly important in the European constitutional debate following the Maastricht Treaty. The Maastricht Treaty and the subsequent amendments to the Treaties adopted at Nice, Amsterdam and Lisbon solemnly entrenched certain constitutional principles as founding principles of the EU and eventually led to the adoption of the Charter of Fundamental Rights of the European Union. In the long run, the adoption of the Charter and of the language of rights is likely to have an increasing effect on the way in which the Court of Justice constructs the cases upon which it is called to decide.[[176]](#footnote-176)

The legal culture and the political environment surrounding the Court generally endorse these tendencies by urging the Court to adopt a different and more principled style of legal argumentation. As the Community has evolved from a market organisation into a more comprehensive form of constitutional entity, so the reasoning goes, the Court of Justice should stop being the promoter of an integration process entirely based on market freedoms and start to “take (other) rights seriously”.[[177]](#footnote-177)

The criticism of the rather uninspiring style of legal argumentation adopted by the Court of Justice is often based on the theory of deliberative democracy – democracy as a form of government that allows for open, public and principled argumentation leading to rational consensus – and/or on the adoption of an ideal of constitutional patriotism, according to which constitutional discourse can be crucial for fostering a sense of civic identity.[[178]](#footnote-178) Those who require legal culture to contribute to the forging of the “We, the Europeans” expect the Court of Justice to expound and develop, if not the ethical foundations of the Union as the common constitutional home of the Europeans, at least the substantive reasons for its decisions. The adoption of the language of rights is seen as a necessary step towards the construction of a feeling of shared identity and the development of a common “constitutional conversation” with the other courts of Europe.[[179]](#footnote-179) It is uncertain whether the style of legal reasoning has any connection whatsoever with the content of the decision – a point against which legal realists would be willing to argue – but the promoters of the language of fundamental rights mainly recommended it for its alleged ability to foster the legitimacy of the legal system (and of the Court).[[180]](#footnote-180) The strong idea underlying these proposals is that the content of the Court of Justice’s decisions may sometimes be less important than the communication that precedes and follows those decisions: the legal reasoning and the public discourses that they promote.

Especially when litigation revolves around national measures impinging on the principles of free movement, the Court of Justice has generally resisted such tendencies. Although it is true that the Court of Justice has accepted that the protection of fundamental rights may occasionally take priority over the market freedoms,[[181]](#footnote-181) its case law on human rights is at least cautious – according to the critics of the Court, it is symbolic, insufficient or merely instrumental.[[182]](#footnote-182) In terms of number of cases decided by the Court of Justice, its role in the field of fundamental rights protection is by far more limited than that of a national constitutional court.[[183]](#footnote-183) Generally speaking, the Court of Justice still strives to eschew constitutional rhetoric and resists the call to become another fully fledged human rights jurisdiction alongside the constitutional courts of the Member States and the ECtHR.

6. *Conclusions*

According to the reading here proposed, this modest and, so to say, “unconstitutional” approach or style of the Court of Justice depends not only on the history of the Court – the declining influence of the French model – and its institutional features – the subject matter of the judgments, their collegiate nature and the need to preserve the independency of the Court – but also on a structural feature of this *sui generis* jurisdiction, that is, its “less-then-constitutional” standing *vis-à-vis* the national courts – what we have called the *sensu lato* constitutional nature of the Court. As the authority of the Court is a matter of dialogue and negotiation with the national courts, the Court may avoid a fully fledged constitutional rhetoric in order not to offend their constitutional identities and escape the rush for the monopoly of constitutional adjudication in the European legal space.

Things might change, of course, and in many respects have already.[[184]](#footnote-184) The *Kadi* case (2008) provides a major example of the new tendency, and also *Les Verts* (1986) and the Opinion 1/91 can be mentioned as cases of self-conscious constitutional language in the area of institutional organisation. The terse and laconic style of the first judgments of the Court of Justice has largely been abandoned and since the 1980s the judgments have become considerably longer. Today nobody would argue that they stick strictly to the French model of administrative jurisdiction. The adoption of the Charter of Fundamental Rights and the move of the EU into policy areas like police and judicial co-operation in criminal matters are likely to strongly affect the legal reasoning of the Court of Justice. The Court will have to address fundamental rights issues more openly.

For the time being, however, the Court has continued to avoid, as far as possible, the language of fundamental rights and constitutional principles: it speaks “strict legalese” and stays away from political rhetoric and vibrant moral calls. Its judgments seem to strive for “a simple and direct style”,[[185]](#footnote-185) not for brightness and depth, and they run the risk of being dry and boring, not emphatic and pompous.

1. \* Researcher in Philosophy of Law, University of Brescia. Comments are welcomed: giulio.itzcovichi@unibs.it. The decisions that are included in the sample of 40 leading cases analysed by the research (hereby ‘the Sample’) will be quoted in shortened form; the decisions that are not included in the Sample will be quoted in the usual complete form

 See e.g. L. Azoulai, ‘Le rôle constitutionnel de la Cour de Justice des Communautés européennes tel qu’il se dégage de sa jurisprudence’, *Revue trimestrielle de droit européen*, 44/1 (2008), 29–46; E. Sharpston, G. De Baere, ‘The Court of Justice as a Constitutional Adjudicator’ in A. Arnull et al. (eds.), *A Constitutional Order of States?* *Essays in EU Law in Honour of Alan Dashwood* (Oxford, Portland: Hart, 2011), 123–150. [↑](#footnote-ref-1)
2. Council of the EU, *IGC 2007 Mandate*, document 11218/07, 26 June 2007, at 3. [↑](#footnote-ref-2)
3. Paradigmatic in this regard is R. Schuman, ‘Préface’ in P. Reuter (ed.), *La Communauté Européenne de Charbon et de l’Acier* (Paris: LGDJ, 1953), at 7. [↑](#footnote-ref-3)
4. On the ‘problems of translation’ of the concepts of constitutionalism from the state to the European Union setting, see N. Walker, ‘Postnational Constitutionalism and the Problem of Translation’, in J.H.H. Weiler, M. Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge University Press, 2003), 27–54. [↑](#footnote-ref-4)
5. A. Jakab, ‘Constitutional Reasoning. A European Perspective on Judicial Reasoning in Constitutional Courts’, *German Law Journal*, 14 (2013), 1215–1275 at 1216. [↑](#footnote-ref-5)
6. *Foto-Frost* (1985), para. 15. [↑](#footnote-ref-6)
7. On the constitutionalisation process, see A.-M. Slaughter, A. Stone Sweet, J.H.H. Weiler (eds.), *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford, Portland: Hart, 1998); J.H.H. Weiler,*The Constitution of Europe: ‘Do the New Clothes Have an Emperor?’ and Other Essays on European Integration* (Cambridge University Press, 1999); A. Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press, 2004). See also G. Itzcovich, *Teorie e ideologie del diritto comunitario* (Torino: Giappichelli, 2006), 85 ff.; A. Vauchez, ‘The Transnational Politics of Judicialization. *Van Gend en Loos* and the Making of EU Polity’, *European Law Journal*, 16 (2010), 1–28. [↑](#footnote-ref-7)
8. ‘Direct effect’ is the obligation of a court or another authority to apply the relevant provision of EU law, either as a norm which governs the case or as a standard legal review, and ‘supremacy’ is the capacity of EU law to take precedence over inconsistent norms of national law: S. Prechal, ‘Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union’, in C. Barnard (ed.), *The Fundamental of EU Law Revisited* (Oxford University Press, 2007), 35–69, at 37–8. [↑](#footnote-ref-8)
9. One rare recent example is Case C-364/10, *Hungary v Slovakia* [2012] not yet published, on the ban of Hungarian President László Sólyom from Slovakia in August 2009. [↑](#footnote-ref-9)
10. P. Craig, ‘The Jurisdiction of the Community Courts Reconsidered’, in G. de Búrca, J.H.H. Weiler (eds.), *The European Court of Justice* (Oxford University Press, 2001) 177–214, examining the mechanisms possessed by the Court for controlling the number of cases brought before it. [↑](#footnote-ref-10)
11. Detailed statistics concerning the judicial activity of the Court of Justice are available on the website of the Court. See the CJEU, *Annual Report 2011*, Luxembourg, 2012, at http://curia.europa.eu/jcms/jcms/Jo2\_7000/. [↑](#footnote-ref-11)
12. CJEU, *Annual Report 2011*. [↑](#footnote-ref-12)
13. R. Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (London: Macmillan, 1998) at 14. [↑](#footnote-ref-13)
14. On the effects of the establishment of the advisory panel, see T. Dumbrovský, B. Petkova, M. Van Der Sluis, ‘Judicial appointments: The Article 255 TFEU Advisory Panel and selection procedures in the Member States’, *Common Market Law Review*, 51 (2014), 455–482. [↑](#footnote-ref-14)
15. D. Chalmers, ‘Judicial Preferences and the Community Legal Order’, *Columbia Journal of European Law*, 5 (1999) 101–134, at 168; D. Edwards, ‘How the Court of Justice Works’, *European Law Review*, 20 (1995), 539–558, at 556 ff.; J. Bell, ‘European Perspectives on a Judicial Appointments Commission’, *Cambridge Yearbook of European Legal Studies*, 6 (2003–2004), 35–48. [↑](#footnote-ref-15)
16. Noteworthy exceptions are S.J. Kenney, ‘The Members of the Court of Justice of the European Communities’, *Columbia Journal of European Law*, 5 (1999), 101–134; H. Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study* (Dordrecht: Martinus Nijhoff, 1986). Recent legal history has started to investigate the first Court of Justice: see e.g. A. Cohen, ‘Constitutionalism Without Constitution: Transnational Elites Between Political Mobilization and Legal Expertise in the Making of a Constitution for Europe (1940s−1960s)’, *Law & Social Inquiry*, 32 (2007), 109–135; issue 14/2 of the *Journal of European Integration History* (2008), co-ordinated by N.P. Ludlow. [↑](#footnote-ref-16)
17. M. Shapiro, ‘Comparative Law and Comparative Politics’, *Southern California Law Review*, 53 (1980), 537–542, at 540. [↑](#footnote-ref-17)
18. Case C-17/98, *Emesa Sugar* [2000] ECR I-665, para. 11. See also Article 6 Rules of Procedure: ‘Judges and Advocates General shall rank equally in precedence according to their seniority in office’. [↑](#footnote-ref-18)
19. For an assessment, see T. Tridimas, ‘The Role of the Advocate General in the Development of Community Law: Some Reflections’, *Common Market Law Review*, 34 (1997), 1349–1387; C. Ritter, ‘A New Look at the Role and Impact of Advocates-General – Collectively and Individually’, *Columbia Journal of European Law*, 12 (2006), 751–773. [↑](#footnote-ref-19)
20. 13 references in eight judgments: *Antonissen* [1991], para. 20; *Brasserie du Pêcheur* [1996], para. 34; *Bosman* [1995], para. 53, 99 and 110; *Schmidberger* [2003], para. 66; *Omega* [2004], para. 27 and 34; *Köbler* [2003], para. 48; *Pupino* [2005], para. 42 and 48; *Mangold* [2005], para. 53 and 73. [↑](#footnote-ref-20)
21. M. de S.-O.-L’E. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford University Press, 2004), at 141: ‘the Court of Justice produces two argumentative modes. In the sphere of the Court of Justice’s official judicial decision operates the discourse of the magisterial and deductive application of EU law ... In the sphere of the [Advocates Generals’] Opinions ... operates the discourse of the personal and subjective construction of purposive judicial solutions’. [↑](#footnote-ref-21)
22. *Les Verts* [1986], para. 23; Opinion 1/91 [1991], para. 21; *Kadi* [2008], para. 281. [↑](#footnote-ref-22)
23. It is doubtful whether the methods adopted by the Court of Justice for interpreting the Treaties are different from the those adopted for interpreting secondary law. While K. Lenaerts, ‘Interpretation and the Court of Justice: A Basis for Comparative Reflection’, *The International Lawyer*, 41 (2007),  1011–1032, denies the existence of any significant difference, it seems that references to precedents play a more prominent role in the interpretation of primary law than they do in the interpretation of secondary law, as the latter is more easily amended by the legislator (P. Dann, ‘Thoughts on a Methodology of European Constitutional Law’, *German Law Journal*, 6/11 (2006), 1453-1474, at 1462 f). Moreover, for the reasons explained below, subjective teleological arguments are likely to be less common in the interpretation of the Treaties than they are in the interpretation of secondary legislation. [↑](#footnote-ref-23)
24. E.g. *Stauder* [1969]: the Court provides several arguments of non-constitutional interpretation directed to showing that ‘interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights’, but with regard to the interpretation of the Treaties it limits itself to stating that ‘fundamental human rights [are] enshrined in the general principles of Community law’ (para. 7) without providing any recognisable argument. [↑](#footnote-ref-24)
25. E.g. *CILFIT* [1982], para. 21 (‘In the light of all those considerations, the answer to the question … must be that…’); *Foto-Frost* [1987], para. 18 (‘It must also be emphasized that…’); *Factortame* [1990], para. 22 (‘That interpretation is reinforced by the system established by Article 177’); *Francovich* [1991], para. 36 (‘A further basis for the obligation … is to be found in…’); Opinion 1/91 [1991], para. 35 (‘This exclusive jurisdiction of the Court of Justice is confirmed by…’); *Köbler* [2003], para. 49 (‘It may also be noted that, in the same connection…’); *Pupino* [2005], para. 43 (‘In the light of all the above considerations, the Court concludes that…’); *Advocaten voor de Wereld* [2007], para. 39 (‘The interpretation … is corroborated by…’). [↑](#footnote-ref-25)
26. *Van Gend en Loos* [1963], 12. [↑](#footnote-ref-26)
27. *Bosman* [1995], para. 78. [↑](#footnote-ref-27)
28. See F. Schauer, ‘Why Precedent in Law (and Elsewhere) Is Not Totally (or Even Substantially) About Analogy’, Perspectives on Psychological Science, 3/6 (2008), 454–460. [↑](#footnote-ref-28)
29. *Francovich* [1991], para. 21 and 43; *Omega* [2004], para. 30; *Advocaten voor de Wereld* [2007], para. 59; *Laval* [2007], para. 87; *Viking* [2007], para. 34 and 40; *Kadi* [2008], para. 224. [↑](#footnote-ref-29)
30. *Brasserie du Pêcheur* [1996]. K. Langenbucher, ‘Argument by Analogy in European Law’, *Cambridge Law Journal,* 57/3, 1998, 481–521, 516 ff., discusses at length *Brasserie du Pêcheur* in order to provide an example of analogical reasoning of the Court of Justice but highlights passages of the judgment that cannot be considered as analogies for the purposes of this research. [↑](#footnote-ref-30)
31. *Brasserie du Pêcheur* [1996], para. 34 and 42. [↑](#footnote-ref-31)
32. The exception is *Grogan* [1991], para. 27. [↑](#footnote-ref-32)
33. L. Azoulai, ‘The ‘Retained Powers’ Formula in the Case Law of the European Court of Justice: EU Law as Total Law?’, *European Journal of Legal Studies*, 4/2, 2011, 192–219. [↑](#footnote-ref-33)
34. Case C-279/93, *Schumacker* [1995] ECR I-225, para. 21; Case C-246/89, *Commission* v. *United Kingdom* [1991], ECR I-04585, para. 12 (‘the powers retained by the Member States must nevertheless be exercised consistently with Community law’). [↑](#footnote-ref-34)
35. Case C-30/59, *Steenkolenmijnen* [1961] ECR 3, 24; Case 9/74, *Casagrande* [1974] ECR 773, para. 12. See also Joined Cases C-6 and C-11/69 *Commission* v. *France* [1969] ECR 523, para. 17 (‘The exercise of reserved powers cannot therefore permit the unilateral adoption of measures prohibited by the Treaty’). [↑](#footnote-ref-35)
36. *Viking* [2007], para. 40. [↑](#footnote-ref-36)
37. *Defrenne II* [1976], para. 27 (‘the terms of article 119 cannot be relied on to invalidate this conclusion’); *Antonissen* [1991], para. 9 ff, rejecting the interpretation based on ‘the strict wording of Article 48’; Opinion 1/91 [1991], para. 14. The argument was adopted by the Court in *Van Gend en Loos* [1963], 13; *Costa* [1964], 597; *Pupino* [2005], para. 33-34; *Kadi* [2008], para. 166 ff. and 199 ff. [↑](#footnote-ref-37)
38. Among the critics of the Court of Justice, standard references include Rasmussen, *On Law and Policy*, cit.; Sir Patrick Neill, *The European Court of Justice. A Case Study in Judicial Activism* (London: European Policy Forum, 1995); T.C. Hartley, *The Foundations of European Community Law*, 4th ed. (Oxford University Press, 1998); Id., ‘The European Court, Judicial Objectivity and the Constitution of the European Union’, *Law Quarterly Review*, 112 (1996), 95–109. See more recently R. Herzog, L. Gerken, ‘Stoppt den Europäischen Gerichtshof’, in *Frankfurter Allgemeine Zeitung*, 8 September 2008, English translation at http://euobserver.com/opinion/26714: the Court of Justice ‘deliberately and systematically ignores fundamental principles of the Western interpretation of law … its decisions are based on sloppy argumentation’. [↑](#footnote-ref-38)
39. E.g. *Costa* [1964], 593; ‘ERTA’ [1971], para. 15; *Defrenne II* [1976], para. 7. [↑](#footnote-ref-39)
40. E.g. ‘ERTA’ [1971], para. 22; *Defrenne II* [1976], para. 63; *CILFIT* [1982], para. 10. [↑](#footnote-ref-40)
41. E.g. *Costa* [1964], 594; *Foto-Frost* [1987], para. 16 and 17; Opinion 1/91 [1991], para. 71; *Kadi* [2008], para. 309. [↑](#footnote-ref-41)
42. E.g. *Costa* [1964], 594; *Grad* [1970], para. 5; *Simmenthal* [1978], para. 18; *Traghetti del Mediterraneo* [2006], para. 36; *Advocaten voor de Wereld* [2007], para. 42; *Laval* [2007], para. 98. [↑](#footnote-ref-42)
43. E.g., ‘ERTA’ [1971], para. 14 (‘this provision, placed at the head of part six of the Treaty, devoted to “general and final provisions”, means that…’); *Defrenne II* [1976], para. 15 (‘since article 119 appears in the context of the harmonization of working conditions…’); *Van Gend en Loos* [1963], 12 (‘This provision is found at the beginning of the part of the Treaty…’); *Costa* [1964], 595 (‘This article, placed in the chapter devoted to the “approximation of laws”, is designed to…’). [↑](#footnote-ref-43)
44. Case C-4/73, *Nold* [1974] ECR 491, para. 13. See, e.g., *Hauer* [1979], para. 15; *Wachauf* [1989], para. 17; *ERT* [1991], para. 41; *Viking* [2007], para. 43; *Laval* [2007], para. 90; *Kadi* [2008], para. 283. [↑](#footnote-ref-44)
45. *Hauer* [1979], para. 17; *ERT* [1991], para. 41; *Bosman* [1995], para. 79; *Pupino* [2005], para. 58; *Advocaten voor de Wereld* [2007], para. 45 and 49; *Viking* [2007], para. 43. [↑](#footnote-ref-45)
46. *Köbler* [2003], para. 49; *Pupino* [2005], para. 60; *Advocaten voor de Wereld* [2007], para. 50; *Kadi* [2008], para. 256 and 311. [↑](#footnote-ref-46)
47. *Defrenne II* [1976], para. 20; *Viking* [2007], para. 43; *Laval* [2007], para. 90. [↑](#footnote-ref-47)
48. *Van Duyn* [1974], para. 22; *Brasserie du Pêcheur* [1996], para. 34; *Köbler* [2003], para. 32. [↑](#footnote-ref-48)
49. Case C-4/54, *Industrie Siderurgiche Associate* [1955] ECR 91. [↑](#footnote-ref-49)
50. Joined Cases C-7 and C-9/54, *Groupement des industries* [1956] ECR 175. [↑](#footnote-ref-50)
51. Schermers, Waelbroeck, *Judicial Protection*, cit., 135; U. Everling, ‘The Court of Justice as a Decision-making Authority’, in Michigan Law Review Association (ed.), *The Art of Governance* (Baden-Baden: Nomos, 1987), 156–172, at 163. *Contra* T. Koopmans, ‘“*Stare Decisis*”in European Law’, in D. O’Keeffe, H.G. Schermers (eds.), *Essays in European Law and Integration: To Mark the Silver Jubilee of the Europa Institute, Leiden 1957-1982* (Deventer et al.: Kluwer, 1982), 11-28, at 18. [↑](#footnote-ref-51)
52. *Defrenne II* [1976], para. 31 (‘as the court has already found in other contexts’). [↑](#footnote-ref-52)
53. *Ratti* [1979], para. 19. [↑](#footnote-ref-53)
54. *Foglia* [1980]; *Antonissen* [1991]. [↑](#footnote-ref-54)
55. ‘Chernobyl’[1990], para. 16. [↑](#footnote-ref-55)
56. *Costa* [1964], 593. [↑](#footnote-ref-56)
57. *Stauder* [1969] para. 7. See also *Internationale Handelsgesellschaft* [1970] para. 4. [↑](#footnote-ref-57)
58. *Internationale Handelsgesellschaft* [1970] para. 3; see also *Simmenthal* [1978], para. 17 (‘principle of the precedence of Community law’). [↑](#footnote-ref-58)
59. *Brasserie du Pêcheur* [1996], para. 22. [↑](#footnote-ref-59)
60. ‘Cassis de Dijon’ [1979], para. 14. [↑](#footnote-ref-60)
61. ‘Chernobyl’[1990], para. 21. [↑](#footnote-ref-61)
62. *Brasserie du Pêcheur* [1996], para. 27. [↑](#footnote-ref-62)
63. *Van Duyn* [1974], para. 18; *Defrenne II* [1976], para. 12-14; *Antonissen* [1991], para. 11; *Schmidberger* [2003], para. 60; *Omega* [2004], para. 30. [↑](#footnote-ref-63)
64. E.g., Schermers, Waelbroeck, *Judicial Protection*, cit., 12; G. Beck, *The Legal Reasoning of the Court of Justice of the EU* (Oxford and Portland: Hart, 2012), at 221-2. [↑](#footnote-ref-64)
65. Case C-9/56, *Meroni* [1958], ECR 133, 140; Case C-8/55, *Fédération Charbonnière de Belgique* [1956], ECR 293, 300: ‘Such an argument is, in fact, acceptable only in the last resort when no other interpretation appears to be adequate or compatible with the text, the context and their objectives’. [↑](#footnote-ref-65)
66. *Van Gend en Loos* [1963], 13. [↑](#footnote-ref-66)
67. *Grad* [1970], para. 5; *Van Duyn* [1974], para. 12; *Ratti* [1979], para. 19. [↑](#footnote-ref-67)
68. *Faccini Dori* [1994], para. 24. [↑](#footnote-ref-68)
69. *Van Gend en Loos* [1963], 12. [↑](#footnote-ref-69)
70. U. Neergaard, R. Nielsen, ‘Where Did the Spirit and Its Friends Go? On the European Legal Method(s) and the Interpretational Style of the Court of Justice of the European Union’, in U. Neergaard et al. (eds.), *European Legal Method. Paradoxes and Revitalisation* (Copenhagen: DJØF, 2011), 95–184, at 122. [↑](#footnote-ref-70)
71. P. Pescatore, ‘Les objectifs de la Communauté européenne comme principes d’interprétation dans la jurisprudence de la Cour de Justice’, in *Miscellanea W. J. Ganshof van der Meersch*, Vol. II (Bruxelles-Paris: Bruylant- LGDJ, 1972), 325–363; H. Kutscher, ‘Alcune tesi sui metodi d’interpretazione del diritto comunitario dal punto di vista d’un giudice’, *Rivista di diritto europeo* (1976), 283–314 and (1977), 3–24; R. Lecourt, *L’Europe des juges* (Bruxelles: Bruylant, 1976), 235 f.; G.F. Mancini, D.T. Keeling, ‘Democracy and the European Court of Justice’, *Modern Law Review*, 57 (1994), 175–190, at 186; M.P. Maduro, ‘Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism’, *European Journal of Legal Studies* (2007), http://www.ejls.eu/2/25UK.pdf [↑](#footnote-ref-71)
72. K. Lenaerts, ‘Interpretation and the Court of Justice: A Basis for Comparative Reflection’, *The International Lawyer*, 41 (2007), 1011–1032. For extensive references to the first EC legal scholarship, see G. Itzcovich, *Teorie e ideologie*, cit., 93 ff. and 97 ff. [↑](#footnote-ref-72)
73. *Van Gend en Loos* [1963], 12. [↑](#footnote-ref-73)
74. *Viking* [2007], para. 79. [↑](#footnote-ref-74)
75. *Costa* [1964], 594. [↑](#footnote-ref-75)
76. *Grad* [1970], para. 5. Other examples can be found in *Simmenthal* [1978], para. 18; *Carpenter* [2002], para. 39. [↑](#footnote-ref-76)
77. *Pupino* [2005], para. 36. The argument could also be qualified as harmonising interpretation and/or objective teleological reasoning: ‘Irrespective of the degree of integration envisaged by the Treaty of Amsterdam …, it is perfectly comprehensible that the authors of the Treaty on European Union should have considered it useful to make provision ... for recourse to legal instruments [framework decisions] with effects similar to those provided for by the EC Treaty, in order to contribute effectively to the pursuit of the Union’s objectives’. [↑](#footnote-ref-77)
78. *Van Gend en Loos* [1963], 12. [↑](#footnote-ref-78)
79. See Neville Brown and Kennedy, *The Court of Justice*, cit., 330 ff., for references to Pescatore, Lecourt and to Case C-6/60, *Humblet* [1960] 559, 575: ‘The opinions of the governments put forward during the parliamentary debates on the ECSC Treaty do not touch on this question’. [↑](#footnote-ref-79)
80. This rationale can be inferred from cases that dealt with EC secondary legislation: Case C-15/60, *Simon* 1961 ECR 225; *Antonissen* [1991], para. 18. See also Joined Cases C-283/94, C-291/94 and C-292/94, *Denkavit* 1996 ECR I-5063. [↑](#footnote-ref-80)
81. P. Dann, ‘Thoughts on a Methodology’, cit., 1463, notes that ‘the widespread opinion that historical interpretation is impermissible in Union law owing to the lack of publication of the *travaux préparatoires* has become invalid since they began to be published’. [↑](#footnote-ref-81)
82. *Grogan* [1991], para. 20. [↑](#footnote-ref-82)
83. *Defrenne II* [1976], para. 71; *Bosman* [1995], para. 77. Further references include Case C-69/80, *Worringham* [1981], ECR 767, para. 31; Case 24/86, *Blaizot* [1988] ECR 379, para. 30; Case C-163/90, *Legros* [1992] ECR I-4625, para. 30; Case C-437/97, *EKW* [2000] ECR I-1157, para. 57; Joined cases C-177 and C-181/99*, Ampafrance and Sanofi* [2000], ECR I-7013, para. 66; Case C-228/05, *Stradasfalti* [2006], ECR I*-*8391, para. 72. [↑](#footnote-ref-83)
84. Case C‑506/06, *Mayr* [2008], ECR I-1017, para. 38; Case C-34/10, *Brüstle v Greenpeace* [2011], ECR I-9821, para. 30. See also Case C-1/96, *Compassion in World Farming* [1998] ECR I-1251, para. 67. [↑](#footnote-ref-84)
85. *Barber* [1990], para. 41. Analogous expressions in *Defrenne II* [1976], para. 72; *Bosman* [1995], para. 142. [↑](#footnote-ref-85)
86. This is the view expressed by T.C. Hartley, *Constitutional Problems of the European Union* (Oxford and Portland: Hart, 1999), at 41-42, commenting *Defrenne II*. [↑](#footnote-ref-86)
87. *Defrenne II* [1976], para. 74. See analogously *Barber* [1990], para. 44, and *Bosman* [1995], para. 144 (‘overriding considerations of legal certainty’). [↑](#footnote-ref-87)
88. *Faccini Dori* [1994], para. 23. [↑](#footnote-ref-88)
89. *Internationale Handelsgesellschaft* [1970], para. 4. [↑](#footnote-ref-89)
90. *Hauer* [1979], para. 20. With regard to the right to property, see also *Wachauf* [1989], para. 17-18. [↑](#footnote-ref-90)
91. *ERT* [1991], para. 41; *Schmidberger* [2003] para. 71. [↑](#footnote-ref-91)
92. *Schmidberger* [2003] para. 71. [↑](#footnote-ref-92)
93. *Omega* [2004], para. 33-34. [↑](#footnote-ref-93)
94. *Brasserie du Pêcheur* [1996], para. 27-32; *Köbler* [2003], para. 48. [↑](#footnote-ref-94)
95. *Pupino* [2005], para. 58-59. [↑](#footnote-ref-95)
96. *Mangold* [2005], para. 74-75. [↑](#footnote-ref-96)
97. *Advocaten voor de Wereld* [2007], para. 49. [↑](#footnote-ref-97)
98. *Viking* [2007], para. 43. [↑](#footnote-ref-98)
99. *Kadi* [2008], para. 283. [↑](#footnote-ref-99)
100. *Hauer* [1979], para. 20, on the social function of the right to property, and *Köbler* [2003], para. 48, on state liability for judicial decisions. [↑](#footnote-ref-100)
101. *Bosman* [1995], para. 81. [↑](#footnote-ref-101)
102. Case C-374/89, *Commission v Belgium* [1991] ECR I-367, para. 15. Starting with Case C-275/00, *First and Franex* [2002] ECR I-10943, para. 34, the Court began to use the expression ‘loyal cooperation’ with great frequency. [↑](#footnote-ref-102)
103. *Pupino* [2005], para. 42. [↑](#footnote-ref-103)
104. The expression was used for the first time in Case C-33/76, *Rewe-Zentralfinanz* [1976] ECR 1989, para. 5. See also *Factortame* [1990], para. 19. [↑](#footnote-ref-104)
105. See, e.g., *Brasserie du Pêcheur* [1996], para. 39. [↑](#footnote-ref-105)
106. See, e.g., *Francovich* [1991], para. 36. [↑](#footnote-ref-106)
107. *Schmidberger* [2003] para. 79; *Kadi* [2008], para. 303. [↑](#footnote-ref-107)
108. Case C-138/79, *Roquette Frères* v *Council* [1980] ECR 3333, para. 33; Case C-139/79, *Maizena* v *Council* [1980] ECR 3393, para. 34. [↑](#footnote-ref-108)
109. See, e.g. Case C‑300/89, *Commission* v *Council* [1991] ECR I-2867, para. 20; Case C-130/10, *Parliament* v *Council* [2012], not yet published, para. 81. [↑](#footnote-ref-109)
110. Case C-139/79, *Maizena* v *Council* [1980] ECR 3393, para. 34. [↑](#footnote-ref-110)
111. Case C-155/07, *Parliament* v *Council* [2008] ECR I-8103. [↑](#footnote-ref-111)
112. On the margin of appreciation doctrine at the Court of Justice, see Y. Shany, ‘Toward a General Margin of Appreciation Doctrine in International Law?’, *European Journal of International Law*, 16/5, 2006, 907–940, 927 ff.; J.A. Sweeney, ‘A “Margin of Appreciation” in the Internal Market: Lessons from the European Court of Human Rights’, *Legal Issues of Economic Integration*, 34/1, 2007, 27–52; J. Gerards, ‘Pluralism, Deference and the Margin of Appreciation Doctrine’, *European Law Journal*, 17/1, 2011, 80–120, 89 ff. [↑](#footnote-ref-112)
113. Case C-83/94, *Leifer* [1995] ECR I-3231, para. 35; Case C-273/97, *Sirdar* [1999] ECR 7403, para. 27; Case C-285/98, *Tanja Kreil* [2000] ECR I-69, para. 24. [↑](#footnote-ref-113)
114. *Van Duyn* [1974], para. 18; Case C-30/77, *R* v *Pierre Bouchereau* [1977] ECR 1999, para. 34; *Omega* [2004], para. 31. [↑](#footnote-ref-114)
115. Case C-34/79, *R* v *Henn & Darby* [1979] ECR 3795, para. 15. [↑](#footnote-ref-115)
116. Case C-141/07 *Commission* v *Germany* [2008] ECR I-6935, para. 51; Case C‑84/11, *Susisalo* [2012], not yet published, para. 28. For this line of reasoning, see already Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, para. 103. [↑](#footnote-ref-116)
117. *Schmidberger* [2003], para. 82 and 89. [↑](#footnote-ref-117)
118. *Van Gend en Loos* [1963], 12; *Costa* [1964], 593. See also Case C-17/67, *Neumann* [1967] ECR 441, 453; Case C-28/67, *Molkerei* [1968] ECR 143, 152; Case C-48/71, *Commission* v *Italy* [1972], ECR 529, para. 9. [↑](#footnote-ref-118)
119. *Van Gend en Loos* [1963], 12; *Costa* [1964], 593; Opinion 1/91 [1991], para. 21. See also Opinion 1/09 [2011] ECR I-0000, para. 65. The concept of limitation of sovereignty is occasionally employed by the General Court. [↑](#footnote-ref-119)
120. For a case – not included in the Sample – that deals with the concept of national identity ex Article 4(2) TEU, see Case C-208/09, Sayn-Wittgenstein [2010] ECR I-13693, para. 83. See also Case C‑473/93 *Commission* v *Luxembourg* [1996] ECR I‑3207, para. 35; Case C‑51/08, Commission v Luxembourg [2011] ECR I-4231, para. 124; Case C-202/11, Las [2013] not yet published, para. 26-27 (preservation of national identity as a legitimate aim of national policy). [↑](#footnote-ref-120)
121. *Bosman* [1995], para. 131. [↑](#footnote-ref-121)
122. Case C-473/93, *Commission v Luxembourg* [1996] ECR I-3207, para. 35. See also Case C-208/09, *Sayn-Wittgenstein* [2010] ECR I-13693, para. 80, for a reference to the need of balancing the legitimate goal of preserving Austrian constitutional identity, on the one side, and the freedom of movement of persons, on the other. [↑](#footnote-ref-122)
123. See A. von Bogdandy, S. Schill, ‘Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty’, *Common Market Law Review*, 48, 2011, 1417–1454, 1422 ff. [↑](#footnote-ref-123)
124. *Pupino* [2005] para. 52; *Laval* [2007] para. 94. It is worth mentioning that the notion of human dignity, although not explicitly mentioned, is at the core of *Stauder* [1969]. [↑](#footnote-ref-124)
125. *Viking* [2007], para. 46. [↑](#footnote-ref-125)
126. *ERT* [1991], para. 44; *Schmidberger* [2003] para. 77. [↑](#footnote-ref-126)
127. *Grogan* [1991], para. 26. [↑](#footnote-ref-127)
128. E.g. *Defrenne II* [1976]; *Barber* [1990]; *Martínez Sala* [1998]; *Köbler* [2003]; *Pupino* [2005]; *Mangold* [2005]; *Kadi* [2008]. See also *Advocaten voor de Wereld* [2007]. [↑](#footnote-ref-128)
129. *Van Gend en Loos* [1963], 13; *Costa* [1964], 594; *Bosman* [1995], para. 84; *Köbler* [2003], para. 33; *Viking* [2007], para. 54. [↑](#footnote-ref-129)
130. *Internationale Handelsgesellschaft* [1970] para. 12 and 16; ‘Cassis de Dijon’ [1979], para. 8; *Hauer* [1979], para. 23; *Wachauf* [1989], para. 18; *Bosman* [1995], para. 104; *Schmidberger* [2003] para. 79; *Omega* [2004] para. 36; *Mangold* [2005], para. 65; *Viking* [2007], para. 46 and 75; *Kadi* [2008], para. 355. [↑](#footnote-ref-130)
131. *Hauer* [1979], para. 23; *Wachauf* [1989], para. 18; *Kadi* [2008], para. 335. For a reference to the ‘essential part’ of the Community competences, see Opinion 1/91 [1991], para. 41. [↑](#footnote-ref-131)
132. M. Kumm, ‘*Internationale Handelsgesellschaft*, *Nold* and the New Human Rights Paradigm’, in M.P. Maduro, L. Azoulai (eds.), *The Past and Future of EU Law:* *The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford and Portland: Hart, 2010), 106–118. [↑](#footnote-ref-132)
133. A. von Bogdandy, ‘The European Union as a Human Right Organization?’, *Common Market Law Review*, 37 (2000), 1307–1338, at 1325. [↑](#footnote-ref-133)
134. Ibid, 1321. B. de Witte, ‘The Past and Future Role of the European Court of Justice in the Protection of Human Rights’, in P. Alston (ed.), *The EU and Human Rights* (Oxford University Press, 1999), 859–897. [↑](#footnote-ref-134)
135. A. von Bogdandy, ‘Founding Principles’, in A. von Bogdandy, J. Bast (eds.), *Principles of European Constitutional Law*, 2nd ed. (Oxford and München: Hart and Beck, 2009), 11–54, at 28; L. Pech, ‘A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law’, *European Constitutional Law Review*, 6 (2010), 359–396, at 362. [↑](#footnote-ref-135)
136. *Les Verts* [1986], para. 23. See also *Foto-Frost* [1987], para. 16; *Kadi* [2008], para. 281. See also *Advocaten voor de Wereld* [2007], para. 45 for a similar formulation. [↑](#footnote-ref-136)
137. *Costa* [1964], 593 f. [↑](#footnote-ref-137)
138. Case C-101/78, *Granaria* [1979] ECR 623, para. 5. [↑](#footnote-ref-138)
139. *Internationale Handelsgesellschaft* [1970], para. 3 [↑](#footnote-ref-139)
140. *Brasserie du Pêcheur* [1996], para. 33. [↑](#footnote-ref-140)
141. *Foto-Frost* [1987], para. 15. [↑](#footnote-ref-141)
142. *Barber* [1990], para. 44; *Bosman* [1995], para. 144. See also *Defrenne II* [1976], para. 74. [↑](#footnote-ref-142)
143. J.H.H. Weiler, ‘The Court of Justice on Trial’, *Common Market Law Review*, 24 (1987), 555-589, at 555 f. [↑](#footnote-ref-143)
144. M. Rasmussen, ‘From *Costa v ENEL* to the Treaties of Rome: A Brief History of a Legal Revolution’, in Maduro, Azoulai (eds.), *The Past and Future of EU Law*, cit., 69–85, 78; H. Schepel, R. Wesseling, ‘The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe’, *European Law Journal*, 3 (1997), 165-188; Itzcovich, *Teorie e ideologie*, cit., 276–307. [↑](#footnote-ref-144)
145. Itzcovich, *Teorie e ideologie*, cit., 307–314 and 324–382. [↑](#footnote-ref-145)
146. F. Snyder, ‘New Directions in European Community Law’, *Journal of Law and Society*, 14 (1987), 167–182; A. von Bogdandy, ‘A Bird’s Eye View on the Science of European Law’, *European Law Journal*, 6 (2000), 208–238; J. Shaw, ‘The European Union: Discipline Building Meets Polity Building’, in P. Cane, M. Tushnet (eds.) *Oxford Handbook of Legal Studies* (Oxford University Press, 2003), 325–352; N. Walker, ‘Legal Theory and the European Union: A 25th Anniversary Essay’, *Oxford Journal of Legal Studies*, 25 (2005), 581–601; Dann, ‘Thoughts on a Methodology’, cit. [↑](#footnote-ref-146)
147. Cfr. A.-M. Burley, W. Mattli, ‘Europe Before the Court: A Political Theory of Legal Integration’, *International Organization*, 47 (1993), 41–76; G. Garrett, ‘The Politics of Legal Integration in the European Union’, *International Organization*, 49 (1995), 171–181. [↑](#footnote-ref-147)
148. J.H.H. Weiler, ‘The Community System: the Dual Character of Supranationalism’, *Yearbook of European Law*, 1 (1981), 267–306. [↑](#footnote-ref-148)
149. B. De Witte Bruno, ‘The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process’, in P. Beaumont et al. (eds.), *Convergence and Divergence in European Public Law* (Oxford: Hart, 2002), 39–57. [↑](#footnote-ref-149)
150. On the reasons for this change of attitude, see N. Mancini, ‘Attivismo e autocontrollo nella giurisprudenza della Corte di Giustizia’, *Rivista di diritto europeo*, 1990, pp. 229–240, pp. 236–240. [↑](#footnote-ref-150)
151. On the legal reasoning of the Court of Justice, broad references to the existing literature in G. Itzcovich, ‘The Interpretation of Community Law by the European Court of Justice’, *German Law Journal*, 10/5, 2009, <http://www.germanlawjournal.com/article.php?id=1106>. See moreover E. Paunio, S. Lindroos-Hovinheimo, ‘Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law’, *European Law Journal*, 16/4, 2010, 395–416; U. Neergaard, R. Nielsen, ‘Where Did the Spirit and Its Friends Go?’, in U. Neergaard, R. Nielsen, L. Roseberry (eds.), *European Legal Method*, Copenhagen, DJØF, 2011, 95–184; G. Conway, *The Limits of Legal Reasoning and the* *European Court of Justice*, Cambridge, CUP, 2012; G. Beck, *The Legal Reasoning of the Court of Justice of the EU* (Oxford and Portland: Hart, 2012; S. Sankari, *European Court of Justice Legal Reasoning in Context*, Groningen, Europa Law Publishing, 2013. [↑](#footnote-ref-151)
152. P. Pescatore, *Vade-mecum. Recueil de formules et de conseils pratiques à l’usage des rédacteurs d’arrêts*, 3rd ed. of 1985 (Bruxelles: Bruylant, 2007), at 292. [↑](#footnote-ref-152)
153. Edwards, ‘How the Court of Justice Works’, cit., 557: ‘some judgments of the Court of Justice are camels’. [↑](#footnote-ref-153)
154. G.F. Mancini, D.T. Keeling, ‘Language, Culture and Politics in the Life of the European Court of Justice’, *Columbia Journal of European Law*, 1 (1994-1995), 397–413, at 398. [↑](#footnote-ref-154)
155. Hartley, *The Foundations*, cit., 75. [↑](#footnote-ref-155)
156. Case C-803/79, *Roudolff* [1980], ECR 2015,para.7. [↑](#footnote-ref-156)
157. Case C-34/78, *Yoshida* [1979] ECR 115, para. 10. [↑](#footnote-ref-157)
158. Case C-160/80, *Smuling-de Leeuw* [1981] ECR 1767, para. 10. [↑](#footnote-ref-158)
159. Case C-395/93, *Neckermann* [1994] ECR I-4027, para. 7. See also Case C-338/95, *Wiener* [1997] ECR I-6495 (on the concept of ‘nightdress’) and the Opinion of AG Jacobs: ‘The present case is a perfect example of a case where it may be questioned whether it is appropriate for this Court to be involved’. [↑](#footnote-ref-159)
160. Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para. 31. See lastly Case C‑503/09, *Stewart* [2011], ECR I-6497, para. 80. [↑](#footnote-ref-160)
161. J.H.H. Weiler, ‘Epilogue: The Judicial Après Nice’, in G. de Búrca, J.H.H. Weiler (eds.), *The European Court of Justice*, Oxford, OUP, 2001, 225 and 219 (‘the style of judicial decisions is outmoded, does not reflect the dialogical nature of European Constitutionalism’); A. Arnull, *The European Union and Its Court of Justice*, 2nd ed., Oxford, OUP, 2006, 12. [↑](#footnote-ref-161)
162. Hartley, *The Foundations*, cit., 74. [↑](#footnote-ref-162)
163. M. Wells, ‘French and American Judicial Opinions’, *Yale Journal of International Law*, 19, 1994, 85–103, 92 and 94; U. Everling, ‘Reflections on the Reasoning in the Judgments of the Court of Justice of the European Communities’, in J. Rosenløv et al. (eds.), *Festskrift til Ole Due*, Gad, Kbh, 1994, 55–74, 59: ‘strict, disciplined form and apodictic brevity’. [↑](#footnote-ref-163)
164. G. Gorla, *Lo stile delle sentenze*, 2 voll., Roma, Soc. ed. Foro Italiano, 1968, I, 16. [↑](#footnote-ref-164)
165. Lasser, *op. cit*.,112 [↑](#footnote-ref-165)
166. According to some authors, however, the tendency towards better argumentation has recently turned into an opposite trend: see Komárek, ‘In the Court(s) We Trust?’, cit., 482; M. Bobek, ‘Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice’, *Common Market Law Review*, 45, 2008, 1611–1643, 1639. [↑](#footnote-ref-166)
167. G. Martinico, ‘Reading the Others: American Legal Scholars and the Unfolding European Integration’, *European Journal of Law Reform*, 11/1, 2009, pp 35–49, 37; G. Davies, ‘Abstractness and Concreteness in the Preliminary Reference Procedure’, in N. Nic Shuibhne (ed.), *Regulating the Internal Market*, Cheltenham, Elgar, 2006, 210–244, 213. [↑](#footnote-ref-167)
168. *Kadi* [2008]. The length is due to the nature of the proceeding (appeal against a judgment of the GC) and to the importance of the case (the ‘findings of the Court’ cover para. 158 to para. 376), but is not at all unprecedented: see the 632 paragraphs of Joined Cases C-40/73 et al., *Suiker Unie* v *Commission* [1975] ECR 1663 (partial annulment of a Commission decision concerning concerted practices in the sugar market). [↑](#footnote-ref-168)
169. On the consequences of multilingualism in EU law, see J. Bengoetxea, ‘Multilingual and Multicultural Legal Reasoning’, in A.L. Kjær, S. Adamo (eds.), *Linguistic Diversity and European Union*, Farnham, Ashgate, 2011, pp. 97-122 (maintaining that so far the preference for French has hindered the development of a genuinely multilingual form of legal reasoning). [↑](#footnote-ref-169)
170. Pescatore, *Vade-mecum*, cit., p. 46 [↑](#footnote-ref-170)
171. Possibly the only exception to the rule of impersonality was due to a translation inaccuracy: in Joined Cases C‑202/08 P and C‑208/08 P, *American Clothing Associates NV* [2009], ECR I-6933, para. 47, the impersonal French phrase ‘il convient tout d’abord de relever que’ became a highly unusual ‘let me start by observing that’. [↑](#footnote-ref-171)
172. M. Horspool, ‘Over the Rainbow: Languages and Law in the European Union’, in Arnull et al. (eds.), *A Constitutional Order of States*, cit., 99–120, 113 (arguing that the Court of Justice borrows from different legal methods, ‘but mostly prefers its own approach’, based on balancing and weighting the principles/interests of the Member States and the Union). [↑](#footnote-ref-172)
173. Pescatore, *Vade-mecum*, cit., p. 28. [↑](#footnote-ref-173)
174. M. Shapiro, ‘Toward a Theory of ‘Stare Decisis’’, *Journal of Legal Studies*, 1/1, 1972, 125–134 [↑](#footnote-ref-174)
175. L. Azoulai, ‘The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization’, *Common Market Law Review*, 45, 2008, 1335–1356, 1339. [↑](#footnote-ref-175)
176. This is the opinion of the majority of the AGs interviewed by S. Morano-Foadi, S. Andreadakis, ‘Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights’, *European Law Journal*, 17/5, 2011, 595–610, 599: ‘the language of the common market is being more and more replaced by the new language of the human rights standards’. [↑](#footnote-ref-176)
177. See, e.g., M. Cartabia, ‘Europe and Rights: Taking Dia­logue Seriously’, *European Constitutional Law Review*, 5, 2009, 5–31, p.31: ‘the European Court, especially when acting as a constitutional court or a court of fundamental rights, should seriously consider moving away from the old-style telegraphic judgments’. [↑](#footnote-ref-177)
178. J. Habermas, *The Postnational Constellation: Political Essays*, Boston, MIT Press, 2001. [↑](#footnote-ref-178)
179. Weiler, ‘Epilogue: The Judicial Après Nice’, cit., 219 and 225; recently D. Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review*, Princeton, PUP, 2010, 345. [↑](#footnote-ref-179)
180. E.g. S. Douglass-Scott, ‘A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*’, *Common Market Law Review*, 43/3, 2006, 661: the Court of Justice ‘is therefore finding its feet as a human rights court ... its status as a Constitutional Court is being improved by its developing human rights jurisprudence’. [↑](#footnote-ref-180)
181. E.g., *Schmidberger* [2003] and *Omega* [2004]. [↑](#footnote-ref-181)
182. See e.g. J. Coppel, A. O’Neill, ‘The European Court of Justice: Taking Rights Seriously?’, *Common Market Law Review*, 29/4, 1992, 669–692. [↑](#footnote-ref-182)
183. B. de Witte, ‘The Past and Future Role of the European Court of Justice in the Protection of Human Rights’, in P. Alston (ed.), *The EU and Human Rights, Oxford*, OUP, 1999, 859–897, 869. Rightly B.-O. Bryde, ‘The ECJ's Fundamental Rights Jurisprudence – A Milestone in Transnational Constitutionalism’, in Maduro, Azoulai (eds.), *The Past and Future of EU Law*, cit., 119–129, 125, notes that this depends upon the fact that the Court of Justice is not a specialised constitutional court, but a court of general jurisdiction in European law and that EU law remains limited to mainly socio-economic functions. [↑](#footnote-ref-183)
184. See U. Haltern, *On Finality*, in Bogdandy, Bast (eds.), *Principles of European Constitutional Law*, cit., 222 ff., analyses the case law on European citizenship in order to show how the Court entered ‘into what might be called “political rhetoric”’. [↑](#footnote-ref-184)
185. Pescatore, *Vade-mecum*, cit., 24. [↑](#footnote-ref-185)