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THE CURRENT ROLE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN EU GOVERNANCE[*]

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Abstract

This research examines the role currently played by the Court of Justice of the European Union in EU governance in light of recent case law, looking firstly at landmark court rulings from the past decade (2010-2019), with a particular focus on the Bauer and Broßonn case (2018) due to its particular relevance regarding the direct horizontal effect of rights recognised by the Charter of Fundamental Rights of the European Union and, indirectly, the applicability in a dispute between private parties of the provisions of a directive that gives concrete expression to these rights. It goes on to analyse the prominent position held by the Court of Justice within the institutional system of the EU subsequent to the Treaty of Lisbon of 13 December 2007, to give a better understanding of how this institution has been able to make such a decisive contribution to preserving and consolidating EU integration. The work concludes by thinking over whether there exists a government of judges within the European Union.

Key words: Court of Justice of the European Union; Charter of Fundamental Rights of the European Union; principle of direct effect; Bauer and Broßonn ruling; judicial governance; European Union.

EL PAPER ACTUAL DEL TRIBUNAL DE JUSTÍCIA DE LA UNIÓ EUROPEA EN LA GOVERNANÇA DE LA UNIÓ

Resum

Aquesta recerca examina el paper actual del Tribunal de Justícia de la Unió Europea en la governança de la Unió a la llum de la seva jurisprudència recent enunciant primerament resolucions jurisdiccionals emblemàtiques de l'última dècada (2010-2019) i fent una anàlisi particular de la sentència Bauer i Broßonn, de 2018, per la seva especial transcendència respecte a l'efecte directe horitzontal dels drets reconeguts per la Carta de Drets Fonamentals de la Unió Europea i, indirectament, la invocabilitat en un litigi entre particulars de preceptes d'una directiva que concreta aquells drets. A continuació s'analitza la posició privilegiada del Tribunal de Justícia en l'organigrama institucional de la Unió després del Tractat de Lisboa, de 13 de desembre de 2007, per comprendre millor per què aquesta institució ha pogut contribuir tan decisivament a la preservació i la consolidació de la integració europea. L'estudi conclou amb una reflexió sobre si existeix un govern de jutges en la Unió Europea.

Paraules clau: Tribunal de Justícia de la Unió Europea; Carta de Drets Fonamentals de la Unió Europea; principi d'efecte directe; sentència Bauer i Broßonn; governança judicial; Unió Europea.

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Summary

1 Introduction

2 The preservation and consolidation of EU law in recent EU case law

2.1 Selection of Court of Justice rulings in the last decade (2010-2019)

2.2 A landmark case: the Bauer and Broßonn judgment of 6 November 2018, C-569 and 570/16

2.2.1 Facts and questions referred for a preliminary ruling

2.2.2 The Court of Justice's reasoning

2.2.3 Legal assessment

3 The judicial governance of the European Union

3.1 The position of the Court of Justice of the EU as an autonomous and supreme power with an essentially constitutional nature in the EU

3.2 Is there a *gouvernement des juges* in the European Union?

4 Final reflections

5 Bibliografic references

1 Introduction

One of the essential characteristics of the European Union (EU) is that it constitutes a *community based on the rule of law*, nowadays a *union based on the rule of law*, in the famous expressions used by the Court of Justice of the EU to reflect the fact that, in this model of sub-regional integration, there is a replication of what is, in the national order, the *rule of law*, as it possesses a legal order to which all of its subjects are subordinated, and conflicts that arise within it can be redirected to a rule and an independent judge who applies and enforces it, and are not simply referred to a political arrangement.[1]

Integrated within a unique institutional framework, the Court of Justice of the EU must participate, insofar as concerns it according to the treaties creating the Union, in achieving the fundamental objectives of European integration in economic, social, cultural and political terms, as stipulated in article 13 of the Treaty on European Union (TEU). Only in this way can it be understood that the Court has been established as a common institution, called upon to perform the EU's task together with others, and has been specifically entrusted with the fundamental mission of ensuring respect for EU law in its interpretations and application (article 19 of the TEU). And in order for it to be able to perform it, the member states of the Union have given it a legal status that adequately safeguards its independence and impartiality and provides it with the necessary competences—albeit limited to specific cases (principle of conferral) —[2] broadly[3] and exclusively (article 344 of the TFEU).[4]

Being aware of this privileged position within the institutional organisational structure, the Court of Justice of the EU has not evaded its responsibilities under the treaties and, as a rule, has provided appropriate legal responses to the delicate problems (many of which are constitutional in nature) that European integration has constantly brought up.

Without seeking to be exhaustive, one should remember that it is the Court of Justice[5] that, since the 1960s, has established the existential foundations of the Union's legal system: a) establishing its novelty (Court of Justice Judgment of 13 November 1964, Commission / Belgium and Luxemburg, 90 and 91/63) and autonomy (Court of Justice Judgment of 5 February 1963, Van Gend en Loos, 26/62) with respect to international law and internal legal systems of member states; b) proclaiming the principles of direct effect of the EU's actions in national legal systems (Court of Justice Judgment of 5 February 1963, Van Gend en Loos, 26/62), interpretation of national rules in accordance with those of the EU (Court of Justice Judgment of 10 April 1984, Von Kolson, 140/83), including landmark decisions for the longstanding pillar of police and judicial cooperation in criminal matters (Court of Justice Judgment of 16 June 2005, Pupino, C-105/03), the primacy of Union law (Court of Justice Judgment of 15 July 1964, Costa / ENEL, 6/64), which requires—

1 The Court of Justice established the expression *community based on the rule of law* in the Judgment of 23 April 1986 (Les Verts / European Parliament, 294/83), and went on to proclaim that the Union is a *union based on the rule of law* (Judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses, C-64/16). Regarding the EU as a community of values pursuant to article 2 of the TEU, in which the rule of law is a core element, see, in general, Fernández (1999), Martín (2019) and Ripol (2018). And regarding the ever-complex concept of the *rule of law*, see the Venice Commission (2011).

2 The Treaty on the Functioning of the European Union (TFEU) of 13 December 2007 stipulates that the areas that the Court of Justice of the EU has jurisdiction (leaving aside proceedings of minor importance) over actions for annulment of EU measures (articles 263, 264 and 266), actions for failure to act by EU (articles 265 and 266), actions for failure to fulfil obligations by member states (articles 258 to 260 and 271), actions for non-contractual liability for damage caused by the EU (articles 268 and 340) and references for preliminary rulings concerning the interpretation and validity of EU law referred by the courts of the member states (article 267).

3 The breadth of the competences can be seen, on the one hand, in that they fall within generically stated spheres and so evade the limitation imposed by any system with a list of challengeable actions and the distinction between justiciable and non-justiciable disputes (García de Enterría, 1986: 662 and 667); and, on the other hand, the Court's autonomy to choose the methods of interpretation and the sources of EU law on which it bases its decisions, in view of the open definition of its mission in article 19(1) of the TEU (Isaac, 1995: 314). One must also take into account its authority to decide on its own competence in the event of a dispute, as an attribute inherent to the exercising of the judicial function (Opinion 2/92 of 24 March 1995 on the Competence of the Community or one of its institutions to participate in the Third Revised Decision of the OECD on national treatment, paragraph 11) and the duty to avoid a *non liquet* (Weil, 1998). The symbiosis of these elements leads the Court of Justice of the EU to reason in terms of competence and employ systematic, teleological interpretation procedures to justify extensive and creative interpretations of EU law, as one can clearly conclude from the aforementioned case law.

4 Concerning the Court of Justice of the EU in general, see Lenaerts, Maselis & Gutman (2014) and Van Raepenbusch (2018).

5 Only one judgment representing the abundant case law of the Court of Justice of the EU is mentioned for the topics listed, but that does not mean there are no other memorable judgments concerning these or others.

inter alia—the disapplication of any national provision opposing it (Court of Justice Judgment of 9 March 1978, Simmenthal, 106/77) and the granting of interim relief to safeguard the uniform application of EU law during the internal process (Court of Justice Judgment of 19 June 1990, Factortame, C-213/89), and, finally, state liability for damage caused by breaches of Union rules (Court of Justice Judgment of 19 November 1991, Francovich, C-6 and 9/90); c) giving constitutional rank to the protection of human rights within the EU (Court of Justice Judgment of 12 November 1969, Stauder, C-29/69); and, finally, d) endorsing the principles of equivalence and direct effect to ensure the uniform and effective application of EU law in domestic legal systems (Court of Justice Judgment of 16 December 1976, Rewe, 33/76) and the principle of effective judicial protection to guarantee the EU subjects the rights recognized by its legal system (Court of Justice Judgment of 25 July 2002, Unión de Pequeños Agricultores /Council, C-500 P/00).

The EU's legal system has received many of its most important achievements from the Court of Justice, as highlighted by various authors who have analysed the key role that this institution has played in preserving and consolidating this integration process.[6] The term *acquis communautaire* is even used to refer to this role.[7]

Moreover, one should note that case law contributions are not limited to the EU's foundational period but are instead spread throughout its history: in fact, the case law mentioned covers fifty years, from the 1960s to the first decade of the 21st-century.

The purpose of this research is to verify whether the EU Court of Justice's role in the governance of European integration is still as relevant today as it was in the past.[8] For that purpose, we will cite landmark rulings by the Court of Justice from the last decade (2010-2019) and will particularly analyse the Bauer and Broßonn Judgment of 6 November 2018, due to its special relevance to the question of the direct horizontal effect of rights recognised by the Charter of Fundamental Rights of the European Union (CFREU) and of directives that regulate or give concrete expression to its rights. On this basis, we will then examine its position as an autonomous and supreme power within the EU, as a step prior to finally tackling the question of whether there is a *gouvernement des juges* in the Union.

The court rulings we will cite and the judgment we will comment on in detail were handed down by the Court of Justice,[9] despite the fact that the Court of Justice of the EU also has a General Court, because that is the main jurisdictional body of the Union's judicial institution.[10]

2 The preservation and consolidation of EU law in recent EU case law

It is well-known that the EU currently faces numerous challenges: large flows of illegal immigration and refugees; the constant threat of terrorism in the EU with selective attacks at iconic sites (Paris, London, Barcelona, Brussels, Hamburg, etc.); the serious after-effects of the global economic and financial crisis that

6 Among the many authors who have highlighted this fact since 2000, see Various Authors (2013 and 2015); García-Valdecasas and Carpí (2004); Lenaerts & Gutiérrez-Fons (2012); Phelan (2019); Poiares & Azoulai (2010); Rosas (2019), and Ugartemendía & Bengoetxea (2014).

7 This is a fortunate doctrinal expression that refers to the Union's basic and inalienable common heritage coming from the Court of Justice of the EU (Pescatore, 1981).

8 We use the term governance to refer to the complex and profound transformation that is taking place at different territorial levels (from local to global) and in different sectors (public, private and civil society) in the system of processes and institutions (formal and informal) that govern and discipline the management of collective activities to ensure their effectiveness, quality and good guidance. Concerning the notion of governance and its distinction from terms frequently employed as synonyms, such as *governability*, *network governance* and *governance,* in general see European Commission (2001), García (2009) and Solà (2001). More specifically, concerning judicial governance in the EU, see Sweet (2010).

9 It is worth mentioning that the main contributions to the preservation and consolidation of European integration by the Court of Justice have come within the framework of action for failure by member states to fulfil obligations and, above all, references for preliminary rulings, which are both proceedings for which it alone has competence (article 256 of the TFEU). And it does not appear likely that this state of affairs will change any time soon, based on that stipulated in Regulation (EU) 2019/629 of the European Parliament and of the Council of 17 April 2019 amending Protocol No 3 on the Statute of the Court of Justice of the European Union.

10 The fact that the most relevant contributions to the acquis communautaire are from the Court of Justice in no way implies that there are no important contributions from the General Court. In the last decade alone, for example, the contributions by this jurisdictional body have concerned the conditions under which an individual may bring action against acts of general application apart from legislative acts (Order of 6 September 2011, Inuit Tapiriit Kanatami and Others / Parliament and Council, T-18/10), access to institutions' documents (Judgment of 19 March 2013, In't Veld / Commission, T-301/10) and non-governmental organisations' participation in Union decision-making (Judgment of 14 March 2018, TestBioTech / Commission, T-33/16).

began in 2008, with high levels of unemployment in various countries, which has led to the impoverishment of broad social strata and is looming over our heads again; the emergence of populisms and authoritarian nationalist drifts call liberal democracy and supranational European constitutionalism into question; the worrying geopolitical division between member states, which frequently makes them antagonistic to the future of European integration; the many uncertainties caused by Brexit, etc.

This state of affairs has forced the institutions of the EU and member states to react and interesting documents reflecting on this have been approved in the last four years.[11]

In the second decade of the new century, the Court of Justice has also done its bit to safeguard and strengthen the process of European integration by issuing many well-constructed decisions that, in my view, are positively helping to alleviate the perverse effects of the aforementioned challenges and even recover the climate of trust in the EU among its citizens. Obviously, not everything is perfect within the judicial sphere but, objectively, things are getting much better in the judicial field than in the political sphere in the EU, where shameful spectacles have taken place on more than one occasion, such as the process of appointments to senior positions in the EU at the beginning of summer 2019, to cite the most recent example.

2.1 Selection of Court of Justice rulings in the last decade (2010-2019)

The notable court rulings issued by the Court of Justice over the last decade are so numerous that it is impossible even to list them.[12] Having said that, we can mention a few that reveal its *savoir faire* regarding questions of great economic importance (such as mortgage floor clauses in Spain) and/or first-order political significance (such as judicial independence in Poland), which also frequently involve principles as fundamental to the EU as primacy and direct effect, rules as essential to its legal system as the CFREU, and values as important to European integration as respect for the rule of law in the EU, among others. We are completely aware that this selection of EU case law is subjective. However, it is not arbitrary because all of the cases mentioned are objectively deserving.

Consider, for example, the decisive steps taken by the Court of Justice to develop the citizenship of the Union in article 20 of the TFEU (Ruiz Zambrano judgment, 8 March 2011, C-34/09, and Coman judgment, 5 June 2018, C-673/16) and to strengthen the position of consumers in their relationship with financial institutions (Mohamed Aziz judgment, 14 March 2013, C-415/11, and Gutiérrez Naranjo judgment, 21 December 2016, C-154 and 307/15); the priceless clarifications concerning the scope of national judges' obligations within the framework of article 267 of the TFEU (Puligienica Facility judgment, 5 April 2016, C-689/13) and the consequences of not referring a question for a preliminary ruling (judgment: Commission / France, 4 October 2018, C-416/17); the fineness with which it specifies the level of protection of the Charter (Melloni judgment, 26 February 2013, C-399/11, and Fransson judgment, 26 February 2013, C-617/10); the first-order impact that the establishment of the right to be forgotten within the union is having on the private life of European citizens (judgment: Google Spain, 13 May 2014, C-131/12); the considerable implications that the declaration of the compatibility of the dispute resolution system in the Comprehensive Economic and Trade Agreement (CETA) between Canada, the EU and its member states (Opinion 1/17, 30 April 2019) is sure to have on defining future common trade policy; the unquestionable peace-of-mind for the EU economy arising from confirmation of the validity of the European Central Bank's programme of purchasing European government bonds in the secondary market (Weiss Judgment of 11 December 2018, C-493/17), and, finally, the splendid holistic focus with which the Court of Justice tackles the exceptional relevance for European integration of the EU's common values of rule of law and judicial independence (Commission / Poland Judgment, 24 June 2019, C-619/18).

11 Concerning all of these, see the European Commission's contribution to the informal EU27 leaders' meeting in Sibiu (Romania) on 9 May 2019, *Europe in May 2019: Preparing for a more united, stronger and more democratic Union in an increasingly uncertain world*. One can also view this institution's documents concerning the future of the EU issued since 2016 and the equivalent documents from the Council.

12 For example, one simply needs to take into account that in the five-year period from 2014 to 2018, 3,498 cases were decided by the Court of Justice (Court of Justice of the EU, 2019). And if one views the judicial activity section of any of the annual reports of the Court of Justice of the EU in recent years, one can see that the court highlights, on average, more than 100 relevant rulings in each of them.

Without taking anything of relevance away from these Court of Justice rulings, I will single out one particular judgment of this court for its additional merits, since it establishes the direct horizontal effect of an employment right in the CFREU and, furthermore, that a directive that specifies its content can be relied on indirectly in a dispute between individuals. Study of this ruling will also aid in better calibrating the extraordinary relevance of this latest judicial addition to the acquis communautaire.

2.2 A landmark case: the Bauer and Broßonn judgment of 6 November 2018, C-569 and 570/16[13]

In order to examine this leading case, we will successively analyse the facts and questions referred for a preliminary ruling and the reasoning of the Court of Justice and then conduct a legal assessment of it.

2.2.1 Facts and questions referred for a preliminary ruling

The deceased husbands of Mrs Maria Elisabeth Bauer and Mrs Martina Broßonn were employees, respectively, of Stadt (town council) Wuppertal (Federal Republic of Germany) and the German enterpreneur Volker Willmeroth. These workers had not taken all of their paid annual leave before they passed away and their widows claimed an allowance in lieu of the outstanding days no enjoyed from their former employers, as the sole heirs of their husbands. The employers refused to pay it. Mrs Bauer and Mrs Broßonn both brought an action against their refusal before the Arbeitsgericht (German Labour Court), which had jurisdiction, seeking payment of those allowances.

Within the framework of the domestic remedies, the case came before the Bundesarbeitsgericht (Supreme Federal Labour Court), which requested the Court of Justice to interpret article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, as well as article 31 of the CFREU. Both of these stipulate that a worker is entitled to paid annual leave (furthermore, the directive specifies a period at least of four weeks) and, if that is not possible, an allowance if the employment relationship ends without that leave period having been taken.

In spite of this, German law (Federal Law on Leave of 8 January 1963, in its version of 7 May 2002) only allows the right to financial compensation in lieu of paid annual leave in the case of termination of the employment relationship, i.e. when the employment contract ends, and rules out the case of a worker's death. The Court of Justice had already ruled against this German legal restriction in the Bollacke judgment, in which it deemed that article 7 of Directive 2003/88/EC precluded national legislation or practices, such as those at issue in the main proceedings, which provide that the entitlement to paid annual leave is lost without conferring entitlement to an allowance for the outstanding days of leave, where the employment relationship is terminated by the death of the worker.[14]

In the reference for a preliminary ruling, the Bundesarbeitsgericht asked the Court whether the Bollacke solution applies where national law precludes an allowance in lieu from forming part of the estate of the deceased, as was the case in Germany due to the combined effect of article 7(4) of the Federal Law on Leave and article 1922 of the Civil Code, as interpreted by the Federal Labour Court. According to the latter, the right to paid annual leave lapsed upon the worker's death and cannot be converted into an entitlement to an allowance in lieu or be part of the estate. The judge a quo stated, furthermore, that any other interpretation of the German provisions would be contra legem. It also argued that the purpose of paid annual leave consists of enabling the worker to rest and enjoy a period of relaxation and leisure, which did not appear capable of being attained where the worker dies.

The case between Stadt Wuppertal and widow Bauer only dealt with recognising an ascending direct vertical effect for the aforementioned provisions in EU law, which was undisputed in view of clear EU case law. In the other case, the questions concerned a dispute between private persons (the widow inheriting from Broßonn and the private businessman Willmeroth). Since the Court of Justice had repeatedly and resoundingly rejected the direct horizontal effect of a directive, the essential issue was whether article 31 of the CFREU could have direct horizontal effect and, if so, whether it was possible to determine its contents taking into account that

13 See the commentary in O'Mara (2019) and Prechal (2019).

14 Court of Justice Judgment of 12 June 2014, Bollacke, C-118/13, operative part. See the commentary in Vitez (2014).

stipulated in article 7 of Directive 2003/88/EC, which would mean that that rule could be relied on indirectly before international courts in a national dispute between private parties.

2.2.2 The Court of Justice's reasoning

In accordance with the interesting conclusions of the Advocate General Yves Bot on 29 May 2018, the Court of Justice, convened as the Grand Chamber (a judicial structure reserved for certain cases),[15] ruled in the operative part of its judgement, on one hand, that article 7 of Directive 2003/88/EC and article 31(2) of the CFREU precluded national legislation such as that at issue in the main proceedings, under which, where the employment relationship is terminated by the death of the worker, the right to paid annual leave acquired under those provisions and not taken by the worker before his death lapses without being able to give rise to a right to an allowance in lieu of that leave which is transferable to the employee's legal heirs by inheritance. Where it is impossible to interpret a national rule such as that at issue in the main proceedings in a manner consistent with Article 7 of Directive 2003/88 and Article 31(2) of the Charter of Fundamental Rights, the national court, before which a dispute between the legal heir of a deceased worker and the former employer of that worker has been brought, must disapply that national legislation and ensure that the legal heir receives payment from the employer of an allowance in lieu of paid annual leave acquired under those provisions and not taken by the worker before his death, since that was required by Article 31 of the Charter. And, on the other hand, this obligation on the national court is imposed not only by Article 31 of the Charter, but also by Article 7 of Directive 2003/88, where the dispute is between the legal heir and an employer which has the status of a public authority.

In its reasoning, the Court of Justice starts from the premise that the worker's death has the inevitable consequence of depriving him of enjoying the period of rest and relaxation attaching to the right to annual paid leave to which he was entitled. In spite of this, the right to annual leave is just one of the two sides of the essential principle of EU social law represented by the right to paid annual leave, expressly enshrined as a fundamental right in article 31 of the CFREU and article 7 of the aforementioned directive. That is because this fundamental right actually includes two rights: a) the right to annual leave; b) the right to receive normal remuneration during leave. And the right to receive financial compensation for annual leave not taken when the employment relationship terminates is an essential part of the right to paid annual leave (paragraphs 39 and 58). These rights constitute essential content of article 31 of the Charter, which member states must respect and cannot make exceptions to, as stipulated in article 52 (1) (paragraphs 59 and 84).

In parallel, the Court of Justice stressed the broad freedom the national courts have to refer questions for a preliminary ruling concerning any aspect of the Union's legal system, including its case law (paragraph 21), as well as their obligations as an ordinary judge under EU law, so the interpretation must be performed in accordance with EU law, within the limits repeatedly stipulated in it (substantially, insofar as possible, as stated in paragraph 26). When it is impossible to do it, as in the case examined, as highlighted by the German Federal Labour Court in its request for a preliminary ruling, the national court must disapply the national legislation in the dispute between a deceased worker and his former employer, whether the latter is a public authority or a private business (exclusion effect). In addition, it must ensure that the heir is awarded an allowance in lieu of the worker's paid annual leave by virtue of the EU rules that the worker did not benefit from before his death (substitution effect). These three obligations (interpretation of national law in conformity with EU law, exclusion of the incompatible national rule and substitution of the latter with the EU rule) are imposed on the national court irrespective of whether the dispute concerns a public power or is between private persons (paragraphs 64-92).

In conclusion, the widows inheriting from the deceased workers are entitled to claim financial compensation for the paid annual leave not taken, since the Court recognises the ascending direct vertical effect of article 7 of Directive 2003/88/EC and article 31 of the Charter in the case of the dispute with the town council and the direct horizontal effect of article 31 of the Charter, interpreted (to give concrete expression to its contents)

15 The Court of Justice only deliberates and decides in the Grand Chamber when a member state or an institution participating in the proceedings so requests (article 16 of the Statute of the Court of Justice of the EU), or due to the difficulty or importance of the case or particular circumstances (article 60 of the Rules of Procedure of the Court of Justice). Consequently, the percentage of cases decided in the Grand Chamber is no more than 10% on average, although it has been increasing in recent years: 76 cases resolved out of a total of 645 in 2018 (Court of Justice, 2019).

in light of article 7 of Directive 2003/88/EC, in the case of the dispute with the private employer, such that, under the conditions described, those rules not only disapply the application of incompatible national rules (exclusion effect) but they may also be directly relied upon before national courts to settle disputes in internal cases (substitution effect).

2.2.3 Legal assessment

The Bauer and Broßonn judgment may be analysed from separate perspectives, as they raise different questions, all of which are deserving of separate study. For the purpose of this research, we are primarily interested in the contributions directly related to the direct horizontal effect of the CFREU and the ability to indirectly rely on EU directives that specify the contents of rights recognised by the Charter in disputes between private persons. However, we will also comment on incidental issues that are affected, such as interpretation of national Law in conformity with EU Law, the exclusion effect of EU Law and referrals by national courts for preliminary rulings.

In relation to the core issue, direct horizontal effect, we find the Court of Justice's reasoning magnificent in both what it says and the way it expresses it, because it reveals a substantive evolution of the first order, and also impeccably justified, raising the level of protection of individuals' rights within the EU. The following explanation will make it possible to properly appreciate the significance of the new Court of Justice approach in relation to the horizontal direct effect.

It has been clear since the 1980s that a directive does not have direct horizontal effect, or descending direct vertical effect, since it cannot, by itself, create obligations on private individuals and, therefore, cannot be invoked by them, because they are responsible neither for breach of the state's obligation to transpose the directive nor the incorrect state implementation, as the directive is not addressed to them (Marshall Judgment, 26 February 1986, C-152/84).[16] The only exception is ascending direct vertical effect, which allows private persons to rely on the rights that the directive grants them against states so that the latter do not benefit from the infringement committed (Van Duyn Judgment, 4 December 1974, 41/74).[17] The analysis of directives' lack of effect between private persons is constantly stated in specialised doctrine.[18]

In spite of this, the Court of Justice was quick to outline solutions mitigating, to some extent, the lack of horizontal effect of directives by resorting to ingenious constructions that largely allowed equivalent effectiveness: through a broad interpretation of the notion of the state so that private persons can assert rights recognised by a directive against any body or institution that is part of the state structure; by allowing the triangular direct effect of directives, so that infringement of directives can be invoked against national courts in cases concerning public contracting, company law, insurance, etc. that involve individuals and cause them damages, since the courts are public authorities that have an obligation to guarantee the correct application; by recognising the effect of exclusion (reactionary effectiveness) of a technical regulation contained in an EU directive, so that its failure to notify prevents its application in a dispute between private persons; by establishing the principle of state responsibility for the damages caused by the infringement of a directive; and in other imaginative ways.[19]

In the Mangold Judgment (22 November 2005, C-144/04), the Court of Justice took a significant step forward in issuing case law according to which a directive that regulates or specifies the contents of a general

16 In the actual words of the Court, "If the possibility of relying on a provision of a directive that has not been transposed, or has been incorrectly transposed, were to be extended to the sphere of relations between individuals, that would amount to recognising a power in the European Union to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations." (Court of Justice Judgment of 7 August 2018, Smith, C-122/17, paragraph 42). See the commentary in Simon (2018).

17 In more recent case law, the Court has declared that "where a person is able to rely on a directive not as against an individual but as against the State he may do so regardless of the capacity in which the latter is acting, whether as employer or as public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with European Union law" (Court of Justice Judgment of 24 January 2012, Domínguez, C-282/10, paragraph 38). See the commentary in Cheynel (2012).

18 Among many others, see the recent Ugartemendía (2019) and Wildemeersch (2018).

19 For more details about these case law techniques and mechanisms, see Alonso (2014: 274-312), Mangas & Liñán (2016: 420-431 and 450-456) and Ugartemendía (2018).

principle of EU law may be indirectly relied on in a dispute between private persons and, therefore, it has indirect horizontal effect.[20]

Later case law (Kücükdeveci Judgement, 19 January 2010, C-555/07, and Prigge, 13 September 2011, C-447/09) supported this view, albeit introducing certain nuances.[21]

The Association de Médiation Sociale Judgment (15 January 2014, C-176/12) appears to take a step backwards in denying the direct effect of article 27 of the CFREU and, consequently, denying that the concrete expression of its contents by Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, allowed the indirect effect (*Drittwirkung)* in disputes between private persons accepted in the Mangold case.[22] In our view, the rejection of direct effect of article 27 of the Charter was predetermined by the specific circumstances of this provision, whose literal wording establishes a principle that needs to be developed by the national or European legislative power, and not an unconditional fundamental right in itself,[23] since it limited its scope of application to "the cases and under the conditions provided for by Union law and national laws and practices" with regard to a company's workers' right to information and consultation in good time. Since this article is not sufficient in itself to grant private persons a subjective right that may be relied upon in their relationships with other private persons or the public powers, it also cannot be sufficient in combination with the provisions in Directive 2002/14/EC, no matter if and how much its provisions may have specified it.

In subsequent judgments, the Court of Justice was inclined to accept the direct horizontal effect of the provisions in the CFREU that are "imperative" (absolute in terms of their compliance, without allowing exceptions) and "regulatorily self-sufficient" — operative by themselves, without requiring development by institutions of the EU or member states.[24] For example, the Egenberger Judgment (17 April 2018, C-414/16) states that article 21 of the CFREU can be relied on in a dispute between private persons insofar as it prohibits any discrimination based on religion or convictions, as well as the direct horizontal effect of the right to effective judicial protection stipulated in article 47.[25]

At that time, the Court again reiterated that a general principle of EU law such as prohibiting discrimination on grounds of age, as given concrete expression in Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, may have direct horizontal effect (Dansk Industri Judgment, 19 April 2016, C-441/14).[26]

Finally, the Bauer and Broßonn Judgement marks another fundamental step in categorically proclaiming that, unlike article 7 of Directive 2003/88/EC, which does not have direct horizontal effect, article 31 of the Charter is, in itself, an imperative rule in EU law that can be directly relied on in court by a private person against a state and also another private person. This was the first time that the Court of Justice proclaimed the direct horizontal effect of a right in the CFREU other than the prohibition of any discrimination and the

20 See the commentary in Schiek (2006).

21 See the commentary in Cortés (2010).

22 See the commentary in Millán (2014).

23 Regarding the distinction between the principles recognised by the Charter for which judicial protection would be limited and indirect, and the rights proclaimed by the Charter that would benefit from full and direct judicial protection, see the general conclusions of Yves Bot on 29 May 2018 in Bauer and Broßonn, C-569 and 570/16, points 68-71, which cites doctrine.

24 Lenaerts (2015: 104-105).

25 See the commentary in Cappuccio (2018).

26 The Court of Justice added that this general principle "result[s] from the constitutional traditions common to the Member States" and is also "now enshrined in Article 21 of the Charter of Fundamental Rights of the European Union" (paragraph 22). See the commentary in González (2017).

right to effective judicial protection.[27] These two fundamental rights had also been recognised as general principles of EU law prior to their incorporation in the Charter in articles 21 and 47.[28]

Moreover, although article 31 of the CFREU has direct horizontal effect *per se*, the concrete expression of its contents given in article 7 of the directive aids its application and, for that reason, this provision in the directive can be relied on in disputes between private persons. It is also the first time that the Court accepted that directives that give concrete expression to and/or develop fundamental EU rights may be applied horizontally, albeit indirectly, as was the case for those directives which gave concrete expression to general principles of EU law since the Mangold Judgment. The Court of Justice is thus clearly consistent with the conclusions of the various advocates general[29] and the majority doctrinal position,[30] which for years has argued for the establishment of *Drittwirkung* for rights recognised by the Charter (or under the general principles of EU law) for various reasons. These include that its acceptance would reinforce the position of the weaker parties in relationships governed by EU law and would lessen the harmful effects on private persons of failure to recognise the case law concerning directives having direct horizontal effect. And rightly so, since the refusal to allow directives to be invoked in relationships between individuals restricts the effectiveness of the rights recognised by the EU's legal system, which has forced the Court to alleviate the situation in the imaginative ways mentioned above. One must also take into account that this legal system intervenes more and more each day in relationships between private persons and, therefore, there will be increasing cases of disputes between private persons involving the issue of being able to rely on directives that contribute to guaranteeing fundamental rights, especially since there are rights in the Charter (articles 21, 27, 30, 31, 32 and 33, etc.) that are incorporated in directives.[31]

At the same time, it is our view that the Bauer and Broßonn Judgment establishes a strong presumption in favour of the direct horizontal effect of social rights in the CFREU when those it addresses (the worker and the employer) are unconditionally specified in the Charter, as is the case for article 31, and grants them a subjective right that may be directly applied even in relationships between private persons, since development by the EU or member states is not required (it is sufficient in itself), provided the situation has an EU connection, i.e. it is covered by EU law and thus falls within the scope of the CFREU (paragraph 85).[32]

We also think that this Court of Justice judgment has definitively eliminated the obstacle created by article 51(1) of the Charter with regard to ability to rely directly on its rules in disputes between private persons, as it does not accept that the fact that this rule stipulates that its provisions are addressed to member states only when they are implementing EU law means that the CFREU cannot have effect in relationships between private persons. This is the same as it did in the past in establishing the direct horizontal effect of provisions in treaties that were addressed solely to member states (thus, in the Van Gend en Loos Judgment of 1963 concerning the former article 12 of the Treaty establishing the European Economic Community). In acting in this way, the Court has explained one of the consequences of article 6 of the TEU giving the Charter the same value and the same effects as the treaties.[33]

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27 Note that in a judgment on the same day concerning a similar matter to the Bauer and Broßonn cases, albeit with less impact, the Court of Justice declared that a worker could not automatically lose the entitlement to paid annual leave due to not having requested it, unless he had deliberately refrained from doing so in full knowledge of the ensuing consequences, even if the employer had given him the possibility of doing so, and so he lost his right to financial compensation if the employment terminated under those circumstances (Court of Justice Judgment of 6 November 2018, Kreuziger, C-619 and 684/16). See the commentary in Véricel (2019).

28 No discrimination on the grounds of nationality in the Court of Justice Judgment of 13 February 1969, Walt Wilhelm, 14/68, and effective judicial protection in the Court of Justice Judgment of 15 May 1986, Johnston, 222/84.

29 See the general conclusions by Yves Bot on 7 July 2009, in the Kücükdeveci case, C-555/07, and Pedro Cruz Villalón on 18 July 2013, in the Association de Médiation Sociale case, C-176/12.

30 For example, Cruz (2016) and Walkila (2016).

31 Ugartemendía (2019: 156-164) also provides various examples of the connection between directives (in particular, the aforementioned Directives 2000/78/EC and 2003/88/EC) and the fundamental rights recognised by the Charter or the general principles of EU law.

32 Sarmiento (2018).

33 As rightly noted by advocate general Yves Bot in her conclusions on 29 May 2018 in the Bauer and Broßonn cases C-569 and 570/16, points 77-78.

Another interesting aspect of this judgment is that the Court of Justice notes that a limitation of a fundamental right guaranteed by the CFREU is only possible if it respects the essential contents (article 52(1)), which, in the specific case of article 31, includes the rights to annual leave, payment during it and an allowance in lieu of paid annual leave not taken upon termination of the employment relationship (paragraphs 58, 59 and 84).

In view of all the foregoing, it is reasonable to think, finally, that the Bauer and Broßonn Judgment will end up having positive effects on other provisions in the Charter and definitively lay aside what could be presumed, *prima facie*, from reading the AMS Judgment.

Regarding other considerations, perhaps not as dazzling as the foregoing and with a smaller scope, it is very opportune that in the Bauer and Broßonn Judgment the Court of Justice linked its reasoning concerning the direct horizontal effect with the obligation on the national court to provide an interpretation of national law in conformity with EU law and its limits, such that, if it were not possible to arrive at a reasonable interpretation of the former in accordance with the latter (as in this case, which the national court noted), the excluding effect of EU law would come into play, i.e. its primacy, which would require the disapplication of the incompatible national law. Moreover, the EU provision (article 31 of the Charter), based on its direct effect, replaces the incompatible national law (substitution effect), which grants the claimant the right to an allowance in lieu of annual leave not taken (paragraphs 65-78).[34] And it is also appropriate to mention the broad margin of discretion that member states' judges and courts have in using article 267 of the TFEU, even if the parties to the domestic dispute object, elegantly encouraging them to refer any question concerning the EU's legal system for a preliminary ruling, including the EU case law (paragraphs 23-28).

In spite of the indisputable merits of the Bauer and Broßonn judgment, it is highly likely that its application in member states' domestic legal systems will end up raising problems of compatibility with national case law. Suffice it to say that the Spanish Supreme Court in its Judgment 497/2016 (8 June 2016, Telefónica Móbiles España, cassation appeal 207/2015), rejected that article 31 of the CFREU had direct horizontal effect, arguing that the right to paid annual leave that it recognises is not sufficient in itself to grant a subjective right that may be relied on in a dispute between private persons with regard to remuneration[35] due to the fact that "it has not duly been given concrete expression (at least with regard to the amount of the remuneration) so as to generate its direct effect as a fundamental right" (Legal Ground 11). In corollary, it denied that Directive 2003/88/EC could be invoked in that dispute, despite the fact that article 7 gave expression to the concept of paid annual leave and, instead, it applied Convention 132 of the International Labour Organization.[36] An additional problem is that the revision of final judgements that contradict a subsequent judgment of the Court of Justice is a question that, as a rule, has not been well resolved in member states. Moreover, in the specific case of Spain, until recently the legal framework raised doubts about its adaptation to the principles of the equivalence and effectiveness of EU law,[37] which manifested, for example, in the vast number of legal cases concerning so-called floor clauses following the Court of Justice Judgment of 21 December 2016, Gutiérrez Naranjo, C-154 and 307/15.[38]

34 Concerning the distinction between the effect of exclusion (primacy) and substitution (direct effect) in general, see Martínez (2006).

35 It raised the question of whether the "normal or average" pay that should be paid during paid annual leave includes variable items for incentives (bonuses), seniority and availability regulated in the applicable collective-bargaining agreement.

36 See the commentary in González (2016).

37 In particular, see article 510 of the Civil Procedure Act (*Ley de Enjuiciamiento Civil*), which includes an innovative special mechanism to review final judgments in Spain that contradict subsequent judgments by the European Court of Human Rights (article 5 bis of Organic Law 7/2015 of 21 July, amending Organic Law 6/1985 of 1 July on the Judiciary). Recent EU case law has confirmed the compatibility of Spanish regulations in this respect due to considering (in an analogous Austrian case) that this special mechanism to revise final national judgments contrary to European Court of Human Rights judgments does not infringe the principle of equivalence and also does not affect the principle of effectiveness (Court of Justice Judgment of 24 October 2018, XC, C-234/17). Concerning the revision of final judgments in Spain, see Pérez (2017).

38 In this ruling the Court of Justice declared the case law of the Spanish Supreme Court (especially its Judgment 241/2013 of 9 May 2013, cassation appeal and procedural infringement number 485/2012) contrary to EU law. This placed a temporal limitation on consumers' right to recover amounts overpaid on the basis of floor clauses considered abusive under Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. However, the Supreme Court declared inadmissible the appeals for review of final judgments that were incompatible with the Gutiérrez Naranjo Judgment, instead applying its traditional case law with arguments including that a Court of Justice judgment is not a "new document" for the purposes stipulated in the regulation of applications for revision in article 510(1) of the Spanish Civil Procedure Act (see Interlocutory Order of the Supreme Court 7/2017 of 4 April, appeal for review 7/2017, which summarises its case law). Only after the XC Judgment cited above did it become clear

In any case, we also should not underestimate the risk that indirect recognition of the direct horizontal effect of directives giving concrete expression to the fundamental rights stipulated in the CFREU or the creation of general principles of EU law may cause new conflicts with member states' supreme courts or fan the flames, since some of them have already stated their disagreement with EU case law concerning fundamental rights on various occasions. Among others, examples include the German Constitutional Court in its Honeywell Judgment of 6 July 2010; the Spanish Constitutional Court in its Melloni Judgment of 13 February 2014; and the Danish Supreme Court in its Dansk Industri Judgment of 6 December 2016.[39]

3 The judicial governance of the European Union

One can conclude from the foregoing sections that the Court of Justice of the EU has always acted as a guarantor of the rule of law within the EU and has preserved, strengthened and even galvanised the common interests and spirit of European integration against selfishness of all kinds that has appeared at different levels of application of the EU legal system. As a rule, it has managed to achieve its mission satisfactorily, as demonstrated by the widespread acceptance of its case law by those subject to EU law, that means private persons, other EU institutions and member states.

The Court conducted itself in this manner in performing its mission because member states have created it as an autonomous and supreme power with an essentially constitutional nature in the EU. However, there clearly may be concerns and criticism, such as the accusation of creating a *gouvernement des juges* within the EU.

3.1 The position of the Court of Justice of the EU as an autonomous and supreme power with an essentially constitutional nature in the EU

The institutionalisation of the Court and its key role in ensuring respect for EU law make it an "autonomous and supreme power" in the EU.[40] It embodies autonomous power, since it is an institution with the same rank as the European Council, the Council, the Commission, the European Parliament, the European Central Bank and the Court of Auditors (article 13 of the TEU). Consequently, it benefits from the organic and functional independence inherent to EU institutions. By virtue of its powers, taken as a whole, it possesses supreme power because it is responsible for interpreting the EU's legal order in the final instance. Furthermore, it is the exclusive guardian of respect for the distribution of powers within the EU and member states and, therefore, the legality of that organisation's law, such that its decisions are compulsorily and irrevocably imposed on those subject to the EU's legal system.[41]

This "so central and defining position" of the Court of Justice of the EU in the Union's legal and constitutional system "does not allow comparison with that which international courts have in international relations", such as the International Court of Justice, the main judicial body of the United Nations (article 92 of the Charter of the United Nations).[42]

Instead, its situation should be compared to that of constitutional courts. On the one hand, constitutional jurisdictions are also autonomous and supreme judicial bodies. That is the case for the Spanish constitutional court, as can be clearly inferred from a combined reading of articles 1, 2, 4, 38 and 40 of Organic Law 2/1979 of 3 October on the Constitutional Court, and article 5(1) of Organic Law 6/1985 of 1 July on the Judiciary. The Constitutional Court itself has stated since its first judgments that it acts as the supreme interpreter of the Spanish Constitution and that its interpretation is imposed on all public authorities (Constitutional Court

that the Supreme Court acted correctly. See the commentary on the Gutiérrez Naranjo Judgment and the controversy it created in Spain in Blázquez (2017) and Juan (2017).

39 For further details, see Alonso (2018) and Ripol (2019).

40 Isaac (1995: 255).

41 Suffice it to say, in this regard, that all of the rulings of the Court of Justice and the General Court in the exercising of their respective powers are binding (article 91 of the Rules of Procedure of the Court of Justice of 25 September 2012—latest version from 9 April 2019—and article 121 of the Rules of Procedure of the General Court, last modified on 11 July 2018) and can only be challenged in exceptional circumstances, e.g. appeals for interpretation and review against Court of Justice judgments in accordance with articles 43 and 44 of the Statute of the Court of Justice of the EU.

42 Boulouis (1974: 150).

Judgment 1/1981 of 26 January).[43] On the other hand, the constitutional functions of the Court of Justice of the EU are more numerous and qualitatively relevant than those of international courts.[44] In fact, it is called upon to exercise "the three-fold function of a constitutional court in a federal system" in a similar manner because it must decide on disputes concerning the powers attributed to the EU's political institutions, resolve conflicts of competency between the EU and its member states, and protect private persons from any unlawful interference by the EU and national public authorities.[45] Even one of the most highly respected academics studying constitutional courts has described the Court of Justice as a "transnational constitutional legal authority".[46]

Based on the foregoing, it is also easy to understand why EU case law is so relevant in the system of sources of EU law and the member states' legal systems.[47]

3.2 Is there a *gouvernement des juges* in the European Union?

Judicial governance within the EU is of very high quality in terms of both the configuration of the legal status of the Court of Justice of the EU and the way in which it has exercised its prerogatives in fulfilling its mission. The high degree of legitimacy enjoyed by the Court of Justice among private persons, other EU institutions and member states proves this beyond doubt.

Taking into account its position as a supreme, autonomous power within the union, it is only natural that doctrine has posed the question of *quis custodiet ipsos custodes* to refer to who monitors the Court's actions.[48] It should come as no surprise that, on occasion, it has received severe approaches from academia, to the extent of considering that its vision of the EU is clearly subjectivist, and on this basis its work throughout history has been described in pejorative terms such as *judicial activism, praetorian case law* and *government of judges.*[49]

The truth is that these concepts, in particular *gouvernement des juges*, should be employed prudently since, ultimately, "judicial power is a question of legitimacy", i.e. of the confidence of those being judged in the judicial task and, therefore, acceptance by public opinion.[50]

If one means by this expression, in a neutral sense, that the Court of Justice has a broad margin for discretion in the performance of its mission that allows it to carry out an autonomous interpretive policy, then one is merely expressing a reality that is hard to refute: the Court is clearly a jurisdiction that can govern because it has the means to do so, and it uses them to promote the values, advance the objectives and serve the interests of the EU, its citizens and member states, and also to ensure the consistency, effectiveness and continuity of its policies and actions, as stipulated in article 13 of the TEU.

If, on the other hand, one uses the term *government of judges* in accordance with its historic origins and the derogatory technical meaning of the expression as the attitude of a jurisdictional body that causes its own ideological and political orientations to prevail, replacing the choices made by the legitimate holders of decision-making power with its own views,[51] then the Court cannot be classified within the paradigm of a government of judges.

43 Concerning all these aspects, see the excellent characterisation of the Spanish Constitutional Court produced shortly after it was created by De Otto (1981) and García de Enterría (1981).

44 One can deduce that, for example, from a reading of the clarifying systematisation of the powers of the Court of Justice of the EU in substantial constitutional and international functions in Rodríguez and Baquero (2006) and Ruiz-Jarabo (2011).

45 Lenaerts & Gutiérrez-Fons (2012: 35).

46 Cappelletti (2015).

47 For more details about this question, see Cienfuegos (1998) and Rodríguez (2017).

48 *Quis Custodiet the European Court of Justice* (1993).

49 This is essentially the case for Ransmussen (1986: 62-63, 154 et seq, 265 et seq, 390-393 and 415 et seq), who describes the Court's case law in many sectors as "increasing social indigestibility of pro-central government judicial activism" and calls upon that its activism be banished. Also see, among others, the severe criticism of the Court of Justice by Neill (1995) and Hartley (1996).

50 Kutscher (1976: I/48).

51 For a complete analysis of the origins of this expression within the context of the United States, where it arose, see Lambert (1921). And with regard to its application to the European Communities, see Colin (1966).

Indeed, from empirical analysis of the vast EU case law one can easily infer that the Court of Justice does not hesitate, in the exercising of its mission, to ensure that a constructive interpretive policy predominates, especially whenever the EU is in an exceptional situation. It is true that, by acting in this way, a broadly praetorian conception of European integration comes forth. However, the Court is perfectly aware not only of the legal limits, but also the political limits, of its mission. This judicial view of the EU does not arise exclusively from the will of the Court of Justice, since its members defend an idea of the EU that is not a purely political interpretation, which is inherent to authorities invested with legislative power, since they do not make their subjectivity prevail over the principle of legality. This is proven by the fact that its legal reasoning is always based on legal rules, i.e. its decisions have always reasonably stemmed from the treaties.[52] We are applying the criteria for distinguishing between the legislative power and the judicial power within a state *mutatis mutandis* to the case of the EU.[53]

One might think that the Court of Justice, influenced by some of the criticism received, has been less active in recent years. It would be a mistake to fall into this way of thinking because the Court's case law policy "is not linear". Instead, it adapts its intervention to the circumstances and needs of the time. In fact, the stages of "interpretive activism", such as those when the fundamental principles of EU law were becoming established in the 1960s, coexist with others of "hermeneutical prudence", as in the years between the Single European Act and the Maastricht Treaty. The uncertainties of the foundational era provided support for its activism, while the calm during the years between the Single European Act and the Maastricht Treaty explain its prudence.[54] In short, the Court adapts its actions to the context. And it is also doing so in the current period, in which the EU is facing new and very serious challenges to consolidate and develop its integration process that often justify it again taking positions of interpretive activism. One extremely clear example of the enhancement of the protection of private persons arises from recognition of the direct horizontal effect of the CFREU and the ability to rely indirectly on directives that give concrete expression to their rights in disputes between private persons, on directives that give concrete expression to their rights in the judgment analysed (Bauer and Broßonn). The other decisions mentioned are also examples of this: recognition of the right to be forgotten on the internet, guarantee of the value of the rule of law in the EU, etc.

Furthermore, doctrine has generally commented favourably on the work performed by the Court of Justice.[55] This is by no means an obstacle to being able to criticise some of its rulings, especially when they do not appear to be well-founded[56] or are too laconic and/or almost indecipherable in style.[57]

The fact that the decision-making institutions of the EU and member states have, as a rule, positioned themselves in favour of EU case law, is of greater importance than that majority position in legal doctrine.

Note, in this regard, that the EU common institution that has undergone fewest changes during the successive reforms of constitutional treaties is the Court of Justice of the EU, and when they have affected it, they have improved its organisation and internal functioning, and provided it with new powers or strengthened existing ones. It is sufficient to consider the Court's powers granted by the Treaty of Lisbon in relation to the longstanding intergovernmental pillars (articles 275 and 276 of the TFEU) or with regard to decisions adopted under article 7 of the TEU (article 269 of the TFEU).

Moreover, the publications of the last two intergovernmental conferences to reform the constitutional treaties clearly bring forth the idea that the Council, the Commission, the European Parliament and the member states consider the role of the Court of Justice of the EU, in general, and its Court of Justice in particular, to

52 Citing the Van Gend en Loos Judgment, Pescatore (2010) has stated that this ruling reveals a certain idea that the Court of Justice has of Europe in which private persons play a decisive role in the effective application of its legal system but then goes on to provide six arguments that demonstrate very robust and well-articulated reasoning based on the treaties.

53 For more details about this distinction, see De Otto (1981).

54 Ulloa (2017: 1-2).

55 Among the many authors in favour of activism, praetorian power and the constitutional creation of the Court of Justice from 2000, see Cappelletti (2015), Kelemen (2006) and Timmermans (2008) and also the authors cited in note 6.

56 For example, see Martín's (2015) reasonable objections to Opinion 2/13 of 18 December 2014 on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms.

57 Weiler's (2002: 480-481) criticism of the "cryptic and Cartesian style" that characterises many of the Court of Justice's rulings is well-known. He argues that it should abandon this and move towards a more "discursive, analytical and conversational style" in order to strengthen the persuasive force of its case law.

be a key part of European integration, so as to ensure respect for the rule of law, a unified interpretation of the EU's legal system and protection of citizens' rights.[58]

Finally, the main case law contributions (primacy, direct effect, state responsibility, protection of fundamental rights, etc.) are today an indisputably integral part of the acquis communautaire and many of them have even been expressly stipulated reflected in the treaties. Sometimes this has been stipulated in their operative part, as in the case, for example, of the protection of human rights in the EU (articles 2 and 6 of the TEU). On other occasions, they have been additionally included in protocols annexed to the treaties, such as the planned accession of the EU to the ECHR, which appears not only in article 6(2) of the TEU and article 218(8) of the TFEU but also in Protocol number 8. There are also cases in which the Court's contributions have been incorporated in declarations annexed to a reform of the treaties, as in the case of recognition of the primacy of EU law in declaration number 17 annexed to the Treaty of Lisbon.[59]

All the foregoing reasons, and others that could be mentioned,[60] corroborate that the Court of Justice is constantly seeking to be in harmony with the treaties and remain faithful, in its position as the "constitutional arbitrator acting in a complex system and at different levels of governance", to its mission to "guarantee a union based on the rule of law in the various stages of the project of European construction".[61]

4 Final reflections

The Court of Justice of the EU holds a privileged position within the Union's institutional system, since it is not subordinate to the other institutions and, compared with other jurisdictional bodies, it is in a situation comparable to a constitutional court. This is evidenced by the fact that, like constitutional courts, the Court is an autonomous and supreme power and also exercises a function analogous to them in order to preserve and consolidate the EU's legal system. It is sufficient to consider the principles of primacy and direct effect, state responsibility and consistent interpretation, and the protection of human rights in the Union, etc. which have arisen from EU case law.

The decisive contribution of the Court of Justice to the construction of the Union's legal system has sometimes been criticised, and it has even been accused of implementing a government of judges in the EU. This criticism is undeserved because it is the treaties themselves, and not the court's own will, that have created and continue to create the basis for its work. This can be seen in its own case law, which faithfully illustrates that in performing its mission it is acting with the firmness and forcefulness required, in each case, to protect the principles and essential values of European integration, no matter how relevant the political, economic or social consequences of the cases that are brought before it by the litigants, including member states and the EU itself.

It could be thought that the Court of Justice of the EU, influenced by the criticism received, has been more passive and prudent in recent years. But that is not true. It has modulated its intervention based on the circumstances and needs of the time. Moreover, in this current period, with very serious new challenges

58 The publications issued by the two intergovernmental conferences in 2004 and 2007 can be viewed on the Council of Europe's webpage.

59 The literal wording of declaration number 17 stresses that the member states and the EU's decision-making institutions have fully accepted the principle of primacy and its case law origin: "The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law [...]. It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court of Justice, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, case 6/64), there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice."

60 We could include other considerations supporting our thesis, such as the interpretations conciliating EU institutional law with the treaties and other hierarchically superior rules, seeking to respect the preferences of the Union's legislature, to the extent that, only as a last resort does the Court of Justice annul an EU act due to the fact of it being incompatible with them (for example, the Court of Justice Judgment of 16 April 2015, Parliament / Council, C-317/13 and C-679/13). In the same vein, member states are constantly recognised as having a broad margin for interpretation in the absence of EU harmonisation measures in a field (Court of Justice Judgment of 1 June 2010, Blanco Pérez and Chao Gómez, C-570 and 571/07).

61 Lenaerts & Gutiérrez-Fons (2012: 34, 106 and 108).

faced by the EU, the Court upholds interpretive activism as the circumstances require. This is evidenced by the aforementioned decisions from the last decade.

In our opinion, by acting in this constructive way, the Court is again achieving the adherence to European integration by the subjects of its legal order. Going beyond our own view, the reality is that the majority of doctrine, the member states and EU institutions all support the work performed by the Court of Justice of the EU.

All in all, one of the keys to the success of the EU is the *savoir faire* demonstrated by the Court in applying its legal statute, which shows that we have a solid and reliable foundation for the protection of this sub-regional process of profound integration and, consequently, that the judicial governance of the EU is truly high-quality.

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