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The Court of Justice and the Construction of Europe:
Analyses and Perspectives on Sixty Years of Case-law
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Court of Justice of the European Union
Cour de Justice de l'Union Européenne

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Court of Justice of the European Union
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Luxembourg

Cover photo: View of the grand staircase connecting levels 6 and 8 of the Palais of the Court of Justice in Luxembourg. G. Fessy © CJUE

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Préface

Le 4 décembre 2012, la Cour de justice de l'Union européenne fête son soixantième anniversaire. Il est vrai que, du point de vue symbolique, cet anniversaire ne peut pas être qualifié d'emblématique. Lors de son cinquantième anniversaire, il y a dix ans, la Cour avait organisé une série de manifestations et actions telles que, notamment, un colloque sur la coopération entre la Cour de justice et les juridictions des États membres, une audience solennelle, un concert au Conservatoire de la ville de Luxembourg et la confection des «Carnets de la Cour» illustrés par un artiste renommé ainsi que d'un ouvrage consacré à l'«Architecture et Œuvres d'art à la Cour de justice».

Soixante ans ne représentent ni la moitié, ni les trois quarts d'un siècle. Néanmoins, la Cour de justice a décidé de ne pas laisser cet anniversaire passer inaperçu. En effet, le système juridictionnel de l'Union européenne a fait l'objet ces dix dernières années d'importantes réformes lesquelles, vues dans leur ensemble, constituent une véritable transformation. L'on peut mentionner à ce titre l'entrée en vigueur du traité de Nice, deux élargissements qui ont conduit au quasi doublement des effectifs de l'Institution et à une multiplication des langues de procédure et de travail, la création du Tribunal de la fonction publique, la modernisation substantielle des méthodes de travail internes, l'entrée en vigueur du traité de Lisbonne avec l'extension des compétences de la Cour, la mise en place de la procédure préjudicielle d'urgence et l'informatisation de la procédure avec le lancement du système e-curia. Il ne serait pas exagéré de prétendre que la Cour de justice en 2012 est très différente de celle de 2002. C'est principalement pour cette raison que, en mettant l'accent sur la substance plutôt que les réjouissances, la Cour a décidé de commémorer son soixantième anniversaire en procédant à l'édition du présent ouvrage collectif consacré au rôle de la Cour et de sa jurisprudence dans la construction européenne.

Un comité éditorial a donc été constitué, chargé de la dense tâche de l'édition de ce volume par le biais duquel la Cour s'ouvre au monde extérieur, en particulier à la doctrine, et manifeste son écoute. À cet égard, je souhaiterais à la fois remercier et féliciter son président, monsieur le juge Allan Rosas, ainsi que ses membres, monsieur le juge Egils Levits et monsieur l'avocat général Yves Bot, qui n'ont pas ménagé leurs efforts, depuis plus d'un an, pour garantir la qualité et la représentativité des contributions soumises.

Dans les pages qui suivent, le lecteur trouvera des contributions couvrant une large gamme des matières du droit de l'Union. Si les styles et les approches des contributions peuvent différer substantiellement entre eux, il n'en demeure pas moins qu'il existe un dénominateur commun: la jurisprudence de la Cour de justice. Nous espérons que le présent ouvrage servira non seulement à rendre hommage aux soixante ans de jurisprudence de la Cour mais également à alimenter la réflexion sur son évolution dans l'avenir.

Vassilios Skouris
Président de la Cour de justice

Avant Propos

Le présent ouvrage, conçu pour marquer le soixantième anniversaire de la Cour de justice, constitue le produit final d'un long processus de réflexion et d'organisation. En effet, c'est la première fois dans son histoire que la Cour entreprend une telle démarche dans le cadre de la commémoration de la date de sa création. Les raisons qui sous-tendent cette démarche sont multiples et se concentrent autour du contexte actuel entourant l'Union européenne en général et la Cour de justice en particulier.

D'une part, l'entrée en vigueur du traité de Lisbonne a renforcé le rôle de la Cour de justice dans l'ordre juridique de l'Union européenne en étendant ses compétences de manière très significative. Le droit de l'Union devient de plus en plus vaste et il paraît désormais plus évident que jamais que, par le terme *droit de l'Union*, on se réfère non pas à une branche spécifique du droit mais plutôt à corpus législatif et jurisprudentiel assimilé à celui d'un État. Il nous a donc paru approprié de commémorer le soixantième anniversaire de la Cour en mettant l'accent sur le rôle, la jurisprudence et sur la contribution de cette dernière dans le processus de l'intégration européenne. Le symbolisme est à nos yeux évident: l'enrichissement constant du droit de l'Union rend nécessaire l'approfondissement de son enseignement et de son étude et la Cour doit y contribuer.

D'autre part, une série d'évolutions relativement récentes, dont les principales sont la conversion de la Charte des droits fondamentaux en texte juridiquement contraignant et le développement de l'espace de liberté, de sécurité et de justice, rapprochent tant l'Union européenne que la Cour de justice du citoyen de l'Union. Le prétoire qu'est la Cour de justice lui devient de plus en plus ouvert et accessible. Ce soixantième anniversaire a donc été considéré par la Cour comme un moment très opportun pour une ouverture vers la doctrine, pour une interaction directe avec la communauté académique consacrée à l'étude du droit de l'Union.

Au début de nos travaux, nous avons dû faire face à deux principales difficultés: délimiter la taille, la structure et les thèmes ainsi qu'identifier les contributeurs. Couvrir l'ensemble des domaines de la jurisprudence de la Cour pendant les soixante dernières années était une tâche herculéenne, voire impossible. Le choix principal a donc été fait de limiter l'ouvrage à un volume, afin d'assurer sa lisibilité,

et de le structurer en quatre chapitres présentant un caractère transversal, tout en laissant aux auteurs le soin de définir le titre exact de leur contribution. Le premier chapitre vise à mettre l'accent sur le rôle institutionnel de la Cour de justice, sur l'évolution de ce rôle au fil des six dernières décennies et sur les perspectives pour l'avenir. Le deuxième chapitre est consacré au caractère constitutionnel de l'ordre juridique de l'Union et aux principes fondamentaux du droit de l'Union qui renforcent ce caractère. Le troisième chapitre, intitulé « L'espace des citoyens », regroupe des contributions ayant pour objet la jurisprudence de la Cour susceptible d'affecter la vie quotidienne des citoyens. Quant au dernier chapitre, il offre une perspective des aspects juridiques des relations extérieures de l'Union ainsi que de sa place dans le monde.

Le choix des auteurs a été effectué par le comité éditorial sur la base des suggestions faites par des membres de la Cour. Nous nous sommes efforcés de faire ce choix sur la base de critères objectifs afin d'assurer une représentativité optimale tant du point de vue géographique que du point de vue du profil professionnel et académique des auteurs. Ce choix, nécessaire, ne nous a pas été facile. Pour les nombreux éminents universitaires et professionnels du droit de l'Union, qui n'auront pas eu l'occasion de contribuer directement à cet ouvrage, nous espérons que les pages qui suivent inspireront leur travaux et promouvront les débats doctrinales. Notre ambition n'est pas que ce volume épuise le dialogue mais qu'il le provoque. Et c'est précisément pour cette raison que les lecteurs constateront que le présent ouvrage ne contient ni d'aperçu général des contributions ni de conclusion.

Il est également significatif de mentionner que, tenant compte du contexte d'austérité économique actuel, la Cour a décidé de confier la publication et la distribution de cet ouvrage à une maison d'édition privée. Après avoir invité 15 maisons d'édition internationales possédant une certaine expérience dans la confection de tels ouvrages à manifester leur intérêt, la Cour a décidé de retenir l'offre des maisons d'éditions T.M.C. Asser Press et Springer Verlag. Nous les remercions vivement pour leur collaboration efficace qui a rendu possible la publication de cet ouvrage dans des délais particulièrement brefs.

Pour terminer cet avant-propos nous souhaitons exprimer notre reconnaissance aux auteurs pour l'enthousiasme avec lequel ils ont accepté l'invitation de la Cour à contribuer à cet ouvrage, pour la qualité remarquable de leurs contributions et pour le respect des délais très serrés qui leur étaient impartis afin que le présent ouvrage puisse être présenté le 4 décembre 2012. Nous ne pouvons omettre de mentionner dans ce contexte le travail de soutien du comité éditorial et de coordination réalisé avec engagement et efficacité par M. William Valasidis, référendaire auprès de M. le Président de la Cour. Nos remerciements tout particuliers doivent également être adressés à l'ancien Vice-président de la Commission,

Monsieur Antonio Vitorino, pour avoir répondu favorablement à notre invitation de rédiger l'introduction de cet ouvrage, tâche assez ardue compte tenu du nombre et de la diversité des contributions.

Le Comité Éditorial
A. Rosas, juge à la Cour de justice, président du comité
E. Levits, juge à la Cour de justice
Y. Bot, avocat général à la Cour de justice

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Introduction

António Vitorino

L'ordre juridique européen constitue une 'révolution souple' dans le cadre des relations entre États-souverains. La Cour de Justice est sans aucune doute la pierre angulaire d'une telle évolution progressive et continuelle au cours des 60 années évoquées dans le présent volume.

La Cour a en effet joué un rôle central de consolidation d'un ordre juridique naissant, tout en contribuant à la définition progressive de ses caractéristiques spécifiques, dont certaines découlent toujours de ses formulations jurisprudentielles (voir par exemple la primauté du droit communautaire et le débat à ce propos lors de l'adoption du Traité Constitutionnel puis de son incorporation dans le Traité de Lisbonne).

En même temps, le développement de la jurisprudence de la Cour a aussi donné une impulsion à l'approfondissement du projet d'intégration européenne, tout en explorant les potentialités des bases juridiques des Traités à la lumière des objectifs définis par les pères fondateurs des Communautés. Un tel rôle d'impulsion (ici et là critiqué en tant qu'expression d'un certain « activisme judiciaire ») exercé en parallèle, a souligné l'importance de la Cour en tant qu'instrument de légitimation et de garantie des finalités de l'intégration européenne établies dans les Traités. La dialectique impulsion/légitimation est à la base de plusieurs avancées de l'intégration européenne, plus évidentes dans les périodes où les impasses au niveau politique et même institutionnel ont laissé un vide que la jurisprudence a rempli.

On ne pourra dons être surpris par le fait que l'image marquante de la Cour soit d'abord liée à une fonction de garantie constitutionnelle au regard de l'ordre juridique étatique. Ce rôle de « Cour Constitutionnelle européenne » n'est pas

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cependant exempt de tensions et de conflits, dans la mesure où la Cour le déploie dans un cadre où s'expriment différents intérêts nationaux et diverses dynamiques d'action des institutions communautaires. Dans un cas de figure autant que dans l'autre, la Cour a dû faire preuve d'une évaluation de l'intérêt général européen tel qu'il découle de la lettre des Traités et ainsi contribuer à moduler la séparation et de l'interdépendance des pouvoirs des institutions communes. Mais en même temps la Cour a toujours reconnu que l'exercice consistant à dégager un tel intérêt européen devrait prendre en ligne de compte les intérêts nationaux des États-membres, selon le modèle de répartition des compétences inscrit dans les Traités. Cette logique a été intégrée dans une large mesure par le Traité de Lisbonne, lequel a essayé d'établir un cadre formel de compétences, en s'inspirant directement de la jurisprudence forgée par la Cour au cours des cinquante années précédentes. Cela étant dit, bien que le principe de subsidiarité ait été inscrit dans les Traités à Maastricht, tout en bénéficiant d'une forme de garantie juridictionnelle, le dispositif originel, aussi bien que son prolongement plus sophistiqué défini par le Traité de Lisbonne, n'ont pas fait l'objet d'une notable, pour des raisons qui no sont certainement pas imputables à la Cour elle-même.

Le présent volume démontre d'ailleurs, dans plusieurs contributions d'une qualité exceptionnelle, non seulement la place fondamentale de la jurisprudence de la Cour dans la définition des éléments identitaires de l'ordre juridique communautaire mais aussi son influence dans le développement des politiques communes, dans la construction du marché intérieur, dans la densification des quatre libertés fondamentales. Aussi bien que dans la vie publique des États-membres, qu'au niveau européen, la formulation des politiques selon les valeurs essentielles liées au respect de la légalité démocratique découle de l'interaction entre les instances exerçant des responsabilités politiques et les institutions de contrôle de type judiciaire. La complexité d'une telle dialectique est accrue au niveau européen, dans la mesure où une partie de ce « dialogue créateur » à l'origine des politiques dépend aussi de l'action des États-membres, des administrations nationales et des niveaux infra-étatiques, donc du rôle accordé dans chaque ordre juridique national aux instances judiciaires correspondantes.

C'est pourquoi dans la jurisprudence de la Cour, les questions préjudicielles représentent non seulement un élément essentiel de garantie de l'unité de l'ordre juridique communautaire mais aussi un outil de dialogue et d'interaction du système judiciaire européen et des cours nationales. L'histoire des rapports entre Cour de Justice et instances judiciaires nationales dessine un cadre de « géométrie variable », un exemple de la diversité des États-membres et de l'évaluation différente du rôle de l'ordre juridique européenne dans chaque système juridique national, soit de la part des tribunaux nationaux soit de la part de l'ensemble des sujets juridiques nationaux.

La dimension constitutionnelle de la Cour ne doit cependant pas obscurcir la dimension « citoyenne » du rôle de la Cour. En effet, si le concept même de citoyenneté européenne n'est entré dans l'ordre juridique européen que dans le Traité de Maastricht, en 1992, la dimension citoyenne est présente depuis l'origine dans la jurisprudence de la Cour. Pour l'essentiel, on peut ancrer cette jurisprudence

dans les racines mêmes de l'ordre juridique supranational, qui reconnait un droit de saisine de la Cour au-delà des États-membres et des institutions européennes. Il ne s'agit cependant pas seulement de l'adoption d'une dimension procédurale, d'ailleurs soumise à des restrictions qui font l'objet de nombreux débats, et même de divergences jurisprudentielles (il suffit de rappeler les débats à propos de l'ancien article 230, n. 4, à la lumière de différentes interprétations jurisprudentielles, tant au niveau de la Cour de Justice que du Tribunal de Première Instance à l'époque). En effet, la Cour a toujours développé sa jurisprudence dans le cadre de référence d'une communauté qui rassemble des États et des citoyens, ce qui est souvent exprimé dans l'expression d' « Union d'États et de Peuples ».

Pour apporter la preuve de cet attachement à une dimension individuelle et citoyenne de la construction européenne, il suffit de se référer à l'abondante jurisprudence de la Cour sur la liberté de circulation des personnes, sur la non-discrimination, sur le rôle des droits fondamentaux dans le cadre de l'ordre juridique européen. Toute l'histoire de l'incorporation des droits, libertés et garanties fondamentales en atteste également, notamment si l'on inclut la contribution fondamentale de la Cour jusqu'à l'adoption de la Charte des Droits Fondamentaux de l'Union Européenne par le Traité de Lisbonne en 2009.

Ceci étant dit, le rôle des droits fondamentaux dans l'Union représente aussi un terrain de dialogue et d'interaction entre la Cour de Justice et le système établi par la Convention Européenne des Droits de l'Homme et des Libertés Fondamentales : ce dialogue, qui se déroule depuis des années et connait aujourd'hui un renouveau découlant de l'adoption de la Charte des Doits Fondamentaux et de la perspective de négociations d'adhésion de l'Union elle-même à la Convention Européenne des Droits de l'Homme, dans les termes définis par le Traité de Lisbonne. Je suis pareillement convaincu que, dans ce domaine spécifique, le développement de la jurisprudence de la Cour renforcera les rapports de dialogue entre le système judiciaire européen et les Cours Constitutionnelles nationales. Le critère essentiel de la « protection effective », qui fait l'objet d'un débat très pertinent dans le cadre européen (surtout en ce qui concerne le possible élargissement des voies d'accès à la Cour), appelle l'attention sur le rôle des instances judiciaires nationales dans le cadre du système de garanties de l'ordre juridique européen.

Un raisonnement du même ordre pourrait d'ailleurs être fait en ce qui concerne l'objectif d'un espace de liberté, de sécurité et de justice dans l'Union Européenne. Formellement, on peut faire référence au Traité sur l'Union Européenne de 1992 (ou Traité de Maastricht) comme le moment générateur des politiques européennes qui ont été rassemblées par le Traité d'Amsterdam (1999), dans l'objectif de faire de l'Union un espace de liberté, de sécurité et de justice. Cependant, son développement législatif a connu une impulsion toute particulière suite au Conseil Européen de Tampere, en Octobre 1999. Il s'agissait d'incorporer dans l'ordre juridique européen, dans un ensemble cohérent et coordonné, des politiques ancrées dans la souveraineté des États : la liberté de circulation qui présuppose le contrôle des frontières extérieures communes y compris l'abolition des contrôles aux frontières intérieures – au moins dans l'espace Schengen ; l'immigration et l'asile ; la coopération judiciaire en matière civile – élément essentiel des libertés

fondamentales du marché intérieure ; la coopération policière et judiciaire en matière pénale.

D'où ce paradoxe : les politiques en question ont à voir très directement avec les droits et les libertés fondamentales des citoyens mais, en raison des réticences, sinon de la méfiance, des États vis-à-vis du cadre d'action des institutions européennes, une telle incorporation est assortie de d'importantes limites en ce qui concerne soit la participation du Parlement Européen dans le processus législatif, soit le pouvoir de punir les infractions de la part de la Commission, soit les pouvoirs de contrôle judiciaire de la Cour de Justice. L' évolution de l'espace de liberté, sécurité et justice pendant presque quinze ans a mis en évidence non seulement la complexité de la structure en piliers définie à Maastricht (la Cour ayant à se prononcer plusieurs fois sur le sujet), mais aussi l'attraction progressive par le modèle communautaire de certains de ses éléments constitutifs, jusqu'à une intégration presque intégrale, en vertu de l'abolition de la structure de piliers par le Traité de Lisbonne.

Ces déficits identifiés, tant du point de vue démocratique que du point de vue du contrôle judiciaire, n'ont pu être comblés que par les amendements introduits par le Traité de Lisbonne, en 2009, soit dans les bases juridiques pertinentes, soit par le biais de la Charte des Droits Fondamentaux déjà mentionnée. Il faut cependant souligner le rôle décisif de la jurisprudence de la Cour pendant ces dix années, surtout dans le rapprochement des critères interprétatifs de la législation découlant alors du « troisième pilier » et de la reconnaissance à cette législation des caractéristiques cohérentes avec l'ensemble de l'ordre juridique de l'Union (y compris le rattachement aux droits fondamentaux en tant que principes généraux du droit et de la tradition constitutionnelle commune des États-membres). La projection de ce travail jurisprudentiel dans les solutions adoptées par le Traité de Lisbonne est à la fois évidente et inestimable pour la reconnaissance de l'unité de l'ordre juridique européen.

Comme le démontre ce volume, la projection internationale de la jurisprudence de la Cour a également toujours été présente pendant ces 60 ans. Tout d'abord parce ce que se présente en filigrane une question constitutionnelle fondamentale, à savoir l'incorporation dans l'ordre externe des compétences exercées dans le cadre communautaire, essentielle à l'unité de l'ordre juridique européen. Mais, au-delà de cette question existentielle de l'ordre juridique européen, au fur et à mesure que le droit européen s'est développé, l'incorporation dans la sphère externe de la substance de la jurisprudence de la Cour a sans doute contribuée à renforcer le profil international des Communautés Européennes. Un raisonnement identique peut être fait sur l'Union en tant que telle, même si sa personnalité juridique internationale n'a été reconnue que par le Traité de Lisbonne en 2009 : à cet égard il suffit de rappeler l'enjeu des accords avec les États-Unis de l'Amérique sur le système d'enregistrement des passagers dans les vols transatlantiques – « Passenger Name Record » – ou la jurisprudence sur la transposition dans l'ordre juridique européen des décisions de l'Organisation des Nations Unies sur le gel des avoirs des personnes et institutions suspectées de liens avec le terrorisme). Il est particulièrement remarquable de noter l'attention accordée et les références faites

à la jurisprudence de la Cour dans les plus récentes négociations d'accords internationaux dans ces domaines nouveaux, qui ont des répercussions directes en termes de garantie et de protection des droits fondamentaux des citoyens européens.

Le 60ème anniversaire de la Cour est aussi un moment propice à une réflexion sur l'avenir de cette institution. Il est évident qu'une telle tâche dépasse largement le cadre de cette modeste introduction. Il faut quoiqu'il en soit souligner à titre d' *obitum dictum* que, au-delà des questions traditionnelles posées à l'organisation interne de la Cour (le fonctionnement en chambres, la répartition de compétences entre la Cour et le Tribunal, l'articulation avec les cours nationales, surtout dans le cadre de l'évolution des questions préjudicielles, les conditions de saisie de la Cour par les requérants non privilégiés), un nouveau chantier vient d'être ouvert avec l'approbation du Traité sur la Stabilité, la Coordination et la Gouvernance (TSCG) : il concerne les relations futures entre l' application de ce Traité et le cadre de fonctionnement de l'Union Économique et Monétaire et celui du marché intérieur européen, du point de vue de la substance des politiques comme de la délimitation concrète des compétences accordées à la Cour dans un tel traité intergouvernemental, dont la portée reste encore à clarifier.

Si on considère qu'à l'avenir le projet d'intégration européenne sera chaque fois plus développé en ayant recours à des formes de « différentiation », via les différentes formules possibles de coopérations renforcées, des dispositifs purement intergouvernementaux, soit à 17, soit à 25 États-membres, voire même d'autres regroupements partielles, il me parait évident que la cohésion et la cohérence de l'ensemble européen devront plus que jamais être soumises à un strict contrôle judiciaire. Le futur rôle de la Cour sera donc essentiel pour l'avenir du projet européen, sa dimension constitutionnelle à plusieurs niveaux sera renforcée et son apport institutionnel encore plus remarquable et décisif. Je forme le vœu que tout ces développements s'inscriront dans la meilleure tradition des soixante années passées, que ce volume identifie et analyse grâce à des contributions ayant des perspectives différentes mais toutes d'une très haute qualité : c'est le meilleur hommage que l'on puisse rendre au remarquable travail effectué par plusieurs générations de juges, qui sont autant « d'ouvriers intellectuels » discrets donnant corps au rêve des pères fondateurs.

Part I
The Role of the Court of Justice and the Judicial Architecture of the Union

Le rôle de la Cour de justice et l'architecture juridictionnelle de l'Union

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

Ditlev Tamm

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

1 Introduction

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

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

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

1.1 Courts, Courts, Courts

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

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

[1] The famous High Court of Athens in classical times.

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

[3] See also on the idea of "courtness" or "the root concept" of "the Triad in Conflict Resolution", Schapiro 1981, p. 1 and Schapiro 1999.

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

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

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

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[4] Even when compared to the other "European" court—the European Court of Human Rights, Cohen and Vauchez 2011.

[5] The expression was coined by Berman 1983.

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

[7] Mancini and Keeling 1994, p. 176.

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

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

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

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

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

(Footnote 8 continued)
the standpoint of the individual judges. However, the question is still discussed as to who are or were the driving forces behind the Court's expansive practice.

[9] Tamm 2012.

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

[11] The Court was founded in 1949. The ECtHR's reach now extends to more than 800 million people in 47 countries and it suffers from a very high case-load.

[12] Baquero Cruz 2010, p. 51.

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

1.2 The Spirit of the Court

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

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

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

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

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

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

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

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

[16] The idea of establishing the European Defence Community and the European Political Community was given up in 1954.

[17] See Mancini and Keeling 1994, p. 186: "The preference for Europe is determined by the genetic code transmitted to the Court by the founding fathers, who entrusted the task of ensuring that the law is observed in the application of a Treaty whose primary objective is an 'ever closer union among the peoples of Europe.'"

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

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

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

2 The Foundations

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

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

[20] Stein 1981, p. 1.

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

[22] Valentine 1965, p. 2 as compared to Grilli 2009 and now Boerger-De Schmedt 2012.

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

2.1 The Treaty of Paris

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

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

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[23] From the poem "My Heart leaps up", 1802.

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

[25] About him Wilson 2008, p. 35.

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

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

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

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[26] Wilson 2008, p. 47.

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

[28] Valentine 1965, p. 2.

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

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

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

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

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

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

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

[31] Chronique de politique Etrangère, Jan. 1953, quoted by Valentine 1965 l.c.

[32] *Union des Armateurs Allemands and others v. The High Authority* Valentine 1954.

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

2.2 The Treaties of Rome

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

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

[33] See Rasmussen 2008 and 2010b, p. 640 on case 8/1955.

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

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