The Past and Future of EU Law

The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty

Edited by
Miguel Poiares Maduro and Loïc Azoulai

The Past and Future of EU Law

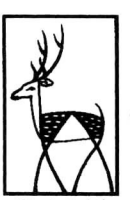
The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty

Edited by

Miguel Poiares Maduro

and

Loïc Azoulai



OXFORD AND PORTLAND, OREGON
2010

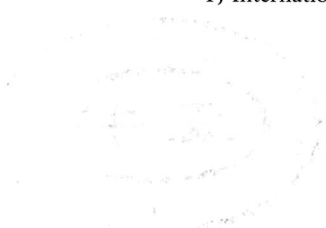
Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213–3786
USA
Tel: +1 503 287 3093 or toll-free: (1) 800 944 6190
Fax: +1 503 280 8832
E-mail: orders@isbs.com
Website: http://www.isbs.com

Hart Publishing Ltd, 16C Worcester Place, Oxford, OX1 2JW
Telephone: +44 (0)1865 517530 Fax: +44 (0)1865 510710
E-mail: mail@hartpub.co.uk
Website: http://www.hartpub.co.uk

British Library Cataloguing in Publication Data
Data Available

ISBN: 978-1-84113-712-4

Typeset by Columns Design Ltd, Reading
Printed and bound in Great Britain by
TJ International Ltd, Padstow, Cornwall



THE PAST AND FUTURE OF EU LAW

This book revisits, in a new light, some of the classic cases which constitute the foundations of the EU legal order and is timed to celebrate the 50th anniversary of the Rome Treaty establishing a European Economic Community. Its broader purpose, however, is to discuss the future of the EU legal order by examining, from a variety of different perspectives, the most important judgments of the ECJ which established the foundations of the EU legal order. The tone is neither necessarily celebratory nor critical, but relies on the viewpoint of the distinguished line-up of contributors—drawn from among former and current members of the Court (the view from within), scholars from other disciplines or lawyers from other legal orders (the view from outside), and two different generations of EU legal scholars (the classics revisit the classics and a view from the future). Each of these groups will provide a different perspective on the same set of selected judgments. In each short essay, questions such as 'What would have EU law been without this judgment of the Court?'; 'What factors might have influenced it?'; 'Did the judgment create expectations which were not fully fulfilled?' and so on, are posed and answered. The result is a profound, wide-ranging and fresh examination of the 'founding cases' of EU law.

List of Contributors

Alberto Alemanno is Associate Professor of Law at HEC Paris and a former Référendaire at the European Court of Justice.

Julio Baquero Cruz is a Member of the Legal Service of the European Commission

Roger van den Bergh is Professor of Law and Economics at the Law Faculty of the Erasmus University Rotterdam.

Nicolas Bernard is a Senior Lecturer at Queen Mary University.

Andrea Biondi is Professor of European Union Law and Co-Director, Centre of European Law, King's College London.

Brun-Otto Bryde is Judge of the German Federal Constitutional Court, 1st Senate, and Professor of Public Law and Political Science at the Justus-Liebig University, Giessen.

Damian Chalmers is Professor of European Union Law at the London School of Economics.

Carlos Closa Montero is CSIC Senior Research Fellow and a former Deputy Director at the Centre for Political and Constitutional Studies (CEPC), Madrid.

Paul Craig is Professor of Law at St John's College, Oxford.

Pedro Cruz Villalón is former President of the Spanish Constitutional Court and Professor of Constitutional Law at the Autonomous University of Madrid.

José Narciso da Cunha Rodrigues is Judge at the Court of Justice and former Attorney General of Portugal.

David Edward is a former Judge at the European Court of Justice and Professor Emeritus of the University of Edinburgh.

Piet Eeckhout is Professor of Law and Director of the Centre of European Law at King's College London.

Nial Fennelly is a Judge of the Supreme Court of Ireland and a former Advocate General at the European Court of Justice.

Daniel Halberstam is the Eric Stein Collegiate Professor of Law and Director of the European Legal Studies Program at the University of Michigan. He also holds a position as Professor of Law in the European Legal Studies Department at the College of Europe, Bruges.

Christophe Hillion is Professor of European Institutional Law, Law Faculty Leiden.

Herwig Hofmann is Director of the Centre of European Law at the Faculty of Law, Economics and Finance of the University of Luxembourg.

Marko Ilešič is Judge at the European Court of Justice and former Professor of Civil, Commercial and Private International Law and Dean of the Faculty of Law at the University of Ljubljana.

Francis Jacobs KCMG, QC, is a former Advocate General at the European Court of Justice and Professor of Law at King's College London.

Jean-Paul Jacqué is Honorary Director General of the Council of the European Union and Professor at the University of Strasbourg.

Zdenek Kühn is Judge at the Supreme Administrative Court of the Czech Republic and Associate Professor at the Charles University Law School in Prague.

Mattias Kumm is Professor of Law at the New York University School of Law.

Síofra O'Leary is Référendaire at the European Court of Justice and Lecturer at the College of Europe, Bruges.

Koen Lenaerts is Judge at the European Court of Justice and Professor European Law, Institute for European Law, Catholic University Leuven.

Petros Mavroidis is Edwin B Parker Professor of Foreign and Comparative Law at Columbia Law School, New York and a Professor of Law at the University of Neuchâtel.

Franz Mayer is Professor of Law at the University of Bielefeld and Senior Fellow at the Walter Hallstein-Institute for European Constitutional Law, Humboldt Universität Berlin.

Agustín José Menéndez is permanent research professor at the Law School of the University of León (Spain) and senior RECON researcher at ARENA, Centre for European Studies, University of Oslo.

Paolo Mengozzi is Advocate General at the European Court of Justice and former Professor of European Union Law at the Faculty of Law of the University of Bologna.

Kalypso Nicolaïdis is Professor of International Relations and Director of the European Studies Centre, St Antony's College, University of Oxford.

Ingolf Pernice is the Dean for International Relations of the Humboldt-University Law Faculty as well as founder and managing director of the Walter Hallstein-Institut for European Constitutional Law at Humboldt University, Berlin.

Pierre Pescatore is a former Judge of the ECJ.

Robert Post is Dean and Sol and Lillian Goldman Professor of Law at Yale Law School.

Morten Rasmussen is Assistant Professor at the Centre for Modern European Studies, University of Copenhagen.

Donald Regan is the William W Bishop Jr Collegiate Professor of Law and a Professor of Philosophy at the University of Michigan.

Allan Rosas is Judge at the European Court of Justice and former Armfelt Professor of Law at the ÅboAkademi University and former Deputy Director-General of the Legal Service of the European Commission.

Damaso Ruiz-Jarabo Colomer is Advocate General at the European Court of Justice.

Daniel Sarmiento is Référendaire at the European Court of Justice and Assistant Professor at the Law School of the Complutense University of Madrid.

Eleanor Sharpston is Advocate General at the European Court of Justice and Fellow of King's College, Cambridge.

Jo Shaw holds the Salvesen Chair of European Institutions and is Dean of Research in the College of Humanities and Social Science, University of Edinburgh.

Denys Simon is Professor of Law at the University of Réunion.

Alec Stone Sweet is Leitner Professor of International Law, Politics and International Studies, Yale Law School.

Christiaan Timmermans is Judge at the European Court of Justice.

Takis Tridimas is Sir John Lubbock Professor of Banking Law at the Centre for Commercial Law Studies, Queen Mary, University of London.

Stefaan Van den Bogaert is Professor of European law at Leiden University.

Neil Walker holds the Regius Chair of Public Law and the Law of Nature and Nations at the University of Edinburgh.

Horatia Muir Watt is Professor of Private International and Comparative Law at the University of Paris I (Panthéon-Sorbonne).

Stephen Weatherill is the Jacques Delors Professor of European Community Law and serves as Associate Director of the Centre for the Advanced Study of European and Comparative Law, University of Oxford.

Bruno de Witte is Professor of Law at the European University Institute, Florence.

Introduction
The Past and Future of EU Law

MIGUEL POIARES MADURO AND LOIC AZOULAI

Lawyers anthropomorphise courts. They do so because the reconstruction of the case law for the purposes of a coherent legal argument is more effectively done by narrating it as driven by a single rationality. Yet, courts have a composite rationality. The jurisprudential reason arises out of a multitude of reasons provided in different cases and the sometimes conflicting, sometimes convergent, reasons of different judges. A court's jurisprudence cannot be immediately ascertained by looking at individual cases. It is also the product of a broader community of actors than courts themselves. It is woven by judges interacting with lawyers and legal scholars, all acting in a particular social context. The importance of a particular judgment can only be properly assessed by seeing its solution and its reasons repeated in subsequent cases. It is this repetition in different contexts that consolidates a particular legal reasoning and transforms judicial adjudication into legal interpretation. But a particular judgment can also acquire a particular importance only at a later stage when the full effects of its underlying reasoning are brought to life by a subsequent judgment, the reaction of the legal community or the practice of the political institutions. And a new jurisprudence may emerge out of the need to reconcile apparently irreconcilable cases. A narrative of the case law born outside the court may also make its way into the case law of a court by the intellectual persuasion of judges arising from the work of lawyers and legal scholars.

The 'classic' judgments in the jurisprudence of a Court are those that survive the passing of time but also those which, even when their concrete legal answer has become obsolete or has even been overturned, have lived on through their multiple effects in other areas of the law. They are judgments of systemic impact, embodying a broader normative lesson about the legal order in which that Court operates. To identify them we must look not only at the particular judgment itself but also at how it has been interpreted and developed by the Court in other cases. We also need to look at the attention paid to it by lawyers, legal scholars and other social actors. The law is also a function of how the judicial decisions are interpreted and challenged by the broader legal and social communities in which a court operates.

These were the criteria we used to identify the 'classics' of the case law of the European Court of Justice. The starting point is simple: we have invited commentators from a diversity of view points and asked each of them the same questions: What would have EU law been without this judgment of the Court? What factors might have influenced it? Did the judgment create expectations which were not entirely fulfilled? Are the potential legal developments arising from these judgments and their legal reasoning fully explored or can they still open new paths for the case law of the Court of Justice and EU law? Did they

create some legal path dependences and are they justified? To what extent is the *acquis* embodied in these cases effectively consolidated?

We specifically asked the authors not to co-operate or divide tasks among them. We did so because we expect one of the added values of the book to be what we can learn by comparing different narratives on the same cases, particularly when they are linked to different viewpoints as we explain below. We wish to provide multiple viewpoints or, perhaps better, a 'multiple' intelligence or kaleidoscopic view of the case law. Another added value arises from the time distance which separates us from most of these cases. This allowed us to measure the lasting effects of such cases and to contextualise them in the light of a much larger body of case law and other legal developments (including how the case law interacted with the constitutional and legislative processes, at the Community and national levels). Curiously, this distance in time also favours a perspective into the future. First, it helps identify persisting inconsistencies in the EU legal order and how the principles developed in those cases may not yet be fully implemented or tested in the entire legal order (legal coherence requires more than consistency among identical cases). Second, by 'forcing' scholars to revisit old cases it creates an additional incentive to scratch beneath the surface. As the reader will see, throughout this book, largely ignored passages of certain cases may gain a new-found importance with time while classic passages are, with time, reconstructed and reconsidered. All this allowed our authors to also suggest new legal developments on the basis of the most classic of cases. Overall, going back to the classics and doing it from such a diverse array of perspectives offers us the best glimpse at the future of EU law. To paraphrase TS Eliot, we have travelled throughout time just to be back to the cases where we started to know them for the first time.

For such an ambitious endeavour we needed a very good and diverse group of contributors. For each set of selected judgments, four authors drawn from different backgrounds were invited to comment: former and current members of the Court (the view from within); some of the best among the more established names of EU legal scholarship (the classics revisit the classics); a selection of some of the most brilliant minds among the new generation of EU legal scholars (the view from the future); and scholars from other legal and social disciplines or lawyers from other legal orders whom we asked to take a perspective from outside EU law (the view from the outside). Together they provide the 'ideal interpreter'. But what is such an 'ideal interpreter'?

He or she must depart from the facts. All judgments have elements that are unique to themselves. The need to provide justice in the case at hand requires courts to attend to particular facts. When stating the law in a case courts merge what is specific to that case with what is general on the rules to be applied. Therefore, when interpreting past decisions lawyers must engage themselves in the task of distinguishing what is specific to the case from what is a statement of the law. This task, which may initially seem conceptually clear, is much less so once one realises that rules only acquire meaning in their application and, as a consequence, the facts and consequences of the cases in which rules are applied actually shape the meaning of those rules. He or she must also contextualise. To a certain extent, lawyers should approach a legal rule in the same way that architects approach a new building: they must identify the *genius loci* (the spirit of the place, the context) in which they will be intervening. A rule only makes sense in its context, the context of the legal system to which it belongs but also the economic, political and social context in which it was adopted and in which it is going to be applied. Its meaning only becomes clear once the text and its ambiguities are contrasted, compared, reconciled with its

context. The economic, social and political context are necessary to understand how the rule was adopted and compare its intended effects with the effects that its different possible interpretations may generate in the present context. The coherence and integrity of the legal order also assumes and requires fitting and, if necessary, reconciling individual decisions and individual rules into the broader legal context of the legal order to which those rules and decisions belong. This requires assessing the systemic impact of different interpretations and to dogmatically organise them, abstracting from the specific to identify what is common, what is general and what appears in tension. In this light, apart from being a legal architect the lawyer must also be a narrator. He or she must put forward an interpretation of the legal rule that appears a natural development of past jurisprudence; a credible new chapter of the narrative of the legal order. Even when it innovates, a new interpretation must be consistent and coherent with the conception of the legal order that emerges from the body of past decisions, as in a story where a sudden twist may initially surprise us but, on second thought, appear as a foreseeable development of the previous episodes and the characters' traits. Further, the interpreter must also be an historian. He must identify continuity and change in the case law. Finally, however, there is no good interpreter deprived of imagination and creativity. Not to depart from the reality of the law but to see this reality with different eyes. Creativity is at the core of giving meaning to what exists by seeing beyond the others. Someone who can uncover a general principle in what looks like a very particular case. Someone who can imagine new ways in which a rule can preserve its meaning by actually adapting to its changing context. Someone who can discover something new in what is old and relate what seems unrelated. In sum, someone who can provide a new interpretation without changing the law. It is in this way that the process of interpretation breathes new life into the legal order without undermining the conditions of its legitimacy.

This book has the contribution of many great legal interpreters but, most of all, it wants to make of the reader the ideal interpreter. It does so by providing the reader with a variety of viewpoints and different narratives on a set of cases that, in our view, embody the identity of the Community legal order and of the jurisprudence of the European Court of Justice. We can divide them into three categories, according to the character and nature of their impact on the Community legal order. Some cases belong to more than one such category and that only highlights how different developments of the case law can actually be seen as instrumental to a broader and coherent (albeit contestable) conception of the Community legal order. Together they provide a good representation of the development of the Community legal order in the case law of the Court of Justice.

First, we have the cases that established and guarantee the authority of the Community legal order. The well-known judgments of the Court in *Van Gend en Loos*, *Costa v ENEL*, *Simmenthal* and *Internationale Handelsgesellschaft* guaranteed the effective incorporation of Community rules in the national legal orders and, by affirming a principle of supremacy, granted them the status of higher law. They created, as a consequence, the basis for a legal order of a federal type. These cases are also famous for their proclamation of the autonomy of the Community legal order and the direct relationship it establishes with individuals. In so doing the Court distinguished the Community legal order from both national and international legal orders and vested upon individuals rights emerging directly from the Community legal order that it itself had to guarantee and protect. It is in the light of this conception of the Community legal order as a Community of rights that the development of a system of guarantees and of a general principle of effectiveness in

the application of EC law has to be understood. *Francovich* is perhaps the most representative case of these developments and their link to the protection of the rights of individuals under EC law.

Second, it is possible to identify cases that legitimise the authority acquired by Community legal order by embodying it with a system of values similar to those of national constitutional orders. This is the case of the protection of fundamental rights (*Internationale Handelsgesellschaft*, *Nold*, *Wachauf* and *ERT*) and the affirmation of the Community legal order as a Community based on the rule of law (*Les Verts v Parliament*). But the legitimacy of the Community legal order is also dependent on the values that are particular to that legal order. Such values are inextricably linked to the creation of the internal market (*Dassonville* and *Cassis deDijon*) but also to the introduction of elements of social justice into that market (*Defrenne*, *Bosman* and the citizenship cases of *Martinez Sala* and *Baumbast*). In all these cases, the Court is occupied with the definition of the system of values of the Community legal order and with the balance between the different political, economic and social dimensions of European integration.

Finally, we have cases where the Court defined the borders of Community law and the scope of application of its rules, and regulated the potential conflicts between Community and national powers. In *ERTA* and *Open Skies* the Court defined the scope of the Community's external competences and its relationship with national competences but, at the same time, also with the internal competences of the Community. In *CILFIT* and *Foto-Frost*, the Court regulated the judicial architecture of the Communities and its decentralised application by national courts. In the free movement cases, the Court was engaged in the separation of powers between the Community and the Member States and between public intervention and market freedom. In all these cases, the Court defined both the extent and the nature of the normative authority of the European Communities and, in doing so, became involved in the construction of a new political and legal community.

This book also helps in answering the why. What makes a case a leading case? Particularly, what made possible these judgments and the importance they acquired? Context and institutional variables seem to matter. Economic context and the problems with the Community political process may help explain the role of the Court's case law in the development of the internal market. At other times, the Court seems, instead, to follow up on the initiative of the political process and take it to its full (if sometimes) unexpected consequences (as in the case of European citizenship). In these cases, the Court appears as an agent of integration, defending the interests of the European majority against the interests of individual Member States. It plays the role of a supranational constitutional court involved in defining and supporting the conditions necessary for a new political community. At other times, however, the Court acts as a limit to Community power such as when it expanded the scope and grounds for judicial review of Community acts. In these instances, the Court is, instead, acting in a counter-majoritarian way. It plays a role more similar to that of domestic constitutional courts when constraining political power.

It is difficult to anticipate the legal importance of a case. Sometimes, the Court establishes an important legal principle in a seemingly unimportant case (such as in *Wachauf* or *Martinez Sala*). At other times it is the ingenuity of the parties or of national judges that puts before the Court an ambitious legal construction that the Court endorses. But, most of all, the importance of a case is determined as much by the judgment as it is by the follow-up to that judgment in the broader political, social and legal communities. The

law is as much a product of judicial interpretation as it is of the reactions to that interpretation by the political process and other relevant actors. It is the internalisation of the legal solution embodied in a particular judicial decision in the institutional practices of the relevant actors that determines the real success of that legal solution. At the same time, other actors or the legal academic world may sometimes derive conclusions from a judicial decision that the Court has not fully articulated or even thought about (one of the contributions to this book highlights how the Commission 'took control' of the *Cassis de Dijon* narrative to develop its own legislative programme). These conclusions may actually shape social practices 'as the law' and it is not uncommon for them to come to be endorsed by the Court at a subsequent opportunity. Equally, however, it may happen that a leading case may already exist and be ignored until a later judicial decision makes clear its legal and/or social consequences (another contributor asks if *Martinez Sala* was not simply a natural consequence of *Gravier*).

All this highlights how the impact and meaning of a particular judgment is as much a product of the Court's work as it is a product of a larger epistemic and discursive European legal community. The Court's greatest success may have been the role its jurisprudence played in the development of this legal epistemic and discursive community. One of main the reasons for this success can be found in the tendency of the Court, in all these leading cases, to not simply decide a case but articulate the law. Most of the judgments commented in this book are remarkable by the way in which, through language, the details of a case are abstracted into general and broad principles. Think of the statements in *Dassonville* that 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions' or in *Grzelczyk* that 'Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for'. The Court has not been afraid to clearly state principles, instead of hiding them behind the particular legal solution of the case. This certainly opened the Court up to criticism but, at the same time, created a large space for argumentation and debate which was instrumental in the development of that legal and epistemic community. It also provided guidance to national courts in future cases, something of indisputable importance in a decentralised legal order such as the EU. Furthermore, such form of what some would call judicial maximilism offers a yardstick from which to assess the Court's coherent development of the legal order. On the other hand, broad judicial decisions may not only be charged of judicial activism but also risk not fully anticipating all legal problems, making the Court too path-dependent and ultimately exposing it to contradictions and reversals. This may explain why some have noted some alternation between judicial maximilism and judicial minimalism in the Court's case law.

What is clear is that the nature of the legal reasoning of the Court and its judicial role has changed over time and will continue to do so. The Court, as any institution, is and ought to be responsive to its social and institutional context. This does not mean, however, that the variations in the forms and degrees of judicial review are a product of empirical pressures or subjective preferences. They can, instead, be fitted into a particular normative theory of judicial adjudication; one that conceives of legal interpretation as a process bounded by rules but also recognises that rules only acquire meaning in their context of application. This requires a more contextual form of legal reasoning and greater awareness

of the institutional choices involved in judicial deliberation. Once one recognises that law changes even when the legal texts remain unchanged then one should expect (and, sometimes, welcome) variations in the case law of courts. The role of the Court of Justice is bound to change not only to reflect changes in the legal rules but also changes in their context of application and in the institutional alternatives to the Court in the development of EU law (including the political process and national courts).

It is in this light that one can envision the future of the European Court of Justice and its role in shaping EU law. There are some known and unknown variables that may affect the future role of the Court. First, it is now clear that the Court is operating under much stricter public scrutiny. Eric Stein famously described the context in which the Court developed its 'constitutional framework for a federal-type structure in Europe' as that of a Court 'tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with the benign neglect by the powers that be and the mass media'. This is no longer true. The Court's initial audience of specialised Community lawyers now includes lawyers from many disciplines which were initially foreign to Community law. Their reaction to Community law and to its impact on their legal subjects is often framed by the terms of reference of their original discipline. This often entails a new criticism of the Court's jurisprudence which not only challenges particular legal solutions but some of the established paradigms of Community law. At the same time, the social, political and economic impact of Community law, and that of the Court's decisions, has led to an increased mediatism and public scrutiny of the role of the Court. Some famous recent decisions were read by both legal and non-legal audiences. As a consequence, the Court is increasingly subject to both academic and non-academic scrutiny and criticism. Independently of the correctness of such criticisms this is a reality which the Court will have to learn to live with. Courts usually cannot answer to such criticisms in the public arena but they can adapt their judicial language so as to be responsive to such public debates without letting themselves be guided by them.

Furthermore, the institutional role played by the Court in the process of European integration is bound to acquire additional relevance in the current context of constitutional and economic crises. The constitutional crisis generated by the failed ratification of the Constitutional Treaty and the difficult ratifcation of the Lisbon Treaty may entail a challenge to the constitutional characterisation of the Union. For some, this requires scaling back such constitutional ambitions and, if necessary, even questioning parts of the constitutional acquis developed in the case law of the European Court of Justice. Others, instead, will claim that the failure of the Constitutional Treaty was not only partial (limited to some Member States) but mostly due to the limited constitutional ambition of the Treaty. As a consequence, the lesson to be learned ought to be that one needs to be even more constitutionally ambitious and protective of the current constitutional *acquis*. In this context, they will stress the importance of the Court remaining faithful to the fundamentals of European integration protecting it from the risks of protectionism and other forms of state selfish and populist behaviour likely to occur in a general context of economic and social crisis. Some will even argue that, as in the past, the Court should lead the way in further constitutionalising the Union as only such a path will be able to solve its crisis of legitimacy and give it the tools to help address the current economic and social crisis.

At the same time, contexts of crises tend to hinder the decision-making capability of the political process and lead to legislative agreements reflective of deeply contested and compromised solutions, de facto deferring to courts the definition of the practical meaning of such rules. This means that the Court is likely to be confronted with two opposing forces: on the one hand, the constitutional uncertainty and the likely increased political deadlock of the Union will increasingly put the Court at the centre of highly political and socially sensitive issues; on the other hand, this same context will tend to increase the contestability of judicial decisions and rigidify their legal outcomes (because the political process is less capable of overcoming them). It is in these troubled waters that the Court will have to navigate, aware of its institutional context, while faithful to its normative role as a court of law.

The Court itself has changed. The number of its members has almost doubled in size as a consequence of recent enlargements and one must not ignore the impact this may have in the deliberative process of the Court. The increased number of judges (and, possibly in the near future, of Advocate Generals) allows the Court to increase its judicial output but, at the same time, brings with it new challenges: the relative weight of institutional memory decreases and collegiality tends also to be reduced. In a Court without dissenting opinions (leaving aside that Advocate Generals' opinions may sometimes, de facto, have that role), collegiality is particularly important both to facilitate deliberation and to guarantee a clear articulation of the legal reasoning supporting a particular judicial decision. The Court will have to make an important effort to balance the quantity and quality of its judicial output.

Finally, current and foreseeable changes in EU law and EU institutions may also require the Court to fine tune its judicial role. First, there is a growing importance of fundamental rights litigation in the case law of the Court and this will only tend to grow as a consequence of a threefold development: increased EU legislation expanding the scope of an EU fundamental rights policy (such as the legislation regarding non-discrimination adopted under Article 13 EC); increased visibility of EU fundamental rights due to the Charter of Fundamental Rights; increased EU legislation with the potential to enter into conflict with fundamental rights (such as in the domain of justice and internal affairs). This will further constitutionalise the Court and will probably require it to progressively articulate a theory of fundamental rights review. Second, and particularly if the Treaty of Lisbon enters into force, EU competences will be extended as well as majoritarian decision making. This will require the Court to increasingly control how and when the Union exercises its competences. Also in this respect, the Court will have to further develop its constitutional facets. While the competences of the Union were relatively limited and controllable by the states through unanimous decision making, it made sense for the Court to concentrate its judicial scrutiny on the risks of state evasions from the broader collective interests of the Union (which, using traditional constitutional jargon, we could qualify as a majoritarian judicial approach). However, the increased scope of EU powers and its majoritarian character will increasingly plead for the Court to also develop a more traditional counter-majoritarian approach in reviewing the actions of the EU political process.

It is in this context that the present book and its revisitation of classic EU law cases must not be seen as primarily aimed at praising or criticising the past jurisprudence of the Court of Justice. More importantly, it highlights many of the current and future challenges to be faced by the Court while, at the same time and by looking at its past jurisprudence,

providing important clues to how such challenges may be successfully answered in the future. It is impossible to do justice in this introduction to the richness of the comments that the reader will find in this volume. Hopefully we were able to trigger your curiosity and highlight how this book is more about the future than the past.

Contents