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INTRODUCTION

The EU Court of Justice as a relational actor: an introduction

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Abstract

This introductory Article sets out the background and summarises the content of the Symposium on 'The Court of Justice of the European Union (CJEU) as a Relational Actor'. Observing that the CJEU has been a key player in shaping European legal integration, the Symposium takes as its starting point that courts – and the CJEU is no exception in this regard – are unable to drive developments in isolation. For the Court to carry out its role as guarantor of the Treaties and guardian of the rule of law in the Union, it needs not to isolate itself but to interact with other European Union (EU) and national institutions. Relations, the Symposium argues, are not only unavoidable but also legitimate and even vital for the adequate execution of the judicial function. This introduction briefly explores six of the Court's most important relationships: those with the other EU institutions; the courts of the Member States; the Member States themselves; the parties appearing before it; other international courts; and the general public. It then summarises the contributions and highlights how they complement each other in examining the CJEU as a relational actor.

Keywords: constitutional law; Court of Justice of the European Union; preliminary references; separation of powers

1. Introduction

The Court of Justice's (the CJEU or the Court) importance for the European Union's (EU) legal trajectory can hardly be overstated. Many of the EU's distinctive constitutional traits, such as supremacy and direct effect, have been first developed in the judgements of the Court. The effectiveness of the internal market has been championed in landmark judgements such as *Cassis de Dijon* and *Bosman*.[1] On several occasions the Court's interventions have pioneered or prompted the expansion of the EU *aquis* into new legal fields, such as civil procedure and fundamental rights.[2]

The Court's role in the history and development of Union law, and of European integration more generally, has been vividly debated both in political science and in legal scholarship, and occasionally also in broader public debates. Most studies have seen the Court as a *driver* of European integration and EU legal development. Indeed, one of its first and most well-known judges famously admitted to the Court having its own 'certain idea of Europe'.[3] The Court's often presumed and sometimes demonstrated judicial activism has provided one of the key explanatory

[1]Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, EU:C:1979:42; Case C-415/93, *Bosman*, EU:C:1995:463.

[2]See eg Case 33/76, *Rewe*, EU:C:1976:188; Case 222/84, *Johnston*, EU:C:1976:188.

[3]P Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' 8 (1983) European Law Review 155.

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factors for many of its bolder decisions, and it has become one of the established truths of both critical scholarship and public rhetoric about the Court.[4]

However, courts – and the CJEU is no exception in this regard – are unable to drive developments in isolation, for the simple reason that courts do not have the power of initiation. The Court of Justice can only work with the cases that are brought before it. Furthermore, the Court's authority reaches a limit where national courts or even executives simply refuse to abide by its rulings, as demonstrated not least by the Court's interactions with illiberal governments and captured courts, discussed in this symposium by the contribution by Bornemann. While the difficulty associated with Treaty changes makes the Court in some cases relatively insulated against legislative override,[5] in many other areas the Court is, as an international court, dependent on the cooperation of other actors such as national courts and enforcement agencies for the effectiveness of its judgements.[6]

These factors suggest that the Court ought to be conscious of its public image as well as its relations to other courts and institutions. Some previous research suggests that it is, and that this at least to some extent has an impact on its legal reasoning.[7] If this is true, it has (at least) two implications. On the one hand, it entails the Court might be vulnerable to external pressure. Is there a risk that the Court might be bullied into – or out of – certain positions? Does this mean that some players before the Court are, to paraphrase Orwell, 'more equal than others'; that the position of, say, the German government counts for more than that of Malta? On the other hand, it suggests that there are alternative and hitherto lesser explored ways for democratically elected bodies and Member State agents as well as civil society groups on both national and European level to have their voice heard by the CJEU. If CJEU judges do indeed read the morning papers, can strategic litigation be supplemented by opinion-shaping activities? Can one lobby the Court?

At the same time, relations are an essential part of the constitutional function of a judiciary in a democratic society. Both federalism and separation of powers – concepts explored in the EU setting in this symposium by Zglinski and Wallerman Ghavanini, respectively – seek to explain the interactions between various public powers. Both have been traditionally shunned in the EU context, where federalism (like 'constitution') has been considered too state-like and therefore likely to provoke a pushback,[8] whereas separation of powers has been rejected as unsuited to the EU's unique *sui generis* character.[9] Nevertheless, issues of both vertical and horizontal organisation of powers, including judicial powers, are clearly of crucial importance for the EU, arguably rendering any concept dealing with those issues at least potentially applicable. Despite its label, the primary function of the separation of powers principle is arguably not the *separation* of functions, but more importantly the the *overlaps* and *interactions* of actors at various positions of

[4]H Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Martinus Nijhoff Publishing 1986); M Dawson et al (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar Publishing 2013).

[5]RD Kelemen, 'The Court of Justice of the European Union in the Twenty-First Century' 79 (2016) Law and Contemporary Problems 117; J Castro-Montero et al, 'The Court of Justice and Treaty Revision: A Case of Strategic Leniency?' 19 (2018) European Union Politics 570.

[6]M Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation* (Hart Publishing 2004); S Drake, 'More Effective Private Enforcement of EU Law Post-Lisbon: Aligning Regulatory Goals and Constitutional Values' in S Drake and M Smith (eds), *New Directions in the Effective Enforcement of EU Law and Policy* (Edward Elgar Publishing 2016) 12.

[7]O Larsson and D Naurin, 'Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU' 70 (2016) International Organization 377; M Blauberger et al, 'ECJ Judges Read the Morning Papers. Explaining the Turnaround of European Citizenship Jurisprudence' 25 (2018) Journal of European Public Policy 1422.

[8]A Boriello and A Crespy, 'How to Not Speak the "F-Word": Federalism between Mirage and Imperative in the Euro Crisis' 54 (2015) European Journal of Political Research 502.

[9]K Lenaerts, 'The Principle of Democracy in the Case Law of the European Court of Justice' 62 (2013) International and Comparative Law Quarterly 271.

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the Union.[10] For the Court to carry out its role as guarantor of the Treaties and guardian of the rule of law in the Union, it needs not to isolate itself but to interact with other EU and national institutions.

Against this background, our symposium sets out to examine the Court as a *relational* actor. How does it *react* to questions, problems, and challenges brought before it, both directly (the subject matter of its cases) and indirectly (the wider implications they bring)? How does it *relate* to the institutions and persons to and with whom it speaks? And how do these *relationships* contribute to shaping the Court's legal reasoning, and by extension the development of Union law?

2. Taking stock of the Court's relationships

The Court regularly interacts with a large number of actors, who are for various reasons and in different capacities interested in its rulings. Although this introduction does not purport to exhaustively list the Court's such relationships, it will briefly explore some of those that appear most consequential.

Among the most prominent of such relations is that with the other EU institutions. The institutions appear before the Court in a a variety of capacities, depending on the type of proceedings and on the case at hand. In particular the Commission is a frequent participant in proceedings before the Court. Perhaps the most clearly inter-institutional proceedings are those where the Court takes on the constitutional role of ensuring that EU legal measures are enacted consistently with the Treaties through judicial review of the legal basis for an act, the legislative procedure followed in its adoption, and its substantive compatibility with the Treaties. In these cases, the Court fulfils the role of the third branch of government in a classical, Montesquieuian sense, exercising control over the other institutions and holding them accountable for their actions. In other settings, the relationship between the Court and the other institutions is set up as a more cooperative one. In the infringement procedure under Article 258 of the Treaty on the Functioning of the European Union (TFEU), the Court and the Commission share the task of keeping Member States to their obligations under the Treaties, even though they fulfil different functions in that process. And finally in the preliminary reference procedure, the Commission and other institutions have the Court's ear as *amicus curiae* – a term that itself refers to the relation as *friendship* – even where they are not themselves concerned by the subject matter of the dispute.

The Court itself characterises its relationship with the other institutions as governed by the principle of institutional balance, which it describes as 'a system for distributing powers among the different [. . .] institutions, assigning to each institution its own role in the institutional structure of the [Union] and the accomplishment of the tasks entrusted to the [Union]'.[11] This draws on Article 13(2) of the Treaty on the European Union (TEU), according to which each institution 'shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them'. However, understanding the relations between the institutions as merely ones where each remains within the bounds of its own competence is too simplistic.[12] As has been observed above, the institutions act variably in collaboration with the Court, pursuing a joint objective (as in the infringement procedure), and in conflict with it (as in the Article 263 TFEU procedure, where the Court's loyalty lies with the Treaties alone whereas the defendant institution seeks to uphold its own act of secondary law). A measure of conflict between the institutions is necessary in order to uphold the democratic

[10]For a thorough examination of the separation of powers concept in the EU context, see C Eckes et al (eds), *The Dynamics of Separation of Powers in the European Union* (Hart Publishing 2024) forthcoming.

[11]Case C-70/88, *EP v Council*, EU:C:1990:217, para 21.

[12]See G Conway, 'Recovering a Separation of Powers in the European Union' 17 (2011) European Law Journal 304.

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processes that ensure that law is formed in accordance with the electoral mandate.[13] The CJEU has recently faced considerable criticism on this account, with commentators lamenting both its lack of realistic opportunities and its unwillingness to challenge the exercise of especially executive Union powers.[14] Possibly, the recent cases of rebellion at the hands of national supreme and constitutional courts such as those of Denmark, France, and Germany can be seen as signs of impatience with a Court of Justice increasingly giving way – sometimes, some might say, even itself paving the way – to a creeping executive power expansion, at the expense of both the Union legislature (and therefore ultimately the electorate) and the Member States.[15]

A second important relationship of the Court's is that to its national judicial colleagues: the courts of the Member States. This relationship is primarily conducted through the preliminary reference procedure, whereby national courts can directly seize the Court of Justice for guidance on any question of EU law that needs to be answered in the adjudication of cases that come before them. This procedure has been described as the cornerstone of the EU judicial system and national courts as 'willing partners'[16] in a 'symbiotic relationship'[17] with the CJEU. Nevertheless, this relationship is increasingly being perceived as one fraught with conflict and more recent research has painted a less rosy picture of the relationships between the CJEU and national courts. A majority of national courts still do not participate in the preliminary reference procedure.[18] The Court itself has been criticised for unresponsiveness and avoidance tactics in its responses to referring courts even at the highest levels of the national judiciaries.[19] It has also been suggested that the Court is increasingly attempting to limit its direct relations with lower national courts,[20] at the same time as apex courts in the Union – and not only in Member States where the independence of the judiciary can be seriously questioned – have outright refused to follow the rulings of the Court.

The Court's relationship with national courts is however not limited to the direct dialogue 'between one court and another', as the Court itself likes to put it, in the preliminary reference procedure. As the Court's judgements are effective *erga omnes,* the ruling that marks the end of one dialogue in the narrow procedural sense may form the impetus for continued references from other courts, thus inciting continuous dialogue with multiple participants. In this sense, even instances of rebellion may, in the bigger picture, be seen more as disagreements than as outright collisions. Ultimately, however, the fact remains that the Court's judgements as a rule gain effect only by being accepted and applied by national courts, which gives the latter something of an upper hand in practice and goes some way to even out the fact that the CJEU holds final authority

[13]C Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press 2013) 76.

[14]Se eg K Combos, 'Constitutional Review and the Economic Crisis: In the Courts We Trust?' 25 (2019) European Public Law 105 (part 1) 229 (part 2); P Leino-Sandberg and M Ruffert, 'Next Generation EU and Its Constitutional Ramifications: A Critical Assessment' 59 (2022) Common Market Law Review 433, 464.

[15]See eg M Dawson and A Bobic, 'Quantitative Easing at the Court of Justice – Doing Whatever It Takes to Save the Euro: *Weiss and Others*' 56 (2019) Common Market Law Review 1005, 1040.

[16]JHH Weiler, 'A Quiet Revolution: The European Court of Justice and its Interlocutors' 26 (1994) Comparative Political Studies 510, 518.

[17]E Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' 75 (1981) American Journal of International Law 1.

[18]J Claassen, 'Attitude or Aptitude? Explaining the Lack of Preliminary References in Dutch Competition Law Cases', and M Glavina, 'Reluctance to Participate in the Preliminary Ruling Procedure as a Challenge to EU Law: A Case Study on Slovenia and Croatia'; both in C Rauchegger and A Wallerman (eds), *The Eurosceptic Challenge: National Implementation and Interpretation of EU Law* (Hart Publishing 2019) 175 and 191, respectively.

[19]R van Gestel and J de Poorter, 'Supreme Administrative Courts' Preliminary Questions to the CJEU: Start of a Dialogue or Talking to Deaf Ears?' 6 (2017) Cambridge International Law Journal 122; U Šadl and A Wallerman, '"The Referring Court Asks, in Essence": Is Reformulation of Preliminary Questions by the Court of Justice a Decision Writing Fixture or a Decision-Making Approach?' 25 (2019) European Law Journal 416.

[20]T Pavone and RD Kelemen, 'The Evolving Judicial Politics of European Integration: The European Court of Justice and National Courts Revisited' 25 (2019) European Law Journal 352.

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on points of EU law (which in turn takes precedence over the national law on which national courts remain the authority).

Third, the Court has direct relationships – in plural – with the Member States. Like the institutions, the Member States may appear before the Court in various capacities depending on the procedure: As defendants in the infringement procedure, as privileged applicants in judicial review proceedings initiated under Article 263 TFEU, and as *amici curiae* in the preliminary reference procedure. Furthermore, the Member States are not uniform actors, and the Court has direct dealings not only with the states as international legal subjects, represented by their governments, but also with various 'emanations of the state', ranging from individual ministers and central public authorities to regional bodies, municipalities, and finally private law subjects owned and/or controlled by the Member States. Indeed, within the preliminary reference procedure, it is not uncommon that the same Member State in different emanations appears twice: once as one of the parties to the dispute before the national court, and once as a government submitting observations pursuant to Article 23 of the Statute of the Court of Justice.

The CJEU's dominance over national administrations and legislatures through not only the infringement procedure – the formal avenue through which such review is foreseen – but also and predominantly through the *de facto* review carried out within the preliminary reference procedure has established the image of the CJEU as an exceptionally powerful judiciary.[21] At the same time, the increasing diversity between the Member States resulting both from enlargement and, more importantly, from the questioning or outright rejection of democratic liberalism in some Member States presumably entails equally diversified relations to the Court of Justice. There is, of course, no presumption of innocence in the infringement procedure – but still, would an infringement action against, say, Portugal be received with the same attitude as one against Poland?[22]

Fourth, the Court's relationships include that with the parties appearing before it. To a large extent, this category overlaps with the three already examined above. Individuals, however, have their own relationship with the Court. The Court's status as an international court with large national importance means that it is more directly involved with individual parties than other international courts, whereas it does not have the same adjudicatory function as national courts. As parties immediately before the Court, individuals are largely at the mercy of the the Court's restrictive and much criticised interpretation of the criterion of direct and individual concern in Article 263(4) TFEU, which leaves individuals with limited options of directly challenging EU legal acts as parties before the Court.[23] In particular non-governmental organisations have been identified as a group that is severely affected by that case law.[24] Individuals also come indirectly before the Court as parties through the preliminary reference procedure. Although these individuals are technically parties to the procedure pending before the referring court and not to that before the CJEU, they are entitled to address the Court directly in this capacity and the Court's judgement will often have immediate consequences for them. Arguably, the identity of the

[21]See eg KJ Alter, 'The European Court's Political Power' 19 (1996) West European Politics 458; DS Martinsen and M Blauberger, 'The Court of Justice of the European Union and the Mega-Politics of Posted Workers' 84 (2021) Law and Contemporary Problems 29.

[22]See Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117 and Case C-619/18, *Commission v Poland*, EU:C:2019:531.

[23]J Manuel and C Martín, 'Ubi ius, Ibi Remedium? – Locus Standi of Private Applicants under Art 230 (4) EC at a European Constitutional Crossroads' 11 (2004) Maastricht Journal of European and Comparative Law 233; R Mastroianni and A Pezza, 'Striking the Right Balance: Limits on the Right to Bring an Action Under Article 263(4) of the Treaty on the Functioning of the European Union' 30 (2015) American University International Law Review 743.

[24]M Eliantonio, 'Towards an Ever Dirtier Europe? The Restrictive Standing of Environmental NGOs Before the European Courts and the Aarhus Convention' 7 (2011) Croatian Yearbook of European Law & Policy 69; I Hadjiyianni, 'Judicial Protection and the Environment in the EU Legal Order: Missing Pieces for a Complete Puzzle of Legal Remedies' 58 (2021) Common Market Law Review 777; N Šubic, 'Challenging the Use of EU Funds: Locus Standi as a Roadblock for Disability Organisations: ECJ Order of 15 April 2021, Case C-622/20 P, Validity and Center for Independent Living v Commission' 18 (2022) European Constitutional Law Review 59.

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parties and their individual circumstances play a greater role for the outcome of a given case than one might expect, considering that the Court within the preliminary reference procedure has competence to rule on matters of law only.[25]

The protection of the rights that individuals, whether natural persons or businesses, derive from EU law is a recurring theme in the case law of the Court. De Witte's characterisation of the preliminary reference procedure as the 'citizen's infringement procedure' illustrates how individuals often come before the Court as proponents of European integration, and therefore as natural allies of the EU institutions (including the Court itself), at dispute with their Member State.[26] The nature of the powers conferred on the Union also means that 'vertical' disputes, between an individual and the state, are overrepresented at the Court. With the adoption of the Charter of Fundamental Rights, and even earlier, the Court has been hailed as a human rights court, albeit also criticised for its exercise of that role.[27] The Court's concern for individuals has however also been repeatedly questioned, with some commentators arguing that rights have been used by the Court to strengthen the reach of EU law (and thereby also its own position) while any effects for the individuals concerned are merely incidental.[28]

An interesting subgroup is repeat-player litigants, and particularly those that engage in strategic litigation. For these parties, the Court has an opportunity of forming an actual, individual relationship with a party that comes before it regularly, or at least frequently, with similar issues and argumentation – parties like Maximilian Schrems, say, or ClientEarth. Are these parties able to enter into a continuous dialogue with the Court, which provides both sides with deeper understanding of each other's positions and therefore also informs their interactions?

Fifth, the Court entertains relationships – or a conspicuous lack of relationships[29] – with other international courts, most prominently the European Court of Human Rights (ECtHR) and the EFTA Court.[30] Opinion 2/13 on the EU's accession to the ECHR illustrates the Court's own insecurities in these relations. In that Opinion, the Court not only held that its being bound by the ECtHR's rulings on the Convention whereas the ECtHR would not be likewise bound by the Court's own interpretation of the Charter would compromise the autonomy of the EU legal order.[31] It also, and more remarkably, feared that the possibility to request an advisory opinion from the ECtHR would compete with the preliminary reference procedure to the detriment of the latter.[32] As the preliminary reference procedure was well established and indeed in the same Opinion referred to as a 'keystone' of the Union judicial system,[33] whereas the possibility to request advisory opinions from the ECtHR had been established by Protocol 16 only slightly over a year before the delivery of the Opinion (and would not enter into force until four years later,

[25]G Davies, 'Has the Court Changed, or Have the Cases? The Deservingness of Litigants as an Element in Court of Justice Citizenship Adjudication' 25 (2018) Journal of European Public Policy 1442.

[26]B de Witte, 'The Preliminary Ruling Dialogue: Three Types of Questions Posed by National Courts' in B de Witte et al (eds), *National Courts and EU Law: New Issues, Theories and Methods* (Edward Elgar Publishing 2016) 15.

[27]G de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' 20 (2013) Maastricht Journal of European and Comparative Law 168; F Fabbrini, 'The EU Charter of Fundamental Rights and the Rights to Data Privacy: The EU Court of Justice as a Human Rights Court' in S de Vries et al (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Hart Publishing 2015) 261.

[28]See critically J Coppel and A O'Neill, 'The European Court of Justice: Taking Rights Seriously?' 29 (1992) Common Market Law Review 669; and from another perspective A Rosas, 'The Court of Justice of the European Union: A Human Rights Institution?' 14 (2022) Journal of Human Rights Practice 204.

[29]de Búrca (n 27).

[30]See generally FG Jacobs, 'Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice' 38 (2003) Texas International Law Journal 547; A Rosas, 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue' 1 (2008) European Journal of Legal Studies 121.

[31]Opinion 2/13 *Accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, EU:C:2014:2454 paras 185–186.

[32]Ibid., para 197.

[33]Ibid., para 176.

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having then been ratified by ten contracting states), this appears to reveal a strikingly low self-esteem on the part of the Court in relation to its international judicial peer.

Sixth and lastly, any account of the Court as a relational actor should take into account its public relations: to the general public as reached by conventional and social media. The overwhelming majority of CJEU rulings presumably pass unnoticed by the general public at large. Some, however, do not.[34] For instance, rulings on the right to be forgotten and the permissibility of headscarf bans have been widely reported in mass media,[35] and the Twitter announcement of the ruling in *Wightman*[36] represents one of the most engaging tweets issued by EU bodies.[37] Furthermore, the Court also has a public image that transcends public opinion on individual cases; pushback against the Court was, for instance, a prominent feature of the Brexit campaign.[38] (This campaign also inadvertently illustrated another public relations problem of the Court, namely that it is not common knowledge what the Court actually is or does.[39])

The CJEU's own attitude to the public has been something of a mixed bag. The Court has been criticised for a lack of transparency and the access to judicial documents for the general public is indeed highly curtailed.[40] At the same time, its increasing social media presence demonstrates a willingness to engage with the public beyond the issuing of judgements.[41] Its press releases serve a similar function, reaching the public both directly through the Court's own Curia website[42] and indirectly through conventional mass media. The use of extra-judicial communication tools crossed into new territory in May 2020, when the Court for the first time responded to a national court judgement – specifically, to the German Federal Constitutional Court's ruling in *Weiss*[43] – with a press release.[44] These developments demonstrate that not only is the Court receptive to changing public debates in the development of its case law,[45] but it is also itself actively engaging in and presumably seeking to influence these debates.

Legal academics form a particular sub-group of this category of the Court's audience. Legal scholars are not only better informed and more interested than (most) other members of the public, but also routinely engaged in reviewing the Court's activities and often offering input *de sententia ferenda;* 'researchers are not passive bystanders but are instead informed observers with a normative perspective', as aptly put by Leino-Sandberg and Hillebrandt.[46] It would be all too self-absorbed to assume that the Court is worried about what legal scholars have to say about its rulings. Nevertheless, while the Court notoriously does not cite academic works (its Advocates

[34]See J Dederke, 'CJEU Judgments in the News – Capturing the Public Salience of Decisions of the EU's Highest Court' 29 (2022) Journal of European Public Policy 609.

[35]See eg 'Employers May Need to Justify Bans on Wearing Religious Signs, EU Court Says' (*Reuters* 16 October 2022); 'EU Court: Google Must Delete Inaccurate Search info If Asked' (Associated Press 8 December 2022).

[36]Case C-621/18 *Wightman*, EU:C:2018:999.

[37]S Özdemir and C Rauh, 'A Bird's Eye View: Supranational EU Actors on Twitter' 10 (2022) Politics and Governance 133, 140.

[38]P Pinto de Albuquerque and H-S Lim, 'The Cross-Fertilisation between the Court of Justice of the European Union and the European Court of Human Rights: Reframing the Discussion on Brexit' (2018) European Human Rights Law Review 567.

[39]D Llewellyn, 'Ten Myths in the Brexit Debate' (SUERF Policy Note No 7 2016) 16–17.

[40]H Rasmussen, 'Present and Future European Judicial Problems After Enlargement and the Post-2005 Ideological Revolt' 44 (2007) Common Market Law Review 1661; A Alemanno and O Stefan, 'Openness at the Court of Justice of the European Union: Toppling a Taboo' 51 (2014) Common Market Law Review 97.

[41]J Dederke, *Contestation, Politicization, and the CJEU's Public Relations Toolbox: Judgments of the Court of Justice of the EU in their Public and Political Context* (ETH Zürich 2020) 96–135. See also Alemanno and Stefan (n 40).

[42]www.curia.europa.eu.

[43]Case 2 BvR 859/15 of the *Bundesverfassungsgericht*, judgement of 5 May 2020.

[44]J Lindeboom, 'Is the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the PSPP Judgment' 21 (2020) German Law Journal 1032; ME Vergara and GV Puig, 'The Quiet Architect Finds its Voice: The Primacy of the Law of the European Union after Press Release No 58/20 of the Court of Justice of the European Union' 27 (2021) European Public Law 673.

[45]Blauberger et al (n 7).

[46]P Leino-Sandberg and M Hillebrandt, 'Challenging the EU Institutions on Transparency – What is the Role of Academics?' 51 (2021) EU Law Live Weekend Edition 6, 10.

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General do, though), we can be relatively certain that the judges read legal scholarship. At times they also contribute to it.[47] The Court's relationship to academia is thus likely more interactional than it may explicitly seem.

3. Relationality and the law

While the Court accepts submissions from most of the actors discussed above in the course of its judicial activities,[48] whether and to what extent these interactions define its outlook is more uncertain and even controversial. From a lawyer's perspective, the idea of a Court entertaining relationships and making efforts to maintain them would easily come across as an illegitimate concern. The Court's actions should be guided by the law alone, the lawyer might argue. Strong constitutional principles support this view. Maintaining relationships, moreover, would appear to fall foul of the principle of judicial *independence* – a notion that stands in some contradiction to the very concept of relations, which typically entails at least a degree of dependence. Attempts at putting pressure on the Court from outside powers is at odds with the independence of the judiciary, and falling for such pressure is a miscarriage of justice. The Court should depend upon nothing but the law.

This position – although admittedly presented here in a somewhat caricatured form – forms the starting point for traditional doctrinal analysis of the Court and its case law. This distinguishes legal scholarship from political science, which has also interested itself in the Court but then approached it as a *political actor*. In a similarly extreme position, political scientists will assume that judicial decision-making is informed only or chiefly by the policy preferences of the participating judges under the so-called attitudinal model of judicial decision-making.[49] This idea is naturally rather hard to stomach for a lawyer.

Between these two there is however a relatively large middle ground. For a legal scholar, Dyevre's characterisation of this middle ground as one that 'do[es] not rule out the possibility that, via the judges' preferences, legal rules [. . .] may play a role in judicial politics' and accepts that legal consistency 'might be among the goals pursued by judges, at least occasionally'[50] still appears an understatement of the importance of the law for legal decision-making – and if it is not, we would at the very least be compelled to strongly lament that state of affairs. Yet, even defending the idea that the law is and must be a strong determinant of judicial decisions, few if any lawyers would dispute the fact that the law rarely provides clear and unambiguous answers to a given problem; and even when it does, lawyers possess a whole toolbox of interpretive methods that would allow them to depart from the clear wording of statute, should the need arise. This means that considerations of the Court's relationships do not need to come at the expense of its adherence to the law; instead, the desire to maintain good relations may aid the Court in its weighing and analysis of various possible interpretations of the law in a given context. Indeed, indifference to its surroundings is hardly desirable. *Fiat iustitia et pereat mundus* may be a noble sentiment, but it is clearly preferable if there remains a Union whose citizens can enjoy the justice dispensed by the Court. Indeed, to uphold and strengthen the Union could be said to be the Treaties' – and therefore also, as a matter of law, the Court's – main goal.

[47]For a critical discussion, see P Leino-Sandberg, 'Enchantment and Critical Distance in EU Legal Scholarship: What Role for Institutional Lawyers?' 1 (2022) European Law Open 231.

[48]On addressing the Court for those actors without formal access rights, see V Passalacqua, 'Who Mobilizes the Court? Migrant Rights Defenders Before the Court of Justice of the EU' 15 (2022) Law and Development Review 381 on 'informal amici curiae'.

[49]See eg JA Segal and AJ Champlin, 'The Attitudinal Model' in RM Howard and KA Randazzo (eds), *Routledge Handbook of Judicial Behavior* (Routledge 2018) 19.

[50]A Dyevre, 'Unifying the Field of Comparative Judicial Politics: Towards a General Theory of Judicial Behaviour' 2 (2010) European Political Science Review 297, 311.

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There are several ways in which relationality is conceived in legal discourse. First, adjudication in court traditionally, at least in the legal orders where the trial is organised as a negotiation between the parties before a (supposedly) neutral arbiter, follows (albeit to varying degrees) the principle of *da mihi factum, dabo tibi ius*.[51] This maxim clearly presupposes the input of the parties, albeit in a circumscribed way that is distinguished from the court's prerogative of interpreting the law. However, the boundary between fact and norm is notoriously blurred.[52] In order to identify the salient facts, the parties must necessarily engage in the interpretation of law. The point is aptly illustrated by the preliminary reference procedure, in which a requirement for the admissibility of a question is that the referring court has set out the factual background of the dispute in sufficient detail even though the Court of Justice is to pronounce only upon a matter of law.[53] Issues of fact and law are simply inseparable, meaning *inter alia* that those responsible for supplying the Court with facts also steps into its application of law. This relation is examined in this symposium by Costamagna and Passalacqua.

Second, the Court's function also includes control of the legislative and executive authorities within the Union and in the Member States. Although the EU is typically not considered to be governed by a separation of powers doctrine,[54] its commitment to the rule of law creates a similar impetus upon the Court to review the exercise of public powers by other actors. This control is specifically provided for in the procedures laid down in Articles 258 and 263 TFEU, which confer upon the Court the competence to hear cases brought against the Member States and the Union institutions, respectively, for failing to adhere to the requirements of the Treaties. Polomarkakis outlines in his contribution to this symposium how these two procedures result in differing power constellations before, but crucially, also *including*, the Court. By each playing their role in these procedures, the institutions – again, including the Court – engage in a 'joint enterprise of governing', alternately supporting and challenging each other.[55]

Approaching the Court as a relational actor thus does not entail denying that it is also a legal actor. The perspectives are, as Davies underscores in this symposium, complementary. They rest on the core observations that the law is indeterminate whereas relations are not only unavoidable but also legitimate and even vital for the adequate execution of the judicial function. No court is an island – not even the CJEU.

4. Exploring the CJEU as a relational actor

This symposium consists of six articles that examine the Court of Justice as a relational actor in both its constitutional and its judicial function (although these functions are of course inextricably entangled; the Court's constitutional role consists, in a nutshell, in fulfilling its judicial task). These perspectives invite both a bird's eye view and the more detailed analysis of specific interactions. The symposium is opened by two articles of the former kind, examining the Court's relations in broad, holistic terms.

Looking beyond what political science terms the 'legal model' entails that it becomes natural to look to other fields of research for new perspectives to understand the Court. As already observed, political science has long examined the Court's activities from the starting point that it is precisely a relational actor; one that suits its actions to external reactions both experienced and expected.

[51]European Law Institute and UNIDROIT (eds), *ELI – Unidroit Model European Rules of Civil Procedure from Transnational Principles to European Rules of Civil Procedure* (Oxford University Press 2021) 68.

[52]See eg RJ Allen and MS Pardo, 'The Myth of the Law-Fact Distinction' 97 (2002) Northwestern University Law Review 1769.

[53]See M Broberg and N Fenger, *Broberg and Fenger on Preliminary References to the European Court of Justice*, 3 ed (Oxford University Press 2021) 154.

[54]See above at n 9.

[55]See A Kavanagh, 'The Constitutional Separation of Powers' in D Dyzenhaus and M Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press 2016) 221.

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Historians have examined both the Court's institutional interactions over time and the actions and attitudes of individual judges on the court.[56] The first Article in this symposium draws on sociology to understand the role of the Court in a macro perspective. Polomarkakis turns to the Bourdieusian concept of *field* in order to explore the power relations between the CJEU and its various interlocutors. This concept proves itself instructive not least in its ability to integrate legal and sociological factors; the legal texts constitute the structure of the legal field, within which the power struggles between the actors take place. This, Polomarkakis demonstrates, allows us to conceptualise the CJEU's powers in the different constellations that come before it – ie, that it participates in.

Davies develops a similar argument from a perspective more familiar to most lawyers. The Court's most important relationship, he argues, is that to previous iterations of itself. Whereas other high courts both in the Member States and at the supranational level regularly overrule their own precedents, the Court of Justice displays a strong path dependence created by its case law. This insight places a firm outer boundary on the conquest or concession of powers that may follow from relational considerations. The actors who seek to persuade the Court – whether parties, governments, or national referring courts – will need to build on previous case law rather than challenge it; the scholars who seek to understand the Court must allow for its fundamental consistency as a limitation to relational adaptability.

The following three Articles examine the Court's constitutional or political relationships. They take as their point of departure the Court's function as a counterweight for legislative and, in particular, executive overreach. Approaching the Court as a relational actor entails not merely examining the formal powers ascribed to the Court but also how it carries out this review in practice, and in particular the extent to which it is willing to enter into conflict with other actors. Symptomatically, perhaps, for the development in recent years, two of the three papers deal with crises: one with the migration crisis, and one with the rule of law crisis.

Wallerman Ghavanini's Article explores how the migration crisis affected the Court's case law. She demonstrates that not only did the Court react with restraint in its review of executive emergency measures in the acute phase of the crisis, but that the onset of the migration crisis has altered its outlook on the field more generally, leading it to take a more reticent position on migration law issues in general since the onset of the crisis. The reluctance to fulfil its full function results in a power vacuum, into which other actors can expand. This somewhat bleak perspective is countered in the following Article on the Court's reactions to the rise of illiberalism in, in particular, Poland and Hungary, authored by Bornemann. He describes a learning process in a 'dialogue' of sorts – or perhaps rather a game of cat-and-mouse – with the Polish lawmaker, in which the Court's initial lack of real impact has been replaced by new strategies that more successfully stifle the room for manouevre for the national autocrats. As the Court's involvement in political matters is brought to the fore, there are however also new demands on the procedures before it. Zooming in on the preliminary reference procedure, Passalacqua and Costamagna observe that this procedure has transformed into a *de facto* avenue for judicial review of the compatibility of national legislation with EU law. This function is not only different from the 'pure' interpretation of EU that was originally foreseen, but also more contentious. The procedural set-up does not afford affected actors equal standing before the Court, meaning that its judgements risk being based on insufficient, one-sided or even biased information.

Finally, in the symposium's sixth Article, Zglinski takes a step back and examines how the broad developments in EU law and politics have contributed to reshaping the EU judiciary. He observes that, while the EU judiciary remains remarkably decentralised, the overall development is one towards increased centralised powers of the CJEU. He notes, however, that the power struggle

[56]See eg M Rasmussen, 'The Origins of a Legal Revolution – The Early History of the European Court of Justice' 14 (2008) Journal of European Integration History 77; V Fritz, 'Activism on and off the Bench: Pierre Pescatore and the Law of Integration' 57 (2020) Common Market Law Review 475.

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between, in particular, the CJEU and national supreme and constitutional courts is not over, and indeed may have been revitalised by the expansion of EU competences and the consolidation of the Court's position as a court of precedence and constitutional court of Europe.

5. Ulf Bernitz in memoriam

This symposium is dedicated to the memory of Professor Ulf Bernitz. At the time of his passing in the summer of 2022, Ulf was in the process of preparing his own contribution to the symposium, having readily participated in the project from the very start and through a series of pandemic-induced postponements and rearrangements. He will be remembered for his life's work in EU law, which often explored the role of the Court of Justice in European integration, as well as for the kindness, supportiveness, and enthusiasm with which he always received his friends and colleagues. He will be deeply missed.

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