Judicial Creativity within Europe's "Mixed Jurisdiction"

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Barbara Pasa
Lorenzo Bairati*

I. ON THE EU AS A "MIXED JURISDICTION"

The nature of mixed jurisdictions has been widely researched in the recent past. For many years, the expression "mixed jurisdictions" was traditionally understood to refer to those hybrid legal systems which

 Barbara Pasa is Associate Professor in Comparative Law at University of Torino; Lorenzo Bairati is Researcher in Comparative Law at University of Torino. The present Article is a reworked version of a presentation made at the Faculty of Law of the University of Catania on 28 May 2013. Although the Article has been jointly conceived and discussed, Professor Pasa has contributed Parts II, III.C, IV, and VI, and Dr. Bairati has contributed Parts III, III.A-B, and V, while the introduction and the final remarks (Parts I and VII) were written jointly. The research has received funding from the University of Torino under the agreement with the Compagnia di San Paolo—Progetti di Ateneo 2011—title of the Project "The Making of a New European Legal Culture. Prevalence of a single model, or cross-fertilisation of national legal traditions?", coordinated by Professor Michele Graziadei.

combined elements of both civil law and common law;[1] the expression was sometimes also used to describe only the territory in which a mixed jurisdiction existed, rather than the mixed jurisdiction itself.[2] The list of countries that the expression traditionally referred to (Quebec, South Africa, Louisiana, Scotland, Israel, the Philippines, Puerto Rico, Botswana, Lesotho, Swaziland, Sri Lanka, Mauritius, the Seychelles, Saint Lucia and Zimbabwe)[3] in some cases was expanded, under a more inclusive theory based on the concept of legal pluralism, to include Iran, Egypt, Syria, Iraq and Indonesia, and in this case the expression "mixed legal system" was sometimes used instead of "mixed jurisdiction";[4] eventually the list also came to include Australia, the Basque Country, Algeria, Hong Kong and the European Union.[5]

The features a "legal system", or "jurisdiction", has to display in order to be recognized as "mixed" traditionally were: (1) that the law in question was specifically a civil-/common-law mixture, (2) that this mixture reached sufficient proportions to strike a neutral observer as obvious, and (3) that private civil law and public Anglo-American (common) law were completely separate.[6] According to a partially different definition, "mixed jurisdictions" or "mixed legal systems" are systems in which elements from more than one traditional legal formant co-exist or intermingle: "Mixed legal systems come into being as a result of the transmigration of legal ideas, institutions, concepts and structures under various types of pressure, internal or external".[7] The former definition perhaps better captures the key features of a possible definition, while the latter definition seems more precise in attempting to describe the flow dynamics of legal rules and principles, and the idea of

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1. Thomas B. Smith, *The Preservation of the Civilian Tradition in 'Mixed Jurisdictions'*, *in* CIVIL LAW IN THE MODERN WORLD 1, 2-3 (A.N. Yiannopoulos ed., La. State Univ. Press 1965).

2. William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 685 (2000), *available at* http://digitalcommons.law.lsu.edu/lalrev/vol60/iss3/2.

3. For the historical development of the theories of mixed systems, see Vernon V. Palmer, *Two Rival Theories of Mixed Legal Systems Electronic*, *in* 12.1 ELEC. J. COMP. L. 7 ff. (May 2008), http://www.ejcl.org/121/art121-16.pdf.

4. Tetley, *supra* note 2, at 680 n.2.

5. STUDIES IN LEGAL SYSTEMS: MIXED AND MIXING (Esin Orücü et al. eds., Kluwer Law Int'l, The Hague, 1996).

6. MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY 19 ff. (Vernon V. Palmer ed., 2d ed., Cambridge Univ. Press: Cambridge 2012).

7. Esin Orücü, *Public Law in Mixed Legal Systems and Public Law as a "Mixed System"*, *in* 5.2 ELEC. J. COMP. L. (May 2001), http://www.ejcl.org/52/art52-2.html; of the same author, *see also What Is a Mixed Legal System: Exclusion or Expansion?*, *in* 12.1 ELEC. J. COMP. L. (May 2008), http://www.ejcl.org/121/art121-15.pdf [hereinafter Orücü, *What Is a Mixed Legal System*].

"cross-fertilisation"[8] that developed from the original theory of legal transplants. In any case, despite conceptual uncertainty and lack of a shared definition, a number of commentators have suggested that the European supranational legal order[9] is a "mixed jurisdiction" or a "mixed legal system". We believe the European legal system is an "evolving mix" and that through study of the nature of this mix[10] we can gain further insight into the interaction between law and culture, given that many mixed jurisdictions or mixed legal systems came into existence as a result of a culture's wish to preserve its language, religion, historical experience, and not least, law and customs.[11]

Europe is a supranational legal space which straddles both a codified system and an uncodified one. Both formal and informal rules make up the complex architecture of EU law: binding rules contained in the Treaties and in legislative acts, but also in informal sources, such as business practices and customs; persuasive rules contained in soft law instruments such as notices, guidelines, resolutions, proposals and preparatory documents, such as white papers, recommendations and green papers expressed in the form of Communications from the Commission in many different areas of law; finally, general principles that find application through leading cases heard by the Court of Justice of the European Union (CJEU).

Moreover, the *acquis communautaire*,[12] the constantly evolving body of European Union law, is expressed in twenty-four official

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> Transplants involve the transposition of a doctrine from one legal system into another. . . . Cross-fertilisation implies a different, more indirect process. It implies that an external stimulus promotes an evolution within the receiving legal system. The evolution involves an internal adaptation by the receiving legal system in its own way. The new development is a distinctive but organic product of that system rather than a bolt-on. This process often gives rise to greater convergence between the receiving legal system and the external stimulus, but this need not to be the case.

John Bell, *Mechanisms for Cross-Fertilisation of Administrative Law in Europe*, *in* JACK BEATSON & TAKIS TRIDIMAS, NEW DIRECTIONS IN EUROPEAN PUBLIC LAW 147-65, at 147 (Hart Publ'g: Oxford 1998).

9. JAN SMITS, THE MAKING OF EUROPEAN PRIVATE LAW: TOWARD A IUS COMMUNE EUROPAEUM AS A MIXED LEGAL SYSTEM (Intersentia, Antwerp, 2002); Francesca Fiorentini, *Tertium datur. Le giurisdizioni "miste" fra common law e civil law*, *in* RIVISTA CRITICA DI DIRITTO PRIVATO 449-59 (2002); Hein Kötz, *The Value of Mixed Jurisdictions*, 78 TUL. L. REV. 435, 439 (2003). Noreen Burrows proposed another expression to identify the peculiarity of the European law: the "mega mix"; see her article *European Community: The Mega Mix*, *in* Orücü, *supra* note 5, at 297-312.

10. Orücü, *What Is a Mixed Legal System*, *supra* note 7, at 16.

11. MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY, *supra* note 6, at 24.

12. It consists of principles, political objectives and provisions of the Treaties; of secondary legislation (Regulations, Directives, Decisions, Recommendations and Opinions)

languages. The European legal system is thus a supranational multilingual legal space,[13] a fact that adds even further complexity to it. It shares some characteristics of civil law tradition and others of common law, and has some unusual characteristics: among others, judicial activity is not carried out by a single hierarchy of judicial officers, and the CJEU is not a trial court. Hence it is impossible to guarantee homogeneous interpretation and application of the law. In fact, implementation of European legal rules is left to Member States' courts: rules are interpreted in different ways by national courts, and then, if necessary, reviewed by the CJEU.

This is the most original aspect of Europe's blend: there is no equivalent in national legal orders.[14] More specifically, the preliminary

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adopted in applying the Treaties; of the judicial precedents of the CJEU, which has traditionally occupied an important place as a source of law; of the declarations and resolutions adopted within the framework of the Union; of acts which are part of foreign policy and common security; of acts which are part of justice and home affairs; of international agreements made by the Community and of agreements made by Member States with one another in the sectors of competence which are conferred upon the Union in the Treaties (principle of conferral: see Arts. 3 and 5 Treaty of European Union, hereinafter TEU).

13. On law and legal translation, see the seminal work of SUSAN ŠARČEVIĆ, NEW APPROACH TO LEGAL TRANSLATION (The Hague: Kluwer Law Int'l 2000). On multilingualism and European law, among others, see LINGUISTIC DIVERSITY AND EUROPEAN DEMOCRACY (Anne Lise Kjær & Silvia Adamo eds., Surrey: Ashgate 2011); LANGUAGE AND THE LAW: INTERNATIONAL OUTLOOKS (Krzysztof Kredens & Stanisław Goźdź-Roszkowski eds., Frankfurt am Main: Peter Lang 2007); MULTILINGUALISM AND THE HARMONISATION OF EUROPEAN LAW (Barbara Pozzo & Valentina Jacometti eds., Zuidpoolsingel: Kluwer Law Int'l 2006); UNIFORM TERMINOLOGY FOR EUROPEAN CONTRACT LAW (Gianmaria Ajani & Martin Ebers eds., Baden-Baden: Nomos 2005). On the main problem in EU translation, which is at the conceptual level, not at the level of the term, see S. Šarčević, *Coping with the Challenges of Legal Translation in Harmonization*, *in* THE ROLE OF LEGAL TRANSLATION IN LEGAL HARMONIZATION 96 ff. (Cornelis J.W. Baaij ed., Alphen aan den Rijn: Kluwer Law Int'l 2012); *cf. also* Barbara Pasa, *Old Terms for New Concepts in Consumer Contracts?*, *in* 09/07 JEAN MONNET WORKING PAPERS NYU SCHOOL OF LAW 1-31 (2007), http://www.jeanmonnetprogram.org/papers/07/070901.html.

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> This court structure is different from national systems of administration of justice. These are characterised by compartmentalisation and decentralisation. There are specialised courts for particular areas, such as tax, intellectual property law, labour law and social security, and distinctions may be made between private law courts and administrative ones. Multi-tiered systems of appeal result in only a very small proportion of cases reaching the more senior courts. The preliminary reference procedure, by contrast, allows all courts and tribunals within the European Union, no matter how high or low, to make a reference to a single court: the Court of Justice. The Community court structure is, therefore, a flat court structure of 'first, and then equals', in which all national courts are granted equal possibilities to make a reference to the Court of Justice, and no national law can disenfranchise any national court of the possibility of making reference.

DAMIAN CHALMERS & ADAM TOMKINS, EUROPEAN UNION PUBLIC LAW 291-92 (Cambridge Univ. Press: Cambridge 2007).

ruling is the key tool enabling communication and cooperation between the CJEU and the national courts.[15] The function of this procedure is well known: in cases involving EU law, national courts, if in doubt as to the interpretation or validity of the law, may, and in some cases must, seek a preliminary ruling from the CJEU on the relevant issue (Art. 267 Treaty on the Functioning of the European Union (TFEU)).

During the last few decades, this procedure has progressively acquired a fundamental role in shaping the European legal system; currently, it appears that key cases of judicial creativity (both European and national) primarily result from the flexible nature of preliminary rulings, which "preserve the integrity and coherence of the Community legal order in an era of constitutional pluralism and diversity."[16]

The preliminary ruling constitutes a double-faced tool for the national courts. Through it, the CJEU rules on interpretation and application of European law and answers questions formulated by national courts; but, at the same time, the CJEU leaves the last word on the compatibility of national rules with European law to national judges.[17] Thus, the cooperative system typical of preliminary reference allows national courts to reconcile the CJEU's jurisprudence with the particular features of national laws and the facts of the case before them.[18] As a consequence (and most interestingly in our view), judicial creativity

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15. HENRICUS G. SCHERMERS & DENNIS F. WAELBROECK, JUDICIAL PROTECTION IN THE EUROPEAN UNION 228 (Kluwer Law Int'l: The Hague-London-New York 2001). As is well known, the preliminary ruling is the main or rather the only means of communication and cooperation between the CJEU and the national courts. The preliminary ruling procedure enables national courts to question the Court of Justice on the interpretation or validity of European law. Accordingly, the incidental nature of the preliminary ruling, which can be promoted in the context of a conflict between private parties or a private party and public authorities, makes the national courts' initiative crucial, not only with regard to frequency of rulings, but also to technique and skill in consulting the CJEU.

16. Takis Tridimas, *Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure*, *in* 40 COMMON MARKET L. REV. 9-50, at 46 (2003).

17. For example, the CJEU, referring to state liability for judicial breach of European law, stated:

> In order to determine whether the infringement is sufficiently serious when the infringement at issue stems from such a decision, the competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is manifest. It is for the legal system of each Member State to designate the court competent to determine disputes relating to that reparation.

Gerhard Köbler v. Republik Österreich, Case C-224/01, [2003] ECR I-10239, para. 59.

18. Koen Lenaerts & Tim Corthaut, *Toward an Internally Consistent Doctrine on Invoking Norms of EU Law*, *in* SACHA PRECHAL & BERT VAN ROERMUND, THE COHERENCE OF EU LAW: THE SEARCH FOR UNITY IN DIVERGENT CONCEPTS 495-515, at 501 (Oxford Univ. Press: Oxford 2008).

develops on many different levels, the supranational level of the CJEU, and the national levels of the twenty-eight judiciaries of the Member States, governed by different rules of procedure, structured according to different models of constitutional review ("diffuse" or "concentrated" in a specialised tribunal), and with courts presided over by professional judges (dealing with civil and criminal law, and administrative law) and non-professional judges (lay persons serving as judges in areas where they have expertise, such as commercial law, or providing an element of popular participation and balancing formal legal rationality to guarantee standards of fairness).[19]

This complex interaction provides a basis for cultural exchange, enhancing reciprocal influence both from national judges on European institutions and from the CJEU on national case law and national legal orders in general.[20] As we will see below, national judicial creativity has reached a level that takes it beyond being a simple consequence of national autonomy. Indeed, the mechanism of cross-fertilisation consists in a much deeper and more pervasive dynamic of mutual imitation, which goes considerably further than the point which a formal balance between principles would suggest.

II. A TAXONOMY OF GAPS IN EUROPEAN LAW COMBINED WITH A POSSIBLE TAXONOMY OF GENERAL PRINCIPLES

In this Part, we will describe how the European Union as "mixed jurisdiction" or a "mixed legal system" can evolve remarkably quickly and cover various areas of law outside areas of conferred competence, especially because of the creative function of the courts.[21] In particular, the Europeanization[22] of law must not to be confused with the fact that the CJEU has exclusive jurisdiction on certain issues. By the term

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19. Each judiciary in Europe is nested with a set of relationships to a legal community, to institutions, and to the wider society. *Cf.* JOHN BELL, JUDICIARIES WITHIN EUROPE: A COMPARATIVE REVIEW (CSICL, Cambridge: Cambridge Univ. Press 2006). On different models of judicial review (top-down vs. bottom-up models, i.e., the traditional French model vs. the emerging "dialogue" model), see TRADITIONS AND CHANGE IN EUROPEAN ADMINISTRATIVE LAW (Roberto Caranta & Anna Gerbrandy eds., Europa Law Publ'g 2011); *cf.* Vittoria Barsotti & Vincenzo Varano (a cura di), *Il nuovo ruolo delle Corti supreme nell'ordine politico e istituzionale*, in ANNUARIO DI DIRITTO COMPARATO E STUDI LEGISLATIVI (ESI Napoli 2012).

20. ANTONIO LAZARI, MODELLI E PARADIGMI DELLA RESPONSABILITÀ DELLO STATO 284 (Giappichelli, Torino 2005).

21. Concrete examples are to be found in Parts III-VI of this Article.

22. Walter van Gerven, *The ECJ Case-Law as a Means of Unification of Private Law?*, *in* TOWARDS A EUROPEAN CIVIL CODE ch. 6, at 101 ff. (Arthur S. Hartkamp & Ewoud Hondius et al. eds., 3d ed., Nijmegen: Kluwer Law Int'l 2004); *see also* GIAN ANTONIO BENACCHIO & BARBARA PASA, A COMMON LAW FOR EUROPE (CEU Press: Budapest 2005).

"Europeanization of law," we refer to another phenomenon, by which national laws are aligned to EU law through the process of interpretation and application of legal rules carried out by judges at national level.[23] This process of interpreting and enforcing national law according to European rules, aims and principles applies mainly in two circumstances: (1) in interpretation, in compliance with EU law, of national rules which result mainly from implementation of a Directive (which is binding as to result, without dictating choice of form and methods to achieve that result). In such cases, the interpreter must favour the legal argument which is most faithful to the text and the purpose of the Directive; he/she has to set aside national legal rules incompatible with EU law; (2) in interpretation of national rules which have no apparent functional link with EU law, that is, rules which are not the result of implementation of a Directive, and do not derive from an express or implied obligation to comply with European law. This situation occurs each time a pre-existing internal rule would be in conflict with a later European rule, that has not yet been implemented, if interpreted according to national criteria. The internal rule would thus be incompatible with the European rule, still to be implemented. In this case, the national judge has a duty to adapt the interpretation of the national rule, so that he/she may continue to apply the national rule without running the risk that the CJEU, which ensures the correct application of EU law, will rule against it. The ruling which formulated this duty for national judges related to the *Marleasing* case (1990).[24] The principle of the supremacy of EU law over national law is operating here, rather than a presumption of conformity.

When interpreting general principles which the CJEU reads into or deduces from the general structure and features of the European legal order, the Court's preference for interpreting wording precisely (as in the case of Directives, and sometimes of Regulations) leaves space for a different kind of interpretation that balances conflicting interests

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23. Judicial style has also been changing in recent decades with the Europeanization of the law. The complexity of issues arising in litigation within Europe's mixed jurisdiction and the way in which litigation is conducted (mainly document-based trials), coupled with efficient databases, bear much of the responsibility for the ever-growing length of modern judgments, both at European and at national levels. We have more expansive judgments than before, that we could classify as "tonsorial or agglutinative" (CHIEF JUSTICE CARDOZO, LAW AND LITERATURE (1925), *reprinted in* 48 YALE L.J. 489, 493 (1939)), because they emerge "from the shears and the paste pot which are its implements and emblem" (i.e., by scissors and paste). On the increasing length of judgments, *cf.* Lady Justice Arden D.B.E., *Judgment Writing: Are Shorter Judgments Achievable?*, *in* 128 LAW Q. REV. 515 ff. (2012).

24. Marleasing SA v. La Comercial Internacional de Alimentacion SA, Case C-106/89, [1990] ECR I-4135.

expressed in general principles. However, neither the European legislature, nor the CJEU have intervened to qualify and define a term which is key to this issue: "gap". What are legal gaps? How does the CJEU recognize them? Which criteria does the Court develop to fill them? Does the Court select the most suitable hermeneutic criteria to fill the gaps? Does the Court refer to a hierarchy of hermeneutic criteria in order to proceed in a coherent way?

The European legal system, in itself, does not define the notion of gap in its Treaties. There are no explicit CJEU rulings addressing the question of how to fill gaps. In CJEU case law we have found neither a definition of gap, nor the hermeneutic criteria used to fill them.

This is not surprising. The CJEU is not formalistic, either in its manner of applying the preliminary ruling procedure, or in its judging techniques. Despite the binding character of its case law, its judicial criteria have had to be inferred by commentators (see Part 3), and an official taxonomy of the rules of interpretation does not exist. Formal limitation of CJEU interpretative activity is indicated by the areas of competence attributed by the Treaties, according to Art. 5(2) TEU.[25]

On the national side, however, we know that many civil codes provide a hierarchical set of rules through which the function of filling the gaps develops alongside legal interpretation: see for example, Art. 12 of *Disposizioni Preliminari* of the Italian Civil Code; Arts. 6 and 7 of the Austrian Civil Code ABGB; Art. 1 of the Swiss Civil Code; or Arts. 1 and 4 of the Spanish Civil Code. Those criteria apply both when there is a normative gap (the legal rule does not exist and it is inferred from general principles) and when there is a nominal gap (the legal rule exists, but is perceived as not appropriate or correct). In this respect, we can expect that the Europeanization of national legal systems will blur the boundaries of the two main European models of interpretation, "passive interpretivism" and "theoretical activism",[26] the former with the judge as *bouche de la loi*, reflecting the myth of inclusiveness of the French Civil code,[27] and the latter with the judge-legislator, where judges play a creative role in deciding cases for which codified law fails to prescribe an

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25. *Cf.* Order of the Court (Third Chamber) of 12 July 2012 (reference for a preliminary ruling from the Tribunale ordinario di Brescia, Italy), Gennaro Currà & Others v. Bundesrepublik Deutschland, Case C-466/11, 12.7.2012.

26. On this point, see, among others, Pier Giuseppe Monateri, *Methods in Comparative Law: An Intellectual Overview*, *in* METHODS OF COMPARATIVE LAW 7-24, at 21 (P.G. Monateri ed., Cheltenham: Edward Elgar Publ'g 2012).

27. *Cf.* Art. 4 of the *Code Civil*, which forces the judge to undertake a decision although the law is obscure (prohibition of *non liquet*), and Art. 5 of the same *Code*, which prevents the judge from overstepping the scope of judicial power.

answer[28] (a model which influenced for example the Swiss Civil Code, Art. 1, para. 2).

At the international level, the Vienna Convention on the Law of Treaties (1969), Arts. 31, 32 and 33, also provides rules for interpretation of treaties, taking into consideration the terms of the Treaties in their context and in the light of their object and purpose, and as supplementary means of interpretation, the preparatory work of the Treaties and the circumstances of their conclusion.[29] But the "intermediate level" between national and international, that is the supranational level of European law, follows its own peculiar path.

III. FILLING LEGAL GAPS AT THE EUROPEAN LEVEL

When making decisions on issues in European law, the CJEU has to fill the (normative) gaps left by the Treaties and legislative acts. Thus, judicial creativity first appears at European level, because the CJEU fills the gaps left by the primary and secondary sources of European law, as well as those gaps left by its rulings (see *infra* this Part). Secondly, the mixed nature of the European legal space means that gap-filling relates also to the multilayer system of negotiation between CJEU and national courts, which has been established through transformation of the preliminary ruling procedure (see Part III.B).

Although the European legal order does not recognize any system or procedure for filling gaps either in its Treaties or in its legislative acts, the CJEU (whose members are highly qualified judicial officers in their own countries or jurists of recognized competence) does in reality use a number of techniques to do this. As some authors have noted, "activism" in relation to the CJEU indicates judgments issued with no basis in the

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28. According to Rudolf von Jhering's Interessenjurisprudenz and then Kantorowicz (or, in France, to the Gény's libre recherche scientifique): see Viviane Grosswald Curran, *Rethinking Hermann Kantorowicz: Free Law, American Legal Realism and the Legacy of Anti-Formalism*, *in* RETHINKING THE MASTERS OF COMPARATIVE LAW 66-93, at 68 (Annelise Riles ed., Oxford & Portland/Oregon: Hart Publ'g 2001).

29. As recent literature testifies, there is continuing scholarly interest in interpretation, sometimes at the cost of over-theorizing. *See* ROBERT KOLB, INTERPRÉTATION ET CRÉATION DU DROIT INTERNATIONAL: ESQUISSE D'UNE HERMÉNEUTIQUE JURIDIQUE MODERNE POUR LE DROIT INTERNATIONAL PUBLIC (Brussels: Bruylant, 2006); CARLOS FERNÁNDEZ DE CASADEVANTE I ROMANI, SOVEREIGNTY AND INTERPRETATION OF INTERNATIONAL NORMS (Berlin: Springer 2007); RICHARD GARDINER, TREATY INTERPRETATION (Oxford: Oxford Univ. Press 2008); ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (Dordrecht: Springer 2007); ALEXANDER ORAKHELASHVILI, THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW (Oxford: Oxford Univ. Press 2008); ISABELLE VAN DAMME, TREATY INTERPRETATION BY THE WTO APPELLATE BODY (Oxford: Oxford Univ. Press 2009).

Treaties or in the secondary binding measures based on the Treaties.[30] These sources make no provision on many matters, and this is when the Court is activist or pro-active.

Many commentators have studied the interpretive methods used by the CJEU.[31] It is generally agreed that there are three types of interpretive criteria used by the CJEU: (1) semiotic or linguistic arguments, (2) systemic and context-establishing arguments, and (3) teleological, functional or consequentialist arguments.[32] While the first two are less employed today, because they prevent the CJEU from contributing to legal theory and to systematic development of European law, the CJEU often employs purposive considerations, in line with a generally functional view of European law. CJEU judgments reflect the *effet utile* approach, because the main objective in the CJEU's interpretation and development of law is the practical effectiveness of European law.

In reality, it is often not easy to distinguish between the teleological and the systemic method in the European legal order because "there is a clear association between the systemic (context) and teleological elements of interpretation in the Court's reasoning. It is not simply the *telos* of the rules to be interpreted that matters, but also the *telos* of the legal context in which those rules exist".[33] In the same way, the *effet utile* and the teleological methods also appear to be intertwined, because teleological interpretation focuses on the purposes of the EU, and the principle of effectiveness is intended to protect these purposes from the Member States' autonomy.

Furthermore, because of the particular nature of Treaties, often containing vague concepts,[34] the CJEU tends to examine the whole context in which a particular provision is situated, and to give the interpretation which is most likely to further what the Court considers that provision sought to achieve.[35] For this reason, it may be

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30. On judicial activism, see recently JUDICIAL ACTIVISM AT THE EUROPEAN COURT OF JUSTICE (Mark Dawson, Bruno de Witte & Elise Muir eds., Cheltenham: Edward Elgar Publ'g 2013).

31. For a synthesis, *cf.* Hannes Rösler, *Interpretation of EU Law*, *in* JURGEN BASEDOW, KLAUS J. HOPT & REINHARD ZIMMERMANN, WITH ANDREAS STIER, THE MAX PLANCK ENCYCLOPEDIA OF EUROPEAN PRIVATE LAW 979-82, at 979 (Oxford Univ. Press, Oxford 2012).

32. This classification is described in JOXERRAMON BENGOETXEA, THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE 233 (Clarendon Press: Oxford 1993).

33. Luís M. Poiares Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, *in* 2 ELEC. J. L. STUD. (2007), http://www.ejls.eu/2/25UK.pdf.

34. On vague concepts, see Gianmaria Ajani, *The Transplant of Vague Notions*, *in* LIBER AMICORUM Z. PETERI, S. ISTVAN TARSULAT 17-37 (Budapest 2005).

35. PAUL CRAIG & GRAINNE DE BURCA, EU LAW: TEXT, CASES, AND MATERIALS 64 (5th ed., Oxford Univ. Press: Oxford 2011).

inappropriate to analyse judicial creativity by focusing on single interpretative approaches. It is difficult and perhaps unreasonable to separately identify specific criteria adopted by the CJEU in every judgment, partly because the Court, despite sometimes being explicit about its interpretative approach, tends to avoid any explicit statement of the weight attributed to the various criteria.[36] However, it is possible to analyse gap filling through the CJEU's actual practice: a practice that leads us to believe in the emerging existence of a "European equity" that construes the law by balancing conflicting principles.

The CJEU relies on many principles, mainly of public law origin, such as supremacy, proportionality, equal treatment, efficacy, effectiveness, non-discrimination, equality and equivalence. During the last decade, the CJEU has also relied on principles pertaining to the private law realm, such as *nemo venire contra factum proprium*, freedom of contract, freedom of form, abuse of right, good faith and fair dealing, unjust enrichment, restitution and damages.

These principles are used to foster the construction of a European legal system, towards the final goal of integration. In other words, the CJEU uses principles to fill the gaps in European law with substance, to refine existing national laws, and to link the two together, in a unique pluralistic legal system that should strive to ensure equity and justice.

A. In the Beginning Was State Liability

One of the fundamental areas of law that has provided particularly fertile ground for gap-filling and judicial creativity in general is State liability for breach of European Union law. The European Court of Justice has been active in this area since 1991, when it heard the *Francovich* case and first established the conditions under which liability gives rise to the right to reparation.[37]

As is well known, the EC Treaty makes no provision on the issue of whether Member States may be liable for damages to injured parties for breach of EU law. However, the CJEU intervened to argue that this is

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36. In CILFIT (para. 20), the CJEU stated:

> [E]very provision of community law must be placed in its context and interpreted in the light of the provisions of community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.

This passage was commented on in GERARD CONWAY, THE LIMITS OF LEGAL REASONING AND THE EUROPEAN COURT OF JUSTICE 24 (Cambridge Univ. Press: Cambridge 2012).

37. Andrea Francovich & Danila Bonifaci & Others v. Italian Republic, Joined Cases C-6/90 and C-9/90, [1991] ECR I-05357.

inherent to the EC Treaty,[38] holding that it must be possible to take legal action against States to seek damages for breach of EC law.[39] Additionally, the Court clarified the conditions that must be fulfilled for the right to reparation to be effective, and applied it to new kinds of breaches and to the State's behaviour in any function or political form.[40]

The purpose of the CJEU was first to establish that States which infringe EC law incur liability just as European institutions do (Art. 340 TFEU, previously Art. 288 TEC). This, as has been noted by many prominent commentators, is another example of the CJEU's function of gap filling.[41] In the *Brasserie du Pêcheur* case, the CJEU stated that Community law confers a right to reparation where three conditions are met: (1) the legal rule infringed must be intended to confer rights on individuals, (2) the breach must be sufficiently serious, and (3) there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.[42]

This vagueness, although criticized by scholars, is necessary in order to protect the claimant better than Member State law does,[43] enhancing, at the same time, interaction and communication with national courts. In other words, the strategy established by the CJEU, based on the minimal guidance provided by these three basic conditions,

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38. *Id.* para. 37.

39. Malcolm Ross, *Beyond Francovich*, 57 MODERN L. REV. 55-73 (1993).

40. As we will see in the following Parts, from the *Brasserie du Pêcheur* case, the Court established that "individuals suffering loss or injury thereby are entitled to reparation where the rule of Community law breached is intended to confer rights upon them, the breach is sufficiently serious and there is a direct causal link between the breach and the damage sustained by the individuals". *Brasserie du Pêcheur SA v Bundesrepublik Deutschland & The Queen v. Sec'y of State for Transp. ex parte Factortame Ltd. & Others*, Joined Cases C-46/93 and C-48/93, [1996] ECR I-01029, para. 4.

41. Commentators noted that "the tort rules laid down in the two lines of case law, one relating to Community institutions and the other relating to Member States, are used by the Court, back and forth, as a source of inspiration". Walter van Gerven, *The Emergence of a Common European Law in the Area of Tort Law: The EU Contribution*, *in* DUNCAN FAIRGRIEVE, MADS ANDENAS & JOHN BELL, TORT LIABILITY OF PUBLIC AUTHORITIES IN COMPARATIVE PERSPECTIVE 125-47, at 132 (BIICL: London 2002). This analogy produces several consequences. For example, the Court ruled that the State is liable whichever of its organs is responsible for the breach and regardless of the internal division of powers between constitutional authorities. Roy W. Davis, *Liability in Damages for a Breach of Community Law: Some Reflection on the Question of Who To Sue and the Concept of "the State,"* 31 EUR. L. REV. 69-80 (2006).

42. *Brasserie du Pêcheur*, para. 51.

43. In other words, the CJEU sanctions the State's failure to act under a test of liability in order to pursue the *telos* of the effectiveness of European law, more than the protection of the claimant's rights. This is a typical international law feature. Michele Graziadei, *Rights in the European Landscape: A Historical and Comparative Profile*, *in* PRECHAL & VAN ROERMUND, *supra* note 18, at 89 n.18, in relation to the comparison between the stance of the CJEU and German law.

has permitted progressive extension and clarification of the principle of Member State liability, as a result of CJEU creativity, and continuous interaction between European Courts and national judges. This will be discussed in greater depth below.

However, at this stage, we stress that in the case of State liability the aim was to enhance the effectiveness of EU law, also a principle which guides interpretation, and which is not limited to making the meaning of a rule clear, but also ensures that it be effectively applied or produce the desired effects. Indeed, the CJEU stated that State liability for breach of European law should be seen as a necessary corollary of the doctrine of direct effect.[44] As a result, especially through the principle of effectiveness of European law, the principle of Member State liability has been progressively clarified and extended through several approaches which operate simultaneously.

As explained further below, the CJEU used a preliminary ruling to extend the principle of State liability and apply its conditions also in the case of infringement of European law attributable to a decision by a national court adjudicating at last instance.[45] The Court filled a gap through a teleological interpretation, pursuing an objective already identified in the CILFIT case,[46] where it "held that Article 234 EC Treaty

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44. Andrea Francovich & Danila Bonifaci & Others v. Italian Republic, Joined Cases C-6/90 and C-9/90, [1991] ECR I-05357, para. 3:

> The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain reparation when their rights are infringed by a breach of Community law for which a Member State can be held responsible. Such a possibility of reparation by the Member State is particularly indispensable where the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law. It follows that the principle whereby a State must be liable for loss and damage caused to individuals by breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty. A further basis for the obligation of Member States to make good such loss and damage is to be found in Article 5 of the Treaty, under which they are required to take all appropriate measures, whether general or particular, to ensure the implementation of Community law, and consequently to nullify the unlawful consequences of a breach of Community law.

45. In the *Köbler* case, the CJEU ruled:

> The principle that Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties.

46. Srl Cilfit & Lanificio di Gavardo SpA v. Ministry of Health, Case C-283/81, [1982] ECR I-3415.

requires the highest national Court (also *ex officio*) to refer a case for a preliminary ruling if any question of EC Law could be relevant for the case to be decided and the answer to that question is not evident (*acte clair*) or already provided by the CJEU (*acte éclairé*)".[47] Nevertheless, national courts have raised some forms of resistance for cultural and political reasons which will be analysed below.

B. The Function of Gap-Filling and the Preliminary Ruling Procedure

As mentioned above, the mixed or pluralistic nature of the European legal space means that gap-filling also relates to the multilayer system of negotiation between CJEU and national courts, established along with the transformation of the preliminary ruling procedure. As is well known, in general terms, the CJEU's arguments and precedents influence national law and individuals' rights through their incorporation into the decision-making process of national courts; at the same time, national courts should apply European law, filling any gaps and reinterpreting European solutions within the national law.

This means that the vaguer or more open the European rules as interpreted by the CJEU are, the more freedom national courts will enjoy in applying them.

In order to guarantee achievement of the goals of European policies expressed in the *acquis*, the CJEU can decide to be more pro-active in judging a preliminary ruling. The transformation of the preliminary ruling procedure[48] was effected by the CJEU (under the previous Treaties, the European Court of Justice) which over the years created the *direct effect*[49] and *supremacy* doctrines.[50] The Court achieved the

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47. Peter J. Wattel, Köbler, Cilfit & Welthgrove, *We Can't Go On Meeting Like This*, 41 COMMON MARKET L. REV. 177-90 (2004).

48. It was created in the European Coal and Steel Community (ECSC) as part of the review role of the Court: individuals could challenge the validity of High Authority (the predecessor of the Commission) decisions in national courts and have these challenges referred directly to the Court of Justice. *See* KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE 9 (Oxford Univ. Press: Oxford 2001). Only with the Treaty of Rome, it was expanded to include questions of interpretation, reinforcing the ECJ's role of filling the gaps, although the Commission remained the primary body responsible for interpreting the law and enforcing it.

49. It established that European law can create rights for individuals that could be invoked before national courts under certain conditions. The CJEU established rules for when Treaties' provisions, regulations and directives can create (vertical and horizontal) direct effects, for example depending on the clarity of the legal text, or the unconditional nature of the obligation. See among others, CRAIG & DE BURCA, *supra* note 35.

50. It established that European law is the supreme law and has precedence over national law, even subsequent changes of national law: through revolutionary decisions, the CJEU allowed the Court itself and the national courts to monitor and enforce European law in the

metamorphosis by using the techniques of legal interpretation mentioned above (from the 1963 *Van Gend en Loos* case, through *Costa v. Enel*, and then the *Simmenthal* decision in 1978);[51] it granted access to private litigants to use European rules in order to challenge national rules and policies. Consequently, this has changed how CJEU decisions have been enforced. As is well known, resistance by some Member State constitutional courts towards the supremacy doctrine came to an end in the 1980s, when a large majority of national judiciaries agreed to take on the role of enforcing European law in national territory.[52] The CJEU used a teleological approach, where the goal was to foster European integration and to increase the effectiveness of the European legal system,[53] which at times meant creative interpretation of the primary and secondary sources of EU law. Now that the authority of the CJEU is well established, the challenge remains of a new phenomenon that is part of an emerging system of checks and balances within the European legal system.

C. Conflicting Legal Interpretations in a Multilevel Judicial System

As seen, CJEU precedents, based on EU statutory interpretation,[54] formulate fundamental principles through comparison of national legal systems: however, the rhetoric of a Court that "finds the law" in the common roots or constitutional traditions of the Member States is a *fictio juris*; in reality the Court creates legal rules by means of judicial

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national setting, stating that Member States cannot escape their obligations by non-compliance. See among others, Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403-83 (1991).

51. *See* Thomas de la Mare & Catherine Donnelly, *Preliminary Rulings and EU Legal Integration: Evolution and Stasis*, *in* PAUL CRAIG & GRAINNE DE BURCA, THE EVOLUTION OF EU LAW 363-406 (Oxford Univ. Press: Oxford, 2d ed. 2011).

52. Legal scholars have identified a range of variables that have influenced national acceptance of this doctrine: (1) the influence of the monist doctrine, where international law is already part of the national legal system and hierarchically supreme to national law, or the dualist doctrine, where international law is not part of the national legal system and requires incorporation into national law; (2) the influence of a tradition of judicial review; (3) government positions on European integration, because political factors shape judicial interpretation; (4) the fact that some States entered the European Economic Community before European law was declared supreme to national law: for example, British legal scholars debated the doctrine of supremacy during the accession period, so it was part of what the UK accepted when it joined the Community. *See* further in ALTER, *supra* note 48, at 28 ff.

53. D. Wincott, *The Role or the Rule of the Court of Justice: An 'Institutional' Account of Judicial Politics in the European Community*, *in* 2 J. PUB. POL'Y 583-602 (1995); Paul Craig, *Once upon a Time in the West: Direct Effect and the Federalization of EEC Law*, 12 OXFORD J. LEG. STUD. 453-79 (1992).

54. Among the EU legislative acts, principally Regulations and Directives.

activism. This raises the normative issue of the limits of EU intervention in national law to achieve the objectives of market integration.

Our concern in this short article is not to define or clarify the notion of "principle", or whether any difference exists, in theoretical terms, between "general principles", "governing principles" and "underlying principles" or "overriding principles".[55] As we will demonstrate by looking at the CJEU, all the principles mentioned in the judgments are of a highly political nature for the protection of human rights, the promotion of solidarity and social responsibility, and the enhancement of an increasingly consumer-friendly and a socially oriented, common internal market. What is at stake here is the relationship between the European market framework, whose core issue is procedural justice[56] and the fairness of the institutional decision-making process,[57] on the one hand, and on the other hand national welfare systems, whose concern is currently the social exclusion of citizens, workers and consumers, at risk of being cut off from labour and consumer markets.[58] In other words, the EU goal seems to be to break down barriers which limit participation in the European market, while the common national goal seems to be to correct inequalities and obtain fair results and social peace. EU integration has been regarded as a technical, a-political, process concerned with the development of rules to support the internal market, rather than a more political process involving debate over socio-political perspectives, in order to correct inequalities and to obtain fair results and social peace.

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55. On this point, among others, see Simon Whittaker, *Operation of the Common European Sales Law*, 50 (Special Issue) COMMON MARKET L. REV. 85-108 (2013); Koen Lenaerts & José A. Gutiérrez-Fons, *The Constitutional Allocation of Powers and General Principles of EU Law*, 47 COMMON MARKET L. REV. 1629-69 (2010); Arthur S. Hartkamp, *The General Principles of EU Law and Private Law*, 75 RABELSZ 241-59 (2011); Jürgen Basedow, *The Court of Justice and Private Law: Vacillations, General Principles and the Architecture of the European Judiciary*, 18 ERPL 443-75 (2010); Marek Safjan & Przemysław Mikłaszewicz, *Horizontal Effect of the General Principles of EU Law in the Sphere of Private Law*, 18 ERPL 475-86 (2010). Before, *cf.* EUROPEAN CONTRACT LAW MATERIALS FOR A COMMON FRAME OF REFERENCE: TERMINOLOGY, GUIDING PRINCIPLES AND MODEL RULES (Bénédicte Fauvarque-Cosson & Denis Mazeaud eds., Sellier: Munich 2008).

56. On welfarism in private law, see Thomas Wilhelmsson, *Varieties of Welfarism in European Contract Law*, 10 EUR. L.J. 712-33 (2004), *available at* http://ssrn.com/abstract=605144l; WELFARISM IN CONTRACT LAW (Roger Brownsword, Geraint Howells & Thomas Wilhelmsson eds., Dartmouth: Univ. of Michigan 1994).

57. See in more general terms, James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 L. & SOCIETY REV. 469-96 (1989).

58. *Cf.* Hans-W. Micklitz, *Judicial Activism of the European Court of Justice and the Development of the European Social Mode in Anti-Discrimination and Consumer Law*, 19 EUI LAW 11 (2009); THE MANY CONCEPTS OF SOCIAL JUSTICE IN EUROPEAN PRIVATE LAW (Hans-W. Micklitz ed., Cheltenham: Edward Elgar 2011).

Now the growing contentiousness (see below, Fig. 1) around sensitive areas of national control (Fig. 2) opens another phase of European integration, where conflicting legal interpretations voiced by the CJEU, national courts, national governments and the Commission play a decisive role in changing the boundaries between national sovereignty and European law.[59]

Fig. 1. Reference rates of national judges to the CJEU, by years and by countries[60].

59. *Cf.* Hans-W. Micklitz & Dennis Patterson, *From the Nation State to the Market: The Evolution of EU Private Law*, 15 EUI LAW 13 ff. (2012). They identify four parameters to describe the interaction between "nation state private law regimes" and "market state European private law regimes": (1) conflict and resistance, (2) intrusion and substitution, (3) hybridisation and (4) convergence.

60. *Cf.* ANNUAL REPORT 2012 OF THE CJEU 98-99, 111-12 (2013), *available at* http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-04/192685_2012_6020_cdj_ra_2012_en_proof_01.pdf.

Political scientists have noted that the more cross-national economic activity there is, the more conflict emerges between national and European law, explaining the growing reference rates of national judges to the CJEU in terms of levels of trade flows. *See* Jonathan Golub, *Modelling Judicial Dialogue in the European Community: The Quantitative Basis of the Preliminary References to the ECJ*, 58 EUI RSC 17 (1996); Alec Stone Sweet & Thomas Brunnel, *Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community*, 92 AM. POL. SCI. REV. 63-80 (1998). However, this correlation is only one part of the story. The European system, as we said, was not designed to be used by individuals to challenge national laws and policies. Its transformation was due to acceptance of the supremacy doctrine and of changing national legal interpretations and practices by the national courts, so that national enforcements of the law were no longer incompatible with European supremacy. *See* ALTER, *supra* note 48, at 37.

	BE	BG	CZ	DK	DE	EE	IE	EL	ES	FR	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK	Others (1)	Total
1961																		1											1
1962																		5											5
1963															1			5											6
1964											2							4											6
1965					4					2								1											7
1966																		1											1
1967	5				11					3					1			3											23
1968	1				4					1	1							2											9
1969	4				11					1					1														17
1970	4				21					2	2							3											32
1971	1				18					6	5				1			6											37
1972	5				20					1	4							10											40
1973	8				37					4	5				1			6											61
1974	5				15					6	5							7								1			39
1975	7			1	26					15	14				1			4								1			69
1976	11				28		1			8	12							14								1			75
1977	16			1	30		2			14	7							9								5			84
1978	7			3	46		1			12	11							38								5			123
1979	13			1	33		2			18	19				1			11								8			106
1980	14			2	24		3			14	19							17								6			99
1981	12			1	41					17	11				4			17								5			108
1982	10			1	36					39	18							21								4			129
1983	9			4	36		2			15	7							19								6			98
1984	13			2	38		1			34	10							22								9			129
1985	13				40		2			45	11				6			14								8			139

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	BE	BG	CZ	DK	DE	EE	IE	EL	ES	FR	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK	Others (1)	Total
1986	13			4	18		4	2	1	19	5				1			16									8		91
1987	15			5	32		2	17	1	36	5				3			19									9		144
1988	30			4	34				1	38	28				2			26									16		179
1989	13			2	47		1	2	2	28	10				1			18			1						14		139
1990	17			5	34		4	2	6	21	25				4			9			2						12		141
1991	19			2	54		2	3	5	29	36				2			17			3						14		186
1992	16			3	62			1	5	15	22				1			18			1						18		162
1993	22			7	57		1	5	7	22	24				1			43			3						12		204
1994	19			4	44		2		13	36	46				1			13			1						24		203
1995	14			8	51		3	10	10	43	58				2			19	2		5					6	20		251
1996	30			4	66			4	6	24	70				2			10	6		6				3	4	21		256
1997	19			7	46		1	2	9	10	50				3			24	35		2				6	7	18		239
1998	12			7	49		3	5	55	16	39				2			21	16		7				2	6	24		264
1999	13			3	49		2	3	4	17	43				4			23	56		7				4	5	22		255
2000	15			3	47		2	3	5	12	50							12	31		8				5	4	26	1	224
2001	10			5	53		1	4	4	15	40				2			14	57		4				3	4	21		237
2002	18			8	59			7	3	8	37				4			12	31		3				7	5	14		216
2003	18			3	43		2	4	8	9	45				4			28	15		1				4	4	22		210
2004	24			4	50		1	18	8	21	48				1	2		28	12		1				4	5	22		249
2005	21		1	4	51		2	11	10	17	18				2	3		36	15	1	2				4	11	12		221
2006	17		3	3	77		1	14	17	24	34			1	1	4		20	12	2	3			1	5	2	10		251
2007	22	1	2	5	59	2	2	8	14	26	43			1		2		19	20	7	3	1		1	5	6	16		265
2008	24		1	6	71	2	1	9	17	12	39	1	3	3	4	6		34	25	4	1				4	7	14		288
2009	35	8	5	3	59	2		11	11	28	29	1	4	3		10	1	24	15	10	3	1	2	1	2	5	28	1	302
2010	37	9	3	10	71		4	6	22	33	49		3	2	9	6		24	15	8	10	17	1	5	6	6	29		385
2011	34	22	5	6	83	1	7	9	27	31	44		10	1	2	13		22	24	11	11	14	1	3	12	4	26		423
2012	28	15	7	8	68	5	6	1	16	15	65		5	2	8	18	1	44	23	6	14	13		9	3	8	16		404
Total	**713**	**55**	**27**	**149**	**1 953**	**12**	**68**	**161**	**287**	**862**	**1 165**	**2**	**25**	**13**	**83**	**64**	**2**	**833**	**410**	**49**	**102**	**46**	**4**	**20**	**79**	**99**	**547**	**2**	**7 832**

Fig. 2. *Cases completed by judgments, by opinions or by orders involving a judicial determination; Subject-matter of the action (2008-12)*

	2008	2009	2010	2011	2012
Access to documents				2	5
Accession of new States		1		1	2
Agriculture	54	18	15	23	22
Approximation of laws	21	32	15	15	12
Area of freedom, security and justice	4	26	24	23	37
Brussels Convention	1	2			
Budget of the Communities (2)			1		
Citizenship of the Union	7	3	6	7	8
Commercial policy	1	5	2	2	8
Common Customs Tariff (4)	5	13	7	2	
Common fisheries policy	6	4	2	1	
Common foreign and security policy	2	2	2	4	9
Community own resources (2)		10	5	2	
Company law	17	17	17	8	1
Competition	23	28	13	19	30
Consumer protection (3)			3	4	9
Customs union and Common Customs Tariff	8	5	15	19	19
Economic and monetary policy	1	1	1		3
Economic, social and territorial cohesion					3
Education, vocational training, youth and sport					1
Energy	4	4	2	2	
Environment (3)			9	35	27
Environment and consumers (3)	43	60	48	25	1
External action by the European Union	8	8	10	8	5
Financial provisions (budget, financial framework, own resources, combatting fraud and so forth) (2)			1	4	3
Free movement of capital	9	7	6	14	21
Free movement of goods	12	13	6	8	7
Freedom of establishment	29	13	17	21	6
Freedom of movement for persons	27	19	17	9	18
Freedom to provide services	8	17	30	27	29
Industrial policy	12	6	9	9	8
Intellectual and industrial property	22	31	38	47	46
Justice and home affairs	1				
Law governing the institutions	15	29	26	20	27
Principles of European Union law	4	4	4	15	7
Privileges and immunities	2				
Public health				3	1
Public procurement				7	12
Regional policy	1	3	2		
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)				1	
Research, information, education and statistics			1		

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	2008	2009	2010	2011	2012
Research, technological development and space					1
Rome Convention		1			
Social policy	25	33	36	36	28
Social security for migrant workers	5	3	6	8	8
State aid	26	10	16	48	10
Taxation	38	44	66	49	64
Tourism					1
Transport (4)	4	9	4	7	14
EC Treaty/TFEU	**445**	**481**	**482**	**535**	**513**
EU Treaty	6	1	4	1	
CS Treaty	2			1	
Privileges and immunities				2	3
Procedure	5	5	6	5	7
Staff Regulations	11	8	4		
Others	16	13	10	7	10
OVERALL TOTAL	**469**	**495**	**496**	**544**	**523**

(1) The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).
(2) The heading "Budget of the3 Communities" and "Community own resources have been combined under the heading "Financial provisions" for cases brought after 1 December 2009.
(3) The heading "environment and consumers" has been divided into two separate headings for cases brought after 1 December 2009.
(4) The headings "Common Customs Tariff" and "Customs union" have been combined under a single heading for cases brought after 1 December".

Cf. ANNUAL REPORT 2012 OF THE CJEU 98-99, 111-12 (2013), *supra* note 60.

IV. DOES A "EUROPEAN EQUITY" EXIST?

The possible existence of a European equity has fundamental importance in the architecture of the European legal system, as well as in judicial interaction, as a source of law. The fact that in CJEU case law the term "equity" is not used may depend on various factors: it does not necessarily mean that a European equity or an equitable jurisdiction does not operate within the European legal system. It is obviously important to define clearly what we mean by European equity, in relation to the common law and civil law meanings, and to draw a distinction between European and national levels, a "centralized and diffuse equity" at one time.

We have developed our idea of a European equity through a concrete approach, drawing on the CJEU's judgments and the reaction of the national courts in two areas of law, State Liability and Contracts and Consumer Protection, which are of greatest concern to EU citizens seeking to shape their economic and social future.

Firstly, we suggest that European equity exists in two senses: both in the original Latin meaning as *jus est ars boni et aequi* (Celsus, one of the most prominent jurists of the early second century AD), and in the

traditional common law meaning as a concurrent jurisdiction which in the past sought to solve disputes and created new remedies (such as specific performance and injunction, with the most innovative contribution being, of course, trust law) and doctrines (for instance, undue influence).

The Latin term *aequitas* in ancient Rome referred to a flexible concept with a corrective function used by magistrates (*praetores*) to apply the law in the interest of justice, and not in a mechanical or automatic fashion. The juxtaposition between equity and the law came later on: it was a creation of the glossators, according to whom *aequitas* was the measure of a criticism of the law in case of *lacunae* and the basis of interpretation to fill the gap.[61] According to canonists (such as Ostiense,[62] for example), *aequitas* always applied, since it was a "reasonable way of giving justice".

Although the CJEU does not use the term equity, its adjudication is always guided by principles which must be fair. Europe's equitable adjudication, like *aequitas*, consists in the exercise of balancing opposing principles, through which the CJEU pursues justice. Its jurisdiction transforms the theoretical possibility of participating in the common market into a realistic and pragmatic opportunity to eliminate unfair results (despite the paternalistic behaviours of Member States). Furthermore, the functioning of this European equitable jurisdiction is influenced by another key factor: interaction with national judges. As stated above, it is preliminary rulings which enable this interaction (Art. 267 TFEU), and which permit European and national judges to influence each other in the development and assimilation of principles. Hence, by studying preliminary rulings it is possible to understand the interactive and collaborative relationships between the courts established in the Treaties, as well as the elements and factors that modify them.

As said, it is also possible to identify a European equity in the common law sense. The CJEU's activity may be compared with that of the Court of Chancery which from the 14th century developed doctrines and remedies that competed with the common law courts, and progressively built an increasingly solid and complex system of rules of its own.[63] It seems to us that the equity jurisdiction of the Chancellor

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61. *See* ANTONIO PADOA SCHIOPPA, STORIA DEL DIRITTO IN EUROPA: DAL MEDIOEVO ALL'ETÀ CONTEMPORANEA 198 ff. (Il Mulino: Bologna 2007).

62. The "man from Ostia" was Henry of Susa, famous master of Canon Law at Bologna and Paris, who became cardinal and bishop of Ostia in 1261. *Cf.* CLARENCE GALLAGHER, CANON LAW AND THE CHRISTIAN COMMUNITY (Università gregoriana editrice: Roma 1978).

63. As Maitland pointed out, equity formally respected every word of the common law and every right at law, but where the law was defective equity provided equitable rights and

("the keeper of the King's conscience") and the equity of the CJEU share a similar function, that is to say the development of remedies and doctrines which complete a unique legal system, intervening where other sources of law leave *lacunae*. A further analogy between the CJEU's and the Chancellor's jurisdiction is that both courts have developed their creative function, but formally they respect the legal order where they operate (respectively European legislation and the common law rooted in the forms of action and the system of *writs*).

Secondly, we can also find a form of equity in the common law sense at national level, in the judicial creativity that national courts show when they fill the gaps, a sort of a "diffuse equity". National judges are in a sense "decentralized European judges",[64] because they must apply European law, which means they must interpret and fill gaps in the European legal space.[65]

V. STATE LIABILITY

State liability for breach of European law is a key area where the CJEU is guided by the principles of (primacy and) effectiveness of European law, and of equivalence and autonomy of Member States which interact and temper each other reciprocally.[66] The balancing

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remedies. *See* FREDERIC W. MAITLAND, EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW: TWO COURSES OF LECTURES (CUP Archive 1932). Even after James I, when the King solved the tension between the two rival jurisdictions, according to the maxim "Equity follows the law", the Court of Chancery was bound by the rules established by common law courts. However, the maxim was operative in a "narrow sense". In reality, the Chancery Court could use its discretion in order to provide relief against abuse of the law or to allay its strictness. While in ordinary circumstances "Equity follows the law" without infringing rights that had been legally acquired, that maxim could yield if extraordinary circumstances called for relief.

64. Bruno de Witte, *Direct Effect, Primacy, and the Nature of the Legal Order*, *in* CRAIG & DE BURCA, *supra* note 51, at 323-62.

65. More precisely,

> the national court is charged with ensuring respect for Community law in various ways: it is required to apply Community law; it must set aside national legislation incompatible with Community law; it is under the duty to interpret national law in conformity with Community law; and it is charged with finding a Member State in breach of Community law in accordance with the principle of State liability. In essence, the national court serves as the 'juge de droit commu' in the Union legal order.

Koen Lenaerts, *The Rule of Law and the coherence of the Judicial System of the European Union*, 44 COMMON MARKET L. REV. 1625–59, at 1645 (2007).

66. According to the principle of primacy, CJEU Case C-26/62, *Van Gend & Loos* [1963] ECR 3, and the principle of effectiveness, CJEU Case C- 6/64, *Costa v. E.N.E.L.* [1964] ECR 1141, of European law, national procedural rules may not be so framed as to render virtually impossible or excessively difficult the exercise of rights conferred by European law. In conformity with the principle of national procedural autonomy, the CJEU has often stated that it is for the "domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the

between these principles in the area of State liability for breach of European Law is related to the complex nature of the remedy. Using reparation to protect European citizens whose rights have been violated as a result of a breach of European law directly influences the relationship between citizens and the Members States to which the violation is attributable. In other words, State liability directly affects the complex relationship between the European Union and Member States, and recently was even applied to adjudication.

It is widely agreed that the CJEU, with the *Köbler* case, opened a new chapter in State liability. This principle, applied also to judicial function, is a reaffirmation of the primacy of European law and of the universality of remedies. On the other hand, it undermines the finality of last instance judgments and establishes a more hierarchical relationship between the CJEU and national supreme courts. Hence, with this judgment, the point of balance between principles has been shifted in favour of the principle of effectiveness of European law. Especially in the *Traghetti del Mediterraneo SpA v Repubblica italiana* and *Commission v. Italy* cases,[67] the CJEU applied the *Köbler* precedent even more directly, establishing that Italian legislation had imposed requirements which were stricter than those of a manifest infringement of the applicable law, and for this reason directly violated European law.[68] This is only the most evident case where the CJEU, in directly stating that a national law infringes European law,[69] has modified the balance

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protection of the rights which citizens have from direct effect of Community law". On the other hand, this principle is tempered by the principle of equivalence, according to which remedies under European law cannot be treated less favourably than remedies under national law. These principles have been studied and applied to State liability, in SCHERMERS & WAELBROCK, *supra* note 15, at 199.

67. Judgment of the Court (Grand Chamber), *Traghetti del Mediterraneo SpA v Repubblica italiana*, Case C-173/03 [2006] ECR I-05177; *European Commission v Italian Republic*, Case C-379/10, [2011], ECR I-00180.

68. *Traghetti del Mediterraneo*, para. 46:

> Community law precludes national legislation which excludes State liability, in a general manner, for damage caused to individuals by an infringement of Community law attributable to a court adjudicating at last instance by reason of the fact that the infringement in question results from an interpretation of provisions of law or an assessment of facts or evidence carried out by that court. Community law also precludes national legislation which limits such liability solely to cases of intentional fault and serious misconduct on the part of the court, if such a limitation were to lead to exclusion of the liability of the Member State concerned in other cases where a manifest infringement of the applicable law was committed, as set out in paragraphs 53 to 56 of the Köbler judgment.

69. For this reason, recently Italian doctrine has been very active in this field. *See* Giovanni M. Flick, *La responsabilità civile dei magistrati. Proposte di modifica fra disinformazione e realtà*, 11 FEDERALISMI.IT 1-10 (2012); Francesca Bonaccorsi, *Clausola di*

between the Europeanization of remedies and respecting national autonomy. In general, this case demonstrates that the balancing of principles can be unbalanced and that there are evident points of resistance in national case law. As is well known, while the CJEU has established the three conditions for State liability, the national courts must apply them and everything that is not regulated at the European level must be regulated at the national level. This involves many important areas, such as "the admissibility of an action, *locus standi* of the applicant, time limits for bringing action, evidential rules, nature or categories of damage to be compensated, its assessment, the calculation of compensation to be paid, the form of redress, the award of interest",[70] including anything which has not been laid down by European law. For these reasons the "Francovich doctrine" is assimilated in a rather variable way in domestic legal systems.

Especially in the last few years, this has been an area of much judicial creativity, influenced by two main factors. Primarily, national courts can apply the principle by selecting rules and legal concepts from their own national legal order. This means that their discretion is expanded, once the principles of equivalence and effectiveness are fulfilled, because actions for damages are in other regards governed by national rules on liability.[71]

The vagueness of the three conditions leaves great discretion to national judges as regards their concretion, another way to develop judicial creativity through progressive application to actual cases.[72] However, the clearest factor encouraging judicial creativity is the

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salvaguardia e responsabilità dello Stato per l'illecito del magistrato, 10 DANNO E RESPONSABILITÀ 981-90 (2012); Nicolò Trocker, *L'Europa delle Corti sovranazionali: una storia di judicial activism tra tutela dei singoli ed integrazione degli ordinamenti giuridici*, *in* ANNUARIO DI DIRITTO COMPARATO E DI STUDI LEGISLATIVI 91-128 (2011); Francesco P. Luiso, *La responsabilità civile*, 10 FORO ITALIANO 285-90 (2011); Maria P. Iadicicco, *Integrazione europea e ruolo del giudice nazionale*, 2 RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO 393-446 (2011); Nicolò Zingales, *Member State Liability vs. National Procedural Autonomy: What Rules for Judicial Breach of EU Law?*, 11 GERMAN L.J. 419-38 (2010), *available at* http://www.germanlawjournal.com/index.php?pageID=11&artID=1244; Vincenzo Amato, *La responsabilità dello Stato giudice. Profili civilistici interni*, PERSONA E DANNO 1-39 (2010), www.personaedanno.it; Antonio Lazari, "*Là où est la responsabilité, là est le pouvoir". Il nuovo ruolo del giudice nel paradigma comunitario dopo la sentenza Traghetti*, REVISTA ELECTRÓNICA DE ESTUDIOS INTERNACIONALES (2008), www.reei.org.

70. SACHA PRECHAL, DIRECTIVES IN EC LAW 293 (Oxford Univ. Press: N.Y. 2006).

71. *Brasserie du Pêcheur SA v Bundesrepublik Deutschland & The Queen v. Sec'y of State for Transp. ex parte Factortame Ltd. & Others*, Joined Cases C-46/93 and C-48/93, [1996] ECR I-01029, para. 67.

72. Roberto Caranta, *On Discretion*, *in* PRECHAL & VAN ROERMUND, *supra* note 18, at 196 ("Liability actions are an almost ideal field for a comparative review of discretion at European level.").

vagueness of the condition of the "sufficiently serious breach" of European Law, as well as of the first condition, that is the existence of a rule intended to confer rights on individuals.[73] In particular, the "sufficiently serious breach" condition (or, in other words, "whether the Member State has manifestly and gravely disregarded the limits on its discretion") has been developed and clarified in the "second generation of cases", that is those CJEU judgments which in the last fifteen years have progressively clarified the three conditions and extended the *Francovich* remedy to new forms of breach.[74] With these judgments, "in terms of legal analysis, the Court has concentrated on elaborating the condition of seriousness of the breach. In terms of judicial policy, the cases evince a tendency to leave more matters to national courts and, perhaps, in some respects a tactical relaxation of liability".[75] Accordingly, national courts apply the broad concept laid down by the CJEU, taking legal content from their own national legal culture, that is from the rules of a legal system which they are familiar with, instead of from rules which they are not aware of or which they would not be able to formulate well.[76] As many commentators have pointed out, judges are products of specific national legal systems, they absorb specific features of their national legal culture, and adopt their own legal reasoning and a

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73. The ambiguity of the division of functions between the CJEU and the national courts, as well as the complex application of the three conditions by the English courts, have been recently analysed in Paula Giliker, *English Tort Law and the Challenge of Francovich Liability: 20 Years On*, 128 L.Q. REV. 541–63, at 551 (2012). Referring to the second condition, national courts only follow guidelines laid down by the CJEU in order to determine whether the threshold of seriousness has been reached.

74. In *Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein*, Case C-424/97, [2000] ECR I-05123, para. 2, the CJEU stated:

> In order to determine whether a mere infringement of Community law by a Member State constitutes a sufficiently serious breach, a national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it. Those factors include, in particular, the clarity and precision of the rule infringed, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by a Community institution may have contributed towards the adoption or maintenance of national measures or practices contrary to Community law.

75. Takis Tridimas, *Liability for Breach of Community Law: Growing Up and Mellowing Down?*, *in* FAIRGRIVE, ANDENAS & BELL, *supra* note 41, at 151.

76. That is a "cryptotype": *see* Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)*, 39 AM. J. COMP. L. 343-401, at 387 (1991):

> Normally, a jurist who belongs to a given system finds greater difficulty in freeing himself from the cryptotypes of his system than in abandoning the rules of which he is fully aware. This subjection to cryptotypes constitutes the "mentality" of the jurist of a given country, and such differences in mentality are the greatest obstacle to mutual understanding between judges of different systems. Cryptotypes may be identified and explored only through the use of comparison at a systemic and institutional level.

consequent distinctive style of framing and resolving legal questions.[77] In applying and clarifying the condition of seriousness of breach, the balance between principles, and judicial dialogue, operate at maximum level. In fact, the vagueness of this condition and the CJEU's indicators to national judges for determining the seriousness of the infringement demonstrate that this is very much the kind of field which can enhance the dynamics of incremental cooperation between judges and the consequent mutual influence called "cross-fertilisation".[78] Thus judges have a double function: they apply EU criteria and they handle the case under their national law.[79] Moreover, national courts are not limited to applying national law in compliance with European law; they can also interpret the remedy according to their national legal structures.[80] Hence, in the area of State liability some analogies can be seen between European judicial cooperation and equity in both the English and in the Latin sense. The wide area of discretion left by the CJEU to national autonomy, as well as the three vague conditions, reveal similarities with the way the Court of Chancery functioned.

However, instead of one court, there are as many "equity courts" as there are national legal systems. Like the relationship between common law and equity in England, the relationship between European law and

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77. Moreover, "other features of national legal culture include a particular understanding of the role of courts in relation to legislative bodies, differing specifically on the extent to which judges 'make' law in the process of interpretation and application of legislative provisions and the extent to which they can fill the gaps in those provisions". Walter Mattli & Anne-Marie Slaughter, *The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints*, *in* ANNE-MARIE SLAUGHTER, ALEC STONE SWEET, & JOSEPH H.H. WEILER, THE EUROPEAN COURT OF JUSTICE AND NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE 252-76, at 272 (Hart, Oxford 1998).

78. Bell, *supra* note 8, at 165.

79. Martina Künnecke, *Divergence and the Francovich Remedy in German and English Courts*, *in* PRECHAL & VAN ROERMUND, *supra* note 18, at 233.

80. In general terms, they can even decide on the nature of the remedy, applying European law directly or some equivalent national rule. This topic, further discussed at the end of this Part, relates to the equivalence of the European principle with the possible equivalent in national law. In Judgment of the Court (Grand Chamber) of 26 January 2010, *Transportes Urbanos y Servicios Generales SAL v. Administración del Estado,* Case C-118/08, [2010] ECR I-00635, the CJEU stated, "*In relation to the principle of equivalence, it should be borne in mind that, according to settled case law, this requires that all the rules applicable to actions apply without distinction to actions alleging infringement of European Union law and to similar actions alleging infringement of national law*". This means that, in order to determine whether the principle of equivalence has been complied with, it is necessary to decide whether, in the light of their purpose and their essential characteristics, the action for damages brought by the claimant, alleging breach of European Union law, and the action that could have been brought through a national specific remedy (e.g., a specific remedy for judicial liability), may be regarded as similar. This decision will have many consequences on the rules which must be applied to the case, as well as the potential mutual influence between the European and national remedy.

national laws has also undergone phases of conflict. Analysis of judicial creativity in the area of Member State liability demonstrates that national judges have often raised some form of resistance.

There are two reasons for resistance. Firstly, public liability for judicial acts has always met limitations and difficulties at national level. Judicial liability has always been an extremely problematic political and institutional question, largely due to the principles which characterize the judicial function and especially its independence with respect to the other constitutional powers. As is well known, judicial liability has also been conditioned by heavy restrictions because of the principles of the authority of *res judicata* and of legal certainty[81].

Secondly, resistance appears to depend on the fact that, in the area of State liability for breach of European law attributable to the courts adjudicating at last instance, CJEU judgments can override national courts' jurisdictional authority; they thus appear to be subjugated to the CJEU and their influence undermined within their national and political systems. There is a connection here with the so-called "theory of interpretive competition" according to which courts have their own interests; conflict of interest can constitute a limit for legal integration and lead to struggles between levels of the judiciary.[82]

Leaving aside the causes of this resistance, what are its consequences? Analysis of judicial creativity reveals that national courts that wish to resist adverse European case law can react primarily by treating a harmonized area of law as a form of foreign body.[83] In cases of Member State liability for breach of European law, this solution has been frequent: national judges have tried to isolate European law in order to apply it, avoiding the confluence between European and national law.[84]

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81. Both these questions were referred to the CJEU in the *Köbler* case. For the first time, the CJEU seems to have applied comparative methodology in order to arrive at its final ruling. Opinion, Advocate General Léger in Case C-224/01, *Köbler*, para. 77, *cited in* Kathrin Maria Scherr, *Comparative Aspects of the Application of the Principle of State liability for Judicial Breaches*, 12 ERA FORUM 565-88, at 572 (2012). The same essay analyses the "rather diverse spectrum of national legal concepts of public liability for judicial breaches".

82. This is the inter-court competition explanation, which examines courts as bureaucracies and sub-bureaucracies with their own interests and bases of institutional support. According to this approach, judges share certain interests, and they are primarily interested in promoting their independence, influence, and authority. Accordingly, they act strategically vis-à-vis other courts, "calculating the political context in which they operate so as to avoid provoking a response which will close access, remove jurisdiction authority, or reverse their decision". *Cf.* ALTER, *supra* note 48, at 46; *see also infra* Part VI.

83. Pierre Larouche & Filomena Chirico, *Conceptual Divergence, Functionalism, and the Economics of Convergence*, *in* PRECHAL & VAN ROERMUND, *supra* note 18, at 487.

84. One of the fundamental gaps in this field is related to the State's liability for legislation. The inter-court competition approach also explains the competing interest of lower

In the only Italian case where the principle of State liability for judicial breach has been applied, the *Tribunale di Genova* assimilated the Francovich doctrine through general liability law (Art. 2043 Civil Code) and not through specific regulations regarding judicial liability (l.117/88).[85] This solution, sustained also by an important doctrinal sector,[86] can be classified, in our opinion, as an attempt to isolate European law, and to block the mutual influence between European and national law, which arises as the logical consequence of real integration between legal orders. Scholars are currently studying the consequences of this solution that, despite complying with European law,[87] constitutes an obstacle to real integration between European and national legal orders.

VI. CONTRACTS AND CONSUMER PROTECTION

We performed a similar exercise within another area of study, contracts and consumer protection[88], in order to (1) identify general

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and higher courts with respect to legal integration. National judges have reacted in varying ways because it is a principle not accepted in the majority of European Member States' domestic law. For example, Italian judges have been especially reluctant to apply this principle. European commentators, following national supreme courts' doctrine (i.e., the *Bundesgerichtshof* and the *Corte di Cassazione*), assert that Member State liability is a *sui generis* remedy, separate from other national remedies for governmental liability. Giliker, *supra* note 73.

85. Ruling of the *Tribunale di Genova*, 23.04.2008.

86. Enrico Scoditti, *Violazione del diritto dell'Unione europea imputabile all'organo giurisdizionale di ultimo grado: una proposta al legislatore*, I FORO ITALIANO, 22-26 (2012); Valeria Piccone, *La responsabilità del giudice nell'ordinamento integrato*, PERSONAEDANNO.IT 1-16 (2011).

87. Some recent Italian contributions on this topic: Alessandro Comino, *La responsabilità dello Stato-giudice alla prova del diritto europeo*, 3 RESPONSABILITÀ CIVILE E PREVIDENZA 776–87 (2012); Luca Leonardi, *Accertamento della responsabilità civile dei magistrati per le violazioni del diritto comunitario e applicabilità della L. n. 117 del 1988*, 4 GIURISPRUDENZA DI MERITO 991-97 (2010).

88. After much (still unresolved) debate, the area of contract law is understood as comprising consumer protection as well (both B2B and B2C transactions). This seems the outcome of the so-called Draft Common Frame of Reference for European Contract Law, developed by the Joint Network on European Private Law: *cf.* PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW, DRAFT COMMON FRAME OF REFERENCE (DCFR) (Christian von Bar, Eric Clive & Hans Schulte-Nölke eds., Munich: Sellier, 2d ed. 2009). It is reflected, at national level, in the adoption of a "monist model", under which rules on consumer protection are inserted into a civil code, as in the case of the BGB in Germany (but see the plea for the reshaping of consumer law in a special statute, outside the BGB: Hans-W. Micklitz, *The Future of Consumer Law—Plea for a Movable System*, 2 J. EUR. CONSUMER & MARKET L. 5-11 (2013). It is less evident in other countries that adopted a "dualist model", i.e., a Consumer Code separate from the Civil Code, as in the case of France, Italy and Spain, for example. Although English private law remains largely uncodified, the question of whether consumer law and contract law can be addressed together in one statute has been an issue at times (see for instance the Sales of Goods Act 1979). Recently, however, the UK has announced a new "Consumer Rights Bill" (to be presented before 2015, in the current Parliament): the specific consumer-

principles through which the CJEU "pursues justice" (Art. 2 TUE, Art. 19 TUE) and (2) find the legal rules generated by those general principles as a result of the interpretation of the Court.

The CJEU clearly pursues justice in the sense of just and fair solutions, resulting from a balance between interacting and conflicting principles, for a given case. The role of the CJEU is to balance interests beyond those principles, and achieve equilibrium between opposing forces: from this perspective, "justice" shares the same root as the Latin term *aequitas* and a part of the meaning. The equitable solutions of the CJEU are quite similar to the way *jus* was applied in ancient Rome to achieve *aequitas*: using the law in its dynamic and open dimension, in pursuit of what is *bonum*, that is to say right, and what is *aequum*, that is to say fair.

Justice acquires substance through principles, which generate detailed rules as a result of the interpretation of the courts.[89] From the start, the Court of Justice explicitly stated that "unless the Court is to deny justice, it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writings and the case law of the Member countries".[90] More than once the Court of Justice has affirmed that in order to establish whether a particular principle is to be considered common to all, it is not sufficient to consider the textual data of the written law, but "it is necessary to consider also the indications provided by the constitutional rules and practices of the nine Member States".[91]

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related provisions of the Sales of Goods Act 1979 would be rewritten as part of this new act, which would provide an opportunity to bring together a range of measures implementing the various directives, as well as the enforcement provisions from the Enterprise Act 2002, and provisions of criminal law sanctions found in the Consumer Protection from Unfair Trading Regulations 2008. "It does, of course, require careful consideration about how the interface between consumer law and general private law should be handled": Christian Twigg-Flesner, *Comment on "The Future of Consumer Law: Plea for a Movable System"*, 2 J. EUR. CONSUMER & MARKET L. 1, 12-14 (2013).

89. On the function of principles, see TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF THE EU LAW (Oxford 2006) (interpretative, derogating and supplementing functions); to compare with Carla Sieburgh, *Principles in Private Law: From Luxury to Necessity—Multi-Layered Legal Systems and the Generative Force of Principles*, 20 ERPL 295-312, at 300 (2012) (who, to those functions, added the generative function). The entire issue 2/2012 of the ERPL is focused on principles and the law.

90. *Cf.* Joined Cases C-7/56, 3/57 to 7/57, Algera & Others v. Common Assembly of the European Coal & Steel Cmty., [1957] ECR I-81.

91. *Cf.* § 20 of the judgment in *Liselotte Hauer v. Land Rheinland-Pfalz*, Case C-44/79, [1979] ECR I-3727.

In the area of contracts and consumer protection, the occasional reference to "general principles and their impact on private law",[92] or to "principles of private law",[93] came later as regards the area of State Liability: for instance with the *Bellone* case (1998),[94] and the *Leitner* case (2002).[95] It has continued in recent decisions, such as the *Mangold* case (2005),[96] the *Hamilton* case (2008),[97] the *Messner* case (2009),[98] the *Sturgeon* case (2009),[99] and the *Kücükdeveci* case (2010).[100]

From the easily acceptable principle of freedom of form expressed in the field of commercial agency contracts such as B2B transactions (*Bellone*), the CJEU stated a more controversial principle, that of compensation for non-material damage resulting from the non-performance or improper performance of the services constituting a package holiday (*Leitner*), then clarified the role of the principle of good faith in distance contracts (*Messner*) within B2C transactions. The CJEU also applied the principle of non-discrimination on the grounds of age in employment contracts (*Mangold* and *Kücükdeveci*),[101] and finally it

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92. The Treaties recognize fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law [see Art. 6(3) TEU] and establish that general principles, common to the laws of the Member States, shall apply in the case of non-contractual liability [see Art. 340(2) TFEU].

93. For a comprehensive analysis, Chantal Mak, *Hedgehogs in Luxemburg? A Dworkinian Reading of the CJEU's Case Law on Principles of Private Law and Some Doubts of the Fox*, 20 ERPL 323-46 (2012). According to Mak, the first example of a case in which we find a clear reference to "principles of civil law" is *Société thermale d'Eugénie-les-Bains v. Ministère de l'Économie, des Finances et de l'Industrie*, Case C-277/05, [2007] ECR I-6415.

94. Case C-215/97, [1998] ECR I-2191, para. 15; *see* Esther Arroyo i Amayuelas, Barbara Pasa & Antoni Vaquer Aloy, *Form*, *in* ACQUIS PRINCIPLES, CONTRACT II: GENERAL PROVISIONS, DELIVERY OF GOODS, PACKAGE TRAVEL AND PAYMENT SERVICES comments to art. 1-304, 75 ff. (Munich: Sellier 2009).

95. Case C-168/00, [2002] ECR I-2631.

96. Case C-144/04, [2005] ECR I-9981; *cf.* Malte Beyer-Katzenberger, *Judicial Activism and Judicial Restraint at the Bundesverfassungsgericht: Was the Mangold Judgement of the European Court of Justice an Ultra Vires Act?*, 11 ERA FORUM 517–23 (2011); Michael Dougan, *In Defence of Mangold?*, *in* A CONSTITUTIONAL ORDER OF STATES? ESSAYS IN EU LAW IN HONOUR OF ALAN DASHWOOD 219-44 (Anthony Arnull, Catherine Barnard, Michael Dougan & Eleanor Spaventa eds., Hart Publ'g 2011).

97. Case C-412/06, [2008] ECR I-2383.

98. Case C-489/07, [2009] ECR I-7315.

99. Joined Cases C-402 & 432/07, [2009] ECR I-10923.

100. Case C-555/07, [2010] ECR I-365.

101. The CJEU applied the principle of non-discrimination also on the grounds of sexual orientation: *cf.* the *Römer* case (Case C-147/08, [2011] ECR I-3591). In the *Römer* judgment, the CJEU reaffirmed (after the *Maruko* case, Case C-267/06, [2008] ECR I- 01757) equal treatment for married couples of the same sex and registered partners of the same sex in the area of social security law. *See* Laurent Pech, *Between Judicial Minimalism and Avoidance: The*

recognized a general "principle of limitation",[102] placing a time-limit on exercise of the right of withdrawal (*Hamilton*), and the principle of compensatory damages for delay, or loss of time (*Sturgeon*),[103] once again in B2C transactions.

The *Sturgeon* case is a striking example of creative judicial activism where the CJEU even re-drafted a piece of European legislation differently from the EU legislature, to the advantage of customers.[104] The preliminary ruling related to Regulation n. 261/2004 that established common rules on compensation and assistance to passengers in the event of denied boarding, flight cancellations, or long flight delays. The Regulation grants, in case of cancellation, a number of rights to passengers, including compensation, while in case of delayed flights compensation is not provided for. The CJEU held that these provisions were against the equal treatment principle, which requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified. The CJEU argued that the situation of passengers whose flights are delayed is comparable with the situation of passengers whose flights are cancelled, because a "long delay" (interpreted contextually within the "extraordinary circumstances", Recital 15 of the Regulation) results in a comparable "loss of time" suffered equally by both types of passengers. The Court then decided that the damage should be redressed by compensation. The Regulation was not annulled, but interpreted broadly, to justify a conclusion that was contrary to the literal interpretation of the Regulation itself. In this case, the Court demonstrated that it is willing to "oppose the free market to the advantage of consumers".[105]

Court of Justice's Sidestepping of Fundamental Constitutional Issues in Römer *and* Dominguez, 49 COMMON MARKET L. REV. 1841-80, at 1842 (2012).

102. *Cf.* Maduro, *supra* note 33.

103. *See* Karl Riesenhuber, *Interpretation and Judicial Development of EU Private Law: The Example of the* Sturgeon-*Case*, 6 ERCL 384-408 (2010); Sacha Garben, *Sky-High Controversy and High-Flying Claims? The Sturgeon in Light of Judicial Activism, Euroscepticism and Eurolegalism*, 50 COMMON MARKET L. REV. 15-46 (2013).

104. *Cf.* scholars' reactions in different Member States: John Balfour, *Airline Liability for Delays: The Court of Justice of the EU Rewrites EC Regulation 261/2004*, 35 AIR & SPACE L. 71-75 (2010); Luis González Vaqué, *Reglamento nº 261/2004 sobre asistencia y compensación de los pasajeros aéreos: el TJCE clarifica (ma non troppo) los conceptos de retraso y cancelación de un vuelo*, 3 UNIÓN EUROPEA ARANZADI 7-17 (2010); Jules Stuyck, *Indemnisation pour les passagers de vols retardés en Europe*, 7 LA SEMAINE JURIDIQUE 359-63 (2010); Antonio Leandro, *Passeggeri con diritto al rimborso forfettizzato anche quando il volo ha un ritardo di tre ore*, 49 GUIDA AL DIRITTO 111-13 (2009).

105. Garben, *supra* note 103, at 36.

Clearly, as said above, the CJEU has been one of the key actors in the creation of the internal market, engaging in both negative integration, with the dismantlement of national barriers to promote free competition inside the common market, and positive integration, through the principle of mutual recognition. Although in the past the CJEU has been involved in a "neo-liberal creation of the European space for free movement", nevertheless at present it is moving to counterbalance some bias in this process, to promote the anti-discrimination test on grounds of nationality, of age, and of gender, acting also in the private law domain as a "socially activist Court".[106] On this last point, we must add that it is impossible to predict whether the CJEU is ready to take responsibility for promoting social welfare within the market arena.[107]

Nevertheless, these recent judgments are interesting because they explore the boundaries of the CJEU's function in relation to the political process.[108] The CJEU has applied general principles that are to be found within the common legal traditions of Member States or European law, but often circumventing the intentions of the European legislature. As a consequence, the first criticism against the Court's activism is the "horizontal separation of powers" objection: the judiciary should respect the prerogatives of the democratically elected legislature. The second criticism is the "vertical separation of powers" objection: by trespassing the limit of its judicial function, the CJEU as a supranational judiciary creates law extrapolating rules from (allegedly) common general principles to the detriment of national courts, especially with respect to their independence and other constitutional powers.[109] The democratic deficit arguments have been analysed in the recent past, while the position of national courts in relation to the supranational judiciary has been examined less; at various times their relationship has been described as cooperative, conflictual, and negotiational. What can national courts do?

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106. *Id.* at 37.

107. *Cf.* THE MANY CONCEPTS OF SOCIAL JUSTICE IN EUROPEAN PRIVATE LAW, *supra* note 58. For an early critique of the technical, neutral and apolitical character of the European Contract Law projects, see Social Justice Study Grp., *Social Justice in European Contract Law: A Manifesto*, in 10 EUR. L.J. 653-74 (2004); Ugo Mattei & Fernanda G. Nicola, *A 'Social Dimension' in European Private Law? The Call for Setting a Progressive Agenda*, 7 GLOBAL JURIST (Frontiers) art. 2 (2007), *available at* http://www.bepress.com/gj/vol7/iss1/art2. For outcomes, see Martin W. Hesselink, *CFR & Social Justice* (Centre for the Study of European Contract Law, Working Paper Series No. 2008/04), *available at* http://www.sssup.it/UploadDocs/3330_SSRN_ID1152222_code764687.pdf.

108. *Cf.* Niels Baeten, *Judging the European Court of Justice: The Jurisprudence of Aharon Barak Through a European Lens*, 18 COLUMBIA J. EUR. L. 135-55, at 148 (2011).

109. *Cf. supra* Part V.

The *Wünsche* judgment[110] made it clear that a national court can make *further* reference to the CJEU when it does not understand how to apply the rule expressed in the CJEU decision; but the national court cannot use this right to refer further questions to the CJEU to contest the validity of its precedents. This would undermine the respective areas of jurisdiction of national courts and of the CJEU.[111] However, it is true that national courts can dissent *without* further reference to the CJEU: they can simply decide not to apply the CJEU precedent to the case, entering into conflict with the authority of the CJEU. Differing behaviours may be observed in national courts: traditionally the courts of last instance resist and the lower courts follow the CJEU's precedents.

Lower national courts usually support the activism of the CJEU. Lower courts are generally willing to apply CJEU precedents, for various reasons. Firstly, by adhering to the Court's precedent and applying the principle of supremacy and direct effect, lower national courts can bypass the national judicial hierarchy, and overturn the judgments of the supreme national courts. Secondly, the lower courts seem less constrained by the specific duty to protect the national Constitution and to guarantee predictability and legal certainty (at least in civil law systems where the *stare decisis* rule does not operate), contrary to the higher courts within the Member States.[112]

However, the *Sturgeon* saga, the heated controversy that developed in Germany, the UK and the Netherlands after the Sturgeon judgment in 2011, showed a surprising resistance in lower national courts: in particular, German and English courts decided to suspend any claim in respect to compensation for delay, until the CJEU provided additional justification to *Sturgeon*, deciding other preliminary rulings.[113] The

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110. Case C-69/85, [1986] ECR I-947; *see also* Art. 104(5) of the Rules of Procedure of the Court of Justice, OJ EU L 265/1, 29.9.2012, in line with Art. 43 of the Statute of the Court of Justice of the European Union, OJ EU C 83/210, 30.03.2010.

111. *Cf.* the Order of the President of the CJEU of 17 January 2013 a propos of the *Van de Ven* case (Case C-315/11, discussed in Garben, *supra* note 103, at 31), ordering that the case be removed from the Register (OJ EU C 108/18, 13.4.2013). Thus, the CJEU is not going to decide on those preliminary rulings after *Sturgeon* which could have been considered against the *Wünsche* doctrine.

112. *Cf.* De Witte, *supra* note 64; Karen J. Alter, *Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration*, *in* SLAUGHTER, STONE SWEET & WEILER, *supra* note 77, at 232.

113. The preliminary rulings came from the High Court of Justice (England & Wales) Queen's Bench Division (Admin. Court), Case C-629/10, *TUI Travel plc.*, and from the *Landgericht of Köln*, Case C-413/11, *Germanwings*.

The first, the *TUI Travel* case, was decided in October 2012 (Joined cases C-581/10 & 629/10, [2012], not yet published) reiterating the interpretation of the EU Regulation already given in *Sturgeon*: the principle of equal treatment requires all passengers whose flights are

CJEU confirmed its decision in *Nelson* (and others) and *TUI Travel* (and others) in 2012, adding that delay does not entitle passengers to compensation if the air carrier can prove that "long delay" is caused by extraordinary circumstances (for example, when it goes beyond the actual control of the air carrier).

What is worth noting in this web of controversies is that judicial activism is amplified at national level by the more fuzzy judicial activism of the lower national courts that can boycott the judgments of the CJEU, although Art. 4 TEU imposes a general duty of loyalty on national and supranational institutions to give full effect to EU law. Consistency would demand that a lower court should be bound by the CJEU interpretation and should not re-interpret this again.[114]

On the other hand, it is true that most national supreme courts or constitutional courts today support the activism through "self-empowerment of the CJEU",[115] because they prefer to use a consistent interpretation (for example, through the reading in/out, reading down techniques of the legal rules contained in Directives' transposition measures), rather than annulment or dis-application of a rule.

In fact, an interpretation in conformity with one of the general principles, such as equal treatment in the *Sturgeon* case, from which the Court derives the rule of compensatory damages for loss of time, or such as prohibition of discrimination on grounds of age in the *Mangold* case, through which it recognizes the standard of good faith, is more deferential and respectful of the legislative process than an annulment would have been.

The crux of the controversy lies in the fact that the CJEU's contextual and teleological interpretations of principles used to fill the gaps highlight that law and policy considerations should go together. They should also both be reasonable, consistent and adequate to serve the interests of the citizens. They should be debated in a broader institutional framework.

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delayed and those whose flights are cancelled to be treated equally, because they suffer the same loss of time, which is not governed by the Montreal Convention on certain rules on international carriage by air (signed 28 May 1999). The second, the *Germanwings* case, was decided in April 2013 (Case C-413/11, [2013], OJ EU C 225/41, 3.8.2013), with the Order of the Court (Ninth Chamber) stating that the interpretation given in the judgment of *Sturgeon* extending, by analogy, the right to compensation to delay to a flight, "has no bearing on the principle of the separation of powers in the European Union". For an overview, *cf. also* Caspar Zatschler, *European Union Litigation*, 8 EUR. REV. CONTRACT L. 456–69 (2012).

114. A common idea in the U.K.: FRANCIS BENNION, STATUTORY INTERPRETATION 167 ff. (London, 5th ed. 2008); already in RUPERT CROSS & JAMES W. HARRIS, PRECEDENT IN ENGLISH LAW 178 ff. (Clarendon Press: Oxford, 4th ed. 1991).

115. Garben, *supra* note 103, at 34.

A. On Law and Policy

The judiciary is a bureaucracy, not only an epistemic community: judges are civil servants working for the State.[116] The neo-functionalist approach[117] recognised that judges, like all actors in a legal system, pursue their self-interest; but it is unclear how to define this "judicial self-interest".[118] Legalism failed with its assumption that legal reasoning is conclusive and that it alone shapes judicial behaviour: legal texts and legal methods alone can seldom resolve interpretative disagreement. Neo-realism failed because it misidentifies how political factors shape judicial behaviour, overstating the link between judges and the national interest.

A theory of judicial interests has been outlined starting from the assumption that political interests are inherent to the legal process and that in this process some actors win while others lose. Judges' specific interests are primarily their independence (legal autonomy from political bodies), their authority (the court is a strategic actor in calculating the political context in which it operates, so as to avoid the risk of provoking a reaction that reverses its decision) and their influence (the ability to make decisions that influence the policy process); these are the key factors which qualify the judiciary.[119]

This means that the twenty-eight judiciaries of the Member States plus the CJEU are not neutral arbiters in the process of adjudication. Adjudication requires value judgments, which will inevitably be political. When resolving gaps, conflicts or ambiguities in a system of legal rules, judges make new rules and apply them to the facts. While judges present themselves as neutral, operating under the fidelity-to-law doctrine, many allegedly neutral judicial opinions are not convincingly so.[120] This raises

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116. In Europe, the selection and appointment of judges is not political (as in the U.S.), but depends on academic qualifications and practical experience, and (in civil law countries) on a state exam as well. *See* ALTER, *supra* note 48, at 47; DANIELA PIANA, JUDICIAL ACCOUNTABILITIES IN NEW EUROPE (Farnham: Asghate 2010); BELL, *supra* note 19.

117. Anne-Marie Burley & Walter Mattli, *Europe Before the Court*, 47 INT'L ORG. 41-76 (1993).

118. Accordingly, the CJEU's legal logic could not shape national courts' behaviour. Through the neo-functionalist approach, the European legal system has expanded and prospered by creating individual incentives to motivate actors within European institutions and within national legal systems, to promote legal integration. Alter, *supra* note 112, at 227-52.

119. ALTER, *supra* note 48, at 45 ff.

120. DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE) 29 ff. (Cambridge: Harv. Univ. Press 1997), distinguishes five general strategies dealing with the question. The first strategy (neutrality) is associated with classical positivism of Hart; the second one, associated with Kelsen, Unger and others, shows the opposite, i.e., that the application of a rule cannot be isolated from subjective influences; the third position, associated with Oliver W. Holmes, accepts that what is not rule application is at least methodologically indistinguishable from judicial

the question of what really determines operational rules, beyond arguments claiming to be based on principles used by judges.[121]

It is particularly curious that in the area of Contracts and Consumer Protection the CJEU omits any reference to the Charter of Fundamental Rights after the entry into force of the Lisbon Treaty, given that the Charter "has the same legal value as the Treaties" (Art. 6(1) TEU). As a primary source of EU law, any reference to it by the CJEU in its judgments would render the judicial activism of the CJEU more acceptable: the judges sitting in national courts may be more willing to enforce a Charter, a Constitution, containing principles and rules, disregarding any national provision contrary to it, if necessary, than to follow CJEU precedents based on general principles. An express reference to the Charter of Fundamental Rights of the EU as the main source of principles,[122] both in private and public law, could legitimize, within the separation of powers doctrine, the judicial activism of the CJEU. In its rulings, the CJEU could justify the application of a particular principle as a Charter principle, thus clarifying the legal status of general principles it applies in adjudication.

This approach would reassure national courts and governments, who would feel the "horizontal separation of powers" threat to a lesser

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legislation; the fourth position associated with Cardozo, Llewellyn, Fuller, Hart and Sacks, to Dworkin, proposes a middle term in between rule application and judicial legislation, through the method of "coherence" or "fit", a method that is focused on the choice among different proposed rules to fill the gap (the judge is making law, but without consulting his own preferences, because he/she is following a prior case or other rules of the system enacting the system itself, in other words, he is following a rational plan); a fifth position, that Kennedy called the civil law version of adjudication, addresses the problem from the presumption that the Code is the coherent framework with a particular conceptual structure, and when the case cannot be solved by semantic or deductive analysis then the judge will apply a teleological approach, in order to disclose the social purpose of the norm.

121. The distinction between operational rules and legal concepts (i.e., symbolic sets of rules) implies that it is necessary to deconstruct the law beyond the peculiar legal discourse of one legal system, in order to understand how the legal actors of the system are working. *Cf.* Sacco, *supra* note 76. The phenomenon is explained through the theory of legal formants which are all those formative elements that make any given legal rule (such as statutes, general propositions, particular definitions, judgments, reasons, holdings, customs, and usage). All of these formative elements are not necessarily coherent with each other within each system. Only domestic jurists assume such a coherence. On the contrary, legal formants are usually conflicting and can better be pictured in a competitive relationship with one another. Thus, within a given legal system, the rules are not uniform, not only because one rule may be given by case law, another by scholars and yet another one by statutes. Within each one of these sources formants also compete with each other.

122. See, for example, Art. 21 of the Charter of Fundamental Rights containing the anti-discrimination principle or Art. 38 on the high level of protection for consumers. Recent Directives and Regulations refer, in their recitals, to the Charter so as to ensure compliance of the secondary legislation with the Charter.

extent. At the same time, it would not irritate common lawyers, because the new "common law as an interpretation of a statute", also called "statute-based common law", is gaining importance in daily adjudication of private law claims in England.[123] This approach would turn out to be the visible expression of the ongoing "constitutionalisation" of private law relationships: what matters is doing justice for the parties in the case.[124]

B. On Law and Facts

Differences continue to exist among Member States' legal systems. This is not necessarily because national judges do not accept certain principles of private law that other national courts do, or because they interpret them not in conformity with European law. The case of good faith illustrates this point well. The general view among commentators appears to be that in English contract law a principle of good faith of general application is absent.[125] However, as Mr. Justice Leggatt noted recently[126]:

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123. See Andrew S. Burrows, *The Relationship between Common Law and Statute in the Law of Obligations*, 128 L.Q. REV. 232-59, at 240 (2012). Statute law cannot have the effect of freezing or turning back the development of the common law; moreover, statute law can be used by analogy in developing the common law (as the interpretation of the Human Rights Act 1998 gave stimulus to stronger protection of privacy for breach of confidence, see *Campbell v. Mirror Group of Newspapers Ltd* [2004] UKHL 22). This is not to be confused with the different idea of "equity of the statute". The mediaeval idea, which raised a different question as to how far one can interpret a statue by analogy, fell out of favour in the eighteenth century because it allowed much room for the courts to enlarge statutes so as to apply them to situations that were not covered by the words of the statutes but were regarded by the courts as within the spirit of the law and analogous. *See* Patrick S. Atiyah, *Common Law and Statute Law*, 48 MLR 1, 7 ff. (1985). Against this view, some commentators have noted that the two processes merely differ in degree and not in kind. MacCormick wrote that the process of reasoning from or with precedents is not radically different from that of reasoning from or with statutes: the differences are in fact at most differences of degree, not in kind. *Cf.* NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 213 (Oxford 1978); *cf.* also NEIL MACCORMICK & ROBERT S. SUMMERS, INTERPRETING STATUES: A COMPARATIVE STUDY 178 ff. (London 1991).

124. Burrows, *supra* note 123, at 247.

125. HUGH BEALE, CHITTY ON CONTRACT LAW vol. 1, para. 1-039, at 31 ff. (Sweet & Maxwell Ltd., 31st ed. 2012). On the "traditional English hostility" towards the doctrine of good faith, see also EWAN MCKENDRICK, CONTRACT LAW 221 ff. (Palgrave Macmillan, 9th ed. 2011). *Cf.* the following observations of Bingham LJ, in *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd* [1989] 1 QB 433 at 439:

> In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table.' It is in essence a principle of fair open dealing . . . English law has,

> It would be a mistake, moreover, to suppose that willingness to recognise a doctrine of good faith in the performance of contracts reflects a divide between civil law and common law systems or between continental paternalism and Anglo-Saxon individualism. Any such notion is gainsaid by that fact that such a doctrine has long been recognised in the United States. The New York Court of Appeals said in 1918: "Every contract implies good faith and fair dealing between the parties to it": Wigand v Bachmann-Bechtel Brewing Co, 222 NY 272 at 277. The Uniform Commercial Code, first promulgated in 1951 and which has been adopted by many States, provides in section 1-203 that "every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."[127] Similarly, the Restatement (Second) of Contracts states in section 205 that 'every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement'.[128] . . . "Under English law a duty of good faith is implied by law as an incident of certain categories of contract, for example contracts of employment and contracts between partners or others whose relationship is characterised as a fiduciary one. I doubt that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts. Nevertheless, there seems to me to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such a duty in any ordinary commercial contract based on the presumed intention of the parties . . . . As a matter of construction, it is hard to envisage any contract which would not reasonably be understood as requiring honesty in its performance. The same conclusion is reached if the traditional tests for the implication of a term are used. In particular the requirement that parties will behave honestly is so obvious that it goes

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characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.

126. *Yam Seng Pte Ltd v. Int'l Trade Corp Ltd* [2013] EWHC 111 (QB), 01/02/2013. It was a claim for breach of contract and misrepresentation, brought by YSP, a distributor in Singapore, against ITC, an English supplier. The goods in question were some fragrances bearing the brand name of the football team "Manchester United". The distribution agreement gave YSP the exclusive right to promote and sell these products in duty-free markets throughout Far East and China. At the time the agreement was entered into, however, the English supplier ITC had not yet acquired all the rights it purported to license. The issue at stake is whether an implied term in the agreement that the parties would deal with each other in good faith exists.

127. According to Douglas G. Baird, *Pre-Contractual Disclosure Duties Under the Common European Sales Law*, 50 COMMON MARKET L. REV. 297-310, at 298 (2013), the UCC was remarkably successful in unifying the commercial law of fifty different jurisdictions and good faith and fair dealing is entirely in the mainstream of the American commercial law tradition.

128. See the judgment, *Yam Seng Pte Ltd*, para. 125.

> without saying. Such a requirement is also necessary to give business efficacy to commercial transactions.[129]

So judges can react differently to the intrusion of EU law, but differences will not come from the traditional *civil law vs. common law* division.

This is well illustrated by the CJEU's judgments on the "unfairness" of terms in consumer contracts under Art. 3(1) of Directive 93/13.[130] In order to substantially define the concept of unfair term, the CJEU set out indications and provided guidance to national courts as to how to apply the interpretation provided in response to requests for a preliminary ruling; but it did not rule on the application of these general criteria in a given case, because "it is for the national court to decide whether a contract term is unfair".[131]

The CJEU's judgments are always related to a preliminary ruling on a concrete fact, which occurred in one of the Member States, brought to the attention of a national judge through a judicial claim. Then the explanation of the significance of what is contrary to the requirement of good faith causing a significant imbalance of the parties' rights and obligations arising from the contract, is left to national courts, because it requires an assessment of the particular legal context, to be balanced against any other relevant elements (such as the nature of goods and services for which the contract was concluded, all the circumstances attending the conclusion of the contract and all the other terms of the contracts, or of another contract on which it is dependent), according to Art. 4(1) Dir. 93/13. Accordingly, although Member States currently seem to converge towards acceptance of a general duty of "good faith and fair dealing" in contracting, national courts may seize on the wording of this general standard and use the metaphorical open texture language

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129. *See id.* paras. 131, 137.

130. *Cf.* Jules Stuyck, *Unfair Terms*, *in* MODERNISING AND HARMONISING CONSUMER CONTRACT LAW 115 ff. (Geraint Howells & Reinhard Schultze eds., Munich: Sellier 2009).

131. *Cf. Freiburger* judgment, Case C-237/02, [2004] ECR I-3403, overruled to the *Océano Grupo Editorial* judgment, Case C-240-244/98, [2000] ECR I-4941, where the CJEU was willing to hold a term unfair in a consumer contract under Directive 93/13. *Cf.* recently the *Pereničová and Perenič* judgment, Case C-453/10 [2012], nyr; *Invitel* judgment, Case C-472/10, [2012], nyr; *Banco Español de Crédito* judgment, Case C-618/10 [2012], nyr; and also the *RWE Vertrieb AG* judgment, Case C-92/11 [2013], nyr.

of good faith,[132] leaving unchanged the existing discrepancies among national legal systems.[133]

There remains considerable room for increasing judicial intervention, notwithstanding the CJEU's detailed guidance. Thus, the attempt to balance the plurality of values and principles underlying private law with the goal of substantive justice leaves a great margin of appreciation to national judges, who give effect to the principles at national levels.[134]

C. On Law and Politics

Not surprisingly, the implicit recognition of good faith in all commercial contracts also within common law systems emerged after the development of the controversial DCFR, the well-known "tool-box" for harmonizing European private law,[135] and the Proposed Regulation on the optional instrument for European Sales Law, the CESL.[136] In these instruments, which are preparing the way for a European Restatement (or codification)[137] of contract (or private) law, "good faith and fair dealing" is a recognized principle, based on Treaties, such as the Treaty on the Functioning of the EU, the European Convention on Human Rights and the EU Charter of Fundamental Rights.[138] Following European scholars on this point, CJEU case law is showing that, at least in the inter-related field of Contracts and Consumer Protection, principles of private law are used to mediate the liberal perspective with the socially-oriented approach: thus, for example, the principle of freedom of contract is to be balanced with the good faith and fair dealing principle, where the latter is used as a rule of interpretation for the "moralization" of contract law.[139]

Conflicting interests, that is a high level of economic performance on one side, and public policies aimed at protecting disadvantaged

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132. *See* Carla Balzanella, Lucia Morra, Piercarlo Rossi, *Metaphor in Legal Language: Clarity or Obscurity?*, *in* LEGAL LANGUAGE AND THE SEARCH FOR CLARITY: PRACTICE AND TOOLS 141-74 (Anne Wagner & Sophie Cacciaguidi-Fahy eds., Bern: Peter Lang 2006); Pasa, *supra* note 13, at 11 ff.

133. *Cf.* A FACTUAL ASSESSMENT OF THE DRAFT COMMON FRAME OF REFERENCE 255 (Luisa Antoniolli & Francesca Fiorentini eds., Munich: Sellier 2010).

134. *Freiburger*, Case C-237/02, [2004] ECR I-3403.

135. On the DCFR, see *supra* note 88.

136. On the issues of good faith and fair dealing in the courts' assessment on the basis of the DCFR and CESL provisions, see Whittaker, *supra* note 55, at 104 ff.

137. The Restatement on the Law of Contracts has become the main target of the full harmonization strategy of the European legislature. At the moment, the codification of all private law seems out of the question.

138. *Cf.* Introduction to the DCFR, *supra* note 88. In particular, on the definition of good faith, see Comments on Book I, Art. 1:103.

139. *Cf.* Whittaker, *supra* note 55, at 100.

parties on the other side, have recently found compromise in the so-called "result-oriented" approach.[140] Mainly developed in interpreting recent Directives such as the Unfair Commercial Practices Directive 2005/29/EC, it assumes that national rules which go beyond the scope of a Directive are unacceptable, because they would run counter to the Directive's full harmonization strategy. As the CJEU recently recalled "*in applying national law, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive, in order to achieve the result pursued by that directive and thereby comply with the third paragraph of Article 288 TFEU*".[141]

The other approach which gives some room to manoeuvre, or margin of appreciation, to national governments, authorities and judges is the "basis of liability" approach. This is an old approach, developed from the Product Liability Directive 85/374/EEC, according to which Member States could not maintain a more stringent regime of product liability than what could be inferred from the wording, purpose and structure of the Directive. Alternative regimes of liability for defective products were allowed only if they were based on different types of liability, that is not strict, but for example fault-based or contractual liability.

The point is that both approaches, "basis of liability" and "result-oriented", are still possible in their respective areas of development (product liability and unfair commercial practices); however, these competing approaches are perhaps no longer appropriate for the CJEU, since the European Institutions now view EU integration in terms of "full harmonization".[142]

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140. The two-track concept of full harmonization is traced in Vanessa Mak, *Full Harmonization in Europe Private Law: A Two-Track Concept*, 20 ERPL 213-36 (2012). The "result oriented" approach is to be found in contract law and has been adopted in recent cases on Unfair Commercial Practice, while the "basis of liability" approach has been developed by the Court of Justice interpreting the Product Liability Directive in *Commission v. France*, Case C-52/2000, [2002] ERC I-3827, and applied to tort law (both are discussed in Mak, *supra*).

141. Case C-428/11, [2012] not yet published: the preliminary ruling concerns interpretation of paragraph 31 of Annex I to Directive 2005/29/EC on Unfair Commercial Practices. It comes from the Court of Appeal (England and Wales) (Civil Division); the dispute was between five undertakings specialized in the distribution of mailings together with a number of people who had worked for those undertakings and the Office of Fair Trading (OFT), which is responsible for enforcing consumer protection laws, regarding the practices used by the trader.

142. See, for example, the recent Proposal for a Directive of the European Parliament and of the Council on Payment Services in the Internal Market, amending Directives 2002/65/EC, 2013/36/EU and 2009/110/EC and repealing Directive 2007/64/EC (COM 2013/547 final), Art. 95; or the Proposal for a Regulation of the European Parliament and of the Council on Interchange Fees for Card-Based Payment Transactions (COM/2013/550 final), p. 16.

It is clear that a predictable framework for handling the principles applied to fill the gaps in European law adjudication would be desirable.

VII. FINAL REMARKS

In recent years, the relationship between national and European judges has been frequently described with reference to war or apocalyptic metaphors.[143] We have analysed two specific areas in order to consider to what extent we can share these catastrophic points of view. Our conclusion is that we need fresh contributions to the debate on the European system of adjudication.

In this Article, we have attempted to examine the function of gap-filling of the CJEU in the European legal space and the potential existence of equity within the European mixed jurisdiction or mixed legal system. We have also looked at the meanings that European equity could have, in respect to both Latin and common law meanings. Analysis of the function of gap-filling reveals several similarities between European judicial creativity and the Chancellor's jurisdiction in England, whose "concurrent jurisdiction" from the fourteenth century developed doctrines and remedies that supplemented the common law jurisdiction, and progressively built a more solid and autonomous system of rules. In its attempts to fill gaps, also the CJEU creates its doctrines, formally acting under the Treaties, and respecting the legal order where it operates. However in reality, the CJEU creates its doctrines according to European law but undermines national legal systems, in the same way that the Chancellor's doctrines after James I "followed the law": the doctrines were not formally in conflict with the common law jurisdiction, but they substantially impinged on the application of common law rules.

Beside the function of gap-filling developed by the CJEU, national courts are also developing a similar function, filling the *lacunae* left by European law within national remedial frameworks. The relationship between European and national levels is conflictual. If we look at the vertical dimension of the interaction, it seems that the CJEU creates its doctrines according to European law, but modifies national legal systems, as we saw when we looked at judicial interaction or negotiation between European and national courts as one of the main features of the European legal space as a "mixed jurisdiction" or a "mixed legal system". At the same time, it is true that European equity in the sense of

143. See, for example, Arthur Dyevre, *Judicial Non-Compliance in a Multi-Level, Non-Hierarchical Legal Order: Isolated Incident or Omen of Judicial Armageddon?* (2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2084639.

a jurisdiction pursuing just and fair solutions, encompasses all general principles provided for by the common constitutional traditions of the Member States and international instruments, and this can make the interaction less conflictual.[144]

Analysis of the function of gap-filling of the CJEU reveals that European equity expresses the core principles central to justice (*aequitas*), and is a useful tool for the CJEU in balancing conflicting interests; moreover, it can provide a compromise between the policies of the European Union and the Member States, whose main actors are the citizens, who are both national and European citizens at the same time. There is no doubt that the European system can work as a whole only if European citizens are aware that they are entitled to enforce their rights founded on both European and national law. Thus, if a European equity exists, then we suggest that it should be applied in the interest of European citizens. The *telos* of the principle of supremacy is that national courts are required to give immediate effect to provisions of directly effective European law in cases which arise before them, and to ignore or to set aside any national law which could impede the application of European law. On the other side, the principle of equivalence is aimed at preventing discrimination (European or national) based on rights that have been infringed. Finally, the principle of national autonomy permits European citizens to enforce their rights according their own national legal rules, which they are likely to be more familiar with.

Considerable criticism of the CJEU's activism reflects national governments' concerns regarding the multi-layer system of European private law in general, as well as national courts' resistance against the alleged competence of the CJEU to extrapolate common principles of private law from more general values, and against following such a principle-based method of adjudication because there is no shared methodology for distilling principles.[145] Another criticism is that a common policy on what should be the driving or underlying principles in European law is lacking.[146] Commentators have noted both the "EU-

144. *Cf.* Mak, *supra* note 93, at 338.

145. *Id.*; *see also* AXEL METZGER, EXTRA LEGEM, INTRA IUS: ALLGEMEINE RECHTSGRUNDSÄTZE IM EUROPÄISCHEN PRIVATRECHT (Mohr Siebeck 2009); Lenaerts & Gutiérrez-Fons, *supra* note 55.

146. *See also* Chantal Mak, *Constitutional Aspects of a European Civil Code*, *in* TOWARDS A EUROPEAN CIVIL CODE 347 (Arthur S. Hartkamp, Martijn W. Hesselink, Ewoud H. Hondius et al. eds., Kluwer, 4th ed. 2011); Martijn W. Hesselink, *If You Don't Like Our Principles We Have Others. On Core Values and Underlying Principles in European Private Law: A Critical Discussion on the New Principles Section in the Draft Common Frame of Reference*, *in* THE

friendly approach" of national constitutional and supreme courts[147] and the recent boycotting decisions of national lower courts.[148]

The prospect of unified opposition by national courts has led the CJEU to practise judicial minimalism or self-restraint. To avoid rupture with national courts, the CJEU can find reasons not to apply existing precedents to a specific case, or find a way to avoid certain policy issues, exactly as it is doing in the two domains analysed in this article. Nevertheless, this may not be the most appropriate strategy to guarantee predictability and legal certainty to European citizens.

FOUNDATIONS OF EUROPEAN PRIVATE LAW 59-71 (Roger Brownsworth, Hans-W. Micklitz, Leone Niglia et al. eds., Hart Publ'g.: Oxford 2011).

147. See, for example, the German Constitutional Court's *Honeywell*, *BVerfG* 6 July 2010, 2 *BvR* 2661/06, Honeywell, para. 58, in Mak, *supra* note 146, at 340.

148. Garben, *supra* note 103, at 40.