12TH BERLIN LEGAL POLICY CONFERENCE

"Current Challenges Facing the European Union – The Contribution of the Court of Justice"

Prof. Dr Dr h.c. Thomas von Danwitz
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Konrad Adenauer Stiftung

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FOREWORD

The European Union currently faces a variety of challenges. Since it is constituted as a Community based on the rule of law, the case-law of the European Court of Justice enables these challenges to be pinpointed with considerable precision. Reason enough for the 12th Legal Policy Conference of the Konrad-Adenauer-Stiftung to conduct a detailed examination of the contribution made by the European Court of Justice to resolving the present challenges confronting the European Union.

The role played by the Court of Justice in safeguarding the rule of law in Europe is of special significance. Mention must be made here not only of the development and formulation of rule-of-law principles, but also of the recognition in case-law of ways and means of providing effective legal protection for Union citizens as well as of prosecution and penalty mechanisms which the European Commission can employ with respect to the Member States in accordance with the Treaty. It transpires that the rule of law in Europe is far from existing only on paper and that there are instruments in the Treaty which are designed to safeguard rule-of-law institutions and procedures. Nonetheless, the Court of Justice authorised to employ these instruments is not a party in a dispute but an independent decision-making body. Its remit is underpinned by the values of the European Union. These are reflected primarily in the fundamental values guaranteed in the Charter of Fundamental Rights of the European Union and they find

symbolic expression in the case-law of the Court of Justice. This case-law reveals the DNA of the European Union and makes it clear time and again that the individual is the focus of its action.

Of no less significance are the challenges the European Union faces in the tension between Union citizenship and right of residence which has arisen in the context of access to social security systems. The requisite balancing of interests the Court of Justice regularly has to undertake in its case-law is of crucial importance for both rightful claimants and taxable Union citizens.

The conference proceedings contain views and reflections presented from a supreme court, jurisprudential, European policy and legal policy perspective on the contribution of the Court of Justice in these two areas of tension. The proceedings offer an overview which, given the challenges currently confronting Europe, provide food for thought in the debate on the further development of the Community of law. We are grateful to the authors for their contributions. Our thanks also go to the conference participants for numerous judicious, critical and constructive comments.

We hope the proceedings make stimulating reading.

Berlin, December 2017
Prof. Dr Dr h.c. Thomas von Danwitz
Dr Franziska Rinke | Christina Bellmann

WELCOME ADDRESS

Dr Hans-Gert Pöttering

Ladies and gentlemen,

I am delighted to welcome you all to the 12th Berlin Legal Policy Conference.

Looking around this room, a former politician like me can only have the deepest respect for those in attendance. Every single one of you deserves to be mentioned in my words of welcome. However, there are so many Presidents, Vice-Presidents, Constitutional Court Judges, Judges of the European Court of Justice, representatives of the legal profession and many others that I hope you will understand if I welcome only a few prominent figures by name.

Your presence shows that our Berlin Legal Policy Conference has a firm place in your extremely busy schedules. We are especially pleased that the conference is again being attended by so many high-calibre representatives of the European and German judicial systems, legal institutions and the media. On behalf of the Konrad-Adenauer-Stiftung might I say that the presence once more of so many young lawyers is an indication that we are on the right path in our persistent endeavours to adopt new perspectives in our debates and discussions on legal policy issues.

It is a particular pleasure for us to welcome the President of the European Court of Justice, Prof. Koen Lenaerts, to today's event. A warm welcome to you, Prof. Lenaerts.

We have had several opportunities to meet this year, though always when attending funerals – firstly in the courtyard of the Hôtel des Invalides to pay homage to Simone Veil, the first directly elected President of the European Parliament, then at the European Parliament in Strasbourg and Speyer Cathedral to remember Helmut Kohl, the Honorary Citizen of Europe and former German Chancellor. It's good to have you with us here in Berlin today.

I would also like to welcome Dr Maria Berger, Judge at the European Court of Justice, and Prof. Thomas von Danwitz, President of the Fourth Chamber of the European Court of Justice. Thank you very much indeed for coming.

Another warm welcome goes to the Vice-President of the Federal Constitutional Court and Chairman of the First Senate, Prof. Ferdinand Kirchhof, as a representative of all the judges at the Federal Constitutional Court and, indeed, all other courts and Presidents.

Furthermore, I wish to welcome Prof. Günter Krings, Parliamentary State Secretary at the Federal Ministry of the Interior, representing the Members of the German Parliament, the Bundestag.

It is a special pleasure for me today to welcome the founding fathers of the Legal Policy Conference: Prof. Hugo Klein and Prof. Carl Otto Lenz, two prominent figures in the German and European judicial systems. I would like to express my deep respect and heartfelt thanks to you as the founding fathers who had the original idea for this conference. A warm welcome to you both, Prof. Klein and Prof. Lenz.

The Berlin Legal Policy Conference normally focuses on the Federal Constitutional Court and its case-law. This year, however, has been marked by a series of extremely important national elections, so we have decided to widen our scope to include the European level, and thus the Multilevel Cooperation of the European Constitutional Courts, which includes the Federal Constitutional Court, the European Court of Human Rights and the Court of Justice of the European Union

European integration is not the product of a single grand design. On the contrary, it proceeds step by step and occasionally takes detours. Looking back over the past few years, however, it appears that the detours have been increasing and getting longer, while the intervals between the challenges to be faced are getting shorter. The project of peaceful European integration has entered a difficult phase, but this is nothing new. The demands placed on the European integration project are enormous. On the one hand, EU citizens expect to receive protection from present-day risks and threats such as terrorism, war and conflict. On the other hand, they also expect to see a joint way forward to the future. This includes equipping an integrated Europe for the digital age and modernising our economic and social systems in the light of demographic change to ensure their continued existence.

Moreover, the state of the European Union is currently seen by many as critical, with doubts being raised about its ability to remain an effective force. A vague feeling of alienation and dissatisfaction among Europe's population has been aggravated by a series of negative developments in both the recent past and the present: the financial and governmental debt crises in a number of euro zone countries, the refugee crisis and several brutal terrorist attacks over the past few years and months. This feeling undoubtedly also encompasses the UK's application to leave the EU under article 50 of the Treaty on the European Union. However, while the impending exit of one of its biggest members is a severe blow to the European Union, it does not by any means herald its end.

As a former member of the European Parliament, perhaps the biggest disappointment for me is that the United Kingdom plans to leave us. We need to be aware that, if the European Union is continually denigrated over a period of years, as it was by the former Prime Minister of the UK, David Cameron, when I was Chairman of the PPE Group in the European Parliament, this will inevitably have consequences. So when the British people were asked to endorse continued UK membership of the EU, they said no.

This teaches us that in many instances things are far from perfect, and if there are things that ought to be criticised in Brussels, then we must have an open discussion of them. The same applies to any shortcomings in Berlin or in the capital cities of our federal states. So we do need to be fair in dealing with the European Union.

Looking at Catalonia now, we can see the massive challenges we face – and the law plays a crucial role here. Looking at the situation in Africa, Russia, China and the United States – and the deep rift in society there – it is obvious that the European Union is no paradise. But I would still say with total conviction: we are the best part of this planet, and that is something we must all defend with courage, passion, patience and determination.

More than ever before it is imperative to remember that integrated Europe is primarily a community of values. The task of the European Court of Justice is to strengthen the community of law. It is responsible for ensuring "observance of the law in the interpretation and application" of European Community law.

The President of the Federal Constitutional Court, Andreas Vosskuhle, says that the European Court of Justice has made a "major contribution to constituting the European Community as a community of law", and may I add that it will continue to do so in the future. Being a community of law means that power is in the hands of the law, not that the law is in the hands of the powerful. This is one of the fundamental achievements of European integration, to which we owe the decades of peace we have enjoyed in a united Europe.

In the Multilevel Cooperation of the European Constitutional Courts – with all its horizontal and vertical interconnections – the European Court of Justice plays a major role in determining how we live together in an integrated Europe. Without the jurisdiction of the European Court of Justice, European integration would not have reached the stage it is at now. So it is not completely wrong to describe it as an "engine of integration". Not everyone sees this development in a positive light. That is an issue which must be debated.

It is an engine which needs plenty of traction at the moment, as it needs to defend and assert European legislation in the face of resistance from Hungary and Poland on the issue of dispersing 120,000 refugees throughout the European Union. Otherwise the entire legal system of the European Union will called into question and European integration shaken to its foundations. Legal experts are called upon here to consider how the judgments of the European Court of Justice can be implemented and imposed.

We will focus today partly on interaction between courts in the European Union in general and the European Court of Justice, in particular. We will also review the current situation of EU citizens in the light of the numerous challenges they face. This will, of course, include the distribution of refugees across EU member states, which I just referred to, and the associated problem of immigration into welfare. Other issues we will address include the exit process of the United Kingdom from the European Union and the development of case-law in an integrated Europe.

Any debate must always take account of the four fundamental freedoms in the European Union – the free movement of people, goods, services and capital. These are the achievements of European integration which continue to bring numerous benefits to each Member State. They are at the very heart of the European Union. They give meaning to our European identity.

As you can see, the 12th Berlin Legal Policy Conference has a challenging agenda. Together with you, the legal practitioners, jurists and German and European representatives of the European Court of Justice, we will engage in a mutually beneficial exchange of experience. An issue very close to our hearts at the Konrad-Adenauer-Stiftung is the promotion of democracy and the rule of law, which finds daily expression in our work in Germany, the European Union, the whole of Europe and around the world.

Let us not make the mistake of equating the European Union with Europe. Seventy years of peace in Europe have prevailed among the European countries that share in the integration of our continent because they are subject to the rule of law. In other parts of Europe – such as the Balkans in the 1990s, Kosovo at the end of the century and Ukraine with the warlike situation it now faces – there have been and continue to be violent conflicts. So let us see this distinction and make it clear to people how fortunate they are to live in the European Union as a community based on the rule of law.

The Legal Policy Conference is one of our outstanding formats and has served successfully as a legal policy exchange forum for many years now. This exchange is more important than ever as the current challenges confronting the European Union call for answers and solutions. If we

show determination and resolution we will find those solutions. Strengthening our European community in a way that benefits everyone calls for new ideas and fresh inspiration. The European Court of Justice has a crucial role to play in this respect. And you, the speakers, are contributing to the development of case-law, to the debate on legal policy and to a constructive dialogue within the community of law.

I look forward, therefore, to some lively, stimulating, memorable and productive legal policy debates at this 12th Berlin Legal Policy Conference.

Thank you for your attention.

THE ROLE OF THE COURT OF JUSTICE IN SAFEGUARDING THE RULE OF LAW IN EUROPE

Prof. Dr Dr h.c. Thomas von Danwitz, D.I.A.P. (ENA, Paris)

A few years ago the first topic on today's agenda would have been regarded as highly academic and might, at best, have prompted a few specialists to draw comparisons between rule-of-law standards in the case-law of the EU Court of Justice and the constitutional courts of the various Member States – comparisons that would seem a little esoteric today. Such deliberations would certainly have had no place on the prominent platform of the Berlin Legal Policy Conference held by the Konrad-Adenauer-Stiftung, and understandably so. However, recent political developments in many European and non-European countries have dramatically changed public perception of the rule of law and its importance for Germany and Europe. For a legal scholar or judge it is undoubtedly regrettable that such developments appear necessary to ensure that safeguarding of the rule of law finds its way back into the political discourse, that its significance is once again seen and accepted as a value, and that there is a need for a functioning police force and judiciary whose budgets cannot be subjected to random cuts.

I.

Nevertheless, the current perception of the issue should not blind us to the fact that safeguarding the rule of law in Europe is a truly fundamental challenge which concerns all of us in equal measure and that the rule of law should not be treated as a novel instrument in political disputes with various EU Member States or non-European states. In particular, this is not a problem that can be limited to one or the other country.

It goes without saying that the requirements of the rule of law apply without exception throughout Europe. EU institutions – including the ECB – and all the EU Member States must bow to its authority in equal measure, even though it might sometimes be inconvenient or politically inopportune to do so. The wording of the Treaties leaves no doubt that safeguarding the rule of law is among the most fundamental concerns of the European Union. Article 2 of the Treaty on European Union states that the values on which the Union is founded include the rule of law and respect for human rights along with freedom, democracy and equality. The implementation of democracy and the rule of law go hand in hand and are interdependent. Just as the principle of democracy is more than mere compliance with majority rule, so the rule of law cannot be reduced to the initiation of legal proceedings.

Yet quite apart from the binding character of this key standard-setting provision in the Treaties, with which the Court of Justice ensures compliance, we do well to remind ourselves of the special historical significance which attaches to upholding the rule of law in Europe. After all, the European Union is constituted as a community of law. As *Walter Hallstein*, the first President of the European Commission, once said: "This community was not created by military power or political pressure, but owes its existence to a constitutive legal act. It also lives in accordance with fixed rules of law and its institutions are subject to judicial review. In place of power and its manipulation, the balance of powers, the striving for hegemony and the play of alliance we have for the first time the rule of law."

Even during the founding years of the European Communities, the Court of Justice in its case-law consistently advocated the recognition and application of principles of the rule of law such as legality[1], legal certainty[2], protection of legitimate expectations[3], proportionality[4], safeguarding of

the rights of defence[5], the rights to be heard[6] and to inspect files[7] and the obligation to state reasons[8]. Consequently – in its groundbreaking judgment *"Les Verts v Parliament"*[9] – the Court acknowledged the concept of the community of law. Ever since, the Court of Justice has consistently abided by this concept, especially in cases in which there was a need to safeguard effective legal protection for Union citizens[10]. In the past decade and, above all, since the Charter of Fundamental Rights came into force, the Court of Justice has shown in its case-law how seriously it takes the key promise of the Charter whereby the Union makes the individual the focus of its actions, stating that "it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technical developments".[11]

II.

In recent years the so-called *Kadi* case[12] at the Court of Justice has come to be regarded as paradigmatic for safeguarding the rule of law in Europe. It concerned the action of the Council of the European Union which – usually in implementation of relevant resolutions of the United Nations – lists individuals or groups suspected of supporting international terrorism and imposes targeted sanctions on them, e.g. by freezing their funds or assets. In essence, such judgments concern the basic rule-of-law conditions for an act of public authority, i.e. the question of whether there must be legal protection before Union courts against such measures, even though the United Nations does not provide for such protection in imposing targeted sanctions. Moreover, such judgments also concern the indications or suspicions the Council must have when listing groups or individuals under Union law before it can impose a measure which may limit the fundamental rights of the persons or organisations concerned. Its paradigmatic nature now appears highly relevant, with recent political developments showing how suddenly individuals can be suspected by governments of supporting terrorist activities.

Seen in this light, I regard the *Kadi* judgment as exemplary because it was a case in which the Court of Justice upheld a landmark decision made in 2008 establishing the justiciability of listing decisions and emphasising the need for effective legal protection. On this basis the Court of Justice insisted in 2013 on compliance with rule-of-law substantiation requirements and – should the persons concerned deny the allegations and substantiate their denial – adherence to standard of proof require-

ments, since legal proceedings under the rule of law must not represent a continuation of politics by other means. It is worth mentioning in this connection that the Council was unable to satisfy the requirements made in a whole series of cases and that the lists therefore had to be withdrawn, even though this concerned a political area seen as an arcanum of governmental decision-making prerogatives in more than one Member State. It should be noted, nonetheless, that fundamental significance attaches in the European Union to compliance with due procedures under the rule of law and to legal verification of sovereign acts, irrespective of all political sensitivities; they constitute a supreme value which must be respected.

III.

Which brings me to the other side of the coin – the role of the Member States. In the recent past the Court of Justice has noted a number of Treaty violations in connection with the observance of rule-of-law guarantees, specifically the independence of the judiciary and the independence of certain administrative authorities, which is guaranteed under Union law.[13] A preliminary ruling procedure is currently pending at the Court of Justice concerning protection against action by Member States which may affect the independence of the judiciary. Such protection is specified in the second subparagraph of Article 19(1) of the Treaty on European Union[14]. To date, however, there are no infringement proceedings pending or, indeed, any applications by the European Commission to impose a lump-sum or penalty payment for non-compliance with the rulings of the Court of Justice in this connection, although such payments have been imposed in other political fields, for example in environmental law. The European Commission has, however, applied for the imposition of a penalty payment in the temporary injunction proceedings now under deliberation on the protection of the primeval forest in Poland's Białowieża region, as this would provide a practical guarantee for compliance with future measures prescribed by the Court of Justice.[15]

Putting specific proceedings to one side, however, we are currently confronted in the political debate by a fundamental questioning of the rule of law and of the values which Europe stands for. This is a development that would have been inconceivable a few years ago. I would emphasise that these values are not the "property" of the European Union. They are values which constitute the very fabric of Europe in historical and cultural

terms, in other words they are ultimately the values of the Enlightenment as our common intellectual foundation. Moreover, the point here is not only that the rule of law as a historical achievement is being challenged, but also that the threat is being directed primarily against its executive agencies, i.e. the courts at the national and European levels. Wherever Europe's values are abandoned, the moment of truth arrives for the judiciary as the third power in a state. Under no circumstances should we underestimate this challenge.

But what does this mean for the third power? Obviously, the challenge highlights the task of the courts, which is essentially to protect citizens. Moreover, it has also been instrumental in raising awareness that the judiciary now finds itself in a "novel" situation in requiring protection against a wide range of measures – including budgetary restraints – which can cast doubt on the independence of the judges. We should certainly sit up and take notice if, at some stage, we arrive at a situation in which judgments handed down by a supranational court are ignored. After all, we are talking here about a court whose founding mission is associated with the fundamental lessons learned from the continent's darkest hours and whose activities have subsequently been aimed at permanently preventing the conduct of war as an instrument of politics, striking a balance between the nations and replacing the rule of the powerful by the power of the law. Smaller EU Member States, in particular, are keenly aware of the historical significance of such protection. After all, what would remain of the rule of law if the state judiciary were to forfeit its independence or ability to function and, at the same time, judgments handed down by supranational jurisdictions were to be ignored?

Faced with these challenges, it is therefore more important than ever, both for national and supranational jurisdictions, to foster mutual trust and to find *common* answers that can put the development of law in Europe on a sound long-term footing. The Court of Justice of the European Union will not hesitate to make its contribution to safeguarding the rule of law in Europe.

1| *ECJ, Judgment of 12 July 1957, Algera et al. v Common Assembly, 7/56 and 3/57 to 7/57, EU:C:1957:7; Judgment of 22 March 1961, Snupat v High Authority, 42/59 and 49/59, EU:C:1961:5; Judgment of 17 April 1997, de Compte v Parliament, C-90/95 P, EU:C:1997:198, recital 35; Judgment of 24 January 2002, Conserve Italia v Commission, C-500/99 P, EU:C:2002:45; recital 90; see also Judgment of 7 January 2004, X, C-60/02, EU:C:2004:10, recital 63; Judgment of 3 May 2007, Advocaten voor de Wereld, C-303/05, EU-:C:2007:261, recital 49-50*

2| *Judgment of 9 July 1981, Gondrand and Garancini, 169/80, EU:C:1981:171, recital 15; Judgment of 13 February 1996, Van Es Douane Agenten, C-143/93, EU:C:1996:45, recital 27; Judgment of 14 April 2005, Belgium v Commission, C-110/03, EU:C:2005:223, recital 30; Judgment of 14 September 2010, Akzo Nobel Chemicals and Akcros Chemicals v Commission, C-550/07 P, EU-:C:2010:512, recital 100*

3| *ECJ, Judgment of 12 July 1957, Algera et al. v Common Assembly, 7/56 and 3/57 to 7/57, EU:C:1957:7; Judgment of 22 March 1961, Snupat v High Authority, 42/59 and 49/59, EU:C:1961:5; Judgment of 13 July 1965, Lemmerz-Werke v High Authority, 111/63, EU:C:1965:76; Judgment of 25 February 1969, Klomp, 23/68, EU:C:1969:6, recital 44; Judgment of 11 July 2002, Marks & Spencer, C-62/00, EU:C:2002:435, recital 44-45; Judgment of 18 June 2013, Schenker & Co. et al., C-681/11, EU:C:2013:404, recital 41; Judgment of 12 December 2013, Test Claimants in the Franked Investment Income Group Litigation, C-362/12, EU:C:2013:834 , recital 44-45*

4| *Judgment of 17 December 1970, Internationale Handelsgesellschaft, 11/70, EU:C:1970:114, recital 12; Judgment of 29 April 1982, Merkur Fleisch-Import, 147/81, EU:C:1982:131, recital 12; Judgment of 17 May 1984, Denkavit Nederland, 15/83, EU:C:1984:183, recital 25; Judgment of 11 July 1989, Schräder HS Kraftfutter, 265/87, EU:C:1989:303, recital 2; Judgment of 8 July 2010, Afton Chemical, C-343/09, EU:C:2010:419, recital 45; Judgment of 23 October 2012, Nelson et al., C-581/10 and C-629/10, EU:C:2012:657, recital 71; Judgment of 22 January 2013, Sky Österreich, C-283/11, EU:C:2013:28, recital 50*

5| *Judgment of 4 July 1963, Alvis v Council, 32/62, EU:C:1963:15; Judgment of 24 October 1996, Commission v Lisrestal et al., C-32/95 P, EU:C:1996:402, recital 21; Judgment of 21 September 2000, Mediocurso v Commission, C-462/98 P, EU:C:2000:480, recital 36; Judgment of 18 December 2008, Sopropé, C-349/07, EU:C:2008:746, recital 36-37; Judgment of 21 December 2011, France vs. People's Mojahedin Organization of Iran, C-27/09 P, EU-:C:2011:853, recital 65-66; Judgment of 10 September 2013, G. and R., C-383/13 PPU, EU:C:2013:533, recital 32*

6| *Judgment of 18 May 1982, AM & S Europe v Commission, 155/79, EU-:C:1982:157, recital 18; Judgment of 18 October 1989, Orkem v Commission, 374/87, EU:C:1989:387, recital 32; Judgment of 14 September 2010, Akzo Nobel Chemicals and Akcros Chemicals v Commission, C-550/07 P, EU-:C:2010:512, recital 92*

7| *Judgment of 13 February 1979, Hoffmann-La Roche v Commission, 85/76, EU-:C:1979:36, recital 9; Judgment of 8 July 1999, Hercules Chemicals v Commission, C-51/92 P, EU:C:1999:357 n recital 75; Judgment of 15 October 2002, Limburgse Vinyl Maatschappij et al. v Commission, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582 recital 315; Judgment of 7 January 2004, Aalborg Portland et al. v Commission, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, recital 68; Judgment of 1 July 2010, Knauf Gips v Commission, C-407/08 P, EU:C:2010:389, recital 22*

8| *Judgment of 22 June 2004, Portugal v Commission, C-42/01, EU:C:2004:379, recital 66; Judgment of 15 December 2005, UniCredito Italiano, C-148/04, EU-:C:2005:774, recital 99; Judgment of 7 September 2006, Spain v Council, C-310/04, EU:C:2006:521, recital 57; Judgment of 6 March 2003, Interporc v Commission, C-41/00 P, EU:C:2003:125, recital 55; Judgment of 29 September 2011, Elf Aquitaine v Commission, C-521/09 P, EU:C:2011:620, recital 14; Judgment of 7 March 2013, Switzerland v Commission, C-547/10 P, EU:C:2013:139, recital 67*

9| *ECJ, Judgment of 23 April 1986, Les Verts v Parliament, 294/83, EU:C:1986:166*

10| *ECJ, Judgment of 15 May 1986, Johnston, 222/84, EU:C:1986:206; Judgment of 15 October 1987, Heylens et al., 222/86, EU:C:1987:442; Judgment of 8 December 2011, Chalkor v Commission, C-386/10 P, EU:C:2011:815; Judgment of 6 October 2015, East Sussex County Council, C-71/14, EU:C:2015:656; Judgment of 6 October 2015, Schrems, C-362/14, EU:C:2015:650; Judgment of 16 May 2017, Berlioz Investment Fund, C-682/15, EU:C:2017:373*

11| *ECJ, Opinion 1/15 of 26 July 2017, EU:C:2017:592, recital 135*

12| *ECJ, Judgment of 3 September 2008, Kadi and Al Barakaat International Foundation v Council and Commission, C-402/05 P and C-415/05 P, EU:C:2008:461; Judgment of 18 July 2013, Commission et al. v Kadi, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518; Judgment of 28 November 2013, Council v Manufacturing Support & Procurement Kala Naft, C-348/12 P, EU:C:2013:776; Judgment of 21 April 2016, Council v Bank Saderat Iran, C-200/13 P, EU:C:2016:284; Judgment of 26 July 2017, Council v LTTE, C-599/14 P, EU:C:2017:583; Judgment of 26 July 2017, Council v Hamas, C-79/15 P, EU:C:2017:584*

13| *ECJ, Judgment of 6 November 2012, Commission v Hungary, C-286/12, EU-:C:2012:687; Judgment of 8 April 2014, Commission v Hungary, C-288/12, EU-:C:2014:237*

14| *ECJ, Case of Associação Sindical dos Juízes Portugueses, C-64/16, pending*

15| *ECJ, Case of Commission v Poland, C-441/17 R, pending*

POWER AND POWERLESSNESS OF THE THIRD POWER IN EUROPE

Maximilian Steinbeis

Ladies and gentlemen,

I have the great pleasure here today of addressing you in between two representatives of institutions whose work I have covered for the greater part of my career as a journalist. I am all the more pleased to see the Federal Constitutional Court represented by Ms. König, who is standing in for Ms. Langenfeld, whom I wish all the best and a speedy recovery.

I regard the topic I have been asked to address "Power and Powerlessness of the Third Power in Europe" as an invitation to look beyond the complex triangular relationship between the European Court of Justice, the European Court of Human Rights and the Federal Constitutional Court to examine the **state of the judicial system in Europe in general**. The question I'd like to ask is: Should we be concerned about the separation of powers, the rule of law and constitutional statehood? In trying to find an answer for myself I became absorbed by the concept of **"power"**. Do power and the judicial system go together? If power is the rule of human beings over their fellows, would not judges have to vigorously deny that they enjoy and exercise power? After all, it is not judges as individuals who make the persons they confront do what

they are supposed to, but the **law**. Indeed, is it not the case that their **authority** diminishes to the extent that their actions are perceived as the exercise of power? If someone has lost a case, can they be expected – without compulsion – to accept the judge's decision as binding if it is power to which they are submitting? The more the judiciary is regarded as exercising power, the more its authority diminishes. This seems to me a very perceptible development in Europe at the moment – and not only here. I will give you two examples to illustrate my point: Poland and Spain.

Poland

You will all be aware that massive pressure is currently being exerted on the independent judiciary in Poland. Media interest has declined – both in Poland and in other countries – since the Polish president repealed parliamentary legislation on the reform of the judiciary, passed by the PiS coalition, on the grounds that it was unconstitutional.

Few people will have noticed that the judicial reform the president himself now wishes to implement is hardly less alarming. President Duda also plans to dismiss and replace all the members of the National Council of the Judiciary, whose constitutional remit is to monitor the independence of the judiciary and whose four-year tenure is enshrined in the constitution. To date, the members of this Council have been nominated by the judiciary, but in future the president wants them to be elected by parliament, although – in contrast to the PiS – he proposes a three-fifths majority, which could be watered down in the event of a stalemate, however. As for membership of the Supreme Court – the last bastion of constitutionality in the Polish judicial system following the takeover of the constitutional court by the PiS – the president plans to reduce the retirement age to 65, which would effectively remove half its judges. The President of the Supreme Court, Małgorzata Gersdorf, who is despised by the PiS for her fearless criticism of its constitutional policy, will be 65 on 22 November. In addition, a new judicial body is to be set up that can be used to re-open cases in which final judgments were handed down up to twenty years ago; it is also to be given control over elections in the future.

There would certainly appear to be no reason whatsoever to be relaxed about the situation in Poland in the light of the current, publicly financed,

anti-judiciary campaign with posters urging people to deny the country's judges any respect and asking: who are they anyway?

Admittedly, people in Poland regularly point out that, even without the PiS, the judiciary's public standing is fairly low. This has to do with problems of efficiency, but also with suspicions that the old elites from the communist era have survived for the past twenty-five years under the sheltering roof of the judiciary. Whether this is true or not, it is certainly not an uncommon phenomenon in countries obliged to negotiate the transition from an authoritarian regime to a democracy. What is interesting, however, is that the country's democratically elected government is actively fanning this resentment and exploiting it for its own ends. The PiS government used the same public resentment as a weapon earlier on in the battle over the Polish Constitutional Court, the question then being: who actually authorised these elitist judges to impose their will on us, the democratically elected representatives of the majority of voters? Which brings me straight to the main theme of my presentation: power.

If democracy means that a minority must yield to the power of the majority, then democracy has a problem. Why should the minority do so? Can they reasonably be expected simply to relinquish power if there is the possibility of it subsequently being used to violate and rob them, the outvoted? The answer is they cannot, or only if there is something in place that will protect them from such a fate. In other words, if they have sufficient rights in terms of participation, legal procedures, freedom and equality that will make the renunciation of power more or less palatable – not just on paper but in practice, too. After a revolution such expectations are naturally hedged around with great uncertainty, which explains why so many of the new democracies that emerged from the 1970s onwards introduced not only extensive catalogues of rights and guarantees of autonomy, but also followed the German example in setting up powerful constitutional courts to safeguard these expectations and ensure their fulfilment.

Seen in this light, a constitution, a constitutional court and the independence of the judiciary are not limitations or burdens, but requirements that enable a democracy to work. The PiS government, on the other hand, equates democracy with majority rule and, from this perspective, brands any constitutional limitation of its power as undemocratic. Anyone acting in this manner must ensure the compliance of the outvoted

in some other way, using either money or violence. The former leads to corruption and the latter to authoritarianism, although – as experience has shown – the two are by no means mutually exclusive.

The PiS government is going a step further by presenting its attack on the judiciary as a conflict with a political adversary, if not an enemy of the people. It is driving the third power into the position of a power factor, which is detrimental to its authority. By claiming that the judiciary is powerful the PiS government is effectively weakening it. This makes strategic sense with a view to its aforementioned objective, which is to divest itself of its constitutional ties.

Spain

The other disturbing European example of a court facing defiance is Spain. The government of the autonomous region of Catalonia – a Spanish government body, by the way – announced and carried out a referendum on independence, even though the Spanish Constitutional Court in Madrid declared its legal foundation unconstitutional. Under the repealed Catalan act, a majority vote for independence in the referendum would result, without any further consideration, in the regional parliament declaring Catalan independence within 48 hours. Prior to this vote, Barcelona's government and the parliamentary majority had already stated that they no longer recognised the Spanish Constitutional Court as authorised to pass judgments on Catalan law.

The entire procedure has a long and highly complex background that I cannot go into in any detail here but in which the Constitutional Court has repeatedly played a crucial role. This applies in particular to the period since 2010, when it overturned key aspects of the Catalan autonomy statutes deemed to be in breach of the principle of national unity set out in Article 2 of the Spanish Constitution. Since then the Catalan side has refused to see the Constitutional Court as an independent authority in the conflict between the country's centre and its periphery – as the guarantor of the rights of the outvoted, as it were – and treats it as an active protagonist in the conflict which sides with the centre.

In structural terms, constitutional courts regularly find themselves in a situation in which they are called upon to act in a tense political environment in which they are suspected by unsuccessful parties of being ex-

ploited for political ends. Taken together, the judicialisation of the legislative and the politicisation of the judiciary create a cause-and-effect cycle that becomes difficult to interrupt and in which there is the built-in possibility of it spiralling into a crisis of legitimacy for the judiciary. In Spain, however, the political instrumentalisation of the Constitutional Court was taken to an extraordinary degree. Firstly, the Court decided in 2015 that not only official Catalan government referenda, but also informal web surveys organised by civil society (albeit supported by the government) were unconstitutional. In its view, calling into question the indivisibility of the nation enshrined in the constitution was not possible in Spain without breaching that very constitution. Secondly, also in 2015, the Spanish legislative extended the authority of the Constitutional Court – again with the Catalan conflict in mind – in a direction that was highly unorthodox. It authorised the Constitutional Court to impose financial penalties on anyone disregarding the court's rulings, to remove such persons from office and, on its own initiative, to declare null and void any acts conflicting with its judgments. The latter, in particular, is incompatible with the function of a constitutional court. It must be appealed to by a third party to become active. Otherwise it is itself a protagonist in the conflict on which it is has to pass judgment. The predicament for Spanish rule of law resulting from this step is all too clear when it comes to the question of the legal protection to be afforded to the person on whom such a sanction is imposed. Which court would be responsible?

Unlike many in Catalonia I would not go so far as to suspect the Rajoy government in Madrid of nurturing autocratic ambitions. But there are other countries where suspicions of this kind are harder to dispel – Hungary, for instance. Until recently authoritarianism and constitutional jurisdiction would have been regarded as natural adversaries. One could be forgiven for thinking that anyone striving for authoritarian rule would wish to keep constitutional courts at bay as far as possible. But the reality is perhaps more complex.

It is a well-known fact that many years ago Viktor Orbán successfully began bending the country's Constitutional Court to his will. This proved highly advantageous for him at the very latest in 2016 when he failed in his attempt to protect Hungarian "national identity" against EU refugee resettlement plans by means of a constitutional amendment. A referendum had foundered on the minimum quorum requirement and he was two votes short in the Hungarian parliament, so the Constitutional Court

came in very useful in enabling him to achieve his objective by passing the requisite judgment.

Another example that might be adduced in this context is the Russian Constitutional Court and its role in fending off the European Court of Human Rights. However, I cannot go into any details here. The point I wish to make is this. Authoritarian regimes have long ceased combating and weakening constitutional courts as opponents, as the Polish government has been doing up till now. They have realised how expedient it is to have a compliant constitutional court that will serve their purposes. Formally, everything is in place that can be expected of a liberal democratic constitutional state: freedom of speech, freedom of assembly, freedom of the press and a constitutional court – they're all there. No one can complain. De facto, however, there is no conceivable conflict that the government cannot win. It is a phenomenon the Turkish-American constitutional lawyer, Özan Varol, has described as stealth authoritarianism. This strikes me as the new, major threat to the third power in Europe – and not only to the judiciary.

Thank you.

THE EUROPEAN COURT OF JUSTICE, THE EUROPEAN COURT OF HUMAN RIGHTS AND THE FEDERAL CONSTITUTIONAL COURT: FROM MULTIPOLARITY TO THE ASSOCIATION OF COURTS IN EUROPE

Prof. Dr Doris König

Introduction

The title of this talk points to a development I would like to briefly review and acknowledge which concerns the relationship between the Federal Constitutional Court and the two European courts – the Court of Justice of the European Union and the European Court of Human Rights.

In using the term "association" I do not mean a material state of existing unity but a process marked by dialogue and cooperation between these courts. Within this association a series of procedural and material arrangements has materialised which governs the relationship between the courts and the various legal levels they are responsible for, i.e. constitutional law, Union law and convention law. These arrangements encompass priority and conflict of laws provisions, provisions on powers, clarification procedures and the practice of mutual consideration[1]. The President of the Federal Constitutional Court, Andreas Vosskuh-

le, has summed up the relationship as follows: The term association allows us to "do without spatial and grossly simplified imagery such as 'equality, superiority and subordination'. Instead, it allows for nuanced paraphrasing based on varying structural points of view such as unity, difference and diversity, homogeneity and plurality, separation, interaction and interdependence. The concept of an association incorporates autonomy, consideration and the capacity for joint action in equal measure."[2]

A. Protection of fundamental rights at three levels – common features and lines of conflict

Interdependence between the three levels of law in the protection of fundamental rights

The close connection between national, supranational and international protection of fundamental rights is formulated very succinctly in Article 6 of the Treaty on European Union. Fundamental rights, which are guaranteed by the European Convention on Human Rights and arise from the shared constitutional traditions of the Member States, maintain their validity as general principles under Union law. In addition, there is the EU Charter of Fundamental Rights which explicitly mentions traditional fundamental rights along with other fundamental rights that might be called modern. Moreover, in Articles 52 and 53, the Charter contains provisions governing the interpretation of fundamental EU rights with respect to fundamental ECHR rights and the shared constitutional traditions of the Member States and ensuring the maximum level of protection. The purpose of these provisions is to provide coherence.

There is no shortage of fundamental rights, then, and I would agree with Christian Kohler who has described this situation as an *embarras de richesses*. However, the legal protection of these rights is complex and proceeds at multiple levels.[3] The Federal Constitutional Court incorporates the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) in a number of different ways: the ECJ primarily in the form of preliminary ruling procedures, and ECtHR case-law through its integration into ordinary law in accordance with the principle of commitment to international law and as an interpretation aid in respect of the German Constitution.

II. The Federal Constitutional Court and the European Court of Justice: from bipolarity to an association of courts in the protection of fundamental rights

1. Primacy of Union law, the commitment of the German Constitution to European law and procedural safeguards by means of preliminary ruling procedures

In my view, a properly functioning association of courts with the European Court of Justice rests on the following parameters. In Germany the primacy of Union law is generally recognised and regularly applied in everyday practice by both the authorities and the courts. I will come on in a moment to those rare cases in which the primacy of Union law encounters constitutional limits. In its judgment on the Lisbon Treaty, the Federal Constitutional Court inferred the Basic Law principle of commitment to European law from the constitutional directive to share in European integration set out in the Preamble and Article 23(1) of the German Constitution. It follows, in particular, that the Constitutional Court must exercise its monitoring powers "with restraint and commitment to European law". Before deciding whether a Union legal act is inapplicable in Germany it therefore sends questions to the ECJ, wherever this is considered necessary, on the interpretation and validity of the relevant Union legislation. It then bases its review on the measure as interpreted by and received from the ECJ. This applies both to ultra vires and identity reviews.[4] In doing so, the Court has refuted opinions in the literature which deem the submission of questions to the ECJ to be unnecessary.

2. Securing adequate protection of fundamental rights in the EU in the association of courts

There is not enough time here for me to trace the development of the dialogue between the two courts on the protection of fundamental rights. Everyone in the hall will be familiar with the *Solange I* ruling of 1974 in which the Federal Constitutional Court, confronted with shortcomings in the protection of fundamental rights, temporarily reviewed Community acts to ascertain their compatibility with fundamental rights in Germany. After the ECJ had extended its protection of fundamental rights, the Federal Constitutional Court responded by issuing its *Solange II* ruling in 1986.

In this second ruling the Court stated that it would suspend its monitoring of fundamental rights as long as there was general protection of fundamental rights under Community law that could be considered equivalent to the protection of fundamental rights deemed to be indispensable in the German Constitution. Given the dynamic nature of the integration process and the increasing incorporation of matters affecting fundamental rights into Union law, the suspension of monitoring – combined with a somewhat theoretical reserve position for the Federal Constitutional Court – was inevitably not going to be the last word. The recent jurisdiction of both senates has, therefore, revealed a tendency to adjust *Solange II* case-law. Moreover, in its so-called *Identity Review I* ruling of 2015 the Second Senate made an exception, albeit on strict conditions. All in all, collaboration between the Federal Constitutional Court and the European Court of Justice is currently in a state of flux on the protection of fundamental rights. This is a situation which calls for tact and sensitivity from both courts.

The third protagonist in the protection of fundamental rights: the European Court of Human Rights

ECtHR case-law is of crucial significance for the protection of fundamental rights by both the ECJ and the Federal Constitutional Court. The main task of the ECtHR is to ensure the protection of fundamental rights in the 47 states party to the Convention while also setting certain minimum standards. It exercises control in a subsidiary manner. It is the responsibility of the ECtHR to answer the difficult question of how much uniformity the ECHR requires in the protection of fundamental rights and how much pluralism it permits. The Court must reconcile the need for effective protection of fundamental rights and its dynamic development, on the one hand, and the need for broad acceptance of its case-law in the states party to the Convention, on the other. The key fine-tuning instrument in striking this balance is the margin of appreciation granted to national authorities. In calculating this margin, the ECtHR is well advised to treat established national traditions and the "preserve" of Union law with respect if it wishes to ensure acceptance of its judgments.

In its *Görgülü* judgment of 2004[5] and its ruling on preventive detention of 2011[6] the Federal Constitutional Court devised certain "association techniques" to give effect to the case-law of the ECtHR in the German

legal system. Despite the status of the ECHR as ordinary law, the Federal Constitutional Court has accorded it constitutional significance by referring to the special importance of the inalienable human rights enshrined in Article 1(2) of the Basic Law. The ECHR – as interpreted by the ECtHR – must be used as an interpretation aid in determining the content and scope of fundamental rights and of rule-of-law principles set out in the Basic Law. This applies not only to ECtHR decisions which affect Germany directly, but also to other decisions by virtue of the orientation and guidance they offer. However, invoking the ECHR does not require any statements it makes to be mirrored in the German Constitution. On the contrary, the assessments arrived at in the ECHR and formulated in greater detail by the ECtHR must be integrated as carefully as possible into the constitution and the country's legal system with all its dogmatic nuances. However, national integration and convention-compliant interpretation have their limits where they no longer appear justifiable when measured against established methods of legal and constitutional interpretation. "Fundamental constitutional principles" represent the ultimate limit. To avoid violations of such principles the German legislative and the courts are to have the option, under exceptional circumstances, of not taking the ECHR into account.[7]

Aims of the association of courts and challenges in protecting fundamental rights

The objective of cooperation within the association of courts is to ensure high standards of fundamental rights and the rule of law, while at the same time promoting dialogue between the courts in the necessary consideration of conflicting objects of legal protection.

It should be clear to the courts involved that there can be no question of concentrating the protection of fundamental rights in a court or of tolerating any extensive domination of such protection. That would run counter to the concept of a pluralistic European community of law in which there are shared responsibilities. Uniformity in the protection of fundamental rights, e.g. through ECJ case-law, would constrict political leeway and obscure the characteristic protection of fundamental rights that has evolved over time in the Member States. The same applies to the case-law of the ECtHR, which is particularly dependent on acceptance by national courts. Examples of controversial judgments that come to

mind here are the *Åkerberg Fransson* case and ECJ judgments on data retention *(Digital Rights Ireland, Telesverige)* as well as several rulings of the ECHR such as in the Tarakhel case.

B. Safeguarding the integration programme in the association of courts – ultra vires and identity reviews

In the final part of my presentation I would like to focus on the two instruments the Federal Constitutional Court has devised to monitor compliance with the integration programme agreed under Union law – ultra vires reviews and identity reviews. How do these instruments fit in with the European association of courts?

Since I can assume that everyone in the audience is familiar with these two review instruments, I will just briefly highlight a few points. Both monitoring instruments are limited to "evident exceptions"[8] and must be exercised in a manner which is open to European law.

In respect of **ultra-vires reviews**, the Second Senate consequently set high hurdles in its *Honeywell* decision of 2010[9] for the determination of ultra vires acts of EU institutions – and thus for their inapplicability in Germany – and subsequently confirmed this case-law in the OMT judgment of 2016.[10] Despite its criticism of the ECJ's decision-making process, the Second Senate nevertheless followed the ECJ's ruling and accepted the disputed measures taken by the ECB, in the form of the legal limitations imposed by the ECJ, as being in line with its competences. The OMT case clearly illustrated the different approaches of the ECJ and the Federal Constitutional Court, yet – as Koen Lenaerts pointed out recently in an article in the German legal magazine JuristenZeitung – it was also "a milestone in deepening the association of courts in the EU" given the "willingness to engage in dialogue that it manifested".[11]

The Federal Constitutional Court first conducted an identity review in respect of the protection of fundamental rights in an extradition decision in 2015. It noted that the identity review enables it to fully guarantee the indispensable protection of fundamental rights that is called for in the Basic Law as well as in individual instances. This represents a departure from *Solange II* case-law in limited exceptional situations in which a person's human dignity might be compromised. In such instances the identity review functions as a last resort that is designed to prevent the

application of Union law from falling short of the minimum protection standards specified in Article 1 of the Basic Law. However, it must also be emphasised that, in principle, an identity review does not encompass a general review of fundamental rights. Rather its purpose is merely to safeguard the protection of human dignity required by Article 1 of the Basic Law. The ECJ responded to this ruling by the Federal Constitutional Court and, in its Aranyosi judgment a few months later, substantially strengthened the protection of fundamental rights in the execution of European arrest warrants.

The identity review currently focuses primarily on safeguarding democratic processes both in Germany and at the European level. The main objective of the Federal Constitutional Court is to ensure the democratic accountability of the integration process, e.g. by means of parliamentary sovereignty over the budget, through the safeguarding of far-reaching rights to information as the foundation for parliamentary participation, and by giving the constitutional authorities responsibility for integration, the exercise of which is monitored by the Court. In procedural terms this review is made possible by a far-reaching "right to democracy", the existence of which the Court sees in the first sentence of Article 38(1) of the Basic Law. Over the years there has been wide interpretation of this provision which, from my point of view, calls for a consolidation of the case-law to date and should not go beyond claims in respect of the constitutional authorities against which the so-called "right to democracy" can be directed, especially the Bundestag and the Federal Government.

C. Conclusions

What can the association of courts do to increase acceptance of Union law and ensure Germany's continued participation in the process of integration? I feel the ongoing dialogue between the ECJ and the Federal Constitutional Court, in which they are both guided by ECtHR case-law in the protection of fundamental rights, shows that their pragmatic mutual respect has resulted in productive cooperation which transcends any fundamental disagreement they may have about the scope of their prerogatives. Criticisms of individual decisions notwithstanding, both courts endeavour to defuse areas of tension and reach acceptable solutions. After all, neither of them is interested in letting conflicts escalate or inflicting permanent damage on the integration process.

Following on the protection of fundamental rights, the assignment of responsibilities and the democratic monitoring of EMU procedures, a new domain has opened up in the form of foreign trade policy, in which the ECJ and the Federal Constitutional Court need to achieve an acceptable balance in their respective case-law. Apart from the demarcation of responsibilities, the basic issues here are how the creation of an independent investment court system, on the basis of treaties under international law, should be assessed and to what extent the Commission can assume and exercise decision-making powers in treaty committees. What are the democratic and rule-of-law principles which must be observed and what degree of democratic accountability is required?

Here again, intensive discussion will be needed to arrive at a balanced solution. Seen in this light, the association of courts is also a learning association, the purpose of which is to master the current and future challenges facing the EU and its Member States and thus, as Walter Hallstein put it, to strengthen acceptance of the European community of law.

1| On the legal structure of the German Constitution see Schmidt-Assmann, Einheit und Kohärenz der europäischen Mehrebenenrechtsordnung, Europäische Grundrechte-Zeitschrift 2016, 85 (85).
2| Vosskuhle, Der europäische Verfassungsgerichtsverbund, Neue Zeitschrift für Verwaltungsrecht 2010, 1 (3)
3| Kohler, Ein Bruderzwist im europäischen Haus: Die Kontroverse zwischen ECJ und EGMR um den Grundrechtsschutz in der EU, in: Rolf A. Schütze (ed.), Fairness, Justice, Equity, FS für Reinhold Geimer, 2017, 375 (375)
4| Decisions of the Federal Constitutional Court 140, 317 <339 recital 6>
5| Decisions of the Federal Constitutional Court 111, 307 <317>
6| Decisions of the Federal Constitutional Court 128, 326 <368 ff.>
7| Decisions of the Federal Constitutional Court 111, 307 <319>
8| Vosskuhle, "Integration durch Recht" - Der Beitrag des Bundesverfassungsgerichts, Juristische Zeitschrift 2016, 161 (165)
9| Decisions of the German Federal Constitutional Court 126, 286 <303 ff.>
10| Decisions of the German Federal Constitutional Court 142, 123 <199 ff., recital 144 ff.>
11| Koen Lenaerts/Moritz Hartmann, Der europäische Rechtsprechungsverbund in der Wirtschafts- und Währungsunion, Juristische Zeitschrift 2017, 321, 330

CHECK AGAINST DELIVERY A EUROPE OF CITIZENS – WHAT ELSE?

Johannes Laitenberger

Ladies and gentlemen,

Thank you very much for the invitation to talk to you here today.

After receiving it, I spent a long time thinking about what I might say, as a representative of the executive, at a conference dealing with the contribution the Court of Justice can make to mastering the current challenges facing the European Union.

In particular, I asked myself what I could say as Director-General of Competition in a panel discussion focussing on Union citizenship.

The potential added value of any contribution of mine to acknowledging the role played by the Court of Justice in mastering the current challenges confronting the European Union will undoubtedly not consist in me examining details of its case-law. Dr. Berger, who is a judge, and Prof. Wollenschläger are much better placed to do that than I am. In fact, the only area in which I might possibly contribute something of value is competition law, but definitely not Union citizenship law. With that

in mind, then, I feel it would be wiser for me to outline the current tensions that exist between the Union, its institutions and, of course, the Court of Justice.

When the conference programme was drawn up, I was deliberately asked to address not the topic of Union citizenship, but the wider ranging issue of the Europe of citizens.

"A Europe of Citizens – What Else?" is a title that seems to state the obvious.

Indeed, from the very beginning the guiding principle of European integration, to coin a phrase from Jean Monnet, was: *"We are not merging states, we are uniting people."*

The Treaties speak of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen, to quote Article 1(2) of the TEU.

But if that goes without saying, why is there not an exclamation mark in the title of this panel discussion? Why the question mark?

It's often the seemingly simple questions which produce the most difficult answers.

I believe that, even though we are now in the 61st year since the adoption of the Treaty of Rome, in the 66th year since the creation of the European Coal and Steel Community and in the 68th year since the Schuman Declaration, the tension formulated in the title of this presentation remains rooted in the truly unique character of European integration.

Ever closer union. The primacy and direct applicability of Union law which constitutes a large wealth of individual rights with immediate effect. These rights apply not only to the right of residence. They go far beyond the four fundamental freedoms. In my current field of activity, competition law, the judgment handed down back in 1974 in the *BRT v Sabam* case made it clear that market players can directly invoke competition rules.

Nevertheless, this structure is not a state. The Federal Constitutional Court describes it as an "association of states". Walter Hallstein's characterisation of it as "an incomplete federation" strikes me as a very concise description of the integration project – perhaps with the rider that even today it is still not on course for completion and possibly cannot be. Which brings us right to the heart of the tense relationship on which my presentation focuses.

During the formative years of the community and – for those Member States which joined later during their first few years of membership – the new opportunities which opened up were literally quite incredible. I can well remember – I was living in Portugal at the time before it joined the community – that, prior to embarking on my first Inter-Rail trip, I was duty bound to have all the limited hard currency I had been allowed to acquire entered in my passport. Today I have to keep reminding myself of all the freedoms and opportunities we have in our daily lives which, if it were not for the European Union, we would not only be unable to take for granted, but would not exist in the first place, or at least not in their current form and in such abundance.

This very fact shows the extent to which we have got used to them. In the beginning we enjoyed everything that was new and unfamiliar, thinking that these positive developments would last forever. As time passed, however, the pleasure faded into the background and irritations and inconveniences came more to the fore. Since the European Union itself is not a state, Union law has to build ever more bridges between today's 28 national legal systems (including all the legal peculiarities that are the hallmarks of federalism and statutes of autonomy). The process of convergence between 28 national legal systems is undoubtedly still a major – if not the biggest – simplification process in legal history. Nevertheless, it is inevitably perceived as disruptive, especially since it is impossible to simply achieve a balance between unchanged national legal systems. On the contrary, the rapid technological, economic and social advances and the new dynamics arising from these processes mean that new balances have to be struck.

The resulting complexities make it hard for citizens to understand the overall system, of which they are supposed to be the beneficiaries. What seemed eminently plausible at the beginning – freedom of movement and non-discrimination – turns out to be highly complex when medical

faculties in Austria are virtually overrun by German students and those in Belgium by French students, to give you just one example I was involved with myself for a while earlier on in my career. A one-dimensional *effet utile* doctrine is not helpful either, since it raises the question of the principle that is to be given an *effet utile*. Freedom of movement and non-discrimination? Or perhaps each country's ongoing national responsibility for organising its own university system, as recognised by the Treaties, and ensuring the provision of nationwide medical care?

The distinctions that need to be made when we move on from individual cases of this kind to the right of residence and social legislation will in all likelihood be explained in detail by Dr. Berger and Prof. Wollenschläger after I have finished.

During my degree course I learned that ensuring practical concordance by balancing interests involves cutting your way through the legal undergrowth and often reaching the limits of your intuitive acceptance of the legal system. That this undergrowth is now threatening to stifle Union law is reflected by the fact – as if any evidence were needed – that, according to a Eurobarometer survey, 56 per cent of respondents quite simply find Union policies too complicated. This can easily lead to a lack of interest. If people are directly affected, however, it can quickly cause resentment. They may have started a university course full of hope but are now disappointed or they may have become subject to an adjustment programme which calls on their own Member State to meet the requirements of the Stability and Growth Pact. Is this what the Europe of citizens is supposed to look like?

That is the way things are, though, even though the rules of primary and secondary Union law were jointly laid down by democratically elected legislators in the European Council and the European Parliament. Even though primary Union law is legitimised in each Member State by a ratification procedure which satisfies national constitutional provisions. Even though ratification must now be preceded by an in-depth public debate. Even though there are now ever more extensive Union citizenship rights, including the European Citizens' Initiative. Even though there are very wide-ranging endeavours to ensure subsidiarity, proportionality and better regulation. With prior impact assessments and subsequent evaluations. With a focus on the big and important areas

("bigger on big") in order to avoid getting bogged down in minor details ("smaller on small").

Nevertheless, it is by no means the case that the carefully integrated system of "multi-level legislation, application and enforcement" offers a way out of the overall complexity.

This is where the *terribles simplificateurs* have a field day. The line they adopt is that the personal benefits of Union citizenship they enjoy can be had without the downsides. Or they argue that a return to plain national citizenship is a sound policy that does away with the need for European integration. During the Brexit referendum campaign this was neatly summed up by the phrase "I want my cake and eat it too".

But maybe the Brexit referendum marks a turning point – perhaps even the turning point – in this resentment? As we can see from various developments, including spontaneous movements such as Pulse of Europe, there is a growing awareness that the problems and grievances associated with Union law cannot simply be overcome by "weeding out" certain areas which supposedly or genuinely present special problems in some Member States. There is a growing realisation that it is not evil intent which prevents the Union from simply offering its citizens an à la carte menu. Ultimately, the aim is to achieve a balance between the different interests of different citizens. Anyone who sets great store by free movement of goods so that they can sell machine tools throughout the internal market must accept that for others it is equally important to have the freedom to provide services.

According to a Eurobarometer survey, 87% of Union citizens are now aware of their status as Union citizens – a higher percentage than ever before.

Does this mean that essentially everything can "continue as usual"? That we can just delete the question mark and replace it with an exclamation mark? I've been speaking for quite a while now, but let me say that would be rather short-sighted.

It is only right that the future of Europe should currently be the subject of an intense and controversial public debate involving a search for ways of making the complexity of the Union understandable and of developing the

Union in such a way that the sum total of its policies comes as close as possible to what the majority of its citizens wish to see in the future.

In March of this year the European Commission under its President, Jean-Claude Juncker, published a White Paper for the Future of Europe, outlining five scenarios of what Europe might look like in 2025. This launched a process in which Europeans determine the path they can and wish to travel together. So far the European Commission has organised over 300 interactive citizens' dialogues in more than 80 towns and cities in 27 Member States. President Juncker's State of the Union Address last month drew on the first results of this discussion and structured them to provide a basis for the next steps. One target date is 30 March 2019 when the European Council is due to meet in Sibiu and is expected to agree a road map to the future.

I am aware that many people – perhaps also here in this room – will object that this process is too complicated, that there is a need for simpler and more straightforward answers.

However, the reality in which we live is neither simple nor straightforward. Even though we long for simplicity and straightforwardness. And sometimes even enjoy the benefits of them. Thanks to the abolition of roaming fees in the internal market, for instance. We are exposed to rapid technological developments which have no roots in politics or law. We will never create a Europe of citizens by suggesting to people that *everything* can be simpler and more straightforward. And then failing to keep our promise because it is impossible to redeem.

The way we can create a Europe of citizens is by making it clear to people that, for all its complexities, the Union remains capable of reform. This is what the process in the White Paper is all about, and this capacity for reform is not an empty promise.

I'd like to illustrate this by reference to competition law, i.e. my direct area of responsibility. Over the past two decades EU competition law has seen comprehensive reforms, all of them based on the principle of "bigger on big, smaller on small".

In anti-trust legislation the law is now no longer applied centrally by the European Commission, but has been replaced by shared responsibilities, with Union law being applied in parallel by both the Commission and the national competition authorities. The Commission focuses on cross-border instances, ranging from the truck cartel to digital markets, e.g. sanctioning the abuse of Google's dominating market position in the provision of price comparison services. However, 85% of all anti-trust decisions under Union law are taken by national competition authorities. An intricate network of collaboration, incorporating the Commission's right of evocation, guarantees uniformity in the application of the law in conjunction with judicial controls that extend to Union courts. At the same time, a new Union law instrument has been introduced in the form of the Damages Actions Directive which strengthens the rights of consumers who wish to take their case to national courts. This is undoubtedly a contribution towards a Europe of citizens.

In state aid law, for instance, the General Block Exemption Regulation (GBER) has been completely revised and its scope substantially extended. It now covers around 95% of all new state aid measures. This means that, provided such measures comply with the GBER, the Commission no longer needs to be notified in advance, as a monitoring system is now in place to ensure that this freedom is not abused. As a result the Commission can concentrate on state aid cases that are particularly serious, including the impact they have on citizens' interests. I would refer you here to the two recent cases of tax subsidies for Apple in Ireland and Amazon in Luxembourg as well as to instances of energy subsidies, e.g. on capacity mechanisms.

The purpose of these measures is not to achieve some abstract "improvement of internal market mechanisms". The effective enforcement of competition rules ensures that markets work for those whom they are intended to serve. With this in mind, the reforms of EU competition law during the earlier terms of office of the Commission as well as in the current term of office of Commissioner Margrethe Vestager ensure that – by rigorously and consistently applying legal and economic regulations and standards – the enforcement of those rules continues to benefit EU citizens in a constantly changing social and market environment.

So what does it mean to be a European Union citizen today?

Some 2,000 years ago the words "Civis romanus sum" ("I am a Roman citizen") meant that Roman citizenship rights could be claimed throughout the Roman Empire. Advocate General Jacobs referred to this fact in 1992 before the Treaty of Maastricht came into force, claiming that Union citizens could say "Civis europaeus sum".

In the light of what I have just said I am not so sure whether the former Advocate General would wish to reiterate that claim.

Let me give you some sober details.

In this era of globalisation, Europe's share of the world's population is steadily declining. Whereas it was still 25% in 1900, it had dropped to 6% by 2015 – and the continuing trend is downwards. By 2030 Europe will be the oldest society in the world. It still generates a high gross domestic product. But the 27 EU Member States' share of global GDP fell from 28% to 22% in the short period between 2004 and 2015.

Being a citizen of the European Union in this world means that, in addition to the protection and freedom that come with national citizenships, you enjoy the additional protection and freedom that are guaranteed by the critical mass of a law-governed Union with its Union law in which the focus is on shared values and common action.

The Courts of the European Union are making a contribution of fundamental importance in this respect. Dr. Berger and Prof. Wollenschläger will show us how, by acting in legal areas that are of immediate importance to Union citizens, Union courts ensure and clarify implementation of the law and, wherever changing situations render it necessary, adapt and improve legislation within the confines of what interpretation of the law can accomplish. So I can now conclude the broad picture I wished to sketch out for you today.

Thank you very much for listening so patiently.

The European Commission is banking on you in its endeavours to build a Europe of citizens.

What else?

UNION CITIZENSHIP AND SOCIAL SECURITY SYSTEMS*

Prof. Dr Ferdinand Wollenschläger

After that panoramic view provided by Mr. Laitenberger I will be concentrating in my talk on an aspect around which discussion of Union citizenship frequently revolves – the controversial consequences it has for national benefit systems. Just a couple of days ago the daily *Frankfurter Allgemeine Zeitung* ran a critical headline saying: 'Welfare state attracts EU nationals'.[1]

What are the issues under discussion? Must social assistance be granted, for instance, to an economically inactive Union citizen who has entered Germany with no intention of working there? Would it make a difference if that person entered the country in order to find work? And what about a student who initially finances his studies in another EU country by going out to work but then wishes to concentrate on his studies in his final year and therefore applies for social welfare benefits?

Prior to the Treaty of Maastricht (1993) and the introduction of Union citizenship it would have been relatively easy to answer these questions. In the European Economic Community freedom of movement was primarily a market integration tool. A certain lack of clarity notwithstanding, it was essentially limited to persons in work and not intended to provide inactive

persons with a right to equal treatment in respect of access to social benefits.[2]

This changed, however, with the introduction of Union citizenship and a general right to freedom of movement, i.e. one that was no longer linked to the pursuit of a gainful activity (Article 21 TFEU); Union citizenship – and the dynamic interpretation of it by the European Court of Justice towards the end of the 1990s – resulted in (limited) access for inactive EU nationals to social benefit systems.[3]

What grounds did the European Court of Justice provide for this interpretation? Let me give you an illustration by referring to the case of Grzelczyk, the student I mentioned a moment ago.[4] Since he was concentrating on his exams in the final year of his studies and was therefore no longer able to work to support himself, he applied for social assistance. Strict application of the sufficient resources condition enshrined in the secondary law[5] valid at the time, which enabled an inactive person to benefit from a right of residence, would entail rejection of the application – irrespective of the fact that the secondary law did not recognise the right of economically inactive persons to equal treatment in respect of social benefits.

After the introduction of Union citizenship, however, the secondary law conditions of residence represented a hurdle to exercise of the general right to freedom of movement, which ranked higher in the hierarchy of norms. The ECJ therefore subjected it to the principle of proportionality and declared a refusal of leave to reside unjustified in view of the particular circumstances.[6] Moreover, the right of residence protected by Union law meant that Mr. Grzelczyk now found himself within the scope of application of the Treaties and so the ECJ confirmed a right to equal treatment in respect of social assistance by virtue of the general ban on discrimination.[7]

The ECJ's development of a social dimension of Union citizenship does not mark the 'end of rational jurisprudence', as which it was once pointedly branded.[8] Its basic approach is viable from the standpoint of legal doctrine.[9] I do not have the time here to go into any more detail, but the following is of crucial importance for the current legal position.

Criticism of the development of a social dimension of Union citizenship, which is frequently directed primarily at the ECJ, fails to take account of the fact that the Union legislator – significantly enough despite all the criticism voiced by the Member States as co-legislators – not only codified case-law in the form of the Free Movement Directive which entered into force in 2004[10], but also to a certain extent transcended it. It was thus also democratically legitimised.

Let me briefly outline the legal position as it is at present. The Free Movement Directive distinguishes between the right of residence and the right of inactive persons to equal treatment on the basis of duration of residence:

1. Periods of residence of up to three months are possible without application of the sufficient resources condition (Article 6); the price paid for this is exclusion from equal access to social benefits in the country of destination (Article 24(2)).

2. After a five-year period of legal residence, Union citizens acquire a permanent right of residence – a key innovation in the Directive; this also dispenses with the imposition of any economic conditions, although it is linked to a comprehensive right to equal treatment (Article 16 f., 24). Recital 17 notes the following: "Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union. A right of permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the host Member State in compliance with the conditions laid down in this Directive during a continuous period of five years without becoming subject to an expulsion measure."

3. There is still unresolved friction in the Directive as regards periods of residence between three months and five years. On the one hand, it requires evidence of sufficient resources (i) in order to counteract migration motivated primarily by a wish to access welfare benefits and (ii) to protect the benefit systems of the countries of destination (Article 7(1)(b) and (c)). However, should an economically inactive person be unable to satisfy this condition, the outcome is not automati-

cally loss of the right of residence or the right to equal treatment (Article 14(3)).[11] Rather there must be an assessment of the individual case, in which duration of access to and the level of social benefits, prior length of residence and personal circumstances must be taken into consideration.[12] The Directive thus codifies not only the principle of proportionality developed in ECJ case-law, but also the concomitant lack of legal certainty. In contrast to views advocated in some quarters, the judgment in the case of *Dano* of 11 November 2014[13] did not reject this proportionality condition. That it should have kept silent about this condition is politically understandable at the height of the Brexit debate, but it is nonetheless questionable in methodical respects and with regard to possible misinterpretations. However, it turned out that no damage was caused by the silence maintained, because a refusal of equal access to social benefits is not disproportionate if the purpose of entry was to enjoy social benefits without any intention to work. However, an interpretation of the judgment as a turning point in jurisdiction and as a general rejection of the (limited) access for unemployed EU nationals to benefit systems not only conflicts with earlier[14] and subsequent decisions[15], but also – and above all – with the Free Movement Directive and its proportionality condition.[16]

At all events, the *Dano* case makes it clear that the sufficient resources requirement is the rule and the relativisation of this condition for reasons of proportionality is the exception. The judgment is thus one in a series of recent decisions which cement the social dimension of Union citizenship.[17] In fact, the ECJ refrains from any querying of clear and proportionate requirements in the Residence Directive. In the *Alimanovic* case it confirmed that people who have lost their jobs must have worked previously for at least one year in order to receive social assistance for a period exceeding six months after the end of their employment;[18] in the *García-Nieto* case it also confirmed the exclusion of inactive persons from social assistance for the first three months of their residence[19]. It is hard to classify these regulations as disproportionate.

Admittedly, consolidation reaches its limits at the point where the Directive itself contains ambivalent requirements, i.e. in respect of the status in residence and social security law of inactive persons residing for periods of between three months and five years (in which case there must be no automatic expulsion in the event of non-fulfilment of the sufficient

resources requirement). Equally, the categorical and permanent exclusion from social assistance of persons seeking employment for the first time still awaits a primary law review because of the conflict with the legal status of other inactive persons.[20]

In summary it can be stated that Union citizenship has led to an opening up of the benefit systems for inactive EU nationals, but only to a limited extent due to the fundamental requirement of economic independence. From a legal point of view it is quite possible to criticise the fact that the legal status of inactive persons thus remains distinctly inferior to the legal status of those in employment and that a freedom of movement regime remains in place in which distinctions are made on the basis of one's position as an employed person. Nevertheless, the requirements of primary and secondary law are satisfied and this reflects de lege lata the state of integration in a politically sensitive area.[21]

As it turns out, the Brexit debate has shown that the legal status of gainfully employed persons is no longer undisputed either. From the very outset of European integration, market players enjoyed a right of residence independent of economic conditions as well as comprehensive access to welfare benefits which specifically did not depend on any minimum period of residence. Hence from the first working day onwards they have an entitlement to all the welfare benefits accruing to nationals. Given that the wide-ranging concept of a worker also includes those in minor employment, this includes raising inadequate pay to the respective social welfare level – in Germany for recipients of a supplement to Hartz IV.[22] The now obsolete deal offered to Great Britain to avoid Brexit envisaged waiting times for the receipt of social welfare benefits, which presented problems in primary law terms in view of ECJ case-law. However, the rejection of the deal obviated the need for the ECJ to update or rewrite the acquis – although things might turn out differently as regards the adjustment of child benefit to the living standard in the country of the child's residence, which is now under discussion.[23]

** The lecture format has been retained. The reference documents have been reduced to a minimum. For a full discussion of the topic and further documentation see F. Wollenschläger, Grundfreiheit ohne Markt, Tübingen 2007 (reprint 2017); idem., Die Unionsbürgerschaft und ihre Dynamik für den Integrationsprozess jenseits des Marktes, ZEuS 2009, p. 1; idem., A new Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration, European Law Journal (ELJ) 17 (2011), p. 1; idem., The Judiciary, the Legislature and the Evolution of Union Citizenship, in: P. Syrpis (ed.), The Judiciary, the Legislature and the EU Internal Market, Cambridge 2012, p. 302; idem., Grundrechtsschutz und Unionsbürgerschaft, in: A. Hatje/P.-C. Müller-Graff (eds.), Enzyklopädie Europarecht, vol. 1: Europäisches Organisations- und Verfassungsrecht, Baden-Baden 2014, § 8; idem., Keine Sozialleistungen für nichterwerbstätige Unionsbürger? Zur begrenzten Tragweite des Urteils des EuGH in der Rs. Dano vom 11.11.2014, in: NVwZ 2014, p. 1628; idem., Consolidating Union Citizenship: Residence and Solidarity Rights for Jobseekers and the Economically Inactive in the Post-Dano Era, in: D. Thym (ed.), Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU, London 2017, p. 171, in detail.*

1| *Frankfurter Allgemeine Zeitung of 10 October 2017, p. 17*

2| *For a detailed account see F. Wollenschläger, Grundfreiheit ohne Markt, Tübingen 2007 (reprint 2017), p. 19 ff.*

3| *For a more detailed account see F. Wollenschläger, Grundfreiheit ohne Markt, Tübingen 2007 (reprint 2017), p. 126 ff.*

4| *ECJ Judgment of 20 September 2001 in Case C-184/99, ECR 2001, I-6193 – Grzelczyk*

5| *Council Directive 93/96/EEC of 29 October 1993 on the Right of Residence for Students (OJ L 317 of 18 December 1993, p. 59)*

6| *See first of all ECJ Judgment of 17 September 2002, Case C-413/99, ECR 2002, I-7091, para. 90 et seq. – Baumbast and R. In terms of the outcome – although not in the dogmatic derivation – there is a similarity with the judgment of 20 September 2001, Case C-184/99, ECR 2001, I-6193, para. 37 et seq. – Grzelczyk. Here the ECJ undertook a teleological reduction of the conditions for residence in view of a certain solidarity between the Member States required by the Directive but dispensed with a proportionality test. For a more detailed account of the development of the case-law see F. Wollenschläger, Grundfreiheit ohne Markt, Tübingen 2007 (reprint 2017), p. 164 ff.*

7| *ECJ Judgment of 20 September 2001, Case C-184/99, ECR 2001, I-6193, para. 27 et seq. – Grzelczyk. For more on the generalisation of the general prohibition of discrimination and its limits see F. Wollenschläger, Grundfreiheit ohne Markt, Tübingen 2007 (reprint 2017), p. 197 ff.*

8| *K. Hailbronner, Die Unionsbürgerschaft und das Ende rationaler Jurisprudenz durch den EuGH?, NJW 2004, p. 2185*

9| *Here again see F. Wollenschläger, Grundfreiheit ohne Markt, Tübingen 2007 (reprint 2017), pp. 126 ff., 197 ff.*

10| *Corrigendum to Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC,72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158 of 30 April 2004, p. 77, as amended by Regulation [EC] No. 492/2011, OJ L 141 of 27 May 2011, p. 1).*

11| *A certain qualification is contained in the formulation of the condition: Union citizens must "have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence" – my italics.*

12| *On the parameters see Recital 16 Council Directive 2004/38/EC: "As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion…".*

13| *ECJ Judgment of 11 November 2014, Case C-333/13, ECLI:EU:C:2014:2358 – Dano*

14| *See most recently prior to Dano the Judgment of 19 March 2013 in Case C-140/12, ECLI:EU:C:2013:565 – Brey.*

15| *See ECJ Judgment of 15 September 2015, Case C-67/14, ECLI:EU:C:2015:597, recital 52 – Alimanovic; Judgment of 25 February 2016, Case C-299/14, ECLI:EU:C:2016:114, recital 46 – García-Nieto.*

16| *For more detail see F. Wollenschläger, Keine Sozialleistungen für nichterwerbstätige Unionsbürger? Zur begrenzten Tragweite des Urteils des EuGH in der Rs. Dano vom 11.11.2014, in: NVwZ 2014, p. 1628; idem., Consolidating Union Citizenship: Residence and Solidarity Rights for Jobseekers and the Economically Inactive in the post-Dano era, in: D. Thym (ed.), Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU, London 2017, p. 171 (179 ff.), in detail. For a restrictive reading see N. Nic Shuibhne, Limits Rising, Duties Ascending : The Changing Legal Shape of Union Citizenship, CML Rev 52 (2015), p. 889 (913 f.); D. Thym, Anmerkung, NJW 2017, p. 3061 (3061).*

17| *For more on this development see F. Wollenschläger, Consolidating Union Citizenship: Residence and Solidarity Rights for Jobseekers and the Economically Inactive in the post-Dano era, in: D. Thym (ed.), Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU, London 2017, p. 171 in detail.*

18| *ECJ Judgment of 15 September 2015, Case C-67/14, ECLI:EU:C:2015:597, recital 59 ff. – Alimanovic*

19| *ECJ Judgment of 25 February 2016, Case C-299/14, ECLI:EU:C:2016:114, recital 45 ff. – García-Nieto*

20| *See F. Wollenschläger, Consolidating Union Citizenship: Residence and Solidarity Rights for Jobseekers and the Economically Inactive in the post-Dano era, in: D. Thym (ed.), Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU, London 2017, p. 171 (186 f.), in detail.*

21| See also F. Wollenschläger, Grundfreiheit ohne Markt, Tübingen 2007 (reprint 2017), p. 343 ff.

22| F. Wollenschläger, Grundfreiheit ohne Markt, Tübingen 2007 (reprint 2017), p. 27 ff.; idem., Keine Sozialleistungen für nichterwerbstätige Unionsbürger? Zur begrenzten Tragweite des Urteils des EuGH in der Rs. Dano vom 11.11.2014, in: NVwZ 2014, p. 1628 (1631 f.)

23| See F. Wollenschläger, Freizügigkeit, Sozialleistungen und Brexit – hält der Deal?, Europäische Zeitschrift für Wirtschaftsrecht 2016, p. 241.

THE CASE-LAW OF THE COURT OF JUSTICE ON THE SIGNIFICANCE OF UNION CITIZENSHIP FOR THE RIGHT OF RESIDENCE[1]

Prof. Dr Maria Berger

Ladies and gentlemen,

I should like to deal with those aspects of our case-law which do not directly affect access to welfare benefits but definitely concern the residence right of Union citizens.

Foundations in primary and secondary law

For the classification of case-law it is important to emphasise that a distinction must be made between two basic situations. Firstly, the situation in which Union citizens exercise their right to mobility, in which case the primary law provisions in Article 21[2] and 45[3] TFEU apply, as does the secondary law foundation, the Freedom of Movement Directive 2004/38, which is also called the Union Citizens Directive. Secondly, the situation in which Union citizens have not exercised their right to freedom of movement but have remained in their home country and have lodged claims against their own Member State, in which case Article 20(1) TFEU[4] applies but where (regrettably) no secondary law is in place. Here the ECJ relies on direct application of the primary law requirements.

Fundamental statements by the European Court of Justice

I come now to some fundamental statements by the Court which are significant for right of residence issues. Firstly, the regularly reiterated statement to the effect that the purpose of Union citizen status is to constitute the fundamental status of the nationals of the Member States and, mostly in conjunction with it, the statement that every Union citizen can rely on the prohibition of discrimination in all situations falling within the scope of the Treaties. This takes us straight to a limitation explicitly referred to in the judgment in the *Dano* case[5]. Here Article 24(1) of the Freedom of Movement Directive was interpreted to mean that treatment equal to that afforded to nationals is limited to Union citizens to whom the Directive grants a right of residence[6]. This right of residence does not apply in the case of inactive Union citizens who do not have sufficient resources for themselves and their family members.

On the other hand, established case-law is very important in practice for the right of residence, where the right to residence of Union citizens derives directly from Union law and it is immaterial whether confirmation has been furnished by an authority or not. A freedom of movement certificate of the kind that has existed in Germany can have a declaratory effect at best but can never be constitutive for the existence of Union citizenship. This also applies to the negative case. It may be that, despite possession of such a freedom of movement certificate or some similar certificate, there is no right to residence in a Member State[7].

It is also important for the correct classification of our case-law that Directive 2004/38 recognises situations in which a right of residence applies but there is no right of access to welfare benefits[8].

Union citizens and family members as third country nationals

I will now present a few examples from the very extensive case-law on "residence rights of third country nationals deriving from the right of Union citizens".

In the *Singh* case a Latvian citizen was married to a third country national in Ireland. The Latvian citizen and, therefore, Union citizen returned to

her native country where she filed for divorce. The question arose as to whether the as yet non-divorced third country national she left behind still had a right to reside in Ireland pursuant to the Directive. The European Court of Justice decided this was not the case and ruled that the divorce would have had to have been completed while the couple were still in the host country for the then divorced third country national to be able to retain his right of residence[9].

Another case[10] concerned two Dutch citizens, each of whom worked to a varying extent in Belgium and therefore a freedom of movement situation applied. The children could not be supervised by a Union citizen, but only by third country nationals, in one instance by the mother-in-law. The question thus arose as to whether these persons had a right of residence, given that the exercise of the right to freedom of movement of the Union citizen as an employee was contingent upon the third country nationals looking after the children. The ECJ confirmed this right on the grounds that the refusal of a right of residence for the third country nationals could have meant that this would act as a deterrent to the exercise of the freedom of movement of workers.

Let me now provide a striking example of the second group of cases in which Union citizens have not exercised the right to freedom of movement and yet the question still arises of the right to residence for third country nationals with respect to these Union citizens. The *Ruiz Zambrano* case was the first case in respect of which experts say the ECJ crossed the Rubicon, because for the first time the exercise of freedom of movement was not constituted as a condition[11]. In this an example from Belgium the children of two Colombian parents had acquired Belgian citizenship in accordance with Belgian law at the time and were thus Union citizens. A deportation order was served on the Colombian father and he was refused access to the labour market. If the parents had had to leave the country and the still very young children been obliged to emigrate together with their parents from Belgium and thus from the Union as a whole, the core of the Union citizenship of these young Union citizens would have been violated. This led to the father's right of residence and access for him to the labour market.

In this case there was no disputing the dependence of the third country national and of both parents as third country nationals. Similarly, there are cases in which one parent is a Union citizen while the other is a third

country national. The *Chavez Vilchez* case provided a combination of several such constellations. The seminal characteristic of these cases was that the female third country nationals concerned had children fathered by Dutch citizens. The Dutch authorities had served deportation orders on the mothers as third country nationals. The question the ECJ faced here was whether the young Union citizens also had to leave the country, because they were obliged to leave together with their mothers, or whether the Dutch fathers could assume responsibility for their welfare. The ECJ elaborated various criteria on how the situation of mixed parenthood was to be assessed. At all events an examination of the specific case must be undertaken by the national courts[12].

Ending of Union citizens' right of residence

I come on now to the question of when Union citizens' right of residence ends. The right to permanent residence after five years means that deportation is possible on serious grounds of public order or security, but after ten years only on imperative grounds of public security. Account must also be taken here of various other criteria[13]. A quite extensive case-law with regard to the terms 'public security' and 'public order' has arisen in connection with these provisions.

Of particular interest here is the *Tsakouridis* case. A Greek citizen who was born and brought up in Germany committed a criminal offence and had a deportation order served on him. This envisaged him being sent to Greece. The ECJ uses the term 'public security' to cover serious forms of organised drug dealing. Here too, however, an examination of the specific circumstances must be conducted[14].

Union citizenship and criminal law

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had a deportation order served on him. This envisaged him being sent to Greece. The ECJ uses the term 'public security' to cover serious forms of organised drug dealing. Here too, however, an examination of the specific circumstances must be conducted[14].

Union citizenship and criminal law

Another aspect which can arise from Union citizenship is reflected in criminal law and in the handling of the European arrest warrant. The *Petruhin* case confronted us with a very interesting constellation in Latvia. The Latvian legal system, like many legal systems among our Member States, provides that criminal prosecution can only be undertaken in the case of a Latvian citizen[15]. In this instance an Estonian citizen resident in Latvia was to be extradited from there to a third country. This is a situation not governed by the European Arrest Warrant Framework Decision. The question therefore arose as to whether the Estonian citizen in Latvia was to be treated like a Latvian citizen in connection with his extradition to a third country, since he was entitled to equal treatment as a Union citizen. The Court of Justice confirmed this and noted that his extradition to a third country would constitute a restriction of freedom of movement. It said that unequal treatment of Union citizens of one's own country and those of another country was justified as a matter of principle for the purpose of criminal prosecution. In this constellation, however, there was the possibility of less restrictive measures being taken. Use can be made of the opportunities for an exchange of information between the Member States, and Latvia was to offer Estonia the opportunity to issue a European arrest warrant so that the Estonian citizen might be subject to criminal prosecution in his native country. In a pending case the issue is that of an extradition to a third country which has already taken place and the resulting possibility of state liability[16].

The future of Union citizenship

Finally, a few general remarks on Union citizenship. It is entirely up to the Member States to decide who is a Union citizen. They determine the nature of their citizenship policy: *ius sanguinis*, *ius soli*, and to an increasing extent also *ius pecuniae*. Member States decide who acquires citizenship. They are also largely autonomous in withdrawing Union citizenship – there is only one minor restriction resulting from our case-law[17]. As regards the right of residence, there is also the concept of

national order and security which, while it is subject to case-law control by the ECJ, is nonetheless largely determined by the Member States. The Member States can define what they mean by national security and public order. There is no really uniform Union law criterion. This can lead to paradoxical situations, such as when Great Britain imposes an entry ban on a French Algerian citizen and he is not allowed to enter the United Kingdom because of his suspected membership of a terrorist organisation. However, he is allowed to stay in France. Is this really the solution to the problem or might this person not also pose a threat from France? This is just one example of how the concept of a purely national approach to public order and security is running into more and more problems. It is also becoming increasingly difficult to distinguish between the two terms: what is still a public order matter and what issue affects public security? What are simple grounds, what are serious grounds and what are imperative grounds?

In legal terms it is not really possible to say that we will soon arrive at a concept of European public order and security (European "ordre public")[18]. At the level of case-law the principle of loyal cooperation (Article 4(3) TFEU) could help to develop mutually supportive perspectives among the Member States and to roll back the "St. Florian principle". I don't know whether you are familiar with this principle in Germany. I come from the region in which St. Florian allegedly lived and worked and there it is interpreted as meaning: "Saint Florian, spare my house and set fire to another one" (roughly equivalent to the NIMBY principle). That is more or less the way in which this principle of public order and security works as interpreted from a purely national standpoint.

The "eurocrimes" listed in Article 83(1) TFEU represent a second approach on which the development of a European "ordre public" might be based.

Thank you for your attention.

1| Transcript of the lecture with footnotes added afterwards.

2| Article 21(1) TFEU: "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

3| *Article 45(1) TFEU: "Freedom of movement for workers shall be secured within the Union." (2): "Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment."*

4| *Article 20(1) TFEU: "Citizenship of the Union is hereby established...." (2): "Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia, the right to move and reside freely within the territory of the Member States..."*

5| *Union citizen status is intended to be the fundamental status of nationals of the Member States. (Dano, C–333/13, recital 58) Every Union citizen may therefore rely on the prohibition of discrimination on grounds of nationality laid down in Article 18 TFEU in all situations falling within the scope ratione materiae of EU law. (Dano, C–333/13, recital 59).*

6| *Dano, C–333/13, recital 72*

7| *Dias, C–325/09*

8| *In the first three months, search for employment following prior occupational activity (Alimanovic, C–67/14, recital 57f, Garcia-Nieto, C–299/14, recital 42).*

9| *Singh,C–218/14, recital 59 ff., Secretary of State, C–115/15, recital 40 ff.*

10| *Article 45 TFEU must be interpreted as conferring on a third country national who is the family member of a Union citizen a derived right of residence in the Member State of which that citizen is a national, where the citizen resides in that Member State but regularly travels to another Member State as a worker within the meaning of that provision, if the refusal to grant such a right of residence discourages the worker from effectively exercising his rights under Article 45 TFEU (S., C–457/12, recital 46).*

11| *In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect. It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents (Ruiz Zambrano, C-34/09, recital 42ff.).*

12| *For an assessment in the case of mixed parenthood these would include inter alia: an examination of the individual case as to which parent actually provides care; the dependency of the child on the third country national parent; the suitability of the Union citizen parent to provide care for the child alone (Chavez Vilchez, C–133/15, recital 68 ff.).*

13| *Directive 2004/38: Account must be taken here of length of residence, age, state of health, family and economic situation, social and cultural integration, links with the country of origin.*

14| *The concept of 'imperative grounds of public security' presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness; public security covers both a Member State's internal and its external security: functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations. Individual case study: the person concerned must represent a genuine and present threat, prospects of social rehabilitation and other circumstances must be taken into consideration (Tsakouridis, C–145/09, recital 41 ff.).*

15| Petruhin case, C–182/15
16| Pisciotti case, C–191/16
17| Rottmann case, C–135/08
18| For more detail see Berger M., Die Grenzen der Unionsbürgerschaft, in EuR, Beiheft 1/2015, 195.

GREETINGS PRECEDING THE DINNER SPEECH

Thomas Köhler

Ladies and gentlemen,

The Legal Policy Conference in Berlin is being held for the twelfth time – and there was an even longer run-up to it far away from Berlin, in Bonn – so it is quite justifiable to talk of a certain tradition. We have experienced that for ourselves in the course of the day.

The purpose of the Konrad-Adenauer-Stiftung in staging this conference is not just to keep abreast of current legal developments. At the end of the day the foundation has an educational mandate in respect of the public at large. And we naturally wish to offer forums which facilitate an exchange between legal experts, legal practice and practical legal policy.

Europe and Germany are confronted by two fundamental developments which have absorbed our attention both directly and indirectly here today and will continue to do so in the future. One is the rise of populist forces and populist thinking – and by that I mean not just in the countries mentioned very often by name today, but in a whole range of European countries including Germany – in which these forces, though not yet in the majority, have already achieved notable election successes. Secondly, we are witness to a wide-ranging scepticism regarding the way in which we organise and live our lives

in Europe. This scepticism is targeted not at the ideas and objectives but at the reality of Europe as it is encountered in everyday practice. That is an issue we must address.

In the public political debate in Germany, reference to fundamental constitutional principles and procedures is now made much less frequently than was the case just a few years or even decades ago. A current example – and an alarming symptom of this development – was provided by the recent federal election campaign. In the major television programmes, leading politicians were supposed to demonstrate their proximity to the public and voters at large by being confronted with individuals‘ personal problems to which they were obliged to find an appropriate solution – in other words, without any detailed account being taken of administrative procedures or legal principles.

Further instances were provided by the TV debate between the leading candidates in Germany as well as in various town hall meetings. This is a development we must keep a critical eye on, because such ‘exaggerated petitioning’ is hardly suited to highlighting the special value of the rule of law. On the contrary, it shows that the educational mandate I mentioned a moment ago no longer relates – from our foundation’s point of view – just to the export of constitutional principles to the world at large, but must increasingly also have its sights fixed on the domestic arena.

Thinking in terms of fundamental constitutional principles is elementary. Populists have an easy ride if the population is largely of the erroneous view that the purpose of the legal system is essentially to provide subsequent legitimisation for largely freely made political or entrepreneurial decisions. In this connection I would draw your attention to the debate on the legal appraisal in Europe and the USA of the financial crisis ten years ago and the issue of guilt associated with it. Surveys in Germany tell us that the population places a great deal of trust in the judiciary, while at the same time people say that the legal system offers better prospects for those with money, power and influence. This is a dangerous development we must tackle.

On the other hand, legally correct action and compelling legal argumentation in the public arena can also help to weaken populist currents in Germany and Europe. It is, therefore, of the utmost importance that we should not form a closed circle here but should try – as you are all doing

– to put forward your arguments to the public at large. This explains the need for intelligent interaction between prudent judgments handed down by the European Court of Justice and the Federal Court of Justice in respect of the forthcoming decisions on the activities of the European Central Bank.

We have learned a lot today about the readiness to engage in dialogue and about a discursive struggle – to which there is nothing I need to add because we can see that progress is being made in this respect. I believe it is important to ensure that the fundamental principles and grounds for decisions are adequately elaborated and presented to the public at large.

If sections of the population already sense a loss of control; if sections of the population respond to crude conspiracy theories; if sections of the population – incorrectly – see political and judicial decisions as no more than a farce, then understandable, systematic, legal arguments are more important than ever for interested lay people.

Hence I am all the more pleased that President Lenaerts will take the opportunity here today to examine in detail the core task of the European Court of Justice as set out in the Treaties, which is to ensure that "the observance of the law in the interpretation and application of the Treaties continues to be upheld." The words "continues to be upheld" are your own – I hope you will have no objection to me quoting them here. We have seen from your contributions during the day how vigorously you go about that task and so we look forward now to a further substantial contribution.

The work of the European Court of Justice is of considerable significance not just for legal developments in Europe. It can also play a major role in acceptance of the European Union by its citizens.

Citizens can demand that politicians demonstrate compliance and contractual fidelity. At the same time they can insist that politicians should find ways within the existing Treaties of resolving problems that demand too much of nation-states – for instance in handling the refugee problem. If further development of the Treaties is currently an unrealistic prospect, then we must work within the existing Treaties to ensure a more effective European Union.

Let me take this opportunity to thank all the speakers, chairpersons and conference participants for the very committed and in-depth debates in both the panels this afternoon. I feel sure we have all benefited from the food for thought presented during the day's discussions.

We have the opportunity over dinner to combine what we have learned so far with what Professor Lenaerts has to tell us now. I wish us all a very enjoyable and rewarding evening.

Thank you.

DINNER SPEECH
THE VALUES OF THE EUROPEAN UNION IN THE CASE-LAW OF THE COURT OF JUSTICE

Prof. Dr Koen Lenaerts[1]

It is a great pleasure and an honour, but a far from easy task, to round off this fascinating afternoon as the closing speaker and to contribute a few new thoughts.

May I take this opportunity to express my heartfelt thanks to those responsible at the Konrad-Adenauer-Stiftung for the kind invitation to attend this conference. I really appreciate it.

Having said that, I must add straightaway that this invitation is a two-edged sword.

Is it possible as President to talk about the contribution of the Court of Justice to mastering the challenges currently facing the European Union (EU), as the title of the conference suggests? And can you really do so without politicising the jurisdiction of the Union in these tumultuous times and the great challenges they present?

Well, I think it is possible. And this contribution can be rendered objective in particular by stepping back a little from the challenges of the present.

But let me explain what I mean.

As you all know, the European Union is subject to the principle of conferral stated in Article 5(1) and (2) TEU. Like the other bodies of the EU, therefore, the Court of Justice is bound to act exclusively within the framework of the competences invested in it by the Member States in accordance with the Treaties.

Pursuant to Article 19(3) TEU and as provided for in the Treaties, the Court of Justice (a) rules on actions brought by a Member State, an institution or a natural or legal person; b) gives preliminary rulings on the interpretation of Union law or the validity of acts adopted by the institutions and c) rules in other cases provided for in the Treaties.

Following the principal lines of the common constitutional traditions of the Member States, Union jurisdiction thus assumes the role of a *third power controlling* compliance with the law on the part of the executive and the legislative.[2]

A key prerequisite for the contribution of the Court of Justice to solving the challenges currently facing the EU is apparent from the functional enabling rule. The Court of Justice can only ever become active in response to actions, claims or submissions by third parties and never on its own initiative. As a judicial body, the Court of Justice therefore does not pursue any political agenda with a view to actively shaping the values of the EU.

In normative terms the Court of Justice is charged, within the scope of its responsibilities pursuant to sentence 2 of Article 19(1) TEU, with observing the law in the interpretation and application of the Treaties. This sentence is of great import. The obligation it contains to uphold the law and to ensure effective legal protection, which extends far beyond the scope of the jurisdiction, constitutes quintessential *recognition of the lawfulness of the Union*.[3] This lawfulness of the Union is its compass, indeed its source of orientation in these times of major political challenges.

Once again the canon of values laid out in Article 2 TEU represents the yardstick for the foundation of this *lawfulness* of the European Union.

As you all know, this states that "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

This canon is not a relic from the time of the founding treaties. On the contrary, the values contained in Article 2 TEU are the expression of a historically motivated, collective learning process on the part of Member States and the European Union which is designed to ensure a minimum homogeneity of standards in the establishment of the Common Market.[4]

The deepening of European integration beyond the iron and steel industries further underlined the significance of this bedrock of values and led to its gradual inclusion in the Treaties.[5] Interestingly enough, the enshrining of the foundations of the Union of values in Article 2 TEU ahead of the objectives of the European Union in Article 3 TEU reflects the change within the Union and the move towards an identity-building community of values both internally and externally.[6]

In this spirit Article 2 TEU expresses the agreed fundamental attitudes of the members of the European community. In the light of present-day challenges, in particular, they serve as legally binding reference standards for the common self-assurance of the European Union. The practical purpose of the normative substance is to simplify coordination between the Member States, to secure the foundations of the EU's legitimisation and to ensure the smooth functioning of the Union.[7]

At a time in which the volume of the discussion about the future of the European Union, not only on the part of some governments of European Member States but also within the societies of the Member States, has occasionally drowned out the reasons for its establishment, the values set out in Article 2 TEU highlight the distinct value of Europeanization. This value is reinforced by the continuous feedback to the national values of the Member States as well as by the clause on national identities in Article 4(2) TEU.

However, the values enshrined in Article 2 TEU are of necessity abstract and vague, which is why their normative substance is enriched with

material content by the context-related interpretations of the Court of Justice and, indeed, must also be consolidated every now and then.

Hence the case-law of the Court of Justice has significantly enhanced not only the individual value principles, but also the formation of a European *system of values* as a whole.[8] I will now look in more detail at the contribution of the Court of Justice and refer by way of example to human dignity, democracy and the rule of law. Even as abstract values they are an exemplary illustration of the normative foundation for resolving the challenges currently confronting the European Union.

Respect for human dignity

The first value mentioned in sentence 1 of Article 2 TEU is respect for human dignity. The provision thus formulates not only human dignity as a value, but also the obligation to respect it. The norm thus reflects the fundamental decision of the Union, in line with the Charter of Fundamental Rights of the European Union, to base European protection of fundamental rights on human dignity as a fundamental value and to profess its faith in man as an end in himself.[9]

Infringements, therefore, always constitute a violation of human dignity, which has been expressly recognised as an unconditional fundamental right ever since the decision of the Court of Justice in the case of *The Netherlands v Parliament and Council*.[10] In this instance the Court of Justice had to decide on the lawfulness of the Directive on Legal Protection of Biotechnological Inventions. The Netherlands was of the view that the patentability of isolated parts of the human body, in particular, constituted an instrumentalisation of living human material, which was a violation of human dignity. It therefore demanded that this patentability be annulled. While the judgment of the Court of Justice confirmed in principle the value of human dignity as a general legal principle of Union law, it could not establish any violation in the case at hand since, according to the provisions of the Directive "the human body at the various stages of its formation and development cannot constitute a patentable invention."[11]

The Court of Justice also concerned itself with the value of human dignity in the context of the 2004 *Omega* decision, which is particularly well known in Germany.[12] In this instance the Court of Justice was obliged to

rule on whether Union law, in the form of the free movement of goods and services, conflicted with a national ban on the simulation of acts of killing in an amusement arcade by means of laser weapons. In its decision the Court of Justice established that the national prohibition resulting from a violation of human dignity, which is protected by the constitution, could not be regarded as a measure which unjustifiably infringed the free movement of services, since "by prohibiting only the variant of the laser game, the object of which is to fire on human targets and thus 'play at killing' people the contested order did not go beyond what is necessary in order to attain the objective pursued by the competent national authorities."[13]

Moreover, it is apparent from the more recent decision of the Grand Chamber of the Court in the *International Stem Cell Corporation*[14] case that respect for human dignity constitutes a criterion of Union law which must be strictly observed by the Union legislative. In this specific case, which again concerned the interpretation of the Directive on Legal Protection of Biotechnological Inventions, the Union legislator was mandated by the Court of Justice, in connection with the protection of the human embryo, to "exclude any possibility of patentability where respect for human dignity could thereby be affected, (...) [it follows that] the concept of 'human embryo' (…) must be understood in a wide sense."[15]

Democracy

In addition, Article 2 TEU states the fundamental value of democracy, which was described by the Court of Justice in the decision on *Kadi and Al Barakaat* as "a foundation of the Union".[16]

The essence of the European democracy principle is specified in further detail in the Lisbon Treaty: Article 10(2) TEU explicitly ties the representative democracy of the European Union to dual legitimisation conditions. Accordingly, the operating principle of the democratic legitimisation of the European exercise of power rests on the connection between a Union citizenship strand of legitimacy (via the European Parliament) and an indirect citizenship strand of legitimacy (via the national parliaments).[17]

In their dual role as national and Union citizens, therefore, citizens make sure that the decisions of the different political representative bodies in the European Union, of the national parliaments and of the European Par-

liament are connected with each other in their functions in order to ensure a democratic link in the legitimacy chains with the individualisable citizen.[18]

Electoral law is thus of crucial significance for the exercise of citizens' dual role as national and Union citizens. Article 10(3) TEU grants all citizens the right to participate in the democratic life of the Union.

This right is guaranteed primarily by means of the elections to the European Parliament, whose elected deputies are in turn entrusted with representing the interests of the Union citizens.

Permanent disenfranchisement of the right to vote in elections to the European Parliament was the subject of the *Delvigne* judgment of the Court, which has become significant in particular with regard to the normative connection between Union citizenship and the basic democratic structure of the European Union.[19]

In this case the Court had been presented with a question requiring a preliminary ruling on whether a Member State can provide for a general, unlimited and automatic denial of the exercise of civil and political rights, including revocation of the right of Union citizens to vote in elections to the European Parliament.

In the national main proceedings Mr. Delvigne, a French citizen, had been convicted by final judgment in France and sentenced to twelve years in prison for having committed a serious crime, whereupon he was automatically deprived for life of his civil rights. Despite the reform of the penal code, the loss of his civil rights remained in place, since it rested on a conviction passed by final judgment before the new penal code came into force. Mr. Delvigne is therefore no longer entitled to vote in France and, by extension, in elections to the European Parliament, which explains why the issue under review was the right to vote of a Union citizen in a Member State whose citizenship he possesses.

In elections to the European Parliament the Member States must make sure that members of the European Parliament are chosen in general, free, direct and secret elections. National legislation stipulating that Union citizens legally convicted for committing an offence are not en-

titled to vote in elections to the European Union must therefore be treated as an implementation of Union law pursuant to Article 51(1) of the Charter.

In its judgment the Court noted that the loss of Mr. Delvigne's right to vote constituted a fundamental limitation on the right of Union citizens to vote in elections to the European Parliament, which is guaranteed by the Charter of Basic Rights. However, it also conceded proportionate restrictions in the exercise of the right to vote within the meaning of Article 52(1) of the Charter, provided these are prescribed by law to ensure respect for the substance of the rights and freedoms and to comply with the principle of proportionality.

In this particular case the Court of Justice, having given the matter due consideration, deemed the loss of the right to vote in accordance with French legislation to be proportionate, since it took due account of the type and seriousness of the offence and the length of the sentence. In particular, the loss applies only to persons who have been convicted for a crime punishable by a term of imprisonment between five years and life. Moreover, French law specifies that it is possible for a person in the situation of Mr. Delvigne to seek and achieve an annulment of this loss of civil rights.

Rule of law

The rule of law, as a requisite element of democratic communities, is also a fundamental European value. While there is no uniform concept of the rule of law that can be drawn on in all the legal systems of the Members States, formal and material conditions for the legality of the exercise of power by the authorities can be combined under the term 'rule of law' in Article 2 TEU. Formal rule of law is guaranteed first and foremost by the principle of the division of powers, regulation by formal law and the requirement for orderly procedures, while material rule of law is guaranteed primarily by respect for fundamental rights and the proportionality principle.[20]

Since 1952 the Court of Justice has consistently derived *general legal principles* such as the protection of legitimate expectations[21], non-retroactivity[22], the principle of legal certainty[23] and forms of a legal protection

guarantee[24] from the principle of the rule of law. It has thus considerably influenced the development of a community which "constitutes a new legal order of international law"[25] on the road to a "Union based on the rule of law"[26].

This momentum propelled by legal certainty and control has always been an inherent feature of European integration. As far back as the *Les Verts* case the Court explained in detail that "the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty."[27] The Court of Justice consequently decided in the *Unión de Pequeños Agricultores* case that it is "for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection."[28]

Therefore, the effectiveness of a judicial legal protection system is also dependent in the European Union on the general possibility of initiating orders in interim legal proceedings. In the case of *The Queen v Secretary of State for Transport* the Court of Justice ruled that "the full effectiveness of Community law would be (...) impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law."[29]

Furthermore, in the light of Article 2 TEU, the independence of the courts is an essential prerequisite for the effectiveness of judicial – and interim – legal protection.[30] This pillar of the rule of law nurtures both the principle of mutual trust between the Member States as well as the principle of mutual recognition of observance by all the other Member States of Union law and, in particular, of the fundamental rights enshrined therein in the interests of legal certainty within the Union. Opinion 2/13 of the Court of Justice says that the basic premise of the legal structure is that every Member State shares a set of common values with all the other Member States – and recognises that it shares these values with them – and thus unconditionally implies and justifies the existence of mutual trust between the Member States in the recognition of these values and thus in the observance of the law of the Union.[31]

This mutual trust and recognition among independent judiciaries of the Member States thus forms the nucleus of the DNA of the legal structure of the Union. Hence it is all the more important at a conference such as this to recall the importance of this fundamental constitutional principle, which in a number of Member States is currently being undermined by the ongoing politicisation of the national judicial system[32] – and is thus structurally destabilising the European set of values set out in Article 2 TEU, to respect for which the Member States are not only contractually bound, but which is of the utmost importance as a point of reference in addressing the current challenges facing the EU.

In the past the Court of Justice has dedicated itself in its case-law to ensuring recognition of this point of reference by "respect for the law in the interpretation and application of the Treaties" within the meaning of sentence 2 of Article 19(1) TEU and it will continue to do so in the future.

Thank you for your attention.

1| *President of the Court of Justice of the European Union. His contribution is based on the talk he gave at the 12th Berlin Legal Policy Conference held by the Konrad-Adenauer-Stiftung and is published here by kind permission of Europäische Grundrechte-Zeitschrift, in which it appeared in the lecture version (EuGRZ 2017, pp. 639-642). It reflects solely the author's personal opinion.*
2| *Calliess/Ruffert (eds.), EUV/AEUV-Kommentar, 5th edition, 2016, Art. 19 EUV, recital 4*
3| *Ibid., recital 1*
4| *Calliess/Ruffert (eds.), EUV/AEUV-Kommentar, 5th edition, 2016, Art. 19 TEU, recital 1*
5| *See Calliess, Europa als Wertegemeinschaft – Integration und Identität durch europäisches Verfassungsrecht?, JuristenZeitung 2004, p. 1038.*
6| *See Mandry, Europa als Wertegemeinschaft eine theologisch-ethische Studie zum politischen Selbstverständnis der Europäischen Union, 2009, p. 49 ff.*
7| *Calliess/Ruffert (eds.), EUV/AEUV-Kommentar, 5th edition 2016, Art. 2 EUV, recital 7*
8| *For the concept of the system of values see Calliess, Europa als Wertegemeinschaft – Integration und Identität durch europäisches Verfassungsrecht?, JuristenZeitung 2004, p. 1042.*
9| *See Grabitz/Hilf/Nettesheim (eds.), Das Recht der Europäischen Union, 60. Ergänzungslieferung Oktober 2016, Art. 2 EUV, recital of 9 October 2001, C-377/98, Netherlands/Commission and Council, EU:C:2001:523, recital 70.*
10| *Ibid., recital 71*
11| *Judgment of 14 October 2004, C-36/02, Omega Spielhallen- und Automatenaufstellungs GmbH, EU:C:2004:61*
12| *Ibid. recital 39*
13| *Judgment of 18 December 2014, C-364/13, International Stem Cell Corporation, EU:C:2014:24*
14| *Ibid., recital 24*
15| *Judgment of 3 September 2008, verb. Cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat, EU:C:2008:461, recital 303; introduction Lenaerts, 'The principle of democracy in the case law of The European Court of Justice' (2013) 62 International and Comparative Law Quarterly 271, p. 300*
16| *Calliess/Hartmann, Zur Demokratie in Europa: Unionsbürgerschaft und europäische Öffentlichkeit, 2014, p. 81*
17| *Ibid., p. 83 f.*
18| *Judgment of 6 October 2015, C-650/13, Delvigne, EU:C:2015:648*
19| *Calliess/Ruffert (eds.), EUV/AEUV-Kommentar, 5. Aufl., 2016, Art. 2 EUV, recital 25*
20| *Judgment of 17 April 1997, C-90/95 P, de Compte v Parliament, EU-:C:1997:198, recital 35 ff.*
21| *Judgment of 25 January 1979, C-98/78, Racke v Hauptzollamt Mainz, EU-:C:1979:14, recital 20*
22| *Judgment of 9 July 1981, case 169/80, Gondrand und Garancini, EU-:C:1981:171, recital 17*
23| *Judgment of 15 May 1986, case 222/84, Johnston v Chief Constable of the Royal Ulster Constabulary, EU:C:1986:206, recital 18 f.*
24| *Judgment of 5 February 1963, case 26/62, van Gend & Loos, EU:C:1963:1, p. 25*
25| *See most recently the judgment of 6 October 2015, C-362/14, Schrems, EU-:C:2015:650, recital 60.*
26| *Judgment of 23 April 1986, case 294/83, Les Verts, EU:C:1986:166, recital 23*

27| Judgment of 25 July 2002, C-50/00 P, Unión de Pequeños Agricultores/Conseil, EU:C:2002:462, recital 41

28| Judgment of 19 June 1990, C- 213/89, The Queen / Secretary of State for Transport, ex parte Factortame, EU:C:1990:257, recital 21

29| Judgment of 17 September 1997, C-54/96, Dorsch Consult Ingenieurs-gesellschaft, EU:C:1997:413, recital 23

30| Opinion 2/13 of 18 December 2014, EU:C:2014:2454, recital 168.

31| See the Third Recommendation of 26 July 2017 regarding the rule of law in Poland in addition to the Recommendations (EU) 2016/1374 and (EU) 2017/146, KOM (2017) 5320 final.

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