

# THE EVOLUTION OF THE EUROPEAN LEGAL SYSTEM: THE EUROPEAN COURT OF JUSTICE'S ROLE IN THE HARMONIZATION OF LAWS

*Yvonne N. Gierczyk\**

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*"We must build a United States of Europe." Winston Churchill!*

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\* J.D. candidate, May 2006, University of Houston Law Center, B.A., Trinity University, 2002. I want to thank Professor Zamora for all of his encouragement.

1. Winston Churchill, Speech at Zurich University (Sept. 1946); See GEORGE A. BERMAN ET AL.,

## I. INTRODUCTION

After the dust settled from World War II, Winston Churchill declared the need for Europe to integrate economically and politically. Integration promised not only peace, but the means by which Europe could remain a world power. The European Union (EU) is considered by many the answer to Europe's post-war condition.<sup>2</sup> The creation of a common market in 1992, a single monetary unit in 1999, and the latest induction of Eastern European countries in 2004 demonstrate the success of the EU.<sup>3</sup> With the impending ratification of the Treaty Establishing a Constitution for Europe,<sup>4</sup> it is clear that the European Union has evolved from a mere free trade agreement<sup>5</sup> to an economic and political union.<sup>6</sup> Fundamental to the formation of an integrated Europe has been the creation of a common legal system.<sup>7</sup>

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CASES AND MATERIALS ON EUROPEAN UNION LAW 4 (West Group 2d ed. 2002) (1993) (giving context to Churchill's speech); See also JOHN CHARMLEY, CHURCHILL'S GRAND ALLIANCE 248 (1995).

2. *A Divided Union*, ECONOMIST, Sept. 25, 2004, at 14 [hereinafter "*A Divided Union*"].
3. JOHN VAN OUDENAREN, UNITING EUROPE: AN INTRODUCTION TO THE EUROPEAN UNION 11 (Rowman & Littlefield, Inc. 2d ed. 2005) [hereinafter UNITING EUROPE]; see generally BERMANN, *supra* note 1; The EU at a Glance, [http://www.europa.eu.int/abc/index\\_en.htm](http://www.europa.eu.int/abc/index_en.htm) (last visited Feb. 13, 2005) ("[The EU] has helped to raise living standards, built a single Europe-wide market, launched the single European currency, the euro, and strengthened Europe's voice in the world.").
4. See generally Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) 1; see also *A Divided Union*, *supra* note 2, at 10.
5. The seeds of the EU were planted in 1952 with the creation of the European Coal and Steel Treaty (ECSC). BERMANN, *supra* note 1, at 5. France, Germany, Italy, and the three Benelux countries designed the ECSC Treaty to ensure that Germany would not develop a supply of weapons. *Id.*
6. See Reinhard Zimmermann, *The "Europeanization" of Private Law Within the European Community and the Reemergence of a European Legal Science*, 1 COLUM. J. EUR. L. 63, 73 (1995) (referring to the movement towards integration with the passage of the Single European Act, the Maastrich Treaty, and stating "[o]bviously, therefore, the political will exists to advance the process of European integration on an economic, political, and cultural level; and it appears to be perfectly appropriate to facilitate this process by striving towards legal unity."); see also CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS*, 6 (2004) ("The history of the EU lends support for neo-functionalism as an explanation for the integration process – in less than fifty years the EU has moved from being merely a coal and steel community to now a major economic and monetary union.").
7. See Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 121 (2001) ("The feasibility of a coherent European economic system inevitably depends on a coherent European legal order," quoting Eric Stein, *Assimilation of National Laws as a Function of European Integration*, 58 AM. J. INT'L L. 1, 29 (1964)); see also George Tridimas & Takis Tridimas, *National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure*, 24 INT'L REV. L. & ECON. 125, 127 (2004) ("Uniform interpretation of law reduces distortions of competition and promotes economic efficiency");

Historical experience has demonstrated that a common market or free trade area cannot operate smoothly without certain generally recognized rules and procedures, without

The task of unifying European nations with different languages, legal systems, and sordid pasts represents a significant hurdle to achieving harmonization of laws.<sup>8</sup> The European Court of Justice (ECJ) through Article 234 (ex Article 177) of the Treaty of Rome,<sup>9</sup> the preliminary ruling procedure, has been the main facilitator in the legal integration of Europe.<sup>10</sup> Although grounded in the civil tradition, the ECJ's interpretation of Article 234 bestows its decisions with the power of precedents. Thus, by borrowing from the common law tradition, the ECJ has created a system of integration by adjudication. This comment seeks to illustrate the evolution of the European legal system as a part of the evolution of the European Union, and the ECJ's key role in the harmonization of laws via Article 234.

Part II provides a background on the ECJ. Part III introduces Article 234 and explains how the preliminary ruling system functions. Part IV analyzes the ECJ's expansion of jurisdiction by giving its decisions the power of precedent through Article 234. Part V addresses how Member States allowed for this expansion of power. Part VI concludes by discussing the evolution and harmonization of the European legal system as part of globalization.

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a core of common legal institutions and convictions . . . . Legal unification has also always been both stimulus for and consequence of political unification, and as a cultural phenomenon it serves to strengthen the feeling of provincial, national or supranational identity.

Zimmermann, *supra* note 6, at 73; Geoffrey Garret, R. Daniel Kelemen & Heiner Schulz, *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52 INT'L ORG. 149 (1998).

8. See UNITING EUROPE, *supra* note 3, at 15 (stating that "the EU of today has twenty-five members and twenty official languages using two alphabets, the Greek and Roman. Economically, culturally, and socially it is far more diverse than the Carolingian Europe of 1957."); see also Curran, *supra* note 7, at 121. ("Scratching the surface of the European Union's legal system might bring into view a juridical Tower of Babel, due to the clash of discordant legal cultures between the two principal, divergent legal systems coexisting in the European Union: namely, the common-law and civil-law systems."); see also Zimmermann, *supra* note 6, at 65 (noting that "for the past two hundred years or so there have been, in principle, as many legal systems (and, consequently, legal sciences) in Europe as there are nation states.").

9. Treaty Establishing the European Community, Feb. 7 1992, U.J. (C224) I (1992), [1992] 3 C.M.L.R. 573 (1992) [hereinafter EEC Treaty].

10. Francis G. Jacobs, *Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice*, 38 TEX. INT'L L.J. 547, 550 (2003) ("It is probably true to say that, over the first thirty years of the EEC, the case law of the ECJ made a more significant contribution to European integration than any other development over that period."); see also Matthew T. King, Comment, *Towards a Practical Convergence: The Dynamic Uses of Judicial Advice in United States Federal Courts and the Court of Justice of the European Communities*, 63 U. PITT. L. REV. 703, 723 (2002) ("Article 234 (then 177) 'is essential for the preservation of the community character of the law established by the treaty and has the object of ensuring that in all circumstances this law is the same in all states of the Community,'" quoting the ECJ's opinion in Case 166/73, *Rheinmuhlen-Dusseldorf v. Einfuhr*, 1974 E.C.R. 33)).

## II. THE EUROPEAN COURT OF JUSTICE

The Treaty of Rome created the ECJ in 1957 to resolve disputes concerning the European Community (EC) Treaties and assist national courts in the uniform application and interpretation of EU laws.<sup>11</sup> The ECJ is charged with the duty of interpreting treaties and making sure that Member States comply with EU law.<sup>12</sup> “The over arching obligation of the ECJ is, in this view, to pursue the primary objective of the EC Treaty as set forth in the Preamble: ‘an ever closer union among the peoples of Europe.’”<sup>13</sup>

The ECJ holds four powers:

- 1) judicial review;
- 2) answering preliminary questions under Article 234;
- 3) answering administrative questions regarding EU personnel;  
and
- 4) reviewing decisions of the Court of First Instance (CFI).<sup>14</sup>

This discussion focuses on the second power, the preliminary ruling procedure under Article 234, which represents the majority of the ECJ’s work.<sup>15</sup>

While it might seem natural to draw an analogy that the ECJ is to the EU what the Supreme Court is to the United States, “the Treaty of Rome did not provide for the establishment of a Supreme Court.”<sup>16</sup> Unlike the United States Supreme Court, which hears appeals from lower courts, the ECJ does not hear appeals from lower courts because there are no lower courts, with the exception

11. Kevin Andrew Swartz, Note, *Powerful, Unique, and Anonymous: The European Court of Justice and Its Continuing Impact on the Formation of the European Community*, 3 S. CAL. INTERDISC. L.J. 687, 691 (1994).

12. See BERMANN, *supra* note 1, at 58 (“Article 220 (ex 164) of the EC Treaty gives the Court the responsibility for ‘ensur[ing] that the interpretation and application of this Treaty the law is observed.’”).

13. Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 701 (1999) (quoting preamble of EEC Treaty: “The internal market is the cornerstone of that ‘ever closer union,’ and together they constitute the very purpose—the ‘telos’—of the EC.”).

14. See generally BERMANN, *supra* note 1, at 58–71 (giving a detailed account of the ECJ facts, such as terms of judges, the composition of the court, and the Court of First Instance (CFI)). The CFI was created in 1988 to deal with the overload in the ECJ’s docket). *Id.* at 65. It primarily hears cases dealing with private litigants, whereas the ECJ handles cases between Member States and EU institutions. *Id.* at 66. See also Justice Breyer, *Constitutionalism, Privatization, and Globalization: Changing Relationships Among European Constitutional Courts*, 21 CARDOZO L. REV. 1045, 1049–1051 (2000) (giving a simple explanation and background to the ECJ and how it works).

15. Breyer, *supra* note 14, at 1049; see also BERMANN *supra* note 1, at 352 (noting that referrals compose about half of the ECJ’s case docket).

16. Tridimas, *supra* note 7.

of the CFI.<sup>17</sup> “This is hardly surprising since the Community was not born as a federation but rather as a *sui generis* supranational entity with an open-ended integrative potential.”<sup>18</sup>

Because the other EC institutions exercise powers of execution and legislation to enforce the Treaty of Rome, it was “imperative that there should be some mechanism to ensure the uniform application of Community law throughout the Member States.”<sup>19</sup> The possibility of national courts rendering different interpretations of the EC Treaties impedes the goal of economic and legal harmonization.<sup>20</sup> The only way for the EU to overcome 150 years of different constitutions and civil codes was to give the ECJ the power to overrule the national courts and establish a precedent that national courts would be obliged to follow.<sup>21</sup> “That is, the EC relied on its adjudicative authority to give content, on a case-by-case basis, to the common market norms set forth in the Treaty.”<sup>22</sup> Through Article 234’s preliminary ruling procedure, the ECJ was given “unifying jurisdiction.”<sup>23</sup>

### III. ARTICLE 234

#### A. General Description

Article 234 provides:

- 1) The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
  - a) the interpretation of the Treaty;
  - b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
  - c) The interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
- 2) Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon
- 3) Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decision

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17. See BERMANN *supra* note 1, at 65–70 (addressing the creation of the CFI to deal with the ECJ’s overloaded docket).

18. Tridimas, *supra* note 7.

19. *Id.*

20. *See id.*

21. *Id.*

22. Lindseth, *supra* note 13, at 662–63.

23. Tridimas, *supra* note 7.

there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.<sup>24</sup>

Article 234 is a procedural device that “enables the ECJ, on request of national courts, to provide rulings on the interpretation and validity of Community law.”<sup>25</sup> A preliminary ruling occurs when a national judge is confronted with a question demanding the application of EU law that is unclear.<sup>26</sup> Once the ECJ answers the question, the national court is bound by the ECJ’s interpretation and “must apply the Court’s ruling to the facts of the case.”<sup>27</sup>

Theoretically, the ECJ’s ruling is only binding on the parties and the court that submitted the question.<sup>28</sup> However, in practice, the ECJ’s pronouncements “are cast in general terms and have been held by the Court to apply to future cases.”<sup>29</sup> As one scholar notes:

[D]espite the absence of a formal rule of stare decisis binding the Court of Justice itself, Article 234 rulings constitute binding precedents for national courts in later cases. Like other Court of Justice rulings, they allow Community law to acquire a determined meaning throughout the territory of the Community, and thus promote legal certainty and unity.<sup>30</sup>

Article 234 is easily considered the “most important procedural rule of the Treaty”<sup>31</sup> because it not only “facilitates dialogue between national courts and the ECJ,”<sup>32</sup> but also “provides a meeting point between Community and national law.”<sup>33</sup>

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24. EEC Treaty, *supra* note 9, at art. 234.

25. Tridimas, *supra* note 7.

26. BERMANN, *supra* note 1, at 354.

27. Swartz, *supra* note 11, at 692–93.

28. Case 52/76, *Benedetti v. Munari*, 1977 E.C.R. 163; Case 29/68, *Milch-, Fett- und Eierkontor GmbH v. Hauptzollamt Saarbrücken*, 1969 E.C.R. 165.

29. BERMANN, *supra* note 1, at 354; *see also* Joined Cases 28–30/62, *Da Costa v. Nederlandse Belasting-sadministratie*, 1963 E.C.R. 61 (discussing the *Da Costa* ruling by the ECJ, which in effect initiated a system of precedent *infra* note 51).

30. *Id.*

31. Tridimas, *supra* note 7; *see also* Martin Shapiro, *The European Court of Justice, in THE EVOLUTION OF EU LAW* 323 (1999) [hereinafter *EVOLUTION OF EU LAW*] (stating that Article 234 is considered the “crown jewel” of the ECJ’s jurisdiction); Paul Craig, *The Jurisdiction of Community Courts Reconsidered*, 36 *TEX. INT’L L.J.* 555, 559 (2001) (describing “the ECJ’s jurisdiction over preliminary rulings under Article 234 . . . is regarded as the jewel in the Crown of the existing regime.”).

32. Tridimas, *supra* note 7.

33. *Id.* at 127–28.

### B. How Article 234 Functions

A national court makes the initial determination of whether a question of Community law is pertinent to the case.<sup>34</sup> “The national court must consider whether or not the answer to the EU law question is necessary to formulate a decision in the case before it makes a discretionary referral under Article 234(2).”<sup>35</sup> Once the national court submits a question to the ECJ, regardless if the question is mandatory or not, the ruling is binding on the referring parties and court.<sup>36</sup>

According to Article 234, national courts may ask for a preliminary ruling in only two circumstances: “1) a discretionary reference under Article 234(2); and 2) a compulsory reference under Article 234(3).”<sup>37</sup> The following discussion addresses the differences between these two scenarios.

A mandatory referral occurs when a question of EU law is presented and no judicial remedy exists under national law.<sup>38</sup> The only exceptions are: “1) the issue is irrelevant; 2) the Court has already addressed the question; or 3) the correct application of EC law is obvious.”<sup>39</sup> Mandatory referrals may come from lower national courts when no judicial remedy exists.<sup>40</sup>

Under an Article 234 preliminary ruling, the ECJ’s role is simply to clarify the meaning of EU law and leave it to the national court to apply the law to the case at hand.<sup>41</sup> Although the ECJ is to limit its analysis to EC law, the ECJ typically makes it clear how the national court should rule.<sup>42</sup> The decision made

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34. See Lisa Borgfeld White, Comment, *The Enforcement of European Union Law: The Role of the European Court of Justice and the Court’s Latest Challenge*, 18 HOUS. J. INT’L L. 833, 847 (1996) (noting that “[t]he ECJ ‘will refuse to accept a reference where it considers that the procedure is being abused by artificially contrived proceedings designed for the purpose of having Community law points decided’”).

35. See *id.* (explaining that “[t]he ECJ wants the national court to consider the following when deciding whether to make a discretionary referral to the ECJ: ‘(i) establish the facts first; (ii) define the national law context of the Community law question; and (iii) explain the reasons why the question needs to be answered.’”).

36. Tridimas, *supra* note 7, at 127-28.

37. White, *supra* note 34, at 846.

38. *Id.* at 847 (citing Article 234(3)).

39. *Id.*

40. *Id.* at 848.

41. *Id.* at 846.

42. John P. Fitzpatrick, *The Future of the North American Free Trade Agreement: A Comparative Analysis of the Role of Regional Economic Institutions and the Harmonization of Law in North America and Western Europe*, 19 HOUS. J. INT’L L. 1 (1996); see also Lindseth, *supra* note 13, at 663 (stating that “[d]espite the fact that national courts retained ultimate decisional power in a formal sense, often ECJ interpretations under the preliminary reference procedure effectively mandated a particular decision significantly constraining the effect of the Member State law in question.”).

by the ECJ on the referred question is binding on the court and parties who made the reference.<sup>43</sup>

While in theory this ruling is applicable only to the case at hand, "when an issue has been previously decided by a preliminary ruling in a similar case, the earlier ECJ decision has a legal effect."<sup>44</sup> Thus, if parties A v. B have a question answered via preliminary ruling, that ruling will apply to parties C v. D if they have the same or similar question.<sup>45</sup> Consequently, national courts will research ECJ jurisprudence before submitting a preliminary reference question to the ECJ.<sup>46</sup> If they find a ruling on a same or similar question, they will apply the principle laid out in the ECJ decision and cite the decision as precedent.<sup>47</sup> Section D, *infra*, discusses the ECJ case law which developed a precedent based legal system.

For many European civil countries, the practice of citing previous decisions as precedent is in itself a new precedent.<sup>48</sup> Only on very rare occasions does a French national court cite a previous decision to answer a question posed by a set of new parties, let alone citing the decision of another court.<sup>49</sup> The practice of national courts citing ECJ rulings as precedent is a revolutionary concept.<sup>50</sup> The result of citing precedent is the creation of a body of jurisprudence that has "independent supranational meaning, even on issues raised before national tribunal."<sup>51</sup>

### C. Purpose behind Article 234

Article 234 Preliminary Ruling procedure "is the cornerstone of the structure designed to secure a common meaning for Community law in all the Member States."<sup>52</sup> Article 234 performs three important functions: "[f]irst, it

43. Tridimas, *supra* note 7 and accompanying text.

44. Fitzpatrick, *supra* note 42; see also BERMANN, *supra* note 1, at 354 (stating "though preliminary rulings only answer the questions put by a national court in a particular case, they are cast in general terms and have been held by the Court also to apply to future cases.").

45. Interview with Isabel Fernández de la Cuesta, EU Law Specialist, in Houston, Tex. (Jan. 8, 2005) (on file with author) [hereinafter Interview with Fernández de la Cuesta].

46. See *infra* notes 95–97 and accompanying text (discussing Case 144/86, Gubisch Maschinenfabrik KG v. Giulio Palumbo, 1987 E.C.R. 4861, which was applied by a national court in Spain).

47. See *infra* notes 95–97 and accompanying text (discussing Case 144/86, Gubisch, 1987 E.C.R. 4861, applying the concept of *lis pendens* as defined by the ECJ in a Spanish court).

48. Interview with Fernández de la Cuesta, *supra* note 45.

49. *Id.*

50. *Id.*

51. Fitzpatrick, *supra* note 42, at 1.

52. King, *supra* note 10 (emphasis added).



ensures uniform interpretation of Community Law;<sup>53</sup> second, “it ensures the unity of the Community legal order and the coherence of the system of judicial remedies established by the Treaty;”<sup>54</sup> finally, “it facilitates access to justice: it makes it clear that Community law is to be applied not only by the ECJ but also by national courts, thus enabling citizens to enforce their Community rights in the national jurisdictions.”<sup>55</sup>

#### D. Case Law Developing Article 234

##### 1. *Da Costa v. Nederlandse Belastingadministratie*<sup>56</sup>

“*The Da Costa* case, therefore, initiated what is in effect a system of precedent.<sup>57</sup> In *Da Costa*, the ECJ was confronted with a case raising a question that had already been answered by the ECJ in a preliminary ruling.<sup>58</sup> *Da Costa* alleged the unlawful increase of a customs duty as prohibited by Article 12 of the EEC Treaty.<sup>59</sup> The Commission requested that the preliminary reference be dismissed because the question posed by *Da Costa* had already been decided by a previous judgment.<sup>60</sup> In response, the ECJ held that a national court is able to refer a matter to the Court, however, if the case does not raise some new factor or argument, the existence of an earlier ruling will dispose of the case.<sup>61</sup>

In *Da Costa* the ECJ made it clear that national courts could and should rely on previous decisions by the ECJ as a form of precedent.<sup>62</sup> This implies that under the preliminary ruling system, “the ECJ directly influences national law through opinions delivered in the context of private disputes before national

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53. Tridimas, *supra* note 7, at 128; *see also* King, *supra* note 10 (stating “Legal harmony is the primary benefit, and goal, of having all Member States refer Community issues to the ECJ.”); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 291 (1997) (noting that “[t]he ostensible purpose of this provision was to ensure uniformity of interpretation of the treaty by ensuring that six (now [nineteen]) sets of national judges did not develop divergent interpretations of the treaty and Community secondary legislation.”).

54. Tridimas, *supra* note 7, at 128; *see also* Vladimir Shifrin, *Article 177 References to the European Court*, 27 DENV. J. INT’L L. & POL’Y 657, 658 (recognizing that the “uniform interpretation of Community law is necessary for uniform application of Community law.”).

55. Tridimas, *supra* note 7, at 128.

56. Joined Cases 28–30/62, *Da Costa*, 1963 E.C.R. 61.

57. Paul Craig & Grainne De Burca, *EU Law: Text, Cases, and Materials* 440 (3d ed. 2003) [hereinafter Craig & De Burca, *EU Law*].

58. Joined Cases 28–30/62, *Da Costa*, 1963 E.C.R. 61.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

courts.”<sup>63</sup> In addition to influencing national laws, the Court shapes and develops Community laws via the preliminary ruling system.<sup>64</sup>

## 2. Srl CILFIT v. Ministry of Health<sup>65</sup>

If *Da Costa* initiated the system of precedent, then *CILFIT v. Ministry of Health*<sup>66</sup> served to reinforce it.<sup>67</sup> The *CILFIT* decision made it “clear that a case can be relied on even if the ruling did not emerge from the same type of proceedings, and even though the questions at issue were not strictly identical.”<sup>68</sup> In *CILFIT*, a textile firm claimed that the obligation to pay certain Italian duties violated an EU regulation.<sup>69</sup> The Ministry of Health urged the Italian national court not to submit a question to the ECJ because they claimed the matter “was so obvious as to obviate the need for a reference.”<sup>70</sup> However, because no judicial remedy existed under the Italian Court, the question became a mandatory referral under Article 234(3).<sup>71</sup> The Italian Court requested a preliminary ruling on the matter.<sup>72</sup>

The ECJ responded by addressing the issue of an *acte clair*<sup>73</sup> and “gave guidance on the relevance of its prior decisions.”<sup>74</sup> In relevant part, the ECJ ruled that “where previous Decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those Decisions, [and] even though the questions at issue are not strictly identical,”<sup>75</sup> national courts may rely on those decisions.<sup>76</sup>

63. Fitzpatrick, *supra* note 42.

64. BERMANN, *supra* note 1, at 352.

65. Case 283/81 Srl CILFIT & Lannificio di Gavardo SpA v. Ministry of Health, 1982 E.C.R. 3415.

66. Case 283/81, Srl CILFIT & Lannificio di Gavardo SpA, 1982 E.C.R. 3415.

67. *Id.* See also CRAIG & DE BURCA, EU LAW, *supra* note 57, at 450 (stating that “[t]he decision in *CILFIT* to reinforce precedent was surely not unintentional.” Case 283/81, 1982 E.C.R. 3415.).

68. *Id.* at 442.

69. Case 283/81, Srl CILFIT & Lannificio di Gavardo SpA, 1982 E.C.R. 3415.

70. *Id.*

71. *Id.*

72. *Id.*

73. See generally CRAIG & DE BURCA, EU LAW, *supra* note 57, at 451 (describing the basic concept of the *acte clair* as a doctrine created by national courts which states that if a question of EU law is clear they are not required to submit that question to the ECJ); see also *id.* at 448 (discussing the acceptance of doctrine of the *acte clair* as part of the “give and take” between national courts and the ECJ. . . by “the ECJ accepting the *acte clair* doctrine, but placing significant constraints on its exercise” it “hope[d] that national courts would play the game and only refuse when matters really were unequivocally clear.”).

74. *Id.* at 441.

75. Case 283/81, Srl CILFIT & Lannificio di Gavardo SpA, E.C.R. 3415.

76. *Id.*

However, according to Article 234, preliminary rulings are only to bind the parties and court that present the question.<sup>77</sup> While the ECJ did not affirmatively state that previous decisions are binding on future parties in a strict sense, it basically said, “[w]e, the ECJ are not going to change our mind on the interpretation of EU law, so if you, national court, do not have a new question, we are going to give you the same answer as before.”<sup>78</sup> The *CILFIT* decision reinforced the notion of a uniform interpretation of EU case law.

In *CILFIT*, the ECJ expanded its authority under the Treaty of Rome, *ex post*, by directing national courts to treat their previous decisions as precedent.<sup>79</sup> By making its previous decisions binding on national courts, the ECJ is effectively rewriting the Treaty and explicitly giving its decisions the power of precedent.<sup>80</sup>

#### IV. HOW THE ECJ GREW POWERFUL VIA ARTICLE 234

##### A. Overview

The shifting of supremacy in the ECJ legal system flourished with ECJ’s interpretation of Article 234.<sup>81</sup> Through the ECJ’s reading and application of Article 234, the ECJ expanded its own power by promoting a *stare decisis*-like application of its rulings and strengthened the EU institutions by interpreting EU treaties beyond their originally intended scope.<sup>82</sup> This expansion of power

77. See *supra* notes 28–29 and accompanying text (outlining the limits of Article 234 preliminary ruling under the EEC Treaty); see also CRAIG & DE BURCA, *EU LAW*, *supra* note 57, at 450 (noting that “[t]hose rulings were now to have authority for situations where the point of law was the same, even though the questions posed in earlier cases were different, and even though the proceedings in which the issue originally arose differed.”).

78. Interview with Fernández de la Cuesta, *supra* note 45.

79. See CRAIG & DE BURCA, *EU LAW*, *supra* note 57, at 450 (noting that “by expanding the precedential impact of past decisions, the ECJ thereby increased the authoritative scope of its past rulings.”).

80. *Id.*

81. *EVOLUTION OF EU LAW*, *supra* note 31, at 330.

82. See Lindseth, *supra* note 13, at 635.

Although purportedly an entity possessing only enumerated powers, the scope of the Community’s normative authority has steadily increased since its inception in the 1950s, partly due to explicit transfers from the Member States, but more importantly due to an expansive interpretation of Community competences by the Community institutions themselves, notably the European Court of Justice (ECJ).

*Id.* See also Ilann Margalit Maazel, *Mulloche v. Netherlands: A Marshallian Discourse on Modern Europe*, 35 *UWLA L. REV.* 1, 25 (2003) (stating that “given the power to define the Community’s sphere of competence, the ECJ has as yet under our analysis no historical, structural, or textual basis to interpret this sphere broadly.”); Aashit Shah, *The “Abuse of Dominant Position” Under Article 82 of the Treaty of European Community: Impact on Licensing of Intellectual Property Rights*, 3 *CHL.-KENT J. INTELL. PROP.* 41, 71 (2003) (“The ECJ has often been criticized as being activist and interpreting treaty provisions beyond its

was necessary for the harmonization of laws in Europe and reflects the evolution of a legal system to meet the demands of economic integration.<sup>83</sup>

The ECJ accomplished this task in the following ways: 1) it transformed an international treaty into a constitutional treaty by developing a body of precedent; 2) it created fundamental principles of EU law by interpreting the EU Treaties beyond their originally intended scope; and (3) it transferred power in three arenas: i) from the governments of the Member States to the institutions of the Community; ii) from the executive and the legislature to the judiciary; and iii) from higher national courts to lower national courts.<sup>84</sup>

### *B. Transforming an International Treaty into a Constitutional Treaty*

The ECJ transformed an international treaty into a constitutional treaty by creating precedent via Article 234's preliminary ruling system.<sup>85</sup>

Successful constitutional courts turn constitutions into constitutional law, that is they convert a text enacted at a given historical moment into a continuous, collective stream of case law . . . in regard to the ECJ, the reference here is not to the much-proclaimed and much-disputed judicial conversion of the Treaties from the realm of international law to that of constitutional law, but to the building of a large body of ECJ law that has become self-generating.<sup>86</sup>

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judicial parameters."); Joseph R. Wetzel, Note, *Improving Fundamental Rights Protection in the European Union: Resolving the Conflict and Confusion Between the Luxembourg and Strasbourg Courts*, 71 *FORDHAM L. REV.* 2823, 2830 (2003) ("The ECJ's broad interpretations of treaty provisions, particularly EC Treaty Article 234, suggest the Court's willingness to assert itself on the supranational stage.").

83. See Shah, *supra* note 82 ("The ECJ has been at the forefront of the European integration movement and has deepened and expanded the original Community principals to maintain the effectiveness of EC law."); see also Wetzel, *supra* note 82, at 2831 (noting that "[t]he ECJ gradually has developed its power and influence with the aim of promoting uniformity in Community law, thereby contributing to further integration within the EC.").

84. See *infra* notes 84–178 and accompanying text.

85. See Helfer & Slaughter, *supra* note 53, at 292 (noting that "the ECJ's success has been such that it has been widely credited with transforming the Treaty of Rome from an international instrument into the 'constitution' of the European Community."); see also Sally J. Kenney, *The European Court of Justice Integrating Europe Through Law*, 81 *JUDICATURE* 250 (1998).

Since its creation in 1952 under the Treaty of Paris to hear cases for the Coal and Steel Community, the European Court of Justice has transformed itself from an international to a constitutional court, holding European Community law to be supreme and, in many cases, directly effective in member states.

*Id.*

86. See *EVOLUTION OF EU LAW*, *supra* note 31, at 326 ("The European Court of Justice's decisions have changed an international treaty into a constitution").

Instead of having an international instrument in which Member States would apply at their own discretion, the ECJ's interpretation of Article 234 secured the application and harmonization of community law.<sup>87</sup> According to one scholar, it is ironic "that Article 234 puts the ECJ in a weaker position than a supreme court in a federation," and yet, "the preliminary reference procedure has proved to be the main procedural route through which the process of the constitutionalization of the Community has taken place."<sup>88</sup>

### C. *Integration by Adjudication*

*"One of the most important developments in European law today is the emergence of a common private law within the European Community. . . . Yet, legal science has barely started to notice that the face of private law is about to be fundamentally reshaped."*<sup>89</sup>

Through the preliminary ruling procedure under Article 234, the ECJ has developed a precedent based system achieving "integration by adjudication."<sup>90</sup> While no formal *stare decisis* system exists, "there is '[n]o doubt [that] a trend towards recognition of Community precedents is gaining momentum."<sup>91</sup> As one scholar states:

The very prevalence of the European Court of Justice as a source, if not, as many would say today, as the most important source, of legal authority in the European Union, has created a system with an increasingly common-law-like component of *stare decisis*. European judges, like their common-law brethren, and, unlike their civil-law brethren (at least in the latter's official role), create law, fashioning it with each judicial decision, such that legal norms are judicially created for future application to similar future cases.<sup>92</sup>

The development of Article 234 jurisprudence "can be seen as a historical record of legal integration."<sup>93</sup> The emphasis placed on ECJ preliminary rulings

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87. *Id.*

88. Tridimas, *supra* note 7, at 128.

89. Zimmermann, *supra* note 6, at 104 (*emphasis added*).

90. Lindseth, *supra* note 13, at 664.

91. Swartz, *supra* note 11, at 694 (quoting D. Lasok & J.W. Bridge).

92. Curran, *supra* note 7, at 72.

93. Thomas de la Mare, *Article 177 in Social and Political Context, in THE EVOLUTION OF EU LAW 215* (Paul Craig & Gianne de Burca eds., 1999). Preliminary rulings "allow Community law to acquire a determined meaning throughout the territory of the Community, and thus promote legal certainty and unity." *Id.* BERMANN, *supra* note 1, at 354.

“demonstrates [a] natural evolution in supranational law, even one based on civil law principles.”<sup>94</sup>

*Fashion Ribbon Co. v. Iberland S.L.*<sup>95</sup> represents an example of a national court citing an ECJ decision as precedent. In that case, the Supreme Tribunal of Spain cited the *Gubisch v. Palumbo*<sup>96</sup> decision when defining the concept of *lis pendens*.<sup>97</sup> The *Gubisch* decision occurred in 1987.<sup>98</sup> Sixteen years later, in a commercial dispute in Spain, the Supreme Tribunal of Spain cites *Gubisch* to define the legal concept of *lis pendens*.<sup>99</sup> The practice of national courts citing ECJ preliminary rulings exemplifies the development of precedent and harmonization of laws.

#### D. Building Blocks of the EU Legal System

Through the preliminary ruling system, the ECJ has expanded the scope of its jurisdiction and laid the foundation of EU law.<sup>100</sup> As former Judge Pescator of the ECJ notes: “[t]he decisions of the Court which have made the most

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94. Charles, H. Koch, Jr., *Envisioning a Global Legal Culture*, 25 MICH. J. INT’L L. 1, 52 (2003); see also Lindseth *supra* note 13, at 638. Commenting that:

In the three decades following the EEC’s establishment in 1957, the Member States largely acquiesced in the Court’s effort to elaborate autonomous supranational norms through the development of such fundamental doctrines as direct effect, supremacy, and implied powers, each of which helped to lay the legal foundation upon which subsequent political integration could build.

*Id.*

95. Tribunal Supremo, 1943/2001 (Madrid 2003) (a motion demanding exequatur of an arbitration award pursuant to the New York Convention) [hereinafter *Fashion Ribbon Co.*].

96. Case 144/86, *Gubisch Maschinenfabrik KG*, 1987 E.C.R. 4861. In *Gubisch*, an Italian citizen was trying to enforce the validity of a contract against a German national. *Id.* *Gubisch* also filed a suit in a German national court stating that the contract was invalid. *Id.* Both the German and Italian court had different definitions of *lis pendens*, which determined whether the contract was enforceable or not. *Id.* The Italian court submitted to the ECJ a preliminary question on what the definition of *lis pendens* was under Article 21 of the Convention. Case 144/86, *Gubisch Maschinenfabrik KG*, 1987 E.C.R. 4861. The ECJ recognized that “the concept of *lis pendens* is not the same in all the legal systems of the contracting states” and “a common concept of *lis pendens* cannot be arrived at by a combination of the various relevant provision of national law.” *Id.* Instead of choosing between the Italian or German definition of *lis pendens*, the ECJ ruled that the definition of *lis pendens* from now on would be the ECJ’s interpretation of Article 21 of the Brussels Convention. *Id.* (referring to the ECJ’s definition of *lis pendens*). *Lis pendens* “covers a case where a party brings an action before a court in a contracting state for the recession or discharge of an international sales contract whilst an action by the other party to enforce the same contract is pending before a court in another contracting state.” *Id.*

97. *Id.*

98. Case 144/86, *Gubisch Maschinenfabrik KG*, 1987 E.C.R. 4861.

99. *Fashion Ribbon Co.*, 1943/2001.

100. White, *supra* note 34, at 848 (“The ECJ has used Article 177 to develop several unique concepts of EU law.”).

conspicuous contribution to the development of Community law have been delivered [by the preliminary ruling].”<sup>101</sup> The doctrine of direct effect, primacy of Community law over national law, protection of fundamental rights, and the principles of competition law and social law have all been developed by the preliminary ruling system.<sup>102</sup> This analysis will focus on the doctrines of supremacy and direct effect, which are considered the “twin pillars of the Community’s legal system.”<sup>103</sup>

### 1. Supremacy of EU Law

Unlike the Supremacy Clause of the United States Constitution, the European treaties contain no express rule that EU law is superior to national law in the areas in which the EU has competence.<sup>104</sup> However, if such a rule did not exist how could harmonization of laws occur if “in a case of conflict, domestic law was determinative”?<sup>105</sup> In *Costa*<sup>106</sup>, “the ECJ handed down a landmark ruling which gave the laws of the EC supremacy over those of the Member States.”<sup>107</sup>

In *Costa v. ENEL*,<sup>108</sup> an Italian Constitutional Court found an EC Treaty invalid because it conflicted with subsequent Italian legislation.<sup>109</sup> The legisla-

101. BERMANN, *supra* note 1, at 352; Lindseth, *supra* note 13, at 638.

102. BERMANN, *supra* note 1, at 352; Helfer & Slaughter, *supra* note 53, at 291–92.

103. Craig, *supra* note 31, at 560 (“[T]he reference procedure laid down in Article [234] must surely be the keystone in the edifice; without it the roof would collapse and the two pillars would be left as a desolate ruin, evocative of the temple at Cape Sounion – beautiful but not of much practical utility.”).

104. See BERMANN, *supra* note 1, at 269 (noting that “[t]he closest approximation is EC Treaty Article 10 (ex 5), which imposes on Member States a general obligation of loyalty to Community law . . . .”); see also Dieter Grimm, *The European Court of Justice and National Courts: The German Constitutional Perspective After the Maastricht Decision*, 3 COLUM. J. EUR. L. 229, 229–30 (1997). Commenting that:

The supremacy of Community law flows from the fact that the Community is a system of attributed or enumerated competencies. The Community has no inherent legislative or executive power; its institutions have no power to adopt an act unless they are authorized to do so by a Treaty provision. If no there is no legal basis for a legislative act in the EC Treaties, national law comes into. Thus, national law is superseded by secondary Community law only the latter is compatible with the EC Treaties—Community law not grounded in a Treaty provision is incapable of superseding national law.

*Id.* at 232.

105. Grimm, *supra* note 105.

106. Case 6/64, *Flaminio Costa v. Ente Nazionale per l’Engeria Elettrica*, 1964 E.C.R. I-585.

107. Swartz, *supra* note 11, at 695.

108. Case 6/64, *Costa*, 1964 E.C.R. I-585.

109. See Swartz, *supra* note 11, at 695–96 (noting that “the Italian constitutional court found that as part of its domestic law, Italy had the power to create laws which contravened the Treaty of Rome.”).

tion permitted the Italian government to nationalize the electric company.<sup>110</sup> According to Costa, an Italian citizen who refused to pay his electricity bill, nationalizing the electric company violated EC competition law.<sup>111</sup> The Italian Court reasoned that “because the Italian Legislature had created a law which conflicted with part of the Treaty of Rome, it was the Treaty rather than the later Italian law which had to give way.”<sup>112</sup>

Relying on the wording of Article 189, the ECJ ruled that the EC’s treaties were “directly applicable” to the Member States, and that the terms of the treaties were “binding in [their] entirety” on them.<sup>113</sup> As the ECJ stated in its opinion, “[t]he executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty . . .”<sup>114</sup> By invoking the spirit of the Treaty, the ECJ overruled a Member State’s highest court and “established [early on] the supremacy of EC law over national law and guaranteed its own place as an important institutional wing of the EC.”<sup>115</sup>

The new EU Constitution codifies the supremacy of EU law, a legal doctrine created purely by ECJ case law.<sup>116</sup> Unlike civil law courts whose power is defined and constrained by a legal code, the ECJ developed legal principles to satisfy the demands of a supranational legal system.<sup>117</sup> In this regard, the ECJ’s behavior resembles a common law court and represents a significant example of the evolution of the European legal system to meet the demands of harmonization.<sup>118</sup>

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110. Case 6/64, *Costa*, 1964 E.C.R. I-585.

111. *Id.*

112. Swartz, *supra* note 11, at 695–96.

113. *Id.*

114. BERMANN, *supra* note 1, at 270.

115. Swartz, *supra* note 11, at 695–96; *see also* Wetzel, *supra* note 82, at 2832 (discussing the evolution of the primacy principle in the *SpA Simmenthal v. Comm’n of the European Communities*, 1979 E.C.R. 777, case which ruled “that national courts must apply Community law in its entirety and eliminate any national laws that conflict with Community law.”).

116. Roger J. Goebel, *European Union Law: Overview: The European Union in Transition: The Treaty of Nice in Effect; Enlargement in Sight; A Constitution in Doubt*, 27 *FORDHAM INT’L L.J.* 455, 496 (2004).

117. *Id.*

118. *Id.*



## 2. Doctrine of Direct Effect—Giving Private Litigants a Voice

The second pillar of the EU legal system is the doctrine of direct effect.<sup>119</sup> In its essence, the doctrine of direct effect allows Community regulations to be self-executing, thus, creating rights for individuals in Member States without the passage of legislation typically required to enforce rights under a Treaty.<sup>120</sup> The doctrine of direct effect declares that “there are certain Treaty provisions that 1) are precise enough to be directly effective, 2) are unqualified, and 3) require no discretion in their application by the court.”<sup>121</sup> Any national law which conflicts with any of these Treaty provisions must be set aside by Member States.<sup>122</sup> The Treaty provisions that are “sufficiently precise and unconditional so as to confer legal rights upon that individual”<sup>123</sup> also have direct effect on Member States and are enforceable by individuals in their national courts.<sup>124</sup>

In addition, the ECJ has ruled via Article 234 that if a Member State fails to implement a directive after the allotted time period, the directive is still directly applicable.<sup>125</sup> The court articulated that these “directives have direct effects in national courts in the sense that they can be relied upon against the state or state bodies . . . irrespective of whether the directive has been implemented.”<sup>126</sup> This ruling in effect gave private citizens judicially enforceable rights under EU law.

Perhaps the greatest transfer of power via the ECJ’s interpretation of Article 234 was the doctrine of direct effect, which granted individuals and corporations the right to enforce EU law in their national courts.<sup>127</sup> “As in the

119. See CRAIG & DE BURCA, *EU LAW*, *supra* note 57, at 258 (discussing the *Van Gend en Loos* decision which initiated the doctrine of direct effect).

120. See EVOLUTION OF EU LAW, *supra* note 31, at 330 (declaring that “[t]he Court’s great bootstrapping operation was, of course, its case law creating ‘direct effect’ so that the Treaties and the secondary laws made under them came to have the kind of ‘supremacy’ that occurs in federal, constitutional states rather than in international organization operating under international law”); see also BERMANN, *supra* note 1, at 271 (stating that Article 249 is the legal basis of direct effect).

121. Case 283/81, *Srl CILFIT & Lannificio di Gavardo SpA*, 1982 E.C.R. 3415. (noting that “[i]n order to find liability, the court must determine that 1) the directive in question provides individuals with rights, 2) these rights are identifiable in the directive itself, and 3) a causal link exists between the state’s breach and the individual injuries.”). See also White, *supra* note 34, at 850.

122. White, *supra* note 34, at 848.

123. Breyer, *supra* note 14, at 1050.

124. White, *supra* note 34, at 848.

125. *Id.*

126. *Id.* (quoting John Temple Lang, *New Legal Effects Resulting from the Failure of States to Fulfill Obligations Under European Community Law: The Francovich Judgment*, 16 *FORDHAM INT’L L.J.* 1, 4 (1992/1993)).

127. See Karen J. Alter, *Who are the “Masters of the Treaty?”: European Governments and the European Court of Justice*, 52 *INT’L ORG.* 121, 126 (1998) [Hereinafter Alter I] (noting that by “using the

United States, individuals are the 'principal 'guardians' of the legal integrity of Community law,' through the Article 234 preliminary ruling procedure."<sup>128</sup> This right not only enhanced the validity of the EU as a recognizable international institution, but it gave individuals a democratic voice in a system that leaves little room for individual say.<sup>129</sup>

As the ultimate recipients of the benefits of a common legal system, the ECJ gained a potent ally in the harmonization of laws by empowering private litigants.<sup>130</sup>

From the earliest of days of the Community, individuals have been drawn in to the process of making the common market a reality in their own States when the Court of Justice (quietly) developed fundamental principles of direct effect and supremacy of Community law. In this way the Court has created an alliance between itself and individuals, thereby circumventing the Member States and the Community legislator.<sup>131</sup>

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direct effect and supremacy of EC law as its legal crutches, the ECJ does not itself exceed its authority by reviewing the compatibility of national law with EU law in preliminary ruling cases."); *see also* Tridimas, *supra* note 7, at 128 (stating that the combination of "the mechanism of preliminary references with the doctrines of primacy and direct effect enables individuals and companies to assert Community rights in national courts").

128. Maazel, *supra* note 82, at 19 (citing J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2414 (1991)).

129. *See* Wetzel, *supra* note 82, at 2834. Stating that:

Through its judgments in response to preliminary reference requests, the ECJ has enhanced individual rights in areas where Community law affords better protection than the national law of some Member States, such as equal pay for women. By subjecting Member States' actions that affect fundamental rights to judicial review under EU standards, Article 234 has become a vital tool for fundamental rights improvement.

*Id.* *See generally* Lindseth, *supra* note 13, at 633–35 (describing the "Democratic Deficit" that is inherent in national and supranational institutions); *see also* Breyer, *supra* note 14, at 1053 (commenting that many European believe the EU suffers from a "democratic deficit").

130. *See* Wetzel, *supra* note 82, at 2834 (discussing "[t]he social legitimacy resulting from the Court's image as a valuable ally to the individual against the Member State's national governments substantially enhances the ECJ's ability to promote fundamental rights within the European Union."); *see also* Tridimas, *supra* note 7, at 128 (noting that "individuals may use Community law as a 'shield', i.e. to defend themselves from action by the national authorities which infringes Community rights, and as a 'sword', i.e. to challenge national measures on grounds of incompatibility with Community laws."). Allowing private litigants a voice is something that is not permitted by all free movement treaties, as evidenced by Article 2022 of North American Free Trade Agreement, Dec. 8–17, 1992, 32 I.L.M. 699.

131. BERNARD, *supra* note 6, at 17.

Individual litigants with “an economic stake” in the formation of a common market were “the primary source of demand for law rulings.”<sup>132</sup>

Allowing private litigants to raise claims in national courts regarding EU law permitted the ECJ to address Member States’ infringement, enlarging the scope of the ECJ’s power and undermining Member States’ sovereignty.<sup>133</sup> “[T]he preliminary reference procedure provides an opportunity for individuals and, indeed, national courts to question governmental action. The ability of a national government to control which cases are sent to the ECJ is thus undermined.”<sup>134</sup> Instead of relying on Member States or the Commission to be the enforcers of EU law, individuals and companies with an economic interest in integration allowed the ECJ to address a wide breadth of legal issues pertaining to the goal of economic harmonization.<sup>135</sup> “In this manner, the system of preliminary ruling has been transformed into a mechanism of enforcing EC law and implementing legal integration.”<sup>136</sup>

*Francovich v. Italy*<sup>137</sup> established the principle giving private litigants the power to raise claims against a national government for failing to implement a directive that granted individual rights under EU law.<sup>138</sup> It was not uncommon for governments to resist implementation of an EU directive by either not transposing the directive on time, executing it incorrectly, or not implementing it at all.<sup>139</sup> Through the *Francovich* decision, the ECJ demonstrated “the urgent

132. Tridimas, *supra* note 7, at 142.

133. Alter I, *supra* note 127, at 127 (“The transformation of the preliminary ruling system significantly undermined [M]ember [S]tates’ ability to control the ECJ. It allowed individuals to raise cases in national courts that were then referred to the ECJ, undermining national governments ability to control which cases made it to the ECJ.”).

134. Tridimas, *supra* note 7, at 128. “[O]ffering individuals and companies the possibility of challenging national law increases the ability of the ECJ to pursue its most preferred policies, while it simultaneously decreases its dependence on the governments of the member states and the Commission to raise an infringement cases.” *Id.* at 137.

135. *See id.* at 128 (stating that “[a]reas of policy that were thought to be under the exclusive remit of the Member States can now be considered, and indeed influenced, by the ECJ, bringing about a distinct loss of national sovereignty.”).

136. Tridimas, *supra* note 7, at 128; *see also* Alter I, *supra* note 127, at 129. Noting that: Although the Court likes to pose modestly as “guardian of the Treaties” it is in fact an uncontrolled authority generating law directly applicable in Common Market member states and applying not only to EEC enterprises but also to those established outside the Community, as long as they have business interests within it.

*Id.*

137. Cases C-6/90, 9/90, *Francovich v. Italy*, 1991 E.C.R. I-5357.

138. *Id.*

139. Melanie L. Ogren, *Francovich v. Italian Republic: Should Member States be directly liable for nonimplementation of European Union Directives?*, 7 *TRANSNAT’L LAW*. 583, 604–05 (1994) (noting that “although [M]ember [S]tates may have accepted the rule of law of the EEC Treaty and the holding of *SpA*

need for enforcement and implementation of EU directives by [M]ember [S]tates.”<sup>140</sup>

In *Francovich*, the Italian State failed to implement a directive on the protection of employees in the event of the employer’s insolvency.<sup>141</sup> Member States were directed to set up a fund for compensating workers affected.<sup>142</sup> Plaintiff’s employers went bankrupt, leaving plaintiff with no remedy.<sup>143</sup> The Italian courts requested a preliminary ruling on the issue.<sup>144</sup> In response, the ECJ ruled “that governments must compensate individuals for the loss caused to them resulting from the nonimplementation of directives, even those without direct effect.”<sup>145</sup> Thus, the ECJ laid down the general principle that Member States are liable for the consequences of not implementing directives which create individual rights.<sup>146</sup>

The underpinning rationale of the *Francovich* decision is that by failing to enforce individual rights recognized under EU law, EU law will be undermined.<sup>147</sup> “In order to meet the goals outlined in the EEC treaty, directive compliance must be enforced if the system of the European Union that has been created by its members is to reach its true potential.”<sup>148</sup> The European Union was created by Member States to derive the benefits of economic and political harmonization.<sup>149</sup> Signatories to the EEC Treaty must recognize that they chose

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*Simmenthal* [1979 E.C.R. 777] in practice [M]ember [S]tates fail to adhere to those rules.”)

140. Ogren, *supra* note 139, at 604.

141. Cases C-6/90, 9/90, *Francovich*, 1991 E.C.R. I-5357; see also Christoph U. Schmid, *Pattern of Legislative and Adjudicative Integration of Private Law*, 8 COLUM. J. EUR. L. 415, 461 (2002) (discussing the *Francovich* case).

142. Cases C-6/90, 9/90, *Francovich*, 1991 E.C.R. I-5357.

143. *Id.*

144. *Id.*

145. Garret, *supra* note 7, at 168–69.

146. Cases C-6/90, 9/90, *Francovich*, 1991 E.C.R. I-5357; see also White, *supra* note 34, at 850.

Stating that:

In deciding whether the employees should be compensated, the ECJ noted that the EEC Treaty, now the EC Treaty, ‘created its own legal system, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal system are not only the Member States, but also their nationals.’ Thus, the Treaty and community law impose obligations on individuals, member nations, and community institutions.

*Id.*

147. Cases C-6/90, 9/90, *Francovich*, 1991 E.C.R. I-5357. “The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.”. *Id.*

148. Ogren, *supra* note 139.

149. THE EUROPEAN UNION AT A GLANCE, at [http://www.europa.eu.int/abc/index\\_en.htm](http://www.europa.eu.int/abc/index_en.htm) (last visited

to surrender some of their sovereignty to derive these benefits.<sup>150</sup> “This recognition implies an empowerment of the European Court of Justice in the enforcement of the goals of the European Union.”<sup>151</sup>

### *E. Expanding the Scope of its Jurisdiction*

The key to the ECJ’s increase in jurisdiction has been through treaty amendments and an expansive reading of the EU Treaties.<sup>152</sup> The ECJ handles cases on issues of the environment, direct taxation, public policy, arbitration, and fundamental human rights, to name a few.<sup>153</sup> With more matters coming under the ECJ’s jurisdiction, its power to harmonize law is increasing. As United States Supreme Court Justice Breyer states in reference to the preliminary ruling system, “one might believe, or at least plausibly argue, that EC law, as interpreted by the ECJ, slowly but surely will come to dominate national law in many areas of European life.”<sup>154</sup>

A prime example of the ECJ extending its jurisdiction is the *Eco Swiss China Ltd. v. Benetton International NV* decision which defined the notion of public policy and redefined procedures for making an arbitration agreement enforceable.<sup>155</sup> In *Eco Swiss*, the ECJ ruled that certain types of arbitration

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Feb. 13, 2005) (“[The EU] has helped to raise living standards, built a single Europe-wide market, launched the single European currency, the euro, and strengthened Europe’s voice in the world.”).

150. *Id.*; see Ogren, *supra* note 139 (discussing the benefits of belonging to the EU).

151. Ogren, *supra* note 139. “Without directive compliance, the EU essentially loses its gamut of control, and unification and harmonization between member states become meaningless ideals. *Francovich v. Italian Republic* is an attempt by the European Court of Justice to urge compliance with EU [d]irectives.”. *Id.* at 605.

152. See BERMANN, *supra* note 1, at 63–65 (discussing Treaty of Nice giving the ECJ the right to rule on issues of fundamental rights).

153. Interview with Isabel Fernández de la Cuesta, *supra* note 45.

154. Breyer, *supra* note 14, at 1051; see also Zimmermann, *supra* note 6, at 104 (stating “[t]he process of harmonization and unification of private law on a European level appears to be irreversible today; and it is likely to gain an ever greater momentum.”). The implications for international companies, especially US corporations doing business with European countries, is an increasing demand for lawyers who understand EU law and are familiar with the ECJ rulings; see also BERMANN, *supra* note 1, at 3. (“As those engaged in international transactions take increasing interest in the development of Europe-wide policies, so the international legal community has taken a parallel interest in the workings of the relatively young but sophisticated Community legal system.”).

155. Case C-126/97, *Eco Swiss China Time Ltd. v. Benetton Int’l NV*, 1999 E.C.R. I-03055.

agreements are void against public policy.<sup>156</sup> Accordingly, if any one of the four freedoms is hampered, the agreement is void against public policy.<sup>157</sup>

Before *Eco Swiss*, various definitions of public policy existed in Europe.<sup>158</sup> Each nation had a distinct definition written into their civil code.<sup>159</sup> With the *Eco Swiss* decision, the ECJ ruled that Member States could still have their definitions of public policy, but in order to comply with EU law their definition must at a minimum abide by the ECJ's definition of public policy.<sup>160</sup>

The *Eco Swiss* decision demonstrates the ECJ's goal of the uniform application of EU law, by requiring parties to an arbitration agreement to meet the ECJ's definition of public policy.<sup>161</sup> The implication of this decision is that when parties are drafting arbitration agreements, they will look primarily to ECJ jurisprudence, not the New York Convention, if they want their arbitration agreement to stand in a European court.<sup>162</sup>

#### *F. Garnering the Support of National Courts*

The preliminary ruling system is dependent on national courts cooperating by submitting questions of EU law to the ECJ.<sup>163</sup> The preliminary ruling

156. *See id.*; see also Christoph Liebscher, *Arbitral & Judicial Decision: European Public Policy After Eco Swiss*, 10 AM. REV. INT'L ARB. 81, 83 (1999) (explaining that Benetton submitted a petition to the national court asking it to annul the arbitration award on the grounds that the arbitration agreement violated Article 85 (now article 81) since it contained a market-sharing clause.). Case C-126/97, *Eco Swiss China Time Ltd*, 1999 E.C.R. I-03055. Susana S. Ha, *The effects of Nullity of Article 81(2) EC*, LUND U.: MASTER OF EUROPEAN AFFAIRS PROGRAMME LAW, 16 (2003). "Article 81(1) and 82 [of EC Treaty] establish, in general terms, a prohibition of practices which may distort trade between Member States" *Id.* at 4. If an agreement violates Article 81, it is considered void under Article 82. *Id.*

157. Liebscher, *supra* note 156, at 83 (quoting the ECJ: "[a]rticle 81 constitutes a fundamental provision which is essential for the tasks of the Community, and, in particular, for the functioning of the internal market . . . [A]ny agreements or decisions prohibited pursuant to that article are to be automatically void.").

158. Interview with Anibal Sabater, Foreign Legal Consultant, Fulbright & Jaworski L.L.P., in Houston, Tex. (Jan. 8, 2005) (on file with author) [hereinafter Interview with Anibal Sabater].

159. *Id.*

160. *See Ha, supra* note 156, at 13 (quoting the ECJ's holding "that Article 81 EC constitutes 'a fundamental provision which is essential for the accomplishment for the functioning of the internal market' and is to be considered 'a matter of public policy.'").

161. *See id.* "The ECJ reiterates that it is manifestly in the interest of the Community legal order that the rules of Community law are given a uniform interpretation, irrespective of the circumstances in which they are to be applied." *Id.* See also Ha, *supra* note 156, at 14 (noting that in this ruling, the ECJ "recognized the importance of Article 81 EC in the accomplishment of the internal market.").

162. Interview with Anibal Sabater, *supra* note 158 (The New York Convention is the main treaty on the enforceability of arbitral awards).

163. *See Tridimas, supra* note 7, at 142.

procedure begins and ends with national courts.<sup>164</sup> Without their support, the ECJ's power under Article 234 could not have been established.<sup>165</sup> By national courts submitting questions to the ECJ and then applying the ECJ's interpretation of EU law, EU law becomes "nationalised."<sup>166</sup>

Consequently, the acceptance of preliminary rulings as precedent by national courts "has [had important] implications for the more general relationship between national courts and the ECJ."<sup>167</sup> As noted by some scholars:

In so far as ECJ rulings do have precedential value, they place the Court in a superior position to national courts. The very existence of a system of precedent is indicative of a shift to a vertical hierarchy between the ECJ and national courts: the ECJ will lay down the legally authoritative interpretation, which will then be adopted by national courts.<sup>168</sup>

The transfer of power from national courts to the ECJ in essence created a hierarchy with the ECJ at the top of that system.<sup>169</sup> While national courts, especially the Supreme Courts, could have felt threatened by this transfer of power (and many in fact were),<sup>170</sup> the empowerment of the ECJ served to empower the judiciary of many Member States.<sup>171</sup>

The ECJ transferred power from the executive and legislative branches to the judiciary by making "national courts . . . [the] enforcers of Community law in their own right."<sup>172</sup> "When the ECJ has decided an issue, national courts can then apply the ruling without further resort to the ECJ. The national courts are, in this sense, 'enrolled' as part of a network of courts adjudicating on

164. Craig, *supra* note 31, at 560; *see also* Shifrin, *supra* note 54. "Disputes involving Community law never come directly before the Court of Justice, but rather before the courts and tribunals of Member States." *Id.*; Tridimas, *supra* note 7, at 142 (stating that "demand becomes effective only when national courts refer to the ECJ, which is the ultimate source of supply [of preliminary references].").

165. *See* Tridimas, *supra* note 7, at 134 (explaining that "In short, the co-cooperation of national courts is a *sine qua non* for the success of the preliminary reference procedure . . . . Legal integration and the implementation of ECJ jurisprudence has relied on the willingness of national courts to refer cases to the Court.") (emphasis added).

166. Craig, *supra* note 31, at 560.

167. CRAIG & DE BURCA, *EU LAW*, *supra* note 57, at 442.

168. *Id.*

169. *Id.* at 450 (stating that "the ECJ [is] at the apex of that network").

170. *See infra* notes 175–180 and accompanying text (discussing the empowerment of lower national courts by Article 234).

171. *See generally* Karen J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* 34 (2001) [Hereinafter Alter II].

172. CRAIG & DE BURCA, *EU LAW*, *supra* note 57, at 450.

Community law . . .<sup>173</sup> Politicians who attempt to use extra legal means to circumvent ECJ law are faced by national courts applying ECJ rulings.<sup>174</sup> Thus, by reinforcing their own legitimacy, national courts bolstered the ECJ's legitimacy. This system of precedent also serves as an "important symbolic [function] which flows from the recognition that the national courts are part of a real Community judicial hierarchy."<sup>175</sup>

While the cooperation of national judiciaries was necessary for expanding the ECJ's preliminary ruling power, it was the enlistment of lower national courts that solidified the ECJ's prominence. Because lower national courts are permitted to make preliminary references under Article 234,<sup>176</sup> lower courts could bypass their country's Supreme Court and thereby influence policy issues at the highest level.<sup>177</sup> This is described as "judicial empowerment."<sup>178</sup> The rationale behind this theory is:

In a national setting without access to the supranational legal system, the national court has few, if any chances, to see its ideal point implemented, since the higher national authority will reverse it on appeal or by new national legislation. When the national court is given the option to refer the case to the ECJ and apply its ruling, the set of interpretations that can be applied in practice changes dramatically.<sup>179</sup>

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173. *Id.*

174. *Alter I*, *supra* note 127, at 133; *see also* EVOLUTION OF EU LAW, *supra* note 31, at 144–45 (stating that the support of national judiciaries "was critical in limiting the ability of national governments to simply ignore unwanted legal decisions from the international ECJ" . . . and reiterating that "the ECJ has changed the weak foundations of the EU legal system, with the help of national judiciaries").

175. CRAIG & DE BURCA, EU LAW, *supra* note 57, at 450.

176. *See supra* notes 33–40 and accompanying text (discussing the institutions and circumstances which permit submission of preliminary questions to the ECJ).

177. *Tridimas*, *supra* note 7, at 135.

178. *Id.* (citing J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2426 (1991)).

179. *Tridimas*, *supra* note 7, at 141–43 noting that:

The ability of national courts to influence policy is much weaker in the national context of each [M]ember [S]tate than in the supranational context of the EC, where national courts implement the authoritative interpretations of the law given by the ECJ. The rulings of national courts can be overturned and altered more easily by higher national authorities than the rulings of the ECJ can be altered by the equivalent authorities of the EC.

*Id.* *Accord* Weiler, *supra* note 128, at 2426 (stating that "Lower courts and their judges were given the facility to engage with the highest jurisdiction in the Community and thus have de facto judicial review of legislation.").



Article 234 served to empower lower national courts, securing the cooperation of national courts in the application and “the very development of the Community legal order.”<sup>180</sup>

## V. MEMBER STATES REACTION

### A. Background

“It is fair to say that when the Member States opted for an ECJ, they thought that Luxembourg would be far closer to the Hague than the District of Columbia.”<sup>181</sup> Historically, the ECJ was created to deal only with the review of EU law, not the interpretation of national laws.<sup>182</sup> Member States intended to create a court with limited jurisdiction to protect their national sovereignty.<sup>183</sup> However, through Article 234 the ECJ “transformed the preliminary ruling system from a mechanism to allow individuals to question *EC law* into a mechanism to allow individuals to question *national law*.”<sup>184</sup> As one scholar states, “[t]he accretion of power by the European Court of Justice is arguably the clearest manifestation of the transfer of sovereignty from nation-states to a supranational institution, not only in the European Union but also in modern international politics more generally.”<sup>185</sup> Despite this dramatic shift in power, Member States and their national courts “have bowed to the ECJ’s requirements, and have accepted the Court’s jurisprudence.”<sup>186</sup>

How is it then that Member States, which created the ECJ, allowed the Court to expand its jurisdiction beyond its originally intended reach?<sup>187</sup> As

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180. Tridimas, *supra* note 7, at 134.

181. EVOLUTION OF EU LAW, *supra* note 31, at 331 (emphasis added).

182. Alter I, *supra* note 127, at 125 (stating “Article 177 challenges were to pertain only to questions of European law, not to the interpretation of national law or to the compatibility of national law with EC law.”). *See id.* also noting:

The ECJ was created to fill three limited roles for the [M]ember [S]tates: ensuring that the Commission and the Council of Ministers did not exceed their authority, filling in vague aspects of EC laws through dispute resolution, and deciding on charges of noncompliance raised by the Commission or by member states. None of these roles required national courts to funnel individual challenges to national policy to the ECJ or to enforce EC law against their governments. Indeed, negotiators envisioned a limited role for national courts in the EU legal system.

*Id.* at 124.

183. *Id.* at 122.

184. *Id.* at 126; *see also* Tridimas, *supra* note 7, at 137 (noting that the transformation of “the preliminary ruling system into a mechanism for the enforcement of EC law has conferred considerable autonomy to the ECJ and freed it from being subservient to the national governments that set it up.”).

185. Garret, *supra* note 7.

186. Wetzel, *supra* note 82, at 2833.

187. Alter I, *supra* note 127, at 122.

discussed earlier, the enlistment of national courts, especially lower courts, greatly assisted in the expansion of the ECJ's jurisdiction.<sup>188</sup> In addition to their cooperation, various other factors influenced the acceptance of ECJ precedent without arousing the suspicion and retaliation of Member States.<sup>189</sup> These factors include: 1) low profile decisions by the ECJ; 2) different timelines for politicians and judges; 3) the difficulty of changing or amending the EC Treaty; and 4) denying an ECJ ruling is like denying membership to the EU.<sup>190</sup> While this list is not exhaustive, it demonstrates some of the more important reasons behind Member States accepting the ECJ's expansion of jurisprudence.<sup>191</sup>

### B. Low Profile Decisions

Some theorists speculate that "by limiting the material impact of its decisions, the ECJ could minimize political focus on the Court and build doctrine without provoking a political response, creating the opportunity for it to escape [M]ember [S]tate oversight."<sup>192</sup> Much like the judicial tactic used by Justice Marshall in *Marbury v. Madison*,<sup>193</sup> the ECJ built powerful legal doctrines by introducing the concept but not wielding its power.<sup>194</sup> As

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188. See *supra* notes 162–180 and accompanying text (discussing the cooperation of national courts in referring preliminary questions to the ECJ and applying their decisions as precedent); see also *id.* at 122 (discussing that with national courts sending cases to the ECJ and applying ECJ jurisprudence, interpretative disputes were not easily kept out of the legal realm, and that national courts would not let politicians ignore or cast aside as invalid unwanted decisions).

189. See generally *Alter I*, *supra* note 127, at 129–35 (discussing how the ECJ escaped Members States' control).

190. See *infra* notes 200–205 and accompanying text.

191. See generally *Tridimas*, *supra* note 7, at 137–38 (discussing the principle agent relationship as another factor in how the ECJ grow powerful without Member States noticing).

Borrowing from the economic theory of the principle-agent relation the ECJ is seen as an institution (agent) to which sovereign states (principals) have delegated authority to interpret the law and thus facilitate transnational co-operation between the member states. However, given the powers granted to accomplish its functions, the institution may take a life of its own and serve its own interests by pursuing its most preferred policies rather than those of the principals. In practice this takes the form of advancing pro-integration policies that would not have been favored by some of the member state governments.

*Id.*

192. *Id.* at 133. See also *Garret*, *supra* note 7, at 155 (stating that "[t]he best way for the Court to further this agenda is through the gradual extension of case law (that is, the replacement of national laws and practices by ECJ decisions as the law of the land in EU member states)."). *Id.*

193. 5 U.S. 137 (1803).

194. See *Alter I*, *supra* note 127, at 131 relating that:

A common tactic is to introduce a new doctrine gradually: in the first case that comes before it, the Court will establish the doctrine as a general principle but suggest that it

demonstrated in the *Da Costa* decision, “the ECJ declared the supremacy of EC law . . . , but it found that Italian law privatizing the electric company did not violate EC law.”<sup>195</sup> By laying the foundation of the EC legal system in an incremental fashion, the ECJ was able to develop a foundation which challenged the sovereignty of Member States, but did not arouse their suspicion until it was too late.<sup>196</sup>

### C. Different Time Lines for Politicians and Judges

The different time horizons for political and judicial careers also greatly affected the Court’s ability to cultivate legal principles.<sup>197</sup> Because the political system is subject to a much shorter time frame, the national judiciaries are less politically vulnerable.<sup>198</sup> “By making sure that ECJ decisions did not compromise short-term political interests, the judges and the Commission could build a legal edifice without serious political challenges.”<sup>199</sup> The material impact of ECJ decisions mattered more to politicians than their doctrinal significance.<sup>200</sup>

### D. To Deny an ECJ Decision is Like Denying Membership to the EU

In relation to the other EU institutions, the ECJ is considered perhaps the most popular of the four institutions.<sup>201</sup> As a neutral third party enforcing the

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is subject to various qualifications; the Court may even find some reason why it should not be applied to the particular facts of the case. The principle, however, is now established. If there are not too many protests, it will be re-affirmed in later cases; the qualifications can then be whittled away and the full extent of the doctrine revealed.

*Id.* (citing TREVOR C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW: AN INTRODUCTION TO THE CONSTITUTIONAL AND ADMINISTRATIVE LAW OF THE EUROPEAN COMMUNITY* 78–79 (2nd ed. 1988)).

195. *Alter I*, *supra* note 126, at 131 (citing *Tridimas*, *supra* note 7).

196. *See Lindseth*, *supra* note 13, at 664 noting that:

Integration by adjudication was effective in part because it appealed to rule of law sentiments among Member States officials, even where they were otherwise hostile to specific decisions. It gave integration a distinctly incremental feel, not necessarily a bad thing while the new regulatory regime was trying to legitimate itself.

*Id.*

197. *Alter I*, *supra* note 127, at 142–43.

198. *Id.*

199. *Id.* at 131.

200. *See id.* at 143 (stating that by taking advantage of the political fixation on the material consequences of cases the ECJ was able to construct legal precedent without arousing political concern).

201. Interview with Anibal Sabater, *supra* note 158 (“If you have a conversation on the street with Europeans about the EU, most will speak highly of the European Court of Justice. This is because the ECJ, unlike the other Community institutions, represents a neutral third party willing to adjudicate interests on behalf of individuals.”).

rights of private citizens created under the EC treaties, the ECJ is perceived as an unbiased enforcer of justice.<sup>202</sup> “No member has ever flatly rejected a Court ruling: to do so would be tantamount to denial of membership of the EC.”<sup>203</sup> In addition, Member States who flout the authority of the ECJ face political repercussions.<sup>204</sup> Member States who do not abide by an ECJ ruling are “single[d] out,” perceived as “uncooperative,” and are forced to face their “domestic courts which apply the ECJ rulings.”<sup>205</sup>

### *E. Difficulty in Reversing or Curtailing the ECJ's Power*

After Member States realized the omnipotence of the ECJ's jurisdiction under Article 234, it was too late to curtail its power. Overturning an ECJ decision is very difficult.<sup>206</sup> It requires not only the passage of new legislation, but cooperation among Member States.<sup>207</sup> “[C]hanging the constitutional provision or changing the role and the functions of the Court requires treaty revision,” something which can only be accomplished “by unanimity and ratification by each [M]ember [S]tate.”<sup>208</sup> The challenge of achieving unanimity in overturning or revising an ECJ decision or power makes such action impractical.

## VI. CONCLUSION

With the signing of the EU Constitution in October of 2004,<sup>209</sup> the EU is moving towards the recognition of a supranational institution. The evolution of the European Union requires the evolution of its legal system. Inherent to the success of this process has been the ECJ's development of precedent through the preliminary ruling system under Article 234.<sup>210</sup>

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202. *Id.*

203. Swartz, *supra* note 11, at 694 (quoting Colchester & Buchan).

204. Tridimas, *supra* note 7, at 138.

205. *Id.*

206. *See id.* *See also* Alter I, *supra* note 127, at 135 (stating that “[t]he only choice left for politicians is to rewrite the EU legislation itself.”).

207. *See* Tridimas, *supra* note 7, at 138.

208. *Id.* (noting that “[t]he latter implies that the threat of revising the Court's mandate may lack credibility and diminish its value”); *see also* Alter I, *supra* note 127, at 136. “In order to change the treaty, [M]ember [S]tates need unanimous agreement plus ratification of the changed by all national parliaments. Obtaining unanimous agreement about a new policy is hard enough. But creating a unanimous consensus to change an existing policy is even more difficult.” *Id.*

209. *EU leaders sign new constitution*, BBC NEWS, Oct. 29 2004, <http://news.bbc.co.uk/1/hi/world/europe/3963701.stm> (last visited Oct. 6, 2005).

210. *See supra* notes 55–80 and accompanying text (giving an overview of the ECJ's development of a precedent based system).

By engaging the support of national courts, private litigants, and creating a body of case law, the ECJ propelled the EU's mission of economic harmonization forward.<sup>211</sup> With the duty to harmonize the laws of twenty-five different nations, "the legitimation of precedent can . . . be defended on the ground that there was not, in reality, any other choice for the ECJ."<sup>212</sup>

The ECJ's development of precedent represents the natural evolution of the global legal system.<sup>213</sup> As argued by one scholar, "the first steps toward a global legal culture will be dominated by some blending of civil law and common law."<sup>214</sup> It is quite possible that the ECJ's development of precedent through Article 234 represents "the tentative emergence of a common private law for the European Community."<sup>215</sup>

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211. Lindseth, *supra* note 13, at 663.

212. CRAIG & DE BURCA, *EU LAW*, *supra* note 57, at 450.

213. See Miriam Aziz, *Sovereignty Lost, Sovereignty Regained? Some Reflections on the Bundesverfassungsgericht's Bananas Judgment*, 9 COLUM. J. EUR. L. 109, 110 (2002) (stating that "the project of European integration and sovereignty . . . at the micro-level represents an illustration of the effects of the macro-level of globalization.").

214. Koch, *supra* note 94, at 3.

215. Zimmermann, *supra* note 6, at 72.