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REVISITING *VAN GEND EN LOOS*

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What *Van Gend en Loos* Stands For

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Prologue:
Revisiting *Van Gend En Loos*

Fifty years have passed since the European Court of Justice gave what is arguably its most consequential decision: *Van Gend en Loos*. The UMR de droit comparé de Paris, the European Journal of International Law (EJIL), and the International Journal of Constitutional Law (I•CON) decided to mark this anniversary with a workshop on the case and the myriad of issues surrounding it. In orientation our purpose was not to ‘celebrate’ *Van Gend en Loos*, but to revisit the case critically; to problematize it; to look at its distinct bright side but also at the dark side of the moon; to examine its underlying assumptions and implications and to place it in a comparative context, using it as a yardstick to explore developments in other regions in the world. The result is a set of papers which both individually and as a whole demonstrate the legacy and the ongoing relevance of this landmark decision.

My warmest thanks go to the co-organizers of this event, Professor H el ene Ruiz Fabri, Director of the UMR de droit compar e de Paris, and Professor Michel Rosenfeld, co-Editor-in-Chief of *I•CON*.

JHHW

WHAT *VAN GEND EN LOOS* STANDS FOR

By Damian Chalmers and Luis Barroso

Abstract

Three transformational developments flowed from Van Gend en Loos: the central symbols and ideals of EU law; an autonomous legal order with more power than traditional treaties; and a system of individual rights and duties. The judgment also set out how each of these developments was to be deployed. The symbols and ideals were set out to proclaim EU authority rather than to go to what the EU did. Insofar as there was to be EU government through law, the EU legal order was conceived, above all, as a vehicle for the expression of EU government. Individual rights were predominantly allocated, therefore only where they furthered the realisation of the collective objectives of EU government. Conceiving EU law as governmental law also left a profound and negative effect on EU legal meaning. This became shaped by EU law being reduced to something to sustain activities valued by EU government rather than to provide a wider, more emancipatory imaginary.

1. Introduction

Van Gend en Loos (*VGL*) was understood very differently at the time to how it is understood today.¹ Within the Court, it was seen as a compromise judgment² and the distinguished comparatists, Riesenfeld and Buxbaum, noted that the judgment neither ventured ‘beyond the line of minimum exposure’ nor engaged in ‘a premature entanglement with constitutional niceties.’³ Today, the situation is very different. On its 50th anniversary, the Court of Justice described it as the ‘source of and a framework for the principles which have shaped the constitutional structure of the European Union’.⁴ The reason is that *VGL* stands for different things now and then. It now carries over fifty years of legal and academic baggage that it did not then. The importance of what *VGL* stands for was well understood by the academics, lawyers and Commission officials who manoeuvred to generate a narrative for it at the time.⁵ However, possibly because this question is so multi-layered and so exacting, it has, however, never been problematized. For what *VGL* stands for can go to many things: a way of life held out to European citizens; the power of the EU legal order, and the grant of justiciable rights and duties which empower some and disempower others. In reality, it stands for all of these, and that makes it the central question to ask of *VGL*.

These different elements were wrapped up within three claims by *VGL*, which shaped how they were expressed and what *VGL* was, subsequently, to stand for. The first proclaimed the authority of EU law. As the scale of authority proclaimed was high, the limitation of national sovereignty, corresponding reasons had to be provided for this, namely EU law possessed more exalted qualities than the national sovereign. This led *VGL* to provide a rich symbolism and idealism for EU law. The second claim went to

¹ Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.

² M. Rasmussen, ‘The Origin of a Legal Revolution – The Early History of the European Court of Justice’ (2008) 14 *Journal of European Integration History* 77, 91-97.

³ S. Riesenfeld & R. Buxbaum, ‘N. V. Algemene Transport- En Expeditie Onderneming van Gend en Loos c. Administration Fiscale Neerlandaise: A Pioneering Decision of the Court of Justice of the European Communities’ (1964) 58 *AJIL* 152, 157.

⁴ http://curia.europa.eu/jcms/jcms/P_95693/ <accessed 10 July 2013>

⁵ M. Rasmussen, ‘Establishing a Constitutional Practice: The Role of the European Law Associations’ in W. Kaiser & J-H. Meyer (eds) *Societal Actors in European Integration : Polity Building and Policy Making 1958-1992* (2013, Palgrave); A. Vauchez, ‘The making of the European Union’s Constitutional Foundations: The Brokering Role of Legal Associations and Networks’ in W. Kaiser et al (eds) *Transnational Networks in Regional Integration: Governing Europe 1945-1983* (Basingstoke, Palgrave, 2010).

the regulatory qualities of EU law. It set out EU law as something through which EU government could be realized by setting out how EU law as an effective policy tool. As a consequence, *VGL* set out the template for how EU legal doctrine would contribute to realization of the objectives of EU government. The final claim went to the recognition of different interests through the grant of justiciable rights. This endowment of rights and responsibilities not only generated geographies of power, they also served to create a broader recognition of the worth of their beneficiaries. These rights, in turn, established legal communities through the setting out of associative ties and mutual commitments between individuals. These communities in turn, shaped the meaning of EU law through setting the material and ideational context for its interpretation.

It is the inter-relationship between these claims which leads to ambivalence about acclaiming what *VGL* stands for. As the symbols and ideals of EU law are contained in a proclamation, they go in no detailed way to what EU law does. They sustain but do not strongly constrain EU government with the centre of gravity of EU law being an instrument of that government. By contrast, the governmental qualities of EU law strongly determined the allocation of individual rights. These were granted predominantly for the realization of collective objectives set by EU government. As a consequence, despite its promise, only a patina of unevenly distributed rights has emerged from *VGL*. The most troubling legacy of *VGL* is, however, the moral compass left by it. The interpretive setting for EU legal rights is one in which individuals come together exclusively for shared purposes which contribute to EU government. This is a peculiarly thin vision of community through which to interpret legal rights. It leads to their meaning being so subsumed by this idea of shared purpose that familiar and important legal concepts carry disfigured interpretations in EU law which simply do not resonate with understandings these found elsewhere.

2. The Proclamation of the Symbols and Ideals of EU Authority

The first matter addressed in *VGL* is not the question asked on the direct effect of what is now Article 30 TFEU by the Dutch court but that of the more general quality of authority enjoyed by EU law. This is unsurprising. Van Gend en Loos could not enjoy tax free imports protected by Dutch courts if the Treaty offering this enjoyed only pipedream authority. It epitomised, however, a more general challenge EU law. To

present any kind of legal vision for its subjects, even on an arcane issue such as this, EU law would also have to set out the quality of obedience generated by it. The two are mutually dependent. An EU vision of life is necessary to justify its authority just as this authority is necessary to make that vision a regulatory reality rather than a thought experience. Furthermore, there is a sliding scale. Grander panoramas offered by EU law would impose greater demands of obedience just as stronger claims to authority would require ever more enticing visions of life.

This presented a dilemma. In *VGL*, a high level of authority for EU law was being sought. Only through the limitation of national sovereignty could there be a piercing of the black box of territoriality which granted States a monopoly over the effects of treaties within their domestic legal systems. Sovereignty, as the 'right to let live', however, could only be displaced by a figure with commensurately valued qualities.⁶ Furthermore, subjects would be expected to follow EU law over the sovereign even where the majority disagreed with individual decisions or these imposed significant costs on them. Simply asserting the benefits of integration would be insufficient to secure this, particularly on a fiscally marginal tax such as customs duties. Such authority required faith to be placed in EU law. It had to be trusted as both representing something of value and as capable of securing something of value. Both of these issues go to the attributes of EU law. With the former, these attributes must symbolise a way of life which has both resonance and is worthy of praise for EU law's subjects. With the latter, these must mark out a certain capacity or strength. This begged the question of the mechanism to put these in place. A matter of fact assertion or a vainglorious boast would not be enough to inculcate faith, which allowed this authority to be recognised. Historically, this dilemma has been met by the use of ceremony. A ceremony has thus been central to the institution of authority with an external audience, whose pedigree to recognise authority is not in doubt, being assembled to acclaim both the status of the authority figure and her symbolic power.⁷

⁶ G. Agamben, *Homo sacer: Sovereign power and bare life* (1998, Stanford University Press) 142.

⁷ G. Agamben, *The Kingdom and the Glory* (2012, Stanford University Press, Stanford) 167-177.

This ceremony was not available in *VGL*. It could, however, engage in a three stage proclamation of its authority, which paralleled, even if it did not mirror, the central elements of authority set out by these ceremonies.

Authority figures are deemed, first, to act on behalf of a higher presence (ie the sovereign in the case of the nation State). This presence both bequeaths authority and provides a repository of values and symbols. The allure of this higher presence lies partly in its mystery. It is something never fully known or knowable. In *VGL*, this presence is a legal constituted post-national community which has the attributes of national communities but also attributes unparalleled by these. Its mystery is protected by the cryptic description of in the judgment. Although well traversed, it is worth citing the relevant passage:

‘The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.’

This mention of individual subjects with their own obligations, rights and heritage envisages a community beyond the State. This idea of community replicates rather that of a ‘human order’, which Charles Taylor has observed to be the central source of political value. Going under various titles (the nation, the people, the public), this human order is in all cases depicted ‘as historical agents, bodies in a material world, which move towards modes of common life in which our individuality is respected (at first as free rights-bearers, then later there are versions which want to make place for individual, original identities)’.⁸ Just as this human order is to provide the secular grammar of value for the modern State, so, according to *VGL*, it is to do this for the Union. The latter creates and acts for a human order marked by a common way of life in which individuals enjoy freedom. Other elements elevate this human order beyond that of the nation one. The claim that EU law limits national sovereign rights, whilst claiming

⁸ C. Taylor, *A Secular Age* (2007, Harvard University Press) 279.

no sovereignty of its own, suggests a limit to the power of the State over the administration of human life. The State is not denied the right to administer this but is required to justify its exercise.⁹ The Union human order, thus, has a civilizing mission which is to curb the excesses of the nation State and rectify its omissions and deficits. Finally, the grant of additional affiliations, rights and responsibilities set out a new subjectivity which challenges subjects to rethink how they relate to one another. New entitlements open fresh horizons just as new duties suggests a different sensitivity to the singularities and needs of others.¹⁰ It is the radical promise of the judgment which has led scholars to project such hope into the European Union. The European Union is thus associated with a European tradition of freedom;¹¹ a mediator between interdependence and difference;¹² an ever-opening form of cosmopolitan integration;¹³ an inclusive communicative community of interests affected by EU law;¹⁴ a world project subject to the demands of universal intelligibility, public justification and responsibility toward all others;¹⁵ or a form of constitutional patriotism committed to sustaining citizen autonomy based on civic solidarity.¹⁶

Secondly, the judgment provides a surrogate to ceremonies habitually used to acclaim the authority figure. To enable this, the higher presence is cast not as external to EU law, as thus can provide an audience to acclaim it, but as immanent to it. The passage above, therefore, sees the Union's post-national community as emanating from EU law. It is to be divined, according to *VGL*, from the 'spirit, general scheme and wording (of the treaty as a whole)'. This human order relies on both interpretation and revelation for its coming into being. Internal to the Treaties, legal interpretation provides the context for its revelation. Disclosure will only take place when a particular provision is being interpreted. However, as an immanent presence, the central dynamic

⁹ D Chalmers, 'European Restatements of Sovereignty' 186, 188-191 in R. Rawlings, P. Leyland & A. Young (eds) *Sovereignty and the Law. Domestic, European and International Perspectives* (Oxford University Press, Oxford, 2013).

¹⁰ J. Kristeva, *The Crisis of the European Subject* (2000, Other Press) Chapter 3.

¹¹ J. Kristeva, 'Europhilia, Europhoria' (1998) 3 *Constellations* 321, 327.

¹² E. Balibar 'Europe: Vanishing Mediator' (2003) 10 *Constellations* 314.

¹³ U. Beck and Lagrande, *Cosmopolitan Europe* (2007, Polity) 6-9 and 225-240.

¹⁴ H. Brunkhorst, *Solidarity: From Civic Friendship to a Global Legal Community* (2005, MIT) Chapter 7.

¹⁵ R. Gasché, *Europe, or the Infinite Task: A Study of a Philosophical Concept* (2009, Stanford University Press) 342.

¹⁶ ie J. Habermas, *The Postnational Constellation* (2001, Polity) Chapter 4; J-P. Müller, 'A European Constitutional Patriotism? The Case Restated' (2008) 14 *ELJ* 542.

is one of revelation. There is no text which explains the nature or details of this presence. Instead, interpretations disclose glimpses of it. Consequently, the vision of this community unfolds as EU law develops. Every new provision or interpretation reveals a little more of it. Like a pointillist painting, dots revealing this image have accumulated over time to give much more elaborate and nuanced picture.

EU law's civilising power, thus, started as little more than protection for market actors from discriminatory or arbitrary national treatment.¹⁷ The expansion of the economic freedoms amplified this to protection from broader governmental malfunction by requiring States to rectify representation deficits or put in place systems of due process.¹⁸ Alongside this, the growth of equal opportunities, consumer, environment and public finances law drew EU law into a broader role as guarantor of those interests historically vulnerable to majoritarian abuse, be they minority, diffuse or future interests. This diversification continues. The policing of denial of central elements of citizenship to a State's own nationals serves to protect a certain core of political community within the national territory.¹⁹ EU law on humanitarian protection and assistance increasingly carves out more active duties for State to assist strangers in need.²⁰

A similar burgeoning has taken place with regard to community. Horizontal direct effect established this initially in legalistic formal terms through its establishment of mutual commitments between private actors.²¹ More substantive commitments of mutual trust and accommodation emerged with doctrine of mutual recognition as home States were to take into account interests of other States citizens whilst other States in turn were to treating its law as the law of their land.²² The most emblematic expansion is EU citizenship whose provision of socio-economic entitlements suggests the provision

¹⁷ E. Mestmäcker, 'On the Legitimacy of European Law' (1994) 58 *Rechts Zeitschrift* 615.

¹⁸ M. Poiares Maduro, *We the court: The European Court of Justice & the European Economic Constitution* (Hart, Oxford-Portland, 1998) 159-174.

¹⁹ Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177.

²⁰ Case C-465/07 *Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-921.

²¹ Famously, of course, the Court rejected the argument that as Treaty articles were only addressed to Member States they could not create associative ties more widely, Case 43/75 *DeFrenne v Sabena (No 2)* [1976] ECR 455, paras 31-32.

²² The interplay is best brought out in M. Poiares Maduro, 'So close and yet so far: the paradoxes of mutual recognition' (2007) 14 *JEPP* 814.

of ties based not on nationality but some other sense of attachment.²³ The array of social and economic entitlements proliferating beyond EU citizenship has led to a thickening and diversification of these. De Witte has observed market solidarities based on legal relations of market dependence; communitarian solidarities where welfare provision is correlated with the reciprocal commitment shown by the EU citizen; and finally aspirational solidarities emerging from citizens making use of the opportunities availed by EU law.²⁴

These immanent qualities allow the ceremonial role traditionally performed by acclamation to be replaced by exaltation. Exaltation, the act marking out the special qualities of a person or object in such a way as to elevate them to great influence, in both Christian theology and early astrology was done by the Creator. Only it had power to bestow these qualities, and therefore to recognise them.²⁵ In *VGL*, the exalters of EU law are thus, the Member States, through their 'acknowledging the authority' of the Treaties. These are given a collective legal presence, not found elsewhere in EU law, namely to exalt EU law. Their exaltation takes the form of a series of signs, which mark out EU law's uniqueness ('new legal order'). These include the breadth of the Treaty objectives in the establishment of a common market; the recognition of the peoples of Europe in the Preamble; the uniform interpretation of EU law recognised by the preliminary reference procedure; and the bringing together of EU nationals marked by the European Parliament and Economic and Social Committee.

The emphasis in exaltation on EU law's having special qualities undoubtedly allowed the Court to dip into the rich vocabulary of fundamental rights, constitutionalism and the rule of law.²⁶ This has allowed it to develop important legal safeguards, greater coherence and a more profound repertoire of value than that explicitly marked out in the Treaties. However, exaltation is often marked by shrill resonance. It involves a magnification of virtue to persuade others. The consequence can

²³ Weiler famously talked of EU law removing nationality as 'the principal referent for transnational human intercourse'. J Weiler, 'The Transformation of Europe' (1991) 100 *Yale LJ* 2403, 2481.

²⁴ F. de Witte, 'Transnational Solidarity and the Mediation of Conflicts of Justice in Europe' (2012) 18 *ELJ* 694, 705-710.

²⁵ In Babylonian theology, the point of exaltation of a planet, was taken to be an expression of divine satisfaction. The Exaltation of Jesus was, of course, God placing him at his right side in heaven.

²⁶ Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, para 4; Case 294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 1339, para 23.

be a hollow façade. These doctrines often have a weak epistemology and an uncertain regulatory reach. The EU Charter on Fundamental Rights relies not merely for its inspiration but, more importantly, for its interpretation on a wide variety of other sources. This grants it a strong derivative quality with only limited signification of its own.²⁷ It still is the case that only one provision of a Directive, the hegemonic legislative instrument, has ever been found to violate EU fundamental law.²⁸

The reliance on revelation and exaltation leads to more endemic problems, however.

If constant revelation suggests the future potential of the Union human order to be almost infinite, its present is always very thin. The incremental, partial, ad hoc process of disclosure generates a normative patchiness, incoherence and lack of texture. If one looks at its civilising mission, the most basic of civilizational tools, fundamental rights, is not fully available to EU law. It can only assess national action against these insofar as it falls within the scope of EU law, and even this is uncertain.²⁹ That most unsettling of all fields of national activity, national security, is screened off, at least partially, from EU's mission here.³⁰ Finally, EU law does almost nothing to protect the economically marginalised and dispossessed. Its idea of community can be similarly critiqued. There is no provision for full political membership and little on the quality of engagement or attachment within these communities necessary for belonging.³¹ The terms of community are also criticised as too individualistic,³² unduly sustaining market relations above other forms of social relation,³³ and grounding entitlement from the community excessively over responsibility towards the community. However, it is in the field of individual subjectivity that EU law's vision is most weak. As something which is

²⁷ Articles 52(3) & 53 EUCFR.

²⁸ Case C-236/09 *Association Belge des Consommateurs Test-Achats v Council* [2011] ECR I-773.

²⁹ Case C-617/10 *Fransson*, Judgment of 26 February 2013. This has been contested in 1 BvR 1215/07 *Counterterrorism Database*, Judgment of 24 April 2013, para 91 (German Constitutional Court).

³⁰ See the last sentence of Article 4(2) TEU. On the constraining of due process rights here see Case C-300/11 *ZZ v Secretary of State for the Home Department*, Judgment of 4 June 2013; Joined Cases C-584/10P, C-593/10P and C-595/10P *Commission v Kadi*, Judgment of 18 July 2013.

³¹ On how this might happen see M. Saward, 'Enacting citizenship and democracy in Europe' in E. Isin & M. Saward (eds) *Enacting European Citizenship* (Cambridge, Cambridge University Press, 2013).

³² A. Menéndez, 'European Citizenship after Martínez Sala and Baumbast: Has European Law Become More Human but Less Social?' in M. Poirares Maduro & L. Azoulai (eds) *The Past and Future of EU Law The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart, Oxford, 2010).

³³ A. Somek, *Engineering Equality: An Essay on European Anti-Discrimination Law* (Oxford, Oxford University Press, 2011) 21-53.

not readily inculcated by law, there is an emptiness there which offers little in how EU citizens are to relate to this new environment.³⁴

Equally concerning is the envious relationship exaltation enjoys with acclaim. It is, of course only a pale substitute for acclaim. The yearning for loud acclaim is thus strong within Union DNA, most saliently shown in the subjection of the Constitutional Treaty to multiple referenda across Europe and in the habitual referenda that are held in all accession States.³⁵ There is also a tension between exaltation and acclaim, manifested in EU law as the tension between constitutionalism and democracy.³⁶ EU constitutionalism requires that, at moments of conflict, democracy gives way to law. The reason therefore, irrespective of the merits of the conflict, that primacy must be granted to EU law over other law is that its 'unity and effectiveness' must be protected.³⁷ This is not an argument one would hear about a constitution within a domestic context. Regard would be had there to the values and safeguards provided by it. EU law is most cherished than any other value, not because of what it does, allows or even symbolises, but because of what it is: the hallmark of exaltation, in this case exaltation of it over both democracy, national law and any other values not present within it. This is problematic in itself but it also establishes the even more problematic position of the creator. She is the source of all authority to whom resort can be had, irrespective of any constitutional checks, whenever further authority is sought. The creator of authority in the case of EU law is national executives. These are granted an unconstrained power in their role as creators not just over it, but, through it, over everything else. They can amend its authority through Treaty amendments; accord it symbolic authority, as occurred with the Declaration attached to the Lisbon Treaty on the primacy of EU law;³⁸ or, now, grant authority to substitutes to displace it.³⁹

³⁴ A. Somek, 'On Cosmopolitan Self-Determination' (2012)1 *Global Constitutionalism* 405.

³⁵ L. v. Middelaar, *The Passage to Europe: How a Continent Became a Union* (New Haven, Yale University Press, 2013) Chapter 9.

³⁶ N. Walker, 'Constitutionalism and the Incompleteness of Democracy: An Iterative Relationship' (2010) 39 *Rechtsfilosofie & Rechtstheorie* 206.

³⁷ Case C-416/10 *Križan v Slovenská inšpekcia životného prostredia*, Judgment of 15 January 2013, para 70.

³⁸ Declaration 17 concerning the primacy of EU Law.

³⁹ In *Pringle*, groups of Member States were allowed to establish a wide-ranging process, the European Stability Mechanism, in fields of EU competence, economic policy, and use EU Institutions to manage it even though this involved very different powers from their Treaty powers. The constraints were that the field should not involve exclusive EU competence; the Union should not be granted a specific power in the

Thirdly, the institution of authority must be the bearer of the formal capacity to exercise authority but transforms her into an authority figure, whose attributes symbolise the strength and capacity to do this, and the special qualities to lead subjects towards this idealised way of life. The writing of Kojève is particularly instructive here. He observed that only four ideal types exist in Western thought: the father, the master-slave, the judge and the leader.⁴⁰ Authority figures are either one or a combination of these. The father figure, in which the political community has authority because it is imputed to give rise to its subjects so that, without it, these are reduced to a bare life belonging to nobody, could not be asserted as the Union claims no such hegemony over the political life of its subjects. The Hegelian master-slave relationship, whereby one party has authority because it has responsibility for the conservation of the other, also could not serve. The Union does not possess those material resources which are at the centre of this relationship.

The authority figure claimed by EU law revolves, consequently, around the other two images: those of the judge and the leader.

The judge symbolises qualities of fairness, justice and dispassion and acts as a counterpoint to other authority figures, be they the father or the master, and can even act over them. EU law's civilising mission in *VGL*, which is to hold other sites of power to account, speaks to this image. It also sits well with the role granted to EU law, whereby it gives rise to Union authority rather than the more usual converse of a sovereign granting authority to law. Deployment of formal rationality - whether this be scientific, economic or legal - marks the exercise of this style of authority, as it gives rise to the qualities of dispassion, objectivity and justice valued in the judge. It also leads to heavy reliance on law not simply to provide the framework for policy and government, but to be an instrument of government. This has led to the thicket of legal measures

field; EU legal norms should be observed; and the essential character of the Institutions not be changed. The last three constraints do not seem meaningful. The EU has a specific power in the field of intellectual property (Article 118 TFEU) but this type of mechanism has, nevertheless, been deployed there, Agreement on Unified Patent Court, OJ 2013, C 175/1. *Pringle* held fundamental rights norms do not apply as the measures are characterised as straightforward national action rather than action of the EU Institutions, which it would otherwise have been. The character of EU Institutions was also described in *Pringle* in vague terms, that of the Commission being to promote European integration and the general interest. Case C-370/12 *Pringle v Government of Ireland*, Judgment of 27 November 2012.

⁴⁰ A. Kojève, *La notion de l'autorité* (Gallimard, Paris, 2004) 66-88.

associated with the Union,⁴¹ with legislative measures exceeded several fold by the delegated and implementing laws which form a central medium of EU policy.⁴² If the value of this style of authority is its formality and dispassion, it is also associated with an inflexibility, which is manifested in the complaints of economic operators about the costs of EU law or in lay concerns about its narrow style of risk management.⁴³

The leader, by contrast, has more wide-ranging and insightful vision than her followers, and accordingly greater ambition. This gets others to act on the basis of her promises being more plausible than others. Joseph Weiler has, thus, noted the ‘political messianism’ of the Union whereby it seeks legitimacy from the destiny it promises to achieve.⁴⁴ This vision is present in *VGL* where it states the Union’s postnational community to be constituted by EU law and the ‘object’ of EU law. EU law has a monopoly over their institution - they can only be realised through EU law - and a monopoly over their conception as it is only through EU law that it can be imagined.

The exercise of this style of authority has led, first, to the continual development of new projects. Without the momentum of these the Union is seen as falling under some bicycle logic where it will otherwise collapse. These projects must be more vaunting in ambition than those which could be achieved at a national level, as, otherwise, *pace* the subsidiarity principle, there would be reason to realise at Union level. As the Union has few resources of its own, one challenge is that it must ask more of its subjects as a consequence, for only these can secure these aims. This can be done either by harnessing more actors together to realise the project. However, this can dilute accountability by virtue of a schema where everybody is responsible for everything, and thereby nobody for anything. Alternately, where it does not increase the number of

⁴¹ The *acquis* of the EU consisted of 8862 regulations and 1885 directives at the end of 2011. European Commission, *29th Annual Report on Monitoring the Application of EU Law*, COM (2012) 714, 2.

⁴² For example, 1625 implementing measures were adopted in 2011, European Commission, *Report on the Working of the Committees during 2011*, COM (2012) 685, 8. This compared with about 130 Regulations and Directives adopted as legislative acts. D. Chalmers & M. Chaves, ‘Union Democratic Overload and the Unloading of European Democracy Before and After the Crisis’ in O. Cramme & S. Hobolt (eds) *Democratic Politics in a European Union under Stress* (Oxford University Press, Oxford, 2014).

⁴³ M. Kritikos, ‘Traditional risk analysis and releases of GMOs into the European Union: Space for non-scientific factors?’ (2009) 34 *ELRev* 405.

⁴⁴ J. Weiler, ‘60 Years since the First European Community – Reflections on Political Messianism’ (2011) 22 *EJIL* 303, 306.

actors, it can increase the levels of responsibility. Individual actors have to do more, something which leads to EU law being seen as overly demanding.⁴⁵

It has led, secondly, to teleological reasoning. The feature of leadership is a vision of a future state which is complete and coherent. Such is teleological reasons. EU law provisions are interpreted in light of their perceived objective. This objective is not, however, the original intent of the law-makers but rather some general point in the horizon to which the provision is believed to be moving. The generality and indeterminacy of this objective allows the Court of Justice considerable manoeuvre. It sets out a particular linear narrative stretching from before the case in hand to final realisation of this objective, which obscures the tensions and contestation along this path. Balancing values or interests can get waylaid. Contemporary practicalities and consequences can get overlooked in pursuit of the dream set out in the final objective.⁴⁶

3. EU Law and the Government of EU Subjects

VGL's image of postnational community sets out what EU law 'should be' about. This 'should be' brings together an actual world, that of the practice of EU law, and a possible world, that of the postnational human order. It then seeks to bring these closer by finding elements of the latter through interpretation of the former.⁴⁷ This articulation of the possible structures certain dimensions of EU law very powerfully: its mode of reasoning, its iconography and the architecture of its authority, most notably the reasons for it, its source and its sustenance. It is silent on other significant dimensions of EU law. In particular, it does not go to what EU law does or even, in detail, how it does it. It says nothing about EU law's remit, content, incidence or modalities.

The relationship of *VGL* to this concrete world of rule is still significant. The case, after all, went to how the Dutch authorities were to administer their taxes. Its involvement is, however, of a different order. It goes to the contribution of EU law to the

⁴⁵ On case studies illustrating the point see D. Chalmers, 'Gauging the Cumbersomeness of EU Law' (2009) 62 *CLP* 405.

⁴⁶ On these qualities of teleological reasoning see G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge, Cambridge University Press, 2012) 274-275.

⁴⁷ On this, and its value, see R. Byrne, *The Rational Imagination: How People Create Alternatives to Reality* (2005, MIT) especially the Conclusion; K. Markman et al, 'Implications of Counterfactual Structure for Creative Generation and Analytical Problem Solving' (2007) 33 *Personality and Social Psychology Bulletin* 312

Union's system of rule. This system of rule exists prior to *VGL*, most obviously by providing the law which gives rise to any provision which may have direct effect. In the European Union, it takes the form of a government order comprising both a public administration and a particular conception of legal and political power. The former provides the administrative and legal apparatus which goes to when the Union can act (ie the remit of EU competencies and subsidiarity principle), and the institutions and instruments of rule. This apparatus grants the possibility for EU rule but cannot explain when and how EU law should regulate an activity. The latter, therefore, sets out when the Union should rule, the limits to that rule, how its effectiveness of rule is to be gauged; how different rules relate to one another and how rule is to be reviewed.

If its system of public administration is clear, its conception of legal and political power is possibly less well known. To understand how *VGL* contributes to this governmental order, it is necessary to say a few words about it.

At the heart of a conception of government is the belief in the presence of spheres of activity external to the legal and political system.⁴⁸ Examples include the workplace, the market place, nature, the school, the financial system, the economy etc. These have, their own *modus operandi*, characteristics, equilibria and systems of value. These external spheres of activity are secondly, perceived as enabling collective life. This grants them a life-enabling quality, which, in turn, means that they provide not just a terrain of action for government but a vocabulary of value. It is to do what it can to nurture them.

These external spheres of activity determine, first, the incidence of EU law as EU law comes into play, as a response to their particular dynamics. There might be certain dysfunctions or disharmonies which need to be rectified or certain opportunities to be seized. The instrument for this is the Action Plan. Used prolifically since their inception in the early 1970s. The Action Plan contours a programme of action around the sphere of activity to be regulated. Action Plans set out problems to be addressed or schema to be realised; justify EU legal action in addressing this; set out the role of this legislation; relate this to existing EU law and action by other legal systems or other forms of regulation; and, finally, locate relate problem to wider Union objectives and, conversely, individual pieces of legislation to the problem. A feature is their multiplicity and

⁴⁸ G. Agamben, *supra* n. 7, 16-52.

diversity. Each puts in place a legal programme which justifies and relates legislation to one another, but each programme is quite discrete from other programmes.

The norms of these external spheres of activity – be these industrial, scientific, commercial, professional, organisational or financial – form, secondly, much of the material content of EU law. These norms stabilise the spheres of activity by establishing conformities, allow the activities in question to be identified and valued by setting out a model of behaviour for that activity; and enable the pursuit of these activities by providing a single template for how they are to be carried out. Their discovery and protection is, thus, EU government's central mission. This leads to a prizing of expertise as it is this which enables these norms to be identified and developed.⁴⁹ The commitment to high regulatory protection in many of the Treaty provisions, which invariably carries with it a commitment to base this protection on state of the art expertise.⁵⁰ Similarly, a failure to give proper effect to or to secure a sufficient quality of expertise in the decision-making process renders the EU measure unlawful.⁵¹ The centrality of norms to EU government is also evidenced in the panoply of institutions and processes whose presence in EU decision-making is justified by their skill at norm-identification and articulation: be it comitology, agencies or standardisation.⁵² It is also present in norm change being one of the central motors for legal reform: be this be through formal amendment of the legislation⁵³ or through the continual adoption of implementing measures to mirror this change.⁵⁴

⁴⁹ G. Canguilhem. *The Normal and the Pathological* (1991, Zone Books, New York) 151-181 especially 176-181.

⁵⁰ Eg Articles 114(3), 168(1), 169(1), 191(2) TFEU.

⁵¹ Case C-212/91 *Angelopharm v Freie Hansestadt Hamburg* [1994] ECR I-171, paras 36-29; T-13/99 *Pfizer Animal Health v Council* [2002] ECR II-3305, para 172.

⁵² At the end of 2011, there were 268 functioning committees in comitology, European Commission, *Report on Working of the Committees during 2011*, COM (2012) 685,6. There were 307 working committees in CEN, the largest European standardisation process at the end of 2012, <https://www.cen.eu/cen/AboutUs/Statistics/Pages/default.aspx> <accessed 1 June 2013> There are currently forty European agencies http://europa.eu/agencies/regulatory_agencies_bodies/index_en.htm <accessed 5 June 2013>

⁵³ According to admittedly dated information, it is seen as the most important driver behind Commission proposals accounting for 35% of them. House of Lords European Union Committee, *Initiation of EU Legislation* (SO, 22nd Report, Session 2007-8, London)15.

⁵⁴ 1785 implementing measures were adopted in 2011 to reflect such change. European Commission, *Report on Working of the Committees during 2011*, COM (2012) 685,8.

The role for the EU administration is as housekeeper to these spheres of activity.⁵⁵ Their external qualities mean that it can regulate but not constitute them. In this, it can contribute to their good functioning, protection and harmony of these spheres of activity. This affects both the incidence and modes of EU government. It is only to intervene when it can enable realisation of the perceived objectives of these spheres of activity better than other institutional orders (subsidiarity) and only to the extent necessary to contribute to their good functioning (proportionality). It also leads to a concern with an economy of government which supplants ideological contestation as the central engine of legal change. The Union is to do 'more with less'. Intervention is to be as unobtrusive as possible to secure the best results possible. Within the Union, the simplification agenda led, therefore, to the repeal between 2005 and 2009 of 6,500 pages of legislation with a further 729 measures 'consolidated' within 142 acts.⁵⁶ In 2012, by contrast, 84 laws were adopted through the ordinary legislative procedure.⁵⁷

VGL grants EU law those regulatory qualities which enable to contribute actively to this government order. This requires it have qualities which allow it to be an effective instrument of government whilst emphasizing those qualities which allow it to be recognized as law. This balancing act involves addressing three different issues: its relationship to other systems of rule; to the machinery of government within the Union and, finally, the quality and extent of obligation that it can extract from its subjects.

Before any of these could be addressed, *VGL* had to characterize the nature of EU legal power. As government is based on an economy of power, the only institutional power to be granted is that necessary to secure the effects desired, *VGL* grants EU law only that power necessary to govern. It does this by returning to a distinction between a power to reign or rule and a power to order, execute or govern.⁵⁸ The former is historically possessed by only the sovereign. It is an absolute and transcendental power. In modernity, Law has often come to replace the sovereign. This is most vividly

⁵⁵ H. Arendt, *The Human Condition* (1958, University of Chicago) 28.

⁵⁶ European Commission, *Third progress report on the strategy for simplifying the regulatory environment*, COM (2009) 17, 3. On the unfolding of this agenda see European Commission, *A Simplification Agenda for the MFF 2014-2020*, COM (2012) 42/5.

⁵⁷ <http://www.consilium.europa.eu/media/1856955/130130-bilan-general-2.pdf> <accessed 6 June 2013>

⁵⁸ Agamben locates this division in theological roots. Sovereign power is a divine power vested in the King and the Kingdom. The origins of governmental power are vested in angels whose role is to praise the sovereign, contemplate, act as role models for subject and administer the affairs of the kingdom. G. Agamben, *supra* n. 7, 68-82 & 144-160

expressed in the idea of the rule of law, which sees law as something which can extend itself to rule anything it wishes. There is a curiosity about EU law. If the Treaties claim that the rule of law is a value on which the Union is founded,⁵⁹ there has never been a claim to a rule of EU law over anything or anybody other than the EU Institutions.⁶⁰ This refusal to claim a power to rule for EU law more generally goes back to *VGL*, which claims no sovereign qualities for EU law. Instead, it holds this power of rule as something held by the national sovereign, to which it stands in opposition. By contrast, the power claimed for EU law by *VGL* is ordered power. However, it is remarkably terse on this, merely describing EU law as a ‘new legal order’. The point is however, by *Costa*, a year later, which had to address the nature of EU law’s power more explicitly by considering whether it took precedence over national law.⁶¹ The reason was, the Court argued, that EU law’s ‘executive force’ should not be contingent or vary.

EU law is granted, therefore, an autonomous power to order the spheres of activity which fall within its aegis rather than any power to rule. It is only granted those attributes which enable it to have sufficient ordering force to realize its objectives. If *VGL* and *Costa* were cryptic about the implications of this, these emerged over time in the three dominant doctrines which go to the regulatory power of the EU legal order: its autonomy, its effectiveness, and the fidelity principle in Article 4(3) TEU.

The autonomy of EU law governs the relationship between EU law and international law.⁶² It is used to explain why, although EU law is bound by international law,⁶³ international law is not to rule on the central institutional features of EU law;⁶⁴ contradict certain norms of EU law;⁶⁵ and why, in many cases, international law is only to generate limited effects within EU law.⁶⁶ In all cases, granting international law greater effect would comprise the autonomy of EU law. This doctrine begs many

⁵⁹ Article 2(1) TEU.

⁶⁰ Most recently Case C-336/09P *Poland v Commission*, Judgment of 26 June 2012, para 36.

⁶¹ Case 6/64 *Costa v ENEL* [1964] ECR 586.

⁶² J. Czuczai, ‘The autonomy of the EU legal order and the law-making activities of international organizations. Some examples regarding the Council most recent practice’ (2012) 31 *YEL* 452.

⁶³ On the binding effects of international law see Article 3(5) TEU, and, most elaborately, Case C-366/10 *Air Transport Association of America v Secretary of State for Energy and Climate Change*, Judgment of 21 December 2011.

⁶⁴ *Opinion 1/09 on a unified patent litigation system* [2011] ECR I-1137, paras 67-89.

⁶⁵ Joined Cases C-402/05P & C-415/05P *Kadi and Al Barakaat International Foundation v Council* [2008] ECR I-6351, para 308.

⁶⁶ On the autonomy of EU law to determine the internal effects of international law see Case C-160/09 *Katsivardas – Nikolaos Tsitsikas v Ipourgos Ikonomikon* [2010] ECR I-4591, para 32.

questions, however. Any constraint by international law will, in some sense, limit EU legal autonomy. The intermittent effects granted to international law suggest some subtext which must go both to EU legal identity and to why it should give international law effect. This cannot be that EU law is a figment of international law. Otherwise, full effect should be given to international law, particularly as EU law could not limit its effects on the same basis as nation States as it does not enjoy sovereignty. If EU law is not such a product, this begs the rationale for being bound at all. International comity, *pacta sunt servanda* or commitment to observance of certain values might generate certain reasons, but their status would be second order ones within such a settlement, and could not explain this question of the autonomy of EU law as they all cut across it.

If the commitment to international law is seen as part of a commitment to govern activities, then the relationship becomes easier to explain. International law is valuable insofar as it enables the orderly management of the external spheres of activity which extend beyond the EU's territorial frontiers. The orderly management of these requires that the Union engage in an orderly way by honoring its commitments. However, this commitment recedes when juxtaposed to securing the orderly management of activities within the Union own territories. It will be allowed to constrain that government but not compromise it. EU law will therefore not allow international law to allow individuals to destabilize its government,⁶⁷ rob it of institutional capacity⁶⁸ or empower institutions to behave in a disorderly manner.⁶⁹ The idea of government, consequently, has a jurisgenerative quality which both allows it to enter international agreements and sets their level of power.

The requirement for EU law to be effective, the effectiveness principle, sets out the circumstances where EU law generates individual rights in national courts. It has, famously, been deployed to grant horizontal direct effect,⁷⁰ direct effect to Directives,⁷¹ State liability,⁷² State liability for judicial error,⁷³ and incidental direct effect.⁷⁴ Most of

⁶⁷ Joined Cases C-120/06P and C-121/06 P *FIAMM v Council* [2008] ECR I-6513, paras 97-99; Case C-366/10 *Air Transport Association of America v Secretary of State for Energy and Climate Change*, Judgment of 21 December 2011, paras 110-111.

⁶⁸ *Opinion I/09 on a unified patent litigation system* [2011] ECR I-1137.

⁶⁹ Joined Cases C-402/05P & C-415/05P *Kadi and Al Barakaat International Foundation v Council* [2008] ECR I-6351.

⁷⁰ Case 43/75 *DeFrenne v Sabena (No 2)* [1976] ECR 455, para 33.

⁷¹ Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337, para 12.

⁷² Joined Cases C-6/90 & C-9/90 *Francovich v Italy* [1991] ECR I-5357, paras 33-34.

the architecture of individual legal rights in EU law, thus, relies on it. However, as a transitive quality, effectiveness is also question begging. It asks, in particular what or whose effectiveness is being secured. It cannot be about securing the full realization and protection of the individual rights in question. If that were so, EU law would have to develop a complete access to justice machinery: its own system, *inter alia*, of remedies, legal aid, rights of appeal, procedural rules. It does none of these things. The reasoning makes more sense, however, if it is seen about securing the effective operation of the spheres of activity which constitute the object of concern of EU government. In some instances, this is very explicit. The Court stated, in its founding judgments on these doctrines, that horizontal direct effect and incidental direct effect were established to secure the better operation of gender equality in the workplace⁷⁵ and the single market⁷⁶ respectively. In others, individual rights are used as tools to police States into ensuring that activities operate as EU law requires they should. They kick in, correspondingly where there has been a failure on the part of the State. With both the direct effect of Directives and State liability, the presence of fault on the part of the State was thus a justification for the establishment of the doctrine and is a condition of its invocation by individuals.⁷⁷ This policing logic also explains EU law's approach with regard to remedies and processes. If the State has a half way satisfactory framework in place,⁷⁸ EU law will not intervene further as it does not wish to police too intensively.

This governmental logic leads to many of the unsatisfactory qualities of EU law when viewed through the prism of upholding individual rights. There is the sectoral variation and uncertainty of application of certain doctrines, notably incidental direct effect. Other doctrines, notably the direct effect of Directives, are cast in terms of the institutional responsibilities of the State rather than in terms of the individual holding something which can be asserted against the world. Most devastatingly, of course,

⁷³ Case C-224/01 *Köbler v Austria* [2003] ECR I-239 para 33.

⁷⁴ Case C-194/94 *CIA Security v Signalson* [1996] ECR I-2201, para 48.

⁷⁵ Case 43/75 *DeFrenne v Sabena (No 2)* [1976] ECR 455, para 19.

⁷⁶ Case C-194/94 *CIA Security v Signalson* [1996] ECR I-2201, para 48.

⁷⁷ See, respectively Case 152/84 *Marshall v Southampton and SW Hampshire Area Health Authority* [1986] ECR 723; Joined Cases C-46 & 48/93 *Brasserie du Pêcheur v Germany and R v Secretary of State for Transport, ex parte Factortame (No 3)* [1996] ECR I-1029

⁷⁸ These must be no less favorable than for equivalent domestic actions and not render exercise of the right excessively difficult or practically impossible, Case C-432/05 *Unibet v Justitiekanslern* [2007] ECR I-2271.

because of its weak status on remedies, EU law does not require that the right be fully protected or fully compensated. It requires merely that its holder be able to exercise it in some form.

The fidelity principle requires all national institutions to contribute to the realisation of EU objectives in a number of ways.⁷⁹ It is, thus, about making national institutions an operating part of the machinery of EU government. If EU law were not governmental in nature, the separation of powers would require that courts not be seen as part of this machinery as they are required to check it. However, in EU law, national courts are under analogous duties to any other governmental institution of government. This leads them into tasks which do not sit easily with the judicial function. Most notably, the fidelity principle introduced the doctrine of indirect effect which requires courts to interpret all national law in the light of all EU law. It is not simply that this can lead to counter-intuitive interpretations of national law. Furthermore, the duty of interpretation is a systemic one. It applies to advance the collective objectives of EU law even where there is no evidence that the EU law is intended to generate individual rights with the consequence that individual rights and duties in national law are determined by a provision not intended to mediate them directly.⁸⁰ This can be justified if the role of the judge is simply to realise governmental objectives of EU law but fits less comfortably with the role of the judge as guardian of individual rights.

4. Membership Rights within Communities of Purpose Dedicated to Reformation of the State

The final form of claim made by *VGL* goes to its recognition of those interests and actors who can now assert EU law rights before national courts. To be sure, this redistributes power as it empowers right holders at the expense of those against whom the rights are asserted. However, these rights also bestow a broader form of recognition by institutionalising a public respect and appreciation for who the right-holders are and what they are about. In the direct establishment of obligations and rights, *VGL* also asserts a vision of community. This sets out not merely formal legal ties between individuals. The esteem demanded of others by the rights puts in play trajectories of

⁷⁹ D. Chalmers et al, *European Union Law* (2010, 2nd Edition, CUP) 223-227.

⁸⁰ Eg Case C-106/89 *Marleasing v La Comercial* [1990] ECR I-4135.

mutual recognition and mutual respect between the parties which provide the basis for broader associative ties and collective identities.

However, what kind of recognition is being bestowed and what kind of communities are being established? Both the other forms of claim made by *VGL* leave a trace here.

These rights and relations contribute to an imaginary of the Union as a democratic postnational community. In this community EU citizens exercise public autonomy through participating as free and equals in EU law-making. *VGL*, thus, explicitly mentions that a special quality of EU law is that it brings national of the member States together within the European Parliament and the Economic and Social Committee with the former perhaps symbolising a pan Union representative democracy and the latter a pan Union civil society and public sphere. Law secure citizens' private autonomy through the grant of rights and the imposition of settled obligations. The reference to the peoples of Europe in the Preamble set these as a constituent power for this democracy on whose behalf its institutions must act.

This image is a weak one in the judgment, however. The democratic references are not sustained. A much stronger logic in *VGL* is the governmental one in which legal communities exist to sustain and realise the objectives of the EU governmental order. To understand the quality of governmental communities, it is necessary to refer back to the famous distinction drawn by Oakeshott between a *universitas*, a community in which individuals come together promote a substantive purpose or perform a shared task, and, a *societas*, a community in which individuals come together under common rules simple to be without the need for any further common purpose.⁸¹ As government is about realising shared objectives, its communities are of the first kind. They exist in relation to some shared purpose or tasks and subjects are only recognised and granted membership rights insofar as they contribute to that.

The logic in *VGL* setting this out is an elaborate, three-tiered one.

VGL, first, states that the Treaty has established a purpose-based association. The Treaty has a single object, namely 'to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community'. This objective shapes

⁸¹ M. Oakeshott, *The Vocabulary of a Modern European State* (2008, edited by L' O Sullivan, Imprint, Exeter) 245-266.

the legal quality of the Treaty. It results, according, to the Court, in the Treaty being more than an agreement setting mutual obligations between States but a legal order which puts in place wider associative ties. The direct concern of this shared purpose to individuals marks it, moreover, as the basis for these ties, giving rise to them and conditioning them.

It, secondly, ties the realisation of this objective to the establishment of an institutional apparatus, the EU Institutions, which are to administer it. The judgment states these are established with 'sovereign rights' for this purpose. 'Sovereign rights' do not mean sovereignty here, as, otherwise, EU Institutions would be above even EU law. It means government powers and harks back to a seventeenth century distinction in which the sovereign was allowed to grant administrative institutions sovereign rights to govern without losing her sovereignty.⁸² This distinction was present in the thinking of the time. Ophuls, the German delegate to the ECSC, for example, talked of the pooling of sovereign rights amongst the ECSC Institutions, by which he meant that the presence of a more powerful administrative apparatus than was allowed for by traditional treaties.⁸³

Thirdly, *VGL* sets out the Treaties as protecting external spheres of activity, which are now to be governed through legal rights and responsibilities. This last point lies tacitly in the statements (provided in the first quote of the judgment in this article) that individuals are subjects of EU law in the same way as States, and that EU law, consequently, directly provides them with both rights and obligations. This legal status as subjects recognises individuals as having an active presence independent of EU law. They are granted rights by EU law but they are not constituted by it. Their agency is only protected by EU law in the context of relations where EU law imposes duties on others to recognise certain elements of it: in *VGL*, the right to import goods free of customs duty. It is the relationship which EU law is committed to uphold, recognise and protect, as it is the relationship which forms part of the external sphere of activity which constitutes the focus of EU government. It is now also seen as a relationship of legal commitments, rights and responsibilities.

⁸² M. Loughlin, *The Foundations of Public Law* (2010, OUP) 185-186.

⁸³ B. Davies, *Resisting the European Court of Justice: West Germany's Confrontation with European Law, 1949-1979* (2012, CUP) 55-56.

VGL sets the European Union up, therefore, as a *universitas* in which subjects come together to realise and contribute to common purposes tied to the legal and administrative order of the Union. This idea of community shapes how subjects engage with each other and EU law. Such communities are profoundly disquieting. They enjoy a misrecognition in that parties are only recognised for what they do that is seen as of value rather than for other elements of their identity. It can, thus, happen that some who do nothing of value at all are not recognised at all. In addition, actors' relative capacities become central to whether they are accorded rights with rights likely to be granted to those who 'can' rather than to those who 'cannot'.

VGL only provides a template for action, however. The extent of take-up depended upon subsequent institutional practice, in particular the allocation of rights. If the governmental logic was followed, one would expect relatively few justiciable entitlements to be granted. Such entitlements will only be granted where they contribute to shared purpose valued by the Union. From the point of policy-maker, this will rarely be the case as the unpredictability of litigants and courts make such rights an unreliable policy tool. Litigants might use these entitlements for purposes other than those anticipated or, through an unexpected judgment, rights might be granted to unwanted beneficiaries. Judgments are difficult to correct and suffer from the policy question being seen through the prism of the dispute. Litigation is time-consuming and uncertain leading to generalised instability during this period. By contrast, if the logic of democratic community was embraced, one would see a much wider distribution of rights with these seen as empowering tools which all citizens should hold in relation to important parts of their economic, social and cultural lives.

This study, therefore, looked at the litigation which gave rise to all preliminary rulings between 1 January 2007 and 31 December 2011. For each judgment, we looked at the field of EU law litigated; the instrument deployed; the nationality of the litigants and their socio-economic background. In total, there were 1,025 judgments generating over 13,000 observations. Finally, the salience of the judgment, at least in the eyes of the CJEU, was assessed by looking at whether the CJEU thought a judgment sufficiently important to mention in its Annual Report. This was a relatively low threshold as 285/1025 judgments, over a quarter, were mentioned in these Reports. To be sure, the preliminary reference procedure is only a rough proxy for which provisions are invoked

before national courts. The time and cost of the procedure, in particular, might lead to a significant difference in the two. However, it is the only pan Union indicator, and none of the other studies have found a material difference between the provisions invoked in national courts and thus referred to the Court of Justice.⁸⁴

Table 1 sets out those fields of EU litigation which averaged three or more judgments per year during the period: a very low threshold as this equates to one reference per Member State every nine years. At the time, the Court set out on its web site fifty six fields of EU law. Eighteen fields met this threshold of three or more judgments. This included many significant policy fields (single market (approximation of laws), external relations, social policy, environmental and consumers, taxation and the area of freedom, security and justice} and the central iconic fields of EU law (the economic freedoms and competition). However, if one delves deeper, a different picture emerges.

At the end of 2011, in addition to the Treaties, there were 8862 Regulations and 1885 Directives in force.⁸⁵ Very little of this is litigated. Instead, the litigation divides into three clusters.

- In eleven fields, litigation is concentrated on a narrow range of instruments. Six fields centre on particular Treaty provisions (the economic freedoms and competition). Other sectors are dominated by litigation of one of two instruments (taxation, social security for migrant workers, customs union and common customs tariff, police and judicial cooperation in criminal matters).⁸⁶

⁸⁴ There is no study prior to this of the background of litigants invoking EU law prior to this. On studies of different provisions see D. Chalmers D. Chalmers, 'The Positioning of EU Judicial Politics within the United Kingdom' (2000) 23 *WEP* 169; B. Bepuly, 'The Application of EC Law in Austria' *IWE Working Paper No 39*. < <http://www.iwe.oeaw.ac.at> > <accessed 1 June 2013>; F. Romeu, 'Law and Politics in the application of EC law: Spanish Courts and the European Court of Justice 1986 – 2000' (2006) 43 *CMLRev* 395.

⁸⁵ European Commission, *29th Annual Report on Monitoring the Application of EU Law 2011*, COM (2012) 714, 2.

⁸⁶ The dominant instruments are, respectively, Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, OJ 1977, L 145/1 (Sixth VAT Directive); Regulation 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Regulation 118/97, OJ 1997 L 28/1, as amended by Regulation 1992/2006, OJ 2006 L 392/1; Regulation 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ 1987 L 256/1; Regulation 2913/92 establishing the Community Customs Code, OJ 1992 L 302/1, as amended by Regulation 2700/2000, OJ 2000 L 311/17; Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings,

- There are four fields whose legislative output is immense (single market, environment, external relations and agriculture). The proportion of instruments litigated is a tiny proportion of those adopted in these fields. To give but one example, the single market comprised 1388 Directives and 1439 Regulations in October 2011.⁸⁷ It, thus, gave rise to about one judgment during the period for every twenty five pieces of legislation.
- There are three fields which involve a significant range of legislation of which a diverse proportion is litigated (social policy, intellectual and industrial policy, area of freedom, security and justice).

Table 1 Dominant Fields of EU Litigation

Field	# cases per field	# salient judgements	% salient judgements
Taxation	151	11	7
Approximation of laws	114	40	35
Social Policy	72	29	40
Agriculture	69	6	9
Environment & consumers	58	19	33
Freedom to provide services	43	20	47
Common customs tariff	39	0	0
Free movement of persons	39	18	46
Law relating to undertakings	35	7	20
Area of Freedom, Security and Justice	35	17	49
Intellectual and industrial property	33	10	30
Customs union	32	1	3

OJ 2001 L 82/1; Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, OJ 2002, L 190/1 .

⁸⁷ European Commission, *Making the Single Market Deliver; Annual Governance Check Up 2011* (2011, Luxembourg, OOPEC) 9.

Freedom of establishment	31	15	48
Free movement of capital	31	9	29
External relations	22	6	27
Free movement of goods	22	10	45
Competition	18	9	50
Social security for migrant workers	15	3	20
Police and judicial cooperation in criminal matters	15	7	47

Litigation, thus, centres on Treaty provisions, isolated pieces of legislation and those last three fields of EU law. It is a narrow proportion of EU legislation which is litigated with all the corollary implications for the democratic qualities of the Union. There rests the issue, however, of why these sectors or instruments are litigated, and, if this litigation goes to certain communities of purpose, the nature of the communities which gives rise to individual rights.

Chalmers and Chaves have suggested a political economy to this.⁸⁸ The dominant interests involved in EU law-making have little interest in creating entitlements to be invoked by other actors in arenas, such as courts, whose decision-making is often unpredictable. This aversion would only be dispelled where there was some clear alternate advantage to this. This would be most obviously be the case, they argued, with 'patrol norms'. When a market in a service or good was established, EU law also prescribes the fiscal, penal and regulatory duties enjoyed by States in relation to that market. Actors involved in establishing this market would an interest in ensuring that the level of regulation, taxation etc agreed was patrolled to ensure that States did not resettle the terms of the pact. Such norms, patrol norms, would include market access provisions, requirements of equal treatment or due process provisions. A feature of patrol norms is that the State will always be a party to the litigation as it is being patrolled. Other litigants will vary according to the political economy of the sector. In

⁸⁸ D. Chalmers & M. Chaves, 'The reference points of EU Judicial Politics' (2012) 19 *JEPP* 25, 31-32.

Table 2, we see the dominant litigant to be the State, which accounts for 38% of the litigants, a very high proportion.⁸⁹ There is high State involvement not just in fields where one would expect, like migration, criminal justice and tax, but in nearly all sectors. It is only low in one field of litigation, intellectual and industrial property, and only below 30% in three other fields: competition; law of undertakings (company law) and the area of freedom, security and justice (due to a number of judgments on judicial cooperation in civil matters).

Table 2 Identity of Different Litigants

Field	Domestic firms	Multinationals	State	Individuals	Others⁹⁰
Agriculture	41	12	59	20	7
%	29	9	42	14	5
Approximation of laws	61	44	84	48	32
%	23	16	31	18	12
AFSJ	15	6	14	32	3
%	21	9	20	46	4
Common customs tariff	25	11	39	2	0
%	32	14	51	3	0
Competition	11	9	8	1	7
%	31	25	22	3	19
Customs union	14	17	31	3	1
%	21	26	47	5	2
Environment & Consumers	23	13	53	21	16

⁸⁹ As all litigation involves two parties and it is rare that one arm of the State litigates against the other, a figure of 50% would represent the State being a party in nearly all the litigation.

⁹⁰ 'Others' are non-commercial actors which are not individuals.

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%	18	10	42	17	13
External relations	2	1	20	20	1
%	5	2	45	45	2
Free movement of capital	11	6	30	14	1
%	18	10	48	23	2
Free movement of goods	16	5	15	5	4
%	36	11	33	11	9
Free movement of persons	4	1	37	35	2
%	5	1	47	44	3
Freedom of establishment	13	7	31	11	4
%	20	11	47	17	6
Freedom to provide services	22	8	39	15	7
%	24	9	43	16	8
Industrial policy	9	6	12	1	2
%	30	20	40	3	7
Intellectual and industrial property	17	32	4	2	10
%	26	49	6	3	15
Law relating to undertakings	37	12	24	2	7
%	45	15	29	2	9
Police and judicial cooperation in criminal matters	0	0	13	15	2
%	0	0	43	50	7

Social policy	17	11	48	63	8
%	12	7	33	43	5
Social security for migrant workers	1	1	13	14	0
%	3	3	45	48	0
Taxation	72	54	153	24	7
%	23	17	49	8	2
Total	489	279	797	415	143
%	23	13	38	20	7

To see whether these patterns of litigants were strongly informed by features of the preliminary reference procedure and not present in more general litigation before domestic courts, we looked at the range of commercial litigants using the preliminary reference and the commercial sectors litigated. If the cost of the procedure was inhibiting certain actors from using it, one would expect large commercial actors to be more strongly represented. If the politics of the procedure was driving it, namely it was being persisted used to secure legislative change rather than for any other reason, one would expect sectoral variation. Commercial sectors in which form of politics was more strongly present would be more represented than other sectors. A break-down of commercial litigations in Table 3 reveals the presence of litigation in all sectors and a relatively even distribution between commercial actors of sizes, with it fair to presume that a large proportion of the 44% of commercial actors whose workforce size could not be identified are SMEs. Table 2 indicates, furthermore, an even spread between domestic commercial actors and multinational actors, with 23% of all litigation, 63.89% of all commercial litigation, involving domestic firms and the remainder, multinational actors.

Table 3 Identity of Commercial Litigants

Industry Subsector	2007	2008	2009	2010	2011	Total
Producer	45	33	64	50	56	248
%	38	22	47	50	55	45
Distributor	47	44	39	32	22	184
%	39	29	29	32	22	33
Retailer	20	14	22	18	18	92
%	17	9	16	18	18	17
Not found	7	7	10	0	5	29
%	6	5	7	0	5	5
Size of companies	2007	2008	2009	2010	2011	Total
<1000	33	27	19	82	59	220
%	26	22	12	48	36	30
>1000	28	33	40	44	54	199
%	22	26	26	26	33	27
Not found	68	65	97	46	52	328
%	53	52	62	27	32	44

The focus of litigation is, in the bulk of cases, thus the *reformation of the State*. Litigation against the State goes to how the administration punishes, taxes, regulates, distributes (in a narrow range of cases) or polices its territory and frontiers. It is above all organisations who are engaged in this reformation. 43% of litigants, over two thirds of non-State litigants, are organisations.⁹¹ The organisations are, moreover, overwhelming commercial ones, with over five times as many of these present as non-commercial actors. This reformation of the States tells us also something about the nature of the community established in the wake of *VGL*. Insofar as they involve the

⁹¹ This figure under-represents the number of organisations who are litigants as a number of cases formally brought by individuals are supported and organised by these. eg A. Stone Sweet & K. Stranz, 'Rights Adjudication and Constitutional Pluralism in Germany and Europe' (2012) 19 *JEPP* 92.

grant of legal rights, they do so to realise the collective purposes set out for the State by EU law, be these regulatory, fiscal or penal. The central rights granted, therefore, on the one hand, those designed to realise that the State extract no more from citizens than that necessary to realise those objective set by EU law and, on the other, to police the thresholds required for it by EU law. An example of the former is the EU Valued Added Tax System. The central individual rights go to limiting the goal of securing revenue on all commercial transactions by allowing individuals to claim that they are not taxable, the activities are not taxable or the tax is deductible.⁹² An example of the latter concerns the panoply of environmental legislation concerning land use whereby actors affected by a development have both rights of notice and comment before the authorities making a decision on whether to authorise it and rights to ensure that a proper assessment is carried out.⁹³

Reformation of the State may be the dominant narrative of the legal communities enabled by *VGL*. It is not the only narrative, and indeed is not the central one told by the Court of Justice. Table 1 shows the fields of EU law most frequently cited in the latter's Annual Reports fall into two categories (see the 'salience' categories). The first is those fields with high numbers of non-commercial private actors. All fields, with the exception of two weakly litigated fields, external relations and social security for migrants, where actors comprise 40% or more of litigants are accorded a strong salience by the Court.⁹⁴ The second is those fields of law based on Treaty provisions with well-established lines of case law. All the economic freedoms (with the exception of free movement of capital) and competition are cited heavily in the Annual Reports. Combining these categories allows the Court of Justice to establish a progression between the heritage of the early case law of the Court on the Treaty and the protection of individual rights of non-commercial actors. This lineage allows a story to be told where the Court starts with the establishment of a constitutional system (so the economic freedoms and *VGL*) which then unfolds into a more generalised constitutional protection of individual rights, notwithstanding that the cases in question are about very different things. This narrative

⁹²A good description is provided in Case C-285/11 *Bonik*, Judgment of 6 December 2012.

⁹³ See, respectively, Case C-416/10 *Križan*, Judgment of 15 January 2013; Case C-420/11 *Leth*, Judgment 14 March 2013.

⁹⁴ A strong salience was taken to be where 45% or more of the judgments were cited by the Court in its Annual Reports.

does not represent the more general picture. Nor does it work as a description of the most important judgments. Politically divisive fields with wider distributive consequences such as taxation, the environment and consumers and approximation of laws are not presented as significant. Equally, some fields such as freedom of establishment and free movement of persons are presented as significant when fields with analogous fact situations, such as free movement of capital and social security for EU migrants, are not.

This narrative can only be explained by a difference in the quality of the litigation which allows the Court to mark it out. Chalmers and Chaves identified it with an alternative narrative, the presence of 'thickly evaluative' norms in EU law.⁹⁵ These set out general values to be realised through the grant of entitlements. Examples include the economic freedoms, non-discrimination, and free competition.⁹⁶ The central thrust of the entitlement is realisation of the value to which it is giving effect. It is difficult to talk of individuals of coming together for some shared purpose in the same concrete way as with other fields of EU law. This is reflected by the political economy behind the establishment of such norms. If there is a shared commitment to these values, there is deep disagreement about what these values entail and what they mean in precise contexts. Courts are, thus, entrusted with the elaboration of these norms both because they are perceived as having a specialised form of moral expertise and because they are skilled in applying norms to complex factual situations and are simultaneously held in check by their judgments being confined to these situations.

It is, however, a limited narrative. The circumstances in which norms come into being tend, however, only to be Treaty negotiations: moments when the general values of the Union are reflected upon and there is not the possibility for legislation to be influenced by a sectorally narrow range of interests. Most thickly evaluative norms date back to the Treaty (ie economic freedoms, competition). The only significant exception is Social Policy. However, even here, a strong proportion of the litigation and legislation extrapolates the equal opportunities principle set out in the Treaty requirement, Article 157 TFEU, that men and women receive equal pay for work of equal value. Beyond this,

⁹⁵ In addition to patrol norms and thickly evaluative norms, a third narrative is emerging, which is litigation of property rights, notably intellectual property rights. Legislation has only proliferated on this in recent years.

⁹⁶ D. Chalmers & M. Chaves, *supra* n. 88, 32-34.

there is no sense of a sustained engagement to develop these types of norm. Even in a field such as the area of freedom, security and justice which might lend itself to this, insofar as it frequently involves giving effect to values of humanitarian protection, there is remarkably little litigation of such norms. It is also increasingly institutionally confined. The EU legislature seeks to interpret these norms like all other provisions, so often locates them against some wider collective shared purpose. Action Plans have, thus been, set visioning both the rights set out in economic freedoms and EU anti-discrimination law as forming part a wider agenda advancing of some wider collective good.⁹⁷ There has also been strong domestic resistance. A considerable part of the defiance by senior national courts to EU law has focussed, therefore, on perceived over-extension of these thick evaluative norms, most notably on non-discrimination,⁹⁸ citizenship⁹⁹ and fundamental rights.¹⁰⁰ A similar picture emerges with national legislatures in the fields of fundamental rights¹⁰¹ and citizenship.¹⁰²

5. The Creation of Meaning in EU Law

These communities of purpose inform the meaning of EU law, first, by providing the setting for its interpretation. This will shape the questions asked of particular provisions and the consequences attached to their interpretation. For example, the issues which arise in relation to human dignity with regard to the patenting of stem cells are very different from those which arise with regard to possible over-zealous questioning by

⁹⁷ European Commission, *Towards a Single Market Act*, COM (2010) 608, Proposal No. 30; European Commission, *Non-Discrimination and Equal Opportunities for All - A Framework Strategy*, COM (2005) 224; European Commission, *Strategy for equality between women and men 2010-2015*, COM (2010) 491.

⁹⁸ PI ÚS 5/12 *Slovak Pensions*, Judgment of 31 January 2012 of Czech Constitutional Court.

⁹⁹ *Attorney General of Cyprus v Konstantinou* [2007] 3 CMLR 24.

¹⁰⁰ *Admenta etal v Federfarma etal* [2006] 2 CMLR 47 (Italy); 1 BvR 1215/07 *Counterterrorism Database*, Judgment of 24 April 2013, para 91 (German Constitutional Court); K 32/09 *Lisbon Treaty*, Judgment of 24 November 2010 (Polish Constitutional Tribunal); *R v MAFF ex parte First City Trading* [1997] 1 CMLR 250 (United Kingdom).

¹⁰¹ Protocol on Article 40.3.3 of the Constitution of Ireland; Protocol No.7 Act of Accession of Malta to the European Union 2003; Declaration 61 to the Treaty of Lisbon by the Republic of Poland on the Charter of Fundamental Rights of the European Union; Protocol on the Concerns of the Irish People on the Treaty of Lisbon, article 1; Protocol 30 on the Application of the European Charter of Fundamental Rights to the United Kingdom and Poland. The Czech Republic conditioned its acceptance of the Lisbon treaty on this Protocol applying to it. This has been rejected by the European Parliament. <http://www.alde.eu/press/press-and-release-news/press-release/article/european-parliament-rejects-czech-opt-out-on-charter-of-fundamental-rights-41493/> <accessed 5 June 2013>

¹⁰² On the Danish reaction to *Metock* see M. Wind, 'When Parliament Comes First – The Danish Concept of Democracy Meets the European Union' (2009) 27 *Nordisk Tidsskrift For Menneskerettigheter* 272.

border guards.¹⁰³ In addition, they set out the central semantic structures guiding interpretation of individual EU provisions. Interpretation of a legal provision relies, generally, on some idea of the form of association which both gives rise to the activity being regulated and is the medium through which legal intervention takes place.¹⁰⁴ The central method of EU legal interpretation explicitly ties these relations to this idea of communities of purpose. The Court has, thus, repeatedly stated that legal interpretation must have regard not only to the wording of a provision, but also the context in which it occurs and the objectives pursued by the rules of which it is part.¹⁰⁵ These objectives and contexts are not abstract ideals, but combine to set out a vision of a way of life with its own social relations, geared to securing a collective goal.

This vision of community is very different from that typical of modern liberal political and legal systems. These build their notions of community around a tension and interplay between two forms of association. The one is based around ties existing by virtue of acknowledgement or communication of co-presence and the other around individuals coming together to realise shared purposes. The *societas* and *universitas* distinction has already been mentioned,¹⁰⁶ but this interplay is pervasive across twentieth century political theory, social theory or philosophy and is deployed by writers from across the political spectrum. A variety of terms are deployed: lifeworld and system;¹⁰⁷ purposeful living and external rationality;¹⁰⁸ or singularity and transcendence.¹⁰⁹ This interplay stops the dangers of abstraction and over-reification posed by a community of co-presence, and the dangers of functionalism and instrumentality posed by a community of shared purposes, whereby the value of every act and person is seen exclusively in terms of their contribution to the shared purpose. The recognition by EU law of only one form of association, association by dint of shared

¹⁰³ Case C-34/10 *Brüstle v Greenpeace*, Judgment of 18 October 2011; Case C-23/12 *Zakaria*, Judgment of 17 January 2013.

¹⁰⁴ A provision that men and women receive equal pay for work of equal value relies, therefore, on an idea of the employment relationship to give meaning to concepts such as 'pay', 'work' and 'value'.

¹⁰⁵ On this Case C-19/08 *Petrosian* [2009] ECR I-495, para 34; Case C-648/11 *R v Secretary of State for the Home Department ex parte MA*, Judgment of 6 June 2013, para 50.

¹⁰⁶ M. Oakshott, *supra* n. 81.

¹⁰⁷ J. Habermas, *Outline of a Theory of Communicative Action: The Critique of Functionalist Reason* (1987, Polity, Cambridge) 119-197.

¹⁰⁸ E. Husserl, 'The Vienna Lecture: Philosophy and the Crisis of European Humanity' in E. Husserl, *Crisis of European Sciences and Transcendental Phenomenology* (1970, transl. D. Carr, Northwestern University, Chicago)

¹⁰⁹ J. Kristeva, 'Europhilia, Europhoria' (1998) 3 *Constellations* 321, 327

purposes, disrupts and distorts this vocabulary of value. It is worth pausing to reflect, for example, what place exists for values such as individual autonomy; kinship and tradition in a community of shared purpose, as none of these go to realization of a task, but to co-presence and a shared imagination and commitment to one another.

Less speculatively, it is reflected in the incidence and meaning of EU law. The best illustration of this is that most evocative norm in EU law, freedom of expression. Set out in Article 11 EUCFR, it offers the promise of EU law setting out markets place for ideas and providing arenas for individual self-realisation through expression of one's own identity.

If one turns, first, to how the incidence of freedom of expression in EU law, in the five year period up until the end of 2011 the Court of Justice gave thirteen judgments involving meaningful questions of freedom of expression. This is a significant number. The field is, however, a confined one. The judgment concerned the immunities of MEPs;¹¹⁰ State liability for statements of public officials;¹¹¹ the limits of intellectual property rights;¹¹² duties on broadcasters to show certain programmes in the general interest;¹¹³ restrictions on advertising of medicinal products;¹¹⁴ data protection¹¹⁵ and public interest restrictions on broadcasting.¹¹⁶ The center of gravity of the field is, thus, freedom of commercial expression with the two most litigated issues being competitors deploying it to whittle down the protection of intellectual property right holders and broadcasters invoking it to limit the programmes they are required to broadcast in the public interest. There is, of course, a betrayal of promise in this. The rich potential of the term gives rise to an underwhelming reality. It might be argued that this deployment of freedom of expression still generates a sensibility which would otherwise be absent.

¹¹⁰ Joined Cases C-200/07 and C-201/07 *Marra v de Gregorio* [2008] ECR I-7929; Case C-163/10 *Patriciello*, Judgment of 6 September 2011.

¹¹¹ Case C-470/03 *A.G.M.-COS.MET* [2007] ECR I-2749.

¹¹² Joined Cases C-403/08 and C-429/08 *FAPL v QC Leisure* [2011] ECR I-9083; Case C-324/09 *L'Oréal v eBay International* [2011] ECR I-6011; Case C-145/10 *Painer v Standardverlags*, Judgment of 1 December 2011;

¹¹³ Case C-250/06 *United Pan-Europe Communications Belgium v Etat Belge* [2007] ECR I-11135; Case C-336/07 *Kabel Deutschland v Niedersächsische Landesmedienanstalt für privaten Rundfunk* [2008] ECR I-10889; Case C-134/10 *Commission v Belgium* [2011] ECR I-1053.

¹¹⁴ Case C-421/07 *Damgaard* [2009] ECR I-2629; Case C-316/09 *MSD Sharp & Dohme v Merckle* [2011] ECR I- 3249.

¹¹⁵ Case C-73/07 *Tietosuojavaluutettu v Satakunnan Markkinapörssi Oy* [2008] ECR I-7075.

¹¹⁶ Joined Cases C-244/10 & C-245/10 *Mesopotamia Broadcast v Bundesrepublik Deutschland* [2011] ECR I-8777.

National restrictions on broadcasters' duties are consequently required to be stable and transparent.¹¹⁷ However, understandings of freedom of expression are shaped by the nature of the activity regulated. For this will provide the language through which questions about the appropriateness of any curbs and the value of the expression are assessed.

A good example is *L'Oreal v eBay*.¹¹⁸ In an action by the perfume and cosmetics company to stop the online market place being used for sale of its products which infringed its trademarks, one of the issues at stake concerned the duties to be imposed on online market places by virtue of Directive 2004/48, which requires both effective, dissuasive measures to be put in place to secure the enforcement of intellectual property rights and the principle of freedom of expression to be observed. The Court held that these service providers were required not merely to prevent existing violations of intellectual property rights, but also take measures to stop future violations. However, what did this mean and what happened if they failed in this duty? This issue was approached through the prisms of the demands of this particular market. The Court noted, with regard to the first question, that online market places were not required actively to monitor transactions taking place. They could be required only to ask for the identity of sellers and buyers to be verified. The issue was, thus, addressed as one of practical regulatory burden in light of the scale of market demands: that it might generate privacy concerns or, from the viewpoint of the right holder, lead to sporadic policing was not the point. Similarly, the penalties to be issued against online market places which failed to do this were couched purely in terms of their right to trade. There was to be no permanent ban from the internet. Other restrictions or penalties (ie fans, temporary bans) might be possible.

The graver threat is the semantic question. If the meaning of EU legal norms is to be interpreted in the light of the shared purposes to which EU law gives effect, these quickly cease to be an independent parameter against which to review EU government but instead become interpreted as to how they can best serve EU government. Freedom of expression, for example, is thus seen as an outcome of EU government whose meaning is realized through EU legislative activities. These, thus come to define it. This

¹¹⁷ Case C-134/10 *Commission v Belgium* [2011] ECR I-1053, para 54.

¹¹⁸ Case C-324/09 *L'Oréal v eBay International* [2011] ECR I-6011.

not sanctifies the EU's work and shields it from more probing scrutiny, it also leads to highly unusual interpretations.

The most salient judgment of recent times on freedom of expression was *Mesopotamia*, which went to the limits in EU law on political speech.¹¹⁹ Two Danish companies broadcast television programmes throughout Europe supportive of the PKK, a group classified as a terrorist organisation by the European Union. Following a complaint from the Turkish Government, the German government sought to stop broadcasts into Germany on the grounds that these violated principles of international understanding, albeit that the programmes could still be rebroadcast from Germany to other States and the Danish authorities had found that there was no incitement to racial hatred and the broadcasts were largely facts and opinion. The question was referred to the Court of Justice whether Germany could invoke the exception in the Broadcasting Directive to restrict the broadcasts on the grounds they incited racial hatred.

The Court did not review that the Broadcasting Directive against an autonomous parameter of freedom of expression. Instead, it stated that the Directive was a 'manifestation' of the more general principle of freedom of expression. Freedom of expression in EU law could, thus, only be understood through the prism of the text of the Directive, which set it out as a detailed legal reality. In this instance, the issue in hand, namely the extent to which political expression may advocate political violence, was to be determined by the relevant provision of the Directive, which required Member States to ensure that broadcasts did 'not contain any incitement to hatred on grounds of race, sex, religion or nationality'. The Court ruled that the provision should be given an everyday meaning taking into account the surrounding legal context of the Directive. Such a meaning would lead incitement to hatred could cover 'any action intended to direct specific behaviour and to generate a feeling of animosity or rejection towards a group of persons'. Initiatives attempting to justify violence by terrorist acts against a particular group of persons fell within such a definition, and the Court, thus, found that the broadcasts could be banned from transmission within Germany.

¹¹⁹ Joined Cases C-244/10 & C-245/10 *Mesopotamia Broadcast v Bundesrepublik Deutschland* [2011] ECR I-8777.

This interpretation makes sense within a worldview whose central focus is to secure a market in transnational broadcasts which do not incite racial hatred. For such a market, the prohibition on incitement to racial hatred must be cast in terms which are sufficiently stable and clear for regulators to develop explanatory guidelines and for broadcasters to plan their international operations. It must be cast in generalizable terms so that incitement to racial hatred is likely to be understood in similar ways in different States. Otherwise, transnational broadcasts will not be possible. Finally, the term must follow the position of the most protective State if there is not to be the accusation that the Union is allowing racism to be propagated in ways that would not have been possible previously. *Mesopotamia* does all this. It deploys general terms which are not explicitly dependent for their meaning on local contexts or traditions. Its definition is so embracing that it would allow broadcasts to be restricted if these were supportive of the ANC during the apartheid period, the Free Syrian Army, regional boycotts of services or goods, and, arguably, Occupy Wall Street protests targeted at bankers.

This contrasts with traditional debates on when expression elides into hate speech. In some jurisdictions, autonomy is highly valued, so expression is only illegal where it incites violence. Others concern themselves far more with the dignity or honour of others. A third position sees the matter in more situated terms so it looks at whether the expression is understood by the target group as denigrating it and by other groups as desensitising them to abuse of that group.¹²⁰ Finally, there are jurisdictions whose laws contain a mixture of these elements.¹²¹ The definition in *Mesopotamia* has no clear reference to any of these issues of autonomy, dignity or context. This accounts for its breadth and its generality. However, more disturbingly, it also accounts for its lack of ethical compass. There is an absence of any sense of understanding of either the normative demands of individuality or community against which such speech can be located.¹²² Such concepts are simply not present. As a consequence, freedom of

¹²⁰ For comparative analysis see M. Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2002) 24 *Cardozo Law Review* 1523.

¹²¹ This is the case in the United Kingdom with Public Order Act 1986, sections 17-22 as amended by the Racial and Religious Hatred Act 2006, Schedule.

¹²² R. Post, 'Racist Speech, Democracy and the First Amendment' (1991) 32 *William & Mary L. Rev.* 267, 325-326; E. Bleich, *The Freedom to Be Racist? How the United States and Europe Struggle to Preserve Freedom and Combat Racism* (2011, OUP) 17-84.

expression becomes whatever EU government – in this instance, through the EU Directive - wants it to be.

6. Conclusion

VGL, finally, stands for poignancy. The fecund, rich vision of postnational community has left a legacy of weakly constrained government, thinly distributed rights and a legal vocabulary of stunted meanings. It was clearly not anticipated to be so. And, in one sense, it remains not so. The seductive promise of *VGL*, and its continual revelation of what the Union could be, still remains. The reason for this promise not being realized is both trite and profound. The reason is that the imagery and ideals of the postnational community set out in *VGL* have insufficient resonance and force within EU law. The more profound answer is that EU law does not have a clear enough idea of *societas*, community as co-presence. The lack of interplay between this idea of community and that of *universitas*, community as shared purpose, leads to all the problems set out in this essay. EU law instruments are conceived in terms of their regulatory qualities, and thus do not generate the rights that they should. Substantive entitlements are largely granted only to those who will serve EU government objectives, resulting, in many areas of EU law, to grant of entitlement to the powerful rather than the marginalized. Finally, laws are not granted a meaning sufficient autonomous from the goals pursued by EU government. They become a cover for government and a justification for it rather than something which acts as a counterpoint to it. If *VGL* is not to be condemned to just being a promise of hope, the challenge for the heirs to its better tradition is to find those legal structures which anchor this richer notion of community as interplay between shared purpose and co-presence within EU law.

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