

Case C-133/06, *European Parliament v. Council* [2008] ECR I-3189

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1. INTRODUCTION

In 2005, after a period of protracted negotiations, Directive 2005/85/EC¹ on minimum standards on procedures in Member States for granting and withdrawing refugee status (hereinafter the Refugee Procedures Directive) was adopted. This was viewed at the time as the final essential element in the construction of a workable common European Union (EU) asylum and immigration system. Two provisions of the Refugee Procedures Directive, Articles 29 and 36, set out a simplified decision-making procedure for the adoption of safe third countries of origin and safe European third countries, which the European Court of Justice (ECJ) annulled in its judgment of *Parliament v. Council* on 6 May 2008. This important ruling provides valuable confirmation of the significance of institutional balance in the decision-making process and the delegation of powers, including the established position of comitology. However, its real significance lies in the issues of secondary legal bases, the rule of law and legitimacy of the decision-making process, particularly for politically sensitive policy areas such as asylum, immigration, and the treatment of refugees.

2. BACKGROUND

The facts giving rise to the case find their origins in the development of the European policy on visas, asylum, and immigration with the view to establishing progressively an area of freedom, security, and justice (AFSJ), as incorporated in Title IV of the EC Treaty by the Treaty of Amsterdam. Within this framework, the Council adopted the Refugee Procedures Directive on the basis of Article 63(1)(d) EC, which provides that the Council shall adopt such asylum measures within five years² of the entry into force

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¹ [2005] OJ L326/13.

² Up to 1 May 2004.

of the Treaty of Amsterdam and in accordance with the procedure provided for in Article 67 EC.

Article 67 EC provides for different procedures for the adoption of measures on the basis of Articles 62 and 63 EC:

- (1) Under paragraph 1, unanimity in the Council and consultation of the European Parliament are required for any measure adopted within the first five years that follow the entry into force of the Amsterdam Treaty.
- (2) Under paragraph 2, second indent, after this period of five years, the Council shall take a decision with a view to providing for all or parts of the areas covered by Title IV of the EC Treaty to be governed by the co-decision procedure. It is on the basis of this provision that Council Decision 2004/927/EC (the 'bridge decision') was adopted on 22 December 2004 to facilitate the transition to the co-decision procedure.³ However, as is apparent from Recital 4,⁴ this Decision does not affect the provisions of Article 67(5) EC.
- (3) Under paragraph 5, first indent, the Council shall adopt, following the co-decision procedure, measures provided for in Articles 63(1) EC and (2)(a) EC, provided it has previously adopted measures, on the basis of Article 67(1) EC, defining the common rules and basic principles governing those issues.

The Refugee Procedures Directive was adopted on the basis of Article 67(1) EC even though it was adopted five years after the entry into force of the Amsterdam Treaty. Its aim is to set out the common rules and basic principles governing the procedures in Member States for granting or withdrawing refugee status and, for that purpose, it authorizes the Council, acting by a qualified majority and after consultation of the European Parliament, to adopt and amend, under Articles 29(1) and (2), a minimum common list of third countries to be regarded as safe countries of origin and, under Article 36(3), a common list of European safe third countries.

Under those two provisions of the Directive, the Council had effectively created secondary legal bases, which gave it the power to adopt and amend the lists of safe countries by using a decision-making procedure that derogated from the co-decision procedure provided for, subject to conditions, in Article 67(5) EC, first indent. As such, the European Parliament requested the annulment of those provisions of the Refugee Procedures Directive.

³ [2004] OJ L396/45.

⁴ 'Pursuant to Article 67(5) of the Treaty which was added by the Treaty of Nice the Council shall, in accordance with the procedure laid down in Article 251, adopt the asylum-related measures provided for in Article 63(1) and (2) (a) provided that the Council has, unanimously and after consultation of the European Parliament, adopted Community legislation defining the common rules and basic principles governing those issues, as well as the measures on judicial cooperation in civil matters provided for in Article 65 with the exception of aspects relating to family law; those provisions are not affected by this Decision'.

3. THE OPINION OF THE ADVOCATE GENERAL

In his Opinion of 27 September 2007, Advocate General Poiares Maduro limited his analysis to the first two pleas that had been submitted by the European Parliament, regarding the Council's alleged infringement of the Treaty and lack of competence. He examined them together as they raised the central question in the case and were based on indissociable arguments.

The Advocate General first analyzed the two fundamental assumptions, which constituted the basis of the main argument of the Parliament. These were that the Refugee Procedures Directive constituted the final stage of legislation and that the adoption and amendment of the list of safe countries could not be the subject of measures of an executive nature. However, he disregarded them as irrelevant for the purpose of assessing whether the Council infringed the Treaty and acted without competence. He then turned his attention to 'the fundamental legal issue in this case', the legality of recourse to secondary legal bases in order to carry out a legislative activity or, in other words, the legality of delegation of legislative powers under the Community institutional system.⁵

In order to analyze this issue fully, the Advocate General considered three possible routes. First, looking for precedent in the case law of the ECJ, he turned to *Parliament v. Council*,⁶ in which this issue had been raised. In this case, the Parliament challenged, on the ground of the illegality of the secondary basis, a Council Regulation setting up a beef-labelling system adopted by means of a simplified decision-making procedure without consultation of the Parliament on the basis of Article 19 of Council Regulation 820/97/EC.⁷ Considering that the contested Regulation simply aimed to prolong the beef-labelling system set up under the 1997 Regulation, the Court ruled that the contested Regulation was in fact amending the 1997 Regulation and could be adopted only on the same legal basis, which was Article 37 EC. As a result, while the contested Regulation was annulled for infringement of parallelism of competences and procedures, the issue of the legality of recourse to secondary legal bases was left untouched and open.⁸

Second, after rightly ascertaining that, unlike some constitutions of the Member States, the Treaty on European Union (TEU) does not sanction the possibility of delegating legislative powers but rather and only that of delegating implementing powers under Article 202 EC, the Advocate General tried to establish whether the delegation of legislative powers could still be possible under Community law either by implied authorization or non-preclusion. Turning to the argument put forward by the Council to support this latter view based on an institutional practice that had developed to that

⁵ Opinion of the Advocate General, para. 23.

⁶ Case C-93/00, *Parliament v. Council* [2001] ECR I-10119.

⁷ Council Regulation 820/97/EC establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products, [1997] OJ L117/1.

⁸ Opinion of the Advocate General, para. 24.

effect, the Advocate General, very logically, deconstructed it through the concepts of custom and of consistent practice of the Community institutions, respectively, and came to the conclusion that practices, which combine the two elements that make up a custom (*repetitio* and *opinio juris necessitates*), and whose effect is to mitigate 'the terseness of the Treaties or (...) to fill their lacunae', may be given the status of a rule of law, provided that they do not run counter to, derogate from, or override the Treaty provisions.⁹ On this basis, he naturally dismissed the view of the Council that nothing in the Treaty precluded that, under a legislative measure adopted on the basis of a Treaty provision and under the legislative procedure provided for therein, a simplified decision-making procedure be referred to for the adoption of supplementary legislative measures. Such practice would run counter to Article 7 EC, which provides that '[e]ach institution must act within the limits of its powers conferred upon it by [the] Treaty'.¹⁰ On that ground, '[a]n institution cannot therefore itself freely decide upon the way in which it exercises its powers and amend, with a view to the adoption of an act, the procedure laid down for that purpose by the Treaty'.¹¹ In the case under discussion, should such practice be ratified, new powers not provided for in the Treaty would be made available to the Council.

From this reasoning, the Advocate General went on to consider the third route, that of the principle of institutional balance and the effect upon it by the choice of legal basis. Logically starting from the premises that '[t]he fact that an institution amends the decision-making process thus causes it to undermine the principle of institutional balance'¹² and that '[i]t is the choice of legal basis that determines the applicable decision-making procedure',¹³ the Advocate General simply reiterated that such choice can only be based on objective factors and cannot be at the discretion of one institution only. Indeed the choice of the legal basis determines not only the applicable decision-making procedure, the competent institutions, the Council voting rules, and the extent of the European Parliament's participation but also the content of the act to be adopted. Similarly, secondary legal bases, whose purpose is to make possible the adoption of legislative acts by way of a simplified procedure instead of the procedure provided for in the Treaty, and the use of which is of more than a purely formal significance, cannot be allowed since they affect the distribution of powers between the institutions and undermine the principle of institutional balance.¹⁴ The Advocate General rejected the arguments of the Council that only secondary legal bases that have the effect of making a Treaty-based procedure more cumbersome should be censored and that its legality could be drawn from the existence of a mere practice.¹⁵ To reject these arguments, he referred to two

⁹ *Ibid.*, para. 29.

¹⁰ *Ibid.*, para. 30.

¹¹ *Ibid.*

¹² *Ibid.*, para. 31.

¹³ *Ibid.*, para. 32.

¹⁴ *Ibid.*, para. 34.

¹⁵ *Ibid.*, paras 34 and 35, respectively.

‘clear and general in application’¹⁶ reminders of the ECJ, notably in *United Kingdom v. Council*.¹⁷ First, ‘it is imperative that the decision-making procedures provided for by the Treaty be complied with’¹⁸ and second, ‘a mere practice on the part of the Council cannot derogate from the rules laid down in the Treaty and therefore cannot create a precedent binding on the Community institutions with regard to the correct legal basis’.¹⁹ He concluded that the Council was not entitled to adopt secondary legal bases in the Refugee Procedures Directive for the purpose of adopting legislative measures under a simplified procedure, which departs from that provided for in Article 67(5) EC.²⁰

4. THE JUDGMENT OF THE COURT

The Grand Chamber of the Court delivered its judgment on 6 May 2008 in a very straightforward and logical way. The ECJ began by amalgamating the first two questions and asking ‘whether the Council could lawfully provide in the contested provisions for the adoption and amendment of the lists of safe countries by a qualified majority on a proposal from the Commission and after consulting the Parliament’²¹ and then stating a common theme in cases on decision-making²² that under Article 7(1)(2) EC each institution must act within the limits of the powers conferred on them by the Treaty.²³ The Court went on to answer its question in two stages. It first considered the delegation of implementing powers by specifying that when the Council adopted the Refugee Procedures Directive they had the opportunity to apply Article 202(3) EC and reserve the right to the Council to exercise implementing powers, so long as detailed reasons were provided.²⁴ However, these reasons had to be ‘stated in detail’²⁵ and had to ‘properly explain, by reference to the nature and content of the basic instrument to be implemented’²⁶ why the Council was derogating from the Treaty’s general rule that the Commission had responsibility for adopting implementing measures. In the Refugee Procedures Directive, the Council had referred to the ‘political importance of the designation of safe countries of origin’²⁷ and ‘to the potential consequences for asylum applicants of the safe third country concept’,²⁸ but the Court held that, although these were satisfactory justifications for the consultation of Parliament when establishing and amending the lists of safe countries, they were not sufficient reasons for reserving these

¹⁶ *Ibid.*, para. 34.

¹⁷ Case C-68/86, *United Kingdom v. Council* [1988] ECR 855.

¹⁸ *Ibid.*, para. 38.

¹⁹ *Ibid.*, para. 24.

²⁰ Opinion of the Advocate General, para. 36.

²¹ ECJ judgment, para. 43.

²² See Case C-93/00, *Parliament v. Council* [2001] ECR I-10119, para. 39, Case C-110/03, *Belgium v. Commission* [2005] ECR I-2801, para. 57, and Case C-403/05, *Parliament v. Commission* [2007] ECR I-9045, para. 49.

²³ ECJ judgment, para. 44.

²⁴ *Ibid.*, paras 45 and 46.

²⁵ *Ibid.*, para. 46.

²⁶ *Ibid.*, para. 47.

²⁷ Recital 19.

²⁸ Recital 24.

implementing powers exclusively to the Council.²⁹ Articles 29(1), 29(2), and 36(3) of the Directive specifically required Parliament to be consulted when adopting and amending the lists. The statement of the political importance and potential consequences for asylum applicants, which were the politically sensitive issues relied upon to attempt to justify reserving powers to the Council, were actually and clearly juxtaposed with a necessity to consult Parliament in Recitals 19 and 24. Furthermore, the Council not only did not provide arguments to claim that it was reserving to itself the right to exercise directly implementing powers, it also stated categorically that these provisions conferred secondary legislative power on the Council.³⁰ This led to the second point considered by the Court, namely that of secondary legal bases.

The ECJ first noted that Article 67 EC set out two separate procedures for adopting the implementing measures for Articles 63(1) and (2)(a) EC: by the consultation procedure or by the co-decision procedure. Articles 29(1), 29(2), and 36(3) of the Refugee Procedures Directive introduced a procedure for adopting and amending lists of safe countries of origin and safe third countries that differed from that set out in Article 67 EC.³¹ This procedure enabled measures to be adopted following a proposal from the Commission, consultation with Parliament, and utilizing qualified majority voting in the Council. However, the rules regarding decision-making procedures were outlined in the Treaty and these rules were not at the disposal of the Member States or the institutions to amend.³² This was something that only the Treaty could provide for in specific circumstances.³³ Allowing an institution to establish secondary legal bases was tantamount to providing the institution with a legislative power that exceeded that provided for in the Treaty.³⁴ Furthermore, the principle of institutional balance, which required institutions to exercise their powers with due regard to the powers of the other institutions, would be undermined by this institution.³⁵ Establishing secondary legal bases would effectively mean that these would have precedence over primary legislation even though the procedure would be less cumbersome than that laid down in the Treaty and thus allegedly more effective, and that the nature of the subject matter was sensitive politically.³⁶ The Court continued with its strong judgment against secondary legal bases by declaring that the existence of an earlier practice of establishing secondary legal bases could not reasonably be relied upon as it could not derogate from the rules of the Treaty and therefore could not create a binding precedent on the institutions.³⁷

The ECJ went on to provide a declaration on which decision-making procedure should be utilized for the adoption and adaptation of the contested lists. The Court found that Refugee Procedures Directive adopted detailed criteria enabling the lists

²⁹ ECJ judgment, para. 49.

³⁰ ECJ judgment, para. 50.

³¹ *Ibid.*, paras 52 and 53.

³² *Ibid.*, para. 54.

³³ *Ibid.*, para. 55.

³⁴ *Ibid.*, para. 56.

³⁵ *Ibid.*, para. 57.

³⁶ *Ibid.*, paras 58 and 59.

³⁷ *Ibid.*, para. 60.

to be established subsequently and thereby not only established the minimum standards for the procedures in Member States for granting or withdrawing refugee status as required by Article 63(1)(d) EC but also ‘common rules and basic principles’ required by Article 67(5)(1) EC for the legislation implementing Articles 63(1) and (2)(a) EC. Thus, co-decision was the applicable decision-making procedure.³⁸

The ECJ found the first two pleas of the Parliament to be upheld and the contested provisions annulled.³⁹ On that basis, there was no need to examine Parliament’s third and fourth pleas.⁴⁰

5. COMMENT

The fact that this case was delivered by the Grand Chamber is evidence of the importance of the issues it deals with. Indeed, the case, in its entirety, provides a number of interesting and valuable elements for the future direction of decision-making, institutional balance, and the rule of law in the EU.

5.1. THE ADVOCATE GENERAL’S OPINION V. THE ECJ JUDGMENT

The first area of note is the distinction between the Advocate General’s Opinion and the judgment of the Court. Advocate General Poiares Maduro’s Opinion is a dense and difficult text that does not appear to reveal its full meaning at first reading as his Opinion operates on the basis of a process of the elimination of issues. This contrasts with the more straightforward approach in the judgment of the ECJ that identifies the relevant issues clearly and then deals with them in a sequential manner. This is not a criticism of Advocate General Poiares Maduro, who has given many valuable insights into EU Law in his Opinions since 2003⁴¹ but simply to note the stylistic differences. However, despite those differences in approach and style, the Court and the Advocate General follow the same basic structure by examining the first two pleas jointly before dismissing analysis of the third and fourth pleas.

5.2. ARTICLE 202 EC AND COMITOLOGY

Implementing powers under Article 202 EC have been the subject of a number of ECJ judgments.⁴² As with most of these judgments, the Court in the present case restated the principle of the limitation of powers in Article 7(1)(2) EC⁴³ before it considered Article

³⁸ *Ibid.*, paras 62–66.

³⁹ *Ibid.*, para. 67.

⁴⁰ *Ibid.*, para. 68.

⁴¹ See, in particular, Joined Cases C-158 and 159/04, *Alfa Vita Vassilopoulos AE & Carrefour Marinopoulos AE v. Elliniko Dimosio, Nomarkhiaki Aftodiikisi Ioanninon* [2006] ECR I-8135 and Case C-402/05 P, *Yassin Abdullah Kadi v. Council and Commission*, Opinion delivered on 16 Jan. 2008, nyr.

⁴² See Case C-257/01, *Commission v. Council* [2005] ECR I-345; noted by V. Randozzo, CML Rev. 42 (2005): 1737.

⁴³ ECJ judgment, para. 44.

202 EC.⁴⁴ It is now settled law that Article 202 EC, third indent enables the Council to empower the Commission to adopt implementing legislation, which it has under the Comitology Decision.⁴⁵ Thus, the Commission is considered to be the default institution for adopting these implementing measures, unless the Council specifically reserves to itself these powers in the initial legislative measure with adequate reasons for doing so. It is now established that these reasons must be clear, directed at the powers reserved and fully justified. When Recitals 19 and 24 of the Refugee Procedures Directive are examined, it is immediately apparent that no reasons are given for reserving the powers to the Council. Indeed, as both the Court⁴⁶ and the Advocate General⁴⁷ found, the emphasis on the political importance of the lists, the significance of the impact on EU external relations policies and the human rights implications in the country of origin and for refugee applicant provided clear justifications for only consulting Parliament. Therefore, any reason for reserving implementing powers cannot rely on these justifications. Furthermore, it is submitted that the reasons given would need to be particularly strong where the reservation of powers is unlimited in time.

Although the Court analyzed the third indent of Article 202 EC as an opportunity for the Council to adopt the lists as implementing measures, it rejected the application of this Treaty provision as the Council confirmed at the oral hearing that Articles 29 and 36 of the Refugee Procedures Directive conferred secondary legislative powers upon the Council.

5.3. SECONDARY LEGAL BASES, INSTITUTIONAL BALANCE AND THE RULE OF LAW

5.3.1. *Secondary Legal Bases*

Secondary legal bases, or delegated legislative powers, have received little consideration by the Court or academic comment with the concept remaining undefined. However, Advocate General Poiares Maduro considered the question to revolve around ‘the permissibility, under the Community institutional system, of delegations of legislative power’.⁴⁸ In *Parliament v. Council*,⁴⁹ the only case to raise the matter previously, while Advocate General Stix-Hackl in her Opinion considered that secondary legal bases were permissible in principle provided that certain procedural and substantive requirements were fulfilled as set out in the delegating provision, the Court had left the matter open by deciding the case on another point and not ruling on this specific issue. However,

⁴⁴ *Ibid.*, paras 45 and 46.

⁴⁵ Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, [1999] OJ L184/23, as amended by Council Decision 2006/512/EC, [2006] OJ L200/11. A Consolidated Version is available in the Official Journal, [2006] OJ L255/4. See G. Schusterschitz & S. Kotz, ‘The Comitology Reform of 2006: Increasing the Powers of the European Parliament without Changing the Treaties’, *EuConst* 3 (2007): 68 for commentary on the 2006 reforms.

⁴⁶ ECJ judgment, para. 49.

⁴⁷ Opinion of the Advocate General, para. 21.

⁴⁸ *Ibid.*, para. 23.

⁴⁹ ECJ judgment, para. 43, n. 22, para. 45.

Advocate General Poiares Maduro rightly pointed out that Advocate General Stix-Hackl did not support her view⁵⁰ and he found that recourse to secondary legal bases was precluded by the principle of the limitation of powers set out in Article 7 EC.⁵¹ The Treaties provide the procedural architecture for decision-making and such procedural architecture establishes institutional balance, which in turn requires choice of legal base that determines procedural architecture. Thus, according to Advocate General Poiares Maduro, EC decision-making is a virtuous circle returning to the Treaties. The ECJ is less prosaic in its reasoning although the same basic principles are utilized. The Treaties set out the decision-making process, and if an institution attempts to establish secondary legal bases different from those in the Treaties, then the institution is attempting to provide for itself legislative power exceeding that conferred upon it by the Treaties. As a consequence, this would upset the delicate institutional balance of the Union.

5.3.2. *Institutional Balance*

This institutional balance is itself a controversial construct of the Court through its interpretation of the Treaties.⁵² Much has been written on the alleged correlation between the principle of the separation of powers, in particular as it applies in the US, and institutional balance of the EU.⁵³ However, as de Búrca⁵⁴ points out, the idea of institutional balance simultaneously suggests stability and fluidity,⁵⁵ with stability provided by the institutional construct in the Treaties and fluidity by the evolving relationship between the institutions. This relationship between the institutions was initially one between the Council and Commission with the Assembly, as the Parliament was then called, a mere talking shop.⁵⁶ However, as power has flowed to Parliament with successive Treaty amendments⁵⁷ so Parliament has taken a greater part in the institutional relationships and with the advent of co-decision as the normal process for decision-making,⁵⁸ Parliament has been elevated to a status alongside the Council in the legislative process, at the expense of the Commission. Sensitive issues though still create tensions for the Member States and they attempt to maintain control of these issues by limiting the role of Parliament in decision-making and thus keeping control within the Council. This is reflected in the AFSJ where the sensitivity of the subject matter determines the level of

⁵⁰ Opinion of the Advocate General, para. 27.

⁵¹ *Ibid.*, para. 34.

⁵² Case C-70/88, *Parliament v. Council (Chernobyl)* [1990] ECR I-2041, para. 23.

⁵³ K. Lenaerts, 'Some Reflections on the Separation of Powers in the European Community', CML Rev. 28 (1991): 11. See also G. Majone, 'Delegation of Regulatory Powers in a Mixed Polity', ELJ 8 (2002): 319, 323.

⁵⁴ G. de Búrca, 'The Institutional Development of the EU: A Constitutional Analysis', in *The Evolution of EU Law*, eds P. Craig & G. de Búrca (Oxford: Oxford University Press, 1999), 55.

⁵⁵ A.M. Sbragia, 'Conclusion to Special Issue on the Institutional Balance and the Future of EU Governance: The Treaty of Nice, Institutional Balance, and Uncertainty', *Governance* 15 (2002): 393, 403.

⁵⁶ J.-P. Jacqué, 'The Principle of Institutional Balance', CML Rev. 41 (2004): 383, 388-390.

⁵⁷ See D. Galloway, *The Treaty of Nice and Beyond: Realities and Illusions of Power in the EU* (Sheffield Academic Press, 2001), 115. S. Hix, 'Constitutional Agenda-Setting through Discretion in Rule Interpretation: Why the European Parliament Won at Amsterdam', B. J. Pol. S. 32 (2002): 259.

⁵⁸ See Widgrén S. Napel, 'The Inter-Institutional Distribution of Power in EU Codecision', *Social Choice Welfare* 17 (Sheffield, 2006): 129.

involvement of the Parliament. As Wallace has suggested,⁵⁹ the Council operates within different roles depending on the subject matter and as such there are different institutional balances reflecting this. Although the ECJ and Advocate General Poiares Maduro acknowledge the political sensitivity of the subject matter that could be expected to be reflected in the institutional balance in this case, both the Opinion and judgment are noticeably rigid in their analysis of the institutional balance, choosing the stability of Treaty interpretation rather than a fluid construct of the institutional relationships particularly in politically sensitive policy areas.

Therefore, the result of this case, to address the issue of delegated legislative powers, secondary legislative powers, or secondary legal bases for the first and final time, is somewhat limited. The discussion by the Advocate General of the virtuous circle of decision-making provides a valuable tool for examining the Community's legislative process and the door that was supposedly ajar after *Parliament v. Council* in 2001 has now been very firmly shut by the Court.

However, the more interesting implication that underpins the case but remains unspoken either in the Court's judgment or the Advocate General's Opinion is that of the affirmation of the principle of the rule of law.

5.3.3. *Rule of Law*

Article 6(1) TEU provides that one of the principles that the Union is founded upon is that of the rule of law. Definitions of the concept have though proved elusive and have engendered, over many years, considerable academic debate.⁶⁰ The starting point must be to consider what the function of the rule of law is. If law can be considered to be 'the enterprise of subjecting human conduct to the governance of rules'⁶¹ or 'the human attempt to establish social order as a way of regulating and managing human conflict',⁶² then the rules must guide this human action⁶³ and the minimum elements of the rule of law, purely on a procedural level, can be presupposed as Lon Fuller suggested and described.⁶⁴ Thus, the rule of law requires the law to be general, promulgated, prospective, clear, non-contradictory, relatively constant, to not require the impossible, and to display congruency between the law as officially declared and the law as administered. If these eight procedural elements are accepted as the constitutive parts of the rule of law, then they can be utilized as a lens through which to analyze the ECJ's judgment.

⁵⁹ H. Wallace, 'The Council: An Institutional Chameleon?', *Governance* 15 (2002): 325.

⁶⁰ For an interesting academic discussion on whether the rule of law is infused with morality, see the debate between N.E. Simmonds, *Central Issues in Jurisprudence*, 2nd edn (London, 2002) and 'Straightforwardly False: The Collapse of Kramer's Positivism', CLJ 63 (London: Sweet & Maxwell, 2004): 98 who argues for the infusion, and M.H. Kramer, *In Defense of Legal Positivism* (Oxford: Oxford University Press, 1999) and 'On the Moral Status of the Rule of Law', CLJ 63 (2004): 65 who argues against.

⁶¹ L.L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969), 96.

⁶² D. Beyleveld & R. Brownsword, *Law as a Moral Judgment* (London: Sweet & Maxwell, 1986), 2.

⁶³ F.A. Hayek, *The Road to Serfdom* (London: Routledge, 1944), 54.

⁶⁴ *Supra* n. 53, 39.

From the judgment, we can see that the focus of the Court, apart from that of institutional balance, is the primary position of the Treaties over other legislative measures. Thus, it is the Treaties that provide the procedural rules for decision-making that are general, fully promulgated, prospective, relatively clear, and possible. By outlawing secondary legal bases, the Court prevents contradictory or unique decision-making procedures to be countenanced and ensures that the law declared is the same as the law administered. Therefore, we can safely conclude that, by prohibiting the use of secondary legal bases, the ECJ upheld and reinforced the fundamental principle of the rule of law in EU Law.

If the procedural rules outlined above are sufficient to describe the rule of law, the necessary element in its effective prescription is the existence of an independent and impartial judiciary that is capable of resolving disputes and providing effective remedies for breaches of the law.⁶⁵ This case clearly demonstrated the ECJ fulfilling efficiently and effectively this particular role, and by providing a declaratory statement, the Court fully complied with its duty to 'ensure that in the interpretation and application of this Treaty the law is observed'.⁶⁶ As Francis Jacobs has recently stated, 'at least an important part of this task is to ensure that the rule of law is observed'.⁶⁷

5.4. THE POSITION OF THE COURT OF JUSTICE IN THE EU CONSTITUTIONAL ARCHITECTURE

The reaffirmation of the principle of the rule of law is followed in the judgment by a declaratory statement on the decision-making procedure to be used to prescribe and amend the lists of countries in the Refugee Procedures Directive, and as such, is an interesting development with constitutional implications, notably regarding the position of the Court and its role as a European Constitutional Court.

In the past, there has been considerable debate over the role of the ECJ and its relationship with the legislative organs at Community and national levels.⁶⁸ However, this debate is now shifting towards a consideration of the future judicial architecture⁶⁹

⁶⁵ A.M. Arnall, 'The Rule of Law in the European Union', in *Accountability and Legitimacy in the European Union*, eds A.M. Arnall & D. Wincott (Oxford: Oxford University Press, 2002), 239, 240.

⁶⁶ Article 220 EC.

⁶⁷ F.G. Jacobs, 'The State of International Economic Law: Re-thinking Sovereignty in Europe', *JIEL* 11 (2008): 5, 8.

⁶⁸ See H. Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Dordrecht: Martinus Nijhoff, 1986) and P. Neill, *The European Court of Justice: A Case Study in Judicial Activism*, Minutes of Evidence, House of Lords Sub-Committee on the 1996 IGC (Session 1994-1995, 18th Report, HL Paper 88, 218-245). See also A.M. Burley & W. Mattli, 'Europe before the Court: A Political Theory of Legal Integration', *International Organisation* 47 (1993): 41; K. Alter, 'Who Are the "Masters of the Treaty"? European Governments and the European Court of Justice', *International Organisation* 52 (1998): 121; and P. Eeckhout, 'The European Court of Justice and the Legislature', *YEL* 18 (1998): 1.

⁶⁹ Much has been written on this topic. See, e.g., J.P. Jacqué & J.H.H. Weiler, 'On the Road to European Union - A New Judicial Architecture: An Agenda for the Intergovernmental Conference', *CML Rev.* 27 (1990): 185; A.M. Arnall, 'Refurbishing the Judicial Architecture of the European Community', *ICLQ* 43 (1994): 296; A.M. Arnall, 'Judicial Architecture or Judicial Folly? The Challenges Facing the European Union', *ELR* 24 (1999): 516; and, M.-P.F. Granger, 'The Community Judiciary at the Dawn of the Third Millennium: A Revolution or a Simple Face-Lift?' *Bracton Law Journal* 34 (2002): 7.

of the Union and indeed the hierarchy of the judicial system. When the Constitutional Treaty was agreed in 2004,⁷⁰ a three-tier judicial architecture was envisaged with specialized courts (replacing judicial panels), the General Court (succeeding to the Court of First Instance⁷¹), and the Court of Justice. Under the Constitutional Treaty, the latter would have heard cases 'likely to raise constitutional questions in the broad sense'.⁷² However, as Arnall has pointed out,⁷³ three developments in the Constitutional Treaty were likely to further enhance the constitutional position of the ECJ at the head of the EU's judicial hierarchy. These were the detailed provisions on the competences of the Union⁷⁴ combined with the significance of the principles of conferral, subsidiarity, and proportionality,⁷⁵ the 'hierarchy of legal instruments matching policies to appropriate acts and procedures',^{76,77} and the incorporation of the Charter of Fundamental Rights.⁷⁸

Unfortunately, in 2005, the Constitutional Treaty died after the French and Dutch citizens rejected it in national referenda and it took another two years until the alternative emerged. The Lisbon Treaty⁷⁹ was signed by the Member States on 13 December 2007, and instead of producing a single Treaty, it reforms the two existing Treaties while renaming only the EC Treaty as the Treaty on the Functioning of the European Union (TFEU). However, although more cumbersome with two Treaties, the reforms envisaged by the Constitutional Treaty are mostly retained. The competences of the Union are included in Part 1, Title I of the TFEU and the principles of conferral, subsidiarity, and proportionality are set out in Article 5 TEU. The legal instruments set out in Part 6, Title I, Chapter 2, section 1 of the Lisbon Treaty, although heavily modified from the Constitutional Treaty to resemble the original EC legal instruments, nonetheless attempt to provide a hierarchical structure of legal instruments with a similar function to that in the Constitutional Treaty. Finally, although the Charter of Fundamental Rights is not included in the body of the Lisbon Treaty, Article 6(1) TEU states that it is to 'have the same legal value as the Treaties'. Furthermore, the naming of the courts envisaged by the Constitutional Treaty is carried over into the Lisbon Treaty.⁸⁰

The upholding of the rule of law in this judgment is an important affirmation by the Court of its position at the apex of the Community's judicial hierarchy. More important is the novel declaratory statement of principle involving interpretation and instructions to other institutions on the decision-making process. The implication of this declaratory statement is that the ECJ is evolving its own role, possibly influenced by the

⁷⁰ Treaty Establishing a Constitution for Europe, [2004] OJ C310.

⁷¹ It is already evolving into a court of general jurisdiction under Art. 225 EC and developing this role further.

⁷² A.M. Arnall, *The European Union and Its Court of Justice*, 2nd edn (Oxford: Oxford University Press, 2007), 661.

⁷³ *Ibid.*

⁷⁴ Part I, Title III CT.

⁷⁵ Article I-11 CT.

⁷⁶ *Supra* n. 64, 661.

⁷⁷ Part I, Title V, Ch. I CT.

⁷⁸ Part II CT and Art. I-9 CT.

⁷⁹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, [2007] OJ C-306/1.

⁸⁰ Article 19 TEU.

political process involved with the Constitutional and Lisbon Treaties but not constrained by politics or indeed waiting for the final outcome of the extended Treaty amendment process. It is submitted therefore that the role of the ECJ, as envisaged by some academic commentators⁸¹ following the Constitutional Treaty, will continue to evolve and develop with the adoption of the Lisbon Treaty into a true Constitutional Court. However, the Court itself appears to be developing its own constitutional role regardless of the outcome of the Lisbon Treaty, evolving from a Court with constitutional elements into a true Constitutional Court.

6. CONCLUSIONS

The importance of the case under discussion appears to be twofold, although we would say the phrase 'Rules will be rules!'⁸² summarizes the judgment. First is the elimination of the possible use of secondary legal bases in the decision-making process combined with the affirmation of the principle of institutional balance. This reinforces the fundamental nature of the rule of law in the structure of the EU. The Court sends a strong message that it will protect the Treaty against attempts to 'revise' the Treaty's law-making processes in the names of institutional efficiency, institutional preference, or collective Member State inclination where these conflict with the Treaty's constitutional structures. Second is the development of the constitutional role of the ECJ and the refinement of such a function by the Court itself in a hierarchical judicial architecture. Although, at present, this development has been incremental, the Lisbon Treaty provides a more distinct and clearly defined judicial hierarchy. The rejection of the Lisbon Treaty by the people of Ireland in the national referendum held on 12 June 2008 might now cast serious doubts as to the future of these constitutional changes. However, it is submitted that, whatever the fate of the Lisbon Treaty, the ECJ is in the process of developing its own role into that of an authentic Constitutional Court for the EU.

This case is an important statement by the Court of the need to protect the constitutional structure of the EU. In time, it is submitted that it will take its place alongside other constitutional rulings by the Court such as *Opinion 2/94*,⁸³ *Tobacco Advertising*,⁸⁴ and *Environment Crime*.⁸⁵

⁸¹ See *supra* n. 72.

⁸² Thanks to Professor Stephen Weatherill for this suggestion.

⁸³ *Opinion 2/94, Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759.

⁸⁴ Case C-376/98, *Germany v. Parliament and Council* [2000] ECR I-8419.

⁸⁵ Case C-176/03, *Commission v. Council* [2005] ECR I-7879.