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6 Constitutional Review in a Democratic Deficit Setting: The Case of the European Union

Violeta Beširević[*]

6.1 Introductory Remarks

In conventional democracies, constitutional review is the logical companion of a constitution and competitive political system. It is established with an aspiration to secure the basic goals to which democracy is streaming: the supremacy of the constitution, human rights consciousness, and alleviation of parliamentary tyranny.[1] Yet, since the courts exercising constitutional review lack democratic legitimization, they are often criticized for depriving the constitution of its legitimization by the constituent power.[2] Besides being accused for usurping the sovereignty of the people, the courts are also attacked on functional grounds: a matter of dispute is their capacity to act as a forum for rational deliberation.[3] Notwithstanding the criticisms, the practice of constitutional review is an obvious choice of today's democracies.[4] As it is of the European Union, despite the fact that the Union is not a state, its constitution is not a product of democracy and it lacks a competitive political system.

Adjudication in the EU is a matter of the European and national courts.[5] This system has been carefully cherished, through so-called 'dialogue of judges', with sporadic mutinies

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1 Some classical works on judicial (constitutional) review include: J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review*, Harvard University Press, Cambridge, Mass, 1980; A.M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Yale University Press, New Haven, 1986; R. Dworkin, *Freedom's Law: The Moral Reading of the Constitution*, Harvard University Press, Cambridge, Mass, 1997; H. Kelsen, *General Theory of Law and State,* (rep.) Transaction Publishers, New Brunswick, NJ, 2005; J. Waldron, *Law and Disagreement*, Clarendon Press, Oxford, 1999; M. Tushnet, *Taking the Constitution Away from the Courts*, Princeton University Press, Princeton, 1999.

2 A. Sajó, *Limiting Government: An Introduction to Constitutionalism*, CEU Press, Budapest, 1999, p. 240.

3 For a detailed discussion, *see, e.g.*, J. Waldron, 'The Core of the Case Against Judicial Review', *The Yale Law Journal*, Vol. 115, No. 6, 2006, pp. 1346-1406.

4 In this regard, the UK and the Netherlands represent a significant exception.

5 Article 19 (1) of the Treaty on European Union (TEU), a constituent part of the Lisbon Treaty, specifies that the Court of Justice of the European Union shall include the Court of Justice, the General Court (the successor of the Court of First Instance), and specialized courts (previously known as judicial panels). This chapter is mostly built on the jurisprudence of the Court of Justice. Further in the text: the Court.

on the part of national courts, particularly national constitutional courts.[6] Although it is a task of domestic courts to adjudicate most of the issues concerning the application of EU law, an actual constitutional umpire of the Union is the Court of Justice of the European Union.[7] However, the Court has not acquired this position without compromising its institutional authority. It has used the assigned institutional role to create law in cases in which Treaties are silent, as well as to extend a review function to national legislation not envisaged in the founding documents.[8] Following the constitutional theories on the nature of judicial review, one may conclude that the Court performs a strong-form judicial review, similar to the prevalent form of judicial review exercised by the US Supreme Court.[9]

Based on its proclamation that the Treaties serve as the constitutional charter (the constitution) of a Community/Union, for quite some time the Court has been a principal actor in introducing and supporting the migration of constitutional ideas to the Union.[10] There is a common narrative among the members of EU academia that, in order to save the integration process, jammed in 1966 due to a disagreement over the system of qualified majority voting and De Gaulle's politics of empty chair, the Court began to build a constitutionalized, pro-federal-legal order.[11] In moving from market building to a pro-state

6 The nature of the 'dialogue' is recently captured in the Court's Opinion, no. 1/09 delivered pursuant to Article 218(11) TFEU, on *Draft Agreement on European and Community Patents Court*: "The system set up by Article 267 TFEU therefore establishes between the Court of Justice and the national courts direct cooperation as part of which the latter are closely involved in the correct application and uniform interpretation of European Union law and also in the protection of individual rights conferred by that legal order".

7 K. Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice', *in* M. Adams *et al.* (Eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice*, Hart Publishing, Oxford and Portland, 2013, p. 60.

8 Article 19 (1) specifies that the main task entrusted to all EU courts is to "ensure that in the interpretation and application of the Treaties the law is observed". The Court's broad subject matter jurisdiction is determined in Article 19 (3) of the TEU and Articles 258-281 of the Treaty Establishing European Union (TFEU), which is another constituent part of the Lisbon Treaty.

9 Scholars tend to distinguish 'weak form' as opposed to the dominant 'strong form' of judicial review exercised by the US Supreme Court. *See, e.g.,* M. Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, Princeton University Press, Princeton, 2008; S. Gardbaum, *The New Commonwealth Model of Constitutionalism*, Cambridge University Press, Cambridge, 2013; for challenges, *see* R. Weill, 'The New Commonwealth Model of Constitutionalism Notwithstanding: On Judicial Review and Constitution-Making', *The American Journal of Comparative Law*, Vol. 62. No.1, 2014, pp. 127-170.

10 Judgment of 23 April 1986 in *Case – 294/83*, *Partiécologiste "Les Verts" v. European Parliament*, [1986] ECR 1339 marks the first time the Court ruled that Community Treaties constituted the constitutional charter of the Community. In its opinion on the European Economic Area, the Court observed that the Treaties formed the constitution of the Community. *See First EEA Case*, Opinion 1/91, (1991) ECR 6079.

11 M. Rasmussen, 'Rewriting the History of European Public Law: The New Contribution of Historians', *American University International Law Review*, Vol. 28, No. 1187, 2013, p. 1202; S. Oeter, 'Federalism and Democracy', *in* A. von Bogdandy & J. Bast (Eds.), *Principles of European Constitutional Law*, Oxford University Press, Oxford, 2011, p. 57; H.W. Micklitz & B. de Witte, 'Judge-Made Integration?', *in* H.W. Micklitz & B. de Witte (Eds.), *The European Court of Justice and the Autonomy of the Member States*, Intersentia Publishing Ltd., Cambridge, Antwerp, Portland, 2012, p. 3.

Community/Union building, the Court has repeatedly asserted its sweeping power of constitutional review:

> Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid the review of the conformity of their acts with the basic constitutional charter, the Community Treaty.[12]

In performing its review function, the Court has inaugurated direct effect and the supremacy of EU law in the Member States. As a result, it has managed to induce political integration even in the absence of constitutional *demos*.

Now, if it is known that the EU is not a particular example of a democratic showcase, it seems reasonable to examine the ramifications of constitutional review in the European Union. The issue to be asked is whether the fact that the EU lacks consolidated democratic procedures mitigates the classical arguments against constitutional (judicial) review, precisely because constitutional review in the Union is a remedy to perceived failures of its insufficiently representative and deliberative political institutions? Or, is it rather the opposite: because it is not a democratic showcase; the practice of constitutional review in the EU setting means going from bad to worse, that is – it further contributes to de-legitimization of the Union on democratic grounds? To answer these basic questions, I have structured my discussion in the following way. In Section 6.2, I will explain why the EU is a case for judicial review rather than the case against. Section 6.3 offers some examples of the Court's expansionist jurisprudence. Section 6.4 deals with the Court's legitimacy: I will first provide an account of the Court's output legitimacy and then focus on some aspects of its input legitimacy that generate a threshold question of the EU legitimization itself.

6.2 European Union: A Pertinent Case for Constitutional Review?

Even firm opponents of judicial review like Waldron admit that the core arguments against judicial review are not absolute and unconditional.[13] It might be that, in what he calls 'non-core' cases, the arguments against judicial review (based on democratic and functional grounds) cannot be sustained. Such cases include societies in which general commitment to rights are manifestly ill or whose electoral or legislative arraignments are not organized according to traditional democratic standards. Under such circumstances, it might be

12 *See, e.g.,* Judgment of 3 September 2008 in *Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European* Union *and Commission of the European Communities*, [2008] ECR I-6351. Further in the text: *Kadi I*.

13 Waldron 2006, pp. 1401-1405.

appropriate to set up judicial review as a remedy for human rights violations and compromised electoral and institutional arrangements.[14] If that is the case, does the EU qualify as a non-core case in which judicial review is not only manageable but desirable as well? To answer this question, I need first to clarify a difference between a democratic setting in which constitutional review is traditionally exercised and the EU design.

The authority of constitutional review in a democratic setting is traditionally attached to the concepts of a state, constitution, and a competitive political system. Constitutional review in the EU operates in the environment that does not connote some of these qualities.

Thus, the issue of whether EU is a state or non-state became highly debatable after the Maastricht Treaty introduced several state-like concepts to strengthen the Union's political integration: European citizenship, common foreign, and security policy, closer economic and monetary policy with an introduction of single currency, and some rudiments of common defence policy.[15] Along with certain institutional changes, established to increase the powers of the EU Parliament and introduce the institution of ombudsman, these concepts were enough reasons for some to claim that the Maastricht Treaty had generated a European federal state.[16] Others were much more sceptical, arguing that the federal Europe had not been created, despite some signs suggesting the opposite.[17] However, some members of the debate insisted that the Maastricht Treaty did not change intergovernmental features on which the Union was based, including the fact that the Member States remained *Herren der Verträge*, as they were since the beginning of the integration.[18] Nevertheless, the debate was soon dominated by those who embraced the 'something else' approach and argued that the EU was neither a state nor an international organization but the community of *sui generis* nature.[19] Even though the Union lacks crucial aspects of the exclusivity of final authority, *pouvoir constituant*, and political identity, there is an overwhelming view that its *sui generis* features can be best explained in constitutional terms.[20]

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14 *Id*.

15 For more on the Maastricht Treaty, *see* R. Corbett, *The Treaty of Maastricht. From Conception to Ratification: A Comprehensive Reference Guide*, Longman, Essex, 1993.

16 D.J. Edwards, 'Fearing Federalism's Failure: Subsidiarity in the European Union', *The American Journal of Comparative Law*, Vol. 44, No. 4, 1996, pp. 537-583.

17 D. Kugelmann, 'The Maastricht Treaty and the Design of a European Federal State', *Temple International and Comparative Law Journal,* Vol. 8, 1994, p. 341.

18 A. Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*, Cornell University Press, Ithaca, 1998.

19 A. von Bogdandy, 'The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty', *Columbia Journal of European Law*, Vol. 6, No. 1, 2006, pp. 27-54; J.H.H. Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration*, Cambridge University Press, Cambridge, 1999; J.H.H. Weiler, 'Federalism Without Constitutionalism: Europe's Sonderweg', *in* K. Nicolaïdis & R. Howse (Eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*, Oxford University Press, Oxford, 2001, pp. 54-70.

20 From the perspective of constitutional theory and law, the philosophy of European integration has been interpreted with the reference to constitutional tolerance, constitutional synthesis, or multilevel constitutionalism. For a discussion, *see, e.g.,* J.E. Fossum & J.A. Menéndez, 'The Theory of Constitutional Synthesis: A

With this said, the next logical issue to assess is whether the EU has a constitution. This is another question that has generated reason for persisting polarization among EU scholars. The polarization endures even after a failure of the Treaty establishing a Constitution for Europe. On one hand, some believe that the Union does not have a constitution because it lacks a 'constitutional moment' and a codified written constitution securing 'a sufficient degree of democratic legitimacy and accountability'.[21] On the other hand, for many scholars, these are unconvincing arguments.[22] Against those who deny the existence of the constitution in the EU legal order, I will shortly illuminate the reasons for its recognition.[23]

First, as a document that speaks about basic organizational rules, a constitution is not always attached to a state. Some international organizations, including the ILO, UNESCO, and the UN FAO, have a constitution. However, for the purpose of this discussion, this is not a sound argument because, unlike these organizations, the EU exercises legislative and executive powers that produce direct consequences for the individuals.

Second, an argument more supportive of the Union's constitution derives from a history of constitutional traditions. To remind, there are two concepts of constitutional traditions from which a constitution can emerge.[24] The first one is democracy-based constitutional tradition, where a democratic *pouvoir constituant* brings about formation of a new order in a revolutionary act of democratic self-determination, with the purpose of safeguarding individual liberty.[25] In the second one, which Christoph Möllers calls 'a power-shaping' constitutional tradition, the emergence of a constitution does not depend on democracy – the constitution emerges as a tool to limit a pre-democratic sovereignty through legal

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Constitutional Theory for a Democratic European Union', *RECON On Line Working Paper*, 2010/25, <www.reconproject.eu/main.php/RECON_wp_1025.pdf?fileitem=3653824>; I. Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action', *Columbia Journal of European Law*, Vol.15, No. 3, 2009, pp. 354-356; G. de Búrca & J.H.H. Weiler (Eds.), *The Worlds of European Constitutionalism*, Cambridge University Press, Cambridge, 2012. By saying this, I do not claim that intergovernmentalist approach is totally dead, but just that it is no longer predominant.

21 *See, e.g.,* D. Grimm, 'Does Europe Need a Constitution?', *European Law Journal*, Vol. 1, No. 3, 1995, pp. 282-302. *See also* D. Grimm, 'Types of Constitutions', *in* M. Rosenfeld & A. Sajó (Eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford, 2012, p. 130.

22 J. Habermas, 'The Crisis of the European Union in the Light of a Constitutionalization of International Law', *European Journal of International Law*, Vol. 23, No. 2, 2013, p. 342. Even before the adoption of the Lisbon Treaty, some claimed that the EU already had a *de facto* constitution (Treaty of Rome), which had served it well. *See* A. Moravcsik, 'What Can We Learn from the Collapse of the European Constitutional Project?', *Politische Vierteljahresschrift*, Vol. 47, No. 2, 2006, p. 220.

23 I discuss this issue in more details in V. Beširević, 'The Constitution in the European Union: The State of Affairs', *in* A. Dupeyrix & G. Raulet (Eds.), *European Constitutionalism. Historical and Contemporary Perspectives,* Peter Lang, coll. 'Euroclio', Brussels/Berlin/Frankfort/New York, 2014, pp. 15-35.

24 For a discussion, *see*, *e.g.,* C. Möllers, 'Pouvoir Constituant – Constitution – Constitutionalisation', *in* von Bogdandy & Bast (Eds.), *Principles of European Constitutional Law*, 2011, pp. 169-204.

25 The American and the French constitutional traditions are cases at point.

rules.[26] The emergence of the constitution in the EU to some extent resembles the emergence of the constitution in the power-shaping constitutional tradition. Established as an international organization, the EU is a creation of Political Messianism and not of democracy.[27] Yet, a by-product of the Messianic project is the constitution that emerged in the process of constitutionalization, which implies "the transformation of the Community from an international to a constitutional legal order".[28] The European constitution does not mirror a national constitution in the sense that it is attributable to the people, nor is it a revolutionary product aimed at limiting the government in the name of individual freedom. It is a constitution that has been constructed out of a treaty.[29]

A test to further discuss the issue is the 1789 French revolutionary Declaration. Apart from declaring civil rights, the Declaration in Article 16 proclaims: "a society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all". Under this test, it is possible to claim that the Lisbon Treaty and its relevant protocols, the EU Charter on Fundamental Rights, the standards developed by the Court, and finally, to some extent, the constitutional orders of the Member States, represent the source of the Union's uncodified, anti-revolutionary, and a rule of law-oriented type of constitution. Accordingly, the constitutional framework in the EU emanates from political decision-making and not from pre-established truth.[30] It secures the fulfillment of all three basic functions of a modern constitution in a federal legal order: division of powers between the Union and the Member States, separation of powers among the Union institutions, and the protection of human rights. Accordingly, the Court operates in a constitution-based rather than a treaty-based environment.

So far, I have demonstrated state-like features that tie rather than separate the Union with a traditional state setting. Now, it is time to be reminded of its institutional and electoral arrangements that underpin the reasons why a democratic deficit has been a principal feature of the Union.

Thus, it is sometimes asserted that the exercise of constitutional review presupposes the presence of a competitive political system.[31] Under this assumption, judicial control is perceived as a mechanism of political insurance. As explained by Ginsburg, the purpose

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26 This is the practice that can be found in German and English constitutional traditions. Möllers 2011, p. 172.

27 For more on this point, *see* J.H.H. Weiler, 'Europe in Crisis – On "Political Messianism", "Legitimacy" and the "Rule of Law"', *Singapore Journal of Legal Studies,* 2012, pp. 248-268.

28 P. Craig, 'Constitutions, Constitutionalism and the European Union', *European Law Journal*, Vol. 7, No. 2, 2001, pp. 125-150.

29 A.S. Sweet, *The Judicial Construction of Europe*, Oxford University Press, Oxford, 2004, p. 241; B. Vesterdorf, 'A Constitutional Court for the EU?', *International Journal of Constitutional Law*, Vol. 4. No. 4, 2006, pp. 607-608.

30 Thus, the constitution of the EU confirms the Grimm's allegation that a modern constitution is a set of legal norms which emanate from a political decision and not from pre-established truth. *See* Grimm 2012, p. 104.

31 *See, e.g.,* M.C. Stephenson, '"When the Devil Turns"…The Political Foundations of Independent Judicial Review', *Journal of Legal Studies*, Vol. 32, No. 1, 2003, pp. 59-89.

of constitutional review is not only to tie the hands of the majority by specifying what it is not allowed to do, but also to secure to the constitution drafters an access to a forum in which they can challenge the majority in case of their electoral defeat.[32]

However, a competitive political system is precisely what the EU still lacks. Despite some efforts to enhance standards of representative and participatory democracy in the Lisbon Treaty, there are several institutional and electoral features that still insulate the EU from a traditional democratic setting. For example, it is still impossible for the voters in the EU to choose between rival candidates for the executive positions or to determine the composition of the EU institutions – among the three institutions performing legislative function, the only one directly elected institution is the European Parliament. In addition, starting from the premise that democracy makes sense only to the extent to which political parties are allowed to fight over power,[33] the absence of authentic European parties competing for the power further underscores the EU's poor democratic credentials. In addition, the EU Parliament is neither a parliament that supports governing majority nor a sovereign legislator whose word is final.[34] And finally, the empirical dimensions of participatory democracy are yet to be identified.

With these distinctions in mind, one may claim that the European Union's setting might be considered, as a 'non-core case', to which, allegedly, arguments against judicial review do not apply exactly because democratic practices are dysfunctional. Yet, the relevance of this thesis depends not only on the presence of a dysfunctional democratic system but predominantly on the vital implications the constitutional review makes for citizens' preferences, which is on the Court's output legitimacy. To frame a discussion on this issue, I now offer several examples of the Court's expansive lawmaking that stimulated and defined the process of constitutionalization of EU legal order.

6.3 The Court in Action: Some Examples of EU Judge-Made Law

Neither has the European Union always been a transnational constitutional system, nor has the Court always been 'at the constitutional centre of Europe'. It was the 1951 Treaty establishing the European Coal and Steel Community (ECSC) that first envisaged the establishment of the Court, and then its functions were provided in the 1957 Treaty

32 For more discussions, *see* T. Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Cambridge University Press, Cambridge, 2003.

33 R. Pildes, 'Political Parties and Constitutionalism', *in* T. Ginsburg & R. Dixon (Eds.), *Comparative Constitutional Law*, Edward Edgar Publishing, Cheltenham, 2011, p. 254.

34 For a similar view, *see, e.g.,* N. Walker, 'The Migration of Constitutional Ideas and the Migration of the Constitutional Idea: the Case of the EU', *in* S. Choudhry (Ed.), *The Migration of Constitutional Ideas*, Cambridge University Press, Cambridge, 2006, p. 322; R. Corbett *et al.*, *The European Parliament*, 7th edn, John Harper Publishing, London, 2007, p. 245.

establishing the European Economic Community (EEC Treaty or the Treaty of Rome). Although it began to operate as a weak international court with a few cases to adjudicate, from the very beginning the Court was conferred with some tasks of a supranational court. For example, the Treaty of Rome provided its compulsory jurisdiction. This meant that the Member States could be compelled to participate in the proceedings. Next, the preliminary ruling procedure enabled private parties to access the Court through national court references. And finally, the Court was empowered to hear cases initiated by the Commission against Member States for non-compliance.[35]

From the mid-1960s, the Court began to utilize and expand these mechanisms to constitutionalize the Union, because only through and by constitutional principles could the obstacles to effective market integration be eliminated.[36] As I will soon explain, despite the silence in the Treaties, through the various heads of its jurisdiction, the Court has upgraded EU law to cover human rights protection and has extended a review function to cover institutions and national legislation that were not expressly subjected to it. Consider the following.

At the time when it appeared that European integrations started to lose a clear political bolstering, the Court inaugurated two doctrines, which still stand at the heart of 'judicial construction of Europe' (Stone Sweet). Both, 'direct effect' and 'supremacy' doctrine made EU a workable concept on the grounds of the language of rights (direct effect) and conflicts of law (supremacy doctrine). In its broader sense, adopted by the Court in *Van Gend en Loos* (1961), direct effect delineates the capacity of an EU norm to be invoked before the national court.[37] In a narrower sense, direct effect holds that under certain conditions, EU norms confer on individual substantive rights on which they can rely before the individual courts.[38] Under the supremacy doctrine, announced in *Costa* (1964) and developed in subsequent cases, in case of conflict, the EU law takes over any provision of the national law, including national constitutions as well.[39] In the subsequent developments, the Court has used both doctrines to develop Community/Union law whenever this was not possible to achieve through legislative proceedings.

For example, at the time when the Communities were created, human rights issues were tackled in a variety of universal and regional treaties, but not in the fundamental treaties establishing the European Communities. The reason was simple: the integration was based on economic rather than on political interests. The perspective had changed

35 K. Alter, *The European Court's Political Power*, Oxford University Press, Oxford, 2009, p. 32.

36 For more, *see* A.S. Sweet, *Governing with Judges*, Oxford University Press, Oxford, 2000, pp. 153-193.

37 Judgment of 5 February 1963 in *Case-26/62, NV Algemene Transport- en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR 1; p. Craig & G. de Búrca, *EU Law: Text, Cases, and Materials*, Oxford University Press, Oxford, 2011, p. 180.

38 *Id*.

39 Judgment of 15 July 1964 in *Case – 6/64, Costa v. ENEL*, [1964] ECR 585. For a discussion, *see* Craig & de Búrca 2011, pp. 256-300.

after the Court had started vehemently to insist on the application of its supremacy doctrine. Although, in principle, the national courts had accepted the doctrine, they did it with a certain degree of resistance.[40] The resistance was the strongest in cases in which EU law supposed to violate the fundamental human rights provisions of the national law. The rest of the story is well known. In what has been described as "an exercise of bold judicial activism",[41] the Court has built remarkable human rights jurisprudence, notwithstanding the fact that the Rome Treaty was silent on the issue. In the *Stauder* decision (1969) and, after, in the *Solange I* decision (1970), the Court argued that the general principles underpinning Community law included respect for fundamental rights as inspired by constitutional orders of the Member States.[42] Some years later, the Court in *Nold* added that the second source of inspiration for the Community law on human rights were international human rights agreements, signed by the Member States.[43] Since then, the Court has been regularly exercising rights-based review, which is one of the routine functions of a constitutional adjudicator.

In order to facilitate the ways in which EU law can impact national legal systems, the Court has also developed the doctrines of 'indirect effects' and 'governmental liability'. According to the first, national judges are always to interpret national rules as if they were in conformity with Community/Union law (the *von Colson* decision).[44] In the subsequent cases, the Court extended this rule to govern in situations in which all competent authorities are to interpret national law.[45] Under the doctrine of governmental liability, first established in *Francovich* (1991), a national court can hold a Member State liable for damages incurred by individuals, either because the Member State failed to transpose properly a directive or for breach of EU law, and may require a Member State to compensate such individuals for their losses.[46]

There is a further wrinkle here. The Court has not only made EU law vulnerable to human rights challenges, but also Member States legislation. However, in the absence of the EU norm similar to the privileges and immunities clause of the US Fourteenth

40 The strongest resistance came from the Italian, the French, and to some extent the British courts. *See* Sweet 2000, pp. 166-170.

41 J.H.H. Weiler, 'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Rights Within the Legal Order of the European Communities', *Washington Law Review* Vol. 61,1986, p. 1105.

42 Judgment of 12 November 1969 in *Case-29/69, Erich Stauder v. City of Ulm*, [1969] ECR 419; *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Solange I)*, BVerfGE 37, 271 (1974) CMLR 540.

43 Judgment of 14 May 1974 in *Case 4/73*, *Nold v. Commission,* [1974] ECR 491.

44 For a discussion, *see* p. Craig & G. de Búrca 2011, pp. 200-207. *See also* the Court's Judgment of 10 April 1984 in *Case- 14/83*, *Von Colson and Kamann v. Land Nordrhein-Westfalen*, [1984] ECR 1891.

45 *See* Judgment of 12 February 2004 in *Case C-218/01, Henkel KGaA v. Deutsches Patent- und Markenamt,* [2004] ECR I-1725.

46 Judgment of 19 November 1991 in *Joined Cases C-6/90 and C-9/90*, *Andrea Francovich and Others v. Italian Republic*, [1991] ECR I-5357. For a discussion, *see* Craig & de Búrca 2011, pp. 241-253.

Amendment, this is a much more contested issue. Initially, it seemed that the Court clearly lacked the right to review national legislation on human rights grounds:

> Legal relationships which are left within the powers of the national legislature must be understood to be subject to the constitutional principle that human rights must be respected, which applies in the State to which the relationship is subject, in so far as the internal provisions are not replaced by directly applicable Community provisions.[47]

Yet, the Court has altered its approach: it now advocates the idea that Member States are to face human rights challenges whenever they act within the scope of application of EU law.[48] For example, the Court will be in a position to review Member States action for compliance with EU human rights standards when Member States apply EU legislation based on human rights protection, when they implement or enforce EU measures, or when they adopt measures derogating from EU law. Admittedly, so far the Court has restrained itself from exercising a strong rights-based review of Member States action. The issue is nevertheless contested because it is on the Court to decide which human rights standards are to be applied for the Member States and because it is not always possible to predict whether in a particular situation a Member State action falls inside or outside the rights-based review.[49]

Now, horizontal separation of powers is another important area of constitutional review in today's democracies. The EU's institutional design does not follow the separation of powers principle, but rather the principle of 'institutional balance', borrowed from the Middle Ages republican discourse on the structure of the government.[50] The concept implies that the political order should be based on a balance between different interests of the different sections within civil society.[51] Given the fact that the Union is a 'living project', it is not difficult to assume that the relationship among its institutions has altered over time. According to the original EEC Treaty setting, the dominant role in the decision-making process had been granted to institutions representing the Community interests (the Commission) and Member States interests (the Council), while the European Parliament had consultative and supervisory powers but not real legislative power. As time went by, the inter-institutional relations within the Community/Union have changed significantly, particularly when it comes to the position of the European Parliament, whose role

47 Advocate General Capotorti in *Case-43/75, Gabrielle Defrenne v. Societe Anonyme Belge de Navigation Aerienne Sabena*, [1978] ECR 1365, p. 1384.

48 Craig & de Búrca 2011, p. 381.

49 *Id*., pp. 382-389.

50 P. Craig, 'Institutions, Power and Institutional Balance', *in* p. Craig & G. de Burca (Eds.), *The Evolution of EU Law,* Oxford University Press, Oxford, 2011, pp. 41-42.

51 *Id*., p. 41.

in the legislative process has been increased to a considerable extent. The changes were not enforced only through Treaty changes, but also under the influence of the Court itself. It is thanks to the Court's ruling of 1990 that the European Parliament can bring the action for annulment against the Council or the Commission.[52] Equally, but somewhat earlier, the Court subjected the Parliament to its constitutional review, although at that time the Parliament under Treaty was not included as a body subject to review.[53]

Apart from using the principle of institutional balance to resolve inter-institutional disputes among key players in the legislative process, the Court has also used this principle to limit the practice of delegated powers. The point to remember here is that governing through agencies was accepted as a mode of governance in the Communities despite the fact that the Communities Treaties did not envisage the formation of agencies nor did they discuss the delegation of powers.[54] When such bodies began to function in the framework of the ECSC Treaty, their decisions had provoked legal challenges. In principle, the Court supported their creation but on the condition that 'institutional balance' was neither altered nor was institutional responsibility shifted or avoided. Back in 1958, the Court formulated the original legal limits on agency powers, when in *Meroni* it ruled that it was not possible to delegate power involving a wide margin of discretion because it replaced the choices of the delegator by the choices of the delegate.[55]

At the end of this section, an important footnote should be added. The Court's aggressive bolstering of European integration would not be possible without the contribution of other actors.

Firstly, the most important backup the Court has received from the stakeholders of the Union – the Member States. Without the above-mentioned unique functions created in the Rome Treaty, including compulsory jurisdiction of the Court and preliminary reference procedure, policy transformative cases would not reach the Court. A decisive role of the Member States in building the Court's authority becomes even more obvious when comparing the Court's achievements under the EEC Treaty/EU Treaties, with its poor score in deciding on issues in the context of the ECSC. As Karen Alter argues, throughout the 50-year history of the ECSC, "the Court was both timid and ineffectual at compelling compliance with the ECSC rules, let alone in facilitating political or policy change".[56] Although in the context of ECSC the political process was also blocked, the Court was not

52 Judgment of 22 May 1990 in *Case – 70/88, Parliament v. Council* (*Chernobyl*), [1990] ECR I-2041.

53 *See Case – 294/83, Partiécologiste 'Les Verts' v. European Parliament*.

54 In the EU agencies do not possess real regulatory powers as agencies in today's democracies, especially in the USA.

55 Judgment of 13 June 1958 in *Case 9-56, Meroni & Co., Industrie Metallurgiche, SpA v. High Authority of the European Coal and Steel Community*, [1958] ECR I-133.

56 Alter 2009, p. 6.

expansionist precisely because it knew that building a common market in coal and steel lacked any real domestic political support.[57]

Secondly, national courts should be definitely added to the list of the Court's supporters. Most of the Court's expansive jurisprudence was born in the preliminary ruling proceedings initiated by the national courts and, at the end, represented a negotiated compromise between the Court and national courts.[58]

Thirdly, the recent historical studies indicate that the Court has also received an important backing from the legal advisers of the Commission and the Council, as well as from EU academia.[59]

Albeit the fact that the Member States have gradually, mostly through Treaty revisions, approved many of the Court's key findings, such an extensive judicial lawmaking begs the question of the Court's legitimization. I turn now to this issue.

6.4 Legitimacy Issues

A discussion about the legitimacy of the constitutional courts is predominantly shaped by what its participants decide to accentuate, because the notion of legitimacy suffers from indeterminacy and depends on the type of parameters chosen to define its meaning.[60] Broadly speaking, one can separate normative from sociological legitimacy narrative, as well as output (result) from input (process) legitimacy. In the context of the European Union, Weiler also speaks about *telos* legitimacy or 'Political Messianism', where the legitimacy is not gained either from the result or from the process, but from the promise.[61]

To focus my argument, I hasten to say that the Court is not 'illegitimate' either from a normative or from a sociological point of view. Its normative legitimacy, the Court draws from the rule of law principle and a blueprint of its jurisdiction set up in the EU foundational Treaties. A sociological approach to the Court's legitimacy indicates that this is one of the most respectable supranational judicial bodies, whose decisions are welcomed and followed to a great extent in the community in which it operates.[62] A potentially decisive role the Court may also play in Europe's fiscal and monetary integration, foreseen to

57 *Id*., p. 8.

58 For the effects, *see, e.g.,* A.S. Sweet & T. Brunell, 'The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961-95', *Journal of European Public Policy*, Vol. 5, No. 1, 1998, pp. 66-97.

59 Rasmussen 2013, pp. 1198-1202.

60 For a thorough explanation, *see, e.g.,* W. Sadurski, 'Constitutional Courts in Transition Processes: Legitimacy and Democratization', *Sydney Law School Legal Studies Research Paper*, No. 11/53, 2011, <http://ssrn.com/abstract=1919363>; Weiler 2012, p. 248-250.

61 *Id*., p. 250.

62 J.H.H. Weiler, 'Epilogue: Judging the Judges – Apology and Critique', *in* Adams *et al*. (Eds.), *Judging Europe's Judges,* 2013, p. 235.

remedy a current financial crisis, well illustrates this point.[63] Lastly, neither the Court's legitimacy can be contested from the approach of *telos* legitimacy, because much of the promise of 'Ever Closer Union' resulted from the Court's adjudication.

This is not to suggest that the Court has always been acting in the proper province of constitutional review, that it has never crossed the line between the law and politics, or that it has never delivered cryptic, reasonably unsound decisions.[64] Certain aspects of its output (result) and input (procedural) legitimacy are clearly subject of concerns. In the rest of this chapter, I will first explore whether the outcomes of the Court's expansive adjudication represent a remedy for dysfunctional democratic processes in the Union and then illuminate a result of their achievements at the expenses of democratic processes.

6.4.1 The Court's Push for 'the Government for the People'

One way to assess the legitimacy of the European integration is to consider public welfare delivered by the Community/Union and its success in generating 'the government for the people'.[65] In view of this consideration, an unavoidable issue is whether the Court has succeeded to rectify the imperfection of democratic procedures at the Community/Union level. For a conclusive answer, one should focus on both human rights jurisprudence, a crucial product of the Court's 'bold activism', and on the Court's efforts to enhance democratic accountability in the Union.

6.4.1.1 Superior Judicial Commitment to Rights?

Originally established without the intention to be responsive to human rights concerns, today, the European Union not only guarantees a variety of human rights and freedoms, but it is also a member of universally binding human rights conventions and at the edge of the accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms.[66] As it is often observed, the protection of human rights has been

63 The Fiscal Compact, an international agreement, concluded by 25 out of 27 EU Member States to tighter fiscal budgetary discipline and improve management of the Eurozone, envisages the Court's review function. The function fits well with the function the Court has under the infringement procedure specified in the Lisbon Treaty. For more, *see* V. Skouris, 'The Court of Justice and the Financial Crisis: New Treaties, New Competences, Future Prospects', <www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/General_Assembly/Keynote_Skouris__Vassilios.pdf>.

64 Useful discussion on the Court's legitimacy can be found in: Adams *et al.* (Eds.) 2013; Weiler 2012; Alter 2009; H.W. Micklitz & B. de Witte (Eds.) 2012; A. Wimmel, 'Theorizing the Democratic Legitimacy of European Governance: a Labyrinth with No Exit?', *European Integration*, Vol. 31, No. 2, 2009, pp. 181-199.

65 President Lincoln's phrase on 'Government of the People, by the People, for the People', included in his 1863 Gettysburg Address, has been frequently quoted with regard to the definition of democracy itself.

66 The first international human rights instrument joined by the EU was the UN Convention on the Rights of Persons with Disabilities (2009). The final version of the Draft Agreement on Accession of the EU to ECHR was adopted on 5 April 2013.

placed on the top of the Community/Union agenda predominantly through the Court's decisions.[67] True, initially the Court refused to engage in the rights-based review.[68] However, it soon realized that legitimacy of the Community law and its application was endangered by the lack of human rights protection in the Community.[69] Under the influence of the Court's jurisprudence of the 1960s and 1970s, the Member States decided at the first opportunity

> to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter.[70]

What followed was a consolidation of human rights law in various Community/Union documents, including legally binding EU Charter of Fundamental Rights, as specified in the Lisbon Treaty.[71] Accordingly, the human rights protection, which is now at the core of the EU legal order, represents a key element of the Union's output-based legitimacy.

Now, in a democratic setting, protection of human rights has always been a central domain of constitutional (judicial) review and therefore one of the reasons for disagreements over the institutional competence of courts. To remind, in the United States the opponents of judicial review claim that there is no good reason to conclude that the courts protect individual rights better than democratic legislatures would.[72] This criticism is, however, generated in the society with the Bill of Rights and democratic legislature, two features that the Community missed at the time of its creation. As I said earlier, initially, neither did human rights standards requiring the Court's interpretation exist, nor did the Community legislative institutions secure the influence of the electorate on the Community policy. Yet, given the fact that the Community soon started to exercise public power producing direct consequences for the individuals, even in the absence of typical tyrannical majorities, the need of controlling possible hazardous effects of the Community's legislation was manifestly clear. True, the Court was simply nudged to review the Community legis-

67 For a detailed discussion, *see* E.F. Defeis, 'Human Rights and the European Court of Justice: An Appraisal', *Fordham International Law Journal*, Vol. 31, No. 5, 2007, pp. 1104-1117.

68 Judgment of 15 July 1960 in *Cases 36/59, 38/59 and 40/59, Geitling and Others v. High Authority* [1960] ECR 423.

69 J. Kühling, 'Fundamental Rights', *in* von Bogdandy & Bast (Eds.), *Principles of European Constitutional Law*, 2011, p. 483.

70 The Preamble of the Single European Act. The Act was the first modification of the Rome Treaty. It was signed in Luxembourg on 17 February 1986. On 1 July 1987, it entered into force.

71 *See* Article 6 (1) of the Lisbon Treaty.

72 Waldron 2006, pp. 1364-1386.

lation on the rights-based grounds,[73] but later on, it decided to bind Member States by fundamental rights of the Union, as well. There are several additional reasons for the shifted policy. First, it becomes a truism to argue that the Court turned to rights-based review to safeguard integration processes.[74] Second, Weiler suggests that the Court's readiness to exercise rights-based review was cherished by the Members States in their fear over qualified majority voting.[75] Another explanation is that, in the face of growing accusations for the Community's democratic illegitimacy, it was reasonable for the Court to develop strategy to mitigate the accusations.[76] Finally, it may also well be that in the global human rights era, the survival of the Community was no longer possible without bold recognition that the Community was responsive to human rights concerns.[77]

Anyhow, the reasons depicted above seem to urge the conclusion that outcome-related reasons, particularly the Court's rights-based decisions, justify the case for a constitutional review in the Union. Yet, this does not mean that by delivering rights-based decisions, the Court has automatically rendered public good capable to legitimize the Community/Union. An important issue is the standard of the human rights protection established by the Court, particularly if it is to be compared with the standard of protection established in the Member States. There is much to be said on behalf of this issue. Here, I will briefly indicate the reasons for which it has been long maintained that the Court's protection of human rights represented a source of reduced constitutionalism in the Union.

First, some assert that for a long time the Court did not distinguish human rights from fundamental market freedoms.[78] In another version of this argument, it is claimed that the Court's protection of fundamental rights remained mostly rhetorical, because its predominant concern was to protect market freedoms or other aims of EU policy.[79] True, the first cases in which the Court distinguished fundamental rights from market freedoms were decided at a late stage of European integration: in *Schmidberger* (2003) and *Omega* (2004), the Court referred to respect for human dignity, freedom of assembly, and freedom

73 The greatest pressure came from the German Constitutional Court. *See* the decisions: *Internationale Handelsgesellschaft (Solange I)* and Wünsche Handelsgesellschaft (*Solange II*), Judgment of 22 October 1986, BVerfGE 73, 339, (1987) 3 CMLR 225.

74 Much ink has been spilled over this point. For the latest assessment, *see, e.g.*, H. de Waele, 'The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment', *Hanse Law Review*, Vol. 6, No. 1, 2010, pp. 3-26.

75 J.H.H. Weiler, 'The Transformation of Europe', *The Yale Law Journal*, Vol. 100, No. 8, 1991, pp. 2428-2429.

76 For more *see* A.M. Burley, 'Democracy and Judicial Review in the European Community', *University of Chicago Legal Forum*, 1992, pp. 81-92.

77 Weiler 1986, p. 1117.

78 Kühling 2011, pp. 479-514; T. Kingreen, 'Fundamental Freedoms', *in* von Bogdandy & Bast (Eds.), *Principles of European Constitutional Law*, 2011, pp. 515-549; Möllers 2011, p. 182.

79 A. Albi, 'An Essay on How the Discourse on Sovereignty and the Cooperativeness of National Courts Has Diverted Attention From the Erosion of Classic Constitutional Rights in the EU', *in* M. Claes *et al.* (Eds.), *Constitutional Conversations in Europe: Actors, Topics and Procedures*, Intersentia Publishing Ltd., Cambridge, Antwerp, Portland, 2012, p. 62.

of expression in reviewing the Community law.[80] This fact is relatively easy to explain. In the mid-1960s, the first Court's concern was uniformity, direct applicability, and supremacy of the Community/Union law, not a comprehensive human rights protection. To that aim the Court turned much later, when the period of political instability endangering the common market seemed to be over and when closer political integration was at stake.

The second reason is closely connected to the first one. Some authors point at a double standard in the Court's approach to rights-based review of Member States measures and of EU measures: while under the human rights doctrine the Court often finds Members States in breach of EU law, it rarely uses fundamental rights to regulate the powers of EU institutions.[81] From a historical perspective, there is much truth in this thesis. By now, however, the situation has improved, although the effects of the Court's review under the EU Charter of Fundamental Rights are yet to be realized.[82] For example, in a series of its antiterrorism decisions delivered in the post 9/11 period, the Court has struck down a number of EU measures, for violating a range of fundamental rights, including due process rights and the right to property.[83] In *Kadi I*, the Court went further and proclaimed that in the EU legal order all EU recognized fundamental rights "belonged to normatively superior category".[84] Moreover, this proclamation served the Court to separate EU legal order from international rules in breach of human rights.[85] Although one can second-guess whether the Court's readiness to challenge international law under the rights-based review was solely motivated by a noble wish to protect human rights, the fact is that in the era of global 'war on terrorism' the Court has prevented the European Union to downgrade the protection of fundamental rights at any cost.[86] Outside of the context of terrorism, the

80 Judgment of 12 June 2003 in *Case-112/00, Schmidberger* [2003] ECR I-5659; Judgment of 14 October 2004 in *Case-36/02, Omega*, [2004] ECR I-9609.

81 Albi 2012, p. 62.

82 For a discussion, *see* G. de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' *Maastricht Journal of European Comparative Law*, Vol. 20. No. 2, 2013, pp. 168-184.

83 *See, e.g.,* Judgment of 12 December 2006 in *Case-T-228/02, Organisation des Modjahedines du peuple d'Iran v. Council of the European Union*, [2006] ECR II-4665; Judgment of 23 October 2008 in *Case-T-256/07, People's Mojahedin Organization of Iran v. Council of the European Union*, [2008] ECR II-3019; Judgment of 4 December 2008 in *Case-T-284/08, People's Mojahedin Organization of Iran v. Council of the European Union*, [2008] ECR II-3487; Judgment of 30 September 2009 in *Case-T-341/07, Sison v. Council*, [2009] ECR II-3625; Judgment of 30 September 2010 in *Case-T-85/09, Kadi v. Commission*, [2010] ECR II-5177; *see also* Judgment in *Kadi I.*

84 G. de Búrca, 'The ECJ and the International Legal Order: A Re-Evaluation', *in* de Búrca & Weiler (Eds.), *The Worlds of European Constitutionalism*, 2012, p. 121.

85 The Court ruled that the obligations imposed by international treaty could not have had the effect of prejudicing the constitutional principles of the European Community Treaty (specifically – allocation of powers and human rights standards) and reaffirmed its earlier finding that the EU autonomous legal system is based on the rule of law. *See Kadi I*, paras. 281-282, 285.

86 For example, Weiler convincingly argues that a strict primacy and sovereignty language in *Kadi I* coincides with the EU efforts to promote itself as an international actor at the global stage of international relations,

Court has also developed a strong rights-based review in the area of antidiscrimination, data protection, and privacy rights.[87]

But even if judicial protection has been improved, this is not to deny that the Court's human rights jurisprudence still suffers from certain flaws. As Albi persuasively argues, the Court went blind with regard to watering down the national constitutional rights that resulted from its rulings, particularly in cases concerning secret legislation, arrest warrant, blanket electronic surveillance, and some aspects of property rights.[88]

To conclude, in an entity not genuinely built on democracy, one can hardly accuse judges of affording constitutional review to individuals for violation of human rights, particularly if it is known to what extent the exercise of public power within the EU influences the life of its citizens. If there is only one achievement for which the Court must be credited, then it is certainly the fact that it made human rights protection the *acquis communautaire* of the EU.[89] Still, although there is no court immune to bad decisions, the above-mentioned criticisms regarding the flaws in its jurisprudence remain valid.

6.4.1.2 The Court as Enhancer of Democracy

Another way to assess the Court's output legitimacy is to examine to what extent the Court has contributed to enhancing democratic accountability in the Union. Although it may be odd to expect from a non-elected body to act as enhancer of democracy, much ink has been split over the courts' important contribution to a reasonably good working democracy. Before focusing on the Court's role in building democratic accountability in the Union, I will remind that the argument about the EU's democratic deficit usually revolves around the European Parliament's reduced role in the legislative procedure, a lack of democratic accountability, executive dominance, excessive policy-making by regulatory bodies (Comitology), and lack of transparency in decision-making.[90]

Generally speaking, EU scholars share different opinions about the Court's proclivity to eliminate mentioned concerns. On the one hand, Weiler argues that the Court's jurisprudence concerning decision-making processes in the Union is not that effective and bold as its human rights jurisprudence.[91] On the other hand, Lenaerts asserts that the Court has not hesitated to deliver democracy enhancing decisions, but not to the detriment

not less significant than the USA and China. He also asserts that *Kadi I* reflects a need of Europe to distance itself from Asia/Muslim bloc in the world of global politics. *See in* de Búrca & Weiler (Eds.) 2012, p. 280.

87 Craig & de Búrca 2011, pp. 362-363.

88 Albi 2012, pp. 41-70.

89 Many authors claim the same. *See, e.g.*, Defeis 2007, p. 1109, Weiler 1986; A.M. Burley 1992.

90 For the summary of a discussion, *see* Craig & de Búrca 2011, pp. 149-156.

91 Weiler 2012, pp. 267.

of two sources of democratic legitimacy at EU level – the Member States and the peoples of Europe.[92]

On this point, I tend to agree with Lenaerts. First, as I said earlier, the Court has been effective in increasing the powers and abilities of the European Parliament to participate in decision-making procedures.[93] At the same time, in cases in which the Treaties envisage a secondary role for the Parliament, it has not allowed the Parliament to usurp powers from other decision-making bodies.[94] Second, Lenaerts demonstrates that the Court has also been active in defining the relationship between the MPs and their political group within the Parliament[95] and in reducing MPs parliamentary immunity only to cases directly related to their parliamentary duties.[96] Third, the case law shows that the Court has been firm in limiting the delegation of powers to make regulations, although, in principle, it supported the system of Comitology.[97] Lastly, in a series of cases, the Court made effort to subject EU legislation to transparency in order to

> enable citizens to participate more closely in the decision-making process and guarantees that the administration enjoyed greater legitimacy and is more effective and more accountable to the citizen in a democratic system.[98]

Although the Court has not declared a general right to public information, it has annulled a number of the Commission and the Council's decisions by which they had refused access to their documents, arguing on the grounds of impermissible exceptions, failure to respect 'giving reason requirement', the refusal to grant partial access, etc.[99]

Could the Court have been more effective in advancing democratic procedures in the Union? Arguably there is always room for an improvement, particularly when it comes to insisting on a greater accountability of the EU's non-elected decision-makers. The present

92 K. Lenaerts, 'The Principle of Democracy in the Case Law of the European Court of Justice', *International & Comparative Law Quarterly*, Vol. 62, No.2, 2013, pp. 271-315.

93 Judgment of 29 October 1980 in *Case 138/79, Roquette Frères v. Council* [1980] ECR 3333; *Case 294/83, Les Verts v. Parliament*; *Case 70/88, Parliament v. Council (Chernobyl)*; Judgment of 11 June 1991 in *Case C-300/89, Commission v. Council* [1991] ECR I-2867.

94 *Case C-130/10, Parliament v. Council ('Listing Procedure Case')*, Judgment of 19 July 2012, not yet reported.

95 Lenaerts 2013, pp. 287-290. *See also* Judgment of 2 October 2001 in *Case T-222/99*, *Martinez and Others v. Parliament* [2001] ECR II-02823, confirmed on appeal in *Case C-486/01 P*, *Front National v. Parliament* [2004] ECR I-6289, Judgment of 24 July 2004.

96 Lenaerts 2013, pp. 290-293. Judgment of 6 September 2011 in *Case C-163/10*, *Patriciello* [2011] ECR I-7565.

97 *See Case 9-56*, *Meroni & Co., Industrie Metallurgiche, SpA v. High Authority of the European Coal and Steel Community*.

98 Judgment of 9 November 2010 in *Joined Cases C-92/09 and 93/09, Volker und Markus Schecke GbR and Hartmut Eifert v. Land Hessen*, [2010] ECR I-11063, para. 68.

99 *See* Craig & de Búrca 2011, p. 544. *See also* Judgment of 5 March 1997 in *Case T-105/95, WWF UK v. Commission* [1997] ECR II-313; Judgment of 19 July 1999 in *Case T-188/97, Rothmans International v. Commission* [1999] ECR II-2463; Judgment of 17 June 1998 in *Case T-174/95, Svenska Journalistforbundet v. Council* [1998] ECR II-2289; Judgment of 7 February 2002 in *Case T-211/00, Kuijer v. Council* [2002] ECR II-485.

crisis offers an opportunity particularly if one keeps in mind that democratic principles entrenched in the Lisbon Treaty signal the promise of an 'Ever Closer *Democratic* Union'. Of course, no matter how desirable the judicial bolstering of democratic processes may be, one should not forget that a general warning attached to judicial review – 'hard cases makes bad law' – remains valid.

6.4.2 Who Is to Decide?

In a typical case against judicial review, a claim that "judicial review is just subjection of the legislature to the rule of law"[100] is contested exactly on the grounds of process-oriented reasons because the issues of disagreements are resolved outside a democratic forum. The problem is that a court (a non-elected body) and not a legislature is a final authority.

In the EU, the problem of *who decides* arises in a different context. The main problem of the Union is the lack of 'the government by the people' or its input democracy. In the presence of a dysfunctional legislator, the Court as ultimate adjudicator is not vulnerable to challenges based on contramajoritarian difficulty, as it is its US equivalent – the Supreme Court.[101] More specifically, because the EU is not a democratic showcase, the Court's rights-based review of EU acts cannot be substantially attacked on democratic grounds, although some may claim that with rights-based review, the Court is building the system of values over which there is no pan-European consensus. However, if in an age of the Union's extensive exercise of public power alternative scenario implies a total absence of the human rights protection, the Court's human rights adjudication clearly mitigates the concern that the protection has been partially achieved at the expenses of democratic procedures. Moreover, in the presence of binding EU Charter of Fundamental Rights and the EUs prospective accession to ECHR, this kind of objection will soon lose its ground. Neither the Court's review of acts adopted by the EU executive institutions seem to produce a reason for conflict, because it is generally accepted that executive institutions are to be subjected to the rule of law. Moreover, the Lisbon Treaty authorizes the Court to exercise constitutional review of executive action.[102]

The main legitimacy process-oriented problem the Court faces is based on a vertical division of powers. Although its greatest challengers are constitutional courts of the Member States, there are certain situations in which the Court usurps the power of national legislators and exposes itself to challenges on democratic grounds. Consider the following.

100 Waldron 2006, p. 1354.

101 For a comparison, *see* M. Rosenfeld, 'Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court', *International Journal of Constitutional Law*, Vol. 4. No. 4, 2006, pp. 618-651.

102 *See* Article 263 (1) of the TFEU.

In the context of a vertical division of powers, a persistent source of the Court's legitimacy challenges is its supremacy doctrine, applicable not only in conflicts between the EU law and national legislation, but also in conflicts between the EU law and national constitutions. Although the Member States have accepted its mandatory nature by way of approving Declaration No. 17 attached to the Treaty of Lisbon, its effects are still judicially grounded.[103] To remind, in order to support the creation of common market, the Court ruled in *Costa* that the EU law could not be subordinated to national law.[104] According to the *Simmenthal* principle (developed, reaffirmed, and extended by the Court several times), in the course of their adjudication, national courts are required to give immediate effect to EU law of whatever rank.[105] Put differently, if it contradicts the EU law, national courts must ignore or set aside any national law, including the constitution. Individuals thus need not go before the national constitutional courts to vindicate their interests. In terms of its present validity, it is important to add that Declaration No. 17 confirms the primacy of EU law under the conditions laid down by the Court's case law.[106]

The Court's anatomization of national-judicial order is particularly sensitive in cases in which the Court does not issue a specific ruling on EU law, but instead grants discretion to national courts to decide on the issue. Since in many European countries, the selection process of ordinary judges is not as democratic as the selection process of constitutional judges, if constitutional courts are precluded to interfere, the legitimacy of ordinary courts to decide the issue may be subject of a concern. Not to mention the issue of legal certainty if national courts disagree over the issue.[107]

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103 The first paragraph of the Declaration No. 17 to the Lisbon Treaty reads: "The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law".

104 *See Case 6/64, Costa v. ENEL.*

105 Judgment of 9 March 1978 in *Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA (Simmenthal 2)* [1978] ECR 629. The Simmenthal principle was further extended in Judgment of 28 June 2001, *Case C-118/00, Gervais Larsy v. INASTI*, [2001] ECR I-5063, and in Judgment of 19 November 2009, *Case C-314/08, Krzysztof Filipiak v. Dyrektor Izby Skarbowej w Poznaniu*, [2009] ECR I- 11049. Its reasoning was reaffirmed in Judgment of 8 September 2010, *Case C-409/06, Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim* [2010] ECR I-8015.

106 A part of the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260), included in Declaration no. 17 reads: "It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/641 (1)) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice".

107 For more *see* Comella 2009, pp. 128-136.

The *Simmenthal* principle has been severely challenged by national constitutional courts, which understood the principle as an open and direct attack on their authority.[108] Some of them have explicitly ruled that the primacy of application of Union law cannot be as comprehensive as to undermine the primacy of a national constitution in the national legal orders, as well as their authority to have a final word in reviewing the effects of EU measures in the Member States.[109] Thus, in addition to undermining the hierarchy of the normative acts in the Member States, the Court may also be accused for unauthorized intervention in national-judicial-hierarchy order. As Comella persuasively argues, the obligation to ignore national law imposed on national courts stands contrary to the Kelsenian nature of the constitutional review in Europe, which requires from ordinary courts to refer the issue to the constitutional courts whenever there is a need to check the constitutionality of the legislation.[110] Basically, the Court took away from the European national constitutional courts their general monopoly to review the statutes in any occasion. As a consequence, the system of constitutional review of EU law is more in line with American decentralized system of judicial review than with constitutional review of legislative acts in the Member States.[111]

Although the issue of *who is to decide* has induced ongoing polarization between the Court and national constitutional courts, the Court's reasoning in *Simmenthal* still prevails. Because there are not in the position to rule on the validity of EU law, the only way to challenge a particular EU norm on national constitution grounds is to challenge a national implementing measure for its incompatibility with a national constitution. The German Federal Constitutional Court frequently restores to this practice, although its impact to EU law remains remote.[112] Nor does the practice of interlocutory procedure for the review of the constitutionality of national laws in situations which are within the scope of EU law significantly affect the obligation of national courts to refer a preliminary reference to the Court. What is innovative is that the Court in *Melki and Abdeli* set out a certain criteria under which interlocutory procedure could be compatible with EU law.[113]

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108 For a discussion *see, e.g.,* A.M. Slaughter, A.S. Sweet & J.H.H. Weiler (Eds.), *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in Social Context*, Hart Publishing, Oxford, 1998.

109 *See, e.g.,* Polish Membership of the European Union (Accession Treaty), Judgment of the Polish Constitutional Court, no. K18/04, 11 May 2005; *Spa Fragd v. Amministrazione delle Finanze, Judgment of the Italian Constitutional Court*, no. 323, 21 April 1989; the 'Lisbon' decision of the German Constitutional Court, no. BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09, 30 June 2009.

110 Comella 2009, p. 126.

111 *Id.*

112 For example, the German Federal Constitutional Court declared unconstitutional the national measures implementing the Lisbon Treaty. *See* the '*Lisbon*' decision of the German Constitutional Court, 30 June 2009.

113 *See* Judgment of 22 June 2010 in *Joined Cases C-188/10 and C-189/10, Aziz Melki and Selim Abdeli* [2010] ECR I-5667.

The Court's intervention in the national-judicial hierarchy has a great potential to diminish the Court's legitimacy in the eyes of constitutional courts, because it opens the room for the ordinary courts to challenge the jurisdiction of constitutional courts and their case law through the preliminary ruling procedure, basically whenever they wish so.[114] The Court might thus find itself in the centre of the domestic judicial battle as it actually happened in two recent cases: *Melki and Abdeli* and *Landtova*.[115]

In the first case the Court was asked to intervene in the dispute between the French *Cour de Cassation* and the *Conseil Constitutionnel* over the power of the latter to hear priority questions on constitutionality.[116] Although, eventually, it gave the priority to the *Conseil Constitutionnel*, the *Conseil Constitutionnel* did not have an opportunity to submit its observations to the Court regarding the question of its crucial concern.[117] The second case sheds more light on this problem. In *Landtova* the Constitutional Court of the Czech Republic attempted to intervene in the proceedings before the Court, initiated by the Czech Supreme Administrative Court, on the grounds that the Constitutional Court's jurisprudence concerning pension law violated EU law. The Constitutional Court sent its observations to the Court, but the registry of the Court upon the instruction of the president of the chamber deciding the case not only bluntly rejected to accept the submitted observations, but informed the Constitutional Court that "the members of the Court do not correspond with third persons regarding cases that have been submitted to the Court".[118] Soon then, acting upon its ego, the Czech Constitutional Court has hasten to claim the violation of its right to fair trial, as if it was a titular of human rights guarantees, and not an organ of the state.[119] The Constitutional Court did not even stop at this misconception, but after a while, it declared the Court's decision to be *ultra vires* and not decisive for the Czech courts and public authorities.[120]

Besides deliberating the effects of the *Simmenthal* principle to national-judicial-hierarchy order, it is also important to discuss to what extent the *Simmenthal* reasoning affects governmental majorities in the Member States. In principle, the supremacy clause does not pose a major threat to governmental majority in the national states, since the governments have the right to be heard before the Court in the course of preliminary ruling procedure.[121] The problem is more evident in the realm of the Court's doctrine of indirect effect under

114 For more *see* M. Bobek, 'Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts', *in* Adams *et al.* (Eds.), *Judging Europe's Judges*, 2013, pp. 197-234.

115 *Case C-399/09, Marie Landtová v. Ceská správa socialního zabezpečení*, Judgment of 22 June 2011, not yet reported.

116 *Joined Cases C-188/10 and C-189/10, Aziz Melki and Selim Abdeli*.

117 For a discussion *see* Bobek 2013, p. 225.

118 Quoted from the decision of the Czech Constitutional Court, Pl. ÚS 5/12, Judgment of 31 January 2012, *in* Bobek 2013, p. 225, n. 90.

119 *Id*., p. 226.

120 The decision of the plenary court. *Id*.

121 *See* Article 23 of the Statute of the Court.

which the national judges are empowered to rewrite national legislation even in cases when national law predates a European directive and has no connection with it.[122] In such circumstances, once national law has been reconstructed in line with EU law, it can be applied in legal disputes between private parties.[123] Essentially, with the help of national judges, the Court has managed to influence policy making on the national level. From whatever point of view, there is no doubt that it has contributed to the judicialization of politics in the Member States. The last point implies a reduced role of democratically elected representatives in the process of decision-making and increased participation of the courts in deciding the most pertinent and controversial political issues.[124]

Perhaps aware of this state of affairs, some authors find that the Court's expansive lawmaking can be justified exactly on democratic grounds. For example, according to von Bogdandy, democracy at the Union level should be comprehended not as the rule by people, but as a concept based on civic equality and representation, coupled with participation, deliberation, and control.[125] Then, he offers two claims. First, the Court's jurisprudence, which strengthens the rights of European citizenship, fortifies a cornerstone of European democracy and; second, the Court, as an institution which is only indirectly elaborated by elections, can generate democratic legitimacy if it elaborates its decision in procedures which are participatory and dialogical.[126] To justify his arguments, von Bogdandy turns to the articles on democratic principles of the Lisbon Treaty, particularly to Article 9 which reads: "In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies".[127]

In principle, I have sympathy for von Bogdandy's suggestion that democracy in the Union need not necessarily mirror democracy in a state setting. Democracy does not equal a state. However, both of his claims are based on shaky grounds. First, even if we accept that democracy in the Lisbon Treaty is perceived as a concept centred on individuals and aimed at representation, participation, and deliberation, we cannot simply claim that the Court's democratic legitimacy generates from the quality of its operation and disregard the famous Madison's lesson in the *Federalist Papers* that the most important expression of the principle of democracy are representative institutions.[128] Although courts are not

122 *See* Judgment of 13 November 1990 in *Case 106/89, Marleasing SA v. La Comercial Internacional de. Alimentacion SA*, [1990] ECR I-4135.

123 *Id*., para. 8.

124 For general discussion on this point, *see* Sweet 2000; *see also* R. Hirschl, 'The Judicialization of Mega-Politics and the Rise of Political Courts', *Annual Review of Political Science*, Vol. 11, 2008, pp. 93-118.

125 A. von Bogdandy, 'The Democratic Legitimacy of International Courts: A Conceptual Framework', *Theoretical Inquires in Law,* Vol. 14, 2013, pp. 365, 369.

126 *Id*., pp. 364, 374.

127 *Id*., p. 363.

128 *See* J. Madison, 'Federalist No. 10', *in* A. Hamilton, J. Madison & J. Jay, *The Federalist Papers,* Bantam Books, New York, 1982, pp. 42-49.

representative institutions, even von Bogdandy admits that under most theories and constitutions, it is up to the representative institutions to set up the courts, elect judges, and finance them.[129] This is not the case in the EU. Article 9 of the TEU cannot be interpreted, without distortion of language, as to provide for European citizens the possibility to participate in the selection of the European judges. Article 10 (2) of the TEU, as an alternative ground for democratic legitimization of the Court is also problematic. It is true that the governments of the Member States appoint the judges of the Court, but to claim that this represents a meaningful source of indirect democratic legitimization of the Court means to neglect Article 10 (3) which specifies that decisions in the Union "shall be taken as openly and as closely as possible to the citizen". When it comes to the appointment of the European judges, Comella rightly warns that in the absence of European public opinion comparable to national public opinion, the appointment of the judges to the Court is less transparent than, for example, the appointment process of the members of national constitutional courts.[130] Moreover, the independence of the judges sitting at the Court appears to be compromised by the possibility of their reappointment at the end of their term of office.[131]

Second, even if we disregard this argumentation, it is unlikely that the Court can generate democratic legitimacy from its 'internal legitimacy', that is, from the quality of its reasoning and style of judgment, notwithstanding the fact that substantive reasons stated in a decision is considered to be a key legitimizing element of a judicial decision.[132] Despite general acceptance of the Court's present style of judgment, as long as the Court continues to expand the scope of EU law without giving substantive reasons, as it did recently in *Ruiz Zambrano*, its decisions will have far less practical importance than it might have been originally envisaged.[133] In addition, the Court's existing style and methodology employed in the rights-based review under the EU Charter of Fundamental Rights also discredit the possibility for the Court to generate democratic legitimacy from the quality of its reasoning and style of judgment.[134]

Lastly, von Bogdandy's thesis begs a simple question: is a democratic legitimization of the Court essential for justification of its decisions? Even on national level the courts do not function in a democratic manner, but they are, nevertheless, indispensible for democracy. If a central problem of the EU is a dysfunctional democracy, the remedy for this disease can hardly be the democratic legitimacy of the Court.

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129 Bogdandy 2013, pp. 370-371.

130 Comella 2009, p. 134.

131 Weiler is particularly sharp on this point. *See* Weiler 2013, p. 251.

132 For more *see* Bobek 2013, pp. 203-208.

133 In *Ruiz Zambrano* the Court expanded the notion of EU citizenship and the application of EU law without any substantive explanation. *See Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, Judgment of 8 March 2011, not yet reported.

134 G. de Búrca 2013, p. 184.

6.5 Conclusion

The current crisis on the Union level messaged the European political elite: the Messianic Project of 'Ever Closer Union' seems to be no longer acceptable because it is not rooted in a democratic process of lawmaking.[135] My principal aim in this chapter was to examine whether the Court had been the part of this problem or rather the part of its solution?

To answer this question, I have grounded my discussion on Waldron's argumentation that in so-called non-core cases, that is, in societies who care nothing for human rights or whose legislature suffers from insufficient representation, deliberation, and transparency, judicial review may offer a hope for ameliorating this situation. In the discussion, I have tried to show the following.

First, the EU as a democratic deficit setting satisfies the requirements Waldron considers necessary to justify the practice of constitutional review. Second, based on its mandate to ensure that 'the law is observed', the Court's constitutional review function serves the same basic purposes that constitutional review serves in functional democracies: it assures the supremacy of the uncodified EU constitution and confirms that the Union is a legal culture committed to human rights and enhances democratic accountability in the Union. Although many of the Court's decisions were delivered beyond the scope of the proper judicial remit, many of them, to a great extent, support democracy building in the Union, particularly in cases where the Member States failed to do so. In the absence of functional democracy, this is already enough reason to mitigate the assertion that the Court loses legitimacy through the activism. In the end, the Court's bold approach would be impossible without being supported from the national courts that have played a decisive role in building its authority and without being explicitly or implicitly approved by the Member States through a series of Treaties changes. Yet, notwithstanding the backing it got from Member States, and even eventually from grouchy national constitutional courts, legitimacy concerns remain because just like other constitutional courts, the Court can misuse its judicial mandate and do what it wants. At present, certain aspects of the Court's output and input legitimacy is something one should worry about. Accusations for judicial building of human rights values in the absence of transnational consensus (which might be soon eliminated in the presence of binding EU Charter of Fundamental Rights and the EU's prospective accession to ECHR), watering down of national constitutional rights, striking down national legislation arguably at the expenses of legal certainty, and unauthorized intervention in national-judicial-hierarchy order are some cases in point.

135 Weiler 2012, p. 268.