

1. DEMOCRACY IN CONSTITUTIONAL POLITICS OF EUROPEAN COURTS

An Overview of Selected Issues

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1. INTRODUCTION

One of the principal constitutional functions of the European Court of Justice (ECJ)¹ is to secure legitimacy² of the European Union (EU) system of governance by protecting the fundamental values on which this system is said to rest.³ This role of the ECJ – as a guardian of democracy, fundamental rights and the rule of law – is complicated by the multi-layered nature of the EU's sources of legal authority: the EU institutions and the law-making bodies of Member States (MSs), and by the heavy reliance on the co-operation of National Courts (NCs) in building up and maintaining the EU's legal system.⁴ I focus on providing an overview of selected problems that are directly related to the ECJ's legitimising role, and I will do so from the perspective of the ECJ's constitutional politics.⁵

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¹ The current name under the Treaty of Lisbon is the Court of Justice of the European Union (CJEU). I prefer to stay with the old name – ECJ. I also do not include the General Court in my discussion since its role is much less constitutionally salient than that of the ECJ.

² This idea is partially inspired by the writings of T. Parsons, 'The professions and social structure' (1939) *Social forces*, 17(4), pp. 457–467.

³ The ECJ has been credited with paying increasing attention to effective application of the principle of democracy in its case law, but as is widely known, this has not always been the case. What still remains problematic is the judicial treatment of democracy and other substantive constitutional principles or values in the high plane of constitutional politics of the EU.

⁴ According to de Waele, there is a suggestion that the ECJ is legally obligated to steer pro-integration course: H.D. de Waele, 'The Role of the Court of Justice in the European Integration Process. A Contemporary and Normative Assessment' (2010) *Hanse Law Review* Vol. 6 No 1.

⁵ This is a huge topic of which a number of aspects warrant a more in-depth investigation that can be provided here. Also, I will not cover issues related to the infamous 'democratic deficit', i.e., the well-recognised problems with popular political participation and representation,

First, I will consider whether the alleged prioritising – by the ECJ – of the principles of integrity of the EU legal system and economic regulations over constitutional values – such as fundamental rights and democracy – amounts to an ideological project that undermines the legitimacy of the EU law. I will focus on instances where the ECJ failed to recognise concerns of the NCs related to the standard of protection of these values in the EU law for the sake of protecting its own authority and the uniformity of the EU law. Historically, these concerns were most famously identified in the so-called ‘supremacy’ challenges, but there was also a string of other cases where the protection of market freedoms clashed with fundamental rights and other constitutional principles.⁶ This period of the ECJ jurisprudence took a more rights-friendly turn in cases such as *Omega* and *Schmidberger*.⁷ The more recent NCs challenges yet again put the ECJ under pressure, this time because of its reluctance to recognise the higher standards of fundamental rights protection related to criminal trials in national constitutions over those existing in the EU law. The string of the European Arrest Warrant (EAW) cases⁸ seems to suggest that the ECJ yet again entered a path of prioritising the supremacy of the EU law over substantive constitutional objectives.

Secondly, I will consider if the ECJ can be said to preside over a process of entrenching a particular model of economic policy across the EU – in contradiction with the core principles of constitutional transparency and contestation. These issues relate directly to the fundamental nature of the EU Treaties as international agreements, which were negotiated by the governments and imposed top-down on the electorate, hence lack popular legitimacy.⁹ Since the ECJ and the national courts play key roles in interpreting

and the functioning of the European Parliament *vis-à-vis* the Commission and the Council. The sources on this topic are too numerous to cite here.

⁶ Compare with Lenaerts, who argued that the ECJ’s interpretation of the principle of democracy is respectful of national traditions as well as supranational regime of the EU; K. Lenaerts, ‘The Principle of Democracy in the Case Law of the European Court of Justice’ (2013) *ICLQ* vol 62, April, pp. 271–315. There is obviously, a whole string of cases where the ECJ directly recognised and supported fundamental rights. See for instance D Chalmers, G. Davies & G. Monti, *European Union Law: Text and Materials* (CUP: Cambridge), 2014, 3rd ed. ch.6. See also J. Weiler & N. Lockhart, ‘Taking Rights Seriously’ ‘Seriously’: The European Court and its Fundamental Rights Jurisprudence’ (1995) 32 *CMLRev.* 51.

⁷ Cases C-36/02, *Omega* [2004] I-9609; and C-112/00, *Schmidberger* [2003] I-5659. Cases such as *Laval* C-341/05 [2007] ECR I-11767 and *Viking: International Transport Workers’ Federation, Finish Seamen Union v Viking Line ABP* [2007] ECR I-10779 led to renewed concerns about the ECJ’s priorities, but did not undermine the overall trend.

⁸ See for instance: C-399/11, *Melloni* [2013].

⁹ This is a rather sweeping claim, but, I believe it should be accepted, as it captures a key tension at the heart of EU constitutional settlement. The simple fact is that all the basic provisions of the Treaties were decided with the exclusion of the electorates of the MSs – due to the international nature of the EU Treaties. The negotiations of the Treaties on accession, and accession referenda could not be reasonably considered as capable of rectifying this shortcoming. See for instance: J. Zielonka, ‘Europe as empire: the nature of the enlarged

and enforcing treaty provisions and by-passing national parliaments in this process, it can be argued that the courts contribute to further shrinking of the scope for democratic scrutiny and contestation, deepening the already weak legitimacy of the EU law.¹⁰ Arguably, this problem is particularly acute in areas of economic policy, as illustrated in cases where the courts enforce seemingly technical rules that in reality are democratically salient – such as those created by administrative agencies – under the non-legislative procedure regulated by article 290 TFEU.¹¹

In the last section, I briefly outline the most disturbing aspects of the Transatlantic Trade and Investment Partnership (TTIP) between the US and the EU currently being negotiated, that is the Investor-State Dispute Settlement (ISDS) – a judicial process of doubtful constitutional legitimacy.

Overall, I argue that the ECJ's constitutional politics might be seen as amounting to a type of ideological project that the ECJ uses as a way to legitimise the EU legal system which, on balance, prioritises the maintenance of efficient jurisdictional order across the EU over substantive principles of democratic governance – despite challenges from national constitutional courts (CC).¹² Furthermore, I suggest that the ECJ's persistence in promoting such ideology might have created a self-reinforcing dynamics; by defining NC challenges as threats to EU law uniformity, the ECJ concentrates on dispelling such threats and fails to refocus its attention towards substantive constitutional concerns. Additional challenges to democracy and constitutionalism in the EU comes from specific choices of economic policy enshrined in the EU Treaties and the way these are interpreted and developed by the ECJ and NCs. With some exceptions¹³ these choices amount to a particular model of economic policy that has been entrenched without much popular or parliamentary debate, and which depends on the active and essential support of the courts.

European Union' (2006) *Central European Review of International Affairs*, 27, 135. G. Ivaldi, 'Beyond France's 2005 referendum on the European constitutional treaty: Second-order model, anti-establishment attitudes and the end of the alternative European utopia' (2006) *West European Politics*, 29(1), 47–69.

¹⁰ Conflicting national law is to be 'set aside' or disapplied according to *Simmenthal II*, Case C-106/77 [1978] ECR I-629.

¹¹ Lenaerts uses the term 'other forms of governance' to describe the process of administrative agencies rule-making function. See note 6 above, p. 271.

¹² Weiler famously stated: '[t]his need for a successful market not only accentuates the pressure for uniformity, but also manifests a social (and hence ideological) choice which prizes market efficiency and European-wide neutrality of competition above other competing values' in: J. Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal*, p. 2478.

¹³ See n. 6.

2. THE ECJ AND NATIONAL COURTS: POWER STRUGGLE OR COOPERATION?

2.1. EUROPEAN COURT OF JUSTICE: ITS OWN MASTER?¹⁴

The preliminary reference procedure contained in Article 267 TFEU¹⁵ has been hailed as the 'jewel in the Crown of the ECJ jurisdiction'.¹⁶ It is undoubtedly a cornerstone of the EU legal system, the very survival and development of which – according to the ECJ's discourse developed in the early constitutional cases – crucially depend on its smooth operation. Article 267 is also the main mechanism determining important aspects of the relationship between the ECJ and NCs. More recently, this relationship has moved from *horizontal* and *bilateral* to more steadily vertical and *multilateral*.¹⁷ This is mainly due to two factors: the doctrine of *acte clair*, which, in effect, makes it very difficult for the national courts to avoid making a reference under threat of *Francovich* action for damages or Article 258 TFEU infringement action, and, also, the fact that ECJ judgements under Article 267 have become binding on all courts across the EU, even retrospectively.¹⁸ Yet, the normal function that it is ascribed to any court hierarchy, that of appeals and reviews of judgements, is limited in relation to ECJ, and not available at all under Article 267 TFEU.

This lack of availability of appeals against the ECJ's preliminary ruling is coupled with the weak mechanism of control over the ECJ power *per se*. It is clear that the Council and the European Parliament can overrule the ECJ by legislating against its decisions, but this is not the most effective system of constitutional checks and balances over the court. Caldeira and Gibson suggested that the ECJ is the 'least accountable EU institution'.¹⁹ Alter²⁰ outlined two approaches to understanding the ECJ's position: legal and neo-functionalist scholars consider the ECJ as enjoying a significant autonomy, as it can, in principle, overrule the interest of MSs, whereas neo-realist claim that in fact, the political control over the court exercised by the MSs means that ECJ is dependent on the governments of the powerful MSs and must heed their interests. The neo-realist positions seem only weakly applicable; the early interference of politicians attempting to instruct the NCs to ignore the ECJ's jurisdiction should be seen as consigned to the past – the national judges have proved to be much too keen to enforce the

¹⁴ For an overview of the debates and literature on the ECJ's activism, see e.g. de Waele, note 4.

¹⁵ Treaty on the Functioning of the European Union, OJ C 83, 30 Mar. 2010.

¹⁶ P. Craig & G. De Búrca, *EU Law: Text, Cases and Materials* (2008) (OUP), p. 460.

¹⁷ P. Craig & G. De Búrca, p. 461, note 42.

¹⁸ Case C-2/06 *Kempeter v. Hauptzollamt Hamburg-Jonas* [2008] ECR I-411, para. 39.

¹⁹ G.A. Caldeira & J.I. Gibson, 'The legitimacy of the Court of Justice in the European Union: Models of institutional support' (1995) 89 *American Political Science Review*, No. 2, 356–376.

²⁰ K.J. Alter, 'Who are the "Masters of the Treaty?": European Governments and the European Court of Justice' (1998) 52 *International Organization* 1, pp. 121–147.

ECJ decisions even if that went against their governments.²¹ The other type of political control over the ECJ is the system of judicial appointments: one judge from each MS. But this type of oversight is only partly effective, which is due mainly to the different time horizons of the judges and the politicians whose term of office is limited and whose re-election can never be assumed. In contrast, the ECJ judges enjoy relative security of tenure.²²

The issue of democratic legitimacy of the ECJ itself is an important one, given the court's immense power: its judgements affect more than 500 million EU citizens. Probably the best way to provide such legitimacy would be to subject the court to some form of higher judicial control. I suggest that the national constitutional courts might be best placed to provide the necessary system of checks and balances over the ECJ, to ensure that its claims to legitimacy rest on firmer foundations. If, as the evidence over the years suggests, the NCs are more ready to respect the higher authority of the law, often against political pressure, such a set-up would strengthen the legitimacy of the EU legal system in more than just formal sense – as evidenced by the NCs' attachment to substantive constitutional values in 'supremacy' and the EAW challenges.²³ Nor should we forget that constitutional courts already enjoy supreme legal status in their domestic environment, which means that their authority and legitimacy might be resting on more solid grounds than that of ECJs.²⁴ However, it is clear that the ECJ would be very reluctant to accept such arrangements as potentially threatening the uniformity of the EU law, and its own position as its guardian.

2.2. THE MAIN TENETS OF ECJ'S CONSTITUTIONAL POLITICS

There is an emerging body of literature claiming that the ECJ has been focussing disproportionately on safeguarding the legal foundations and integrity of the EU at the expense of substantive constitutional values and fundamental rights, as well as principles of democratic governance: their standard has been less than satisfactory over the years.²⁵ This is particularly visible on the high plane of the

²¹ That was the case in the UK. See for instance: *McCarthy v Smith* [1979] 3 All ER 325; *Secretary of State for Transport, ex parte Factortame Ltd (UK no 2)* [1991] 1 AC 60.

²² Article 254 TFEU.

²³ See later.

²⁴ This idea goes against the mainstream position that treats the NCs challenges as potentially destructive to the EU legal order. The complexities and challenges of such an arrangement are numerous. For a start, there would need to be agreed set of constitutional principles and rules to refocus the jurisdictional objectives of the EU. See also Komarek's idea of 'constitutional democracy' in the EU, note 15.

²⁵ The ECJ has developed the rights of individuals under EU law in a way that can only be described as respectful of fundamental values of democracy and liberty, particularly in its jurisprudence expanding the meaning of citizenship under the EU law. This, however, does not negate the main argument of this paper that the type of relationship that developed

ECJ's constitutional politics in the way the ECJ managed the NCs' challenges in the so-called 'supremacy' cases – and other type of legal challenges – where the ECJ claimed to have identified a threat to jurisdictional integrity of the EU law. According to the ECJ, the only way to avert such a threat is by the NCs' unconditional acceptance of the priority of judicial co-operation rooted in the acceptance of limited sovereignty of national legal orders. Most recently, Albi asked if such priorities of the ECJ might be damaging substantive constitutional values:²⁶

[...] the somewhat simplistic focus on sovereignty and co-operation, we are inadvertently discarding a whole set of other intrinsic values embodied by national constitutions, such as limiting power to ensure the protection of the individual against undue arbitrary interferences by the authorities, the protection of constitutional rights and civil liberties, the rule of law and separation of powers with due checks and balances, and judicial review by courts to safeguard these values.

Albi placed her concerns in the area of the relationship between the ECJ and domestic courts, or, rather, in the bi-dimensional framework of 'Euro-friendliness' or 'Euro-hostility' within which this relationship seemed to have developed. She blames European scholarly and public discourse for reinforcing this duality which results in a displacement of concerns with substantive constitutional values articulated by the national constitutions and CCs of Member States in relation to the developments in EU law. The bi-dimensional framework that Albi criticised is in fact very familiar to me as a seminar tutor in EU law – and most likely many colleagues who teach this subject – both from readings of the mainstream textbooks and academic papers, but also from the approach taken to the way this part of the EU syllabus has been taught in my law school and probably in other law schools as well.

The focus on the confrontational nature of the challenges of MSs constitutional courts²⁷ to supremacy of the EU law represents the seductively

between the ECJ and NCs has been far from conducive to developing a joint unifying platform aimed at protecting the basic values of democracy and human rights in the case-law that belong to the 'supremacy' type of challenges. See A.T. Williams, 'Taking values seriously: towards a philosophy of EU Law' (2009) 29 *OJLS* (3), pp. 549–577; A. Albi, 'Erosion of constitutional rights in the EU: A call for substantive co-operative constitutionalism' *Paper presented at the IACL IXth World Congress*, 12–16 June 2014 in Oslo.

²⁶ See, for instance, case C-345/06, *Henrich* [2009] ECR I-1659, which raised the issue of secret EU rules; European Arrest Warrant system does not allow the scrutiny of the circumstances on which the accusation is based, hence clashing with the core principle of *Habeas Corpus*; and perhaps the best known *Solange* series of cases, followed by *Banana* judgement, where the ECJ clearly prioritised single-market regulations over concerns with human rights – Case C-280/93 [1994] ECR I-4973. See also: W. Sadurski, 'Solange, chapter 3': Constitutional Courts in Central Europe – Democracy – European Union, (2008) *European Law Journal*, Vol. 14, No. 1, January 2008, pp. 1–35.

²⁷ J. Weiler, 'Community, Member states and European integration: is the law relevant?' (1982) 21 *JCMS: Journal of Common Market Studies* no. 1: 39–56; J. Weiler, 'The Community system: the dual character of supranationalism' (1981) 1 *Yearbook of European law*, (1), 267–306.

simple dynamics of a relationship between the two sides, as it draws clear lines of struggle for power referred to by some sources as the 'clash of the titans' or 'clash of absolutes'²⁸ between the EU and national constitutional orders. The use of expressions such as the threat of 'limiting' sovereignty by the ECJ, and the national courts' defences against such threats, feeds into this dynamics. The deceptive attraction of this type of discourse has been clearly visible in my classroom – it proved excellent in shaking young minds out of tutorial lethargy. However, that also meant that the students were much less receptive to any ideas that disturbed this clarity: any mention of fundamental rights or democracy in the context of 'supremacy' cases usually resulted in a return to indifferent slumber.

Albi's argument plunges the debate on the state of the EU constitutionalism straight back into this messy realm as she attempts to refocus it on the principles that should have been placed in its heart long ago.²⁹ She pitches ECJ's focus on 'sovereignty' and 'cooperation' against the relative neglect of substantive constitutional values. Such a construction suggests that in the relationship between the ECJ and national constitutional courts, both cooperation and sovereignty have been construed as opposing rather than complementary. The existing evidence suggests that this has largely been the case both historically and contemporarily. Crucially, it seems that the nature of 'cooperation' was mainly of a procedural type, emphasising a hierarchy of legal authority, rather than the protection of substantive principles. This omission is surprising given that the level of commitment to constitutional principles is strong both in the EU Treaties and in national constitutions. Why is it, then, that such commitments do not translate into a substantive platform of cooperation between the ECJ and NCs? I suggest that this might be due, at least in part, to the ECJ's ideologically driven agenda of protecting its own legal authority by constructing a unifying doctrine of the supremacy of EU law.³⁰

The firm stance taken by the ECJ in early 'constitutional' cases on supremacy confirms that this might have been the case. It was obvious, then, that the ECJ's objective was to create an effective hierarchy of legal authority between the ECJ and domestic courts, despite the rhetoric of partnership and co-operation. This was demonstrated by the ECJ's claim that the imperative to protect the legal integrity of the EEC's still budding legal system could only have been secured by setting clear rules for resolving conflicts of laws in a way that ensures its uniform, coherent interpretation and application. Another strand of this argument was the famous *effet utile* of the common-market regulatory framework. In contrast, values such as democracy, respect for fundamental rights and the rule of law

²⁸ M. Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' 2005) 11 *European law Journal*, No. 3, pp. 262–307.

²⁹ See also M. Kumm p. 290.

³⁰ Compare with M. Kumm p. 287.

– now articulated in article 2 TEU – were only gradually introduced into the text of the Treaties, and only relatively recently found their way into the ECJ's jurisdiction.³¹ These are notoriously contested concepts, which means that, understandably, their meaning and legal interpretation has been often less than coherent.³² This absolves the ECJ only to some degree, as it is clear that it declared itself to be on the side of rule of law as applied to economic rules and policy, but less inclined to show a similar commitment where democratic values were decoupled from economic concerns.³³

2.3. THE ENDURING ATTRACTION OF THE CONCEPT OF SOVEREIGNTY IN RELATIONS BETWEEN THE ECJ AND NCs

Sovereignty is a highly fluid and contested concept, and engaging in the lively debate over how its meaning evolves in today's globalised world³⁴ is outside the scope of this paper.³⁵ What is certain, and experientially verifiable, is the long endurance of this term in the language of politics and academia. The huge body of academic literature defining the EU as a supranational organisation largely refers to 'divisibility of sovereignty', 'transfer of sovereignty', 'divided sovereignty' and many other variations on this theme. It seems that there is no getting away from this concept despite growing number of scholars questioning its usefulness in explaining political dynamics of contemporary world.³⁶ I suggest that sovereignty had lost part of its currency in the early days of the first European Communities, as even then it appeared misaligned with the character

³¹ There is a string of cases that confirm this suggestion. For an analysis of the most representative ones see for instance A.T. Williams, note 25, above, and J. Komarek, 'The Place of Constitutional Courts in the EU' (2013) 9 *European Constitutional Law Review*, pp. 420–450.

³² Williams p. 552, note 25 above; D. Kochenov, 'EU Enlargement and the Failure of Conditionality: *Pre-accession Conditionality in the Fields of Democracy and the Rule of Law*', Wolters Kluwer: Austin 2007.

³³ There are various cases that illustrate this point. See C-159/90 *Grogan* [1991] ECR I-4685; C-584/10 *Kadi and Al Barakaat* [2013] ECR I-6351; *Laval* [2007] ECR I-11767; *International Transport Workers' Federation, Finnish Seamen Union v Viking Line ABP* [2007] ECR I-10779. Cases where the ECJ showed more willingness to recognise fundamental rights were mainly those of EU citizenship-related rights. See e.g. *Grzelczyk* C-184/99 [2001] ECR I-6193; *Zhu and Chen* C-200/02 [2004] ECR I-9925. The cases of *Mangold* C-144/04 [2005] ECR I-9981, and *Küçükdeveci* C-55/07 [2010] ECR I-00365 elevated the principle of anti-discrimination on the ground of age to new jurisprudential heights.

³⁴ See e.g. M. Koskieniemi, 'What Use for Sovereignty Today?' (2011) *Asian Journal of International Law* 1, pp. 61–70 and sources quoted there.

³⁵ See also A. Albi, *EU enlargement and the constitutions of Central and Eastern Europe*, Cambridge: Cambridge University Press 2005.

³⁶ See Albi's overview of the most vocal of scholars who propose new ways of looking at sovereignty, or express doubts about the explanatory potential of this term, pp. 122, 198–199, note 25.

of the Communities governance structure. The 'transfer or limitation of sovereignty' in support of the supranational governance require relinquishing it or ceding it to an autonomous site of power that is discreet and self-contained. Yet, none of the EU law-making bodies entirely fit this description: both Councils (of Ministers and the European) and the Commission are populated by representatives of the MSs who are seasoned politicians. Only the occasional MEP might be elected from the general public, by then the European Parliament is not the primary agenda shaper in the EU. This confirms the existence of a firm link between the decisions taken in Brussels, Luxemburg and Strasburg and national capitals, despite the Treaties' provisions requiring 'independence' from the Commissioners.³⁷ There does not have to be a contradiction between the duty of independence from one's government, and recognising the best interest of the majority of the MSs comprising the Union, especially if the best interest of one's own country also happen to belong to this category.

The clear lines defining the 'best interests' and 'authority' under the ECJ's sovereignty-determined logic, on the other hand, would require the EU institutions, particularly the Commission, to be completely alienated from national sites of political authority – a depiction which is difficult to accept as realistic. An alternative explanation should be created, one that would escape the confines of the 'sovereignty' discourse and be better suited to reflect the true nature of the nuanced and complex relations between the EU institutions and the MSs. There are few signs of this happening any time soon. Yet, the centrality of 'sovereignty' has many complex, and mostly negative implications, most serious perhaps in relation to integration politics, as it clashes with the original imperative to curb the sovereign power of the nation state that was one of the strongest political drivers behind the very idea of the European project.³⁸

It must therefore have been seen as disappointing that soon after the signing of the first Treaties, the ECJ actively resurrected 'sovereignty' as the central plank of its legal integration discourse in the *Van Gend en Loos* (1963) and *Costa* (1964) cases. That also meant that ECJ placed the sovereignty-centred narrative at the very heart of the two constitutional principles that these cases created – supremacy and direct effect. The member states were told that only by limiting their sovereignty, albeit within limited fields, could the legal integrity of the EU law be sustained and protected. The ECJ failed to elaborate on the essence of the

³⁷ Article 17(3) TEU.

³⁸ After all, the key steps taken in the Treaties of Paris and Rome amounted to a serious assault on sovereignty: the transfer of control over strategic resources such as coal and steel, and later atomic energy to the collective entity, i.e., community of states and its supranational institutions (mainly then the High Authority) was aimed at removing such control from the sovereign prerogative of nation states. Such strategy was to lead to a new model of international co-operation, one that would protect Europe from military aspirations of states such as Germany that were blamed for the devastation of past conflicts, particularly the World War II.

concept of 'legal integrity of the EU law', but it was clear that this was the court's choice of the legitimising principle rather than fundamental rights, democracy or the rule of law.

The ECJ's emphasis on limiting national sovereignty in those early years is surprising, but to a degree understandable, since sovereignty has been associated with all sorts of anti-communal, anti-cooperative, qualities,³⁹ hence tempering such tendencies was rightly seen as a priority for the budding 'community' of states. The ECJ's strategy, however, might be seen as partly rebounding – the overreliance on sovereignty – even when deployed to limit or control it – suffused the ECJ's discourse with negative semantics associated with this concept.

The narrative of 'sovereignty' created by the ECJ in the early 'supremacy' judgements is proving remarkably persistent, and remains strong in shaping the ECJ's, and the EU's constitutional politics. The relationship between the ECJ and national courts continues to revolve largely around this concept. Hence, we seem to be stuck with the narrative of 'limited sovereignty' that defined the terms of reference within which the relationship between the ECJ and NCs was to be conducted and made sense then and in the future. This kind of phrasing, as argued above, decisively defined this relationship as one focussing mainly on protection of the EU legal system by adherence to the ECJ-created doctrines of supremacy and direct effect.⁴⁰ This was to be achieved by what the ECJ projected as 'co-operation', yet, what in reality turned out to be the expectation of subservience from the NCs, and unquestioning support for the objectives chosen by the ECJs.⁴¹ Arguably, this demonstrates the ideological nature of the discourse of supremacy and direct effect⁴² which is also visible in the way the ECJ rebuked the NCs challenges to supremacy, regardless of their substantive grounds.⁴³

In contrast to NCs' concerns in relation to substantive values raised in supremacy cases, the ECJ was much more ready to protect only those values that it deemed essential for the construction and successful operation of the common

³⁹ M. Koskieniemi, p. 61, note 34.

⁴⁰ Yet, as pointed out by a number of scholars, these two doctrines have been known in International Law. See, for instance, de Waele, note 4. Hence, this strong justification based on limits to sovereignty may not have been needed, as the MSS were likely to accept both anyway.

⁴¹ Compare with Komarek, p. 420, note 31.

⁴² Komarek, stated: 'National Constitutional Courts [...] are gradually marginalised by the ECJ's decisions, which follow a rather dogmatic approach to the principle of primacy and direct effect', p. 420, note 31.

⁴³ There is no need to rehearse here the well-known saga from the *Solange I & II*, through *Brunner, Carlsen* to the Polish and Czech challenges. See also *Gauweiler* 2 BvE 2/08 [2010] 3 C.M.L.R. 13 & *Re Honeywell* 2 BvR 2661/06 [2011] 1 C.M.L.R. 33. The common thread connecting these case is the questioning of EU commitments to democracy, fundamental rights and constitutionalism.

market – a long-term objective of the EU.⁴⁴ Prioritising those values contributed, in some degree at least, to the displacement of concerns with democracy and fundamental rights.⁴⁵ There was a strong rationale behind this: on a practical level, any weakening of the uniform application and interpretation of the EU law could potentially weaken the common market regulations – by giving rise to distortions of competition and discriminations between economic operators.⁴⁶ From a theoretical perspective, such an incursion would have been likely to weaken the legitimising strategy of the ECJ, who assumed the role of seemingly neutral enforcer and guardian of the Treaties, which, after all represent a political and constitutional settlement between the MSs.

The type of legal stance taken by the ECJ on supremacy, described by Allott⁴⁷ as ‘self-serving and self-referential,’ had not been well suited to encourage a frank exchange of views and challenges that could help clarify the law and foster mutual learning between the European court and the NCs. It also largely failed to steer the relationship between the courts towards tempering the early hostility of national courts to preliminary reference procedure.⁴⁸ In other words, the focus was predominantly on quashing the potential dissent that could threaten the hierarchy of judicial power and legal integrity of the EU, at the expense of what should have been the substantive concerns of the courts.⁴⁹ Simply, this can be taken as if the ECJ was saying to the national courts ‘We could not trust you to co-operate on raising the level of substantive rights protection, as we suspect that you would abuse such co-operation for your own domestic ends.’ This stance of the ECJ also suggests the limited nature of the EU’s legal integrity promoted by the ECJ as mainly one of a procedural variety, in areas other than common market.

Could matters have taken a different turn? I suggest that they could have. This is obviously a purely speculative argument, but developing some relevant points should help to seek a more productive way of promoting the core constitutional principles in the EU through the judicial process, while preserving the

⁴⁴ See note 33 for a selection of cases illustrating this point. See also Williams’s analysis of some of the most recent cases in note 25.

⁴⁵ Williams p. 570, note 25.

⁴⁶ Williams, p. 562, note 25.

⁴⁷ P. Allott, ‘Globalisation from Above’ in *The Health of Nations: Society and Law Beyond the State*, CUP, Cambridge 2002.

⁴⁸ On this point see for instance: K.J. Alter, ‘Who are the “Masters of the Treaty?”: European Governments and the European Court of Justice’ (1998) 52 *International Organization* 1, pp. 121–147.

⁴⁹ In this sense, the challenges focussed more on establishing the ‘ultimate [legal] authority’ in the EU. Compare with Poiaras Maduro, ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’, in N. Walker (ed), *Sovereignty in Transition* Hart, 2003, 501, at 502; N. Walker, ‘Late Sovereignty in the European Union’, in Walker (1999: 3–32); N. MacCormick, *Questioning Sovereignty* Oxford University Press, Oxford 1999; M. Kumm, ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty’ (2005) 11 *European Law Journal* 262.

imperatives of EU legal integration and protecting the foundations of common market.

In order for this to happen, however, the legitimising role of the ECJ, NCs and national constitutions should be more openly accepted. But equally, the principle of co-operation between the courts must be recast in line with a different organisational approach. Mutual trust and respect should replace the emphasis on sovereignty to make way for mutual learning and rallying around substantive values and principles. Most of all, however, this would require the legitimising ideology promoted by the ECJ to be more balanced and more receptive to the concerns raised by the NCs in 'supremacy' cases.⁵⁰

2.4. BEYOND 'SOVEREIGNTY': POWER STRUGGLE, OR POWER-POSTURING?

A closer look at the way in which supremacy and direct-effect doctrines have operated over the years reveals a slightly different picture than the sovereignty-focussed analysis allows. Instead of a full-on confrontation, the so-called power struggle never amounted to more than mere posturing between the ECJ and NCs – that is, in essence, closer to full co-operation and acceptance of the supremacy of the ECJ and the EU law by the national courts, although, seemingly, on their own terms.⁵¹ The Treaty of Lisbon Declaration 17; the EU Charter of Fundamental Rights (CFR); the Opinion of the Council Legal Service⁵² – these all reinforce the perception that the MSs' senior courts accept the primacy of EU law.⁵³ A number of new provisions of the Lisbon Treaty offer conflict-diffusing clauses by stressing mutual respect and sincere co-operation.⁵⁴ Still uncertain, though, are the types of value-choices and policy priorities that will underpin this type of co-operative framework.

A dark shadow of doubt about such value-choices of the ECJ has been cast in a number of ECJ decisions in the following areas:⁵⁵ secret and unpublished legislation,⁵⁶ EU Data Retention Directive 2006/24⁵⁷ cases related to market

⁵⁰ Albi 2014, note 25.

⁵¹ Chalmers, Davis and Monti concluded that the 'primacy [of the EU law] now represents the political consensus as to the status of EU law', p. 188, note 6. They further consider three approaches that have emerged in relation to the internal authority of the EU law: European constitutional sovereignty, unconditional national constitutional sovereignty and constitutional tolerance which dominates. On this point, see also Kumm, p. 285, note 29.

⁵² *EU Council Doc. 11197/07*, 22 June 2007.

⁵³ See also A. Dyevre *European Integration and national Courts: Defending Sovereignty under Institutional Constraints?* (2013) 9 *European Constitutional Law Review* pp. 139–168.

⁵⁴ Articles 4(2) and 4(3) of the TEU 2009.

⁵⁵ Albi, n. 25.

⁵⁶ For instance, Case C-345/06 *Heinrich* [2009] ECR I-1659.

⁵⁷ C-594/12 *Seitlinger and Others*.

regulations where substantive rights clashed with common market imperative⁵⁸ and the European Arrest Warrant (EAW).⁵⁹ Let me briefly discuss the last example.

A number of concerns have been raised by several NCs in relation to the EAW. Some of the most serious concerns focused on the potential breaches of the right to a fair trial, presumption of innocence, retroactivity, double jeopardy, judgements in absentia.⁶⁰ The common thread discernible in the ECJ's responses is a tendency to avoid directly addressing the issue,⁶¹ or to reject the possibility to grant a due level of protection guaranteed under national constitutions – as in the case of *Melloni v. Ministerio Fiscal*. That is despite Article 53 of the EU CFR guarantee: 'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised [...] by [...] the Member States' constitutions.'⁶²

Can the NCs trust the ECJ to find a more viable balance between democratic and constitutional principles and the EU law integrity? The Treaty of Lisbon adoption of the EU Charter of Fundamental Rights and the promise of accession to the European Convention on Human Rights (ECHR) contained in Article 6(2) TEU⁶³ seem to suggest that this might indeed be the case. However, new concerns have been raised by the ECJ's *Opinion 2/13* on the compatibility with the EU law of the draft agreement for EU accession to the European Convention of Human Rights, delivered on 18 December 2014. In this document, the ECJ concluded that the accession agreement is not compatible with the EU law. The reasons for this incompatibility given by the Court relate almost entirely to the alleged special nature and autonomy of the EU law, and the position of the Court itself, as the only judicial body authorised to interpret the EU law – a role that could be threatened by the binding nature of the European Court of Human Rights interpretation of the ECHR. The ECJ's concerns in relation to the draft agreement might be resolved and accession could be achieved. However, by focussing so strongly on preserving its own position of power as the highest arbiter of the EU legal order and by stressing the special nature and position of EU law, the Court, once again, placed its priorities on the wrong side of constitutional politics: in preservation of judicial power as a key factor in safeguarding the unity of the EU, rather than on upholding substantive standards of fundamental rights. It seems, then, in light of *Opinion 2/13*, that the prospects for development of the ECJ-led

⁵⁸ See n. 34.

⁵⁹ See the case of *Melloni*, n. 8.

⁶⁰ See V. Mitsilegas, 'General Report: The Area of Freedom, Security and Justice from Amsterdam to Lisbon. Challenges of Implementation, Constitutionality and Fundamental Rights' (FIDE: 2012). Available at: www.fide2012.eu/index.php?doc_id=90; See also Albi, n. 25.

⁶¹ D. Sarmiento, 'European Union: the European arrest warrant and the quest for constitutional coherence' (2008) 6 *International Journal of Constitutional Law* 1, 177–178.

⁶² Charter of Fundamental Rights (2007/C 303/02), 14 December 2007.

⁶³ See also: *CoE Final Report to the CDDH 47+1(2013)008 rev2*.

substantive constitutionalism appears to have diminished even further. This is particularly unfortunate in the current climate of growing Euro-scepticism and the potential paralysis of the European Parliament, which has been populated by a sizable fraction of MEPs representing political formations on the far-right political spectrum, and also hostile to the very idea of European integration.

3. THE SUPREMACY OF EU ECONOMIC POLICY

In this section I suggest that part of the ECJ's legitimising strategy is to deploy a particular type of ideology which projects the economic common market regulations as coherent and consistent, hence well serving the overall objective of EU integration. Such a strategy, however, might be hiding the underlying policy choices and protecting those from democratic scrutiny and oversight⁶⁴ as they could be smuggled into the body of EU law under the guise of technical rules contained in secondary legislation, known as 'non-legislative acts'.⁶⁵ Since such rules, supposedly, do not entail policy choices (as they are only 'supplementary', or amending the 'non-essential elements of the legislative acts') they are not subjected to the same scrutiny as the legislative acts. A number of reforms over the years partly addressed this concern – those culminated in the European Parliament's power of veto, both stopping the adoption of such an act and revoking delegation.⁶⁶ Still of concern, however, are rules that are not very likely to register on the EP's radar, such as those presented as purely technical and created by administrative agencies. Despite these shortcomings in the democratic oversight, those rules have the same binding power in domestic law as 'legislative acts' through the doctrines of supremacy and direct effect.

Let us recall that one of the most significant effects of the doctrines of supremacy and direct effect was the opening up of national jurisdictions to the reception of EU law. The operation of these two doctrines is supported and complemented by the preliminary reference procedure. These three legal devices combined place the national courts in position of enforcers of the EU law over and above conflicting national law, under the supervision of the ECJ.⁶⁷ Since internal-market law is by far the widest in scope and impact of all the types of EU legal regulations,⁶⁸ and since its main aim is to integrate national markets

⁶⁴ The best-known examples where such inconsistencies are visible are the CAP and the bail-outs of the banks across the EU in the wake of financial crisis. Discussion of these two phenomena is outside the scope of this paper.

⁶⁵ Article 290 TFEU.

⁶⁶ Article 290 TFEU.

⁶⁷ Compare with D. Nicol *The constitutional protection of capitalism*, Oxford, Oregon, Hart Publishing 2010.

⁶⁸ A. Follesdal and S. Hix 'Why there is a democratic deficit in the EU: A response to Majone and Moravcsik' (2006) 44 *JCMS: Journal of Common Market Studies* no. 3 pp. 533–562, at 11.

into a single EU one, it follows that the national courts were placed in a position to play a key role in transforming and integrating the economies of the Member States in line with the policy choices of the EU institutions, and, even more crucially, under the control of the ECJ.

The key role that the national courts play in protecting the integrity of the EU legal system and in enforcing the individual rights under EU law gives the courts the power to override their own parliaments, particularly in cases when domestic provisions fall short of, or conflict with, the EU standard of legal protection. What is more, national courts are empowered to create rights and obligations not available under domestic law, including domestic constitutions.⁶⁹ Since most of such instances are, either directly or indirectly, related to economic law and policy, this activity of the courts amounts to assisting in the entrenchment of certain tenets and ideas underlying the EU Treaties regulation of that nature.⁷⁰ Such entrenchment raises a number of important questions related to constitutional and democratic standards of economic law- and policy-making in the EU, since it commits the national courts to act as guardians of an economic model that has in effect been placed outside democratic control, contestation and debate of the MSs' electorates.⁷¹ The key role in this process is played by the ECJ,⁷² which has the ultimate authority in the interpretation and application of the Treaties.⁷³

3.1. WHAT IS THE MODEL OF ECONOMIC POLICY ENTRENCHED IN THE TREATIES?

Article 3(3) TEU commits the EU internal market to be based on 'highly competitive social market economy'. Both in law and in practice this broad commitment translates into priority of competition and privatisation. These two objectives underpin the vast majority of policies that can be described as core within the EU Treaties: the four freedoms provisions within the internal market and competition law, rules governing state aid and public procurement. These objectives are often described as 'neoliberal'.⁷⁴ (Common Agricultural Policy is the one glaring exception here, its persistence often explained by the power-

⁶⁹ Caldeira & Gibson, note 19.

⁷⁰ See Article 48 TEU, which in effect entrenches the Foundation Treaties.

⁷¹ See also n. 9.

⁷² According to Article 225(3), the General Court also has the power of hearing article 267 TFEU preliminary references, but this has not yet been made operational.

⁷³ Article 19 TEU.

⁷⁴ I am using this concept in a theoretically unsophisticated way, as denoting the possibility of extracting commercial value from any type of human endeavour. See also Nicol, note 67. The exceptions are the interventionist policies of the CAP, and the recent bail-out of the banks in some MSs. But, these can be understood as an unorthodox application of neoliberalism, which is used to promote certain type of private interest, even if this goes against the free-

politics in the EU, particularly in the early years after the signing of the Treaty of Rome.)⁷⁵ There are, obviously, a number of Treaty provisions and ECJ case-law examples where objectives other than of the free-market nature are, at least theoretically, permitted to shape the law and policy. But, even those are relatively few. All in all, it would be difficult to dispel the suggestion that the pursuit of economic objectives in EU law and policy 'outweighs the taking into account of social concerns'⁷⁶

3.2. THE ECJ AND THE EU'S 'DEMOCRATIC DEFICIT'

The issues identified above relate directly to the EU's infamous 'democratic deficit'.⁷⁷ However, a serious weakness of the democratic-deficit debate is the narrow focus on standards of democracy considered within the traditional divide of public/private, in line with the dominant neo-liberal views, which exclude market economy – considered as private – from democratic scrutiny.⁷⁸ Following Nicol and Stupiot,⁷⁹ among others, I argue that such an exclusion is no longer viable. There are a number of factors that justify this suggestion. The following two are probably the most pertinent: the traditional problem of technocratic bias in EU law making, particularly under article 290 TFEU; and the Eurozone crisis, which led to the ousting from power of democratically elected governments in Italy and Greece, driven by the need to implement economic austerity measures by technocrats.⁸⁰ The latter provided a shocking reminder that economy and politics – even when relating to the governance of MSs, hence of constitutional nature – must be seen as closely interwoven;

market principles of limited intervention in the economy, as suggested by D. Harvey, *A brief history of neoliberalism*, Oxford, Oxford University Press 2005.

⁷⁵ Mainly the French leverage.

⁷⁶ Lenaerts, n. 6, p. 274.

⁷⁷ Sources on this topic are too numerous to mention here. The most famous is the debate between A. Moravcsik, 'Reassessing legitimacy in the European Union' (2002) *JCMS: Journal of Common Market Studies*, 40(4), 603-624, and A. Follesdal & S. Hix, 'Why there is a democratic deficit in the EU: A response to Majone and Moravcsik' (2006) *JCMS: Journal of Common Market Studies* 44(3), 533-562. I will not engage in this debate, as its focus is mainly on procedural standards of democratic oversight, which still remain problematic, but have been considerably strengthened under the Treaty of Lisbon, through empowering further the National Parliaments via the enhanced regulations of subsidiary and proportionality.

⁷⁸ See e.g. F.A. Hayek *The Road to Serfdom: Text and Documents: The Definitive Edition*. Routledge 2014; Nicol (2010), n. 68.

⁷⁹ A. Supiot, 'The public-private relation in the context of today's refeudalization' *International Journal of Constitutional Law* (2013) Vol. 11, No. 1, pp. 125-145.

⁸⁰ According to Supiot, at stake here is much more than the 'familiar practice of privatizing profits and having taxpayers bear the losses. What we are witnessing, rather, is an undisguised challenge to a people's right to self-government' Supiot, n. 79, p. 125. See also 'Eurozone turmoil: Enter the technocrats' in the *Financial Times*, 11 November 2011, available at: www.ft.com/cms/s/0/93c5cb36-0c92-11e1-a45b-00144feabdc0.html#axzz2ztWNegpu (accessed 25 Apr. 2014).

the powerful effects of the EU law on shaping not just the economic, but also political orders of the MSs became clearly visible. In the case of the former, the very nature of the market-regulation measures, including those enacted under Article 290 TFEU, illustrate the impossibility of separating economic and non-economic considerations from the broader objectives of public policy.⁸¹

It is therefore necessary to extend the democratic-deficit debate to the whole of EU law and policy-making, including internal-market regulation, against the current position which prevents market regulation from being 'politicised', in line with the assertion that scientific and economic issues involved in market regulation 'are a matter of technical competence more than political choices'.⁸² An outcome of such an approach is that the technical, science-based rationales are often prioritised over ethical, environmental, or public health concerns, which cannot be backed by hard scientific data either because such data is not yet available, or because the nature of such concerns makes it impossible to express them in strictly scientific terms. As illustrated by the *Austrian GMOs* case, this often results in the marginalisation of this type of legitimate 'non-scientific' concerns.⁸³

The reasons for this are complex. According to Chalmers et al.:

'the adoption of the distinction between the questions of fact (what is the risk?) and value (what should be done about it?) has led to the exclusion of the vast majority of public concerns from the most influential stage of the decision-making model: the process of risk framing.'⁸⁴

This is partly the result of the key role played by the technocratic agencies in both framing the issues under consideration and influencing actual policies by supplying expert advice and scientific data. Yet, those agencies are not always neutral and objective,⁸⁵ hence, their advice might be biased. In fact, there is evidence to suggest that the agencies might be seen as conduits for private interests not always subjected to sufficient political control:

Charged with market entry/exit regulation and more general, informal, information-gathering and policy-informing duties, the new European agencies apparently meet

⁸¹ The Treaty itself demands such a fusion in Article 7 TFEU, which states that 'the Union shall ensure consistency between its policies and activities, taking all of its objectives into account.' Articles 8–17 & 114 TFEU identify most of those objectives. The Transatlantic Trade and Investment Partnership (TTIP) which is currently negotiated, arguably, blurs such division even further.

⁸² Chalmers, n. 6, p. 704.

⁸³ Joined cases C-439/05 P and C-454/05 P *Land Oberösterreich & Austria v Commission* [2007] ECR I-7141.

⁸⁴ Chalmers, n. 6, p. 703. See also M. Kriticos, *Traditional Risk Analysis and Releases of GMOs into the European Union: Space for Non-Scientific Factors* (2009) 44 *European Law Review*, p. 405.

⁸⁵ K. Kanska 'Wolves in the clothing of sheep? The case of European Food Safety Authority' (2004) *E.L. Rev.* 29(5), 711–727, p. 727.

a purely technical demand for market-corrective and sector-specific regulation. This seemingly technocratic and semi-autonomous status implicitly provides market interest with a voice [...] Notwithstanding their placement under the Commission's institutional structure [...] varying degree of budgetary autonomy and direct networking with national administrations largely shields these agencies from explicitly political processes.⁸⁶

Given that the Commission is duty-bound to seek and to follow the advice of the agencies,⁸⁷ this places the agencies in a position to shape EU policy and law-making without much political scrutiny.^{88, 89} It means that large areas of law and policy-making are, indeed, excluded from political debate and contestability, indicating a critical shortfall in democratic credentials. Moreover, as argued earlier, the scope and focus of existing debate on the EU democratic-deficit is too narrowly oriented at issues not directly linked to this particular aspect of the EU functioning.

3.3. ENTRENCHMENT OF THE EU ECONOMIC POLICY, TTIP, AND THE ROLE OF THE COURTS

3.3.1. *Democratic deficit of economic policy and the courts*

These weaknesses of political scrutiny over some key areas of EU law and policy-making, particularly related to the internal-market regulations, are not satisfactorily addressed by the Courts. In fact, the opposite might be the case: for instance, the ECJ's interpretation of exceptions under Article 114 TFEU in the *Austrian GMOs* case suggests that the court allowed the parties to rely on exceptions within this article only under very strict conditions, one of which is 'new scientific evidence'. According to the ECJ, no sufficient new scientific evidence was provided for the existence of unique ecosystems in this case.

Even if the court's textual interpretation was correct, it failed to take into account that phenomena such as ecosystems are not easily quantifiable, and that there is no hard scientific evidence to support the claim of their uniqueness. That is partly due to the fact that the judgement of what is and what is not a unique ecosystem is also closely bound to ethics and social values. Yet, by adopting its position, the court found itself endorsing the limited understanding of complex

⁸⁶ C. Joerges, 'The Law's Problem with the Governance of the Single European Market' in C. Joerges and R. Dehousse (eds.) *Good Governance in Europe's Integrated Market* Oxford, Oxford University Press 2002, p. 17.

⁸⁷ The Commission has, in practice, always followed agencies' advice, as the conditions for suggesting an alternative are almost impossible to satisfy.

⁸⁸ Chalmers, n. 6, p. 274.

⁸⁹ K. Lenaerts, 'The Principle of Democracy in the Case Law of the European Court of Justice' (2013) *ICLQ* vol 62, April, p. 274.

phenomenon, one that is based on the only available, narrowly defined ‘scientific evidence’.

One of the most complex challenges within the EU internal-market law is how to achieve a balance between the free-market imperative and public-policy goals and interests. Arguably, the ECJ struggles to get this balance right, as demonstrated in a string of cases within this field, including public procurement, and state-aid rules.⁹⁰ This might be seen as reflecting the ECJ’s narrow and predominantly economic approach to harmonisation of EU internal market law.

a. Investor-State Dispute Settlement

The Transatlantic Trade and Investment Partnership (TTIP) between the United States and the EU, which is currently being negotiated, might contribute to further tipping the balance towards prioritising purely economic objectives (at the expense of the public interest ones) in the way that EU and national law is interpreted and enforced. Its Investor-State Dispute Settlement (ISDS)⁹¹ allows businesses and corporations to sue governments when their commercial interests are threatened by public-interest regulation. Moreover, the ISDS enables foreign investors to circumvent domestic legal processes and sue host governments in third-party arbitration tribunals for unfair or discriminatory treatment, bypassing domestic laws and regulations, and hence, domestic parliaments. Yet the need to protect the commercial interests of companies means that the hearings are held in secret by panels of corporate lawyers, without the usual safeguards provided by an open trial in domestic courts. Citizens and communities affected by decisions have no legal standing to challenge such decisions.⁹²

The details of the ISDS under the TTIP are still being negotiated. However, what is clear is that the main challenge of running this mechanism will be to find a way of reconciling public-interest-driven objectives and the commercial interests of the investors. If the ISDS will be based on a strict application of contractual agreement in a black-letter, legalistic manner, which demands equality in the eyes of the law, and objective, neutral application of the rules, the public interests regulation will almost certainly be vulnerable to be trumped by commercial interests. The democratic underpinnings of state regulation will be immaterial in this type of proceedings. On the other hand, it is difficult to

⁹⁰ See for instance Chalmers et al. n. 6, and sources listed there.

⁹¹ For more see European Commission Factsheet on Investor-State Dispute Settlement, 3 Oct. 2013.

⁹² See for instance Open Democracy Centre comment available at: www.opendemocracy.net/ourkingdom/thomas-mc-donagh/allowing-corporations-to-sue-governments-for-changing-their-laws-may-be (accessed 27 April 2014); Stiglitz on the dangers of bilateral investment agreement, 2013, available at: www.project-syndicate.org/commentary/joseph-e--stiglitz-on-the-dangers-of-bilateral-investment-agreements (accessed 27 April 2014).

imagine open-ended clauses being accepted by corporations in their contractual agreements with governments that would protect democratically legitimate, but commercially unviable solutions.

All in all, this new development including the ISDS in the TTIP will create a new layer of judicial authority in the EU, which might prove the most controversial to date when it comes to deepening the democratic deficit in enforcement of economic law and policy.

In the light of the above, it can be argued that the ECJ, the national courts and the panels under the ISDS mechanism all contribute, in some measure at least, to the enforcement of a particular model of the economic order where increasing areas of (mainly) economic regulations are de facto entrenched and, as a result, placed beyond the democratic control of the national parliaments and the electorate. This contributes to the wider process of 'inverting the relation between public and private' which leads to the 'privatization of legal rules',⁹³ and amounts to the shrinking of the public sphere and a corresponding shift of power towards the private sphere of market-driven interests.⁹⁴ From this perspective, it can be argued that the ECJ and the constitutional courts of the MSs enforcing EU law appear more as challengers to democracy than as its defenders, at least on the level of constitutional legal politics in the EU.

4. CONCLUSIONS

The main purpose of this paper was to present an overview of some key challenges in the constitutional politics of the European courts that pitch constitutional principles such as democracy, fundamental rights and rule of law against the ECJ-created ideology of legal integrity of the EU. More specifically, I show that in performing its role as the guardian of the EU legal order, the ECJ is largely guided by the imperative to provide legitimacy for the EU legal system, resting on its uniformity and clear hierarchy of judicial authority, often to the detriment of substantive constitutionalism. Such a perspective brings into focus the way in which the ECJ used the concept of 'sovereignty' in structuring its relationship with the national and constitutional courts, diverting attention from substantive concerns raised by the NCs in the 'supremacy' challenges and the EWA cases. This discussion also suggested that the ECJ used the alleged threat of national 'sovereignty' to the unity of the EU, as an excuse to protect its own position of power and authority *vis-à-vis* the NCs. It seems that by doing this,

⁹³ Supiot, n. 79, p. 134.

⁹⁴ According to Koskieniemi: the process of power being shifted towards private economy and finance might already dominate. He noted: 'Corporate executives and hedge fund managers do not consult the populations whose fate they determine...sometimes with the assent of the state, more often in complete independence': M. Koskieniemi 'What Use for Sovereignty Today?' (2011) *Asian Journal of International Law* 1, pp. 61-70.

the ECJ continues in its failure to develop a more balanced approach towards the twin objectives of preserving the integrity of EU law and paying attention to substantive constitutional principles.

This suggests that the democratic credentials and legitimacy of the ECJ might be questioned from at least two perspectives: its commitment to substantive values in the face of market imperative and the perceived threats to the uniformity of EU law, and as a body that is its own master, due to an almost non-existent system of oversight of its 'constitutional' jurisdiction.

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EUROPEAN JUDICIAL
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FOR DEMOCRACY

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