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**The Court of Justice of the European Union  
as a Democratic Forum**

**Volume I**

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## Volume I

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I hereby confirm that this thesis has been composed by me; that its contents are my own; and that it has not been submitted for any other degree or professional qualification.

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Ross Carrick, 30<sup>th</sup> November, 2012

The purpose of this thesis is to examine the procedural democratic legitimacy of the Court of Justice of the European Union. The Court of Justice has been instrumental in the construction of the European Union. Through its interpretation of the Treaty of Rome since the 1960s, it has constituted a legal system distinctive in kind. In contrast to orthodox instances of the political community – international organisations and the nation-state – the EU exemplifies no general type. Its legal, constitutional, political, economic and social infrastructures are part of a complex and pervasive web of overlapping jurisdictions that goes some way beyond the ordinary international organisation (by virtue of constitutional principles such as direct effect and citizenship), but not quite as far as the nation-state (e.g. sovereignty contestation). This being the case, its interlocutors have long since understood that the EU is in a state of transformation – it is itself a project and a process, the end result of which (*finalité*) is unknown. As such, many questions have been asked about the legitimacy of this process; and, given the Court of Justice's (in)famous generative role within this process, the Court also finds itself the subject of such scrutiny. The legitimacy of the Court of Justice has been the focus of attention from both academics and practitioners. Most of that attention has been on the Court's jurisprudence and jurisdiction – scrutinising the legal reasoning of cases; or questioning the limits of its constitutional functions according to axiomatic conceptions of, for example, the separation of powers doctrine. By contrast, less attention has been paid to the democratic legitimacy of the Court of Justice, and much less in relation to the Court's institutional design.

The subject-matter of the analysis in this thesis is the Court's structures and processes, such as: the composition and appointments processes for members of the Court; the mechanisms that give access to various kinds of participants (such as *locus standi* and third-party intervention); and the use of judicial chambers. Procedural democratic legitimacy, moreover, has two dimensions: intrinsic and instrumental. The intrinsic is a measure of the democratic credentials of the Court as a discrete decision-making authority (such as representativeness and democratic participation); whereas the instrumental is concerned with the ways in which the Court contributes to the overall democratic legitimacy of the EU. In this thesis, the structures and processes of the Court of Justice are examined in light of both of those criteria. In contrast to prevailing approaches of constitutional theorists – who tend to treat these criteria as functions that are quite discrete, and their performance as mutually exclusive – an important theoretical contribution of this thesis is to develop an analytical framework that allows for the inherent synergies and tensions that exist between intrinsic and instrumental criteria to be factored into analyses of the democratic legitimacy of constitutional courts.



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Consolidated edition of the Rules of Procedure of the Court of Justice of the European Communities (1991) OJ L 176/7 and (1992) OJ L 383 (corrigenda), as amended by: (1995) OJ L 44/61; (1997) OJ L 103/1, and OJ L 351/72 (corrigenda); (2000) OJ L 122/43; (2000) OJ L 322/1; (2001) OJ L 119/1; (2002) OJ L 272/1, and OJ L 281/24 (corrigenda); (2003) OJ L 147/17; (2003) OJ L 172/12; (2004) OJ L 132/2; (2004) OJ L 127/107; (2005) OJ L 203/19; (2005) OJ L 288/51; (2006) OJ L 386/44, and (2007) OJ L 332/108 (corrigenda); (2008) OJ L 24/39; (2008) OJ L 200/20; (2008) OJ L 200/18; (2009) OJ L 24/8; (2010) OJ L 92/12; (2011) OJ L 162/17.

Directive 98/34 (1998) OJ L 204/37.

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Directive 98/48 (1998) OJ L 217/18.

Council Decision 1999/468/EC (2000) OJ L256/19.

Council Framework Decision on the Standing of Victims in Criminal Proceedings 2001/220/JHA (2001) OJ L 82.

Regulation (EC) No 1049/2001 Regarding Public Access to European Parliament, Council and Commission documents, (2001) OJ L 145/43.

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Council Decision 2006/512/EC (2006) OJ L 200/11 (consolidated version at (2006) OJ C 225/4).

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Rankings of the Judges at the European Union Civil Service Tribunal (2009) OJ C 270/06.

Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on Trade in Seal Products (2009) OJ L 286/36.

CJEU, Information Note on References from National Courts for a Preliminary Ruling (2009) OJ C 297/01.

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Council of Ministers, “Decision of the Representatives of the Governments of the Member States of the European Union Appointing Judges to the General Court” (2010) 11912/10.

Council of Ministers, “Decision of the Representatives of the Governments of the Member States of the European Union Appointing Judges to the General Court” (2010) 10952/2/10 REV 2.

Council Decision, Appointing the Members of the Panel provided for in Article 255 [TFEU] (2010) OJ L-50/20.

Rankings of Judges at the General Court (2010) OJ C 288/06.

Rules of Procedure of the Court of Justice (2012) OJ L 265/1.

**3. The United Kingdom**

European Communities Act 1972.

Human Rights Act 1998.

Constitutional Reform Act 2005.

**4. The United Nations**

International Covenant on Civil and Political Rights of 19 December 1966.

**5. The United States of America**

The United States Constitution.

<u>AFSJ</u>	The Area of Freedom Security and Justice (pre-Lisbon third pillar).
<u>CFSP</u>	The Common Foreign and Security Policy (pre-Lisbon second pillar).
<u>CJEU</u>	The Court of Justice of the European Union.
<u>CST</u>	The European Union Civil Service Tribunal.
<u>EC</u>	The European Community (pre-Lisbon first pillar, or Community pillar).
<u>ECHR</u>	European Convention on Human Rights.
<u>ECtHR</u>	The European Court of Human Rights.
<u>ECJ</u>	The European Court of Justice.
<u>ECSC</u>	The European Coal and Steel Community.
<u>EEC</u>	The European Economic Community.
<u>EU</u>	The European Union.
<u>Euratom</u>	The European Atomic Energy Community.
<u>GC</u>	The General Court.
<u>OJ</u>	The Official Journal of the European Union.
<u>RPCJ</u>	The Rules of Procedure of the Court of Justice.

<u>RPCST</u>	The Rules of Procedure of the European Union Civil Service Tribunal.
<u>RPEctHR</u>	The Rules of Court of the ECtHR.
<u>RPGC</u>	The Rules of Procedure of the General Court.
<u>SCJ</u>	The Statute of the Court of Justice.
<u>TEC</u>	Treaty establishing the European Community.
<u>TEEC</u>	Treaty establishing the European Economic Community.
<u>TEU</u>	Treaty on the European Union.
<u>TFEU</u>	Treaty on the Functioning of the European Union.
<u>UN</u>	The United Nations.

*I think it is not unreasonable to assert that the role of courts has, or should have, something to do with the realities of democracy. Properly organized, it is through them that the individual can play a larger and more significant part of government while gaining a greater sense of security.*<sup>1</sup>

The Court of Justice of the European Union<sup>2</sup> is an exceptional institution within an exceptional political community. This is not somehow to convey a sense of endorsement of the Court of Justice and its contribution to the EU. Rather, it is to highlight the sheer *distinctiveness* of both the Court and the EU – as distinct from more familiar instances of constitutional-type courts functioning within equally familiar types of political communities, especially nation-states. The Court of Justice and the EU – as profound exceptions to these orthodoxies – thus present compelling subject-matter for inter-disciplinary research, such as the research of this thesis. And it is this sense of distinctiveness that runs as a guiding *motif* throughout the various arguments and analyses presented here.

As alluded to by the above quotation, this research focuses on the democratic role of the Court of Justice within the EU. The primary research question is: is the Court of Justice democratically legitimate? This is itself a complex analytical question, and, again, as the above quotation indicates, the democratic legitimacy of courts is, in a large part, guided by a notion of their role within the political community for which they function. There are thus two aspects to the analysis here: democratic legitimacy as exemplified by the Court of Justice assessed on its own terms (what I term standards of *intrinsic* democratic legitimacy); and democratic legitimacy with respect to the various ways in which the Court responds and contributes to the broader democratic ordering of the EU as a political community (*instrumental* democratic legitimacy). These two aspects do not, moreover, represent unrelated or alternative methodological approaches i.e. they do not present two different sets of answers in relation to the primary research question. Rather, each perspective – the intrinsic and the instrumental – is informed by the other. And it is precisely this inherent methodological interaction between (intrinsic) democratic notions of the Court and

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<sup>1</sup> John Mitchell, “Why European Institutions?” (Nov, 1968) University of Edinburgh Inaugural Lecture No. 39 (hereinafter Mitchell, 1968): 11.

<sup>2</sup> Hereinafter the Court of Justice, the Court, or the CJEU.

(instrumental) democratic conditions of the EU that gives such emphasis and analytical relevance to the *distinctiveness* of both the Court and the EU.

Why are these questions interesting and to whom are they of interest? At one level, this research fits within the very densely packed analytical terrain associated with the study of the European integration project. Within that area of enquiry – naturally prone to multi-disciplinary and inter-disciplinary research – there are two sub-branches in particular to which this research makes a contribution. First, there is an historically rich literature that has devoted its attention to the more general concern of the legitimacy of the Court of Justice – focussing, more specifically, on its jurisprudential output; its putatively “activist” decisions and legal reasoning. This analytical terrain is dominated by constitutional and legal scholars and jurists, whose analytical attention tends to focus on canons of legal reasoning and axiomatic notions of constitutional propriety, such as the separation of powers doctrine. Within those debates, there has been very little attention paid to *democratic* legitimacy as a yardstick against which the Court’s role and contributions can be measured.

An important second branch is located within the political science and political theory realms of European integration research – in particular, the controversies surrounding the EU’s putative “democratic deficit”. Within that literature, there are two important, and related, contributions to be made by this thesis. The first arises out of that literature’s demonstrable neglect of the Court of Justice as a relevant institution for its analyses. Invariably, proponents and opponents of the deficit-thesis employ empirical observations in relation to the EU’s overtly political institutions (namely, the Council of Ministers, the Commission and the European Parliament) in support of their claims. The second contribution to be made to that literature relates to prevailing methodological problems associated with analysing the *sui generis* political community that is the EU. Such problems manifest themselves in diagnoses of the EU’s democratic credentials, such that empirical appraisals of the EU’s institutions tend to be founded on shaky analytical premises. The approach in this research is to make explicit the salient and distinctive polity-conditions of the EU towards establishing a coherent analytical framework with which to undertake a



methodologically sound empirical analysis of the democratic legitimacy of the Court of Justice.

Beyond European integration studies, this research contributes to similarly densely packed debates at a theoretical level – in particular, to the theoretical debates on the democratic legitimacy and roles of constitutional courts; or, more broadly, theories of judicial governance. Methodologically, these debates tend to frame their analyses according to theories of legal reasoning and theories of constitutionalism. On the former, there are those who propose or oppose the idea that there are democratic ways for judges in constitutional courts to interpret constitutional law: counter-majoritarian arguments; protecting inviolable socio-political conditions of democracy; and sociological responsiveness to public interests, *inter alia*. There are also those that propose or oppose the idea that a constitutional court has the mandate to do any of the above on the basis of constitutional orthodoxies such as the separation of powers. These latter debates take shape most prominently within the opposition between the so-called political constitutionalists and legal constitutionalists. The former, in general terms, oppose the degree of interpretative discretion that constitutional judges ought to have in the first place, regardless of any “face-saving” methods of interpretation. Their arguments are premised on the idea that constitutional courts are simply not structured and designed according to basic and salient precepts of democratic institutional configuration. A typical, though somewhat trite, example of such an argument is that “judges are not elected by the people”.

In relation to these theoretical debates, there are two primary contributions – again, related – being made here. The first is that, by contrast to the two prevalent analytical approaches, this thesis assesses the democratic legitimacy of constitutional courts (e.g. the Court of Justice) at the *structural* and *procedural* levels, via a substantive examination of (EU) law. It is not an empirical examination of the constitutional court’s juridical output i.e. what it can, or has, contributed to the democratic ordering

of the political community for which it functions.<sup>3</sup> Nor is it a theory of legal reasoning, which argues how a constitutional court's judges ought to interpret law democratically.<sup>4</sup> Further still, it is not an examination of how a constitutional court safeguards the democratic structures and processes of overtly political institutions of the broader political community.<sup>5</sup> This thesis looks directly at the Court of Justice's structures, procedures and processes, and assesses how *they* are democratic in both intrinsic and instrumental terms. The structural aspects being examined include, *inter alia*: the composition, appointment and performance of incumbent members of the Court (primarily the Judges and the Advocates-General); the mechanisms that give access to various kinds of participants; the formation of judicial chambers; and the division of judicial labour between the EU courts (i.e. the General Court and the Civil Service Tribunal; but also the national courts and tribunals of the Member States). The procedural aspects being examined include: the jurisdiction of the Court; the actions that the Court is competent to hear (such as annulment proceedings and preliminary rulings); enforcement mechanisms; and generic procedural mechanisms (such as the provision of legal aid and translation services). In other words, this thesis explores *the procedural democratic legitimacy* of the Court of Justice.

The second theoretical contribution responds to the prevalent and pervasive methodological approach of the debates in relying on particular constitutional orthodoxies, and, related to that, neglecting to appraise normatively the democratic structuring of political institutions with the necessary *sensitivity to distinctive-polity conditions*. Again, this is where the exceptionality motif shines through. The constitutional orthodoxies referred to above relate to the familiar analytical

<sup>3</sup> Consider, for example, the Court's contribution in Case C-70/88 *Parliament v Council* [1990] ECR I-2041 (hereinafter *Chernobyl*), in which the Court interpreted Article 173 of the Treaty establishing the European Economic Community (1957), available at <http://eur-lex.europa.eu/en/treaties/index.htm> (hereinafter TEEC) (now Article 263 of the Treaty on the Functioning of the European Union (2010) OJ C 83/47 (hereinafter TFEU)) in such a way as to grant standing to the European Parliament (hereinafter the EP) in actions of judicial review of (what is now) Union Acts (insofar as the EP was to be able to protect its legislative prerogatives).

<sup>4</sup> See, for example, Michelle Everson and Julia Eisner, *The Making of a European Constitution: Judges and Law Beyond Constitutive Power*, London and New York: Routledge, 2009 (hereinafter Everson and Eisner, 2009): Chapter 6 and Chapter 7.

<sup>5</sup> Consider, for example, the Court of Justice's decision in Case C-294/83 *Parti Ecologiste "Les Verts" v Parliament* [1986] ECR 1339 (hereinafter *Les Verts*), in which the Court safeguarded the procedural and substantive rights of political parties participating in elections to the EP.

frameworks that guide the democratic ordering of contemporary western states: the separation of powers doctrine; the rule of law; partisan representative politics, etc. These conceptual tools, though applicable, have been constructed against the backdrop of the modern manifestation of the political community i.e. the Westphalian nation-state. The tendency to use these concepts as analytical premises robs appraisals of the democratic legitimacy of political institutions, more generally, and constitutional courts, more specifically, of theoretically coherent and robust precepts with which to evaluate those institutions; and all the more so in the *sui generis* context of the EU. The solution offered here is to incorporate into the analytical framework a conceptual way of understanding the democratic legitimacy of institutions – in particular, judicial institutions – with the necessary sensitivity to the distinctiveness of each polity-context in mind.

How do these methodological approaches help, ultimately, to answer the principal question on the procedural democratic legitimacy of the Court of Justice? There is no real quantifiable sense in which we can say institutions are, or are not, democratic – there is no objective standard or measurement whereby we can say, for example, “the Court of Justice is 72% democratic.” Instead, the argument here will be to point out the various ways in which the Court’s structures and processes meet, and fall short of meeting, the precepts of democratic legitimacy. Moreover, this analysis examines the Court’s structures and processes in light of both intrinsic criteria (self-standing standards and exemplification of democratic legitimacy) and instrumental criteria (the functional role of the Court within the EU) of democratic legitimacy.

The argument begins by outlining its intellectual contribution to existing scholarship. In Chapter One, the “activism literature” is reviewed. The activism literature examines the legitimacy of the Court of Justice from what I refer to as an *intrinsic* perspective – assessing the legitimacy of the Court as a discrete decision-making authority – as opposed to assessing its *instrumental* legitimacy (assessing the legitimacy of the Court in terms of how it legitimises the EU). Given that one of the main aims of this thesis is to analyse the democratic legitimacy of the Court from an intrinsic perspective, the activism literature is one to which this thesis contributes.

We see that the activism literature has two principal analytical approaches to intrinsic questions: evaluation of the Court according to theories of legal reasoning; and examination according to theories of EU constitutionalism. The former approach examines the different methods the Court's Judges use, or should use, when interpreting indeterminate Union law. The latter approach examines, or makes normative claims on, the functions of the Court depending on a theory of EU constitutionalism – a theory on what the EU is, or should be, as a polity; and, consequently, a theory on which institutions constitutional supremacy is, or should be, held by (national or EU institutions). Within this literature, there are only very minor and tangential arguments or analyses made relating to the democratic legitimacy of the Court. We see a few examples of theories of democratic *legal reasoning* – the Court as a responsive institution; and the Court that adjudicates according a citizen-oriented paradigm of constitutional justice. Yet there is much less in relation to the structures and processes of the Court, which is the subject-matter of this thesis.

Chapter Two has two objectives. The first, like Chapter One, is to clarify the intellectual contribution of this thesis by reviewing one of the key literatures to which it contributes. Whereas in Chapter One the analyses which review the Court's structures and processes from an intrinsic democratic perspective are addressed, in Chapter Two I look at the literature in which contributions on the instrumental democratic legitimacy of the Court of Justice are made. In this regard, the debates over the EU's putative "democratic deficit" are particularly relevant to discussions on the instrumental roles of the EU's institutions: how do the Union's institutions contribute to the democratic legitimacy of the EU as a polity? We see that there is a variety of analytical approaches and schools of thought, but that there is a demonstrable neglect of the Court of Justice within that literature. The second objective of this Chapter is to identify the salient characteristics of the EU that are relevant for the analysis of the procedural democratic legitimacy of the Court of Justice. This is because, as is explained in Chapter Three, analysing the procedural democratic legitimacy of the Court of Justice (or, indeed, any Union institution) is sensitive to the underlying polity-conditions of the EU. In this regard, I argue that

there are three salient conditions of EU constitutionalism: the complexity of the EU as a polity; the contestation over the nature of the EU; and the ever-changing nature of the EU (the three C's of EU constitutionalism).

In Chapter Three, an analytical framework is presented within which the procedural democratic legitimacy of the Court of Justice can be examined. As we have seen, procedural democratic legitimacy is understood in two ways: intrinsic (the democratic credentials of the Court as a discrete decision-making authority) and instrumental (the ways in which the Court contributes to the democratic functioning of the EU). One of the key contributions of this thesis is to argue that, at a theoretical level, constitutional courts ought to be designed according to the intrinsic virtues of democratic legitimacy in a way that is balanced against their instrumental requirements. The purpose of this Chapter is to clarify precisely how these analytical perspectives will be used to examine the Court's structures and processes. This clarification is necessary given the demonstrable complexity involved in analysing *courts* in this way, and because of the distinctive complexity involved in doing so for the Court of Justice of the *European Union*. To that end, the notion of trusteeship is adopted to provide an important conceptual grounding. The idea of the trustee-institution explains – in terms of constitutional and political theory – the legitimate administration of delegated regulatory decision-making in non-majoritarian institutions, such as constitutional courts. Owing to the virtuous fiduciary relationship between trustee-institutions and their beneficiaries (the public) – as laid down through agreed upon rules by the settlors of the trust – trustee-institutions are endowed with significant discretion with which to exercise regulatory decision-making in a responsive (and so, democratic) way. Given this foundational framework, and in order to avoid methodological pitfalls associated with democratic specification, democracy is defined as an *inclusive* process of governance of the people, for the people and by the people. I then consider precisely how the intrinsic and instrumental criteria of democratic legitimacy fit into that framework – addressing the inherent conceptual complexities; and the complexities associated with specifying this analytical framework given the *sui generis* characteristics of the EU. In doing so, I provide an outline of how the argument of this thesis unfolds in

the remaining chapters, which empirically examine the Court's structures and processes in light of the analytical framework presented in Chapter Three.

Chapter Four considers how the Court is supported by various structures and processes in meeting its core *instrumental* objectives: specifically, how the structures and processes of the Court bolster its institutional independence and insulation from interference by extraneous political forces, such that it can adjudicate sufficiently impartially. We see that the deeply contested nature of the EU justifies the Court of Justice, in comparison to other constitutional courts (national and transnational), being strongly insulated from *ex ante* and *ex post* political influences, because of the demonstrable threat to judicial independence posed by the EU's politically heterogeneous and multiple constituencies e.g. its 27 Member States, *inter alia*.

Chapter Five and Chapter Six move on to consider the intrinsic virtues of democratic legitimacy: representativeness (Chapter Five) and participation (Chapter Six). The underlying normative rationale of intrinsic virtues is institutional responsiveness to public interests, and what we are concerned with here are the structural and procedural mechanisms by which salient affected public interests are *identified* by the Court of Justice, which is the province of representativeness and participation.

In Chapter Five, I address the intrinsic virtue of representativeness in the Court of Justice – assessing the extent to which, and the precise manner in which, its structures and processes exemplify that virtue. The underlying rationale of representativeness is that it is a mechanism by which public interests can be identified in an holistic or aggregated sense. What are the primary political cleavages that emerge from within the polity, generally; and, more specifically, how do those contests manifest themselves within constitutional disputes? The structures and processes of the Court are argued to be aligned with the holistic, aggregated public interests of the EU. Moreover, we see that, given the strength of intergovernmentalism within the complex *mélange* of ordering principles of constitutional design in the EU, representation in the Court of Justice is achieved by balancing structures and processes that are representative of national legal traditions

(such as common law, inquisitorial, and federal systems) with those that represent an emerging, autonomous Union legal culture.

Chapter Six then moves on to the issue of disaggregated or special interests. In other words, beyond the salient holistic matters of political contestation that are represented in the Court of Justice, how are the more particular, disaggregated or special interests that are manifested disparately among the many categories of public actors (e.g. from within civil society) identified by the Court of Justice? This Chapter considers structural and procedural mechanisms that give *access* to different actors in order that they may express their arguments and viewpoints on how their affected-interests should be dealt with by the Court of Justice in its constitutional adjudication. We see that democratic participation in the Court is achieved through various mechanisms of access to judicial review (such as rules of standing, and third party intervention). The discussion then turns to examine the degree to which civil society actors, and national and Union actors, can gain access to the Court of Justice by virtue of the Court's procedural rules, concluding that access for civil society actors is significantly more restricted than for national and Union actors (the "privileged" actors). The discussion then normatively appraises the relative degrees of access afforded to these actors, emphasising how our (contested) understanding of the EU polity and *finalité* informs that analysis. It is argued, first, that the Union's commitment to an intergovernmental organisational logic, and its countervailing supranationalist posturing, justifies the privileged degree of institutional access apportioned to the governments of the Member States and the Union's institutions. I then go on to consider the weaker position of civil society actors, and consider whether or not this is justified. It is argued, first, from a comparative perspective, that civil society actors (natural and legal persons) have an unusually high degree of access to the Court of Justice when compared to national supreme or constitutional courts, as well as other transnational courts. Furthermore, under the rubric of "civil society", the problematic group is not individuals, but interest groups. It is thus argued that these actors are entitled to greater access because of the Union's democratic deficits that exist within its legislative and administrative infrastructure; and also because, in the Union, as a *sui generis* polity, the domains of "politics" and

“law” are functionally intertwined in such a way that requires its legal institutions to be more democratic and, thus, participatory.

The thesis concludes by summarising the overall findings of the research. I argue that the overall picture is a positive one – that the Court fulfils the functions of a trustee-court respectably by meeting the criteria of procedural democratic legitimacy. This is to suggest neither that the Court – or courts in general – should be the focus of democratic ordering in polities, nor that there is no room for improvement. Rather, the extent to which Court’s structures and processes satisfy the criteria of procedural democratic legitimacy tend to outweigh the ways they do not.



## **1. Introduction**

The purpose of this Chapter is to review the literature which assesses the legitimacy of the Court of Justice of the European Union. This literature – referred to here as the activist literature – is one of the key fields to which this thesis contributes. The aim in this Chapter is to categorise the arguments and viewpoints into schools of thought that account for this discursive terrain (Section 2). It is demonstrated that there are two principal analytical approaches in this literature: evaluation of the *legal reasoning* of the Court of Justice; and evaluation of the Court’s *constitutional role* within the EU. The boundaries of the discourse will then be critically assessed in order to determine the shortfalls and gaps that exist in the literature, with a view to placing this thesis into its discursive context and clarifying its intellectual contribution (Section 3). It is demonstrated that within these analytical approaches, and their schools of thought, insufficient attention has been paid to questions on the democratic legitimacy of the Court of Justice.

## **2. The Activism Literature: Analytical Approaches and Schools of Thought**

This Section examines the literature which assesses the legitimacy of the Court of Justice.<sup>6</sup> This body of literature is referred to as the “activism literature”, since its core question is the extent to which the Court is legitimately performing its role (however defined). Since the purpose of this thesis is to evaluate the *democratic* legitimacy of the Court of Justice, the activism debate is an important literature to which it contributes.<sup>7</sup> The term “activism” is a loaded term, since it suggests right

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<sup>6</sup> The literature reviewed here does not include institutional commentary from governmental, quasi-governmental or judicial bodies, writing in their institutional capacity. That literature is referenced in later Chapters of this thesis – as it informs particular structural or procedural arguments. Instead, this review focuses only on academic literature.

<sup>7</sup> The other important contribution of this thesis is the subject-matter of the analysis: the structures and processes of the Court of Justice. As will be seen in Chapters Four, Five and Six, the existing literature on the structures and processes of the Court is fragmented – tending to analyse only one or a few structures or processes at a time from a range of analytical perspectives. See, for example, Anthony Arnall, *The European Union and its Court of Justice*, Oxford: Oxford University Press, 2006

away that the Court is adjudicating illegitimately. Nevertheless, I shall use it here given its definitional function and general cognisability.

There are, broadly, two principal analytical approaches to the legitimacy question. First, there are analyses that focus on theories of interpretation, which seek to assess the legitimacy of the Court's legal reasoning according to varying criteria of judicial interpretive methods. Second, there are analyses that focus on the constitutional role of the Court, which seek to identify the appropriate function(s) of the Court according to varying conceptions of EU constitutionalism – is it, for example, a constitutional court in the orthodox sense? The two analytical approaches are not, moreover, mutually exclusive. It is quite common, for example, for arguments explicitly pertaining to a theory of interpretation to be implicitly informed by a particular theory of EU constitutionalism. In this Section, the various schools of thought which fall into these analytical approaches will be outlined. In Section 3, they will be critically assessed in light of their shortcomings with respect to arguments from the perspective of democratic legitimacy.

### *2.1. Theories of Interpretation*

There are four schools of thought which assess the legitimacy of the Court of Justice in terms of legal reasoning. The schools are presented in the following order: the school of literal interpretation; the teleological school; the Razian school; and the school of socio-political responsiveness.

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(hereinafter Arnall, 2006); and Paul Craig, “The Jurisdiction of the Community Courts Reconsidered”, in de Búrca and Weiler (Eds), *The European Court of Justice*, Oxford University Press, 2001 (hereinafter Craig, 2001). The focus in this literature review is, by contrast, on the *conceptual* perspectives adopted (such as democracy or legal reasoning) when systematically evaluating the legitimacy of the Court.

2.1.1. The School of Literal Interpretation

The first school of thought holds that the Court must adhere strictly to a literal interpretation of EU law. Proponents of this idea do not believe that the Court has, or should have, any creative leeway in interpreting the EU's legal texts. Their argument is that the Court is bound to give effect to, and only to, precise and unambiguous legal language. Further to this, where the wording is ambiguous or unclear in some way, the Court is, or should be, prohibited from imputing any meaning. Two key advocates of this school of thought are Neill and Hartley. In his 1995 "Case Study in Judicial Activism",<sup>8</sup> Neill indicts the Court for having flagrantly interpreted the Treaty establishing the European Community<sup>9</sup> (now, the TFEU) with a missionary zeal:

The ECJ has indulged in 'creative jurisprudence' on many occasions. The Treaty texts and directives agreed between the Member States may at any time be given by the Court a meaning and impetus that may not have been contemplated by the negotiators ...<sup>10</sup>

This is a view that Hartley shares and has expanded.<sup>11</sup> Hartley categorised two forms of "extra-textual interpretations": "rulings outside the text" and "rulings contrary to the text", both of which are deemed "activist" and, thus, illegitimate.<sup>12</sup> Both Hartley and Neill examined the Court's most influential early constitutional jurisprudence – the seminal *Vand Gend en Loos*<sup>13</sup> and *Costa v ENEL*<sup>14</sup> jurisprudence – to support their claims. They held that the judicially-created doctrines of direct effect and

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<sup>8</sup> Patrick Neill, "The European Court of Justice: A Case Study in Judicial Activism", published in the Minutes of Evidence, House of Lords Sub-Committee on the IGC (Session 1994-95, 18th Report, HL Paper 88: 218-52); and published in London: European Policy Forum Frankfurt: Frankfurter Institut, 1995 (hereinafter Neill, 1995).

<sup>9</sup> Consolidated Version of the Treaty establishing the European Community (1992) OJ C 224/06 (hereinafter TEC (pre-Nice)).

<sup>10</sup> Neill, 1995: 1, 2.

<sup>11</sup> Trevor Hartley, "The European Court, Judicial Objectivity and the Constitution of the European Union" (1996) *Law Quarterly Review* Vol. 112 95 (hereinafter Hartley, 1996).

<sup>12</sup> Hartley, 1996: 96.

<sup>13</sup> Case 26/62 *Van Gend en Loos (NV Algemene Transporten Expeditie Onderneming) v Nederlandse Administratie der Belastingen* [1963] ECR 1 97 (hereinafter *Van Gend en Loos*).

<sup>14</sup> Case 6/64 *Costa v ENEL* [1964] ECR 585 (hereinafter *Costa v ENEL*).

supremacy were clear examples of the Court imputing a meaning into the (then) TEEC, which had made no provision for either of those principles i.e. “outside the text” interpretations.

There are two (related) problems with these arguments. The first is that they are based on a parochial theory of legal reasoning. To argue that judges must only give effect to clear and unambiguous legal text, and must not impute any meaning to such legal text, is both disingenuous and ignores a very rich literature in legal theory on the legal reasoning of judges.<sup>15</sup> Much of that literature is premised on the notion that unclear and ambiguous legal texts, from whatever authoritative source, are inevitable; and that it is moreover a necessary part of the judge’s duty to give meaning to such legal texts. Such an analytical premiss – the inevitability of ambiguous legal texts (legal indeterminacy) – is a relatively uncontroversial claim, and a commonplace understanding for those working in legal scholarship and legal practice.<sup>16</sup>

The second problem with their arguments builds on the first. It is that the issue of legal indeterminacy is amplified in the context of EU law. Tridimas makes this point well in his contribution to the “activism” debate.<sup>17</sup> Here, he refers to the open-textured nature of EU law (especially the Treaties<sup>18</sup>) i.e. that EU law is inherently and necessarily drafted in such a way that gives rise to greater degrees of legal indeterminacy.<sup>19</sup> He elaborates on this by presenting reasons why the EU legal texts should not be relied on in the same way as, for example, the text of English statutes. This is because of the style of drafting of the former, and its inherent multi-lingual nature. He contrasts the Treaties’ style of drafting with that of English statutes;

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<sup>15</sup> This literature is discussed in greater depth in Chapter Three. An example of an important and pertinent contribution is Neil MacCormick, *Legal Reasoning and Legal Theory*, Oxford: Clarendon Press, 1994 (hereinafter MacCormick, 1994).

<sup>16</sup> See Lord Goff in *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737.

<sup>17</sup> Takis Tridimas, “The Court of Justice and Judicial Activism” (1996) *European Law Review* Vol. 21 199 (hereinafter Tridimas, 1996): 203, 204.

<sup>18</sup> Then, the Treaty on European Union (1992) OJ C 224/02 (hereinafter TEU (pre-Nice)); and the TEC (pre-Nice).

<sup>19</sup> This point is of analytical significance for the arguments made in this thesis, and will be addressed in greater depth in Chapter Three.

unlike the latter, they take their form from a Civilian tradition of deliberately imprecise, codified, broad statements of principle. In addition to this, Tridimas notes that the process by which the substantive content of the Treaties was decided was a compromise between the competing policy views of Member States, which required unanimity and thus broader articulations in the hope that they would be narrowed down by the Court of Justice.<sup>20</sup> Moreover, the multiplicity of official languages of the (then) Community reduced any sense of objective authority of the wording of the Treaties. It should be noted that all of these considerations have even greater weight today in the juridically, politically, territorially and linguistically expanded EU. It is for these reasons that Tridimas argues that the Union's judiciary ought not to rely so heavily on the wording of the Treaties when performing its interpretive duty.<sup>21</sup>

It is rare, however, for scholars to defend such a disingenuous view so dogmatically.<sup>22</sup> Yet the literal school represents an important point of departure from which scholars can argue for different methods of legitimate judicial interpretation of indeterminate legal text. The remainder of Section 2.1 will outline three schools of thought which all share, to varying degrees, the "inevitability" postulate; and share the ambition of proposing a method of interpretation in the instance of legal indeterminacy.

### 2.1.2. The Teleological School of Thought

The teleological school of thought (as with the following schools) seeks to fill the void of open-textured EU law according to a method of judicial interpretation.<sup>23</sup> A

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<sup>20</sup> Tridimas, 1996: 204.

<sup>21</sup> See also Anthony Arnall, "The European Court and Judicial Objectivity: A Reply to Professor Hartley" (1996) *Law Quarterly Review* Vol. 112 411 (hereinafter Arnall, 1996). See also Pierre Pescatore, "The Doctrine of 'Direct Effect': An Infant Disease of Community Law" (1983) *European Law Review* Vol. 8 155 (hereinafter Pescatore, 1983).

<sup>22</sup> Hartley does propose "justifications" for the Court's interpretive behaviour (pp. 102-109). These only account, however, for counter-arguments to his thesis rather than suggest a workable alternative thesis. He ultimately rejects them in any event.

<sup>23</sup> Article 19 (1) of the Treaty on European Union (2010) OJ C 83/13 (hereinafter TEU) provides that the Court is to "ensure that in the interpretation and application of the Treaties the law is observed."

teleological method of interpretation is an interpretive method by which the Judges of the Court of Justice fill in the blanks of indeterminate Union law according to a particular vision of what the EU is, or what the EU is to become – a *telos*.<sup>24</sup> Tridimas puts it in the following way:

Where issues are raised before the Court on which the text of the Treaty provides little or no guidance, the Court takes into consideration ... the objectives of the Treaty and it is a specific application of the teleological method of interpretation...<sup>25</sup>

A familiar example is the Court's instrumental use of the preamble to the Treaties. Most notably and recognisable is the drafters' resolve "to continue the process of creating *an ever closer union among the peoples of Europe*" (emphasis added) – a commitment that has survived since the inaugural Treaty of Rome.<sup>26</sup> So, in Pescatore's (a former ECJ judge) view, this part of the preamble is an important "structural element" that permits the Judges to interpret indeterminate Union law in such a way as to further European integration.<sup>27</sup>

As alluded to above, however, European integration is itself a broad church, and can be broken down into a variety of teleologies.<sup>28</sup> In this part of the Chapter, I will demonstrate two examples: variations of a *federal* EU; and variations of an *intergovernmental* EU.<sup>29</sup>

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<sup>24</sup> What the EU is or what it is to become is itself a complex issue (addressed in Chapter Two).

<sup>25</sup> Tridimas, 1996: 208.

<sup>26</sup> The Treaty of Rome, available at [http://ec.europa.eu/economy\\_finance/emu\\_history/documents/treaties/rometreaty2.pdf](http://ec.europa.eu/economy_finance/emu_history/documents/treaties/rometreaty2.pdf). See, now, Treaty of Lisbon: Amending the Treaty on European Union and the Treaty on Establishing the European Community (2007) OJ C 306/01 (hereinafter the Lisbon Treaty); and the preamble to the TEU.

<sup>27</sup> See generally Pescatore, 1983. Indeed, in a critical reply to Hartley (Hartley, 1996), Arnall argues that "[t]he Court can hardly be criticised for striving to construe the Treaty in a way which gives effect to its authors' overall design" (Arnall, 1996: 413). See also Hans Kutscher, "Methods of Interpretation: As Seen by a Judge at the Court of Justice" (September, 1976) *Judicial Academic and Conference; Luxembourg; Court of Justice of the European Communities Vol. I 1* (hereinafter Kutscher, 1976).

<sup>28</sup> It is by virtue of the frequency with which the preamble's "ever closer union" leitmotif is used, judicially and academically, that such a variety of, and often competing, visions of European integration have taken shape in the Court's legitimacy discourse.

<sup>29</sup> For an alternative *telos*, see Renaud Dehousse, *The European Court of Justice: the Politics of Judicial Integration*, Basingstoke, Macmillan, 1998. Dehousse argues for a teleological approach of

Visions of the EU as a federal or quasi-federal polity date back to its inception. For Koopmans, this political paradigm pertains to the inaugural Jean Monnet philosophy of a federal Europe: complete with an integrated economy; common political institutions; and peaceful international relations.<sup>30</sup> Indeed, this is the teleological basis for Mancini and Keeling's theory of interpretation.<sup>31</sup> Based also on the preamble to the Treaty, they envisage a European polity that is based on the rule of law and parliamentary democracy, which has been transmitted to the constitutional structuring of the EU by the objectives set out in the Treaty as if it were a "genetic code".<sup>32</sup> Following this logic, they consider that an important role of the Court is to protect and preserve the institutional balance of the EU (in terms of an orthodox conception of the separation of powers doctrine i.e. executive, legislative and judicial organs of state). In their view, then, the Court's interpretation of Article 173 TEEC (now Article 263 TFEU) in *Chernobyl* was legitimate. In that case, the Court decided that the European Parliament should be granted *locus standi* in the Treaty's annulment procedure, in spite of the Treaty's silence on the issue, and a prior ruling by the Court to the contrary.<sup>33</sup> Methodologically, their argument is premised on the Court's duty to interpret "the law" (*qua* Article 19 (1) TEU) in line with a teleological view of the EU as a federal polity.<sup>34</sup>

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judicial interpretation towards the ends of "market integration" i.e. the single market. See also Stephen Weatherill, "Law and the Economic Objectives of the Union" (Chapter Nine) in *Cases & Materials on EU Law (9<sup>th</sup> Edition)*, Oxford: Oxford University Press, 2010 (hereinafter Weatherill, 2010); and Niamh Nic Shuibhne, "The Free Movement of Goods and Article 28 EC: An Evolving Framework" (2002) *European Law Review* Vol. 27 No. 4 408 (hereinafter Nic Shuibhne, 2002). Nic Shuibhne argues that the Court has continued to rigorously develop the jurisprudence on Article 28 TEC (now Article 34 TFEU) so as to further the process of market integration by giving pride of place to the notion of "market access" in justifying its decisions.

<sup>30</sup> Thijmen Koopmans, "The Role of Law in the Next Stage of European Integration" (1986) *International and Comparative Law Quarterly* Vol. 35 925 (hereinafter Koopmans, 1986): 925.

<sup>31</sup> Federico Mancini and David Keeling, "Democracy and the European Court of Justice", (1994) *Modern Law Review* Vol. 57 No. 2 175 (hereinafter Mancini and Keeling, 1994).

<sup>32</sup> Mancini and Keeling, 1994: 186.

<sup>33</sup> Case 302/87 *Parliament v Council* [1988] ECR 5615 (hereinafter *Comitology*). In the aftermath of these jurisprudential developments, the EP was formally granted this privilege by subsequent Treaty amendments. See, most recently, Article 263 (2) TFEU.

<sup>34</sup> A similar analysis is presented by Komarek in relation to the Treaty's Preliminary Rulings procedure (Article 267 TFEU). See Jan Komarek, "In the Court(s) we Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure" (2007) *European Law Review* Vol. 32 No. 4 467 (hereinafter Komarek, 2007).

As we shall see in Section 2.2 of this Chapter, and in Chapter Two especially, there is a divisive controversy over whether or not a federal *telos* is legitimate. Standing in direct contention with that vision is the view that the EU is, and should remain, an *intergovernmental* association. Likewise, variations of the intergovernmental vision influence the views taken on legitimate judicial interpretation. An example of a debate in which this controversy arose was on the (now, since Lisbon, largely resolved) “depillarisation” of Union law.<sup>35</sup> Given that the division between the three pillars had a natural inclination to overlap, the Court of Justice’s incidental involvement in adjudicating on matters that did not squarely fall into its jurisdiction became a contested matter. Those that hold an intergovernmental view of the EU argue that the Judges should avoid interpreting the Treaty<sup>36</sup> in such a way that allows the Court to adjudicate on matters falling outwith its jurisdiction. Nicol forecasted the suitability of the Court extending supremacy (*qua Costa v ENEL*) to the EU’s (former) 2<sup>nd</sup> and 3<sup>rd</sup> pillar jurisdictions. He rejected the claims that the Court ought to extend this principle, because of an underlying intergovernmental teleological rationale.<sup>37</sup> Contrary to this view, analysing a case of a similar nature,<sup>38</sup> Tridimas approves of the Court’s reasoning in that it accords with teleological “policy

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<sup>35</sup> Prior to the coming into force of the Lisbon Treaty in December 2009, the jurisdiction of the EU was structured under three “pillars”: the first pillar was the largely supranational European Community, under which the Court of Justice was endowed with significant powers of judicial review; the second and third pillars related to matters of Common Foreign and Security Policy (hereinafter the CFSP), and the Area of Freedom Security and Justice (hereinafter the AFSJ), respectively. The second and third pillars were intergovernmental in nature, and the Court of Justice had limited powers with respect to the third pillar (see Article 35 of the Treaty on European Union (2006) OJ C 321 E/5 (hereinafter TEU (pre-Lisbon))); and even fewer with respect to the second pillar. Whilst the Lisbon Treaty formally abolished the Union’s pillar structure (symbolically at least), the divisions of jurisdiction and the Court’s powers remain functionally similar in some respects. For a detailed overview of this evolution, see Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials (5<sup>th</sup> Ed.)* (Oxford: Oxford University Press), 2011 (hereinafter Craig and de Búrca, 2011): Chapter One. For the jurisdiction of the Court now, see Appendix One.

<sup>36</sup> Specifically, Article 40 TEU (ex Article 47 TEU (pre-Lisbon)), which provides that the Union’s putatively intergovernmental competences (i.e. the former second and third pillars) “shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of” the Union’s supranational competences (i.e. the former first or Community pillar), over which the Court of Justice has significant supervisory powers.

<sup>37</sup> Danny Nicol, “Democracy, Supremacy and the ‘Intergovernmental’ Pillars of the European Union”, (2009) *Public Law* Apr 218 (hereinafter Nicol, 2009): 219. Nicol justifies this view on the basis that the Member States of the EU specifically wished to avoid the supremacy and supranationality of these competences – as can be elicited, in Nicol’s view, from legislative deliberations.

<sup>38</sup> Joined Cases C-402/05 and C-415/05, *Yassin Abdullah Kadi, Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities Case*, [2005] ECR II-3649 (hereinafter *Kadi*).



perspectives”.<sup>39</sup> One of the issues under consideration was the extent to which the open texture of Article 308 TEC<sup>40</sup> could allow for counter-terrorist sanctions to be applicable to individuals vis-à-vis Community regulations. Whilst disagreeing with some of the Court’s arguments, he concurs with the decision that the Community had such a competence given that “[t]he making of counter-terrorist policy, its implementation via binding legal measures, and its actual enforcement stand a much higher chance of being successful if they are coordinated at supra-national level.”<sup>41</sup>

### 2.1.3. The Razian School of Thought

As its name suggests, the analytical approach of proponents of this school of thought resonates with an important contribution to legal theory by Joseph Raz: specifically, Raz’s theory of the conceptual nature of *the rule of law*, which aptly describes the sorts of arguments that are often presented when defending a position on the legitimacy of the legal reasoning of the Court of Justice. Raz’s theory of the rule of law has been described as “formal”<sup>42</sup> and “legalistic”.<sup>43</sup> It is a theory that eschews *political* philosophies as underpinning the true nature of the rule of law,<sup>44</sup> and instead postulates that the rule of law is systemic – intrinsic to a *legal* system – and composed of four inter-connected virtues: non-retroactive law-making; clear rules of law; a judiciary that is independent from the political branches of governance (and,

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<sup>39</sup> Takis Tridimas, “Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order”, (2009) *European Law Review* Vol. 34 No. 1 103 (hereinafter Tridimas, 2009).

<sup>40</sup> Article 308 of the Treaty Establishing the European Community (2006) OJ C 321 E/37 (hereinafter TEC (pre-Lisbon)), now Article 352 TFEU.

<sup>41</sup> Tridimas, 2009: 108. Tridimas’ argument here overlaps with the Razian school of thought. This is returned to in Section 2.1.3. For similar views, see Koen Lenaerts and Tim Corthaut, “Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law” (2006) *European Law Review* Vol. 31 287 (hereinafter Lenaerts and Corthaut, 2006); and Maria Fletcher, “Extending ‘Indirect Effect’ to the Third Pillar: The Significance of Pupino?” (2005) *European Law Review* Vol. 30 862 (hereinafter Fletcher, 2005).

<sup>42</sup> Paul Craig, “Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework” (1997) *Public Law* Aut 467 (hereinafter Craig, 1997).

<sup>43</sup> Nicholas Barber, “Must Legalistic Conceptions of the Rule of Law Have a Social Dimension?” (2004) *Ratio Juris* Vol. 17 No. 4 474 (hereinafter Barber, 2004).

<sup>44</sup> Though this is challenged by Barber (Barber, 2004: 476-478).

indeed, any other authoritative institutions); and that the system be accessible.<sup>45</sup> These virtues are all necessary components of a legal system, which not only overlap, but are mutually dependent on each other i.e. systemic. The implication here, then, is that any one virtue not only cannot credibly be attained without the others, but also that the invocation of one or more of these virtues within a system of “law” necessitates the discovery and implementation of the others.

The link to the work of the Court of Justice should thus be obvious to those familiar with its evolutionary jurisprudence – especially its putatively “constitutional” jurisprudence. Some of the most (in)famous and influential cases of the Court of Justice have been justified on the basis of “general legal principles” (some of which are not, or were not at the pertinent time,<sup>46</sup> present in the Treaties):

The general principles have been largely fashioned by the Union Courts. They have read principles such as proportionality, fundamental rights, legal certainty, legitimate expectations, equality, the precautionary principle, and procedural justice into the Treaty, and used them as the foundation for judicial review ...<sup>47</sup>

These principles all resonate, in one way or another, with Raz’s four virtues. Furthermore, they are mutually dependant in order for their justification i.e. they are systemic.<sup>48</sup> Proponents within this school of thought regard these general principles, and juridical developments, as a legitimate means by which the Judges of the Court of Justice can interpret indeterminate Union law. Leczykiewicz argues that all judges

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<sup>45</sup> Joseph Raz “The Rule of Law and its Virtue” in Joseph Raz, *The Authority of Law*, Oxford: Oxford University Press, 1979: 210–29 (hereinafter Raz, 1979).

<sup>46</sup> See the now largely justiciable Charter of Fundamental Rights of the European Union (2010) OJ C 83/389 (hereinafter the Charter of Fundamental Rights)

<sup>47</sup> Craig and de Búrca, 2011: 109.

<sup>48</sup> Consider, for example, that the Court of Justice justified the invocation of direct effect (*Van Gend en Loos*) and supremacy (*Costa v ENEL*) on the basis that the Treaty of Rome had established a “new legal order”. Consider, then, how further general principles of law – recognised as authoritative by the Court of Justice – that have been discovered by the Court have been justified on that foundation and its progeny: Case 29/69 *Stauder v City of Ulm* [1969] ECR 419 (fundamental rights); *Les Verts* (procedural fairness and the *constitutional basis* of the new legal order); Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Eygnadsarbetareförbundets avd. 1, Byggettan, Svenska Elekrikerförbundet* [2007] ECR I11767 (hereinafter *Laval*); and Case C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti* ECR I-10779 (hereinafter *Viking Line*) on social rights.

need to use such “legal concepts” in order to justify their legal reasoning.<sup>49</sup> But she also argues that there is an even greater need for the Court of Justice’s Judges. Legal concepts, she argues, are necessary in the EU for “system-building” by the Court – especially because of the inchoate and contested nature of the EU polity:

In light of those difficulties, the authority of Community law and therefore the proof that the Community has a legal system has to be deduced from other sources, for example from the fact of observance of *the rule of law* or from the *coherence* of the system. The role of legal concepts is especially important in those theories that relate the authority of law to its coherent, systematic character.<sup>50</sup>

A variant of this logic is – instead of “system building” – systemic *effectiveness* i.e. without the invocation or use of the legal concept, the legal system would be functionally ineffective. Dehousse captures this point well:

Supremacy of Community law is in many respects the *logical corollary* of the doctrine of direct effect developed by the Court; similarly the ECJ developed a closer interest in the protection of human rights in reaction to the dangers facing the doctrine of supremacy.<sup>51</sup>

The commentary on the Court’s putative “depillarisation” jurisprudence is indicative of this trend. Fletcher’s observations of the Court’s decision *Pupino*<sup>52</sup> are a good example of this.<sup>53</sup> In *Pupino*, the Court extended the principle of “indirect effect” from the first pillar’s legal framework into the third pillar – holding particular

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<sup>49</sup> Dorota Leczykiewicz, “Why Do the European Court of Justice Judges Need Legal Concepts?” (2008) *European Law Journal* Vol. 14 No. 6 773 (hereinafter Leczykiewicz, 2008).

<sup>50</sup> Leczykiewicz, 2008: 784 (emphasis added). “Coherence” – again, which resonates with the Razian virtues – is meant in the MacCormick sense of the concept (MacCormick, 1994). See also Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice*, Oxford: Clarendon Press, 1993.

<sup>51</sup> Dehousse, 1998: 95 (emphasis added).

<sup>52</sup> Case C-105/03 *Criminal proceedings against Pupino* [2005] ECR I-5285 (hereinafter *Pupino*).

<sup>53</sup> Fletcher, 2005. For a similar analysis, see Simone White, “Harmonisation of Criminal Law Under the First Pillar” (2006) *European Law Review* Vol. 31 No. 1 81 (hereinafter White, 2006): 90. Commentary on *Kadi* has reignited some of these arguments. Cardwell et al, for example, argue that the contention that UN legal norms should have primacy over Community law “seemed incompatible with the whole tenor of the ECJ’s jurisprudence on fundamental rights.” See Paul Cardwell, Duncan French and Nigel White, “Case Comment *Kadi v Council of the European Union* (C-402/05 P)” (2009) *International and Comparative Law Quarterly* Vol. 58 No. 1 229: 234.

significance for national courts, individuals and the EU's AFSJ – raising the question of how the Court justified this development in its reasoning. Fletcher observes that the duties of “harmonious interpretation” and “loyal co-operation” were the principal justifications for this development. These principles do not appear explicitly in the Treaties, but have been adopted as general legal principles which guide the Court's legal reasoning. Approving of this approach, Fletcher reinforces the argument by observing the Court's consideration of other general principles of law extraneous to the Treaties: non-retroactivity and legal certainty. She argues that the duty of loyal co-operation should not operate *contra legem* with respect to the precise meaning of national law (albeit with a very rigid application).<sup>54</sup> Without the cross-fertilisation of legal principles between the Union's jurisdictions, Union law would be ineffective.

#### 2.1.4. The School of Socio-Political Responsiveness

The conceptual distinctiveness of this school of thought – compared to the distinction between the former two – is much clearer, and more radical. According to this school of thought, when the Judges are to interpret indeterminate Union law, they ought to do so by inferring observable preferences from the social and/or political environment within which they adjudicate. It is a theory of legal reasoning which eschews axiomatic conceptions of constitutional interpretation – what Hjalte Rasmussen referred to as the “legal purity approach”<sup>55</sup> – and, instead, places an emphasis on looking towards so-called “real world” sources. Rasmussen, for

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<sup>54</sup> Notably, these principles mirror those pronounced by the Court in relation to the indirect “horizontal” effect of first pillar directives in Case 14/83 *Von Colson and Kamann* [1984] ECR 1891 (hereinafter *Von Colson*).

<sup>55</sup> Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study on Judicial Policymaking*, Dordrecht; Lancaster: Nijhoff, 1986 (hereinafter Rasmussen, 1986): 180. Rasmussen adopted this methodological approach in relation to the Court of Justice following the work of *inter alia* Bredimas (see Anna Bredimas, *Methods of Interpretation and Community Law*, Amsterdam; New York; Oxford: North-Holland, 1978 (hereinafter Bredimas, 1978)). Rasmussen's thesis (and *a priori* many aspects of the analytical approach of the socio-political school) has received much (often mis-guided) criticism. See Mauro Cappelletti, “Is the European Court of Justice ‘running wild’?” (1987) 12 *European Law Review* Vol. 12 3 (hereinafter Cappelletti, 1987); and Joseph Weiler, “The Court of Justice on Trial” (1987) *Common Market Law Review* Vol. 24 555 (hereinafter Weiler, 1987).

example, asks “how liberally may the Community judge... give preference to teleology over text; to some nebulous *effet necessaire* over Treaty-provisions which do not ordain such an effect?”<sup>56</sup> Similarly, and with an eye to the Razian school of thought, Everson and Eisner argue:

‘General principles of law’ may very well constitute a necessary formalist glue of law-internal self-illusion. In a real-world, however, ‘general’ legal principles are meaningless: no more than a theoretic mantra of judicial self-justification. The principled mechanics of constitutional morphogenesis must instead be proximate to a real-world ... in light of experience.<sup>57</sup>

How, then, can the Judges interpret indeterminate Union law in this responsive way? For Rasmussen, the judiciary is “responsible for taking the body politic’s pulse in order to verify whether an actual activism is acceptable or not.”<sup>58</sup> This is to be measured, empirically, as an assessment of the views of the “countervailing powers”<sup>59</sup> which can be inferred from the “welcoming [of] judicial involvement in the political affairs of government to launching court-curbing or even court-destroying initiatives.”<sup>60</sup> Thus, the appropriate yardstick by which unwarranted activism – i.e. illegitimate interpretations of indeterminate Union law – can be determined is the existence of expressions of disapproval from the political institutions of the EU.<sup>61</sup>

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<sup>56</sup> Hjalte Rasmussen, “Between Self-restraint and Activism: A Judicial Policy for the European Court” (1988) 13 *European Law Review* Vol. 13 28 (hereinafter Rasmussen, 1988): 33.

<sup>57</sup> Everson and Eisner, 2009: 174. Throughout their thesis, they refer to “formalist” legal reasoning as “transcendental nonsense”.

<sup>58</sup> Rasmussen, 1986: 17.

<sup>59</sup> These are the *political* institutions of the polity, such as (in the EU) the European Commission, the EP, national parliaments, etc.

<sup>60</sup> Rasmussen, 1986: 17. Rasmussen borrowed this empirical method from Joutsamo (Karl Joutsamo, *The role of Preliminary Rulings in the European Communities*, Turku: Suomalainen tiedeakatemia, 1979). For Joutsamo, it is necessary for there to be “rationality” in the Court’s judgments because it is a supreme court, and hence the judgments must reflect and adapt to changing social conditions.

<sup>61</sup> Weiler is critical of this method. Whilst he believes that this method should have a role to play in constitutional adjudication, he does not believe that the existence of negative political inputs “becomes a sign of judicial impropriety” (Weiler, 1987: 578). In the first place, along with Cappelletti, Weiler argues that there is a constitutional need for there to be judicial resistance to political powers i.e. judicial independence (Weiler, 1987; and Cappelletti, 1987). Weiler also observes that it would not be of much practical use for individual cases anyway. This would be problematic not

Another variant of this school of thought is the idea of constitutional dialoguing. “Dialoguing” is used broadly here to mean the exchange of ideas (relevant to constitutional interpretation of indeterminate law) between the Court and other institutions of (social, legal and/or political) authority – *ex ante* responsiveness, as opposed to the former variant’s *ex post* responsiveness. Whereas in Section 2.2.3, we will see theories on how the Court of Justice ought to dialogue with other *courts* (national and transnational), the school of socio-political responsiveness is not limited to *judicial* dialoguing.<sup>62</sup> Everson and Eisner argue for an interpretive methodology for neutrally responding to the EU’s social and political environment. Following a Habermasian proceduralist logic,<sup>63</sup> this neutral responsiveness is achieved through the Judges’ deference to deliberative politics that are on-going between social and political institutions.<sup>64</sup> The responsiveness of the Court to its social and political real-world environment is a mechanism that allows, as much as possible, social, political and, importantly, yet-to-be social and political actors to play out their political deliberations *inter se*. In this way, the Court plays a facilitative role in ensuring “that the only appropriate conduit between legal and extra-legal environments, ‘politics’, functions in an open, honest and transparent manner”.<sup>65</sup> The Court achieves this by channelling these extra-legal deliberations through its politically-neutral procedural criteria of rationality, subsidiarity and proportionality.<sup>66</sup> They eschew teleological explanations – such as the Court’s

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least because the empirical methods proposed by Rasmussen (and others) do not avail themselves of a clear analytical process for reaching clear and precise solutions – much less by judges.

<sup>62</sup> On judicial dialoguing in the Court of Justice, see Charles Sabel and Oliver Gerstenberg, “Constitutionalising an Overlapping Consensus: the ECJ and the Emergence of a Coordinate Constitutional Order” (2010) *European Law Journal* Vol. 16 511 (hereinafter Sabel and Gerstenberg, 2010).

<sup>63</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge: Polity Press, 1995 (hereinafter Habermas, 1995); and Jürgen Habermas, “Paradigms of Law” in *Habermas on Law and Democracy: Critical Exchanges*, edited by Michel Rosenfeld and Andrew Arato, Berkeley, California; London: University of California Press, 1998: Chapter One (hereinafter Habermas, 1998).

<sup>64</sup> Everson and Eisner, 2009: Chapter Six and Chapter Seven.

<sup>65</sup> Everson and Eisner, 2009: 222.

<sup>66</sup> For some criticisms of this argument, see Ross Carrick, Review of *The Making of a European Constitution: Judges and Law Beyond Constitutive Power* by Michelle Everson and Julia Eisner (London and New York: Routledge, 2009), (2011) *European Law Journal* Vol. 17 No.1 138: 139 – 140.

propensity towards increasing majoritarianism in the EU – which necessarily implicate the Judges in matters of political contestation.<sup>67</sup>

This rationale has links to a final variant within this school of thought: that the Judges ought to interpret indeterminate Union law according to what they perceive to be the shortcomings of the legislature i.e. how the legislature – by way of Treaty amendments (especially), ordinary, and delegated legislative procedures – *would have* framed the law given the foresight.<sup>68</sup> In this regard, Dehousse considers the decision in *Reyners*.<sup>69</sup> In this case a Dutch national sought the right to practise at the Belgian bar. In the absence of legislative measures, the Court decided that the general provisions of law<sup>70</sup> were sufficient to impose the negative obligation on the Belgian State – prohibiting it from making a nationality discrimination that would prevent the Dutch individual from practising at the bar. This was largely justified because, as Dehousse puts it, “the shortcomings of the Community legislature could not be allowed to imperil the implementation of the provisions of the Treaty.”<sup>71</sup>

## 2.2. Theories of EU Constitutionalism

The other main analytical approach in the activism literature is evaluating the legitimacy of the Court of Justice according to theories of EU constitutionalism, which determine the nature of the Court of Justice: what type of court is the Court of Justice? As was alluded to in Section 2.1.2, theories of EU constitutionalism are abundant, complex and contested. A theory of EU constitutionalism informs an analysis of legitimate institutional functioning by, first, asking “what sort of polity is the EU?”; and then, “what sort of institutional configuration should support this polity?” What is distinctive in the EU about the relationship between these analytical questions is the complex, contested and ever-changing nature of the polity itself, and

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<sup>67</sup> Everson and Eisner, 2009: Chapter Six.

<sup>68</sup> This point is also argued by Everson and Eisner, using *Les Verts* as an example.

<sup>69</sup> Case 2/74 *Reyners v Belgium* [1974] ECR 631 (hereinafter *Reyners*).

<sup>70</sup> In this case, the freedom of establishment under Article 52 TEEC (now Article 49 TFEU).

<sup>71</sup> Dehousse, 1998: 75.

the corollary questions in EU constitutional theory.<sup>72</sup> The former “what polity-type” question can be characterised in terms of the sort of political form the EU takes. Is it an intergovernmental international agreement; a federal or quasi-federal polity; or something in-between? I refer to this line of enquiry as the “spectrum of polity-type”. The second question runs in parallel to the first, and considers the question of *constitutional supremacy*: in which institutions – in particular, here, *judicial* institutions – does constitutional supremacy lie? Is it with the Member States’ courts; is it with the EU’s courts; or does it lie somewhere in-between? A view on the former set of questions will naturally inform a view on the latter, which I refer to as the “spectrum of vertical<sup>73</sup> constitutional supremacy”. Both of these analytical queries serve to identify a normative basis on which the legitimacy of the Court’s functions can be gauged – in particular, the second question on vertical constitutional supremacy. In this sub-section, we consider three schools of thought on these questions: the school of intergovernmental arbitration; the federal Court; and the *sui generis* Court.

### 2.2.1. The School of Intergovernmental Arbitration

This school exists at the intergovernmental end of “the spectrum of polity-type”. Its proponents advocate, primarily, that the EU is, and should be nothing more than, an international agreement between its Member States, for which the EU’s institutions (like the Court of Justice) merely implement its political ends.<sup>74</sup> As such, the

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<sup>72</sup> In Section 4 of Chapter Two, we take a closer look at these theories. Here, we are concerned only with the ways in which these perspectives inform the activist literature.

<sup>73</sup> To be distinguished from “horizontal” questions of constitutional functioning. Given the different ways constitutional power can be divided between political institutions (according to one perspective or another on a theory of “separation of powers”), how can “law-making” and “law applying” functions be divided between the EU’s institutions (as opposed to a division between EU and national judicial institutions)? The former is addressed in greater depth in Chapter Two. On horizontal divisions of power, see Nicholas Barber, “Prelude to the Separation of Powers” (2001) *Cambridge Law Journal* Vol. 60 No. 1 59 (hereinafter Barber, 2001). On these issues, as they pertain to the EU, see Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State*, Oxford: Oxford University Press, 2009 (Carolan, 2009).

<sup>74</sup> Dehousse, for example, (critically) explains the intergovernmentalist view of the *instrumental* role that the Court of Justice plays in achieving the political ends of market integration. Dehousse, 1998: 70, 78-93.



question of legitimate authority lies squarely in the domain of Member State sovereignty. On the parallel “spectrum of vertical constitutional supremacy”, constitutional supremacy rests with the Member States’ institutions. The constitutional authority of the EU’s institutions is thus either non-existent, or there is a minimal degree of authority based on the vicarious monist or dualist notions of (Member) state sovereignty. These arguments emphasise that the authority of the EU’s institutions is derived from the requisite “permission” – in one shape or form – from the retained constitutional authority of the Member States’ institutions. For example, Dyèvre takes the view that the EU not only does not have a constitution, but also that it is a political structure incapable of constitutionalisation.<sup>75</sup> He based this view in an observation of the political structure of the EU: that, without political autonomy, it is inappropriate to consider the EU in constitutional terms (unlike the sovereign state). The constitutional authority of the Court of Justice is thus fictional, which ultimately derives from the sovereign powers of the Member States, and particularly their national courts which afford the Court legal validity.<sup>76</sup> Indeed, this is the paradigmatic basis of Hartley’s and Neill’s indictments of the Court’s “activist” decisions. They argue that the Court’s interpretive duty is determined by an intergovernmentalist paradigm, and not by federalism.<sup>77</sup> This is a difficult argument to sustain in that it does not convincingly address the significant “supranational” aspects of the EU and its Court of Justice – particularly given what the Court has contributed to the development of the single market (and, more broadly, the jurisdiction formerly referred to as the “Community pillar”).<sup>78</sup>

Nevertheless, there was much greater scope and support for this school of thought with respect to the CFSP and the AFSJ (the pre-Lisbon TEU’s second and third pillars). There are those who argue that, because those competences are

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<sup>75</sup> Arthur Dyèvre, “The Constitutionalisation of the European Union: Discourse, Present, Future and Facts” (2005) *European Law Review* Vol. 30 165 (hereinafter Dyèvre, 2005).

<sup>76</sup> Dyèvre, 2005: 178, 179.

<sup>77</sup> Hartley, 1996; and Neill, 1995: 2.

<sup>78</sup> The supranational aspects will be addressed in the Section 2.2.3, and in Section 4 of Chapter Two. For an overview, see Joseph Weiler, “The Transformation of Europe” (1991) *The Yale Law Journal* Vol. 100 2403 (hereinafter Weiler, 1991). See also Joseph Weiler, “The Community System: The Dual Character of Supranationalism” (1981) *Yearbook of European Law* Vol 1 267.

intergovernmental by design, the Court must respect that arrangement in its judgments.<sup>79</sup> In his commentary on *Kadi*, Tomuschat argues that these areas of law should retain a commitment to general principles of international law – being part of the over-arching international community – and that the EU should be subject to the rules of the UN Security Council. He thus rejects the notion of an autonomous (i.e. supranational) EU fundamental rights jurisprudence (*qua Internationale Handelsgesellschaft*<sup>80</sup>).<sup>81</sup> Bernd Meyring, by emphasising the intergovernmental nature of the (then) third pillar, observes the legal limitations on the application of the norms therein:

[The first pillar] establishing a Community based on the rule of law, relies upon the principles of supremacy and direct effect. In the framework of the two ‘intergovernmental’ pillars we are no longer in this legal order. Therefore, measures under the third pillar do not have the same effect as Community Law does.<sup>82</sup>

The most generous admission of EU constitutional authority for this school is one that grants the EU’s institutions a vicarious or derivative authority from the Member States’ sovereign cores – along the lines of *das Bundesverfassungsgericht*’s famous

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<sup>79</sup> This is so in relation to the “depillarisation” cases (See Section 2.1.3).

<sup>80</sup> Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125 (hereinafter *Internationale*). A case in which (following *Stauder*) the autonomy of the (then) EC’s competence in fundamental rights was affirmed.

<sup>81</sup> Christian Tomuschat, “Note on *Kadi v Council and Commission* (CFI)” (2006) *Common Market Law Review* Vol. 43 537.

<sup>82</sup> Bernd Meyring, “Intergovernmentalism and Supranationality: Two Stereotypes for a Complex Reality” (1997) *European Law Review* Vol. 22 No. 3 221 (hereinafter Meyring, 1997): 231. Nicol, however, forecasts the extension of the principle of supremacy to the (then) third pillar, and notes that “in stark contrast to art.234 EC [now Article 267 TFEU], it is optional for Member States whether to accept the ECJ’s jurisdiction under the Art.35 regime [see, now, Article 10 of Title VII, Protocol (No 36) TEU On Transitional Provisions (2010) OJ C 83/322 (hereinafter Protocol 36)]. They are free to choose not to accept the ECJ’s jurisdiction at all ... The limited jurisdiction of the ECJ lends a strong intergovernmental flavour to the third pillar, and differentiates EU framework decisions sharply from EC directives” (Nicol, 2009: 220). There are normative arguments and empirical indications to the contrary. Commenting on the Court’s extension of criminal sanctions into the Community (first) pillar in *Council v Commission* (and the “depillarisation” jurisprudence more generally), White observes that it has reignited the discussion of “communitarian vs intergovernmental” schools of thought., and delivers quite a blow to the intergovernmentalist way of thinking (White, 2006: 86). See also Fletcher, 2005; and Lenaerts and Corthaut, 2006.

*Brunner* rationale.<sup>83</sup> It retains its conceptual premiss of national constitutional supremacy, whilst offering an explanation for how the Court has successfully functioned beyond that limit. Nicol notes that, in the UK, the supremacy of EU law is ultimately derived from the UK's European Communities Act 1972, and not from any source of Union law i.e. the Court's jurisprudence.<sup>84</sup>

A variant of this argument is that the Court of Justice's institutional authority is derived (also) from the compliance of national courts in applying its interpretations under Article 267 TFEU, and its jurisprudence more generally, in cases before national courts.<sup>85</sup> Arnall argues, for example, that national court discretion (as to whether or not to use an Article 267 TFEU preliminary ruling) encourages national courts to decide points of Union law for themselves, which can jeopardise its uniform application across the Member States.<sup>86</sup> In a similar vein, Nyikos argues that, given their discretion, national judiciaries use the preliminary rulings procedure as a means of directing the meaning and application of Union law according to their own juridical preferences, as opposed to treating the Court of Justice as a constitutional court that has constitutional supremacy.<sup>87</sup>

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<sup>83</sup> See Case 2 BvR 2134/92 & 2159/92 *Manfred Brunner and Others vs. The European Union Treaty* (1994) *CMLR* 57 (hereinafter *Brunner*); and was more recently rearticulated in the wake of the Lisbon Treaty ratification judgment; available at [http://www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html) (hereinafter the Lisbon Judgment). See especially Paras 99-114, 136-165, and 298-350. See also Daniel Thym, "In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court" (2009) *Common Market Law Review* Vol. 46 1795.

<sup>84</sup> Nicol, 2009: 226. Yet he does not reflect the nuance of the the House of Lords' judgment in *R v Secretary of State for Transport ex. p. Factortame (No.2)* [1991] AC 603 (hereinafter *Factortame II*): 658 onwards, which, it should be noted, followed a preliminary ruling from the Court of Justice in C-213/89 *R v Secretary of State for Transport ex. p. Factortame* [1990] ECR I-2433 (hereinafter *Factortame*).

<sup>85</sup> See Florence Giorgi and Nicolas Triart, "National Judges, Community Judges: Invitation to a Journey through the Looking-Glass – On the Need for Jurisdictions to Rethink the Inter-Systemic Relations beyond the Hierarchical Principle" (2008) *European Law Journal* Vol. 14 No. 6 693 (hereinafter Giorgi and Triart, 2008): 695-709. See also Craig and de Búrca, 2011: 268-296.

<sup>86</sup> Anthony Arnall, "The Past and Future of the Preliminary Rulings Procedure" (2002) *European Business Law Review* Vol. 13 No. 3 183.

<sup>87</sup> Stacy Nyikos, "Strategic Interaction Among Courts Within the Preliminary Reference Process – Stage 1: National Court Preemptive Opinions" (2006) *European Journal of Political Research* Vol. 45 527–550 (hereinafter Nyikos, 2006). In particular, she demonstrates how national courts have used the provision of "pre-emptive opinions" (in their summary of the legal and factual circumstances) as effective "rhetorical weapons" designed to secure their desired interpretation of Union law (Nyikos, 2006: 527 – 530).

The most damaging indictment, however, of the Court of Justice's constitutional supremacy (in favour of national judicial compliance) is the *Solange* jurisprudence and its progeny.<sup>88</sup> That case-law – emanating from *das Bundesverfassungsgericht* (but observed in other jurisdictions also<sup>89</sup>) – takes a strong stance against the supremacy of EU law by making it conditional on the compliance of EU law with national constitutional norms. In other words, where EU law (particularly EU legislation), or national implementing measures, do not comply with national constitutional principles, the national constitutional court reserves the right to be the ultimate arbiter of legal validity – *not* the Court of Justice.<sup>90</sup> In this regard, Meyring indicts the Court's fundamental rights jurisprudence with respect to the authority of *das Bundesverfassungsgericht*:

Since Community law requires its supremacy to be uniformly applicable and the ECJ has exclusive jurisdiction to decide whether it is applicable, this jurisprudence is a clear violation of Germany's obligations under Community law as interpreted by the ECJ.<sup>91</sup>

So, even with the admission of a degree of constitutional authority, the Court is required to function in such a way that does not offend national constitutional supremacy.

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<sup>88</sup> *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1974] 2 CMLR 540 (hereinafter *Solange I*); and *Re Wünsche Handelsgesellschaft* [1987] 3 CMLR 225 (hereinafter *Solange II*).

<sup>89</sup> See Massimo Fichera, "The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?" (2009) *European Law Journal* Vol.15 No.1 70 (hereinafter Fichera, 2009).

<sup>90</sup> For recent examples of this, in relation to the European Arrest Warrant, see Fichera, 2009: 81-96.

<sup>91</sup> Meyring, 1997: 226.

2.2.2. The Federal Court

Mancini and Keeling famously stated that the Treaties are endowed with a “genetic code”, which configures the institutions of the EU into a federal-type polity.<sup>92</sup> On the spectrum of polity-type, this school exists at the opposite end to the intergovernmentalist school. Proponents of this school believe either that the EU *is* a federal or quasi-federal polity; or that its institutions should behave as such for the purposes of integration towards that end.<sup>93</sup> The end result is the same: a normative appraisal that the Court of Justice’s functions accord with those normally attributed to supreme or constitutional courts of federal states.<sup>94</sup> In terms of vertical constitutional supremacy, then, the Court of Justice is the ultimate arbiter of legal validity with respect to matters pertaining to the Treaties. It is (or is to behave as) a *constitutional court* in the orthodox sense.

Due provides an empirical analysis of how the Court has acquitted itself in performing the function of a constitutional court:

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<sup>92</sup> Mancini and Keeling, 1994: 186.

<sup>93</sup> This distinction will be addressed further in Chapter Two. There is a distinct literature that explores the Court’s role in *shaping* the EU into a federal (or otherwise) polity – referred to under the rubric of “integration through law”. In Cappelletti, Seccombe and Weiler’s “Integration through Law” series, Cappelletti and Golay examine the dichotomy between national regulatory diversity and the uniformity of EU law (Mauro Cappelletti and David Golay, “The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration” in Cappelletti, M., Seccombe, M. and Weiler J. (gen. eds.), *Integration Through Law: Vol. I: Methods Tools and Institutions Book 2*, Berlin and New York, de Gruyter, 1986 (hereinafter Cappelletti and Golay, 1986): 260).

<sup>94</sup> There is a particularly strong comparative trend with the US Supreme Court and *das Bundesverfassungsgericht* of Germany. Much of the early work on the legitimacy of the Court of Justice was carried out by North American scholars in comparative law. Hay, for example, regarded the Court of Justice as a constitutional court within his paradigm of federal politics (Peter Hay, *Federalism and International Organization*, University of Illinois Press, 1966). See also AW Green, *Political Integration by Jurisprudence*, Sijthoff, Leyden, 1969. More recently, Shapiro observes that the Court, by comparison with the US Supreme Court, has the same functions with only superficial terminological or procedural differences; rather than constitutional, functional or systemic differences. He thus sees that, like the US supreme court, judicial review of legislation, human rights review, separation of powers review, and administrative review are necessary functions of the Court of Justice (see Martin Shapiro, “The US Supreme Court and the European Court of Justice Compared” in Anand Menon, Martin Schai eds., *Comparative Federalism: The European Union and the United States in Comparative Perspective*, Oxford University Press, 2006: 216). Whilst the trend of comparative scholarship is significant in itself, it shall not be examined any further in this review.

It is possible to conclude from this short examination of the case law that the Court of Justice has found ways and means for filling the gaps in the judicial system of the Treaty text so as to provide full judicial protection of Member States, Community institutions and individuals against encroachment upon their rights and to offer opportunities for the Court to decide on practically any issue of a constitutional character which may arise in a Community context. Without any doubt, the Court exercises the functions of a Constitutional Court for the Communities.<sup>95</sup>

As part of the same project, Jacobs considers the specific functions of the Court that are of a “constitutional character” to be inter-institutional review and legislative review.<sup>96</sup> Cappelletti argues that another quintessentially federalist function that the Court does, and should, perform, in the context of judicial review, is mediating a plurality of sources of law.<sup>97</sup> A good example of this is the Court’s fundamental rights jurisprudence, which explicitly incorporates the “constitutional traditions common to the Member States”.<sup>98</sup> Indeed, the judicial protection of fundamental rights of the individual is a common reference point in this school of thought.<sup>99</sup>

An important aspect of the Court’s competence within this school of thought is, of course, that it is the supreme constitutional arbiter of Union law (as opposed to national courts). Naturally, this sits in a tension with the intergovernmentalist school of thought and, in particular, the *Solange* jurisprudence. In terms of the Court’s relationship to national courts, Komarek argues that:

The Court of Justice is not merely a “supranational” court ... it has *become part of national* judicial structures. It is not like an international court acting *outside*

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<sup>95</sup> Ole Due, “A Constitutional Court for the European Communities?” in D. Curtin and D. O’keeffe, *Constitutional Adjudication in European Community and National Law, Essays for the Hon. Mr Justice TF O’Higgins*, Butterworth (Ireland) Ltd., 1992: 8.

<sup>96</sup> Francis Jacobs, “Is the Court of Justice of the European Communities a Constitutional Court?” in D. Curtin and D. O’keeffe, *Constitutional Adjudication in European Community and National Law, Essays for the Hon. Mr Justice TF O’Higgins*, Butterworth (Ireland) Ltd., 1992: 22-35.

<sup>97</sup> Cappelletti, 1987: 4-8.

<sup>98</sup> See *Internationale*: Para. 4.

<sup>99</sup> Van Gerven considers the protection of fundamental rights of the individual to be an important constitutional function of the Court (Walter van Gerven, “The Role and Structure of the European Judiciary Now and in the Future” (1996) *European Law Review* Vol. 21 211 (hereinafter van Gerven, 1996): 212).

national judicial systems, but rather a supreme court, whose task is to guide lower courts in their application of EU law... it acts as the EU Constitutional Court – deciding disputes concerning the division of powers, systemic principles of EU law or fundamental rights of those who are bound by it.<sup>100</sup>

Komarek's normative basis for this argument (like other proponents of this school) is the federal political paradigm. He goes on to argue that the preliminary rulings procedure should be reformed according to a "hierarchical system", which would transform the procedure into a system akin to an appeals process in a federal polity.<sup>101</sup> This rests on an assumption of unfettered constitutional supremacy of the Court, such that national courts should be hierarchically ranked. In a similar vein, Weatherill argues that, given the importance within federal states of the vertical relationship between federal and state institutions, the development of the principle of supremacy in the Court's jurisprudence was instrumental and necessary for legitimising its federal constitutional functions.<sup>102</sup> Indeed – in the context of fundamental rights adjudication, and with an eye to the *Solange* threshold from the national courts – the Court's jurisprudence not only emphasises its autonomy and supremacy, but also that the Court has its own "version" of the *Solange* jurisprudence (hereinafter referred to as the reverse-*Solange* jurisprudence). In cases like *Schmidberger*<sup>103</sup> and *Omega Spielhallen*,<sup>104</sup> the Court has deferred to the standards of fundamental rights protection set by national authorities *so long as* they do not fall below the minimum standard provided by EU fundamental rights at the level protected by the Court of Justice.

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<sup>100</sup> Komarek, 2007: 484.

<sup>101</sup> See also Pescatore, 1983.

<sup>102</sup> Stephen Weatherill, *Law and Integration in the European Union*, Clarendon Press, 1995 (hereinafter Weatherill, 1995): 187-189. He goes on to highlight that the Court's powers of judicial review, for the institutions (notably the European Parliament) and individuals, are necessary and exemplary constitutional functions (Weatherill, 1995: 189-205).

<sup>103</sup> Case C-112/00 *Schmidberger v Austria* [2003] ECR I-5659 (hereinafter *Schmidberger*).

<sup>104</sup> Case C-36/02 *Omega Spielhallen* [2004] ECR I-9609 (hereinafter *Omega*).

2.2.3. The Sui Generis Court

This school of thought proposes that the Court and its political environment hold distinctive qualities that demand a unique type of judicial function. In terms of the spectrum of polity-type, this school exists in a murky tension between the intergovernmental school and the federal school. Many accounts of the EU here are based on the idea of the EU as a “supranational” political and legal order that does not conform to the orthodoxies of international law and legal systems.<sup>105</sup> There are also accounts of the EU which deliberately eschew axiomatic taxonomies, instead simply emphasising that it is a polity *sui generis*.<sup>106</sup> There is a quintessentially postmodern approach to this school of thought, which has a very diverse and rich literature (see Chapter Two).

In terms of the “spectrum of vertical constitutional supremacy”, this school of thought tends to reject the notion of constitutional supremacy as a zero-sum game; or to reject the premiss that it is a necessary condition for effective institutional functioning. Instead, the Court of Justice – on account of the distinctive social, legal and political environment within which it functions – is a Court *sui generis*, and functions legitimately according to varying criteria. Petersmann, for example, compares the Court of Justice with the European Court of Human Rights (hereinafter the ECtHR) and the European Free Trade Area court, and argues that the EU is a *sui generis* political organisation that functions according to the precepts of “multi-level judicial governance”.<sup>107</sup> Underpinning this political organisation is a bottom-up, citizen-oriented notion of constitutional justice – with the analytical premiss that the citizen is the political subject and political institutions their agents. As such, these

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<sup>105</sup> See, famously, Weiler, 1991.

<sup>106</sup> See Deirdre Curtin, *Postnational Democracy: the European Union in Search of a Political Philosophy*, The Hague, London: Kluwer Law International, 1997 (hereinafter Curtin, 1997).

<sup>107</sup> Ernst-Ulrich Petersmann, “Judging Judges: from ‘Principal-agent Theory’ to ‘Constitutional Justice’ in Multilevel ‘Judicial Governance’ of Economic Cooperation Among Citizens” (2008) *Journal of International Economic Law* Vol. 11 No. 4 827 (hereinafter Petersmann, 2008): 827, 828.



structures “transcend the intergovernmental structures of European law by focussing on ... [individuals] rather than on state interests in intergovernmental relations.”<sup>108</sup>

The distinctiveness of this type of political structure in terms of vertical constitutional legitimacy is two-fold. First, as Petersmann has attested to, the focus of constitutional supremacy becomes instrumental towards the ends of citizens and not those of the Member States or the EU. Secondly, constitutional legitimacy is borne out of a tension between Member States and the EU (the actors) in terms of constitutional supremacy.

One solution to this tension in this school of thought is found in the notion of constitutional pluralism, in which both national and EU institutions enjoy a degree of constitutional autonomy simultaneously and in a non-hierarchical way. So, instead of the imposition of authority on one institution by another, constitutional pluralism operates by way of inter-institutional co-operation, or, in the words of Weiler:

[When Member States] are told: in the name of the peoples of Europe, you are invited to obey ... When acceptance and subordination is voluntary, it constitutes an act of true liberty and emancipation from collective self-arrogance and constitutional fetishism: a high expression of *Constitutional Tolerance*.<sup>109</sup>

A delicate balance has to be struck in order for constitutional pluralism to be a sustainable and legitimising force. It is in preserving this balance that proponents of this school find their normative criteria to determine the Court’s legitimate institutional functions. This is argued by many to be found in what Maduro refers to

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<sup>108</sup> Petersmann, 2008: 850. For a similar argument, see Daniel Halberstam, “The Bride of Messina: Constitutionalism and Democracy in Europe” (2005) *European Law Review* Vol. 30 No. 6 775 (hereinafter Halberstam, 2005): 798.

<sup>109</sup> Joseph Weiler, “Federalism and Constitutionalism: Europe’s Sonderweg” (2000) *Harvard Jean Monnet Paper* 10/2000, available at <http://jeanmonnetprogram.org/papers/00/001001.html>. Emphasis added. Martinico and Pollicino argue that this pluralist approach provides a unique kind of authority to the Court’s decisions by virtue of its “moral and intellectual prestige”, which results in voluntary obedience by national courts. See Giuseppe Martinico and Oreste Pollicino, “Between Constitutional Tolerance and Judicial Activism: the ‘Specificity’ of European Judicial Law” (2008) *European Journal of Law Reform* Vol. 10 No. 1 125 (hereinafter Martinico and Pollicino, 2008): 128.

as “contrapunctual law”.<sup>110</sup> This refers to a “reflexive dialogue” between the Court of Justice and the Member States’ constitutional courts within which rules and principles of law shared between the jurisdictions are developed in “universal” terms so as to be accommodating to the juridical preferences of all affected overlapping legal orders. This way, the issue of constitutional supremacy between the courts, and the tensions that emerge (as we have seen in the *Solange* and reverse-*Solange* jurisprudence), are reconciled.<sup>111</sup>

A subtly different pluralist account is provided by Giorgi and Triart. They provide a pluralistic framework that steps outside the prevailing orthodoxies of *constitutional* pluralism, and, instead, emphasises *legal* pluralism, which they refer to as “network pluralism”.<sup>112</sup> The idea here is that sites of judicial governance (such as, but not limited to, the Court of Justice and national constitutional courts) operate within a plurality of sites of judicial governance, domestically and internationally, and do not enjoy constitutional supremacy *inter se*:

One possibility would be to no longer consider the hierarchical nature of the system as a determining element of its identity. An interesting idea was provided by the concept of the site of governance developed by Francis Snyder to describe the interactions between the actors of a globalised legal pluralism ... there is not one but many sites of governance. Furthermore, this voluntarily broad definition allows us to appreciate ... the relationships between sites such as the WTO as much as the EU or its Member States, but the possibilities are almost endless.<sup>113</sup>

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<sup>110</sup> Miguel Maduro, “Contrapunctual Law: Europe’s Constitutional Pluralism in Action” in Neil Walker (Ed.), *Sovereignty in Transition*, Hart Publishing, 2003: 501-537. See also Miguel Maduro, “Europe and the Constitution: What if this is as Good as it Gets?” (2000) *Constitutionalism Web-Papers ConWEB* No. 5/2000, available at: <http://les1.man.ac.uk/conweb/>.

<sup>111</sup> See also Jan Komarek, “European Constitutionalism and the European Arrest Warrant: In Search of the Limits of Contrapunctual Principles” (2007) Vol. 44 *Common Market Law Review* 9 (hereinafter Komarek, 2007a); Damien Chalmers, “Judicial Authority and the Constitutional Treaty” (2005) *International Journal of Constitutional Law* Vol. 3 No.2/3 448 (hereinafter Chalmers, 2005); and Petersmann, 2008: 850.

<sup>112</sup> Giorgi and Triart, 2008: 712. Sabel and Gertenberg present a similar argument, and provide useful case-studies to support their claims (see Sabel and Gerstenberg, 2010).

<sup>113</sup> Giorgi and Triart, 2008: 711.

Notably, at the time of writing, *Kadi* had not been decided by the Court of Justice, the implications of which conflict with this idea of network pluralism. Indeed, given the Court's and national constitutional courts' preoccupation with constitutional supremacy, this account must be taken to be normative, rather than descriptive of legitimate judicial governance in the EU.<sup>114</sup>

### *2.3. Interim Conclusion*

The foregoing literature review was presented to demonstrate the primary scholarly contributions that have been made in evaluating the legitimacy of the Court of Justice. The first approach focuses on canons of legal reasoning; and the second on constitutionalism. Within these debates, there is little, if any, attention paid to the concept of democracy as an analytical lens. The point to note is that analysing the Court from the perspective of democracy is a relatively neglected part of the activism debate, thus presenting a gap in which the contribution of this thesis can fill. In the next Section, I consider the (limited) ways that the concept of democracy has been used to evaluate the Court, with a view to clarifying more precisely the contribution of this thesis.

## **3. Arguments from Democracy: Framing the Contribution of this Thesis**

Having reviewed the main literature that assesses the legitimacy of the Court of Justice in Section 2, here we consider the ways in which the Court is assessed to be *democratically* legitimate. An important preliminary point to emphasise is that arguments on the democratic legitimacy of the Court can be understood in the two ways discussed in the introduction to this thesis: in *intrinsic* terms and in

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<sup>114</sup> Note here the legal reasoning of the national constitutional courts and the Court of Justice adverted to above i.e. the *Solange* and reverse-*Solange* jurisprudence.

*instrumental* terms.<sup>115</sup> Intrinsically, the Court can be examined as a discrete decision-making authority, whereby its democratic credentials are determined solely with respect to the form and functioning of the Court itself. Instrumentally, the democratic legitimacy of the Court can be examined with respect to the ways in which it contributes to the democratic legitimacy of the EU. In this Chapter, we have been concerned with literature that assesses the Court of Justice from an intrinsic perspective – the *legal reasoning* of the Court’s judges (Section 2.1), and the nature of the Court (Section 2.2) being matters of form and function with respect to the Court’s decision-making authority.<sup>116</sup> The next Chapter deals with the literature that examines the democratic legitimacy of the Court from an instrumental perspective *inter alia*. The literature that assesses the democratic legitimacy of the Court from an intrinsic perspective is very limited. What follows is a walk-through of the various *ad hoc* arguments from democratic theory that are presented, somewhat tangentially, within the activism literature.

The starting point returns to Rasmussen’s thesis. He postulated that the Court’s judicial law-making is an affront to the virtues of democracy, and this so because the Court’s decision-makers – the judiciary – are unelected by the people and thus do not hold the capacity to represent the popular will (a prerequisite, for Rasmussen, of a democratically legitimate norm-producing institution):

Since the laws which a litigant may request the Court to set aside are adopted by duly democratically elected legislatures, a democratically less accountable court should always show some measure of caution before following his invitation unless the democratic political will was not formulated under due observance of all requirements of form.<sup>117</sup>

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<sup>115</sup> The intrinsic-instrumental taxonomy is explained in greater depth in Section 3.2.2 of Chapter Three.

<sup>116</sup> The inherent connection between intrinsic and instrumental perspectives comes out in the discussion in Section 2.2. Nevertheless, the analyses in that literature are primarily concerned with the constitutional nature of the Court – an intrinsic category.

<sup>117</sup> Rasmussen, 1986: 181.

This was most emphatically asserted by Rasmussen in his stark warning that should the Court's activity remain unchecked then this will "inevitably lead to a totalitarian state".<sup>118</sup>

It is surprising that Rasmussen has limited the connection between democratic theory and his socially and politically *responsive* method of interpretation to merely observing that courts "should always show some measure of caution". By this I mean that his consideration of democratic theory is itself limited, in that it could have provided a more persuasive and illuminating account of his responsiveness premiss.<sup>119</sup> It is also surprising because he has considered Gulmann's theory of interpretation.<sup>120</sup> Gulmann emphasised the need for democratic values to be factored into the legal reasoning of supreme courts. This method of interpretation requires supreme courts to conform to "democratic" values, which are defined as the same kind of "real world" values advocated by Rasmussen. The (surprising) difference is that Rasmussen has not framed this premiss as pertaining to democratic values, with which they would more than comfortably fit. Indeed, this is an advantage of Everson and Eisner's more sophisticated theory of responsive adjudication. They make this link explicit, and present a theoretically robust argument.<sup>121</sup> Their argument is that the Court acts as a conduit through which political deliberations – seen as a necessary democratic good in politics – can take place, following Habermas' proceduralist paradigm of law.<sup>122</sup> Yet this argument does not relate to the structures and processes of the Court, and are germane to theories of instrumental democratic legitimacy (Chapter Two).

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<sup>118</sup> Rasmussen, 1986: 46. This is the same argument presented in Peter Blok's analysis of the Court's legitimacy: "this objection against judicial law-making is decisive, it must be firmly maintained that important political decisions should not be taken by the Court ... To the extent this principle is not observed the *democratic nature of the decision-making process is squashed.*" (emphasis added). See Peter Blok, *Patentrettens Konsumtionsprincip*, Kobenhaven, 1974: 621.

<sup>119</sup> As will be demonstrated in Chapter Three, the notion of "institutional responsiveness" is a foundational virtue for *intrinsic* democratic ordering.

<sup>120</sup> Claus Gulmann, "Methods of Interpretation of the Court of Justice" (1980) Stockholm Institute for Scandianvian Law 1957-2009, available at <http://www.scandinavianlaw.se/pdf/24-8.pdf>.

<sup>121</sup> See Everson and Eisner, 2009: Chapter Six and Chapter Seven.

<sup>122</sup> Habermas, 1995; and Habermas, 1998.

The proposition of participatory self-governance via a judicial institution is an idea that Cappelletti considers as having democratic virtues, and makes reference to in his analysis of the Court of Justice.<sup>123</sup> This is particularly so given the judicial predisposition to observe and arbitrate pluralities of normative ordering – another important democratic virtue. Petersmann presents a much more comprehensive analysis of this argument, and does so with reference to the broader literature. His premiss of a bottom-up constitutional justice – with the citizen as principal democratic subject and political/judicial organs as their agents – fits well with a postmodern theory of democracy:

International economic courts, notably in Europe, have played a crucial role in adjusting state-centered economic and human rights agreements to the democratic demand by citizens... Similar to human rights courts, also national constitutional judges increasingly argue that constitutional democracies are premised on ‘active liberty’; the exercise of individual rights to participate in democratic self-government.<sup>124</sup>

For Petersmann, the democratic legitimacy of the Court’s law-making function is based on a different quality of democratic theory that revives the democratic virtues of participatory and deliberative democracy – via judicial dialogues. Like Everson and Eisner, he goes on to make the crucial link to Habermas’ judicial model of deliberative democracy. Yet he does so without much explanation of the applicability of this theory, and seemingly based more on the idea of the “just” decision, but not on the issue of the *procedural* means by which they should achieve this. Yet MacCormick articulates a deliberative role for the Court in procedural terms:

[T]he European Court of Justice ... does not present an image or an actuality of arbitrary decision making by the will of those in authority. Decisions that bind by virtue of the Court’s authority are reasoned out and justified publicly in the light of publicly deployed arguments on themes to which all can contribute, either by way of

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<sup>123</sup> Cappelletti, 1987: 6.

<sup>124</sup> Petersmann, 2008: 877-878.

the general or specialised legal discussion of problems about law and legal policy and principles, or more restrictedly by directly arguing a case before the Court, which only specially appointed advocates for parties can do ... The institutional arrangements are set up in such a way as to facilitate the careful presentation of every relevant argument on legal points on issue, and to consider them in an atmosphere of cool and rational deliberation.<sup>125</sup>

There are other, more familiar, arguments that have been made on the democratic legitimacy of the Court of Justice: a counter-majoritarian “check” on the legislature; the protection of core democratic rights, such as freedom of speech; and the building of a democratically robust polity.<sup>126</sup> Yet these arguments are instrumental arguments i.e. they are more about the ways in which the Court of Justice can help bolster the democratic credentials of the EU, rather than how the Court of Justice is itself democratic. This literature will be examined in Section 2 of Chapter Two, where I demonstrate how this thesis contributes to the literature on the *instrumental* arguments from democracy. It is clear, however, that there is very little in the way of analyses which explore the democratic legitimacy of the Court from an intrinsic perspective. Those that do tend to do so somewhat tangentially to their principal arguments, much less in a systematic way (see Chapter Three), and do not focus on the Court’s structures and processes. This is one aspect of the intellectual contribution of this thesis: to present a systematic analysis of the *democratic* legitimacy of the Court of Justice from an intrinsic perspective, which focuses on the Court’s structures and processes (as opposed to, for example, its legal reasoning).

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<sup>125</sup> Neil MacCormick, “Democracy, Subsidiarity, and Citizenship in the ‘European Commonwealth’” (1997) *Law and Philosophy* Vol. 16 No. 4 331 (hereinafter MacCormick, 1997): 352-353.

<sup>126</sup> See, for example, Quoc Loc Hong, “Constitutional Review in the Mega-Leviathan: A Democratic Foundation for the European Court of Justice” (2010) *European Law Journal* Vol. 16 No. 6 695 (hereinafter Loc Hong, 2010).

#### **4. Conclusion**

In this Chapter, the activism literature was reviewed. The activism literature is one that examines the legitimacy of the Court of Justice from what I refer to as an *intrinsic* perspective (assessing the legitimacy of the Court as a discrete decision-making authority). We saw that the activism literature has two principal analytical approaches to intrinsic questions: examination of the Court according to a theory of legal reasoning; and arguments on the constitutional function(s) of the Court according to a theory of EU constitutionalism. Within this literature, there were only very minor and tangential arguments or analyses made relating to the democratic legitimacy of the Court. We saw a few examples of theories of “democratic” legal reasoning: the Court as a responsive institution; and the Court that adjudicates according a citizen-oriented paradigm of constitutional justice. There was much less in relation to the structures and processes of the Court – with a few *ad hoc* comments made on the unelected (and so *a priori* undemocratic) judiciary as law-makers; and on the deliberativeness of the Court. Given that one of the main aims of this thesis is to analyse the democratic legitimacy of the Court’s structures and processes from an intrinsic perspective, the activism literature is one to which this thesis contributes.



## **1. Introduction**

This Chapter has two objectives. The first, like Chapter One, is to clarify the intellectual contribution of the thesis by reviewing one of the key literatures to which it contributes – the democratic deficit debate. As we see in Chapter Three in more detail, my criteria of procedural democratic legitimacy – the analytical lens through which I evaluate the Court’s structures and processes – are intrinsic and instrumental democratic legitimacy. In Chapter One, we saw that there is very little in the way of analyses which review the Court’s structures and processes from an intrinsic democratic perspective. In this Chapter, I look at the literature in which contributions on the instrumental democratic legitimacy of the EU’s institutions are made (Section 2). We see that there are some contributions relating to the Court of Justice, but, ultimately, there are significant shortcomings and gaps (Section 3).

The second objective of this Chapter is to identify, drawing from the literature review in Section 2, the salient characteristics of the EU in constitutional terms – hereinafter the EU’s polity-conditions (Section 4). This objective is necessary because, as we see in Chapter Three, analysing the procedural democratic legitimacy of the Court of Justice (or, indeed, any EU institution) is sensitive to the underlying polity-conditions of the EU. Whilst this is more intuitively significant for the analysis of instrumental democratic legitimacy (because that type of analysis looks directly at how institutions contribute to the democratic ordering of polities), it is also a necessary factor in determining the scope of intrinsic criteria.<sup>127</sup>

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<sup>127</sup> This complexity is addressed in detail in Section 4 of Chapter Three.

## 2. The “DemDefLit”<sup>128</sup>

In this Section, the literature on the European Union’s putative democratic deficit is reviewed. This field of enquiry is expansive and draws the attention of various disciplines and analytical approaches – most prominently, of public lawyers and political scientists. With such an abundance of scholarly attention, the following review will be a synoptic overview of the main analytical approaches to questions on the democratic legitimacy of the EU.

Broadly speaking, there are two levels of enquiry: there are theories of the polity; and theories of the system. The former analytical approach considers the democratic legitimacy of the EU from philosophical and theoretical perspectives. It postulates what the EU is, or what it should be, according to concepts of the political community in political theory – questioning the EU’s capacity to conform to underlying pre-institutional precepts of democracy (Section 2.1). The latter approach focuses on the institutional architecture of the EU – considering the extent to which it conforms to democratic standards; or arguing for institutional reform in the same vein (Section 2.2). These two approaches are, moreover, analytically connected. Advocates of institutional reform, for example, will base their arguments, either explicitly or implicitly, in a theory of the polity.

### *2.1. Theories of the Polity*

Here we are concerned with analyses that approach the issue of the EU’s democratic legitimacy by considering, from a theoretical point of view, what sort of polity the EU is or should be. There are two principal debates that follow this approach: the existential debate, which considers the nature of the EU from a functional point of

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<sup>128</sup> Weiler referred to this literature as the “DemDefLit”, adopted hereinafter by way of shorthand. See Joseph Weiler, “European Democracy and its Critics: Polity and System” in *The Constitution of Europe: “Do the New Clothes Have an Emperor?” and Other Essays on European Integration*, Cambridge: Cambridge University Press, 1999 (hereinafter Weiler, 1999).

view; and the “no *demos*” debate, which examines the underlying socio-political conditions within which the EU exists, and because of which the EU can (not) be, or should (not) be, understood in democratic terms. These two debates will be considered in turn.

### 2.1.1. The Existential Debate

Arguments about Europe’s democratic deficit are really arguments about the nature and ultimate goals of the integration process.<sup>129</sup>

At its most fundamental level, questioning the democratic legitimacy of the EU is really about determining the location of the institutional capacity to solve problems and implement solutions in relation to the provision of certain public goods – public goods being anything that members of a community would expect to be provided by the community, such as health-care, education, legal enforcement, etc. In this way, the EU is defined by what public goods it is competent to administer. In other words, what is the EU for? Bearing in mind that our Member States – as Westphalian states in form (see Section 2.1.2 below) – were once competent to administer *all* public goods, to what extent is the existence of the EU necessary or desirable?

The empirical frame of reference for the EU’s democratic deficit is by way of comparison with the position as it would be if matters were still dealt with at national level. This requires us to assess the reality of decision-making within national polities, and postulate what the locus of decision-making would be if there were no EU.<sup>130</sup>

A common premiss within this debate is the idea that there are some public goods that states cannot provide to their citizenry without the transnational assistance of

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<sup>129</sup> Giandomenico Majone, “Europe’s ‘Democratic Deficit’: The Question of Standards” (1998) *European Law Journal* Vol. 4 No. 1 5 (hereinafter Majone, 1998): 5.

<sup>130</sup> Craig and de Búrca, 2011: 151.

other states.<sup>131</sup> Menon and Weatherill argue that EU integration, as a transnational “process”:

... provides a cure for the democratic failings of Member states by embedding within national political and administrative systems legally enforceable obligations to respect the interests of actors whose voice is excluded or muffled (de jure or de facto) within purely national political processes.<sup>132</sup>

Their analysis is confined, however, to the functional benefits of the single market, and notably does not address the somewhat more controversial aspects of political union inaugurated by the Maastricht Treaty in 1993,<sup>133</sup> and developed in subsequent Treaty reforms.<sup>134</sup> Yet it is precisely this sort of issue that forms the subject-matter of the existential debate – *should* the EU have jurisdiction on matters of, for example, internal and external security? Furthermore, the debate not only considers *what* functions the EU should have; it also considers, more qualitatively, the extent of discretion each level of actor (Member State and EU) should have with respect to those functions – to what extent should the EU *share* its jurisdiction on security with

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<sup>131</sup> It is uncommon for scholarly analyses to refute this premiss. Such claims tend to be manifested in party-political “Euro-sceptic” rhetoric. Menon and Weatherill note: “French President General Charles de Gaulle described the European Commission in typically withering terms as a ‘mostly foreign technocracy, intended to encroach upon French democracy’ (cited in P. Magnette, *What is the European Union? Nature and Prospects* (Basingstoke: Palgrave, 2005) 171); in 2006 Wolfgang Schäussel, Chancellor of Austria, was reported to have urged the European Court to ‘pay more heed to public opinion and to refrain from handing down heavy-handed judgments’ (Financial Times, April 19 2006)” (see Anand Menon and Stephen Weatherill, “Democratic Politics in a Globalising World: Supranationalism and Legitimacy in the European Union” (2007) *LSE Law, Society and Economy Working Papers* No. 13/2007 (hereinafter Menon and Weatherill, 2007), available at [www.lse.ac.uk/collections/law/wps/wps.htm](http://www.lse.ac.uk/collections/law/wps/wps.htm): footnote 6). In 2005, the United Kingdom Independence Party (UKIP) published their party manifesto for the general election. The introduction entitled “Why the UK must leave the EU” states that a UKIP government would “restore ... confidence in the democratic process and reconnect with people ... [by] [f]ormal withdrawal from the EU by repealing the 1972 European Communities Act. This will release [the UK] from obligations under EU treaties and re-establish the precedence of UK law over EU law.” Available at <http://www.stuartagnemep.co.uk/stuartagnew/pdf/UKIPa4manifesto2005.pdf>.

<sup>132</sup> Menon and Weatherill, 2007: 3. See also Weatherill, 2010: Chapter Nine. Both contributions make reference to a Commission study on the impact of the single market, which provides evidence of the economic benefits of the EU. See European Commission (2002) *The Internal Market: Ten Years Without Frontiers*, available at [http://europa.eu.int/comm/internal\\_market/10years/docs/workingdoc/workingdoc\\_en.pdf](http://europa.eu.int/comm/internal_market/10years/docs/workingdoc/workingdoc_en.pdf).

<sup>133</sup> The Maastricht Treaty (1992) OJ C 191.

<sup>134</sup> For an analysis that does address this point, see Jukka Snell, “‘European Constitutional Settlement’, an Ever Closer Union, and the Treaty of Lisbon: Democracy or Relevance?” (2008) *European Law Review* Vol. 33 No. 5 619.

the Member States? There is thus a natural connection in the existential debate to the relationship between sovereignty and democratic legitimacy. Many of the contributions to this debate centre on this core issue.<sup>135</sup>

In this regard, there are two categories of EU existentialism: reductionist; and experimentalist. Reductionist analyses try to square the circle by understanding the EU according to orthodox conceptions of the polity – tending to frame the analysis against the backdrop of the (Westphalian) nation-state and/or the orthodox conception of international regimes in public international law.<sup>136</sup> Experimentalists will treat the EU as a *sui generis* phenomenon, and take exploratory and sometimes quite radical approaches to (re)understanding concepts of the polity and democracy in this context.

A typical reductionist approach is, for example, intergovernmentalism. Intergovernmentalists advocate – empirically and/or normatively – that regulatory authority is provisionally transferred by the Member States to the EU’s institutions.<sup>137</sup> Among other things, they emphasise that the EU does not need to be measured in democratic terms since its competences are foreseeable, retractable and have been authorised by democratic processes of the Member States.<sup>138</sup> These competences are, moreover, of a kind that do not create “winners” and “losers”, but, instead, achieve politically neutral “pareto-optimal” policy objectives – analogous to

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<sup>135</sup> See Neil Walker, “Surface and Depth: The EU’s Resilient Sovereignty Question” in J. Neyer and A. Wiener (Eds.), *Political Theory of the European Union*, Oxford: Oxford University Press, 2010, also available at:

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1585852](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1585852) (hereinafter Walker, 2010). Walker argues that the problem of locating sovereignty causes pervasive “diagnostic controversies” over the democratic nature of the EU, which he frames under six headings: denial, delegation, demarcation, disaggregation, displacement and dualism (Walker, 2010: 15-20).

<sup>136</sup> On the latter, see Ole Spiermann, “The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order” (1999) *European Journal of International Law* Vol. 10 No. 4 763 (hereinafter Spiermann, 1999).

<sup>137</sup> On “provisional supranationalism”, see Sverker Gustavsson, “Defending the Democratic Deficit” in A. Weale and M. Nentwich (Eds.) *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship*, London: Routledge, 1998 (hereinafter Gustavsson, 1998).

<sup>138</sup> This rationale has been defended by various national constitutional courts in Treaty ratification processes over the years (see Section 2.2 of Chapter One). See Andrew Moravcsik, “In Defence of the ‘Democratic Deficit’: Reassessing Legitimacy in the European Union” (2002) *Journal of Common Market Studies* Vol. 40 No. 4 603 (hereinafter Moravcsik, 2002).

national regulatory agencies.<sup>139</sup> Another typical reductionist approach is a statist orientation. Observing the same empirical phenomena as the intergovernmentalists, those with a statist orientation take the converse view that the EU should become *more* state-like (i.e. greater sovereignty) if it is to be democratic. Habermas – in an altogether more conspicuous indication of his modernity – argues that the hitherto deregulatory, market-freeing forces of EU integration give rise to “increasing inequalities in the distribution of the gross national product”.<sup>140</sup> Such problems – associated with globalisation – are themselves democratic deficits, requiring the EU to be transformed into a federal, state-like entity to be redressed.<sup>141</sup>

There is a variety of experimentalist approaches. The common theme here, however, is exploratory (re)conceptualisation given the *sui generis* nature of the EU. Curtin argues that reconceptualisation is necessary for “survival in the modern world in which the whole concept of geographical borders is rapidly becoming irrelevant.”<sup>142</sup> It is thus the intellectual movement towards post-Westphalian forms (and, in some respects, Curtin argues, *pre*-Westphalian forms) of the polity which is virtuous, especially given the ubiquity of new boundary-less communicative structures (such as the Internet). Humanity, in other words, needs to make this “transcendental” journey.<sup>143</sup> The approaches here do not reject, but invariably accept, the same

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<sup>139</sup> See Majone, 1998: 14; and Moravcsik, 2002: 607. See also Michael Greven, “Can the European Union Finally Become a Democracy?” in Greven and Pauly (Eds.), *Democracy Beyond the State?: The European Dilemma and the Emerging Global Order*, Toronto: University of Toronto Press, 2000 (hereinafter Greven, 2000): 49. He argues that in the minds of EU citizens, the EU is merely an “international appendage” to the state, given the relatively unimportant areas in which it is competent to regulate.

<sup>140</sup> Jürgen Habermas, “Why Europe Needs a Constitution” (2001) *New Left Review* Vol. 11 5 (hereinafter Habermas, 2001): 11.

<sup>141</sup> Zürn refers to the problems associated with the globalisation of markets as “input and output incongruities”, which give rise to “pre-political” and, hence, democratic deficits. See Michael Zürn, “Democratic Governance Beyond the Nation-State” in Greven and Pauly (Eds.), *Democracy Beyond the State?: The European Dilemma and the Emerging Global Order*, Toronto: University of Toronto Press, 2000 (hereinafter Zürn, 2000). See also Federico Mancini, “Europe: The Case for Statehood” (1998) *European Law Journal* Vol. 4 No. 1 29 (hereinafter, Mancini, 1998): 40; and Richard Kuper, “The Many Democratic Deficits of the European Union” in A. Weale and M. Nentwich (Eds.) *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship*, London: Routledge, 1998 (hereinafter Kuper, 1998). Such conditions of globalisation, however, do not *ipso facto* lead to the conclusion that a *European state* is needed (Menon and Weatherill, 2007).

<sup>142</sup> Curtin, 1997: 4.

<sup>143</sup> Curtin, 1997: 4. This is the leitmotif of Mitchell’s inaugural lecture “Why European Institutions?” (see Mitchell, 1968).

“regulatory efficacy in the globalised world” premiss. Yet their distinctiveness shines through in other, varied, ways. For example, Weiler et al. suggest a distinctively post-nationalist purpose for the EU:

Maybe in the realm of the political, the special virtue of contemporaneous membership in a national ethno-cultural demos, and in a supranational civic, value-driven demos, is in the effect which such double membership may have on taming the great appeal, even craving, for belonging in this world which nationalism continues to offer but which can so easily degenerate into intolerance and xenophobia.<sup>144</sup>

The issue of sovereignty is also treated in exploratory ways. Indeed, we saw in the last Chapter how notions of “constitutional pluralism” inform the functioning of the Court of Justice of the European Union. There are likewise many theories of constitutional pluralism that seek to understand the nature of the EU and the constitutional relationships that exist therein. There is the post-sovereign idea of the “mixed system”, within which there is a plurality of political and legal systems that overlap: intergovernmental, supranational, infranational, postnational and state systems.<sup>145</sup> Walker, on the other hand, argues that sovereignty in the EU:

... is not best conceived as merely redistributed in a mixed or multi-layered federal ‘system’ for the states in combination, for that would still imply a single ‘superstate-like’ final authority for the system in question and an overarching principle or rule for deciding the hierarchy of norms within that system.<sup>146</sup>

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<sup>144</sup> Joseph Weiler, Ulrich Haltern, and Franz Mayer, “European Democracy and its Critique” (1995) *West European Politics* 18 (hereinafter Weiler et al., 1995): 23-24. Indeed, MacCormick notes that the era of post-sovereign Europe is “a very welcome development in diminishing the probability of recurrence to the barbarism of time recently past.” See MacCormick, 1997: 338.

<sup>145</sup> Weiler et al., 1995: 24-28. See also MacCormick, 1997: 338-339; Richard Bellamy and Dario Castiglione, “The Uses of Democracy: Reflection on the European Democratic Deficit” in Eriksen and Fossum (Eds.), *Democracy in the European Union: Integration Through Deliberation?*, London; New York: Routledge, 2000 (hereinafter Bellamy and Castiglione, 2000): 69; and Heidrun Abromeit, “How to Democratise a Multi-Level, Multi-Dimensional Polity” in A. Weale and M. Nentwich (Eds.) *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship*, London: Routledge, 1998 (hereinafter Abromeit, 1998): 112.

<sup>146</sup> Walker, 2010: 13.

Nor can sovereignty, as an analytical tool, be dispensed with altogether in this task, as post-sovereignists would claim (e.g. MacCormick). Instead, it is:

... discretely located in each of these various overlapping polity sites, none of whom will defer to the other and so concede the absoluteness and exclusivity of the claim of the other, and *whose relations inter se are for that reason finally heterarchical rather than hierarchical* ... [the EU is a] multi-sovereign, territorially and jurisdictionally overlapping configuration ... which does not subserve to a single discipline of internal hierarchy and system-integrity, and where identities and loyalties are not nested within one overall system supplying both the ordering mechanism and inter-cultural traditions.<sup>147</sup>

There is also, finally, a strong school of thought that seeks to rescue the idea of “democratic deliberation” as a way of explaining – and, normatively, guiding the evolution of – the EU as a *sui generis* polity. In this view, the special virtue of the EU is in its capacity to disaggregate and optimally coordinate special interest representation via its multi-faceted institutional framework.<sup>148</sup>

### 2.1.2. The “No Demos” Debate

There are considerable doubts expressed as to whether the EU can be understood as a democratic polity given broader social and political phenomena. These concerns manifest themselves within the so-called “no demos” thesis, which is another

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<sup>147</sup> Walker, 2010: 13-14, 22. For a similar pluralist account, see Sabel and Gerstenberg, 2010.

<sup>148</sup> Christian Joerges and Jürgen Neyer, “From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology” (1997) *European Law Journal* Vol. 3 No. 3 273 (hereinafter Joerges and Neyer, 1997); Christian Joerges, “‘Deliberative Political Processes’ Revisited: What Have we Learnt about the Legitimacy of Supranational Decision-Making” (2006) *Journal of Common Market Studies* Vol. 44 779 (hereinafter Joerges, 2006); Joshua Cohen and Charles Sabel, “Directly Deliberative Polyarchy” (1997) *European Law Journal* Vol. 3 No. 4 313 (hereinafter Cohen and Sabel, 1997); Oliver Gerstenberg, “Law’s Polyarchy: A Comment on Cohen and Sabel” (1997) *European Law Journal* Vol. 3 No. 4 343 (hereinafter Gerstenberg, 1997); and Everson and Eisner, 2009.



contested aspect of the DemDefLit.<sup>149</sup> The argument can be summarised simply that because there is no “European People” *per se*, the EU cannot and should not be understood in democratic terms.

The idea of a *people* or *demos*, as such, has been described as a sense of “togetherness”,<sup>150</sup> or “a minimum sense of ‘we feeling’”.<sup>151</sup> This, it is argued, is lacking in the ever-enlarging, expanding and deepening EU. The principal claim is that the EU lacks of a distinctively European “collective self-identity” – a community *identity* by which the citizenry can understand itself.<sup>152</sup> In particular, it is argued that there is no comparable *national* identity of the EU.<sup>153</sup> This rationale is backed up by empiricists, like Moravscik, who observe the disinterested and ignorant attitudes towards the EU exhibited by its *de jure* members.<sup>154</sup> Examples of these attitudes are: low voter turnout at elections to the EP; non-competitive party-politics in the EU; EU politics and policies of low salience in the minds of voters; and EU elections being of “second order” to national elections.<sup>155</sup> They argue that these attitudes signify the absence of a European, “we-feeling” sense of collective identity.

Weiler et al further argue that “the kind of *homogeneity* of the ethno-national conditions on which peoplehood depend [does not] exist.”<sup>156</sup> In order for there to be a democratic community there needs to be a “modicum of cultural homogeneity”.<sup>157</sup>

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<sup>149</sup> For an overview of the “no demos” thesis, see Weiler et al’s “standard version” in Weiler et al, 1995: 9-14.

<sup>150</sup> Zürn, 2000.

<sup>151</sup> Walker, 2010.

<sup>152</sup> See Abromeit, 1998; and Zürn, 2000.

<sup>153</sup> An important factor in the *Lisbon Judgment ratio* was the discussion of *das volk* (the people), and the lack thereof in relation to the EU: para. 105.

<sup>154</sup> Moravscik, 2002: 615-617. See also Andrew Moravscik, “The Myth of Europe’s Democratic Deficit” (2008) *Intereconomics: Journal of European Public Policy* 331 (hereinafter Moravscik, 2008).

<sup>155</sup> Blondel, Sinnott and Svensson, *People and Parliament in the European Union*, Oxford: Oxford University Press, 1998 (hereinafter Blondel et al., 1998).

<sup>156</sup> Weiler et al, 1995: 13 (emphasis added).

<sup>157</sup> Abromeit, 1998. See also Albert Weale, “Between Representation and Constitutionalism in the European Union” in A. Weale and M. Nentwich (Eds.) *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship*, London: Routledge, 1998, on pre-political bonds; Andreas Føllesdal, “Democracy, Legitimacy and Majority Rule in the European Union” in A. Weale and M. Nentwich (Eds.) *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship*, London: Routledge, 1998: 36, on the need for avoidance of “standard harms”; Larry

Given these requirements, there is a general presumption that a socio-culturally diverse Europe of nation-states is incapable of the necessary degree of homogeneity. Grande, for example, argues that Europe's socio-political cleavages result in "structural minorities" making the implementation of majoritarian decision-making less feasible.<sup>158</sup> Another argument is that the EU does not have a public sphere within which political deliberation can take place – seen as a necessary condition for a democratic polity, and for the cultivation of a sense of community.<sup>159</sup> Greven argues that public communication in the EU is difficult to achieve given the multiplicity of languages.<sup>160</sup> Associated with this is that there is no transnational media that are "specifically European".<sup>161</sup>

There are three responses to the no-*demos* thesis: to say that it is not needed given the intergovernmental nature of the EU;<sup>162</sup> that the EU should *create* the necessary conditions to foster a European *demos*, as above;<sup>163</sup> and the experimentalist approaches that decouples the Westphalian precepts of democracy by re-imagining the conceptual relationship between democracy and the polity: in particular, the rejection of the strictures that the notion of "nationality" imposes on understanding the concepts associated with *demos*.<sup>164</sup> MacCormick argued that there is a *de jure*

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Siedentop, *Democracy In Europe*, London: Allen Lane, 2000 (hereinafter Siedentop, 2000), on a "shared moral base"; Greven, 2000, on shared "political symbols".

<sup>158</sup> Edgar Grande, "Post-National Democracy in Europe" in Greven and Pauly, *Democracy Beyond the State? The European Dilemma and the Emerging Global Order*, Toronto: University of Toronto Press, 2000 (hereinafter Grande, 2000): 122. See also Loc Hong, 2010.

<sup>159</sup> Habermas, 2001: 18.

<sup>160</sup> Greven, 2000.

<sup>161</sup> Habermas, 2001: 18. See also Philip Schlesinger and Deirdre Kevin, "Can the European Union Become a Sphere of Publics?" in Eriksen and Fossum (Eds.), *Democracy in the European Union: Integration Through Deliberation?*, London; New York: Routledge, 2000.

<sup>162</sup> This view is not restricted to intergovernmentalists. See, for example, Loc Hong, 2010: 706.

<sup>163</sup> Habermas, 2001, on a "catalytic EU Constitution". See also Simon Hix, *What's Wrong With the European Union and How to Fix It*, Polity Press, 2008 (hereinafter Hix, 2008): 68. See also Andreas Føllesdal and Simon Hix, "Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik" (2006) *Journal of Common Market Studies* Vol. 44 No. 3 533 (hereinafter Føllesdal and Hix, 2006). They argue that this will be achieved by competitive party-political processes, the establishment of which would create pan-European public discourse and a collective identity.

<sup>164</sup> Curtin, 1997: 14, 15, 53. Habermas defines the nation as "a political community shaped by common descent, or at least by a common language, culture, and history" (see Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory* (2<sup>nd</sup> Edition) The MIT Press, 1999: 107). It is worth noting, however, that Habermas adopts a postnational approach – with his idea of "constitutional patriotism" in the EU – as a necessary stepping stone towards European statehood (see Jürgen

European citizenship on which a *demos* can develop. He notes that this is a notably “thin” sense of citizenship and *demos*, and that it presently co-exists with national identities derived from the traditions of the Member States.<sup>165</sup> Associated with the idea of postnational identity is the blockage caused by socio-cultural heterogeneity. To this, Habermas optimistically argues:

Europe has developed institutional arrangements for the productive resolution of intellectual, social and political conflicts. In the course of painful, if not fatal struggles, it has learnt how to cope with deep cleavages, schisms and rivalries between secular and ecclesiastical powers ... Europe has thus learnt a sensitive attitude and a balanced response ... to the promise of future benefits from the ‘creative destruction’ of present productivity.<sup>166</sup>

## 2.2. Theories of the System

Thus far we have considered the more philosophical aspects of the DemDefLit – looking at the literature which examines the nature and form of the EU, and the taxonomies therein that invariably borrow the conceptual language of political theories of the polity. In this sub-section, we consider literature focusing on the institutional system of the EU, and which questions the overarching system’s democratic legitimacy. This literature looks at the institutional system of the EU holistically and postulates how it is to be legitimate or accountable in a general sense,<sup>167</sup> and ties that into a theory of democratic legitimacy i.e. because such mechanisms are regarded as being instrumental towards holding the institutional

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Habermas, “Citizenship and National Identity: Some Reflections on the Future of Europe” (1992) *Praxis International* Vol. 12 1.

<sup>165</sup> MacCormick, 1997: 342. On formative notions of EU citizenship, see Grande, 2000: 122; Weiler et al. 1995: 19, 23; Abromeit, 1998; Zürn, 2000; Habermas, 2001; and Greven, 2000; and Curtin, 1997: 18.

<sup>166</sup> Habermas, 2001: 20.

<sup>167</sup> For Bovens, “[a]ccountability is a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences. This is generic because the actor and forum may be anyone or any institution. See Mark Bovens, “Analysing and Assessing Accountability: A Conceptual Framework” (2007) *European Law Journal* Vol. 13 No. 4 447 (hereinafter Bovens, 2007): 450.

system of the EU to standards of *democratic* legitimacy e.g. institutional checks and balances.<sup>168</sup>

There is a necessary relationship in the DemDefLit between reductionist and experimentalist philosophies with approaches to systemic accountability. The intergovernmental point of view, for example, is that democratic control remains with the Member States – their publics being the ultimate accountability forum *qua* Bovens.<sup>169</sup> The preoccupation here is with ensuring as much as possible that Member States ultimately remain in control.<sup>170</sup> The supranational, or infranational, variant of this logic is a particular strand of delegation theory called trusteeship.<sup>171</sup> Whereas the intergovernmental approach depicts the relationship between the Member States and the EU as “principal-agent”, trusteeship depicts the relationship as analogous to the common law trust; whereby EU’s institutions are the trustees, acting for, and on behalf of, the European public(s) (the beneficiaries of the trust).<sup>172</sup> The crucial difference between trusteeship and the principal-agent model is that the EU’s institutions – as trustee-institutions – are, as much as possible independent from the Member States in exercising this discretion –preventing the Member States from renegeing on their previously agreed policy-commitments. In this view, the insulation of supranational institutions, like the Commission, from Member State control is seen as (democratically) legitimate.<sup>173</sup> The statist approach seeks to replicate the

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<sup>168</sup> The theoretical relationship between the separation of powers doctrine and democracy is considered in greater detail in Section 3.2 of Chapter Three. See also Eric Barendt, “Separation of Powers and Constitutional Government” (1995) *Public Law* Winter 599 (hereinafter Barendt, 1995); Barber, 2001; and Richard White, “Separation of Powers and Legislative Supremacy” (2011) *Law Quarterly Review* Vol. 127 July 456 (hereinafter White, 2011).

<sup>169</sup> For intergovernmentalists, the aspects of the Union’s legislative processes that require “unanimity” are important democratic safeguards. See Moravscik, 2008: 334; Grande, 2000: 124; and Abromeit, 1998: 115.

<sup>170</sup> Such a system is open to normative and empirical objections. Empirically, it does not explain the supranational elements of the EU. Conceptually, unanimity may create *de facto* minorities through “pork barrelling” (see Abromeit, 1998; and Grande, 2000); and “disabling” legislative impasses (Walker, 2010: 24).

<sup>171</sup> As we shall see in Section 2 of Chapter Three, the notion of trusteeship is central to the analytical framework of this thesis.

<sup>172</sup> See Giandomenico Majone, “Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance” (2001) *European Union Politics* Vol. 2 103 (hereinafter Majone, 2001).

<sup>173</sup> Indeed, this is why advocates of this approach, such as Majone, Weatherill and Menon, focus on matters of institutional output (Majone, 1998; Menon and Weatherill, 2007; and Weatherill, 2010). Such a system is also descriptively attractive since it explains the demonstrable supranational

institutional arrangements that inhere in the modern democratic state. Føllesdal and Hix present the paradigm case: a Westminster style, majoritarian,<sup>174</sup> competitive system of party politics.<sup>175</sup> Hix argues:

[C]ompetition for political power is *the essential element* of virtually all modern theories of democratic government. Even if a polity is procedurally democratic, in terms of having representative institutions and checks-and-balances on the exercise of power, it is not substantively democratic unless there is open competition for executive office and over the direction of the policy agenda.<sup>176</sup>

A variant in the statist school is the case for a federal Europe – complete with a written and justiciable constitution, which would provide a set of basic unassailable social and/or political rights that are to be protected by the supervisory jurisdiction of the Court of Justice.<sup>177</sup>

The experimental analyses tend to be less normative. They are more concerned with finding ways of explaining the prevailing institutional set-up by reframing standards of accountability and legitimacy. So, rather than adopt a single paradigmatic organising principle (such as intergovernmentalism or federalism) with which to explain what can be seen, and criticise what cannot, experimental approaches will first determine what can be seen, and then postulate new paradigms. Two examples of new paradigms are pluralism in a “mixed system”<sup>178</sup> and “deliberative

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elements of the EU system. See, however, Deirdre Curtin, “Holding (Quasi-)Autonomous EU Administrative Actors to Public Account” (2007) *European Law Journal* Vol. 13 No. 4 523 (hereinafter Curtin, 2007); Joerges and Neyer, 1997; and Joerges, 2006 for contrary views on the accountability of the Commission.

<sup>174</sup> Føllesdal argues that majoritarianism gives greater control for all affected parties, thus protecting political equality, whereby the “losers” (i.e. the minorities) have consented to the overall system in the knowledge that they have the opportunity to “win” at some opportunity in the future; as well as the advantage that it allows for more effective problem-solving (Føllesdal, 1998).

<sup>175</sup> See Føllesdal and Hix, 2006. See also Føllesdal, 1998; Hix, 2008; and Richard Bellamy “Democracy Without Democracy? Can the EU’s Democratic ‘Outputs’ be Separated from the Democratic ‘Inputs’ Provided by Competitive Parties and Majority Rule?” (2010) *Journal of European Public Policy* Vol. 17 No.1 2 (hereinafter Bellamy, 2010).

<sup>176</sup> Hix, 2008: 68 (emphasis added).

<sup>177</sup> See Kuper, 1998; Siedentop, 2000: Chapter One; Greven, 2000; Zürn, 2000; Habermas, 2001; and Loc Hong, 2010.

<sup>178</sup> MacCormick, 1997.

supranationalism”.<sup>179</sup> We have already seen how the different notions of pluralism (constitutional, legal, post-sovereign, and heterarchical) reconfigure institutional legitimacy in a mixed system of political and legal orders. In that view, issues such as the insufficiency of legislative power in the EP, or the executive dominance of the unelected Commission,<sup>180</sup> are not *per se* unaccountable or undemocratic. Accountability in the multi-level EU does not “subserve to a single discipline of internal hierarchy and system-integrity”,<sup>181</sup> but instead is disaggregated, leading to multiple, discrete, but effective, forums of accountability *qua* Bovens. Curtin, for example, in rejecting delegation theory, uses Bovens’ generic model of accountability to demonstrate the various public forums through which the committees of the Commission, and the EU’s regulatory agencies, are held to account.<sup>182</sup>

In the theory of “deliberative supranationalism”, the legitimacy of the EU system is derived from on-going inter-institutional deliberations and the effectiveness of the EU’s institutions in both problem-solving and grass-roots interest representation. Moreover, the special virtue of this theory is its resolution of the tension between intergovernmental and supranational forces, which pervade institutional structuring and decision-making in and around the EU:

Comitology has provided a forum for the development of novel and mediating forms of interest formation and decision making. Any attempt to provide for its analytical conceptualisation and normative evaluation, may therefore be confronted with institutional innovations which fit neither into the analytical models of functionalism and intergovernmentalism ...<sup>183</sup>

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<sup>179</sup> Joerges and Neyer, 1997.

<sup>180</sup> Both issues are part of the “standard version” of the DemDefLit (Weiler et al, 1995). These are also concerns most acutely felt by those of a statist or majoritarian persuasion (see Føllesdal and Hix, 2006).

<sup>181</sup> Walker, 2010: 22.

<sup>182</sup> Curtin, 2007.

<sup>183</sup> Joerges and Neyer, 1997: 279. For a similar paradigm, see Cohen and Sabel, 1997; and Gerstenberg, 1997.

As well as opening up political deliberation to otherwise marginalised interest groups, the democratic legitimacy of deliberative supranationalism is rooted in its extraordinary inclusivity and its capacity to embrace “revolutionary politics”.<sup>184</sup>

### *2.3. Intrinsic Democratic Virtues and Institutional Claims*

This Section is particularly relevant for understanding and clarifying the contribution of this thesis. As we shall see in Chapter Three, intrinsic virtues of democratic legitimacy are central to the argument of this thesis. The democratic virtues are representation, participation, accountability, and transparency. In the DemDefLit, these virtues form the analytical bases in various accounts. Sometimes they are used in relation to the EU’s institutional framework holistically, and sometimes they are used to analyse the democratic legitimacy of particular institutions. Unlike the systemic accounts in Section 2.2, these virtues are self-standing democratic criteria (intrinsic), and, as such, their claim to democratic legitimacy is not *a priori* (instrumental). In the following sub-sections, the various systemic and institutional claims that are made in the DemDefLit in terms of these four democratic virtues will be outlined.<sup>185</sup>

What is important to observe in the following presentation is the manner in which the intrinsic virtue is being analysed: in particular, whether the institution that is under examination is being assessed in light of its capacity to foster an intrinsic virtue of the system, or another institution (an instrumental point of view); whether the institution is itself being examined in light of an intrinsic virtue; and, crucially for the argument of this thesis, whether or not, and to what extent, an underlying philosophy of the EU (as discussed in Section 2.1 *supra*) guides the assessment. In Section 3, we

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<sup>184</sup> Everson and Eisner argue that political processes in the EU should not exclude non-nationals, and should not “smother” the possibility of political revolution (Everson and Eisner, 2009: Chapter Seven).

<sup>185</sup> Often they are not understood discretely. This is because there is a natural ontological overlap between these otherwise discrete concepts, and there are therefore variations in the ways in which they have been used analytically.

look at the literature that examines the Court of Justice from an instrumental perspective; and in Section 4, I explain, first, that an underlying philosophy necessarily informs these sorts of analyses, and go on to specify my own philosophy – explaining how it will inform the argument of my thesis.

### 2.3.1. Representation

Democratic representation is portrayed in two ways in the DemDefLit: representation by election; and the representation of salient public interests – the former approach emphasising the notion of those in political office acting as (elected) “representatives”; and the latter emphasising institutional responsiveness to public interests more generally. On the former, there have been a variety of claims made by those engaged in evaluating the democratic credentials of the institutional framework of the EU. In the standard version of the democratic deficit, the EU’s institutions are overrun by unelected bureaucrats or technocrats.<sup>186</sup> In particular, it is a common objection that the unelected Commission and the merely indirectly elected Council of Ministers – both of which are regarded as the *de facto* executive of EU governance – suffer this democratic deficit. There have thus been many proposals for reform presented along the lines of electing – directly or indirectly – the incumbents of these institutions.<sup>187</sup> Another, latterly more successful, argument has been for the election of the President of the Commission.<sup>188</sup> Since the adoption of the Lisbon Treaty, the

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<sup>186</sup> See Weiler et al, 1995: 6-9. For more recent accounts of the prevailing arguments, see Føllesdal and Hix, 2006: 534-537; Menon and Weatherill, 2007: 3-6; and Craig and de Búrca, 2011: 150-155. These accounts do not merely present a “straw man”. Indeed, Føllesdal and Hix have systematically and normatively rehearsed these arguments in their contributions to the DemDefLit (Føllesdal and Hix, 2006; and Hix, 2008).

<sup>187</sup> On direct elections to the Council, see Blondel et al, 1998; and Føllesdal, 1998. Moravcsik argues, on the contrary, that the incumbent representatives of Member States in the Council suffice given that they have been elected by their electorates and are *a priori* accountable to their national parliaments (See Moravcsik, 2002; and Moravcsik, 2008). On direct and indirect elections to the Commission, see Christophe Crombez, “The Democratic Deficit in the European Union: Much Ado about Nothing?” (2003) *European Union Politics* Vol. 4 No. 1 101.

<sup>188</sup> On direct election of a Commission president, see Vernon Bogdanor, “The Future of the European Community: Two Models of Democracy” (1986) *Government and Opposition* Vol. 21 No. 2 161; and Frank Decker, “Governance Beyond the Nation-State. Reflections on the Democratic Deficit of the European Union” (2002) 9(2) *Journal of European Public Policy* Vol. 9 No. 2 256. On elections via



European Parliament now has a *de jure* role in electing a Commission President.<sup>189</sup> It has also been argued that the Commission should be stripped of its executive powers,<sup>190</sup> or, as we have seen, that it is simply unnecessary for such technocratic organisations to be democratic and thus elected anyway, given the nature of the EU.<sup>191</sup>

In the school of electoral representation, even the directly elected European Parliament does not escape criticism. From the point of view of representation by election, the key claims are that there is low voter turn-out at European elections, and that, for those who do vote, the elections are more about national politics than they are about distinctively EU policy and politics.<sup>192</sup> This is another reason why Føllesdal and Hix argue for a competitive system of party politics – so that real debates emerge in the eyes of voters, and there is thus something at stake to vote for or against in European elections.<sup>193</sup>

Beyond electoral representation, there are analyses that conceive of democratic representation in terms of politically-salient public interests that ought to be factored

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an electoral college, see Simon Hix, “Elections, Parties and Institutional Design. A Comparative Perspective on European Union Democracy” (1998) 2(3) *West European Politics* Vol. 2 No. 3 19. On the involvement of the European Parliament specifically, see Walter Van Gerven, *The European Union: A Polity of States and Peoples*, Oxford: Hart Publishing, 2005; and Brenden Donnelly and Markus Wagner “Voting for Europe: Citizens, Elections and Referendums” Federal Trust, Policy Brief Number 27, 2006.

<sup>189</sup> Article 14 (1) TEU. This is, however, a vote on a proposal from the European Council (Article 17 (7) TEU), on the basis of consultations between the European Council and the European Parliament (Declaration 11 of the Lisbon Treaty). But the EP does not enjoy similar powers with respect to the Council (Article 16 (6) TEU, and Article 236 TFEU); the Court of Justice of the European Union (for the processes of elections of Presidents of the Union Courts, see Section 3.3.4 of Chapter Four); the Court of Auditors (Article 283 TFEU); and the Executive Board of the European Central Bank (Article 286 TFEU).

<sup>190</sup> Roland Vaubel, *The Centralisation of Western Europe: The Common Market, Political Integration and Democracy*, London: Institute of Economic Affairs, 1995.

<sup>191</sup> See especially Majone, 1998; Majone, 2001; Moravscik, 2002; and Moravscik, 2008.

<sup>192</sup> For a detailed empirical study of these claims, see Moravscik, 2002: 615-617. See also Blondel et al, 1998. These and other criticisms of the EP have been made in relation to the broader issue of democratic accountability of the EU, discussed below.

<sup>193</sup> See Føllesdal and Hix, 2006: 551-553; and Hix, 2008: 98-107. It is interesting to note here that Føllesdal and Hix share the same empirical observations as Moravscik, yet their normative arguments strongly diverge. This issue will be explored in Section 4.

into institutional decision-making and structuring.<sup>194</sup> In the DemDefLit, these interests are typically understood along the paradigmatic fault-lines of EU governance: intergovernmental, supranational, and infranational.<sup>195</sup> Naturally, the intergovernmental approach emphasises the importance of distinctively national interests within the EU's regulatory framework.<sup>196</sup> The standard version here is that by transferring competences to supranational (procedurally and/or substantively undemocratic) EU institutions, such as the Council and the Commission, national interests are marginalised or bypassed altogether. This argument manifests itself in debates on the conceptual and practical issues of *subsidiarity* in the EU.<sup>197</sup> Subsidiarity – best understood here in its political (as opposed to legal) form<sup>198</sup> – provides a rationale by which scholars have argued in favour of protecting national regulatory diversity and interests, in opposition to a dis-interested European technocracy.<sup>199</sup> As such, much of the focus here has been on the role of national parliaments within the ordinary legislative process, which has latterly resulted in significant reforms via the Lisbon Treaty.<sup>200</sup>

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<sup>194</sup> As we shall see in Chapter Five, it is this perspective that forms the basis of the analysis of the representativeness of the Court of Justice's structures and processes.

<sup>195</sup> See especially Weiler et al, 1995: 24-28.

<sup>196</sup> See, for example, Vivien Schmidt, *Democracy in Europe. The EU and National Politics*, Oxford and New York: Oxford University Press, 2006.

<sup>197</sup> For an overview of the different conceptual understandings of subsidiarity, and its practical application, see Nicholas Barber, "The Limited Modesty of Subsidiarity" (2005) *European Law Journal* Vol. 11 308 (hereinafter Barber, 2005). For a critical view of its application and understanding within the EU, prior to the reforms in the Lisbon Treaty, see Gareth Davies, "Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time" (2006) *Common Market Law Review* Vol. 43 63 (hereinafter Davies, 2006).

<sup>198</sup> See Davies, 2006.

<sup>199</sup> See Robert Schütze, "Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism" (2009) *Cambridge Law Journal* Vol. 68 525; and Philipp Kiiver, "The Early-Warning System for the Principle of Subsidiarity: the National Parliament as a *Conseil d'Etat* for Europe" (2011) *European Law Review* Vol. 36 98.

<sup>200</sup> The major innovation of the Lisbon Treaty in this regard was to provide national parliaments with formal powers in the ordinary legislative procedure (under Article 289 TFEU and Article 294 TFEU) within which national parliaments may participate and negotiate in the process. See Protocol (No 2) TEU On the Application of the Principles of Subsidiarity and Proportionality (2010) OJ C 83/206 (hereinafter Protocol 2). National parliaments must be consulted, and have (limited) powers of negotiation that can result in the redrafting of legislative proposals (see Article 6 and Article 7 of Protocol 2). They cannot, however, veto proposed legislative acts. Recently, the first instance of a "yellow card" raised by a sufficient number of national parliaments under this procedure connection with the so-called "Monti II" legislative proposal of the Commission, clarifying the consequences of the rulings on labour law and free movement of companies in light of the judgments in *Viking* and *Laval*. National Parliament objections can be tracked via IPEX, <http://www.ipex.eu/IPEXL-WEB/search.do>. The Commission has since withdrawn the proposal (12 September, 2012), yet it did

The supranational variant places a premium on the notion of representation in the liberal tradition of substantive democracy i.e. democratic output. Habermas, for example, as we have seen, bases his claim of a democratic deficit in the asymmetry between market deregulation and welfare protection of citizens. The solution is, therefore, to codify a set of socio-political rights that redress the under-represented class of citizens who have been marginalised by the market-freeing forces of EU integration.<sup>201</sup> This is a more ambitious version of Menon and Weatherill's supranationalist claims, in which they emphasise the virtue of representation as "respect[ing] the interests of actors whose voice is excluded or muffled (*de jure* or *de facto*) within purely national political processes."<sup>202</sup> An important point to note here, which is of great significance to the claims in this thesis, is that there is a *prima facie* zero-sum tension between the intergovernmental and supranational variants of interest representation. We shall return to this point in Section 4.

Finally, the "infranational" variant of interest representation extols the virtue of civil society as a relevant and important actor in the constitutional structuring of EU governance.<sup>203</sup> Civil society here refers to a range of actors that do not qualify as a public authority, at whatever level: private organisations; NGOs; regions of the Member States; sectoral or epistemic interest groups, and individuals, *inter alia*. Grande observes that "in [a] multi-level system of governance like the EU, some of the premises of political representation no longer hold."<sup>204</sup> He argues that there are

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not admit to violation of the subsidiarity principle. Instead it simply cited absence of adequate political support.

<sup>201</sup> Habermas, 2001.

<sup>202</sup> Menon and Weatherill, 2007: 3. See also Weatherill, 2010: Chapter Nine.

<sup>203</sup> This is sometimes referred to in political theory as associative democracy. Weiler refers to this system as "infranationalism" and holds that it is apolitical and "technocratic" (Weiler, 1999: 283-285). It gives rise to efficacious problem-solving, whilst at the same time circumventing the zero-sum, or negative sum, tensions that exist between the intergovernmental and supranational structures of representation (see also Joseph Weiler, "Epilogue: Comitology as Revolution Infranationalism, Constitutionalism and Democracy" in C. Joerges and E. Vos (Eds.) *EU Committees. Social Regulation, Law and Politics*, Hart Publishing, 1999: 347). An interesting addition here is in the way that Joerges and Neyer conceive of this. Unlike Weiler, they hold that its virtue lies in its capacity to foster public discourse and deliberation around the policy-making process – a view against which Weiler strongly protests. This will be examined below under the heading of deliberation.

<sup>204</sup> Grande, 2000: 124-125.

many actors that have *de facto* influence on the policy-making process (like those above) and that the EU's political framework ought to be oriented towards their representation.

### 2.3.2. Participation

In two important respects, there is a conceptual overlap between the democratic virtues of representation and participation.<sup>205</sup> First, both virtues can, and should, be understood as mechanisms of institutional responsiveness to politically-salient matters of public interest.<sup>206</sup> Second, both representation and participation are capable of measuring the (often marginalised) interests of civil society. Yet the crucial difference between these two virtues is the manner in which each is disposed to such measurement.<sup>207</sup> The representation of civil society – infranationalism or associative democracy – is primarily a substantive conception of democratic ordering. On the basis that there are institutional structures and incumbents in place to represent interests, it tends to measure those interests in terms of what is *perceived* to be of interest (government *for* the people), whereas participation in institutional decision-making is a procedural conception of democratic ordering and institutional responsiveness (government *by* the people). Of course, the two approaches can be synergistic, but it is often the case, and demonstrably the case in the EU, that democratic representation is dominated by intergovernmental and supranational interests.<sup>208</sup>

A point of departure here, then, towards the virtue of participation, is that there is too much emphasis within the political institutions of the EU on representation, to the extent that the interests of civil society are displaced. Opportunities for citizens and interest groups to participate directly in the policy-making process are more

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<sup>205</sup> See Section 2.1 of Chapter Six for further discussion.

<sup>206</sup> See Section 3.2.1 in Chapter Three.

<sup>207</sup> See the theoretical discussions in Chapters Five and Six for a more detailed account of this distinction.

<sup>208</sup> This is an important premiss in Joerges and Neyer's theory of "deliberative supranationalism" (Joerges and Neyer, 1997; and Joerges, 2006).

attractive from a civil society point of view. Abromeit thus argues that in the design of EU institutional structures:

The task is ... depicting the structure of the existing mixture of decision-making institutions and policy networks, of ‘statist’ elements and intergovernmental as well as intersocietal cooperation, in this way clarifying it and indicating the places – the crucial ‘intervention points’ – where participatory elements can and should be introduced.<sup>209</sup>

She proposes a combination of representation and direct participation under a system of sectoral and regional veto referendums as part of the policy-making process. Under this system, members of regional or sectoral (i.e. epistemic) groups would be given the opportunity to vote at referendums on policy decisions that directly affect their interests, the consequence of which could be the capacity to veto any potential development.

Similarly, Nentwich observes that the current array of opportunity structures for citizens’ participation is too heavily dominated by representative structures.<sup>210</sup> He presents various, empirically identifiable, “opportunity structures for citizens’ participation” in the EU policy process: the Internet could be used to provide interactive media; deliberative opinion polls; a forum for citizens to comment on green and white papers (with enhanced transparency<sup>211</sup>) and input on EP hearings (of which there should be more); expanding the range and depth of Eurobarometer research; less restrictive *locus standi* rules for the Court of Justice’s judicial review procedure under (what is now) Article 263 TFEU; trans-European political parties that allow citizens to become members; referenda for all constitutional issues;

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<sup>209</sup> Abromeit, 1998: 113.

<sup>210</sup> See generally Michael Nentwich, “Opportunity Structures For Citizens’ Participation: The Case of the European Union” in A. Weale and M. Nentwich (Eds.) *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship*, London: Routledge, 1998 (hereinafter Nentwich, 1998).

<sup>211</sup> On transparency and the reforms that have been made in that regard since 1998, see Section 2.3.4, below.

controlling petition referenda to block legislation (similar to Abromeit's point); and for commissioners to be accountable via public opinion.<sup>212</sup>

There is a significant deliberative variant in the participation school. In Curtin's outline of an "alternative vision of democracy for the EU", she explains that her postnational conception is a resolutely thicker notion of democracy than that of the national conception. By this she means that it encapsulates a broader range of theoretical influences including, most significantly, a deliberative notion of democracy. This view emphasises processes of dialogic will-formation within non-governmental civil spheres and networks of communication and, importantly, does not "hinge on the assumptions of macro-subjects, like the 'people' of a particular community".<sup>213</sup> Furthermore, it emphasises a republican conception of political participation:

Whereas a liberal vision of democracy stresses the importance of giving due weight to each individual's distinct preferences, the deliberative view relies upon a person's capacity to be swayed by rationale arguments and to lay aside particular interests and opinions in deference to overall fairness and the common interest of the collectivity.<sup>214</sup>

This conception, finally, does not oppose the idea of political representation *per se* and, in fact, Curtin proposes that this republican model be used in combination with sites of representation within the EU's institutional framework. Indeed, some of the advocates of representative structures, such as Grande, envisage a system in which the kinds of "associative" elements of representation (i.e. the involvement of private organisations and NGOs, for example, in policy-making) are exposed to deliberative opportunities for the direct participation of citizens.<sup>215</sup> This reflects the theoretical premiss of Joerges and Neyer's "deliberative supranationalism". Through their examination of the practice of Comitology in the Commission – whereby experts and

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<sup>212</sup> On the democratic accountability of the Commission, see Section 2.3.3.

<sup>213</sup> Curtin, 1997: 54.

<sup>214</sup> Curtin, 1997: 54.

<sup>215</sup> Grande, 2000: 130.

leaders of epistemic communities are consulted during policy-making – they discover a deliberative practice contained within “non-hierarchical transnational governance structures”. This practice, they argue, depends upon “persuasion, argument and discursive processes rather than on command, control and/or strategic action.”<sup>216</sup>

### 2.3.3. Democratic Accountability

In contrast to systemic or generic accountability, *democratic* accountability relates specifically to the manner in which the public holds particular institutions of the EU to account. Bovens’ conception still captures this relationship, yet it is more specific inasmuch as the “forum” is the public, or institutions representative of the public (e.g. the EP), and the “actor” is any one of the EU’s regulatory institutions.<sup>217</sup> This does not mean that democratic accountability cannot be understood systemically (as an aggregation of the entire institutional framework of the EU’s institutions). On the contrary, the first and most pervasive perspective on democratic accountability in the EU that we consider here relates to the deficiencies of the EP to provide the central forum by which institutional accountability is guaranteed holistically in the EU (what Bovens refers to as broad, public and democratic accountability). Following a Westminster model of parliamentary accountability, the standard version of the democratic deficit holds that the EP does not have enough legislative power, and that it does not have sufficient supervisory powers under which the executive branches of the EU (namely the Council and the Commission) are answerable to it. In spite of these claims, over the years during successive Treaty reforms and inter-institutional agreements, the powers of the EP have gradually and incrementally increased. We saw above that the EP now has a *de jure* role in electing the President of the Commission. Likewise, it has gained considerable power in the ordinary legislative procedure (both procedurally and substantively), and greater powers of oversight and veto with respect to the secondary legislative acts of the Commission during the

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<sup>216</sup> Joerges and Neyer, 1997: 298.

<sup>217</sup> See Bovens, 2007: 455, 463.

committee stage.<sup>218</sup> It may also censure and dismiss the Commission,<sup>219</sup> and has (limited) oversight powers with respect to the budget of the Commission.<sup>220</sup> It also has the power to supervise and call to account the institutions of the EU by petition,<sup>221</sup> or via its Ombudsman.<sup>222</sup> Nevertheless, these reforms have not completely addressed the concerns of advocates of Westminster-style parliamentary accountability. We have already seen the claims of Føllesdal and Hix, whereby democratic accountability via the EP can only be achieved with a competitive system of party-politics in place. This perspective is, however, notably ambitious and feasible only in the event of a state-like transformation of the EU. Papadopoulos, by contrast, considers the role of the EP in light of the multi-level nature of the EU and argues that each institution should be formally answerable and punishable by the EP following Bovens' generic model of accountability.<sup>223</sup> Ultimately, these criticisms stem from the fact that the EP is still a comparatively weaker accountability forum than its national counterparts – largely down to the *sui generis* system of separation of powers in the EU's institutional framework.<sup>224</sup>

Moving away from the parliamentary notion of democratic accountability, there are more optimistic and ambitious renditions of democratic accountability in the EU. In these views, accountability must be understood in a disaggregated sense, whereby particular institutions and/or areas of regulatory competence are answerable to a multiplicity of public forums. Curtin adopts this approach in her assessment of the accountability of “(quasi-) autonomous” institutions – namely, Comitology and EU agencies.<sup>225</sup> For Curtin – in addition to the aforementioned (limited) mechanisms of

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<sup>218</sup> See Articles 288 to 299 TFEU; and Article 36 TEU; Council Decision 1999/468/EC (2000) OJ L 256/19; and Council Decision 2006/512/EC (2006) OJ L200/11 (consolidated version at (2006) OJ C-225/4). For an overview of the historical evolution of institutional reform, see Craig and de Búrca, 2011: Chapter One; and for comments on the powers of the EP in particular, see Craig and de Búrca, 2011: 51-58.

<sup>219</sup> Article 234 TFEU.

<sup>220</sup> Article 314 TFEU. For commentary, see Carl Bergstrom, *Comitology. Delegation of Powers in the European Union and the Committee System*, Open University Press, 2005.

<sup>221</sup> Article 226 TFEU and Article 227 TFEU.

<sup>222</sup> Article 228 TFEU.

<sup>223</sup> Yannis Papadopoulos, “Problems of Democratic Accountability in Network and Multilevel Governance” (2007) *European Law Journal* Vol. 13 No. 4 469 (hereinafter Papadopoulos, 2007).

<sup>224</sup> Barber, 2001.

<sup>225</sup> Curtin, 2007: 531-539.



accountability to the EP – the Commission, its committees and EU agencies are accountable to other public forums such as the Court of Justice,<sup>226</sup> the Court of Auditors and the European Ombudsman,<sup>227</sup> which represent alternative accountability forums that do not fall foul of the mis-guided and mythical democratic legitimacy postulate that delegation theory offers. In other words, the former institutions are *directly* accountable to the latter – a more efficacious and contextually appropriate system of accountability.<sup>228</sup> The same sort of inter-institutional accountability is observed in other contexts. For example, it is argued that different actors are accountable to the Commission under the complaints and infringement procedures.<sup>229</sup> Article 17 TEU states that “[the Commission] shall oversee the application of Union law under the control of the Court of Justice of the European Union.” Its role is thus analogous to that of a public prosecutor – charged with the responsibility of enforcing the law unilaterally with sanctions; or by bringing infractions to the attention of courts.<sup>230</sup>

#### 2.3.4. Transparency

Institutional transparency, especially in terms of decision-making, is seen as a core democratic virtue. If we understand transparency (as I argue that we should) as part of a process by which the public can audit institutional processes, then it goes together with the democratic virtue of accountability. In other words, transparency is an adjunct to democratic accountability in the name of public supervision.<sup>231</sup> What is

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<sup>226</sup> This role of the Court of Justice will be considered in greater depth in Section 3. See also Loc Hong, 2010. He argues that the Court fulfills this function as part of a broader democratic network of counter-majoritarian institutions.

<sup>227</sup> On the European Ombudsman, see Peter Bonnor, “Institutional Attitudes in Context: A Comment on Rawlings’ Engaged Elites” (2001) *European Law Journal* Vol. 7 No. 1 114: 115.

<sup>228</sup> Following Bovens’ generic conception of accountability, Curtin points out that the Court of Auditors and the Ombudsman are deficient in some respects i.e. a lack of coercive power (Curtin, 2007: 537-538).

<sup>229</sup> See Richard Rawlings, “Engaged Elites: Citizen Action and Institutional Attitudes in Commission Enforcement” (2000) *European Law Journal* Vol. 6 4; Melanie Smith, “Enforcement, Monitoring, Verification, Outsourcing: The Decline and Decline of the Infringement Process” (2008) *European Law Review* Vol. 33 No. 6 777; and Arnull, 2006: 34.

<sup>230</sup> For an overview of this process, see Appendix One at note 2.

<sup>231</sup> This is a point made by Bovens, amongst others (Bovens, 2007: 453).

important here is the idea of access to institutional documents, which record the input, the reasoning, and the output of the decision-making in political (and legal) institutions.<sup>232</sup>

In the standard version of the democratic deficit, the Council and the Commission are subject to the greatest criticism. Not only are their decision-making processes concealed from the public eye (especially in the Council), but the severity of this is compounded by the strong political and, in particular, legislative power they yield. Yet transparency in the EU is both conceptually nuanced and, like many of the other democratic virtues, gaining greater force through successive Treaty reforms and inter-institutional agreements.<sup>233</sup> There are nonetheless still calls for greater transparency in the EU. Føllesdal and Hix criticise the Council in particular for its enduring lack of transparency, and make this central to their claims of a democratic deficit in the EU in spite of the aforementioned reforms.<sup>234</sup> Brandsma et al take a socio-legal approach to their study of the transparency of Comitology. In their view, the formal legal obligations of transparency belie the day-to-day practice of institutional decision-making. In an empirical study of the Comitology process – examining the “input”, “throughput” and “output” of decision-making in Commission committees – they discovered that there are serious shortcomings with respect to the information that is being published; shortcomings in both quantitative and, especially, qualitative terms.<sup>235</sup>

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<sup>232</sup> See Gijs Jan Brandsma, Deirdre Curtin and Albert Meijer, “How Transparent are EU ‘Comitology’ Committees in Practice?” (2008) *European Law Journal* Vol. 14 No. 6 819 (hereinafter Brandsma et al, 2008): 824-829.

<sup>233</sup> On transparency in the EU, see Deirdre Curtin and Albert Meijer, “Does Transparency Strengthen Legitimacy?” (2006) *Information Polity* Vol. 11 No. 2 109; and Brandsma et al, 2008: 827-829. For an overview of the progress that has been made, see Brandsma et al, 2008: 819-822. For a broader overview of institutional reform, see Craig and de Búrca, 2011: Chapter One. Important examples include Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (2001) OJ L 145/43. See also European Commission, Green Paper, Public Access to Documents held by the Institutions of the European Community A Review, COM (2007) 185 Final (18 May 2007); and inter-institutional agreement between Commission and Parliament on procedures for implementing Council Decision 1999/468/EC (2000) OJ L 256/19.

<sup>234</sup> These are claims that are made by Føllesdal and Hix, 2006: 553-554. See also Hix, 2008.

<sup>235</sup> For their data, see Brandsma et al, 2008: 831-836. A highly significant observation they made was that, whilst input and output documentation was relatively well published, this information was much more quantitative in nature, simply recording the final decision of meetings or the results of votes, whereas the arguably more democratically pertinent qualitative information (at least from a

Yet there are also more nuanced accounts of transparency in the EU context. As Craig and de Búrca (correctly) observed,<sup>236</sup> it is important to make such assessments from a comparative perspective. Moravcsik, for example, argues that there is even greater transparency in the EU than we would legitimately expect from our national institutions:

Yet even in promulgating regulation, the EU acts under the procedural straightjacket of extreme transparency ... Successively, it must secure: (a) consensual support from national leaders in the European Council to be placed on the agenda, (b) a formal proposal from a majority of the technocratic Commission, (c) a formal 2/3 majority (but in practice, a consensus) of weighted member state votes in the Council of Ministers, (d) a series of absolute majorities of the directly elected European parliament, and (e) transposition into national law by national bureaucrats or parliaments ... Such a set of barriers would be unimaginably high in a national context, where elected unitary parliamentary governments can often legislate effectively by a single majority vote and bureaucratic mandate ... In addition, the EU has imposed state-of-the-art formal rules guaranteeing public information and input; studies show these protections are stronger than those of the USA or Switzerland.<sup>237</sup> It's all in the Financial Times, or any one of the many publications and websites – including the EU's own – that track legislation.<sup>238</sup>

Another more nuanced analysis is Curtin's theory of institutional "secrecy" in the context of both internal and external security policy and practice in the EU.<sup>239</sup> She argues that, in the context of information relating to security, institutional secrecy is

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deliberative democracy perspective) was seriously deficient. From their data-set, they recorded that in 45.2% of the publications of committee deliberations the details were "poor"; 40% were "fair"; 11.9% were "good"; and only 2.9% were "excellent". For more detail on these results, see Brandsma et al, 2008: 832.

<sup>236</sup> See *supra* at note 130.

<sup>237</sup> Thomas Zweifel, *Democratic Deficit? Institutions and Regulation in the European Union, Switzerland and the United States in Comparative Perspective*, Lanham MD, 2002; and Thomas Zweifel, *International Organizations and Democracy*, Boulder 2005.

<sup>238</sup> Moravcsik, 2008: 334.

<sup>239</sup> Deirdre Curtin, "Top Secret Europe" Inaugural Lecture 415 (delivered upon appointment to the chair of Professor of European Law at the University of Amsterdam on 20 October 2011), Universiteit vvan Amsterdam, 2011.

a necessary public good, which also exists at the transnational level. Whilst nevertheless generally arguing for less secrecy (especially in the Council and the European Council), she conceives of different levels of secrecy: “deep” and “shallow” secrets. The former are secrets that are so secret that their very existence is unknown and unknowable to the general public (as well as other institutional actors). Her principal argument is then to say that the EU should become more transparent by avoiding such deep secrets, but allowing for institutional secrecy in the shallow sense, whereby other political institutions and their actors, and/or the general public can in limited ways hold the holders of shallow secrets to account, whilst ultimately recognising the demonstrable need for this information to be kept away from the broader public domain.

#### *2.4. Interim Conclusion*

The literature review in this Section was presented, first, to outline an area of scholarly enquiry to which this thesis contributes; and, second, to tease out relevant analytical criteria for my argument. On the former, we saw that much of the literature focused on how the political institutions of the EU are, or are not, instrumental in making the EU a democratic polity. In Section 3, I consider the (limited) contributions within the DemDefLit that analyse the Court in this way. On the latter, a few observations need to be emphasised. First is that underlying political philosophies of the EU (Section 2.1) pervade all levels of analysis in the DemDefLit. It is rare, and, as I argue in Chapter Three, improvident, to evaluate the instrumental democratic legitimacy of institutions without a clear analytical grounding of the polity-context within which they function. To that end, in Section 4, I clarify the salient polity conditions of the EU for my argument. Another important observation was the conceptual overlap between the intrinsic virtues and instrumental democratic legitimacy. Indeed, Hix’s argument that the EP should hold competitive Westminster-style party-political elections entails elements of participation, representation, and accountability, which ultimately (according to his guiding

philosophy) generate the “essential” institutional dynamics for a democratic EU i.e. instrumental democratic legitimacy. It is central to the argument of this thesis to carefully address the boundaries and balance between intrinsic virtues and instrumental democratic legitimacy, which will be addressed in the following Chapters.

### **3. The Court of Justice, the DemDefLit and Instrumental Democratic Legitimacy**

In this Section, we look at the limited contributions to the DemDefLit with respect to the role of the Court of Justice of the European Union. Recalling the different perspectives and analyses of the Union’s other institutions in Section 2, here we are interested in the extent to which the Court of Justice has been analysed in these ways. These approaches are outlined in Section 3.1. In Section 3.2, I move on to highlight the analytical shortfalls and intellectual gaps that persist, and demonstrate the intellectual contribution of this thesis – explaining how my arguments fit into those gaps.

#### *3.1. The Court of Justice and the DemDefLit*

Mitchell’s point was that courts and, by implication at least, the Court of Justice have “something to do with the realities of democracy”.<sup>240</sup> For him, courts were not simply a service that people may use to resolve their disputes, but part of the very fabric of democracy. Moreover, he argued that in the context of the EU, we should be prepared to adopt new paradigms in political theory in order to understand the democratic legitimacy of courts.<sup>241</sup> What, then, has been made of this legacy?

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<sup>240</sup> See *supra* at note 1.

<sup>241</sup> Mitchell, 1968: 11-12.

The most common, and not altogether surprising, claim is that the Court safeguards the basic tenets of a democratic polity through its exercise of judicial review. Moravscik, for example, in his emphatic rejection of the need for democracy at the EU level, argues that the Court of Justice protects national democracies from unwarranted legislative and executive trespass by the EU given its powers of legislative and administrative review.<sup>242</sup> Operating under non-intergovernmentalist paradigms, there is a variety of instrumental arguments. There is the equivalent of Moravscik's approach, whereby the Court of Justice is regarded as a democratically essential "counter-majoritarian" institution under an orthodox separation of powers paradigm. Lenaerts proposes that an important democratic end for constitutional courts to observe is an inter-institutional check – specifically, to guard against the failure of political institutions to fulfil their legislative duties:

[T]he Court of Justice is still seen as the guardian of the rule of law and of democratic values when the actors in the political process seem to need protection against each other's majoritarian rule.<sup>243</sup>

Loc Hong adopts the approach of Ely,<sup>244</sup> by which constitutional courts, like the Court of Justice, are necessary in a democracy to protect "discrete and insular minorities" from being marginalised by majoritarianism; and to unblock the political channels through which political actors may participate and deliberate communicatively:

[A] politically powerful ECJ is, in fact, indispensable for the democratic legitimacy of qualified majority voting in the long run. Without such a counter-majoritarian mechanism for liberation, minorities in general, and minorities composed of small

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<sup>242</sup> Moravscik, 2002: 610, 611-614; and Moravscik, 2008: 334. For an outline of the Court's powers of review, see Appendix One of this thesis. Others have argued that mere judicial oversight is not enough to protect the democratic deficits that putatively exist at the national level (see Meyring, 1997; Weiler et al, 1995: 9).

<sup>243</sup> Koen Lenaerts, "Some Thoughts about the Interactions between Judges and Politicians in the European Community" (1992) *Yearbook of European Law* Vol 12 1: 34.

<sup>244</sup> See John Hart Ely, *Democracy and Distrust*, Cambridge: Harvard University Press, 1980 (hereinafter Ely, 1980). Ely borrows the terminology of "discrete and insular minorities" from the famous case heard by the US Supreme Court: *United States v. Caroline Products Co.* 1938 304 US 144 (hereinafter *Caroline Products*).

Member States in particular, would soon have reasons to perceive the governance of the Union on the basis thereof as nothing more than a regime under which, to quote Thucydides, the strong do what they can and the weak suffer what they must.<sup>245</sup>

The contributions of Weiler, and Mancini and Keeling, span two different kinds of instrumental democratic legitimacy. They argue, in a similar vein to Loc Hong, that the Court's constitutional jurisprudence contributes towards democratic *ends* in its capacity to protect and preserve the juridical conditions necessary in a democratic polity e.g. the Court's fundamental rights jurisprudence.<sup>246</sup> In other words, without freedom of expression, for example, to whom could the Union's regulatory authorities credibly be responsive?

This also overlaps with a particular strand of theory in which the Court's famous constitutional jurisprudence has been instrumental towards *building* a democratic polity. Mancini and Keeling make the point that the progenitors of the EU (the European Coal and Steel Community; the European Atomic Energy Community; and the European Economic Community)<sup>247</sup> were not, nor intended to be, "democratic" organisations. Similarly, Weiler provides a genealogy of the Court's polity-constitutive developments.<sup>248</sup> The same logic has been applied in relation to specific categories of putatively necessary conditions for a democratic polity. Halberstam argues that an important democratic aspect of judicial polity-building is a bottom-up form of constitutional legitimacy associated with citizenship. He proposes that the Court's rejection of intergovernmentalism might "further democratic equality among

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<sup>245</sup> Loc Hong, 2010: 715. Rosenfeld rejects the separation of powers paradigm in the context of the EU, and, thus, the counter-majoritarian argument with respect to the Court of Justice (see Michel Rosenfeld, "Comparing Constitutional Review by the European Court of Justice and the US Supreme Court" (2006) *International Journal of Constitutional Law* Vol. 4 No. 4 618 (hereinafter Rosenfeld, 2006): 632. See also Snell, 2008: 621-623.

<sup>246</sup> See Weiler, 1991: 2417-2419; and Mancini and Keeling, 1994.

<sup>247</sup> These are: the Treaty Establishing the European Coal and Steel Community (1951), available at <http://eur-lex.europa.eu/en/treaties/index.htm#founding> (hereinafter ECSC); the Treaty establishing the European Atomic Energy Community (1957), available at <http://eur-lex.europa.eu/en/treaties/index.htm#founding> (hereinafter Euratom); and the Treaty of Rome (1957), available at [http://ec.europa.eu/economy\\_finance/emu\\_history/documents/treaties/rometreaty2.pdf](http://ec.europa.eu/economy_finance/emu_history/documents/treaties/rometreaty2.pdf). For an overview of this evolution, see Weatherill, 2010: 3-26.

<sup>248</sup> See generally Weiler, 1991.

citizens, not the long-term policy preferences of constituent state governments.”<sup>249</sup> The role of law, and the Court of Justice, is central to Joerges and Neyer’s conception of a democratic EU – following their paradigm of “deliberative supranationalism”<sup>250</sup> – especially with regard to ensuring that regulatory decision-making in and around the EU is deliberative, transparent and effective:

It would be the task of the law to further this kind of orientation, for example through: clear commitments represented primarily by the Commission to arrive at a common solution; the establishment of forums where the views of all concerned societies can be included; legal principles and rules civilising the decision-making process and providing an institutional context for practical reasoning; to ensure the potential of the system to manage tensions between output rationality (high standards), procedural transparency<sup>251</sup> and fairness; to control the regulatory bargaining power of individual states; to promote the generation and dissemination of knowledge.<sup>252</sup>

### *3.2. The Court of Justice and Instrumental Democratic Legitimacy*

As a general observation, there is much more room for contributions on Court of Justice in the DemDefLit. The contributions made tend to be tangential to broader

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<sup>249</sup> Halberstam, 2005: 798.

<sup>250</sup> See *supra* at Sections 2.1.1 and 2.2.1.

<sup>251</sup> Curtin examines how the Court is instrumental in safeguarding transparency in the Union’s administrative processes. See Curtin, 2007: 535.

<sup>252</sup> Joerges and Neyer, 1997: 299. These observations very much follow a Habermasian proceduralist logic (see Habermas, 1995; and Habermas, 1998). There are a variety of contributions along these lines in the DemDefLit. Everson and Eisner’s central claim in their contribution is that the Court of Justice has been instrumental in facilitating the construction of, through its legal reasoning, a self-reflexive, inclusive, socio-politically responsive polity (Everson and Eisner, 2009). Similarly, Eriksen and Fossum note the manner in which the Court reasons via an inter-institutional dialogue; and that its development and protection of rights within the Union legal order is, and will continue to be, a valuable source of deliberative potential, particularly with respect to citizens’ participation (see Erik Eriksen and John Fossum, “Conclusion: Legitimation Through Deliberation” in Eriksen and Fossum (Eds.), *Democracy in the European Union: Integration Through Deliberation?*, London; New York: Routledge, 2000). On the Court’s role in making regulatory decision-making in the EU more transparent, see Joni Helliskoski and Päivi Leino, “Darkness at the Break of Noon: The Case Law on Regulation No. 1049/2001 on Access to Documents” (2006) *Common Market Law Review* Vol. 43 735; and Pedro Cabral, “Access to Member State Documents in EC Law” (2006) *European Law Review* Vol. 31 No. 3 378.



arguments, and do not reflect the rich literature on the instrumental democratic legitimacy of constitutional courts in constitutional theory (outlined in Chapter Three). The Court is *the* neglected institution in the DemDefLit. Even interdisciplinary approaches suffer from a somewhat parochial understanding of the role of courts in a democratic system. This is why the limited arguments that are made on the Court of Justice tend to resort to the safe-ground of the counter-majoritarian postulate. And the examples given above that go beyond that claim invariably focus on the Court's *output* i.e. its judgments.

In this thesis, an important objective is to contribute to this debate by going beyond these orthodoxies. In terms of the instrumental democratic legitimacy of the Court, the focus of the analysis here is the Court's structures and processes – what we might refer to as institutional *input* or *through-put*. As we saw in Section 2, many of the claims made in relation to the Union's other institutions are concerned with matters of institutional input e.g. election processes of incumbents (vis-à-vis democratic representation) and decision-making procedures (vis-à-vis democratic participation and institutional transparency). In those arguments, institutional structures and processes are *ipso facto* instrumental in bolstering the democratic legitimacy of the EU, largely because those institutions (namely the Council, the Commission, and the European Parliament) wield significant regulatory power (and probably because they are more recognisable to the public). But, as will be explained in Chapter Three, courts, especially constitutional courts like the Court of Justice, have regulatory powers too. The contributions that we saw in Section 3.1 on the Court's instrumental role were not about the *Court's* structures and processes, but how the Court – primarily via its judgments – helps to make the structures and processes of the Union's political institutions more democratic. They were not claims on how the Court's structures and processes themselves are instrumental in bolstering the democratic legitimacy of the Union. Contributions will either make claims on the structures and processes of the Court with limited emphasis on their democratic

credentials;<sup>253</sup> or they will make purely instrumental arguments, that have little to do with the structures and processes of the Court (Section 3.1).

The objective here is to redress this – to challenge the assumptions that give courts a limited role in contributing to the democratic ordering of polities; and to change the focus from judicial output to input/through-put i.e. the Court’s structures and processes. To that end, there are three (related) ways in which to understand democratic contribution (instrumental democratic legitimacy) made by the Court of Justice. The first is simply that the Court, via its structures and processes, applies the democratically established rules of law in a faithful manner – it is part of the transmission belt from which European citizens enjoy and can vindicate the democratically established rules of law of the EU. The second is that the Court *compensates* for democratic or systemic “deficits” that exist in the Union’s decision-making and law-making processes. The third is that the Court *complements* the Union’s decision-making and law-making processes. The difference between the latter two perspectives is dependent on the particular vision of what the EU is (i.e. the existential debate, above) – what I will hereinafter refer to as *finalité*. Given the analytical force of *finalité* in the DemDefLit, I defend a vision of *finalité* that roughly accords with the idea of “deliberative supranationalism” (*qua* Joerges and Neyer), and explain how this vision guides my own analysis of the procedural democratic legitimacy of the Court of Justice.

#### **4. Understanding *Finalité*: The Three C’s of EU Constitutionalism**

This thesis began with a statement about the distinctiveness of the EU as a polity, and that distinctiveness forms an important premiss in my argument. This is unfolded in the following Chapters, but in this Section I will state briefly the core features of the EU that make it distinctive, with an emphasis on the features that have a particular resonance with understanding the procedural democratic legitimacy of the

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<sup>253</sup> See Section 3 of Chapter One. In particular, see Rasmussen, 1986: 46, 181.

Court of Justice. There are two levels underpinning my vision of *finalité*: abstract and empirical. The former denotes an underlying philosophy that guides my understanding of what the EU *should be*; and the latter empirically observes three related conditions of EU constitutionalism, which complement the abstract notion of *finalité*, but which also provide an important grounding on which to gauge democratic institutional configuration within the EU.

At the abstract level, my vision of *finalité* roughly accords with Joerges and Neyer's "deliberative supranationalism", and Everson and Eisner's notion of *Rechtsverfassungsrechts*.<sup>254</sup> The kernel of this the idea is that "we don't know what it is yet".<sup>255</sup> The contestation we observed in Section 2.1.1, in relation to the existential debate, exemplifies this. The EU is a *sui generis* category of polity. Not simply because the prevailing reductionist categories do not so neatly fit, but because it is a polity in a state of flux – responding to different pressures of constitutional and political design from its socio-political environment. It might be the case that the final result is something more recognisable and modernistic.<sup>256</sup> But at this stage we can only say, first, that it does not fit within the reductionist categories; and, second, that there is something to be said for treating the EU as the historical emergence of something quite new, which provides an opportunity for new paradigms of constitutional and political design to be cast as a response to the prevailing insufficiencies of the modern democratic state. This is what Mitchell urged in his inaugural lecture at the University of Edinburgh in 1968; and what Curtin meant by a "transcendental journey".<sup>257</sup>

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<sup>254</sup> Joerges and Neyer, 1997; and Everson and Eisner, 2009. See Section 2 generally for an overview of their arguments.

<sup>255</sup> David Fincher and Aaron Sorkin, *The Social Network*, Columbia Pictures, 2010. In this biographical film, the leitmotif was that *facebook* – as an emerging online "social network" – could not be categorised according to orthodox notions of business entities, such that its founders refused to conform to market pressures by treating it as a profitable service; because they "don't know what it is yet". There is a variety of interesting parallels that can be made between online social media and the EU, from ontological, epistemological and historical perspectives. Here it is only relevant to note that a similar argument is made in relation to the EU.

<sup>256</sup> See, for example, Habermas, 2001.

<sup>257</sup> See Mitchell, 1968; and Curtin, 1997: 4.

Complementing this abstract and normative vision of *finalité* are three empirical observations of constitutionalism in the EU – the three C’s of EU constitutionalism – the appreciation of which is vital to the task of democratic institutional configuration in the EU; these are: complexity, contestation, and change. The first is that the constitutional architecture of the EU, such as it is in its present form, is distinctively complex. As observed in the DemDefLit, the EU is typically understood to embody a constitutional tension between intergovernmental and supranational forces – particularly so as a tension between Member State interests and autonomous Union interests, respectively. Indeed, these forces represent the central constitutional feature of EU constitutionalism. Yet even this seemingly simple bifurcation is grounded in a complex web of jurisdictional division, and multi-level inter-institutional relations. This is so on two levels. First, the political objectives, or ends, of the Union are functionally divided into intergovernmental and supranational jurisdictions e.g. the CFSP, and the Common Market, respectively. Second, the Union’s institutional infrastructure – within its supranational jurisdiction – is organised in such a way that involves both intergovernmental and supranational decision-making structures and processes.<sup>258</sup> Within the intergovernmental parts of the Union, Member States (acting through the representatives of their governments) are the key players in the decision-making process. In this view, the ultimate goals of the Union, and the measures by which they are achieved, lie in the hands of the governments of the Member States acting in concert. By contrast, the supranational parts of the Union see the transfer of competences from the Member States to the Union’s central *independent* institutions, especially the Commission. According to this logic, the delivery of the ends transferred over to those institutions is administered without the interference of the Member States, and can be implemented by institutions that represent the Union as an autonomous polity. In addition to these complexities, we must also appreciate that there are other categories of constitutional actors – beyond intergovernmental (*qua* Member State), and supranational (*qua* autonomous Union) – that have their place in, and exert pressure on, the governance of the EU. There are, for example, other international jurisdictions that are either part of the EU, but which are limited to a

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<sup>258</sup> Consider the accounts of the Comitology procedure in Section 2.3.

sub-set of Member State signatories (e.g. the Eurozone); or which can overlap with the jurisdiction of the EU (e.g. the Council of Europe's Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter the ECHR) and the United Nations (hereinafter the UN)).<sup>259</sup> There is also, importantly, what we might broadly term civil society. Under the rubric of civil society, we can include categories such as the individual (as economic or political citizen), and specialist or sectoral interest groups. We saw in the DemDefLit that the civil society component plays an important role in guiding the constitutional structures of the EU – from Majone's neo-functionalism to Joerges and Neyer's deliberative supranationalism.<sup>260</sup> In that respect, the role of civil society in the EU is intertwined and insinuates itself within the primary constitutional tension between intergovernmentalism and supranationalism; and is marginalised somewhat given the dominance of the latter two forces. Finally, and in line with the foregoing guiding philosophy of the incomplete and unknown destination of *finalité* adopted here, there is the constitutional space within which yet-to-form categories of actors can emerge i.e. Everson and Eisner's normative and empirical argument that the EU is governed in such a way that allows for "revolutionary politics" to take shape.<sup>261</sup>

The second C of EU constitutionalism is polity contestation. If we consider the sheer breadth of perspectives in the DemDefLit, it is immediately apparent that the democratic nature of the EU and its institutions is deeply contested. In that regard, it is important to remember that underpinning many, if not all, of these debates is one theory or another on the nature of the EU i.e. the existential debate. In Section 2.1.1,

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<sup>259</sup> See, for example, Deirdre Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces" (1993) *Common Market Law Review* Vol. 30 17; and Sabel and Gerstenberg, 2010.

<sup>260</sup> Majone, 2001; Joerges and Neyer, 1997. See also Eric Stein, "Lawyers, Judges, and the Making of a Transnational Constitution" (1981) *American Journal of International Law* Vol. 75 1 (hereinafter Stein, 1981); and Everson and Eisner, 2009.

<sup>261</sup> Everson and Eisner, 2009: Chapter Seven. We might look to the emergence of socio-political rights of non-EU nationals (as Everson and Eisner do) as consistent with this premiss. The Court of Justice has been instrumental towards this end in a series of cases. See, for example, Case C-127/08 *Metock and Others* [2008] ECR I-6241 (hereinafter *Metock*). In this case, the Court of Justice was referred questions from the Irish High Court on the extent to which third country nationals could enjoy Union law rights. The Court of Justice, controversially (against the submissions of ten intervening Member States), ruled that Irish law (that excluded third country national family members of Union citizens from enjoying Union rules on free movement) was incompatible with Union law.

we saw that the EU is understood in a variety of, often competing, ways: reductionist views of the EU include intergovernmentalism, supranationalism, and (super)statism; and the more experimental views regard the EU as a *sui generis* polity that exemplifies a “mixed system” of reductionist categories, pluralism, heterarchy, and/or deliberative polyarchy. Such a diversity of visions of *finalité* invariably permeates analyses at the institutional and meta-institutional levels, and does so in a decisive way.<sup>262</sup> What is important to note here is that such contestation should not simply be regarded as a mere symptom of the EU project, or as an interesting academic sideshow, but is itself part of the *mélange* of *finalité*. Polity contestation in the EU is an important guiding hand with which to configure the EU’s institutions democratically. If we take the national political context as an analogy, we see in the US, for example, how important the ideological cleavage between the Republican and Democrat parties is in guiding the configuration of the US’s Federal and State institutions. In the EU context, competition over *finalité* is *the* essential element in a theory of EU democracy. In other words, it is the equivalent of the US’s ideological divide as represented by Republicans and Democrats. Yet we do not need to go as far as Hix by suggesting that the *only* way for the EU to be responsive to this contestation is by institutionalising a competitive system of party-political elections. As will be made clear in the following Chapters, not only would such a system be ill-suited to the EU as a *sui generis* polity, but there is a variety of structural and procedural mechanisms by which the EU’s institutions can be configured so as to be responsive to polity-contestation.

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<sup>262</sup> The debate between Moravscik and Hix exemplifies this (see Moravscik, 2002; Moravscik, 2008; Føllesdal and Hix, 2006; and Hix, 2008). Their dispute centres on their differing approaches to *finalité*. They agree, and base their arguments, on the same set of empirical observations of the EU’s governance structures e.g. that there are no competitive party-political elections to an EU executive; that there is voter apathy with respect to European policies; and that the EU is regulated by a top-heavy executive. Yet intergovernmentalists, such as Moravscik, view the EU as nothing more than a “fourth branch of government”, that serves a similar function to quasi-governmental domestic institutions such as central banks and constitutional courts. They adopt the same vision of *finalité* that has famously been propounded by *das Bundesverfassungsgericht*: that the Member States are the masters of the Treaty and that the EU and its institutions derive their legitimacy from them (*Brunner*; and *The Lisbon Treaty Judgment*). As such, democratic legitimacy is still a matter of national politics and does not have a place in the EU. Hix, on the other hand, takes a more ambitious approach by adopting a view of *finalité* that sees the EU *becoming* more state-like in form. For Hix, the democratic legitimacy of the EU and its institutions does not emanate from the authority of the Member States, but must come from the institutional reconfiguration of the EU’s central institutions towards a state-like system of parliamentary democracy.

The final C of EU constitutionalism is polity change. In no period in the history of the EU, much less in recent decades, can we say that the EU has been a settled polity. In terms of its membership and its jurisdiction, the EU has constantly been in a state of flux – in particular, by-and-large, a state of growth. The first Chapter in most textbooks on EU law will suffice to demonstrate this point.<sup>263</sup> Even a cursory glance will show that the EU, as it is now, has transformed significantly since its inception by the Treaty of Rome in 1957. This growth is also complex. It is not simply territorial,<sup>264</sup> but also jurisdictional. The jurisdictional expansion, moreover, is not simply that the EU has gained greater regulatory competence,<sup>265</sup> but also the degree of autonomy with which it can administer those competences.<sup>266</sup>

What is important to note about polity change is how this state of flux affects democratic institutional configuration in the EU. As the EU expands and deepens, the institutions of the EU are subject to enlargement (in terms of their incumbents), and broader administrative discretion. The same is true with respect to the citizenry affected by autonomous EU norms, and the extent of their affected-interests. This is precisely the reason why Majone's pareto-optimism, and Moravcsik's fourth branch of government, become ever-more tenuous; and why the EU gradually accrues responsibility for responsive decision-making. Moreover, given the incomplete state of change, it is important for the EU's structures and decision-making processes to

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<sup>263</sup> See, for example, Weatherill, 2010; and Craig and de Búrca, 2011. For a detailed overview of the recent forms of the Lisbon Treaty, see Michael Dougan, "The Treaty of Lisbon 2007: Winning Minds, Not Hearts" (2008) *Common Market Law Review* Vol. 45 617 (hereinafter Dougan, 2008).

<sup>264</sup> The number of Member States that have joined the EU has risen gradually from six in 1957, to 27 today. Croatia will be the 28th Member State in July, 2013. See Treaty of Accession of Croatia (2012) OJ L 112.

<sup>265</sup> The TEEC was primarily concerned with economic deregulation within its territory. Increasingly, (what is now) the EU has become competent in other regulatory areas, such as defence (see now Title V TEU) and the administration of justice (see now Article 4 (2) (j) TFEU; and Title V TFEU). For a full list of competences see Article 4 (2) TFEU. Alongside Treaty reform, the EU has also expanded its constitutional scope through, primarily, the jurisprudence of the Court of Justice (see Weiler, 1991; Christiaan Timmermans, "The Constitutionalization of the European Union" (2002) 21 *Yearbook of European Law* Vol. 21 1 (hereinafter Timmermans, 2002); and Dyèvre, 2005).

<sup>266</sup> See Weiler, 1991. Consider also the aforementioned "depillarisation" jurisprudence in cases such as *Pupino*; and the reforms in the Lisbon Treaty that, for example, extend to the Union's legislature the power to enact laws in the AFSJ (Title V TFEU) using the ordinary legislative procedure in Article 289 TFEU (for an overview of these reforms, see Dougan, 2008 : 680-687).

be able to accommodate newly emerging actors and categories of actors whose interests are, or are likely to be, affected. We must therefore be careful to understand debates on institutional reform in light of this historical trend. To what extent are arguments on the reform of the Union's institutions in the 1980s relevant today?

## **5. Conclusion**

This Chapter had two objectives. The first was to identify the DemDefLit as a literature to which this thesis contributes, and to explain how the arguments herein contribute to that literature. The second objective was to specify the salient polity-conditions of the EU that are relevant for analysing the procedural democratic legitimacy of the Court of Justice.

On the former, the DemDefLit was shown to be particularly relevant to discussions on the instrumental roles of the EU's institutions: how do the Union's institutions contribute to the democratic legitimacy of the EU as a polity? We saw in Section 2 that there are broadly two analytical approaches in the DemDefLit: political theories of the EU polity; and empirical analyses of the EU's institutional system and institutions. We saw that the former approach largely informs the analytical premises of the latter. Within these analyses there are reductionist and experimentalist perspectives on understanding the EU and its institutions. The demonstrable conclusion was that insufficient attention has been paid to the Court of Justice within the DemDefLit. There were only very limited, tangential, and somewhat parochial arguments on the instrumental role of the Court e.g. the counter-majoritarian postulate, and the Court's democracy-generative juridical output. In this regard, the contribution of this thesis is to look at the Court's structures and processes (what we might term institutional input or through-put), and to determine how they are democratic in instrumental terms.



On the second objective of this Chapter, it was argued that there are three salient conditions of EU constitutionalism – the three C’s of EU constitutionalism: complexity, contestation, and change. In particular, polity-contestation – as observed within the DemDefLit – is necessarily pervasive in empirical institutional analyses. It refers to the deeply contested nature of the EU in existential terms, such that the conflict itself must be factored into the structures and processes of the Union’s institutions – including, of course, the Court of Justice – so that they are democratically responsive.

## **1. Introduction**

The purpose of this thesis is to assess the procedural democratic legitimacy of the Court of Justice of the European Union, at the structural and procedural levels. How can we answer that principal research question? There is no real quantifiable sense in which we can say that institutions are, or are not, democratic – as observed in the Introduction to this thesis, there is no objective standard or measurement whereby we can say, for example, “the Court of Justice is 72% democratic.” Instead, the argument here will be to point out the various ways in which the Court’s structures and processes meet, or fall short of meeting, the precepts of procedural democratic legitimacy – intrinsic (self-standing standards and exemplification of democratic legitimacy) and instrumental (the functional role of the Court within the EU) standards of democratic legitimacy. The purpose of this Chapter is to outline the key analytical framework within which the Court of Justice can be examined in this way. In Section 2, the foundations of the analytical framework are constructed under the guiding and instructive notion of institutional “trusteeship”. In Section 3, we address the messy task of formulating an analytically coherent methodology for understanding the concept of democracy, and how that concept can be specified for normative appraisals of institutions. Finally, in Section 4, the analytical framework is specified in relation to the Court of Justice and the EU – identifying the core argumentative thread of this thesis with a view to setting up the specific substantive analyses in the following Chapters.

## **2. The Foundations of the Analytical Framework: Institutional Trusteeship**

In theoretical terms, a central concern of this thesis is *institutional legitimacy* – how, in the abstract, can institutions that are endowed with political powers (broadly speaking) legitimately hold and administer those powers? An examination of the democratic legitimacy of the Court of Justice of the European Union is

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fundamentally addressing this question, albeit from a particular perspective. In this Section, we consider how the notion of institutional *trusteeship* provides an analytical starting point for an examination of institutional legitimacy, in both the abstract sense and, for the present analysis, of the democratic legitimacy of the Court of Justice.

### 2.1. Institutional Trusteeship

What is institutional trusteeship? In general terms, the notion of trusteeship explains the nature of the relationship between non-majoritarian political institutions (e.g. central banks) and the broader polities within which, and for which, they function, in such a way that justifies the former's possession and exercise of "regulatory" powers.<sup>267</sup> It depicts this relationship as analogous to the common law trust, whereby non-majoritarian institutions (the "trustees") have been delegated regulatory powers by the polity's central political institutions (i.e. executive and legislative institutions – the "settlers" of the trust) for, and on behalf of, the public (the "beneficiaries" of the trust). As with the common law trust, institutional trusteeship involves a transfer of property rights:

This situation may be expressed in the language of property rights. The right to exercise public authority in a given policy area may be thought of as a species of property rights: *political property rights*.<sup>268</sup>

In this view, central political institutions hand over political property rights (i.e. delegate regulatory powers) to non-majoritarian institutions. Those political property rights become the exclusive competence of the receiving institution (the trustee),

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<sup>267</sup> Majone, 2001.

<sup>268</sup> Majone, 2001: 108 (emphasis added). Majone develops the idea of political property rights from Terry Moe, "Political Institutions: The Neglected Side of the Story" (1990) *Journal of Law and Economic Organization* Vol. 6 213.

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which must then hold and administer them in a responsible and faithful manner: for, and on behalf of, the public, who are the ultimate beneficiaries of the trust.

There is an important normative logic that underpins this sort of institutional relationship. A democratic polity<sup>269</sup> has to provide its people with certain types of political goods and services that are most effectively administered when they are immune, or *independent*, from the control and influence of majoritarian political forces or the *realpolitik*. This can be understood under two headings: *the problem of commitment* and *the problem of contractual incompleteness*. The problem of commitment relates to the ways in which majoritarian political forces would significantly disrupt or undermine the delivery of political goods and services. It might be the case, for example, that certain types of political goods and services need to be delivered over the long-term and thus not be subject to the regular interference of incoming and outgoing administrations. Alternatively, their delivery might require the delicate and insulated treatment of specialists. Handing over the administration of such goods and services to an independent institution (i.e. a transfer of political property rights) allows for a greater commitment to administering them effectively by avoiding the impulsive and unpredictable ephemeral forces of the *realpolitik*.<sup>270</sup> The problem of contractual incompleteness, on the other hand, refers to the inability of political institutions – subject to majoritarian political forces – to agree on the precise manner in which political goods and services are to be administered, whilst fundamentally agreeing on the basic necessity of those goods and services. In such a situation, in order to circumvent an impasse, political principals reach an agreement on how the delivery of those goods and services is to be administered in very general terms only, handing over the responsibility of deciding on the specifics to an

<sup>269</sup> The term “democratic polity” must hereinafter be understood only in its most abstract sense, which is discussed in Section 3.1.1 of this Chapter.

<sup>270</sup> See Majone, 2001: 107-108. See also Mark Thatcher and Alec Stone Sweet, “Theory and Practice of Delegation to Non-Majoritarian Institutions” (2002) *West European Politics* Vol. 25 1 (hereinafter Thatcher and Stone Sweet, 2002). It is according to this logic that modern democratic polities set up *independent* central banks, for example, so that complex issues pertaining to the economy – such as the setting of national interest rates – are administered by specialists who can do so without their decisions being subverted by majoritarian political forces.

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independent institution that has sole discretion with respect to the implementation of those goods and services.<sup>271</sup>

Institutional *independence* is thus a key element in trusteeship. It fosters the conditions necessary for the trustee-institution to function effectively i.e. for a trustee-institution to resolve the problems of commitment and contractual incompleteness. Independence distinguishes trusteeship from other, weaker, forms of delegation, such as agency:

An agent bound to follow the directions of the delegating politicians could not possibly enhance the credibility of their commitment. Independence means not only that the principal's and the delegate's preferences may be different but also, and this is the key point, that in general it is not in the principal's interest to minimize such difference.<sup>272</sup>

For Majone, trusteeship more accurately explains delegation as a commitment and contractual-completion device than the principal-agent relationship.<sup>273</sup> The virtue of trusteeship is its capacity to facilitate the fulfilment of long-term policy objectives by political principals who, being subject to the *realpolitik*, would subsequently renege on those commitments. The principal-agent relationship, by contrast, is less suitable for that task because agents have only very limited discretion – they do not “own” any political property – and would ultimately be subject to the whims of their principals. Instead, trusteeship, offers a greater degree of delegation – a transfer of *ownership* – giving rise to a much higher degree of institutional independence. Furthermore, the trusteeship-agency distinction is not binary – it is not an either/or situation – but, instead, a sliding scale, or spectrum, with the key variable being the level of institutional independence the delegate-institution enjoys. Delegate-

<sup>271</sup> This is what Stone Sweet refers to as “relational contracting”. See Alec Stone Sweet, “Constitutional Courts and Parliamentary Democracy” (2002) *West European Politics* Vol. 25 77 (hereinafter Stone Sweet, 2002): 86.

<sup>272</sup> Majone, 2001: 110.

<sup>273</sup> See also Thatcher and Stone Sweet, 2002: 7.

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institutions with high levels of independence tend towards the trustee end of the spectrum and vice versa.

What is the test, then, for levels of independence? Following Majone's conceptual framework, Stone Sweet frames this sort of analysis in terms of the "zone of discretion" the delegate-institution enjoys, whereby the greater the discretion the delegate institution enjoys, the greater its independence.<sup>274</sup> The zone of discretion is determined by two factors: first, establishing the degree of decision-making powers that have been formally delegated to the delegate-institution; and, second, then to subtract from the former whatever "mechanisms of control" are available to political principals. Political principals will delegate greater and lesser degrees of administrative powers to institutions i.e. what the delegate-institution is empowered to do in order to meet its objectives (whatever they may be). In some instances, the purview and administrative powers of delegate-institutions will be narrowly constrained by explicit terms set out in the delegation-settlement or "contract". On the other hand, political principals may, for the reasons set out above (the problems of commitment and contractual incompleteness), endow delegate-institutions with a broad range of administrative powers by virtue of a combination of terms that are explicitly set out and terms that are left open for the delegate-institution to interpret itself. In that case, the delegate institution will tend to have a higher "zone of discretion" and thus be more independent.

This conjecture is contingent, however, on the "mechanisms of control" that are available to political principals. Notwithstanding the powers that are formally transferred to delegate-institutions, there may remain various constitutional or political powers on the part of political principals that, if activated, would undermine any administrative action taken by the delegate-institution. Stone Sweet argues that there are four types of mechanisms of control: direct, indirect, *ex post* and *ex ante*.

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<sup>274</sup> See Alec Stone Sweet, *The Judicial Construction of Europe*, Oxford: Oxford University Press, 2004 (hereinafter Stone Sweet, 2004): Chapter One. See also Stone Sweet, 2002: 92-93. Stone Sweet examines the notion of trusteeship in relation to constitutional courts. This is addressed in greater depth in Section 2.2.

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With some degree of overlap, direct controls are those that arise by virtue of superior constitutional norms that can, by design, invalidate or reverse the administrative discretion of delegate-institutions e.g. especially legislative supremacy; indirect controls can arise by virtue of rules of law or customary institutional practices and place, to greater and lesser extents, incentives and disincentives – as opposed to invalidation – on delegate-institutions to favour particular administrative outcomes; *ex post* mechanisms of control relate to the ways in which political principals can *respond* to the output of delegate-institutions (these also tend to be direct mechanisms of control); and *ex ante* mechanisms of control are the ways in which political principals can influence the decision-making of delegate-institutions (these tend to be indirect mechanisms of control).

The “zone of discretion”, then, is determined by balancing all the types of mechanisms of control available to political principals against the administrative powers delegated to the delegate-institution. Less of the former and more of the latter result in stronger institutional independence of the delegate-institution, which is thus situated towards the trusteeship end of the spectrum. This is because, as with the common law trust, once the (political) property has been transferred to the trustee(-institution), and the terms have been set, the settlors (the political principals) cease to be able to control or exercise administrative discretion with respect to that competence (the delegated areas of public authority). Moreover, the settlors (political principals) are then subject to the “supremacy” of the trustee(-institution). Unlike the agent, the trustee-institution has a large zone of discretion and is not bound to follow the instructions, post-settlement, of a principal (*ex ante* control); nor can the principal reverse the decisions of the trustee-institution. In the example of the independent central bank, a government that would benefit politically from, for example, introducing a higher rate of inflation, could neither implement this of its own accord, nor could it compel the central bank to do so – that competence remaining within the sole discretion of the bank.

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Thus far, we have determined the normative and conceptual underpinnings of trusteeship – considering *why* trusteeship is a desirable institutional arrangement; and what the necessary constitutional and institutional conditions are for that arrangement. So what does this mean for institutional legitimacy? How does the trustee-institution legitimately exercise those powers for which it has administrative “supremacy”?

Once it has been established that an institution is of the trustee type, then its legitimate exercise of this exclusive competence is subject primarily to the terms and objectives that have been set by the settlors of the trust, and, more specifically, the *fiduciary duties* that inhere in that arrangement. In general terms, fiduciary duties are about ensuring that the trustee administers the trust in good faith i.e. in the interests of the beneficiaries. In particular, this means that the trustee dutifully observes the settled terms of the trust (what we can refer to as *primary fiduciary duties*), but it also means that the interests of the beneficiaries are not undermined by any unforeseen contingencies. The latter relates to the problem of contractual incompleteness and how the trustee responds to that indeterminacy i.e. the inevitability that the terms of the trust are not exhaustive, and do not, therefore, explicitly set out how the trustee is to administer the trust in all situations.<sup>275</sup> It is in this sense that the trustee’s fiduciary relationship to the beneficiaries involves “filling the gaps” of contractual incompleteness – what we can refer to as *secondary fiduciary duties*. In other words, when a situation arises whereby a trustee cannot look to the terms explicitly laid down in the trust for direction, the trustee must decide how to administer the trust according to standards that are implicit in the settled terms – either by inferring what the broader objectives of the trust are, or by reference to some other more general standard that corresponds to the interests of the beneficiaries.

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<sup>275</sup> Majone, 2001: 116-119.



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It is easy to see how this conceptual scheme is descriptive of institutional relationships between independent non-majoritarian institutions and their political principals. Typically, the former are set up by virtue of constitutionally entrenched rules of law, in such a way that guarantees their institutional independence from their political principals, including their administrative supremacy. These rules of law will typically set out the institution's primary responsibilities i.e. the terms of the trust; or, at the very least, they will incorporate the trustee-institution's responsibilities – from whatever source – into that legal and, more pertinently, *constitutional* framework. And so, observing these constitutionally entrenched terms forms a core part of the trustee-institution's fiduciary duties i.e. their *primary* fiduciary duties. Yet, given the (intentionally) open-textured nature of constitutional provisions, the trustee-institution will inevitably be subject to contractual incompleteness. Consequently, they will have to “fill in the blanks” according to the terms and objectives *implicit* within those constitutional provisions and/or according to more general standards of good faith vis-à-vis the beneficiaries (in this case, the public) i.e. the *secondary* fiduciary duties of trustee-institutions.

As an analytical starting point for this thesis, we are interested in the relationship between the EU and one of its non-majoritarian institutions (the Court of Justice) and the extent to which this relationship exemplifies institutional trusteeship. Confirming the hypothesis that the Court of Justice *is* an institution of the trustee kind provides a firm grounding on which to frame an analysis of democratic legitimacy. Before we move on to that analysis, however, we need to address two questions. First, to what extent is the notion of trusteeship applicable to courts? Second, given a confirmation of that hypothesis, where and how does a concept like democratic legitimacy fit in? These questions are addressed in the remainder of this Section, and Section 3, respectively, after which I specify this analytical framework in the context of the Court of Justice in Section 4.

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### 2.2. Institutional Trusteeship and Courts

In this sub-section, we consider the extent to which the notion of institutional trusteeship is applicable in the context of courts – both in normative terms (*should* courts be configured in this way?) and in conceptual terms (*can* courts be regarded as trustee-institutions?). These questions are very much related: there are certain types of courts that are trustee-institutions because of the particular role they are expected to play within a polity's institutional architecture; whilst other types of courts function more like agents. They are also important questions because, as we shall see in Section 2.3, establishing whether or not a court (like the Court of Justice) can credibly be regarded as functioning as a *trustee* institution – as distinct from acting as an institutional *agent* – opens up the analysis of institutional legitimacy to measures of *democratic* legitimacy. Put simply, if the Court is a trustee-institution, and because of the high degree of institutional independence that configuration exemplifies, then it ought to be structured and to function more democratically.

The normative justification for having trustee-courts can be expressed in the same terms as in Section 2.1 i.e. problems of commitment and contractual incompleteness. Yet their relevance to the work of courts is not altogether straightforward and has to be treated with care. To begin with, the people of a democratic polity expect that the law they make is reasonably applied and enforced: a task that is delegated to courts (as well as other enforcement institutions, like the police). In the event that there is a disagreement between people – whether it is a public or private dispute – over their legal responsibilities and rights *inter se*, courts provide a forum within which not only can these disputes be settled, but the meaning and application of the people's law can be clarified and communicated to the public.<sup>276</sup> Breaking this down, the primary responsibilities that have been delegated to courts (generally) are:

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<sup>276</sup> This is the same as Rawls' idea of courts as "exemplars" of public reason. See John Rawls, *Political Liberalism*, New York; Chichester: Columbia University Press, 1996 (hereinafter Rawls, 1996): 215-218.

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1. to resolve legal disputes;
2. to resolve legal disputes according to a faithful interpretation of the meaning of established rules of law;
3. to make reasonable interpretations and clarifications of indeterminate law; and
4. to ensure that no-one is above the law i.e. that the law is observed by all.

These functions are what we might view as the particular form of “political good” or “political service” that courts provide for, and on behalf of, the public.

In certain types of courts, or for certain types of dispute resolution, these functions are most effectively administered by a court that is fully independent from majoritarian political institutions (i.e. trusteeship) due to particularly acute problems of commitment and contractual incompleteness. Stone Sweet argues that the problems of commitment and contractual incompleteness are of greatest relevance to the work of *constitutional* courts, as distinct from ordinary courts.<sup>277</sup> This is because the sorts of legal disputes constitutional courts are charged with settling are disputes over the rights and obligations of parties *inter se* with respect to the *higher order* legal norms that are explicitly set out, or implicit in, constitutional settlements – significantly, making political principals, and in some cases legislative processes, subject to their superior normativity. Given the formation, the functions and the superior status of constitutional legal norms – compared with ordinary sources of law, such as legislation and case-law – the problems of commitment and contractual incompleteness are somewhat foundational to the work of constitutional courts. The orthodoxy is that constitutional settlements (the source of constitutional norms, in abstract terms) are reached and implemented by the people of a polity – via their political representatives, typically – in order to bind the polity to protecting particular inviolable rights that are to be guaranteed to the people. Such rights – which, depending on the polity, can include social, political, substantive and procedural

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<sup>277</sup> Stone Sweet, 2002: 77-82.

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rights – are deemed to be so necessary that their place within the polity’s legal and political infrastructure cannot be undermined by the day-to-day world of majoritarian politics or the *realpolitik*. In other words, they are deemed to be so important as to bind future democratically elected governments and administrations from unilaterally or whimsically altering their superior normativity.<sup>278</sup>

The role of constitutional courts thus arises out of problems of commitment and contractual incompleteness inherent in constitutional settlements. On the former, given that constitutional settlements provide people with a set of rights to be vindicated, in particular, against political institutions, it is necessary for there to be an administrative institution that is immune to the *ex ante* control of political institutions and, in particular, majoritarian decision-making forces; and which has supreme discretion over that administrative function, such that its decision-making cannot be undermined or even invalidated by the *ex post* control of political institutions i.e. institutional independence. In this regard, a typical function of a constitutional court is the judicial review of legislation, whereby the court decides on the legal validity of the legislation produced by the political branches of government (legislatures) in accordance with the *higher order* legal norms as expressed, or implicit, in the constitutional settlement. This sometimes involves constitutional courts invalidating legislation that does not conform to constitutional standards.<sup>279</sup> Given this function, and given that legislatures will inevitably resist a legislative annulment, it is important that constitutional courts are sufficiently independent from the executive and legislative political institutions and, thus, have sole discretion in determining the validity of legislation.

<sup>278</sup> In his thesis, Ely frequently characterises this as placing the protection of values and processes “beyond the reach of the political process” (Ely, 1980: Chapter Four).

<sup>279</sup> Of course, there are many theories of constitutionalism that reject the notion of judicial review as the legitimate means by which political institutions and actors are to be subject to constitutional norms. See, for example, Jeremy Waldron, *Law and Disagreement*, Oxford: Oxford University Press, 1999 (hereinafter Waldron, 1999); Adam Tomkins, *Our Republican Constitution*, Oxford: Hart, 2005 (hereinafter Tomkins 2005); and Richard Bellamy, *Political Constitutionalism*, New York: Cambridge University Press, 2007 (hereinafter Bellamy, 2007).

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On the latter problem (contractual incompleteness), establishing the *content* of constitutional settlements is something that is prone to disagreement between the political principals (the representatives of the people) who set their terms.<sup>280</sup> Some might hold the view, for example, that constitutional settlements should protect social or moral *values* e.g. the provision of social welfare for the economically disenfranchised.<sup>281</sup> On the other hand, some would argue that there is little or no place for social or moral values in constitutional settlements, instead holding the view that they should guarantee rights of fair and equal access to political, democratic *processes* only.<sup>282</sup> Furthermore, there will inevitably be significant disagreement over how each of the rights – regardless of their nature – contained in constitutional settlements is to be applied in specific contexts that arise in the social world. Indeed, many contexts will be either unforeseen or unforeseeable. Notwithstanding these formative disputes, political principals will often be in agreement over the need for the basic constitutional protection of rights, even if only in very general terms. This is the problem of contractual incompleteness most pertinent to the work of constitutional courts. Constitutional courts are delegated the task of “filling in the blanks” in the course of their development of constitutional jurisprudence, as it emerges within particular constitutional disputes. Constitutional courts, like all courts, have been delegated the political property rights to bring meaning to the law through interpretation i.e. judicial law-making.<sup>283</sup> Yet, as

<sup>280</sup> Following Rawls’ idea of “the circumstances of justice”, Bellamy argues that the underlying contestation over the content of constitutional settlements is derived from “reasonable disagreement” over particular conceptions of justice – what he refers to as “the circumstances of politics” (Bellamy, 2007: Chapter One). Indeed, we saw in Chapter Two that there is a considerable degree of controversy over the nature and *scope* of the EU’s constitutional project.

<sup>281</sup> This is precisely Habermas’ core argument on the democratic deficit in the EU. He argues that, in order for there to be a (democratically) legitimate EU constitutional settlement, EU citizens would have to be guaranteed basic social welfare rights as part of a codified, and justiciable, “constitution” (Habermas, 2001).

<sup>282</sup> This is Ely’s central normative claim. He argues that – in the context of American judicial review, at least – the virtue of the Constitution is its commitment to protecting the basic structures of representative democracy, which is achieved “by a quite extensive set of procedural protections, and by a still more elaborate scheme designed to ensure that in the making of substantive choices the decision process will be open to all on something approaching an equal basis, with the decision-makers held to a duty to take into account the interests of all those their decisions affect.” Ely, 1980: 100.

<sup>283</sup> Indeed, Bengoetxea argues that judicial law-making, in this fashion, is a political property right tacitly delegated to courts by political organs. See Joxe Bengoetxea, “The Scope For Discretion,

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Kavanagh notes, there are important differences between judicial law-making and legislative procedures:

[I]t seems plausible to suggest that many of the considerations in judicial decisions are exactly those which a legislator must consider when enacting new legislation. However, one crucial difference between legislation and judicial law-making ... is that when judges make law, they must do so by way of interpretive reasoning. This means that they cannot approach a legal question in a purely forward-looking way. They are also obliged to look back at and take account of the pre-existing legal frameworks and standards set out by Parliament and previous judges.<sup>284</sup>

Yet there is a special significance in the context of the interpretation of constitutional rules of law. Constitutional interpretation functions as a way of resolving the inevitable impasse associated with establishing the content of constitutional settlements. In the words of the ECtHR: “[where there is] no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, the margin [of appreciation] will be wider.”<sup>285</sup> In this regard, constitutional courts need to be able to give *authoritative* interpretations on the general terms of constitutional settlements in such a way that provides the public with *definitive* constitutional norms that are derived from the constitutional court’s duty to provide definitive solutions to constitutional disputes. Stone Sweet thus argues that it is important for constitutional courts’ “*rulemaking* [to be] effectively insulated from *ex post* controls”.<sup>286</sup> In other words, legislatures should not be able to reverse or invalidate constitutional interpretations; or, at least, they should be subject to cumbersome legislative processes in order to do so.

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Coherence and Citizenship”, in O. Wiklund (ed.), *Judicial Discretion in European Perspective*, Stockholm: Kluwer Law International, 2003.

<sup>284</sup> Aileen Kavanagh, “The Elusive Divide Between Interpretation and Legislation Under the Human Rights Act 1998” (2004) *Oxford Journal of Legal Studies* Vol. 24 No. 2 259: 271. See also MacCormick, 1994.

<sup>285</sup> ECtHR Application No. 44362/04 *Dickson v United Kingdom Government*, judgment, (Grand Chamber) of 4 December 2007: para. 78.

<sup>286</sup> Stone Sweet, 2004: 28, emphasis added.

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The position of constitutional courts can be contrasted with other courts, and, in particular, what Stone Sweet refers to as “ordinary courts”.<sup>287</sup> The key difference between the two is that, whereas constitutional courts can (and should) be regarded as trustee-institutions (as explained above), ordinary courts are best described as the institutional agents of the political branches of government. This is essentially because ordinary courts are subject to the legislative supremacy of their political principals (legislatures), and the role that has been delegated to them is not *prima facie* to hold political institutions to account, but, rather, to apply and bring determinacy (albeit tentative) to the legislature’s law. As Ely puts it:

There is obviously a critical difference: in non-constitutional contexts, the court’s decisions are subject to overrule or alteration by ordinary statute. *The court is standing in for the legislature, and if it has done so in a way the legislature does not approve, it can soon be corrected.* When a court invalidates an act of the political branches on constitutional grounds, however, it is overruling their judgment, and normally doing so in a way that is not subject to “correction” by the ordinary lawmaking process.<sup>288</sup>

To the extent that we can empirically determine whether or not a court is a trustee or an agent, we have to be aware of a few factors. First, more generally, the distinction is a matter of degree – courts are not necessarily *either* trustees *or* agents. Indeed, many so-called supreme courts do not easily fall into either category. The UK Supreme Court, for example, is competent to exercise constitutional review, but is significantly limited by both *ex ante* and *ex post* mechanisms of control derived from the legislative supremacy of the UK Parliament.<sup>289</sup> The extent to which a court tends,

<sup>287</sup> On the distinction between the different types of courts, and how they can be differentiated in constitutional terms, see Stone Sweet, 2002: 77-82. Stone Sweet derives his conception of the constitutional court from Hans Kelsen’s model of constitutional review, and argues that “constitutional courts have links with, but are formally detached from, the judiciary and legislature. They occupy their own ‘constitutional’ space, which is neither clearly ‘judicial’ nor ‘political’” (Stone Sweet, 2002: 80). He also argues that they do not take part in the resolution of ordinary legal disputes or litigation, which is the jurisdiction of “ordinary courts”.

<sup>288</sup> Ely, 1980: 4, emphasis added.

<sup>289</sup> See Section 4.1.2 of Chapter. See also Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act*, Cambridge University Press, 2009.

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then, towards trusteeship or agency depends on the factors described in Section 2.2 under the rubric of “the zone of discretion”, which is broken down into: (1) establishing the degree of decision-making powers that have been formally delegated to the court (does it have powers of constitutional review?); and (2) to balance this against whatever “mechanisms of control” are available to political principals.

As we saw in Section 2.2, there are four ways of categorising mechanisms of control: direct, indirect, *ex post* and *ex ante*. In the context of courts, mechanisms of control relate to the remaining legislative and administrative powers (post-delegation) of political principals that allow them to control or influence judicial decision-making, or the effects thereof. The most significant of these, as can already have been inferred, is the capacity for legislatures to overturn a judicial decision, or invalidate a judicial interpretation, through enacting corrective (normatively superior) legislation (i.e. a direct, *ex post* mechanism of control). Political principals may also be able directly to control and alter the powers of courts. Indeed, it is for both of these reasons that the UK Supreme Court does not easily fit the description of a trustee-institution, in spite of having been delegated powers of constitutional review. This is because, as we saw, the UK Parliament is always able to “correct” decisions of the UK Supreme Court by way of legislation; in addition to which, the UK Parliament can repeal or amend the Human Rights Act 1998 (hereinafter the HRA) – which defines the powers of judicial review that are available – in such a way that either mitigates further the UK Supreme Court’s powers, or removes those powers of constitutional review altogether. Short of being able *directly* to *control* the discretion of courts, political principals may also be able *indirectly* to *influence* judicial decision-making *ex ante*. This depends on, as we shall see in greater detail in Chapter Four, the level of *institutional insulation* of the court from political majoritarian forces or the *realpolitik*. Are the judges elected into office by the public? If so, their decision-making may be significantly affected by popular opinion – especially if judicial opinions are published and the judges do not have indefinite tenure. Are the judges appointed by heads of state or executive governments? If so, they may be



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selected on the basis that they will decide cases according to a favourable party-political ideology.<sup>290</sup>

### 2.3. Assessing the (Democratic) Legitimacy of Trustee-Courts

The foregoing criteria can be used as a way of empirically assessing the level of independence of courts with a view to determining where on the spectrum a court can be placed between agency and trusteeship. In the next Chapter, it is demonstrated how the Court of Justice of the European Union can be regarded as an independent trustee-institution. Before moving on to that analysis, it is important to clarify what trusteeship means for institutional legitimacy in the context of constitutional courts.<sup>291</sup> How does a constitutional court legitimately administer its delegated powers (constitutional adjudication) for which it has supreme discretion? And how does this set up an analysis of democratic legitimacy?

Earlier we saw that trustee institutions administer their “political property” legitimately when they do so according to the standards set by a fiduciary relationship between the trustee-institution and the public-beneficiaries. The fiduciary relationship is defined by primary and secondary fiduciary duties on the part of the trustee-institution, designed to ensure that the interests of the beneficiaries are respected in all matters relating to the administration of the trust. In the context of trustee-courts, their fiduciary relationships are with the publics of the polities within which, and for which, they function. Their primary fiduciary duty is dutifully to observe the terms of the trust. In other words, to give a faithful interpretation and application of constitutional norms in settling constitutional disputes. Re-articulating the four criteria listed in Section 2.2 above, the primary duties of constitutional courts are:

<sup>290</sup> The legitimacy of electing judges into office is considered in Section 4 of Chapter Five.

<sup>291</sup> The terms *trustee-court* and *constitutional court* will hereinafter be used interchangeably.

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1. to resolve constitutional disputes (e.g. judicial review);
2. to resolve constitutional disputes according to a faithful interpretation of the meaning of the norms set out (explicitly and implicitly) in constitutional settlements i.e. constitutional law;
3. to make reasonable interpretations and clarifications of indeterminate constitutional law; and
4. to ensure that no-one is above the law i.e. that the law is observed by all, especially political institutions.

Adhering to these duties is the first, and most important, way for constitutional courts to exercise their administrative supremacy legitimately.

Secondary fiduciary duties relate to the ways in which trustee-institutions are to administer the trust given the inevitability that the terms of the trust are not exhaustive, and do not, therefore, explicitly set out how the trustee is to administer the trust in all situations. This is very much the flip-side of the problem of contractual incompleteness. For constitutional courts, secondary fiduciary duties relate to the *processes* by which courts discover “implicit constitutional norms” (Point 2, above) and how they “make reasonable interpretations and clarifications of indeterminate constitutional law” (Point 3) i.e. “filling in the blanks”. In very general terms, this is achieved legitimately when constitutional courts do so in ways that are *responsive* to the interests of the public i.e. the beneficiaries of the trust.

It is at this analytical juncture that we can place many, if not all, of the debates on the legitimacy of constitutional adjudication. There is always a sense in which these debates start from a shared assumption: that constitutional courts, like all courts, fulfil a necessary law-applying function, since “statutes do not interpret, apply, or enforce themselves”.<sup>292</sup> In other words, there is a shared assumption of a very narrow appreciation of primary fiduciary duties – because polities need their laws to be

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<sup>292</sup> Stone Sweet, 2002: 78.

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applied, polities need courts. Where the contention tends to arise is in questioning the legitimacy and the processes by which courts: (1) “fill in the blanks” (secondary fiduciary duties); and 2. annul democratically enacted rules of law (the judicial review of legislation).<sup>293</sup> How can or how do courts legitimately perform *these* tasks? There is a wide variety of objections and solutions that form the core theoretical literature in this area of enquiry, and, indeed, we saw these analytical perspectives take shape in the context of the Court of Justice in Chapter One. There, we saw that there are broadly two epistemological approaches within this area of enquiry: there are various *theories of legal reasoning* that seek to establish normative frameworks of judicial interpretation i.e. establishing the canons of legal interpretation by which judges ought to “fill in the blanks” or, more broadly, justify their decisions;<sup>294</sup> and there are also many *theories of constitutionalism* that critically assess the roles of courts – especially constitutional and supreme courts – in light of particular (somewhat axiomatic) conceptions of the legitimate ordering of polities.<sup>295</sup> Of course, these approaches are not mutually exclusive, and it is often the case that they overlap in scholarly analyses.<sup>296</sup> Furthermore, within these approaches, there are many different schools of thought and sub-branches or approaches e.g. the different schools of thought on canons of judicial interpretation, such as the teleological, positivist, and natural law approaches.

<sup>293</sup> These two questions are often taken together as part of the same analysis. See, for example, Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, Oxford: Oxford University Press, 1996 (hereinafter Dworkin, 1996). Yet they essentially relate to two separate, if related, aspects of adjudication.

<sup>294</sup> Notable examples include: Hans Kelsen, *Pure Theory of Law*, Berkeley: University of California Press, 1970; Herbert Hart, *The Concept of Law*, Oxford: Clarendon Press, 1994; Joseph Raz, *Practical Reason and Norms*, Princeton, NJ: Princeton University Press, 1990; and MacCormick, 1994.

<sup>295</sup> See, for example, Waldron, 1999; Tomkins, 2005; and Bellamy, 2007.

<sup>296</sup> See, for example, Ely, 1980; Ronald Dworkin, *A Matter of Principle*, Cambridge, Mass.; London: Harvard University Press, 1985 (hereinafter Dworkin, 1985); Habermas, 1995; and Wilfred Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, Cambridge: Cambridge University Press, 2007.

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It is in this analytical terrain that an analysis of democratic legitimacy fits.<sup>297</sup> More specifically, it is at the analytical juncture between primary and secondary fiduciary duties of trustee-courts that an analysis of the procedural democratic legitimacy of constitutional courts can take place. How is this so? In Section 3, we go on to consider this in more detail. In quite basic terms, however, the concept of democracy, first, neatly explains and fits with many of the conceptual foundations of trusteeship. In particular, it emphasises the importance of trustee-courts adhering to primary fiduciary duties, because (1) applying the law gives expression to and application of *the people's* law, who have set its terms through democratic political processes; and (2) because it is the people who have – via their political representatives – set the terms of the trust. In other words, fulfilling the terms of the trust is itself a democratic duty.

Democracy is also relevant as an analytical yardstick with which to gauge how courts and judges are to “fill in the blanks”. This is especially relevant in the context of trustee-institutions and constitutional courts, where there are greater degrees of contractual incompleteness and commensurate degrees of institutional discretion. In this regard, democratic legitimacy is a good way to guide courts seeking to determine their secondary fiduciary duties. As Majone puts it:

The central issue in these cases is how to make the delegate independent and at the same time *accountable*. The fiduciary principle and fiduciary duties are essential instruments for reconciling independence and accountability.<sup>298</sup>

<sup>297</sup> Indeed, many of the theoretical discussions on the legitimacy of constitutional adjudication frame their analyses according to a view on democratic legitimacy. Waldron and Bellamy – as “political constitutionalists” – take the view that the judicial review of legislation is illegitimate on the grounds that it offends a (proceduralist) conception of democratic legitimacy (Waldron, 1999; Bellamy, 2007), whereas Ely and Dworkin would argue that judicial review is necessary in order to protect important democratic rights from being undermined by improvident legislative processes (Ely, 1980; Dworkin, 1985). There are analytical positions that go beyond the issue of judicial review. Habermas, for example, argues that courts play an important *instrumental* role in bolstering the deliberativeness of the broader politics within which they function in his “proceduralist paradigm of law” (Habermas, 1995; and Habermas, 1998).

<sup>298</sup> Majone, 2001: 119, emphasis added.

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In other words, because majoritarian political institutions become powerless in those areas of public policy and administration that they have delegated to trustee-institutions, the people *prima facie* lose their capacity to self-govern, as those tasks of government have been transferred to an autonomous and independent institution that is, by design, insulated from majoritarian forces. Fiduciary duties are therefore one way of ensuring that democratic accountability (understood in very broad terms) is not sacrificed. Furthermore, it is not simply the case that democratic legitimacy is just one other thing for courts to be aware of when determining their secondary fiduciary duties. As we shall see in the next Section, one of the key objectives of democratic ordering is the virtue of institutional *responsiveness* – that is, responsiveness to the interests of the people. In that regard, democratic ordering significantly overlaps with the underlying premiss of fiduciary duties, which is to ensure that the interests of the beneficiaries are not undermined and given due appreciation throughout the administration of the trust. In the context of constitutional courts, this means precisely the same thing as being responsive to the public, who are the constitution's beneficiaries.

These basic propositions are elaborated in the remainder of this Chapter, specifying their relevance to the analysis of the procedural democratic legitimacy of the Court of Justice. In Section 3, we consider the applicability and application of the concept of democracy, by, first, outlining a workable concept of democracy; then by specifying an analytical framework that explains how institutions can be understood in democratic terms; and, lastly, explaining how trustee-courts can be understood in those terms. In Section 4, we then go on to consider how this analytical framework is specified for assessing the procedural democratic legitimacy of the Court of Justice in the following Chapters.

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### 3. Democratic Legitimacy: An Analytical Framework

Democracy is one of those elephants: *hard to define, but you know it when you see it*. Pinning down a settled notion of what it means, how it is to function and its underlying values have always been dependent on historical and geo-political circumstances. Over time and across varied manifestations of political power, there have been many “democratic experiments”. Records begin with the classical (and inaugural) manifestations in Greece, BC;<sup>299</sup> then, after a prolonged period of inactivity, finding a resurgence in the early modern era with the establishment of the Westphalian nation-state;<sup>300</sup> followed by a respecification in the post-industrialist era (and very much setting the standards of *modern* democratic thought);<sup>301</sup> and, laterally, with the advent of globalisation and international political regimes – bringing with them associated concepts of socio-cultural pluralism and the gradual erosion of the strictures of the modern nation-state – a series of quintessentially *post-modern* instances of democratic experimentalism.<sup>302</sup> Of course, it is not the case that these experiments were conducted merely out of philosophical or academic curiosity. Each stage and each data-set have arisen by virtue of changes and challenges from within the social world: the Enlightenment; the spread of capitalism; the industrial revolution; global warfare; the emergence of the welfare state; secularisation; globalisation; human rights regimes; international political and economic regimes; and technological advances have all given rise to significant challenges to how people envisage their political relations *inter se*, and, thus, to a perpetual rediscovery and respecification, by iteration, of the values and objectives that underpin democracy.

<sup>299</sup> Plato, *Republic* (Translation by Robin Waterfield), Oxford: Oxford University Press, 1993.

<sup>300</sup> John Locke, *Two Treatises of Government*, Cambridge: University Press, 1960.

<sup>301</sup> Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, Macmillan: London; New York, 1897. In a contemporary context, consider Habermas’ account of the role of civil society in constituting the public sphere. Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, Cambridge: Polity Press, 1989 (hereinafter Habermas, 1989). See also Ely’s account of representative democracy (Ely, 1980: Chapter Four).

<sup>302</sup> See especially Cohen and Sabel, 1997; and Curtin, 1997. On the notion of “constitutional patriotism” as a transitional phase in the establishment of a European *demos*, see Habermas, 1992; and MacCormick, 1997.

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It is not within the remit of this thesis to engage in a comprehensive genealogy of democratic experimentalism. It is, however, relevant to at least be firmly aware of the context-dependant nature of democratic thought, and furthermore, to be aware that it is by virtue of such a rich history of data that there are so many definitions and analytical “models” of democracy.<sup>303</sup> Familiar examples include: classical democracy;<sup>304</sup> participatory democracy; protective democracy; representative democracy; parliamentary democracy;<sup>305</sup> associational democracy;<sup>306</sup> democracy as a set of formative political procedures;<sup>307</sup> democracy as a set of substantive socio-political or moral values;<sup>308</sup> and experimental democracy.<sup>309</sup> These perspectives are not mutually exclusive, and each emphasises one or other core virtue of democratic legitimacy that has been given priority at any given time or place.

What we are left with, then, is a plethora of terminology and concepts of democracy, which, if we are not careful, might lead us into diagnostic problems when assessing the democratic legitimacy of the Court of Justice.<sup>310</sup> In this Section, an analytical framework is presented in such a way as to avoid becoming trapped by such diagnostic problems. The framework clarifies a very general set of fundamental or “threshold” standards of democracy, and demonstrates how they may be of analytical

<sup>303</sup> Indeed, contemporary political science textbooks will invariably recast the basic historical precepts of democracy as “models of democracy”. See, for example, David Held, *Models of Democracy* (2<sup>nd</sup> Edition), Oxford: Polity Press; Stanford: Stanford University Press, 1996; and Andrew Heywood, “Models of Democracy” in *Politics* (2<sup>nd</sup> Edition), Palgrave, 2002.

<sup>304</sup> Melissa Schwartzberg, “Athenian Democracy and Legal Change” (2004) *The American Political Science Review*, Vol. 98 (2) 312 (hereinafter Schwartzberg, 2004).

<sup>305</sup> This is where the putative political constitutionalists fit in i.e. Waldron, Tomkins and Bellamy (discussed above).

<sup>306</sup> The idea of civil society as a disaggregated set of specialist interest groups forming a core democratic constituency e.g. Habermas, 1989.

<sup>307</sup> See Ely, 1980; or Bellamy, 2007.

<sup>308</sup> Dworkin, 1996.

<sup>309</sup> Cohen and Sabal, 1997.

<sup>310</sup> Indeed, this is a problem that was identified in much of the DemDefLit. For example, consider Hix’s proposition that “competition for political power is *the* essential element of virtually all modern theories of democratic government” (Hix, 2008: 68). Hix, like so many others, has relied too heavily on the notion of parliamentary democracy when addressing the issue of the democratic deficit in the EU. This is problematic because we can only really accept that claim in the nation-state context. Yet this is too much to assume for an analysis of a *sui generis* polity like the EU.

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use when determining the configuration of democratically legitimate political institutions and, in particular, trustee-courts. This allows for a coherent analysis which systematically connects particular institutional claims (especially, of course, the claims made in this thesis about the Court of Justice) to the core values and virtues of democracy (in their most basic sense); yet avoids an analysis where everything and anything counts as democratic.

### *3.1. Threshold Criteria of Democracy*

Given the account above, how can we arrive at a workable, coherent and applicable set of concepts by which we can credibly analyse political institutions from a democratic perspective? In this Section, we consider a threshold theory of democracy that aims to capture its essence, and which outlines how such a basic set of criteria can be specified for its analysis.

There are three elements of a threshold theory of democracy of which we have to be aware. These are: the *subject-matter* of democracy; the *content* of a theory of democracy; and the *context-dependency* of the specification of a theory of democracy. Each of these ideas will be developed below with a view to providing solid grounding for the present analysis of the procedural democratic legitimacy of the Court of Justice.

#### *3.1.1. The Subject-Matter of Democracy*

When we speak about democracy and democratic ordering, to which sorts of social phenomena are we relating? In general terms, democracy is a form of *governance*, and, as such, seeks to provide the subjects of an *authority* with a way of organising the administrative powers of that authority – in particular, establishing a rationale by which administrative power is divided between the subjects of an authority; and



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determining how administrative discretion should be implemented. The term “authority” is thus key, and there are many different types of authority for which democracy can serve. Elaborating on this is important for the analysis in this thesis.

It is often said that a golf club can be democratic. In the same vein, so too can a business entity, a charity, a university, and, of course, a nation-state. These examples are not exhaustive and are presented to illustrate the types of social phenomena that we can regard as being “authorities”. They are authorities because they are each responsible for regulating how their members are to conduct themselves in relation to a particular goal or function. Using the golf club example, its primary remit is to provide people with the facility of playing the game of golf. In order to do so, it will necessarily require various tasks to be coordinated among people: cutting the grass; providing refreshments; establishing rules of play, etc. A system of governance is required in order to ensure that these tasks are optimally performed i.e. a means of directing and coordinating the activities of the persons involved in providing the facility to play golf. Someone needs to cut the grass; someone needs to lay down the rules of play; someone needs to decide on who does what, etc. A system of governance puts these elements into place, and a *democratic* system of governance does so according to a particular logic (discussed in Section 3.1.2). Naturally, we can make similar observations in relation to the business entity or the charity – both of which engender particular functional objectives in the fulfilment of which the activities of persons have to be governed. Yet, in this thesis, we are concerned with a particular type of authority: the polity. What sort of authority does the term polity denote?

In an abstract sense, a polity is what Rawls refers to as “the basic structure” of society, by which he means “a society’s main political, social, and economic institutions, and how they fit together into one unified system of social cooperation from one generation to the next.”<sup>311</sup> The polity is thus an authority that seeks to

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<sup>311</sup> Rawls, 1996: 11.

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govern the relations between persons who are engaged in political, social and economic matters, and, significantly, disagreements *inter se*. The polity seeks to regulate such spheres of the social world so as to bring about a “unified system of social cooperation”. Yet even this definition is too narrowly conceived. Rawls confines himself, for the purposes of his analysis, to the strictures of modernity i.e. the Westphalian state. But it is important for the present analysis not to be so self-limiting. A polity can exist independently of the strictures of the modern nation-state. There are increasing instances of transnational, postnational, supranational, international and global governance structures whose remits are to regulate specific spheres of social, political or economic matters.<sup>312</sup> Indeed, as we have seen in Chapter Two, the EU is a comparatively powerful, or authoritative, example of such a non-state polity.

In this respect, when we consider what types of authorities are to be regarded as polities, it is the concept of the *political* that provides the necessary qualification: polities, in the most abstract sense, are authorities that are concerned with regulating and coordinating the activities of their subjects in relation to *political* matters, and, more particularly, *political contestation* between subjects. The concept of the political, here, being itself broadly conceived so as to encompass a range of substantive issues (economic, social, moral, etc.) that take on a political character. In line with Schmitt’s analytical framework, what makes an issue “political” is determined by the capacity with which any given issue can give rise to a confrontation between “collectivities” of peoples seeking to defend *their way of life* with respect to a given issue.<sup>313</sup> The political does not presuppose, therefore, nor is it

<sup>312</sup> The key elements that prevent polities from being regarded as nation-states are: their political institutions do not possess comprehensive powers in all substantive areas; connected to that, they are generally not regarded as “sovereign” authorities – with their administrative powers often contingent on their constituent nation-states’ approval; they are not pre-defined by a territory; nor do they enjoy a sense of nationhood, underpinned by a common culture or ethnicity. For a breakdown of the key elements of the nation-state, see Curtin, 1997: 13-16.

<sup>313</sup> Schmitt uses the distinction between “friend” and “enemy” to represent the political (as opposed to the moral or aesthetic) antithesis. See Carl Schmitt, *The Concept of the Political*, Chicago: University of Chicago Press, 1996 (hereinafter Schmitt, 1996): Chapter One.

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defined by, particular types of public dispute, but is instead manifested by the existence of the dispute itself:

The political can derive its energy from the most varied human endeavours, from the religious, economic, moral, and other antitheses. It does not describe its own substance, but only the intensity of an association or dissociation of human beings whose motives can be religious, national (in the ethnic or cultural sense), economic, or of another kind and can effect at different times different coalitions and separations.<sup>314</sup>

To this we must add that the political is also about identifying the interests and ways of life of individuals, not merely collectivities. Moreover, it does not need to be conceived as a process of identifying a *dominant* collectivity, but, rather, a process of negotiation between collectivities and individuals such that polities, as authorities, can regulate and mediate political contestation insofar as they bring about what Rawls refers to as “a unified system of social cooperation”. These qualifications are, as we saw in Chapter Two, especially pertinent to the EU given the multiplicity of constitutional actors that bring their political interests to bear on the EU’s governance structures. Moreover, being so broadly conceived, polities can manifest themselves in different forms – such as international political and economic regimes – and are not restricted to the modern configuration of the nation-state. In this thesis, we are only concerned with polities, broadly so conceived, as the subject-matter of an analysis of democratic legitimacy, and we leave behind golf clubs and business entities. The democratic relevance and roles of *institutions* (e.g. the Court of Justice) are addressed in Section 3.2, below.

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<sup>314</sup> Schmitt, 1996: 38. The “economic” dimension mentioned here resonates strongly with the EU.

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### 3.1.2. The Content of a Theory of Democracy

How should polities be governed? In what manner should the administrative powers of the polity be divided between its subjects? And how should those powers be exercised? These are the questions that are relevant to arriving at a threshold definition of democracy, since democracy itself is one of a set of archetypes of governance which seek to explain these very questions. These archetypes include: monarchies; tyrannies; aristocracies; oligarchies; and democracies.<sup>315</sup> Consider the order in which these archetypes have been presented as occupying relative positions of a spectrum, whereby the former archetypes answer the questions above by placing as much, or all, of the administrative power of a polity in the hands of the few; with less, or no, capacity for the remaining subjects of the polity to exert their influence on the exercise of that power.

Democracy exists at the furthest extreme away from the former archetypes, whereby governance of the polity is administered by *the collective self-government of the people, by the people and for the people* of the polity.<sup>316</sup> It is the subjects (the people) of the polity themselves, in their collectivity, who are endowed with the power to govern i.e. government *of* the people, *by* the people. Furthermore, in line with this logic, their discretion has to be measured against what is fairly and justly regarded to be in the interests of the people in their collectivity i.e. government *for* the people. Democracy is thus an *inclusive* ordering mechanism by which the people of a polity are collectively in control of administering, in Rawlsian terms, their political, social and economic institutions i.e. the basic structure of society; and, importantly, according to their own interests that they themselves are responsible for identifying.

<sup>315</sup> MacCormick reviews these archetypes of governance. Furthermore, he argues that each of them is present – to greater or lesser extents – in *any* polity. For example, in a so-called (modern) democracy, the head of state (e.g. a president or prime minister) exhibits the characteristics of a monarch; the elected government – a benevolent oligarchy; and the electoral process – the democratic expression of the people. He refers to this as a “mixed system”. See MacCormick, 1997: 338-339.

<sup>316</sup> This definition is paraphrasing the well-known axiom, famously delivered by Abraham Lincoln in his Gettysburg address, that democracy is “government of the people, by the people, for the people”. Whilst somewhat dated, its pithy truisms serve to articulate the general precepts of democracy very well.

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### 3.1.3. The Context-Dependency of Democratic Specification

The final element of a threshold theory of democracy is its context-dependent nature. This is the quite natural consequence of there being such a wide variety of authorities for which democracy can serve as an organisational logic – from golf clubs to polities. Indeed, even if we limit an analysis to polities as the particular subject-matter – as is the case in this thesis – there is still great variety. As we saw, beyond (and including) the Westphalian nation-state, a polity can take shape in different ways – the necessary criterion being that it is an authority that regulates and mediates political contestation between groups of people and individuals. There are, accordingly, many variables that will determine the particular form that a polity will take – variables of which we must be aware when specifying the open-textured content of a theory of democracy i.e. specifying how to implement a system of collective self-government for any given polity. These variables will include, *inter alia*: the number of members of the polity e.g. population size; the polity's remit – which may be expressed in some form of “constitutional charter”; the scope of that remit – what are the substantive limitations of the polity's powers?; the degree of the polity's powers i.e. sovereignty; the socio-cultural background(s), and the heterogeneity or homogeneity thereof, of the polity's members; and the territorial nature of the polity – is the polity self-contained by a geographical boundary, and if so, is that for posterity?

It should be pointed out that these variables are not exhaustive, nor are they mutually exclusive, but they serve to highlight the fact that polities can come in all shapes and sizes. Moreover, they are pre-institutional conditions. As we shall see in the Section 3.2, given the size of most polities, their administration has to be disaggregated into institutions that perform particular democratic functions. Specifying how those institutions are to exemplify the moral content of a theory of democracy – the collective self-government of the people, by the people and for the people – is not a straight-forward or self-evident formula and must, it is argued here, be calibrated to the distinctive pre-institutional variables (as described above) of any given polity.

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This is why, in Chapter Two, it was argued that democratic specification in the EU – as a polity *sui generis* – cannot and should not be expected to form along the same lines as a nation-state. As we saw, the sheer complexity of the EU – with its multi-level and multi-jurisdictional features – makes it irreducible to the precepts of axiomatic constitutional theory and political theory. The orthodoxy of “left wing” and “right wing” party politics, for example, is misplaced in the EU given its constitutional structures and preferences i.e. the three Cs of EU constitutionalism. Democratic specification must be calibrated according to the type of polity and, in particular, according to the sorts of pre-institutional variables identified above. In Section 3.2, we consider the role of institutions within democratic polities, and how it is their roles and functions are to be understood in democratic terms; and in Section 4.3, we consider how the polity-conditions of the EU are to be factored into the analysis of the Court of Justice.

### *3.2. The Democratic Role of Political Institutions*

Given the foregoing criteria – which represent very general standards only – we now address the role of the polity’s *political institutions*. Here, we understand political institutions to be the manifestation of a polity’s democratic governance structures: they *are* the governance structures. What forms can they take and how can they be democratic? These questions are addressed in the following two sub-sections.

#### *3.2.1. Addressing the Paradox of Exclusive Democratic Political Institutions*

One of the great paradoxes of modern democratic theory is borne out of the necessity for polities to be governed through institutions – institutions being inexorably *exclusive* forums of political power. In an arguably ideal democratic polity, the political powers of the polity would be at the disposal of *all* the people in the polity. Democratic political processes would be directly accessible and available for

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*participation* by all. Indeed, in its classical and inaugural form, democracy was designed as such, and it is perhaps the most intuitive form of democratic ordering i.e. collective self-government *by* the people.<sup>317</sup> Yet even the Athenian models were fundamentally challenged by unavoidable practical problems associated with granting the public universal participation,<sup>318</sup> thus promulgating alternative democratic ordering mechanisms – most notably, the idea of *representative democracy*.<sup>319</sup> As Ely puts it:

Representative democracy is perhaps most obviously a system of government suited to situations in which it is for one reason or another impractical for the citizenry actually to show up and personally participate in the legislative process.<sup>320</sup>

The paradox arises because, in attempting to formulate an *inclusive* system of government (*by* the people), it is necessary – due to pragmatic concerns – for political power to be handed over to institutions that are *exclusive*. What this means is that the democratic idea of *government by the people* is at best an ideal; but, more realistically, it is mythological – albeit virtuous. Democracy, then, has to be understood not as government by the people, but, instead, *government by political institutions*.<sup>321</sup>

How can this problem be reconciled with our threshold criteria, and, in particular, the content of a theory of democracy i.e. the collective self-government of the people, by the people and for the people? Answering this question is important for the present analysis, as there is a range of possible solutions available that can help to reconcile this apparent paradox; and identifying the optimal solution is very much a part of the context-dependant nature of democratic specification. So, in purely theoretical terms,

<sup>317</sup> See Schwartzberg, 2004.

<sup>318</sup> In addition to which was the exclusion of women and slaves.

<sup>319</sup> For a genealogical exposition of this principle, albeit in an American context, see Ely, 1980: 77 – 88.

<sup>320</sup> Ely, 1980: 77.

<sup>321</sup> The more commonly used taxonomy is “governors” for, and on behalf of, the “governed”. These have unfortunate connotations, however, of political power being ascribed to individuals as opposed to the preferred view here, which is that it is the institutions that are endowed with political power.

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what solutions are available that make otherwise *exclusive* political institutions nonetheless *democratic* institutions? There are, broadly speaking, two ways that this problem can be resolved: institutional responsiveness; and the disaggregation and division of political powers between a multiplicity of mutually cooperating political institutions.

Institutional responsiveness is a basic standard to which all democratic political institutions within a polity ought to conform. The idea itself is relatively straightforward: political institutions, in their political decision-making and political action, ought to act according to the identifiable interests of the people over which they govern i.e. they ought to *respond* to those interests. Institutional responsiveness is, moreover, broad enough to cover the “by the people” and “for the people” qualifications. On the former, institutional responsiveness can involve direct participation in the administration of political powers by the political institution, in several ways. First, the officials of political institutions will be appointed from the citizenry, whereby the capacity to be appointed is, in Rawls’ terms, “open to all under conditions of fair equality of opportunity”.<sup>322</sup> Second, political institutions may offer what Nentwich refers to as “opportunity structures for citizens’ participation”.<sup>323</sup> These are channels through which non-officials of political institutions can directly engage in their decision-making processes. Obvious examples include voting in general elections; lobbying; and the consultation of experts in the committee stages of the legislative process.<sup>324</sup>

Institutional responsiveness also plays an important role in exemplifying the democratic qualification of “government *for* the people”. Given their exclusivity, it is essential for democratic political institutions to be responsive to the *interests* of the

<sup>322</sup> Rawls, 1996: 6. Here, Rawls is referring to the second of his two principles of justice, which seeks to justify “social and economic inequalities” in society. In addition to the fair terms of appointment point (noted above), he adds that such inequalities must also be justified such that “they are to be to the greatest benefit of the least advantaged members of society” (Rawls, 1996: 6).

<sup>323</sup> Nentwich, 1998.

<sup>324</sup> For a more nuanced view and “experimental” forms of direct political participation by the citizenry, see Cohen and Sabel, 1997.



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people over which they govern; and for them to use whatever available means there are to determine those interests. There are several ways that these interests can be measured and/or protected. First, many of the mechanisms of direct participation (just outlined) can be useful indicators of public interest, and, as such, straddle the *by the people-for the people* divide. Indeed, a common example of this is the idea of “representative democracy” i.e. the appointment of officials of political institutions that are deemed, in some way or another, to *represent* the interests of either the public as a whole, or a particular constituency thereof. The most obvious example of this is the public voting-in of officials during general elections, *inter alia*. Democratic representation is a much broader notion than this particular example, however, and is given greater attention in Chapter Five. In addition to measuring public interest and representation, there are also important mechanisms designed to ensure that incumbent officials faithfully act in the interests of the public. These mechanisms can be broadly conceived as “supervisory” i.e. mechanisms by which the public can supervise and, where necessary, disempower the officials of political institutions. These are more commonly understood under the headings of *accountability* and *institutional transparency*. In general terms, accountability protects the public’s interests from being subverted by improvident political decision-making and political action by officials by providing some mechanism or other by which those officials can be “punished” for such action; or, alternatively, “rewarded” for performing their duties in good faith.<sup>325</sup> Institutional transparency, on the other hand, provides a means of public audit of the decision-making and actions of political institutions. Institutional transparency might involve, for example, the publication of institutional records that relate to political decision-making e.g. the publication of parliamentary debates. Transparency thus guards the interests of the public – by providing the public with the means to hold officials to account – as well as fostering the conditions by which the public can react and respond to political action. In other words, institutional transparency also generates public participation in political processes by virtue of an iterative process by which the public can reflect

<sup>325</sup> Indeed, this is precisely Hix’s rationale in arguing for a competitive system of elected party politics, through which the public can “get rid of the scoundrels”. Hix, 2008: 68.

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and refine their interests on any given political issue and, consequently, for those interests to be rearticulated by *responsive* political institutions.

The second way in which the apparent paradox of exclusive democratic political institutions can be resolved is the disaggregation and division of political powers between a multiplicity of mutually cooperating political institutions. In its modern guise, this is referred to as the *separation of powers* doctrine, with the paradigm case being the division of political power between *executive*, *legislative* and *judicial* political institutions.<sup>326</sup> The idea here is that, taken holistically, any given polity is endowed with political powers – to greater and lesser extents – and, rather than to administer those powers within one political institution, those powers are disaggregated and functionally divided between a multiplicity of political institutions, which, acting in concert, achieve the desired administrative goals or ends of the polity. Such an inter-institutional configuration has many benefits – not least of which is optimal administrative efficacy – but it also provides two important democracy-enhancing qualities that help to resolve the exclusivity paradox. First, by dividing political power in this way, it reduces the capacity with which incumbent officials of political institutions may subvert the democratic process by abusing their powers. This is simply because officials of particular political institutions will have more narrowly constrained purviews i.e. fewer political powers. This logic could perhaps also be understood as an alternative method of accountability. Second, by virtue of there being multiple political institutions, each of which having a pre-defined set of administrative functions, it presents a more nuanced and effective system of institutional responsiveness.<sup>327</sup> In some respects, this provides more opportunity structures for citizens' participation; and, in other respects, it allows for democratic representation within each political institution to be calibrated according to whatever particular set of substantive issues is expected to arise by virtue of that institution's given functions. Using the paradigmatic case as an example, in the

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<sup>326</sup> See Barber, 2001; and White, 2011.

<sup>327</sup> This is the rationale of Cohen and Sabel's multi-faceted deliberative polyarchy (Cohen and Sabel, 1997).

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judicial institutions – as opposed to the legislative or executive institutions – democratic representation will take on a more legal form – judges and legal actors, for example, representing particular strands of public interest that are germane to the world of law and legal administration, as opposed to the somewhat broader matters of public interest to which executives and legislatures must be responsive.<sup>328</sup>

As was alluded to above, furthermore, the paradigmatic tripartite division of power between executive, legislative and judicial power represents only one, albeit popular, incarnation of the separation of powers doctrine – bringing with it an association of normative values that underpin such a system (majoritarianism, accountability, formalism, etc.). But political power does not need to be narrowly conceived under such a formalist paradigm. It can be functionally divided in a variety of ways. For example, it can be decentralised – dividing administrative responsibilities between local and central political institutions. Consider the possible types of decentralisation: federalism, devolution – which can also be asymmetrical<sup>329</sup> – and unitary divisions of administrative jurisdiction (e.g. France). Taking a more constructivist view, political power can be seen to emanate within politically autonomous institutions, such as economic institutions or associations within civil society.<sup>330</sup> The complexities here are further compounded when we go, as we do in this thesis, beyond modernity and its nation-state template, whereby the separation of powers doctrine takes on new forms: intergovernmentalism, “inverted regionalism”, supranationalism, transnationalism, constitutional and legal pluralism, and “heterarchical” divisions of sovereignty, *inter alia*.

An important point to be aware of here is that the variety of alternative formulations of this doctrine go hand in hand with the variety of possible manifestations of polity-type (considered in Section 3.1.1 and Section 3.1.3, above), and that an appreciation

<sup>328</sup> These ideas are given greater clarification in Section 4.3 below – on contrapunctual constitutionalism and the Court of Justice.

<sup>329</sup> For an analysis of asymmetrical devolution in the UK context, see Chris Himsworth, “Devolution and its Jurisdictional Asymmetries” (2007) *Modern Law Review* Vol. 70 No. 1 31 (hereinafter Himsworth, 2007).

<sup>330</sup> See especially Cohen and Sabel, 1997.

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of these factors is crucial for an assessment of the democratic legitimacy of political institutions, like the Court of Justice. Not only must we assess each institution in isolation with respect to its responsiveness, but we must also balance that assessment against the given political role an institution is expected to perform for, and on behalf of, the polity within which it functions, by virtue of the separation of powers doctrine, which must necessarily be calibrated according to distinctive polity-conditions. In the following sub-sections, then, we consider an analytical framework that encapsulates these analytical complexities and provides a rationale by which these different criteria can be prioritised *inter se*, such that we can make a coherent and methodologically sound assessment of the democratic legitimacy of political institutions in the abstract; and the Court of Justice of the European Union, specifically.

#### 3.2.2. An Analytical Framework for Assessing the Democratic Legitimacy of Political Institutions: Intrinsic and Instrumental Democratic Legitimacy

The foregoing criteria have been presented to establish the basic structures and precepts that underpin a democratic order in the abstract – almost as if to set-up a blueprint for the construction of a democratic polity with democratic institutions. Naturally, such a project is fanciful. Instead, we must take notice of these criteria for the more modest task of measuring the democratic legitimacy of pre-existing political institutions within pre-existing polities (which may or may not have been designed according to those precepts). In order to make such an assessment, we must identify an analytical framework that coherently and comprehensively incorporates the foregoing criteria – general as they intentionally and necessarily are. To that end, there are two ways of understanding the democratic legitimacy of political institutions: *intrinsic* democratic legitimacy and *instrumental* democratic legitimacy.<sup>331</sup>

<sup>331</sup> For a particularly cogent explanation of the *intrinsic-instrumental* taxonomy, see MacCormick, 1997.

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Intrinsic democratic legitimacy relates to the requirement of institutional responsiveness. As we saw in Section 3.2.1, institutional responsiveness denotes a set of standards by which (what are necessarily and inexorably) *exclusive* political institutions can (nonetheless) exemplify the core democratic ideal of collective self-government – specifically, rescuing the associated ideals of government *by* and *for* the people. Meeting this requirement can be achieved by political institutions following four key virtues, which will hereinafter be referred to as the *intrinsic virtues*. These are: participation (making institutional decision-making accessible to the public for their involvement); representativeness (ensuring that the public’s interests are, in various ways, part of institutional decision-making); accountability (ensuring that the officials of political institutions are supervised by the public, whereby the public can punish improvident political action and reward political officials for acting in good faith); and institutional transparency (providing the means for public audit of the political institution’s exercise of political power).<sup>332</sup>

There are two important qualifications to note in relation to the intrinsic virtues. First, in order for political institutions to exemplify them, they must do so at the structural and procedural levels. The extent to which a political institution is participatory or representative is dependant on there being either processes that, for example, make institutional decision-making accessible for public participation, or general structures – such as the composition of incumbent officials – that symbolically and/or substantively reflect salient matters of public interest. Given the focus on the Court of Justice’s structures and processes in this thesis, the intrinsic virtues are central to the analysis herein. Second, exemplifying these virtues is not to be understood in absolutist terms. There are natural tensions that exist between the intrinsic virtues (elaborated on in Section 3.3.1, and Section 4). Moreover, the extent

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<sup>332</sup> As will be explained in Section 4, the focus in this thesis, in relation to the intrinsic virtues, is on representativeness and participation. These concepts are explained in greater depth in Chapter Five and Chapter Six, respectively. For an analysis of the democratic legitimacy of judicial review in purely intrinsic terms, see Annabelle Lever, “Democracy and Judicial Review: Are They Really Incompatible?” (2009) *Perspectives on Politics* Vol. 7 No. 4 805 (hereinafter Lever, 2009).

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to which any given political institution is participatory, representative, accountable or transparent is dependent on the polity-conditions within which that institution functions. This is so in two senses. First, there is a necessary sensitivity to, what we termed in Section 3.1.3, the pre-institutional variables of the polity. In other words, given the distinctiveness of each polity (its jurisdiction, its scope of powers, its socio-cultural values, etc.), the precise manner in which an intrinsic virtue like representativeness is implemented will be sensitive to those polity-conditions. The second way that institutional exemplification of intrinsic virtues is context-dependant is because, as we saw in the previous sub-section, democratic polities typically divide up political power into a multiplicity of political institutions, each of which have a given function to fulfil commensurate with that power. In constitutional courts, for example, given their trustee-duties (discussed in Section 2, above), it is important that they are sufficiently insulated from the whims of majoritarian politics. In this case, then, the virtues of institutional accountability and transparency are somewhat limited.<sup>333</sup> This leads on to the explanation of *instrumental* democratic legitimacy.

Instrumental democratic legitimacy is a way of understanding the functional relationship between the political institution and the democratic polity within which, and for which, it functions. The reason we examine a political institution in this way is because each political institution within a democratic polity has been allocated certain functions in order to enhance the democratic qualities of the polity, taken holistically. In order to understand the democratic legitimacy of a political institution, then, we must also pay attention to how it functions – paying close attention to the scope of its political powers and the limits that places on institutional functioning.

There are two aspects of the polity-institution connexion to be aware of here. First, there are the formally established institutional roles and objectives that have been

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<sup>333</sup> The impact of the associated issues of institutional independence and insulation is given greater attention in Chapter Four.

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handed over (or delegated) to the institution by virtue of the separation of powers doctrine – thus enabling one to deduce the expected output of and appropriate limits to institutional functioning. Legislative assemblies are, for example, endowed with the responsibility *inter alia* to make law for the polity. Courts, on the other hand, are (primarily) responsible for resolving disputes between parties in accordance with established rules of law. By fulfilling these functions, institutions are contributing to the broader democratic governance structures of the polity and, as such, enhance the democratic quality of the broader polity. Second, because political institutions will have, to varying degrees, a certain amount of discretion (a “zone of discretion”) with which to administer their formally established roles and objectives, they will inevitably and iteratively function in such a way as to help (re)define and (re)constitute the polities within which they function. This arises by virtue of administrative indeterminacy (i.e. contractual incompleteness) and, as a (secondary) form of institutional output, can be understood as *polity-constitutive output*. Legislative assemblies, for example, might bolster the polity’s social legitimacy by introducing “progressive” taxation laws. Courts, on the other hand, may, for example, via judicial interpretation, bolster the polity’s protection of the citizen by granting individuals greater procedural rights e.g. Ely’s discrete and insular minorities. These constitutive contributions by institutions may well be bolstering the democratic legitimacy of the polity in two ways. They may be simply *contributing* social, political and/or juridical conditions necessary for a democratic polity, as per the institution’s formally established role; but this contribution may also be *compensating* for broader (democratic) structural defects and deficiencies elsewhere in the polity, which may legitimate the institution exercising its discretion in this way. In addition, given the incompleteness of *finalité*, the Union institutions’ contributions can be regarded as generative of the very conditions of democracy e.g. increasing the democratic power of the EP by the Court of Justice in *Les Verts*.

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### 3.3. *The Intrinsic and Instrumental Democratic Legitimacy of Trustee-Courts*

Given the foregoing, and looking forward to our analysis of the democratic legitimacy of the Court of Justice, we are left with two sets of questions. First, if we are to analyse the democratic legitimacy of a political institution in the terms outlined above (intrinsic and instrumental), how can we determine the optimal configuration of intrinsic virtues and instrumental output? In other words, if we were to assess empirically a particular political institution – surveying its intrinsic and instrumental credentials – how could we determine whether or not that institution is *sufficiently* participatory, representative, accountable, or transparent; and whether or not that institution’s instrumental functions and output are also sufficient, democratically speaking? The complexity of such a diagnosis is further compounded by what was alluded to above, the fact that, sometimes, instrumental functions are in a tension with intrinsic virtues e.g. the independent constitutional court and transparency. How do we reconcile such tensions; or, more accurately, how do we factor-in the inter-dependency of intrinsic virtues and instrumental functions to that analysis? The second set of questions relates to the position of courts – as a particular type of political institution. How can courts, and, in particular, constitutional (trustee-)courts, fit into this analytical framework? Furthermore, *why* should we analyse courts in this way? In particular, why should we analyse the Court of Justice of the European Union in this way? The following sub-sections will address these questions.

#### 3.3.1. Resolving the Diagnostic Problems of the Intrinsic-Instrumental Taxonomy: Back to the Notion of Trusteeship

Briefly restated, there are two problems that need to be addressed here: finding a rationale by which we can determine the optimal configuration of intrinsic virtues; and finding a rationale by which we can make that assessment in light of the inter-dependency of intrinsic virtues and instrumental functions and output. Resolving



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these problems brings us back to the notion of trusteeship. Trusteeship provides a rationale by which these conceptual complexities can be coherently ordered. This is because, first, trusteeship – with its bipartite division of primary and secondary fiduciary duties – provides a normative logic which prioritises the relationship between, and applicability of, instrumental functions and intrinsic virtues; and, second, because the notion of trusteeship itself significantly overlaps with the concept of democratic legitimacy. These two premises are explained presently.

To begin with, trusteeship is a useful way to understand *instrumental* democratic legitimacy. The terms and objectives of the trust determine the trustee-institution's functional relationship to the democratic polity. They determine what it is the trustee-institution is expected to provide for, and on behalf of, the polity within which it functions. The trustee-institution has been handed over these tasks *by* the people of a polity (settlers), *for* the people of a polity (beneficiaries). Thus, meeting the terms and objectives of the trust is a democratically mandated task. This also naturally resonates with the aforementioned separation of powers doctrine, whereby the political power of a democratic polity, in order to enhance the polity's self-governing credentials, is functionally divided between a multiplicity of political institutions. In other words, the polity *delegates* political powers to political institutions, and so, fulfilling the terms and objectives that have been set by virtue of that delegation, represents, for the delegate political institution, the *primary* democratic remit. The overall design of the polity – with its disaggregated power structures – has to be assumed to have a democratic logic of its own, in the service of which a particular political institution must conform to its delegated functions. Given this logic, from a democratic legitimacy perspective, trustee-institutions must give priority to measures of instrumental democratic legitimacy. They must faithfully observe the terms and objectives of the trust in order to bolster and enhance the democratic legitimacy of the broader polities within which, and for which, they function. In this way, when measuring the extent to which a political institution exemplifies the intrinsic virtues of democratic legitimacy, the applicability or suitability of those virtues has to give way to measures of instrumental legitimacy, as

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a matter of priority – in the language of trusteeship, this is the same as fulfilling *primary fiduciary duties*. This is why, for example, it is easy to accept that institutional transparency (an intrinsic virtue) must be somewhat limited in the context of constitutional adjudication, because, as we shall see in greater detail in the next Chapter, institutional transparency often conflicts with constitutional courts' impartial and independent adjudication i.e. part of their primary fiduciary duties, which is also their primary instrumental remit.

There are a few qualifications to make here, however. First, it is not *necessarily* the case that intrinsic virtues will conflict with instrumental functions. Indeed, in certain political institutions – legislative assemblies for example – their primary instrumental functions *are* to exemplify the intrinsic virtues. The extent to which intrinsic virtues will conflict with instrumental functions is very much dependant on the type of political institution under examination. In Section 3.3.2, we will consider these issues in the context of constitutional courts.

Second, as we saw in Section 2, trusteeship is, by its nature, not simply a matter of following the rules as laid down by political principals. The problem of contractual incompleteness gives rise to significant zones of discretion within which any trustee-institution must “fill in the blanks”, because the terms and objectives of the trust (their instrumental functions or primary fiduciary duties) are indeterminate. In this regard, as we have seen, trustee-institutions are expected to “fill in the blanks” according to what we termed *secondary fiduciary duties*. In other words, when a situation arises whereby a trustee cannot look to the terms explicitly laid down in the trust for direction, the trustee must decide how to administer the trust according to standards that are implicit in the settled terms – either by inferring what the broader objectives of the trust are, or by reference to some other more general standards of good faith vis-à-vis the beneficiaries (in this case, the public). In this regard, there is a significant relationship between secondary fiduciary duties and intrinsic virtues of democratic legitimacy. At one level, we may say that intrinsic virtues – being exemplary of the democratic ideal of collective self-government – are simply good

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examples of, or one way of understanding, the sorts of general standards of good faith required by secondary fiduciary duties. But the relationship between intrinsic virtues and secondary fiduciary duties has a more compelling significance. As we saw above, democratic political institutions are paradoxically exclusive, which makes it necessary for them to become responsive to the interests of the public over which they govern. This is the rationale that underpins the intrinsic virtues: institutional responsiveness. What is important to note here is that this rationale significantly overlaps with the core objectives of secondary fiduciary duties in trustee-institutions, which are, again, for the trustee-institution to administer the trust according to standards that are implicit in the settled terms by acting in good faith vis-à-vis the beneficiaries. Acting in good faith is, moreover, precisely about ensuring that the public's interests are taken into account, acted upon and not subverted by the exercise of the trustee-institution's administrative discretion.

The relationship between secondary fiduciary duties and intrinsic virtues is one in which their core objectives significantly overlap i.e. institutional responsiveness to the interests of the public-beneficiaries. Yet the domain of secondary fiduciary duties is the exercise of discretion – an interpretative function – whereas the domain of intrinsic virtues is the structural and procedural design of political institutions. The structures and processes of a political institution will, moreover, typically be set by the settlors of the trust and so are not subject to alteration by the trustee-institution.<sup>334</sup>

What we have to be aware of, then, is that secondary fiduciary duties relate to the exercise of administrative discretion, and intrinsic virtues, strictly speaking, do not – yet their core rationales (institutional responsiveness) significantly overlap. In this respect, we can understand the implementation of intrinsic virtues – through the design of a political trustee-institution's structures and processes – as *facilitating* the trustee-institution's fulfilment of their secondary fiduciary duties. In other words, the design of political trustee-institutions according to intrinsic virtues, such as

<sup>334</sup> Indeed, the Court of Justice's structures and processes are laid down and pre-determined by legislative and statutory instruments, and their capacity to be altered is not solely within the purview of the Court of Justice's administrative discretion. See Article 281(2) TFEU.

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participation and representativeness, facilitates that institution's capacity to be responsive to the interests of their beneficiaries – the public.

There are two important final points to note here: first, there is a subtle, yet consequential, difference between the nature of “public interests” vis-à-vis the trustee-institution, and the nature of “public interests” with respect to the broader polity; and, second, the explanatory power of trusteeship, vis-à-vis the diagnostic problems associated with the intrinsic-instrumental taxonomy, is that trusteeship incorporates the (democratically) necessary sensitivity to polity-conditions into its analytical framework. On the former, identifying the salient matters of public interest to which the trustee-institution ought to be responsive is dependent on the special role that the trustee-institution plays within the polity. In the EU, we saw in Chapter Two that the contestation between intergovernmental and supranational or statist organising principles of constitutional design is a central political dispute to which the EU's institutions must be responsive e.g. the structures and processes of Comitology in the Commission. But to what extent is this tension, or should this tension, be of concern to all of the Union's institutions? As we shall see in Chapter Five, the Court of Justice is not directly concerned with this tension *per se*, because the Court is primarily concerned with resolving disputes and constitutional tensions as they emerge through the adjudication of *law* i.e. the Court's trustee duties. In that respect, the salient and relevant public interests to which the Court must be responsive relate to a tension between respecting national legal traditions and an emerging autonomous Union legal culture, which, whilst there are significant parallels, is not the same as the tension between intergovernmentalism and supranationalism. The important point to note here is that when institutional responsiveness in trustee-institutions is called for, then it is a more narrowly focussed set of public interests that are relevant. On the latter point, as we saw in Section 3.1.3, according to a threshold theory of democracy, democratic specification is a necessarily context-dependent task. That is, when considering how it is a democratic polity sufficiently configures itself, it must do so according to what we termed the “pre-institutional variables” that define any given polity e.g. the size of

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the polity, the socio-cultural values that underpin the polity, its jurisdictional scope and powers, etc. The analytical ordering provided by the notion of trusteeship allows for these variables to be factored-in when determining the optimal configuration of intrinsic virtues and the limits of institutional functioning and output (instrumental democratic legitimacy) by virtue of the discretion provided through contractual incompleteness. The precise manner in which both of these points are operationalised in the analysis of the Court of Justice is addressed in Section 4, and in the theoretical Sections of the following Chapters.

#### 3.3.2. The Democratic Role of Constitutional Courts: Instrumental and Intrinsic Legitimacy?

We have already seen, in Section 2.2 and Section 2.3, that constitutional courts can, and should, be regarded as institutions of the trustee kind. And we have also just seen that the democratic legitimacy of political institutions can be carefully and optimally analysed under the organising principle of trusteeship. The questions that we are concerned with now, however, are: how can, and why should, constitutional trustee-courts be analysed in terms of instrumental and intrinsic democratic legitimacy? Why would we want to analyse the democratic legitimacy of constitutional courts at all? Indeed, there are many schools of thought which eschew such an analysis – preferring to view courts and legal systems as mere tools of the true democratic *political* institutions, such as governments and legislative assemblies.<sup>335</sup>

To answer these questions, we must begin by recalling the primary functions of constitutional courts, which are:

1. to resolve constitutional disputes (e.g. judicial review);

<sup>335</sup> This perspective that underpins much of the political constitutionalist tradition. See, for example, Waldron, 1999; Tomkins, 2005; and Bellamy, 2007.

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2. to resolve constitutional disputes according to a faithful interpretation of the meaning of the norms set out (explicitly and implicitly) in constitutional settlements i.e. constitutional law;
3. to make reasonable interpretations and clarifications of indeterminate constitutional law; and
4. to ensure that no-one is above the law i.e. that the law is observed by all, especially political institutions.

How can we understand these functions to be of either instrumental or intrinsic democratic significance? First, simply put, instrumental democratic legitimacy relates to a political institution's functions and output – determining the extent to which it enhances the broader polity's democratic credentials. If the political institution under examination is a constitutional court that performs the four functions listed above, then to what extent or in what ways are these functions credibly regarded as instrumental functions and output? There are two relatively straightforward answers to this, which present quite modest responses to the objections of political constitutionalists. First, these four functions can be regarded as the terms and objectives of the trustee relationship between the constitutional court and the (democratic) polity for which it functions. The trustee-court has been handed over these tasks *by* the people of a polity (via their political representatives), *for* the people of a polity (the public-beneficiaries). Thus, meeting the terms and objectives of the trust is a democratically mandated task. Second, beyond the constitutional court simply “doing what it's told” by the public, the principal focus of these four functions is giving application and faithful meaning to the law – law that has been established by prior democratic political processes. In other words, applying the law *is* a democratic function in that it is fulfilling the ends demanded by the people. In both senses, then, the trustee-court is an *instrument* towards meeting the desired ends of the people of a polity, as set up under the terms and objectives of a trust.

Such an account is naturally quite formalistic, and, as we have seen, trustee-courts are endowed with large “zones of discretion”. That discretion arises by virtue of the

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indeterminacy of both the terms and objectives of the trust-settlement; as well as, specifically for courts, the semantic indeterminacy of law. The question here, then, is, can constitutional courts exercise that discretion in a democratic way? This question is particularly significant because, when judges interpret indeterminate law, they are effectively law-making. This problem relates to the instrumental democratic legitimacy of the constitutional court's output. Indeed, this is where the real contestation lies between political constitutionalists and legal constitutionalists. Political constitutionalists – such as Waldron, Tomkins and Bellamy – would argue that a court has no legitimate mandate with which to take on the role of legislature, particularly in the context of the judicial review of legislation.

There are, however, very credible and compelling reasons to reject the objections of political constitutionalists. To begin with, at a methodological level, their objections are somewhat misplaced. They tend to ignore, first, that there is not really such a thing as a determinate law that can be simply and robotically applied in courts. They are also misplaced because they ignore the sheer inevitability and necessity of having an institution like a court that can act as a neutral umpire, bringing determinacy to the inexorably indeterminate legislature's law. Furthermore, as we saw in Section 2, the problem of contractual incompleteness – a cause of indeterminacy – actually provides a normative rationale for (1) legislatures purposefully making law indeterminate; and (2) having independent institutions like courts to bring determinacy thereto. That normative rationale was that formal political deliberations, within legislatures or wherever, cannot always agree on the particulars of legislative content, whilst agreeing fundamentally on broader objectives – leaving the specifics to be ironed out by courts that are independent from the same majoritarian political forces that give rise to such legislative impasses.<sup>336</sup>

Beyond these methodological problems, there are also some very compelling counter-arguments on why courts *should*, from a democratic perspective, and in

<sup>336</sup> We may present these objections to political constitutionalists – especially Waldron and Bellamy – somewhat playfully, but sincerely, as “the *circumstances* of constitutional adjudication”.

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certain circumstances, take on a more legislative role. These arguments very much resonate with the idea of secondary fiduciary duties, thus establishing various rationales by which constitutional courts can exercise their discretion according to the values that inhere in the terms and objectives of the trust. There are those who argue, for example, that constitutional courts play an important role in safeguarding the necessary socio-political conditions of a democratic order from being subverted by the impulsive and whimsical forces of the *realpolitik*.<sup>337</sup> There are also arguments which propose that an important function of constitutional courts is to foster, enable or enhance the deliberativeness of political processes.<sup>338</sup> In terms of understanding the democratic roles and democratic legitimacy of constitutional courts, these approaches focus on instrumental functions and output – emphasising the various rationales by which judges can legitimately exercise their administrative discretion with respect to interpreting indeterminate law in a democratic way. But what about the intrinsic virtues and the structures and processes of constitutional courts? Why should a constitutional court be participatory, representative, accountable or transparent? In what sense should it use these structural and procedural virtues to determine public interests? Does the democratic role of courts not simply stop at courts performing their given (instrumental-trustee) functions? Understood rhetorically, these are very reasonable objections. It is not intuitive to think of courts' structures and processes being designed in a democratic way. Lever argues that judicial review in constitutional courts is democratically legitimate in intrinsic terms, especially through representation and participation.<sup>339</sup> Yet her argument is too narrowly focussed on the intrinsic virtues, and fails to take account of the various complexities involved in reconciling the tensions between the intrinsic virtues; tensions with instrumental democratic legitimacy; and the calibration of procedural democratic legitimacy to the idiosyncrasies of the polity. One of the key contributions of this thesis is to argue that, at a theoretical level, constitutional courts ought to be designed according to the intrinsic virtues of democratic legitimacy in a

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<sup>337</sup> Ely, 1980; Dworkin, 1985; Dworkin, 1996; and Rawls, 1996.

<sup>338</sup> Habermas, 1995; and Everson and Eisner, 2009.

<sup>339</sup> Lever, 2009.



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way that is balanced against their instrumental requirements and sensitive to polity-conditions.

Given that the intrinsic virtues (participation, representativeness, accountability and transparency) are concerned with responsiveness to public interests, we need to focus on the relationships between the constitutional court, its functions and responsiveness to public interests in both the broader polity and the constitutional court itself. In some respects, we have already considered this above. Some of the arguments presented by legal constitutionalists, such as Dworkin, are premised on the idea that it is necessary for constitutional courts to exercise their interpretive discretion by defending certain categories of public interests or “principles” – whether they be of minorities or some more general category of public interest like the right of peaceful protest. Yet the difference between these arguments and the present issue centres on the *methods* by which those public interests are identified. Legal constitutionalists tend to make these assertions in relation to canons of legal reasoning, and less so in relation to the structures and processes of constitutional adjudication, the latter, of course, being where intrinsic virtues can take shape. What we can say, then, as a starting point, is that the intrinsic virtues present a supplementary mechanism by which constitutional courts and their judges can be responsive to the interests of the public – they *facilitate* the constitutional court in exercising a responsive discretion. But under what circumstances would it be appropriate to design constitutional courts in this way?

This very much depends on the levels of institutional responsiveness and interest representation that exist within the political institutions of the broader polity. In the language of trusteeship, one factor that becomes apparent here is that as political property is transferred to non-majoritarian institutions, such as constitutional courts, responsiveness to the affected interests of that “political property” has to be addressed. Because majoritarian political institutions become powerless in those areas of public policy and administration, “the people” *prima facie* lose their capacity to self-govern, as those tasks of government have been transferred to an

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autonomous and *independent* institution that is, by design, insulated from majoritarian forces. We need to know how those institutions can also be responsive to the affected interests of the people. One way of achieving this is to design trustee-institutions, like constitutional courts, according to the intrinsic virtues of democratic legitimacy.

Of course, one might object that the terms and objectives of the trust – including, importantly, the implicit terms – have already factored in the salient matters of affected public interests, so why provide these extra mechanisms? Are they not unnecessary? There are two responses to this objection. First, trustee-courts are subject to high zones of discretion, which is in response to the problem of contractual incompleteness. That logic is, furthermore, underpinned by the idea that political principals have not been able to pin-down sufficiently what the public's interests are; or, rather, that they have not been able sufficiently to reconcile the various cleavages of public interest that relate to that area of public administration i.e. the settlement of constitutional disputes. Political principals have consequently handed over that administration to the trustee-court, which itself must still be able to measure salient matters of public interest in order for it to reach concrete solutions.

A second response to this objection is that the trustee-court might be operating within a polity with significant systemic deficits with regard to determining salient matters of affected public interests. One could argue, for example, that a constitutional court, as a trustee-institution, might still be able to identify salient matters of public interest via an inter-institutional dialogue with the other (majoritarian) political institutions.<sup>340</sup> This is a good argument, and in the ordinary polity-context – the modern, democratic nation-state – this would perhaps be a sufficient means by which constitutional courts could reasonably identify salient matters of affected public interests without having to be designed according to the intrinsic virtues. Yet the situation is somewhat different outwith that polity-context.

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<sup>340</sup> Indeed, this is one of the premises of Everson and Eisner's sociological, deliberative theory of adjudication. Everson and Eisner, 2009.

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One of the key premises of this thesis – which is examining the EU’s constitutional court – is that the EU is not an ordinary polity, but one that has significant systemic deficits with regard to the identification and protection of public interests by its other political institutions. Put simply, because polities like the EU and their “mainstream” political institutions (i.e. executive and legislative institutions) are not sufficiently responsive to salient matters of affected public interests, it is more appropriate to design their constitutional courts according to the intrinsic virtues, whereby their interests can be identified as they emerge within constitutional disputes.<sup>341</sup>

#### 4. The Court of Justice: Framing the Argument

Given the foregoing, we now have a conceptual language with which, and an analytical framework within which, to understand and assess the procedural democratic legitimacy of the Court of Justice. Trusteeship is an umbrella concept that establishes the underlying rationale for this analysis. It explains how and why we should empirically examine the Court’s structures and processes in intrinsic and instrumental terms. That the Court of Justice is a trustee-institution is a central claim of this thesis. Moreover, trusteeship provides an ordering logic by which the tensions that exist between intrinsic virtues and instrumental legitimacy can be resolved; and by which the necessary sensitivity to the EU’s polity-conditions can be factored into the analysis.

The argument of this thesis can be understood at three levels: (1) the ways in which the structures and processes of the Court of Justice satisfy intrinsic and instrumental criteria; (2) how the tensions therein are reconciled; and (3) the manner in which the former two threads of the argument are guided by the socio-political environment of the Court i.e. the EU’s polity-conditions. These three aspects of the argument are not

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<sup>341</sup> The same phenomenon may be found in other polity-contexts. In the EU context, the specifics of these systemic deficits were outlined in the review of the DemDefLit, and shall be rearticulated in Section 4 with a view to framing the argument of this thesis.

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discrete. Indeed, they must ultimately be taken together as part of the same analysis. But they are presently outlined separately in order to make clear how they inform the overall argument of this thesis.

#### *4.1. Instrumental and Intrinsic Democratic Legitimacy and the Court of Justice*

The first level of the argument is how the Court's structures and processes satisfy instrumental and intrinsic criteria. We begin this analysis in Chapter Four by considering how the Court's structures and processes satisfy instrumental democratic legitimacy. We have seen that instrumental legitimacy can be understood in two ways: fulfilling primary fiduciary duties; and, through the discretion afforded by secondary fiduciary duties, making polity-constitutive, democracy-generative contributions to the broader polity. In Chapter Four, we look at the former: specifically, at how the structures and processes of the Court bolster the Court's institutional independence and insulation from interference by majoritarian forces, such that it can perform the four aspects of constitutional adjudication free from political constraint and influence.

Chapter Five and Chapter Six move on to consider the intrinsic virtues of democratic legitimacy. Yet we are only concerned with two of those virtues: representativeness (Chapter Five) and participation (Chapter Six). This is because, as we saw in Section 3.2.2, the underlying normative rationale of intrinsic virtues is institutional responsiveness to public interests, and what we are concerned with here are the structural and procedural mechanisms by which salient affected public interests are *identified* by the Court of Justice, which is the province of representativeness and participation. Accountability and transparency, by contrast, are more about fostering the necessary means by which the public can supervise and audit political institutions. These virtues tend to operate most effectively with respect to majoritarian political institutions. Accountability, for example, understood as a broader systemic virtue, seeks to punish or reward incumbent political officials

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according to their preferences. Such a mechanism transgresses quite significantly the primary trustee duties of constitutional courts, which is impartially and independently to adjudicate on constitutional rules of law. The same observation could be made with respect to institutional transparency, whereby, again, in the service of independent and impartial adjudication, it is necessary for a significant degree of secrecy, especially with respect to judicial deliberations.<sup>342</sup> This is not to suggest that these virtues are altogether misplaced when analysing constitutional courts like the Court of Justice. Indeed, there are more nuanced ways that the Court exemplifies these virtues.<sup>343</sup> Whilst these analyses are interesting, and worthy of further attention, it is beyond the scope of this thesis to venture into those aspects of institutional responsiveness.

In Chapter Five we address the virtue of representativeness in the Court of Justice – assessing the extent to which, and the precise manner in which, its structures and processes exemplify that virtue. The underlying rationale of representativeness is that it is a mechanism by which public interests can be identified in a holistic or aggregated sense. What are the primary political cleavages that emerge from within the polity, generally, and, more specifically, how do those contests manifest themselves within constitutional disputes? The structures and processes of the Court are examined in line with a view arguing how it is they align themselves to the holistic, aggregated public interests of the EU.

Chapter Six moves on to the issue of disaggregated or special interests. In other words, beyond the salient holistic matters of political contestation that are represented in the Court of Justice, how are the more particular, disaggregated or

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<sup>342</sup> See Article 2 SCJ.

<sup>343</sup> In terms of accountability, for example, the President of the Court of Justice has the power to assess the suitability of the Judges to remain in office in the event that a Judge fails to act according to the established duties and obligations incumbent on them (see Articles 3, 4, 5 and 6 of the Rules of Procedure of the Court of Justice (2012) L 265/1 (hereinafter RPCJ)). In terms of institutional transparency, the Court publishes its judgments, and increasingly so in the 23 official languages of the EU (see Article 36 RPCJ). Complementing this, the Court has an internal translation service, mitigating the inherent difficulties associated with an extraordinarily multi-lingual polity such as the EU (see Article 42 RPCJ).

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special interests that are manifested disparately among the many categories of public actors (e.g. from within civil society) identified by the Court of Justice? This Chapter considers structural and procedural mechanisms that give *access* to different actors in order that they may express their arguments and viewpoints on how their affected-interests should be dealt with by the Court of Justice in its constitutional adjudication.

#### *4.2. Tensions and Synergies Between the Intrinsic Virtues and Instrumental Legitimacy*

The second level of analysis relates to the inexorable complexity involved in determining precisely the manner in which instrumental legitimacy and intrinsic virtues are to be operationalised in the Court of Justice. The exemplification by the Court of intrinsic virtues such as representativeness and participation cannot be understood in the abstract.<sup>344</sup> There is no sense in saying that the Court must be as accessible as possible, or that representation must be achieved by electing Judges from each Member State. There is an art of precision and calibration involved in determining how intrinsic virtues are to be operationalised. There are two principal reasons for this: first, at a conceptual level, there are tensions and synergies between instrumental legitimacy and intrinsic virtues; and, second, much depends on the specificities of the Court of Justice and its socio-political environment i.e. the polity-conditions of the EU. On the latter, the polity-conditions of the EU that pertain to that assessment are specified in Section 4.3.

On the former, one of the difficulties with understanding procedural democratic legitimacy is that, conceptually speaking, the various criteria that we have identified are sometimes in conflict. We considered the example above that transparency, in the context of constitutional adjudication, conflicts with requirements of secret judicial

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<sup>344</sup> This is where Lever's analysis of the procedural democratic legitimacy of judicial review is lacking (Lever, 2009).

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deliberations – the latter being necessary so as to safeguard the independence of the judiciary and, thus, its capacity to fulfil its fiduciary duties i.e. instrumental legitimacy. If the deliberations of the judiciary were not secret, then the judges would become vulnerable to the influence of, broadly, the body-politic and thus undermine their impartiality. As we shall see in Chapter Four, in the Court of Justice the threat most strongly emanates from the governments of the Member States. Likewise, certain forms of representation conflict with judicial independence e.g. elections to the judiciary. Indeed, addressing the tensions that are created by the (instrumental) requirement of judicial independence and the intrinsic virtues is a core motif in the following Chapters.

It is also important to note here that there is no neat demarcation between the intrinsic virtues and instrumental legitimacy, conceptually speaking i.e. they often overlap in a synergetic way. For example, there is a synergetic relationship between representativeness and participation, on the one hand, and instrumental democratic legitimacy on the other. As we saw in Section 3.3.1, we must understand intrinsic virtues as facilitating the legitimate exercise of secondary fiduciary duties i.e. bringing determinacy to contractual incompleteness. There is thus an essential relationship with the second aspect of instrumental democratic legitimacy – the polity-constitutive, democracy-generative aspect. In other words, when the Court of Justice adjudicates in such a way that impacts on the social, political and/or juridical conditions of the EU, its exemplification of intrinsic credentials must be understood as one of the ways in which this is achieved democratically. In Chapter Five, we see that representativeness has a symbolic value that goes beyond the idea of institutional responsiveness. Representation of salient public interests is, of course, responsive insofar as it transmits to the decision-makers (the Judges) matters that are to be factored into their decision-making (adjudication). Yet in recognising these categories of public interest at a symbolic level, the Court is also ensuring fealty to the authority of the Court by the public (i.e. an instrumental quality), whether or not its decision-making is in fact responsive. In Chapter Six, we see that the mechanisms of access that allow actors to participate in the Court's decision-making processes are

not only intrinsically democratic – exemplifying the core democratic virtue of collective self-government – but they also go some way towards fostering responsive polity-constitutive jurisprudence from the Court i.e. the polity-constitutive aspect of instrumental legitimacy.

#### *4.3. The Polity-Conditions of the EU: Contrapunctual Constitutionalism and the Court of Justice*

I have emphasised throughout this Chapter how important it is that the polity-conditions of the EU be factored in to the analysis of procedural democratic legitimacy. Institutional specification of intrinsic and instrumental criteria is not an abstract exercise. We cannot say, for example, that access to judicial review should be granted to natural and legal persons without first knowing something about the relevant court and the broader socio-political structures within which it operates.<sup>345</sup> This is why in Section 4 of Chapter Two we considered the salient polity-conditions of the EU – the three C’s of EU constitutionalism: complexity, contestation, and change. It is these three conditions that are most pertinent to the analysis and argument here. This is because these conditions tell us how to balance the tensions in and between the intrinsic virtues and instrumental legitimacy. How independent is the Court of Justice, and how independent does it need to be? In Chapter Four, we see that the deeply contested nature of the EU justifies the Court of Justice, in comparison to other constitutional courts (national and transnational), being strongly insulated from *ex ante* and *ex post* political influences, because of the demonstrable threat to judicial independence posed by the EU’s politically heterogeneous and multiple constituencies e.g. its 27 Member States, *inter alia*. On representativeness (Chapter Five), given the strength of intergovernmentalism as part of the complex *mélange* of ordering principles of constitutional design in the EU, representation in the Court of Justice is achieved by balancing structures and processes that are

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<sup>345</sup> See Lever, 2009: 813–814 (see especially note 66).



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representative of national legal traditions (such as common law, inquisitorial, and federal systems) with those that represent an emerging, autonomous Union legal culture. In Chapter Six, we see that democratic participation in the Court is achieved through various mechanisms of access to judicial review (such as rules of standing, and third party intervention). Yet, comparatively, it is demonstrated that these mechanisms of access are strong (contrary to prevailing critiques), which is justified given demonstrable systemic deficits within the Union's legislative processes i.e. the putative "democratic deficit".

Finally, it is important to note how it is that concepts associated with the three C's of EU constitutionalism are relevant to the analysis of the Court of Justice. For illustration, if we consider the concept of intergovernmentalism as a standard that guides constitutional design in the EU more generally, it is not *ipso facto* of concern to legal actors in the Court of Justice. One might believe, for example, that the broader political structures and processes of the EU ought to be, or to remain, guided by intergovernmentalism, yet at the same time believe that the Court itself be structured and function according the paradigm of an autonomous Union legal culture (a more supranational logic) – believing that the special virtue of the Court is to ensure that the fruits of intergovernmental agreement are realised. We need to be mindful, therefore, that whilst the three C's of constitutionalism influence and have parallels with the structures and processes of the Court, they do not necessarily translate directly. In this vein, consider Maduro's vivid metaphor of counterpoint in music, and how he uses that imagery to convey a means by which the judges at the different levels of the EU's plural legal order ought to reconcile clashes and conflicts of norms.<sup>346</sup> Because the EU's overlapping legal systems lay claim to the sovereign jurisdiction with which to interpret and apply norms in common with the jurisdiction of the EU; and because of the EU's commitment to a uniform system of (Union) law, Maduro argues that the judiciaries ought to transpose – like in counterpoint – their prevailing interpretations of national law into universal terms that fit with EU law:

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<sup>346</sup> See Maduro, 2003.

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national law in minor key, as it were. Here, too, we can understand the three C's of EU constitutionalism, as they relate to the political system of the EU more generally, in contrapunctual terms with respect to the Court of Justice. Whilst intergovernmentalism or supranationalism do not directly attach to the sorts of *legal* matters of interest to legal actors in and around the Court of Justice, their logics and analytical force have their counterparts in the legal world. As we see in Chapter Five, for example, the forceful preoccupation of representing national legal traditions in the Court of Justice is guided by similar sensibilities to intergovernmentalism – national legal traditions as intergovernmentalism in minor key. In this vein, it is important to pay due regard to the three C's of EU constitutionalism as guiding forces in designing the structures and processes of the Court in a democratic way, but to be mindful of how these conditions are transposed into the legal world.

#### 5. Conclusion

In this Chapter, an analytical framework was presented within which the procedural democratic legitimacy of the Court of Justice can be examined. As we have seen in previous Chapters, procedural democratic legitimacy is understood in two ways: intrinsic and instrumental. The purpose of this Chapter was to clarify precisely how these analytical perspectives will be used to examine the Court's structures and processes. This clarification is, moreover, necessary given the demonstrable complexity involved in analysing *courts* in this way, and because of the distinctive complexity involved in doing so for the Court of Justice of the *European Union*.

To that end, the notion of trusteeship was shown to provide an important conceptual grounding. The idea of the trustee-institution explains – in terms of constitutional and political theory – the legitimate administration of delegated regulatory decision-making in non-majoritarian institutions, such as constitutional courts. Owing to the virtuous fiduciary relationship between trustee-institutions and their beneficiaries (the public) – as laid down through agreed upon rules by the settlors of the trust –

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trustee-institutions, such as constitutional courts, are endowed with significant discretion with which to exercise regulatory decision-making. The fiduciary relationship that inheres in this arrangement was shown to involve primary and secondary fiduciary duties. The former simply denotes a dutiful compliance with the terms of the trust e.g. judges faithfully applying rules of law. Secondary fiduciary duties, however, account for the inevitability that the terms of the trust are not exhaustive (which neatly overlaps with the idea of indeterminate law), given unforeseen, or unforeseeable, contingencies, and contractual incompleteness. These duties require the institutional decision-makers (i.e. the judges) to “fill in the blanks” in ways that are responsive to the interests of the public-beneficiaries.

Given this foundational framework, we then considered the requirements of intrinsic and instrumental criteria of democratic legitimacy. First, in order to avoid methodological pitfalls associated with democratic specification, democracy was defined as an *inclusive* process of governance of the people, for the people and by the people. Yet, given the paradoxical inevitability that institutions are *exclusive* for pragmatic reasons, it was argued, first, that there ought to be a multiplicity of institutions; and, second, that they must ultimately exercise their discretion in a responsive way – thus overlapping with the fiduciary relationship which inheres in the trusteeship model. Instrumental democratic legitimacy was shown to be consistent with primary fiduciary duties, and the democratic requirement that each institution within a democratic polity will be delegated a particular task, the observance of which is instrumental towards bolstering the democratic legitimacy of the polity. In constitutional courts, this was shown to be fealty to democratically established rules of law. Intrinsic democratic legitimacy was then shown to be a way for the trustee-institution to administer its discretion in a democratic way. This is because intrinsic democratic legitimacy is ultimately about institutions – understood as discrete decision-making authorities – being responsive to the interests of the public. The intrinsic virtues (especially representativeness and participation), moreover, are operationalised through institutional structures and processes, whereas secondary fiduciary duties relate to institutional decision-making. In this regard, it

### The Procedural Democratic Legitimacy of the Court of Justice: An Analytical Framework

was shown that the implementation of intrinsic virtues in constitutional courts *facilitates* the democratic exercise of their law-making discretion.

We then considered the conceptual and empirical complexities associated with examining the Court of Justice in this way. It was noted that there is no neat demarcation between the intrinsic virtues and instrumental legitimacy, conceptually speaking – sometimes they conflict, and sometimes they overlap in a synergetic way. One of the key contributions of this thesis is to argue that, at a theoretical level, constitutional courts ought to be designed according to the intrinsic virtues of democratic legitimacy in a way that is balanced against their instrumental requirements. We saw that this is where the notion of trusteeship is again instructive. Not only does it prioritise the requirements, but it does so in a way that pays due regard to the polity-conditions of the EU. It is in this way that the three C's of EU constitutionalism are pertinent to the examination here.

# **The Court of Justice of the European Union as a Democratic Forum**

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## **1. Introduction**

This Chapter considers how the Court is supported by various structures and processes in meeting its primary instrumental objectives. In Section 2, the theoretical framework of this analysis is presented. Guided under the umbrella of trusteeship, institutional independence is the central standard against which the Court's structures and processes are to be examined, which is broken down into specific criteria. Section 3 then moves on to an empirical examination of the structures and processes that satisfy these criteria. Section 4 contextualises that analysis in light of the distinctive polity-conditions of the EU. It is argued that the underlying polity-conditions of the EU – the three C's of EU constitutionalism – justify the comparatively<sup>347</sup> strong degree of institutional independence in the Court, but that the remaining weaknesses are justified, to an extent, by countervailing legitimacy-factors (specifically, the need to ensure Member State representation in the composition of the judiciary), which is consistent with the Court's secondary fiduciary duties as a trustee-institution.

## **2. Theoretical Orientations: Instrumental Democratic Legitimacy, Trusteeship and Institutional Independence**

In this Chapter, we are concerned with instrumental democratic legitimacy, which refers to the role that an institution plays within a democratic polity, and how that role contributes to the proper democratic functioning of the polity. In particular, we are concerned with the structures and processes of the Court of Justice that support and foster its *primary* trustee/instrumental role within the EU, which is: to resolve legal/constitutional disputes; to resolve those disputes according to a faithful interpretation of the meaning of established rules of law; to bring determinacy to that law; and to ensure that the law is observed by all.

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<sup>347</sup> Three other apex courts are considered: the ECtHR, the UK Supreme Court, and the US Supreme Court.

Trusteeship is a useful way to understand instrumental democratic legitimacy. A democratic court is, first and foremost, one that does what it is supposed to do. The terms and objectives of the trust determine the trustee-institution's functional relationship to the (democratic) polity. The trustee-institution has been handed over these tasks *by* the people of a polity (settlers), *for* the people of a polity (beneficiaries). Thus, meeting the terms and objectives of the trust is a democratically mandated task. In the context of courts, their primary objectives are to apply the law and to define the law – the law itself, moreover, being a democratic expression of the people. The people have, via their representatives, created laws that they demand to be applied universally, fairly and dispassionately; and which they demand to be reasonably interpreted and clarified in light of the, sometimes unforeseen, circumstances that emerge in real-world legal disputes (i.e. judicial law-making).<sup>348</sup>

In order to achieve this, it is necessary that constitutional courts are *independent* – that the effective administration of courts' objectives is not subverted or undermined by external influences, especially political influences. In this regard, we saw that the test for independence – to the extent that we can credibly regard courts as trustees, as opposed to weaker forms of delegation such as agency – is establishing the “zone of discretion” courts enjoy.<sup>349</sup> This test first determines the powers and discretion given to courts i.e. its jurisdiction; then balances these against both *ex post* and *ex ante* external mechanisms of control that may undermine the exercise of that discretion.<sup>350</sup> *Ex post* mechanisms of control relate to the ways in which political principals can respond to the discretion of delegate-institutions (these also tend to be direct mechanisms of control) such as to invalidate or reverse the decisions of delegate-institutions; and *ex ante* mechanisms of control are the ways in which political principals can influence the decision-making of delegate-institutions (these tend to be indirect mechanisms of control) such as to make that discretion heteronomous.

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<sup>348</sup> See Chapter Three, Section 2.3.

<sup>349</sup> See Section 2.1 of Chapter Three.

<sup>350</sup> We can also understand *ex post* and *ex ante* discretion-curbing mechanisms as being direct or indirect. Given that these overlap with the former two, it is not necessary here to treat them discretely.

In Section 3, we consider the independence of the Court of Justice in light of the foregoing by examining its structures and processes. We first assess the jurisdiction of the Court in order to determine the degree of institutional power and discretion it enjoys. Then, under the rubric of *ex post* mechanisms of control, we assess the extent to which the Court's discretion – especially with respect to its interpretation of Union law – is subordinate to legislative processes: can the Union's legislative processes invalidate or reverse judicial decisions? In terms of *ex ante* mechanisms of control, we consider the extent to which the Judges of the Court are free to exercise non-heteronomous discretion when adjudicating. It is demonstrated that the appointments process of the Judges poses the most significant threat, but that there is a series of structures in place which insulate the judiciary from external influences.

### **3. The Institutional Independence of the Court of Justice**

#### *3.1. The Jurisdiction and Interpretive Discretion of the Court of Justice*

What powers have been formally delegated to the Court of Justice? In the language of trusteeship, what are the Court's "political property rights"? The foundational mandate is expressed in Article 19 (1) TEU:

The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties *the law is observed* [emphasis added].

As indicated by the first sentence, the Court of Justice of the European Union is functionally divided into three, formally non-hierarchical, courts: the Court of Justice, the General Court (formerly known as the Court of First Instance (hereinafter



CFI) prior to the Lisbon Treaty), and the Civil Service Tribunal (CST).<sup>351</sup> Each of these courts is competent to hear a variety of actions. The table in Appendix One provides a comprehensive list of the actions each of the three courts is competent to hear. These include, *inter alia*: actions for the annulment of Union Acts (legislative, and non-legislative); inter-institutional administrative review – both vertically (between Member States and the Union’s institutions), and horizontally (between the Union’s institutions; and between Member States); preliminary rulings on the interpretation and validity of EU law vis-à-vis national law; and various forms of public and private international dispute resolution.<sup>352</sup> Moreover, we see that the Court has powers of constitutional review within specific areas of the Union’s intergovernmental jurisdictions.<sup>353</sup> Historically, as the Union has expanded and deepened its jurisdiction, so too has the Court – contemporaneously with its own enlargement – gained greater powers of constitutional review. Sometimes this has been achieved by the Court itself in cases such as *Pupino*,<sup>354</sup> but also as part of the Treaty amendments processes – as indicated by the provisions listed in Appendix One.<sup>355</sup>

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<sup>351</sup> The only specialised court in existence, at present, is the CST (see Annex I SCJ). The introduction of a specialised Intellectual Property court and a labour law court have been part of ongoing deliberations, but have yet to be implemented. See also Article 262 TFEU; and Opinion 1/09 of the full Court, pursuant to Article 218 (11) TFEU on the compatibility of the draft decision to create a unified European and Community Patent Court [2011] Judgment of 8 March 2011 (hereinafter Opinion 1/09). For reforms as part of the Nice Treaty negotiations, see Working Party for the European Commission, Report by the Working Party on the Future of the European Communities’ Court System, May 2000, available at [http://ec.europa.eu/dgs/legal\\_service/pdf/due\\_en.pdf](http://ec.europa.eu/dgs/legal_service/pdf/due_en.pdf) (hereinafter the Due Report): 32; and see also The Future of the Judicial System of the European Union (Proposals and Reflections), May, 1999, available at <http://www.docstoc.com/docs/2458996/THE-FUTURE-OF-THE-JUDICIAL-SYSTEM-OF-THE-EUROPEAN-UNION> (hereinafter the Courts’ Paper, 1999): 19, 26. For negotiations on the Constitutional Treaty, see The European Convention on the Future of Europe, “Final Report of the Discussion Circle on the Court of Justice” (Brussels, 2003) CONV 636/03 CERCLE I 13 (hereinafter Final Report of the European Convention): 4-5, available at <http://european-convention.eu.int/EN/bienvenue/bienvenue2352.html?lang=EN>. The role of national courts within the European Union’s legal order is not addressed here. This is addressed in Chapter Five and Chapter Six, with respect to their roles in the preliminary rulings procedure (Article 267 TFEU), and their relationship to Union law more generally by virtue of the principles of direct effect (*Van Gend en Loos*) and supremacy (*Costa v ENEL*).

<sup>352</sup> See the table in Appendix One for a full break-down of these actions.

<sup>353</sup> See Section 4 of Chapter Two for an overview of these areas, and the table in Appendix One for list of the Court’s competence within these areas.

<sup>354</sup> See Fletcher, 2005; and White, 2006.

<sup>355</sup> Interestingly, the powers of review in substantive areas that fall under the intergovernmental jurisdictions are cases that can be designated to the Court of Justice sitting as a Grand Chamber (at the

Jurisdiction aside, the Court enjoys significant interpretive discretion. We know this empirically because of the well-documented historical role of the Court in the evolution of the EU.<sup>356</sup> Yet the constitutional justification, or, indeed, cause, of this discretion can be found in Article 19 (1) TEU's ironically inconspicuous statement that the Court shall ensure that "the law is observed". Relying on the English translation of Article 19 (1) TEU can be misleading, since it may suggest that the Court is empowered merely to incorporate formally established *rules* of law (such as Treaty provisions, legislation, and case-law) into its interpretive canon. If we look, for example, to the French and the German versions of the Treaty, we see that the Court's mandate is much broader. French and German, unlike English, make a distinction between two forms of "law": between, on the one hand, "*du droit*" and "*dem Recht*"; and, on the other, "*le loi*" and "*dem Gesetz*" (respectively). The latter relate to the more narrowly construed notion of established *rules of law*; whereas the former are much broader notions, which are literally translated as "rights", and can be read as pertaining to the protection of general rights associated with the *rule of law*. In the French version, it reads:

La Cour de justice de l'Union européenne comprend la Cour de justice, le Tribunal et des tribunaux spécialisés. Elle assure le respect *du droit* dans l'interprétation et l'application des traités.<sup>357</sup>

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request of a Member State that is a party to the action) or, in cases of "exceptional importance", the full Court. See Article 16 SCJ (3) and (5). See Section 3.3.4 for further details on the use of judicial chambers.

<sup>356</sup> See, for example, Stein, 1981; and Weiler, 1991. More recently, consider the Court's "depillarisation" jurisprudence, and the ever expanding EU citizenship *acquis* in cases such as Case C-85/96 *Martínez Sala* [1998] ECR I-2691, and *Metock*. See also Niamh Nic Shuibhne, "The Resilience of EU Market Citizenship" (2010) *Common Market Law Review* Vol. 47 1597. See also Section 2 of Chapter One.

<sup>357</sup> Article 19 (1) Version Consolidée du Traité sur l'Union Européenne (2010) OJ C 83/27 (emphasis added).

In German:

Der Gerichtshof der Europäischen Union umfasst den Gerichtshof, das Gericht und die Fachgerichte. Er sichert die Wahrung *des Rechts* bei der Auslegung und Anwendung der Verträge.<sup>358</sup>

We must therefore take the interpretive discretion of the Court of Justice to be broader than merely, and robotically, applying *rules* of law, but, instead, ensuring that “in the interpretation of the Treaties” that the *rule of law* (and *prima facie* any rights associated with that mandate) “is observed”.

Given the foregoing, it is reasonable to say that the Court of Justice is a court with significant constitutional powers and discretion, which match the criteria listed in Chapter Three that establish the first part of the test for determining the extent to which a court is an institution of the trustee kind.<sup>359</sup> Particularly important to bear in mind is the special significance of primary and secondary fiduciary duties that inhere in that arrangement; and the extraordinary degree of contractual incompleteness exemplified by the significantly open-textured nature of the Treaties, the combination of which demonstrates that the Court has particularly wide interpretive discretion.<sup>360</sup> The next part of the test, then, in establishing the “zone of discretion” and independence of the Court, is determining the existence and extent of *ex post* and *ex ante* mechanisms of control, which may undermine the Court’s jurisdiction and discretion.

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<sup>358</sup> Artikel 19 (1) Konsolidierte Fassung des Vertrags über die Europäische Union (2010) OJ C 83/27 (emphasis added).

<sup>359</sup> See Section 2.3 of Chapter Three.

<sup>360</sup> On primary and secondary fiduciary duties, see Section 2.1 of Chapter Three; and on the extraordinary degree of contractual incompleteness exemplified by the significantly open-textured nature of the Treaties, see Section 2.1.1 of Chapter One.

### 3.2. Ex Post Mechanisms of Control

Thatcher and Stone Sweet argue that the notion of trusteeship accurately depicts the relationship between the Court of Justice and the EU:

A trustee typically wields the power to govern those who have delegated in the first place. In the EU, for example, one of the Court's tasks is to interpret authoritatively provisions of the Treaty of Rome; such rulings govern all legal persons in the [Union], including the member states. The Court, as constitutional court, is a trustee that is well insulated from formal controls.<sup>361</sup>

In terms of direct *ex post* mechanisms of control, we are interested in the extent to which the Court's interpretation of Union law – in whatever form – can be overturned by legislative processes. First, it is very difficult for the Court's Treaty-interpretations to be reversed or invalidated. The only way for this to happen is via the somewhat infrequent intergovernmental Treaty revision and amendments processes. As Stone Sweet notes, moreover, the amendments process is subject to the cumbersome requirement of unanimity, where the *status quo* will remain if unsuccessful.<sup>362</sup> The failure to ratify the Constitutional Treaty in 2005,<sup>363</sup> and the protracted ratification of the Lisbon Treaty exemplify this.<sup>364</sup>

The situation is different, however, with respect to the Court's interpretation of other species of Union law.<sup>365</sup> Thatcher and Stone Sweet note that “when the Court interprets a regulation or directive, it acts more as the agent of the EU legislator, and the EU legislator monitors and corrects the Court's rulings, through subsequent

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<sup>361</sup> Thatcher and Stone Sweet, 2002: 7.

<sup>362</sup> Stone Sweet, 2002; and Stone Sweet, 2004.

<sup>363</sup> Treaty establishing a Constitution for Europe (2004) OJ C 310/01 (hereinafter the Constitutional Treaty).

<sup>364</sup> See, however, Protocol (No 33) Concerning Article 157 of the Treaty on the Functioning of the European Union (2010) OJ C 83/319. This Treaty provision was originally introduced in the Maastricht Treaty (Protocol (No 2)) in order to limit the effects of the Court's decision in Case 262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889 in relation to the retrospective application of Article 119 TEC (pre-Nice) (now Article 157 TFEU).

<sup>365</sup> On the different forms of Union law, and the various processes through which they are enacted, see Chapter 2, Title I, Part Six TFEU. See also Article 5 TEU.

legislative acts, as the legislator see fit.”<sup>366</sup> The ordinary legislative procedure under Article 289 TFEU, and delegated acts under Article 290 TFEU, are, moreover, not constrained by the requirement of unanimity, but, instead, subject to the less cumbersome requirement of Qualified Majority Voting (QMV) in their enactment.<sup>367</sup> This gives the Union legislator a stronger mechanism by which to “correct” the Court’s interpretation of Union Acts. Yet this does not prevent the Court from reviewing any consequent Union Acts, and re-asserting its constitutional interpretation thereof.<sup>368</sup>

Thus far, we have seen that the zone of discretion is quite large for the Court of Justice – bolstering its independence and thus facilitating instrumental democratic legitimacy. The final aspect to consider here is the *ex ante* mechanisms of control that may reduce the zone of discretion of the Court.

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<sup>366</sup> Thatcher and Stone Sweet, 2002: 7.

<sup>367</sup> See Article 114 TFEU; and Article 352 TFEU. Yet there are areas of Union jurisdiction that cannot use the ordinary legislative procedure, in which case the more cumbersome requirement of unanimity is required. Most of those areas of substantive law fall within the Union’s intergovernmental jurisdictions, which, as we can see in Appendix One, the Court has limited competence in anyway. Yet there are a few substantive areas in which the Court does have competence, and which require unanimity in the adoption of Union acts. See, for example, Article 113 TFEU and Article 115 TFEU, which provide for legislation in the area of taxation. Moreover, since the adoption of the Lisbon Treaty, national parliaments now have a procedural role in the ordinary legislative procedure (Article 7, Protocol 2), such as to make the legislative process more cumbersome.

<sup>368</sup> Indeed, this situation is illustrated by the *Tobacco Advertising* cases. In Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419 (hereinafter *Tobacco Advertising I*), the Court annulled, in its entirety, Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (1992) OJ L 213/9, on the basis of a lack of competence as per Article 95 TEC (now Article 114 TFEU). Consequently, the Union legislature enacted Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (2003) OJ L 152/16, which largely reproduced the annulled Directive in *Tobacco Advertising I*. The new Directive was challenged before the Court in Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573 (hereinafter *Tobacco Advertising II*), and, whilst it was declared valid, it was on the basis that the concerns of constitutional validity in relation to the previous Directive, as observed by the Court in *Tobacco Advertising I*, had been duly respected in redrafting the new Directive.

### 3.3. Ex Ante *Mechanisms of Control*

An independent court is also one in which its decision-makers – the judges – are free to exercise their discretion without interference from external forces. By its nature, adjudication creates “winners and losers”. Most obviously, the parties pleading before a court are involved in some form of dispute, for which the judges must decide, in light of the parties’ submissions and established rules of law, who is right and who is wrong i.e. which party wins the case and which loses. Beyond the principal decision, judges must invariably interpret the law in light of the facts of the case. Such an interpretation necessarily puts the judges in a position to define, and re-define, the meaning of the law – whether it be legislation or prior judicial decisions. As such, the broader public becomes an interested “party” to the decision, where some members of the public will prefer one interpretation of the law, and some will prefer an alternative interpretation. Barber refers to these complexities under the rubric of “polycentricity”:

[T]here are certain types of issue that that cannot be satisfactorily resolved in the triadic model because the decision has implications that go beyond the parties appearing before the judge. This point is not a new one; Lon Fuller characterised such issues as ‘polycentric’.<sup>369</sup> An issue is a polycentric one when it is interrelated with other issues ... The decision of the court consequently has an impact on parties who may not be represented before the judge ... Most decisions before the court have some elements of polycentricity about them; court action can rarely be contained within a neat boundary between the parties.<sup>370</sup>

This is another way in which adjudication creates winners and losers, and one that is particularly important for this thesis, given the democratic implications of polycentricity.

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<sup>369</sup> Lon Fuller, “The Forms and Limits of Adjudication” (1978) *Harvard Law Review* Vol. 92 353.

<sup>370</sup> Barber, 2001: 76, 77.

The underlying requirement of non-heteronomous adjudication must thus be understood as a way to ensure that judges are not predisposed to adjudicate in favour of particular parties *and* particular public interests, and that they treat each case purely on the merits of the facts, the arguments presented, and the established rules of law.<sup>371</sup> To that end, in analysing the Court of Justice, it is important to look for the structures and processes in place that affect these qualities. I begin by outlining what represents the greatest threat – the role of Member State governments in the judicial appointments process – then move on to present the various aspects of the appointments process and the structuring of the Court that, on the one hand, foster the virtue of judicial *impartiality* and, on the other, *insulate* the Court from the influence of Member States, as well as the influence of the Union’s political institutions, such as the Commission and the EP. The virtues of impartiality and insulation ensure that parties will be judged, and the law will be defined, in such a way that prevents the Judges from strategically adjudicating in favour of particular parties or particular public interests – whether they be political, financial, social or personal influences.

### 3.3.1. The Judicial Appointments Process

The appointment and re-appointment processes for the Court’s Judges present the Member States with opportunities to exercise some control. The Court of Justice functions within a political system composed of politically and constitutionally powerful constituent Member States.<sup>372</sup> This is reflected in the appointments process, whereby Article 19 (2) TEU states that “[t]he Court of Justice shall consist of one judge from each Member State”<sup>373</sup> and that they are to be “appointed by *common*

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<sup>371</sup> Of course, this does not mean strict neutrality. The judges must favour one interpretation over others, and, ultimately, such interpretive preferences will be guided by higher order “principles” and “values”. See Dworkin, 1985; and MacCormick, 1994.

<sup>372</sup> In this vein, consider the discussion in Chapter Two on the EU’s powerful intergovernmental structures.

<sup>373</sup> It also states that “[t]he General Court shall include at least one judge per Member State.” For the General Court, see Article 254 TFEU and Article 48 SCJ. The CST does not operate on a one Judge per Member State basis. Instead, the CST has seven judges that are appointed on as “broad a

*accord* of the governments of the Member States for a term of six years, after consultation of *the panel* provided for in Article 255 [emphasis added].”<sup>374</sup> As it stands at present, with 27 Member States, there are 27 Judges in both the Court of Justice and the General Court – one for each Member State.<sup>375</sup>

Before going on to consider the significance of the “common accord” requirement and the use of the “panel” – both of which foster a degree of insulation from Member State control – there are a few significant points to note here about this process. First, it is common knowledge that the governments of the Member States simply choose their judge.<sup>376</sup> Indeed, this practice is reflected in official discourse on matters pertaining to the appointment process. The Council’s recommendation on the functioning of the panel states, for example: “[a]s soon as the government of a Member State has lodged a proposal for appointment, the General Secretariat of the Council shall send it to the President of the panel.”<sup>377</sup>

Second, it was not always the case that the Treaty stipulated “one judge from each Member State”. This was introduced by the Nice Treaty in 2001 with a view to ensuring that:

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geographical basis as possible from among nationals of the Member States and with respect to the national legal systems represented”. See Article 2 and Article 3 of Annex I SCJ. See also, below, the discussion of the use of specialised courts.

<sup>374</sup> Article 253 TFEU for the Court of Justice; and Article 254 TFEU for the General Court. See also Article 19 TEU. The judges at the CST, by contrast, are “appointed by the Council, acting unanimously.” Article 257 (4) TFEU.

<sup>375</sup> There is a list of all of the Judges for each court on the Court’s website, which, interestingly, does not explicitly state the Member State they are from. This omission can be construed as consistent with the Court’s trend towards independence (discussed further in Section 4). See, for the Court of Justice, [http://curia.europa.eu/jcms/jcms/Jo2\\_7026/](http://curia.europa.eu/jcms/jcms/Jo2_7026/); for the General Court, [http://curia.europa.eu/jcms/jcms/Jo2\\_7035/](http://curia.europa.eu/jcms/jcms/Jo2_7035/); and for the CST, [http://curia.europa.eu/jcms/jcms/T5\\_5240/](http://curia.europa.eu/jcms/jcms/T5_5240/).

<sup>376</sup> Simon Hix, *The Political System of the European Union* (2nd ed.), Palgrave, 2005: 117.

<sup>377</sup> Note from the President of the Court of Justice (Mr. Vassilios Skouris) on “Recommendation Relating to the Operating Rules of the Panel Provided for in Article 255 TFEU” to Mr. Miguel Angel Moratinos, President of the Council of the European Union and of the Conference of the Representatives of the Governments of the Member States, (Brussels, 2010) sse/SE/ms 5195/10 (hereinafter Skouris, 2010): 3 (emphasis added).



... each national legal order [is] represented by a Judge at the Court, to ensure that each national legal tradition makes its contribution to [Union] law and that the national courts abide more closely by the Court's case-law.<sup>378</sup>

In principle, this means that, before the Nice Treaty, the Judges could all have been Russian.<sup>379</sup> Yet, even before Nice, there was always a strong political pressure to structure the Court's judiciary according to the logic of one Judge per Member State – it was “always tacitly agreed” that each Member State would have its own Judge at the Court.<sup>380</sup> With such a strong bargaining position for the Member States, other proposals for structural composition have been rejected in favour of the Member States' political interests.<sup>381</sup>

Third, the Member States may also be able to take advantage of the short term and renewable tenure of the Judges i.e. the re-appointment process. The tenure of the judges, in both the Court of Justice and the General Court, is six years.<sup>382</sup> There is to be a partial replacement of the judges every three years, alternating between 13

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<sup>378</sup> The Due Report: 46. See also the Court's Paper, 1999. The notion of “national legal traditions” is particularly relevant for the discussion in Chapter Five.

<sup>379</sup> See Tom Kennedy, “Thirteen Russians! The Composition of the European Court of Justice”, in AIL Campbell and M. Voyatze, *Legal Reasoning and Judicial Interpretation of European Law: Essays in Honour of Lord Mackenzie Stuart*, London: Trenton Publishing, 1996.

<sup>380</sup> See the Court's Paper, 1999: 18. See also Federico Mancini, “The Practice, Procedure and Working Methods of the European Court of Justice”, (last updated, 2006) Lecture to the Law and Justice Foundation of New South Wales, available at <http://ljf.itechne.com/ljf/app/&id=/EB1B6BA8391FA0C1CA2571960024FC2B> (hereinafter Mancini, Law and Justice Foundation of New South Wales); and Arnall, 2006: 7-8.

<sup>381</sup> It is questionable whether this conviction – historically endorsed by the judiciary – will last for posterity given the rapid process of enlargement in the last decade. In the deliberations on the Constitutional Treaty, the Discussion Circle considered the number of Judges and the appointments process and “felt that the provisions should remain unchanged in this regard”, but added that “thought must be given to the question whether to maintain the current number of judges (11) sitting in the Grand Chamber ... after enlargement.” See Final Report of the European Convention: 2. There have yet to be any significant proposals for change in this regard, with the current size of the Grand Chamber at 15 Judges (see Section 3.3.4). For earlier proposals, see, for example, Francis Jacobs' proposal to appoint judges on a one judge per legal system basis (i.e. Scottish, Northern Irish, and English or Welsh judges instead of one UK judge). See Institut D'Eudes Européennes, *La Cour de Justice des Communautés Européennes et les États Membres*, Université Libre de Bruxelles, 25 January 1980 (hereinafter IEE, 1980): 15-16.

<sup>382</sup> See Article 19 (2) TEU. For the Court of Justice see also Article 253 TFEU; and for the General Court see Article 254 TFEU.

Judges of the Court being replaced, followed by a replacement of 14.<sup>383</sup> Additionally, retiring Judges may be reappointed, meaning that there are no *prima facie* limitations that prevent them from keeping their tenure indefinitely. Yet, what this potentially represents is a mechanism by which the incumbent Judges, in order to retain their tenure, have to meet the satisfaction of the governments of their Member States. Indeed, one of the recurring issues in the area of judicial reform of the Court of Justice has been the call, by the Judges themselves, for the their tenure to be increased (to twelve years) and made non-renewable on the basis that the prevailing system significantly undermines judicial independence – a proposal that has not, thus far, been taken up.<sup>384</sup>

The foregoing thus represents a threat to the Court’s independence. The governments of Member States can take advantage of the appointment process, by virtue of which they can potentially exert their influence over the Court of Justice in its decision-making *ex ante*. The remainder of Section 3 will consider the ways in which the Court’s independence is preserved, however, emphasising insulation from external influences, and the impartiality of the Judges.

#### 3.3.1.1. The “Common Accord” Requirement

Within the appointments process itself, the Judges are to be “appointed by *common accord of the governments of the Member States*”. This suggests that the

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<sup>383</sup> Article 253 TFEU and Article 9 SCJ for the Court of Justice; and Article 254 TFEU and Article 47 SCJ for the General Court. Recently: “[b]y decisions of 25 April 2012, 20 June 2012 and 20 September 2012, the representatives of the Governments of the Member States have renewed, for the period from 7 October 2012 to 6 October 2018, the mandates as Judges at the Court of Justice of Messrs Alexander Arabadjiev and George Arestis, Ms Maria Berger, Messrs Jean-Claude Bonichot, Anthony Borg Barthet, Carl Gustav Fernlund, Egidijus Jarašiūnas, Egils Levits and Jiří Malenovský, Ms Alexandra Prechal, Messrs Antonio Tizzano and Thomas von Danwitz. For the period from 7 October 2012 to 6 October 2018, Mr José Luís da Cruz Vilaça, replacing Mr José Narciso da Cunha Rodrigues, and Mr Christopher Vajda, replacing Sir Konrad Schiemann, have been nominated Judges at the Court of Justice, by decisions of 25 April 2012 and 20 June 2012.” See CJEU, “Partial replacement of the Court of Justice and entry into office of a new Member of the General Court” ((8/10/2012) Press Release 126/12.

<sup>384</sup> See, for example, Francis Jacobs’ submissions in IEE, 1980: 16-17. See also the Due report: 51.

appointments process is subject to the agreement, of some sort, of all the Member States. The “common accord” requirement is not, however, defined in the Treaties, nor any other legal material, nor does it seem to have any bearing on the well-established practice of Member States simply choosing their candidate. Nevertheless, the requirement is symbolic of a process that eschews exclusive Member State influence in favour of a centralised *Union* (albeit intergovernmental) appointments process. Furthermore, the “common accord” provision may have a latent functionality. As Mancini noted, this provision underpins “an unwritten rule, which to date has been scrupulously observed, [which] dictates that the other Member States *acquiesce*”.<sup>385</sup> This system of acquiescence may serve to influence how governments of Member States select their Judges, arguably conforming to unwritten standards that they feel will be accepted, or with which they feel the other governments will be comfortable.<sup>386</sup> The “common accord” provision may also take on greater practical significance in the future, if and when the EU evolves and its central institutions take on greater control of the appointments process.<sup>387</sup>

### 3.3.1.2. The Advisory Role of the Appointments Panel

Article 255 TFEU provides:

A panel shall be set up in order to give an *opinion* on candidates’ *suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court* before the governments of the Member States make the appointments referred to in Articles 253 and 254.<sup>388</sup>

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<sup>385</sup> Mancini, Law and Justice Foundation of New South Wales: at Point 2, para. 2 (emphasis added).

<sup>386</sup> In this respect, see Section 3.3.2 on Judicial Competence.

<sup>387</sup> However, at this stage, this has not been proposed, or considered, in any of the literature or reform debates.

<sup>388</sup> Emphasis added. The CST’s appointment process is not subject to the consultation of a panel. Instead, a committee has been set up to ensure that “candidates [have] the most suitable high-level experience”. See Article 3 (4) Annex I SCJ. Indeed, the Judicial Panel, created by the Lisbon Treaty, was modeled on this committee; see Skouris, 2010: 1.

There are a few points to note here. First, in spite of the appointments system whereby governments of the Member States can choose *their* Judge, the involvement of the panel ostensibly provides a degree of impartiality and objectivity. The focus of the panel is on the candidates' "suitability to perform the duties of Judge" and, thus, is instrumental towards fostering the qualities necessary for judicial competence. Its deliberations are to be, where desired, evidence based, where "[t]he panel may ask the government making the proposal for appointment to send additional information or other material which the panel considers necessary for its deliberations,"<sup>389</sup> and it "shall hear the candidate".<sup>390</sup> However, it may only give an "opinion", which, as we saw in Article 19 TEU, the governments of the Member States only use for "consultation".<sup>391</sup> Moreover, the operating rules of the panel prevent the panel from conducting a hearing for *reappointments*.<sup>392</sup> Yet what is unclear is the extent to which the panel is involved in the reappointments process.

This relates to the second point. The introduction of the panel was discussed in the Constitutional Treaty reforms and finally introduced by the Lisbon Treaty, on the basis of increasing judicial independence and democratic accountability in the European Union.<sup>393</sup> Yet there is a lack of transparency of its proceedings and, in particular, the opinions on the candidates.<sup>394</sup> Mance reveals that the panel maintains

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<sup>389</sup> Skouris, 2010: 3 (at Point 6).

<sup>390</sup> Council Decision relating to the operating rules of the panel provided for in Article 255 [TFEU] (2010) OJ L-50/18 (hereinafter Council Decision 2010/50/18): Point 7 of the Annex.

<sup>391</sup> See also Skouris, 2010.

<sup>392</sup> Council Decision 2010/50/18: Point 7 of the Annex.

<sup>393</sup> On increasing democratic legitimacy in the Union's institutions in the run up to Lisbon, see generally Council of the European Union, "IGC 2007 Mandate" (Brussels, 2007) POLGEN 74 11218/07, available at <http://register.consilium.europa.eu/pdf/en/07/st11/st11218.en07.pdf> (hereinafter IGC Mandate, 2007). During the discussions on the Constitutional Treaty – when the introduction of the appointments panel was proposed – it was argued that: "it was appropriate to set up an 'advisory panel', which would have the task of giving the Member States an opinion on whether a candidate's profile was suited to the performance of his/her duties, particularly on the basis of objective criteria relating to professional qualifications." See the Final Report of the European Convention: 2. See also Skouris, 2010: 3 (at Point 1).

<sup>394</sup> See Lord Jonathan Mance, "The Composition of the European Court of Justice" (2011) Presented to the United Kingdom Association for European Law, [http://www.supremecourt.gov.uk/docs/speech\\_111019.pdf](http://www.supremecourt.gov.uk/docs/speech_111019.pdf) (hereinafter Mance, 2011): paras. 41-45. Lord Mance, one of the Justice's of the UK Supreme Court, is one of the panel's seven members.

the confidentiality of its opinions in light of Council Regulation 45/2001,<sup>395</sup> and, in light of the interpretation thereof given by the Court in *Commission v The Bavarian Lager Co Ltd*,<sup>396</sup> “[t]he panel readily concluded both that the content of its opinions, whatever their purport, on individual candidates constituted personal data, and that it could not be disclosed in any way in its report.”<sup>397</sup> Indeed, one researcher has recently noted that understanding the function of the panel is “difficult to research” given its lack of transparency.<sup>398</sup> This is demonstrated in recent Council Decisions on the appointments and re-appointments of Judges.<sup>399</sup> In 2010, Greece nominated a candidate to fill its vacant slot at the General Court, yet his candidature inexplicably ceased thereafter, suggesting that he had been knocked back by the panel.<sup>400</sup> More conspicuously, however, was the protracted reappointment of the Hungarian Judge at the General Court in the same year. In a series of draft Council Decisions during a period of appointment his name was eventually withdrawn from the list of nominees – the second recital of draft Council Decision stated that the panel “has given an opinion on the suitability of the aforementioned *eleven* judges”; yet the Hungarian Judge’s name was not included in the list of *ten* Judges approved in the third recital.<sup>401</sup> It thus appeared that the panel had indeed knocked back another candidate, but his name re-appeared in the final Council Decision and he was subsequently re-appointed.<sup>402</sup> Ultimately, however, we do not know the full effect of the panel’s opinions, even if there is some evidence to suggest that they do knock back candidates.<sup>403</sup>

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<sup>395</sup> Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, [2001] OJ L-145/43.

<sup>396</sup> Case C-28/08 P *Commission v The Bavarian Lager Co Ltd* [2010] ECR I-06055.

<sup>397</sup> See Mance, 2011: para. 45.

<sup>398</sup> Bilyana Petkova, “Structural Changes and Decision-Making at the European Court of Justice after the Eastern Enlargement” (2010) Dublin, ECPR Conference on EU Politics (hereinafter Petkova, 2010): 12-13.

<sup>399</sup> See the well-documented findings on the EU Law Blog: <http://eulaw.typepad.com/eulawblog/2010/07/index.html>.

<sup>400</sup> *Ibid.*

<sup>401</sup> Council of Ministers, “Decision of the Representatives of the Governments of the Member States of the European Union Appointing Judges to the General Court” (2010) 10952/2/10 REV 2.

<sup>402</sup> See Council of Ministers, “Decision of the Representatives of the Governments of the Member States of the European Union Appointing Judges to the General Court” (2010) 11912/10.

<sup>403</sup> See Petkova, 2010: 10-13; and Mance, 2011: paras. 23-45.

Notwithstanding its limitations and this uncertainty, the appointments panel still serves to reflect a more independent appointments process. The panel is composed of individuals most likely to be competent to make prudent assessments:

The panel shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament.<sup>404</sup>

The panel's current members include the head of the French *Council d'Etat*, three national supreme court judges (from Denmark, Hungary, and the UK), a retired CJEU Judge, a retired GC Judge, and a European Parliamentarian.<sup>405</sup> Indeed, this is where the objectivity of the panel may prove to be most effective. The result here is an objective process of expert scrutiny of candidates, which ultimately restricts, or negatively influences, the discretion of the Member States, as the (expert) members of the Panel will provide an important check against which the Member States' nominees can be assessed.<sup>406</sup> Even if the panel has no formal *de jure* veto powers, the effect of this procedural step is likely to influence how the governments of Member States choose their candidates, as their selection processes are subject to independent scrutiny. Its composition, moreover, does not reflect the same system of symmetrical Member State representation and influence as can be seen in the one-Judge-per-Member-State appointments process. With only seven members, one of which is proposed by the EP, it is unlikely that strategic intergovernmental interests will be implicated in the evidence-led deliberations.

Somewhat counter-intuitively, however, the involvement of the European Parliament – in proposing one of the members of the appointments panel – is delegitimising. As

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<sup>404</sup> Article 255 (2) TFEU. Emphasis added. For the CST, Article 3 (3) of Annex I SCJ provides that the Committee shall be composed of “former members of the Court of Justice and the General Court and lawyers of recognised competence”.

<sup>405</sup> Council Decision, appointing the members of the panel provided for in Article 255 [TFEU] (2010) OJ L-50/20. See also Mance, 2011: para. 24.

<sup>406</sup> The same can be said in relation to the CST's Committee. See Article 3, Annex I, SCJ.

a central EU institution, the European Parliament's involvement in the appointment process, through having a member on the panel, undermines the independence of the process, where the appointments process becomes tainted by the political concerns of EU governance structures (as opposed to the governments of the Member States). This is discussed further in Section 4 of Chapter Five.

### 3.3.2. Judicial Competence

One way to ensure that the Court's law-applying and law-making objectives are satisfactorily independent is to ensure that the Judges are sufficiently qualified and experienced in the art of adjudication – particularly interpretation. Accordingly, in order for a judge to be appointed to the Court of Justice, Article 19 TEU provides that they have to be “persons whose independence is beyond doubt”; and they have to possess “the qualifications required for appointment to the *highest judicial offices* in their respective countries or who are *jurisconsults of recognised competence*”.<sup>407</sup> Candidates must thus be chosen on the basis of their professional experience and qualifications, including the capacity to sit at their Member State's supreme court. On “jurisconsults of recognised competence”, Arnall explains:

The term ‘jurisconsult’, at least in the English version of the Treaty, is wide enough to cover lawyers in private practice and academic lawyers, even where they are not eligible for appointment to the Bench at home. In practice, the members of the Court have come from a variety of backgrounds, including the national judiciary, the civil service, the Bar, and the academic world.<sup>408</sup>

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<sup>407</sup> Article 253 TFEU. Emphasis added. It is much the same for the Judges appointed to the General Court, except that, Article 254 TFEU states that they must “possess the ability required for appointment to *high judicial office*” – a less restrictive requirement. In the CST, the requirements are even less restrictive: “[t]he members of the specialised courts shall be chosen from persons ... who possess the ability required for appointment to *judicial office*.” Article 257 TFEU. Emphasis added.

<sup>408</sup> Arnall, 2006: 20.

In conjunction with the “common accord” requirement, and the opinion of the panel, these criteria *prima facie* further limit the discretion of Member States when choosing their Judge.

Yet the professional experience and expertise of the Court of Justice’s 35 members at present (the 27 Judges, and eight Advocates-General) indicate that *legal* experience is less decisive than *political* or *academic* experience. Looking at the Court’s website,<sup>409</sup> only twelve have sat as a judge at a national supreme court, eleven at a lower-tier national court, two at the ECtHR, and three at other international courts or tribunals; with 22 having never sat at a national supreme court or international court, and 15 not appearing to have had prior involvement in legal practice at all (albeit all 35 members hold Bachelor of Laws degrees). By contrast, 29 have held various governmental or quasi-governmental positions (primarily at the national level, but also at the international level), whereas only six of its members have never held such a post. These data suggest that Member States place greater weight on those with political, rather than legal, experience – giving rise to a concern as to the impartiality of the Court’s Judges.<sup>410</sup>

However, this concern is somewhat balanced by the equally strong legal-*academic* credentials of the Court’s members: 25 hold a doctorate in law; 27 have held academic posts (ranging from lecturer to professor) at many prestigious universities around the world (including the universities of Amsterdam, Cambridge, Harvard, Johns Hopkins, and Oxford); with only six having neither obtained a doctorate nor held an academic post. This academic experience is, moreover, invariably in legal

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<sup>409</sup> The data presented herein is taken from the presentation of the professional experience of the Court of Justice’s 35 members at [http://curia.europa.eu/jcms/jcms/Jo2\\_7026/](http://curia.europa.eu/jcms/jcms/Jo2_7026/).

<sup>410</sup> Another possible concern is that, across all 27 Member States, the extent to which national supreme court judges are experienced and qualified judicial actors will vary, depending on national rules. This may mean that, at the Court of Justice, there will be varying levels and types of judicial expertise; and also that Judges from newly acceded Member States may be less familiar with EU law. Nevertheless, these concerns are theoretical at best, and are not demonstrated by the data. Furthermore, at least one former member of the Court of Justice regarded such scepticism to be “misplaced and ill-informed” (Mancini, Law and Justice Foundation of New South Wales: Point 2 Para 3).



areas associated with European law and governance, and is complemented by an impressive record of publications (writing extra-judicially) of their research.<sup>411</sup>

Professional experience notwithstanding, Judges are appointed on the basis that they are “persons whose independence is beyond doubt”. There is a series of formal obligations that serve to bolster this. First, according to Article 2 SCJ:

Before taking up his duties each Judge shall, before the Court of Justice sitting in open court, take an oath to perform his duties *impartially* and conscientiously and to preserve the secrecy of the deliberations of the Court.<sup>412</sup>

Additionally, the Judges must sign a declaration of commitment to these obligations, which adds that these obligations run beyond their tenure as Judges.<sup>413</sup> Second, the Judges (as for public servants of the Union’s other institutions) are immune from certain forms of legal provisions set out under Union law. Article 3 SCJ provides that the “Judges shall be immune from legal proceedings”. This Article goes on to refer to further immunities and privileges to which the Judges are entitled, including certain tax and other financial privileges.<sup>414</sup> Finally, Article 4 SCJ provides that the Judges will not be involved in any other political or financial engagements, and

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<sup>411</sup> Indeed, in this thesis, there are references to the work of many members and former members of the Court. For example: Due, 1992; O’Keeffe, 1992; Gulmann, 1980; Jacobs, 1992; Koopmans, 1986; Kutscher, 1976; Lenaerts, 1992; Lenaerts and Corthaut, 2006; Maduro, 2000; Maduro, 2003; Mancini, 1998; Mancini and Keeling, 1994; Pescatore, 1983; Timmermans, 2002; Van Gerven, 1996; and Van Gerven, 2005.

<sup>412</sup> Emphasis added. The oath, set out in Article 4 RPCJ and Article 4 of the Consolidated Version of the Rules of Procedure of the General Court (2010) C 177/02 (consolidating: the Rules of Procedure of the Court of First Instance of the European Communities (1991) OJ L 136/1, and (1991) OJ L 317/34 (corrigenda), as amended, hereinafter RPGC), reads as follows: “I swear that I will perform my duties impartially and conscientiously; I swear that I will preserve the secrecy of the deliberations of the Court”. For the CST, see Article 5, Annex I, SCJ.

<sup>413</sup> Article 5 RPCJ; Article 4 (2) RPGC. For the CST, see Article 5, Annex I, SCJ.

<sup>414</sup> These privileges and immunities are set out explicitly in Articles 11-14, and Article 17 of Protocol (No 7) On the Privileges and Immunities of the European Union (2010) OJ C 83/266. Article 11 provides that the Judge shall “be immune from legal proceedings in respect of acts performed by them in their official capacity, including their words spoken or written. They shall continue to enjoy this immunity after they have ceased to hold office ...”. It further provides in sub-sections b. to d. certain other financial and movement freedoms. Articles 12 to 14 concern the Judges’ immunity in relation to tax and social security matters. And Article 17 provides that these immunities shall be accorded to the judges “solely in the interests on the Union.” For the CST, see Article 5, Annex I, SCJ.

Article 18 SCJ provides that a Judge is not allowed to be involved in cases in which the Judge has had prior involvement:

[a]s agent or adviser or has acted for one of the parties, or in which he has been called upon to pronounce as a member of a court or tribunal, of a commission of inquiry or in any other capacity.

These provisions are designed to ensure that the Judges do not become predisposed to political, financial or personal biases that may undermine their dispassionate treatment of cases – specifically, their adjudication. It is easy to imagine how the judicial office could be exploited and subverted by judges with vested interests – ideological, financial, personal – in the immediate and juridical outcomes of cases. Doing so would not only be a severe constitutional impropriety, but also undermine the Court’s independence and, hence, its instrumental democratic legitimacy. Article 6 SCJ provides an enforcement mechanism against Judges who default on these obligations: “[a] Judge may be deprived of his office ... [if] he no longer fulfills the requisite conditions or meets the obligations arising from his office.”<sup>415</sup>

### 3.3.3. The Secrecy of Judicial Deliberations

One very important legal mechanism that mitigates Member State control (and, indeed, the control of the Union’s institutions) is the requirement of *secret* judicial deliberations.<sup>416</sup> This requirement prohibits the Judges from discussing their deliberations on cases in public, and results in the Court producing a single collegiate judgment in all cases, where the Court’s reasoning appears unanimous and anonymous. The Judges are thus shielded from their governments’ dissatisfaction and reprisal (or, arguably, the Judges are prevented from improper governmental reward) on the basis of the individual Judge’s contribution to the case. Indeed, one

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<sup>415</sup> The procedures of these deliberations are outlined in Article 6 RPCJ; and Article 5 RPGC. For the CST, see Article 5, Annex I, SCJ. It is worth noting that, to date, the extra-judicial dissemination of the Judges (in publications and colloquia) has not given rise to any disciplinary action.

<sup>416</sup> Article 2 SCJ; Article 4 RPCJ; and Article 4 RPGC. For the CST, see Article 5, Annex I, SCJ.

former Court of Justice Judge supports this system, noting that “[g]iven the recent attitude of certain Member States, this danger may be greater than it used to be.”<sup>417</sup> Additionally, the Judges must sign a declaration of commitment to these obligations, which adds that these obligations run beyond their tenure.<sup>418</sup> The discussions on reform reveal that the Judges have been in favour of this mechanism, precisely because their tenure is short and renewable. They have also been in favour of single collegiate judgments (as opposed to the introduction of individual dissenting opinions) on the same basis.<sup>419</sup>

We have to understand the single collegiate judgment as a necessary sacrifice. If the Judges were not subject to frequent appointments processes, and that their parent Member States did not have such a strong role therein, then I would argue that individual opinions and dissenting judgments would be desirable from a democratic point of view. It is commonplace to argue that the accountability and transparency of courts is exemplified by this. Indeed, in Chapter Five, we look at the representation of national legal traditions; and since many of the Union’s Member States’ legal systems provide individual judgments and dissenting opinions, the collegiate judgment of the Court of Justice also offends the intrinsic virtue of representation. Furthermore, as we saw in Chapter Three, there is a strong trend in constitutional theory that argues that the democratic virtue of political deliberation is achieved in the judicial setting by such a system. Yet, as will be discussed in Section 4, the EU’s distinctively contested nature, and the competing political forces which converge on the appointments process from the Member States and the Union’s institutions, have generated an appointments process that is particularly vulnerable to *ex ante* control. With these factors at play, the secrecy of the Judges’ deliberations insulate the Court

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<sup>417</sup> David Edward, “How the Court of Justice Works” (1995) *European Law Review* 539 (hereinafter Edward, 1995): 557.

<sup>418</sup> Article 4 (3) SCJ; Article 3 RPCJ; and Paragraph 2 of Article 4 RPGC. For the CST, see Article 5 Annex I SCJ.

<sup>419</sup> See Francis Jacobs’ submissions in IEE, 1980: 16-17; Edward, 1995: 557-558; the Due Report; the Court’s Paper, 1999; Petkova, 2010; and Mance, 2011.

in such a way that bolsters its independence and, thus, its instrumental democratic legitimacy.<sup>420</sup>

#### 3.3.4. Judicial Chambers

One of the most notable features of the court system is the limited number of the adjudicators who sit on each case. It is rare to find a court with more than a dozen judges, and generally it seems that there are between one and three judges in the court. It follows from this that it is virtually impossible for a single judge to hear all the cases arising within a system. There will, almost unavoidably, be a multiplicity of judges. This creates a dilemma for those appearing before the courts; how can they be certain that the outcome of their case will not depend on the selection of the judge?<sup>421</sup>

Another way that the Court is insulated is through limiting the number of Judges that hear each case by organising them into judicial chambers. This way, the extent to which a Member State, or another party that may have strategic intentions, can “select” a Judge is either impossible or improbable – thus limiting the scope (potential or actual) or perception of judicial bias.<sup>422</sup>

There are ten chambers comprising three or five Judges in the Court of Justice.<sup>423</sup> The Court can also sit as a full Court (all 27 Judges), or in the Grand Chamber (15

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<sup>420</sup> For further reflection on this issue, as it pertains to the intrinsic virtue of representativeness, see Section 3.1.1 of Chapter Five.

<sup>421</sup> Barber, 2001: 74-75.

<sup>422</sup> This issue has indeed been the subject of controversy in the media recently, where: “[a] controversial ruling by a Spanish judge [*sic*] at the European Court of Justice has triggered anger in Gibraltar and raised questions of impartiality. *PublicServiceEurope.com* questions whether the Luxembourg court can ever be truly independent of the interests of EU member states.” See [http://www.publicserviceeurope.com/article/2371/the-case-of-gibraltar-at-the-european-court-of-justice?utm\\_source=MailingList&utm\\_medium=email&utm\\_campaign=PSEurope290812](http://www.publicserviceeurope.com/article/2371/the-case-of-gibraltar-at-the-european-court-of-justice?utm_source=MailingList&utm_medium=email&utm_campaign=PSEurope290812). The “ruling” in question was the Opinion of the Advocate-General.

<sup>423</sup> See [http://curia.europa.eu/jcms/jcms/Jo2\\_7029/](http://curia.europa.eu/jcms/jcms/Jo2_7029/); Article 251 TFEU; Article 16 SCJ; and Article 11 RPCJ. The General Court has eight chambers. It can likewise use a Grand Chamber and a full Court. Unlike the Court of Justice, the General Court can use a chamber of one Judge. See Article 254 TFEU and Article 50 (2) SCJ. The CST is organised into three chambers: two chambers of three judges and one chamber of five judges. “The Civil Service Tribunal shall sit in chambers of three judges. It may ... sit in full court or in a chamber of five judges or of a single judge.” Article 5 Annex I SCJ.

Judges).<sup>424</sup> For any given case, a Judge-Rapporteur (chosen by the President of the Court,<sup>425</sup> or the recently established office of Vice President<sup>426</sup>) makes a recommendation as to the formation of the chambers in the preliminary report.<sup>427</sup> Notwithstanding this discretion, there are rules which govern how cases are to be allocated to certain forms of chambers. Cases that are of “legal difficulty” or of “high importance” will be referred to the Grand Chamber or the full Court,<sup>428</sup> where Article 16 SCJ provides that cases of “exceptional importance” shall be heard by the full Court.<sup>429</sup> Given the size of the full Court (now 27 Judges), the full Court very rarely sits. Indeed, in 2011, the full Court only sat on one case out of 668 in *Opinion I/09*;<sup>430</sup> and the last time it heard a case before that was in 2006. That year, only two cases were heard by the full Court out of the 444 cases; in contrast to, for example, in

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<sup>424</sup> In this respect, Article 16 SCJ is incongruous with the newly adopted RPCJ, where, in Article 27 RPCJ, it provides that the Grand Chamber for the Court of Justice will consist of 15 Judges; whereas Article 16 SCJ states 13, which is still applicable to the General Court (see Article 10 RPGC).

<sup>425</sup> According to Article 253 TFEU the Judges are to elect one of their 27 to be the official President of the Court, who occupies that office for three years and who may be re-elected. Indeed, the current President, Mr. Vassilios Skouris has recently been re-elected as the Court’s President (see CJEU, “Mr Vassilios Skouris is re-elected President of the Court of Justice of the European Union” (9/10/2012) 127/12). For the General Court, see Article 254 (3) TFEU. For the CST, see Article 4 (1) Annex I SCJ and Article 6 Consolidated Edition of the Rules of Procedure of the European Union Civil Service Tribunal (2007) OJ L 225/1, with corrigendum (2008) OJ L 69/37, with amendments dated (2009) OJ L 24/10; (2010) OJ L 92/17; and (2011) OJ L 162/19 (hereinafter RPCST). The election takes place immediately after the partial replacement of the Judges. The President of the Court, under Article 9 (2) RPCJ, “shall direct the judicial business and the administration of the Court; he shall preside at hearings and deliberations” and is thus endowed with significant administrative authority. Two examples of this role include: coordinating and presiding over the disciplinary proceedings of other Judges and Advocates-General (Article 6 RPCJ); and designating the Judge-Rapporteurs for each case (Article 15 RPCJ). For the General Court, see Article 7 RPGC. For the CST, see Article 6 RPCST and Article 7 RPCST.

<sup>426</sup> See Article 8 and Article 10 RPCJ. “The post of Vice-President was created by recent amendments to the Statute of the Court of Justice of the European Union. The duty of the Vice-President is to assist the President in the performance of his duties and to take the President’s place when the latter is prevented from attending or when the office of President is vacant. Mr Lenaerts will be the first judge to carry out the duties of the Vice-President of the Court of Justice. Under Article 9a of the Statute of the Court of Justice of the European Union: ‘The Judges shall elect the President and the Vice-President of the Court of Justice from among their number for a term of three years.’” See CJEU, “Mr Koen Lenaerts is elected as Vice-President of the Court of Justice” (9/10/2012) Press Release 128/12.

<sup>427</sup> Articles 59 and 60 RPCJ. For the General Court, see Article 14 (2) RPGC and Article 52 (2) RPGC; and for the CST, see Article 14 (1) RPCST, and Article 45 RPCST.

<sup>428</sup> Article 60 RPCJ. For the General Court, see Article 14 RPGC. For the CST, see Article 13 RPCST.

<sup>429</sup> Additionally, the full Court shall always hear matters in relation to Article 228(2) TFEU, Article 245(2) TFEU, Article 247 TFEU and Article 286(6) TFEU.

<sup>430</sup> See *Statistics concerning the judicial activity of the Court of Justice*, 2011, available at [http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-06/ra2011\\_statistiques\\_cour\\_en.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-06/ra2011_statistiques_cour_en.pdf).

2002, when the full Court heard 31 cases out of the 361 cases heard that year.<sup>431</sup> The Grand Chamber must be assigned to cases in which one of the parties or interveners is a Member State requesting it.<sup>432</sup> Absent these conditions, cases will be designated to three or five Judge chambers.<sup>433</sup> This depends on, again, the relative legal complexity or importance of the case.

Each of the chambers follows a specified compositional pattern. The Grand Chamber:

... shall be composed of the President of the Court, the Presidents of the Chambers of five Judges, the Judge-Rapporteur and the number of Judges necessary to reach 15. The last-mentioned Judges shall be designated from the lists referred to in paragraphs 3 and 4 of this Article, following the order laid down therein.<sup>434</sup>

The smaller chambers follow a similar pattern. They are each composed of their elected President<sup>435</sup> and the number of Judges required to reach the required five or

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<sup>431</sup> Compare *Statistics concerning the judicial activity of the Court of Justice, 2009*, available at [http://curia.europa.eu/jcms/jcms/Jo2\\_7032/](http://curia.europa.eu/jcms/jcms/Jo2_7032/): 88, with *Statistics concerning the judicial activity of the Court of Justice, 2002*, available at [http://curia.europa.eu/jcms/jcms/Jo2\\_11035/rapports-annuels/](http://curia.europa.eu/jcms/jcms/Jo2_11035/rapports-annuels/): 160. Indeed, this is symptomatic of the process of enlargement, and presents new dynamics on the debates on reform of the Court of Justice. It also runs in parallel to other problems on the effective functioning of the Court, leading to sub-optimal and, in some cases, negative sum consequences. These issues are addressed further in Section 4 of Chapter Five.

<sup>432</sup> Article 16 (3) SCJ; Article 60 (1) RPCJ. For the General Court, see Article 51 RPGC. This is not available in the CST.

<sup>433</sup> Preliminary rulings that are in relation to the substance of Title V, Part Three of the TFEU are assigned to a pre-specified chamber of five Judges. Additionally, cases can be re-assigned to the Grand Chamber or the full Court at any stage of proceedings. If a case is allocated a larger number of Judges, the new formation shall include the Judges that had been hearing the case in the prior formation. See Article 113 RPCJ. For the General Court, see Article 51 RPGC; and for the CST, see Article 13 (2) RPCST.

<sup>434</sup> Article 27 RPCJ. According to Articles 27 (3) and (4) RPCJ, the Judges that are used to make up the 15 are designated according to a pattern established by the Court for the purposes of filling up the other chambers, as well as for unforeseen absences. This pattern “shall follow the order laid down in Article 7 of these Rules, alternating with the reverse order: the first Judge on that list shall be the first according to the order laid down in that Article, the second Judge shall be the last according to that order, the third Judge shall be the second according to that order, the fourth Judge the penultimate according to that order, and so on.” Article 7 RPCJ determines an order of precedence of the judges, according to their level of seniority in office i.e. their duration in office. The judges thus rank according to that list. For the General Court, see (2010) OJ C 288/06; and for the CST, see (2009) OJ C 270/06.

<sup>435</sup> There are also Presidents elected to preside over each three or five Judge chamber. Article 16 SCJ provides that “[t]he Judges shall elect the Presidents of the chambers from among their number. The

three. It is worth noting here that all of the Court's compositions are published in the *Official Journal* and can be found on the Court's website.<sup>436</sup>

Most cases are assigned to a three or five Judge chamber, in which case, the chances of a particular (desired Member State) Judge sitting on the case will be very limited. Furthermore, Article 18 SCJ states:

A party may not apply for a change in the composition of the Court or of one of its chambers on the grounds of either the nationality of a Judge or the absence from the Court or from the chamber of a Judge of the nationality of that party.

The only exception to these rules is that if one of the parties or interveners is either a Member State or a Union institution, then they may request that the Grand Chamber of 15 Judges be assigned to the case, thus increasing the chances that they may “get their Judge”.<sup>437</sup> However, one former Court of Justice Judge noted that “this happens very rarely”.<sup>438</sup> And even if this request is made, it does not guarantee the politically motivated Member State their Judge. This means that Member States' appointees will not be involved in the majority of cases being heard by the Court; and, even more significantly, Member States cannot rely on having their appointees deciding cases that they might wish to exert an influence – especially cases in which the Member State is a party-litigant. In most cases, then, this prevents Member States from exerting pressure on their Judge for a favourable result (indeed, it prevents the

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Presidents of the chambers of five [and three] Judges shall be elected for three years. They may be re-elected once”, which happens immediately after the election of the President of the Court (Article 12 RPCJ). For the recent elections, see CJEU, “Election of the Presidents of the Chambers of five Judges of the Court of Justice” (9/10/2012) Press Release 129/12. The Presidents of chambers fulfill the same administrative functions for their chambers as the President of the Court does generally (Article 11 (4) RPCJ). Additionally, in the event that the President of the Court is absent, the highest ranking of the Presidents of chambers shall perform that role (Article 13 RPCJ). For the General Court, see Article 15 RPGC. For the CST, see Article 4 (3) Annex I SCJ and Article 11 RPCST.

<sup>436</sup> The specific composition of each chamber for the Court of Justice, see [http://curia.europa.eu/jcms/jcms/Jo2\\_7029/](http://curia.europa.eu/jcms/jcms/Jo2_7029/); for the General Court, see [http://curia.europa.eu/jcms/jcms/Jo2\\_7038/](http://curia.europa.eu/jcms/jcms/Jo2_7038/); and for the CST, [http://curia.europa.eu/jcms/jcms/T5\\_5232/](http://curia.europa.eu/jcms/jcms/T5_5232/).

<sup>437</sup> Article 16 (3) SCJ; Article 60 (1) RPCJ. For the General Court, see Article 51 RPGC. This is not available in the CST.

<sup>438</sup> Edward, 1995: 552.

Judges from being in the position to give a biased result); and it also thus provides a disincentive for Member States to nominate candidates open to their persuasion.

### 3.3.5. Specialised Courts

The final aspect to consider here is the use – and potential/prospective use – of specialised courts. The functionally divided structure exemplified by the use of specialised courts further insulates the Court’s judiciary from potentially politically powerful strategic influences. Like the use of chambers, this is partly (empirically) a matter of composition – limiting the extent to which a party may “get their preferred Judge”. As we have seen in the CST (the only example, at present, of such a specialised court), Member States have less control over the composition of the judiciary. Unlike the Court of Justice and the General Court, the CST does not have one Judge from each Member State: there are only seven Judges.<sup>439</sup> In fact, there is no requirement for there to be any particular form of Member State representation. Instead, the Judges are appointed on as “broad a geographical basis as possible from among nationals of the Member States and with respect to the national legal systems represented” and they are appointed by the Council.<sup>440</sup> In addition to this, the very existence of a specialised court comes about by virtue of Article 257 (1) TFEU:

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish specialised courts attached to the General Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas. The European Parliament and the Council shall act by means of regulations either on a proposal from the Commission after consultation of the Court of Justice or at the request of the Court of Justice after consultation of the Commission.

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<sup>439</sup> Article 2 of Annex 1 SCJ.

<sup>440</sup> Article 257 TFEU; and Article 3 (1) Annex 1 SCJ.



The Member States thus have much less power to influence the internal workings and the establishment of specialised courts.

But there is an added value with respect to specialised courts, which is that, by their nature, their specialist mandate is all the more so consistent with the independence-enhancing virtues of judicial competence i.e. professional experience and expertise.<sup>441</sup> Indeed, of the present seven Judges of the CST, five have significant legal, academic, and/or political experience in the Civil Service, labour law, industry and social law.<sup>442</sup> It remains to be seen whether or not, or to what extent these observations will be reflected in future specialised courts should the Union legislature see fit to create an IP Court, or, indeed, courts within other areas of specialisation. Nevertheless, in principle, by dividing judicial labour into institutions composed of expert and experienced legal actors, under the remit of EU law administration, these fields of legal and professional practice become more insulated from national legal and political processes.

#### **4. Questions of Balance: Understanding Institutional Independence in the EU**

[T]he Treaty of Rome effectively insulates the ECJ from Member State controls: when it interprets the Treaty, the ECJ exercises the fiduciary powers of a powerful trustee court.<sup>443</sup>

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<sup>441</sup> For a commentary on the value of the CST and future specialised courts, see Nikolaos Lavranos, "The New Specialised Courts within the European Judicial System" (2005) *European Law Review* Vol. 30 No. 2 261 (hereinafter Lavranos, 2005).

<sup>442</sup> See [http://curia.europa.eu/jcms/jcms/T5\\_5240/](http://curia.europa.eu/jcms/jcms/T5_5240/).

<sup>443</sup> Stone Sweet, 2004: 17. Indeed, this was a claim made by Hamson at a much earlier time in the EU's development: "[t]he European Court, I think, regards itself as the trustee of the hopes and aspirations, the purposes and the objectives of the founders of the Community and is anxious not to fail in the performance of the trust" (Hamson, 1976: II-25). Rasmussen, however, rejected the idea that the Court acts as "trustee" on the basis that the Court had hitherto favoured "interpretation to further social, economic and political integration" despite a "declining taste for a precipitated process of integration" (Rasmussen, 1986: 12 and 14). Yet he does not offer much in the way of support for this claim. See Akos Toth, "Review of *On Law and Policy in the European Court of Justice* by H. Rasmussen. Martinus Nijhoff Publishers, Dordrecht 1986" (1987) *Yearbook of European Law* Vol. 7 No. 1 411.

This is a bold claim, especially in light of some of the observations made in Section 3. The Member States have a powerful position in the appointment (and re-appointment) of the Court's institutional decision-makers: the Judges. Do the mechanisms of insulation discussed above *sufficiently* insulate the Court from the Member States, such that we might credibly claim the Court to be an independent "powerful trustee court"? This is a question of balance: how independent should the Court of Justice be? Answering this involves both empirical and normative issues to be addressed. Empirically, how independent is the Court in comparison to other apex courts, at both the transnational and national levels? In Section 4.1, we look at the independence of the ECtHR, the UK Supreme Court, and the US Supreme Court, and confirm the hypothesis that the Court of Justice of the European Union is, as Stone Sweet postulates, an atypically independent court. In Section 4.2, we then go on to consider the normative aspect of the boundary question by considering why this degree of independence is justified. There, it is argued that, given the EU's polity-conditions (see Section 4 of Chapter Two), in order for the Court to act sufficiently as a trustee-institution, it carefully treads the tightrope between being insulated from a hostile political environment (emanating from the tide of deep polity-contestation in the EU), and being responsive to that environment.

#### *4.1. The Independence of the Court of Justice in a Comparative Context*

It is beyond the scope of this thesis to conduct comprehensive comparative analyses of the three apex courts (the ECtHR, the UK Supreme Court, and the US Supreme Court). The data presented here are limited to the salient characteristics of those courts and the constitutional frameworks within which they adjudicate, in order to demonstrate the (different) ways in which they are less independent – have smaller "zones of discretion" – than the Court of Justice.

4.1.1. The European Court of Human Rights

In jurisdictional terms, the ECtHR has been delegated comparatively few and weak powers of constitutional review. In terms of direct actions before the ECtHR, there are only two types: actions alleging a breach of any of the substantive provisions of the Council of Europe's European Convention on Human Rights<sup>444</sup> by a High Contracting Party<sup>445</sup>, raised *by* a High Contracting Party ("Inter-State cases");<sup>446</sup> and "individual actions", whereby "any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto" can apply to the ECtHR.<sup>447</sup> Whilst the judgments of the ECtHR are final and binding,<sup>448</sup> they are merely compensatory in nature – aggrieved applicants receiving "just satisfaction"<sup>449</sup> – and do not *ipso facto* result in legal or administrative change with respect to the recalcitrant High Contracting Party.<sup>450</sup> Likewise, whilst the ECtHR is regarded to be the decisive arbiter on the interpretation of Convention rights, its jurisprudence does not necessarily<sup>451</sup> penetrate the national (nor, indeed, the EU's) constitutional framework, such that the latter's courts can dis-apply rules of national law.<sup>452</sup> In

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<sup>444</sup> European Convention on Human Rights, (as amended, 2010) Council of Europe Treaty Series, No. 194 (hereinafter ECHR).

<sup>445</sup> The term used to denote one of the signatory states to the ECHR – the equivalent to the EU's "Member State".

<sup>446</sup> Article 33 ECHR.

<sup>447</sup> Article 34 ECHR.

<sup>448</sup> The decision will be "final" under the procedural conditions set out in Article 44 ECHR; and it is binding on the High Contracting Party against which the action has been raised according to Article 46 ECHR.

<sup>449</sup> Article 41 ECHR.

<sup>450</sup> Consider the (non-legal) effects of the recent judgment of the ECtHR in *Hirst v the United Kingdom* (No 2) (2006) 42 EHHR 41, whereby the ECtHR ruled that the UK's legislation, which banned certain classes of prisoners from voting, was in contravention of Article 3, Protocol No 1 ECHR. The UK was ordered to reform its law in compliance with the ECHR and the judgment, yet, instead, it led to protracted and fruitless deliberations which ultimately emphasised Westminster's legislative supremacy. See Isobel White, "Prisoners' voting rights" (26 September 2012) *Library of the House of Commons* SN/PC/01764.

<sup>451</sup> This will be dependent on the type of constitutional framework within which the national legal system operates. In dualist systems, such as the UK, it will not. Whereas monist systems, such as France, it may do so depending on how their constitutional framework has been adjusted with respect to the ECtHR's jurisprudence. Nevertheless, this does not preclude legislatures in monist systems from enacting corrective legislation.

<sup>452</sup> In the UK, see Section 3 and Section 4 of the HRA. See also *Ghaidan v Godin-Mendoza* [2004] UKHL 30 on the qualifications on how the UK's judiciaries can legitimately apply ECtHR

other words, the ECtHR's powers of constitutional review are weak; partly down to having limited competence, but also because it is subject to strong mechanisms of *ex post* control. This stands in stark contrast to the jurisdiction of the Court of Justice, which, as we saw in Section 3.1 and Section 3.2, enjoys a variety of jurisdictional powers, and has the advantage of compliance of the national courts by virtue of the principles of direct effect and supremacy.

In terms of *ex ante* mechanisms of control, the situation is hardly comparable. The ECtHR has been recognised as having a “politicised” appointments process that has more to do with “safeguarding state sovereignty” than it does for creating an effective and independent judiciary.<sup>453</sup> Here, like with the Court of Justice, the High Contracting Parties (or State) are the *de facto* appointers of *their* judge in the ECtHR. Judges are appointed to the ECtHR on a one judge per State basis.<sup>454</sup> When there is a vacancy, the State nominates three candidates<sup>455</sup> and submits its list to the Directorate General of Human Rights of the Council of Europe (hereinafter the DG), who reviews the list then passes it on to the Committee of Ministers, which also reviews the list and can reject the list if the candidates are not sufficiently qualified, or if the State did not follow suitable procedures to select the candidates.<sup>456</sup> The Committee of Ministers then passes the list on to the Parliamentary Assembly, which votes on which of the three nominees should fill the vacancy.<sup>457</sup> Furthermore, the requirements of office are largely the same as they are for the Court of Justice: judges are to be appointed if they are of “high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence”;<sup>458</sup> they are to take an oath, which holds

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jurisprudence; and, generally, Kavanagh, 2009. In the EU, on the autonomy of the EU's fundamental rights jurisprudence, see *Internationale Handelsgesellschaft*; *Schmidberger*; and *Kadi*.

<sup>453</sup> For a detailed empirical analysis of the appointments process in the ECtHR, see INTERIGHTS, Report on “Law and Practice of Appointments to the European Court of Human Rights”, May 2003, available at <http://www.interights.org/jud-ind-en/index.html> (hereinafter INTERIGHTS, 2003). See also IEE, 1980: 15, 17.

<sup>454</sup> Article 20 ECHR.

<sup>455</sup> Article 22 ECHR.

<sup>456</sup> This aspect of the appointments process is not detailed in the ECHR. See INTERIGHTS, 2003: 20-23.

<sup>457</sup> Article 22 ECHR.

<sup>458</sup> Article 21 (1) ECHR.

them to impartiality, independence and preserving the secrecy of the ECtHR's deliberations;<sup>459</sup> they are prevented from engaging in activities that would undermine their impartiality, such as participation in political or financial offices;<sup>460</sup> and they are subject to the internal supervision by the ECtHR should they fail to satisfy these requirements, such that they may be dismissed from office.<sup>461</sup>

In spite of these formalities, there are a few weaknesses that favour the discretion of the appointing States, such that they may not only “get their judge”, but also exert strategic political influence on them, and, thus, the ECtHR's adjudication. First, in practice, the roles of the DG, the Committee of Ministers and the Parliamentary Assembly are somewhat superficial, and tend simply to accede to the wishes of the appointing State.<sup>462</sup> There is no comparable “common accord” requirement, or independent appointments panel as observed for the Court of Justice. The States can effectively choose who they want to be their judge at the ECtHR, regardless of any formalities in place. Judges may also write their own separate judgments in cases on which they sit.<sup>463</sup> This has added significance because, unlike the Court of Justice, judges appointed by a State are required to sit on any case to which that State is a party.<sup>464</sup> This strength of this requirement is such that, if, for whatever reason, that judge is unable to sit on such a case, the State is empowered to appoint an “*ad hoc*” judge of their choosing for that case; or to choose another elected judge of the ECtHR.<sup>465</sup> The implications of this system significantly undermine the capacity for elected or *ad hoc* judges to adjudicate without the potential or actual strategic influence of their appointers.

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<sup>459</sup> Rule 3 of Rules of Court, Registry of the Court, Strasbourg, 1 September 2012 (hereinafter RPECtHR).

<sup>460</sup> Rule 4 RPECtHR. See also Article 21 (3) ECHR.

<sup>461</sup> Rule 7 RPECtHR. See also Article 21 (3) ECHR.

<sup>462</sup> INTERIGHTS, 2003: 17-24. This report notes that “[i]n practice [the Committee of Ministers] are reluctant to look behind the ‘sovereign veil’ and the Committee of Ministers as a whole sends the lists unchanged to the Parliamentary Assembly” (INTERIGHTS, 2003: 8).

<sup>463</sup> Rule 74 (2) RPECtHR. Though, since their tenure is non-renewable, the effects of this may be limited (see Article 23 (1) ECHR).

<sup>464</sup> Article 26 (4) ECHR; Rule 24 (2) (b) RPECtHR.

<sup>465</sup> Rule 29 RPECtHR.

4.1.2. The UK Supreme Court

As we have already seen, the UK's constitutional framework gives pride of place to the legislative supremacy of its Parliament. As such, the UK Supreme Court – like the lower-tier courts – can have its law-making, including its constitutional law-making, decisions overturned by the ordinary legislative process i.e. an Act of Parliament. The judiciaries of the UK have consistently affirmed that the courts cannot look beyond the statute book in determining the validity of rules of law.<sup>466</sup> This position is, of course, subject to the requirements of EU law, and, to an extent, the ECHR.<sup>467</sup> Nevertheless, the UK Supreme Court is subject to very strong mechanisms of *ex post* control.

In terms of *ex ante* control, the UK Supreme Court is relatively independent. For example, neither the Head of State, nor government ministers, have a strong role in the appointment process. Under Section 26 of the Constitutional Reform Act 2005, the Lord Chancellor (a Government Minister) sets up a “selection commission” – composed of the President and Deputy President of the Supreme Court and the senior members of the regional judicial appointments boards across the UK<sup>468</sup> – for the purposes of filling any vacancies in the Supreme Court. In reaching its choice, the selection commission must carry out consultations with senior judicial and political actors and their selection must be made “on merit”.<sup>469</sup> The Lord Chancellor is the only member of the British Government who has a say in the selection, and may only veto the selection in the event that there is not enough evidence to suggest that the proposed candidate meets the official statutory criteria. After the Lord Chancellor has ratified the choice made by the selection commission, the Prime Minister is

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<sup>466</sup> See *Ellen Street Estates v Minister of Health* [1934] 1 K.B. 591; *Pickin v British Railways Board* [1974] A.C. 745; and *Jackson v HM Attorney-General* [2005] UKHL 56. This position has even been regarded by the UK Supreme Court to be applicable in the context of Acts of the Scottish Parliament (conventionally regarded to be constitutionally inferior secondary legislative acts that are reviewable by the courts, and may *prima facie* be annulled), see *AXA General Insurance v Lord Advocate* [2011] UKSC 46, per Lord Hope at paras 42-52.

<sup>467</sup> On the implications of EU law on the doctrine of legislative supremacy, see *The European Communities Act 1972*; *R v Secretary of State for Transport ex. p. Factortame* [1990] 2 A.C. 85 (hereinafter *Factortame I*); and *Factortame II*.

<sup>468</sup> Schedule 8, Section 1 of the Constitutional Reform Act 2005 (hereinafter CRA 2005).

<sup>469</sup> Section 27 CRA 2005.

bound to accept the candidate.<sup>470</sup> The Government thus has very little room to make any arbitrary or politically motivated interventions in the selection and appointment of the Supreme Court Justices. Yet there are two weaknesses to be considered here. First, according to Section 33 of the CRA 2005, a Justice of the UK Supreme Court “may be removed from it on the address of both Houses of Parliament.”<sup>471</sup> Furthermore, it is common practice for the judges in British courts individually to publish their judgments, which may subject them to public and political scrutiny – the latter being especially problematic in light of Section 33.<sup>472</sup>

#### 4.1.3 The US Supreme Court

By contrast with the ECtHR and the UK Supreme Court, the US Supreme Court, like the Court of Justice, is not subject to strong *ex post* mechanisms of control. This is for three reasons. First, US law is structured according to the legal supremacy of the US Constitution. Legislation, common law, and other sources of law are always hierarchically inferior to the various Articles and Amendments of the formally recognised written Constitution – something that is famously absent in the UK context. Second, in order to alter the Constitution – by way of legislative amendment – there are notably difficult and practically cumbersome legislative processes to be overcome e.g. a national referendum on the proposed change, which requires a super-majority to have the change ratified. Finally, the US Supreme Court, as Richard Posner argues, is thus in the position of being able to make new constitutional law by way of interpreting legally indeterminate provisions of the Constitution.<sup>473</sup> Given these three factors, the Supreme Court potentially wields a

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<sup>470</sup> Section 26 (3) CRA 2005.

<sup>471</sup> For further discussion, see Anthony Bradley and Keith Ewing, *Constitutional and Administrative Law (15<sup>th</sup> Ed)* Pearson, 2010 (hereinafter Bradley and Ewing, 2010): 371.

<sup>472</sup> It is worth noting that a Justice has never been removed under this procedure; and that, according to the *sub judice* constitutional norm, parliament is prohibited from discussing impending or occurring cases, in spite of parliamentary privilege. See <http://www.parliament.uk/site-information/glossary/sub-judice/>.

<sup>473</sup> Richard Posner, “The Supreme Court 2004 Term: Foreword: A Political Court” (2005) *Harvard Law Review* Vol. 119 31 (hereinafter Posner, 2005): 39-54.

significant law-making power, to the extent that such a constitutional interpretation would be very difficult to “overturn” legislatively.

Yet the composition and appointments process tells a different story, and one that reveals weaknesses with respect to *ex ante* mechanisms of control. Principally, Justices are seemingly appointed on an ideological basis. Formally, Supreme Court Justices are appointed by the US President, with congressional oversight and ratification i.e. the “advice and consent” of the House of Senate.<sup>474</sup> Yet, since the highly publicised controversy surrounding the (failed) appointment of Robert Bork to the Supreme Court by the Reagan administration in 1987, the US appointments process has become yet another “hot potato” in American politics, leading the Supreme Court’s academic interlocutors and the media towards greater attention to the ideological nature of the process. The legacy of the “Borking debacle” is now the common understanding that, as Barry Friedman notes, “judges appointed by Republican Presidents will be more conservative than judges appointed by Democrats” and vice versa.<sup>475</sup> If this is correct, then it may undermine the impartiality of the Supreme Court’s adjudication. This situation is compounded by the practice of publishing individual opinions, and dissenting opinions, by the Justices; and the heightened awareness of the decisions (and constitutional power) of the US Supreme Court in the American public’s eye.<sup>476</sup>

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<sup>474</sup> See Article 2 of the United States Constitution, Section 2.2.2.

<sup>475</sup> Barry Friedman, “The Politics of Judicial Review” (2005) *Texas Law Review* Vol. 84 No. 2 257 (hereinafter Friedman, 2005): 277-278. See also, Tom Lininger, “On Dworkin and Borkin” (2007) *Michigan Law Review* Vol. 105 1315 (hereinafter Lininger, 2007).

<sup>476</sup> The national and, indeed, international attention of (in)famous cases such as *Roe v Wade* (1973) 410 US 113 (hereinafter *Roe v Wade*), and *Brown v. Board of Education of Topeka* (1954) 347 U.S. 483 (hereinafter *Brown v Board of Education*) exemplify this. Indeed, Dworkin argues that the public scrutiny of these cases enhance the democratic legitimacy of the US Supreme Court because it fosters the virtues of public debate and deliberation of political issues within the general public (Dworkin, 1996: 345).



*4.2. Understanding Judicial Independence in the EU*

The foregoing shows that the Court of Justice of the European Union is, as Stone Sweet observed, a powerfully insulated court. It has a large “zone of discretion” because of its jurisdiction, and its insulation from *ex post* and *ex ante* mechanisms of control, to a comparatively high degree. But this is only part of the story here. Democratic legitimacy and trusteeship demand more than this.

To be sure, independence is key to instrumental democratic legitimacy; and all the more so in the Court of Justice. Unlike its national and transnational counterparts, the Court of Justice functions in an atypical socio-political environment. As we saw in Chapter Two, the EU is a polity distinctive in its complexity; its divisive existential contestation; and its susceptibility to (potentially radical) change – the three C’s of EU constitutionalism. Particularly relevant to the discussion of independence is the contestation over *finalité*, which gives rise to a hostile political environment of competing political interests – especially (though not exclusively) from the Member States – that inevitably exert strategic pressure on the Union’s central institutions, including the Court of Justice. Nation-states suffer much less from this sort of existential tension. The political legitimacy of the nation-state – and the legitimacy of its central political organs – is relatively stable. Furthermore, nation-states have the benefit of a collective *national* identity that underpins the centrality and strength of the overarching political system and its political organs i.e. a *demos*.<sup>477</sup> In a similar vein, the Council of Europe quite neatly, and relatively uncontroversially, fits into the intergovernmental model. There are no questions or debates on deeper political, economic and fiscal union (i.e. supranationalist or statist visions of *finalité*)

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<sup>477</sup> Though this is not to suggest that there are not constitutionally significant powerful political tensions that emerge in the UK’s or the US’s courts. In the UK, the great constitutional debate of the present day, over the devolution settlement and Scottish independence, has pervaded the judicial sphere, including especially questions on the UK Supreme Court’s jurisdiction in the Scottish Legal System. See Neil Walker, “Final Appellate Jurisdiction in the Scottish Legal System”, 2010, available at <http://www.scotland.gov.uk/Publications/2010/01/19154813/0> (hereinafter Walker, 2010a; this issue is addressed in greater depth in Chapter Five, on the issue of the representativeness of courts). In the US, the aforementioned (oxymoronic) ideological cleavage between free-market, social conservatives (Republicans); and (relatively) market-interventionist, social liberals (Democrats) pervades the appointments process and general public-political evaluation of the US Supreme Court (see Posner, 2005; Friedman, 2005; and Lininger, 2007). This issue is also addressed in Chapter Five.

that pervade the ECtHR's structures and processes. By contrast, the EU and its institutions have to contend with competing claims, rife in their complexity, over the constitutional nature of the Union – intergovernmentalism, supranationalism, infranationalism, experimentalism, statism – which ultimately exert pressure on the Court of Justice. And given the demonstrable strength of Member States' interests *qua* intergovernmentalism within the ordering of the Union generally, it is all the more justified that the Court – as a type of institution that requires independence *qua* trusteeship – be powerfully insulated from their strategic influence. In this regard, we can say that, on the agency-trustee spectrum, courts like the ECtHR, the UK Supreme Court, and the US Supreme Court, are justifiably understood to tend towards the agency end of the spectrum, whereas the Court of Justice must be understood conversely.

But what of institutional responsiveness and the intrinsic virtues of democratic legitimacy i.e. representativeness and participation? We saw in Chapter Three that these requirements are important parts of what makes a good trustee-institution. How do we reconcile these requirements with independence? This is, again, all the more relevant in the Court of Justice because, paradoxically, its democratic legitimacy depends on responsiveness to *inter alia* the interests of Member States. As Barber notes:

The European Court of Justice and the European Court of Human Rights are conspicuously large ... Part of the rationale for large courts is undoubtedly political; it makes the decision of the court more palatable to those before it. Transnational courts are especially sensitive to the need to secure acceptance; their authority depends on the voluntary obedience of member states. The same explanation does not seem to hold for large national courts.<sup>478</sup>

Yet the difference between the Court of Justice and the ECtHR is that the former's "authority depends on the voluntary obedience" of more than simply the Member States, as noted above. The Court of Justice must also be responsive to the Union's

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<sup>478</sup> Barber, 2001: 80-81.

supranational and civil society organisations, and individuals. This is why the Court – in order for it to be a good trustee-institution – must be carefully balanced between being responsive to those interests (through representativeness and participation), and independence. But does responsiveness to the interests of the public not undermine judicial impartiality? This is an important question to address before proceeding to consider how the Court of Justice fosters *intrinsic* virtues of democratic legitimacy in the following two Chapters.

The answer here lies in the distinction between *responsive* decision-making and *biased* decision-making. Biased decision-making is precisely what impartiality and insulation seek to suppress. It is about ensuring that institutional decision-makers do not prioritise one set of interests over others, pre-decision. Judges should not favour Member State party-litigants because they are from that Member State; nor should they favour a particular interpretation of EU law because it is in the political or economic interests of their parent Member State. The same can be said of financial or other personal motivations that might influence a judge. Responsive decision-making, by contrast, is about ensuring that all affected interests are considered. As we saw in Chapter 3, the trustee-court enjoys a “zone of discretion” within which it must bring determinacy to the law. Responsiveness ensures that the interests that would be positively or negatively affected by the exercise of this discretion have been addressed by the Judges, *before* they make their decision. It does not preclude a Judge from making, for example, an interpretation that is favourable to their parent Member State. As long as the decision has been made after consideration of all affected interests, and without giving priority to one set of interests regardless of the others, the Court’s independence is not undermined.

## **5. Conclusion**

This Chapter demonstrated that the structures and processes of the Court of Justice support the Court in satisfying the criteria of instrumental democratic legitimacy

through fostering the virtue of institutional independence. In Section 2, we saw that instrumental democratic legitimacy refers to the role that an institution plays within a democratic polity, and how that role contributes to the proper democratic functioning of the polity. For the Court of Justice, this is: to resolve legal/constitutional disputes; to resolve those disputes according to a faithful interpretation of the meaning of established rules of law; to bring determinacy to that law; and to ensure that the law is observed by all. The independence of the Court from external influences is central to these functions. In Section 3, the structures and processes of the Court were shown to meet the criteria of institutional independence, under the rubric of “zone of discretion”. That assessment was broken down into first determining the powers and discretion given to the Court i.e. its jurisdiction; then balancing these against both *ex post* and *ex ante* external mechanisms of control that may undermine the exercise of that discretion.

We saw that the Court is not only competent to hear a vast number of actions, but that it has significant interpretive discretion with which to adjudicate. *Ex post* mechanisms of control relate to the ways in which political principals can respond to the discretion of delegate-institutions (these also tend to be direct mechanisms of control) such as to invalidate or reverse the decisions of delegate-institutions. In that regard, we saw that it is very difficult for the Union’s legislature to reverse or invalidate the decisions of the Court. *Ex ante* mechanisms of control are the ways in which political principals can influence the decision-making of delegate-institutions such as to make that discretion heteronomous. It is here that the main threat to the Court’s independence exists by virtue of the strong role the Member States have in the appointments process of the Court’s Judges. Yet in spite of that, we saw that the Judges are strongly insulated from extraneous influences by various structural and procedural mechanisms in place, such as: the “common accord” requirement; the independent appointments panel; the formal duties and protections afforded to the Judges, and the internal supervision by the President of the Court; the secrecy of deliberations; collegiate judgments; the use of judicial chambers; and the use, and potential use, of specialised courts.

We then considered the Court's independence from a comparative perspective – reviewing the “zones of discretion” of the ECtHR, the UK Supreme Court, and the US Supreme Court. There, we saw that the Court of Justice, by comparison, has a relatively high “zone of discretion”. Each of the three comparator courts suffered (in different ways) from jurisdictional and/or structural weaknesses. Viewed holistically, the Court's independence-enhancing credentials are, indeed, atypically strong.

The final part of the analysis posed the question of balance: how much independence is needed in the Court of Justice? As we saw in Chapter Three, intrinsic and instrumental criteria cannot be understood or applied in the abstract, and that they often conflict. This was shown to be true of independence, whereby the more insulated the Court, the less open it is to being responsive, *prima facie*. Yet we considered two responses to this: conceptual and empirical. Conceptually it was observed that there is a distinction between responsiveness and impartiality. So long as the Judges are dispassionate in their appraisal of all affected interests, then structures and processes which allow for such interests to be (re)presented to the Court can be both responsive and impartial. Empirically, and related to that point, it was observed that given the dominance of Member State power within the EU (e.g. strong intergovernmental constitutional structures) it is, in fact, necessary for Member States to have a strong role in the appointments process, in order to foster the authority and acceptance of the Court. As we shall see in the next Chapter, there is a special (intrinsic) virtue of the one-Judge-per-Member State *composition* of the Court, in spite of the process by which that composition is formed i.e. representation.

### **1. Introduction**

This Chapter examines the extent to which the structures and processes of the Court of Justice exemplify the intrinsic virtue of *representativeness*. In Section 2, the concept of democratic representation is defined, and its applicability to trustee-courts explained. Section 3 goes on to demonstrate that there are two categories of interests represented in the Court of Justice: national legal traditions, and Union legal culture. Section 4 then critically appraises the relative dominance of these categories of representation – determining whether or not, and to what extent, alternative categories and mechanisms of representation might be justified. The Section concludes by demonstrating that, in spite of a few sub-optimal consequences, the dual representation of national legal traditions and Union legal culture in the Court of Justice is both necessary and a democratically responsive solution to matters relating to the polity-conditions of the EU.

### **2. Theoretical Orientations: Symbolic and Substantive Democratic Representation in Trustee-Courts**

In this Section, the concept of democratic representation is defined, and its applicability to trustee-courts explained. Intrinsic virtues, such as representativeness and democratic participation (Chapter Six), are capable of being, and, indeed, ought to be, exemplified by trustee-courts. Yet this is achieved in different and more nuanced ways than the way in which they are exemplified by majoritarian institutions, such as parliaments.

*2.1. Representativeness: Symbolic and Substantive Democratic Representation of Holistic Public Interests*

As we saw in Chapter Three, most polities are constituted by millions of individuals, so it is simply not feasible (nor necessarily desirable) for institutions to be open to everyone for *direct* participation. Representation is, at its core, a way of resolving this problem, by identifying the salient political ambitions of the people and implementing them i.e. government *for* the people. Do the people want progressive taxation; the rights of the child to prevail over countervailing interests, such as parental autonomy; or to trade freely with other polities? Representation is about identifying salient matters of public interest, and incorporating them into institutional decision-making processes, without the actual participation of all the people.

There are two ways that institutions can identify these interests: responsiveness to the eclectic array of *disaggregated interests* of the public; and responsiveness to more *holistic* aggregations of public interest. On the former, disaggregated interests are generally understood in democratic theory as coming from “civil society”: individuals, NGOs, corporations, interest groups – promoting a cause and representing some shared political ambition or interest.<sup>479</sup> The most obvious example of this in the modern polity is the practice of lobbying in majoritarian institutions – where representatives of this sort exert pressure on governments and legislatures: for example, an environmental organisation such as Greenpeace campaigning for reduced carbon emissions.

Institutions may also take a more holistic approach to representing the public’s interests. Public interests are aggregated into some totalising concept – which could be a community of identification, or a political ideology – that members of the public feel reflects their overarching political values and ambitions. In this way, members of the public can trust the institution to make political decisions on their behalf. A commonplace example of holistic representation is the party-political system.

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<sup>479</sup> On the relationship between civil society and the public sphere, see Habermas, 1989.

Imperfect as it may be, the party political system presents the public with ideological alternatives as a “best fit” for their interests. In contemporary western polities, this typically takes the form of a choice between “right wing” and “left wing” ideologies, which take ideological approaches to an array of political issues. Members of the public who believe in greater individual autonomy, particularly in matters of economic policy, as well as social conservatism, will typically vote for right wing political parties in general elections, such as the Conservative Party in the UK, or the Republican Party in the US. After a general election, the public’s interests across this ideological spectrum will be proportionally balanced by representatives according to the relative support between party-representatives. In this Chapter, we are concerned only with holistic forms of representation. In Chapter Six, we look at the ways in which the Court of Justice allows for disaggregated interests to be represented, by granting *access* to legal actors so that they may *directly participate* in the Court’s decision-making through its structures and processes.

Holistic representation has both *symbolic* and *substantive* operational logics. Symbolically, what is important is the public’s perception of institutions and the extent to which the public recognises them as *theirs*.<sup>480</sup> This form of representation thus depends on the visible structures of institutions. The public can identify with parliaments because of their ideological structuring, which takes into account salient political matters of public interest. Furthermore, the public is endowed with the power to appoint and remove these representatives. Both of these factors function to generate confidence in the public that the parliament is responsive to their interests, whether or not this is in fact the case. Substantively, on the other hand, institutional decision-makers may rationalise their decision-making according to holistic aggregations of public interest. In this way, the ideological preferences of the public can exert an influence on various aspects of political administration e.g. legislating.

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<sup>480</sup> On the idea of symbolic representation, see Colin Turpin and Adam Tomkins, *British Government and the Constitution: Text and Materials*, Cambridge, [England]; New York, NY: Cambridge University Press, 2011: 377. They distinguish between “effective” and “symbolic/representative” parts of government, with the latter not being assessed or legitimised on actual decision-making, but as a representative symbol.



*2.2. Symbolic and Substantive Representation in Trustee-Courts*

To what extent can trustee-courts exemplify holistic forms of representation? As we saw in Chapter Four, there is a danger that institutional responsiveness may offend the instrumental requirement of judicial independence – especially judicial impartiality. There is a careful balance to be struck between responsiveness and independence, which presents itself as a particularly tricky feat in terms of substantive representation. We have seen, however, that this is achieved in observing the distinction between biased decision-making and responsive decision-making. Moreover, as we saw in Chapter Three, a good trustee-court is one that *is* responsive to salient matters of public interest, and is thus representative, insofar as it is consistent with its (secondary) fiduciary duties.

How, then, do trustee-courts represent holistically? As we saw above, holistic representation operates in relation to aggregations of interests with which the public can identify as reflecting their more general political ambitions, which serve to generate and foster the confidence and trust of the public in the institution. Those interests can be ideological, as we see in the US Supreme Court; or national, as we see in the UK Supreme Court. Furthermore, there are both symbolic and substantive elements to this form of representation. Symbolically, the necessary condition is that there is some visible structure or process of the institution with which the public can identify. In a study of the appellate court structure in the Scottish legal system, for example, Walker refers to representation as the cultivation of public confidence in institutions and a sense of public identification with the institution:

[W]hat is required is a culture of institutional compliance on the one side and a culture of public respect for and *confidence* in these institutions on the other side, with each set of dispositions reinforcing the other.<sup>481</sup>

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<sup>481</sup> Walker, 2010a: 49, emphasis added.

### The Representativeness of the Court of Justice

In the UK Supreme Court, the composition of the Justices is a sensitive issue that plays a strong role in determining public confidence in the Court. The *nationality* of the Justices – or rather, the national legal system in which they have been trained and have practised law – is a particularly salient matter of institutional posturing. The UK has three distinct quasi-autonomous legal systems – the Scottish; the English and Welsh; and the Northern Irish – over which the UK Supreme Court has final appellate jurisdiction.<sup>482</sup> It is thus important to ensure a reasonable degree of representation of these jurisdictions in the composition and the appointments of the Justices. In this way, in order for the UK Supreme Court to foster the support of the Scottish people, it is important to have Scottish Justices.<sup>483</sup> The present two Scottish Justices at the UK Supreme Court can thus be understood, and are often referred to, as representatives of the Scottish legal system, because the Scottish public, as a constituent part of the British public, has confidence in the UK Supreme Court because of its Scottish judicial incumbents. In a similar vein, as we saw in Chapter Four, in the US Supreme Court, judges are seemingly appointed on an ideological basis – observing the American public’s primary ideological cleavage between conservative Republicans and progressive Democrats.<sup>484</sup> Symbolically, this helps to generate the trust in, and acceptance of, the US Supreme Court’s decisions for the American public. For those who oppose the practice of abortion, for example, the Court’s decision in *Roe v Wade*, and the Court as a legitimate institution, is more acceptable given the presence of the putatively Republican Justices.<sup>485</sup>

Substantively, it is also important for these structures and processes to be able competently to articulate those preferences within and around institutional decision-making. The substantive implications of holistic representation in courts are more

<sup>482</sup> There are many qualifications to make here. For a useful overview, see Walker, 2010a: Chapter Two; and Himsworth, 2007.

<sup>483</sup> When the UK Supreme Court was established, there was a convention by which two Scottish judges were always appointed to the Appellate Committee of the House of Lords, which has survived in the composition of the UK Supreme Court. See House of Commons, Constitutional Affairs Committee, Judicial appointments and a Supreme Court (court of final appeal), First Report of Session 2003–04 Volume I: 17. See also the Court’s website at <http://www.supremecourt.gov.uk/>.

<sup>484</sup> See Section 4.1.3 of Chapter Four.

<sup>485</sup> Indeed, the dissenting Opinion in *Roe v Wade* was delivered by Justice Rehnquist, a Republican nominee.

problematic, however. “Democrat” Justices, for example, being motivated by liberal or progressive political preferences, cuts too close to the bone in terms of the requirement of impartial adjudication. This concern can be addressed in two ways. First, as Posner argues in relation to the US Supreme Court, the Justices of the Supreme Court do not argue according to these ideological preferences, and they sometimes argue against their own “legislative preferences” in the judicial forum because of their duties of impartiality i.e. their primary duties as trustees.<sup>486</sup> In other words, their position as Republican or Democrat Justices serves only a symbolic, confidence-generating, function. Second, the substantive input of the Justices does not need to be in the form of strategic negotiations or bias. In order for conservative or progressive views to take shape in the judicial forum, they need only be expressed, rather than relied on by one or all of the Justices. A Republican Justice may simply air the views of the conservative approach, without necessarily being persuaded by them; or persuading the other Justices of the Court.

Substantive representation in courts can also be non-ideological. In the UK Supreme Court, for example, the Scottish Justices are representatives not because they somehow advocate Scottish interests or are motivated to adjudicate according to the political preferences of the Scottish public, but because they have been trained in, and have practised, Scots law. The UK Supreme Court is thus a more competent court because its Scottish Justices are able to advise the Court on the nuances of the Scottish legal system for cases that are embroiled in the overlapping jurisdictions of the UK. Likewise, as we saw in the last Chapter, in the transnational context of the ECtHR, the judges are appointed on a one judge per State basis. The High Contracting Parties have entrenched domestic political and legal interests that they wish not to be subverted by the ECtHR’s decision-making. Symbolically, then, States, and their publics, can be confident in the ECtHR by virtue of the fact that they have a legal representative there – *their* judge. Substantively, each judge is able to advise the ECtHR’s judiciary as to the likely effects and problems any decision

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<sup>486</sup> Posner, 2005.

might pose to each State's legal and political system, without necessarily being personally motivated to decide in the State's interest.

In Section 3, we consider holistic representation in the Court of Justice. It is argued that the Court represents, via its structures and processes, two identifiable categories: national legal traditions, and an emerging autonomous Union legal culture. In Section 4, it is then argued that representing these categories in the Court of Justice is justified, and *representative* of the public, given the distinctive polity conditions of the EU, but that it leads to sub-optimal consequences.

### **3. Democratic Representation in the Court of Justice**

The argument in this Section is that the Court of Justice represents the *national legal traditions* of the Member States; and a distinct and autonomous *Union legal culture*. The following presentation will address how it does this by examining the Court's structures and processes.

Before proceeding with this analysis, it is important to clarify what these two categories entail. What kind of holistic interests are being represented? And to what extent do they differ? The issue here is the *nature of the legal system* of the EU. The back-story is a familiar one: “[t]ucked away in the fairyland Duchy of Luxembourg” the Court has been instrumental in “the making of a transnational constitution.”<sup>487</sup> Furthermore, in this process, law is not simply the *object* of integration, whereby “new common rules emerge, and in which new institutions and structures are created”, but is also “perceived as an *agent* of integration”, whereby legal actors are themselves largely in control of the direction of integration.<sup>488</sup> As such, as Stone Sweet argues, “[l]itigants and their interests are understood to be fuelling a machine

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<sup>487</sup> Stein, 1981: 1.

<sup>488</sup> Jo Hunt and Jo Shaw, “Fairy Tale of Luxembourg? Reflections on Law and Legal Scholarship in European Integration” in *Reflections on European Integration: 50 Years of the Treaty of Rome* in D. Phinmore and A. Warleigh-Lack (Eds.), Palgrave: Macmillan, Basingstoke, 2009: 93-109; Weiler, 1991; Timmermans, 2002; Dyevre, 2005; and Stein, 1981: 1-3.

operated by judges. In this view, legal integration develops a self-sustaining logic.”<sup>489</sup> And so, compounded by competing claims to supremacy (examined in Section 2.2 of Chapter One)<sup>490</sup> and visions of *finalité* (examined in Section 4 of Chapter Two),<sup>491</sup> legal actors have different expectations of the EU’s legal system. What sort of legal system is it, or what should it be? They also have different expectations of how the Court of Justice – as its apex court – fits within the broader constitutional architecture of the EU. What sort of court should the Court of Justice be? A constitutional court? A supreme court? An appellate court of last instance? The represented categories discussed in this Chapter – national legal traditions and Union legal culture – depict alternative visions of the legal system of the EU, and the proper role of its apex court – *finalité* in minor key.

### *3.1. National Legal Traditions*

The notion of national legal traditions is quite broad, and engenders a variety of characteristics to be found in the diverse constituent legal orders of the European Union. In light of the conceptual framework identified in Section 2, national legal traditions – as an holistic category of democratic representation – can be understood in both symbolic and substantive terms. Symbolically, national legal actors are used to, and have faith in, the form of their own legal orders. In other words, they are familiar with the broader institutional structures and processes within which they operate and in which *their* law is adjudicated. These forms are illustrated in the table

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<sup>489</sup> Stone Sweet, 2004: 21.

<sup>490</sup> The distinction between national legal traditions and Union legal culture is not inherently the same as competing claims to constitutional supremacy between national constitutional courts (i.e. the *Solange* jurisprudence) and the Court of Justice (i.e. *Costa v ENEL* and the reverse-*Solange* jurisprudence), but this competition generates some of the conditions that give rise to the need for the Court of Justice to be representative of these categories.

<sup>491</sup> In Section 4, the analytical distinctions between these represented categories will be considered as analogous to schools of thought on *finalité* discussed in Chapter Two: intergovernmentalism (national legal traditions); and supranationalism/statism (Union legal culture). Indeed, the represented categories exemplify the “contrapunctual” understanding of the three C’s of EU constitutionalism. See Section 4.3 of Chapter Three.

in Appendix Two.<sup>492</sup> The types of legal form are split into four distinctions: civil law and common law systems; inquisitorial and adversarial modes of legal enquiry; constitutional and majoritarian democracies; and federal, unitary and union divisions of state sovereignty. The table demonstrates that, across the 27 Member States, these traditions are all present. It also demonstrates that there is no consistent trend or pattern by which a model European tradition could be identified. It is difficult to identify any more than two Member States that share exactly the same traditions. Some Member States, such as France and Luxembourg, are, for historical reasons, very similar – they are both civilian systems; they both employ inquisitorial modes of legal enquiry; they both have limited forms of administrative review; and they are both unitary states. If we look to the UK, on the other hand, there are no other Member States that share all of its “asymmetric” common law features.<sup>493</sup> Given the diversity of the Member States, the Court of Justice – at the apex of the EU’s legal order – has been structured, and its processes designed, in such a way that seeks its recognition and acceptance by legal actors from the different legal traditions within the EU i.e. the symbolic representation of these national legal traditions. It is through these structures and processes that legal actors can gain confidence in the Court by recognising and identifying with features that reflect their own national legal traditions.

Substantively, structuring the Court in this way helps to ensure that, like it is in the ECtHR and the UK Supreme Court, the Court’s decision-making process pays due regard to the entrenched nuances of the domestic legal systems of the Member States that are affected by adjudication. It is about ensuring that there are structures and processes in place in the Court of Justice (e.g. Judges from each of the Member States, because of their knowledge of the laws of their Member States<sup>494</sup>) that allow for these nuances to be competently articulated to the Court, especially when it

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<sup>492</sup> The table illustrates four key distinctions or type of tradition, and marks them against each of the 27 Member States – pointing out the ways in which each Member State’s legal order reflects these types. Below the table, the conceptualisation of each type is given in an explanatory note.

<sup>493</sup> Himsworth, 2007.

<sup>494</sup> See Section 3.1.1.

adjudicates at the interface between national and EU jurisdictions e.g. the preliminary rulings procedure (Article 267 TFEU, discussed below).

In contrast to Union legal culture, the representation of national legal traditions comes out more strongly in the Court's structures and processes. There are four principal ways in which the Court represents national legal traditions: the composition and function of the Judges; the composition and function of the Advocates-General; the recognition and use of national languages in the Court's proceedings; and the use of the preliminary rulings procedure.<sup>495</sup> Each of these will now be addressed in turn.

### 3.1.1. The Composition and Functions of the Judges

As observed in Chapter Four, the Judges in the Court of Justice are appointed on a one Judge per Member State basis.<sup>496</sup> As such, there are 27 Judges at the Court of Justice. *Prima facie*, this means that each Member State has a "representative" in the Court's judiciary. Yet, as we saw in Chapter Four, they are not there to act in the interests of the Member State from which they have been appointed – nor should they be, given the constitutional and democratic requirements of independence and impartiality. In what sense, then, can we regard the composition of the judiciary as an example of the representation of national legal traditions?

One short (though very important) answer to this is simply that, at a purely symbolic level, this system enhances the "acceptability" of the Court's decisions by national

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<sup>495</sup> Space precludes a comprehensive analysis here. Consider also the manner in which the Court balances the adversarial mode of legal enquiry in its actions with the inquisitorial. Inquisitorial refers to the capacity of judges to *proactively* conduct investigations that will help them adjudicate. In the inquisitorial mode, by contrast to the adversarial mode, judges initiate their own investigations independently from the parties' submissions. In the Court of Justice, the judges may conduct these sorts of investigations *ex proprio motu* (see, for example *Les Verts*: para. 19); and through the use of "measures of enquiry" (see Section 2, Chapter 7, Title II RPCJ).

<sup>496</sup> The same is true for the General Court, but not the CST (see Section 3.3.1 of Chapter Four). The issue of representativeness in the CST is addressed in Section 3.2.2 of this Chapter.

### The Representativeness of the Court of Justice

legal and political actors.<sup>497</sup> This is an especially pertinent point in relation to national political actors, particularly national governments, who may feel that it is their right to have a place, or their say, in the workings of all of the EU's institutions, such is the nature and well-established practice of international, intergovernmental associations and institutions.<sup>498</sup> As we saw in Section 2, this symbolic representation serves to generate confidence in, and identification with, the Court for national political and legal actors.

Yet beyond the purely symbolic, the Court also represents national legal traditions substantively. Specifically, the Court, through its Judges' professional training and their professional interaction with one another, represents national legal traditions as a *comparative court*:

[E]ach deliberation gives rise to a 'mixing' of mentalities, cultures and legal constructions. A judgment will thus tend to be the result of 'cross' contributions of different legal systems and ways of legal reasoning ... the comparative approach nevertheless permeates the daily activities of the [Union] judge in many ways. For this reason, some commentators have called the Court of Justice and the [General Court] a 'laboratory of comparative law'.<sup>499</sup>

<sup>497</sup> Mancini presciently argues that it is likely that the one Judge per Member State system will eventually give way to the demands created by the enlargement of the EU, which, he argues, presents a "danger ... to the acceptance of the Court's rulings in the States which would no longer be represented" (Mancini, Law and Justice Foundation of New South Wales: para. 2 (1)). Indeed, the enlarged Court is now presented with sub-optimal problems (on which see Section 4 *infra*).

<sup>498</sup> The ECtHR, for example, also works on a one judge per State basis. The International Court of Justice (ICJ) and the International Criminal Court (ICC), with their significantly larger memberships, gives each signatory State a veto power in the selection of their judges. For the ICJ see <http://www.icj-cij.org/court/index.php?p1=1&p2=2>. For the ICC, see <http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Structure+of+the+Court.htm>.

<sup>499</sup> Koen Lenaerts, "Interlocking Legal Orders in the European Union and Comparative Law" (2003) *International and Comparative Law Quarterly* Vol. 52 873 (hereinafter Lenaerts, 2003): 876. See also Koen Lenaerts, "Interpretation and the Court of Justice: A Basis for Comparative Reflection", *The International Lawyer* (2007) Vol. 41 No. 4 (hereinafter Lenaerts, 2007): 1011-1078; and Thijmen Koopmans, "The Birth of European Law at the Crossroads of Legal Traditions" (1991) *The American Journal of Comparative Law* Vol. 39 493 (hereinafter Koopmans, 1991). Mancini noted that the Court's members can draw on each others' knowledge of Member States' legal systems when deciding cases, even when that particular Judge is not involved in the case at hand. This is particularly relevant in preliminary rulings. See Mancini, Law and Justice Foundation of New South Wales: para. 7 (3); and para. 10.



In this regard, the Judges are able to represent national legal traditions by bringing together their collective wisdom, which draws on the legal traditions of the Member States from which they have been selected, as part of both formal and informal professional interactions. Former Judge of the Court of Justice, Sir David Edward, writing about judicial deliberations in the Court, explains that:

In these discussions, and in the deliberations later, the role of the judge of the country from which the case comes (the so-called “national judge”) is not to urge on the Court a solution favourable to that Member State. Such advocacy would almost certainly be counterproductive. But it is important that the Court should be aware of all dimensions of the cases it has to decide. It is therefore expected that the judge of the country from which the case comes should draw the Court's attention to any special features of the case of which the Rapporteur and Advocate General may have been unaware. This may be a significant deciding factor in determining how the case should be dealt with.<sup>500</sup>

This process has both a symbolism – generating the confidence of national legal and political actors – and an influence on the substantive output and the working methods of the Court i.e. the substance of the law, and the form of the Union legal order. For example, French concepts of administrative review, such as misuse of power (*détournement de pouvoir*), violations of essential procedural requirements (*vice de forme substantielle*), and the *acte clair* doctrine<sup>501</sup> have become part of Court's jurisprudence in actions for judicial review.<sup>502</sup> Similarly, the German concept of proportionality (*verhältnismässigkeit*), and the English concept of estoppel have also become part of the Court's jurisprudence.<sup>503</sup> Similar observations can be made in relation to matters of form, such as the distinction between civil law and common

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<sup>500</sup> Edward, 1995: 553.

<sup>501</sup> See Advocate General Capotorti in Case 283/81 *CILFIT* [1982] ECR 3415 (hereinafter *CILFIT*): 3435.

<sup>502</sup> Koopmans, 1991: 500.

<sup>503</sup> Koopmans, 1991: 501; and Mancini, Law and Justice Foundation of New South Wales: para. 10 (5).

law jurisdictions.<sup>504</sup> One former Judge at the Court of Justice, and the Court of First Instance, argues that a truly European Union “common law” emerges from “the fact that the members and staff of the Court, as well as those who plead before it, have been bred in a variety of legal traditions spanning the historic divide between the so-called Civil Law and Common Law systems”<sup>505</sup> and that it achieves this by “[bringing] together in a single working institution representatives of nearly all the classical legal systems of Europe.”<sup>506</sup> A good example of this is that since the accession by the UK, Ireland and Denmark (notably common law jurisdictions) in 1973, the Court has made consistent reference to its own case-law in its judgments – thus reflecting the common law practice of *stare decisis*. The working methods of the Court’s proceedings also reflect the common law tradition through its more discursive oral hearings, which were formerly more monological in style.<sup>507</sup>

A problem with this assessment is that, since then, the Judges, as we saw in Chapter Four, are organised into judicial chambers – increasingly so as the Court and the EU expand. The result of this is that the *substantive* representation of national legal traditions is diluted. In any given case, there is no way of ensuring the involvement of a particular Judge who may be able to advise the other Judges and the Advocate-General on the salient national legal and political conditions of a Member State that might be affected by their decision. There are three ways, however, in which this concern might be mitigated. First, each of the Judges will have at least some awareness of the national legal traditions of the other Member States, which will continue to develop over time as they interact with each other formally and informally. Second, Judges considering a case may take advantage of their informal interactions – out of chambers – with relevant Judges and the members of their *cabinets*. Third, in spite of the dilution of the substantive representation of national

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<sup>504</sup> David Edward, “The Role and Relevance of the Civil Law Tradition in the Work of the European Court of Justice,” in D.L. Carey Miller and R. Zimmerman, (eds.), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays*, Duncker & Humblot: Berlin, 1997.

<sup>505</sup> Edward, 1995: 540.

<sup>506</sup> Edward, 1995: 548.

<sup>507</sup> See Koopmans 1991.

legal traditions in judicial chambers, the one Judge per Member State appointments system still holds its symbolic significance.

Another problem with the current composition of the Judges is that it does not take into account the quasi-autonomous legal systems that operate at the sub-state level, such as, for example, the Scottish legal system. In a conference held in 1980 on the reform of the Court – attended by the Judges and Advocates-General of the Court of Justice, and academics – many of the issues outlined above were the main focus of the discussions.<sup>508</sup> One of the initial observations made by Professor (soon to be Advocate-General) Francis Jacobs was:

[I]n some respects I would say that the Court of Justice is, or ought to be, a representative court. That does not mean that the Judges ought to represent the political views of governments, and of course there is no place in the European Court for judges like some in other international courts, spokesmen for the national interest; but it does mean that they should represent the legal backgrounds from which they come, and that the Court itself should embody *the variety of legal and political cultures which make up the Community*.<sup>509</sup>

He then went on to propose that the Judges be appointed on a per *legal system* basis, as opposed to a Member State basis. He argued, for example, that there ought to be a Scottish Judge, an English Judge and a Northern Irish Judge from the UK, given that these are distinct legal systems.<sup>510</sup> Ultimately, however, these proposals were rejected on the basis that national legal traditions are satisfactorily represented by the prevailing one Judge per Member State system.<sup>511</sup> Moreover, again, in today's enlarged Court, representing quasi-autonomous legal systems in this way would be

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<sup>508</sup> See IEE, 1980.

<sup>509</sup> IEE, 1980: 15, emphasis added.

<sup>510</sup> IEE, 1980: 15-17.

<sup>511</sup> Indeed, the reform in the Nice Treaty in 2001 – to make explicit the one Judge per Member State requirement – was justified, in part, by the argument that this system satisfactorily represents “national legal orders”. See the Due Report: 46. See also an earlier articulation of this logic in Edward, 1995.

even less feasible. This problem is redressed to a large extent anyway by the existence of the preliminary rulings procedure (Section 3.1.4).

### 3.1.2. The Composition and Functions of the Advocates-General

Formally, the role of the Advocate-General is a quasi-judicial one, and they are subject to the same constitutional safeguards of independence as the Judges.<sup>512</sup> The Advocates-General take part in cases by assisting with the procedural administration of the cases; making “reasoned submissions” in open court; and, finally, preparing and presenting a written legal opinion – very much in the style of a judgment – to the Judges *before* they begin their deliberations.<sup>513</sup> Compositionally, according to Article 252 TFEU, the Court of Justice shall be assisted by eight Advocates-General;<sup>514</sup> and the Court may request an increase to eleven with the unanimous consent of the Council.<sup>515</sup> This composition is also sensitive to the Member State from which each Advocate-General comes, although it is not explicitly designed as such in the Treaties. There are five that are, by convention, always appointed from the five “big” Member States: France, Germany, Italy, Spain, and the UK. The three remaining Advocate-General positions are the nominees of three of the remaining 22 Member States, each of which will have to wait their turn to fill one of these three

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<sup>512</sup> Article 252 (2) TFEU; and Article 8 SCJ. The Advocates-General are also members of the Court of Justice appointed on the basis that they are “persons whose independence is beyond doubt” (Article 253 TFEU).

<sup>513</sup> Article 252 (2) TFEU. See generally Title III SCJ. See also Edward, 1995: 555. In Chapter Six, we consider their roles in more depth. In particular, it is shown that their duty to submit a written opinion is analogous to that of “pioneering research” (Kirsten Borgsmidt, “The Advocate General at the European Court of Justice: A Study” (1988) *European Law Review* 106 (hereinafter Borgsmidt, 1988): 108), and, as such, represents a mechanism of access to democratic participation.

<sup>514</sup> The General Court has a different system in operation. Article 49 (1) SCJ provides that members of the General Court’s judiciary may be “called upon to perform the task of an Advocate-General” and Article 2 RPGC further provides that *any* member, except the General Court’s President, may perform this role. There are thus no extra members of the General Court that perform the role of Advocate-General, where the function is performed by the General Court’s Judges on a case-by-case basis in accordance with the rules set out in the RPGC (Article 49 (3) SCJ). According to Article 17 RPGC, this happens when case is head by the GC in plenary sessions. This happens vary rarely (see GC, Statistics concerning the judicial activity of the General Court, Annual report 2011: 200. There are no Advocates-General at the CST.

<sup>515</sup> If there is an increase to eleven Advocates-General, then Poland will acquire a permanent Advocate-General, leaving five rotational positions. Declaration of Article 222 TFEU on the number of Advocates-General in the Court of Justice, (Lisbon, 2007) DS 866/07.

positions.<sup>516</sup> The majority of Member States (at any one time, as it stands at present, 19 Member States) have no Advocate-General at all, and will have to wait up to 42 years for their turn.<sup>517</sup>

In this respect, *prima facie*, the composition of the Advocates-General does not represent national legal traditions. Yet there are reasons to reject this view, or, at least, to be sceptical of it. First, national legal traditions transcend the “per Member State” boundary. As we have seen in the table in Appendix Two, there are at least four taxonomies of national legal traditions. Looking at the table more closely, the five Member States who permanently have an Advocate-General have been highlighted. The table shows that each of these Member States is sufficiently different from the others and that they represent *all* of the national legal traditions, at least in terms of the *form* of their legal orders. In fact, even if we were to remove Italy and Spain, this would still be the case: France – the archetype civilian, inquisitorial system – is a unitary state with relatively weak forms of administrative review; Germany is a federal state, with a codified system of law which recognises judicial precedent and has a strong system of judicial review; and the UK – with its “union” of common law legal orders – employs an adversarial legal process, and has relatively weak powers of judicial review in all of its jurisdictions. At a purely symbolic level, national legal actors familiar with each form of legal tradition can feel confident that the system to which they are used is represented in some combination of the Advocates-General. An Austrian lawyer, for example, used to dealing with a federal court structure, but one that has inquisitorial processes, may feel confident that the French and German Advocates-General understand, and are

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<sup>516</sup> At present, those members are the nominees of Finland, Slovenia and (recently appointed) Belgium. The current members’ profiles can be viewed on the Court’s website at: [http://curia.europa.eu/jcms/jcms/Jo2\\_7027/](http://curia.europa.eu/jcms/jcms/Jo2_7027/).

<sup>517</sup> Article 253 TFEU stipulates that the tenure of the Advocates-General is, like for the Judges, six years, and that there will be a partial replacement every three years (except that the Advocates-General from the “big five” Member States may stay on). Article 9 SCJ stipulates that four Advocates-General are to be replaced – or, in the case of the “big five”, potentially renewed – on each occasion. For the Member State who is last in line, they will have to wait up to 42 years for their turn. With 19 Member States on rotation and only three rotational positions, and with a full replacement of those three positions every six years, the calculation is  $19/3 = 6.3$ , rounded down to 6; then  $6 \times 6 + 6 = 42$  years.

sensitive to, the demands of these structures, in spite of the fact that there may be no Austrian Advocate-General.

Second, in functional terms, the Advocates-General assist adjudication as expert advisors on legal matters pertaining to each case.<sup>518</sup> This function is implemented primarily through the submission of an opinion, which is very much in the style of a judgment. This process simultaneously symbolises both inquisitorial and common law systems. On the former, the historical roots of the office was modelled on the French *commissaires du gouvernement* for the *Conseil d'Etat*.<sup>519</sup>

Yet, at the same time, it was felt by those from the common law tradition that collegiate judgments were unsatisfactory, with their lack of discursively framed deliberations and dissenting opinions. The invocation of the Advocate-General's opinion was thus a compromise that was reached, and one which continues to this day to be a satisfactory consolation for legal actors from the common law tradition who find it hard to accept the apparent rigidity of the Court's judgments.<sup>520</sup>

Third, in substantive terms, the advisory role of the Advocates-General is, as with the Judges, amenable to comparative reasoning and influence. Given that within the permanent five, there is a sufficiently broad range of experience of the different forms of legal traditions, the Advocates-General may adopt a similarly reliable comparative approach to their written opinions. For example, Advocate-General Léger compared the laws of 15 Member States (the EU's full membership at that time) in relation to the right of access to information held by public authorities in *Council v Hautala*.<sup>521</sup>

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<sup>518</sup> For a useful break-down of the various ways the Advocates-General assist with the "legal reasoning" of the Court, see Norreen Burrows and Rosa Greaves, *The Advocate General and EC Law*, Oxford: Oxford University Press, 2007 (hereinafter Burrows and Greaves, 2007): 29. See also Edward, 1995: 555.

<sup>519</sup> Rapport de la délégation Française sur le traité instituant la Communauté Européenne du Charbon et de l'Acier; Ministère des Affaires Etrangères, Paris, Octobre 1951: 32.

<sup>520</sup> See, for example, Burrows and Greaves, 2007. See also Edward, 1995: 555.

<sup>521</sup> Case C-353/99 P *Council v Hautala* [2001] ECR I-9565.

Given these observations, the Advocates-General have both strong symbolic and substantive representative qualities with respect to national legal traditions. Following on from the discussion in Section 3.3.3 of Chapter Four, their role compensates for the democratic deficits observed in relation to the Court's single collegiate judgments. Whilst the Advocates-General opinions are not "dissenting opinions", as we saw above, the separate opinion is a compromise between competing interests of national legal traditions i.e. common law and civil law systems. As we shall see below, their opinions also serve to represent Union legal culture. Their capacity to be representative is thus virtuous in its accommodation of a complex array of competing intrinsic (representativeness) and instrumental requirements. Even within the representation of national legal traditions, the role of the Advocates-General manages to pacify the competing interests at stake (as above); not to mention the representation of Union legal culture, and the instrumental requirement of independence, the latter of which is preserved by the system of collegiate judgments that has been accepted by those familiar with the common law system by virtue of the Advocates-general opinions.

### 3.1.3. National Languages

The "General Presentation" section of the Court's Website opens with this statement on language in the Court:

As each Member State has its own language and specific legal system, the Court of Justice of the European Union is a multilingual institution. Its language arrangements have no equivalent in any other court in the world, since each of the official languages of the European Union can be the language of a case. The Court is required to observe the principle of multilingualism in full, because of the need to communicate with the parties in the language of the proceedings and to ensure that its case-law is disseminated throughout the Member States.<sup>522</sup>

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<sup>522</sup> See [http://curia.europa.eu/jcms/jcms/Jo2\\_6999/](http://curia.europa.eu/jcms/jcms/Jo2_6999/).

There are 23 official languages recognised by the EU, all of which can be used in legal proceedings before the Court of Justice. Participants in and members of the Court of Justice will naturally be from different linguistic backgrounds. The question here is how the legal process of the Court allows for the use of these multiple languages. First of all, each case is assigned one of the official languages, as chosen by the applicant, or the national court in preliminary rulings procedures; except in cases where the defendant is a Member State or a natural or legal person, in which case the language of the case will be determined by their choice.<sup>523</sup> The language of the case determines the operating language of the documents and oral proceedings of the case (except for the purposes of Member State intervention).<sup>524</sup> The Judges and Advocates-General are free to use any one of the official languages in the oral proceedings,<sup>525</sup> and they may require that any evidence be submitted with a translation in a language of their choice.<sup>526</sup> By convention, however, the operating language of the Judges and Advocates-General is French.<sup>527</sup> Furthermore, the Court of Justice has an extensive translation service, as well as having staff who are competent in many of the official languages of the EU – especially the Registrar.<sup>528</sup> This service functions to translate supporting documents that have been prepared in languages different to the language of a given case; to translate the oral or written testimony of witnesses or experts; and to translate the opinions, judgments and reports of the Judges and Advocates-General into the language of the case.<sup>529</sup> Finally, the translation service translates the publications of the Court i.e. the judgments and the opinions of the Advocates-General.

The general point to take from this is that much is done to ensure that the various actors coming from different Member States and national legal traditions – many of

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<sup>523</sup> Chapter 8, Title I RPCJ; and Article 35(2) RPGC. The provisions in the RPGC governing language arrangements apply to the CST (Article 29 RPCST).

<sup>524</sup> Article 38 (4) RPCJ; and Article 35 (3) RPGC.

<sup>525</sup> Article 38 (8) RPCJ; and Article 35 (5) RPGC.

<sup>526</sup> Article 38 (2) (3) RPCJ; Article 35 (4) (5) RPGC.

<sup>527</sup> Edward, 1995: 546.

<sup>528</sup> Article 39 RPCJ. The General Court does not have its own translation service, but its Registrar is generally responsible for ensuring that translation is provided where necessary, see Article 36 RPGC. Indeed, linguistic skill is one of the Registrar's required qualifications for the post.

<sup>529</sup> Paragraph 5 of Article 29 RPCJ for the Court of Justice and Paragraph 5 Article 35 RPGC for the General Court.



whom may not be proficient in a language other than one of their national languages – are capable of participating and understanding everything they need to understand. By adopting an inclusive approach towards the many different languages spoken within the Union, the Court fosters public confidence in national legal actors; as well as allowing for substantive representation.

There are a few problems to note here, however. First, the official languages that are recognised by the Court only account for linguistic communities as they appear in their Member State form. In other words, the Court does not represent regional languages (e.g. Welsh) or dialects. Once again, the dominance of the Member State-centric logic appears as a more favourable criterion of national identification. Second, there is a more subtle problem in relation to the working language of the Judges and Advocates-General. Edward and Mancini both point out, for example, that the use of French by the Judges and Advocates-General “is criticised on the ground that it gives an unacceptable predominance to French as the language of [Union] law, or that it unduly favours francophones or, more generally, that it favours French or ‘continental’ legal culture.”<sup>530</sup> Indeed, it may prove to be cumbersome to those members of the judiciary whose French skills are comparatively weak. However, short of radically altering the deliberations process, there does not appear to be a satisfactory solution to this problem. Naturally, with one Judge per Member State, there are always going to be, at least, 23 “mother tongues” at the table. Finally, given the multiplicity of languages and documents involved, this presents significant economic constraints on the working of the Court. The translation service must be staffed by numerous individuals proficient in several languages; and must function to make the sure the many documents involved in the legal proceedings – those published and those that are not – are translated. This relates to the discussion in Section 4, where I argue that the polity-conditions of the EU (the multiplicity of languages being a strong feature of which) justify sub-optimal performance issues of the Court (in this case, the costs associated with the translation service).

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<sup>530</sup> Edward, 1995: 546. See also Mancini, Law and Justice Foundation of New South Wales: para. 10.

3.1.4. The Preliminary Rulings Procedure

Article 267 (1) TFEU (ex Article 234 TEC (pre-Lisbon)) provides that the Court of Justice has “jurisdiction to give preliminary rulings” on “(a) the interpretation of the Treaties” and “(b) the validity and interpretation of [Union Acts]” when references are sent by national courts.<sup>531</sup> It is an action through which national courts – and, by association, national legal actors – can have matters of national and Union law clarified by the Court of Justice. The procedure involves a dialogue between national courts and the Court of Justice. In this way, national courts act as representatives of their national legal traditions, articulating, clarifying, and negotiating the most salient concerns of the beneficiaries of the national legal systems at the interface between national and Union law. Moreover, Article 267 (3) TFEU provides that “any court or tribunal of a Member State” may make a reference, insofar as it is “necessary to enable it to give judgment” (emphasis added). The Court has taken a relatively liberal approach in determining the types of institutions that qualify as a “court or tribunal”. A referring institution must be acting in a “judicial capacity”, which means that it must be addressing questions of law that arise in relation to a dispute, and that it must be able to settle the dispute authoritatively.<sup>532</sup> It must also establish that it is sufficiently independent from the institution(s) that established the laws or rules that form the subject-matter of the reference to the Court of Justice.<sup>533</sup> These rules thus do not exclude judicial forums that are not formally part of national court structure. The Court has allowed various administrative tribunals – for example, administrative bodies set up to address disputes over taxation – to refer questions of Union law.<sup>534</sup> This means that *ad hoc* tribunals and “private” dispute resolution bodies can make references.

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<sup>531</sup> See Appendix One, and Section 3.3.2 of Chapter Six for a more detailed account of the preliminary rulings procedure.

<sup>532</sup> Case C-134/97 *Victoria Film* [1998] ECR I-7023; and Case C-111/94 *Job Centre* [1995] ECR I-3361.

<sup>533</sup> Case C-24/92 *Corbiau* [1993] ECR I-1277; Case C-54/96 *Dorsch Consult Ingenieuresellschaft v. Bundesbaugesellschaft Berlin* [1997] ECR I-4961. For a more detailed examination of these rules, see Takis Tridimas, “Knocking on Heaven’s Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure” (2003) *Common Market Law Review* Vol. 40 No. 1 9 (hereinafter Tridimas, 2003): 27-34.

<sup>534</sup> *Ibid.*

The preliminary rulings procedure is not an appellate system, and neither does it engender a hierarchical relationship between national courts and the Court of Justice. It is generally regarded as one of the EU's more successful enterprises.<sup>535</sup> Giving access to lower-tier national courts is very much a part of that success. It generates a greater degree of public confidence in the Court of Justice, and the EU's legal system, inasmuch as the various national legal traditions within the Union are being represented, both symbolically and substantively. Indeed, this system addresses the concerns to which Francis Jacobs referred in his arguments for reform of the composition of the judiciary.<sup>536</sup> Lower-tier Scottish courts and Northern Irish courts, for example, become part of the overarching legal system of the Union – generating confidence in those legal actors in the national context who feel that they are a part of the Union's legal system; as well as providing them with the opportunity to articulate the nuances of their legal systems and laws to the Court of Justice.<sup>537</sup>

### *3.2. Union Legal Culture*

In this Section, Union legal culture is examined using the same analytical framework as national legal traditions – being understood as an holistic interest in both symbolic and substantive terms. The European Union has, since the early 1960s, been developing its own autonomous legal order – much of which has been defined by the Court of Justice itself.<sup>538</sup> In substantive terms, much of this is the result of this is an array of general legal principles that have the force of law, such as legal certainty, legitimate expectations, non-retroactivity, proportionality, non-discrimination, equality and fundamental (human) rights.<sup>539</sup> In fact, here there is a synergetic relationship between national legal traditions and Union legal culture. The EU's legal order is, to a large extent, a synthesis of the commonalities of the national legal

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<sup>535</sup> Tridimas, 2003: 30.

<sup>536</sup> See IEE, 1980: 15-17.

<sup>537</sup> On the strategic use of references by national courts, see Nyikos, 2006.

<sup>538</sup> See Section 2.1 of Chapter One.

<sup>539</sup> See Leczykiewicz, 2008; and Section 2.1.3 of Chapter One.

traditions of the Member States as they are applicable in a newly emerging EU legal order.<sup>540</sup> Koen Lenaerts, the present Belgian Judge and newly elected Vice President of the Court of Justice, argues that these jurisprudential developments at the EU level have explicitly and implicitly been drawn from the national legal traditions of the EU's Member States by the Court of Justice acting as a "comparative court".<sup>541</sup> He argues that in cases such as *Internationale*, and in Treaty provisions such as Article 6 (3) TEU and Article 340 TFEU (ex Article 288 TEC), EU jurisprudence has explicitly paid due regard to the "general principles common to the laws of the Member States" as a guiding hand in the development of general principles of EU law. We can thus view the development of *Union legal culture* as part of a process in which the national legal traditions of the Member States play a significant *formative* role. Yet the broader significance of this process of juridification is that there is a separate and autonomous Union *legal system*. For the relevant actors here, there is a vested interest in sustaining and developing the EU's emerging legal system and culture as one that is autonomous and distinctive with respect to its constituent national legal systems. In this way, the influence of national legal traditions on the development of the EU's legal order is formative, but conditional on the approval of central EU legal actors – especially the Court of Justice.<sup>542</sup> The preservation and development of a Union legal culture, is, then, itself, a represented category within the Court's structures and processes, both symbolically and substantively.

In this sub-section, the structures and processes of the Court of Justice that represent these interests will be demonstrated. There are three principal ways that this is achieved: the structures and processes of institutional independence (as identified in Chapter Four); the composition and functions of the Advocates-General; and the procedural mechanisms that ensure a Union-centred singularity of legal voice. Although not always mutually exclusive, each of these will now be addressed in turn.

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<sup>540</sup> Koopmans, 1991; Lenaerts, 2003; and Lenaerts, 2007.

<sup>541</sup> *Ibid.*

<sup>542</sup> See, for example, the constitutive developments in cases such as *Van Gend en Loos*, *Costa v ENEL*, *Internationale Handelsgesellschaft*, *Omega*, and *Kadi*.

3.2.1. Independence

One important way that Union legal culture is represented is through the independence of the Court itself. In Chapter Four, it was argued that the independence of the Court – as a trustee-institution – was vital to secure the impartial adjudication (and therefore interpretation) of law, which serves to bolster the Court’s instrumental democratic legitimacy. Here, however, there is a subtle distinction to be made between the former rationale for independence, and independence as a mechanism that fosters the representation of Union legal culture. As we saw in Chapter Four, the utility of the mechanisms of independence was largely about insulating the Court from the undue influence of national legal and political forces. Here it is important to focus on the distinction between national legal traditions and Union legal culture a little more closely. There is an apparent tension between the two categories. The sustained cultivation of a distinct and autonomous Union legal culture exists, to a large extent, in a zero-sum tension with the preservation of national legal traditions.<sup>543</sup> The extent to which there can be such an autonomous and self-standing Union legal system depends, to a large extent, on the partial relinquishment of national legal traditions. The insulation of the Court of Justice from Member State influence thus plays its part in the cultivation of a distinct and autonomous Union legal system by further reducing the reach, and thus the impact of, national legal institutions in the constitution of the Union legal system. By having an independent Court, with independent members, the Court and its legal actors have greater control over the fate of the development of the Union’s legal system. The survival and resolute application of EU law depends, to a large extent, on these institutional mechanisms of independence and insulation.

All the greater the significance, then, is the use of the CST and the proposals for other specialised courts.<sup>544</sup> By dividing up judicial labour into institutions composed of expert and experienced legal actors, under the remit of the vindication of *Union*

<sup>543</sup> In Section 4, it will be shown how this tension manifests negative-sum consequences.

<sup>544</sup> On the independence of the CST, see Section 3.3.5 of Chapter Four.

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law, these fields of professional practice become more insulated from national legal and political processes. They become more deeply embedded within the infrastructure of the Union legal system. The appointments process for the Court of Justice and the General Court can also be regarded as representing Union legal culture.<sup>545</sup> As we have seen, the Judges in both of these courts are appointed on a *one judge per Member State* basis, exposing them somewhat to the influence of national political and legal interests. Yet there are two factors within this process that mitigate this control, and exemplify the representation of Union legal culture: the “common accord” requirement, and the consultation of the appointments panel.<sup>546</sup> These requirements are symbolic of a process that counterposes exclusive Member State influence in favour of a centralised Union appointments process. Notwithstanding the functional limitations of the panel (i.e. its *advisory* role), it also substantively represents Union legal culture insofar as “one of [its members] shall be proposed by the *European Parliament*”.<sup>547</sup> Given that the deliberations of the panel are evidence based, where “[t]he panel may ask the government making the proposal for appointment to send additional information or other material which the panel considers necessary for its deliberations”,<sup>548</sup> the result here is an objective process of expert scrutiny of candidates, which ultimately restricts, or negatively influences, the degree of autonomy each Member State has in appointing a Judge – substantively representing the (desired) autonomy of the EU’s legal order. For those with a vested interest in the cultivation of a Union legal culture, the role of the EP here will be a welcome development.

#### 3.2.2. The Advocates-General

The second way Union legal culture is represented is through the composition and functions of the Advocates-General.<sup>549</sup> Symbolically, because their composition is

<sup>545</sup> See Section 3.3.1 of Chapter Four.

<sup>546</sup> See Section 3.3.1.1, and Section 3.3.1.2 of Chapter Four, respectively.

<sup>547</sup> Article 255 (2) TFEU, emphasis added.

<sup>548</sup> Skouris, 2010: 3.

<sup>549</sup> See *supra* at Section 3.1.2.

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not on a *per Member State* basis, it is much less nationalistic; and signifies another structural feature within the Union legal system over which Member States have less control. Substantively, as we saw above, the key function of the Advocate General is to provide an opinion on cases. Whilst there is scope for symbolic and substantive representation of national legal traditions within this process (as outlined above), the primary remit of the opinion is to assist the Judges with their deliberations with respect to *EU law*, insofar as it is the Court's duty (and, *a priori*, the duty of the Advocate General) to "ensure that [EU] law is observed" (Article 19 (1) TEU).<sup>550</sup> The submission of opinions exemplifies the Court's concern for robust legal reasoning, which necessarily reflects the interests of those who envisage an effective and autonomous system of EU law; as well as to represent EU law in accordance with its Treaty enshrined autonomy. Indeed, one of the decisive factors that establishes the necessity of an Advocate-General's opinion is whether or not the case at hand "raises a new point of law"<sup>551</sup> or, in the General Court, an Advocate General is used where there is "legal difficulty or the factual complexity of the case so requires".<sup>552</sup> Their role thus has quite a close relationship to jurisprudential development, and serves as a guiding hand to the ends of establishing an autonomous Union legal culture, which, as we saw above, is virtuous in its capacity to accommodate competing interests within and between representativeness; as well as instrumental democratic legitimacy i.e. institutional independence.

#### 3.2.3. The Singularity of Authoritative Legal Voice

The final way that Union legal culture is represented – here, in substantive terms – is through procedural mechanisms designed to ensure the singularity ("integrity" *qua* Dworkin, 1996; or "coherence" *qua* MacCormick, 1994) of voice in the EU legal system. To that end, a significant feature of the Court's jurisprudence, and the rationale by which the Court's designers have ordered the Union's court structure, is

<sup>550</sup> See Burrows and Greaves, 2007: 29.

<sup>551</sup> Article 20 (5) SCJ.

<sup>552</sup> Article 49 SCJ; and Article 18 RPGC.

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the requirement of the “uniform” application of EU law across the Member States. First, the Court of Justice acts as a court of appeal,<sup>553</sup> as well as being able to review the decisions of the General Court on the instruction of the First Advocate General for the purposes of preserving the “unity and consistency of EU law”.<sup>554</sup> Additionally, under Article 3 SCJ and Article 8 SCJ, the Court of Justice has the responsibility of hearing disciplinary proceedings for the General Court’s members. This quasi-hierarchical system is designed to ensure, generally speaking, the effective administration of Union law and, in particular, by the “unity and consistency of EU law”. Indeed, it is for precisely this reason that the General Court, although having a *prima facie* jurisdiction to hear preliminary rulings under Article 256 (3) TFEU, has never been enabled to exercise it.<sup>555</sup> There has been some debate as to whether or not the General Court should be competent to exercise this jurisdiction,<sup>556</sup> and the most common argument against this is that in order for there to be uniform application of EU law across the diverse national legal systems of the Member States, and for coherence thereof, the Court of Justice, as a single institution, must be responsible for directing EU jurisprudence in light of those requirements. The involvement of the General Court would only serve to fragment this jurisprudence and thus undermine the coherence and general effectiveness of Union law. Placing jurisprudential supremacy within the Court of Justice, for the purposes of jurisprudential “unity”, ensures that the substance and form of the Union’s legal system is effectively and systematically represented in proceedings

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<sup>553</sup> Article 56 SCJ.

<sup>554</sup> Article 62 SCJ.

<sup>555</sup> Article 256 (3) TFEU: “[t]he General Court shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267, in specific areas laid down by the Statute.” However, Point 3 of Information Note “On References from National Courts for a Preliminary Ruling (2009) OJ C 297/01 states: “Since no provisions have been introduced into the Statute in that regard, the Court of Justice alone has jurisdiction to give preliminary rulings.”

<sup>556</sup> See the opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445, where he argues that “[t]he uniform interpretation of [Union] law must, without exception, remain subject to the jurisdiction of the Court of Justice for preliminary rulings . . . the [General Court] should not be asked to share the task . . . The day that two different interpretations are given by the two Courts in respect of the same precept of [Union] law, the death knell will sound for the preliminary-ruling procedure” (para. 74 of the Opinion). See also Bo Vesterdorf, “A Constitutional Court for the EU” (2006) *International Journal of Constitutional Law* Vol. 4 No. 4; Angus Johnston, “Judicial Reform and the Treaty of Nice” (2001) *Common Market Law Review* Vol. 38 499; and Tridimas, 2003: 13. We look at counter-arguments in Section 4 – in particular, see Pescatore, 1983; and Komarek, 2007.



before the Court, as well as national courts. The internal hierarchy ensures that, formally at least, Union law and legal culture has this internally ordered quality. One significant manifestation of this is that – in spite of its imperfect realisation – it has uniform effects across the Member States.

### *3.3. Interim Conclusions*

Before moving on to discuss the question of balance, it is worth recapping the dynamics of representation in the Court of Justice. As we have seen, the Court's structures and processes symbolise and substantiate the national legal traditions of the Member States, as well as an emerging autonomous Union legal culture. There are aspects of conflict (and, in ways outlined above, synergy) here between these two forms of holistic representation. This is because each serves to represent two distinct democratic constituencies. First, under the rubric of national legal traditions, there are those who favour a Union legal system that simply reflects, and does not trespass on, the prevailing systemic and substantive characteristics of national legal systems – what we can understand, in contrapuntual terms, as intergovernmentalism in minor key. Yet we see that, given the diverse range of national legal traditions across the 27 Member States, this constituency is itself one of a contested nature, giving rise to countervailing forces on the Court's structural and procedural design even before we consider Union legal culture. Second, Union legal culture represents a constituency that sees the Union legal system as something that naturally overlaps with Member State systems, but which ultimately must be self-standing – supranationalism or statism in minor key – imposing on the Court's designers another set of criteria to be responsive to. In the next Section, we evaluate the balance between these two categories, and in light of alternative ways of designing a representative Court.

#### **4. Questions of Balance: Understanding Representativeness in the EU**

In Section 3, we saw that the two dominant categories of representation in the Court of Justice were national legal traditions and Union legal culture. In this Section, we are concerned with understanding representativeness in the complex, contested and ever-changing context of the EU. Is it justified that these two categories are the focus of representation? What about other processes or categories: elections to the judiciary; statistical categories, such as diversity on the bench; or ideological representation? These arguments will now be addressed in turn.

A good trustee-court could not credibly allow for public elections to the bench. As a matter of priority – constitutionally and democratically – courts must be impartial adjudicators of the established rules of law of the polity; and independent from the arbitrary and ephemeral whims of majoritarian politics. Subjecting potential judges to popular elections significantly undermines their capacity to adjudicate on matters of law impartially. This is because judges running for office would have to convince the public why they are the best candidates, which could have negative repercussions should they be successful. In particular, judges would be held accountable by the public for the decisions they subsequently make against the promises they made in their campaign, or, at the very least, feel obligated to adjudicate according to those promises. Judges would become embroiled in matters of politics – adjudicating on the basis of a political mandate and motivated to do so by the possibility of being punished or rewarded by the public during elections. Such biases are even likely to penetrate any potential shielding mechanisms, such as anonymous judgments and secret deliberations (both of which are practised in the Court of Justice), because judges may feel personally obligated to remain true to their election promises; to themselves and in front of the other judges. If this latter hypothesis is correct, then judicial impartiality will have been compromised. If it is incorrect, then the elections process will have been rendered both toothless and dishonest. In other words, the point of having popular elections is to hold the office-bearers to account for their

decisions. Accountability, in this form, encroaches too far into the requirements of independence in trustee-courts.<sup>557</sup>

What about representing statistical categories, such as the ethnicity, sex, and religious beliefs of the Court's Judges? Solanke considers the extent to which the Court of Justice's composition of its members does and *should* conform to the requirements of "diversity".<sup>558</sup> She argues that, in the first place, the Court is, and has always been, composed of predominately white males,<sup>559</sup> and that given the lack of "minority representation" in the Court, the appointments process should incorporate the requirement of diversity by having sufficient levels of black and female judges being appointed by central Union institutional processes, which, she argues, "could increase the Court's legitimacy by providing a second, European Union level, source of legitimacy. Diversity of the members would act as a third, Court-level source of legitimacy."<sup>560</sup> Her argument is premised on the notion that a diverse judiciary will ensure "a more independent court" and that this is down to both the symbolic element of representation, as well as the substantive element. In other words, she argues that, in addition to there being greater public recognition and acceptance of the judiciary, the judges' deliberations will be better inasmuch as they are more independent because of the diversity of views being represented.<sup>561</sup>

What about ideological representation? As we have seen, the Justices of the US Supreme Court are appointed by the Federal Government.<sup>562</sup> It is commonly understood that these appointments are made on the basis of the ideological

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<sup>557</sup> In the US, elections to the bench are carried out in 22 of the States. For discussions on this issue, see Seth Andersen and Rebecca Kourlis, "How it Works, Judicial Selection in the States, Why it Matters" (2008) Institute for the Advancement of the American Legal System, University of Denver. See also "Election vs. Appointment" (2012) Justice at Stake Campaign, available at [http://www.justiceatstake.org/issues/state\\_court\\_issues/election-vs-appointment/](http://www.justiceatstake.org/issues/state_court_issues/election-vs-appointment/).

<sup>558</sup> Iyiola Solanke, "Diversity and Independence in the European Court of Justice" (2008-9) *Columbia Journal of European Law* 89 (hereinafter Solanke, 2009). At the time of this study, there are five female Judges and all 27 judges are white. Three of the eight Advocates-General are female and they are all white.

<sup>559</sup> Solanke, 2009: 91.

<sup>560</sup> Solanke, 2009: 114. See generally Part IV of her paper.

<sup>561</sup> Solanke, 2009: 114.

<sup>562</sup> See Section 4.1.3 of Chapter Four.

preferences of the appointing Government, where a Republican administration will appoint a Republican Justice.<sup>563</sup> Consequently, the primary category of representation that dominates the appointments process in the US Supreme Court is the distinction between the putative “conservatives” and “liberals”,<sup>564</sup> leaving the public concerned with whether or not these ideologies are evenly represented in the Supreme Court.

In light of these views, we might ask whether or not the different categories outlined should be represented in the Court of Justice, instead of national legal traditions and Union legal culture? Also, how would we go about answering this? What are the relevant measures of (democratic) legitimacy for this assessment? As argued in Chapter Three, in answering how the Court can be, for example, representative, it is important to consider the broader polity conditions within which the Court functions. In order to answer how the Court can be representative – or to appraise critically the representation of national legal traditions and Union legal culture within the Court’s structures and processes – we must consider the polity-conditions, and, in particular, the contested nature, of the EU. By measuring this, we can determine the most salient matters of public interest vis-à-vis the EU as a way of gauging the representativeness of the Court of Justice. Considering the US ideological context for illustration, the ideological cleavage between Republicans and Democrats is *the* dominant force in American political thought.<sup>565</sup> As such, there is an understandable place for a system of representation and accountability in the US Supreme Court. Lininger’s argument is that appointing Justices on the basis of the prevailing ideological cleavage in US politics delivers this sort of legitimacy, referring to it as

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<sup>563</sup> See Friedman, 2005: 277-278. For a sceptical view of this assessment see Posner, 2005.

<sup>564</sup> Of course, there are other forms of ideology capable of being represented in courts. For example, it has been argued that there is a lack of feminist representation in the UK Supreme Court. See Rosemary Hunter, Clare McGlynn, Erika Rackley, *Feminist Judgments: From Theory to Practice*, Hart Publishing, 2010. For a summary of the issues addressed in the book see <http://www.guardian.co.uk/law/2010/nov/11/feminism-improve-judicial-decision-making?intcmp=239>.

<sup>565</sup> Hix would thus concur that the US’s system of party-political elections to Congress is justifiably centred on this cleavage (see Section 2.2.1 of Chapter Two).

“the salutary effect of intense public scrutiny” and “a vindication of democratic power as expressed in the Senate’s ‘advice and consent’ function.”<sup>566</sup> He argues:

Public engagement in the selection of new Supreme Court justices brings a measure of accountability and increases awareness of Court’s [*sic*] important work ... Public outcry has been beneficial in keeping unqualified nominees off the Court. Perhaps Harriet Miers would be wearing a robe right now if the public and the media had not been so vigilant.<sup>567</sup>

The question we are concerned with here is whether there is an equivalent in the EU? As we saw in Chapter Two, the deep contestation over *finalité* underpins much, if not all, of the political and institutional debates on the future of the EU. This is the equivalent contestation for which we are looking. With this in mind, then, the distinction between national legal traditions and Union legal culture is both symptomatic of this contestation (intergovernmentalism and supranationalism/statism in minor key, respectively); as well as a measured and democratically representative response to it. This is because the representation of national legal traditions reflects the interests of national political and legal actors who share a view of *finalité* that accords with the arguments of Moravcsik and Majone; whereas Union legal culture reflects the interests of the arguments of Weatherill and Hix. In other words, for the former, their interests ultimately lie in preserving, as much as possible, the Member State as the appropriate location of sovereignty (intergovernmentalism). On the other hand, the representation of Union legal culture reflects the interests of the political and legal actors who aspire towards deeper forms of European integration and the absorption of sovereignty within the EU and its institutions (supranationalism or statist).

*Prima facie*, Solanke’s proposal for a more diverse bench does not conflict with this proposition. Yet, her argument is more consistent with institutional independence, and is less persuasive with respect to representation. This is not because she is wrong

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<sup>566</sup> Lininger, 2007: 1323.

<sup>567</sup> *Ibid.*

that a diversity of views on the bench would both symbolically and substantively represent sectoral interests in relation to statistical categories of the European public. It is because the lack of consensus, at both the national and EU level, between the intergovernmentalists and supranationalists, provides the key to answering the question of representativeness in the Court of Justice. Yet, as observed in the *DemDefLit*, it is the sheer pervasiveness of this contestation that gives rise to the sort of political contestation around which representative structures ought to be configured, as argued by Hix,<sup>568</sup> and which justifies the dominance of representation of national legal traditions and Union legal culture – both of which represent salient democratic political principals (Member State centred and Union centred), which is ultimately where the contestation emerges.

What we are left with is a complex *mélange* of legitimising, representative, forces that inform the structuring of the Court of Justice. The impact of the intergovernmentalist and supranationalist visions pervades the structuring of the Court of Justice, some of the consequences of which are delegitimising. In light of the observations in Section 3, the structuring of the Court has become a highly regulated field. With various legitimacy claims converging on the same structures, it becomes somewhat of a sub-optimal relationship, which, ultimately, undermines other measures of legitimacy e.g. institutional independence. In some respects, these two categories of representation are not in conflict and are mutually reinforcing. The preliminary rulings procedure, for example, is virtuous in its capacity simultaneously to represent national legal traditions and Union legal culture. As Tridimas argues:

The overriding concern is to make the preliminary reference procedure available as widely as possible, thus ensuring the uniform interpretation of [Union] law and the availability of a remedy for the protection of [Union] rights. The Court, behaving, in effect, as a rational decision-maker, widens the franchise of [Union] law: by making the preliminary reference procedure available to as wide a category of bodies as

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<sup>568</sup> Hix, 2008.

possible, it upholds [Union] rights at the lower level and increases their immediacy and resonance.<sup>569</sup>

The same observation can be made with respect to the recognition of the Union's multi-lingual background.<sup>570</sup> In other respects, it is sub-optimal, whereby an unfortunate consequence of contestation negatively impacts on the Court's structure and performance. The requirement of uniformity, for example operates in a sub-optimal way. As we saw in Section 3.2.3, it has inhibited the Union legal system's designers from permitting the General Court to hear references from national courts under the preliminary rulings procedure. It is also demonstrably the case that the preliminary rulings procedure accounts for the majority of the workload for the Court of Justice; and that, whilst the duration of the cases before the Court is being reduced slowly, the number of cases the the Court of Justice has to hear is increasing.<sup>571</sup> Indeed, Komarek has argued that the procedure be reformed to one that is akin to an appellate system like those in federal systems – ultimately rejecting the premiss that uniformity would be undermined in such a system.<sup>572</sup> Similarly, Lavranos extols the virtue of the CST, and the proposals for more specialised courts, as being one that sufficiently responds to the increasing workload of the Court.<sup>573</sup> Nevertheless, as we have seen, the designers are sticking to their guns, in spite of rapid enlargement. Likewise, the Member States' strong position in the appointments process, for example, is somewhat counter-balanced by the involvement of the EP in the selection of one of the members of the appointments panel. Yet there are aspects here that have this sub-optimal quality, insofar as the effectiveness of the appointments process is undermined by so many competing claims by the two democratic

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<sup>569</sup> Tridimas, 2003: 30.

<sup>570</sup> See *supra* at Section 3.1.4.

<sup>571</sup> In 2011, out of 668 cases before the Court of Justice, 423 were references from national courts (63%), with an average duration of 16.4 months; whereas in 2007, it was 265 out of 581 (46%), with an average duration of 19.3 months (see Statistics concerning the judicial activity of the Court of Justice, 2011, available at [http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-06/ra2011\\_statistiques\\_cour\\_en.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-06/ra2011_statistiques_cour_en.pdf)). In 1997, it was 301 out of 456 cases, with an average duration exceeding 20 months (see Statistical information of the Court of Justice (1997) available at [http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/st97cr\\_2008-09-30\\_16-42-41\\_25.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/st97cr_2008-09-30_16-42-41_25.pdf)).

<sup>572</sup> See Komarek, 2007.

<sup>573</sup> See Lavranos, 2005.

constituencies. The appointments process, like in the UK, could more effectively and simply be performed by the appointments panel.<sup>574</sup>

It might simply be the case, then, that there are significant legitimation deficits in the Court's structures and processes, because of the need to represent both national legal traditions and Union legal culture. This is, however, perhaps properly understood as necessary given the ever-changing – specifically, ever-growing – nature of the EU. The convergence of competing legitimacy claims and visions of *finalité* on the Court's structures is not just an unfortunate and inevitable state of affairs, but, instead, a necessary way to ensure the continued survival and legitimacy of the institution and the polity within which it serves. To put it another way, without responding to these competing claims, and without reaching (sub-optimal) consequences, it is unlikely that the actors involved would continue to accept the legitimacy of the institution, since the democratic national Member States and the democratic supranational Union institutions are representative of two sets of democratic constituencies. As Barber notes, like with the ECtHR, without the Member States' role in the appointments process, the legitimacy of the Court and the Union legal system may be less “palatable”.<sup>575</sup> Pescatore once described the preliminary rulings procedure as an “infant disease”, precisely because of the sorts of sub-optimal consequences it creates; but, more importantly, that epithet was premised on the notion of the maturity of the Union legal system i.e. a vision of *finalité*.<sup>576</sup> It is perhaps necessary to accept these consequences in order for the Court

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<sup>574</sup> There are also negative sum consequences here. In relation to the instrumental virtue of independence, the involvement of the EP in the appointments panel undermines the independence of the appointments process, where the appointments process becomes affected by political influences of the supranationalist elements of EU governance, as opposed to, but *in addition to*, the governments of the Member States. Indeed, this was one of the objections made during the European Convention's discussion circle on the Court of Justice as part of the Constitutional Treaty deliberations: “[h]owever, one member was opposed to the idea of the European Parliament's involvement because he saw in it a danger that the appointment process would become politicised.” See the Final Report of the European Convention: 2.

<sup>575</sup> See Section 4.2 of Chapter Four.

<sup>576</sup> Pescatore, 1983. Burrows and Greaves also argue that the office of Advocate-General is unnecessary now given the “maturity” of the EU legal order – specifically responding to the increasing workload of the Court (Burrows and Greaves, 2007: 293).



and the Union legal system to retain its (democratic) legitimacy, especially given the EU's unpredictable state of flux and that we don't know what it is yet.

## **5. Conclusion**

The purpose of this Chapter was to demonstrate that the Court of Justice is a representative institution – and that it achieves this through its structures and processes. The argument was split into three parts. First, it was argued that the Court represents holistic categories of public interest both symbolically and substantively. Symbolic representation is achieved through structures and processes with which the public can identify. Substantive representation is where the interests at stake play a part in the decision-making of the Court.

Second, it was shown that the Court of Justice represents both national legal traditions and Union legal culture. National legal traditions can be understood in two ways: the substance of the laws of the Member States; and the form of the legal orders of the Member States. In terms of substance, the legal and political actors of the Member States have a vested interest in their own legal rules, and maintaining the objectives they serve. Form refers to the broader institutional structures and processes within which national legal and political actors operate and on which they have *their* law adjudicated. The types of legal form are: civil law and common law systems; inquisitorial and adversarial modes of legal enquiry; constitutional and majoritarian democracies; and federal, unitary and union divisions of state sovereignty. Union legal culture, by contrast, refers to the sustained cultivation of a distinctive and autonomous European (Union) legal order. We saw, for example, that the composition and appointment of the Judges represent national legal traditions. By operating on a one judge per Member State basis, the appointment of the Judges ensures that the interests of national legal actors are represented. In terms of Union legal culture, we saw that, for example, the various mechanisms of insulation from Member State control represent the autonomy of a distinct Union legal culture. The

use of the appointments panel is geared towards making the appointments process more insulated, and involves the European Parliament.

The analysis then went on to appraise critically the emphasis on the representation of national legal traditions and Union legal culture. The argument here was that the pervasiveness of national legal traditions and Union legal culture is a symptom of, and a measured democratically representative response to, the underlying contestation over visions of *finalité*. With such a controversy ongoing between legal and political actors at the national and Union levels, the structural and procedural representation of national legal traditions and Union legal culture of the Court of Justice is a justified and representative configuration, in spite of a few sub-optimal consequences associated with this.

## 1. Introduction

In this Chapter, we turn to the second intrinsic virtue: democratic participation. Thus far, we have seen that, in fulfilling its fiduciary duties as a trustee-court, the structures and processes of the Court of Justice have been designed in favour of, in particular, Member State interests (intergovernmentalism) and Union interests (supranationalism or statism). Yet, as we saw in Chapter Two, the categories of actors that fall under the rubric of “civil society” are also important beneficiaries of the trust – arguably all the more so in the EU given its complex “neo-functionalist”, “infranational”, and “deliberative supranationalist” constitutional and political structures.<sup>577</sup> This Chapter examines the structures and processes of the Court of Justice which provide these actors with access to participate in the decision-making of the Court, such that *their* affected interests are *also* matters to which the trustee-Court is democratically responsive. This does not mean that Member State and Union actors do not or should not enjoy access to democratic participation. As we shall see in Section 2, they too have disaggregated affected interests that must be taken into account. But given the demonstrable dominance of intergovernmental and supranational forces in the Court’s configuration, and the Union more generally, special attention will be paid here to the extent of democratic participation available to civil society actors.

In Section 2, the concept of democratic participation is defined, and its applicability to trustee-courts explained. At a conceptual level, democratic participation can take many forms. But the key variables are: disaggregated or special interests; and some form of *access* to decision-making authorities, such that decision-making authorities recognise those interests. In Section 3, a case-study is presented on three mechanisms of access to the Court of Justice: the researcher role of the Judges and Advocates-General; third party intervention; and access as litigants. Section 4 then goes on critically to appraise these mechanisms of access to democratic participation,

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<sup>577</sup> See Section 4 of Chapter Two.

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assessing the extent to which the degree of access afforded to actors by the Court of Justice is sufficient – the question of balance.

### 2. Theoretical Orientations: Democratic Participation in Trustee-Courts

In this Section, the notion of democratic participation is defined (Section 2.1). Section 2.2 goes on to specify how and why the Court of Justice can and should be analysed in this way – setting up the case-study in Section 3; and the critical discussion in Section 4.

#### 2.1. Democratic Participation

As we saw in Chapter Three, democratic participation is an intrinsic virtue of democratic ordering – it is a mechanism by which discrete decision-making authorities can be responsive to the interests of the public. Specifically, democratic participation refers to the capacity with which actors can engage directly (i.e. without the medium of representation) with decision-making authorities, such that their interests can be taken into account. In a sense, this concept is a relatively straightforward institutional ordering virtue of democratic legitimacy – most intuitively a signifier of collective *self*-government (government *by* the people) – as it relates to the classic, inaugural notion of democracy.<sup>578</sup> Yet, as we have seen, contemporary polities – including the EU – simply cannot achieve this given the size of their populations. Indeed, this was the rationale underpinning representativeness. Irrespective of the contemporary polity context, there is a universal relationship between representativeness and democratic participation. Here, we must understand this relationship to be compensatory or complementary.<sup>579</sup> This is because underpinning theories of democracy is the idea that public interests are most

<sup>578</sup> See the introduction to Section Three of Chapter Three. See also Schwartzberg, 2004.

<sup>579</sup> The distinction between compensatory and complementary bears a special significance in the EU context, discussed in Section 4.

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optimally defined, articulated and defended by the *representatives* of a polity's political institutions. The legitimacy of systems such as these is based on the premiss that the polity's political representatives, who are directly accountable to the public, cannot escape democratic scrutiny and can guard all salient matters of public interest.

One of the key problems with this is that public interests are reduced to very blunt aggregations of interests – typically expressed as abstract political philosophies, such as liberalism, conservatism, left wing, right wing, etc. i.e. *holistic* categories of public interests.<sup>580</sup> The capacity for non-representatives (the Joan Public) to have their particular, *disaggregated* or *special interests* taken into consideration by decision-making authorities is severely displaced, if not altogether abandoned, by purely representative democracy. Nevertheless, democratic participation remains – theoretically, if not popularly – a core mechanism for collective self-government. And in the contemporary polity, it takes shape in different and more nuanced forms.

To that extent, we must understand that the sorts of interests to which institutions must be responsive are, unlike the holistic interests examined in Chapter Five, disaggregated and special interests. We must also be aware that participation is a broad concept, and can be understood in different ways. Common examples of participation include referendums and lobbying by institutions of civil society. Habermas, for example, demonstrates, by analysing a discrete period in history, how representatives can respond to the particular, disaggregated interests of the public as they emerge from civil society.<sup>581</sup> The legacy of this discrete period in history is the

<sup>580</sup> There is also an epistemological problem with understanding the polity as a genuine manifestation of “the public” or “the people”. See, for example, John Dewey, *The Public and its Problems*, A. Swallow: Denver, 1954 (hereinafter Dewey, 1954). Dewey argues that as soon as the public is defined by the emergence of the office of state regulation, the latter ceases to be definitive of that public (Dewey, 1954: 33-34). This observation is central to Everson and Eisner's theory of *Rechtsverfassungsrechts* in Everson and Eisner, 2009. Likewise, it resonates with the vision of *finalité* adopted in this thesis, which extols the notion of the EU as a polity with respect to which we “don't know what it is yet”.

<sup>581</sup> Habermas argues that there was a brief period in history where the “public sphere” was populated by private individuals bringing to bear their special interests thereon. He argues that this was achieved through the publication of letters – written between market actors conveying important market-related information – and represented an instance of civil society influencing matters of state; in this case, the regulation of the (newly emerging) transnational free market (Habermas, 1989).

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mass media – especially newspapers – which provides a crucial democratic link between political representatives and Joan Publics as forums within which salient matters of public interest can be communicated to the former by the latter.<sup>582</sup> In this view, salient matters of public interest – as expressed by Joan Publics within and between their private associations – are an important resource for discrete decision-making authorities; bridging the gap between the governors (representatives) and the governed (non-representatives). Anthony Giddens – an advocate of dialogic democracy – argues that self-help groups, for example, present people with more attractive forums of political discourse than membership of political parties.<sup>583</sup>

Participation can also take place within institutions that, whilst being autonomous from representative institutions, nevertheless wield regulatory powers (either delegated powers, or powers that exist by virtue of broader socio-political structures e.g. private market regulation) and are accessible to the public for their participation. In this context, Cohen and Sabel have developed a special theory of the polity – “directly deliberative polyarchy” – within which decision-making authorities are broken up into epistemic units.<sup>584</sup> In their analysis, they argue that such institutions are best suited to decision-making at the “local” level, e.g. parents and teachers’ associations, or community policing, where local problems require local solutions.<sup>585</sup>

There are thus many ways for actors to engage themselves in political discourse. In this Chapter, I do not focus on aspects such as deliberativeness – itself a (related)

<sup>582</sup> One of Habermas’ key points was that contemporary forums of public discourse are poor substitutes that lead to unsatisfactory civil society deliberative participation. The emergence of social networks via the Internet may represent a re-emergence of Habermas’ notion of the public sphere.

<sup>583</sup> Anthony Giddens, “Brave New World: The New Context of Politics”, in D. Miliband, (Ed.), *Reinventing the Left*, London: Polity Press, 1994.

<sup>584</sup> Cohen and Sabel, 1997.

<sup>585</sup> Cohen and Sabel argue that directly-deliberative institutions can address these difficulties in three ways. First, given their autonomy, they are not bound to implement solutions that are commensurate with solutions arrived at in other locales. Second, interested members – the parents, the teachers, or the residents of the community, for example – familiar with the local circumstances can more effectively determine appropriate solutions. And third, deliberative institutions can coordinate and interact with one another in a broader discussion on how problems in common can be, and have been, addressed by different types of solutions – what Cohen and Sabel call “deliberative coordination” (Cohen and Sabel, 1997: 322-327). In other words, they can learn from each other, without being restricted by each other.

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intrinsic virtue – but on the more modest ways in which actors can participate in trustee-courts.

### 2.2. Access to Democratic Participation in Trustee-Courts

We have seen that a good trustee-court is one that is democratically responsive, insofar as this is consistent with its (secondary) fiduciary duties (Chapter Three) and does not lead to judicial bias, but, instead, to the dispassionate treatment of all affected interests (Chapter Four). Yet there is an added instrumental value to be noted here. As we saw in Chapters Two and Three, the Court of Justice, like other constitutional courts, can exemplify instrumental democratic legitimacy by, first and foremost, giving faithful expression to the established rules of law in its interpretation thereof. But its interpretation is also instrumental insofar as it makes polity-constitutive, democracy-generative contributions e.g. defining, establishing and refining the basic tenets of a democratic polity (such as fundamental rights) through its adjudication i.e. its output. The degree to which the EU has been constituted in this way by the Court of Justice need not be repeated here. What we must understand is that there is some degree of overlap between the intrinsic and the instrumental when it comes to democratic participation. In this thesis, we are not analysing the Court's output, but, instead, looking to how the Court's structures and processes exemplify intrinsic virtues such as, in this Chapter, democratic participation. As we saw in Chapter Three, the reason that we are interested in this aspect of instrumental legitimacy relates to the ways in which the structures and processes *facilitate* legitimising the Court's adjudication and jurisprudence.<sup>586</sup>

Trustee-courts can exemplify the virtue of democratic representation in the terms outlined above: responsiveness to disaggregated or special interests, through mechanisms of *access* to the decision-making process of the trustee-court (its cases),

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<sup>586</sup> This aspect is addressed in Section 4, where, in evaluating the putative gap in access to democratic participation for natural and legal persons (outlined in Section 3), we consider the significance of the instrumental role of access in terms of democratic compensation and complementarity.

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such that it can give dispassionate treatment of all affected interests. As emphasised above, this thesis is not exploring the deliberative efficacy of adjudication;<sup>587</sup> nor are we interested in the “locality” *qua* Cohen and Sabel of the trustee-court vis-à-vis those interests.<sup>588</sup> Three questions will be addressed here: what are disaggregated interests; what sorts of mechanisms of access are available in trustee-courts; and for whom are these mechanisms available? On the first question, disaggregated interests are the particular or special interests of actors that are implicated in cases before trustee-courts. Some of those issues will be purely doctrinal, requiring specialists in particular areas of law. Yet, given the notion of “polycentricity”,<sup>589</sup> the range of issues pertinent to any given case is expansive – from the mundane to the sublime: fishing rights in international waters;<sup>590</sup> trade union rights;<sup>591</sup> the right to freedom of expression;<sup>592</sup> feminism;<sup>593</sup> environmentalism,<sup>594</sup> or human dignity.<sup>595</sup>

<sup>587</sup> Dworkin, for example, argues that the deliberative efficacy of constitutional adjudication is a more effective way of reaching a legitimate decision in the interests of democracy than its majoritarian counterpart, because judges are closer to the facts and are therefore equipped to make more informed decisions; they are immune to the cynicism that plagues mainstream politics and politicians, therefore enabling more radical decisions of principle to be made; and they are better placed to make decisions that protect the interests of minority groups and the “politically impotent” (Dworkin, 1985: 24-28). Similarly, Habermas proposes “a proceduralist paradigm of law”, in which the deliberative function of communicative action is greatly enhanced by the procedural conditions through which *law* is articulated: “[i]n the proceduralist paradigm of law, the vacant places of the economic man or welfare-client are occupied by a public of citizens who participate in political communication to articulate their wants and needs, to give voice to their violated interests, and, above all, to clarify and settle the contested standards and criteria according to which equals are treated equally and unequals unequally” (Habermas, 1998: 18). See also Robert Keohane, Stephen Macedo, and Andrew Moravcsik, “Democracy enhancing Multi-Lateralism” (2009) *International Organisation* Vol. 63 No. 2 309. On the deliberative performance of constitutional courts, see Conrado Hübner Mendes, “Political Deliberation and Constitutional Review” in Imer Flores and Kenneth Himma (Eds.), *Law, Liberty, and the Rule of Law*, Ius Gentium: Comparative Perspectives on Law and Justice Vol. 18, Springer Science+Business Media Dordrecht, 2013.

<sup>588</sup> See Thomas Horsley, “Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?” (2012) *Journal of Common Market Studies* Vol. 50 No. 2 267. On the relationship between subsidiarity (*qua* locality) and democracy, see Barber, 2005.

<sup>589</sup> Barber, 2001.

<sup>590</sup> *Factortame*.

<sup>591</sup> *Viking*; and *Laval*.

<sup>592</sup> *Schmidberger*.

<sup>593</sup> *Roe v Wade*.

<sup>594</sup> Case T-585/93 *and Others v Commission* [1995] ECR II-2205; on appeal to the Court of Justice, Case C-321/95 P *Greenpeace and Others v Commission* [1998] ECR I-1651 (hereinafter *Greenpeace*).

<sup>595</sup> *Omega Spielhallen*.



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On the second question, mechanisms of access relate to the various structural, procedural or socio-legal factors that affect the capacity for different types of actors to participate in the trustee-court's cases. These include: *locus standi* (rules of standing) for actors to raise actions that the trustee-court is competent to hear, including judicial review;<sup>596</sup> the rules of access that allow third parties to intervene in cases; financial considerations, e.g. the provision of legal aid; and the linguistic dimension of the legal process before the Court. There are also less formal mechanisms of access. As discussed in Section 3.1, for example, the role of the Court of Justice's members performing a researcher-role is a proxy for actors to engage, albeit informally, with institutional decision-makers.

On the third question, it is inimical to the foundational notion of democracy – as an *inclusive* mode of governance – to prohibit certain categories of actors, or certain categories of interest, from institutional decision-making. Yet it is central to the argument of this Chapter that, in the context of trustee-courts (specifically, the Court of Justice), there is a question of balance to be addressed. To make trustee-courts as accessible as possible – a participatory free-for-all – would be deeply impractical. Putting it more normatively, it would cause severe negative sum consequences by overloading the work of trustee-courts to the extent that they would be unable to perform their primary instrumental duties. In short, there has to be a line drawn somewhere. As a general rule, the basic principle is that the actor's interest must be one that is reasonably affected by the outcome of the case. How to specify that rule is very much dependent on the circumstances not just of each case, but, as we shall see in Section 4, the type of court and the type of polity within which that court functions.

In Section 3, I present a case-study of some of the Court of Justice's mechanisms of access – demonstrating the extent to which different types of actors and different

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<sup>596</sup> Schwartzberg proposes that “a key insight for contemporary democracy” is derived from the “distinctively democratic quality of the capacity to modify law” under the Athenian concept of “pragmatic innovation”, which, among other things, emphasised the *direct* participation of the people and incorporated a system of judicial review into its institutional framework (Schwarzberg, 2004: 321).

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types of interest are thereby given attention. Section 4 moves on to address the question of balance, evaluating the mechanisms of access to determine whether or not they are satisfactory given the broader polity-conditions within which the Court adjudicates.

### 3. Access to Democratic Participation in the Court of Justice: A Case-Study

In this Section, some of the Court's key mechanisms of access will be outlined.<sup>597</sup> In Section 3.1, we look at the researcher role of the Court's Judges and Advocates-General as a proxy by which actors express their affected interests to the Court's decision-makers. In Section 3.2, we look at third party intervention in cases as a way in which actors who are not litigants in cases can nevertheless articulate their affected interests to the Court. In Section 3.3, we look at the capacity through which actors can express their affected interests to the Court as litigants. We look at the rules of access to raise actions for judicial review under Article 263 TFEU (actions for annulment of Union acts); and the participatory nature of the preliminary rulings procedure (Article 267 TFEU), commenting also on the (well-documented) synergetic relationship between these two forms of action.<sup>598</sup> In Section 4, I then go on critically to appraise the commentary on the putative gap in the "complete system of judicial remedies"<sup>599</sup> that has been argued to exist in relation to access to the Court for natural and legal persons.

<sup>597</sup> As indicated in Section 2.2, there is a variety of phenomena – formal, informal, legal, socio-legal – that are relevant to the discussion of access. It is beyond the scope of this thesis to give sufficient attention to all of these issues, which is why a case-study approach has been adopted.

<sup>598</sup> Indeed, attesting to the comments made *ibid*, there is a variety of actions that are worthy of attention here (see Appendix One). I have chosen Article 263 TFEU and Article 267 TFEU because of their synergetic relationship, and because of the extensive commentary thereon, to which the arguments made in Section 4 contribute.

<sup>599</sup> See *Greenpeace*: para. 70; and the case-law referred to in Section 3.3.1 *infra*.

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### 3.1. *The Judges and Advocates-General as Researchers*

We have already considered the professional association of the Judges and Advocates-General with the academic world, insofar as this strengthens their competence and bolsters (the instrumental virtue of) institutional independence in the Court of Justice.<sup>600</sup> Here, we consider the significance of this association as a mechanism of access. Given the eclectic range of interests that may be implicated in the Court's cases, the association of members of the Court with academia – as researchers themselves; and through their interaction with other academic researchers – provides an important proxy by which potentially salient public interests can be expressed to the Court. Stein argued:

[T]he judges and the Advocates General of the Court of Justice often assume the role of scholarly writers. Their publications and speeches on issues facing the Court and the seminars they offer for members of national judiciaries greatly facilitate the propagation and acceptance of the Court's rulings.<sup>601</sup>

More recently, Burrows and Greaves note:

The Judges read the literature, gauge the reaction to their case-law, interact with national judges and academics, meet students in the Court and respond to questions ... Judges of the European Court of Justice, much more so than judges from the courts of the Member States, participate in academic and practitioner conferences and events where they are exposed to a wide variety of ideas.<sup>602</sup>

What is important is that this researcher role makes for an informed Court. We might call this epistemic representation through access. Indeed, there is a special

<sup>600</sup> See Section 3.3.2 of Chapter Four.

<sup>601</sup> Stein, 1981: 2. See, for example, Section 3.3.2 of Chapter Four. See also the extensive list of publications of the present Belgian Judge and Vice President of the Court of Justice (and former CFI Judge) Koen Lenaerts at [http://www.law.kuleuven.be/int/europees/English/Publications/Lists%20of%20Publication/publication\\_list.htm](http://www.law.kuleuven.be/int/europees/English/Publications/Lists%20of%20Publication/publication_list.htm); and of former UK Judge at the Court of Justice (and former CFI Judge) Sir David Edward at <http://www.law.du.edu/index.php/judge-david-edward-oral-history/publications>.

<sup>602</sup> Burrows and Greaves, 2007: 289, 293.

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democratic significance here with respect to the individual, and also to associations of civil society. The informed Court is also responsive to the affected intergovernmental and supranational/statist (disaggregated) interests of the European public, including those of, for example, the governments of Member States or the Commission. Since civil society does not benefit from the sorts of holistic representative structures and processes observed in Chapter Five, the researcher role of the Judges and Advocates-General plays both a compensatory and complementary role in making the Court a responsive court – achieved by actors’ access to the Court’s members, such that their affected (disaggregated) interests are expressed. Furthermore, academia is informed by the interests and viewpoints of other spheres of civil society. Academic writings on a given issue of EU law invariably dwell on broader social structures and interests and thus act as a proxy for civil society representation.

The contribution of the Advocates-General presents an even greater significance here. The Advocates-General make “reasoned submissions” in open court and prepare a written opinion – very much in the style of a judgment – to assist the Judges with their deliberations.<sup>603</sup> In a comparative review, Borgsmidt observes that, given their involvement in the academic world and the nature of their contribution to cases (mainly through their written opinions), the role of the Advocates-General “approximates most closely to the concept of pioneering research work”.<sup>604</sup> A significant advantage of the Advocate-General’s opinion is that it is “the product of a single mind”, which has “a clarity and directness which judgments of the Court, essentially a committee document, may lack.”<sup>605</sup> The Advocates-General do not produce their opinions in concert with other Advocates-General, or Judges, and they can write them in their own language,<sup>606</sup> which enhances their argumentative and expressive potential – making them more amenable to academic consumption. Furthermore, opinions often include academic citations to support their interpretation

<sup>603</sup> See Sections 3.1.2 and 3.2.2 of Chapter Five. The opinions are published along with the final judgment in the case, and published online at the time of delivery.

<sup>604</sup> Borgsmidt, 1988: 108.

<sup>605</sup> Arnall, 2006: 16.

<sup>606</sup> See Section 3.1.3 of Chapter Five. See also Edward, 1995: 555.

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and consideration of the salient legal issues. The opinion is thus simultaneously a reference point for the Judges' deliberations as well as a focal point for academic attention and debate. The Advocate-General is thus able to facilitate a "dialogue" between the Court's Judges and with interested fields of academic practice. Burrows and Greaves note:

What is important is the dialogic relationship between the Advocate General and the Court. This dialogic relationship does not end with the outcome of any particular case but continues as part of the ongoing conversation on the interpretation of Community law and it takes place over time ... It can also take place outside the Court ... Very often, academics would look to the Opinions of the Advocates General as a starting point for a critique of the case-law of the Court.<sup>607</sup>

This attests to the view that the academic role of the Judges and Advocates-General resonates with the interests of civil society: directly, if we consider academic fields themselves as spheres of civil society; and indirectly, if we regard the academic commentary as a proxy for other spheres of interest that emanate from civil society. In both cases, the dialogic process between the Advocates-General and the Judges allows for the eclectic range of interests of the European public to access the decision-making of the Court.

*3.2. Third Party Intervention*

In general terms, third party intervention is a procedure that grants access to actors that have a demonstrable interest in direct actions<sup>608</sup> being heard by the Court of Justice. It is a mechanism of access that allows actors to participate in cases in which they are not – and in some instances could not have been – party-litigants, such that

<sup>607</sup> Burrows and Greaves, 2007: 293.

<sup>608</sup> The legal framework of third party intervention concerns direct actions only (see Chapter 4, Title IV RPCJ) and is thus unavailable in indirect actions such as the preliminary rulings procedure (Article 267 TFEU).

they may persuade the Court to consider their affected interests when determining the outcome of cases. According to Article 40 SCJ:

Member States and institutions of the Union may intervene in cases before the Court of Justice. The same right shall be open to the bodies, offices and agencies of the Union and to any other person which can establish an interest in the result of a case submitted to the Court. Natural or legal persons shall not intervene in cases between Member States, between institutions of the Union or between Member States and institutions of the Union.<sup>609</sup>

As can be seen in Appendix One, and will be illustrated in Section 3.3, Member States and Union institutions are “privileged” actors insofar as they have standing to raise almost all of the actions that the Court is competent to hear, often irrespective of whether or not they have any demonstrable interest at stake.<sup>610</sup> As such, the focus in this Section will be on the extent to which *non*-privileged actors can avail themselves of this mechanism of access.

There are two stages involved in establishing an “interest” for non-privileged actors: the application; and the “statement in intervention”. The application to intervene must be made within six weeks of publication of the lodging of the initial application with the Registry, and must include: (a) the description of the case; (b) the description of the parties; (c) the name and address of the intervener; (d) the intervener’s address for service at the place where the Court has its seat; (e) the form of order sought, by one or more of the parties, in support of which the intervener is applying for leave to intervene; and (f) a statement of the circumstances establishing the right to intervene.<sup>611</sup> The application only permits the applicant to state which

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<sup>609</sup> For the General Court, see Article 53 SCJ, which may derogate from the rules laid down in Article 40 SCJ “in order to take account of the specific features of litigation in the field of intellectual property.” For the Civil Service Tribunal, see Article 7 of Annex I SCJ.

<sup>610</sup> This is reflected in Article 40 SCJ, since, unlike “bodies, offices and agencies of the Union and [natural and legal persons]”, Member States and Union institutions do not have to “establish an interest in the result of a case”. Furthermore, they may submit “observations” to the Court in cases, including in Article 267 TFEU references, which is a distinct process that gives them an extra layer of privileged access. See Article 20 SCJ, Article 23 SCJ and Article 53 SCJ.

<sup>611</sup> Article 130 RPCJ; Article 115 RPGC; and Title 3 Chapter 3 RPCST.

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party the applicant supports.<sup>612</sup> Yet, if the application is accepted (i.e. if the rules of standing having been met, discussed below<sup>613</sup>), the intervener is permitted to make a “statement in intervention”, which outlines: (a) a statement of the form of order sought by the intervener in support of or opposing, in whole or in part, the form of order sought by one of the parties; (b) the pleas in law and arguments relied on by the intervener; and (c) where appropriate, the nature of any evidence offered.<sup>614</sup> It is through this document that the interveners can express their arguments and viewpoints on the legal and factual details of the case i.e. to express their affected interests to the Court.<sup>615</sup>

The determining factor for a successful application to intervene for non-privileged actors is establishing “an interest in the result of a case”. The Court defined “interest” in *Região autónoma dos Açores v Council*:

On this point, it has consistently been held that an interest in the result of the case means a direct and present interest in the decision on the claims. In particular, it is necessary to ascertain whether the prospective intervener is *directly affected* by the measure in question and that his interest in the result of the case is certain ... Associations may be admitted to intervene to protect the interests of their members in cases raising matters of principle capable of affecting those interests [emphasis added].<sup>616</sup>

<sup>612</sup> Article 40 SCJ states that the application to intervene “shall be limited to supporting the form of order sought by one of the parties.”

<sup>613</sup> It is only if the President of the Court or Chamber is satisfied that the applicant has met the standing criteria for intervention that the applicant will be permitted to make a statement in intervention. Article 131 RPCJ; Article 116 (1) RPGC; and Article 109 (6) RPCST.

<sup>614</sup> Article 132 RPCJ; Article 116 (4) RPGC; and Article 110 (3) RPCST.

<sup>615</sup> The interveners are given the opportunity to review documents submitted by the parties. Article 131 RPCJ; Article 116 RPGC and Article 116 (5) RPGC; and Article 109 RPCST. Additionally, an intervener may submit observations at the oral hearing. Article 129 (4) RPCJ; Article 116 (6) RPGC; and Article 110 (6) RPCST.

<sup>616</sup> The order in Case T-37/04 R *Região autónoma dos Açores v Council* [2004] ECR II-02153 (hereinafter *Região autónoma dos Açores v Council*): para. 59. See also the orders in Case T-54/00 R *Federación de Cofradías de Pescadores de Guipúzcoa and Others v Council* [2000] ECR II-2875: para 15; Case T-138/98 *ACAV and Others v Council* [1999] ECR II-1797: para. 14; and Case C-151/98 P *Pharos v Commission* [1998] ECR I-5441: para. 6.

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As we shall see in Section 3.3.1, the requirement of “direct concern” is a less restrictive a test than that of “direct *and* individual concern” under Article 263 TFEU, and presents, for natural and legal persons, an opportunity to participate in cases they might otherwise have been unable to raise themselves. Indeed, in *Região autónoma dos Açores v Council*, the Court permitted two associations to intervene, where one was, significantly, a non-economic association.<sup>617</sup> As I argue below, the salient problem of *locus standi* in relation to Article 263 TFEU is that general interests (such as those of environmental associations) are too broad to satisfy the requirement of “individual concern” e.g. the judgment in *Greenpeace*, which prevented that association from raising an action for annulment.<sup>618</sup> This is somewhat counter-intuitive from a democratic point of view, since the more general the interest, the greater the need is ostensibly for those actors to have their interests taken into account by the Court. In the context of third party intervention, however, the Court is willing to regard environmental interests as sufficient:

An order suspending the Contested Regulation would have a direct effect on fishing activities within Azorean waters including the use of fishing gear that may have a significant impact on the ecosystem of the Azorean waters, an area which forms the principal area of activity of GÊ-Questa. It is, therefore, considered that GÊ-Questa has a direct and certain interest in the outcome of the present proceedings.<sup>619</sup>

Nevertheless, the Court refused standing to intervene in this case to two other environmental associations on the basis that their interests were not specifically concerned with the geographical area or the particular issues in question.<sup>620</sup>

<sup>617</sup> *Região autónoma dos Açores v Council*: para 63: “GÊ-Questa is a not-for-profit association for the defence of the environment, whose principal responsibilities are the defence and marketing of the environment as well as the study and the protection of the national and cultural heritage of the Azorean archipelago. The Statute of GÊ-Questa specifically directs it to protect the natural heritage of the Azorean archipelago which includes the fish population and marine ecosystems of that archipelago.”

<sup>618</sup> *Greenpeace*: para. 28.

<sup>619</sup> *Região autónoma dos Açores v Council*: para. 64.

<sup>620</sup> *Região autónoma dos Açores v Council*: para. 70: “[i]ndeed, despite their expertise and involvement in environmental issues, both organisations’ aims and activities cover large geographic areas and are not focused exclusively or mainly in Azorean waters ... The members and supporters of Seas at Risk and WWF are located throughout the world and their interests are even more remote, consisting in environmental protection in general.”



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Therefore, even though the test is less restrictive than that under Article 263 TFEU, a balancing exercise will still be undertaken. Moreover, non-privileged actors cannot intervene in cases where both the applicant and defendant are either a Member State or a Union institution i.e. privileged actors. In this sense, many of the cases, in which an institution or organisation with a *prima facie* affected interest that is too general in nature to satisfy the standing criteria of Article 263 TFEU, will also be incapable of being accessed through Article 40 SCJ.

Before moving on to consider *locus standi* in more detail in Section 3.3, it is worth considering one final point that brings us back to the inquisitorial roots of the Court's structures and processes. In *CIRFS*,<sup>621</sup> the Court refused standing to intervene to an applicant, and, as such, refused to respond to an objection of inadmissibility (in relation to the main action) that the applicant intervener raised. The Court pointed out that Article 40 SCJ limits the applicant to merely supporting one of the parties in the initial application, and, as such, "[i]t follows that the interveners were not entitled to raise the objection of inadmissibility, and that the Court is therefore not bound to consider the pleas on which they rely."<sup>622</sup> Yet, immediately following this in the judgment, the Court continued: "[h]owever, since this is an objection of inadmissibility involving public policy considerations, the Court should examine it *of its own motion* under Article 92(2) of the Rules of Procedure".<sup>623</sup> This demonstrates another potential effect of rules of access. It shows that even unsuccessful applicants can (1) make submissions to the Court (whether or not they will be successful); and (2) that the Court may act on those submissions. Of course, in these circumstances, with no standing, the failed applicant or intervener will not be able to "dialogue" with the Court on the relevant issue. Yet it nonetheless exemplifies a responsive court by virtue of a mechanism of access. Access is the virtue; not success.

<sup>621</sup> Case C-313/90 *CIRFS and Others v Commission* [1993] ECR I-1125 (hereinafter *CIRFS*).

<sup>622</sup> *CIRFS*: para 22.

<sup>623</sup> *CIRFS*: para 23, emphasis added.

### 3.3. Democratic Participation as Litigants

In this section, I present a case-study of the rules of standing for Article 263 TFEU (the action for annulment of Union Acts) and of the significance of Article 267 TFEU (the preliminary rulings procedure) as a mechanism of access. Both of these actions are concerned with, broadly, the judicial review of established rules of law. As such, they implicate the issue of democratic legitimacy in several ways.<sup>624</sup> As litigants, actors have the opportunity to vindicate the rights with which they are provided by democratically established rules of law. In that context, the processes through which the rules of law under review have been established and the notion of polycentricism exacerbate the democratic implications of judicial review. On the former, the trustee-Court becomes part of the legislative process, clearly emphasising its responsibility to be a democratically responsive institution; on the latter, given the range of interests potentially affected by judicial review, the trustee-Court must *prima facie* have quite open rules of access, to allow for those actors whose interests are at stake to have their say. As mentioned above, this does not mean “access for all” – there is a line to be drawn somewhere in order that the trustee-Court can function effectively.<sup>625</sup> This question is addressed in Section 4. In this Section, I present the relevant procedural rules of access that govern these actions, with a view to setting up the evaluation in Section 4.

At the outset, it is important to point out that the actions provided for by Article 263 TFEU and 267 TFEU operate synergistically, insofar as the Court can review the validity of Union acts under both mechanisms. It is because of this synergy that the debates on *locus standi* under Article 263 TFEU have developed. The prevailing critique (notwithstanding the Lisbon Treaty, discussed below) is that natural and legal persons are not afforded sufficient access to the Court of Justice. This issue is

<sup>624</sup> Indeed, much of the literature referred to in Chapter Three – especially the debates between political and legal constitutionalists – focuses on the democratic legitimacy of the judicial review of legislation.

<sup>625</sup> Gormley argued that the drafters of the EC Treaty designed this action so as not to become an “*actio popularis*”. See Laurence Gormley, “Judicial Review in EC and EU Law – Some Architectural Malfunctions and Design Improvements?” (2000) *Durham European Law Institute*, available at [http://www.dur.ac.uk/resources/deli/annuallecture/2000\\_DELI\\_Lecture.pdf](http://www.dur.ac.uk/resources/deli/annuallecture/2000_DELI_Lecture.pdf): 5-6.

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central to the discussion in Section 4 and will be given special attention in this Section also. Here, it will be demonstrated, first, that “natural and legal persons” is not a uniform category, and that, second, whilst the critiques lament the rules of access for individuals, the more salient problem, especially from a democratic perspective, is access for associations whose affected interests are “general” in nature.

#### 3.3.1. The Annulment of Union Acts

Article 263 TFEU (ex Article 230 TEC) gives the Court the jurisdiction to review the validity of Union acts; and, should they be found to be invalid, Article 264 TFEU empowers the Court to annul the act, or the relevant parts thereof.<sup>626</sup> The Court has defined a Union act as “any act intended to produce legal effects”.<sup>627</sup> So, in addition to legislation<sup>628</sup> and the processes through which it can be adopted,<sup>629</sup> the Court has interpreted “Union act” more broadly. For example, in *Commission v Council*,<sup>630</sup> “conclusions” reached by the Council were held by the Court to generate “legal effects” amenable to review under this action.<sup>631</sup> The legal framework of Article 263 TFEU apportions different degrees of access primarily on the basis of the type of actor involved: Member States and Union institutions (privileged actors); the Court of Auditors, the European Central Bank and the Committee of the Regions (semi-privileged actors); and natural and legal persons (non-privileged actors). In the following analysis, we look at the extent to which each of these categories of actors is afforded access to this action, and under what conditions.

<sup>626</sup> The General Court hears these actions at first instance (Article 256 (1) TFEU), except in cases brought between Member States and Union institutions (Article 51 SCJ).

<sup>627</sup> Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263 (hereinafter *ERTA*).

<sup>628</sup> According to Article 288 TFEU, these are Regulations, Directives, and Decisions.

<sup>629</sup> These are: the Ordinary Legislative Procedure (Article 289 TFEU); “Delegated Acts” (Article 290 TFEU); and “Implementing Powers” (Article 291 TFEU).

<sup>630</sup> Case C-27/04 *Commission v Council* [2004] ECR I-06649.

<sup>631</sup> Decisions by the Union’s institutions to initiate legal proceedings are not subject to review in this sense. See Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris International and Others v Commission* [2003] ECR II-1. Neither are framework decisions that may encroach on the competences associated with the former “Community Pillar” (See Case C-170/96 *Commission v Council* [1998] ECR I-2763).

## 3.3.1.1. Privileged Actors

In stark contrast to what we see in relation to non-privileged actors, the governments or representatives of Member States and the Union's institutions – namely, the Council, the Commission and the European Parliament – have virtually unfettered access to this action. Article 263(2) TFEU simply provides that “[the Court] shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission”. Critically, in order to raise proceedings before the Court, the privileged actors do not need to satisfy any restrictive standing criteria.<sup>632</sup> They are free to challenge any Union act, regardless of the nature and the objective of administrative and legislative acts of the Union. The UK Government could feasibly raise an action for annulment against a decision issued to the Bulgarian Government. As such, the interest the former has in the case will be capable of being expressed to the Court, affected or not. The desirability of this privileged degree of access is discussed in Section 4.2.

## 3.3.1.2. Semi-Privileged Actors

There are three actors that enjoy semi-privileged status. They are identified in Article 263(3) TFEU as the Court of Auditors, the European Central Bank, and the Committee of the Regions. These institutions may raise an action for annulment under the same conditions as the privileged actors, except that they may only do so “for the purpose of protecting their prerogatives.”<sup>633</sup> This qualification restricts access for these actors depending on the *nature* of their interest in the case. In other words, protecting their prerogatives is virtually synonymous with “affected interests” and, as such, presents a relatively uncontroversial test by which this mechanism of access can be optimally utilised.

<sup>632</sup> The only relevant restriction that these actors (along with semi-privileged and non-privileged actors) face is the two month time-limit (Article 263 (6) TFEU).

<sup>633</sup> Article 8 of Protocol 2 provides that “the Committee of the Regions may also bring such actions against legislative acts for the adoption of which the [TFEU] provides that it be consulted.”

## 3.3.1.3. Non-Privileged Actors: Natural and Legal Persons

Historically, the issue of access to annulment proceedings for natural and legal persons (the non-privileged actors) has been one of the most significant controversies amongst European public lawyers. There is a vast literature and a considerable degree of judicial pronouncement on the subject. It is beyond the scope of this Chapter to present a comprehensive overview of the debates and jurisprudence; instead the key points of contention and law will be highlighted in Section 4.<sup>634</sup> They key question is, how easily can natural and legal persons participate in the judicial review of Union acts? This phrasing also reflects the discussion in Section 3.3.3, in which the question is addressed more fully in light of the availability of the preliminary rulings procedure to review Union Acts. In this Section, we look at the rules of access to Article 263 TFEU for natural and legal persons. Article 263 (4) provides three ways for natural and legal persons to raise this action:

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, [1] institute proceedings against *an act addressed to that person* or [2] which is of *direct and individual concern* to them, and [3] against a *regulatory act* which is of *direct concern* to them and *does not entail implementing measures* [emphasis added].<sup>635</sup>

<sup>634</sup> For a comprehensive historical overview of these jurisprudential developments and debates see Arnall, 2006: Chapter Three and Chapter Four. For a more recent account – discussing the (potential) implications of the Lisbon Treaty reforms – see Stephan Balthasar, “Locus Standi Rules For Challenges to Regulatory Acts by Private Applicants: The New Art.263(4) TFEU” (2010) *European Law Review* Vol. 35 No. 4 542 (hereinafter Balthasar, 2010); and Koen Lenaerts and Nathan Cambien, “Regions and the European Court: Giving Shape to the Regional Dimension of the Member States” (2010) *European Law Review* Vol. 35 No. 5 609 (hereinafter Lenaerts and Cambien, 2010).

<sup>635</sup> Latent requirements of standing include natural and legal persons having “legal personality”; and “establishing a legal interest”. On legal personality, according to settled case law, there are two tests: first, if the legal person has been recognised as such under national legal rules (Case T-161/94 *Sinochem Heilongjiang v Council* [1996] ECR II-695 (hereinafter *Sinochem*): para 31); and, second, if a Union institution has treated an organisation as an independent “negotiating body” for the purposes of the former’s administration. In Case 175/73 *Union Syndicale, Massa and Kortner v Council* [1974] ECR 917, the Court recognised an *ad hoc* representative group of employees as an officially recognised “trade union”, legitimately acting in the collective interest of its employee members (at para. 12). It should also be noted that legal personality does not exclude third country nationals. See *Sinochem*; and *Metock*. See also Koen Lenaerts and Dirk Arts, *Procedural Law of the European Union*, London: Sweet and Maxwell, 1999: 157. On the requirement to establish a legal interest, applicants must establish that the annulment of the contested Union act will significantly affect their

The first is relatively straightforward and uncontroversial. It is easy to understand, for example, a business entity's right to challenge a fine imposed on it by the Commission on the basis of anti-competitive commercial practice e.g. Microsoft in *Microsoft v Commission*.<sup>636</sup> Like access for semi-privileged actors, there is a sense of evenness and optimality regarding this rule of standing – the natural or legal person's affected interest is palpable, and analogous to the prerogatives of semi-privileged actors.

It is the second rule of access that has given rise to controversy and debate. Given the broad scope of "Union act", there are many species of Union law that fall within the requirement for the natural or legal person to demonstrate that they are "directly" and, most problematically, "individually" concerned therewith. The requirement of "direct concern" was clarified by the Court in *Les Verts*:

It must first be pointed out that the contested measures are of direct concern to the applicant association. They constitute a complete set of rules which are sufficient in themselves and *which require no implementing provisions*, since [its application] is automatic and leaves no room for any discretion.<sup>637</sup>

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interests. This test overlaps with the tests of direct and individual concern: "[w]here the contested act exhibits those characteristics, it is rare that that condition of a legal interest will not be satisfied. In any event, the existence of a legal interest is one of the elements of admissibility of the action examined by the [Union] judicature." Opinion of Advocate-General Cosmas in *Greenpeace*: para. 49. Moreover, the applicant is not precluded from establishing a legal interest based on the *type* of interest – i.e. whether it is environmental, economic, social, etc. (*Greenpeace*: Para 50. The type of interest can, however, be relevant in the determination of individual concern (discussed below). In *Antillean Rice Mills and Others v Commission*, the CFI decided that the decisive test for the existence of a legal interest is whether the annulment of the contested act was "of itself capable of having legal consequences" (Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others v Commission* [1995] ECR II-2305: para 59). See also Case 77/77 *BP v Commission* [1978] ECR 1513; Case 207/86 *Apesco v Commission* [1988] ECR 2151; and Case T-183/97 *Micheli and Others v Commission* [2000] ECR II-28. Indeed, this is what differentiates this test from the test for direct concern. Whereas the latter test requires the applicant to demonstrate that the contested measure brings about legal consequences on the applicant, the test for legal interest requires the applicant to show that the annulment of the contested measure will alter the applicant's legal situation (by itself, logically connected to, and practically the same as, the test of direct concern; though not the same, strictly speaking) in such a way that is commensurate with an identifiable interest of the applicant, whatever that may be e.g. economic, social or environmental.

<sup>636</sup> Case T-201/04 *Microsoft v Commission* [2007] ECR II-1491 (hereinafter *Microsoft*).

<sup>637</sup> *Les Verts*: para 31, emphasis added.

The requirement is that legal effects flow directly from the contested measure, and are not subject to any further administrative discretion i.e. no implementing provisions. In *Greenpeace*, for example, the Court held that the applicants were not directly concerned by financial aid given by the Commission to the Spanish authorities because there was a level of discretion with which the Spanish authorities could use that financial assistance – leaving only an “indirect” link between the Commission’s act (providing financial assistance) and the issue with which the applicants were ultimately concerned (the building of power stations by Spanish authorities). This requirement all but excludes EU directives from being reviewed by non-privileged actors, since directives “shall leave to the national authorities the choice of form and methods.”<sup>638</sup> However, the Court decided in *Piraiki-Patraiki* that even when an act leaves open the possibility of further administrative discretion, if that discretion is “entirely theoretical” and if there is “no doubt” as to the intended use of that discretion, then that would be sufficient to satisfy the test of direct concern.<sup>639</sup> Even though that judgment concerned an applicant challenging a decision, and not a directive, this rationale has opened up the possibility of natural and legal persons being able to establish that they are directly concerned by directives.<sup>640</sup> A useful summary of these rules is provided by Lenaerts and Cambien:

The requirement that an act not addressed to the applicant must be of direct concern to it expresses the rule that an applicant may bring an action for annulment only against acts which, as such, have legal effects on it. The legal consequences for the applicant must flow directly from the act, which implies that it should not leave any margin of discretion with regard to its implementation. The act’s implementation must be automatic and result from Union rules without the application of other intermediate rules.<sup>641</sup>

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<sup>638</sup> Article 288(3) TFEU.

<sup>639</sup> Case 11/82 *Piraiki-Patraiki v Commission* [1985] ECR 207: para. 9.

<sup>640</sup> See Joined Cases T-172/98 and T-175/98 to 177/98 *Salamander AG and Others v Parliament and Council* [2000] ECR II-2487.

<sup>641</sup> Lenaerts and Cambien, 2010: 611-612.

The requirement of “individual concern” was seminally defined by the Court in *Plaumann*:

Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.<sup>642</sup>

That *ratio* survives to this day as the foundation on which the jurisprudence on “individual concern” has been constructed.<sup>643</sup> Yet, it must be observed that this foundation is shaky at best. Syntactically, it makes for, and has resulted in, a remarkably incoherent jurisprudence – opening its application to all sorts of hostages to fortune. In 1962, in *Plaumann*, the Court rejected the application as inadmissible on the basis that the applicant – an importer of clementines – was indistinguishable from other importers of clementines in relation to the legal effects of the contested measure, holding that “by reason of a commercial activity which may at any time be practised by any person”.<sup>644</sup> This would tend to suggest that *any* legislative act would be beyond the scope of this requirement, especially regulations, which “shall have general application”.<sup>645</sup> Yet, in later years, the test has been construed in such a way as to grant natural and legal persons standing to challenge the validity of legislative acts of the Union, including regulations.<sup>646</sup> In *Codorniu*, the Court considered that the applicants were individually concerned by a regulation because it prohibited the applicant from using one of its registered trade-marks. The incoherence of the *Plaumann* ratio makes its application to any given applicant legally uncertain. Historically, this requirement has been especially contentious because it has proven

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<sup>642</sup> Case 25/62 *Plaumann v Commission* [1963] ECR 95 (hereinafter *Plaumann*): 107.

<sup>643</sup> See Balthasar, 2010: 544-549.

<sup>644</sup> *Supra* at note 642.

<sup>645</sup> Article 288(2) TFEU.

<sup>646</sup> See Case C-309/89 *Codorniu v Council* [1994] ECR I-1853 (hereinafter *Codorniu*); and Case C-358/89 *Extramet Industrie v Council* [1991] ECR I-2501 (hereinafter *Extramet*). In both of these cases the Court gave standing to business entities seeking to annul regulations.



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to be so restrictive.<sup>647</sup> When the Union legislature enacts a rule of law of general application, such as a regulation adopted under the ordinary legislative procedure, it is intuitively difficult to see how a natural or legal person could be *individually* concerned. Indeed, this is referred to as the “closed class” test, where access will only be granted to a categorically finite group.<sup>648</sup> The demonstrable concern of the action’s interlocutors has been that individuals, in particular, are deprived of their constitutional right to “a complete system of judicial protection”.<sup>649</sup> However, the argument here is that the real problem is access for *non-economic* associations whose interests are “general” in nature.

Economic legal persons, such as business entities, are typically the recipients of Union decisions, and often their interests are more clearly implicated by other species of Union acts. Arnall has identified two ways in which the Court has applied the *Plaumann* formula in this way.<sup>650</sup> First, applicants are individually concerned by a Union act if it relates to a *property right* (including an intellectual property right) that is peculiar to the applicant e.g. *Codorniu*. Second, applicants are individually concerned by a Union act if “the relevant [Union] legislation has laid down specific procedural guarantees for such a person”.<sup>651</sup> Furthermore, in *Federolio*, the General Court interpreted individual concern to include:

- (a) where a legal provision expressly grants trade associations a series of procedural rights; (b) where the association represents the interests of undertakings which would be entitled to bring proceedings in their own right; [and] (c) where the association is differentiated because its own interests as an association are affected,

<sup>647</sup> See Balthasar, 2010: 542-543.

<sup>648</sup> Arnall, 2006: 78-80.

<sup>649</sup> See especially the Opinion of Advocate General Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677 (hereinafter *UPA*): para 62. See also Albertina Albors-Lorens, “The Standing of Private Parties to Challenge Community Measures: Has the European Court of Justice Missed the Boat?” (2003) *Cambridge Law Journal* Vol. 62 72 (hereinafter, Albors-Lorens, 2003).

<sup>650</sup> Arnall, 2006: 78-80.

<sup>651</sup> See Case T-60/96 *Merck and Others v Commission* [1997] ECR II-849: para. 73.

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and especially where its position as negotiator is affected by the measure which it seeks to have annulled.<sup>652</sup>

By contrast, in *Greenpeace*, the Court of Justice emphasised that, although the standing requirements, and, in particular, the sorts of “interests” applicants are required to demonstrate, do not, in principle, exclude non-economic interests:

It has consistently been held that an association formed for the protection of the collective interests of a category of persons cannot be considered to be directly and individually concerned for the purposes of the fourth paragraph of Article 173 of the Treaty by a measure affecting the general interests of that category, and is therefore not entitled to bring an action for annulment where its members may not do so individually.<sup>653</sup>

The exclusion of “collective interests” that are of “general interest” severely limits the extent to which civil society associations can raise actions for annulment of Union acts addressed to third parties. In *Greenpeace*, the applicants were *inter alia* environmental associations, specifically concerned in this case with the damage that two power stations would cause to the environment if they were built by the Spanish authorities. As well as not being directly concerned by the Commission’s financial support given to the Spanish authorities (the contested act, discussed above), the Court held that the “general” nature of environmental interests is incompatible with the requirements of individual concern and thus refused them standing. Economic actors, especially business entities, stand a much better chance of satisfying this requirement given that, typically, their purview is confined to the particular interests of their stakeholders.<sup>654</sup>

<sup>652</sup> Case T-122/96 *Federolio v Commission* [1997] ECR II-1559 (hereinafter *Federolio*): paras. 60-61.

<sup>653</sup> *Greenpeace*: para 59. See also Gormley, 2000.

<sup>654</sup> See Takis Tridimas and Gabriel Gari, “Winners and Losers in Luxembourg: A Statistical Analysis of Judicial Review Before the European Court of Justice and the Court of First Instance (2001-2005)” (2010) *European Law Review* Vol. 35 No. 2 131 (hereinafter Tridimas and Gari, 2010). Their findings show that between 2001 and 2005, “[o]ut of a total of 340 [actions for annulment] ... the percentage of actions dismissed as inadmissible was considerably higher amongst those lodged by natural persons (50 per cent) than those lodged by legal persons (30 per cent)” Tridimas and Gari, 2010: 159-160).

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The Court has frequently had the opportunity to reform these rules in light of these criticisms, especially in light of the forceful Opinion of Advocate General Jacobs in *UPA*, in which he argued that:

The only satisfactory solution is therefore to recognise that *an applicant is individually concerned by a Community measure where the measure has, or is liable to have, a substantial adverse effect on his interests.*<sup>655</sup>

The Court rejected this argument, however, on the basis that the drafters of the Treaty had not meant for this rule of law to be part of the jurisprudence, otherwise they would not have explicitly included the requirement of “individual concern” in the Treaty – and reasoning, therefore, that the solution must be reform of the Treaty.<sup>656</sup>

The question we must now address is whether or not the advent of the third category of access for natural legal persons – the “regulatory act” – introduced by the Lisbon Treaty compensates for the restrictiveness of the *locus standi* case law; and the same question must also be asked given the availability of the preliminary rulings procedure (Section 3.3.2). In Section 4, we go on to address the boundary question in view of complete picture presented here in light of the polity-conditions of the EU.

If the contested Union act is a “regulatory act” that is of direct concern and entails no implementing measures, natural and legal persons do not have to satisfy the requirement of individual concern. What we need to know is the scope of “regulatory act”. To what extent does it overlap with the three forms of legislation in Article 288 TFEU; furthermore, does it relate to the ordinary legislative procedure (Article 289 TFEU), delegated acts (Article 290 TFEU), and/or implementing acts (Article 291 TFEU), the latter two being forms of secondary legislation? The advent of this

<sup>655</sup> *UPA* Opinion of Advocate General Jacobs: para. 102 (4), emphasis not added.

<sup>656</sup> *UPA*: para 45. This *ratio* is discussed in Section 3.3.3. See also the interestingly timed and competing decisions of the CFI in Case T-177/01 *Jégo-Quéré & Cie SA v Commission* [2002] ECR II-2365; and the ECJ in Case C-263/02 P *Commission v Jégo Quéré* [2004] ECR I-3425, the former accepting Advocate General Jacob’s Opinion in *UPA*, only for it to be overturned by the ECJ in the latter.

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mechanism of access was brought about because of the controversy and consternation over the restrictive requirement of individual concern in Article 230 TEC (pre-Lisbon), as reflected in the reform deliberations.<sup>657</sup> In the wake of the Lisbon Treaty solution, there were disagreements as to whether or not the term “regulatory act” would cover Union acts adopted under the ordinary legislative procedure:

[T]he central question is which kinds of Regulations fall under the term “regulatory act”. It is common ground that it covers non-legislative acts of general application and thus implementing and delegated Regulations adopted under arts 290 and 291(2) TFEU; arguably, it also includes Decisions of general application. It is unclear, however, whether “regulatory acts” also include Regulations that are adopted through a legislative procedure and that are therefore legislative acts under art.289 (3) TFEU.<sup>658</sup>

In 2011, the General Court twice confirmed the suspicions of Balthasar by excluding acts adopted under the ordinary legislative procedure from the scope of regulatory

<sup>657</sup> Since the Laeken Declaration (European Council, Laeken Declaration, 14-15 December 2001, available at European Council website at: <http://ue.eu.int/en/Info/eurocouncil/index.htm>. (hereinafter the Laeken Declaration)), there has been a deliberate movement towards a more “democratic” EU; attempted, first, by the European Convention and concluded, finally, in 2009 with the ratification of the Lisbon Treaty. Within these protracted deliberations, was a consistent emphasis on reform of the standing requirements under the then Article 230(4), specifically in relation to the requirement of individual concern, with a view to expanding individuals’ involvement in EU law-making. Indeed, the pre-legislative discussion papers and related literature – for both the proposed Constitution and the Lisbon Treaty – show that removing this requirement was important for giving individuals a greater role in the law-making process and was generally regarded as part of the EU’s move towards greater democratic legitimacy. See, generally, the meeting minutes of the Discussion Circle on the Court of Justice, available at [http://european-convention.eu.int/doc\\_register.asp?lang=EN&Content=CERCLEI](http://european-convention.eu.int/doc_register.asp?lang=EN&Content=CERCLEI). See also “A Summary Guide to the Treaty of Lisbon”, National Forum on Europe, January 2008: 18. For an overview, see Balthasar, 2010: 544-547.

<sup>658</sup> Balthasar, 2010: 543-544. See Dougan, 2008: 675-680. Dougan argues that the Convention deliberately excluded *legislative* measures from the meaning of “regulatory acts”. For a contrary view, see Lenaerts and Cambien, 2010: 616-619. Lenaerts and Cambien argue that the interpretation given to “regulatory acts” with respect to the Lisbon Treaty should not necessarily be drawn from the deliberations by the European Convention, given their essentially different purviews. They argue that the form and substance of the Lisbon Treaty are sufficiently different from the proposed Constitution and support a broader interpretation of “regulatory acts”.

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act. In *Inuit*,<sup>659</sup> the applicant sought to annul a regulation adopted under the ordinary legislative procedure.<sup>660</sup> The General Court dismissed the action as inadmissible insofar as the term “regulatory act”, whilst applying to acts of general application, does not cover legislative acts.<sup>661</sup> The Court relied *inter alia* on the deliberations in the run-up to the Constitutional Treaty.<sup>662</sup> Subsequently, in *Microban*<sup>663</sup> the General Court decided that the term “regulatory act” covered an implementing act of the Commission in the form of a decision adopted under Article 291 TFEU.<sup>664</sup>

This situation relaxes the requirements of standing somewhat, but not in a way that would sufficiently enhance access for associations with affected interests of a general nature, primarily because the exclusion of legislative acts precludes precisely matters of general interest. Of course, much depends on how the Court of Justice interprets this new provision on appeal.<sup>665</sup> Given the Court’s discretion here, it certainly would not be unreasonable for the Court to interpret “regulatory acts” as inclusive of legislative measures. Indeed, it is conceivable that the Court might do so, since the decisive reason on the basis of which the Court rejected Advocate General Jacobs’ recommendation in *UPA* was because the Treaty explicitly included the requirement of individual concern. The legislative history, and its end product (being the removal of the requirement of individual concern for regulatory acts), presents the Court with another, less “activist”, opportunity to grant private individuals standing to challenge legislative acts of the Union. On the contrary, the Court might be minded to uphold the reasoning of the GC.

<sup>659</sup> Case T-18/10 *Inuit Tapiriit Kanatami EA v Parliament and Council* Order of the General Court of 6 September 2011 (hereinafter *Inuit*).

<sup>660</sup> Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products (2009) OJ L 286 36.

<sup>661</sup> *Inuit*: para. 56.

<sup>662</sup> *Inuit*: para. 49.

<sup>663</sup> Case T-262/10 *Microban v Commission* Judgment of 25 October 2011 (hereinafter *Microban*).

<sup>664</sup> *Microban*: para 22.

<sup>665</sup> C-583/11 P *Inuit Tapiriit Kanatami EA v Parliament and Council* (pending). For further analysis of this emerging jurisprudence, see Steve Peers and Marios Costa, Case Report on Case T-18/10 *Inuit Tapiriit Kanatami EA v Parliament and Council* (2012) *European Constitutional Law Review* Vol. 8 82; and Jürgen Bast, “New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarisation in EU Law” (2012) *Common Market Law Review* Vol. 49 885: 898-907.

3.3.2. The Preliminary Rulings Procedure

As we saw in Section 3.1.4 and Section 3.2 of Chapter Five, the preliminary rulings procedure under Article 267 TFEU (ex Article 234 TEC) is a key component in integrating the legal systems of the Member States with the Union's legal system. This is especially the case because, as we saw, its procedural rules allow *any* court or tribunal of a Member State to make a reference to the Court of Justice. In this Section, we consider this procedure as a mechanism of access. In particular, to what extent can actors have their affected interests expressed in matters relating to Union law? Given the nature of this action, and the overlap of jurisdictions it entails, *national* courts are themselves part of the legal system within which matters of Union law are adjudicated. Thinking especially of the twin doctrines of direct effect (*Van Gend en Loos*) and supremacy (*Costa v ENEL*), national courts, at all levels, present actors with forums within which their affected interests vis-à-vis Union law can be expressed. As we shall see below, the role of the Court of Justice, and access thereto, is relevant also – as a constitutional court with supervisory jurisdiction – and entails procedural criteria to be satisfied in order for it to deliver authoritative and binding decisions.

Direct effect is a principle that requires national courts to apply EU law where relevant in their determination of cases. Broadly speaking, this principle covers all species of Union law, including primary (i.e. Treaty provisions) and secondary (see Section 3.1, above) legislation, and the decisions of the Court of Justice.<sup>666</sup> Of

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<sup>666</sup> It is unnecessary for the purposes of this thesis to present a comprehensive overview of the various qualifications here. See Damian Chalmers, Gareth Davies, and Giorgio Monti, *European Union Law (2<sup>nd</sup> Edition)*, Cambridge: Cambridge University Press, 2011 (hereinafter Chalmers et al, 2011): 268-300. Of particular note, however, is that directives only enjoy direct effect under very specific conditions. Private individuals are able to enforce unimplemented directives that are unconditional and sufficiently precise (see Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337) against “organisations or bodies which [are] subject to the authority or control of the [Member] State” (Case C-188/89 *Foster v British Gas* [1990] ECR I-3313) after the period of transposition of the directive into national law has expired (Case 148/78 *Pubblico Ministero v Ratti* [1978] ECR 1629) – vertical direct effect. Private individuals are, generally speaking, unable to invoke unimplemented directives in national courts against other private individuals – horizontal direct effect – (Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723), except in the case of “incidental direct effect”, whereby an organ of the state is implicated in the case as a third party (Case C-194/94 *CIA Security International SA v Signalson SA and Securitel Sprl* [1996] ECR I-

particular note here is that direct effect establishes not only that Union law can be enforced against Member States that have defaulted on their Union obligations (vertical direct effect), but also that private individuals may rely on Union law in cases *inter se* (horizontal direct effect).<sup>667</sup> Moreover, rules of national procedural law are prohibited from preventing litigants from vindicating rights established by Union law in national courts, subject to the requirements of “effectiveness” (that rules of national procedural law must not render directly effective species of Union law ineffective) and “equivalence” (that restrictive rules of national law are only permissible if they are applied consistently in substantive areas of law that are not germane to Union law i.e. that they are “no less favourable than the rules governing actions for safeguarding an individuals rights under national provisions”).<sup>668</sup> In the situation where a national court cannot, or does not, apply Union law, the Member State may be liable to a claim in damages, which is actionable in national courts i.e. state liability.<sup>669</sup> The principle of supremacy complements these rules,<sup>670</sup> whereby

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2201; and Joined Cases C-152/07 and C-154/07 *Arcor v Bundesrepublik Deutschland* [2008] ECR I-5959); and in the case of “indirect effect” where the national court is required to interpret national law insofar as is possible in light of unimplemented directives (*Von Colson*; and Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135).

<sup>667</sup> *Van Gend en Loos*; and Case 43/75 *Defrenne v Sabena (No. 2)* [1976] ECR 455. On regulations, see Case 93/71 *Leonesio v Italian Ministry of Agriculture* [1972] ECR 293. On directives, see *ibid*.

<sup>668</sup> The seminal judgment in Case 33/76 *Rewe-Zentralfinanz v Landwirtschaftskammr für das Saarland* [1976] ECR 1989 established these rules. On effectiveness, see *Factortame* (the ECJ prescribing that national courts must allow interim protection vis-à-vis Union law, in order that the rules of Union law are not deprived of their effectiveness). See also C-465/93 *Atlanta* [1995] ECR I-3761: para 42; and Case C-432/05 *Unibet v Justitiekanslern* [2007] ECR I-2271 (hereinafter *Unibet*): para 64 (where the lack of available national procedures gave rise to a *prima facie* obligation on the Swedish legal system to allow for an action with a view to permitting the litigant to raise a reference to the Court of Justice under Article 267 TFEU, discussed *infra*). On equivalence, see *Unibet*: para 52. See also Case C-326/96 *Levez v Jennings* [1998] ECR I-7835: paras 41-53 (on time limits imposed by national procedural rules). Moreover, these requirements also apply in horizontal cases (see Case C-453/99 *Courage Ltd. v Crehan* [2001] ECR I-6297).

<sup>669</sup> See Joined Cases C-6/90 and Case C-9/90 *Francovich and Others v Italy* [1991] ECR I-5357: para 33. These rules also apply in areas of law that are not directly effective in national courts (see Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur v Germany* [1996] ECR I-1029). As we shall see below, the principle of state liability can also be activated where national courts of last instance do not make a reference to the Court of Justice when, according to the Union’s procedural rules under Article 267 TFEU, they are required to (see Case C-224/01 *Köbler v Austria* [2003] ECR I-10239 (hereinafter *Köbler*): para. 55).

<sup>670</sup> Indeed, in its inception (*Costa v ENEL*) it was justified on the basis that direct effect and the effectiveness of Union law would be deprived in the absence of this principle.

rules of national law that conflict with Union law are to be “disapplied” by national courts.<sup>671</sup>

The democratic significance of this, in terms of the intrinsic virtue of participation, is highly significant. From a socio-legal perspective (and, as we shall see in Section 4, also from a comparative perspective), the complementary doctrines of direct effect and supremacy provide actors with an (atypical) exceptional opportunity to express their views within the overarching architecture of the Union legal system. The fact that *any* court (or tribunal) is bound by these rules, and, by association, can make references to the Court of Justice under Article 267 TFEU, avoids the economic pitfalls associated with appellate jurisdictions. Moreover, national courts of first instance will not generally exclude categories of actors from their rules of standing – allowing privileged, semi-privileged, and natural and legal persons to access the Union legal system in order to express their affected interests.<sup>672</sup> We must also consider national courts themselves as relevant actors, since they too have vested interests (holistic, as we saw in Chapter Five, but which may be disaggregated into particular interests, perhaps systemic or doctrinal) that are implicated by the overlapping jurisdiction of the Union legal system.<sup>673</sup> In democratic terms, as we saw in Section 2.2, access to democratic participation overlaps with instrumental virtues of democratic legitimacy – in particular, the polity-constitutive, democracy-

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<sup>671</sup> Case 106/77 *Simmenthal (Italian Finance Administration) v Simmenthal* [1978] ECR 629. See also *Factortame I*, *Factortame*, and *Factortame II*. See CJEU, Information Note on References from National Courts for a Preliminary Ruling (2009) OJ C 297/01 (hereinafter CJEU, Information Note on 267 TFEU): Point 8. See also Case 28-30/62 *Da Costa en Schakke NV v Nederlandse Belastingadministratie* [1963] ECR 31 (hereinafter *Da Costa*). The issue of supremacy is a complex area of legal and political analysis, especially in terms of the competing claims to *kompetenz-kompetenz* and constitutional supremacy. For a fuller discussion, see Section 2.2 of Chapter One, especially the discussion on the *Solange* and reverse-*Solange* jurisprudence; and Section 2.1 of Chapter Two, on the existential debate.

<sup>672</sup> Indeed, the Court recently decided that it was not contrary to the Charter for the Commission to raise an action, subsequently referred to the Court of Justice under Article 267 TFEU, before a national court. See Case C-199/11 *Europese Gemeenschap v Otis NV and others* Judgment of the Court (Grand Chamber) 6 November 2012.

<sup>673</sup> Nyikos argues that, given their discretion, national judiciaries use the preliminary rulings procedure as a means of directing the meaning and application of Union law according to their own juridical preferences. In particular, she demonstrates empirically how national courts have used the provision of “pre-emptive opinions” (in their summary of the legal and factual circumstances, discussed above) as effective “rhetorical weapons” designed to secure their desired interpretation of Union law (Nyikos, 2006: 527-530).



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generative aspects. The *system* created through the preliminary rulings procedure is of great significance here too. As Stone Sweet puts it:

Litigants and their interests are understood to be fuelling a machine operated by judges. In this view, legal integration develops a self-sustaining logic. In announcing the doctrines of supremacy and direct effect, the ECJ opened up the European legal system to private parties, undermined certain constitutional orthodoxies in place in Continental legal systems, and radically enhanced the potential effectiveness of EC law within the Member States. Private actors, motivated by their own interests, provided a steady supply of litigation capable of provoking [Article 267 TFEU] activity.<sup>674</sup>

The questions we are now concerned with relate to the supervisory jurisdiction of the Court of Justice within this system. The actors/litigants before national courts – expressing and negotiating their affected interests vis-à-vis Union law – are ultimately subject to the constitutional authority of the Court’s interpretation of Union law. As well as this mandate being expressed in Article 19(1) TEU, the national courts, when making a reference, are bound to adopt the interpretation of Union law provided by the Court of Justice.<sup>675</sup>

In Section 3.3.2.1, we consider the access of actors to the supervisory jurisdiction of the Court in relation to questions of interpretation of Union law. In Section 3.3.2.2, we consider two issues. First, the accessibility question in relation to references made by national courts on the validity of Union law; and, second, the extent to which this access compensates for the difficulties associated with *locus standi* for natural and legal persons under Article 263 TFEU (Section 3.3.1.3).

<sup>674</sup> Stone Sweet, 2004: 21.

<sup>675</sup> See Case C-306/99 *BIAO v Finanzamt für Grossunternehmen in Hamburg* [2003] ECR I-1: para. 92 (although this was doubted by Advocate General Jacobs in paragraph 50 of his Opinion). See Article 91 RPCJ and Article 104(1) RPCJ, which provide that the judgments and orders in preliminary rulings are binding.

### 3.3.2.1. Accessibility and References on the Interpretation of Union Law

In references on the interpretation of Union law, the Court interprets Union law on behalf of national courts seeking to determine its applicability in cases before the national court. The Court can give interpretations of any species of Union law, including legislation, and binding and non-binding administrative acts of the Union's institutions,<sup>676</sup> which can have the result of national courts disapplying rules of national law.<sup>677</sup> The Court cannot, however, give rulings on matters of fact before the national court,<sup>678</sup> nor can it interpret provisions of national law.<sup>679</sup>

There are two main procedural hurdles for litigants within the Article 267 procedure: the discretion of national courts to make a reference; and the Court's rules on when national courts may, must and cannot make a reference. On the discretion of national courts to make a reference, the general position under Article 267(2) TFEU is that a national court can make a reference "if it considers that a decision on the question is *necessary* to enable it to give judgment" (emphasis added). The Court has consistently held that:

[N]ational courts have the *widest discretion* in referring matters to the Court of Justice if they consider that a case pending before them raises questions involving interpretation, or consideration of the validity, of provisions of [Union] law, necessitating a decision [emphasis added].<sup>680</sup>

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<sup>676</sup> See Case C-322/88 *Grimaldi v Fonds des Maladies Professionnelles* [1989] ECR 4407.

<sup>677</sup> *Factortame, Factortame I, and Factortame II*.

<sup>678</sup> Case C-435/97 *WWF and Others* [1999] ECR I-5613.

<sup>679</sup> Case C-295/97 *Piaggio* [1999] ECR I-3735. There is some confusion on this point, however. In Joined Cases C-297/88 and C-197/89 *Dzodzi v Belgium* [1990] ECR I-3763, the Court of Justice ruled that it had jurisdiction to interpret national law when "the national law of a Member State refers to the content of [provisions of Union law] in order to determine rules applicable to a situation which is purely internal to that State" (at para. 36). See also Article 104(2) RPCJ, which allows national courts to re-refer rulings that they deem not to have sufficiently enabled it to deliver a judgment. For a full discussion on the blurring of this boundary – conceptually and empirically – see Arnall, 2006: 107-114; and Silvere Lefevre, "The Interpretation of Community Law by the Court of Justice in Areas of National Competence" (2004) *European Law Review* Vol. 29 No. 4 501: 508.

<sup>680</sup> Case 166/73 *Rheinmühlen v Einfuhr- und Vorratsstelle Getreide* [1974] ECR 33: para. 4. It was decided in *Da Costa* that Article 177 TEEC (now Article 267 TFEU) always allows a national court to make a reference if it feels it is desirable, and even if materially similar references have already been made. See CJEU, Information Note on 267 TFEU: Points 20-24. A referring courts is invited to, "if it

Litigants must therefore convince the national court to make a reference if it is their intention to deliberate with the Court of Justice. Access here is, therefore, dependent on rules of national procedural law, which may differ across the legal systems within each of the 27 Member States.<sup>681</sup> In terms of Union law, the position is that the national court has sole discretion in situations where the national court is not compelled to make a reference by the Treaty; national courts are not obliged to make a reference simply because a party raises a question of Union law.<sup>682</sup> Indeed, the Court of Justice makes this point explicit in its directions to national courts on how to make references:

It is for the national court alone to decide whether to refer a question to the Court of Justice for a preliminary ruling, whether or not the parties to the main proceedings have requested it to do so.<sup>683</sup>

This means that the case presented to the Court of Justice does not necessarily reflect the interests of the litigants themselves. For example, even though litigants are invited to make written submissions and take part in oral proceedings,<sup>684</sup> they do not choose the questions that form the principal subject-matter of the preliminary ruling – in contrast to the position of party-litigants in annulment proceedings, whose legal and factual submissions in their initial application form the principal parameters of the case.

This basic framework has been further developed by the Court's rules on when national courts may, must, and cannot make references. On the latter, the Court has established criteria on the accessibility of a reference, based on the questions that have been drafted by the national court, and the nature of the proceedings therein. It

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considers itself able, briefly state its view on the answer to be given to the questions referred for a preliminary ruling." (Point 23).

<sup>681</sup> It is beyond the scope of this research to determine empirically and illustrate these national rules.

<sup>682</sup> *CILFIT*: para. 9.

<sup>683</sup> CJEU, Information Note on 267 TFEU: Point 10.

<sup>684</sup> See Article 23 SCJ, and Article 97 RPCJ. Note, however, Article 97 (3) RPCJ, which provides: "[a]s regards the representation and attendance of the parties to the main proceedings in the preliminary ruling procedure the Court shall take account of the rules of procedure of the national court or tribunal which made the reference."

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is for the referring court to choose the questions, and to ensure that the request for a preliminary ruling satisfies the procedural criteria. These criteria emphasise the discretion conferred on referring courts by laying down precise instructions to enable referring courts to articulate effectively the questions that *they* deem to be “necessary to enable [them] to give judgment”.<sup>685</sup> Indeed, the Court of Justice will refuse to hear a preliminary ruling from a national court if the latter’s reference is not sufficiently explained.<sup>686</sup> Furthermore, the Court of Justice has taken a very dim view of litigants before national courts that have ostensibly contrived cases in order to access the Court of Justice. In *Foglia v Novello*,<sup>687</sup> for example, the Italian national court referred questions on the interpretation of Union law with respect to French law – the result of which (for the Court of Justice to rule that French law was incompatible with Union law) was shared by both parties pleading before the Italian court. The Court of Justice refused to answer the questions referred on the basis that the Court’s remit, with respect to its jurisdiction to give preliminary rulings, is to assist national courts to resolve genuine disputes and not to be used for strategic purposes:

It must in fact be emphasized that the duty assigned to the Court by [Article 267 TFEU] is *not that of delivering advisory opinions on general or hypothetical questions* but of assisting in the administration of justice in the Member States. It accordingly does not have jurisdiction to reply to questions of interpretation which are submitted to it within the framework of procedural devices arranged by the parties in order to induce the Court to give its views on certain problems of [Union]

<sup>685</sup> See CJEU, Information Note on 267 TFEU: Points 20 – 24. Referring courts are invited to, “if it considers itself able, briefly state its view on the answer to be given to the questions referred for a preliminary ruling.” (Point 23).

<sup>686</sup> Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo v Circostel* [1993] ECR I-393. In this decision, the Court of Justice refused to give a preliminary ruling on the questions referred by the Italian national court on the grounds that the Italian court had not adequately explained the factual and legislative background to the case that necessitated a reference to the Court of Justice. Exceptions to this rule include: when a ruling by the Court is very important (Case C-316/93 *Vaneetveld* [1994] ECR I-763); or if the deficiencies are remedied at a later stage in the proceedings (Case C-35/99 *Arduino* [2002] ECR I-1529). See also Article 101 RPCJ, which allows the Court of Justice to request that the national court clarifies its reference.

<sup>687</sup> Case 104/79 *Foglia v Novello* [1980] ECR 745; and Case 244/80 *Foglia v Novello* [1981] ECR 3045 (hereinafter *Foglia II*).

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law which do not *correspond to an objective requirement inherent in the resolution of a dispute*.<sup>688</sup>

There are also procedural rules that determine when national courts *may* and *must* refer questions on the interpretation of Union law. Article 267(2) TFEU provides that national courts “may” make a reference, whereas Article 267(3) TFEU goes on to state that “[w]here any such question is raised in a case pending before a court or tribunal of a Member State *against whose decisions there is no judicial remedy* under national law, that court or tribunal *shall* bring the matter before the Court [emphasis added].” *Prima facie*, this means that courts of last instance, when faced with questions on the interpretation of Union law, are under a duty to refer, which, if not carried out, may give rise to Member State liability (*Köbler*).<sup>689</sup> Any other national court has the discretion to make that determination for itself, which will not render the Member State liable.<sup>690</sup>

Yet, in *CILFIT*, the Court of Justice provided national courts – including courts of last instance – with a set of criteria that permit them not to refer in certain circumstances. This is referred to as the *acte clair* doctrine, and it relates to the complexity of proposed questions. In *Da Costa*, the Court of Justice held that national courts may refer questions that are materially identical to questions referred in previous preliminary rulings proceedings, but that, in that event, the Court of Justice will simply refer the national court to the original judgment. This rationale was developed in *CILFIT*, in which the Court concluded that, in those circumstances, national courts – including national courts of last instance – are permitted to make the interpretation of Union law themselves, where:

... the correct application of [Union] law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of

<sup>688</sup> *Foglia II*: para 18, emphasis added. In Case C-83/91 *Meilicke v ADV/ORG*A [1992] ECR I-4871, the Court refused a reference from a German court in which a German jurist posed a hypothetical legal problem. See, however, Tridimas, 2003: 23-24.

<sup>689</sup> The duty is not affected by the discontinuance of infringement proceedings by the Commission on the same issue. See Case C-393/98 *Gomes Valente* [2001] ECR I-1327.

<sup>690</sup> Case C-99/00 *Lyckeskog* [2002] ECR I-4839.

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specific characteristics of [Union] law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the [Union].<sup>691</sup>

This can be extended to questions in which the points of law have been clearly established, but the facts and/or questions at issue are not strictly identical. National courts are thus empowered to provide their own interpretation of Union law, foregoing jurisprudential dialogue with the Court of Justice. The *acte clair* doctrine thus potentially undermines access, as it provides national courts with a legal basis on which to refrain from making a reference, even when there are legitimate questions on the interpretation of Union law raised in national proceedings – precluding access to the Court of Justice’s supervisory jurisdiction.<sup>692</sup>

#### 3.3.2.2. Accessibility and References on the Validity of Union Acts

Much the same rules of access outlined in Section 3.3.2.1 apply to references on the validity of Union acts.<sup>693</sup> Where any national court or tribunal of a Member State entertains doubts as to the validity of a Union act in a relevant case, it must refer the matter to the Court of Justice. In terms of the discretion of the national court, especially from the perspective of strategically motivated litigants, the procedural rules are the same. The Court will only hear references that are germane to genuine disputes; and it is for the national court – not the litigants – to determine whether or not a reference is needed for adjudication. There are, however, some qualifications that differentiate this type of reference from the former. In particular, should the

<sup>691</sup> *CILFIT*: Para 16.

<sup>692</sup> The *acte clair* doctrine has been criticised on different grounds. Tridimas demonstrates its abuse with an example of a Greek national court, in which, he argues, the Greek national court’s interpretation of Union law was “not supported by the Court’s case law on mutual recognition and appears to be incorrect. In any event, given that a substantial number of the Conseil d’Etat members dissented, it must be accepted, at the very least, that the issue was not *acte clair*. The Conseil d’Etat clearly exceeded its *CILFIT* mandate.” See Tridimas, 2003: 43. See also Arnall, 2002. Tridimas does argue, however, that “[a]cte clair is an indication of maturity in the development of the Community legal order.” See Tridimas, 2003: 12.

<sup>693</sup> Unlike references on interpretation, the Court of Justice cannot review the validity of Treaty provisions, only Union acts as under Article 263 TFEU.

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national court decide that the validity of a Union act is relevant in order for it to give judgment, it *must* refer to the Court – regardless of whether or not it is a court of last instance.<sup>694</sup> This is so even when a similar reference has been made by another national court.<sup>695</sup> The doctrine of *acte clair* does not apply in these instances.<sup>696</sup> The other qualification to note is that litigants who would otherwise have had standing to challenge the validity of the impugned Union Act under Article 263 TFEU, but have missed the two month deadline, are unable to have the national court make this type of reference.<sup>697</sup>

The question that we must now address is, given this procedure, and these qualifications, are the restrictive rules of standing for natural and legal persons under Article 263 TFEU redressed? This question is all the more pertinent since the Court's insistence on retaining the requirement of individual concern was, in part, premised on the argument that Article 267 TFEU provides “a complete system of judicial remedies” – thus redressing the concerns of the critics of standing under Article 230(4) TEC.<sup>698</sup> The starting point is to consider the detailed and systematic Opinion of Advocate General Jacobs in *UPA*, who addresses precisely this question. AG Jacobs' argument is that the availability of Article 267 TFEU does not address the deficits in Article 263 TFEU (Lisbon reforms notwithstanding, which came after his Opinion). His argument is essentially two-fold: that the procedural rules discussed above do not provide a complete system of judicial remedies; and that it should be the CFI (now the General Court) that hears these actions, not the Court of Justice.<sup>699</sup> On the former, he argued that the requirement in *Foto-Frost* – that all national courts

<sup>694</sup> Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199 (hereinafter *Foto-Frost*). Arnul argues that it would be anathema to the Union system – especially the objective of uniformity – for national courts unilaterally to invalidate Union law. See Arnul, 2006: 125.

<sup>695</sup> *R v Intervention Board for Agricultural Produce, ex parte ED and F Man Sugar Ltd.* [1986] 2 ALL ER 126 (Queens Bench Division).

<sup>696</sup> The only exception to this rule is that national courts may suspend the application of Union acts in the interim, so long as there are ongoing proceedings challenging the validity of the same Union act. See *Factortame*: para 22, in light of the judgments in *Factortame I and II*. See also Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen v Hauptzollamt Itzehoe* [1991] ECR I-415: para 18. Moreover, the national court must use the same test under Union law for enforcing interim measures (Article 279 TFEU) – see *Foto-Frost*: para. 33.

<sup>697</sup> Case C-188/92 *TWD Textilwerke Deggendorf v Germany* [1994] ECR I-833 (hereinafter *TWD*).

<sup>698</sup> *UPA*: 6734.

<sup>699</sup> Opinion of Advocate General Jacobs: paras 36-49. See also Arnul, 2006: 131.

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*must* refer – means that litigants cannot vindicate their rights at the national level;<sup>700</sup> related to that, the wide discretion given to national courts as to whether or not to make a reference results in procedural gaps that might encourage litigants to break the rules in order to make a reference,<sup>701</sup> time-delays (given the protracted proceedings of the preliminary rulings procedure),<sup>702</sup> and, thus, legal uncertainty. On his preference for the General Court to hear these actions, AG Jacobs argued that litigants would have direct access to the Court and thus be able to express their viewpoints more effectively;<sup>703</sup> that raising these actions would be published in the OJ, and thus also allow for third party intervention;<sup>704</sup> and, finally, that the two month time-limit would apply and lead to greater legal certainty.<sup>705</sup> He also rejected the argument that there would be a “deluge” of cases if the standing requirements were relaxed; arguing that there is no comparative evidence to support that claim; that similar applications could be dealt with together; and that the rules of procedure could be reformed in such a way as to accommodate a greater volume of applications.<sup>706</sup> In light of these observations, he concluded:

[A]n individual should be regarded as individually concerned within the meaning of the fourth paragraph of Article 230 EC by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, *a substantial adverse effect on his interests* [emphasis added].<sup>707</sup>

This Opinion received great support from the scholarly community, and was surely one of the forces that lead to subsequent legal developments. In *Unibet*, for example, the Court held that:

<sup>700</sup> *Ibid*, para. 41.

<sup>701</sup> *Ibid*, para 43. See also Laurence Gormley, “Judicial Review: Advice for the Deaf?” (2006) *Fordham International Law Journal* Vol. 29 655 (hereinafter Gormley, 2006): 661, 681.

<sup>702</sup> *Ibid*, para 42.

<sup>703</sup> *Ibid*, para. 46.

<sup>704</sup> *Ibid*, para. 47.

<sup>705</sup> *Ibid*, para.48. This was one of the key rationales supporting Albors-Llorens’ evaluation of these rules (Albors-Llorens, 2003: 85).

<sup>706</sup> *Ibid*, paras. 79-81. See also Albors-Llorens, 2003: 89-90; and Gormley, 2006: 676.

<sup>707</sup> *Ibid*, para. 103.



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[I]t is clear from paragraphs 56 to 61 above that Unibet must be regarded as having available to it legal remedies which ensure effective judicial protection of its rights under [Union] law. If, on the contrary, as mentioned at paragraph 62 above, *it was forced to be subject to administrative or criminal proceedings and to any penalties that may result as the sole form of legal remedy* for disputing the compatibility of the national provision at issue with Community law, that would not be sufficient to secure for it such effective judicial protection [emphasis added].<sup>708</sup>

The Court thus concluded that, in such a situation, the Swedish authorities ought to ensure that there are procedural means available for litigants to access national courts such that they can activate a reference, subject to the discretion of the national court. There is a *prima facie* argument to be made that the same ratio ought to apply to references on the validity of Union acts – responding to the concerns of AG Jacobs and others that, in order to vindicate rights established by Union law, litigants would have to break the law. The feasibility of this argument is less convincing, since it does not require Member States to establish new and open-ended legal procedures. More persuasively, the reforms in the Lisbon Treaty go some way towards addressing these concerns (discussed in Section 3.3.1.3). Indeed, Balthasar optimistically argued that “regulatory act” be adopted in line with AG Jacobs’ Opinion, pointing out that it was part of the history of reform.<sup>709</sup> Yet, as we saw above, the General Court has (tentatively) only relaxed this requirement in relation to non-legislative acts.

As compelling as AG Jacobs’ analysis was, it must be noted, contrary to prevailing support, that he was wrong, on two counts. First, the Court in *UPA* did what any good trustee-court ought to do, which is dutifully to apply the established rules of law, irrespective of convincing arguments to the contrary. It is anathema to the trustee-Court’s primary fiduciary duties – and, thus, its instrumental democratic legitimacy – so flagrantly to dispense with the terms of the trust (in this case, a Treaty provision, no less). Indeed, as we have seen, this was one of the Court’s primary

<sup>708</sup> *Unibet*: para. 62.

<sup>709</sup> Balthasar, 2010: 543-544.

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justifications for not adopting AG Jacobs' radical legal transformation.<sup>710</sup> Second, AG Jacobs' account of access to the Court is somewhat myopic. It omits from the analysis various other standards of legitimacy, a comparative perspective, and, relatedly, the distinctive polity-conditions of the EU. In Section 4, we go on to consider this question of boundary, assessing the extent to which access to democratic participation in the Court of Justice strikes the right balance.

**4. Questions of Balance: Understanding Access to Democratic Participation in the EU**

In this Section, we turn to consider the appropriateness of the current distribution of access between different actors' interests. Is there too much access for privileged actors? Is there not enough for civil society actors? We thus consider the criteria by which appropriate boundaries can be set for apportioning levels of access for these actors. In Section 4.1, we look at the prevailing approaches in the literature to this question, and determine the shortfalls and gaps therein. Sections 4.2 and 4.3 then move on to re-assess this question in light of the theoretical framework identified in Chapter Three.

*4.1. Diagnostic Problems and Solutions*

In the literature on access to judicial review in the Court of Justice, there are four shortcomings that, as indicated above in relation to AG Jacobs' analysis in *UPA*, present an unfair account of the issue of access. These are: a myopic preoccupation with particular values of good governance; a general neglect of the salient problem of access as being one that affects associations of (non-economic) "general interests" (as observed in Section 3.3.1.1); a non-comparative approach; and the neglect of the

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<sup>710</sup> Albors-Llorens disagrees with this position, arguing that the Court has historically adopted radical "teleological" interpretations of Union law; providing the invocation of State liability in *Francovich* as an example. See Albors-Llorens, 2003: 90. For a similar argument, see Gormley, 2006: 674.

distinctive polity-conditions of the EU (recalling the three C's of EU Constitutionalism), especially the pervasive debate on *finalité*. In this Section, these shortfalls will be addressed with a view to setting up the arguments presented in Sections 4.2 and 4.3.

In the literature (and in the jurisprudence of the Court), there are certain key values that emerge which guide a normative assessment of the apportionment of access (i.e. the question of balance). These values are: adherence to the rule of law; ensuring an effective or complete system of judicial remedies; legal certainty; the requirement of uniformity; and the control of the increasing workload of the Union's courts. Arnall, for example, argues:

It is submitted that the annulment action strikes a better balance than the reference procedure between the competing interests at stake when the validity of a [Union] act is challenged. The *principle of legality* requires unlawful acts to be quashed after a thorough review of their validity. This implies adversarial proceedings in which the institution which adopted the act plays a full part and all the relevant issues are examined. The principle of *legal certainty* requires the question of an act's validity to be resolved within a reasonable period of its adoption so that those affected by the act can have confidence in the legal context within which they conduct their affairs. The *right to an effective remedy* entitles those who are adversely affected by an act to bring proceedings before a court with jurisdiction to rule on its legality. Although the preliminary rulings procedure may sometimes seem to safeguard one or other of those principles more effectively than the annulment action, only the latter action is able to protect all of them simultaneously.<sup>711</sup>

Arnall, like AG Jacobs in *UPA*, stresses that the preliminary rulings procedure does not present an effective alternative for natural and legal persons who fail to establish

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<sup>711</sup> Arnall, 2006: 131, emphasis added. On legal certainty and jurisprudential complexity, see Albers-Llorens, 2003: 85, 92. On judicial protection of the individual, see Gormley, 2006: 688. See also Balthasar, 2010; Lenaerts and Cambien, 2010; Koen Lenaerts and Tim Corthaut, "Judicial Review and a Contribution to the Development of European Constitutionalism" (2003) *Yearbook of European Law* 1; and Stefan Enchelmaier, "No-One Slips Through the Net? Latest Developments, and Non-Developments, in the European Court of Justice's Jurisprudence on Art. 230 (4) EC" (2005) *Yearbook of European Law* Vol. 24 173.

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the standing criteria under the annulment procedure, which, consequently, cannot be justified as it offends higher order values that must take precedence i.e. the principle of legality, legal certainty and the right to an effective remedy. The debate on this issue is thus derived from a disagreement over the implementation of these values, rather than over the normative weight of the values themselves. The Court and the commentators are in agreement that, for example, rule of law requirements of “legality” or “the right to a judicial remedy” take precedence. Where the analytical confusion emerges is the failure, by both the Court and the commentators, adequately to frame these higher order values in a relational way. Rather than discuss the synergies and tensions between these values – and a broader normative rationale within which to reconcile and implement them coherently – discussion and debate over the organisation of the Court’s procedures and processes tends to frame analyses in a narrow way, incongruously generating a plethora of values with which to justify very particular institutional claims.

The literature tends to give the greatest attention to the “private individual”, or sometimes, “trade associations”, as the categories of actors that are most severely affected by the problems associated with access.<sup>712</sup> Yet, as we saw in Section 3.3.1.1, the counter-intuitive requirement of applicants demonstrating affected interests peculiar to them as a “closed-class” of actor (*qua Plaumann*) most severely disenfranchises the association whose interests are general in nature e.g. the environmental association; and that these rules are relatively relaxed for the interests of economic associations. Moreover, the interpretation of “regulatory act” by the General Court to date only partially redresses these concerns, given the exclusion of legislative acts. Albers-Llorens curtly addresses the concerns of “pressure groups” in a somewhat dismissive way, given the strength with which she supports AG Jacobs’ Opinion in *UPA* more generally:

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<sup>712</sup> See generally Llorens, 2003; Gormley, 2006; and Balthasar, 2010. Indeed, this was the focus of AG Jacobs’ Opinion in *UPA*.

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[A]lthough the standing of pressure groups such as environmental associations would be difficult to establish under either test, the Jacobs test seemed more suitable for assessing the *locus standi* of trade associations.<sup>713</sup>

For her, like others, it is the “private party” that we should be most concerned about – her contribution stressing “the unsatisfactory position of private parties who might wish to challenge [Union] acts”.<sup>714</sup>

Yet the individual is not quite so severely disenfranchised by these rules of access, and the position of (non-economic) associations with “general interests” should be a greater focus of concern. First, most individuals are relatively unconcerned with the sorts of policy initiatives that give rise to the adoption of Union acts.<sup>715</sup> Yet, even when they have a demonstrable interest in a Union act’s substance, the extent to which they can access proceedings for judicial review thereof is, as we shall see below, actually comparatively stronger than the typical position in national and transnational courts. More pertinently, however, there are strong reasons to support the proposition that (non-economic) associations with general interests deserve greater attention in the literature; and, more importantly, greater access to judicial review of Union acts. As we saw in Section 2.1, the intrinsic virtue of democratic participation (and thus the associated issue of access) overlaps with the intrinsic virtue of representation – democratic participation as epistemic representation. As such, (non-economic) associations with general interests (hereinafter epistemic associations) fulfil a core democratic function in a democratic society – that of representing disaggregated interests as they emanate from civil society. Given that epistemic associations’ interests are of a general nature, they will represent the affected interests of large groups of individuals via the association itself. As such, these associations should be granted access to judicial review of Union acts, because such general interests will often be implicated in Union legislation. Moreover, because they represent, greater access would prevent a plethora of individual

<sup>713</sup> Albors-Llorens, 2003: 85-86.

<sup>714</sup> Albors-Llorens, 2003: 92.

<sup>715</sup> Indeed, this is empirically verified by Moravcsik (see Moravcsik 2002: 615-617).

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applicants from raising actions on these bases – their affected interests converging through the representation of the epistemic association. The extent to which the correct balance has been struck, vis-à-vis the boundary question, with respect to epistemic associations (*qua* natural and legal persons) is addressed in Section 4.3 below. The other neglected category of actor in the debates is the privileged actors. This is perhaps because they have virtually unfettered access to judicial review of Union acts directly via Article 263 TFEU. Nevertheless, the boundary question should still be addressed here – do they enjoy *too much* access? This issue is addressed in Section 4.2.

The third weakness of the debates on access is the neglect of the comparative context. In spite of the limitations observed in Section 3.3, the fact that natural and legal persons can challenge the validity of legislation in an apex court should be recognised to be quite special protection of their rights, and atypical when compared to national and transnational courts. Given the appellate structure in the UK and the US, for example, individuals cannot raise *direct* actions at first instance before the UK Supreme Court or the US Supreme Court respectively. Nor, for the same reason, can they do so indirectly by making references thereto. As we saw in Section 4.1.1 of Chapter Four, individuals can raise direct actions before the ECtHR. Yet there are two problems with this. First is that “[the ECtHR] may only deal with the matter *after all domestic remedies have been exhausted*, according to the generally recognised rules of international law”.<sup>716</sup> This qualification reduces the direct nature of the action to one of an especially burdensome appellate system. Moreover, applicants cannot make references to the ECtHR. Second, as we saw in Section 4.1.1 of Chapter Four, there are only two actions available to raise in the ECtHR, both of which have the principal effect of awarding damages to aggrieved applicants. They are thus not actions for judicial review in the orthodox functional sense, whereby the reviewing court can authoritatively strike down impugned legislation. Indeed, this is a problem we observed in relation to the UK Supreme Court, in Section 4.1.2 of Chapter Four, which also lacks the jurisdiction to strike down primary legislation,

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<sup>716</sup> Article 35(1) ECHR, emphasis added.

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and, where it can strike down secondary legislation, or interpret legislation in a novel way, it is subject to the strong *ex post* mechanism of control through the doctrine of parliamentary legislative supremacy, which means that Parliament can overturn or reverse those decisions. The fact that natural and legal persons can challenge the validity of Union acts both directly and indirectly in the Union's apex Court *at all* must be recognised as being atypical and exceptional, and this must be factored into the appraisals of access to judicial review in the Court of Justice.

The fourth, and final, criticism of the literature is that the debates give only a very sparse consideration, if at all, to the distinctive polity context of the EU and to the relevance of the deep controversy over *finalité*. The claims famously propounded by the Court in *Les Verts*, that the EU is a polity “based on the rule of law” and that the Treaty is a “basic constitutional charter”, *prima facie* present quite compelling organisational logics for the design of the Court's procedures. Indeed, as we have seen, commentators will often justify particular institutional claims on these premises. Yet, viewed in abstract terms, the notion of the “rule of law”, for example, presents more of a *rhetorical* means by which to justify these claims. Notions like the rule of law, a complete system of judicial remedies and legal certainty are concepts that have been borrowed from the constitutional orthodoxies that underpin the modern nation-state, which we know the EU is not. How does the rule of law apply in the *sui generis* EU, for example? To put this into context, consider, for example, a claim made by the Court when considering the issue of standing under Article 263(4) TFEU for (trade) associations:

The very nature of the process of preparing legislative acts and of such acts themselves, as measures of general application, is such that the participation, by virtue of those principles, of the persons and/or associations affected is not required, their interests being deemed to be represented by the political authorities called upon under the Treaty to adopt those acts.<sup>717</sup>

<sup>717</sup> See *Federolio*: para. 75. The General Court also advanced the same point of view in Case T-109/97 *Molkerei Grossbraunshain and Bene Nahrungsmittel v Commission* [1998] ECR II-3533, also arguing that, for the purposes of interest representation in the legislative process, associations are “deemed to be represented by the political bodies called upon to adopt those measures”: para. 60.

In the nation-state context, this argument would hold much more weight. Yet, as we saw in Chapter 2, the EU's political institutions do not enjoy the same degree of democratic legitimacy as their national counterparts. The legislative process of the EU does not offer the same degree of representation and accountability as can be observed in national parliaments. This is not to suggest that borrowing constitutional orthodoxies from the nation-state context is entirely implausible. On the contrary, they present useful analytical yardsticks. But they must be approached, first, in the abstract and then, second, re-specified with a careful appreciation of the distinctiveness of the EU polity.

In light of these diagnostic problems, the proposed solution here is to reframe the debates in light of the notion of institutional trusteeship, and to use that conceptual frame to address the boundary question – how much access? Above all, here, trusteeship factors in a sensitivity to the EU's conditions. In terms of resolving the boundary question, as we saw in Section 2, the intrinsic virtue of access to democratic participation has an important relationship to (output) instrumental legitimacy. Given the centrality of Union law within the terms of the Court's trusteeship, the Treaties – and the norms that inhere implicitly within them – present a necessary and primary source for determining legitimate institutional functioning and ordering. The Treaty, as an instrument that is *constitutive* of the EU polity, does not operate in a vacuum, and must always be interpreted and reinterpreted in light of the very political conditions that gave rise to its formulation. The institutional configuration of the Court of Justice is inexorably tied to the social and political realities that define the EU as a polity. Given this relationship, the extent to which institutional access can and should be apportioned between actors must be assessed in light of the broader context that defines the EU polity. All of the juristic and academic discussions on the nature of the EU and *finalité* (outlined in Chapter 2) are informative for this purpose. If, for example, the EU's legislative processes were commensurate, democratically speaking, with those of national legislative processes, and they offered the same degree of responsiveness to public interest, then the Court



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of Justice would have been right in making the observation given in *Federolio*. Not only is it the case that the Union's legislative processes are insufficiently responsive to public interests (Chapter 2), but it is also plain that neither the Court nor commentators pay sufficient regard to the complex nature of the EU polity when justifying arguments on legitimate institutional ordering.

In the remaining sections of this Chapter, the boundary issue will be (re)examined in light of these methodological propositions, emphasising how our (contested) understanding of the EU polity and *finalité* informs that analysis. It is argued, first, that the Union's commitment to an intergovernmental organisational logic, and its countervailing supranationalist posturing, justify the privileged degree of institutional access apportioned to the governments of the Member States and the Union's institutions. We then go on to consider the weaker position of civil society actors, and consider whether or not this is justified. It is argued that civil society actors are entitled to greater access, because of the democratic deficits that exist within the Union's legislative and administrative infrastructure, and also because in the Union, as a *sui generis* polity, the domains of "politics" and "law" are functionally intertwined in such a way that requires its legal institutions to be more democratic.

#### 4.2. Understanding Privileged Access

Given the deliberate use of the term "*privileged actor*" within the debates on access, it is perhaps surprising that there are few, if any, objections to this institutional configuration. Indeed, it is anathema to the very idea of democracy to think of political democratic rights as something qualified by status; underpinning the notion of collective self-government is the idea that all actors share those rights equally.<sup>718</sup> Of course, as we are addressing these rights in the context of trustee-courts, and given the specific instrumental roles of such institutions, something like institutional

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<sup>718</sup> Rawls, 1996: 6.

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access comes at a premium – it cannot be a deliberative “free-for-all”. Nevertheless, giving the governments of the Member States and the Union’s institutions unfettered (for the most part) access to deliberative participation in the Court begs the question, especially when civil society actors are given comparatively little: how can these privileges be justified?

It is here that an appreciation of polity-complexity and polity-contestation are particularly informative. On the former, it is important to recall the complex jurisdictional asymmetries that are divided between intergovernmental and supranational ordering logics (Section 4 of Chapter Two). Given this complexity, it is quite natural and proper that the governments of the Member States and the Union’s institutions are afforded privileged judicial access. For example, for those areas that fall under purely intergovernmental jurisdiction, the Court acts as “umpire” in the event that these actors disagree over the form or methods of intergovernmental action e.g. the CFSP. This is why, as can be seen in Appendix One, there is a range of actions before the Court that concern only these institutions. It is relevant to note, for example, that the Commission – as the Union’s strongest supranationalist symbol – has less access within these “intergovernmental” actions. Actions of this type are generally reserved for the governments of Member States and the Council of Ministers, both of which assume the Union’s intergovernmental responsibilities. With respect to the supranational jurisdiction of the Union, privileged access for these actors can be understood in two ways. First, in the same vein as the intergovernmental jurisdiction, the governments of the Member States and the Union’s institutions are the primary actors involved in the administration and delivery of the Union’s (supranational) objectives. The Court thus acts, again, as an “umpire” in the event that these institutions have disagreements over the proper implementation of those objectives e.g. the single market.

On polity-contestation, we saw in Chapter Five that the dominance of the representation of national legal traditions and Union legal culture within the Court’s structural configuration is counter-poised from the inherent tension that exists

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between intergovernmentalism and supranationalism. This same phenomenon is also relevant when addressing the issue of institutional access. Because of the political controversy over *finalité*, representatives (broadly speaking) from either school of thought, and, importantly, the *de jure* political representatives of the relevant institutions (e.g. the governments of Member States and the Council of Ministers, representing the intergovernmentalist vision; and the institutional actors of the Union's institutions, representing the supranationalist vision) have vested interests to protect as those interests emerge and are exposed in the Court's constitutional deliberations. These vested interests thus go beyond the ordinary and immediate subject-matter of any given legal dispute, but, in addition to that, they relate to the consequences of the Court's constitutional adjudication with respect to intergovernmentalist and supranationalist sentiments. For example, will the decision by the Court in any given case bring the Union closer to the supranationalist vision of *finalité*? In order to ensure that these quasi-ideological interests can be sufficiently protected, their adherents must be given the means to articulate them to the Court on any given matter of constitutional adjudication that might affect them, which, given the constitutional nature of the vast majority of the Court's cases, will be often.

#### 4.3. Understanding Access for Civil Society Actors

Can the reduced capacity of civil society actors to access the Court of Justice be justified?<sup>719</sup> Should they be afforded *more* access? The argument here is that the procedural rules of access are too restrictive given the legitimacy deficits that exist in the EU's political domain. This argument can be given from two perspectives: the view that greater access for civil society actors *compensates* for those deficits; and the view that, given the inseparability of the "political" and "legal" domains in the EU polity, greater access for civil society actors is *complementary* to the EU's democratic legitimacy. Both of these perspectives are grounded in the same

<sup>719</sup> Here we understand "civil society actors" to relate to natural and legal persons. Yet, given the observations made in Section 4.1 on the special virtue of epistemic associations (*qua* non-economic associations with general interests), the focus here is on their access.

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empirical observations in relation to the EU's political credentials i.e. that, according to an orthodox conception of politics and its commensurate institutional infrastructure, the EU suffers from a political deficit (as seen in the DemDefLit). Where these perspectives differ are the ways in which they respond to this deficit: the former re-affirms the hypothesis that the EU's political deficit is, indeed, a problem that has to be resolved; whereas the latter perspective rejects the applicability of institutional orthodoxies that give rise to these *perceived* deficits, and, instead, postulates that the *de facto* political infrastructure that operates in the EU is *sui generis* and overlaps with the EU's legal system to a large extent. As such, the legal system must be infused with measures of democratic legitimacy, irrespective of the failure of the EU's "political" infrastructure to foster legitimacy.

4.3.1. Compensating for Political Democratic Deficits

The argument here is that greater access for civil society actors *compensates* for the fact that those actors are poorly represented by the Union's political institutions. By allowing private individuals and associations to participate in various mechanisms of judicial review at the Court of Justice, their democratic rights of interest-representation are re-established, even if this solution is not ideal. Here, the argument is that, because of democratic deficits (detailed in Chapter Two), the Court of Justice should allow for greater involvement of civil society actors within its actions for judicial review. But the problem with these deficits is that they are inadequately *responsive* to the European public. The epistemic association cannot support or exert pressure on a political party that may be voted into office and consequently implement favourable policies. Likewise, the individual voter cannot reward or punish European administrations because the latter have insufficiently represented their interests. Indeed, this is exemplified by the General Court's interpretation of "regulatory act". Given that it excludes "legislative acts", and, thus, acts adopted under the ordinary legislative procedure (Article 289 TFEU), epistemic associations may only enjoy this relaxed standing requirement with respect to "delegated"

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(Article 290 TFEU) or “implementing acts” (Article 291 TFEU). Furthermore, according to Article 2 of Protocol 2 TEU, national parliaments may only participate in the adoption of “legislative acts”, and are thus excluded from raising objections with respect to delegated and implementing acts.

Given that national parliaments do not suffer from the same representation deficits as the EP, we can say that the General Court’s interpretation of “regulatory act” is somewhat commensurate with responding to political deficits. Nevertheless, the role that national parliaments have in the adoption of legislative acts is limited,<sup>720</sup> and they do not necessarily represent epistemic associations at the EU level. As such, it is still insufficient that epistemic associations do not have direct access to the judicial review of legislative acts under Article 267 TFEU. From the perspective of legitimate democratic ordering at the EU level, civil society needs to be given the means to articulate and defend its interests. This is not to suggest that the framework of *locus standi* (for both raising actions and intervening as interested third parties) is improvident – owing to the specificities of the judicial forum (i.e. its primary trustee-duties), it would be both unnecessary and counterproductive to turn the Court into a deliberative “free-for-all”. There has to be some mechanism by which relevant and salient affected interests are optimally determined. Allowing greater civil society participation will ultimately make the Court a more responsive and informed court for when it has to deliberate over the meaning and application of indeterminate Union law. In this way, the interests of civil society actors are re-integrated into the Union’s legislative and administrative decision-making.

#### 4.3.2. Complementing the Union’s Sui Generis Political System

The compensatory view implicitly assumes a modernistic orientation to the issue of political and democratic legitimacy. It affirms that the observations of “democratic deficits” are problems that have to be solved – in one way or another – in order to

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<sup>720</sup> See Article 7 Protocol 2 TEU for the limitations of this procedure.

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make the Union a more democratic polity. This view is therefore dependant on orthodox political structures – as derived from the nation-state tradition – as the appropriate benchmark of democratic ordering. In particular, democratic legitimacy is dependant on a particular vision of the appropriate location of “political” action i.e. in the axiomatic sense of the word. In this view, the political domain of the polity – as distinct from the social or the legal domains, for example – is presupposed to be identifiable by, and only by, a particular institutional infrastructure. So, because the EP is a “parliament” with “elected officials”, it must be where political action takes place, and, therefore, where measures of democratic legitimacy ought to be implemented. But that approach tends to place the cart before the horse. Rather than determine, first, where political action *does* take place, and, thereafter, assess democratic legitimacy accordingly, it pre-supposes that democratically relevant political action only takes place in institutions that are ostensibly the same as national democratic political institutions i.e. because the Council of Ministers, the Commission and the European Parliament are ostensibly “executive” and “legislative” institutions, then why are they not structured democratically? No wonder, then, that so much attention is paid to perceived deficits vis-à-vis the European Parliament, which fails in several ways to imitate the democratic ordering of national parliaments.

This is not to say that the Union’s institutions do not have significant political powers. Nor is it to suggest that they should have fewer powers. The foregoing observations merely emphasise that such an analysis is methodologically misplaced because it anticipates the Union’s institutions to be *as* politically active – both quantitatively and qualitatively – as national executives and legislatures, which, as a matter of empirical verifiability, they are not. Furthermore, and significantly for the present argument, it overlooks the role of law within the political ordering of the Union. Historically, it has been through the administration of law, within and around the Union legal system, that the *political* objectives of the Union have been most significantly implemented i.e. integration through law (for the familiar backstory here, see Section 3 of Chapter Five). It is therefore the case that meaningful and

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democratically relevant political action within the Union is inseparably intertwined with the Union's legal system and its legal institutions. It is in this sense that the Union's political system is *sui generis*, because it, unusually, operates through legal processes. In this view, instilling the Union's legal institutions with measures of democratic ordering serves to *complement* the Union's democratic legitimacy, as opposed to merely compensating for perceived deficits in the Union's putatively executive and legislative institutions.<sup>721</sup> This presents an alternative rationale for affording civil society actors (as well as, indeed, the Union's institutions) greater degrees of institutional access to democratic participation than presently exists. Given my vision of *finalité* – namely, that “we don't know what it is yet” – this justification is preferable.

**5. Conclusion**

In this Chapter, I examined the Court's structures and processes in light of the intrinsic virtue of democratic participation. In Section 2, democratic participation was defined as the expression by actors of their affected interests in institutional decision-making. It was shown that the sorts of interests that are relevant here were special or disaggregated interests, in contrast to the holistic forms of interests observed in Chapter Five. Disaggregated interests, moreover, entail any kind of interest – from the mundane to the sublime – that an actor feels is affected by a discrete authority's decision-making. We also saw that democratic participation as an intrinsic virtue overlaps significantly with representation, as well as instrumental indices of democratic legitimacy; in this case, the polity-constitutive output from the decision-making authority. We then saw how these concepts applied in the context of trustee-courts: supplementing the representation of holistic interests with avenues for disaggregated interests to be expressed; and facilitating the legitimate exercise of the trustee-court's polity-constitutive jurisprudential output (given rise to by secondary fiduciary duties).

<sup>721</sup> On the suitability of “democratic experimentalism” in the EU, see Gerstenberg, 1997: 346 – 349.

Section 3 then went on to present a case-study on the Court's structures and processes that act as mechanisms of access for different types of actors to express their arguments and viewpoints on how their affected interests should be dealt with by the Court of Justice in its constitutional adjudication. We saw that democratic participation in the Court is achieved through the researcher role of the Judges and Advocates-General, which enhances the Court's awareness of affected interests through giving access, albeit informally, to actors via involvement in academic and practitioner colloquia; and because the Judges and Advocates-General conduct research, read the literature, and publish their research. We then looked at various mechanisms of access to judicial review – such as third party intervention; the rules of standing under the Court's annulment procedure (Article 263 TFEU); and the significance of Article 267 TFEU's preliminary rulings procedure for national litigants, and the availability thereof for access to the Court of Justice – examining the extent to which these formal mechanisms of access allowed for different categories of actors and interests to be expressed to the Court of Justice. We saw that there are three categories of actors: privileged (Member States and the Union's institutions); semi-privileged (the offices bodies and agencies of the Union); and non-privileged (natural and legal persons). It was further observed that access is especially limited for the latter category and that the salient problem that emerges from these rules is for epistemic associations (non-economic associations with general interests) – alternatively referred to under the rubric of “civil society”.

The discussion then normatively appraised the relative degrees of access afforded to these actors, emphasising how our complex and contested understanding of the EU informs that analysis. It was argued, first, that the Union's commitment to an intergovernmental organisational logic, and its countervailing supranationalist posturing, justifies the privileged degree of institutional access apportioned to the governments of the Member States and the Union's institutions. We then went on to consider the weaker position of civil society actors, and considered whether or not this is justified. It was argued, first, from a comparative perspective, that civil society



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actors have an unusually high degree of access to the Court of Justice when compared to the likes of national supreme or constitutional courts, as well as other transnational courts. Yet the truly problematic group is not individuals, but epistemic organisations. It was then argued that these actors are entitled to greater access because of the democratic deficits that exist within the Union's legislative and administrative infrastructure; and also because, in the Union, as a *sui generis* polity, the domains of "politics" and "law" are functionally intertwined in such a way that requires its legal institutions to be more democratic.

The purpose of this thesis was to examine the procedural democratic legitimacy of the Court of Justice of the European Union. The subject-matter of this analysis was the Court's structures and processes, including the composition and appointments processes for members of the Court; the mechanisms that give access to various kinds of participants (such as *locus standi* and third-party intervention); and the use of judicial chambers. Procedural democratic legitimacy, moreover, has two dimensions: intrinsic and instrumental. The intrinsic refers to the democratic credentials of the Court as a discrete decision-making authority (measured by indicators such as representativeness and participation); whereas the instrumental is concerned with the ways in which the Court contributes to the overall democratic legitimacy of the EU.

This analysis was set against the backdrop of a court that has famously been a key player in constituting a polity that is distinctive in kind – the *sui generis* European Union. In so doing, the Court of Justice is implicated – actually and potentially – in a range of discourses on the legitimacy of judicial governance. The argument of this thesis contributes to three principal discourses of this kind. First, in Chapter One, I examined the literature that critically evaluates the Court of Justice's methods of legal reasoning, and its constitutional functions. I observed that very little attention has been given to evaluating the Court through the lens of democratic legitimacy. Second, in Chapter Two, I examined the expansive (conceptually and empirically) debates on the democratic deficit in the EU – debates within which an examination of the instrumental democratic legitimacy of the Court of Justice play an essential part. Yet we saw that, whilst there have been some modest contributions in that regard, there remains much more to be said about the Court's role in contributing to the overall democratic legitimacy of the EU. Third, in contrast to the prevailing approaches of many constitutional theorists – who tend to treat intrinsic and instrumental democratic criteria as functions that are quite discrete, and their performance as mutually exclusive – an important theoretical contribution of this thesis was to develop an analytical framework that allows for the inherent synergies

and tensions that exist between intrinsic and instrumental criteria to be factored into analyses of the democratic legitimacy of constitutional courts.

In Chapter Three, I developed an analytical framework within which the procedural democratic legitimacy of the Court of Justice was examined. As stated above, procedural democratic legitimacy embraces both intrinsic and instrumental dimensions. In terms of intrinsic democratic legitimacy, I argued that discrete decision-making authorities must use their discretion in a manner that is *responsive* to the interests of the public. This is because contemporary polities are constituted by such large populations that it is simply impractical for institutions to accommodate the direct participation of all. Responsiveness to public interests is, then, an underlying principle that facilitates democratic decision-making in decision-making institutions that possess final and exclusive authority. To that end, I argued that there are four intrinsic virtues that achieve this: participation (making institutional decision-making accessible to the public for their involvement); representativeness (ensuring that the public's interests are, in various ways, part of institutional decision-making); accountability (ensuring that the officials of political institutions are supervised by the public, whereby the public can punish improvident political action and reward political officials for acting in good faith); and institutional transparency (providing the means for public audit of the political institution's exercise of political power). Instrumental democratic legitimacy, by contrast, is a way of understanding the functional relationship between the particular political institution and the broader democratic polity within which, and for which, it functions.

The reason we examine a political institution in this way is because each political institution within a democratic polity has been allocated certain functions in order to enhance the democratic qualities of the polity, taken holistically. In order to understand the democratic legitimacy of a political institution, we must also pay attention to how it functions – paying close attention to the scope of its political powers and the limits that places on institutional functioning. There are two aspects of the polity-institution connection to be aware of here. First, there are the formally

established institutional roles and objectives that have been handed over (or delegated) to the institution by virtue of the separation of powers doctrine – thus enabling one to deduce the expected output and appropriate limits to institutional functioning. Second, because political institutions will have, to varying degrees, a certain amount of discretion in enacting their formally established roles and implementing their objectives, they will inevitably and iteratively function in such a way as to help (re)define and (re)constitute the polities within which they function.

As noted above, an examination of the procedural democratic legitimacy of any discrete decision-making institution must pay due regard to both intrinsic and instrumental criteria, carefully addressing the inherent synergies and tensions that exist therein. Moreover, because the instrumental dimension is sensitive to the nature of the wider polity, the salient characteristics of that polity (the polity-conditions) must be factored into the analysis of both the intrinsic and instrumental dimensions of procedural democratic legitimacy. The complexity here is compounded by the peculiar character of the EU. In that regard, in Chapter Two – having observed the various ways in which the EU's polity-conditions informed empirical analyses of the instrumental democratic legitimacy of its political institutions – the salient polity-conditions of the EU were identified under the heading of the three C's of EU constitutionalism: complexity, contestation, and change. Polity-complexity refers to the multi-faceted nature of the Union in terms of its jurisdiction and its multi-level, inter-institutional relations – in particular, the tangled relationship between intergovernmentalism and supranationalism. Polity-contestation refers to the deeply contested nature of the EU in existential terms i.e. what is the EU, and what is it for? We saw that, given the demonstrable conflict over this question, this conflict must itself be factored into the structures and processes of the Union's institutions. Finally, polity-change refers to the ever expanding, widening, and deepening of the EU – territorially and jurisdictionally. Given this state of flux, not only must we understand the structures and processes of the Union's institutions to be contingent upon future reform, we must also be careful to understand debates on institutional reform in light of this historical trend.

The foregoing thus presents a complicated array of conceptual conditions by which the procedural democratic legitimacy of the Court of Justice ought to be examined. In light of these complexities, the notion of trusteeship was presented in Chapter Three as an analytical basis from which to address them. The idea of the trustee-institution explains – in terms of constitutional and political theory – the legitimate vesting of delegated regulatory decision-making in non-majoritarian institutions, such as constitutional courts. Owing to the virtuous fiduciary relationship between trustee-institutions and their beneficiaries (the public) – as laid down in rules agreed by the settlors of the trust – trustee-institutions are endowed with significant discretion with which to exercise regulatory decision-making. In constitutional courts such as the Court of Justice, this discretion relates to the following duties: to resolve constitutional disputes; to do so according to a faithful interpretation of the meaning of the norms set out (explicitly and implicitly) in constitutional settlements i.e. constitutional law; to make reasonable interpretations and clarifications of indeterminate constitutional law; and to ensure that no-one is above the law i.e. that the law is observed by all (especially political institutions). The fiduciary relationship that inheres in this arrangement was shown to involve primary and secondary fiduciary duties. The former simply denotes dutiful compliance in accordance with the four listed criteria e.g. judges faithfully applying rules of law. Secondary fiduciary duties, however, account for the inevitability that the terms of the trust are not exhaustive (which neatly overlaps with the idea of indeterminate law), given unforeseen, or unforeseeable, contingencies and contractual incompleteness. These duties require the institutional decision-makers (i.e. the judges) to “fill in the blanks” in ways that are responsive to the interests of the public-beneficiaries. Trusteeship thus provides a firm basis on which (1) both the intrinsic and the instrumental democratic legitimacy of the Court of Justice can be understood and measured; (2) the inherent tensions and synergies within and between the intrinsic and the instrumental dimensions can be optimally evaluated; and (3) the salient polity-conditions of the EU can be factored into the analysis.

With trusteeship operating as an umbrella concept, in Chapter Four I then proceeded to examine the structures and processes of the Court that foster the requirement of

institutional independence. This feature relates to the Court's primary instrumental democratic role of giving faithful interpretation to and application of democratically established rules of law. The structures and processes of the Court were shown to meet the criteria of institutional independence, and to quite a significant degree in comparison to other apex courts (the ECtHR, the UK Supreme Court, and the US Supreme Court). That assessment was broken down into, first, determining the powers and discretion given to the Court i.e. its jurisdiction; and, second, balancing these against both *ex post* (the ways in which the Union legislature can nullify or reverse the decisions of the Court) and *ex ante* external mechanisms of control that may qualify or undermine the exercise of that discretion. We saw that the Court is not only competent to hear a vast number of actions, but that it has significant interpretive discretion with which to adjudicate, given comparatively weak *ex post* and *ex ante* mechanisms of control. It was thus concluded that the Court fulfils its primary instrumental democratic duties.

Chapters Five and Six went on to consider the intrinsic virtues of democratic legitimacy, namely: representativeness (Chapter Five) and participation (Chapter Six). What we were concerned with here were the structural and procedural mechanisms by which relevant public constituencies and interests are identified with or articulated by the Court of Justice, which is the province of representativeness and participation.

In Chapter Five, I argued that the Court represents key holistic categories of public interest both symbolically and substantively. Symbolic representation is achieved through structures and processes with which the public can identify. Substantive representation is where the relevant public interests are factored into the decision-making of the Court. In that regard, it was shown that the Court of Justice represents both national legal traditions and Union legal culture. The concept of national legal traditions was understood in two ways: the substance of the laws of the Member States; and the form of the legal orders of the Member States. In terms of substance, the legal and political actors of the Member States have a vested interest in their own legal rules, and maintaining the objectives they serve. Form refers to the broader

institutional categories and processes within which national legal and political actors operate and in terms of which they have *their* law adjudicated, such as: civil law and common law systems; inquisitorial and adversarial modes of legal enquiry; constitutional and majoritarian democracies; and federal, unitary and union models of state sovereignty. Union legal culture, by contrast, refers to the sustained cultivation of a distinctive and autonomous European (Union) legal order. We saw, for example, that the basic framework of composition and appointment of the Court's Judges strongly represents national legal traditions. By operating on a one judge per Member State basis, the appointment of the judges ensures that the interests of national legal actors are represented. In terms of Union legal culture we saw, however, that there are also various mechanisms of insulation from Member State control which represent the autonomy of a distinct Union legal culture. The use of the appointments panel is geared towards making the appointments process more insulated, and involves the European Parliament as a strong supranational counterpoint to the Member States.

In Chapter Six, I examined the Court's structures and processes in light of the intrinsic virtue of democratic participation. Democratic participation was defined as the expression of an actor's affected interests in institutional decision-making in the particular or disaggregated sense, by contrast to the holistic forms of interests observed in Chapter Five. To that end, I presented a case-study on the Court's structures and processes that act as *mechanisms of access* for different types of actors to express their arguments and viewpoints on how their affected interests should be dealt with by the Court of Justice in its constitutional adjudication. We saw that democratic participation in the Court is achieved through the researcher role of the Judges and Advocates-General, and mechanisms of access to judicial review – such as third party intervention; the rules of standing under the Court's annulment procedure (Article 263 TFEU); and the significance of Article 267 TFEU's preliminary rulings procedure for national litigants (and the availability thereof for access to the Court of Justice). We examined the extent to which these formal mechanisms of access allowed for different categories of actors and interests to be expressed to the Court of Justice. There are three categories of actors: privileged

(Member States and the Union's institutions); semi-privileged (the offices, bodies and agencies of the Union); and non-privileged (natural and legal persons). It was observed that access is somewhat limited for the last category, and that the key difficulty that emerges from these rules concerns the role of epistemic associations (non-economic associations with general interests) – alternatively referred to under the rubric of “civil society”.

The foregoing observations simply, but systematically, addressed the procedural democratic legitimacy of the Court's structures. Yet the leitmotif throughout all of these analyses was the “question of balance” – addressing the synergies and tensions between the different democratic roles of the Court, especially in light of the EU's salient polity-conditions (the three C's of EU constitutionalism). In Chapter Four, the key tension that emerged was, *prima facie*, that the more independent the Court, the less open it is to being a responsive institution i.e. the instrumental conflicting with the intrinsic. Yet I argued that there is a distinction between responsiveness and partiality: so long as the Judges are dispassionate in their appraisal of all affected interests, then structures and processes which allow for such interests to be (re)presented to the Court can be *both* responsive and impartial. It was also observed that independence in the Court is most acutely threatened by the powerful position of the Member States in the appointments process i.e. they can, to a significant extent, choose *their* Judge. I argued, however, looking to the EU's polity conditions, that this was a necessary sacrifice. Given the dominance of Member State power within the EU (e.g. strong intergovernmental processes and institutions) it is, in fact, necessary for them to have a strong role in the appointments process, in order to foster the authority and acceptance of the Court.

In Chapter Five, I observed that the pervasiveness of the representation of national legal traditions, as opposed to Union legal culture, gave rise to an internal conflict within the intrinsic virtue of representation, generating zero-sum or sub-optimal consequences. For example, the insistence of the Court's designers on denying the General Court jurisdiction in the preliminary rulings procedure, because of the (Union legal culture-centred) preoccupation with system integrity or “uniformity”,



exacerbates the already problematic case-load of the Court of Justice, with references from national courts constituting the majority of its cases. The appointments process also displayed sub-optimal qualities by becoming such an over-regulated field – the dominance of the Member States being offset by the creation of an appointments panel, for which the EP can recommend one of its incumbents. Yet there is also a negative sum aspect to consider here in the relationship between representation and independence. The involvement of the EP in the appointments panel, in seeking to create a representative counterbalance, also threatens to undermine the independence of the appointments process, for the appointments process becomes affected by political influences of the supranationalist elements of EU governance *in addition to* the governments of the Member States. Yet these tensions, I argued, might well be necessary given the EU's polity-conditions. They are symptoms of, and measured democratically representative responses to, the underlying contestation over visions of *finalité*. With such a sustained division of interests between legal and political actors at the national and Union levels, and the need for its continuous negotiation and accommodation, the structural and procedural representation of national legal traditions and Union legal culture of the Court of Justice is a justified and representative configuration, in spite of certain sub-optimal, zero-sum and negative sum consequences.

In Chapter Six, we saw that democratic participation – as an intrinsic virtue – overlaps significantly with representation, as well as with instrumental indices of democratic legitimacy (in this case, the polity-constitutive output from the decision-making authority) in a *synergetic* way. This was seen in the discussion that appraised the relative degrees of access afforded to privileged, semi-privileged and non-privileged actors, emphasising how our complex and contested understanding of the EU informs that analysis. I argued, first, that the Union's commitment to aspects of an intergovernmental organisational logic, together with its countervailing supranationalist commitments, justifies the privileged degree of institutional access allocated to both the governments of the Member States and the Union's institutions. I then considered the weaker position of civil society actors (as non-privileged actors), and examined whether or not this is justified. It was argued, first, from a

comparative perspective, that civil society actors have an unusually high degree of access to the Court of Justice when compared to national supreme or constitutional courts, as well as other transnational courts. The problematic group is not, as already noted, individuals, but epistemic associations. The synergy with representation in this regard is due to the fact that epistemic associations may bring to bear their disaggregated or special interests on behalf of those with whom their views are shared. The synergy with instrumental indices of democratic legitimacy is borne out of the need for responsiveness to all affected interests when the Court's juridical output can have (and has had) significant effects on Union law. In that light, I made two arguments: (1) that epistemic associations are entitled to greater access because of the Union's democratic deficits as manifest in its legislative processes (the "compensation" thesis); and (2) that in the Union, as a *sui generis* polity, the domains of "politics" and "law" are functionally intertwined in such a way that requires its legal institutions to be more democratic (the "complementary" thesis).

At the beginning of this thesis, I remarked that the findings of this research could not be expressed in quantitative terms – that we could not conclude, for example, that "the Court of Justice is 72% democratic." As an overall estimation, however, 72% – its mathematical crudity apart – might be a fair assessment. The findings of this research have been expressed in terms of the ways in which the Court meets, or fails to meet, the precepts of procedural democratic legitimacy. And the conclusions reached show that the structures and processes of the Court are more democratic than might have been expected, and tend to outweigh the ways in which they are undemocratic. This is not to suggest that the Court of Justice – or courts in general – ought to be the focus of democratic functioning. That was not part of my argument. It is to say, though, that given the Court's essential function within the EU – as a trustee-Court – here are the ways that it fulfils those functions in a democratic way; it is, in other words, a good trustee-Court.

The Court of Justice	Description of Action	The General Court <sup>722</sup>
Article 218 TFEU.	Review of the constitutionality of agreements reached by the Union and third parties, actionable by the Commission, the European Parliament or the Council.	None.
Article 259 TFEU.	Enforcement proceedings for Member State failure to fulfill an obligation under the Treaties raised by a Member State.	None.
Article 260 TFEU.	Enforcement proceedings for Member State failure to fulfill an obligation under the Treaties raised by the Commission (Article 258 TFEU) <sup>723</sup> – including the power to impose fines on defaulting Member States.	None.
Article 263 TFEU.	Action for annulment of Union Acts raised by Member States, Union institutions, and natural and legal persons. <sup>724</sup>	Yes.

<sup>722</sup> According to Article 257 (1) TFEU, the General Court is primarily a first instance court (subject to the appeals process from the CST (see *infra*)). Article 51 SCJ: By way of derogation from the rule laid down in Article 256 (1) TFEU, jurisdiction shall be reserved to the Court of Justice in the actions referred to in Articles 263 and 265 TFEU when they are brought by a Member State against: (a) an act of or failure to act by the European Parliament or the Council, or by those institutions acting jointly (except for: decisions taken by the Council under Article 108 (2) (3) TFEU; acts of the Council adopted pursuant to a Council regulation concerning measures to protect trade within the meaning of Article 207 TFEU; acts of the Council by which the Council exercises implementing powers in accordance with Article 291 (2) TFEU); and (b) against an act of or failure to act by the Commission under Article 331 (1) TFEU. Jurisdiction shall also be reserved to the Court of Justice in the actions referred to in the same Articles when they are brought by an institution of the Union against an act of or failure to act by the European Parliament, the Council, both those institutions acting jointly, or the Commission, or brought by an institution of the Union against an act of or failure to act by the European Central Bank.

<sup>723</sup> Article 258 TFEU provides that the Commission has the responsibility to deliver a “reasoned opinion” to Member States when it considers that they have failed to meet their Treaty obligations. The reasoned opinion outlines the legal and factual basis of the Commission’s complaint; an indication of the appropriate remedial action to be taken by the allegedly recalcitrant Member State; and a deadline for this action to be taken. Private individuals and associations do not have direct access to the infringement procedure. They can, however, take action indirectly via the complaints process set up by the Commission. This process allows private individuals and associations to bring to the attention of the Commission any perceived infringements by the Member States of their Union obligations, which may consequently lead to Article 258 TFEU and Article 260 TFEU action. The process is clearly explained and can be viewed by the public on the Commission’s webpage at: [http://ec.europa.eu/eu\\_law/your\\_rights/your\\_rights\\_en.htm](http://ec.europa.eu/eu_law/your_rights/your_rights_en.htm). See also (2002) OJ 2002 C 244/5. Article 260 TFEU then gives the Court of Justice jurisdiction to review potential infractions and impose sanctions if applicable.

<sup>724</sup> The scope of “Union Act” and the extent to which this action can be raised by different classes of actor is addressed in depth in Section 3.3.1 of Chapter Six.

Article 265 TFEU.	Failure to act of a Union Institution	Yes.
Article 267 TFEU. <sup>725</sup>	Preliminary rulings on the interpretation or the validity of Union law with respect to national law, referred by national courts and tribunals.	Formally, yes. In practice the General Court has not been given statutory powers of substantive review as per Article 256 (3). <sup>726</sup>
Article 268 TFEU.	To settle disputes on the non-contractual liability of the Union.	Yes.
Article 269 TFEU.	Review the constitutionality of disciplinary measures adopted by the Council or the European Council under Article 7 TEU.	None.
Article 270 TFEU. <sup>727</sup>	To settle disputes between the Union and its servants.	Yes.
Article 272 TFEU.	To settle disputes on the contractual liability of the Union.	Yes.
Article 273 TFEU.	To settle disputes between Member States on matters pertaining to the subject-matter of the Treaties.	None.
Article 275 TFEU.	To monitor compliance with Article 40 TEU; and to rule on proceedings, brought in accordance with Article 263 (4) TFEU, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.	None.
Article 10 (2) Protocol 36 TEU – incorporating the Court’s competences under Title VI TEU (pre-Lisbon) on	1. Article 35 (1) TEU (pre-Lisbon): To give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under this title and on the validity and interpretation of the measures implementing them.	None.

<sup>725</sup> For a detailed overview of this action, see Section 3.3.2 of Chapter Six.

<sup>726</sup> See Section 3.2.3 of Chapter Five.

<sup>727</sup> The CST ordinarily hears these actions at first instance, which is the sole competence of the CST. See Article 1 Annex I SCJ. These decisions can be appealed to the General Court and the Court of Justice (see *infra*).

Provisions on Police and Judicial Cooperation in Judicial Matters. <sup>728</sup>	<p>2. Article 35 (6) TEU (pre-Lisbon): To review the legality of framework decisions and decisions in actions brought by a Member State or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.</p> <p>3. Article 35 (7) TEU (pre-Lisbon): To rule on any dispute between Member States regarding the interpretation or the application of acts adopted under Article 34 (2) TEU (pre-Lisbon)<sup>729</sup> whenever such dispute cannot be settled by the Council within six months of its being referred to the Council by one of its members; to rule on any dispute between Member States and the Commission regarding the interpretation or the application of conventions established under Article 34(2)(d) TEU (pre-Lisbon).<sup>730</sup></p>	
Article 56 SCJ.	Appeals may be brought before the Court of Justice, within two months of the notification of the decision appealed against, against final decisions of the General Court and decisions of that Court disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of competence or inadmissibility.	NA <sup>731</sup>
Article 57 SCJ.	Any person whose application to intervene has been dismissed by the General Court may appeal to the Court of Justice within two weeks from the notification of the	NA

<sup>728</sup> The Treaty of Lisbon, having repealed Article 35 TEU (pre-Lisbon), incorporates Article 35 TEU (pre-Lisbon) into the legal framework here under Protocol 36 TEU's "transitional provisions. As such, it must be referred to to determine the nature and scope of this action.

<sup>729</sup> Article 34 (2) TEU (pre-Lisbon) provides: "The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may: (a) adopt common positions defining the approach of the Union to a particular matter; (b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect; (c) adopt decisions for any other purpose consistent with the objectives of this title, excluding any approximation of the laws and regulations of the Member States. These decisions shall be binding and shall not entail direct effect; the Council, acting by a qualified majority, shall adopt measures necessary to implement those decisions at the level of the Union; (d) establish conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements. Member States shall begin the procedures applicable within a time limit to be set by the Council.

<sup>730</sup> *Ibid.*

<sup>731</sup> The General Court may hear appeals against decisions of the CST (Article 256 (2) TFEU).

**Appendix One**  
**Actions of the Court of Justice of the European Union**

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	decision dismissing the application.	
Article 62 SCJ.	To review the decisions of the General Court on the instruction of the First Advocate General for the purposes of preserving the “unity and consistency of EU law”.	NA
Article 6 SCJ.	Disciplinary proceedings against Judges of the Court of Justice, the General Court, and the CST, who have breached their duties as Judges and may be deprived of office.	NA

## Appendix Two National Legal Traditions in the EU

	Civilian 1	Civilian 2	Common law	Inquisitorial legal process	Adversarial legal process	Constitutional democracy	Majoritarian democracy	Federal structure	Unitary structure	Union
Austria	x			x			x	x		
Belgium	x			x		x		x		
Bulgaria	x			x		x			x	
Cyprus			x		x	x				x
Czech Republic	x			x		x				x
Denmark		x		x			x			x
Estonia	x			x		x			x	
France	x			x			x		x	
Finland			x		x		x		x	
Germany		x			x	x		x		
Greece	x			x		x			x	
Hungary		x		x		x			x	
Ireland			x		x	x			x	
Italy	x			x		x			x	
Latvia		x		x			x		x	
Lithuania		x		x		x			x	
Luxembourg	x			x			x		x	
Malta		x		x		x			x	
Netherlands		x		x			x			x
Poland	x			x			x		x	
Portugal		x		x		x				x
Romania	x			x			x		x	
Slovakia	x			x		x			x	

## Appendix Two National Legal Traditions in the EU

Slovenia		x			x				x	
Spain	x			x						x
Sweden		x						x		
UK			x		x			x		x

### Explanatory Note

Member States highlighted indicate a Member State which has a permanent Advocate-General.

Civil law: This conceptualisation does not consider civil law from a substantive perspective, but on matters of legal form and legal system. Civil law refers to a codified corpus of law within the legal system; and a legal system that does not systematically recognise case-law and judicial pronouncements as a source of law.

Civil law 2: This refers to a largely codified corpus of law, but one that recognises case-law and judicial pronouncements as a source of law.

Common law: This refers to a legal system that recognises case-law as a source of law, and has areas of law in which case-law, or non-codified sources of law, are the only or major source e.g. Scots criminal law.

Inquisitorial<sup>732</sup>: This refers to a mode of legal enquiry by which the factual veracity of a given legal matter is determined by the judges or judicial bodies conducting *proactive* investigative methods e.g. the Court of Justice's "measures of enquiry".<sup>733</sup> This tradition is also generally regarded as part of the civil law tradition.

<sup>732</sup> For a distinction between inquisitorial and adversarial modes of legal enquiry, see Norman Dorsen, Michel Rosenfeld, András Sajó and Susanne Baer, "Criminal Procedure (Due Process)" *Comparative Constitutionalism* St. Paul, MN: West Group, 2003 (hereinafter Dorsen et al., 2003).

<sup>733</sup> See Section 3.1 of Chapter Five.



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**Adversarial:** This refers to a mode of legal enquiry in which legal problems arrive out of a dispute between parties, and the factual veracity of the claims are dependent on the parties' submissions, giving the judiciary or judicial bodies a more *reactionary* role. This tradition is generally regarded as part of the common law tradition.

**Constitutional democracy:** This refers to a legal and political system where governments and legislatures are held to account by courts deciding on the legality of their legislation and administrative acts according to a higher source of law i.e. a constitution. Additionally, courts in this set-up may invalidate legislation by way of judicial review.

**Majoritarian democracy:** This refers to a legal and political system where governmental power, and especially legislative processes, are controlled by majoritarian, parliamentary processes, and the courts have either no powers, or very limited declaratory powers, such as the UK's courts under Section 4 of the Human Rights Act 1998. The courts may have, however, powers of administrative review.

**Federal state:** This refers to a political and legal system in which sovereignty is divided evenly between central and local political and legal institutions on a territorial basis.

**Unitary:** This refers to a political and legal system in which sovereignty is undivided, and rests within central political and legal institutions.

**Union:** This is essentially the same as a unitary system, except that there is an uneven distribution of legislative and administrative competences between central and local political and legal institutions, organised on a national or ethnic basis. Sovereignty ultimately, however, still rests with the central institutions e.g. Scotland – with devolution and its Scottish legal system – in the UK.<sup>734</sup>

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<sup>734</sup> See Walker, 2010a: Chapter Two. See also Himsworth, 2007; and Neil MacCormick "Is There a Constitutional Path to Scottish Independence?" (2000) *Parliamentary Affairs* Vol. 53 721 (hereinafter MacCormick, 2000).

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