Law versus Democracy?
Democratic Constitutionalism and the Role of Judges in the European Union

First Draft

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0. Introduction

The EU as a new source of law has brought about a profound structural change of the national legal systems and a transformation of the state. An increasing proportion of member states' legislation is either directly borrowed from Community Law or substantially shaped by Community legislation, especially when general political aims are laid down. The member states are to a high extent placed 'in the shadow of the law' being constrained by a quasi-constitutional legal context which they do not fully control. Community law has gradually developed into an autonomous and independent supranational legal order, possessing primacy over the law of the Member States. A central actor in promoting legal integration – as a ‘device of centralised policy-making’ - is the ‘European Court of Justice’ (ECJ). The ECJ is far more acting as a law-maker than applying existing law by mere interpretation, i.e. the Court is at the centre of the legal system(s).

There is an extensive theoretical debate about the democratic deficit of the European Union, circumscribing it as a lack of democratic representation, democratic and transparent decision-making procedures and popular legitimacy. The guiding principle behind such criticism is that citizens should not only be addressees but authors of the law and the constitutional essentials that determine and form a polity. The basic idea of democratic legitimacy is that political power is ultimately the power of the public, i.e. the power of free and equal citizens. On the other hand, there is – more and more transcending the context of the ‘nation state’ – a debate about constitutionalism, not just in the sense of opposing and compromising democracy but of being an integral part of democracy. Accordingly, a ‘constitution’ is rather supposed to enable, enhance and promote democracy itself. In a manner of speaking, the concept of democracy tended towards accounting for the development of constitutional jurisdiction with the protection of fundamental civil and human rights at the root of ‘constitutionalism’.

From this inception the paper will sketch a conception of ‘constitutional democracy’ or ‘democratic constitutionalism’ - beyond the state, i.e. for the EU – which aims at maximising the participation of the citizens in political decision-making procedures and at resolving conflicts among individual rights as well as among different interests. It starts with the assumption that there is an interplay between principles of legality and self-government and discerns ‘self-rule’ as 'law-rule' (under certain conditions). Within this normative framework the paper will explore the role and function of a constitutional
– or in the case of the ECJ a ‘quasi-constitutional’ – court. Insofar as constitutional constraints are meant to facilitate democracy, not to weaken and jeopardise it, the judiciary may be expected to play an important role in promoting and securing democracy. It is argued that judicial control aiming at the protection of individual rights and freedoms, and ‘resisting’ legislative prejudice, then, does not seem anti-democratic at all but may add to the overall representativeness of the political system without necessarily being synonymous with paternalism. In a final step the paper will explore the Court’s perception of the ‘democratic’ subject of the EU, i.e. the status of the individual in the context of the EU. The Court’s verdicts on issues related to ‘democracy’ in its broadest terms are various, they range from the institutional balance, the transparency of the decision-making process, the ‘separation’ of powers and competencies between the Community and the member states to fundamental rights of the individual and ‘Union citizenship’. The Court’s jurisdiction in this sphere will be exemplified and assessed with regard to the jurisdiction on Union-citizenship, 'European' fundamental rights of the individual and the standing of the ‘European Parliament’.

1. The central role of the 'European Court of Justice' in the institutional system of the European Union and in the legal systems of the member states

To accomplish a normative assessment of the Court's role and function requires some preliminary remarks about its actual position in the political and legal system of the EU as well as in the national legal systems. The ECJ is at one and the same time a constitutional, an administrative and a civil court. It acts as an ombudsman and as the final arbiter on practically any question of Community law (see Bebr 1981 and Shapiro&Stone 1994). That means the ECJ has 'universal jurisdiction' and is in fact much more than a constitutional court1.

The Court's pivotal role in structuring and fixing the limits of the European polity ensues to a high extent from the opaqueness, complexity and inconsistencies of the legal base (the European treaties). Another point in case is the question of justiciability of constitutional principles (such as subsidiarity) and political aims (like in the preamble),  

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1 See about the procedures Art. 220 (ex 164) TEC – Art. 245 (ex 188) TEC. The wording of Art. 220 (ex 164) TEC states in very general terms: 'The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed'.
and the problem that the European Treaties assign different areas and scope of jurisdiction (according to the relevant pillar) to the Court. But decisive in this respect is the Court's self-perception as the 'promoter of integration' committed to the 'rule of law'. In determining the scope of the ECJ's jurisdiction the presumed 'programmatic' and 'dynamic' nature of the Community, i.e. the telos of integration, was pushed to the fore – in contrast to the allegedly static nature of 'traditional' constitutions. The result was that of an open-ended and vigorous process of arrogating competencies to the Community. Finally, the ECJ did not get tired of asserting a competence to fill lacunas in the system of remedies in order to safeguard individual rights and freedoms as well as to guarantee full and effective judicial protection and control in general. Such pronouncements in fact correspond to a 'self-positioning' as constitutional court' (see Curtin 1993 and Weiler 1993).

Thus, the supranational legal order of the EU is foremost the result of a gradual construction on part of the ECJ, i.e. a legal system a posteriori, after interpretation by the Court. The practice of interpretation meant first of all developing a legal system that penetrates deeply into the national legal orders and promotes negative and positive integration by transcending the current policy-preferences of the member states (see Alter&Meunier-Aitsahalia 1994). As such, the 'constitutionalisation' in the Court's interest of an effective enforcement of the Treaties was inevitably (if not intentionally) directed against the integrity of the national legal orders (see Stein 1981 and Hartley 1998). Although theoretically derived from domestic law by means of 'authorisation clauses', 'supremacy', 'direct effect' and the validity of the secondary law are based exclusively on 'European law'. The ECJ created the Community, 'it declared the Treaty of Rome to be not just a treaty but a constitutional instrument that obliged individual citizens and national government officials to abide by those provisions that were enforceable through their normal judicial processes' (Shapiro 1992: p. 123).

The Court's most decisive doctrinal elaboration are:\(^2\) (1.) 'direct effect' (and its expansion\(^3\)) which bestowed enforceable obligations on the member states and conferred subjective rights upon the individual. Direct effect is the first doctrine

\(^2\) See especially Bebr 1981 and Hartley 1998 for an extensive overview of cases.

\(^3\) The scope of direct effect was extended (1.) from a negative to a positive duty to fulfil Community obligations, (2.) from vertical to horizontal effect of the primary law, i.e. from public to private actors in case transnational trade is concerned, (3.) from the primary to the secondary law with a tendency to extend the direct effect of secondary law to horizontal relations too, (4.) from the enforcement of European law by national judiciaries to the enforcement by national public administration in general.
explicitly not being derived from the wording but from 'the spirit' and 'the general scheme', i.e. from the alleged 'telos' of the treaties. It now works as a general operational principle of the Community system; (2.) ‘supremacy’ without a ‘supremacy clause’ but with the effect of elevating the treaties to higher law status and of (incrementally) pre-empting member states from taking legislative actions when a policy area has become occupied by the Community; (3.) automatic inapplicability of national law that is incompatible with European law; (4.) equal relevance and effective enforcement, whereas the emphasis of the need to effectively enforce European law stipulated the collaboration of national courts – Bankowski and Scott (1996) do even speak of a 'capture of domestic judiciaries'. The same reasoning was used to confer upon the ECJ the final competence to mark the limits of European law; (5.) an implied powers-doctrine (as well as a doctrine of the 'effet utile'); and last but not least the (6.) 'reverse incorporation' of fundamental and human rights as a matter of the 'general principles of law' forming an unwritten part of European law.

**Legal Integration and the national judiciaries**

The process of legal integration is characterised by an enormous density of juridification (see Joerges 1996), by a kind of symbiotic relationship between the ECJ and national courts – and by a high degree of involvement of citizens engaged in litigation instituted against their governments. Subnational actors can exercise ‘pressure through law’, and especially pro-community interest-groups or ‘constituencies’ have a quasi-direct stake in the promulgation and implementation of Community law (via the procedure of reference codified in Art. 234 (ex 177) TEC) (see Harlow & Rawlings 1992). The relationship between the European and the National legal systems is characterised by

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4 The ECJ invented the formula that fundamental rights are 'inspired by the constitutional tradition common to the member states' and 'enshrined in the general principles of the Community' (case 29/69, Stauder v. City of Ulm, (1969) ECR 419). In case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, (1970) ECR 1125 the ECJ deduced the general principles of Community law mainly from what it called the 'common heritage': 'fundamental principles of the national legal systems forming a philosophical, political and legal substratum common to the member states'. See chapter 6 about the Court's reference to international treaties on human rights.

5 Art. 234 (ex 177) TEC states: 'The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgement, request the Court of Justice to give a ruling thereon'.
interdependence and interpenetration, consequently, it is hardly possible to speak any longer of separated legal spheres. The centralised enforcement by the ECJ is closely connected to a system of de-centralised control, with every national judge functionally becoming a ‘European’ judge because he/she is obliged and empowered to question the Community validity of national laws. In fact, we are dealing with a closely constructed network of sub-, supra- and national actors operating within a functioning ‘community of the law’ (s. Mattli&Slaughter 1996).

However, Art. 234 (ex 177) TEC and the system of remedies to safeguard the individual’s rights (conferred on them by European law) are, on the whole, theoretically problematic. On the one hand, the individual largely lacks a direct standing to appeal, on the other hand, there are no uniform criteria and standards within (and among) the national legal systems for the vindication of community rights. There are a multitude of procedures and procedural barriers, and accordingly 'equality before the law' is not really accomplished. The European legal system has no system of independent lower courts and the ECJ relies on the willingness of national courts to co-operate and enforce European law. But in spite of these ‘built-in’ procedural weaknesses, practically, the preliminary rulings of the ECJ have precedential effect and they are a powerful instrument to assure the uniform interpretation of European law.

2. The inseparability of Law-application and Law-making: the judicial process (I)

The central role of the ECJ in the process of integration and its characterisation as a ‘quasi’-constitutional court (in analogy to national judiciaries) obviously leads to the very general and basic questions associated with the relation of law and politics. Anyone dealing with judicial activity is confronted with the cardinal question about how to fill the gap between the norm as such and the application of the norm. I shall argue that it is an illusion to believe in a straight path from the positive codification of norms

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6 The national judiciaries (except the highest courts) are especially empowered in the way that they are placed in the position to review legislative and administrative actions which is – in the continental legal systems - traditionally restricted to constitutional courts.

7 There is no right to preliminary ruling and no possibility to lodge a complaint against 'unjustified' references to the ECJ. See about Art. 230 (ex 173) TEC footnote 31.

8 Anyway, the very basic problem with regard to Art. 234 (ex 177) TEC is namely that the dubiousness (of interpretation and validity) is the jurisdictional criterion. Regardless of this difficulty, the ECJ has never elaborated a firm and reliable *acte-clair doctrine* to clarify the cases that need referral to the Court (see Cappelletti&Golay 1986).
to their application. A distinct and tangible instruction to apply the law is rather
doubtful. The application of law is no simple deductive and subsumptive process
leading to non-contestable decisions. There are always gaps in legislative programmes
leaving room for value-judgements and discretion; accordingly, the application of law
possesses elements of law-making, i.e. elements of genuine 'norm-generation'. A theory
of law centred around the notion of source\(^9\) (compare Raz 1979 and 1991) expressing
trust in the clearness and exhaustiveness of the legislator's work does not provide
adequate explanations of the judicial activity. At the same time, the description of the
judge's activity as firstly finding the source and secondly using purely cognitive
reasoning, i.e. using theoretical not practical reason is inadequate as well. The
syllogism allows various conclusions, all formally correct, because general and abstract
norms lead to multiple concrete manifestations\(^10\). The revolts against formalism
‘emphasized the illusory nature of the idea that a purely deductive logic could help the
judge 'ascertain', uncreatively and without personal responsibility, the law, be it the law
of societal custom, precedents, statutes, codes, or a presumed 'system of norms''
(Cappelletti 1989: p. 10).

Even if the assertion of the inseparability of law-application and law-making seems like
a banality, it has relevant consequences for theory-building that cannot be neglected.
This is a point in case because one task for legal as well as for political theory is to
scrutinise the rationality of law and jurisdiction; the element of 'judicial creativity',
therefore, opens the door to meta-legal justifications – be it the universe of practical
reason, functional utilitarianism, or whatever. Meta-legal justifications of the judge's
decision-making process, however, do not imply to occupy (more or less)
democratically legitimised law by universal justice or by economic, functional or
systemic imperatives. From my point of view, meta-legal considerations in general are
inevitable in order to specify the system of law, delimit it, mark its function(s) and
prescribe the way law and legal processes work. Such a meta-normative perspective

\(^9\) Although, the stress on 'codification' and hence the subordination of the judiciary is much
stronger in the Continental legal systems. Whereas the Anglo-American legal system is surely
more 'easy-going' with judge-made law and considers the judiciary as co-equal to the other
political branches of government (after all it is a common law system with an influential
tradition of 'casuistic' and 'stare decisis').

\(^10\) This point may well be illustrated by differentiating between the cognitive openness and the
normative closeness of law. That is, any normativity works from the internal prescriptive system
– but the transformation of facts of life into case in law is a creative interpretative process, even
the unnecessariness of interpretation can only be construed by way of interpretation, and
consequently the legal reasoning ranges from the identification of legal relevancy to the meting
out of consequences. (see Varga 1990).
imposes certain requirements on the claims made by normative systems in order to consider such claims as justified and valid. The validity of judicial decisions may then depend on (just to mention the most influential ones): universalisability; rationality; consistency; coherence; and also second-order justifications that involve choices between rival possible rulings within the specific context of a legal system, f. i. desirability of consequences. Uppermost constitutional justice, being concerned with the 'law of politics', must use argumentative strategies transcending the syllogistic model in order to justify its own decisions (see Alexy 1991). Interpretation has to be based on a recourse to hermeneutic criteria outside the deductive justificatory model – and in turn, those validity claims of law and interpretation depend on their normative quality\(^\text{11}\). The criteria of law's validity (not just the purely formal-legal validity of the law) range from formal to principled conditions. But the conditions of law's validity are never more than presumed sufficient according to an underlying normative postulate. As already mentioned, judicial decision-making is law-making, i. e. law as such, and ideally, it is justified and valid law. The consequence is that the legitimacy of law is not the same as legality in the sense of the purely formal-legal democratic law-making procedure. Provided that legitimacy is not just legality, this gap has to be filled by further criteria of justification. That is, from an axiological stance, law will still be subject to the scrutiny of critical and/or positive morality according to law's function and aim\(^\text{12}\) (f. i. law as a means of self-government; law as a practical discourse; law as providing internal legitimacy for public authority; legal certainty and the rule of law; conflict- and problem-solving capacity or maintenance of social order etc.). As Obradovic (1996: p. 197) puts it: ‘appeals to the law can never provide more than a primary, and therefore provisional, ground for legitimacy. Rules cannot justify themselves simply by being rules, but require justification by reference to considerations beyond themselves’. After all, the bug might not be hidden in the telos as such but in its kind. As will be shown later, this paper emphasises a conception of law as a medium of self-determination and a special form of practical discourse which is, among others, directed to the attempt of

\(^{11}\) The normative quality can sequentially contribute to the level of acceptance and compliance (compare Höffe 1987, Zürn&Wolf 1999, Neyer 1999 and Joerges 1996). The perceived legitimacy of a court influences the level of acceptance because legitimacy is also about the – moral, functional, practical – appropriateness of the rule of law with law as an institution through which a society can assert its values and enable peaceful co-operation. Cappelletti (1989) f. i. emphasises the 'enforcement impotence' of courts as a source of strength because 'command by convincing' has a higher degree of social quality and therefore compliance than 'command by force'.

\(^{12}\) I shall again turn my attention to this point under the heading of 'rationalisation' (see below).
providing justified rational grounds of the law. It is furthermore argued that even if legitimacy via legality is privileged compared to the rational grounds of the content of a norm (see Habermas 1998) law has a moral function too – in constituting a justified and valid ‘ought’ in general and in invoking moral principles about political justice in particular (see Dworkin 1986, Alexy 1994 and MacCormick 1978).

As already mentioned, judicial interpretation is unavoidably creative. Even the mere task of clarifying ambiguities implies making choices, and the end-result of interpretation is never unequivocally and mechanically predetermined. Making choices and having discretion also means evaluating and balancing competing considerations. It means giving consideration to the choice's practical and moral results. Yet, this process is not necessarily one of pure arbitrariness. The decisive questions are: what are the modes, the degree, the limits, the legitimacy and the acceptability of law-making by the courts, and what is the specific difference of law-making by legislation and by judiciary (see Holmes 1952). Revealing the law-making element, we can no longer assume courts to be neutral and de-politicised. But to assert that courts are genuine political institutions does not amount to imagine them as the handmaidens of 'power'-politics, nor does it omit a normative perspective; neither does it conceptualise the judicial decision-making process as purely voluntaristic. On the contrary, as will be demonstrated later on, this view favours the 'principle-based', 'rational' elements over the decisional or instrumental ones in judicial argumentation and reasoning. This perspective might, after all, especially with regard to the EU, supply for gains in legitimacy and acceptance without relying on law’s more repressive features as coercive order. In the consequence, politicisation leads unequivocally to responsabilisation – because, at least if one considers the democratic principle as relevant, political authority without ‘mediation’ is rather a pathology. Responsabilisation of courts can be carried out in form either of 'accountability' or of 'rationalisation'.

Let us leave aside 'accountability' which is dealing with the modes of selecting and electing the judges as well as their standing in the 'system of checks and balances', and

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14 Campell (1997: p. 175) f. i., who starts from 'creative interpretation' as well, states: ‘as legal powers, [judicial powers] are de jure and by definition legitimate within the legal system. In so far as they are viewed externally to the legal system, judicial powers may be viewed also as political rights requiring moral justification’.
let us instead turn to ‘rationalisation’ respectively ‘re-rationalisation’. First of all the judicial process is characterised by certain formal-procedural principles of justice and fairness (to name just the classical but still basic ones: *nemo judex in causa propria* – nobody being judge in his own affairs, *audiatur et altera pars* – the right of all sides to be heard, *ubi non est actio, ibi non est jurisdictio* or *nemo judex sine actore* – no judge without plaintiff). Ideally, procedural limits are imposed by procedural passivity and a high degree of impartiality, neutrality and detachment from the parties in case. Not to forget that anybody involved in the legal practice – from the plaintiff to the interpretative authority – is subject to the structural constraints of the normative context, i.e., whenever a legal claim is promulgated it has to be justified by (mutually) acceptable reasons and related to a norm or principle, right or duty. Rational justification – which is central in the judicial process - has a universalising tendency because it aims at excluding discriminating reasons, inequalities and privileges (see Koller 1990 and Perlman 1965). It is only under these conditions that courts ‘can transform and transcend the litigant's dispute by invoking universally shared resolving propositions’ (Burt 1992: p. 31). Law (or better: ‘democratic’ law with the connotation of ‘just’ law) is intrinsically related to the principle of equality (before the law) as a regulative ideal. Equality, in turn, is itself a principle of justice and the vehicle for the highest possible ‘generality’ of the law - and that is why law is potentially universal in form (*dura lex, sed lex*). Thus, in its pursuit of the general, i.e. the reasonable, law is above all the pursuit of taking things into account, i.e. extending the range of persons and interests entitled to genuine consideration, respect and inclusion. That is why ‘[l]aw aims at coherence of form and of substance, of procedures and principles’ (Erh-Soon Tay 1990: p. 173). In short, universality and generality as principles of justice aim at including all affected subjects and at maintaining their status as co-equals. Only under this condition law can command (universal) compliance.

It follows that a key-element to the legitimacy and validity of judicial authority is the 'equal accessibility' of the legal system: ‘Thus judicial law-making, nonwithstanding all its inherent limits, is not anti-democratic per se’ (Cappelletti 1989: p. 46). Theoretically, there is the affirmative claim that courts can add to the representativeness of the polity by protecting groups that cannot gain access to the political process, that is: the ‘judicial

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15 The principle of equality is consequently expressed in the rule of law and its attributes, namely legal certainty (or *stare decisis*). Compare f. i. Kant’s ‘principle of universalisation’ and Singer’s ‘principle of generalisation’.
process [should be] so structured as to be, at the same time, the most participatory yet the least partisan of all law-making processes’ (ibid.); in this way, courts contribute to safeguarding civil rights and freedoms. This concept suggests that law, on the one hand, challenges ‘the peoples' self-enclosing tendency' (Michelman 1988)\textsuperscript{16} and that judges, on the other hand, listen to voices from the margin and consider so far excluded interest. In protecting minorities and safeguarding the balance and the separation of political power (see Böckenförde 1999 and Häberle 1995) the judiciary might be considered an active agent of a 'constitution of pluralism'. Finally, the European polity can be conceptualised as a ‘constitution of pluralism’ as well, with the additional task of, enabling the co-existence and co-operation of different constituencies.

3. What about law’s regulatory potential?

For the purpose of describing the role and function of the European judiciary we have to clarify whether 'regulatory' law guiding social interaction retains any practical relevance. In modern societies one can observe a growth of the administrative-procedural and the substantive power of the judiciary and of its responsibility for the organisation and development of the law (see Cappelletti 1986). The reasons for this trend are diverse: (1) the growth of the legislative role in general and the increased volume of legislation as well as the ambiguity and compromising nature of enactments; (2) the institutionalisation of constitutional, administrative and welfare state adjudication which transforms the judiciary into a controller of the political branches (and in cases even into a controller of governmental and non-governmental centres of power on the whole). Consequently, the judiciary assumes office as a 'supervisor' of a system of checks and balances; (3) a growing tendency to adopt entrenched bills of rights with programmatic and promotional social rights that aim at effectuating values rather than prescribing procedures and that are phrased in aspirational terms; (4) the 'massification' of legal conflicts and of litigation, i.e. the transformation of 'purely' individualistic two-party concepts and structures of the judicial process into mass-conflicts. This phenomenon is underlined by a general growth of what is referred to as 'public interest litigation' aiming at the enforcement of diffuse, collective and

\textsuperscript{16} That is the people’s 'tendency to assume their own moral completion as they now are and thus to deny to themselves the plurality on which their capacity for transformative self-renewal depends' (Michelman 1988: p. 1532).
fragmented rights and interests\textsuperscript{17}. (5) Furthermore, the judges' central role in the legal system is enhanced by the fact that law and the instance producing it have lost in legitimacy. The democratically elected institutions are less successful in designing and carrying out a transparent and 'rational' law-making process. Accordingly, law itself is less justified and rational because the mass-production of law often evades discussion of principles, the pursuit of the 'general interest' or contemplative public debate. So, democracy 'in order to escape the corrupt and corrupting logic of part clientelism and technobureaucratic opacity –tends to become, so to speak, 'judicial' (LaTorre 1998: p. 6). These tendencies have been observed in the context of national legal systems but are equally salient with regard to the role of law in the EU.

Walker (1999: p. 5) rightly states that '[l]aw, with its traditionally vast regulatory potential, will inevitably continue to be invoked as a means of containing and resolving crisis'. Even if law as the traditional formal legal order within a 'nation'-state loses hegemony, law as a general concept retains a 'legitimacy credit' and enough conflict-solving capacity to play a decisive role in political regulation and to be an active agent even in tackling the governance problems associated with the multi-dimensionality of the EU. This is (on the part of the political and legal elites) expressed by the emphasis of the 'rule of law' and the classification of the EU as a genuine Community of law („Rechtsgemeinschaft“). Likewise, law embodies a (more or less habitual) ideology of obedience which highly substitutes for the use of forced sanction – and this might, after all, be another explanation for the general acceptance of and compliance with European law.

Theoretically speaking, the normative system of the EU as a system of ‘practical statements with a regulative - action-guiding and action-justifying - pretension’ (Bengoetxea 1991: p. 197) is characterised by a sufficiently high degree of structuralisation and institutionalisation of norm-creation, -interpretation and – enforcement (or in Cassese's (1986) words: law-making, law-determination and law-enforcement) in order to call the system ‘law’. If there is a difference to nation-state law, then it is in degree – maybe with severe functional and normative (validity) deficits – but not in kind. The body of European law or better, the European 'quasi'-constitution' comprises structural rules relating to the institutional architecture as well as substantive prescriptive 'constitutional' norms.

\textsuperscript{17} See the research on public and diffuse interest litigation, on 'action collective', or 'Verbandsklagen' in various Western Countries as well as in relation to the EU.
On the one hand, European law lives ‘in the shadow of a pluralist conception of authority which shares and challenges [its] jurisdiction in every functional and territorial corner’ (Walker 1999: p. 18). On the other hand, EU law challenges the general claim of statal constitutional law to ultimate authority. In influencing the traditional intra-state constitutional law sphere of the basic rights and duties of the individual vis-à-vis the state and vis-à-vis non-state polities, EU law has developed an institutional structure with sufficient depth and scope of authority to constitute a non-state polity itself, ‘within a more complex multi-dimensional configuration of authority’ (ibid.: p. 13).

If the normative system of the EU counts as law – which is asserted – then any general theory of law has to account for European law too, and cannot ignore extra-statal legal phenomena. What is needed in relation to the EU is an explanatory and foundational theory of law that does neither cling to law as coercion within the concept of the state nor depreciate legal arrangements transcending the nation-state as mere conventions or private ‘soft-law’. However, help is at hand: there might be – after all - a self-generating dynamic at work between constitutional and meta-constitutional sites. A structural analogy from traditional constitutional to meta-statal legal sites can provide a context for a similarly patterned discursive continuity. Discursive continuity does not intend to frame the EU as an exact image of the traditional nation state. It rather means to distil and extrapolate those normative standards capable of transcending the ‘corset’ of the nation state.

4. Democracy versus Law?

Let us now turn to the 'democratic principle' as a ‘normative distillate’ to be applied to the EU. The democratic principle is first of all a principle of self-determination in the modus of free and equal participation. The democratic principle is furthermore related to the organisation of political authority – hence it is relevant in the context of the EU. Restricting the democratic principle to the 'nation-state' implies excluding the individual from actively participating in processes of integration. In this case, the individual's fundamental power of guiding and controlling ‘political power’ is denied, i.e. the individual is just an object of and not a subject to authority and law. Consequently, the various ideas and normative requests related to democracy are concerned with non-statal power and authority: the most prominent demands are those for transparency, information, public discussion, political decision-making procedures that are structured in a manner maximising the participation of individuals and solving conflicts among
individual rights and interests. ‘The fundamental idea of democratic legitimacy is that political power...is ultimately the power of the public, that is, the power of free and equal citizens as a collective body’ (Gerstenberg 1997: p. 344). Citizens should not only be addressees but authors of the basic laws and constitutional essentials that constitute their polity. From my point of view, it is exactly this requirement which leads back to the point that normativity has to be justified in order to fulfil the requirement of citizens equally being authors and addressees of law and justice.

Regarding the EU, what stands out is the discrepancy between citizens' participation and genuine institution-building by political and technocratic élites. ‘And this elite is now likely to decide, quite undemocratically, what sorts of democratizing modifications they are going to implement in order to reduce public hostility to their intransparent and undemocratic rule’ (Pogge 1997: p. 161). Yet, the commotion about 'top-down' models neglects the chance of social-engineering measures enhancing democratic structures and institutions in order to enable citizens' attempt at rapprochement and consent-building: experts can design a procedure ‘that allows EU citizens a certain measure of participation in designing the political institutions of the EU’ (ibid.: p. 170). The establishment of political institutions and authority in turn requires a specification of the various rights of the individual. In this sphere too, criticism of a top-down model is expressed. It is fair enough to assert that ‘enjoying rights created by others does not make you a full subject of the law’ (Weiler 1996: p. 521) - yet – enjoying rights created by others gives you at least the chance to become a full subject of the law. And rights are, after all, not that individualistic in principle if seen in the light of right-struggles and claims for recognition evolving 'bottom-up.'

Reciprocal recognition of symmetric rights and freedom is ideally obtained in the political sphere of civil self-government. A theory of justice that relies on the idea of ethical self-determination starts from the individual to legitimise and conceptualise law and communities. Yet, it is possible to be committed both to the idea of people acting politically as the source of law and of law (mainly in the shape of rights) as a precondition of (good, i.e. democratic) politics. Law is a creation and at the same time a normative a priori ‘that constitute and underwrite a political process capable of creating constitutive law’ (Michelman 1988: p. 1504). This paper envisages a conceptual and

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18 Rights are invariably 'relational' and can thus be formative in establishing a link between citizens and governmental institutions.
regulative ideal of reconciling the notion of 'government of the people, by the people' and of 'government of laws and not of men'; this synthesis prescribes a self-revisionary normative dialogue between citizens with the overall aim of inclusion and of the enhancement of political freedom. Self-rule is not meant to oppose law-rule but both are one and the same: law stands in a circular relation with politics and is both outcome and input, product and prior condition (see Michelman 1986 and 1988). So, what we are concerned with is in fact an interplay between principles of legality and self-government. Democratic law has the function to reconstruct and constitute the conditions of its own genesis out of the participation of free and equal citizens. Rights, therefore, help to secure the social pre-conditions of political participation (see Habermas 1998, Michelman 1988, Müller 1993 and Rawls 1993) because the practice of participation already implies the mutual recognition as free and co-equal. In order for citizens to play the role of authors of the law, basic rights need prior institutionalisation. In a way, rights precede responsibilities – and citizens can be politically free only insofar as democratic 'jurisgeneration' is always within the medium of law, i.e. law-immanent. Hence, politics is a 'sovereign' process only as long as it is legally 'domesticated' (see Michelman 1988 and 1994). The vision of the 'rule of law' as the 'rule of men' is, after all, inspired by an egalitarian project with the overall aim to reconcile freedom and equality. Basic rights do foremost have the function to establish an egalitarian institutional base to realise political autonomy and guarantee the citizen's status activus (s. Cohen 1993 and Rawls 1971).

5. The judicial function and the judicial process (II)

As mentioned above, the judicial decision-making process may be conceptualised as being part of a rationalising project aiming at inclusion, generalisation and universalisation, and thus the judiciary may be expected to play an important role in

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19 It is important to notice that, in this conceptualisation, rights omit any pre-political connotation. A 'right' is first of all a normative position of a person in relation to another person imposing a duty, or in Dworkin's (1984) words: a right is a trump in the hand of the individual (see Koller 1990). To clarify this point: a freedom imposes a duty on the other to respect my freedom, at the same time a freedom implies a duty to myself to recognise the border of my freedom in respecting the other as equally free.

20 Both procedural and substantive rights are conditional in this sense. As will be argued later on, procedural justice and substantial justice are reasonably interdependent: Fair participation, equal access, inclusiveness and transparency have substantial implications, they rely heavily on principles like tolerance, personal integrity, the guarantee of privacy as well as social rights etc. (see Alexy 1995, Gerstenberg 1997, and Preuß 1994, see also below).
promoting democracy in relation to openness of government and fairness of participation.

The decisive question in relation to the EU is, whether the ECJ can contribute to ameliorate a public discourse directed at establishing consent between authors and addressees of norms, on the one hand by providing a forum of public discourse itself – as a ‘citizens' court’ -, and on the other hand by enabling a participatory public discourse via its adjudication. From my point of view, this function can be obtained without, at the same time, playing the role of putative moral experts upholding an overlapping consensus of constitutional values. More specifically, the decisive question is whether there is normative room and need for a quasi-constitutional (i.e. a political as well as law-making) court in Europe not just capturing the individual in a net of institutions, procedures, rules, precedents and customs but affirming and strengthening the ‘European citizen’ as the origin of politics and law (see Preuss 1993). From the conception of law and politics as a 'structural circle' it follows that law is not just a result of democratic self-incapacitation, i.e. contingent to the political will and therefore conceptually subordinated to politics. Instead, it is at an equal rank with politics insofar as law is politics' premise and as it imposes the duty on political decision-making to respect certain fundamental rights (see Arthur 1996). This points to the possibility that the judiciary is not only the agent of the past, unable to introduce 'decisive breaks', but that the judiciary can act without people's prior pronouncement: ‘If republican constitutional possibility depends on the genesis of law in the people's on-going normative contention, it follows that constitutional adjudicators serve that possibility by assisting in the maintenance of jurisgenerative popular engagement’ (Michelman 1988: p. 1525). The legal practice can have a 'critical-transformative dimension' (ibid.) by supporting the pursuit of political freedom as a constant quest for inclusion and fair representation (see Ely 1980 and Dahl 1989). That does, however, not imply that judges are the once and for all institutionalised 'crusaders' of justice and democracy – they might as well be substituted: ‘When democracy advances and politics asserts its claims, judges are bound to take a pace back’ (Mancini 1989: p. 613). To preclude misunderstanding: sketching an ‘ideal-type judiciary’ does not equate a concept in which the judiciary is superordinated and ultimate umpire. On the contrary, it does leave room for heterarchisation and pluralisation. Bellamy and Castiglione (1996: p. 123) f.i. speak of a scheme of political justice that ‘involves the creation of counter-balancing centres of decision-making that devolve power up or down to the most appropriate level in order to ensure that different values and interests get heard within
the policy-making process’. To illustrate this claim: Firstly, the judiciary may be expected to propose solutions, not to impose them. Secondly, the judiciary may be expected to be itself bound into a system of checks and balances, being subject to review, revision and contestation. Thirdly, the judiciary may be expected to question and reflect upon its own activity and role in form of self-administered ethical checks (like judicial self-restraint and abstention).

The judiciary is conceptualised as an agent of democracy and the law (or better, the constitution) is foremost an institutionalisation of democratic procedures comprising all those subjective rights that are functionally or structurally necessary for a democratic decision-making process. This does not yet give a hint whether the constitution – be it a constitution proper in the traditional sense or a judge-made 'quasi'-constitution like the one of the EU - is concerned with mere procedural justice (see Ackermann 1991, Ely 1980, and Dahl 1989) or with substantial rights too (see Cohen 1993, Dworkin 1985 and 1990, Kennedy 1993, Michelman 1986, Sunstein 1993, and also Rawls 1971). Is it possible to coherently separate substance from procedure and eliminate substantial implications of fair participation? If no, then procedural and substantial justice must be somewhat intertwined and interdependent. And of course, the role of a constitutional court changes according to that greater range and scope of judicial protection. Transposed to the level of rights the particular task is to distinguish all those rights constitutive for democracy: negative and/or positive freedoms, participation rights, social rights etc. It seems plausible not to restrict constitutional justice to the protection of the purely formal-procedural democratic process so as to reinforce the participation of minorities but rather to consider more than procedural participation rights as a sine qua non for the realisation of democracy. Dworkin (1978) f. i. formulates an ideal of government under law and principle – which in his view means that all subjects to authority are to have equal moral and political status and concern. He envisages the protection of those interests captured in a general principle of tolerance. In this sense, courts are a forum of principled decision-making 1. enabling participation, 2. upholding the status of persons as co-equal members of a political community, and at the same time 3. preserving the 'moral autonomy' of the citizen. In order to enable democratic self-determination, Michelman (1979) includes into law all those basic rules designed to evade power-biases in general. Law’s ultimate aim is the protection against a concentration of political, economic and social power because this is a hindrance to fair interest-articulation and participation. In other words, the value of freedom depends on the possibility to realise personal interests and aims within a scheme of equal rights and
basic rules. A system of equal rights tries to uphold a person's ability to act, to communicate and to negotiate - which can be guaranteed only by eliminating unequal and rigid social power-relations and structural discrimination in general (see also Sunstein 1990 and Kennedy 1993). These claims uphold the fundamental notion that law is 'counterfactual' (s. Maus 1986) and that norms work as regulative principles directed against asymmetric power-relations of the 'real' political process.

6. The ECJ and the 'European' citizen

Citizenship

'Citizenship' is both a means for settling the question of inclusion and exclusion in a political community and for prescribing the mode of participation in a community. The legitimisation of political authority is theoretically inextricably linked to the citizens constituting the political subjects of a polity and being the principal source of justification: ‘in citizens vests the power to enable and habilitate representative institutions which will exercise governance on behalf of, and for citizens' (Weiler 1996: p. 521).

It follows from the above outlined conception of democracy and law that citizenship does not just stand for membership but foremost for the freedom of activity, for participation as equals in public affairs. The ideal of a self-determining political community itself can be embodied in a conception of citizenship. Participation relies on mutual recognition, on mutual respect as free and equal and on the inviolable integrity of the individual citizen as a member of a polity. As Gawert (1987) points out: the reference point of citizenship is the self-organisation of society and the core of a concept of citizenship are the political rights of participation. The status of the citizen depends on those democratic rights that enable the individual member to take part in political decision-making as an active agent21. What follows again is the interplay between principles of self-government and principles of legality, the dependence of active citizenship on the legal order, and the need for citizenship along civil, social and political lines. Citizens' status activus can only be guaranteed by an underlying constitution of egalitarian relations of mutual recognition.

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21 In Taylor's (1989: p. 178) words: 'To rule and be ruled in turn means that at least some of the time the governors can be 'us' and not always 'them". 
Regarding the EU, there is a remarkable discrepancy between the ‘economic citizen’ and the ‘political citizen’. On the one hand, the citizen is subject to European government, on the other hand, he/she has few opportunities to take part in deciding how he/she is to be governed. The construction of the ‘market citizen’ emphasised the private citizen, the citizen as consumer, client or user, and neglected the political citizen having a superior and integrative status in relation to political authority. The prevailing rhetoric stressed the allegedly universalising tendency of the market-freedoms and went so far as to define them as the ultimate ‘human rights’, turning the normative hierarchy of rights upside down (see below). From my point of view, however, there is – on a very basic conceptual level - a collision of the inclusionary principle of citizens rights (relying on certain objective criteria) and the exclusionary principle of the market (relying on criteria of purchasing power)²².

The ECJ changed its diction insofar as it began to emphasise the role or even the centrality of the political citizen. The court tried somehow to construct an ex-post 'social contract' among European citizens stressing the importance of a transnational civil society and bottom-up elements of institution-building. But compared to the socio-economic status of the citizen, the political and civil rights are still underdeveloped. One circumstantial evidence for a (rudimentary) changed perception of ‘citizenship’ is provided by the jurisdiction on the principle of equality. Although the jurisdiction of the ECJ is rather inconsistent and not overall inclusionary, there has been a noticeable shift towards a universal principle of equality, i.e. an equal treatment principle and a general principle of non-discrimination²³.

²² This trend may well be illustrated by the fact that the ECJ so far tended to respond better to interests of manufacturers, investors and holders of mobile capital than to welfare recipients for example.

²³ Traditionally, there has been a division between economic active categories of migrants and marginal categories (non-economic migrants) which lead to differences in entitlements. The equal treatment principles (f. i. the right of residence, non-discrimination rights) was counteracted by privileging the free-flow of workers and restricting the free-flow of welfare-recipients (see case 316/85 Lebon, (1987) ECR 2811 and case C-292/89 Antonissen, (1991) ECR I-745. In case C-85/96 Martinez Sala v. Freistaat Bayern, (1998), ECR the ECJ affirmed a universal principle of equality of treatment and access to welfare benefits irrespective of the dependence upon welfare, i.e. it pronounced a universal right of access to all manner of welfare benefits. The main problem, however, is that the EU relies on the existing welfare state regimes, and right-talk in relation to social rights is cheap-talk for the EU. Another significant shift in the court’s jurisprudence relates to Art. 141 (ex 119) TEC as amended by the Amsterdam International Conference to protect equal opportunity measures. In contrast to case C-450/93 Kalanke v. Freie Hansestadt Bremen, (1995) ECR I-3051 where the Court ruled against ‘affirmative action measures’, in case C-409/95 Marshall v. Land Nordrhein-Westfalen, (1997) ECR I-6363 the ECJ started to rule in favour of equality of result or outcome at the expense of mere equality of opportunity.
A serious obstacle is that the formal rights and duties of Art. 17 (ex 8) TEC are few: right of residence, voting-rights based on residence, consular and diplomatic protection in third countries, petition to the European Parliament and complaints to the European ombudsman. Actually, the transnational citizen is rather seen as an instance who holds and exercises rights vis-à-vis the member states which are seen as being the obstructive parties, but there is hardly a direct vertical and horizontal relationship dealing with the reciprocal nature of citizenship (see Shaw 1997). And last but not least, Art. 17 (ex 8) TEC provides no real guidance to the nature of the relationship of the EU as a political authority and its citizens as a political community which would be essential to a debate about democracy (see Curtin 1996).

**Fundamental Rights**

The nucleus of a constitution is usually a charter of fundamental rights, and their protection is at the root of constitutionalism. The protection of human rights enhances regime legitimacy: ‘rights jurisdiction bolsters arguments in favour of the democratic nature of the otherwise non-representative institutions and enhances their public standing’, and ‘the central position of constitutional courts in an ongoing...discourse of rights provides these courts with the materials of political autonomy and legitimacy’ (Shapiro & Stone 1994: p. 409). This stems mainly from the idea that human rights and constitutional review are constituent components of modern democracy.

The TEC does not contain a bill of rights, that means, the individual is subject to an additional level of political authority, but this political authority is not legally 'domesticated' according to the legal standard of the nation state. Especially the 'federalising' tendency of the European Union raised the question of potential losses of state guarantees. Integration can potentially endanger the individual's basic rights standard. And integration in the sense of harmonisation, after all, is not an end in itself but needs evaluation in the light of some kind of higher normative ought. ‘For it is not self-evident that federalism, transnational and legal integration are such worthy goals that we should be eager to sacrifice our fundamental rights to their cause’ (Cappelletti & Golay: p. 266). In order to get acceptance for Direct effect and Supremacy, the ECJ read such guarantees into the treaties. Thus, to ensure member states' adherence to supremacy – in cases even against their own constitutional
guarantees - is to guarantee Community's respect of fundamental rights. The ECJ confirmed that European law is bound to a 'higher law' which itself is transnational in character. Accordingly, the Court asserted that it had the last word in finding such a 'higher' European law. It affirmed its position as the authority to judge the validity of Community acts and subsequently the validity of legal acts performed by the member states (like implementation measures). In short, the ECJ sees itself responsible for the balance between protecting fundamental rights and meeting community needs.

The very basic principles of 'the unwritten bill of rights' (as elaborated by the ECJ) read like the traditional 'rule of law' corpus juris: the right to be heard in the sense of a general right of defence which is comparable to 'procedural due process'; a double jeopardy clause (non bis in idem); legal certainty in the sense of the prohibition of retroactive legislation, of bills of attainder and ex post facto laws as well as the protection of 'legitimate expectation'; non-discrimination and equality of treatment, i.e. an 'equal protection clause'; and proportionality which is equivalent to substantive due process. Apart from these principles, the court predominantly elaborated the scope of 'European' privacy and property rights and the freedom to pursue economic activity, i.e. the four market-freedoms (see Binder 1995).

The tricky question is whether the language of fundamental rights protection translates into an actual protection. As already mentioned, the initial motivation of the ECJ for the

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24 See especially case 29/69 Stauder v. City of Ulm (1969), ECR 419 and case 4/73 Nold v. Commission (1974), ECR 491 about fundamental rights contained in the general principles of the law of the Community. The sources of those transnational fundamental rights are various. The ECJ derives them from the national legal systems (mainly constitutional law) as well as from European and International treaties on human rights. As a point of reference, the 'European Convention on Human Rights' and the jurisdiction of the 'European Court of Human Rights' stand out. The ECJ applies the convention only indirectly, without formally being bound to it. At the beginning of its jurisdiction on fundamental rights, the ECJ named the convention as a point of reference in very general terms (see case 4/73 Nold v. Commission (1974), ECR 491). Later on, the Court referred to specific articles (s. Johnson 86, Orkem, Hoechst) and stated that it would consider the fundamental principles of the convention as relevant in the context to the EU (see case 222/84 Johnston v. Chief Constable of the Royal Ulster Constabulary (1986), ECR 1676, case 374/87 Orkem SA v. Commission, (1989) ECR 3343, joint cases 46/87 and 227/88 Hoechst AG v. Commission (1989) ECR 2919 and case 404/92 X v. Commission, (1994) ECR 4780, see also Kokott 1996).


26 Interesting enough but altogether not unusual is the fact, that the Court's jurisprudence on human rights was adopted by the 'political' institutions (the European Parliament, the Council and the Commission) in their 'Declaration on Fundamental Rights', April 1977 and codified in the 'Single European Act' as well as in Art. F (2) Maastricht-Treaty.
adoption of a fundamental rights terminology was to defend supremacy (see Weiler 1999). But the ECJ proceeded to a more offensive use of fundamental rights. This had the double effect of extending its jurisdiction into areas previously reserved to the member states and to expand the influence of the Community over member states' activity in general. Mancini's statement that the 'Court's effort to safeguard the fundamental rights of the Community citizens stopped at the threshold of national legislation' (Mancini 1989: p. 611) became rather doubtful. The Court frequently alluded to fundamental rights considerations in the context of member state actions. It extended its jurisdiction of member state acts implementing Community rules towards any member state measure incompatible with European fundamental rights in general. So, while originally, the ECJ rejected the notion of a competence to review on member states, subsequently it suggested a possible willingness to declare member state actions derogating from the Treaty's fundamental freedoms to be incompatible with the treaty on fundamental rights grounds alone (see Binder 1995). Coppel and O'Neill (1992: p. 680) point to another incremental expansion of fundamental rights jurisdiction over member states' administrative and legislative actions, namely the 'change of emphasis from that which is within the jurisdiction of the national legislator to that which is within the jurisdiction of Community law'. This change has the consequence that the 'exclusive' member states' jurisdiction is (potentially) open to future redefinition by the ECJ.

These remarks hint at the fact that the Court has employed fundamental rights instrumentally so as to accelerate integration and not for the sake of the individual. Likewise, the general community objective has prevailed against claims to the violation of fundamental rights and the concrete protection of an individual vis-à-vis the Community – remarkably, however, not vis-à-vis a member state. In case a member state was concerned, the ECJ required a far higher standard of compensation and state-liability and a far easier locus standi of natural and legal persons than in cases the EU was tried. Coppel and O'Neill (1992: p. 683) even state that 'In each case the Court

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28 There has been a growing trend of assessing member states' public policy derogation from the market freedoms assured by Community law on fundamental right grounds (see especially case 36/75 Rutili v. Minister for the Interior, (1975) ECR 1219, case 118/75 Watson&Belmann, (1976) ECR 1185 and case 260/89 Elliniki Radiophonia Tileorasi ERT v. Dimotiki Etairia Pliroforissis, (1990) ECR).

29 The high level of judicial protection within the reference procedure of Art. 234 (ex 177) TEC has not been equally applied to the 'direct' locus standi of natural and legal persons under Art.
has manipulated the usage of Fundamental right principles, endowing these principles with just enough significance in Community terms to allow to the triumph of the Community will’. The point to be made here is that, by starting from the market, Community rights (especially the four freedoms of workers, services, goods and capital) are elevated to the status of fundamental rights and thus, fundamental rights outside this area lose their pre-eminent character\(^30\). Correspondingly, these rights cease to be a 'trump card' against executive acts. Consequently, the rhetoric of fundamental rights protection seizes a moral high ground, but the factual instrumentalisation of fundamental rights (i.e. rights fundamental to running the market\(^31\)) arrogates power to the community and lets the individual down. Especially because it neglects the fundamental civil and political rights of the individual.

**The standing of the European Parliament**

The right of standing of the European Parliament under ex Art. 173 TEC and its rights to participate in proceedings before the Court has evolved gradually. The Court has refused to exclude the Parliament from the scope of provisions which refer to the institutions of the Community in general terms. Stressing the need for complete judicial protection, the ECJ has admitted actions for annulment against acts of the Parliament capable of affecting the legal position of third parties (s. Arnull 1990)\(^32\). The following statement of Advocate General Mancini is indicative for the Court's approach: ‘that the obligation to observe the law takes precedence over the strict terms of the written law.'

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230 III (ex 173) TEC. Those persons can challenge a regulation if it is of direct and individual concern to them. Direct and individual concern, however, was as narrowly defined as it has to 'single out' and affect or injure a person more than it affects others. That is, the threshold of admissibility with regard to the 'direct' access of the individual is far higher than with regard to the 'indirect' access (via Art. 234 (ex 177) TEC). See esp. case 26/86, *Deutz and Geldermann v. Council*, (1987) ECR 941.


31 Opponents of this view would of course argue that fundamental rights are themselves contingent and that economic rights which keep the market going as an efficient and fair entity are the 'only' universal rights; they would assert that the single market itself contains a universalising tendency and that ‘to cut a swathe through various particularities, obliterating them in the name of market freedoms and putting local constitutions in danger might not be a bad thing’ (Bankowski&Scott 1996: p. 91).

Whenever required in the interests of judicial protection, the Court is prepared to correct or complete rules which limit its powers in the name of the principle which defines its mission’ (case 294/83, *Les Verts*, (1986) ECR 1339, 1350).

The ECJ ‘as arbiter between the other institutions in order to safeguard the system of checks and balances’ has also admitted actions brought by the Parliament for the annulment of acts adopted in violation of its right to be consulted or to co-operate in the legislative process. The general line of reasoning to consolidate the role of the parliament did not primarily aim at the institutional balance but at the adaptation of a 'fundamental democratic principle' as an integral part of the constitutional order of the Community - and in turn basing the system of checks and balances on a democratic principle (see Mancini&Keeling 1994)\(^{33}\). Finally, this jurisdiction of the Court found its way into political decision-making, the analogue application of ex Art. 173 TEC to the European Parliament was ratified in the new version of Art. 173 TEC (Art. 230).

**Conclusion**

The constitutionalisation of the founding treaties and the qualification of the ECJ as a 'quasi'-constitutional court reveal the Court's pivotal position in the political and legal process of polity formation. Far from denying the 'constitutional' quality of European law this paper has invoked issues of 'constitutional justice' (dealing with the 'law of politics').

At the beginning, the Court's self-perception as a 'promoter of integration' devoted to the *telos* of 'harmonisation' and 'effective enforcement' of the treaties, foremost led to an undifferentiated arrogation of competencies to the Community, and to the negligence of individual rights that seemed irrelevant to the 'free flow' of commodities. Especially the claim of an 'inherent competence' to fill lacunas in the system of remedies to safeguard fundamental 'individual' rights (which seems perfectly sound when it is for the sake of the individual, i.e. to strengthen his status vis-à-vis the political authority) fulfilled mainly the function of an alibi to meet community needs. A closer look at the Court’s recent jurisdiction reveals that the ECJ is gradually developing an increasingly balanced

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\(^{33}\) See esp. case 138/79, *Roquette Frères v. Council*, (1980) ECR 3333. 1988, in the 'Comitology' case (fn. 26) the Court declared the European Parliament's action inadmissible, i.e. not giving the Parliament title to sue. This restriction was overcome two years later in the 'Chernobyl' case (fn. 26), after the amendment of the treaties by the 'Single European Act'. The Court argued that the Parliament should have standing to commence proceedings against acts of the Council and the Commission.
view of its task, i.e. adjusting the *telos* of (undifferentiated) integration and focusing on plurality, diversity, responsiveness and transparency. Flexibility instead of uniformity and subsidiarity instead of centralisation are more and more invoked. At least rhetorically, the 'European citizen' as a subject and source of law is taken in earnest and the need for access, accountability and responsibility is stressed.

If the judiciary is ideally seen as an active agent of democracy it might foremost have the function of strengthening the citizens' status of equally being authors and addressees of law and justice. If the starting point is a framework of the people acting politically as the source of law and at the same time of law as a precondition of democratic politics, then the judiciary might be expected to 're-construct' all those rights that are functionally and structurally necessary for a democratic decision-making process. To specify this point: the judiciary can have a constructive responsibility for the organisation and development of the law by providing the 'rational' grounds of the law as a *sine qua non* for democracy. The 'ratio' of law as a medium of self-determination and a special form of practical discourse is insofar directed to the idea of universality, inclusion and the maintenance of the status of all affected subjects as co-equal.

To sum up: A normative conceptualisation of a 'European judiciary' should sufficiently contribute to the debate about 'how to render the EU more democratic'. A 'European Judiciary' has the potential of strengthening the 'European citizen' as the origin of politics and law, and it would be a *faux pas* to ignore its formative contribution to public discourse and participation.
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