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1

Introduction: The ECJ as a Federal Constitutional Court

This is a study of the jurisdiction of the European Court of Justice (ECJ) in two particular areas of activity of the European Union: the Area of Freedom, Security, and Justice (AFSJ) and the Common Foreign and Security Policy (CFSP). Before focusing on specific areas of its jurisdiction, however, it may be useful to reflect on the nature of the Court of Justice's role. Some of the Court's functions may be described as those of a national supreme court (ensuring the uniform application by lower courts of civil, criminal, or administrative law) and others as those of a constitutional court (building a coherent legal system, ensuring the vertical as well as horizontal division of powers, and protecting individual rights).[1] This monograph will focus on those aspects of the role of the Court that liken it to the constitutional court of a federal legal system.[2] Accordingly, any considerations on the Court's jurisdiction and its role within the legal system of the European Union are best placed in the context of the general discussion on constitutional adjudication and the problems it raises. With

[1] Although, as Lenaerts notes, there are also constitutional aspects to the Court's role as a supreme court, since divergent application of EC law would run counter to the objectives set out in the Treaties: K Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) 44 CML Rev 1625, 1651–2; see also V Skouris, 'The Position of the European Court of Justice in the EU Legal Order and its Relationship with National Constitutional Courts' (2005) 60 Zeitschrift für Öffentliches Recht 323. Finally, bear in mind that all functions may be fulfilled through a single channel, ie, the preliminary reference procedure, which makes the distinction difficult in practice.

[2] There is widespread agreement in the literature that the Court may be considered a constitutional court: A Dashwood and A Johnston, 'Synthesis of the Debate' in A Dashwood and A Johnston (eds), *The Future of the Judicial System of the European Union* (Hart: Oxford, 2001) 59. For a comprehensive review of the literature on this point, see M Claes, *The National Courts' Mandate in the European Constitution* (Hart: Oxford, 2006) 399 and ff.

this intention, the first section will provide a broad-brush overview of the different models of constitutional review, before focusing on the ECJ itself, its creation and posterior evolution into a constitutional adjudicator of sorts. The final section will shed light on the choice of two specific areas of the jurisdiction of the Court as the object of this study.

1.1 The Context: Models of Constitutional Review

Constitutional adjudication is a global phenomenon. In 1803, the US Supreme Court declared a statute unconstitutional in the case of *Marbury v Madison*, generally hailed in the literature as the beginning of judicial review;[3] since then, the principle of constitutional review has been accepted as a feature of most democratic legal systems. The US and European models of constitutional review do, however, differ substantially: while all US courts can carry out such review, this function is normally reserved in European legal systems for a special constitutional court (where it is allowed at all).[4] A distinction has therefore been drawn in the literature between a centralized and a decentralized model of constitutional review.[5]

In the classic European model, the judiciary can be divided into two main branches: ordinary courts, on the one hand, and a constitutional court, on the other. Whereas ordinary courts are entrusted with the 'ordinary judicial function', or applying the law to decide specific cases, the constitutional court is entrusted with the 'constitutional function', or reviewing the compatibility of legislation with the constitution. The decentralized nature of the American model means that a single judicial branch is entrusted with both functions.[6] Furthermore, review in the American model is concrete, in

[3] *Marbury v Madison* 5 US 137 (1803). But see also WM Treanor, 'Judicial Review before Marbury' (2005) 58 Stanford L Rev 455.

[4] M Shapiro and A Stone, 'Introduction: The New Constitutional Politics' (1994) 26 Comparative Political Studies 397, 400; L Favoreu, 'Le Droit Constitutionnel, Droit de la Constitution et Constitution du Droit' (1990) 1 Revue Française de Droit Constitutionnel 71. But see eg the 'conventionality control' exercised by ordinary courts in France: O Beaud, 'Reframing a Debate Among Americans: Contextualizing a Moral Philosophy of Law' (2009) 7 I-CON 53, 60.

[5] V Ferreres Comella, 'The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism' (2004) 82 Texas L Rev 1705. Ferreres Comella has also distinguished between more and less rigid centralized models: the less rigid a centralized model is, the more it approaches the American or decentralized model: ibid, 1706–11.

[6] Ibid, 1706.

the sense that courts only decide on the constitutionality of a law as it applies to the specific facts of an actual controversy, whereas review is to a large extent abstract in the classic European model: the constitutional court does not decide on the substance of specific cases, in accordance with the separation of competences already outlined.[7]

The protection of constitutional rights was one of the aims of judicial review in the US model since its origins.[8] Yet the same cannot be said of the European model of constitutional review, the roots of which can be found in the constitutional court of the First Austrian Republic,[9] the brainchild of Hans Kelsen. The Kelsenian model of constitutional review sought to avoid the creation of a Government of judges by clearly distinguishing between positive and negative legislating: while Parliament could legislate freely, in a creative manner (positive legislating), the constitutional court could only apply the constitution and strike down legislation which did not comply with it (negative legislating).[10] Kelsen argued forcefully that the principle of separation of powers could only be respected if constitutional courts were not allowed to become positive legislators. To this end, the constitution must be a positive body of higher norms that merely lay down how the legal system is organized, but cannot include a list of constitutional rights. The reason for this is that rights provisions are vague, open to interpretation, and value-laden: if a constitutional court has to interpret rights provisions, it is likely to become politicized and to start legislating in a positive manner, thereby usurping a task that belongs rightfully to Parliament.[11]

[7] For a comparison, M Rosenfeld, 'Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts' (2004) 2 I-CON 633; J Ferejohn and P Pasquino, 'Constitutional Adjudication: Lessons from Europe' (2004) 82 Texas L Rev 1671.

[8] Since the main corpus of individual rights was included in the Constitution early on in the form of the Bill of Rights. For a brief overview: AT von Mehren and PL Murray, *Law in the United States* (2nd edn, Cambridge University Press: Cambridge, 2007) 146–9.

[9] 1920–34. A Stone-Sweet, *Governing with Judges* (OUP: Oxford, 2000) 34.

[10] For a more encompassing historical introduction, see M Shapiro and A Stone, 'Introduction: The New Constitutional Politics' (1994) 26 Comparative Political Studies 397, 400–3.

[11] For a more general overview: H Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and American Constitution' (1942) 4 The Journal of Politics 183; H Kelsen, 'La Garantie juridictionnelle de la Constitution' (1928) 44 Revue du Droit Public 197. It can be argued that this is not the only way in which a constitutional court may usurp the legislator's legitimate role: even if the constitution contains no 'dangerous' rights provisions, the constitutional court may not act only as a negative legislator—by merely saying no to the legislator—but may amend legislation, commanding the legislator to behave in a certain way: A Stone-Sweet, *Governing with Judges* (OUP: Oxford, 2000) 135.

Later developments, however, set a very different trend. There have been two waves in Europe whereby appreciation of the damaging effect of arbitrary and poorly controlled state power generated a strong momentum for rights protection: firstly, post-1945, in Western Europe; and secondly, post-1989, in Central and Eastern Europe. Fundamental rights were thus embedded in national constitutions, and powerful constitutional courts emerged with the mandate to protect those rights and, in general, supervise state power. The protection of constitutional rights is, nowadays, an integral part of constitutional adjudication across the globe.

It is in this context that the role of the European Court of Justice is better understood: the European Union has a federal judicial system with a mixed model of constitutional adjudication (partly centralized and partly decentralized, as will be explained below). At the apex of this federal judicial network sits the ECJ, a court that may be comparable to a young US Supreme Court in some respects,[12] but that has unavoidably acquired the most prominent features of a European constitutional court. The how and why of this evolution will be explored in the following section.

1.2 The ECJ as a Federal Constitutional Court

One of the premisses of this book is that the European Court of Justice acts as a federal constitutional court of sorts: there is a Constitutional Charter of the European Union,[13] and the European Court of Justice can be considered its ultimate interpreter and guarantor,[14] ultimately able to declare legislation unconstitutional if necessary. Furthermore, given the federal features of the judicial system of the EU, the Court's tasks best resemble those of the highest court in a federal system. The aim of this section is to briefly describe how this evolution has taken place.

[12] For a general comparison, see eg M Rosenfeld, 'Comparing Constitutional Review by the European Court of Justice and the US Supreme Court' (2006) 4 I-CON 618.

[13] See eg Opinion 1/91 *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area* [1991] ECR I-6079 [1]. The Court itself uses the language of a Constitutional Charter, and so by implication labels itself a constitutional court.

[14] Art 220 EC, first para: 'The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed.' In the Court's own words, it 'carries out tasks which, in the legal systems of the Member States are those of the constitutional courts, the courts of general jurisdiction or the administrative tribunals as the case may be': CJEC Annual Report, 'Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union' (1995).

The ECJ was created as a supranational court, integral to the European Community project. The establishment of this sort of court at a supranational level follows a similar logic to that of any other court: individuals rely on an impartial third party to solve controversies and ensure compliance with a pre-agreed set of rules.[15] In this particular case, Member States decided to establish a third-party institution that would ensure that the other parties to the agreement would comply with it, even if it meant that they themselves would be held to comply with it too;[16] this was necessary for the long-term commitments undertaken pursuant to the Treaties to be credible. Because of the characteristics of the Treaty system it was supposed to guard—a polity with an areal division of powers between the central government and a number of constituent governments—the first and foremost function of the European Court would be to ensure the correct balance of powers between the central power and the peripheral ones.[17] Following the dynamics that have affected all European systems of constitutional review, and which have been described above, the European Court of Justice slowly transformed, however, into not only a decider of boundary conflicts between powers, but also a guarantor of constitutional rights.

Consider first the way in which the ECJ comes to see the protection of fundamental rights as part of its remit. Fundamental rights were not mentioned in the founding Treaties and, initially, the Court resisted attempts to be transformed into a guarantor of fundamental rights.[18] Finally, though, the necessities of collaboration with national judiciaries proved too much: the European Court of Justice had to adjust its position to what national constitutional courts expected of it, that is, to the European model of a constitutional court. We must not forget that the judicial system of the Community rests upon the respect that national courts are willing to grant to the Court of Justice and this, in turn, rests upon their conception of what the proper role of the Court of Justice as a constitutional court should be. In this case, the ECJ was conditioned by the willingness of national constitutional courts to step in to secure protection of

[15] See generally M Shapiro, *Courts. A Comparative and Political Analysis* (University of Chicago Press: Chicago, 1981) ch 1; A Stone-Sweet, *Governing with Judges* (OUP: Oxford, 2000) 13–17.

[16] This is the second-best strategic possibility: the best one would be making everyone else comply without having to comply oneself: M Shapiro, 'The European Court of Justice' in P Craig and G De Búrca (eds), *The Evolution of EU Law* (OUP: Oxford, 1999) 321–2.

[17] Ibid, 321.

[18] See eg Case 1/58 *Stork v High Authority* [1959] ECR 17; Case 40/64 *Sgarlata and others v Commission EEC* [1965] ECR 279.

fundamental rights, should they conclude that the ECJ's approach is wanting.[19] This distinctive dialogue coined the development of the role of the Court of Justice within the EC judicial system. As a result, the Court had to execute a double twist by introducing human rights into the Constitutional Charter of the Community, first, and by declaring itself competent to review the compatibility of legislation with these constitutional rights, second.[20] To the extent that it was the Court itself that had to introduce rights into the constitution, this double manoeuvre was decidedly remarkable.

The protection of classic fundamental rights, although an extremely important milestone in the development of the ECJ as a constitutional court, is by far not the only function that has allowed it to grow into its current role. The Court has further used the language of individual rights to legitimize and provide a basis for the developing federal legal system in place,[21] only this time referring to EC rights, or rights contained in binding EC legislation, be it primary or secondary.[22] By using the language of rights to develop the legal system of the EC, the Court managed to intertwine its two main functions (to protect rights and to develop a coherent base for a young legal system) even further.

It has been recognized as a common pattern that constitutional courts tend to empower the central level of government while federal systems are still young.[23] The ECJ has not been an exception to this rule. And, as Ward convincingly shows, the notion of 'individual rights' (together with that of

[19] Such willingness was, for instance, expressed by the German and Italian Constitutional Courts in: BVerfGE 37, 271 *Internationale Handelsgesellschaft v Einfuhr und Vorratsstelle für Getreide und Futtermittel (Solange I)* [1974] 2 CMLR 540; BVerfGE 73, 339 *re the application of Wünsche Handelsgesellschaft (Solange II)* [1987] 3 CMLR 225; *Frontini v Ministero delle Finanze (Case 183)* [1974] 2 CMLR 372; *Corte Constituzionale, 21 Aprile 1989 n. 232 - Pres. Conso; red. Ferri - S.p.a. Fragd c. Amministrazione delle finanze dello Stato* [1989] 72 Rivista di Diritto Internazionale 104.

[20] Case 20/69 *Stauder v Stadt Ulm* [1969] ECR 419; Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125; Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 3727. On this evolution, see also M Claes, *The National Courts' Mandate in the European Constitution* (Hart: Oxford, 2006) 417–22.

[21] A Ward, *Judicial Review and the Rights of Private Parties in EU Law* (OUP: Oxford, 2007) 1, 14–15.

[22] C Hilson and T Downes, 'Making Sense of Rights: Community Rights in EC Law' (2009) 24 ELR 121. There is of course a degree of overlap between EC Rights as defined in the main text and fundamental rights as principles of Community law (ibid, 121–2).

[23] RD Kelemen, *The Rules of Federalism: Institutions and Regulatory Politics in the EU and Beyond* (Cambridge University Press: Cambridge, 2004) 13–14; D Halberstam, 'Comparative Federalism and the Role of the Judiciary' in KE Wittington, RD Kelemen, and GA Caldeira (eds), *The Oxford Handbook of Law and Politics* (OUP: Oxford, 2008) 151.

effet utile) has been the justification underpinning all major interferences with national regulation.[24] The most flagrant cases are the direct effect of Treaty provisions,[25] the direct applicability of regulations and decisions,[26] and the principle of Member State liability for breach of EC law,[27] among others. Indeed, it can be said that the notion of individual rights has prompted the Court of Justice to introduce the elements of a federal judicial architecture;[28] but not only that. It has also used the 'individual rights argument' to win national courts over, to make them collaborate and accept said elements.

It has already been discussed in the previous section how giving constitutional courts the capacity and the obligation to protect individuals' rights is widely considered to be the reason for the transformation of modern European constitutional courts into positive legislators, or courts which have to take political—or at least, 'creative'—decisions in their function as controllers of political decision-making.[29] The European Court of Justice was set up, originally, as a supranational court that would decide on boundary conflicts in a polity with an areal distribution of powers. Slowly, however, the Court developed into much more. It has been argued here that this came partly as a result of the need for the ECJ to conform to the expectations of national constitutional courts, and also of the duty placed on the Court to enforce a constitutional bargain that was necessarily incomplete at its inception.[30] The Court managed to unite both

[24] A Ward, *Judicial Review and the Rights of Private Parties in EU Law* (OUP, Oxford 2007) 2. For a fuller discussion of the examples that follow, see ibid, 2–9. For an illustration of the affinity between the principle of effectiveness and fundamental rights (in this case, the right to judicial protection), see Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651; also T Tridimas, *The General Principles of EU Law* (2nd, edn, OUP: Oxford, 2006) 443–4.

[25] See for instance Case 43/75 *Defrenne v Sabena* [1976] ECR 455 [24] or Case 36/74 *Walrave and Koch* [1974] ECR 1405 [34].

[26] On the direct applicability of regulations (justified because they 'confer rights on private parties'), see for example Case 34/73 *Variola* [1973] ECR 981, 990. On the direct applicability of decisions, see Case 9/70 *Grad v Finanzamt Traunstein* [1970] ECR 825 [5].

[27] Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357.

[28] A Ward, *Judicial Review and the Rights of Private Parties in EU Law* (OUP, Oxford 2007) 9.

[29] Some authors accept it as a necessary condition for this transformation, although not a sufficient one. Hirschl, for example, argues that there are other causes at play, related to the balance of power in a society: R Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press: Cambridge, 2004) 212 and ff.

[30] The precise contents of the federal bargain are always incomplete: D Halberstam, 'Comparative Federalism and the Role of the Judiciary' in KE Wittington, RD Kelemen, and GA Caldeira (eds), *The Oxford Handbook of Law and Politics* (OUP: Oxford, 2008) 143. On incomplete agreements more generally, C Sunstein, 'Incompletely Theorized Agreements' (1995) 108 Harvard LR 1733, 1739–40.

aims by using the language of individual rights to appeal to national courts in their role as protectors of rights,[31] while at the same time using these individual rights to build a new legal system.

The role played by national courts in this process should come as no surprise. The legal system of the European Community placed an area of decision-making outside the realm of control of national constitutional courts and within the realm of control of the European Court of Justice. National constitutional courts were not able to discharge what they considered their duty and a requirement of the rule of law; but saw that the European Court of Justice was in a position to do so. The famous inter-court dialogue that took place during this time had as a result a change in the role of the ECJ,[32] which had to take to itself the role of guarantor of rights. In order to make the legal system of the EC acceptable to national constitutional courts, such legal systems had to have a modern European constitutional court.[33]

With the benefit of hindsight, this seems to be a natural evolution since the moment the Member States created a legal system with a last interpreter that was in a position of authority in relation to national constitutional courts in matters pertaining to that system. It was natural for national constitutional courts to expect this court to have an ethos similar to theirs, and that this would be a requirement if they were to accept relinquishing some of their control in favour of this court. Further, the need for collaboration and inter-court dialogue in the system was also likely to lead to an accommodation between the national courts'

[31] A Burley and W Mattley, 'Europe before the Court: A Political Theory of Legal Integration' (1993) 47 International Organizations 41, 64.

[32] A-M Slaughter, AS Sweet and JHH Weiler (eds), *The European Courts and National Courts: Doctrine and Jurisprudence* (Hart: Oxford, 1998); J Schwarze (ed), *The Birth of a European Constitutional Order: The Interaction of National and European Constitutional Law* (Nomos: Baden-Baden, 2000); S Weatherill, 'Activism and Restraint in the European Court of Justice' in P Capps, M Evans, and S Konstadinidis (eds), *Asserting Jurisdiction: International and European Legal Perspectives* (Hart: Oxford, 2003).

[33] F Jacobs describes the constitutional role of the Court as 'inescapable': F Jacobs, 'Is the Court of Justice of the European Communities a Constitutional Court?' in D Curtin and D O'Keeffe (eds), *Constitutional Adjudication in European Community and National Law* (Butterworths: Dublin, 1992), 32. On how this position may be reinforced in the future, see T Tridimas, 'The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?' in T Tridimas and P Nebbia (eds), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order* (Hart: Oxford, 2004).

expectations and the role of the European Court of Justice. The fact that the ECJ's legitimacy is more contested because it operates in a transnational context makes the collaboration and support of national constitutional courts even more necessary.

Kelsen argued that giving the role of guardian of rights to a constitutional court meant it would become politicized, because rights provisions are typically vague and admit several, value-laden interpretations. He was certainly right in the case of the European Community, a legal system where, firstly, human rights provisions were not even at hand and had to be created, to some extent, by the constitutional court itself—or, at least, borrowed and reshaped from other sources, mainly the ECHR and national constitutional traditions. The ECJ was creating this role for itself, if not from scratch, then at least without having a proper starting point in the Treaty; the Court did not only have to deal with vague and ambiguous concepts, it also had to cherry-pick them from external sources and adapt them to the EC legal system. Secondly, the same argument applies to the role of the Court in building a legal basis for the Community using the language of EC rights. The Court had to build a complex legal system on the basis of a very ambiguous corpus of Treaties and, as a consequence, its development into a positive legislator was inescapable.

The upshot, then, is that the legal structure of the European judicial system and its characteristics—mainly, the existence of the European Court of Justice at its apex and the need for it to secure the respect and collaboration of national constitutional courts—meant that the ECJ had to present itself as a guarantor of individuals' rights. At the same time, the Court had to develop an incomplete constitutional bargain and it used the language of rights to do so. Both aspects of the role of the Court are closely intertwined and they both contributed decisively to the evolution of the Court into a federal constitutional court of sorts and, clearly, a positive legislator. The result is well known: for years now, the ECJ has been 'deciding issues of political governance, defining democracy at European and national level, and contributing through the process of judicial harmonization to the creation of a European demos'.[34]

[34] T Tridimas, 'The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?' in T Tridimas and P Nebbia (eds), *European Union Law for the Twenty-First Century. Rethinking the New Legal Order* (Hart: Oxford, 2004) 113.

Of course, the Court's bold approach has been met with criticism and its role is decisively problematic in terms of democratic legitimacy.[35] This will be further explored in the conclusion to this monograph. For now, let us bear in mind that the European Court of Justice considered itself legitimized to create judge-made law from the beginning.[36] The foremost argument, made always explicit, is that the Treaty itself gives the Court of Justice jurisdiction to ensure that in the interpretation and application of its text, the law is observed (Article 220 EC). We have, then, a constitutional provision which foresees constitutional review, and which has been interpreted to include the development of the law, when needed, to provide a 'firm legal base' for the Community.[37]

Further than the formal legitimation granted by the Treaty, the Court obtains its practical legitimacy from its position in the legal system of the Community, from its standing as an established and objectively acting institution, and from 'its manner of decision-making in formal and strictly regulated judicial procedures, with the independence, impartiality and professional qualification of its members'.[38] These elements of legitimation are hardly unique to the European Court of Justice, and can be

[35] For some of the best-known early criticisms, see: H Rasmussen, *On Law and Policy in the European Court of Justice* (Martinus Nijhoff: Dordrecht, 1986); H Rasmussen, *The European Court of Justice* (GadJura: Copenhagen, 1998); P Neill, *The European Court of Justice: A Case Study in Judicial Activism* (European Policy Forum: London, 1995); T Hartley, 'The European Court, Judicial Objectivity and the Constitution of the European Union' (1996) 112 LQR 95. Some authors who have defended the constitutional role of the Court are, among others: M Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press: Oxford, 1989); F Jacobs, 'Is the Court of Justice of the European Communities a Constitutional Court?' in D Curtin and D O'Keeffe (eds), *Constitutional Adjudication in European Community and National Law* (Butterworths: Dublin, 1992); T Tridimas, 'The Court of Justice and Judicial Activism' (1997) 2 ELR 199; A Arnull, 'The European Court of Justice and Judicial Objectivity: A Reply to Professor Hartley' (1996) 112 LQR 95; A Arnull, *The European Union and its Court of Justice* (2nd edn, OUP: Oxford, 2006) 620–1. For the most recent controversy, see R Herzog and L Gerken, 'Stop the European Court of Justice' http://www.cep.eu/678.html?&L=1 (accessed January 2009) and a reply in 'Editorial' (2008) 48 CML Rev 1571

[36] U Everling, 'On the Judge-Made Law of the European Community's Courts' in D O'Keeffe (ed), *Judicial Review in European Union Law* (Kluwer, The Hague 2000) 35; A Arnull, 'Does the Court of Justice Have Inherent Jurisdiction?' (1991) 28 CML Rev 669; J Ukrow, *Richterliche Rechstfortbildung durch den EuGH* (Nomos: Baden-Baden, 1995).

[37] U Everling, 'On the Judge-Made Law of the European Community's Courts' in D O'Keeffe (ed), *Judicial Review in European Union* Law (Kluwer, The Hague 2000) 36; I Pernice, 'Die Dritte Gewalt im europäischen Verfassungsverbund' (1996) 31 Europarecht 27; J Ukrow, *Richterliche Rechstfortbildung durch den EuGH* (Nomos: Baden-Baden, 1995) 90 and ff.

[38] U Everling, 'On the Judge-Made Law of the European Community's Courts' in D O'Keeffe (ed), *Judicial Review in European Union Law: Liber Amicorum in Honour of Lord Slynn of Hadley* 36.

extrapolated to any European constitutional court; they all are formally legitimized by a constitutional provision, and their social legitimacy can be said to come as a consequence of their position in the constitutional system (constitutional politics, over time, reinforce their stability and authority)[39] and of their perception as qualified, independent, and impartial organs.

Although the ECJ and national constitutional courts share similar mechanisms to justify their role, the legitimacy of the ECJ is, needless to say, far more contested than that of its national counterparts. Any modern constitutional court has to take politically-charged decisions that affect the shape of the legal order. At the national level, this may seem less outrageous because there is a stable, traditional polity with an established constitution. There is likely to be a consensus on constitutional values among the population, what has been termed a commitment to 'constitutional patriotism' in the literature.[40] The greater this consensus is concerning the fundamental values behind the constitution, the less polemic the guidance of the constitutional adjudicator will seem.[41] At the European level, the level of consensus is much lower. When exercising its role as constitutional adjudicator, the ECJ is developing a constitutional bargain that is more incomplete than a standard national constitution, and it is operating in the absence of a pan-European consensus on the values that should underlie the new system and how these values should be articulated.[42] Consequently, the crisis in legitimacy of constitutional adjudication will always be greater at the EU level.

It is not my intention to argue that there is no difference between what national constitutional courts, on the one hand, and the ECJ, on the other, do. Rather, my point is that both sides of this comparison are, in essence, behaving like the positive legislators that constitutional courts are. Differences, of course, occur because of the different contexts in which they

[39] A Stone-Sweet, *Governing with Judges* (OUP: Oxford, 2000) 151–2.

[40] A term coined in the German literature (*Verfassungspatriotismus*) and originally used in: D Sternberger, *Verfassungspatriotismus* (Insel: Frankfurt am Main, 1990) and famously taken up by Habermas in: J Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaates* (Suhrkamp: Frankfurt am Main, 1992). Since then, it has been widely used in the political debate. A recent overview can be found in: JW Mueller, *Constitutional Patriotism* (Princeton University Press: Princeton, 2008).

[41] M Rosenfeld, 'Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts' (2004) 2 I-CON 633, 666.

[42] Kumm believes, in fact, that constitutional patriotism is not possible in the EU, at least under the current political conditions: M Kumm, 'Why Europeans Will Not Embrace Constitutional Patriotism' (2008) 6 I-CON 117.

operate. The ECJ stands on far shakier ground when exercising its role as a constitutional adjudicator and one may foresee that the Court will be likely to adopt a degree of pragmatic and/or principled caution in its rulings for this very reason.[43] Albeit taking into account these distinctions, the ECJ may be studied as the constitutional court of a vertical federal system, where the central government and the constituent states share a significant range of powers.[44] This vertical federal system has opted for a mixed system of judicial review, in the sense that only the ECJ may review EC law for compliance with the 'constitutional charter' (centralized model) while all courts review national law for compliance with the same standard (decentralized model).[45]

Once the ECJ has been placed in the more general context of constitutional adjudicators across the globe, the aim of this monograph is to study the evolution in the jurisdiction of this Court in two specific areas, namely the second and third pillars of the European Union.

1.3 The ECJ as a Constitutional Court in the Second and Third Pillars

The second and third pillars of the European Union will be the focus of this monograph for several reasons. These are the areas of the European Union that are evolving fastest, from mere intergovernmental cooperation to more 'constitutionalized' parts of the legal system. As a consequence, they offer a valuable insight into how new areas of EU activity come to the fore, with all institutional actors having to decide how such activity will

[43] The classic example is Grogan: Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* [1990] ECR I-04685; see also Cases C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609; C-91/91 *Paula Faccini Dori v Recreb Srl* [1994] ECR I-3325; Opinion 2/94 of 28 March 1996 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-01759.

[44] As opposed to a horizontal federal system, where 'central and constituent governments are organizationally distinct, each with a full complement of legislative, executive and fiscal powers': D Halberstam, 'Comparative Federalism and the Role of the Judiciary' in KE Wittington, RD Kelemen, and GA Caldeira (eds), *The Oxford Handbook of Law and Politics* (OUP: Oxford, 2008) 142.

[45] V Ferreres Comella, 'The European Model of Constitutional Review of Legislation: Toward Decentralization?' (2004) 2 I-CON 461, 481. In the case of the ECJ, the review of national legislation may be direct (through infringement proceedings) or indirect (through the preliminary ruling procedure). Although the review of national law is decentralized, in case of controversy national courts may turn to the ECJ, shifting the burden of decision to the centre.

come to be controlled. In this process, the ECJ has had to lead the way in the face of legislative forestalling, as in the case of the Commission's proposals to extend the jurisdiction of the Court by Council decision,[46] or demise, as in the case of the failed Constitutional Treaty.

The fact that the ECJ has had to lead the way means that these areas offer a fascinating example of a constitutional court coming to grips with new parts of the legal system that need 'building'.[47] Just like the Court had to do with the first pillar, it now has to shape new areas of the legal system of the EU, providing a coherent legal basis for them and ensuring that the rights of individuals are properly protected. In order to do so, it has had to push the boundaries of its own jurisdiction, to the extent that this was possible. Further changes are nevertheless afoot; the nature of the law created in the intergovernmental pillars as well as the competence of the Court to control its constitutionality are part of the wide-ranging changes proposed in the Lisbon Treaty (LT).[48] The Union is, it seems, deciding how and to what extent governmental activity in these areas should be subject to judicial control.

It is for all these reasons that these particular areas of the European Union have been chosen for this study, the aim of which should be considered twofold: to map out the evolution of judicial control in two specific fields of Union activity, but also to study this process as a further step in the development of the ECJ as the constitutional court of the EU.

[46] Communication from the Commission to the European Council. A Citizens' Agenda: Delivering Results for Europe. Brussels, 10.5.2006. COM(2006) 211 final, 10; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the regions and the Court of Justice of the European Communities: Adaptation of the Provisions of Title IV of the Treaty establishing the European Community relating to the jurisdiction of the Court of Justice with a view to ensuring more effective judicial protection. Brussels, 28.6.2006. COM(2006) 346 final.

[47] This study focuses on the role of the ECJ as part of a wider process; it does not assume that the Court alone is regularly responsible for major changes in wider policy, but that it has initiated them in some cases. See in this respect L Conant, *Justice Contained* (Cornell University Press: Ithaca, NY, 2002).

[48] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, *OJ* (2007) C 306/1, 17 December 2007. The consolidated version will be used throughout this paper: Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, *OJ* (2008) C 115/1, 9 May 2008. The Lisbon Treaty is not a substantive Treaty: it reforms—without turning them into a single document—the TEU and the EC Treaty, renaming the latter Treaty on the Functioning of the European Union or TFEU. For that reason, references to the Lisbon Treaty will appear as 'Article X TEU (after LT)' or 'Article X TFEU'. On the process leading up to the signature of the Lisbon Treaty and its current status, see Section 2.4.3.