

The Court of Justice as an Institutional Actor: Judicial lawmaking and its Limits

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Abstract

The EU Treaties bind the Court of Justice of the European Union as an institution of the Union. But what does that mean for judicial lawmaking within the EU legal order? And how might any limits set out in the EU Treaties be effectively applied *to the Court of Justice* as lawmaker? My work on the Court of Justice interrogates these fundamental and underexplored questions at a critical juncture in European integration. This paper summarizes the key findings of that research. It argues, first, that the EU Treaties should be considered to function as the principal touchstones for assessing the internal constitutionality, and hence legitimacy, of all Union institutional activity – including the work of the Court. Thereafter, it offers an overview of my findings in relation to the Court's compliance with the demands of the EU Treaty framework in the exercise of its interpretative functions. The results of that analysis are striking and offer scholars powerful new insights in the nature and limits of the Court's role within the EU legal order.

Introduction

This paper offers an overview of my research into the role of the Court of Justice of the European Union as an institutional actor in EU integration. For a fuller account of my work on this topic, please see my recently published monograph: [*The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and its Limits* \(CUP, 2018\)](#). The following outline, which will form the basis of my presentation, adapts the introductory chapter of that text.

In summary, my work on the Court of Justice and its role in EU integration is focussed on answering the following research question: to what extent does the Court of Justice comply with the EU Treaty framework in the exercise of its attributed functions? My core argument is that institutional compliance with that framework is not optional. As an institution of the Union (Art 13 TEU), the Court of Justice is, as a matter of principle, normatively bound to comply with the demands of the EU Treaties in the exercise of its institutional functions. The use of the EU Treaty framework to scrutinise the Court's interpretative choices is an innovative approach to the study of EU judicial lawmaking and its limits. Legal scholars (and the Court itself) presently overlook the application *to the Court* of the EU Treaty framework as a tool to determine the internal constitutionality, and thus legitimacy, of its institutional activities. This entrenched perspective, I argue, fundamentally obscures the duality of the Court's position within the EU legal order as both a court and an institution of the Union. Moreover, it also distorts our understanding – and *critique* – of that institution's dynamic approach to judicial lawmaking within the EU legal order.

Section 1 frames the background to my core argument. It outlines the Court's functions under the Treaty framework and the significance of its institutional

contribution to the process of European integration. Thereafter, it points to a critical gap in the scrutiny of EU institutional activity for compliance with the Treaty framework. Specifically, the Court is identified as the only Union institution whose activities are presently not routinely scrutinized (by itself or by others) for compliance with the EU Treaties.

Section 2 introduces the intellectual framework that I develop to scrutinize EU judicial activity for compliance with the Treaty framework as a constitutional touchstone. It offers an overview of my original claims concerning the status, function and limits of the EU Treaties as the principal touchstones for assessing the internal constitutionality, and hence legitimacy, of all Union institutional activity – including the work of the Court.

Section 3 précises the findings of my review of EU judicial activity for compliance with the Treaty framework. More precisely, it foregrounds the argument that the Treaty framework and the Court of Justice have adopted and maintained fundamentally distinct statements on what I define as the three key issues for EU constitutionalism: *the formal status of Union law and the conditions under which it applies within Member States* (Constitutional Issue No. 1); *the locus of political authority within the EU legal order* (Constitutional Issue No. 2); and *the objectives, values and limits governing European integration* (Constitutional Issue No. 3). The Court's adoption, and subsequent robust defence, of its own distinct institutional statements on each of these three issues gives rise to paradigmatic examples of what I conceptualize in my work as acts of *constitutional contestation*. This concept references acts of the Union institutions (and Member States) that expressly *contest* the Treaties' clear position on the three basic issues for EU constitutionalism outlined above.

Section 4 offers a summary of my key conclusions. First, it details how my work uses the responses of the Court's interlocutors (Member States, national courts and EU

scholars) to transform the identified acts of constitutional contestation into three contemporary problems for EU judicial lawmaking. Secondly, it links the existence of these problems with contemporary debates about EU integration, its limits and the democratic credentials of Union policymaking. Finally, it sets out four specific reform proposals in outline form as part of a constructive attempt to align the exercise of EU judicial functions more closely with the demands of the Treaty framework as constitutional touchstone. This process of alignment is, I argue, absolutely critical. It serves directly to reinforce the legitimacy of the Court's contribution to European integration as an institution of the Union.

1. The Court of Justice and European Integration

1.1 The Court's Functions under the EU Treaty Framework

The EU Treaties confer specific functions on the Court. These include competence to adjudicate on the validity of secondary EU law and competence to interpret both primary (Treaty) and secondary EU law.¹ Additionally, the Court is empowered to hear infringement actions raised by (usually) the Commission against Member States for alleged breaches of Union law.² Furthermore, the Court may also be engaged to rule on the compatibility of draft agreements concluded between the European Union and third countries and/or other international organisations.³ It also enjoys jurisdiction in a range of other specific instances, including in any dispute relating to the subject matter of the Treaties submitted to it under a special agreement concluded between Member States.⁴

¹ See, in particular, Art 263 TFEU and Art 267 TFEU.

² See Art 258 TFEU. See also, by analogy, Art 259 TFEU.

³ See Art 218(11) TFEU.

⁴ See Art 273 TFEU, interpreted in Case C-648/15, *Austria v Germany (Double Taxation)* EU:C:2017:664. See also Arts 272, 274 and 275 TFEU.

In the exercise of its attributed functions, the Court of Justice is guided by an overarching mandate to ensure that, in the interpretation and application of the Treaties, the law is observed (Art 19 TEU). The Court's role in EU integration under the Treaty framework remains strikingly unchanged despite successive Treaty amendments.

1.2 *The Court of Justice as the 'Motor' of European Integration*

The Court of Justice's contribution to the EU integration process through the exercise of its conferred judicial functions is widely acknowledged, remarkable and enduring.⁵ Exercising its interpretative functions, the Court of Justice has radically recast the nature of the EU legal order and, in particular, the relationship between EU and Member State law. Furthermore, employing these same competences, the Court has continued to make significant contributions to the development of EU substantive law, including in the areas of intra-EU movement,⁶ competition law,⁷

⁵ E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *American Journal of International Law*, 1; F. Mancini, 'The Making of a Constitution for Europe' (1989) 26 *Common Market Law Review*, 595; J.H.H. Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal*, 2403; J. Shaw and G. Moore (eds.), *The New Legal Dynamics of European Union* (Oxford: Oxford University Press, 1996); K. Alter, *Establishing the Supremacy of European Law* (Oxford: Oxford University Press, 2001); A. Stone Sweet, *The Judicial Construction of Europe* (Oxford: Oxford University Press, 2004) and H. de Waele, 'The Role of the Court of Justice in the Integration Process: A Contemporary and Normative Assessment' (2010) 6(1) *Hanse Law Review* 3. See also A. Rosas, E. Levits and Y. Bot (eds.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law* (The Hague: T.M.C. Asser Press, 2013).

⁶ For discussion, see e.g. N. Nic Shuibhne (ed.) *Regulating the Internal Market* (Cheltenham: Elgar, 2006) and C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (5th ed.) (Oxford: Oxford University Press, 2016).

⁷ For discussion, see e.g. D. Gerber, 'The Transformation of European Community Competition Law?' (2004) 35 *Harvard International Law Journal*, 127; J. Goyder and A. Albors-Llorens, *Goyder's EC Competition Law* (5th ed.) (Oxford: Oxford University Press, 2009) and N. Petit, 'The Future of the Court of Justice in EU Competition Law: New Role and Responsibilities' in Rosas, Levits and Bot, *The Court of Justice and the Construction of Europe*, n5.

data protection;⁸ external relations;⁹ and EU citizenship.¹⁰ The Court has also played a critical role in determining the internal constitutionality of acts of the EU institutions. This has included the development of an autonomous system of EU fundamental rights protection.¹¹ More recently, the Court has been called upon to rule on the constitutionality of the Union's responses to the Eurozone financial crisis and its efforts to accede to the European Convention on Human Rights.¹² In relation to the ongoing migrant crisis, the Court has also been requested to determine the impact of the arrival of an exceptionally large number of third-country nationals wishing to obtain international protection on the application of Regulation 604/2013 EU (the Dublin III Regulation).¹³

⁸ See esp. Case C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and González* EU:C:2014:317 and Case C-362/14, *Schrems v Data Protection Commissioner* EU:C:2015:650. For discussion, see e.g. L. Azoulay M. van der Sluis, 'Institutionalizing Personal Data Protection in Times of Global Institutional Distrust: Schrems' (2016) 53(5) *Common Market Law Review*, 1343 and T. Horsley, "'The Court Hereby Rules...' - Legal Developments in EU Fundamental Rights Protection' (2015) 53(5) *Journal of Common Market Studies*, 108.

⁹ For discussion, see e.g. M. Cremona (ed.), *The European Court of Justice and External Relations Law* (Oxford: Hart Publishing, 2014).

¹⁰ For discussion, see e.g. E. Spaventa, 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects' (2008) 45(1) *Common Market Law Review*, 13; M. Dougan, N. Nic Shuibhne and E. Spaventa (eds.), *Empowerment and Disempowerment of the European Citizen* (Oxford: Hart Publishing, 2012) and D. Thym (ed.), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Oxford: Hart Publishing, 2017).

¹¹ See here esp. Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* EU:C:1970:114; Case 4/73, *Nold, Kohlen- und Baustoffgroßhandlung v Commission* EU:C:1974:51 and Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* EU:C:1996:140.

¹² Case C-370/12, *Pringle v Government of Ireland and Others* EU:C:2012:756; Case C-62/14, *Gauweiler and Others v Deutscher Bundestag* EU:C:2015:400 and Opinion 2/13, *Draft Agreement on Accession of the EU to the European Convention on Human Rights* EU:C:2014:2454.

¹³ See here Case C-490/16, *A.S. v Slovenia* EU:C:2017:585 and Case C-646/16, *Jafari and Jafari v Bundesamt für Fremdenwesen und Asyl* EU:C:2017:586. Regulation (EU) No 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L 180/31.

1.3 *A Blind Spot Overlooked*

Among the EU institutions, the Court remains uniquely distinguished as an actor in the integration process. It is the only Union institution whose activities are not routinely scrutinized (by itself or by others) for compliance with the EU Treaties. The Treaty framework is employed without question to measure the constitutionality of acts of the EU legislative and administrative institutions (as well the activities of the Member States).¹⁴ The exercise of political authority by the European Council, Council, Parliament and Commission is scrutinised against a range of normative limits set out in the Treaty framework.¹⁵ The applicable limits have steadily increased over time as a consequence of repeated amendments to the founding Treaty framework and include, *inter alia*, the principles of conferral (Art 5(2) TEU); subsidiarity (Art 5(3) TEU) and proportionality (Art 5(4) TEU) as well as the protection of national identity (Art 4(2) TEU).

By contrast, the constitutionality of EU judicial activity is rarely discussed with direct reference to the Treaty framework.¹⁶ The judgments in *Gascogne Sack Deutschland GmbH* and *Guardian Europe v European Union* in the sphere of competition policy remain the exception. In both decisions, the Court ruled, with reference to the EU Charter, that the Union was liable to compensate undertakings for losses incurred as a result of the General Court's undue delay in hearing

¹⁴ From a long list of illustrations, see e.g. Case C-376/98, *Germany v Parliament and Council (Tobacco Advertising)* EU:C:2000:544; Case C-370/12, *Pringle*, n12; Opinion 2/13, *Draft Agreement on Accession of the EU to the European Convention on Human Rights*, n12; Case C-409/13, *Council v Commission (Macro Financial Assistance)* EU:C:2015:217 and Case C-62/14, *Gauweiler and Others*, n12.

¹⁵ See Art 263 TFEU. See also Art 218(11) TFEU.

¹⁶ None of the leading textbooks on EU law or works on the Court of Justice addresses the application of the EU Treaty framework *to the Court* as a source of normative restraint on the exercise of its attributed functions.

competition proceedings.¹⁷ Beyond that set of cases, however, the potential impact of that Treaty framework in connection with assessments of EU judicial activity and its legitimacy is rarely examined.¹⁸ Discussion of the Court and the Treaty framework is typically focussed on analysing the strength of the Court's role in the enforcement of Treaty norms *against other Union institutions* and/or the *Member States*.¹⁹ Elsewhere, EU scholars reflect in great detail on the enduring impact of the Court's interpretative choices on both the vertical and horizontal balance of competences within the EU legal order.²⁰ With respect to the exercise of its own attributed functions, there is no sustained discussion of the potential impact of the Treaty framework on the scope of the Court's authority.²¹ Analyses of EU judicial power – and its limits – look to other sources of normative restraint.

¹⁷ Case T-577/14, *Gascogne Sack Deutschland GmbH EU:T:2017:1* and Case T-673/15, *Guardian Europe v European Union EU:T:2017:377*. See also Case T-673/15, *Kendrion v European Union EU:T:2017:48*.

¹⁸ See exceptionally, G. A. Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) 94 *Columbia Law Review* 331; T. Schilling, 'Subsidiarity as a Rule and a Principle' (1994) 14 *Yearbook of European Law* 203; G. de Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor' (1998) 36(2) *Journal of Common Market Studies*, 217; P. Craig, 'The ECJ and the *Ultra Vires* Action: A Conceptual Analysis' (2011) 48 *Common Market Law Review*, 395; T. Horsley, 'Reflections on the Role of the Court of Justice as the "Motor" of European Integration: *Legal Limits to Judicial Policymaking*' (2013) 50 *Common Market Law Review* 931 and E. Cloots, *National Identity in EU Law* (Oxford: Oxford University Press, 2015).

¹⁹ See here e.g. A. von Bogdandy and J. Bast, 'The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform' (2002) 39 *Common Market Law Review*, 227; S. Weatherill, 'Competence Creep and Competence Control' (2004) 23(1) *Yearbook of European Law*, 1; S. Weatherill, 'The Limits of Legislative Harmonization Ten Years after *Tobacco Advertising*: How the Court's Case Law has become a "Drafting Guide"' (2011) 12 *German Law Journal*, 827 and S. Adam and F. J. M. Parras, 'The European Stability Mechanism through the Legal Meanderings of the Union's Constitutionalism: Comment on *Pringle*' (2013) 38(6) *European Law Review*, 848.

²⁰ See here recently e.g. H. W. Micklitz and B. de Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Antwerp: Intertax, 2012); M. Adams, H. de Waele, J. Meeusen and G. Straetmans (eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Oxford: Hart Publishing, 2013) and M. Dawson, B. de Witte and E. Muir (eds.), *Judicial Activism at the European Court of Justice* (Cheltenham: Elgar, 2013).

²¹ For the principal exceptions, see n18 and the literature cited therein.

For most EU legal scholars, the legitimacy of the Court's activities continues to be assessed primarily with reference to generally accepted (Western) standards of good constitutional adjudication.²² As Adams et al summarize, the dominant approach in the literature remains focussed on assessing,

'Whether the [Court's] judgments display sufficient consistency, whether the outcomes are well-founded, whether the results were reasonably predictable and whether the ECJ defers to the EU legislature and the Member States whenever appropriate.'²³

Crucially, this highly developed body of work overlooks the Treaty's function as principal touchstone on the internal constitutionality of EU judicial activity.²⁴ It takes its cue instead from the Court's own jurisprudence, specifically: its institutional positions on the three key issues for EU constitutionalism (see further Section 3 below).

²² See here e.g. Adams et al, *Judging Europe's Judges*, n22 and Dawson et al, *Judicial Activism at the European Court of Justice*, n22 and N. Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (Oxford: Oxford University Press, 2013).

²³ M. Adams et al, 'Introduction: Judging Europe's Judges,' in Adams et al, *Judging Europe's Judges*, n22, at p.8.

²⁴ The same is true of other strands of the scholarship on the Court – examined in Chapter 6. See here e.g. H. Rasmussen, *On Law and Policy in the European Court of Justice* (Dordrecht: Martinus Nijhoff Publishing, 1986); J. Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Oxford: Oxford University Press, 1993); P. Neill, *The European Court of Justice: A Case Study in Judicial Activism* (London: European Policy Forum, 1995); T. Hartley, 'The European Court, Judicial Objectivity and the Constitution of the European Union' (1996) 112 *Law Quarterly Review*, 95; G. Beck, *The Legal Reasoning of the Court of Justice of the EU* (Oxford: Hart Publishing, 2013) and S. Sankari, *European Court of Justice Legal Reasoning in Context*, (Groningen: Europa Law Publishing, 2013). See also, though to a lesser extent, G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge: Cambridge University Press, 2012).

1.4 A Fundamental Omission in Existing Legal Analyses of the Court

The absence of a comprehensive and rigorous Treaty-based critique of EU judicial activity in the scholarship is striking for two reasons. First, the Treaty framework provides no basis whatsoever to justify differentiating between the Court and the Union's administrative and political institutions with regard to compliance with the EU Treaty framework. The Court is formally designated an institution of the Union under Art 13 TEU. As such, along with the Union's political institutions, it is irrefutably subject to compliance with the EU Treaties.²⁵ Indeed, as the Court of Justice has repeatedly stated,

'the [Union] is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the [Treaties].'²⁶

Secondly, and more strikingly still, existing criticism of the Court and its role in EU integration raises concerns that the EU Treaty framework directly addresses. In particular, the principal interlocutors (Member States, national courts and EU scholars) voice concerns that the Court of Justice often plays fast and loose with the basic character of the EU legal order as a system of limited, attributed competences (see Art 5(2) TEU).²⁷ As Sharpf summarizes,

²⁵ See here esp. Art 13(2) TEU.

²⁶ Joined Cases C-402/05 P and C-415/05, *P Kadi and Al Barakaat International Foundation v Council and Commission* EU:C:2008:461 at para. 282; Case 294/83, *Parti écologiste "Les Verts" v European Parliament* EU:C:1986:166 at para. 23 and Opinion 2/13, *Draft Agreement on Accession of the EU to the European Convention on Human Rights*, n12 at para. 163.

²⁷ See here e.g. Rasmussen, *On Law and Policy in the European Court of Justice*, n24; Neill, *The European Court of Justice: A Case Study in Judicial Activism*, n42; Hartley, 'The European Court, Judicial Objectivity and the Constitution of the European Union,' n24; Conway, *The Limits of Legal Reasoning and the European Court of Justice*, n24 and Beck, *The Legal Reasoning of the Court of Justice of the EU*, n24. See also in the popular press, R. Herzog and L. Gerken, 'Stop the European Court of Justice' *EU Observer*, 10 September 2008.

'Whilst the Court's contribution to European integration is widely considered beneficial in politically correct discourses, its impact on the constitutional balance of the multilevel European polity does raise serious problems.'²⁸

Similarly, the Court is also routinely criticised for undermining democratic processes at both Union and national level through its approach to the judicial review of EU and Member State measures.²⁹ Grimm, for example, directly links the Court's case law, and its role in driving the process of 'constitutionalising' the EU legal order, with the European Union's chronic democracy deficit.³⁰ On his analysis,

'[the Court's] confusion of elements of constitutional law with elements of ordinary law in the treaties favours the unelected and non-accountable institutions of the EU over the democratically legitimised and accountable organs.'³¹

My research seeks directly to address the persisting failure to scrutinise EU judicial activity for compliance with the demands of the Treaty framework as a constitutional touchstone. In so doing, its primary contribution is to correct the

²⁸ F. Scharpf, 'Perpetual Momentum: Directed and Unconstrained?' (2012) 19(1) *Journal of European Public Policy*, 127, at p.134.

²⁹ See here e.g. D. Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' (2015) 21(4) *European Law Journal*, 460; Scharpf, 'Perpetual Momentum: Directed and Unconstrained?', n28 and D. Ritleng, 'Does the European Court of Justice take Democracy Seriously? Some Thoughts about the Macro-Financial Assistance Case' (2016) 53(1) *Common Market Law Review*, 11. Similarly, the Court is also criticized for its lack of deference to Member States on sensitive matters of cultural, moral, ethical and redistributive policy. See here e.g. C. Newdick, 'Citizenship, Free Movement and Health Care: Cementing Individual Rights by Corroding Social Solidarity' (2006) 43(6) *Common Market Law Review*, 1645; S. Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17(1) *European Law Review*, 80 and F. de Witte, 'Sex, Drugs & EU law: The Recognition of Moral and Ethical Diversity in EU Law' (2013) 50(6) *Common Market Law Review*, 1545.

³⁰ Grimm, 'The Democratic Costs of Constitutionalisation,' n29.

³¹ *Ibid.*, at p. 471.

asymmetry that presently arises between, on the one hand, analysis of the internal constitutionality of EU administrative/legislative activity and Member State measures and, on the other hand, assessments of the Court's institutional choices.

2. The Treaty Framework as Constitutional Touchstone

2.1 The EU Treaties as Constitutional Touchstones

My central normative claim is that the EU Treaties should be viewed as the principal measure of the internal constitutionality of all EU institutional activity. This includes, as a matter of principle, the activities of the Court of Justice – an EU institution the activities of which are presently not routinely scrutinised for compliance with the Treaties. The argument that the EU Treaties apply *to the Court* as a source of normative restraint on the exercise of its institutional functions is easily constructed. It follows expressly from the EU Treaties and also finds explicit confirmation in the Court's case law (Section 1.4 above).

Internal constitutionality is not, of course, the only possible baseline against which the legitimacy of EU judicial activity may be measured. The legitimacy of the Court of Justice's role in the EU legal order, and European integration more broadly, may be (and is) assessed from a range of complementary and/or competing perspectives.³² The alignment of internal constitutionality (i.e. legality) with discussion of the legitimacy of EU judicial activity addresses an important gap in existing legal research on the Court of Justice. More crucially, however, it also finds

³² Legitimacy may be assessed, for example, not only in terms of legality, but also from a range of political, sociological and moral perspectives. For an overview of the main legitimacy models applied to the study of EU judicial activity, see e.g. R. Bobek, 'Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts' in Adams et al, *Judging Europe's Judges*, n23 at pp.198-202.

deeper foundations. Above all else, it acknowledges the fundamental value that Member States, through the EU Treaties, have always attached – and continue to attach – to the nature of the EU legal order as a system of limited, attributed competences.³³

2.2. *The Treaty Framework and the Three Key Issues for EU Constitutionalism*

As a constitutional touchstone, the EU Treaty framework performs an important normative function. It provides important clarity on what I define as the three basic issues for EU constitutionalism. These three issues are representative of questions that a public lawyer may ask, in adapted form, of any legal system based on the rule of law. They address the *how*, *who* and *what* of European integration. The first issue references *the formal status of Union law and the conditions under which it applies within Member States* (Constitutional Issue No. 1); the second addresses *the locus of political authority within the EU legal order* (Constitutional Issue No. 2); and the third is focussed on identifying *the objectives, values and limits governing European integration* (Constitutional Issue No. 3).

The EU Treaty framework's statements on each of these three constitutional issues have remained strikingly consistent over time.³⁴ To a considerable extent, Member States, as Treaty signatories, have repeatedly (re)ratified remarkably clear positions on the fundamentals of EU integration that trace their origins back to the founding EEC Treaty. The principal changes to the EU Treaty framework over time have primarily concerned the objectives, values and limits of EU integration (Constitutional Issue No. 3). These have undergone a process of broadening and deepening. In addition, successive waves of Treaty amendment have also radically

³³ See here Art 5(2) TEU and Art 13(2) TEU.

³⁴ See also G. de Búrca, 'The Institutional Development of the EU: A Constitutional Analysis' in P. Craig and G. de Búrca (eds.) *The Evolution of EU Law* (Oxford: Oxford University Press, 1999) at p.57.

adjusted the disposition of policymaking competence between the three key political institutions (Constitutional Issue No. 2) – to enhance, first and foremost, the position of the European Parliament.

2.3 Limits to the EU Treaty Framework as Constitutional Touchstone

The EU Treaties form the centrepiece of the broader constitutional context that structures EU integration. However, they do not capture that context exhaustively. The wider context is conditioned by what I characterise as acts of *constitutional supplementation* and *constitutional contestation*.

The first of these concepts, constitutional supplementation, references acts of the EU institutions (and also Member States) that elaborate – but do *not* fundamentally contest – the EU Treaties' basic statements on the three key issues for EU constitutionalism (Section 2.2). Examples include inter-institutional agreements concluded between the EU's political organs to manage the exercise of their legislative competences³⁵ and, in the judicial sphere, the Court's recognition of fundamental rights as 'general principles of Union law.'³⁶ By contrast, the concept of constitutional contestation refers to acts of the EU institutions (and Member States) that expressly *contest* the Treaties' clear position on the three basic issues for EU constitutionalism. Examples include, in the political context, Member State agreement on the 'Luxembourg Compromise'³⁷ and, more recently, the use of

³⁵ See here e.g. Interinstitutional Agreement of 20 December 1994 – Accelerated working method for official codification of legislative texts [1996] OJ C102/2 and Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making [2016] OJ C123/1.

³⁶ See here e.g. Case 11/70, *Internationale Handelsgesellschaft*, n11.

³⁷ Bulletin of the European Communities, March 1966, 3-66 at pp.5 – 11.

intergovernmental treaties to reform core aspects of the Treaty framework on Economic and Monetary Union in response to the Eurozone crisis.³⁸

The introduction of the concepts of constitutional supplementation and constitutional contestation serves two specific objectives. First, it reveals the existence of limits to the functioning of the bare bones of the EU Treaties as touchstones on the internal constitutionality of EU institutional activity. Secondly, it establishes the framework that I employ in work to structure the critique of EU judicial activity for compliance with the Treaties.

3. The Court of Justice *versus* the EU Treaty Framework

My work uses the concepts of constitutional supplementation and constitutional contestation to assess how far the Court's institutional position on the three key issues for EU constitutionalism conform to the Treaty framework's statements on each as constitutional touchstone. This leads to the identification of multiple acts of *judicial* constitutional contestation across all three basic issues for EU constitutionalism.

3.1 The Court of Justice and the Formal Status of Union Law and the Conditions under which it applies within Member States

First, with regard to the formal status of Union law and the conditions under which it applies within Member States (Constitutional Issue No 1), the Court and the Treaty

³⁸ Treaty establishing the European Stability Mechanism and Treaty on Stability, Coordination, and Governance in the Economic and Monetary Union. See also, similarly, Decision of the Heads of State or Government, meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union [2016] EUCO 1/16.

framework have offered and maintained fundamentally different responses.³⁹ The Treaties, as an expression of the political preferences of the Member States, ground EU integration in the normative framework of public international law. For example, pursuant to Art 4(3) TEU, Member States retain full control over the internal effect of Union law – in accordance with the principles and practice of international law.⁴⁰ By contrast, the Court of Justice robustly defends a vision of the EU as a ‘new legal order’ that is defined in opposition to international law and, further, considers the domestic effect of EU norms an exclusive matter for Union, not Member State law.⁴¹ The source of this judicial vision is external to the Treaty framework. It represents the Court’s projection onto the Treaty framework of a model of political federalism. To a great extent, that vision was also ‘co-produced’ with an influential body of legal scholars advocating a shared political vision for EU integration.⁴²

³⁹ See, further, Horsley (CUP, 2018) Chapter 3.

⁴⁰ On Member State control over the domestic effect of EU norms, see also Art 260 TFEU, Art 280 TFEU and Art 291(1) TFEU.

⁴¹ Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* EU:C:1963:1 at p.12. See also Case 6/64, *Costa v E.N.E.L* EU:C:1964:66 at p.593; Opinion 1/09, *Draft Agreement on the Creation of a Unified Patent Litigation System* EU:C:2011:123 at para. 65 and Opinion 2/13, *Draft Agreement on Accession of the EU to the European Convention on Human Rights*, n12 at para.157. See also with respect to the Court’s position on the autonomy of the EU legal order in the field of external relations, 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* EU:C:1991:490 at para. 2 and Opinion 1/00, *Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area* EU:C:2002:231.

⁴² On the role of EU scholars in promoting the Court’s work, see e.g. Alter, *Establishing the Supremacy of European Law*, n5 at p.58 and Conway, *The Limits of Legal Reasoning and the European Court of Justice*, n24 at pp 52-59. On co-production theory, see S. Janasoff (ed.), *States of Knowledge: The Co-Production of Science and the Social Order* (London: Routledge, 2004).

3.2 *The Court of Justice and the Locus of Political Authority within the EU Legal Order*

Secondly, the Court of Justice has also mounted a series of challenges to the EU Treaties' clear statements on the locus of political authority within the Union legal order (Constitutional Issue No. 2).⁴³ With respect, first, to *constituent* authority, the Court of Justice is shown to have repeatedly challenged the position of Member States – acting collectively – under the Treaty framework as the ultimate source of constituent political authority within the EU legal order. For example, in *Parliament v Council (Chernobyl)*, the Court revised the Treaty rules on standing rights in annulment actions, notwithstanding the (then) Treaty's reservation of competence to do so to Member States.⁴⁴ Similarly, in cases such as *Rottmann*, the Court has found no difficulty at all in disregarding specific acts of constitutional supplementation that Member States have collectively adopted to manage discrete issues, including, in that decision, the rules governing the acquisition and loss of Member State nationality.⁴⁵

Secondly, with regard to the locus of EU political authority, the Court of Justice has also subverted the formal framework structuring *EU policymaking* authority under the EU Treaties by aggregating to itself primary responsibility for Union

⁴³ See, further, Horsley (CUP, 2018) Chapter 4.

⁴⁴ Case C-70/88, *Parliament and Council (Chernobyl)* EU:C:1990:217. See also the Court's establishment of the right to reparation in Joined Cases C-6/90 and C-9/90, *Francovich and Others v Italy* EU:C:1991:428.

⁴⁵ Case C-135/08, *Rottman v Freistaat Bayern* EU:C:2010:104. See also e.g. the Court's interpretation of Protocol No 8 relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms [2012] OJ C 326/273 in Opinion 2/13, *Draft Agreement on Accession of the EU to the European Convention on Human Rights*, n12.

policymaking in key areas of Union activity.⁴⁶ This has been achieved by attributing direct effect to a range of EU norms and, moreover, asserting their primacy over conflicting provisions of Member State law. In short, the formal status of Union law and the conditions under which it applies within Member States (Constitutional Issue No 1), the Court of Justice has effectively interposed itself alongside the EU legislature as direct policymaker.⁴⁷ Its policymaking functions are typically activated using the preliminary reference procedure, which empowers and/or compels Member State courts to make references to the Court to rule on, *inter alia*, the interpretation of provisions of Union law.

The Court's assertion of direct policymaking functions has had a transformative impact on the development of substantive EU law, so much so that in specific instances the Union legislature has subsequently done little more than transpose the Court's interpretative choices into secondary legislation.⁴⁸ However, its substantive impact notwithstanding, the Court's move to interpose itself alongside the EU legislature as direct policymaker exists in clear tension with the Treaty framework as constitutional touchstone. The EU Treaties continue as under the founding EEC Treaty to entrust primary responsibility for policymaking to the Union's political institutions: principally, the Commission, European Parliament and Council of the European Union.⁴⁹

⁴⁶ See here, T. Horsley, 'Institutional Dynamics Reloaded: The Court of Justice and the Development of EU Internal Market' in P. Koutrakos and J. Snell (eds.), *Research Handbook on the Law of the EU's Internal Market* (Cheltenham: Elgar, 2016). See also R. Dehousse, *The European Court of Justice* (Basingstoke: MacMillan Press, 1998).

⁴⁷ See Horsley, 'Institutional Dynamics Reloaded: The Court of Justice and the Development of EU Internal Market,' n46 at pp.414-422.

⁴⁸ See here e.g. Directive 2011/24 EU on the application of patients' rights in cross-border healthcare [2011] OJ 88/45.

⁴⁹ For analysis, see e.g. See H. Wallace, M. Pollack and A. Young (eds.), *Policy-Making in the European Union* (2nd ed.) (Oxford: Oxford University Press, 2014); S. Hix and B. Høyland, *The Political System of the European Union* (3rd ed.) (Basingstoke: Palgrave MacMillan, 2011) and N. Nugent, *The Government and Politics of the European Union* (7th ed.) (Basingstoke: Palgrave MacMillan, 2010).

3.3 *The Court of Justice and the Objectives, Values, and Limits of EU Integration*

Thirdly, the Court's approach to the Treaty framework's statements on the objectives, values, and limits of EU integration (Constitutional Issue No. 3) give rise to further acts of constitutional contestation in EU judicial activity.⁵⁰ The EU Treaties now set out a range of restraining norms that exist to manage EU institutional activity. The provisions in question include, for instance, the principles of conferral;⁵¹ subsidiarity;⁵² proportionality;⁵³ national identity;⁵⁴ and inter-institutional balance.⁵⁵ The Court has been routinely criticized by commentators at various points for its apparent failure to enforce these provisions effectively against other EU institutions.⁵⁶ More strikingly, however, there is evidence of its systematic disregard for the same values and limits of EU integration in connection with the exercise of its own institutional functions. This applies, first and foremost, to its interpretive choices as direct policymaker (Section 3.1.2 above).

The Court's use of directly effective EU norms to override, sidestep, or simply interrogate the Union legislature's preferences in decisions such as *Sturgeon and Others* (air passenger rights) is a paradigmatic example of constitutional contestation with regard to the Treaties' statements on the values of EU integration (falling within Constitutional Issue No. 3).⁵⁷ More precisely, the Court's disregard for the

⁵⁰ See, further, Horsley (CUP, 2018) Chapter 5.

⁵¹ Art 5(2) TEU.

⁵² Art 5(3) TEU.

⁵³ Art 5(4) TEU.

⁵⁴ Art 4(3) TEU.

⁵⁵ Art 13(2) TEU.

⁵⁶ See e.g. n19 and the literature cited therein.

⁵⁷ Joined Cases C-402/07 and Case C-432/07, *Sturgeon v Condor Flugdienst GmbH and Böck and Lepuschitz v Air France SA* EU:C:2009:716. See also e.g. Case C-138/02, *Collins v Secretary of State for Work and Pensions* EU:C:2004:172; Case C-144/04, *Mangold v. Helm* EU:C:2005:709; Case C-236/09, *Test-Achats*

integrity of EU legislative choices undermines the increased normative weight that the EU Treaty framework now attaches to the value of representative democracy as the foundation of EU decision-making. That value is now firmly embedded within the Treaty framework as constitutional touchstone, most visibly in Art 10 TEU.

Similarly, as direct policymaker, the Court of Justice has also detached EU policymaking from the framework of limits that the Treaties now impose on EU *legislative* policymaking. This defies functional expectations. As a consequence of its move to interpose itself alongside the Union legislature as direct policymaker, the Court of Justice is legitimately to be expected to exercise its new role in accordance with the framework of limits structuring EU legislative policymaking. However, as its jurisprudence on issues such as cross-border healthcare and the right to strike demonstrate, the Court has adopted a very different approach. Specifically, it does not construe express Treaty exclusions on Union legislative competence as limits on its own functions as direct policymaker.⁵⁸ At best, such provisions are operationalised as potential derogations to specific EU norms that the Court has ruled directly effective – and subject to a strict proportionality assessment.⁵⁹

ASBL and Others v Conseil des ministres EU:C:2011:100; Case C-382/08, *Neukirchinger v Bezirkshauptmannschaft Grieskirchen* EU:C:2011:27; Case C-34/09, *Ruiz Zambrano v Office national de l'emploi* EU:C:2011:124; Joined Cases C-581/10 and Case C-629/20, *Nelson and Others v Deutsche Lufthansa AG and TUI Travel plc and Others v Civil Aviation Authority* EU:C:2012:657 and Case C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen* EU:C:2016:278.

⁵⁸ See e.g. Case C-157/99, *Geraets-Smits v Stichting Ziekenfonds VGZ and Peerbooms v Stichting CZ Groep Zorgverzekeringen* EU:C:2001:404; Case C-385/99, *Müller-Fauré and van Riet* EU:C:2003:270; Case C-372/04, *Watts v Bedford Primary Care Trust* EU:C:2006:325; Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* EU:C:2007:809 and Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP* EU:C:2007:772.

⁵⁹ See here esp. Case C-341/05, *Laval un Partneri Ltd*, n58 at paras 103-11. See also, by analogy and with reference to Art 4(2) TEU and Art 346 TFEU on national security, Case 300/11, *ZZ v. Secretary of State for the Home Department* EU:C:2013:363 and Case C-284/05, *Commission v Finland (Military Equipment)* EU:C:2009:778.

4. Three Contemporary Problems for EU Judicial Lawmaking, Four Reform Proposals

The individual acts of judicial constitutional contestation that my research unmask do not exist in a legal and political vacuum. On the contrary, the Court's statements on the three issues for EU constitutionalism are bounded together closely with the activities of its principal interlocutors: namely, Member States, national courts and tribunals, and also EU scholars. These three sets of actors are empowered, to differing degrees, to respond to the Court's decisions to formulate its own independent responses on, respectively, the formal status of Union law and the conditions under which it applies within Member States (Constitutional Issue No. 1); the locus of political authority within the EU legal order (Constitutional Issue No. 2); and the objectives, values and limits governing European integration (Constitutional Issue No. 3).

The final stage of my research (and the concluding chapter of my monograph) reconsiders the three acts of judicial constitutional contestation in light of the responses of the Court's interlocutors. The result is the isolation of three contemporary problems for EU judicial activity. The first problem concerns the Court's use of its own statements on the three key issues for EU constitutionalism as tools to *challenge clear statements of constituent authority* (Problem No. 1). The second and third problems address the Court's contribution to EU integration as *direct policymaker*. On the vertical axis, the problem centres on the Court's *disregard for the range of limits that the EU Treaties impose on Union policymaking* (Problem No. 2) On the horizontal axis, it concerns the Court's *use of directly effective norms as tools to override, adjust, or step beyond the EU legislature's policy choices* (Problem No. 3).

The existence of these three contemporary problems places the Court of Justice at the very centre of critical debates about EU integration, its limits and the democratic credentials of Union policymaking. Successive Treaty amendments have sought to place clearer limits on the existence and exercise of EU competences, as well as to introduce new safeguards to protect Member States autonomy in sensitive policy areas.⁶⁰ In parallel, far-reaching reforms have also been introduced into the Treaty framework in an effort to bolster the democratic qualities of Union policymaking.⁶¹ These (and other related) reform initiatives amount to very little if the Court of Justice – one of the most powerful and influential institutions of the Union – considers that it remains free to act independently of the Treaty framework as constitutional touchstone.

The application of the Treaty framework *to the Court* as a means to problematize that institution's role within the EU legal order is the primary contribution that my work makes to the scholarship on European integration. By way of conclusion, however I also ask how the Court and its interlocutors can (and should) respond to the existence of the three contemporary problems for EU judicial activity. Specifically, I offer four reform proposals to strengthen the legitimacy of the Court's institutional role within the Treaty framework as a Union institution.

⁶⁰ See here the introduction, at Maastricht, of e.g. Art 3b EEC (now Art 5 TEU) (on conferral, subsidiarity and proportionality); at Amsterdam, of e.g. Art F(3) TEU (on national identity), Art K(5) TEU (on national security), Art 129(5) EEC (now Art 151(2) TFEU) (on protection of national healthcare systems); and, at Lisbon, of e.g. Art 4 TEU and Arts 2-6 TFEU (on categories of competence), Art 6 TEU (on the legal status of the EU Charter of Fundamental Rights), Art 50 TEU (on Member State withdrawal) and Art 65(4) TFEU (on Member State control over the liberalization of external capital movements).

⁶¹ See here the introduction, in the Single European Act, of e.g. Art 6 (establishing the co-operative legislative procedure); at Maastricht, of e.g. Art 8d EEC (now Art 24 TFEU) (establishing EU citizens' right to petition the European Parliament and engage the EU Ombudsman); at Amsterdam, of e.g. Art 189b (see now Arts 289 and 294 TFEU) (establishing the co-decision procedure) and, at Lisbon, of e.g. Art 10 TEU (on the dual democratic basis of the Union), Art 11(4) TEU and Regulation (EU) No 211/2011 of the European Parliament and of the Council on the citizens' initiative [2011] OJ L65/1 (establishing the European Citizens' Initiative) and Art 12 TEU (on the role of national parliaments).

First, and most crucially, I argue that the Court of Justice is required to demonstrate closer engagement with the EU Treaty framework when exercising its interpretative functions (Reform Proposal No. 1).⁶² Secondly, I challenge legal scholars to reframe the intellectual paradigm that presently structures both explanatory and normative analysis of the Court and its case law (Proposal No. 2). Thirdly, I argue that it is incumbent on Member States to improve the quality of the EU Treaty framework (Reform Proposal No. 3). Finally, and most ambitiously, Member States are also encouraged to consider the merits of establishing a stronger institutional framework to facilitate more effective scrutiny of EU judicial activity for compliance with the EU Treaties (Proposal No. 4).

The first and second proposals are the most significant. They do not require Treaty amendment and can be actioned immediately. The third and fourth proposals are presented as supplementary. They outline options for further reform to enhance the legitimacy of EU judicial activity by aligning this more closely with the Treaty framework as constitutional touchstone. The fourth is the most innovative in that respect. It prompts the Member States (and legal scholars) to consider the added value of establishing new mechanisms to monitor the Court's adherence to the EU Treaties. This goes beyond existing discussions of the advantages and disadvantages of creating a new 'EU Supreme Court' to include consideration of fresh alternatives, such as establishing a role for certain national courts and/or political institutions to support the Court of Justice as a Union institution.⁶³

⁶² That requirement is, in turn, broken down further into three specific normative prescriptions. See, further, Horsley (CUP, 2018) Chapter 7.

⁶³ On proposals to establish an EU Supreme Court, see e.g. J.H.H. Weiler, 'Epilogue: The Judicial Après Nice,' in G. de Búrca and J. H.H. Weiler (eds.), *The European Court of Justice* (Oxford: Oxford University Press, 2001). See here also Lindseth's proposal for a 'Conflicts Tribunal' in P. L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford: Oxford University Press, 2010) at pp.266-277.

Concluding Remarks

EU scholars – especially legal scholars – have authored and adhered to a particular sociological understanding of the Court of Justice and its role in European integration. For them, the Court of Justice now unquestionably functions as a *de facto* constitutional court within a quasi-federal transnational legal order. My work on the Court does not challenge this embedded understanding of the Court. It simply argues that it is *incomplete*. Crucially, I argue that the prevailing view fails to recognise – and engage with – the *duality* of the Court of Justice’s position within the Union legal order as both a court *and an institution of the Union*. That institutional duality has robust normative foundations: it follows both from the Treaty framework as well as from the Court’s own case law. It also has potentially transformative implications for our understanding of the nature (and limits) of the Court’s role within the EU legal order. It invites us to embrace a ‘new way of seeing’ the Court – to think differently about how we conceptualize that institution and, moreover, critique its functioning.⁶⁴

It is, without doubt, a difficult time to ask critical questions of the European Union and its institutions, including the Court of Justice. The Union remains beset by a succession of crises – from the management of the Eurozone and the migration crises to the challenges of upholding the rule of law within the Union, not to mention Brexit. These crises place enormous strain on the Union and its institutions, including the Court. At a deeper existential level, they also pose further fundamental challenges to the legitimacy of the European integration project.

Yet, even at times of heightened crisis, it remains the responsibility of EU scholars to offer critical perspectives on European integration based on robust, objective

⁶⁴ This label is borrowed from J. Berger, *Ways of Seeing* (Penguin Modern Classics: London, 2008).

analysis. My work on the Court, which this paper has sought to summarize, is written firmly in that spirit. The critical perspective that I adopt with specific reference to EU judicial adjudication challenges head-on many of the things that EU legal scholars defend (or at least have come to accept) as incontrovertible ‘truths’ in European integration. This is done not to undermine the Court or, more broadly, to support the denigration of the European Union and its institutions. The aspiration instead is to *enhance* the legitimacy of EU judicial adjudication by reinforcing the normative foundations of the Court’s institutional role within the EU legal order. This, I believe, can only be fully achieved, *first*, by recognising the duality of the Court’s institutional role in EU integration and, *secondly*, by scrutinising the exercise of its interpretative choices for compliance with the EU Treaty framework. That framework remains the principal touchstone when assessing the legitimacy of all Union institutional activity – including the work of the Court.

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