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Introduction: Judging Europe's Judges

MAURICE ADAMS, HENRI DE WAELE, JOHAN MEEUSEN AND GERT STRAETMANS

I. DYNAMIC ADJUDICATION

DISCUSSIONS ON THE proper role of adjudicators are as old as the proverbial way to Rome: *Quis custodiet ipsos custodes*? In recent times, especially in the context of the functioning of international and supranational courts, these discussions have acquired a new momentum.[1] Moreover, the debate appears to elicit much stronger sentiments than ever before, with hardened pleas for placing fetters on tribunals that are external to the nation state emerging with ever-increasing frequency.[2] Quite paradoxically, this occurs at a moment when the globalisation process seems to have reached cruising speed, with the intertwining of legal orders and multiplication of spheres of governance becoming a nigh irreversible process.[3]

Naturally, the functioning of courts in international and supranational settings raises countless questions. Their adjudicatory task as such, however, might be considered by and large the same when compared with that of national courts, since they are all expected to apply the law. Correspondingly, in the opening chapter of this volume, Koen Lenaerts emphasises that courts must not intrude into the political process, as the borderline between law and politics is of vital importance for a court's legitimacy, and intends to preserve a legal system's checks and balances. Yet, when applying the law, courts must also determine what the law is, and thus interpret it. This is (also according to Lenaerts) 'risky business' – for in doing so, they are in fact drawing the borderlines of their own legitimacy.

[1] See recently, eg A von Bogdandy and I Venzke (eds), *International Judicial Lawmaking* (Berlin, Springer, 2012); J Christoffersen and MR Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford, Oxford University Press, 2011); G Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge, Cambridge University Press, 2012).

[2] Consider, eg the remarks by Lord Hoffman in his Judicial Studies Board Annual Lecture regarding the European Court of Human Rights: 'The Universality of Human Rights', 19 March 2009: 'Even if the Strasbourg judges were omniscient, knowing the true interests of the people of the United Kingdom better than we do ourselves, it would still be constitutionally inappropriate for decisions of the kind which I have been discussing to be made by a foreign court'.

[3] AM Slaughter, *A New World Order* (Princeton NJ, Princeton University Press, 2005).

That courts must apply the law can therefore not mean that they are denied all interpretative manoeuvring space, or that they should behave as the imaginary – legalistic – mouth of the law.[4] That would be quite impossible because, although judicial decisions should be grounded in an elaboration of relevant legal texts, the precise meaning and relevance of those texts are themselves subject to debate. In addition, adjudication has nowadays become more challenging than ever before, since the law is increasingly interlinking different sets of interests, so as to address ever more complex societal problems and issues. As a result, in individual cases, courts can no longer confine themselves to applying the legal rules as established by the legislator. Rather, they are increasingly expected to weigh and reconcile the relevant interests themselves. Also, on ever more frequent occasions, courts must derive appropriate standards from the available rules – ie, principles of proper administration and good governance, demarcations of responsibility, etc – which may then serve as benchmarks for assessing the extent to which conflicting interests should be protected. For that reason, the process of adjudication will necessarily have to be dynamic – at least, if the law itself is to remain a valued means for channelling social developments.

II. THE EUROPEAN COURT OF JUSTICE: A DYNAMIC ADJUDICATOR IN A UNION TRANSFORMED

The above holds in particular for the European Court of Justice (ECJ), which finds its origin in the tribunal established more than 60 years ago by the European Coal and Steel Community Treaty, concluded by the then six Member States. Over time, the legal and political landscape wherein the ECJ operates has undergone a spectacular transformation, a process which reached its provisional apogee with the entry into force of the Lisbon Treaty in December 2009. For one thing, as a result of successive rounds of enlargement, the territorial scope of EU law expanded ever further, nearly doubling the number of Member States and citizens to be adjudicated. In addition, there is the expansion of the Court's jurisdiction *ratione materiae*, which nowadays covers an unprecedented number of fields. As a result, it finds itself having to rule on issues such as terrorist listings, the rights of aircraft passengers and the permissibility of using human embryos for industrial or commercial purposes.[5]

As such, the ECJ can count on relatively strong support within the scholarly community, where it is still generally regarded as the principal guarantor of the rule of law within the Union. Admittedly, it has in the past been repeatedly accused of overstepping the limits of the conferred mandate. Yet, such allega-

[4] Montesquieu's famous metaphor, which informed many of the previous discussions about the role of the judiciary (usually also in terms of 'judicial activism' versus 'judicial restraint').

[5] See eg Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351; Joined Cases C-402/07 and C-432/07 *Sturgeon v Condor* and *Böck v Air France* [2009] ECR I-10923; Case C-34/10 *Brüstle v Greenpeace*, Judgment of 18 October 2011, not yet reported.

tions have invariably received quick rebuttals in legal doctrine.[6] In the past few years, criticism of supposed faux pas hardly displays a structural trend, but mostly emerges ad hoc, in editorials, the margins of case notes or articles mainly devoted to other themes.[7] Still, the renewed attention in academia for the role and function of the judiciary, in particular in international and supranational settings, justifies a comprehensive inspection of the ECJ's performance. For that purpose, we invited a select number of scholars to engage in a contemporary assessment of the legitimacy of its case law. Significantly, the Court is recognised as a dynamic adjudicator in almost every contribution included in this volume. Thus, in their chapter on the judicial development of the general principles of EU law, Ján Mazák and Martin Moser confirm that interpretation always involves a process of understanding that can, as such, not be turned into a mathematical formula (see chapter two). According to them, this especially holds true when dealing with EU rules and provisions, which incorporate myriad variables, including the broadly formulated Article 19 TEU that explicitly entrusts the Court to 'ensure the observance of the law'.

In chapters three and four, in their discussion of the breadth and ambiguity of the Treaty provisions on the internal market, Stephen Weatherill and Jukka Snell acknowledge as well that the interpretation exercise is a highly demanding one. Weatherill draws specific attention to the ambiguity of the internal market rules, asserting that they leave open a 'host of vital questions' and 'delegate much interpretative autonomy to the Court'. This brings him to conclude that the ECJ's case law in this domain carries vital implications for the vertical and horizontal distribution of competences in the EU – yet the Court does not refrain from using 'troublingly imprecise words and phrases'. In Weatherill's view, it is precisely the evasive quality of the Treaty provisions establishing the guiding concepts that lies at the root of the problem. Snell, in his contribution, indicates how much more controversial the free movement case law has become. Recent rulings have had a much more direct effect on national economic models, impacting on labour relations and regulating the business and governance of corporations. As long as the focus was essentially on the free movement of goods, national economic models were only challenged indirectly. With the coming of age of the internal market however, this has all changed drastically, with the interpretative choices to be made not getting any easier. In a similar vein, Michael Dougan and Daniel Thym survey the interesting yet complex challenges currently facing the

[6] For the indictments, see H Rasmussen, *On Law and Policy in the European Court of Justice. A Comparative Study in Judicial Policy-Making* (Dordrecht, Martinus Nijhoff Publishers, 1986); P Neill, *The European Court of Justice: A Case Study in Judicial Activism* (London, European Policy Forum, 1995); TC Hartley, 'The European Court, Judicial Objectivity and the Constitution of the European Union' (1996) 112 *LQR* 95. For the rebuttals, see, inter alia, JHH Weiler, 'The Court of Justice On Trial' (1987) 24 *CML Rev* 555; T Tridimas, 'The Court of Justice and Judicial Activism' (1996) 21 *ELRev* 199; A Arnull, 'The European Court and Judicial Objectivity: A Reply to Professor Hartley' (1996) 112 *LQR* 411.

[7] Or the occasional newspaper; *cf* R Herzog and L Gerken, 'Stoppt den Europäischen Gerichtshof!' *Frankfürter Allgemene Zeitung* (8 September 2008).

ECJ's citizenship case law (chapters five and six). This case law also illustrates the increasing entanglement of economic and non-economic free movement rights, which has prompted the Court to take a new turn on fundamental concepts such as the general principle of non-discrimination, the notion of restrictions to movement, the required cross-border dimension and the import/export of goods divide. Hence, here as well, dynamic adjudication is the name of the game.

The institutional complexity of the multilayered European legal system too leads to certain issues being more strongly present than is generally the case in a purely national context. One of the particular headache dossiers concerns the proper allocation of powers between the various levels, a topic abundantly addressed in this volume. In chapter one, for example, Koen Lenaerts expounds how in its case law, the Court defers to both the Union legislator (horizontal allocation of powers) and the Member States (vertical allocation of powers). In chapter seven, Eileen Denza notes that in delineating the EU and the international legal order, the Court is similarly deferential to external tribunals. The prime importance of this theme is equally underscored in the contributions by Stephen Weatherill and Jukka Snell, as well as those by Michael Dougan and Daniel Thym. They all confirm that the distribution of powers in a given field influences – or should indeed influence – the outcome and legitimacy of the Court's decisions.

III. ON GAUGING LEGITIMACY

The tectonic shifts flagged above appear to justify an in-depth examination of the challenges facing the Court, and merit a renewed appraisal of its output in order to determine how it has been coping so far. Our enquiry aims to gauge the legitimacy of its functioning in light of the transformations the EU has undergone in a relatively short period of time. Yet of course, as Michal Bobek asserts in chapter eight, in the realm of notions, legitimacy is one of the troubling ones. Indeed, though frequently employed in scholarly discourse, there exists no common understanding on its exact content.[8] Legitimacy may thus, inter alia, be explored from a legal, political, sociological or moral point of view.[9]

Notwithstanding these different angles from which legitimacy may be approached, it has become an established practice to separate input from output legitimacy. From the input perspective, legitimacy presupposes mechanisms or procedures that link political decisions with citizens' preferences. From the output perspective, it refers (generically put) to the fact that the citizens are will-

[8] *cf* RL Abel, 'Redirecting Social Studies of Law' (1980) 14 *Law and Human Behaviour* 805, 825: 'The concept of legitimacy has neither a precise definition nor a clear behavioral correlative'.

[9] N Huls, 'Introduction: From Legitimacy to Leadership' in N Huls, M Adams and J Bomhoff (eds), *The Legitimacy of Highest Courts' Rulings: Judicial Deliberations and Beyond* (The Hague, TMC Asser Press, 2009) 13–18.

ing to support the decisions made.[10] The two may be positively correlated, with output legitimacy resulting from input legitimacy. However, the judiciary constitutes a special case here, as the prior involvement of the public in its decision-making is weak – even when members of representative assemblies are sometimes implicated in the recruitment and selection of judges.

It is therefore interesting to note here that, according to Bobek, the posture of national courts should serve as a main yardstick for measuring the legitimacy of the Court's judicial activity. In his contribution, he does not look at how the case law of the ECJ is received by citizens, but by domestic courts. Since it lies within the Court's competence to supply guidance on what EU law means and how it is to be applied by national courts, Bobek reflects on whether the decisions of the Court can be applied by ordinary domestic judges – something he refers to as the 'feasibility' of the Court's rulings. Thus, he prefers to adopt a notion of *functional* legitimacy. In an alternative and equally original approach, Koen Lenaerts opts to distinguish between external and internal legitimacy, examining the interaction between the Court and the EU legislator on the one hand, and between the Court and the Member States on the other.

Another distinction that seems useful in the study of adjudication is the one that separates substantive from procedural legitimacy. According to the substantive view (new) rules or interpretations may be considered legitimate when they are perceived to embody proper ends and standards, and when their addressees regard them as the most appropriate solutions to the problems in the given context.[11] In the procedural view, the main question is whether or not the rule or interpretation stems from the rightful source of authority, and whether those addressed by a (new) rule or interpretation believe that it has come into being and operates in accordance with general accepted principles of due process.[12] Examples of the procedural legitimacy approach abound in this volume, in which some of the Court's most controversial judgments of the last decade (for example, *Viking*, *Laval*, *Förster* and *Mangold*) are scrutinised. While some of these cases are discussed by more than one author, it is interesting to see how their opinions sometimes converge and sometimes diverge on different aspects of the legitimacy issue. For example, whereas in chapter three, Stephen Weatherill expresses his unease with the cryptic 'substance of rights' doctrine established in *Ruiz Zambrano*, in chapter five, Michael Dougan appears to regard it as curious, but not principally flawed.

The multiplicity of definitions notwithstanding, most of the existing characterisations of the legitimacy concept are informed by two elements: acquiescence and/or obedience. Courts could therefore be said to possess the power of

[10] *cf* FW Scharpf, *Governing in Europe: Effective or Democratic?* (Oxford, Oxford University Press, 1999) 7–10.

[11] I Clark, *Legitimacy in International Society* (Oxford, Oxford University Press, 2005) 18.

[12] TM Franck, *The Power of Legitimacy among Nations* (New York, Oxford University Press, 1990) 19. This harks back to a conception of legitimacy of the German sociologist Niklas Luhmann ('*Legitimation durch Verfahren*').

legitimacy if they are able to command acceptance, mainly from the members of the community they are meant to serve, so as to render the use of force unnecessary.[13] Phrased in these terms, the aforementioned 'output perspective' clearly and prominently re-enters the debate. Indeed, in an increasingly complex environment such as the EU this is of seminal importance, since it translates to an ECJ that manages to secure the continued willingness of other actors to comply with its rulings, even when that does not correspond with those actors' immediate self-interest. At the same time, Bobek rightfully cautions that mere silence or absence of open resistance does not necessarily come down to acceptance.

In order to gauge legitimacy in this setting, one could undertake to investigate the level of popular support for the Court's judgments across the Union, or the support existing in the individual Member States and among their governments, etc. Such socio-empirical research has been conducted in the past, but requires a methodology with which most lawyers are insufficiently acquainted.[14] As will have become clear, this volume rather proceeds along an alternative path, electing to have the performance of the ECJ assessed by seasoned scholars that engage in wide-ranging legal analyses of the Court's rulings in various fields of law. In so doing, a tentative link is forged between the legitimacy concept and the normative, interpretative and institutional specificities of EU law. All the same, whereas there can be no doubt that the support for its output matters to any institution, we refrain from identifying a single actor whose acquiescence or obedience can serve as the sole, decisive measuring rod.

IV. THE RELEVANCE OF INSTITUTIONAL DESIGN

In their judgments, the Union's judges must maintain a delicate balance between substantive legal 'correctness' on the one hand, and procedural aspects (securing majorities within chambers, deciding within a reasonable time, managing workload) on the other.[15] For that reason, any appraisal of the Court's case law must acknowledge the relevance of its institutional structure, composition and modus operandi. Arguably, the high number of judgments to be rendered on an annual basis, coupled with the prohibition on the publication of dissenting opinions, leaves an unmistakable imprint, and produces a typical style of reasoning.[16] For

[13] LR Helfer and AM Slaughter, 'Towards a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 273, 278.

[14] See eg GA Caldeira and JL Gibson, 'The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support' (1995) 89 *American Political Science Review* 356. Studies conducted from a quantitative angle often neglect the value-oriented nature of the concept of legitimacy. For an incisive review see J Kocken, 'Questioning Legitimacy or Why Social Scientists Find Legitimacy Where None Exists' (2008) 29(3) *Recht der Werkelijkheid* 7.

[15] Huls, above n 9, 25.

[16] On this, from a comparative point of view, see M Lasser, *Judicial Deliberations. A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford, Oxford University Press, 2004).

one thing, the ECJ regularly resorts to employing sophisticated judicial formulas that suggest continuity and an overriding rationale.[17]

Furthermore, it is essential to recognise that the Court operates (in the words of Koen Lenaerts) as a 'constitutional umpire in a multilayered system of governance'. This setting, which also manifests itself in a truncated system of judicial protection, probably explains the argumentative style that generally characterises the ECJ's pronouncements. After all, it has to suit several legal traditions at once. Thereby, as is more generally the case in adjudication, its jurisprudence seems marked by a fuzzy logic, leading to decisions that are neither 'true' nor 'false' in an empirically verifiable way. Nevertheless, this does not mean that overly opaque judgments should become the standard. In some quarters, decisions of that type seem to be readily acceptable – for example, at the Cour de cassation in France, where only a small in-crowd is able to embrace the message, however terse or enigmatic it may be. Despite being based on a French model, the Union's judiciary might ponder whether it can still content itself with such a practice when it entails that its dicta can only be fathomed by pundits. Even if those decisions continue to fit in with the overall narrative of European integration, it is rendered vulnerable to critique when that story becomes less compelling.

Evincing the backgrounds and preferences of the various authors, appraisals of the Court's contemporary style of reasoning are made in many of the following chapters. Thereby, the classic discussion on the merits of introducing dissenting opinions in the ECJ is revisited by several contributors. Stephen Weatherill, for example, comes out strongly in favour of such a move, arguing that the quality of the reasoning in hard cases would be opened up to scrutiny and development. In vivid contrast, however, Michal Bobek is much less convinced of their added value, believing that they would merely invite new bewilderment, rather than increasing the accessibility of the Court's decisions.

V. JUDGING JUDGMENTS, IMPROVING QUALITY

As known, the ECJ originally wallowed in 'benign neglect from the powers that be and the mass media'.[18] Initially, the judges had to feel their way, and they did so by deriving basic rules from the multitude of technical provisions, interpreting these rules in light of the objectives set out in the Treaties, slowly developing a system of case law on that foundation.[19] Their adjudicatory practice was dynamic from the very beginning, with a wholesome array of fundamental rights, a firmly entrenched internal market and a defiantly autonomous legal order constituting some of the most salient achievements. The Court strenuously sought to deliver

[17] L Azoulai, 'The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization' (2008) 45 *CML Rev* 1335, 1339–40.

[18] E Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *AJIL* 1.

[19] T Koopmans, *Courts and Political Institutions. A Comparative View* (Cambridge, Cambridge University Press, 2003) 274.

judgments that fit in with the European integration narrative, and while attention for its work was gradually expanding, in society-at-large, few saw a need for questioning that direction. From this point of view, its case law has been superbly effective. Yet, effectiveness is not necessarily a proxy for legitimacy, nor does it suffice for a wholehearted scholarly endorsement. All in all, the opinions prevailing in academia, while maybe not decisive, surely count for something, for they could vindicate the judicial achievements – or precipitate their demise. Moreover, comments on certain rulings that are strongly adverse might also be indicative of a lukewarm reception among the wider audience. This justifies once again an enquiry into the current state of play.

Ultimately of course, legitimacy is not a binary thing but something that comes in gradations. Bearing that in mind, the individual authors were left considerable discretion to formulate their own benchmarks for legitimacy, and apply a specific frame of analysis if they so preferred. Their contributions cover specific domains and seek to ascertain, inter alia, whether the judgments display sufficient consistency, whether the outcomes were well founded, whether the results were reasonably predictable and whether the ECJ defers to the EU legislator and the Member States whenever appropriate. While some are patently more optimistic than others, concerns with regard to the quality of the Court's reasoning (flowing from such overarching exigencies as transparency, coherence and persuasiveness) run like a red thread through the chapters. Fortunately, many authors do not limit themselves to voicing discontent, but venture to proffer solutions as well. At the end of the day, it is to be hoped that all chapters collected in this volume will, in one way or the other, contribute to improving the legitimacy of the case law of the European Court of Justice.

VI. A CONCISE OVERVIEW OF THE CONTRIBUTIONS

In chapter one, Koen Lenaerts explores the Court's external and internal legitimacy when it interacts with the Union's legislature, the Member States and national courts. With regard to the external dimension, Lenaerts first explains – pointing to a series of recent judgments – how the ECJ displays due deference to the policy choices of the EU legislator (*Test-Achats*; *Sturgeon*), and how it is the Court's role neither to anticipate nor to pre-empt policy choices that fall within the purview of the EU legislator (C-211/08 *Commission v Spain*). Lenaerts subsequently demonstrates how the ECJ strives to find an equilibrium between national and EU interests, and that it maintains an open ear for national interests even in the presence of harmonising measures (*Mesopotamia Broadcast*). He furthermore draws attention to the importance of constitutional principles embedded in national law, and illustrates how the ECJ welcomes 'value diversity' (*Omega*; *Sayn-Wittgenstein*). Lenaerts also stresses, however, that national policy choices are bound by consistency requirements (*Placanica*; *Hartlauer*; *Blanco Pérez*). As to the internal legitimacy of the Court's case law,

he recalls that the ECJ operates under the principle of collegiality, and that its judgments are necessarily based on consensus. To his mind, precisely this fact explains why the argumentative discourse of the ECJ is limited to the very essential and why – in particular in hard cases of constitutional importance – the argumentative discourse is built up progressively, in a 'stone-by-stone approach' (as illustrated by *Rottman*, *Ruiz Zambrano*, *McCarthy* and *Dereci*). Lenaerts concludes that as a constitutional umpire, the ECJ has taken its role seriously, constantly endeavouring to strike a balance between the different interests at stake in a multilayered system of governance.

In the next chapter, Ján Mazák and Martin Moser discuss the legitimacy of the use of general principles of EU law in a string of recent cases, with particular attention to the *Mangold* and *Kücükdeveci* judgments (and their siblings). Mazák and Moser choose to focus on the quality, soundness and coercive pull of the Court's judicial reasoning, rather than on substantive acceptance or societal response. Prior to evaluating the Court's manoeuvrings in *Mangold* and *Kücükdeveci*, they consider the nature and foundations of the general principles in Union law. While they do not dispute that developing Union law on the basis of general principles lies within the judicial competence conferred by Article 19 TEU, they do criticise the way in which the Court discovered and employed the general principle of non-discrimination on grounds of age in *Mangold* and *Kücükdeveci*. From the legitimacy point of view, the authors identify two main problems. First, to their mind, the reasoning as to the foundation of the general principle prohibiting discrimination on grounds of age is quite feeble. Second, the ostensible awarding of horizontal direct effect to general principles in *Mangold* raises problems of legal certainty and consistency, besides muddling the constitutional allocation of powers within the European legal order. For that reason, Mazák and Moser conclude that with the *Mangold* case law, the ECJ may have reached the limits of legitimate adjudication.

Chapters three and four are devoted to recent case law on the internal market, and contain meticulous examinations of how the Court has been fine-tuning the Treaties' free movement provisions. The central theme of Stephen Weatherill's contribution is the constitutionally significant, yet strikingly ambiguous wording in several pronouncements on the scope and content of the internal market rules, such as for instance 'a *considerable* influence' with regard to Article 34 TFEU (*Mickelsson and Roos)*, 'a *serious* inconvenience' with regard to Article 21 TFEU (*Runevič-Vardyn*), or 'the *substance* of rights' with regard to Article 20 TFEU (*Ruiz Zambrano*). His main argument is that at the heart of the problem lies not so much the Court's case law, but rather the internal market itself. Weatherill masterfully elaborates how the ambiguity and breadth of the internal market provisions further complicate already difficult questions with regard to determining the outer limits of EU law. Similarly, regarding harmonisation measures, he explains how the ECJ's nebulous tests are an inevitable consequence of the wording of Article 114 TFEU. The judgments Weatherill discusses (C-376/98 *Germany v Parliament*; *Vodafone, O2 et al v Secretary of State*; *Alliance for*

National Health v Secretary of State for Health; C-301/06 *Ireland v Parliament and Council*) illustrate that the Treaty actually denies the ECJ a useful operational role in establishing the boundaries of Article 114 TFEU. Definitional precision remains elusive. Consequently, a case-by-case examination is required, which delegates considerable power to the relevant institution (the judiciary as far as Article 34 TFEU is concerned; the legislature where it concerns Article 114 TFEU). Finally, Weatherill muses on whether the ECJ could have done a better job. He concludes that at a micro-level, this is probably so, but that at a macro-level, the Court largely follows the logic of the Treaty when it develops internal market law.

To a considerable extent, the views of Jukka Snell dovetail with Weatherill's conclusion – ie, that the final verdict on the legitimacy question should not be overly harsh. Nevertheless, he follows a different 'plan of attack', and discusses numerous other judgments. Snell opts to study the Court from a dual angle, namely, first, as a judicial institution and, second, as an EU institution. With regard to the judicial angle, his point of departure is that 'power must be kept in check', and that legitimacy should be examined on the basis of three main standards: sources, consistency and reasoning. He then applies these criteria to the Court's free movement case law, and finds that the legitimacy of this case law has been weakened by insufficiently reasoned (*Smits and Peerbooms*; *Fidium Finanz*; *Säger*) and inconsistent judgments (C-110/05 *Commission v Italy*, and *Mickelsson and Roos* vis-a-vis *Keck*; *Kerckhaert* vis-a-vis *Cassis de Dijon*; *Gysbrechts* vis-a-vis *Alpine Investments*). Regarding the Court as an EU institution, Snell's main argument is that it should ensure that it does not excessively interfere with national economic models (referring to *Viking*; *Laval*; *Centros*; *Volkswagen*) nor with areas that the Treaties allocate to Member States (for example, direct taxation; health care; education). His main concern here is that the Court has proceeded too much on an ad hoc basis, and failed to adopt a principled, consistent approach, thus neglecting to spell out the basic foundations in its legal reasoning.

Chapters five and six focus on the Court's case law on EU citizenship. Michael Dougan's contribution is essentially divided into an analysis of judgments delivered before 2008, and judgments delivered after 2008. He starts off with a critical reading of the case law from 1998 to 2008 (*Sala*; *Grzelczyk*; *Baumbast* and *Collins*) and then moves on to discuss the post-2008 instalments, drawing attention to the technique of 'indirect judicial review' (*Förster*; *Vatsouras*), the 'personal circumstances' assessment (*Förster*; *Wolzenburg*; *Sayn-Wittgenstein*; *Rottman*; *Gottwald*) and the 'substance of rights' test (*Ruiz Zambrano*; *McCarthy*; *Dereci*). While Dougan acknowledges that, since 2008, the outcome of a citizenship case has become highly unpredictable, he declines to appraise this evolution by subscribing to constitutional anxieties about judicial activism. His main argument is rather that the 'second generation' case law on EU citizenship must be seen as an interactive, two-way dialogue between judges and politicians about how best to balance the construction of a meaningful form of Union citizenship on the one hand,

against the need to respect the social competences and financial concerns of the Member States on the other – while at the same time remaining sensitive to relevant changes in the broader European integration landscape.

In chapter six, Daniel Thym offers another examination of the legitimacy of the citizenship case law, by gauging the case law's impact on, and acceptance by, the EU legislator and the Member States. Thym first examines the case law on access to social benefits (*Martínez Sala*; *Grzelczyk*; *Baumbast*; *Collins*; *Bidar*; *Förster*; *Vatsouras*; *Teixeira*; *Ibrahim*) in order to verify whether a dialogue with the EU legislator indeed takes place, and whether (sufficient) deference is shown towards the Member States. Hereafter, he assesses the quality of the Court's reasoning, profoundly deploring the lack of clarity and coherence in a number of recent judgments. Thym subsequently looks into the Court's case law on third- country national family members, with particular emphasis on the *Ruiz Zambrano* judgment and the Court's much-debated 'substance of rights' test. According to him, constitutional legitimacy requires this test to be interpreted in light of the federal vertical balance of power and the horizontal dialogue with the EU legislator. Thym concludes that the latest directions in the ECJ's case law have moved EU citizenship into a new era, but that when exploring this novel frontier, some hard choices will have to be made.

Chapters seven and eight are devoted to the position of the EU/ECJ vis-a-vis other legal orders and other courts and tribunals. Eileen Denza, reflecting on the Union's international context, starts off with a succinct analysis of the Court's mandate under the Treaties. Immediately hereafter, she takes a closer look at the case law on conflicts between international obligations and EU legislation (*Intertanko*; *Air Transport Association of America*; *Kadi*). This is followed by an analysis of the reception of customary international law (*Air Transport Association of America*). Next, she addresses the relationships the ECJ maintains with other international courts, in particular with the European Court of Human Rights (*ERT*), in order to ascertain whether this case law can be considered legitimate. Denza's discussion is not limited to an assessment of legitimacy in terms of deference to other (international) legal orders, but extends to explaining how the Court's case law is legitimate in terms of being protective of the Union's own legal system (*Kadi*; Opinion 1/09; C-459/03 *Commission v Ireland*).

In chapter eight, Michal Bobek adopts the perspective of national courts, developing what he calls a 'functional legitimacy' or 'legitimacy as feasibility' approach. In his eyes, the crucial question is not whether the Court's decisions are legitimate *in se*, but whether the judicial output is feasible in the eyes of national courts. Are national courts actually satisfied with the Court's decisions once they receive them? Do national courts consider the Court's decisions as authoritative? And do national courts in practice take heed of the ECJ's pronouncements in other cases? After plumbing the depths of these questions, Bobek draws several surprising conclusions. One of these pertains to the Court's standard of reasoning in individual judgments (in general, according to Bobek,

the current standard does not raise too much cause for concern). Another relates to the presumed acceptance of, and faithful compliance with the ECJ's case law in the domestic legal orders, which seems to convey a false sense of security (for silence should not necessarily be understood as a national embracing of the European judicial mandate). Last but not least, Bobek highlights some institutional and procedural opportunities for the Court to generate legitimacy, which are, in his view, far from sufficiently exploited.

In his epilogue, JHH Weiler engages particularly with the opening chapter by Koen Lenaerts. He means to demonstrate thereby that the legitimacy issue is far more complex than Lenaerts's text and conclusions would suggest. As a result, as Weiler himself puts it, Lenaerts's chapter stands as one bookend to this volume, and his epilogue as the other.

We hope that this volume sparks off a fresh debate on the role and functioning of the ECJ. There would seem to be good reason for this, not least because the topics dealt with in each of the contributions do not, in Weiler's words, 'deal with trivia'. . .