Judging European democracy

National constitutional review of European law and its democratic legitimacy

de Boer, N.J.

Citation for published version (APA):

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: https://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.
In a large and growing body of case law, constitutional courts from the EU Member States have reviewed EU treaties and related legal instruments, as well as secondary EU law and decisions by EU institutions, on their compatibility with national constitutional law. These EU-related judgments deal with issues of major importance such as the EU’s democratic legitimacy, the protection of persons’ fundamental rights and freedoms, the division of competences between the EU and its Member States, as well as the place of national sovereignty within the EU. Yet are constitutional courts the institutions that should decide such issues of major constitutional importance for the EU? Or is it more democratic to leave these matters to political institutions that represent Europe’s citizens and that are supposedly politically accountable to them?

This book explores these questions and offers a new perspective on the national constitutional courts’ EU-related case law. In the current literature, the national constitutional courts’ EU-related case law is often evaluated in a positive light: it can help ensure respect for the Member States’ national constitutional identities, function as a check on the EU’s powers, open up a space for contestation and dialogue, or serve as a justified response to pressing concerns about the democratic quality of the EU’s decision-making process. By contrast this book argues that the courts impose constitutional limits on the EU in a way that is often difficult to justify democratically. The book builds on key insights from political philosophy and constitutional theory to better understand the democratic legitimacy of the national constitutional courts’ role in the EU. Through in-depth case studies of the German Constitutional Court and its political impact, as well as a comparison with the Netherlands where such review is absent, the book details how the German Court risks debilitating political debate on the future of Europe. The book argues that national courts should instead exercise their review powers in such a way that it promotes political contestation.
JUDGING EUROPEAN DEMOCRACY
NATIONAL CONSTITUTIONAL REVIEW OF EUROPEAN LAW AND ITS DEMOCRATIC LEGITIMACY

NIK DE BOER
JUDGING EUROPEAN DEMOCRACY
NATIONAL CONSTITUTIONAL REVIEW OF EUROPEAN LAW AND ITS DEMOCRATIC
LEGITIMACY

ACADEMISCH PROEFSCHRIFT
ter verkrijging van de graad van doctor
aan de Universiteit van Amsterdam
op gezag van de Rector Magnificus
Prof. dr. ir. K.I.J. Maex
ten overstaan van een door het College voor Promoties ingestelde
commissie, in het openbaar te verdedigen in de Agnietenkapel
op vrijdag 4 mei 2018, te 14:00 uur
door Nik Jan de Boer
geboren te Groningen
Promotiecommissie:
Promotores:
Prof. dr. D.M. Curtin, Universiteit van Amsterdam en European University Institute
Prof. dr. L.F.M. Besselink, Universiteit van Amsterdam

Copromotor:
Dr. I. Venzke, Universiteit van Amsterdam

Overige leden:
Prof. dr. C. Eckes, Universiteit van Amsterdam
Prof. dr. M.W. Hesselink, Universiteit van Amsterdam
Prof. dr. J. Komárek, University of Copenhagen
Prof. dr. F.C. Mayer, Universität Bielefeld
Prof. dr. M. de Wilde, Universiteit van Amsterdam
Prof. dr. B.E.F.M. de Witte, Universiteit Maastricht

Faculteit: Faculteit der Rechtsgeleerdheid
ABSTRACT

In a large and growing body of case law, constitutional courts from the EU Member States have reviewed EU treaties and related legal instruments, as well as secondary EU law and decisions by EU institutions, on their compatibility with national constitutional law. These EU-related judgments deal with issues of major importance such as the EU’s democratic legitimacy, the protection of persons’ fundamental rights and freedoms, the division of competences between the EU and its Member States, as well as the place of national sovereignty within the EU. Yet are constitutional courts the institutions that should decide such issues of major constitutional importance for the EU? Or is it more democratic to leave these matters to political institutions that represent Europe’s citizens and that are supposedly politically accountable to them?

This book explores these questions and offers a new perspective on the national constitutional courts’ EU-related case law. In the current literature, the national constitutional courts’ EU-related case law is often evaluated in a positive light: it can help ensure respect for the Member States’ national constitutional identities, function as a check on the EU’s powers, open up a space for contestation and dialogue, or serve as a justified response to pressing concerns about the democratic quality of the EU’s decision-making process. By contrast this book argues that the courts impose constitutional limits on the EU in a way that is often difficult to justify democratically. The book builds on key insights from political philosophy and constitutional theory to better understand the democratic legitimacy of the national constitutional courts’ role in the EU. Through in-depth case studies of the German Constitutional Court and its political impact, as well as a comparison with the Netherlands where such review is absent, the book details how the German Court risks debilitating political debate on the future of Europe. The book argues that national courts should instead exercise their review powers in such a way that it promotes political contestation.
Table of Contents

CHAPTER 1 - INTRODUCTION ........................................................................................................... 1
1. Problem ........................................................................................................................................ 4
  1.1 Democratic Legitimacy and Judicial Review .............................................................................. 4
  1.2 National Constitutional Courts and the EU ............................................................................. 7
  1.3 Research Question .................................................................................................................... 13
  1.4 A Note on Methods .................................................................................................................. 15

2. Objectives ..................................................................................................................................... 16

3. Outline ......................................................................................................................................... 17

CHAPTER 2 - JUDICIAL REVIEW AND DEMOCRATIC LEGITIMACY ................................................. 25
1. Introduction ............................................................................................................................... 25

2. Definitions: Legitimacy, Democracy, Constitutionalism and Judicial Review ..................... 29
  2.1 Legitimacy .............................................................................................................................. 29
  2.2 Democracy and Constitutionalism .......................................................................................... 31
  2.3 Judicial Review ......................................................................................................................... 33
  2.4 The Democratic Problem with Judicial Review ..................................................................... 34

3. The Liberal Justification of Judicial Review ............................................................................... 36
  3.1 Legitimation by Constitution ................................................................................................. 36
  3.2 Constitutional Courts as the Forum of Principle .................................................................. 41

4. Rejecting the Liberal Justification ............................................................................................... 44
  4.1 Reasonable Disagreement ....................................................................................................... 45
  4.2 The Turn to Procedure: Democratic Legitimacy .................................................................... 49
  4.3 Central Elements of Democratic Legitimacy ........................................................................ 51
    4.3.1 Deliberation ..................................................................................................................... 51
    4.3.2 Participation .................................................................................................................... 62
  4.4 Consensus, Majoritarianism and the Tyranny of the Majority ............................................... 55

5. The Democratic Case Against Judicial Review .......................................................................... 57
  5.1 Waldron’s ‘Core Case’ Against Judicial Review .................................................................... 58
  5.2 Outcome-based Reasons against Judicial Review .................................................................. 60
  5.3 Process-based Reasons Against Judicial Review ................................................................... 62
    5.3.1 Elections and Public Opinion ......................................................................................... 62
    5.3.2 Direct Participation ........................................................................................................ 63
  5.4 Difficulties with the Democratic Case Against Judicial Review ........................................... 64

6. Democratic Reasons for Judicial Review ..................................................................................... 68
  6.1 Precommitment ....................................................................................................................... 69
  6.2 Judicial Review to Protect Democracy ................................................................................... 72
  6.3 The Case for Weak Judicial Review ....................................................................................... 79

7. Beyond Rights: Democratic Legitimacy and Structural Judicial Review ............................... 81
  7.1 The Democratic Objection to Structural Judicial Review ....................................................... 82
  7.2 Which Majority? The Problem of Federal Judicial Review .................................................... 84

8. Conclusion: Towards Critical Engagement with Legislative and Judicial Practice ............... 86

CHAPTER 3 - THE NATIONAL CONSTITUTIONAL COURTS’ REVIEW OF EUROPEAN LAW AND ITS
DEMOCRATIC LEGITIMACY ............................................................................................................. 89

1. Introduction .................................................................................................................................. 89

2. Should Democracy be a Standard for Reviewing European Law? ........................................ 91
2.1 The EU’s Democratic Legitimacy Problems and Possible Solutions ......................................... 92
  2.1.1 Executive Dominance ........................................................................................................... 92
  2.1.2 Over-constitutionalisation, De-politicisation and Judicialisation ....................................... 94
  2.1.3 Possible Solutions for Making the EU More Democratic .................................................. 97
  2.2 The Trouble with Democracy-based Review: Disagreement Yet Again ............................... 98
  2.3 On the Need for Comparative Institutional Assessments ....................................................... 102
3. Making Institutional Comparisons in the EU Context .................................................................. 103
  3.1 Review of European Treaties and Similar Instruments ............................................................. 104
  3.2 Review of Primary and Secondary EU Law After Ratification ............................................... 105
    3.2.1 Primary EU Law ............................................................................................................... 106
    3.2.2 Secondary EU Law ......................................................................................................... 107
4. Assessing the Grounds of Review ................................................................................................. 109
  4.1 Fundamental Rights ................................................................................................................ 109
  4.2 National Constitutional Identity .............................................................................................. 114
    4.2.1 Case Law of the National Constitutional Courts ............................................................... 114
    4.2.2 Protecting National Constitutional Identity: Reclaiming the Political Dimension .......... 117
    4.2.3 The Case Against Judicial Dialogue ............................................................................... 119
    4.2.4 The Problem with National Constitutional Identity as a Limit to Primacy ...................... 123
    4.2.5 Courts or Politics? Assessing the Legitimacy of Identity Review in a Comparative
        Institutional Perspective ................................................................................................. 126
  4.3. Ultra Vires Review .............................................................................................................. 128
    4.3.1 Case Law of the National Constitutional Courts ............................................................... 128
    4.3.2 Democratic Reasons Against Ultra Vires Review ............................................................. 131
    4.3.3 Comparing Political and Judicial Safeguards ................................................................. 134
    4.4 Court-Ordered Parliamentary Oversight ............................................................................. 137
5. Conclusion ..................................................................................................................................... 141

CHAPTER 4 - RESEARCH DESIGN ................................................................................................. 143
  1. Introduction .............................................................................................................................. 143
  2. Justification for a Qualitative Case Study Based Research ....................................................... 144
  3. Case Selection .......................................................................................................................... 145
    3.1 Case Delineation .................................................................................................................. 146
    3.2 Selection and Justification ................................................................................................... 147
  4. Assessing the Constitutional Quality of Judicial and Political Deliberations ......................... 150
  5. Data Sources .......................................................................................................................... 153
  6. Analysis .................................................................................................................................... 154
  7. Conclusion .............................................................................................................................. 156

CHAPTER 5 – THE RISE OF JUDICIAL EUROSCEPTICISM: MAASTRICHT .................................... 159
  1. Introduction .............................................................................................................................. 159
  2. Comparing Judicial and Political Assessments of European Democracy ............................... 162
    2.1 Connecting Statehood and Democracy: the GFCC’s Maastricht-Urteil ............................ 162
    2.2 Intergovernmentalism versus Supranationalism: Democracy in the Treaty Negotiations .... 167
    2.3 Coming to Terms with a Disappointing Result: Ratification .............................................. 169
      2.3.1 German Disappointment ............................................................................................... 169
      2.3.2 Dashed Dutch Ambitions ............................................................................................ 181
  3. Monetary Union: Political and Judicial Mistakes .................................................................... 188
    3.1 The GFCC: Constitutionalising EMU’s Asymmetries ......................................................... 188
3.1.1 Asymmetric Union: Maastricht’s EMU Architecture ....................................................... 189
3.1.2 The GFCC’s Assessment: Stability as a Constitutional Requirement ............................ 192
3.2 The Treaty Negotiations: Incomplete Deliberations and Incomplete Monetary Union ........ 196
3.3 Missing the Broader Picture: Monetary Union in the Ratification Debates ...................... 198
3.3.1 German Stability Anxieties ............................................................................................ 198
3.3.2 Dismissing Crisis Concerns: Dutch Parliamentary Debate ........................................... 202
4. Did the Maastricht Judgment Facilitate Democratic Deliberation? .................................... 205
4.1 German Public Debate before the Maastricht Judgment .................................................... 206
4.2 Facilitating Euroscepticism: Debate in the Context of, and after the Maastricht Judgment ... 211
5. Conclusion ............................................................................................................................ 216

CHAPTER 6 - THE EURO CRISIS AND THE JUDICIALISATION OF EURO-POLITICS ........... 219
1. Introduction ............................................................................................................................. 219
2. Fixing the Monetary Union? The EU’s Euro Crisis Response ............................................. 221
   2.1 Providing Financial Assistance ......................................................................................... 222
   2.2 Tightening Budget Rules and Enhancing Economic Governance ................................. 224
   2.3 Regulating Financial Markets and Establishing a Banking Union ................................ 226
3. The GFCC’s Assessment: Protecting Budgetary Sovereignty .............................................. 227
   3.1 Main Elements of the Case Law ....................................................................................... 227
   3.2 Judging Financial Assistance and Budget Rules ............................................................. 229
   3.3 ‘Stabilitätsgemeinschaft’ and Review of the OMT Policy ................................................ 232
4. Challenging the Court’s Assessment: Protecting Sovereignty at the Expense of Democracy? 235
   4.1 A Crisis of Excessive Debt? ............................................................................................. 235
   4.2 Or a Crisis of the Markets? ............................................................................................ 236
5. Debilitating Democratic Debate: The GFCC and the German Political Process .................. 240
   5.1 Positions within German Political Debate ....................................................................... 240
   5.1.1 Debt as the Problem: The Position of the Government Coalition ................................ 240
   5.1.2 A Crisis of the Markets: The Position of the Opposition Parties ................................. 242
   5.2 The GFCC as a Chamber for the Euro-critics ................................................................... 245
   5.3 Constraining Political Debate: The Constitutional Disqualification of Eurobonds ........... 248
   5.4 Exploring the Constitutional Limits: Debating a Constitutional Referendum ................... 255
   5.5 The Increasing Importance of Constitutional Arguments: The Fiscal Compact and ESM Debates ................................................................. 257
   5.6 A Constitutional Referendum as a Way Out? ................................................................. 261
6. Effects of the GFCC Case Law on European Decision-making .......................................... 263
   6.1 Making Financial Assistance a Last Resort: The EFSF and ESM ..................................... 264
   6.1.1 Moving Outside the Treaty Framework: The EFSF .................................................... 264
   6.1.2 Inducing Treaty Change: The ESM ............................................................................ 267
   6.2 Banking Union: Making the Single Resolution Fund Intergovernmental ........................ 269
7. Political Debate without Review: Crisis Politics in the Netherlands ................................... 272
8. Conclusion ............................................................................................................................. 278

CHAPTER 7 – COURT-ORDERED PARLIAMENTARY OVERSIGHT ..................................... 281
1. Introduction ............................................................................................................................. 281
2. Demanding Parliamentary Oversight: The GFCC Case Law and Its Implications ............. 281
   2.1 Parliamentary Participation and Information within the Rescue Mechanisms ................... 282
   2.1.1 The EFSF: From Limited to More Extensive Oversight ............................................. 282
   2.1.2 The Lure of Confidentiality: The ‘Neuner Gremium’ and Its Constitutional Demise .... 285