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Besselink, L.

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# RULE OF LAW IN THE EU

30 YEARS AFTER THE  
FALL OF THE BERLIN WALL

Edited by  
Antonina Bakardjieva Engelbrekt,  
Andreas Moberg and Joakim Nergelius

SWEDISH STUDIES  
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VOLUME 15

Part One

The Rule of Law in the European Union:  
Theoretical Foundations and Political  
Reality

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## *Rule of Law Problems as Problems of Democracy*

LEONARD BESSELINK

WHEN TALKING ABOUT principles, constitutional lawyers usually hover somewhere between stating the obvious and being apodictic. So do I in this chapter. I feel somewhat consoled with the memory of the placards carried during that great demonstration in East Berlin on Saturday, 4 November 1989, which I feel privileged to have witnessed in person. It was after an academic conference organised by the constitutional law section of the University of Amsterdam together with the then Karl-Marx-Universität in Leipzig, under the title *Menschenrechte in unserer Zeit* (Human Rights in our Time), which took place in Leipzig in the very last week of October.<sup>1</sup> The title had already been suggested by Amsterdam in 1988, when it could not be guessed how appropriate and timely it would be a year later. We stayed over with three Amsterdam colleagues for the weekend in East Berlin. The impressive and massive procession of people passed our hotel, inviting us to walk with them, with many placards, among which:

*Freie Presse! Free Press!*

*Gewaltenteilung! Separation of Powers!*

*Freie Wahlen! Free Elections!*

These and other traditional constitutional concepts, which were by then in the West considered somewhat shallow and worn-out concepts that stood in need of replacement with others, were used to justify *die Wende*, the turn towards democracy. It gave pause for reflection on the merits such classic notions evidently seemed to have in such revolutionary circumstances.

<sup>1</sup>The papers were published as an edited volume, K Bönninger, I Wagner and G van Wissen (eds), *Menschenrechte in unserer Zeit* (Arnhem, Gouda Quint; Deventer, Kluwer, 1990). On the cover, there is also a series title: Wissenschaftliche Serie Universität von Amsterdam juristische Fakultät, Karl-Marx-Universität Leipzig Sektion Rechtswissenschaft. The volume contains contributions to the 17th Leipziger Rechtstheorie-Konferenzen, under the theme 'Menschenrechte (Grundrechte) und subjektives Recht in unserer Zeit' (Leipzig, 1989).

When we discuss the rule of law 30 years after the Fall of the Wall, we do so in light of developments we witness in Member States of the European Union (EU) like Hungary and Poland. The EU approach to these has been framed in terms of ‘the rule of law’. In this short essay, I start from the premise that the rule of law as a frame of reference is too limited.<sup>2</sup> European lawyers, no less than other lawyers, tend to have a strong affinity with the legal approach that is implicit in the notion of the rule of law. The strong legal drive of European integration may explain why the rule of law has been picked out from the various founding principles of the Union (Article 2 TEU). Democracy is easily considered a thing for political scientists. However, in my view, staying in the comfort zone of the rule of law only fails to grasp the kind of problem we are facing. Law is not going to stop the facts. Law is not going to prevent revolutions, nor are constitutions going to prevent ‘constitutional backsliding’ or ‘constitutional capture’. What we must fear these days in Europe is that law is no longer democratically legitimate in the way it was sought for in those days in November in Berlin. I emphasise that it is not only developments in Poland and Hungary, nor only in the Central and East European Member States, that cause concern, but also those in the older Member States that have not yet gone as far down the road to authoritarianism as others. There is a need to focus on what such developments mean for *democracy* in states under the rule of law. Democracy may be more difficult to grasp for us lawyers, but avoiding it risks remaining irrelevant.

#### I. OXYMORON OR PLEONASM?

When speaking of democracy and the rule of law, the classic question arises whether expressions that combine the two, such as *demokratisk rättsstat*, *demokratischer Rechtsstaat*, *État de droit démocratique*, *demokratikus jogállamiság* and *demokratycznego państwo prawa*, form a pleonasm or an oxymoron. We should not take this question for granted. My starting-point on this, and I return to it in the conclusion, is that if it is a pleonasm, democracy would seem to be redundant; and that if it is an oxymoron, democracy and the rule of law would seem to be antagonistic and basically incompatible. Both are undesirable states of affairs.

So how do the terms relate? In order to assess this, I briefly go through some minimum characteristics of the rule of law and try to relate them to democracy. I take four of those minimum characteristics to do so: the principle of legality; fundamental rights; the separation of powers; and judicial protection.

<sup>2</sup>For an earlier discussion, see L Besselink, ‘Talking about European Democracy’ (2017) 13 *European Constitutional Law Review* 207.

## II. LEGALITY

Legality, in the traditional French Revolutionary interpretation dominant on the Continent, protects citizens' liberty:<sup>3</sup> citizens are free to do what they prefer unless the law prohibits it; but public authorities are not free to act, they do not have the power to act unless that power has a basis in parliamentary legislation or the constitution. This requirement for a legislative basis in principle ensures a democratic anchoring of legislation that affects citizens, in as much as the legislature that empowers public authorities is composed of representatives of the people. Legislation empowers public authorities to act in the general interest and is supported by legislative majorities. Viewed thus, legality may be the least problematic of the rule of law requirements. The rule of law and democracy coincide in a felicitous manner.

But this is the case only when the representative claim is made plausibly. This claim can formally be considered valid as long as the legislation we are talking about is parliamentary legislation. However, we see today that the executive – which in parliamentary systems derives its constitutional legitimacy from either not being censored or being actively supported by parliamentary majorities – also claims a mandate from the people in a more direct manner. The 'government of the day' now appeals to the people also, or particularly, when this is in the context of fluctuating parliamentary majorities in fragmented parliaments. Governmental leaders occasionally claim power even when it is not granted by a parliamentary majority, and justify it as the caretaker and even true representative of the people – it is the silence of the people that in the 1970s' political jargon was turned into 'the silent majority'. The Coronavirus emergency and similar moments framed as 'crises' that ask for 'critical' decision making, provide examples in various Member States.

In the EU itself, legality is ensured under the principle of conferral (Article 5 TEU). This principle, as transpires from the language of Article 5, is embedded in a federal notion of division of competences rather than the democratic notion of legality. Nevertheless, since the European Parliament has been elected directly, and nearly all EU legislation needs its cooperation, the representational claim of the Parliament is constitutionally similar to that of national parliaments in the EU. The main difference is in the curious semi-parliamentary structure of governance in the EU, which can be said to be parliamentary in relation to the Commission but not in relation to the Council (and European Council). This makes the Union constitutionally an in-between zone between a democracy and demoi-cracy,<sup>4</sup> in which competing claims as to democratic legitimacy are further

<sup>3</sup>The Revolutionaries and Napoleon never crossed the Channel, and one of the consequences is that the British and common law understanding of the principle of legality is rather different from that on the Continent.

<sup>4</sup>Critical about such an in-between zone, see K Nicolaidis and R Howse, 'This is my EU-topia: narrative as power' (2002) 40 *Journal of Common Market Studies* 767; also K Nicolaidis, 'The new constitution as European "demoi-cracy?"' (2004) 7 *Critical Review of International Social*

complicated by the overall relatively low turnout at European Parliament elections. This provides ample scope for the Council and European Council, and their members taken together, to claim to represent the citizens in the EU decision making.

Another shift towards the executive is the change in substance of parliamentary legislation. In modern welfare states, legislation has turned into a set of framework acts, initiated by the executive itself, that have gained parliamentary approval but which delegate the setting of the actual concrete rules to the executive. In that way the executive has to both enact and apply the rules in practice. Delegation of legislative power is one thing, granting discretion another. This discretion is not only discretion to execute in the literal sense but also to legislate, thus turning the executive into an actual legislature itself. So-called ‘Henry VIII clauses’, under which the executive can override, withdraw or disapply parliamentary legislation, keep popping up in many different contexts, usually – but not only – in complex legal and legislative situations such as Brexit, and more generally in the implementation of international and European decisions.<sup>5</sup> We see such things happening also in various other contexts, and again crisis situations are a case in point. The climate crisis is one of them. The European Parliament has declared ‘a climate and environment emergency’, piously hypothesising that ‘no emergency should ever be used to erode democratic institutions or to undermine fundamental rights [and] all measures will always be adopted through a democratic process’.<sup>6</sup> Many crises and emergencies, when not prepared for and (potentially) severely and negatively affecting large parts of the population, may indeed provide a temporary justification for measures that would not ordinarily be taken in that fashion; this at any rate is the assumption: the people as such is unable to act, parliaments are undecisive and uninformed talk shops, executives are the ones that have the expertise or can hire it effectively, act upon it, take decisions and enforce them – just what is needed in an emergency. But unfortunately, most emergencies lead to at least some measures that well outlast the duration of the actual emergency. It is unlikely that this will be any different in the climate and Coronavirus emergencies from, let us say, the 9/11 counter-terrorism or the banking and Euro crises.

In short, legality operates in function of democracy as long as the locus of democratic legitimacy is clear not only constitutionally, but also in institutional practice. And in a variety of circumstances this becomes obfuscated and legality becomes more tenuously related to democracy.

*and Political Philosophy* 76, 83. See also the work of Bellamy in its latest version in R Bellamy, *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (Cambridge, Cambridge University Press, 2019).

<sup>5</sup> On the UK, where the expression ‘Henry VIII clause’ originates, see N Barber and A Young, ‘The rise of prospective Henry VIII clauses and their implications for sovereignty’ [2003] *Public Law* 112. On the British case law’s partial acceptance, see, amongst others, C Forsyth and E Kong, ‘The Constitution and Prospective Henry VIII Clauses’ (2004) 9 *Judicial Review* 17.

<sup>6</sup> European Parliament resolution of 28 November 2019 on the climate and environment emergency (2019/2930(RSP)). The pious hypothesis is under point C of the preamble.

### III. FUNDAMENTAL RIGHTS

In the 'long nineteenth century' in Europe, constitutional law was mainly about government and democracy. In the latter half of the twentieth century it shifted towards constitutional rights understood as individual rights. Clearly, a number of individual fundamental rights are in the service of democracy, such as the freedoms of expression and association. But rights have more and more become understood as purely individual rights and freedoms. Such rights, for example the right to privacy, stand in no other relation to the democratic political order than in terms of a zero-sum calculus between individual rights and the general interest. In Europe, even the freedom of religion – historically mainly understood as a matter of group rights and hence politically highly significant – is now conceived of in such terms.

The focus on the individual has driven minority rights to the margin of the fundamental rights discourse. Its relation to democracy has been tenuous. Democracy is often viewed as a corrective mechanism, in the sense that it should be premised on the possibility of political change: today's majority may be tomorrow's minority, and today's minority may be tomorrow's majority.

The virtue of this view is that it basically requires a dynamic openness. This is in a sense a requirement of an ethical openness, but with a political edge. Everyone needs to be able to participate on equal basis, and engage – in principle – on the basis of whatever political views.

More problematic about viewing democracy and democratic rights in terms of shifting majorities is the fact that permanent minorities exist, that is, certain groups that are unlikely ever to become a majority. We might typically think of cultural minorities, or minorities that define themselves territorially. These also need rights guarantees, including of their democratic rights. This may force us to think of representation not merely in terms of arithmetic equality. Democracy in the situation of diversity in representation may need to be approached in a way that moderates arithmetic proportionality. In the EU context, we might think of digressive proportionality in the composition of the European Parliament for the sake of ensuring politically diverse representation of smaller Member States.

Without necessarily thinking of such moderations or modifications of arithmetic representation, in Member States we may need also to think of minorities other than the cultural groups we mentioned, and need to take more seriously into consideration the fact that what were the poor masses in nineteenth-century industrialising economies, are now indeed minorities of often quasi-permanently economically, financially and socially disadvantaged persons. It is by now generally received knowledge that such economic marginalisation has, for instance, pernicious consequences for the health of these marginalised groups. This has led to the formulation of a set of Ten Tips for Better Health by the British Chief Medical Officer, as shown in Table 2.1 alongside the Alternative Tips of the Townsend Centre for

International Poverty Research at Bristol University.<sup>7</sup> The first of the Alternative Tips is ‘Don’t be poor. If you are poor, try not to be poor for too long’; the second might very well have been ‘Don’t have poor parents’, because that will surely extend the time you are poor. The American dream may no longer apply in America, but it does not really apply in Europe either; ‘born as a dime that never becomes a dollar’ still exists. Transgenerational poverty and social marginalisation may have been more entrenched than is recognised, precisely because we are no longer dealing with the poor masses but with what are now relative minorities.

In the fundamental rights discourse, social rights are often not taken for what they are intended to be. Lawyers especially still systematically discuss them in terms of issues of justiciability, most often reducing their meaning to those of individual rights. By doing so, social rights have effectively become understood

**Table 2.1** Ten Alternative Tips for Better Health

	<b>The Chief Medical Officer’s Ten Tips for Better Health</b>	<b>Alternative Tips</b>
1	Don’t smoke. If you can, stop. If you can’t, cut down.	Don’t be poor. If you are poor, try not to be poor for too long.
2	Follow a balanced diet with plenty of fruit and vegetables.	Don’t live in a deprived area. If you do, move.
3	Keep physically active.	Don’t be disabled or have a disabled child.
4	Manage stress by, for example, talking things through and making time to relax.	Don’t work in a stressful low-paid manual job.
5	If you drink alcohol, do so in moderation.	Don’t live in damp, low quality housing or be homeless.
6	Cover up in the sun, and protect children from sunburn.	Be able to afford to pay for social activities and annual holidays.
7	Practise safer sex.	Don’t be a lone parent.
8	Take up cancer screening opportunities.	Claim all benefits to which you are entitled.
9	Be safe on the roads: follow the Highway Code.	Be able to afford to own a car.
10	Learn the First Aid ABC: airways, breathing and circulation.	Use education as an opportunity to improve your socio-economic position.
	<i>Source:</i> DoH (1999) <i>Saving Lives: Our Healthier Nation</i> . London: The Stationery Office	<i>Source:</i> Townsend Centre for International Poverty Research, University of Bristol

<sup>7</sup> Available at [www.bristol.ac.uk/poverty/healthinequalities.html](http://www.bristol.ac.uk/poverty/healthinequalities.html).

as non-discrimination rights, or have become reduced to other individual rights, such as the right to health morphing into the right to life, and the right to work or to adequate social subsistence rights becoming the right to property. In this manner, lawyers have contributed to eventually depriving social rights of their very nature as *social* rights.

This fitted neatly into what now goes under the general label of ‘neo-liberalism’, the legacy of Margaret Thatcher to Continental Europe, whose political programme was initially despised but gradually embraced, crucially also by social-democratic and Christian-democratic parties.

Human rights discourse in Europe has in the main overlooked that social rights are in function of and crucial to achieving social goods. Social rights essentially concern distributive justice. That requires democratic decision making, as it is liable to contestation in circumstances of scarcity. If legal discourse is to have an impact on the current populist wave we witness in all Member States, it will have to take social rights seriously, not as individual rights but as social rights. And it is far from obvious why that would detract from their character as legal rights, that is, not ‘legal’ in the British sense of ‘law’ as identical to ‘enforceable in a court of law’, but as legally binding duties on the part of public authorities to realise and respect the social goods they aim at within the polity.

#### IV. THE SEPARATION OF POWERS

The idea of the separation of powers seems perhaps the most difficult principle to reconcile with ideas of democracy, which after all unavoidably hinge on decision making by majority. When the ultimate legislative power is supposed to reside in the people or its elected representatives, the inference is that the legislature should hold primacy over the other powers that exercise authority within the state.

Let us here concentrate on the political powers of the legislature and the executive. These have become more merged than separated in parliamentary systems of government, precisely because the executive’s mandate is democratically legitimated through parliament.<sup>8</sup> The mechanics of democratic legitimation from the people to the actual wielders of power, whether one views this metaphorically as the chain-belt or as the plumbing of democratic legitimacy, seem to be in order. In this respect, parliaments and executives are no longer the mutually countervailing powers they were viewed to be in the nineteenth century. They are the very expression of the dominance of democracy.

<sup>8</sup> When, as in France, the other head of the executive, the President, who has ways of interfering with the government that is under control of the parliament, does so because he has a direct mandate from the electorate.

In practice, of course, we have a not-so-mechanical reality in which one has to concede that executives in all the Member States dominate the legislatures, if not formally then materially – that at least is the case in situations where the executive enjoys actual majority support. In a situation of more and more fragmented parliaments, there are situations in which ideologically coherent executives can get things done their way precisely because parliament is fragmented. But the opposite also occurs: the executive cannot have things their way because they fail to acquire support for a certain course of action. Brexit in the parliament under Theresa May provided many examples of the latter. Interestingly, the British electorate did not like the spectacle and, after a number of ‘hung’ or ‘nearly hung parliaments’, finally managed to elect a parliament with a clear majority. Many found the situation under May not a good thing for democratic government. Even if not necessarily sharing the political views of the Johnson Government, many found that, whoever has the majority, majoritarian government leads to better functioning of democratic government.

The desirability of majoritarian arrangements or of systems with a more broadly spread form of representation remains the object of distinct differences between Member States, as is reflected in the variety of their electoral systems. The EU’s institutions reflect a penchant for broad representation. The European Parliament has an electoral system of modified proportional representation, which is enhanced in order to guarantee the ability of the smallest Member States to be represented too (‘degressive proportionality’, Article 14(2) TEU). The Council has a voting system of in principle broad representation, modified in order to enhance the ability to act (the ordinary majority voting rule requiring 15 out of 27 Member States (55 per cent), but also 65 per cent of the population, with the aim of increasing the weighting of the vote by size of Member State (Article 16(4) TEU)). There is, moreover, still a practice of voting by consensus<sup>9</sup> whenever practicable, although there is some evidence of more majority voting.<sup>10</sup> So broad representation, giving a say to as many participants as possible, is institutionally the norm – with the corollary that often decisions cannot actually be made or made easily.

So what, then, is the rationale for spreading the exercise of power, for dividing powers and institutionally translating that also into separating them over different actors or institutions? For that purpose, we must turn to the origins of its introduction into European constitutional thought.

<sup>9</sup> Contrary to what is sometimes thought, nowadays a vote is always taken in the Council, even in cases of consensus (see the Comments on the Council’s Rules of Procedure, available at [www.consilium.europa.eu/en/documents-publications/publications/council-rules-procedure-comments/#](http://www.consilium.europa.eu/en/documents-publications/publications/council-rules-procedure-comments/#), March 2016, at 53), though a vote only takes place when there is the certainty that it will pass (there are no cases of a proposal’s being rejected in the Council).

<sup>10</sup> See L Besselink, K Swider and B Michel, ‘The impact of the UK’s withdrawal on the institutional set-up and political dynamics within the EU’ (2019), Research paper requested by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the AFCO Committee, 16–18.

The idea of separating the exercise of powers over various public authorities, though not novel, took hold in eighteenth-century writings with the rationale of avoiding despotism. It was canonised in the French Revolution, forming part of such documents as the *Déclaration des droits de l'homme et du citoyen*.<sup>11</sup> Around that time, the archetype of the despot was the fearsome Eastern, Persian, in particular Ottoman or Turkish, prince, probably enhanced by the experience and memory of the Second Siege of Vienna of 1683. The problem with the despots was that they considered everything their property, to dispose of at their discretion. Their power is *δεσποτεία*, despotism, the power over persons and things they regard as theirs. Separation of powers was thought of as an antidote against such an accumulation of power, against *δεσποτεία*, which was viewed as the cause of maladministration of the polity.<sup>12</sup> In the eighteenth century this was taken to imply that to protect civil liberty, a division of powers was necessary.

This in fact is still prevailing as the very notion of liberty in a democracy under the rule of law. It is hardly a coincidence that those leaders who have difficulty with having to share the exercise of public powers, with division and separation of powers over various actors and institutions, are the same leaders who have a problem with things liberal. Is it a coincidence that in its extreme form they claim to strive for an 'illiberal democracy'? Is it a coincidence that these are the same leaders who do away with division of power in the traditional understanding? Is it a coincidence that they happen to have as their ultimate programme to accrue as much power as possible in few or even one pair of hands, considering 'countervailing powers' as a diminution of their elective title? Despotism is a threat to liberty. It is a threat to democracy as well, by pushing out and stymieing other voices. It undermines the openness required for democracy under the rule of law, and required for attaining the common good.

## V. JUDICIAL PROTECTION

Concerns about the rule of law focus strongly on the position of the judiciary in some of the EU Member States – the judiciary, which in parliamentary systems is the most separate branch of government in the classic understanding of the *trias politica*. Despots dislike courts' and judges' independence. They actually dislike any independence in the judicial system, including independence of the public prosecution. That is why they like to have a firm grip over who is prosecutor general and other prosecutors and investigators. We have seen moves in

<sup>11</sup> Art 16, 'Toute Société dans laquelle la garantie des Droits n'est pas assurée, ni la séparation des Pouvoirs déterminée, n'a point de Constitution.'

<sup>12</sup> A classic place is the third book of Plato's *The Laws*, where it is said of the Persian Empire that 'its present evil administration is due to excess of slavery and of despotism' (Plato, *The Laws*, 698a) (the number refers to the so-called Stephanus pages, which has been the standard reference in all critical editions since the end of the 16th century).

that direction in the USA recently<sup>13</sup> and in Ukraine with every change of regime over the last decades,<sup>14</sup> and unfortunately it is also an issue in some of the EU Member States.

The annoyance with the independence of the judicial machinery that frustrates power-seeking elected despots, logically tempts them into ‘normalising’ the courts, filling them with politically friendly judges in order to make them work in function of the power holders’ claim to have authority because the people wants them to have that authority.<sup>15</sup>

Having said that, we cannot be naive enough to deny that indeed the judiciary is a branch of government, one of the powers of the *trias politica*. It is indeed exercising public authority, in the classical sense of *political* authority. This requires us to assess the democratic nature of the judiciary’s role and activity, a calibration of its democratic role in a state under the rule of law.

The democratic legitimacy of courts is determined by the democratic nature of their mandate. That mandate is substantively determined by the democratic nature of the law that grants them their powers: constitutional law, parliamentary acts, and possibly delegated acts and rules established by judicial self-government. Also substantively, the democratic nature of their mandate is determined by the democratic nature of the law that they have to interpret and apply.

Functionally, judges tend, to a very large extent, to understand their role and *habitus* to be to provide judicial protection of citizens against other citizens and, in relevant cases, against public authorities. This typically turns them into a counter-majoritarian institution. I would argue that in a non-pathological, that is an overall well-ordered and reasonably well-functioning, democratic state

<sup>13</sup>Beginning with Donald J Trump’s complaint on 2 November 2017 (less than a year in office) about the independence of the Justice Department: ‘The saddest thing is that because I’m the President of the United States I’m not supposed to be involved with the Justice Department, I’m not supposed to be involved with the FBI, I’m not supposed to be doing the kinds of things I would love to be doing and I’m very frustrated by it. I look at what’s happening with the Justice Department, why aren’t they going after Hillary Clinton with her emails and with the dossier and the kind of money ... ?’ Larry O’Connor Radio show, transcripts at <http://edition.cnn.com/TRANSCRIPTS/1711/05/ip.01.html>; for further context of his tweets along the same lines, see at [www.redstate.com/streiff/2017/11/03/donald-trump-not-happy-justice-department-neither/](http://www.redstate.com/streiff/2017/11/03/donald-trump-not-happy-justice-department-neither/). President Trump turned the somewhat convoluted constitutional doctrine of a strongly unitary executive (see, eg, L Lessig and CR Sunstein, ‘The President and the Administration’ (1994) 94 *Columbia Law Review* 1), into a diatribe for easy consumption, which asserts ‘I have an Article II [of the Constitution] where I have the right to do whatever I want as a President’; for a compilation of him making these assertions in the context of investigative powers of the Justice Department and the public prosecution, see at [https://youtu.be/sl\\_gO3uOds8](https://youtu.be/sl_gO3uOds8). In the context of his powers over State governors, the claim is that ‘[w]hen somebody is president of the United States, the authority is total’ (13 April 2020), see at [www.youtube.com/watch?v=r3QXrQDTDYo](http://www.youtube.com/watch?v=r3QXrQDTDYo).

<sup>14</sup>See T Kuzio, ‘Ukraine: Democratization, Corruption, and the New Russian Imperialism’ (2015) 53(5) *Praeger Security International* 327 *et passim*.

<sup>15</sup>At the time of writing we saw the totally politicised effects of that claim in the wrangling over the succession of Justice Ruth Bader Ginsburg, where the appointment had even become an electoral campaign issue of prime importance. Political appointments to the judiciary have a long history in the USA that goes back to the early decades of the skirmishes after President Adams, the Federalist, was defeated in the presidential elections and appointed the ‘midnight judges’ during the last weeks

under the rule of law, this makes it necessary to respect limits to judicial activism, for the sake of retaining the democratic character of the state.

In this context, I would argue there is a difference between a counter-majoritarian court and a (quasi-)legislative court. I am fully aware of the nuances in practice, and of the various pros and cons; but still there is merit in the distinction between a court that disapplies legislation ('negative legislation') because of its (more or less evident) conflict with a superior norm, and a court that issues injunctions telling the legislature what to do ('positive legislation'). The latter occurs not only when courts formally exercise the power to give injunctions ordering certain legislation to be passed; it also can occur when a court engages in 'consistent interpretation', that is an interpretation of legislation, whether a constitutional one or an EU or international norm, in such a manner that the legislation becomes in accordance with the superior norm. This may end up in courts' determining the manner in which the legislation that is being reviewed has to be applied in practice, which may be an application of the norm that was not evidently the one intended by the legislature.<sup>16</sup>

If we look at the case law of constitutional courts in the EU Member States, it would appear that in most instances they operate in a manner that respects and even legitimises the constitutional nature of the legislation, in so far as these courts – as far as I am aware – mostly reject claims of unconstitutionality. Hence, to the extent that that legislation has been democratically adopted, that case law legitimates and reinforces the democratic quality of the legislation. Also, there are constitutional court judgments that actually favour and reinforce the role of parliaments as against the powers of executives. Probably something similar could be traced in at least some of the case law of the Court of Justice of the EU – although here the difficulty must be acknowledged that there exist competing claims of the respective democratic credentials of EU acts and certain Member State acts.<sup>17</sup>

of his term before Jefferson, the Republican, could take up office. Clearly, this was an attempt to keep Federalist control over the federal courts after the defeat of the Federalists by the Republicans. Its legacy is *Madison v Marbury*, 5 US 137 (1803), but it acquired fame for reasons unconnected to the power grab over the judiciary.

<sup>16</sup>This plays out differently in different legal orders. In the 1980s, the *Hoge Raad* (Supreme Court) of the Netherlands found the system of parental authority in the Civil Code of 1972 to be in contravention of the right to family life under Art 8 ECHR. Instead of declaring relevant domestic legislation inapplicable (a power granted to courts in Art 94 of the Netherlands Constitution), it proceeded to develop a new system of parental authority under the guise of ECHR-consistent interpretation. In the UK, the matter is elaborately discussed in the context of s 3 of the Human Rights Act 1998, which instructs courts that '[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'; this in contradistinction to the declaration of incompatibility under s 4 of the 1998 Act. The literature is large, and instead of many, I here mention P Sales and R Ekins, 'Rights-consistent interpretation and the Human Rights Act 1998' (2011) 127 *Law Quarterly Review* 217, who discuss the division of powers core explicitly in relation to democracy and the rule of law.

<sup>17</sup>The initial lack of Court of Justice case law striking down secondary legislation, prior to data protection and anti-terrorism cases, may be a case in point, where the Court legitimates the political institutions' decisions. But the Court's initial reticence to strike down secondary legislation

I see problems when courts are dealing with general interest litigation. I am strongly inclined to think that courts and judges are not better able to assess what the general interest requires than the other political organs, and at any rate are not the best placed to make choices when various general interests clash. They are not well situated to take into account competing arguments about costs and benefits, particularly those that do not easily translate into law and legal considerations. Are courts the best situated, for instance, to balance the economic and political cost of the climate crisis and the public health crisis in situations of scarce financial means, when they are asked to order measures in this or that respect? I would think that in such situations, deference is judicial wisdom.

## VI. CONCLUSION

The rule of law is in most of its essential elements a pre-twentieth-century concept. We need to rethink constitutional fundamentals in the light of what they mean for democracy as we have come to understand it since the early twentieth century in the context of twenty-first-century circumstances. We need to balance democracy and the rule of law. We want to prevent turning the concept of a democratic state under the rule of law, *demokratische Rechtsstaat*, *demokratisk rättsstat*, *État de droit démocratique*, *demokratikus jogállamiság*, *demokratycznego państwo prawa*, into an oxymoron. Such expressions should rather be turned from oxymorons into pleonasms, the one element implying the other. To do so requires us to have recourse to constitutional principles beyond the rules as they stand; a reliance on the underlying values that may once upon a time have seemed self-evident but are no longer so. This also implies going beyond too lawyerly concepts of the rule of law and daring to move towards notions of political normativity, of political morals and ethics. That is not what we lawyers are necessarily good at. But it is one of those challenges that have to be faced nevertheless.

could also be viewed in the context of the EU versus the Member States. This is different for the case law favouring the institutional rights of the European Parliament, like Case 294/83 *Les Verts*, ECLI:EU:C:1986:166, Judgment of 23 April 1986, and Case C-70/88 *European Parliament v Council*, ECLI:EU:C:1990:217, Judgment of 22 May 1990, on the capacity of the European Parliament to bring an action for annulment of decisions interfering with its prerogatives.