EUROPEAN JUDICIAL SYSTEMS AS A CHALLENGE FOR DEMOCRACY

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European Judicial Systems as a Challenge for Democracy
Elżbieta Kużelewska, Dariusz Kloza, Izabela Kraśnicka and Franciszek Strzyczkowski (eds.)

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FOREWORD

BY PROF. MACIEJ SZPUNAR, ADVOCATE GENERAL AT THE COURT OF JUSTICE OF THE EUROPEAN UNION

The role of European Judiciary in the process of European integration cannot be overestimated. The achievements of European integration after the second world war are usually analysed from the perspective of political decisions that were made, initially, by the Founding Fathers and, subsequently, by the political leaders of the European countries. However, in the public debate we very often forget how much we owe to the two supreme jurisdictions of Europe, that is the Court of Justice of the European Union and the European Court of Human Rights.

One cannot deny that without some "revolutionary" decisions of the Court of Justice, the process of European integration would never come to the place where we are now. We would have never achieved the level of integration that, despite some shortcomings, still remains unique in comparison to all other initiatives of economic and political integration in the rest of the world. The Court of Justice takes the mission of ensuring that "law is observed" seriously and continues to assure that it is the rule of law which is at the heart of the European Union. The strength of the European Union comes essentially from the fact that it constitutes an autonomous legal order which rests on the concepts of direct effect and supremacy. These latter concepts were not only developed by, but – and this must be emphasized – originated in the case law of the Court of Justice. The landmark decisions of the Court of Justice gave life to and strengthened the internal market that still remains the cornerstone and the main achievement of the European integration. One would not exaggerate by saying that political initiatives would remain "wishful thinking" if they were not supported by the historic decisions of the Court of Justice.

The contribution of the European Court of Human Rights is equally significant. It assured that the protection of human rights on our continent became effective and universal. The limits of human rights are no longer restricted to national boundaries nor exposed to the danger of national authorities abusing their discretionary competences.

I am very happy that the group of young scholars, under the auspices of Elżbieta Kużelewska and Dariusz Kloza, has taken the initiative to explore the challenges for the European Judiciary that have emerged in recent years. It seems clear that despite its evident achievements, the process of European integration is, if not at a crossroads, at least at a moment where important choices have to be made. It is impossible to enumerate all these challenges. They stem not only from internal changes and developments of the European Union, but also from external threats.

The authors of the contributions to the book decided to concentrate their research on the response of the European Judiciary to the problems of modern democracy. The problem of the so-called democratic deficit has been present in the academic debate for many years. It has been discussed by political scientists, lawyers and economists. The continuing extension of the competences of the European Union, especially in the field economic and monetary policy, calls for the new assessment of the nature of the decision making process at the European level. Is this process sufficiently democratic? If not, what are alternative solutions? To what extent can one accept a possible shift from the traditional model of a democratic decision making process towards new models? These kinds of questions will have to be dealt with by the Court of Justice of the European Union as well as by the European Court of Human Rights. Clearly, the mere existence of judicial review does not make a decision making process democratic. It does, however, strengthen the accountability of decision making bodies. Moreover, it is for the European judiciary to shape the democratic framework of the decision making process. Will the response of the European judiciary to the new challenges be as brave and effective as in the past?

Maciej Szpunar
Luxembourg, March 2015

PREFACE

EUROPEAN INTEGRATION, DEMOCRACY AND THE COURTS

Toutes ces institutions pourront être modifiées et améliorées à l'expérience
Jean Monnet[1]

The process of European integration is "evolving and the form it finally takes still cannot be predicted".[2] The European judiciary – i.e. the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR) and national courts interpreting and applying European law *sensu largo* – have shaped this process actively, alongside the Founding Fathers, European nations, European states and their citizens. The involvement of judiciary raises its own wide range of questions concerning the very nature of democracy. Much ink has been already spilled over issues such as democratic legitimacy, subsidiarity and accountability, the rule of law or judicial activism. But it was the recently celebrated 50th anniversaries of *Van Gend en Loos* (1963)[3] and *Costa v ENEL* (1964)[4] judgements that gave us further impetus to ponder about the place of the European judiciary in the democratic life in the Old Continent and their role in the process of its integration.

Therefore, under the auspices of the Centre for Direct Democracy Studies (CDDS) at the Faculty of Law, University of Białystok, in March 2014 we issued a call for papers and seventeen scholars from across Europe, predominantly young researchers, have kindly responded thereto and shared their views on the European judiciary as a challenge for democracy.

The present book constitutes the third fruit of our academic interest in the questions posed by European integration and democracy. In 2012 the Centre established a dedicated, peer-reviewed book series that produced, up-to-date, two volumes.[5] It is edifying that from this volume onwards, the reputable

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1 J. Monnet, *Les États-Unis d'Europe ont commencé*, Robert Laffont, Paris 1955, 141 pp.

2 K.-D. Borchardt, *The ABC of European Union law*, Publications Office of the European Union, Luxembourg 2010, p. 32.

3 Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

4 Case 6/64, *Flamino Costa v ENEL* [1964] ECR 585.

5 The two previous books were: E. Kużelewska and D. Kloza (eds.), *The Challenges of Modern Democracy and European Integration*, European Integration and Democracy Series, Vol. 1,

Belgian-based international publishing house *Intersentia* has decided to publish this series.

The various contributions to the present volume have been split into two parts. The first provides ten chapters on the judicial systems of the European Union (EU), discussing, *inter alia*, recognition of democratic principles in the case law of the CJEU, contribution thereof to the democratisation of the Union and reception of EU law in the Member States. The second part discusses the judicial means to protect human rights in Europe, consisting of three chapters devoted to the promise of advisory opinions of ECtHR as well as to democratic standards for voting and for fair trial.

The authors of this collection of papers have done an excellent and outstanding job illuminating – as Advocate General Maciej Szupnar, who kindly provided this book with a foreword, puts it – "the response of the European judiciary to the problems of modern democracy". The series editors, the reviewers and the peer-reviewers helped us ensuring academic quality of this volume. We have been fortunate to work with *Intersentia* and our editor Tom Scheirs. Further invaluable assistance was received from Michał Czerniawski, Valentin Gros, Władysław Jóźwicki and Monika Kokštaitė. We thank them all. Finally, each of us, editors, undersigned, thank each other for this piece of teamwork.

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Białystok – Łódź – Brussels, March 2015

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CONTENTS

PART TWO
THE EUROPEAN COURT OF HUMAN RIGHTS

LIST OF ABBREVIATIONS

AG	Advocate General
AO	Advisory Opinion [ECtHR]
BVerfG, FCCG	Federal Constitutional Court [Germany] (Bundesverfassungsgericht)
CC	Constitutional Court
CCP	Code of Criminal Procedure [Poland]
CE	Central Europe
CFR	Charter of Fundamental Rights of the European Union
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CoM	Committee of Ministers [CoE]
EAW	European Arrest Warrant
EC	European Community
EC, Commission	European Commission
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EEC	European Economic Community
EFSF	European Financial Stability Facility
EFSM	European Fiscal Stabilisation Mechanism
ELA	Emergency Liquidity Assistance
EP, Parliament	European Parliament
ESM	European Stability Mechanism
EU	European Union
GCh	Grand Chamber [ECtHR]
GDP	Gross Domestic Product
ISDS	Investor-State Dispute Settlement
MEP	Member of European Parliament
MS	Member State
NC	National Court
NCA	National Competition Authorities
OMT	Outright Monetary Transactions
SMP	Securities Markets Programme

SRM	Single Resolution Mechanism
SSM	Single Supervision Mechanism
TEAEC, TAEC	Euratom Treaty, Treaty establishing the European Atomic Energy Community
TEC	Treaty establishing European Community
TECSC	Treaty establishing the European Coal and Steel Community
TEEC	Treaty establishing the European Economic Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TTIP	Transatlantic Trade and Investment Partnership
UK	United Kingdom of Great Britain and Northern Ireland