Studies in European Economic Law and Regulation 12

Narin Idriz

Legal Constraints on EU Member States in Drafting Accession Agreements

The Case of Turkey

Springer

Studies in European Economic Law and Regulation

Volume 12

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ISSN 2214-2037 ISSN 2214-2045 (electronic)
Studies in European Economic Law and Regulation
ISBN 978-3-031-04101-3 ISBN 978-3-031-04102-0 (eBook)
https://doi.org/10.1007/978-3-031-04102-0

This Springer imprint is published by the registered company Springer Nature Switzerland AG
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

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List of Abbreviations

AA	Ankara Agreement (EEC-Turkey Association Agreement)
AG	Advocate General
AP	Additional Protocol
BVerGE	Bundesverfassungsgericht (German (Federal) Constitutional Court)
CCT	Common Customs Tariff
CEECs	Central and East European Countries
CFR	Charter of Fundamental Rights
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
Coreper	Committee of Permanent Representatives
DCFTA	Deep and Comprehensive Free Trade Area
EA	Europe Agreement
EAEC	European Atomic Energy Community
EC	European Community
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice (also referred to as CJEU)
ECR	European Court Reports
ECSC	European Coal and Steel Community
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EU	European Union
GATT	General Agreement on Tariffs and Trade
GG	*Grundgesetz* (Basic Law, i.e. the German Constitution)
GCC	German (Federal) Constitutional Court (BVerGE)
JHA	Justice and Home Affairs
OEEC	Organisation for European Economic Co-operation
OJ	Official Journal
PSC	Permanent Safeguard Clause

SAA	Stabilisation and Association Agreement
SAP	Stabilisation and Association Process
TCN	Third-Country National
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UK	The United Kingdom
UKTI	The United Kingdom Trade and Investment
WTO	World Trade Organization

Chapter 1
General Introduction

1.1 Starting Point

The European Economic Community (EEC) and Turkey signed an Association Agreement in Ankara on 12 September 1963 with the purpose to "facilitate the accession of Turkey to the Community at a later date".[1] Since 1963, Turkey's quest for joining the EU has often been resembled to a long, rough, winding road or to the story of Sisyphus,[2] who was doomed to roll a large rock up a hill, only to watch it roll back down and then try again. As difficult as Sisyphus' task seems to have been, that of Turkey has been at least as hard, as each time the rock rolled down, Turkey found a larger rock to roll and a higher hill to climb. The hill grew to become a mountain with a life of its own, which never stopped growing ("widening and deepening" in EU terminology), almost as if out of control of the Gods (the Member States of the EU) that had created it.

This book is as much about the growing rock (*acquis communautaire*) and the mountain (the EU) as it is about the insurmountable task of Sisyphus (Turkey's accession process). Through the tale of Sisyphus, one also learns about the story of the mountain, which managed to partly escape the rule of its creator Gods to acquire a life of its own. The story sheds light on the process in which the once omnipotent Gods of the mountain saw their hands and feet tied on certain occasions. As will be demonstrated in this book, many elements in the mountain joined forces to form the spirit of the mountain (EU constitutional law) which, combined with tricks of faith and some magic (facilitated by the case law of the Court of Justice of the EU), managed to constrain its creator Gods (the Member States) to some extent so that the mountain could develop to lead a relatively autonomous and independent life.

[1] See the preamble of the Agreement, OJ C 113/2, Eng. Ed., 24.12.1973.

[2] For two examples, see Çakır (2011); Tayanç (2012).

N. Idriz, *Legal Constraints on EU Member States in Drafting Accession Agreements*,
Studies in European Economic Law and Regulation 12,
https://doi.org/10.1007/978-3-031-04102-0_1

Turkey's accession prospects and the drafting of a possible Accession Agreement seem very far-fetched today.[3] It appeared less so when the author embarked on writing a PhD on this topic, around a year after the opening of Accession Negotiations with Turkey.[4] Those were different times indeed. Times in which EU enlargement was still considered to be the most successful foreign policy of the EU,[5] and the rule of law issues in Turkey and in some of the EU Member States were not yet in sight.[6] Today, the democratic backsliding in Poland and Hungary and the EU's unpreparedness and inability to deal with these serious challenges, have repercussions for both the EU legal order as well as its enlargement policy.[7] What was a Sisyphian task for Turkey might now also turn into one for other candidate countries for EU accession in the Western Balkans,[8] as EU Member States act with extra caution so as not to repeat the mistakes of the past.[9] It is difficult to predict what this

[3] According to the Commission's latest Progress Report, [t]here are *serious deficiencies* in the functioning of Turkey's democratic institutions. Democratic backsliding continued during this period." Emphasis added. See, Turkey 2021 Report, SWD(2021), Strasbourg, 19.10.2021, p. 3. Many scholars classify Turkey as 'competitive authoritarian' or 'weak authoritarian', but claim it is moving towards 'full' or 'new' authoritarianism. See, Çalışkan (2018); Tansel (2018); Esen and Gumuscu (2016); Öktem and Akkoyunlu (2016); Polat (2016); Somer (2016).

[4] Accession negotiations with Turkey were launched in an Intergovernmental Conference on 3 October 2005. That is also the date on which the Council adopted the Negotiating Framework for Turkey. Available online at: http://ec.europa.eu/enlargement/pdf/st20002_05_tr_framedoc_en.pdf.

[5] Schimmelfennig (2008), pp. 918–921; Hillion (2010), pp. 5–6. For the limits of the EU's transformative power in light of recent global shifts, see Öniş and Kutlay (2019).

[6] There is a substantial amount of literature on the topic of democratic backsliding, the challenges it presents for the Union, and possible ways to address it. For a selection of books and articles on the topic, see Muftuler-Bac (2019); Closa and Kochenov (2016); Hillion (2016); Hirsch Ballin (2016); Jakab and Kochenov (2017); Kochenov (2017); Pech and Scheppele (2017); Bogdanowicz and Schmidt (2018); Kelemen and Pech (2019); Scheppele et al. (2020); Pech and Kochenov (2021).

[7] For the repercussion on the rule of law, see ibid.; for the repercussions on EU enlargement policy, see Chap. 4, Sects. 4.3.3 and 4.3.4.

[8] It should be noted that it is not only caution, but also other political factors that resulted in the stalling of Albania and North Macedonia's accession processes. The decision of the General Affairs Council of 25 March 2020 to open accession negotiations with both countries, was also endorsed by the European Council that convened the next day. See, General Affairs Council, Council Conclusions on Enlargement and Stabilisation and Association Process, Brussels, 25 March 2020, 7002/20. The latest obstacle blocking the process has been placed by Bulgaria in the Council meeting of the Ministers of EU Affairs of 17 November 2020. Bulgaria threatened to veto the opening of accession negotiations until North Macedonia acknowledged its historic and linguistic connection to Bulgaria. See, Jacapo Barigazzi, "Bulgaria blocks EU membership talks for North Macedonia", *Politico,* 17 November 2020. Available online at: https://www.politico.eu/article/bulgaria-blocks-eu-membership-talks-for-north-macedonia/.

[9] The main criticism regarding the enlargement process to the Eastern and Central European States is that the pre-accession process and monitoring carried out by the Commission failed to prepare these states to become fully functioning Member States. The pre-accession strategy was primarily focused on institutional reform and the necessary changes to bring national laws in line with the *acquis communautaire*, without paying due attention to the quality of these laws, their implementation or internalisation. In other words, the focus was on the quantity of reforms rather than their

caution will translate into when Member States decide to adopt the Negotiating Frameworks for Albania and North Macedonia,[10] and later for the remaining potential candidates.[11] Whatever this may be, the arguments and analysis laid down in all the chapters of this book (except for Chap. 3),[12] would also be applicable to the accession processes of any of the candidate and future candidate states.

As to the main research question this book aims to address, it is whether Member States of the EU have a completely free hand in drafting Accession Treaties, or whether there are some legal constraints on their primary law-making function in this context. It is worth emphasising from the outset that the book focuses exclusively on Member States' primary law-making function under Article 49 TEU.[13] It argues that such constraints exist, and accordingly, tries to identify these constraints as well as the sources they flow from, thereby hoping to provide some insight into the nature of the EU legal order. The point of departure as well as the main focus of the book is the proposed permanent safeguard clause (PSC) on free movement of persons in the Negotiating Framework for Turkey. It is with reference to the PSC that legal provisions, rules, principles and norms constraining Member States as primary law makers in the context of drafting an Accession Agreement are identified.

Before going into discussing how the issue is approached and structured, the term "legal constraints" is defined and discussed so as to shed light on the types of constraints covered by this study. It should be noted that the focus is exclusively on constraints flowing from EU law, even though occasionally the most obvious constraints flowing from public international law might be mentioned as well. Since

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quality. For an in-depth discussion see, Kochenov (2008); Nicolaidis and Kleinfeld (2012), pp. 7–16; and Louwerse and Kassoti (2019).

[10] It is noteworthy that in its 2018 Communication laying down "A credible enlargement perspective for and enhanced EU engagement with the Western Balkans", the Commission identified "the application of the principle of free movement of workers" to the future Member States as "an issue of concern to EU and Western Balkan citizens alike". The Commission explains that this issue is to be addressed during the negotiations by the adoption of transitional measures. See, Commission Communication 2018, COM(2018) 65 final, Strasbourg, 6.2.2018, p.8. As far as the Negotiating Frameworks for Albania and North Macedonia are concerned, they were prepared by the Commission and presented to the General Affairs Council on 1 July 2020. They have not been adopted yet (as of 1 October 2021); hence, they are not yet publicly available. See the Commission Press Release, "Commission drafts negotiating frameworks for Albania and North Macedonia", Brussels, 1 July 2020, IP/20/1021.

[11] The potential candidates for EU accession are Bosnia and Herzegovina and Kosovo.

[12] Chapter 3 focuses on the bilateral framework of association between the EU and Turkey, which developed over more than half a century. Because of its special trajectory of development, this regime contains idiosyncratic rules applicable only to Turkey.

[13] It does not deal with issues or constraints on Member States in the context of Article 48 TEU. Primary law in the Union legal order is composed of the Treaties (Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), OJ C 202/1, 7.6.2016), the Charter of Fundamental Rights (CFR), and various Acts of Accession, which contain the terms of accession for new Member States. In other words, this book deals only with this last aspect of primary law. Acts of Accession, their protocols and annexes constitute provisions of primary law. See, Case C-445/00 *Austria v Council* ECLI:EU:C:2003:445, para. 62.

the concept of constraint and the premise on which this study is based, i.e. that the EU legal order is of constitutional nature, are inextricably linked they will be elaborated on briefly below. After discussing the salient characteristics of the EU legal order that merit its categorisation as constitutional, analogies will be drawn from other constitutional legal orders, which have developed implicit and explicit rules (constraints) in order to protect their most basic and foundational characteristics from arbitrary change.

There are many examples, but the German, and Indian legal orders protected by their constitutions are particularly insightful for our purposes. Next, to complete the endeavour of defining "legal constraints", a working definition of the term is developed in light of the preceding discussion on the nature of the Union legal order. This working definition, as well as discussions underlying the characteristics of the term, lie at the basis of the methodology chosen for this study.

After explaining the methodological course adopted for this study and the rationale underlying this choice, the final term that needs clarification in the introduction is: the "permanent safeguard clause". After briefly discussing the vague wording provided in the Negotiating Framework, the term is defined in light of the common features of other safeguard clauses used in past Treaties and Accession Agreements. Last but not least, comes the description of the structure of the book, which identifies constraints flowing from three levels of analysis: the pre-accession level, the accession process itself, and the constitutional foundations of the Union. The approach taken in those parts and their structure is explained below at the very end of this chapter.

1.2 Existence of "Legal Constraints": Nature of the EU Legal Order

"Law not only constrains government but also constitutes and enables it."[14] It enables action by legitimizing assertions of authority by those who fulfil its requirements. Thus, it is argued that these enabling rules also act as constraints.[15] In other words, "constitutional constraint and empowerment are two sides of the same coin".[16] In the EU legal order the primary instruments that perform the function of constituting and enabling have been the founding Treaties, which have for long been regarded as "the constitutional charter" of the Union by the Court of Justice.[17] As

[14] Bradley and Morrison (2013), p. 1124.

[15] Bradley and Morrison (2013), p. 1124.

[16] Fallon (2009), p. 1035.

[17] See Case 294/83 *Les Verts* ECLI:EU:C:1986:166; and *Opinion 1/91 EEA* ECLI:EU:C:1991:490. Since Article 1(3) TEU provides that "[t]he Union shall replace and succeed the European Community", it could be argued that the Treaties are now "the constitutional charter" of the EU as well.

early as in *Van Gend en Loos*, the Court held that the subjects of the new legal order created by the EEC Treaty were not only Member States but also their nationals. The new legal order conferred on individuals both rights and obligations. According to the Court, "[t]hese rights arise not only when they are expressly provided by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community".[18] This illustrates clearly that the Treaties are the main source of empowerment and constraint on Member States, as well as other actors operating within the Union legal order. Another source of constraint that is worth mentioning is the case law of the Court interpreting the Treaties.

Just like constitutions function in states, in the EU legal order the Treaties establish the actors/institutions as well as the procedures through which the legal order operates. One of these institutions, the Court of Justice of the EU (CJEU, the Court, or the Court of Justice) is empowered to "ensure that in the interpretation and application of the Treaties the law is observed".[19] In their functioning, both the institutions created by the Treaties, as well as the Member States, which have laid down the rules in the Treaties, are equally bound and constrained by them. The Treaties lay down both procedural and substantive constraints on the Member States as well as on other actors/institutions that function within their scope. For their actions to be legal and legitimate, all actors functioning within the EU legal order need to comply with both types of constraints.

It should be noted from the outset that it is not possible to find the word "constraint" in legal dictionaries.[20] One reason for its absence might be the fact that the nature and form of "constraints" in law ("legal constraints") are different in different jurisdictions as well as in different areas of law depending on whom they apply.[21] This brings the necessity to coin our own definition in light of existing literature on legal constraints and taking account of the specificities of the EU legal order (as well as using dictionaries providing the colloquial definition of the term).[22]

To begin with the nature of the EU legal order, as it serves as a stepping-stone to move from the issue of "existence" of constraints to that of "identifying" them, there

[18] Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1, p. 12.

[19] See Article 19(1) TEU.

[20] Garner (2001, 2007).

[21] Different studies focus on the constraining power of different types of legal rules on different actors. For an example of legal constraints on the powers of the president in the US legal order, see Bradley and Morrison (2013); for a conceptual study on the sources of constraints on judges as decision makers, see Braman (2010), pp. 204–216; for a study examining constitutional constraints on judicial as well as non-judicial actors in the US legal order, see Fallon (2009), pp. 975–1037.

[22] (1). A constraint is something that limits or controls the way you behave or what you can do in a situation. (2). Constraint is control over the way you behave which prevents you from doing what you would prefer to do. See, Sinclair (1994), p. 302. Another dictionary provides the following definition: "the act of constraining; restraint, compulsion, necessity; a compelling force; a constrained manner; reserve, self-control. [OF constreign-, stem of constreindre, L constringere (stringere, to draw tight)]". See, Kirkpatrick (1989), p. 279.

is an overwhelming agreement among EU law scholars that despite their international law origins, the Treaties on which the legal order is founded, have gradually evolved over the decades and transformed the order to one of constitutional nature.[23] This process of constitutionalisation has been driven by the Court of Justice and consolidated by subsequent Treaty amendments. What caused divergence of opinion regarding the nature of the legal order has been the fact that it contains both constitutional and international elements at the same time.[24] The divergences of opinion on the role of Member States as primary law makers under Article 48 TEU and of the end product under the Treaty revision procedure is a good illustration for the latter point. While for some the Treaty revision procedure is "more compatible with an international treaty than with a constitution",[25] others see the procedure differently. For instance, Besselink acknowledges the prominent role of the intergovernmental conference, but argues that "this does not detract from its being embedded in the EU structures",[26] as Article 48(3) TEU stipulates that "the European Council shall define the terms of reference for a conference of representatives of the governments of Member States".

The contested nature of the EU legal order necessitates a closer look at the qualities it manifested at its various stages of development and its current state.[27] This discussion is important not only in its own right, but also because it will demonstrate the existence of "legal constraints". Without this discussion or demonstration, the book could be criticised on the ground that it is built on an assumption of the existence of constraints. In short, the brief discussion on the nature of the legal order in the introduction will demonstrate the *existence* of "legal constraints" and will enable us to move on to the issue of identifying those constraints in the following parts. Moreover, this discussion will also influence the definition of the term "legal constraints", which is central for the findings of this study.

Unfortunately, the difficulties are not only limited to the novel and unique nature of the legal order under analysis, but also extend to our use of ancient concepts, which have acquired different meanings over centuries, and were developed in the

[23] Weiler (1990–1991), p. 2410; Dashwood qualified it as "constitutional order of states", see Dashwood (1998), pp. 201–216; Piris (1999), p. 559; Craig (2001), p. 125; Tanchev (2009), p. 29; Cuyvers (2013a), pp. 712–713.

[24] Martins (2009), p. 74.

[25] Martins (2009), p. 74.

[26] Besselink (2009), p. 268. For a similar argument, see von Bogdandy (2012), pp. 766–767.

[27] We are beyond the stage in which the EC/EU was defined as *sui generis*. Closer examination and comparison with the American experience demonstrates that the origins and development of the EU might not have been as unique as initially thought. For an in-depth comparison of these two traditions, see Schütze (2009), ch. 1; 2016, ch. 2. However, even though there are much better terms to describe what the EU can be considered to be at the moment, such as a "Federation of States", "a supranational federation", "federative association" or "an inverted confederation with a federate superstructure", the complex nature of the EU does not seem to lend itself to an easy classification. For the authors of these terms, see respectively Schütze (2016), p. 45; von Bogdandy (2012); Rosas (2003); Cuyvers (2013b), ch. 3.

framework of the nation-state.[28] Hence, the need to define what is meant by those terms: the most central ones for this book being constitution, constitutionalisation (of the EU legal order) and constitutionalism (in the context of the latter order).

1.2.1 Constitutional or Not?

As Grey eloquently puts it "[c]onstitutionalism is one of those concepts, evocative and persuasive in its connotations yet cloudy in its analytic and descriptive content, which at once enrich and confuse political discourse."[29] To illustrate his point, he provides examples of mutually inconsistent definitions of the term used by different scholars in different periods.[30] For our purposes the focus will be exclusively on the qualities of the term that fit the emergence and development of the EEC/EC/EU legal order, which goes back around six decades. To begin with what is considered as the "one essential quality"[31] or "the centre piece"[32] of constitutionalism and constitutions respectively, it is their role as "a legal limitation on government"[33] or "the limitation of power",[34] in other words, their role as constraint on the exercise of public power.

"A central way the Constitution [the Treaties] constrains is by constituting or otherwise giving rise to institutions and legal practices [procedures] that perform constraining function."[35] As mentioned above, constraint and empowerment in this sense are inseparable. "Constraint inheres not just in threats of sanctions",[36] as will be discussed in more detail below, "but also in the incapacity to act with recognized authority beyond the sphere of tenable claims of lawful power, and in norms that define official roles and obligations."[37]

In the EU legal order, the founding Treaties laid down the institutional structure as well as the rules and procedures for its lawful functioning. In this "thin sense" of the term constitution, as the law establishing and regulating the main organs of

[28] The problems arising out of the use of concepts that emerged in the context of the nation-state to describe the nature of the EU legal order has been called "the problem of translation". See, Walker (2003), pp. 27–54.

[29] Grey (1979), p. 189.

[30] See Grey (1979), p. 189. For more information on the features of 'ancient constiutionalism' versus 'modern constitutionalism', see La Torre (2007), pp. 1–12.

[31] McIlwain (1947), p. 21; cited in Grey (1979), p. 189.

[32] Castaglione (1996), p. 417.

[33] McIlwain (1947), p. 21; cited in Grey (1979), p. 189.

[34] Castaglione (1996), p. 417.

[35] Fallon (2009), p. 995.

[36] Fallon (2009), p. 1035.

[37] Fallon (2009), p. 1035.

government and their powers,[38] the founding Treaties were indisputably of constitutional nature. As far as the Treaties encompassed the fundamental legal norms underlying the polity, in addition to establishing the institutional framework, which was to create general legal norms, they were also a constitution in a "material sense".[39] However, as Curtin explains, the material constitution refers to "*the totality* of fundamental legal norms that make up the legal order of the polity",[40] which is not limited to the Treaties, but includes the contributions of the Court of Justice. By developing the principles of supremacy, direct applicability and direct effect, the Court instigated the development of the empirical constitution, which refers to the way in which the EU is organized and functions as a matter of fact.[41] What the Treaties have never been, however, is a democratic or political constitution, as the emphasis in the latter conception of the term lies in the manner in which the constitution is adopted, that is deliberated by the people directly or through their representatives.[42]

The "thick sense" of the constitution is more controversial as different scholars emphasize different features of the term.[43] For instance, Griller bases this "thicker" concept on the European Enlightenment, the gist of which is illustrated in Article 16 of the French Declaration of the Rights of Man and of the Citizen (1789): "Any society in which the guarantee of rights is not secured, and in which the separation of powers is not determined, has no constitution at all."[44] Hence, according to Griller, a constitution needs to perform three important functions: firstly, to recognize the rights of citizens; secondly, to organize the relations between the government and those governed; and lastly, to establish a system of checks and balances among the various branches of government. In the EU, there are now rules in place that fulfil all these criteria.[45]

To begin with the first of Griller's criteria, the Court established at the very beginning that individuals (Member State nationals) are granted rights by the Treaty

[38] Raz (1998), pp. 152–153; cited in Craig (2001), p. 126.

[39] Griller (2008), p. 30.

[40] Emphasis added. Curtin (2009), p. 77.

[41] Curtin (2009), p. 77.

[42] Curtin (2009), pp. 77–80.

[43] Craig cites seven features that Raz finds important for a constitution to be considered a constitution in the thick sense: firstly, it needs to be *constitutive*, i.e. define the main institutions of government and their powers; secondly, it needs to provide a *stable* framework for the legal and political institutions; thirdly, it needs to be enshrined in one or few *written* documents; fourthly, it needs to be *superior law*; fifthly, it needs to be *justiciable*; sixthly, it needs to be *entrenched*, i.e. amendable only by special procedures; and lastly, it needs to express a *common ideology*. Craig acknowledges that any constitution will contain these elements to a lesser or greater degree. Not all constitutions will contain all the elements listed. Yet, it is important to identify them in order to understand the nature of constitutions in general. See, Raz (1998); cited in Craig (2001), pp. 126–127.

[44] Griller (2008), pp. 29–30.

[45] Curtin also identifies modern constitutionalism with three elements. Those are limited government, adherence to the rule of law and protection of fundamental rights. See, Curtin (2009), p. 80.

on which they can rely and have enforced in national courts.[46] Yet, that was just the beginning. Subsequently, taking the hints of some national constitutional courts, the Court also established that individuals have fundamental rights, which Union institutions and Member States need to respect when they act within the scope of EU law. Drawing inspiration from the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the common constitutional traditions of the Member States, the Court established that fundamental rights constitute general principles of EU law. Those rights are now enshrined in a Charter (Charter of Fundamental Rights (CFR)), which has the same status as the Treaties.[47]

Another monumental development in the history of European integration was the move from economic to political integration with the signature of the Maastricht Treaty and the inclusion of intergovernmental cooperation in the two new pillars of the EU: Common Foreign and Security Policy, and Justice and Home Affairs. To mark the importance of this shift, and create a concept that would bring Member States' nationals closer to the integration project, the status of Union citizenship was introduced.[48] While the concept of Union citizenship was regarded as empty and superfluous at the beginning, the Court managed to flesh it out. It proclaimed that it "is destined to be the fundamental status of nationals of Member States".[49] In short, in terms of securing the rights of individuals, the EU legal order has moved a long way forward compared to its early days.

As to the latter two criteria, separation of powers is foreseen both vertically and horizontally in the EU.[50] The Treaties lay down the division of competences between the Union and its Member States, and provide for procedures through which the Union institutions interact in order to be able to legislate. The Court makes sure that those procedures and the balance between the institutions is respected,[51] which leads Griller to the conclusion that the Treaties can be qualified as a constitution.[52]

1.2.2 Evolution Towards Further Entrenchment of Rights

Since the French revolution individual rights, together with representative government, (which according to Bellamy was largely assimilated to the principle of

[46] Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1.

[47] See Article 6(1) TEU. Charter of Fundamental Rights of the European Union (CFR), OJ C 202/389, 7.6.2016.

[48] See Article 20 TFEU.

[49] Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458, para. 31.

[50] See Articles 5 and 13 TEU.

[51] See Case 138/79 *Roquette Fréres* ECLI:EU:C:1980:249; Case 139/79 *Maizena* ECLI:EU:C:1980:250; and Case C-70/88 *Parliament v Council* ECLI:EU:C:1990:217.

[52] Griller (2008), p. 32.

separation of powers), have defined constitutionalism for a long time. However, rights have become predominant in recent years. "Rights, upheld by judicial review, are said to comprise the prime component of constitutionalism, providing a normative legal framework within which politics operates."[53] While rights have risen to provide the substantive aspect of the constitution, political mechanisms and procedures have been relegated to a secondary role. Accordingly, argues Bellamy, "constitutionalism has come to mean nothing more than a system of legally entrenched rights that can override, where necessary, the ordinary political process".[54] In the same vein, Dworkin pointed out that constitutionalism is increasingly understood as being no more than "a system that established legal rights that the dominant legislature does not have the power to override or compromise".[55] The question is whether that is the case in the EU legal order as well, and if so, to what extent? The experiences of the German and Indian constitutional orders, which are briefly discussed below, provide useful clues and guidance that enable us to draw some conclusions for the EU legal order as well.

The latter definition of constitutionalism implies the entrenchment of certain individual rights or a hierarchically superior position in comparison to other provisions of a constitution. While many constitutions declare that it is "the people" who are sovereign and exercise that power through the democratic process, they also establish limits on what can and cannot be done within that process. As far as individual rights constrain and limit the legislature, this is viewed as the clash of democracy versus rights,[56] or the clash of ancient versus modern constitutionalism,[57] also referred to as the counter-majoritarian difficulty.[58] What led to the rise of constitutionalism in the latter sense were events such as the atrocities committed during the Second World War, post-colonialism, and military interventions in troubled democracies.[59] They resulted in the insertion of "immutable constitutional clauses" protecting the rights of the individual in the constitutions of many states.[60]

[53] Bellamy (1996), p. 436.

[54] Bellamy (1996), p. 436.

[55] Dworkin (1995), p. 2.

[56] Katz (1996), pp. 252–253.

[57] La Torre (2007), pp. 1–12.

[58] The counter-majoritarian difficulty is seen as the "intrinsic constitutional dilemma", which arises in legal systems in which the judiciary has the ultimate authority to interpret the constitution and is able to overrule unconstitutional acts of the executive and legislative branches through judicial review. See, Mohallem (2011), p. 765.

[59] This logic can be seen in Klass Case of the GCC: "The purpose of Article 79, paragraph 3, as a check on the legislator's amending the Constitution is to prevent the abolition of the substance or basis of the existing constitutional order, by formal legal means of amendment . . . . and abuse of the Constitution to legalize a totalitatrian regime." See, Privacy of Communications Case (Klass Case), BverfGE, 1 (1970).

[60] Mohallem (2011), pp. 765–767. Not all examples of immutable clauses deal directly with the protection of individual rights. Often, it is the form of government that is protected. For instance, Article 89 of the 1958 French Constitution, Article 139 of the 1947 Italian Constitution, Article 288 of the 1975 Portuguese Constitution and Article 4 of the 1982 Turkish Constitution protect the

While some of those rights were spelled out explicitly by the constituent power (*pouvoir constituant*) that had drafted the constitution in some states, such as Germany and Brazil,[61] in others, the same result was achieved by judicial activism. Constitutional courts in countries, such as India,[62] South Africa[63] and Colombia,[64] developed doctrines to protect individual rights as well as certain aspects of their systems, which they viewed as defining or essential for their constitutional identity.[65] In the case of Germany and Brazil, their constitutions laid down the so-called "eternity clauses" or "petrified clauses" (*cláusulas pétreas*), which future legislatures acting as constituted powers (*pouvoir constitué* or also called "derived constituent power") would not be able to amend.[66] In Germany, it is Article 79(3) of the Basic Law (*Grundgesetz*; henceforth GG) that prohibits the amendment of the constitution "in such a way as to change or abrogate the principles laid down in Arts. 1 and 20 GG".[67] While Article 20 GG lays down the central qualities of the German State such as democracy, republican State order, federal organization etc., Article 1 GG enshrines one of the constitution's "most fundamental, 'supra-positive' principles",[68] which declares human dignity inviolable. Article 60 of the Brazilian constitution plays a similar function.[69]

The existence of the immutable clauses should not be taken to mean that the German and Brazilian courts were less activist compared to their Indian or Colombian counterparts.[70] The German Constitutional Court (GCC) has widened the scope

republican form of government. An interesting example to note is Article 112 of the 1814 Norwegian Constitution, which protects the "spirit" of the constitution. It provides that constitutional amendments "must never [. . .] contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution". See, Gözler (2008), pp. 52–53 and 70.

[61] See, Goerlich (2008); Kommers (1991); Mohallem (2011); O'Connell (1999); Albert (2009).

[62] Prateek (2008); Mohallem (2011), pp. 770–772; Jacobsohn (2006), pp. 470–476.

[63] Albert (2009), pp. 25–28; Mohallem (2011).

[64] Bernal (2013).

[65] For a comparative study including various traditions of judicial review of constitutional amendments, see Gözler (2008).

[66] The distinction between constituent and constituted powers is traced back to Emmanuel Joseph Sieyès. While the former refers to the sovereign power of the people to create a new constitutional regime without any restraints (also called "original constituent power"), the latter refers to the power to reform the constitution in accordance with the procedural and/or substantive limits set by the original constituent power (also called "derived constituent power"). See, Sieyès (1963); cited in Colón-Ríos (2011), p. 366.

[67] Herzog (1992), p. 90.

[68] Herzog (1992), p. 90.

[69] It prohibits any proposition to abolish: "(a) federative form of the state; (b) the concealed, direct, universal and periodic right to vote; (c) the separation of powers and (d) individual rights and guarantees." See, Mohallem (2011), p. 773.

[70] O'Connel argues that the doctrine of "unconstitutional constitutional norms", proclaimed in the Southwest Case, 1 BVerfGE 14 (1951), is controversial, since there is no explicit authorization in the Basic Law for the review of legality of constitutional amendments. That power was claimed by

of application of Article 79(3) GG by providing a broad interpretation to the concept of human dignity.[71] In the same vein, its Brazilian counterpart has extended the immutability doctrine to almost all constitutional provisions that confer rights on individuals.[72] However, those clauses are not the only means employed by constitutional courts to guarantee the identity and continuity of the constitutions, whose guardians they are. It is worth citing more extensively from the case law of the GCC, since it forms part of the constitutional tradition on which the jurisprudence of the Court of Justice is built and serves as a source of inspiration for the doctrines developed by other constitutional courts, such as "the basic structure doctrine" of the Indian Constitutional Court.[73]

In German constitutional theory, the constitution is seen as a coherent and unified structure of principles and values.[74] Hence, the GCC provided that:

> An individual constitutional provision cannot be considered as an isolated clause and interpreted alone. A constitution has an *inner unity*, and *the meaning of any part is linked to that of other provisions*. Taken as a unit, a constitution reflects certain *overarching principles* and fundamental decisions to which individual provisions are subordinate.
>
> . . .
>
> That a constitutional provision itself might be null and void, is not conceptually impossible just because it is part of the constitution. There are constitutional principles that are so fundamental and to such an extent an expression of a law that precedes even the constitution that they also bind the framer of the constitution, and other constitutional provisions that do not rank so high may be null and void, because they contravene these principles.[75]

The court clarifies that both harmonious interpretation as well as invalidation are possible options. In a later case, it also explained that fundamental constitutional change was possible, but only if it were in line with the overarching principles and the logic/identity of the constitution, i.e. if it were carried out "in a system-immanent manner".[76] Hence, a constitutional amendment could be nullified to the extent that it transformed the constitution into something "fundamentally incoherent".[77]

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the GCC in order to "protect the objective order of values on which the Constitution rests". See, O'Connell (1999), p. 54.

[71] Goerlich (2008), p. 408.

[72] Mohallem (2011), p. 773.

[73] Prof. Dietrich Conrad, a German scholar of Indian politics and law, is seen as the instrumental name in acquainting Indian judges with the German experience. See, Jacobsohn (2006), p. 477; see also, Chapter I titled "Sanctity of the Constitution: Dieter Conrad – the man behind the 'basic structure' doctrine", in Noorani (2006).

[74] Kommers (1991), p. 851; Jacobsohn (2006), p. 478.

[75] Emphasis added. The Southwest Case, 1 BVerGE 14 (1951), cited in Murphy (1987), pp. 13–14.

[76] Privacy of Communications Case (Klass Case), BverfGE, 1 (1970). The GCC provided as follows: "Restrictions on the legislator's amending the Constitution . . . must not, however, prevent the legislator from modifying by constitutional amendment even basic constitutional principles in a system-immanent manner", cited in Jacobsohn (2006), p. 477.

[77] Jacobsohn (2006), p. 478.

Similarly, in one of the most important cases of Indian constitutional law, *Kesavananda Bharati v. the State of Kerala*,[78] the Supreme Court of India ruled by a narrow majority (7–6) that the constitution could be amended following the procedure stipulated in Article 368, however, no part could be amended so as to change its "basic structure". Six of the Justices argued that Article 368 did not empower the Parliament to abolish fundamental rights because it contains "inherent or 'implied limitations'"[79] that protect the "basic structure" of the constitution. The other six disputed the existence of such limitations. The Justice tilting the balance (Justice Khanna) rejected the theory of implied limitations but argued that the word "amendment" itself contained limitations. He argued that "[t]he power of amendment under Article 368 does not include the power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution."[80] That is the same argument that lies at the basis of "the constitutional replacement doctrine" developed by the Colombian Constitutional Court.[81]

It is argued that the doctrine developed by the Indian Court constitutes a version of the coherence requirement developed by the GCC. As far as it also emphasized the need to preserve the identity of the Indian constitution, it is viewed as a more demanding criterion,[82] even though both are interlinked. As Jacobsohn argues, "the incongruities and inconsistencies that could lead to a finding of constitutional incoherence might only mean that the document's identity has been obscured in a manner that seemingly casts doubt on its fundamental character and commitments".[83] As to the vexing issue of what constitutes a state's identity, and when it could be considered to have changed, Aristotle provided the following answer: "a polis's identity changed when the constitution (referring to more than just a document) changes as the result of *a disruption in its essential commitments*".[84] Hence, we can identify the EU's identity by looking at its main goals and commitments.

[78] AIR [1973] SC 1461.

[79] Noorani (2006), p. xv.

[80] Noorani (2006), p. xv.

[81] Articles 241 and 379 of the Colombian Constitution empowers the Court to review constitutional amendments, however, only with respect to the rules establishing the amendment procedure. The Colombian Constitutional Court developed the "constitutional replacement doctrine" to circumvent this constraint. Put succinctly, it argued that the power to amend the constitution does not entail the power to replace it, but to only modify it. The Court has the power to check whether the amending authority is only modifying, or replacing the constitution. However, that requires an analysis of the content to be able to determine whether the constitution is modified or replaced. In short, the Colombian Court concludes that "the power to review whether the constitution has been replaced implies the competence to review the content of constitutional amendments". Bernal (2013), p. 340.

[82] Jacobsohn (2006), p. 478.

[83] Jacobsohn (2006), p. 478.

[84] Aristotle (1962), p. 99; cited in Jacobsohn (2006), p. 478.

When those goals clash with the means to achieve them, according to Murphy, "it is the means that must yield, unless a people rethink and redefine their goals".[85]

What can be extrapolated from the German and Indian examples for the EU legal order? There are no explicitly set immutable clauses in the Treaties. However, it can be argued that there is an implied hierarchy within the Treaties, which is also confirmed by the case law of the Court.[86] Just as the Indian Supreme Court established that some fundamental rights form part of the "basic structure" of the Indian Constitution, which it protects, the CJEU established the fundamental nature of some principles, which form part of "the very foundations"[87] of the Union legal order, whose guardian it is. The Court did not hesitate to give negative opinions about signing agreements, which it found incompatible with principles that form part of "*the very foundations* of the Community",[88] or as it stated more recently, incompatible with "*the essential character of the powers* which the Treaties confer on the institutions of the European Union and on the Member States and which are *indispensable to the preservation of the very nature of European Union law*".[89]

Fundamental rights are now deeply entrenched in the EU legal order. They are called "constitutional principles" by the Court.[90] Scholars qualify them as "constitutional core values",[91] and those laid down in Article 2 TEU, arguably, constitute "the very '*untouchable core*' of the EU legal order".[92] This can be inferred both from the Treaty text itself, as well as from the case law of the Court. To begin with the latter, in *Kadi I*, the Court explicitly stated that other Treaty provisions "cannot be understood . . .to authorize any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU [now Article 2 TEU] as a foundation of the Union".[93] The Court elaborated further, that other provisions, in this case Article 307 EC, "may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights".[94]

The foundational or overarching character of fundamental rights can also be inferred from the clear wording of Article 2 TEU as well as their central place in

[85] Murphy further warns that "means – institutional arrangements – inconsistent with those ends pose grave problems for the system's survival". See, Murphy (1987), p. 18.

[86] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi* ECLI:EU:C:2008:461, paras. 288–290.

[87] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi* ECLI:EU:C:2008:461, para. 303. See also, *Opinion 1/91 EEA* ECLI:EU:C:1991:490, and da Cruz Vilaça and Piçarra (1994).

[88] Emphasis added. *Opinion 1/91 EEA* ECLI:EU:C:1991:490.

[89] Emphasis added. *Opinion 1/09* ECLI:EU:C:2011:123, para. 89.

[90] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi* ECLI:EU:C:2008:461, para. 285.

[91] See, Kokott and Sobotta (2012), p. 1015.

[92] Emphasis in original. Klamert and Kochenov (2019), p. 23. See also, Lavranos (2010), p. 119.

[93] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi* ECLI:EU:C:2008:461, para. 303.

[94] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi* ECLI:EU:C:2008:461, para. 304. For an analysis of the concept "very foundations of the Community legal order", see Lavranos (2010), p. 119.

the Treaty. As soon as Article 1 TEU declares the establishment of the European Union, Article 2 TEU lists the values (previously, principles listed in ex Article 6(1) TEU) on which the Union is built. According to Article 2 TEU:

> The Union is founded on the values of respect to human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.
>
> These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Moreover, first among the list of the Union's objectives in Article 3(1) TEU is the promotion of peace, Union's values and the well-being of its peoples. Article 6 TEU is also entirely devoted to demonstrate the central place of fundamental rights in the EU legal order. After declaring the rights and freedoms in the CFR have the same legal value as the Treaties in its first paragraph, Article 6(2) TEU mandates Union's accession to the ECHR. Last but not least, Article 6(3) TEU proclaims that fundamental rights as guaranteed by the ECHR and common constitutional traditions of the Member States constitute general principles of Union law.

The fact that the very first sentence of Article 49 TEU, which lays down the procedure for accession of new Member States mentions respect for the values in Article 2 TEU as well as commitment for their promotion as a precondition for application of EU membership, also illustrates their importance. However, arguably, the provision that implies their hierarchical superiority is Article 7 TEU. While other fundamental rights provisions in the Treaty apply on the proviso that Member States act within the scope of Union law, there is no such limitation in Article 7 TEU. The values enumerated in Article 2 TEU are considered to be so important, so vital for the EU legal order that a clear risk of serious breach of those values eradicates the "acting within the scope of Union law" requirement for Member States. Hence, the European Council is empowered to take punitive measures against a Member State in serious and persistent breach of these values, even when the latter breach falls under the so-called "internal situation" rule.[95] Unfortunately, the failure of Union institutions to act decisively and trigger Article 7 TEU when necessary has triggered a lot of criticism regarding the effectiveness of this provision.[96] However, Union

[95] In its Communication on Article 7 TEU, the Commission provided the following explanation concerning its application: "[t]he scope of Article 7 is not confined to areas covered by Union law. This means that the Union could act not only in the event of a breach of common values in this limited field but also in the event of a breach in an area where the Member States act autonomously." See, Communication from the Commission to the Council and European Parliament, on "Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based", COM(2003) 606 final, 15.10.2003, p. 5. See also, Communication from the Commission to the European Parliament and the Council, "A new EU Framework to strengthen the Rule of Law", COM(2014) 158 final/2, 19.3.2014, p. 5.

[96] See the literature cited in note 5 above. There seem to be quite a few issues with the design of the provision that need to be addressed for it to become operational. But to provide one example, triggering the 'punitive' or 'sanctioning' arm of the provision (Article 7(2) TEU) is extremely

institutions have in the meantime come up with new initiatives and strategies to remedy the problem.[97] Overall, despite the difficulties encountered along the way, one could say that the EU now acts as a guarantor of rights both against the Member States (by virtue of Article 7 TEU) as well as against international organizations,[98] even though the process whereby fundamental rights were incorporated into the case law of the Court was instigated by the push of a few national constitutional courts.[99] This clearly demonstrates the emergence of the EU legal order as a new and autonomous legal level between national and international law.[100]

The latter discussion leads us to a definition of constitutionalisation, which signifies the process by which the Treaties assert their normative independence *vis-à-vis* the Member States and become "the founding charter of a supranational system of government".[101] It is usually argued that the border between an international treaty and a constitution will be transgressed if future amendments are no longer a prerogative of the Member States.[102] In other words, the crucial question is to what extent the EU as the subject created by the Treaties can become legally independent from the Member States, which are the parties to the Treaties?[103]

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difficult, as it requires unanimity in the European Council, minus the country subject to the proceedings. This comes close to impossible when there are more than one 'illiberal' or 'backsliding' governments, unless they are subjected to the procedure together. So far, Article 7(1) TEU has been triggered twice: by the European Commission in the case of Poland, and by the European Parliament in the case of Hungary. No follow up action has been taken under Article 7(2) TEU in either of these cases. For more details on this procedure and why it proved to be ineffective in the cases of Hungary and Poland, see Pech and Scheppele (2017); Besselink (2017); Kochenov (2019).

[97] The Commission developed its 'Rule of Law Framework', which is by now known as the "pre-Article 7 procedure". The Council on its own part, developed the initiative called 'The Annual Rule of Law Dialogue', which engages the Member State concerned in a dialogue within the Council. For an exhaustive review of the rule of law toolbox developed to tackle rule of law backsliding, see Pech (2020).

[98] See, Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi* ECLI:EU:C:2008:461.

[99] For the inclusion of fundamental rights into the Union legal order as general principles of EU law, and for their subsequent development, see Chap. 6, Section.

[100] According to Möllers, in the context of EU law, constitutionalisation denotes the developing autonomy of the legal order from intergovernmental action. It can also be defined as "a phenomenon of the gradual formation of a new legal level". See, Möllers (2009), p. 195. See also, Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1, de Búrca (2010).

[101] Tridimas (2006), p. 5.

[102] Möllers (2009), p. 176; see also, Besselink (2009), p. 268.

[103] Griller (2008), p. 23. For an article exploring 'the practical dynamics of primary law-making', see Sowery (2018).

While it is still the Member States that are "the Masters of the Treaty text",[104] once ratified the Treaties escape their exclusive control.[105] The enormous contribution of the Court of Justice to the development of the unwritten or empirical constitution was already mentioned. It is true that Treaty amendments "provide for a framework but it takes tradition, conventions and implementing law to make the system tick".[106] The process of development of these legal and institutional practices is incremental and cumulative, some of which lead to corresponding changes in the Treaties over time.[107] If Member States act as Masters of the Treaties from one amendment to another, while in between the system incrementally evolves and takes shape in the light of the interactions of the EU institutions, what conclusion does this lead us to?

As Walker explains eloquently:

> . . . constitutionalism and constitutionalization should be conceived of not in black-and-white, all-or-nothing terms but as questions of nuance and gradation. There is no unitary template in terms of which constitutional status is either achieved or not achieved. . .[108]

Accordingly, if "constitutional" and "not-constitutional" are seen as the two opposite ends of a spectrum, the constitutionalisation of the EU legal order can be viewed as a gradual and evolutionary process that has slowly but surely been moving towards the "constitutional" end of the spectrum spurred by the case law of the Court and Treaty amendments. Since EU constitutional law comprises both the Treaties as well as the case law of the Court, it is often compared to the unwritten constitution of the UK, which is comprised of charters, bills, declarations, Parliamentary statutes, constitutional conventions etc.[109] As argued above, Tanchev confirms that the concept of the unwritten EU constitution, though more difficult to comprehend, "reflects a relatively high level of independence of the Communities from the Member States and

[104] de Witte (2012), p. 36; Shaw (2000), p. 29. It is noteworthy in this respect that with the Lisbon Treaty, simplified procedures have been introduced for the amendment of the Treaties under Article 48(6) and (7) TEU. For the first time, a Union institution, that is the European Council is empowered to amend the Treaties by adopting a decision to that effect. It is argued that this is of interest from a theoretical point of view, as this implies the EU has been conferred *Kompetenz-Kompetenz* to amend the Treaties. See, Barrett (2008), pp. 15–16. However, it should be noted that in practice, very little has changed, as the European Council adopts its decisions under Article 48(6) TEU by unanimity, and subsequently, ratification of these decisions in line with every Member State's constitutional requirements is needed for their entry into force. See also, Klamert (2019).

[105] de Witte (2012), p. 36.

[106] Curtin (2009), p. 82.

[107] Curtin (2009), p. 85.

[108] Walker (2002), p. 339 Like other scholars cited above, Walker identifies a set of factors that enable one to identify and measure the degrees of constitutionalisation. His "indices of constitutionalism" can be summarized as follows: discursive self-awareness, authority, jurisdiction, interpretive autonomy, institutional capacity, citizenship and voice. For a more detailed elaboration of those indices, see pp. 343–354.

[109] Tanchev (2009), p. 31. See also, Besselink (2009), pp. 262–267.

has a highly developed level of legally regulated power, institutional framework independently existent from the Member States".[110]

The role of the Court of Justice in the constitutionalisation of the EU legal order can indeed not be overrated.[111] Sólyom draws attention to the importance of historical circumstances as well as the self-understanding of constitutional courts, since they actively shape their own competences and power.[112] In that regard, both the self-understanding of the Court of Justice,[113] which can be inferred from the Court's reference to the Treaties as 'constitution', 'constitutional' or 'the basic constitutional charter',[114] the historical circumstances under which it was established in the framework of the Communities in the aftermath of the Second World War, as well as the constitutional traditions of the Member States' constitutional courts from which it draws inspiration and with which it interacts, have been instrumental in how the Court shaped its own jurisdiction as well as the legal order within which it operates.[115]

In short, this overview serves to demonstrate how the process of entrenchment of fundamental rights in some of the European national legal orders was followed by the Court of Justice as well as other constitutional courts around the world. This process of emulation has, in addition to other factors and developments, contributed to the further constitutionalisation of the Union legal order. The more entrenched rights are in a legal order (that is the more deeply rooted they are), the more constraining they get for actors operating within it. For the purposes of this book, it is important to expose that a PSC on free movement of persons would violate rights that are deeply rooted in the Union legal order. In our case, such an exposition would imply that Member States would not have the power to override those rights, i.e. those rights would constrain them from including the PSC in a future Accession Agreement. A preliminary examination of the compatibility of the PSC with the legal order and some of its fundamental principles follows at the end of Sect. 5.2.4.3.

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[110] Tanchev (2009), pp. 31–32.

[111] There are many scholars, who in defining the process of constitutionalisation, lay emphasis on the Court's contribution to the process. For instance, Tanchev provides the following definition: "[t]he constitutionalization is a mechanism through which the unwritten constitution is taking shape through the Court's jurisprudence". See, Tanchev (2009), pp. 31–32.

[112] Sólyom (2005), p. 249.

[113] For a brief elaboration of the constitutional powers exercised by the Court of Justice, see Esteban (1999), pp. 23–25.

[114] See *Opinion 1/76* ECLI:EU:C:1977:63, para. 12; Case 294/83 *Les Verts* ECLI:EU:C:1986:166; para. 23; Joined Cases 46/87 and 227/88 *Hoechst AG* ECLI:EU:C:1989:337, para. 62; *Opinion 1/91 EEA* ECLI:EU:C:1991:490, para. 20; Case C-314/91 *Weber* ECLI:EU:C:1993:109, para. 8; Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi* ECLI:EU:C:2008:461, paras. 202, 281 and 316. For a deeper discussion of these cases, see Esteban (1999), pp. 26–37.

[115] It is argued that many "European constitutional courts were created out of a deep mistrust in the majoritarian institutions, which had been misused and corrupted during the Nazi, fascist, and communist regimes". It was this historical setting that led the judges to see themselves as guarantors of their democratic legal orders and explained their "self-conscious activism". See, Sólyom (2005), pp. 249–250.

1.3 Nature of "Legal Constraints": Theoretical Definition

The preceding discussion on the nature of the legal order is important, as it provides important clues as to the types of legal constraints operating within it. It is possible to make different categorizations of the concept of legal constraints. So far, procedural and substantive constraints were mentioned, as well as those relating to the overall structure or identity of a constitution. While procedural constraints were just mentioned in passing, the significance of some substantive constraints, especially those flowing from the fundamental nature of some principles and norms, was emphasized. It was also argued that just like some national constitutional courts protect the "basic structure", identity or coherence of their constitutions, so does the Court of Justice protect "the very foundations" of the Union legal order. In other words, those "very foundations" place constraints on Member States and Union institutions, which need to be taken account of.

To begin with the theoretical underpinning of the concept of legal constraints in the literature, the constraining effect of law is typically considered to be based on internal and external considerations (internal (normative) versus external constraints). The first and most obvious way that law constrains is when relevant actors or institutions within a system have internalized legal norms derived from "authoritative text, judicial decisions, or institutional practice",[116] i.e., they have learnt what those texts or decisions say and act accordingly, out of belief they "ought to" do so. As far as the protection of fundamental rights in the EU legal order is concerned, it is not difficult to demonstrate how deeply internalized they are as they are mentioned widely in the Treaties, as well as in Member States' constitutions. Moreover, they have been incorporated into the case law of the Court as general principles of EU law as mentioned above, and have always been actively promoted by the political institutions.[117] All actors believe in the value of and need to act in accordance with established standards of fundamental rights. The penultimate Chapter of this book provides a specific example of the general principle of equality.

Normative (or internal) constitutional constraint is a matter of law: it does not depend on what any particular actor or institution believes the law to be. However, since different actors can perceive the law differently, Fallon distinguishes further between "direct normative constraints" and "mediated constitutional constraints".[118] The former are about "the *perceptions* of constitutional obligation"[119] experienced by particular actors. Since different perceptions might lead to a dispute about constitutional meaning, the importance of the latter concept comes to the fore, as "mediated constitutional constraint" is about the interpretation adopted by the

[116] Bradley and Morrison (2013), p. 1132; in the literature, this is referred to as the "Hartian" perspective. See, Hart (1994).

[117] See, Joint Declaration by the European Parliament, Council and the Commission concerning the protection of fundamental rights and the ECHR (Luxembourg, 5 April 1977).

[118] Fallon (2009), pp. 995–997.

[119] Fallon (2009), p. 1036.

judiciary, which further constrains the non-judicial actors and institutions within a legal system.[120]

In the EU legal order, it is the Court of Justice that provides authoritative interpretation of provisions of both primary and secondary law.[121] To provide an example, it is not rare that different institutions have different understanding of what the Treaties provide for. In *Chernobyl*,[122] different understandings of what Article 173 EC (now Article 263 TFEU) meant (direct normative constraint) led to a dispute between the European Parliament and the Council. The Court held that the provision should be interpreted to allow Parliament to bring an action for annulment to safeguard its prerogatives, despite the fact that it was not listed as one of the institutions that could do so under Article 173 EC. The Court's pronouncement constituted an example of a "mediated constitutional constraint", which was thereafter, binding on all actors and institutions operating within the scope of Union law.

As to the second type of constraints, called external constraints, their power arises from "[t]he prospect of inefficacy and the threat of sanctions".[123] Actors within a legal order are aware of the boundaries of their competence and authority. They know that transgressing those boundaries would make their assertions of power inefficacious, and trigger sanctions in some cases. For instance, if the Council fails to follow the procedure prescribed in the Treaties, and tries to legislate without obtaining the consent of the Parliament as required, the promulgated legal act could be invalidated by the Court, for not fulfilling "an essential procedural requirement".[124] Similarly, there are procedures built in the system, for instance the infringement proceedings under Article 258 TFEU, whereby Member States, which fail to fulfil their obligations under the Treaty might end up incurring heavy financial sanctions.[125]

Despite the distinction between internal and external (sources of) constraints in the literature, scholars point out that in many contexts the two do not operate independently.[126] Bradley and Morrison underline that often practices followed out of fear of external sanction become internalized as a result of habit. This is called "the normative power of the actual" and denotes people's inclination "to give

[120] Fallon (2009), p. 1036.

[121] See, Article 19(1) TEU and Article 267 TFEU.

[122] Case C-70/88 *Parliament v Council* ECLI:EU:C:1990:217.

[123] Fallon (2009), p. 1036. For a more detailed discussion of "external sanctions", see Fallon (2009), pp. 997–1000; and Bradley and Morrison (2013), pp. 1137–1140.

[124] Case C-65/90 *European Parliament v Council* ECLI:EU:C:1992:325, para. 21.

[125] Bradley and Morrison explain further that enforcement does not have to be formal. Even formal modes of enforcement are considerably strengthened by informal mechanism, such as criticism and public shaming. See, Bradley and Morrison (2013), p. 1127.

[126] Bradley and Morrison (2013), p. 1040. Fallon agrees with that, but points out that there could be few instances when the two might diverge. For instance, in the American system voters could sanction a state court judge for upholding an unpopular but legally valid constitutional claim. See, Fallon (2009), p. 1036.