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The Court of Justice of the European Union's vision for and development of EU democracy

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Abstract: *Scholarly attention is frequently paid to the Court of Justice of the European Union's constitutionalising role. Far less work considers the court's democratisation role - how it articulates and pursues an approach to EU democracy. This neglects the important point that the court's jurisprudence seeks the most democratic lawmaking process possible within the confines of existing EU law. This paper steps towards plugging this gap in the literature. It outlines the court's approach to EU democracy and its democracy-building role. The paper argues that the court's conception of EU democracy is embedded in its institutional balance doctrine. This holds that each institution must be able to fulfil their tasks as effectively as possible. For the Commission, Council, and European Parliament (EP) this includes a legislative role. Each represents a particular EU constituency, understood by the court as respectively the common EU interest, Member States, and EU citizens. When the court states a need for balance between these lawmaking institutions it is making a democratic statement: representatives of three legitimators must be substantially involved in lawmaking. Case law therefore endeavours to actualise that vision by placing the EP's input on a more even keel with the Commission and Council. This is a necessary part of the court's mandate to pursue ever-closer union. The jurisprudence acknowledges that the 'new legal order' the court has been developing since Van Gend en Loos must, in order to be successful, incorporate a democratic settlement as well as a legal relationship, and shapes EU law accordingly.*

Introduction

The literature discussing the European Parliament (EP)'s relationship to EU democracy often takes a political perspective. A considerable amount of research considers the extent to which EU citizens actually engage with the EP as a conduit for their representation at EU level (or, given the lack of a pan-European demos, *can* engage with the EP), and one frequently encounters updates on the EP's growing influence as a co-

legislator.[1] Recently, Lenaerts added a legal perspective to this literature. Identifying that the Court of Justice of the European Union (CJEU) holds a 'conception of democracy that seeks to enhance the participation of citizens in the adoption of decisions that may affect them',[2] Lenaerts argues that the CJEU draws on the idea of democracy to protect the legislative position of the directly-elected EP and to thereby improve EU democracy. His examples encompass decisions which uphold the EP's legislative prerogatives, promote the organization of pan-European political party groupings, and provide immunity to MEPs for speech directly relating to their duties as MEPs. This intervention is important because it reminds us that the CJEU's case-law has helped to constitutionalise the EU and can be equally important in building EU democracy.

This article complements Lenaerts' analysis. Its primary goal is to situate the judicial enhancement of the EP's legislative role within the CJEU's broader approach to EU democracy. This wider context, epitomised by the *Van Gend en Loos*[3] judgment and by the court's institutional balance doctrine, draws out the Court's under-examined, but very important, role in building EU democracy. The CJEU has always played an integrationist role. Its 'genetic code'[4] tends towards decisions that encourage ever-closer Union. This is well-demonstrated by its famous constitutionalising decisions on supremacy and direct effect, which tightened the legal commitments owed to the EU by its Member States. For developments such as these to be successful in the long term, there must be more than a formal legal relationship between the EU and its Member States and citizens. There must also be a democratic one that tries to ensure that the EU does not progress towards closer union without the input of its constituents. It is submitted that this is precisely what a constitutional court such as the CJEU ought to do:

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[1] Andreas Føllesdal and Simon Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2005) 44 JCMS 553.

[2] Koen Lenaerts, 'The Principle of Democracy in the Case Law of the European Court of Justice', (2013) 62 ICLQ 271, 313.

[3] Case 26/63 *Van Gend en Loos* [1963] ECR 3.

[4] G Federico Mancini and David T Keeling, 'Democracy and the European Court of Justice' (1994) 57 MLR 186.

where possible, it should build the democratic side of a polity in addition to developing the legal relationships within it.[5] Whilst making this argument the paper also points to two further areas of case law – on re-consulting the EP during the consultation legislative process and on the choice of legal base – where the CJEU has promoted the EP's role in EU lawmaking and democracy. These areas were not subject to sustained analysis by Lenaerts and serve to illustrate how the EP's position has been improved as part of a wider democracy-building trend.

Section 1 explains that the Court's prizing of the EP, and its promotion of the EP's legislative role, is based on more than the acknowledgment that the EP provides an avenue for the direct representation of EU citizens. The CJEU feels that EU democracy must also take into account the views of Member States in the Council and the wishes of the Commission, which it recognizes as the primary legitimators within the EU's 'new legal order'.[6] This is evident from *Van Gend en Loos* and the court's understanding of institutional balance.

As demonstrated across Sections 2 and 3 – respectively looking at the case law on consultation and choice of legal base – on one level this tripartite understanding of democracy led the CJEU to improve the EP's legislative role. It was historically (and in some ways remains) weaker than that of the Commission and Council. This means the representatives of EU citizens become a more substantial feature of that triumvirate, promoting and encouraging the input of citizens and consequently a development of a broader EU political identity. By placing the EP's contribution to EU democracy on more of an even keel with the Council and Commission, the Court demonstrates a democracy-building role that should be seen as part of its overall polity-developing function. It strives to give the most substantial legislative role possible to the representatives of the three actors that it sees as affected by EU laws. Because they are so affected, the Court feels that their interests must be accommodated as equally as possible in a democratically legitimate EU.

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[5] Alicia Hinarejos, *Judicial Control in the European Union* (OUP 2009) ch 1.

[6] *Van Gend en Loos* (n 2) p 12.

1. The EP within the Court's view of EU democracy.

It is important to understand why the CJEU sees the EP as such an important part of EU democracy. Part of the answer is found in *Isoglucose*.[7] As expanded upon in Section 1.2 below, that case was one of the first involving the EP to be heard after the institution of direct elections in 1979. It was argued that Regulation 1111/77 been passed incorrectly. Under Article 43(2) EEC, the Council should have consulted the EP before the Regulation was passed into law. The CJEU upheld this argument and annulled the Regulation. It was evident that the Council asked the EP for its opinion but did not wait for a response. The most important part of *Isoglucose* described the EP in the following terms:

> it reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly.[8]

The Council's failure to respect the democratic principle embedded in the EP was a major motivation behind the annulment. That clearly suggests that the CJEU values the EP because it represents citizens. They are constituents of the EU polity and therefore must be part of the decision-making process if the polity is to develop democratically. This conceptualization has become a *leitmotif* in cases concerning the EP.[9] There is however more to it than that. To grasp the full significance of the Court's connection of the EP to the fundamental democratic principle of the direct representation of citizens, the statement must be placed in its institutional and historic context.

Contextualising *Isoglucose* reveals three things about EU democracy and the Court's conception of it. First – obviously but still importantly – the EP was designed to improve the representation of EU citizens. Second, the CJEU understands this

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[7] Case 138/79 *Isoglucose* [1980] ECR 3333.

[8] *Isoglucose* (n 7) para 33.

[9] Case 139/79 *Maizena GmbH* [1980] ECR 3393, para. 34; Case C-300/89 *Commission v Council* [1991] ECR I- 2867 para. 20; Case C-65/93 *Parliament v Council* [1995] ECR I-643, para. 21; Case C-104/97 *Atlanta AG* [1999] ECR I-6983, para. 71.

representation to take place within an institutional balance, where other legislative bodies represent other interests: the EP is meant to boost the input of EU citizens, not to make their representatives the primary lawmakers. Third, *Isoglucose* recognized the need to bring the direct input of citizens into line as far as possible with those other organs and interests. Underpinning all of this is the Court's definition of a 'new legal order' in *Van Gend en Loos*. As is now explained, that decision established early in the court's lifetime a clear view of what EU democracy ultimately involved, namely the input of citizens, Member States, and representatives of the EU's common interest as a polity. The institutional balance, once the EP became directly elected, provided a framework that allowed the Court to ensure the best possible input of each interest within EU lawmaking and in turn to promote its view of democracy.

1.1. *Van Gend en Loos* and EU democracy.

Barroso and Chalmers explain that *Van Gend en Loos* was of intensely symbolic importance as well as having a profound constitutionalising effect. They argue that it expressed deep ideas about the authority of EU law, including how the EU order was to reorganise the interests recognised across Europe. *Van Gend en Loos* is more than just an expression of the fact that the EU *is* a constitutional order; the decision stands for a set of 'symbols and ideals'[10] that summarise the deontology of the entire European project. In their view, the most famous passage of the case:

> The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.[11]

Articulates a vision of:

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[10] Damian Chalmers and Luis Barroso, 'What *Van Gend en Loos* stands for' (2014) 12 ICON 105, 106.

[11] *Van Gend en Loos* (n 7) p 12.

> a postnational democratic community. In this community, EU citizens exercise public autonomy through participating as free and equal in EU law-making ... Law secures citizens' private autonomy through the grant of rights and the imposition of settled obligations. The reference to the peoples of Europe in the Preamble sets these peoples as a constituent power for this democracy on whose behalf its institutions must act.[12]

In other words, it holds out an idea of community on which the authority of EU law is ultimately founded. This community encompasses EU citizens but, as the quoted section of the judgment makes clear, it also maintains the importance of 'the states', represented in the Council, and the overall 'Community', whose interests are sought by the Commission, as legitimating constituencies of the EU. The CJEU places three constituents – states, citizens, and the Community interest – at the core of the judicial vision, and consequent shaping, of EU democracy. Of those three interests, it is the historically weak role of EU citizens that the CJEU has sought to address. This is to create effective pathways for those citizens to participate in EU democracy and become genuine political actors, which it sees as essential for the EU's continued legal and democratic development. Democracy-building is thus another side of the Court's mission to promote ever-closer union.

The CJEU's intention to articulate the democratic foundations of the EU by identifying citizens alongside Member States and 'The Community' as the polity's constituents is laudable. However as Chalmers and Barroso go on to explain, it was – and as discussed below, some maintain still is – problematic. At the time of the decision the mechanisms for the inclusion of individuals in EU decision-making were underdeveloped. The EP was not elected, and was frequently ignored by other institutional actors.[13] The democratic message in *Van Gend en Loos* could not therefore be sustained by the Court's reasoning, which instead rested justifying the creation of direct effect on the idea that it

[12] Chalmers and Barroso (n 14) 120.

[13] JHH Weiler, '*Van Gend en Loos*: the Individual as Subject and Object and the Dilemma of European Legitimacy' (2014) 12 ICON 94, 99.

is required to effectively achieve the pooled goals of EU governments.[14] The EP continues to be critiqued for its inability to properly represent EU citizens despite the fact that it is now generally-accepted that the EP now an impressive formal legislative strength as a co-legislator, under legal frameworks as well as political tools such as inter-institutional agreements and strong leadership.[15] Føllesdal and Hix provide a classic summary of the EP's weaknesses. In short, EP elections tend to reflect national politics – often functioning as protest votes or opinion polls – rather than a cohesive EU citizenry's views on EU issues.[16] As a result, voters do not really have a large impact on EU policy, since their electoral preferences are generally unrelated to the issues MEPs vote on and discuss. Coupled with a general unwillingness of EU citizens to engage with EU issues, there is disconnect between them and their representatives.[17] More recently Kohler has argued that that committees, rather than plenary sessions, dominate the EP. This places MEPs in silos, reducing its ability to host public debate on behalf of EU citizens.[18] I am aware of these criticisms, but my perspective here is legal. This paper intends to uncover and relay the CJEU's view of democracy to demonstrate the CJEU's democracy-building role. It is not to critique the effectiveness of that democracy. Constitutional courts such as the CJEU should be developing their legal orders in line with a particular democratic or constitutional vision, and the CJEU does that within a strict legal architecture.

Even if at the time of *Van Gend en Loos* there were insufficient tributaries through which to channel the representation of the EU's three legitimating interests, a legal framework ensured that EU institutions could fulfil their representative roles during lawmaking.

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[14] Chalmers and Barroso (n 14) 120.

[15] Desmond Dinan, 'Governance and Institutions: the Unrelenting Rise of the European Parliament' (2014) 52 JCMS 109.

[16] This position may change – the upcoming elections in 2014 could revolve around EU issues such as the Eurozone crisis and therefore see quite a direct interaction with EU competences.

[17] Føllesdal and Hix (n 2) 535-536.

[18] Manfred Kohler, 'European Governance and the European Parliament: From Legislative Powerhouse to Talking Shop' (2014) 52 JCMS 600.

Section 1.3 explains that institutional balance, currently expressed in Art 13(2) TEU – 'each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions, and objectives set out in them' – is interpreted by the Court to mean that each institution in the legislative process representing one of the EU's core constituents must be allowed to fulfil this role to the fullest extent possible within the confines of EU law. Together, *Van Gend en Loos* and institutional balance set out the CJEU's broader view of democracy within which the EP's direct representation of EU citizens sits. Before this it will be briefly explained why the EP is seen as the representative of EU citizens and why the Council and Commission occupy the tasks of deputising Member States and the EU's polity interest.

1.2. The EP: necessary, but not sufficient, to EU democracy.

Isoglucose was decided a year after the first direct elections to the EP. Those elections were partially intended to boost the EU's democratic legitimacy by introducing a directly-elected element into the EU's legislative processes. One should not over-egg this. As explained in Section 2, at this point the EP was primarily a consultative body with limited legislative powers.[19] Nonetheless the introduction of elections was significant. It marked a shift away from a predominantly intergovernmental system where national ministers in the Council promulgated laws to one which recognized and gave effect to the importance of a directly-elected popular influence on EU lawmaking. Prior to the elections the Council was the only real means through which citizens could have their views heard at EU level, and it provided an indirect voice at best; the EP provided a direct influence. In turn it gave the CJEU an institution that could be used to actualise its *Van Gend en Loos* view of EU democracy, leading to its *Isoglucose* conceptualisation of the EP as reflecting 'the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly'.

Despite the increased input granted to EU citizens, the Court's view of democracy in the EU is not confined to including the EP in lawmaking. This is crucial to understanding

[19].See Renata Kardasheva, 'The Power to Delay: the European Parliament's Influence in the Consultation Procedure' (2009) 47 JCMS 385.

the wider importance of the EP case law for the judicial development of EU democracy. When it was created, and when direct elections began, the EP became part of a pre-existing legislative system. Because the EP started at a lower level of input, the case law had the most influential role on the Parliament's position. The Council and Commission have always had central roles in initiating and finalising legislation and simply have not needed any help in furthering their influence. Although there were several different procedures, broadly speaking the situation in 1979 was as follows. The Commission, which as Article 17 TEU explains is charge of 'the general interest of the Union',[20] proposed legislation. The Council – which, per Article 10 TEU and its practice, represents Member State governments and indirectly their electorates[21] - was responsible for voting proposals into law. These roles remain part of EU lawmaking today, but now the EP, and the direct representation of EU citizens, has a place alongside those institutions. A triumvirate of interests are represented in EU lawmaking.

That trio represents the three interests that the CJEU identified as making up the EU's new legal order in *Van Gend en Loos*. As a result the CJEU set about ensuring that each actor's representative played the most meaningful legislative role possible in order to build its vision of EU democracy. As now explained, the institutional balance doctrine allowed it to do this by recognising a tripartite legislative process based on interest representation.

1.3. Institutional balance.

Institutional balance was first outlined in *Meroni*.[22] That case held that when the High Authority of the European Coal and Steel Community delegated its discretionary powers

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[20] John Temple Lang, 'How Much do the Smaller Member States Need the European Commission? The Role of the Commission in a Changing Europe', (2002) 39 CML Rev 315, 315-318.

[21] Fiona Hayes-Renshaw and Helen Wallace, *The Council of Ministers*, (2nd edn, Palgrave Macmillan 2006) ch 2.

[22] Case 9/56 *Meroni* [1958] ECR 11. See also J-P. Jacqué, 'The Principle of Institutional Balance', (2004) 41 CML Rev 383; G. Conway, 'Recovering a Separation of Powers in the EU', (2011) 17 ELJ 304, 319-321.

to regulatory agencies it acted unlawfully. Specific powers and responsibilities had been given to each ECSC institution and no other body could perform them.

Since its early origins, the idea of institutional balance — each institution has a specific role to play and must be allowed to play it — is now enshrined in Article 13(2) TEU. It has carried with the CJEU independently of this. Advocate General Kokott states that it 'characterises the structure and functioning of the European Union'.[23] A recent CJEU judgment concurred: 'the Treaties set up a system for distributing powers among the Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community'.[24] As further explained by AG Maduro, 'the legislative procedures laid down by the Treaties establish the extent to which each institution is to be associated with the taking of decisions and thus establishes an institutional balance'.[25]

One level this means that each body, representing a certain interest and playing a particular legislative role, must be allowed to play its assigned role in the lawmaking process and cannot intrude on others. Driessen explains that in this sense it is about delineating competences between institutions.[26] This is certainly one way of understanding it. However, as Jacqué notes, it is also a political idea that relates to the how institutions interact with one another, something also evident in AG Maduro's description.[27] When one considers that this interaction occurs between lawmaking institutions that to the CJEU each represent core legitimising interests, the doctrine gains a democratic hue. It means that institutional balance demands that the inputs of each democratic actor within the EU's new legal order be respected.

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[23] Case C-73/11 P *Frucona Košice,* Judgment of 24 January 2013, not yet reported, para. 92.

[24] Case C-539/09 *Commission v Germany*, [2011] ECR I-11235, para. 56.

[25] Opinion of A.G. Maduro in *European Parliament v Council of the European Union (*C-133/06) [2008] ECR I-3189 at [31].

[26] Bart Driessen, 'Interinstitutional Conventions and Institutional Balance' (2008) 33 EL Rev 550.

[27] Jacqué (n 22) 383.

The directly-representative EP is therefore not only an important actor because it represents EU citizens. Its significance is equally connected to the fact that it represents those citizens as one of the EU's constituents in a process that involves other interests, ones at the heart of EU democracy. Promoting its lawmaking position thus helps prevent EU citizens being dominated and protects their legislative prerogatives. It is part of a drive to make sure that the overall functioning of EU democracy incorporates as far as possible the three legitimators in the polity, in the process giving EU citizens the chance to engage at the EU level and inculcate a sense of belonging. In sum, the Court promoted a newer and more democratic legal order that encompassed the views of Member States, the Commission, and *directly* EU citizens.

This democracy-building role anticipated changes in the Treaties. It is long-established that the CJEU has developed the EU's new legal order in terms of the constitutional relationship between the EU and its Member States *avant la lettre* through mechanisms such as direct and indirect effect and supremacy. A less well-trodden path is how the CJEU built the democratic side of the new legal order, yet it is a similarly important facet of the development of EU constitutionalism. Developing democracy, particularly by improving the input of the historically under-voiced EU citizens, is essential for the EU to continue to develop as a legitimate polity. The jurisprudence recognizes this. The general idea is epitomised through *Van Gend en Loos* and institutional balance, and its actualisation is sought by decisions that try to pull the input of the EP onto more of a par with the other interests represented in the legislative process.

This paper offers two examples of how this occurs.[28] First, the Court read consultation to include a requirement for re-consultation – the EP should not only have input into the initial proposal but also any subsequent ones. Second, once co-operation and co-decision were introduced into the Treaties, it encouraged a choice of legal base that utilised one of those two methods – promoting the EP's legislative participation. Although there are problems with the EP's ability to represent citizens, this is not

[28] Lenaerts (n 2) notes other ways that the CJEU has improved the EP's role in EU democracy – such as encouraging party groupings and protecting legislative prerogatives – but, as noted in the Introduction above, he did not seek to situate those developments in the CJEU's wider approach to EU democracy.

something the CJEU can remedy. It can only shape EU democracy according to its ideal vision of three legitimators, using the Treaty's architecture. Problems with this underline the political issues facing the drive to democratise the EU, although that is not this paper's focus.

For present purposes the noteworthy factor is the Court's democracy-building role. Its tendency to pull EU democracy towards an ideal approach based on three legitimators – ascertained from the Treaties and therefore highly suitable for the present EU's structure – to create what it sees as a more legitimate Union. This is what a constitutional court ought to do: advance a vision of democracy inherent in the law as well as to develop the law and legal order more generally in order to promote its growth and legitimacy. The CJEU's democracy-building role provides the context for its advancement of the EP's legislative position.

2. Consultation.

The consultation legislative procedure is one of the EU's oldest and most frequently used. Kardasheva calculates that, since the Amsterdam Treaty, it has been used to pass over half of the EU's laws. This position has begun to change because after the Lisbon Treaty came into force in 2009 the Ordinary Legislative Procedure became the default method of lawmaking. Nonetheless the historic usage of consultation, and the fact that it remains extant, means its place in EU democracy is significant.[29]

Consultation is, according to the Treaties, fairly simple. The Council must ask for the Parliament to opine on a proposal but the EP does not directly vote on its adoption. One example is Article 192(2) TFEU: 'the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament … shall adopt'. As is to be expected, the CJEU makes sure that this procedure is complied with. It annuls legislation that, despite ostensibly being passed through consultation, did not actually see any consultation take place. That was essentially the situation in *Isoglucose*;

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[29] Kardasheva (n 19) 386.

the EP was asked for its views on a proposal but the Council did not wait to hear what those views were.[30]

As well as making sure consultation occurs, the CJEU's jurisprudence imbues that procedure with more substance, giving the EP a more meaningful legislative role. In the process it draws on the principle of direct democracy identified in *Isoglucose*. This displays a desire to ensure that the directly elected element of EU lawmaking can make the fullest possible contribution to EU legislation alongside the representatives of Member States and the EU polity. This is part of an attempt to develop a democratic legal order that takes due account of the three actors identified in *Van Gend en Loos*. That is essential for the project of ever-closer Union to be effectively achieved.

2.1. Re-consultation.

Re-consultation originated in *Chemiefarma*.[31] A cartel was fined for breaching Article 85 EC [101 TFEU]. The companies appealed against this decision partly because the fine did not entirely correspond with the punishment on which the EP had been consulted. The Court dismissed this argument because 'considered as a whole the substance of the draft Regulation on which the Parliament was consulted has not been altered'.[32] Although no re-consultation was needed, the judgment implied that a significant divergence between an adopted measure and the one on which the EP was consulted might lead to annulment.

Later decisions made concrete *Chemiefarma*'s nascent re-consultation requirement. This is best illustrated by the *Cabotage* cases, because they best explain its rationale, but

[30] *Isoglucose* (n 7) para. 34.

[31] Case 41/69 *Chemiefarma* [1970] ECR 661.

[32] ibid para. 178. See also Case 817/79 *Roger Buyl* [1982] ECR 245, paras. 23-24.

it is a feature of many judgments.[33] Most recently *Parliament v Council*[34] affirmed that 'if the Parliament is not immediately and fully informed at all stages of the procedure … it is not in a position to exercise the right of scrutiny which the Treaties have conferred on it'.[35] This comment was made in the context of the Common Security and Foreign Policy but still reflects the general rule that consultation should not occur in a weak manner that effectively mutes the EP.

Cabotage I[36] saw the EP seek the annulment of Regulation 4059/89. The EP complained that the final Regulation significantly differed to the draft over which it had been consulted. The Court granted annulment because the differences were so large that in effect the Council had failed to consult the EP. It first stated the general premise of its decision: 'the duty to consult the European Parliament ... includes the requirement that the Parliament be reconsulted on each occasion when the text finally adopted, viewed as a whole, departs substantially from the text on which the Parliament has already been consulted'.[37]

This connects consultation to re-consultation and suggests that they are two sides of the same coin. Consultation goes beyond a one-off Parliamentary opinion. It requires the Council to continue talks with the EP on each substantially different new draft. This extends the consultation process by making sure that when necessary the EP is included in initial and subsequent deliberations on legislative proposals. The CJEU explained the narrow circumstances in which the EP did not need to be re-consulted: if 'the

[33] For example, Joined Cases C-13/92, C-14/92, C-15/92 and C-16/92 *Driessen en Zonen, A Molewijk, Motorschiff Sayonara Basel AG and vof Fa C Mourik en Zoon* [1993] ECR I-4751, para. 23; Case C-388/92 *Parliament v Council* [1994] ECR I-2067, para. 10; Case C-316/91 *Parliament v Council* [1994] ECR I-625, para. 17; Case C-417/93 *Parliament v Council* [1995] ECR I-1185, para. 17.

[34] Case C-658/11 *Parliament v Council*, 24 June 2014.

[35] ibid para 86.

[36] Case C-65/90 *Parliament v Council* [1992] ECR I-4593.

[37] Case C-65/90 *Parliament v Council,* para. 16.

amendments essentially correspond to the wishes of the Parliament itself'.[38] This underscores that the CJEU believes the EP should genuinely contribute to those consultations. It will accept a lack of re-consultation if changes responded to the EP's concerns, because in that situation the EP has clearly influenced the content of the law. When the EP has not had this impact, the CJEU desires that it remains part of negotiations for as long as possible, maximising the chance that the EP has shaped the final proposal.

By asking that changes to a proposal either reflect the EP's comments on an earlier draft or trigger re-consultation, the CJEU helps the EP actively contribute to the content of legislation. That can be seen from the following passage. The CJEU scrutinized the altered Regulation and found that the

> amendments affect the very essence of the instrument adopted and must therefore be regarded as substantive. They do not correspond to any wish of the Parliament … [they] affect the scheme of the proposed regulation as a whole, [and] suffice to require fresh consultation of the Parliament.[39]

The most noteworthy aspect of this quotation is that it is not only the proposal's significant alteration that led to a demand for re-consultation. The modifications did not correspond to the EP's wishes. It is not the changes but the failure to properly consider or otherwise deal with the EP's comments that offends.

Advocate General Darmon's Opinion in *Cabotage II*[40] provides a further indication that re-consultation is about involving the EP more fully during the consultation procedure that it would otherwise be allowed to be. That case concerned Regulation 2454/92. Like *Cabotage I*, the Regulation was adopted containing provisions that were not present in the proposal on which the EP was consulted. The Court annulled the Regulation, in keeping with the re-consultation principle. Darmon explained that if the

[38] Ibid.

[39] Ibid., para 19-20.

[40] Case C-388/92 *Parliament v Council (Cabotage 2)* para. 32.

Court did not make that decision it would essentially be 'excluding the Parliament from the legislative procedure'.[41] This reiterates that re-consultation is designed to ensure that the EP plays a genuine part in lawmaking. Crucially, two paragraphs earlier Darmon had written that 'the obligation to *reconsult the Parliament is not provided for by the Treaty* (emphasis original)'.[42] The democratic significance of this can be underscored by referring back to *Isoglucose*. That case saw the CJEU affirm that the directly-elected EP's legislative participation represented a fundamental democratic principle: EU citizens now had a say on EU matters directly, rather than via their national governments. Construing the Treaties so that this forum had a greater say thus stands as an example of the Court using its interpretation of democracy to promote citizen input within an overall balance of interests encompassing citizens, Member States, and the Commission. In doing so it developed the legal side of EU democracy. It made sure that formally speaking the representatives of those *Van Gend en Loos* saw as essential legitimators had the most meaningful legislative roles possible. This aspect of the Court's jurisprudence is now explored.

2.3. Re-consultation and EU democracy.

Much of the discussion so far has emphasized the role of the EP in the Court's conception of EU democracy. Re-consultation instantly suggests that the EP's involvement in lawmaking, representing the preferences at EU level of EU citizens, is a central pillar of the CJEU's view of EU democracy. There is however more to it than that. As noted in Section 1.3 the EP exists within an institutional balance alongside the Council and Commission. Re-consultation ensures that the EP can more effectively represent the views of EU citizens alongside those other key actors during lawmaking. This suggests that the Court's approach to EU democracy, and the vision it feels necessary to promote as part of its polity-building duty, is not just based on the principle of parliamentary involvement. Citizens must be heard *alongside* the Member States and the polity. As now explained, in addition to shaping the form of the legislative process, re-consultation also describes how the parties to the EU's legislative dialogue should *interact*. This showcases the second level of the Court's approach of

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[41] Opinion of Advocate General Darmon in *Cabotage 2* (n 43) para. 19.

[42] Case C-388/92 *Parliament v Council*, para. 17.

democracy. It draws not just on the need for direct EP input but on a desire that the three organs involved in lawmaking, representing what the CJEU perceives as the interests within the new legal order, engage with one another via constructive dialogue and therefore encountering conditions that allow them to represent their respective constituents as meaningfully as possible.

Advocate General Fennelly provides the clearest exposition of the dialogue requirement. In *Visas*[43] he noted:

> Where the Treaty provides for consultation, the Parliament is entitled to express its views both on the original proposal and again in the event of substantial amendment ... As the Court has put it, 'consultation ... [of the Parliament] is likely to affect the substance of the measure adopted'. *To dispense with consultation because of an a priori view that the attitude of the Parliament was known and was unacceptable to the Council presupposes closed minds and rigid postures on the part of both institutions and denies the usefulness of the process of consultation* (emphasis added).[44]

This describes the consultation process as something designed to create an engaged and constructive dialogue between the Council and the EP. When the Commission's role in proposing legislation is added to the equation, this becomes a discussion between the actors the CJEU identifies as central to EU democracy. This is especially evident in Fennelly's decrial of 'closed minds and rigid postures': the institutions should genuinely debate the proposal with a view to its possible amendment. Consequently this encourages more effective legislative input from each actor, since the views of their representatives are given fuller consideration and a real chance to influence the content of the promulgated law. The *Visas* judgment affirms this view. In that case the EP sought the annulment of Regulation 2317/95. That Regulation governed which non-EU nationals required visas when crossing into or out of the EU. The EP argued that the Council made significant changes to the draft following its initial consultation. This

[43] Case C-392/95 *Parliament v Council* [1997] ECR I-3213 (*Visas*).

[44] Opinion of Advocate General Fennelly in ibid, para. 23.

should have triggered re-consultation.[45] Specifically the draft proposal listed countries whose nationals always required visas, but the adopted Regulation let Member States decide if they would require visas from nationals of those countries.[46] The CJEU upheld the EP's complaint.

An interesting aspect of this decision – confirming the need for the two representatives to engage in dialogue – is the Court's treatment of one of the Council's defences. The Council claimed that it was aware of the EP's wishes, so re-consultation was unnecessary.[47] This failed. The CJEU noted that:

> proper consultation … constitutes one of the means enabling it [the EP] to play an effective role in the legislative process of the Community; *to accept the Council's argument would result in seriously undermining that essential participation in the maintenance of the institutional balance intended by the Treaty and would amount to disregarding the influence that due consultation of the Parliament can have on adoption of the measure in question* (emphasis added).[48]

Letting the Council avoid re-consultation because it felt aware of the EP's wishes would prevent dialogue between the two institutions and the interests they represent. The EP – and hence EU citizens – would be unable to fully influence the content of legislation and the Council's voice – Member States – would dominate.

Here, the institutional balance (and re-consultation) is shown to be about more than formally involving the EP alongside the ever-present Council and Commission. The EP, and the legislative process, is a forum in which representatives of the EU's main democratic actors should be able to effectively communicate their views and have them taken seriously. The quotation shows re-consultation as a means to – ideally – modify

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[45] *Visas* (n 47) para. 7.

[46] ibid para. 8.

[47] Ibid para 21.

[48] Ibid para 22.

or alter legislative proposals on a dialogic basis and – at the very least – ensure the proper consideration of the EP's views alongside those of the Council. It is this approach to EU democracy that the CJEU seeks to secure, because it simultaneously gives citizens a greater voice and respects the need to hear other interests within EU democracy. This development helps to legitimate the ever-closer legal order the CJEU is developing.

The discussion now shifts to the CJEU's legal base jurisprudence. The Court rules that, whenever possible, legislation should use the legal basis that offers the EP greater legislative participation. This continues the judicial development of the EP's role in EU democracy, as informed by its *Isoglucose* conceptualization and the institutional balance. As with re-consultation, the legal base cases exhibit a judicial desire to make sure that the EP and the interests it represents are as fully involved as possible in EU lawmaking and thus to democratize the polity.

3. The choice of legal base.

Every EU measure must be adopted under a legal basis provided by the Treaty. Some bases give the EP greater involvement than others because they dictate a particular legislative process. To illustrate, Article 192(2) TFEU gives the EP a consultative role; in contrast, Article 16(2) TFEU allows laws on personal data processing to be adopted using the ordinary legislative procedure.

This requirement is related to the principle of conferred powers. The EU may only legislate in areas mandated by the Treaty. It is not uncommon for cases to be bought before the Court seeking the annulment of legislation because the measure was not thus authorized. The Court's general test asks whether the text of the contested measure corresponds to the Treaty provision, or provisions, on which it is based.[49] This flows from *Generalized Tariff Preferences*.[50] There the CJEU annulled a Regulation because it did not state a specific legal basis. It reasoned that 'the choice of the legal basis for a

[49] But the CJEU is willing to accept most wide readings of legal bases: Stephen Weatherill, 'Better Competence Monitoring' (2005) 30 EL Rev 25.

[50] Case 45/86 *Commission v Council* [1987] ECR 1517.

measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review.[51] Valid EU legislation must therefore explicitly state its legal basis or otherwise make clear which base has been used and why it has been chosen.[52]

When the EP challenges the legal basis of legislation it sometimes alleges that the choice rendered its role weaker than under a different legal basis.[53] Advocate General Kokott captured the CJEU's reaction to such claims in *EIB Guarantee*.[54] She suggested that where there was a choice of possible legal bases, 'consistent with the principle of … democracy … [if in doubt, choose] the basis under which the Parliament's rights of participation are greater'.[55] This statement – reaffirming the value that the CJEU places on the EP's participation in the legislative process – can be seen paradigmatically in *Titanium Dioxide*.[56] This case annulled legislation for having the incorrect legal basis. It considered whether a dual legal basis could be used in any re-adoption. A dual legal basis has the potential to introduce two legislative procedures with differentiated EP involvement, possibly undermining the EP's role.

The Court's ruminations over whether a dual legal basis would disadvantage the EP are telling. It argues against a dual basis if that would harm the EP's legislative role. This demonstrates a general desire to protect and enhance the representation of EU citizens

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[51] Ibid para 11.

[52] Kieran St Clair Bradley, 'Powers and Procedures in the EU Constitution: Legal Bases and the Court' in The Evolution of EU Law', in P. Craig and G. de Búrca, *The Evolution of EU Law* (2nd edn, OUP 2011) 91-92.

[53] More frequently the EP's motivation is that it believes the incorrect legal basis has been chosen, e.g. Case C-166/07 *Parliament v Council* [2009] ECR I-7135.

[54] Case C-155/07 *Parliament v Council* [2008] ECR I-8103.

[55] Opinion of Advocate General Kokott in ibid, para. 90. See also Opinion of Advocate General Tesauro in Case C-65/93 *Parliament v Council*, para. 17; Opinion of Advocatre General Fennelly in Case C-392/95 *Parliament v Council* [1997], para. 37.

[56] Case C-300/89 *Commission v Council*. [1991] ECR I-2867.

in the legislative process. It part of an overall system of interest representation necessary for the democracy that the CJEU feels suits and facilitates the new legal order.

In *Titanium Dioxide* the CJEU upheld a complaint that Directive 89/428, harmonizing national laws on treating pollution generated by the titanium dioxide industry, had the wrong legal basis. In doing so it considered whether a dual legal basis would be appropriate. The Directive was based on Article 130s EEC, which allowed the Council to take environmental action after EP consultation. The Commission's successful plea was that the Directive should have been based on Article 100a EEC. The judgment revolved around the disparity between the Directive and Article 130s. The Directive's main purpose was to harmonize national industrial laws and prevent distortions of competition in the internal market. As a result the Court ruled that it should have been based on Article 100a's power to regulate the establishment and functioning of the internal market. Article 130s was an environmental competence and did not provide the requisite authority.[57]

Although the final decision was not formally predicated on the EP's involvement, the judgment paid close attention to how the annulment would affect the EP. In particular, the Court noted that the Directive could theoretically be passed on the dual basis of Article 100a and Article 130s.[58] It did not recommend this, because doing so would limit the EP's contribution. Advocate General Tesauro set the tone. He noted that 'the fundamental differences between the two provisions [Articles 100a and 130s] are to be apprehended at the procedural level'.[59] Article 100a called for co-operation and 130s for consultation. Co-operation has since been repealed. However, it represented a halfway point between consultation and the OLP. Even with the Court's reading of consultation, co-operation granted the EP more legislative involvement. That is because it allowed the EP to formally propose amendments to legislation. The judgment

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[57] ibid paras 22-24. The CJEU summarized its test for whether to adopt a dual legal basis in Case C-164/97 *Parliament v Council* [1999] ECR I-1139, para 14.

[58] Ibid., paras. 16-17.

[59] Opinion of Advocate General Tesauro in ibid, para 2. See also Case C-370/07 *Commission v Council* [2009] ECR I-8917, para. 48.

recognized this point. It noted that co-operation was designed 'to increase the involvement of the European Parliament in the legislative process'.[60]

The CJEU problematized the procedural differences between Arts 100a and 130s on democratic grounds. Using co-operation *and* consultation would 'divest the cooperation procedure of its very substance'.[61] It would void the increased parliamentary input granted by co-operation. The reason lay in each procedure's voting requirements. Co-operation saw the EP's amendments voted on by the Council through qualified majority voting. Under the voting rules then in force, the EP's amendments were adopted if a weighted majority of the Council voted in favour. However, if consultation *and* co-operation were used, the consultation procedure would require the Council to vote unanimously to adopt the amended proposal. That would negate the increased chance of EP amendments being accepted that co-operation alone would provide. In explaining this, the Court connected the need to uphold the integrity of the co-operation procedure and its conceptualization of the EP as a representative democratic body:

> if, as a result of simultaneous reference to Arts 100a and 130s, the Council were required, in any event, to act unanimously … the very purpose of the cooperation procedure, which is to increase the involvement of the European Parliament in the legislative process of the Community, would thus be jeopardized…. that participation reflects a fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly.[62]

This is a clear statement that the EP's legislative involvement is considered an essential part of EU democracy. Interestingly, the emphasis on the need to protect the EP's input into the legislative process seemingly outweighed in tone the operative part of the case, which was a more formulaic comparison of the text of the Directive and the legal basis. Co-operation has been superseded by co-decision and the OLP, but the quotation's

[60] ibid para 20.

[61] Ibid para 18.

[62] Ibid paras. 19-20. See also the Opinion of Advocate General Tesauro, para. 11.

democratic sentiments still apply. When considering the choice of legal basis, the CJEU tries to ensure that the EU's directly representative body does not have its role weakened. On one level this is because the EP represents EU citizens. On another level it is because the EP imbues the EU's legislative process with a directly representative element. Alongside the involvement of Member States in the Council and the 'community interest' safeguarded by the Commission, the Court feels that this is necessary for the EU's legal order to be democratic.

4. Conclusion.

This paper aimed to develop the legal literature on the relationship between the EP and EU democracy. It did so by contextualising the CJEU's enhancement of the EP's legislative position within its view of democracy as exhibited in *Van Gend en Loos* and the institutional balance. In the process it has shed additional light on the Court's hitherto under-appreciated role in developing EU democracy. The development of EU democracy is crucial for the continued legitimacy of the polity, and the Court has done what constitutional courts ought to do: using the laws at its disposal to try and actualise an appropriate model of democracy for the constitutional order it must develop.

The CJEU's approach to EU democracy is not only based on the EP. The CJEU sees EU lawmaking and democracy as something involving three organs – the EP, Council, and the Commission. They respectively represent EU citizens, Member States, and the common EU interest. This reflects the Court's identification in *Van Gend en Loos* of those actors as the affected members of the 'new legal order'. It is within this overall context that the judicial improvement of the EP's influence through mechanisms such as re-consultation must be appreciated. The CJEU does not simply strive to improve the EP's lawmaking position, but seeks to make sure that EU democracy takes proper account of the EU's three legitimators.