Common Market Law Review **54**: 1–10, 2017.

EDITORIAL COMMENTS

A way to win back support for the European project?

Recent developments in the Member States of the European Union indicate that the European project is losing more and more acceptance among the peoples of Europe. Whereas the Brexit may, perhaps, find one of its various explanations in the fact that some parts of the British population never really developed emotional ties with Europe and traditionally took a somewhat sceptical view of anything coming from "Brussels", the populist movements in France, Italy, and the Netherlands, striving not only for some more or less fundamental reform of the European legal system but explicitly calling for an exit from the Union, indicate that the very basis of the integration project, laid in the 1950s, may be in the process of crumbling.

It should be admitted that euroscepticism (even in its harshest version as an anti-European ideology) is nothing particularly new. However, for some time it was restricted to more or less fringe left and right-wing parties. In contrast, both euroscepticism and (nationalistic) populism nowadays seem to win considerable support, and, to a certain extent, may even go hand-in-hand among large parts of the population in some Member States; Hungary, Slovakia and Poland may also be taken as evidence. In such an alarming setting for the European project, any analysis of the reasons for these troubling developments, and any suggestions for finding a cure, deserve attention. Most recently, Dieter Grimm, a former judge at the German *Bundesverfassungsgericht* and well-known academic, author of books on sovereignty[1] and constitutionalism,[2] has published a collection of essays, entitled *Europa ja – aber welches?* (Europe yes – but what kind of Europe?),[3] – essays which were (for the most part) written between 2013 and 2015. These essays form part of a growing body of literature dealing with the manifold problems encountered by the European Union these days. As the diminishing popular support of the European project has to be regarded as a truly major problem, these essays deserve particular interest for their legal analysis, and

1. Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept* (Columbia University Press, 2015).

2. Grimm, *Constitutionalism: Past, Present, and Future* (OUP, 2016).

3. Grimm, *Europa ja – aber welches? Zur Verfassung der europäischen Demokratie* (C.H.Beck, 2016); one of the essays has been prepublished as "The democratic costs of constitutionalisation: The European case", 21 ELJ (2015), 460. See also Grimm, "The power of restraint in the European Union" in Van Middelaar and Van Parijs (Eds.), *After the Storm. How to save democracy in Europe* (Lannoo, 2015), pp. 109–121.

the ensuing cure based on this analysis – particularly since the author, though being firmly pro-European in outlook, nevertheless suggests a somewhat radical change in the Union's constitutional setting in order to reinvigorate the necessary popular support for the European project.

The book does not aim to address the broad political and sociological developments that may account for the rising tide of euroscepticism (in fact, the term does not even appear in the book's index). These developments are, of course, always present, but they merely form the background for the legal arguments presented. Besides, the author reminds us that the *telos* that once inspired the European project – to integrate European States in such a way that a war between them would become impossible – has been so successfully achieved that today's populace takes it as a matter of course to live in a peaceful European environment. Integration is thus no longer perceived as a peace-keeping project. Similarly, the many advantages that the realization of the internal market has brought – free choice among goods and services from all over Europe, free movement of workers and Union citizens, and the rights derived therefrom – are just taken for granted by most people. In contrast, what seems to be dominant in today's conception of Europe are the effects of globalization (for which Europe is blamed), the growing "distance" between different segments of the population and the governing economic and political elites, the reinvigorated strife for self-determination in smaller entities, the desire to regain freedom to take autonomous decisions at the level of smaller entities and to uphold national traditions and cultural identity, and, above all, the intimidating effects of migration flows, international terrorism, and the fear of islamization; in addition, at least in some Member States, the damaging effects of the economic and debt crisis, and of the austerity policies imposed by State governments, for which Europe, at least in part, is blamed as well.

To be sure, in Grimm's perspective the single market project is, of course, a great and valuable achievement. Moreover, action and cooperation at the European level is regarded as essential for all those problems that have a cross-border dimension and that transcend the national problem-solving potential and capacities of the Member States. Therefore, "Europe" is very much needed; and therefore it needs support. This insight leads to the question why the European project is losing support among Europe's populace and what an adequate cure may be.

The essays take a predominantly legal perspective, some of them concentrating – as the subtitle of the book indicates – on constitutional issues of European democracy. One major topic, developed in a couple of essays, is the thesis that the constitutional construction of the European Union, as laid down in the Treaties and developed, for the most part, in the case law of the Court of Justice, may (at least to some extent) account for the declining

popular support for and acceptance of the European project, and therefore is in need of a major reform. The gist of the argument is that many essential steps in European integration were not achieved by means of the political process, and thereby were not directly supported by the populations of the Member States. Moreover, the constitutional framework of the European Union, as it exists today, is blamed for having withdrawn major issues from the arena of political discussion. To regain support for the European project, and to solve (at least some aspects of) the democratic deficit, Grimm makes the (revolutionary sounding) proposal to "downgrade" large parts of European primary law (at one point he even refers to nearly the whole TFEU[4]) to secondary law, in order to give the Union legislature the power and chance to get involved in fundamental political choices, thereby invigorating the democratic process[5] and creating public support in the course of this.

The argument runs (roughly) as follows. Starting with its early case law on direct effect and supremacy of European Community law (*van Gend en Loos; Costa* v. *ENEL*), the Court of Justice has turned an international treaty into a document with "constitutional" character.[6] Its adjudication thereby transformed the Community into a supranational entity, somewhere in between an international organization and a federal State.[7] In the 1970s and 1980s, the Court's case law, with its expansive reading of the fundamental freedoms and of the notion of State aid, led to a creeping, but dramatic loss of competence on the side of the Member States with regard to the regulation of economic and social matters, foremost in the public sector (*services publics, Daseinsvorsorge*).[8] This development of a European (economic) constitution by the Court was neither called into question by the other Community/ Union organs, nor (more surprisingly) did it meet with severe resistance from the Member States.[9] But this transformation was not actively supported by the population in the Member States, instead creating the widespread feeling that integration may have gone too far.

Grimm contends that certain implications of this transformation by judicial action have hardly been noticed. Starting from the premise that the very essence of constitutionalism is based on the very distinction between a

4. Pp. 27, 46. This far-reaching statement is modified at other places of the text where Grimm describes provisions on institutions, competences, procedures, human rights and basic goals as typically constitutional in nature; e.g. pp. 43, 131.

5. Pp. 27, 37–41, 86–88, 108–109, 111, 113–115, 126–127, 214–216.

6. This has indeed been observed by many commentators, cf. e.g. Mancini, "The making of a Constitution for Europe", 26 CML Rev. (1989), 595; Weiler, "The transformation of Europe", 100 Yale L J (1991), 2403.

7. P. 11.

8. Pp. 14, 38, 109–111, 216.

9. Pp. 16, 39.

constitution as the relevant institutional framework for the political process on the one hand and the political decisions and choices (by legislation) that are taken within this framework on the other, Grimm contends that the "constitutionalization" of the European Treaties by the interpretation of the ECJ (via direct effect; supremacy) has led to a problematic mix,[10] as the Treaties contain a great many substantive provisions that within a State would normally not appear in a constitution, but – in his view – should be left to ordinary legislation and thereby to the political process with democratic legitimacy.[11] Given the central role of the ECJ with regard to the interpretation of the substantive provisions of the Treaties (e.g. competition law, including State aids, and the fundamental freedoms), the Union legislature cannot change or even influence the political choices (with constitutional flavour) made by the Court; and correction by way of a Treaty amendment amounts to a *mission impossible*.[12]

To restate this clearly: the issue is not whether the Union legislature has developed policies that may be criticized. A central message of the book is, rather, that decisions with important political implications and consequences (e.g. for the social policies of the Member States) are taken as a matter of constitutional law in an *a-political mode*[13] – by judgments handed down by the Court (or, as Grimm adds, also by decisions of the Commission[14]). The Court acts, but due to its constitutional status is isolated from the other political Union organs, the Council and the Parliament, and from the influence and will of the Member States. This is described as the real problem of democratic deficit in the European Union.[15]

Grimm argues that any improvement with regard to the democratic legitimization of the Union and support for the European project has to take into account the fact that the European Parliament, being too far away from the social basis of its electorate, cannot wholly fulfil the necessary legitimizing role. Rather, for the foreseeable future, the Member States, deciding in the Council, will still have to be attributed an essential function in the Union's democratic legitimization. It is therefore proposed that these two institutions should be entrusted with the political decisions that (clothed in substantive constitutional law) up until now have been taken in an *a-political mode* by the

10. P. 18.
11. P. 87 (with reference to competition law), 114, 131.
12. P. 18.
13. Pp. 21, 22–23, 41, 113. The argument could be made that the Court, in reality, also behaves as a political actor anticipating and reacting to political developments and pressures. However, this does not contradict the contention that the Court reaches its judgments isolated from the relevant political discourse, thereby creating the democratic deficit.
14. E.g. with regard to State aids.
15. P. 21.

Court. The ensuing proposal – as mentioned above – is to downgrade the TFEU in large parts[16] to secondary law, which would give the Union legislature the power to correct any unwanted decision reached by the Court of Justice.

Given that Grimm's proposal would mean a radical departure from the present constitutional set-up of the Union, one may ask whether, on the one hand, it promises a realistic cure for the diminishing popular support for the European project (under 1.), and, on the other hand, whether it is based on a convincing legal description of European primary law and the respective role of the Court (under 2.).

(1) The hope for an increase in the popular support of the European project based on the proposal to downgrade large parts of Union primary law assumes that the population in the various Member States is aware of the implications and consequences of European primary law in their daily life. The fact that the proposed European Constitution met with strong opposition in the Netherlands and in France does not amount to convincing evidence that the population was opposed to the constitutional principles that evolved in the Court's case law up till now.[17] It is open to speculation whether these principles are widely known at all and, if so, whether their impact and consequences are a matter of popular concern. Moreover, one may wonder whether a proposal to downgrade certain parts of European primary law to secondary law would meet with broad approval in the respective populace of the Member States. Are matters of competition law, State aid law or the impact of the fundamental freedoms matters of such public interest that we can predict with any certainty that moving these areas of law into the political discourse of Union secondary action would improve the support for the Union?

Moreover, it is submitted that many key challenges facing the Union today – like mass migration and international terrorism – are only indirectly, or even on mistaken premises, connected with the criticized "constitutionalization" of Treaty provisions relating to the internal market or competition law. The suggested cure – downgrading the TFEU – is not related to the important topics that dominate popular thinking and feeling these days, and will presumably not be able to regain public support for the European project. It is submitted that as far as the Treaties provide for specific competence provisions for the Union, and some guiding principles for Union secondary action to meet those challenges, what is needed is not some sort of downgrading of European primary law, but rather effective action by the

16. See *supra* note 4.
17. It should be recalled that the ECJ was for a long time the most popular institution.

(democratically legitimized) European institutions; that could in the end engage support for Europe.

(2) Grimm's proposal to downgrade primary to secondary law is based on a concept (or ideal) of a constitution that is restricted to provisions devoted to fundamental issues,[18] leaving as many political issues as possible to the democratic discourse. In Grimm's view, the European Union must – to that extent – be regarded as "overconstitutionalized".[19] Apart from the highly complex question whether there is something like an "ideal" constitution and what issues should be covered therein, Grimm's proposed cure is surprising for its sweeping breadth, as it is meant to encompass essentially the whole TFEU.[20] Closer analysis reveals, however, that the author himself exaggerates this point to a considerable degree. Moreover, on still closer inspection, it is submitted that the proposal is built on a legal analysis of Union law that seems to be incomplete and not at all convincing.

Firstly, the proposal to downgrade the TFEU to secondary law is qualified by Grimm himself as far as institutions, competences, procedures, human rights and basic goals are concerned: these fields of law (in his line of thinking) have to be considered as typically "constitutional" in character, and therefore exempt from the proposal[21] which thereby, in fact, loses part of its sweeping character. This relates to the many TFEU provisions dealing with the Union's institutions (Arts. 223–309 TFEU) on the one hand, and provisions relating to the manifold policies and competences of the Union on the other (Arts. 67–79, 145–196 TFEU). The same applies to the institutional arrangements with regard to the Economic and Monetary Union; all these provisions are of a constitutional nature dealing, for the most part, with the competences of the Union, and are as such (also in Grimm's view) not appropriate candidates for downgrading. However, within the TFEU, the major candidates for downgrading are such important areas of primary law as the fundamental freedoms and competition law, including State aid law. Arguably, Grimm's proposal extends also to the (substantive) guiding standards that the TFEU sets forth for the exercise of the Union competences. In this respect, it should be noted that these standards do not reflect decisions taken in an *a-political mode* by the case law of the Court, but, quite the opposite, decisions taken in the highly political mode of the Treaty amendment procedures. It is not at all clear whether downgrading would at all mean a cure for the democratic deficit in this respect.

18. P. 40.
19. P. 41.
20. P. 27.
21. P. 45.

Secondly, important areas of Union law dealt with in the TFEU have not been constitutionalized by the case law of the Court of Justice at all: they have always been open to political discourse and may be shaped more or less by secondary law. This holds, above all, for the policies mentioned in the previous paragraph, for which the Union has some (often very restricted) competences. It also relates, for instance, to public procurement law which, in its essentials, is secondary law. Even competition law is, to some extent, subject to political discourse as well: the Merger Regulation was enacted by the Council; and the Council also has the power to regulate important details of the application of Article 101(3) TFEU (which may be delegated to the Commission). The same applies to State aid law whose application by the Commission is harshly criticized by Grimm; it should be recalled, however, that the Council has broad competences to legislate with regard to procedures and substantive matters (Art. 109 TFEU).

In contrast, it has to be admitted that the most fundamental competition provisions, Articles 101(1) and 102 TFEU, are not at the disposition of the Union legislature. And, if one takes a closer look, they should not be either. These provisions belong to the historical foundations on which the EEC was built. Their appearance in a constitution-like document may, indeed, seem surprising. However, they have not really been affected by the constitutionalizing adjudication of the Court (attributing Treaty provisions with direct effect); it is rather the Treaty of Rome itself that foresaw that these provisions should become directly applicable and enforced by the courts and authorities of the Member States from 1958 on (Art. 104 TFEU; ex Art. 89 EEC). The basic competition provisions of the TFEU have proved to be a model for the development of national competition law in the Member States, comparable provisions have been inserted in many free trade agreements, and they have been copied worldwide. It is hereby submitted that the basic competition provisions represent a long-term framework for the European economy that should be immune from changes imposed by short term majorities in the Council (and the Parliament). Moreover, competition law, in this case also including State aid law, should be considered as an important adjunct to the free movement of goods and services, making provisions on safeguard measures (such as anti-dumping) superfluous.

A third point relates to Title III of the TFEU, dealing with agriculture, which is also part of the historical foundation on which the EEC was built. As far as Title III contains provisions on competences, these are, again, of a typical constitutional character, and therefore (in Grimm's line of thought) not candidates for downgrading. Based on these competences, the Union organs have enjoyed a broad discretion to shape the Common Agricultural Policy –

which has been developed in open political discourse. Insofar, the "cure" of downgrading is not available.

Fourthly, and finally: should the fundamental freedoms (and the results reached by the adjudication of the ECJ) be put, as a result of downgrading, at the disposition of the Union legislature? Such a proposal is not as far-fetched as may seem at first sight. As an example, one may look at the experience of the United States where the Supreme Court, a long time ago, developed the so-called negative implications of the Constitution's *commerce clause*, restricting State powers to protect their economies, but, despite the constitutional background, always deferring to Congress to regulate the matter otherwise.[22] Though the Court of Justice has never followed a comparable approach with regard to the fundamental freedoms,[23] the democratic deficit ensuing therefrom is not as grave as Grimm's argument may suggest: large areas of the economy with relevance to the fundamental freedoms are covered by secondary law (e.g. product safety, pharmaceuticals, food products, capital market law, insurance and credit institutions). In all these areas of the internal market, the *a-political mode* of decision-making by the Court of Justice has been replaced or at least supplemented by Union secondary action, and thereby in the democratically legitimized way of decision-making which Grimm calls for.

The fundamental freedoms are not just the basis of the original Common Market, but these days also important instruments to set limits to economic nationalism and protectionism of the Member States. To downgrade them to secondary law could make them – with regard to certain popular issues – the potential object of *negotiation deals* in the Council or in Parliament, influenced by conflicting economic and social traditions and concerns in the Member States. Depending on their consequences, such deals may attract some extra support for Europe in the population of some Member States, but may also lead to loss of support in others. The argument could even be made that it is precisely the *a-political mode* of interpreting the fundamental freedoms by the Court (at the expense of the democratic process) which mitigated such potential conflicts in the past, and thereby (covertly) even consolidated support for the European project.

Undoubtedly, it can be argued that the case law of the Court of Justice with regard to the fundamental freedoms has not always given the Member States enough leeway to follow their (social and economic) policy choices; more or

22. *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 434–436 (1946).

23. A somewhat comparable approach is discussed in the literature with regard to the Court's interpretation of the general principles of Union law in the light of secondary law; cf. Syrpis, "The relationship between primary and secondary law in the EU", 52 CML Rev (2015), 461. See also the reference in Art. 21 TFEU to Union legislation which may define the limits of the Union citizenship.

less famous examples immediately come to mind. Nevertheless, demanding that the Court of Justice should give the Member States enough room to breathe and to develop their respective policies within the framework of the fundamental freedoms is one thing; downgrading the freedoms and putting them at the free disposition of the legislature is quite another.

Taken all together, it seems doubtful whether the proposal to downgrade parts of the TFEU to secondary law would ultimately be successful in drawing increased support from the European population. Moreover, this recipe seems to be based on a somewhat problematic and incomplete legal analysis of Union law; and, with regard to its (legal) consequences, it might (further) tend to shake the very legal foundations on which the Union is built. This leads to the question whether there are other legal avenues which may promise (some) success in drawing acceptance of the European project. The book discusses a number of other suggestions that, in comparison, are not that novel. Grimm tends to be rather sceptical towards proposals to further enlarge the competences of the European Parliament, given the still underdeveloped public discourse on the European level and the still modest involvement of the European populace in matters of European politics.[24] Moreover, such a development might weaken the role of the Council and European Council, and thereby the still important democratic legitimation of the European Union derived from the Member States.[25] In contrast, Grimm believes that acceptance of the Union may and should be furthered by a Europeanization of elections for the Parliament, with truly European political parties having close contacts to their electorate, discussing predominantly European topics in their election campaigns, and the election taking place on the basis of uniform standards in all Member States.[26] Grimm is also sceptical towards all proposals to give the subsidiarity principle more bite, stating that experience has proven that it is hard, if not impossible, for the principle to be applied by the Court of Justice.[27] Instead, he suggests that the functional single market competence (Art. 114 TFEU) should be replaced by a clear catalogue of competences, defined on the basis of substantive criteria.[28]

Finally, given the insight that the initial basis for the European project – its peace-keeping function – no longer provides an "emotional glue", the project needs explanation by politicians at the European and national level as to why it is still necessary and where the voyage should go. Grimm rightly warns against voices arguing in favour of creating a US-like European federal State,

24. Pp. 92. 117, 123.
25. Pp. 130, 140–141.
26. Pp. 32–33, 121–123, 130, 133–136, 143.
27. P. 23.
28. Pp. 44–45.

which would probably increase the distance between the populace and European institutions, and therefore reduce the acceptance of the Union further.[29] It might be added that proposals to push integration in the direction of a supranational entity with the power to impose direct taxes, establish a federal unemployment insurance system and federal social assistance and suchlike,[30] may meet with strong opposition within the population of at least some Member States. Grimm is certainly not the first to state that a discussion on the *telos* of the Union is long overdue.[31] Perhaps (as the author also indicates[32]) we should view and discuss the present problems encountered by the Union – terrorism, migration flows, innovation and technological change, globalization with all its implications – based on the insight that all these problems, being international in their dimension, cannot be coped with by the Member States on their own in an autonomous way, but only and more effectively if they cooperate within a framework like the European Union. In other words: the way to more support for the European project and to overcome eurosceptisism should not lie with a radical constitutional reform, as proposed by Grimm; instead, support should rather be stimulated by convincing the populations in the Member States that the challenges of today and the future do require a functioning European Union.

29. P. 43.
30. See most recently Offe, *Europa in der Falle* (Suhrkamp, 2016).
31. Pp. 27–28.
32. P. 22 (Grimm calls this the rational justification of integration).