

Elżbieta Kuźelewska, Dariusz Kloza, Izabela Kraśnicka and Franciszek Strzyczkowski (eds.), *European Judicial Systems as a Challenge for Democracy. European Integration and Democracy Series. Volume 3.* (Cambridge, Antwerpen, Portland: Intersentia 2015), ISBN 978-1-78068-316-4, 260 p.<sup>1</sup>

## Introduction

Reviewing this book is not an easy task. Each chapter is written by a different author or different authors and the topics covered are diverse. The book does not have a common introduction nor common conclusions. The preface does give the reader only a vague idea on what the book is about. The editors do stress in the preface the importance the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR) and national courts have had for European integration. They want to know more about the role European and national courts play in this process and about the relationship between courts and democracy. However, the editors do not formulate an explicit overarching research question which the thirteen contributions would then try to answer. Neither do they provide a common analytical framework for the contributions. I would describe the book as a collection of articles of varying quality which address different fundamental issues of European Union (EU) law and of the European Convention of Human Rights (ECHR).

Due to the diversity of topics that the book deals with, I will introduce all of the chapters in short in the following section - not necessarily in the order they are in the book but rather by topic. This will enable the reader of this review to evaluate which chapters are of interest to him or her. Unfortunately, this overview cannot capture all the details of a contribution that the author spent so much time on putting on paper but I think it gives a good picture of the diversity of topics. In the final part of this review I will address some of the chapters in more detail and give my assessment of the book as a whole.

## The contributions

The book is divided into two parts: A long first part containing contributions on the CJEU and a much shorter second part on the ECtHR and the ECHR.

The contributions found in the first part of the book address a number of legal issues concerning the nature of the EU, some with the help of case studies of specific fields. This part has ten chapters spanning 180 pages. The first chapter written by Bogusia Puchalska covers issues of supremacy, takes a look at the economic model promoted by the CJEU and investigates a possible investor-state dispute settlement system of the Transatlantic Trade and Investment Partnership (TTIP). Puchalska argues that the CJEU prioritized economic values

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and the uniformity of EU law over fundamental rights and warns that an investor-state dispute settlement system would promote the interests of corporations and therefore increase the democratic deficit. Supremacy also plays a major role in three other chapters. Mariusz J. Golecki addresses supremacy in connection with the preliminary ruling procedure and analyses reactions of national constitutional courts to the doctrine of supremacy. In addition, he suggests that the development of clearer rules on state liability on a European level could make the application of EU law more coherent. Elżbieta Kużelewska and Dariusz Kużelewski look at how the Polish Constitutional Tribunal dealt with the doctrine of supremacy. After analyzing judgments of the Tribunal they conclude that the Tribunal does not accept the principle of supremacy in full and argue in favor of a full recognition of the principle of supremacy by the Tribunal. Izabela Kraśnicka uses the *Miś*-case concerning working time and the definition of on-call duty as a case study to show how the principles of supremacy and direct effect are applied by Polish courts. She concludes that in the end (the case went to the supreme court) supremacy and direct effect of the Working Time Directive were accepted by the Polish courts involved. Two chapters address the balance of power between EU institutions. Tomasz Dubowski concludes, after analyzing several CJEU rulings, that the CJEU's balance of power-argument is a result of legal activism and that the use of this argument by the CJEU mostly in favor of the European Parliament (EP) has increased the democratic character of the EU. Agnieszka Piekutowska looks at CJEU rulings on the power of the EP and comes to the same conclusion concerning the increase of power of the EP through rulings of the CJEU. However, she identifies the duty of the EP to diligently exercise its democratic powers as a new trend in recent CJEU rulings. Three chapters deal with the private enforcement in competition law, the financial crisis and data protection respectively. Franciszek Strzyczkowski describes a number of CJEU cases on competition law. He argues that the approach of the CJEU to allow consumers to bring competition cases to court under certain conditions adds to the democratic character of the EU. Filip Křepelka investigates the role played by the CJEU in the euro crisis in the light of the recent preliminary reference from the German Federal Constitutional Court (*Gauweiler*-case). At the time Křepelka wrote his chapter the Advocate General (AG) had given his opinion but no ruling had been delivered yet. He predicts that the CJEU will follow the opinion of the AG who argued that the European Central Bank has considerable discretion. As it turns out he was right. However, this is not very surprising as the CJEU follows the opinion of the AG in most cases. Gabriela Zafir writes about the protection of digital personal data under EU law in general and about two recent CJEU data protection cases in particular (*Digital Rights Ireland* and *Google*). She sees the CJEU as a defender of fundamental rights as it put personal data protection before the economic interests of service providers. Tine Carmeliet and Georgia Kosmidou analyze the legal instruments the EU has at its disposal to make member states respect fundamental democratic values. They point to the

weaknesses of the existing legal framework and propose to give the CJEU a key role in defining and applying liberal democratic values.

In the second part of the book the ECHR and the ECtHR are examined in three chapters spanning 60 pages. Władysław Józwicki analyses the protocol 16 procedure which allows national higher courts to ask the ECtHR for an opinion. He is rather pessimistic about the procedure being able to achieve its aims, like the reduction of the court's case load or better implementation of the ECHR. Fisnik Korenica and Dren Doli compare the electoral system of the EU with the standards applied by the ECtHR to national systems. In their opinion, the electoral rules of EP elections go against standards laid down by the ECHR and the ECtHR concerning the right to vote and the prohibition of discrimination. They do sketch how a system which fulfills the standards of the ECtHR could look like (for example different role for Council, single constituency for whole EU) but because such a system would require substantial treaty changes, they are not very optimistic about the chances for such a system to be introduced. Karol Pachnik and Jakub Krajewski look at the position of temporary judges in Poland in the light of fair trial requirements. They argue that under certain conditions for nomination and duration of office, temporary judges are sufficiently independent. They see the rules on temporary judges in administrative courts in Poland as a possible solution to problems of fair trial.

### Assessment

The title of the book is a little misleading. Readers who expect a thorough discussion of the concept of democracy, the role of the courts in liberal democracies or more complicated issues of democratic legitimacy of the national and European legal orders will be disappointed. Some contributions do not mention the word democracy and none actually see European judicial systems as a real challenge for democracy. Instead more often than not courts are seen as protectors of individual rights, which is arguably one of the main functions of courts in liberal democracies and thus not really surprising. Moreover, the editors apparently did not provide a style sheet to the authors. The style used for bibliographies differs greatly between chapters adding to the feeling of inconsistency already triggered by the lack of a common research question. Many authors do not formulate a research question either, making it unnecessarily difficult for the reader to see what the research problem actually is. In addition, several contributions would have benefited greatly from a more thorough review by a native English speaker. Particularly the peculiar use of the definite article in some of the contributions makes it a bumpy read. In addition, some authors should have made more use of the existing literature on their subject and thus provide a better overview of the state of the art. This general critique does not necessarily say anything about the quality of the individual contributions. Actually, there are a number of contributions that stand out. They make good use of the existing literature, are well written, formulate a research problem and

address relevant recent developments. This selection of the most interesting contributions is, of course, partly subjective and informed by my own academic interests. For example, Piekutowska's contribution is a concise analysis of the CJEU's case law on the powers of the EP and although the subject has been discussed many times before, the inclusion of newer CJEU case law makes it an informative read. Also a pleasure to read is Józwicki's well researched critical analysis of protocol 16 to the ECHR comparing expectations and obstacles connected to this procedure. And the two chapters on how supremacy of EU law is interpreted by Polish courts, one by Kuźelewska and Kuźelewski and the other one by Kraśnicka, are valuable case studies that give insight into how national courts approach fundamental European legal questions and how they, in practice, handle the requirements and expectations found in EU law. The focus on Poland in these case studies is also and maybe especially interesting to readers who are not experts on the Polish judiciary. Another outstanding chapter is the one written by Carmeliet and Kosmidou on the shortcomings concerning the enforcement of fundamental values in the EU. The authors go beyond a purely legal analysis and take political constraints and political opportunities into consideration. Also very well written and documented is Korenica's and Doli's chapter on how the electoral rules of EP elections collide with the standards for parliamentary representation formulated by the ECtHR. In addition to some high quality chapters, the focus on Poland in many contributions is very interesting.

To sum up, missing guidelines by the editors on style and research problem, sometimes awkward language usage and shortcomings in literature-use and structure in some of the contributions diminish in my opinion the overall quality of the book. Nevertheless, I do not regret reading this book. It contains some very good contributions and the diversity of the contributions makes it interesting for legal scholars from different fields. The focus on Poland in many of the contributions places the application of EU in a national context, something that should happen more often.

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