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### **REVISITING *VAN GEND EN LOOS***

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**Van Gend en Loos:  
The Individual as Subject and Object and  
the Dilemma of European Legitimacy**

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Prologue:  
**Revisiting *Van Gend En Loos***

Fifty years have passed since the European Court of Justice gave what is arguably its most consequential decision: *Van Gend en Loos*. The UMR de droit comparé de Paris, the European Journal of International Law (EJIL), and the International Journal of Constitutional Law (I•CON) decided to mark this anniversary with a workshop on the case and the myriad of issues surrounding it. In orientation our purpose was not to ‘celebrate’ *Van Gend en Loos*, but to revisit the case critically; to problematize it; to look at its distinct bright side but also at the dark side of the moon; to examine its underlying assumptions and implications and to place it in a comparative context, using it as a yardstick to explore developments in other regions in the world. The result is a set of papers which both individually and as a whole demonstrate the legacy and the ongoing relevance of this landmark decision.

My warmest thanks go to the co-organizers of this event, Professor H el ene Ruiz Fabri, Director of the UMR de droit compar e de Paris, and Professor Michel Rosenfeld, co-Editor-in-Chief of *I•CON*.

JHHW

**VAN GEND EN LOOS:  
THE INDIVIDUAL AS SUBJECT AND OBJECT AND  
THE DILEMMA OF EUROPEAN LEGITIMACY**

By J.H.H. Weiler\*

**Abstract**

This essay examines, first, the reasons for the extraordinary impact and iconic status which attached to Van Gend en Loos. It argues that the explanation lies in a confluence of structural factors and not in the "direct effect" doctrine simpliciter. It then looks at the 'darker' side of the case -- a proxy for governance -- its contribution to a European narrative of efficiency which disregards the traditional mechanism of democratic legitimacy.

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\* President, European University Institute. This is a revised and amplified version of my general introduction to the Van Gend en Loos 50th Anniversary Conference held at the European Court of Justice on May 13, 2013. Thanks to Anna Sodersten for research assistance.

## **I. The Promise of Van Gend en Loos**

The celebrity status of Van Gend en Loos is surely justified. I feel comfortable in saying that in the annals of judicial decisions of international courts and tribunals none comes even close to Van Gend en Loos in its profound systemic and conceptual impact. Van Gend en Loos did not only shape the legal order; it played a huge role in constituting that order. For once the word ‘iconic’ is not a cliché.

In the first part of this reflection I want to reexamine that systemic and conceptual genesis and impact. In the second part I want to articulate some of the challenges it posed and continues to pose. Every bright moon has its dark side too. With the perspective of time we can begin by clarifying some commonplace misconceptions.

To say that Van Gend en Loos introduced the doctrine of Direct Effect to the Community (as it was known then) legal order does not even begin to capture the source of its profound impact. As has been pointed out by many – from the doctrinal ‘direct effect’ perspective, it may have been something of a stretch to speak of a “New Legal Order.” Neither Direct Effect nor Supremacy are, or were at the time, innovative doctrines under international law.<sup>1</sup>

We should also, I would respectfully submit, abandon the thesis that Van Gend en Loos represented a new hermeneutic, a different way of interpreting treaties or international law in general. I do not like that thesis because it suggests that somehow the Court changed the rules about construing rules as it went along, rendering Van Gend en Loos a revolutionary interpretation. I thought that in the past. But on careful reconsideration I have to contest that: The case which, indeed, had a revolutionary impact was brought about, rhetorical flashes aside, by an impeccable classical hermeneutic which was rooted in the treaty before the Court.<sup>2</sup> Van Gend en Loos is not the work of an Activist Court – if the concept of Activist Court has any meaning, which I doubt.<sup>3</sup> The fact that it was a different result to what international tribunals and courts

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<sup>1</sup> See e.g. Derrick Wyatt, “New Legal Order, or Old?” *European Law Review* (1982).

<sup>2</sup> J.H.H. Weiler, “Rewriting Van Gend en Loos: Towards a Normative Theory of ECJ Hermeneutics,” in *Judicial Discretion in European Perspective*, ed. Ola Wiklund, Stockholm: Norstedts Juridik: Kluwer Law International, 2003.

<sup>3</sup> On the concept of an Activist Court, see Anthony Arnall’s account in “Judicial Activism and the European Court of Justice: How Should Academics Respond?” in *Judicial Activism at the European*

were doing elsewhere is surely in large part due to some special features of the Treaty – which other treaty had a Preliminary Reference procedure, to give but one critical example, a feature which played a major role in the reasoning of the Court.

This is not to deny the audacity of the Court and the internal actors within it which are responsible for the outcome. Had it wished, the Advocate General gave it an escape root and the intervening Member States pressed it too. But my point is that it managed to make the audacious route by very respectable and solid hermeneutics.

Likewise, clearly the European Court of Justice is a central player, perhaps the central player, in this legal drama but, here too, we miss something if we place all our attention on this one, so called hero. Van Gend en Loos is a case with more than a single protagonist – central both to its genesis and its subsequent impact. The very decision by the Dutch court to make a preliminary reference (and the truly breakthrough decision of the lawyers who pleaded the case to request such) was not only procedurally and politically bold but conceptually, from a legal perspective was, inevitably, predicated on the existence of direct effect, which the European Court of Justice then confirmed, articulated and made a Community wide norm. Put differently, by asking the question and making the reference as regards Article 12, the Dutch court was already opening the conceptual (and political) door to the Court.

The key, then, to the genesis and profound impact was the confluence of two sets of elements the interaction of which explains the gravitas of the case.

The first is the confluence of the doctrine of direct effect with the (unintended and at the time unappreciated) genius of the Preliminary Reference system. Take away the Preliminary Reference and Direct Effect in a transnational system loses much of its impact. Put differently: There is I contend a huge difference between say, a ruling of the ICJ (the World Court) that a certain international norm at issue before it produces direct effect but this ruling takes place in the normal procedural and substantive context of intergovernmental litigation and State Responsibility and an identical ruling of the ECJ (the European Court) within the procedural context of the Preliminary Reference.

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*Court of Justice: Causes, Responses and Solutions*, eds., Mark Dawson, Bruno De Witte, and Elise Muir (Cheltenham: Edward Elgar, 2013).

The second is the confluence of Direct Effect and Supremacy.<sup>4</sup> In the case as argued before the Court, both the Advocate General and the Commission fully understood that nexus.<sup>5</sup> The Advocate General linked his rejection of the Direct Effect in that case precisely to the absence of Supremacy in some of the national legal orders, such as Italy. It seemed to him, *a titre juste*, impossible to indicate direct effect if it would result in unequal application of the same norm in different Member States. The Commission agreed with that analysis, arguing however, that if that were the case, the Court would simply have to insist on Supremacy of European Community law as well as its direct effect, indeed, because of its direct effect. The Court, in commendable restraint, refrained from adjudicating that issue which was not before it, and awaited a subsequent case to establish the nexus.

Taking these two confluences together helps explain the huge pragmatic and political significance and impact of the case. In one swift move, the Community had in place not only a full fledged system of judicial review (that after all the Treaties provided *expressis verbis*) but it was a decentralized/centralized, Private Attorney General model<sup>6</sup> – the most effective in ensuring compliance of Member States with the Community law application. Legally, direct effect construes mutual obligations among Member States as rights owed by States to individuals which national courts must protect. As a socio-legal phenomenon, Direct Effect harnesses the *private* economic, political and social interests of the individual in vindicating those rights to the public interest of ensuring the rule of law at the transnational level.

With each individual effectively becoming in that way a ‘legal vigilante’ of the public rule of law, an effective civil society monitoring system is put in place.<sup>7</sup> A collateral benefit (not without problems) is the shift of enforcement of the rule of law to a mixed market model of private and public resources. The benefits do not end here.

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<sup>4</sup> For a description of the nature and the evolution of these principles, see Bruno de Witte, “Direct Effect, Primacy, and the Nature of the Legal Order,” in *The Evolution of EU Law*, eds. Paul Craig and Gráinne de Búrca (Oxford: Oxford University Press, 2011), 346-348.

<sup>5</sup> J.H.H. Weiler, “The Transformation of Europe,” *Yale Law Journal* 100 (1991), footnote 49.

<sup>6</sup> J.H.H. Weiler, “Cain and Abel—Convergence and Divergence in International Trade Law,” in *The EU, The WTO and The NAFTA: Towards a Common Law of International Trade*, ed., J.H.H. Weiler, ed., (Oxford: Oxford University Press, 2000), 1.

<sup>7</sup> “Direct Effect and National Remedies” in T.C. Hartley, *The Foundations of European Union Law* (Oxford: Oxford University Press, 2010).

Subsidiarity – though we do not often see this term applied to this phenomenon – is built into the system given the fundamental role which individuals come to play as a result of direct effect combined with the Preliminary Reference. The demand for legal rights and their enforcement is a bottom up phenomenon, emanating from and close to, the most immediate stake holders.

And, of course, there are the two most commented upon socio-political effects of Direct Effect in terms of the process of European integration:

First, the constitution of the individual as a European subject, along side his or her national identity, decades before the institution of formal European Citizenship. And second, the symbiotic relationship between domestic courts and the European Court of Justice in the operationalization of the Direct Effect/Supremacy confluence.<sup>8</sup>

It is worth dwelling on this symbiotic relationship which Van Gend en Loos itself is both constitutive and reflective. In 1951 and 1956 the theologian Abraham Joshua Heschel published two path breaking books: *Man is not Alone*; and *God in Search of Man*.<sup>9</sup> They can stand as perfect metaphors for the relationship between the European Court and Member State courts.

It is possible to find in the constitutional order of many states a variety of “self executing” doctrines which would enable domestic courts to give direct effect to international treaty provisions. And yet, until quite recently, domestic courts were extremely reluctant to take advantage of such provisions. There are two principal reasons for such judicial reticence to give direct effect even when possible by domestic constitutional arrangements: First, it is an hermeneutic reluctance – almost an insecurity and timidity of a domestic court in the face of international norms with the interpretation of which the domestic court is unfamiliar. Even if constitutionally they might be ‘the law of the land,’ they feel to the domestic judge as ‘foreign law.’ Coupled with this hermeneutic reticence there is an understandable political reticence: Typically, Direct Effect gives a right to an individual which is enforced against his or her government. A national norm is made to bend before an international norm. What if, the domestic court reasons, it will interpret a treaty against its government and a court

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<sup>8</sup> Eric Stein, “Lawyers, Judges, and the Making of a Transnational Constitution,” *American Journal of International Law* 75 (1981), 1.

<sup>9</sup> *Man is not Alone: a Philosophy of Religion* (New York: Farrar, Straus & Giroux, 1951); *God in Search of Man: a Philosophy of Judaism* (London: John Calder, 1956).



in another country will take the opposite interpretation of the same norms? Would not the domestic court be compromising the national interest in the international arena?

What makes Direct Effect so effective and seductive to national courts in the European system is the fact that the Preliminary Reference system eliminates both those impediments: The Member State Court does not have to grapple with hermeneutic uncertainty as to the correct interpretation of the treaty norm: It receives an authoritative interpretation from the European Court of Justice. And, what is more, that interpretation is *de facto* valid, *erga omnes*, i.e. binding equally on all. The Member States Courts 'are not alone' when confronted with the higher norm of the international treaty.

The symbiotic relationship works also in the opposite direction. The European Court 'needs' the national courts not only to 'activate' and initiate the European norm. But also for the compliance pull issue. When, for example, the august World Court in the Hague issues a decision against this or that State, it is not uncommon for the condemned State to "study the decision" and then quietly to disregard it. The World Court, indeed, the international legal order, has limited enforcement mechanisms. By contrast, in most Western democracies, when a domestic court issues a decision against the government, the latter may appeal that decision, but the option of non-compliance is absent or very limited. This is not, principally, because of an army which stands at the service of national courts, but because of a much deeper "habit of obedience" which national law and domestic courts enjoy when compared to their international counterparts.<sup>10</sup> What I am describing here is the notorious and seemingly paradoxical difference in the compliance pull of domestic and international tribunals and courts.

What is of huge significance in the European system, is that the confluence of direct effect and the Preliminary Reference system means that the European Court will articulate the content and contours of the applicable European norm, but it will be the national court which will actually mouth it in the specific case giving the directly effective European norm all the compliance pull which is attached to domestic courts. Even the living word of God is but a cry in the desert if Man does not actuate it, apply it, abide by it.

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<sup>10</sup> See H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon, 1961), chapters IV and X.

It will, thus, also be noticed, that Van Gend en Loos standing as a proxy for direct effect, supremacy and the Preliminary Reference system, did not only put the individual in the center but also the European Court of Justice and the judicial branch more generally.

Van Gend en Loos was, thus, the cornerstone of this multifaceted legal order – the reality of which was not simply in determining legal rules for the relationship between Union law and Member State law, but has to be explained, as we have seen, in economic social and above all political terms.

## **II. The Challenge of Van Gend en Loos**

Conceptually, Direct effect has one additional hugely important significance which I have not articulated until now: It is a proxy for Governance. The fact that the writ of Union law runs through the land, that European Law is the law of the land, also can be expressed that the Union is a system of governance, whereby the Union legislative and administrative branches do not need the intermediary of the Member States, as is the default position in general public international law, to reach individuals both as objects and subjects of the law. And herein lies the challenge.

Direct Effect, inescapably and inextricably, implicates the Court in the very issues of democratic and social legitimacy which are at least partially at the root of current discontent. I want to argue further that the Court has responsibilities all of its own which do not even fit under the rubric of “implicated”.

But before I explain this thesis I want to state clearly what I am not arguing:

My critique is not part of ‘the Court has no legitimacy,’ *gouvernement des juges* and all that.<sup>11</sup> Nor is it an attack on the “activism” of the Court or its hermeneutics i.e. it is not part of more contemporary trends, notable in the USA, which have (re)discovered Bickel’s silent virtues<sup>12</sup> and normatively embrace restraint and a reduced role for courts and all *that*. I do not think Europe has a *gouvernement des juges* (whatever that means) nor do I find fundamental fault with the hermeneutics of its essential jurisprudence

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<sup>11</sup> For a review of the literature in this regard, see Hjalte Rasmussen, *On Law and Policy in the European Court of Justice* (Dordrecht: Martinus Nijhoff, 1986) at 154 et seq.

<sup>12</sup> See Alexander Bickel, “Foreword: The Passive Virtues,” *Harvard Law Review* 75 (1961).

critical as one may be of this or that decision or line of cases. Importantly, this critique does not have as its purpose to argue that the constitutional jurisprudence such as *Van Gend en Loos* was a normative mistake, a road which should not have been taken. As a matter of its underlying values I believe it was not simply expedient but, in post WWII Europe, no less than noble. The critique is, thus, not methodological but substantive.

My approach rests on two propositions. First, it highlights a certain irony in the constitutional jurisprudence. When the jurisprudence was adopted it was often perceived (and there are indications in the cases that it was so perceived by the Court itself) as being a response to, and part of, a broader political discourse of integration often a response to non-functioning dimensions of the political process.<sup>13</sup> But there has been, both by the Court itself but especially its observers at times a myopic view which has failed to explore deeper some of the consequences and ramifications of the constitutional jurisprudence.<sup>14</sup> There has been, for example, a refusal to see the way in which the essential legal order constitutional jurisprudence is part and parcel of the political democratic legitimacy crisis. Very often one has the impression that though the political (in the sense of institutions) is well grasped in relation to the case law, the social (in the sense of human dimension and communities) has been far less understood.

How then is the Court implicated in the democratic deficit?

*Van Gend en Loos* itself is the fountainhead. In arguing for the concept of a new legal order the Court reasoned in the following two famous passages as follows:

The conclusion to be drawn from this is that 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

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<sup>13</sup> G. Federico Mancini, "The Making of a Constitution for Europe," *Common Market Law Review* 26 (1989): 595; Pierre Pescatore, "Jusqu'ou le juge peut-il aller trop loin?" in *Festschrift til Ole Due*, eds., Kirsten Thorup and Jens Rosenlov (Copenhagen: GEC Gads Forlag, 1994) 326, 327.

<sup>14</sup> For a review of the literature in this regard, see Hjalte Rasmussen, *On Law and Policy in the European Court of Justice* (Dordrecht: Martinus Nijhoff, 1986) at 154 et seq.

become part of their legal heritage. These rights arise not only where they are expressly granted 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.

This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. *Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.* (Emphasis added)

The problem is that this “cooperation” was extremely weak. This is, in truth, a serious “dumbing down” of democracy and its meaning by the European Court. At the time, the European Parliament had the right to give its Opinion – when asked, and it often was not asked. Even in areas where it was meant to be asked, it was well known that Commission and Council would tie up their bargains ahead of such advice which thus became *pro-forma*. But can that level of democratic representation and accountability, *seen through the lenses of normative political theory* truly justify the immense power of direct governance which the combined doctrines of direct effect and supremacy placed in the hands of the then Community institutions? Surely posing the question is to give the answer.

You might think that since those early days the European Parliament is a very different body, hugely increased in powers and a veritable Co-Legislator with the Council. And yet there is the persistent, chronic, troubling Democracy Deficit, which cannot be talked away. The manifestations of the so-called democracy deficit are persistent and no endless repetition of the powers of the European Parliament will remove them. In essence it is the inability of the Union to develop structures and processes which adequately replicate or, ‘translate,’<sup>15</sup> at the Union level even the imperfect habits of governmental control, parliamentary accountability and administrative responsibility that are practiced with different modalities in the various

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<sup>15</sup> Neil Walker, “Postnational Constitutionalism and the Problem of Translation,” in *European Constitutionalism beyond the State*, eds., J.H.H. Weiler and Marlene Wind (Cambridge: Cambridge University Press, 2003): 27-29.

Member States. Make no mistake: It is perfectly understood that the Union is not a State. But it is in the business of governance and has taken over extensive areas previously in the hands of the Member States. In some critical areas, such as the interface of the Union with the international trading system, the competences of the Union are exclusive. In others they are dominant. Democracy is not about States. Democracy is about the exercise of public power – and the Union exercises a huge amount of public power. We live by the credo that any exercise of public power has to be legitimated democratically and it is exactly here that process legitimacy fails.

In essence, the two primordial features of any functioning democracy are missing – the grand principles of accountability and representation.<sup>16</sup>

As regards accountability,<sup>17</sup> even the basic condition of representative democracy that at election time the citizens “...can throw the scoundrels out”<sup>18</sup> – that is replace the Government – does not operate in Europe.<sup>19</sup> The form of European governance,<sup>20</sup> governance without Government, is, and will remain for considerable time, perhaps forever such that there is no “Government” to throw out. Dismissing the Commission by Parliament (or approving the appointment of the Commission President)<sup>21</sup> is not quite the same, not even remotely so.

Startlingly, but not surprisingly, political accountability of Europe is remarkably weak. There have been some spectacular political failures of European governance. The

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<sup>16</sup> Adam Przeworski, Susan C. Stokes, and Bernard Manin, eds. *Democracy, Accountability, and Representation* (Cambridge: Cambridge University Press, 1999); Philippe C. Schmitter and Karl Terry Lynn, “What Democracy Is... and Is Not,” *Journal of Democracy* 2(3) 1991: 76.

<sup>17</sup> On the concept of accountability, see Deirdre Curtin, *Executive Power of the European Union: Law, Practices and the Living Constitution* (Oxford: Oxford University Press, 2009), chapter 9. See also Carol Harlow, *Accountability in the European Union* (Oxford: Oxford University Press, 2002); Anthony Arnall and Daniel Wincott, eds., *Accountability and legitimacy in the European Union* (Oxford: Oxford University Press, 2002).

<sup>18</sup> Ian Shapiro, *Democracy's Place* (Ithaca: Cornell University Press, 1996): 96; J.H.H. Weiler, “To be a European Citizen: Eros and Civilization,” in *The Constitution of Europe: “Do the New Clothes Have an Emperor?” and Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999) 324 at 329.

<sup>19</sup> Renaud Dehousse, “Constitutional Reform in the European Community. Are there Alternatives to the Majority Avenue?” in *The Crisis of Representation in Europe*, ed., Jack Hayward (London: Frank Cass, 1995) 118 at 123.

<sup>20</sup> Philip Allott, “European Governance and the Re-branding of Democracy,” *European Law Review* 27 (2002): 60.

<sup>21</sup> Article 17.7 and 17.8 TEU.

embarrassing Copenhagen climate fiasco;<sup>22</sup> the weak (at best) realization of the much touted Lisbon Agenda (aka Lisbon Strategy or Lisbon Process),<sup>23</sup> the very story of the defunct “Constitution”<sup>24</sup> to mention but three. It is hard to point in these instances to any measure of political accountability, of someone paying a political price as would be the case in national politics. In fact it is difficult to point to a single instance of accountability for political failure as distinct from personal accountability for misconduct in the annals of European integration. This is not, decidedly not, a story of corruption or malfeasance.<sup>25</sup> My argument is that this failure is rooted in the very structure of European governance. It is not designed for political accountability. In similar vein, it is impossible to link in any meaningful way the results of elections to the European Parliament to the performance of the Political Groups within the preceding parliamentary session, in the way that is part of the mainstay of political accountability within the Member States.<sup>26</sup> Structurally, dissatisfaction with “Europe” when it exists has no channel to affect, at the European level, the agents of European governance.

Likewise, at the most primitive level of democracy, there is simply no moment in the civic calendar of Europe where the citizen can influence directly the outcome of any policy choice facing the Community and Union in the way that citizens can when choosing between parties which offer sharply distinct programs at the national level. The political colour of the European Parliament only very weakly gets translated into the legislative and administrative output of the Union.<sup>27</sup>

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<sup>22</sup> See European Parliament resolution of 10 February 2010 on the outcome of the Copenhagen Conference on Climate Change (COP 15) [2010] O.J. Electronic 341-06/25 especially at 26, points 5, 6.

<sup>23</sup> Iain Begg, “Is there a Convincing Rationale for the Lisbon Strategy,” *Journal of Common Market Studies* 46 (2008); European Commission, “Facing The Challenge: The Lisbon Strategy for Growth and Employment,” Report from the High Level Group chaired by Wim Kok (Luxembourg: Office for Official Publications of the European Communities, 2004).

<sup>24</sup> Treaty establishing a Constitution for Europe [2004] OJ C 310/1 [European Constitution]. See Ian Ward, “Bill and the Fall of the Constitutional Treaty” (2007) 13 *European Public Law* 461; “What Should Replace The Constitutional Treaty?” Editorial Comments, *Common Market Law Review* 44 (2007) 561.

<sup>25</sup> On this aspect, see Veith Mehde, “Responsibility and Accountability in the European Commission,” *Common Market Law Review* 40 (2003), 423.

<sup>26</sup> Julian Priestley, “European Political Parties: The Missing Link” in *Democracy in the EU after the Lisbon Treaty*, ed., Raffaello Matarazzo (Rome: Edizioni Nuova Cultura, 2011) 15; Francisco Roa Bastos, “Des ‘partis politiques au niveau européen’? Etat des lieux à la veille des élections européennes de juin 2009” (2009) *Notre Europe, Etudes & Recherches* No. 71.

<sup>27</sup> Vernon Bogdanor, “Legitimacy, Accountability and Democracy in the European Union,” A Federal Trust Report (2007), at 7, 8; Andreas Follesdal and Simon Hix, “Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik,” *Journal of Common Market Studies* 44(3) (2006), 533.

The Political Deficit, to use the felicitous phrase of Renaud Dehousse<sup>28</sup> is at the core of the Democracy Deficit. The Commission, by its self-understanding linked to its very ontology, cannot be ‘partisan’ in a right-left sense, neither can the Council, by virtue of the haphazard political nature of its composition. Democracy normally must have some meaningful mechanism for expression of voter preference predicated on choice among options, typically informed by stronger or weaker ideological orientation.<sup>29</sup> That is an indispensable component of politics. Democracy without Politics is an oxymoron.<sup>30</sup> And yet that is not only Europe, but it is a feature of Europe – the “non-partisan” nature of the Commission – which is celebrated. The stock phrase found in endless student text books and the like, that the Supranational Commission vindicates the European Interest, whereas the intergovernmental Council is a clearing house for Member State interest, is, at best, naïve. Does the “European Interest” not necessarily involve political and ideological choices? At times explicit, but always implicit?

Thus the two most primordial norms of democracy, the principle of accountability and the principle of representation are compromised in the very structure and process of the Union.

The implication of the Court of Justice in the democratic travails of the Union is easily stated even if usually uncomfortably discussed. The late Federico Mancini in his *Europe: The Case for Statehood* forcefully articulated the democratic malaise of Europe.<sup>31</sup> There were many, myself included, who shied away from Mancini’s remedy, a European State and shied away from his contention that this remedy was the only one which was available.<sup>32</sup> But few quibbled with his trenchant and often caustic denunciation of the democratic deficiencies of European governance.

But could the Court distance itself from this malaise so trenchantly and caustically denounced by one of its judges?

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<sup>28</sup> Dehousse, *supra* note 20, at 124. See also, Jean-Marc Ferry and Paul Thibaud, *Discussion sur l’Europe* (Paris: Calmann-Lévy, 1992).

<sup>29</sup> Follesdal and Hix, *supra* note 28, 545.

<sup>30</sup> On EU’s “policy without politics,” see Vivien Ann Schmidt, *Democracy in Europe: the EU and National Politics* (Oxford: Oxford University Press, 2006): 157-162 .

<sup>31</sup> G. Federico Mancini, “Europe: The Case for Statehood,” *European Law Journal* 4(1) (1998).

<sup>32</sup> J.H.H. Weiler, “Europe: The Case Against the Case for Statehood,” *European Law Journal* 4(1) (1998).

It is precisely on these occasions, I argued, that I rejoice most that I am not a judge on the Court. What would I do if I felt, as Mancini did, that the European Community suffered from this deep democratic deficit which he described so unflinchingly and which according to him could only be cured by a European State? Would I want to give effect to a principle which rendered the Community's undemocratic laws—adopted in his words by ‘numberless, faceless and unaccountable committees of senior national experts’<sup>33</sup> and rubber-stamped by the Council—supreme over the very constitutional values of the Member States? If democracy is what one cared about most, could one unambiguously consider much of the Community edifice a major *advance*? Whatever the hermeneutic legitimacy of reaching supremacy and direct effect, the interaction of these principles with the non-democratic decision making process was and is, highly problematic. In effect, if not in design, giving direct effect in the context of European governance, objectifies the individual or re-objectifies him or her. In the Member States with imperfect but functional democracies the individual is ‘the’ political subject. In the European Union with its defective democratic machinery where the individual has far less control over norm creation, direct effect has the paradoxical effect of objectifying him or her – an object of laws over which one has no effective democratic control.

The paradox is thus that the legitimacy challenge to the Court’s constitutional jurisprudence does not rest as often has been assumed in its hermeneutics – a good outcome based on a questionable interpretation. But quite the opposite: An unassailable interpretation but an outcome which underpins, supports and legitimates a highly problematic decisional process. Substantively, then, the much vaunted Community rights which serve, almost invariably the economic interests of individuals were “bought” at least in some measure at the expense of democratic legitimation.

Procedurally we find a similar story. The secret of the Rule of Law in the legal order of the European Union rests, as stated, in the genius of the Preliminary Reference procedure. The Compliance Pull of law in liberal Western Democracies does not rest on the gun and coercion. It rests on a political culture which internalizes, especially public authorities, obedience to the law rather than to expediency. Not a perfect, but one good

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<sup>33</sup> Mancini, *supra* note 32, at 40 [footnote numbers omitted].



measure of the rule of law is the extent to which public authorities in a country obey the decisions, even uncomfortable, of their own courts.

It is by this very measure that international regimes are, as I stated, so often found wanting. Why we cannot quite in the same way speak about the Rule of International Law. All too frequently, when a State is faced with a discomfiting international norm or decision of an international tribunal, it finds ways to evade them. Statistically, as we know, the Preliminary Reference in more than 80% of the cases, is a device for judicial review of Member State compliance with their obligations under the Treaties.<sup>34</sup> However, it is precisely in this context that we can see the dark side of this moon. The situation implicated in the Preliminary Reference always posits an individual vindicating a personal, private interest against the national public good. That is why it works, that is part of its genius, but that is also why this wonderful value also constitutes another building block in that construct which places the individual in the center but turns him into a self-centered individual.

As I stated – the reasoning of the Court was impeccable. As argued in the first part of the paper, the impact profound and even noble. But we would be eschewing our critical duties if we did not see that Van Gend en Loos and its progeny also accentuate the enduring legitimacy crisis of the Union.

There is no ‘grand’ conclusion to the constitutional-political saga which Van Gend en Loos ushered in. It has become part of the DNA of the European Union system. Neither virtue nor vice – two concepts which assume a subject which is distinct from its qualifiers. Van Gend en Loos is Europe, with all its complexities.

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<sup>34</sup> Robert Lecourt, “Quel eut été le droit communautaire sans les arrêts de 1963 et 1964” in *L'Europe et le droit: Mélanges en hommage à Jean Boulois* (Paris: Dalloz, 1991) at 349; Henry G. Schemers et al., eds., *Article 177 EEC: Experiences and Problems* (Amsterdam: North-Holland, 1987); Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (Oxford: Oxford University Press, 2010); Thomas de La Mare and Catherine Donnelly, “Preliminary Rulings and EU Legal Integration,” in *The Evolution of EU Law*, eds. Paul Craig and Gráinne de Búrca (Oxford: Oxford University Press, 2011).