Special Issue: *Constitutional Reasoning*

Comment on Katalin Kelemen—Activist EU Court "Feeds" on the Existing Ban on Dissenting Opinions: Lifting the Ban is Likely to Improve the Quality of EU Judgments

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The editors of this special issue of the German Law Journal on Constitutional Reasoning kindly invited us to participate in their project and, more specifically, asked us to share some of our ideas about the banning of dissenting opinions with their readers. Logistically, our observations follow senior lecturer Katalin Kelemen's paper entitled *Dissenting Opinions in Constitutional Courts*.[1] We gladly accepted the invitation for several reasons. First and foremost, it was an honorable invitation. Second, Kelemen's presentation is a fairly complete and thoroughly worked-through scholarly overview of the contemporary state of the organization and multiplication in space of "the decades-long history of dissenting opinions in the practice of several European constitutional courts."[2] In the present circumstances, we are witnessing a remarkable growth, to still more jurisdictions, of the institution of constitutional review, which bears witness to the importance of reflecting intensely on the admittance and role of dissenting opinions. In her paper, Kelemen makes use of a large size brush in presenting her many findings about where in contemporary Europe constitutional review is entrenched and in which of its many functional and organizational variants it is available. Hers is a very meritorious work. If she had not brought it to the fore, one would have to advertise that it be done. We shall therefore spend the present paper's efforts on some of the spots left over by her.

As for our own part in this, we propose to limit the scope of the analyses considerably. In the course of the last year or so we have spent some time analyzing the problem of dissenting opinions. Specifically, our focus has been on the interconnectedness of issues inside the topical triangle made up of (1) judicial-institutional openness, transparency and dialogue with the polity surrounding courts, (2) the tensions between monolithic

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[1] *See generally* Katalin Kelemen, *Dissenting Opinions in Constitutional Courts*, 14 GERMAN L.J. 1345 (2013).

[2] *Id.*

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judgments and judgments with dissenting opinions, and (3) judicial policy-and constitution-making activism. Our preferred theme thus touches upon the pros and cons of banning dissenting opinions, an issue that Kelemen very deliberately did not expound on. Instead of offering a fully-fledged presentation of the issue with a large quantity of footnotes—it would consume far more space than allotted to us—we propose to apply a bird's eye view on our hypotheses and ideas. We have also chosen a motto for our *Auseinandersetzungen* about the intricate dissent problem. It is coached in the following, wise, 250-year-old sentence announcing that:

> Neither the popes nor the cardinals made a serious attempt to improve matters except one, Benedict IV, an intelligent man who had read Voltaire and the philosophes and knew that the art of government required something beyond an attitude of rigid obscurantism.[3]

The rest of the paper will tell whether there still is a judicial market for the quote's simple truth.

The first spot on which we propose to dwell escapes identification at first glance. It is the paper's bypassing in silence of two of the most well-known constitutional courts on European soil. They are the Court of the European Convention on Human Rights (ECH-court; acting out of Strasbourg) and the European Court of Justice (EU-court; acting out of Luxembourg)—both of which call for a great deal of scholarly attention. Both are functionally performing constitutional review *en masse* and both are reputed for their activist rewriting and reconstructions of the high Laws they were meant to protect and guard. Because the Convention authorizes dissenting opinions and its judges exploit their given freedom, the focus of this paper will be on the EU-court and EU-law's ban against dissenting opinions, a ban that the vast majority of the Court's members support and are adamant to keep on the books. This conservatism not only strikes the observer's mind because it derives from a court otherwise reputed for its unrestrained drive to societal change and constitutional innovation. Remarkably, the Court binds up its performance to values of the past, thereby delegating to irrelevance the values of transparency and dialogue which, in the twenty-first century, are vanguard values in terms of both a genuine rule of law and a polity's democratic credentials.

It might all be a matter of convenience. At the end of the nineteenth century, a proposal to introduce dissenting opinions in the German Constitutional Court was voted down. Then, publication of dissents was held to be "incompatible with the authority of the courts and

[3] DAVID GILMOUR, THE PURSUIT OF ITALY 124 (2011).

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good relations between the judges."[4] However, governmental institutions' authority is never a matter settled once and for all; to uphold its authority it has to be fought for continuously. Moreover, while the prevalence of good relations between governmental officials may, 150 years ago, have counted as an immitigable must; today it remains at best a laudable objective, in no possible way a bar to the realization of the words and spirit of TFEU Article 11, 2nd paragraph. While this argument seems to be non-objectionable, the behind-the-judicial-scenes posturing for or against dissenting opinions may well be influenced a great deal by considerations of the convenience of the *Brethren*, a good many of whom prefer to operate behind a smoke screen. The Court's sole argument against lifting the ban has, since times immemorial, been that it would permit outside interests, i.e., appointing governments, to improperly influence and infiltrate the judges' deliberations. However, it sounds prima facie incredible that this argument, the steam of which can easily be emptied by disallowing reappointments of judicial members, is alone in control of all the learned judges' collective thinking. A competing justification might be that the Court's decision-making is already cumbersome enough without having to bother about what commentators might criticize and argue over after the introduction of openness, transparency, and a dialogue worthy of that characterization.

We already announced the second important missed white spot in Kelemen's paper: Her promise to herself not to become involved in any pro-con discussions of the merits of banning or authorizing separate or dissenting opinions.[5] To be sure, this self-containment cannot really be held out against her, given the paper's perspective, which is a global one. Far from this, pro-and-con discussions are most properly conducted on a case-by-case basis dealing with the merits of tearing down a ban on dissents in one concrete jurisdiction. The overall theme, and the latter approach, therefore, does not make a suitable match. The absence of the discussion is regrettable, however, because a "yes" to banning dissents implies a "no" to governmental openness, transparency, and dialogue between the governors and the governed to which it lends credibility. It implies to absolutely forget that the latter gave the courts their mandate in the first place. A ban on dissents and the flowerbeds of additional secrecy-mongering that often are its companion-in-arms always exert a vicious effect on the conduct of any government. In view that it, moreover, runs squarely counter to modern (Western) democracies' ambition and obligation to deliver on all three openness-variants.[6] Article 11(2)[7] states that these three

[4] Kelemen, *supra* note 1.

[5] *Id*. Because anyway most of what follows circulates around dissenting opinions, we refer for convenience below to *dissenting* and only occasionally to the more neutral term *separate* opinions.

[6] We should note in passing that this paper uses *democracy* and terminological derivatives in a loose unspecified sense. It is about governmental action being "measured by the closeness, responsiveness, representativeness and the accountability of the governor to the governed." J.J. WEILER, THE CONSTITUTION OF EUROPE 81 (1999).

[7] The provision, first time occurring in the defunct Constitutional Treaty, is now in the Lisbon Treaty.

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values range in modern times among democracies' highest priorities in the hierarchy of values of public governance—more about article 11(2) will follow after this listing of the many faces of the Court's arsenal of secrecies. Note in passing this particular paradox: On the one hand, the Court in several innovative and ground-breaking rulings from the 1990s forced the elected Union institutions to open, become transparent, and engage in dialogues with third parties. On the other, the Court's reform-frenzy came to a virtual standstill when the conduct of its own business was on the openness agenda. Here, policies of aloofness, self-absorption, and secrecy-mongering remained the unscathed name of the game.

At this point we ought to note that what follows consists, for the most part, of extrapolations from thin layers of circumstantial evidence. However, in the face of the Court's secrecy-mongering, how might we alternatively have built up our case? Now the confession has been made. The milestones of the Court's concealment policies comprise, first of all, of the rule banning individual, concurring as well as dissenting, opinions in European Court practices. This ban has been in force ever since the first EC-court was set up in 1952. It is argued *infra* that the ban on dissents together with the concealment-culture freed forces inside the Court who were not disciplined to assume responsibility for exercising powers as vast as those the Court developed for itself. They began to run wild, intoxicated by seeing the vast horizons of action that the necessary and logical thinking opened to their action. And, most crucially, they did so without anyone being able to look at them over their shoulders. It is arguable that only a root-and-branch reform will have any chance of uprooting the ills and ailments, the bad habits and preposterous self-satisfaction which the Court's leading federalist cadres put on display.

Next, among secrecy's many faces, Article 2 of the Court's Statutes obliges appointees to judgeships to swear, before they take office, that they will not divulge the tiniest bit of the Court's deliberations. This duty embraces, and rightly so, what a judge knows about the views of his Brethren. Yet, he also commits himself not to divulge anything about his own thinking, both in general and with respect to individual cases. It might be a step too far to keep secret the order in which the deliberating judges cast their votes: Does the most senior or junior judge speak first?[8]

Third, an internal rule of collegial conduct prohibits any advocate-general from engaging in public discussions about cases in which the Court did not follow his advice. Of all the secrecy-guaranteeing measures this is arguably the most ominous considering that the arguments, which can be cited in favor of keeping secret the judges' *Willensbildung*,[9] do

[8] We might be under-informed on this point of importance.

[9] *Willensbildung* is a German word, which it is difficult to translate into English. It encapsulates the ways and means by which–in our case–a group of judges and their institution strive to formulate a unanimous or divided will or intention on which it can build a necessary action, i.e. the handing down of a judgment (including the holdings to go with it).

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not apply to forbidding the advocates-general from debating in public their own views on one or more cases or jurisprudences. Note that unlike the judges' thoughts, the advocates-general's individual opinions have, as a rule, been published in the Court's Reports.

Fourth, it is an unwritten but established practice that the Court is hostile to honoring precedent. This hostility being born out of principle, the Court, as a rule, refrains from openly announcing that it is about to overrule one or more of its older holdings.[10] Moreover, in those rare instances when it tells, the reasons given are most often but empty shells.[11] It is totally closed land why the Court in some instances forecasts that an overruling is imminent, but for the most part acts without saying. To finish the argument about precedent, it is suggestive, in fact, that judges demonstrating an intense interest and effort in being seen to be, precisely, judicial officers and not politicians, in the widest and most neutral sense of this contaminated word, manifest a similar distaste for all doctrines of precedent and adjoining restraints. Is there in fact another argument more suitable to promote one's commitment to self-restraint than to invoke, however open and receptive the treaties are to being filled by one's personal whims, one's duty to interpret and follow the wise decisions by one's predecessors? Explaining that this activity definitely is non-innovative, non-creative, and free of all law-making discretion? It is well known that the techniques of distinguishing dismantle many of the constraints of a declaration of allegiance to a binding precedent. The ability to distinguish makes it possible to live with binding precedent for most judge-politicians. The constitutional and political ambitions of the vanguard clans of activist European judges must, it follows, be monumental and non-negotiable since they freely declared that precedent does not bind them. Whereby, they gave away for nothing the handsome and inexpensive *cache* proffered by the precedent-doctrine.

Fifth, the Court's archives are kept under an almost unbreakable seal of secrecy. It is also reported that when a member retires, his personal archives are removed from the premises of the Court, if not outright destroyed. Ultimately, all that the outside world is permitted to know are the names of the Brethren, and the Court's annual production of, too often poorly reasoned, rulings. Importantly, the outside word is left with little clue as to what caused the Court's majority to rule as it did.

Reverting after this initial survey rich in surprises to Article 11, 2nd paragraph (TFEU),[12] notes that the three openness-mantras range in the hierarchy of values of Union public

[10] Exceptions such as Joined Cases, *Bernard Keck v. Daniel Mithouard*, CJEU Case C-267–68/91, 1993 E.C.R. I-6097 [hereinafter *Keck*-case], and *Metock and Others v. Minister For Justice, Equality and Law Reform*, CJEU Case C-127/08, 2008 E.C.R. I-6241 [hereinafter *Metock*-ruling].

[11] The Court's reasoning for overruling *Sec'y of State for the Home Dep't v. Hacene Akrich*, CJEU Case C-109/01, 2003 E.C.R. I-9607 in the *Metock*-ruling illustrates this point well.

[12] The first time the Provision occurred was in the defunct Constitutional treaty; It is now in the Lisbon treaty.

governance in modern times among democracies' highest priorities. This over-arching provision is placed in the treaty's Title II, entrenching the democratic principles upon which the Union's governmental structure builds. Its words stipulate that "[t]he institutions maintain an open, transparent and regular dialogue with representative associations and civil society." In these few but pregnant words, Article 11(2) encapsulates both the Union's high democratic ambitions and its non-pliant will to let it be seen that the rule of law is complied with by all its branches of government, the judicial included. In so doing, Article 11(2) translates into legal reality the need to protect Union governmental legitimacy against the negative fall-outs of actions emanating from the smoke-filled back rooms of government—or against the *rigid obscurantism* of the paper's motto.

The Court, like a mummy behind the thick armoured glasses of the prohibition against dissenting opinions and all its other black boxes, stands *non-communicado* about almost anything worth knowing about the Union's most supreme judicial institution and its judgments and about why its reasoning in important judgments are too often of poor quality.[13] The Court's activism and its obsession with secrecy-mongering are among the Union judiciary's best known trademarks, the latter squarely affronting both the text and spirit of Article 11(2)'s command to openness and transparency. The Court must budge: Its longing for the good old days when the Court was elevated above critique is no longer a viable option. While the Court—or some other institution—must take the lead and make adequate proposals for letting the outside world in on a good many of today's judicial secrets, I ought to emphasize from the outset that this quest for openness of course admits that the secrecy of judicial deliberations is sacred. They should never be opened to non-insiders' curiosities. With this exemption in mind, insights ought not to be systematically denied in a multitude of other aspects of the Brethren's modes of *Willensbildung* and organization of contiguous decisional methods, procedures, and practices.[14] Is, for example, the normal amount of time spent deliberating a matter a few hours, days, weeks, or more? Why doesn't the Court or its individual members take up arguments with those accusing it of indulging in an illegitimate activism; every accused is deemed not guilty until after the arguments pro and con have been advanced and their validity measured? Is it because the activism issue, and possible answers to it, splits the Brethren ideologically? Is it one dividing the Brethren into pros and contras and everything in between? For example, do narrow or very narrow majorities stand behind many of the published judgments or are their results and reasoning generally agreed upon unanimously? And, what would characterize the abnormal situation, if that is the case, that decision-making is massively time-consuming? Or, is the role of the *juge rapporteur* that of a caretaker guiding the practical steps to be taken in the normal life of a case from the

[13] For a fierce critique of the Court's poor reasoning–especially–*ultra vires* extensive interpretations of community powers, see generally Editorial Comments, *The Court of Justice in the Limelight—Again*, 45 COMMON MKT. L. REV 1571, 1571 (2008).

[14] But for publishing judgments and some selected judicial statistics.

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time that it is docketed to the time the judgment is handed down? Or, does the *juge rapporteur*, relatively often, or more than that, influence decisively the outcome of the future ruling? Are there any recognizable patterns in the Court's President's stewardship in relation to, say, his choice of Brethren to act as reporting judges or choice of chambers to deal with a new case? Does the Court have other reasons for preferring rigid obscurantism instead of openness—other than the thin explanation about the, almost wholly theoretical, risk of improper employer-influencing of judges wanting to sit more than one term—which would come with a dissenting opinion, but merely those with names under it? Moreover, why is the outside world barred from knowing whether all the judges or merely some small majority among them favor upholding the ban on dissents? Law professors and other commentators of the Court's output are in the habit of referring the "courts' judgment(s)" as if they were not kept completely in the dark about things like the listed ones.

On this backdrop, the dominant theme of this article was almost forced upon this paper. It professes that the Court's concealment policies are not a viable policy in contemporary Union polity. It has, in 2013 time, become ripe to break the taciturnity impasse and make the first overtures towards greater institutional openness, transparency and dialogue. On this route, middle-way solutions between staying put and authorizing signed dissenting opinions are on offer. If adopted, they might quite possibly yield access to court-information that would go quite some way towards satisfying Article 11(2)'s quest. This paper nonetheless argues that the terminus of this judicial journey towards full openness, transparency and dialogue should consist in doing away with the ban on dissents. The core of this argument, which the paper develops below, is the likely existence of a link between the Court's defense of the ban and its activism. The hypothesis is that judicial activism feeds on the ban of dissenting opinions and casts stark shadows on everything that is pertinent for outside observers to know about how the Brethren discharge themselves of their business. Because they make a lot of constitutional law and union-political choices as they decide cases, middle-way solutions will not unlock the code. The Court's majorities can, in the future, also have it their way on condition that they swallow the bitter pill of dissenting opinions. This ultimate step, and only this, is likely to offer a required counterweight to the accruing indigestibility of an otherwise unaccountable judicial law- and policy activism.[15]

To be sure, many occasions have offered the Court opportunities to rethink the validity and acceptability of its postures of concealment. In the course of the Court's lifespan there have been several sharp edges inviting a discontinuation of judicial self-absorption and aloofness. One of these coincided with the exponential growth in the Court's armor of powers. Competence-growths especially occurred at the entry into force and aftermath of

[15] The terms "judicial activism" or "judicial imperialism" are short hand for the rather countless number of innovative and groundbreaking constitutional rulings which the Court has authored since the early years of the 1960s, all too often questionably within the clear warrants of the treaty's texts.

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the European Single Act. Authorizing dissenting opinions offers a means of defusing some of the ensuing tension that builds up when judicial dockets grow sharply. During any constitutional court's infant years, a ban on dissents makes certain sense as a means of protecting its quest for authority and decisional legitimacy:

> The trust in justice and especially in constitutional justice was not yet sufficiently developed . . . to preclude the possibility in litigation with political aspects that public reactions . . . may result if, in litigation involving political issues, a judge himself asserted that it would have been possible to decide otherwise.[16]

However, in the case of the EU-court, three decades later when the Single Act imposed itself, it had become unjustifiable in cheered matrixes of institutional obscurity, self-absorption and virtual complete anonymity of decision-making and *Willensbildung*.

Second, about the same time a hitherto unknown phenomenon emerged in the form of docket congestions, rising case processing time, and queues before the Court's gates. This arguably offered another propitious instance to reconsider the wisdom or even pertinence of the no-openness policies. Were the worst of the massively longer waiting lists to materialize, the effect might intoxicate the Brethren's high priority, preliminary co-operation with the judiciaries of the Member States. However, even in the face of this calamity, the Court sought refuge in proposing—and getting—treaty-made rule changes widening the President's discretion over the Court's internal allocation of work and shortening the list of judicial duties that ought to be done in public audiences. There was no indication that the Brethren seriously considered that more openness and dialogue with its customers might persuade them to share the burdens of case-overweight with the Court—or just generally add to the accountability and legitimacy of judicial processes.

Third, from the early 1980s until the mid-2000s, both the number of judges and radically different legal systems joining the Union doubled, or rather tripled. However, although several of the new-comers' judicial traditions displayed considerably more openness—indeed many of them authorizing to varying degrees even dissenting opinions—than the Original Six, the Court stayed unmoved.[17] The idea seems to have held a firm grip on judicial imaginations that the best way to govern was both in the 1950s and by the end of the century, by monopolizing all knowledge about paths and troubles of European judging. Questionably valid, a good case may easily be made in favor of sharing with the outside

[16] Arthur von Mehren, *The Judicial Process: A Comparative Analysis*, 5 AM. J. OF COMP. L. 197, 209, n.42 (1956). *See also* Kelemen, *supra* note 1.

[17] *Cf*. Kelemen, *supra* note 1.

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world some insights as to how the judges managed to bridge the, as it probably were, increasingly intractable problem of identifying majorities. That is, oil judicial judgment-production by finding the necessary number of judges willing to vote for a given judgment and the reasoning to go with it.

However, we know that schisms along North-South, East-West, Old-New Member State, and many other fault lines almost paralyzed the Union's political institutions' work progress when this was organized under voting rules bent on unanimity. In steeply growing numbers they forced the elected departments to ask for, and several IGCs granted them, qualified majority voting. Even extrapolating from this with great caution, it does not sound absurd to speculate, or even assume, that, as numbers of legal systems represented by the Brethren inside the Court grew, similar schisms and fault lines conquered more and more of the Court's *Willensbildung*, intoxicating it by multi-philosophical, multi-personal diversity instead of unity. If this can be taken, it needs no prolonged argument that similar decision-paralyses took hold of the Court's decision-making. The consequence hereof was not to operate a shift from unanimity to majority voting by the Brethren whose majorities always *in camera* had had the final say over their judgments. No, if anything, it was the Brethren's ability to find operational majorities that in all likelihood suffered from diversity. The difficulties, as I presume in want of any information given by the Court, associated with finding satisfactory or valid majorities to take responsibility for developing its jurisprudences led, instead, to the Court taking at least two initiatives. The first consisted in following its instincts by further tightening its control over information flows, thereby cementing knowledge monopolization. This tightening becomes visible if one—with all the required caveats—compares the Court's mid-1960s relatively relaxed communicative policies with the information-ice-age occurring by the turn of the century.

The core of the Court's next initiative was to strip the Court's plenary sessions of the real power of decision, which it had had as the forum in which most of the grand and hard cases were decided. From 2004, the new powerhouse was to become the thirteen-man Grand Chamber; the membership of which, because it encompassed but half the number of judges sitting on the Court, could be manipulated. The Court's President exploited very skillfully this opportunity, which probably did not come as manna from heaven because it, in all likelihood, was premeditated.[18] The operation created a situation in which four or five subtly selected judges sat on all cases while the remaining seats on the Chamber were distributed among the remaining twenty-one or twenty-two judges. Therefore the latter, on average, participated in deciding roughly one third of the Chamber's caseload. The result of a combination of the permanent members' personalities and the fact that they sat on all cases gave them a status of first class judges and, via this, an opportunity to

[18] Hjalte Rasmussen dealt in considerable detail with the decision to set up the Grand Chamber and the institutional and personal calamities in brought in its wake. *See generally* Hjalte Rasmussen, *Present and Future EC-Judicial Problems After Enlargement and the Post-2005 Ideological Revolt*, 44 COMMON MKT. L. REV. 1661, 1661 (2007).

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persuade the second class Brethren to cast their votes from following the directions of the leadership.[19] Needless to dwell on the fact that the permanent members were chosen from among the Court's most teleologically minded, federalist membership. To them, the words of the treaty or the Founding Fathers' original intentions with the common European enterprise were townships in Siberia; far from concerned with the text and original intention they were adamant to exploit all the centralizing and federalizing potentialities of the new powerhouse. This organizational gimmick did not do away with the grave obstacles to an effective and smoothly evolving juridical process that had haunted the Court before 2004. It was not of course the organization's shell that hampered the decision-making and intoxicated it. It was presumably more likely the Court's pursuance of activist jurisprudential agendas that caused the poor reasoning and the other calamities associated with postulating what the law is instead of solidly building it up from sources available in the treaty. From all this it emerges that assembling unanimity or just stable and important majorities behind the pushes for "more Europe" was rarely possible. Bargaining, often hard and implacable, horse-trading and manipulations were, the usual birds caged in the Court's *volière*.

This should not surprise in the view that activism's arch-typical expressions are to engage in power-excesses that locate judicial actions outside the areas constitutionally allotted to the judicial branch of government. Such actions obliterate, by their very nature, the rule of law and instates in its place a regime characterized by judicial personalities ruling the law. On this backdrop, the possibility of a substantiated link between the Court's defense of the ban and its activism immediately jumps to mind. The hypothesis is that judicial activism feeds on the ban of dissenting opinions and the stark shadows it casts on everything that it is pertinent for outside observers to know about how the Court discharges itself of its business. A ban on dissents must be dear to policy-happy members of collegiate benches because it grants them a golden opportunity to yield to their instincts or vices while the apparent unanimity of their court's output shields them and their not so legitimate inputs from any possible identification and answerability. They can both have their cake and eat it too.

The next point deals with where to locate the proper line of demarcation around the Court's discharge of its presumed duties. Much depends on the eye of the beholder and of the specific organizational and procedural rules and practices that apply in each particular instance.[20] Since such a line is awfully difficult to draw, especially in practice, its location will always be a matter of dispute. Tom Bingham, one of England's greatest judges, recently penned his view in his book entitled *The Rule of Law.* He warns that:

[19] One of them once told us that he appreciated a lot that Hjalte had published the first second-class analysis. Before, most of the non-privileged judges knew that they had been deliberately marginalized but also that the Court's leadership did not find it appropriate for anyone to air such grievances. He added that for his part Hjalte could as well have classified them as third class members of the Court.

[20] Kelemen explained this to us.

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> It is one thing to move the law a little further along the line it is already moving, or to adapt it to accord with modern views and practices; it is quite another to seek to recast the law in a radically innovative and adventurous way. Then, law is made uncertain and unpredictable that are features representing the antitheses of the rule of law.[21]

When judges recast the law in a radically innovative, groundbreaking and adventurous fashion, they do a lot more than create legal uncertainty and unpredictability. They divert from courts' purposes, their organization, their procedures, their institutional *raison d'être*, the judging personnel's education, their training and all other resources. This action is not only constitutionally illegitimate but squarely illegal because it violates the other fundamental constitutional separation-of-powers pact. This endowed certain functions of government on the judiciary while it vested law- and policy-making functions in other, typically elected and democratically responsible institutions.

Courts' *raison d'être* is the best possible discharge of their duty to apply, in most cases, the legislator's laws to the facts of concrete cases and conflicts, hereby upholding the rule of law. Of course, while applying the law the courts interpret and fill gaps in it, utilizing their margins of discretion to best transform the legislator's legal messages to actual legal facts. To randomly rewrite or reconstruct the constitution and/or the entire legal system to make it consonant with the whims of judicial majorities is to substitute the rule of men to the rule of law. However, to be sure, it remains wholly within this functional determination of the conception of the rule of law that courts from time to time make some laws or their own motion—the condition being though that their law-making is kept within the Bingham'ian limits or close to them. When they law-make on a grand scale, they turn that *raison d'être* into the service of other and wholly incongruent purposes.

In almost all Western-type democracies that comply with the rule of law, it is commonplace that courts are not to be held accountable for their job-performances to other institutions, voters or anyone else. That the members of the judiciaries therefore answer to no one but the individual member's conscience is wholly justifiable and should be welcomed. It is in fact probably not feasible to prescribe a more wise and indispensable device for the purposes of protecting judges' integrity, independence, impartiality, principled objectivity, professional quality, and legality of their work. However, the need to uphold a shield of protection is obliterated when it has become clear that courts do no longer stand guard around the sacred rule of law but are enjoying the rule by men.

[21] TOM BINGHAM, THE RULE OF LAW 45–46 (2010).

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The big question then becomes asking whether some sort of accountability ought to be put in protection's place. The answer ought very probably to be given in the affirmative, considering that it is to wholly upset society's balances of powers prescribed in the fundamental pact of separation-of-powers when judges rebel, and in rebelling such judges make themselves the equals of those elected to make laws and constitutions. In so doing they make themselves and their institution vulnerable to the rightful claims that some sort of formalized accountability be put in place. In sum, the accountability should take aim with judicial, legal and political inadequacies, power excesses, and below-standard qualities of jurisprudences and the reasoning to go with them.

At his appointment hearings in the US Senate in 2005, this was the now Chief Justice John Roberts' clear message. He said he had no "agenda" or "platform." Judges were not politicians, "who can promise to do certain things in exchange for votes." They were like umpires, applying the rules they did not make themselves. It was a vital role, but a limited one "nobody ever went to a ball game to see the umpire."[22] As usual, the Chief Justice said the right thing: What the umpires do is not dependent on voters' approval for its constitutional validity. The mischievous thing is exactly, however, that all imaginable links of answerability are missing from US judges' work. They are also completely absent from European courts' job performance. What this paper therefore proposes be discussed is what may be done in order to make European judicial work responsible. For two reasons this places the study's focus on the EU-court, and not encompassing the two levels of courts under it. First, the EU-court is competent to deal as a first and last instance court in the bulk of those cases that give rise to constitutional issues; the so-called preliminary caseload and cases dealing with inter-institutional problems. Second, among the Union's courts, it is the majorities of judges sitting on this court who over a period stretching from the early 1960s until today have legitimized massive criticisms for power excesses and activism. It is thus only in the context of the EU-court that there exists a fertile ground for analyzing the interconnectedness of lifelines between bans on dissenting opinions and the growth of activism.

With a ban on dissents, the Court's judgments present themselves as unanimously decided. In the initial period of its activist approach to ruling, this did not matter so much because, presumably, under a strong court leadership—such as that of, most notably, Robert Lecourt presiding 1967–1976—most important rulings were handed down either unanimously or by near-unanimous majorities. In contrast, the ban became of great importance when by the early 1990s the internal culture of coherence and unanimity crumbled under the weight of sheer membership numbers, of increasing diversity in the judges' legal cultural backgrounds, and possibly also of less controllable judge personalities, all combining to create an atmosphere of that the judges were no longer

[22] Lexington, *Umpire of Liberty*, THE ECONOMIST, Mar. 31, 2012, at 49, *available at* http://www.economist.com/node/21551477.

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fighting for the same cause. In this new reality, and despite the establishment of the Grand Chamber with its born "federalist" members and its less predictable "second class" rotating members as it were, it became less common for competence expansion-minded majority judges to give their minority Brethren time, influence and other incentives to join them. They were left behind with an often less than real influence on the ruling while looking as if they had voted for the judgment. In sum, the majority judges neither had to bother about the views of their marginalized Brethren nor about Court outsiders. A majoritarian culture is always at a risk of bringing out a constitutionally radicalized output since the moderating influences of minorities are not there to hold it in check. In theory, such a radicalization is not bound to bring about a more judicially activist court, however, in the case of the EU-court, it has indeed contributed to more political and legal integration—a continuation of its signature trademark. Thus, without the possibility of being looked over their shoulders by outside observers, the Court both freed itself of the moral obligation to listen to minority judges' justified objections and gave way to a significant deterioration of the stringency and argumentative quality of many of its reasonings. In fact, many of them became indistinguishable from postulates about the interpretative test's legal consequences. In this context the ban on dissents has served to shield the identity of the judges making up the majority behind the Court's decisions, thus shielding them from accountability. When the names of the judges forming a fragile majority are made known, such a majority will certainly invest all their intellectual capacity into delivering well-founded legal reasonings for their judgments; not the poor type of reasonings we have seen in the past ten or fifteen years.

A counter-consideration objecting that a lift of the ban be incompatible with upholding the Court's authority must be dismissed as, on the contrary, the ban has contributed to the handing down of poorly reasoned judgments. In this way narrow majorities' hiding behind a guise of unanimity has caused serious doubts to be cast about the authority and legitimacy of the Court, evoking justified harsh criticism by onlookers. Due to the upholding of the ban on dissents the Court has become its own victim, so to say. Or put it this way: Having been protected by a ban on dissents for sixty years, if the Court could not muster to build up a viable legitimacy, authority, reputation for quality reasonings and for acceptable solutions to EC/Member State competence conflicts, it never can.

Equally, if in view of the possibility of re-appointment the integrity of EU judges may be questioned, re-appointments must be done away with together with the ban on dissents. The appointment period could be extended from six to eight years, perhaps, with the possibility of an extension by two years. This way, judges could still sit for a decade—a considerable time and close to the twelve years currently on offer; and at the same time few would suspect that a judge would compromise his consciousness for fear of not being reappointed for an additional two-year period.

Keeping status quo could prove a more dangerous bet in that there is a real chance that our modern politicians, media and ordinary townsmen could someday revolt against the

Court's autocratic rule. This threat is especially real in the case of a court which regularly determines cases by narrow majorities—often one judge's vote—and in cases where the surplus vote leads to a judgment stripping one or more Member States of any chance of enforcing high priority national policies such as, for example, labor market or environmental protection laws, or obstacles-to-immigration rules enjoying support of large voters' majorities. Lifting the ban would unveil obscurantism and make away with secrecy-mongering, catapulting the Court into the twenty-first century, where it belongs, and bringing it in line with the values of openness and transparency as held out in the treaty governing the Union.

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