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Introduction - The European Court of Justice and legal integration: perpetual momentum?

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The European Court of Justice (ECJ)[1] has played an indispensible role as a motor of European integration. In judgments addressing the balance between national and supranational authority, the European Court - not unlike high courts in other federal-type systems (Bzdera 1993; Halberstam 2008; Volcansek 2008) - has demonstrated a bias in favour of centralization. Again and again, the ECJ has demonstrated the independence and the authority necessary to push the scope and depth of European integration beyond what EU law-makers had intended. The literature on the European legal integration establishes a number of reasons for this marked bias towards supranationality: There is a comparatively weak legislator at the supranational level and divisions between EU lawmakers generate gridlock and open up space for the ECJ to pursue its pro-integration preferences (Pollack 2003; Tallberg 2002; Stone Sweet 2004: 7−9); European lawyers worked early to establish the supremacy and direct effect of European law (Vauchez 2008); national lower courts have had incentives to refer cases to the ECJ through the preliminary ruling system (Alter 2001); private parties had incentives to make legal claims based on their economic rights and other individual rights under European law (Conant 2002; Cichowski 2007; Kelemen 2011). Together these factors have sparked a self-reinforcing process of judicialization that has expanded ECJ power and deepened integration (Stone Sweet 2004; Stone Sweet and Brunell 1998).

Some observers fear that in privileging integration over the safeguarding of national competences, the Court's jurisprudence may threaten the maintenance of a politically acceptable balance between European-level and national competences in the EU. Political

controversy surrounding the ECJ's major integrative decisions is of course nothing new. Powerful national leaders from French President Giscard d'Estaing in the 1980s to German Chancellor Kohl in the 1990s have publicly attacked the court for its activism and overreach. In recent years, however, the expansion of EU law has led it to impact ever more politically sensitive issues. And today EU law treads on this sensitive terrain in a period when **(← p. 1)** the 'permissive consensus' concerning European integration has faded. ECJ rulings in controversial cases such as the '*Laval* quartet' (i.e., *Laval*, *Viking*, *Luxembourg*, and *Rüffert*) (see Malmberg 2010) and *Mangold* have elicited what many see as an unprecedented level of political criticism. This furor raises the question of whether the ECJ can maintain a politically acceptable balance of European and national competences, and the question of which political and legal factors influence its jurisprudence on this balance.

To date, the expansive jurisprudence of the ECJ seems unbroken. But in a more politically sensitive environment and in a Union that has grown to encompass 27 member states based on very different traditions of the rule of law, one might expect as much change as continuity.

This collection of essays investigates how the ECJ has sustained its bias toward deeper integration and whether the EU is experiencing an increase in countervailing forces that may diminish the Court's ability or willingness to act as a motor of integration. Can we expect the dynamics of the Court's case law to continue as before without member States or other countervailing forces intervening? Other than national governments working to safeguard their authority, national courts and national bars might be expected to react negatively to continued ECJ expansionism where it threatens their authority.

To understand whether the Court can sustain its role as a motor of deeper integration, we need to revisit established explanations of the Court's power to see if they remain viable in the Court's contemporary environment. We also need to better understand the ultimate limits of the Court's power – the means through which and extent to which national governments,

national courts, litigants and the Court's other interlocutors attempt to influence the Court and to limit the impact of its rulings.

There are many glaring lacunae in our knowledge about European legal integration. Though the literature on legal mobilization in the EU has grown in recent years (for instance, Stone Sweet 2010; Cichowski 2007; Kelemen 2011), we still know far too little about the decision-makers at the heart of the EU's legal system – the justices of the ECJ. Unlike the US Supreme Court, the ECJ publishes no votes or dissenting opinions, making it difficult to conduct analyses assessing the impact of the justices' policy preferences. Based on the ECJ's pro-integration track record, many assume that ECJ judges always favour integration over the safeguarding of national competences. But can this assumption hold, given that the judges are after all appointed by their member-state government, having been socialized in their national legal system? Likewise, we still know far too little about the conditions under which private litigants actually claim their European rights in front of national courts. How does the interaction between the ECJ and these courts take place? Given these institutional conditions, how can we explain the way that case law develops? Finally, we know too little about the impact of the ECJ's case law on member states. Though there is a growing literature on 'Europeanization' of public policy, there is still no equivalent in studies of European law to the extensive literature on 'impact analysis' conducted by scholars of American **(← p. 2)** public law (but see Conant 2002 for a notable exception). Europeanization studies have predominantly been concerned with the transposition and implementation of European secondary law – directives and regulations (Börzel 2001), and have largely neglected the reactions to case law (Töller 2010).

We should also note what we cannot do. With the broad focus on revisiting and refining our established explanations of the ECJ's power, we do not purport to take exhaustive account of major ongoing changes that arguably would merit a special issue in their own right. The

accession of 12 new member states with very different legal traditions is a major change, and not much is known yet of its implications on the EU's judicial system, particularly if we include the relationship with the lower and constitutional courts in the new member states. We therefore restrict the discussion of enlargement to its impact on the aggregate level in as far as it is already apparent there, for instance in terms of the increase of judges, or conflict lines (Laval). Other developments to be noted are the increasing impact of the case law of the ECJ on national criminal law, and the changes brought about by the Charter of Fundamental Rights, and the accession to the European Convention on Human Rights.

This collection assembles a number of renowned scholars and more junior scholars conducting cutting edge research on the ECJ. It brings together both political scientists and lawyers and explores legal integration from the perspectives of both disciplines. Collectively, the papers explore a number of central themes including the following.

How do the composition and structure of the ECJ influence its jurisprudence? Might the appointment by some governments of more Eurosceptic judges influence the Court's jurisprudence? Malecki's (2012) innovative research suggests that some judges may indeed hold more Eurosceptic preferences and that the presence of more Eurosceptic judges on chambers of the court is associated with those chambers making decisions that are less supportive of European integration. More generally, in recent years as it has expanded to twenty-seven judges, the Court has dramatically reorganized the way it conducts its work, hearing more and more cases in 'chambers' composed of subsets of judges. While decisions are taken in the name of the ECJ as a whole, in fact most decisions are made by groups of three or five judges. Does reliance on a chamber system pose a risk to the coherence of ECJ jurisprudence, or has the system been structured in a way that is likely to maintain the coherence of the law and safeguard the independence of the Court (Kelemen 2012)?

How sensitive is the court to political attacks? As mentioned above, the Court has been subject to an unprecedented degree of political criticism in recent years (Blauberger 2012). But just how sensitive should we expect the Court to be to such criticism? Often, when governments increase political pressure on courts, this simultaneously increases normative pressure on courts to act in a 'countermajoritarian' fashion and to defend minority interests (Chalmers and Chaves 2012). Moreover, if the Court enjoys a high degree of diffuse public support relative to the politicians who criticize it, this may shield the Court against such criticisms (Kelemen 2012). **(← p. 3)**

How do litigants, national courts and other members of the 'legal fields' involved in ECJ litigation influence the impact and course of ECJ jurisprudence? Though the ECJ is often portrayed as existing in a kind of 'splendid isolation' in Luxembourg, the Court is actually surrounded by specialized and often very circumscribed legal communities. These communities can empower the ECJ – by bringing cases to its docket, helping it to build up lines of case law in a path-dependent fashion (Schmidt 2012) and spreading its jurisprudence within national legal orders – but the very fact that these constituencies are limited in number, in specialization and in their interests may itself constrain the ECJ's impact (Chalmers and Chaves 2012).

How do national governments and national courts further, react to or adapt to ECJ jurisprudence? The papers go beyond simplistic dichotomies between compliance and non-compliance to explore the variety of ways in which national courts and national governments respond to ECJ decisions. The authors find that some national courts may rely on ECJ rulings in their conflicts with other courts within their national legal order (Stone Sweet and Stranz 2012) or that national courts may in fact build on ECJ rulings, offering more 'activist' interpretations than the ECJ had required (Davies 2012). National governments, for their part, may craft nuanced legislative strategies to mitigate the impact of controversial ECJ decisions,

and the content of these strategies will vary depending on the political composition of the government in question (Blauberger 2012).

Where do the contributions of this issue leave us? First of all, very clearly, they show once again how characterizations of European integration along the supranationalist – intergovernmentalist divide miss the point (Schmidt 1996). Integration advances because the multilevel system offers an opportunity structure for (integrationist) changes not only to supranational, but also to national private and public actors. Mobile litigants use European law to circumvent domestic legal constraints. National courts use the opportunity to strengthen their role in the national legal hierarchy, with single judges more often than not realizing specific legal – or policy preferences in this way. As to the ECJ, the lack of institutionalized court-curbing mechanisms and an apparently functioning permissive consensus insulates it effectively from political pressure. While there are clear differences as to the preferences of the involved judges, the likelihood that member states can use their appointment power to alter the Court's interpretation towards a more autonomy-regarding course for the member states seem slight. The development of case law can be conceptualized as being path dependent – the entitlement to individual rights established with direct effect and the prohibition of a restriction of economic rights grounded in *Dassonville* and *Cassis* offers sufficient incentives to litigants to pursue an extension of the reach of European law.

Yet, the image of an expansionist ECJ does not stand undisputed in this volume. Only some areas of law advance to this extent, as Chalmers and Chaves (2012) argue, resulting in a very uneven development across legal fields. And according to Davies (2012), where this expansion does take place, it is not **(← p. 4)** driven solely or even primarily by the ECJ, but rather is rooted in broad interpretations of EU law made by national courts. Finally, Michael Blauberger (2012) shows that even highly controversial judgments are absorbed in the domestic political

process in a way that a new consensus becomes possible, eventually diminishing the impact of the ruling.

It remains to be seen whether (and if so when) the European Union may enter into a phase of consolidation as other federal-type systems have experienced (Bzdera 1993) – a phase in which the ECJ would act less as an engine of integration and more as balancer of EU ('federal-level') and national interests. It is clear, however, that the EU has not yet entered such a phase. And as Fritz Scharpf (2012) emphasizes in his conclusion to this collection, the dominant role of the ECJ results in a skewed constitutional balance. While authors disagree as to the extent of the ECJ's activism, the pro-integrative role of the European court system as a whole - including member states' courts and the ECJ - is undisputed.

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NOTES

[1] The Treaty of Lisbon introduced changes in the names of EU judicial institutions. The Court of Justice of the European Communities is now officially known as the 'Court of Justice' – but informally we can still refer to it as the European Court **(← p. 5)** of Justice or ECJ. The Court of First Instance is now known as the General Court. The EU's judiciary as a whole – including the ECJ, the General Court and the Civil Service Tribunal, and any lower courts that may be established in the future are collectively referred to as the Court of Justice of the European Union (or CJEU).

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