

## The European Courts

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## **The European Courts**

**Robert Harmsen and Karen McAuliffe**

### **Introduction**

The ‘judicialisation of politics’ has been one of the most important structural shifts on the European political landscape in the decades since the end of the Second World War (Conant 2007; Kühn 2006). Courts have overcome a historically subordinate role to become important political actors. This most obviously takes the shape of direct judicial interventions in policy-making processes, with courts generally assuming the role of ‘veto players’, variably influencing both the forms and the substance of policy decisions. The effects of ‘judicialisation’, however, also manifest themselves in more subtle or indirect ways, rebalancing the relationship between law and politics. Litigation may thus emerge as a key instrument in the making of public policy, displacing more traditional modes of regulation and governance (Keleman 2011; see also Volcansek in this *Handbook*). More generally, political actors may themselves adapt to this shifting balance between law and politics, internalising a more legally attuned mode of decision-making as an anticipatory strategy to minimise the possibility of subsequent, negative judicial intervention. As Alec Stone Sweet (2000: 204) appositely concludes his widely cited survey of the judicialisation phenomenon, ‘In the end, governing with judges also means governing like judges’.

The general trend towards judicialisation may be seen across different levels of governance. At the national level, as Britta Rehder details elsewhere in this *Handbook*, there has notably been a diffusion of a distinctive (Kelsenian) model of constitutional court. Such courts first took root in Western Europe,

before subsequently emerging as a generalised (if not essential) feature of post-transition democratic systems in Central and Eastern Europe. There have also, of course, been comparably dramatic developments at the European level, as two distinctive and distinctively effective bodies of supranational law have taken shape. The Luxembourg-based Court of Justice of the European Union (CJEU) has emerged as a key driver of the European integration process, crafting an innovative constitutional architecture and system of regulation. The Strasbourg-based European Court of Human Rights (ECtHR) has played a similarly pioneering role, fashioning a uniquely effective system of regional human rights protection on the basis of the Council of Europe's European Convention on Human Rights (ECHR).

In broad terms, these developments at different levels have been mutually reinforcing, sustaining a generalised legitimation of judicial power in relation to the executive and the legislature. At the same time, however, this generalised logic of empowerment is tempered by the different relative positions of courts. Judicial actors will be conscious not only of their general position in relation to the other branches of government, but also of their specific position within formal judicial hierarchies and wider networks of influence. As such, differing institutional strategies and patterns of jurisprudential development may be expected (cf. Alter 2009).

It is thus against the background of this wider judicialisation phenomenon that the present chapter focuses on 'the European Courts'. In the two main sections, the patterns of institutional development of the European Court of Justice and the European Court of Human Rights are examined. Drawing particularly on the relevant political science and critical legal literatures,

particular attention is paid to both questions of institutional legitimacy and the roles assumed by the respective courts in relation to wider political processes. This is complemented, in the conclusion, by an examination of the relationship between the two Courts, situated relative to the wider European (and international) trends towards judicialisation discussed above.

### **Enunciating a Vision of Europe**

Although it was always intended that the ECSC and EEC should have a supreme court, its jurisdiction as established in the Treaty of Rome was limited: an administrative court, based in international law, with the jurisdiction to decide on the misuse of powers by the institutions of the ECSC. Furthermore, the Treaty made no mention of the type of legal system or principles that it might adopt in ensuring that law was observed. The Court was thus, through its case law, able to enunciate a vision of Europe that allowed it to develop and extend its jurisdiction under the treaties. The Court has, in effect, ‘constitutionalised’ the EU legal order, and by so doing transformed that Union from a traditional international organisation, albeit with supranational elements, into a new type of legal order, which binds not only member states but also individuals. In the seminal case of *Van Gend en Loos* in 1963, the Court declared that the EEC was not governed by traditional international law, but rather that it was a “***new legal order***”<sup>1</sup>. In *Costa v ENEL* in 1964, the Court reaffirmed that new legal order, distinct from traditional international law, and set out the principle that EU law should be supreme over member states’ national laws<sup>2</sup>. There then followed a series of cases throughout the 1960s and 70s in which the Court embedded that

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<sup>1</sup> Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

<sup>2</sup> Case 6/64 *Costa v ENEL* [1964] ECR 585.

principle of supremacy in the EU legal order, in particular in its *Internationale Handelsgesellschaft* and *Simmenthal* rulings<sup>3</sup>. This principle of supremacy has been termed ‘*the most important constitutional issue of the [EU] legal order*’ (Eleftheriadis 1998, p. 257), and the impact it has had on the national legal orders of member states is certainly beyond what might be expected from traditional international law.

Hand in hand with that principle of supremacy, the Court also developed the principle of direct effect. Direct effect allows individuals to invoke provisions of EU law directly before their national courts. That principle was first set out, once again, in the case of *Van Gend en Loos*, in which the Court stated that the subjects of the ‘new legal order’ were “*not only the member states but also their nationals*”<sup>4</sup>. For the first time, in any legal system, individuals had rights which flowed directly from international (EU) law and which national courts were bound to uphold. The Court has continued to broaden the parameters of the principle of direct effect and, over the years, has extended the application of the principle to further Treaty articles, decisions, and, most controversially, to directives. By these principles (among some others) the CJEU enunciated a vision of Europe, which was vastly different and ran deeper to what member states might have envisaged when they agreed to create the common market.

### *Acceptance of the constitutionalisation paradigm?*

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<sup>3</sup> Case 11/70 *Internationale Handelsgesellschaft v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, Case 92/78 *Simmenthal SpA v Commission* [1979] ECR 777.

<sup>4</sup> *Supra* note 1.

The 'activism' of the CJEU has been heavily criticised, in particular in legal literature from the latter part of the 1980s onwards<sup>5</sup>. There is also a significant political science literature on that court. The question of most interest to political scientists is **why** these 'radical' decisions of the CJEU were, and continue to be, accepted and applied by member state courts<sup>6</sup>. There are a number of theories as to why this is the case, each of which focuses on the relationship between the CJEU and national courts in an effort to explain the constitutionalisation paradigm. The basis of that relationship lies in the procedure for preliminary rulings under Article 267 TFEU. This article is frequently termed the 'keystone' of EU law, for without it there would be no principle of supremacy, or indeed much EU law at all (Ward 2009, p. 65). Under Article 267 member state courts may, and in some cases must, refer questions of EU law to the CJEU for preliminary rulings on the interpretation of the Treaty and the validity and interpretation of the acts of the institutions. Those preliminary rulings are then binding on the national courts that made the references and on other member state courts before which the same or similar questions may be raised<sup>7</sup>. All of the constitutional-type principles developed by the CJEU were developed in judgments given in response to references for preliminary rulings. In other words, the CJEU was dependent on those references from national courts in order to develop EU law. Most commentators agree that on the whole, national courts (in particular lower courts) have not only failed to resist the 'constitutionalisation' of the EU legal order by the CJEU,

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<sup>5</sup> Following the publication of Rasmussen's *On Law and Policy at the European Court of Justice* (1986) many commentators became very critical of the Court. See, in particular, Coppel & O'Neill (1992) and Mancini (1991).

<sup>6</sup> See, for example: Dehousse (1994); Dehousse (1998); Alter (2001); Arnull (1999); Slaughter, Stone Sweet and Weiler (1998).

<sup>7</sup> Cf Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ERC 3415.

but have enthusiastically played their part (Azoulai and Dehousse 2013, p.357). So, given the impact of those seminal judgments of the CJEU on national legal systems and sovereignty, why did national courts continue to engage with the preliminary ruling mechanism?

Arguably the most influential work scrutinising the policies and strategies of the CJEU was done by Joseph Weiler. Weiler claimed that the CJEU was unable to force a pace of integration that did not conform to member states' own interests and so had to engage in a 'dialogue' with national courts, working-out justifications for doctrines that were 'acceptable' to member states (Weiler, 1982). Through that dialogue, authority was gradually allocated between the EU and national legal orders while at the same time "*enhancing judicial power on both levels*" (Stone Sweet 2010, p. 16). The success of the Court's integration project was, according to Weiler, due to a balance between a supranational legal system on the one hand and an intergovernmental legislative system on the other.

A neo-functionalist view submits that since law exists in a technical autonomous arena, the Court of Justice has its own discourse and autonomy. Scholars such as Burley/Slaughter and Mattli claim that, by introducing direct effect and supremacy, the CJEU transformed national courts into EU courts in their own right. As more litigation was brought before national courts by private actors, more references for preliminary rulings were sent by national courts to the CJEU. By empowering individuals and national courts in this way the CJEU made it advantageous for those actors to use Community norms and thereby to foster legal integration (Craig 2003, p. 31).

Dehousse points out, however, that such analyses are limited as they fail to take account of the fact that not all national courts behave alike and in fact higher courts tend not to be as 'enthusiastic' as lower Courts (Azoulai and Dehousse 2013). Alter, in her work, does deal with those differing degrees of enthusiasm and submits that the relationship between the CJEU and national courts is based on competition between courts within member state legal orders. Under Article 267 TFEU all member state courts, including lower courts, have direct access to the CJEU. As a result of the principles of direct effect and supremacy of EU law, lower national courts can refuse to apply decisions of higher courts. Indeed, lower national courts do appear to have taken full advantage of their new role as watchdogs of EU law, continuing to make references to the CJEU under Article 267 TFEU, and higher national courts have had to "*reposition themselves to the new reality*" (Alter 1998, p. 243). In effect, lower courts have "cajoled" higher courts into accepting the supremacy doctrine (Alter 1998, p. 242).

An intergovernmentalist view, on the other hand, denies the autonomy of the CJEU and claims that its role is merely one of a guarantor of interstate bargains/agreements. According to scholars such as Garrett (1992, 1995) and Weingast (1993), the Court's 'power' comes from the fact that it can assist member states to overcome problems of commitment and collective action: because of their interest in the development of the common market, member states gave the CJEU jurisdiction not only to supervise the activities of the institutions of that common market, but also to control their own activities in that sphere. Thus, principles such as supremacy and direct effect were accepted by member states. In an intergovernmentalist view, the mere possibility that member states may resist CJEU judgments, subjecting them to constitutional



review etc. is enough to ensure that the Court remains within a sphere that is acceptable to those member states. The intergovernmentalist view is, however, often criticised by lawyers for not acknowledging the autonomous nature of law.

One idea common to most of those theories is the idea that left to its own devices, separate from the other EU institutions, “*tucked away in the fairytale Grand Duchy of Luxembourg*”, the Court was able to implement its own EU integration agenda even against the interests of some member states (Weiler, 1982; Burley and Mattli, 1992). Recently, however, new literature has emerged, based on studies of EU and national archives and focusing on the development of EU law (cf. Davies and Rasmussen, 2013, p. 2). This literature challenges that notion of ‘integration by stealth’ and shows that national governments were not only aware but were, at least in the case of Germany, broadly facilitative of that integration process. Davies and Rasmussen (2013) claim that national European law associations, the Court itself and the legal service of the Commission were the key driving forces in the development of EU law – that it was “*a battle between legal elites*”.

### **A Socio-Economic Court**

It was not envisaged that the jurisdiction of the original court should extend to the social sphere. Yet, through its rulings in a number of landmark cases, the CJEU has adopted the role of a socio-economic court within a Union of much broader scope than initially envisaged.

The successful completion of the internal market was due in a large part to a shift in approach by the European Commission from exhaustive to minimum harmonisation. That shift in fact originated in the CJEU’s case law, specifically in

its principle of mutual recognition of national standards. According to this principle, set out in *Cassis de Dijon*<sup>8</sup>, a good produced and marketed lawfully under the rules of any one member state must be allowed to circulate freely within the internal market<sup>9</sup>. This ruling has been described as a “constitutional innovation” because it introduced a mode of integration unforeseen by the member states (Stone Sweet 2004, p. 135). The Court justified its *Cassis* ruling on the grounds that traders should not suffer because of the absence of legislative harmonisation at the EU level, but should have access to the entire internal market on the basis of access to the market of any member state. This, of course, provided “a powerful incentive to harmonise the most important market rules” to prevent investment and production moving to the member states with the lowest regulatory costs (Stone Sweet 2004, p. 136). Traders could invoke that principle of mutual recognition in national courts and their rights under EU law had to be upheld by those national courts.

The principle of mutual recognition is indicative of what Maduro terms the constitutionalisation of negative integration (Maduro, 1997, p. 3-4). That principle also highlights the significant ‘asymmetry’ between positive and negative integration<sup>10</sup>. As a result of the *Dassonville/Cassis* line of case law, the Court has almost unlimited freedom to scrutinise ever-increasing policy areas for rules that may potentially hinder the exercise of individual rights. However, the

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<sup>8</sup> Case 120/78 *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

<sup>9</sup> Note: In order to complete the internal market, both fiscal (e.g. taxes and duties) and non-fiscal barriers to trade had to be removed. Articles 28-29 of the EC Treaty were intended to eliminate all non-fiscal barriers to the free movement of goods throughout the internal market. In its *Dassonville* ruling (Case 8/74 [1974] ECR 837), the Court held that any trading rules enacted by a member state which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade shall be considered measures having equivalent effect to non-fiscal barriers to trade (MEQRs). The *Cassis de Dijon* ruling extended the *Dassonville* principles to indistinctly applicable measures (IAMs) – i.e. to all measures covering all goods, whether domestic or imported, as well as introducing the principle of mutual recognition.

<sup>10</sup> Positive integration refers to the adoption of harmonising legislation at the European level; negative integration refers to the prohibition of national-level legislation that may violate Treaty objectives in order to remove barriers to trade.

Court's case law can only achieve negative integration (Scharpf, 1999, ch.2) – it cannot impose a common European regime to replace discriminatory national rules. 'Positive integration' on the other hand, can only be achieved through legislation and as such depends on a broad consensus and can be inhibited by political disagreements (Scharpf, 2010). Negative integration has developed what Scharpf terms a "*deregulatory dynamics*": a decision of the CJEU against a member state effectively reduces its potential for democratically accountable policy-making, yet politics at the European level cannot make up for the loss.

Two relatively recent cases, *Laval* and *Viking*, illustrate the difficult balance that the Court aims to strike. Those cases occurred against the background of the Posted Workers Directive<sup>11</sup>. That directive sets out the employment conditions which should apply to workers temporarily posted from one member state to another and requires the host state to apply to posted workers 'a nucleus of mandatory rules for minimum protection' listed in the directive. Initially, the directive was welcomed, particularly by wealthier member states, as a way of protecting labour standards from being undermined by posted workers from poorer states (i.e. preventing social dumping). However, the question remained as to whether this was a minimum labour law directive – providing protection for host-state labour and/or posted workers or a free movement of services directive – effectively limiting the regulatory powers of the host state. The CJEU, in the *Laval* and *Viking* cases had to try to balance the different objectives of the Treaty (free movement) on the one hand and adequate social protection of workers on the other. *Laval* concerned industrial action taken by Swedish trade unions against a Latvian company employing Latvian

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<sup>11</sup> Directive 96/71/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ(L)18 1-6.

workers, in Sweden, for about 40% less wages than Swedish workers. In *Viking*, Finnish trade unions took action to try to prevent a Finnish shipping company re-registering a ship under a Latvian flag in order to employ Latvian workers at lower rates and in worse conditions than Finnish workers. In its judgments in these cases, the Court first stated that it was for the relevant national courts to ultimately answer the questions – thereby assigning this difficult balancing act to the member states. However, it then went on to provide a narrow reading of the Posted Workers directive by observing that it is ‘first’ intended to ‘*ensure a climate of fair competition between national undertakings and undertakings which provide services transnationally*’<sup>12</sup>. The ‘compromise’ reached by the CJEU, between free movement economic concerns and member states’ legitimate social policy objectives appears to be that provided the host state has complied precisely with the provisions of the directive, then posted workers may enjoy the better terms and conditions of employment in the host state. If that is not the case, then an attempt to apply the host-state rules will be contrary to the free movement rules.

The *Viking* and *Laval* judgments have been heavily criticised for their narrow interpretation of the directive at the expense of social rights. The rulings in these cases are clear steps towards “*the hard law of negative integration*” (Joerges and Rödl 2009) in instances where political processes seem slow or unappealing. Just how far the Court has extended its jurisdiction into the social sphere is evident. However, we should question whether this constitutionalisation of negative integration is in fact preferable to soft-law mechanisms of coordination. The ‘socio-economic’ CJEU attempts to balance

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<sup>12</sup> *Laval* para 74

conflicting interests but, as Maduro notes “*has never clearly addressed the issue of which interests should be balanced*” (Maduro 1997, p. 54).

### **Contemporary Challenges**

It is clear that the roles adopted by the CJEU have changed over time. Today’s Court faces a number of contemporary challenges ranging from stricter public scrutiny to the growing importance of fundamental rights litigation in its case law. One of the most significant challenges, however, is that of increased workload, particularly in the light of the recent EU enlargements. Unsurprisingly the workload of the original ECSC Court was minimal (only 34 cases were brought before that court between 1952 and 1957, and only 12 judgments were delivered in that time). However, as the CJEU extended its competence, and with each new enlargement, that workload increased many hundredfold (632 new cases were brought before the CJEU and 617 before the General Court in 2012 alone). While this increase is not on a scale comparable with that of the Strasbourg court (see *infra*) it is nonetheless significant. Over the years various efforts have been made to alleviate the workload of the CJEU, such as the introduction of the Court of First Instance in 1989 and subsequent allocation of particular types of action to that court as well as the dispensing of the oral hearing in certain circumstances, use of expedited or accelerated procedures and the possibility of judgment being delivered in a case without an opinion of the advocate general. The number of judges at the Court has also almost doubled in size since 2004. Yet, in spite of such efforts, the CJEU remains overloaded and under pressure with its caseload. At the end of 2012 there was a backlog of 886 cases pending before the CJEU and 1237 cases pending before the General

Court<sup>13</sup>. Moreover, as Maduro and Azoulai point out, the increased number of judges may allow the Court to increase its judicial output, but this also runs the risk of a loss of institutional memory and a reduction in collegiality (Maduro and Azoulai, 2010).

The ‘mega-enlargement’ of May 2004 brought with it opportunities and challenges. Most significantly, the CJEU had the opportunity to re-evaluate its working methods. The sheer scale of that enlargement forced the Court to streamline its system of management as well as introduce extensive changes to its integral multi-language system of translation (cf McAuliffe, 2008). In order to “counteract the expanding average length of proceedings”<sup>14</sup> a series of measures were put into practice progressively from May 2004<sup>15</sup>. The Court also reassessed its practice of publishing judgments in the European Court Reports (ECR), adopting a policy of selective publication<sup>16</sup>. In terms of challenges, the question that immediately arose was whether that ‘mega-enlargement’ would represent a qualitative or merely a quantitative change in the functioning of that institution. While enlargement was as much a pretext as a cause for some changes introduced that had been mooted for years, there have been some notable shifts in the working methods of the Court as a consequence of that enlargement. Preliminary studies, focusing on the role of language and translation at the CJEU, have shown that the introduction of thirteen new languages (between 2004 and

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<sup>13</sup> Source: Court of Justice Annual Report 2012.

<sup>14</sup> Court of Justice Annual Report 2004, I-A (1.3), p. 13.

<sup>15</sup> Those measures included adopting a stricter approach to granting extensions of time-limits for submitting pleadings; decreasing the size and content of reports for the hearing and ceasing to produce a report of the judge-rapporteur in cases that do not require an oral hearing.

<sup>16</sup> It should be noted that the texts of decisions not published in the ECR are nonetheless accessible to the public in electronic form on the website of the Court of Justice in the language or languages available. Because of their perceived importance for the interpretation and uniform application of Community law throughout the EU member states, all judgments delivered in references for a preliminary ruling continue to be published in the ECR.

2013) and thirteen new cultures have indeed marked a shift in the dynamics of that institution (McAuliffe, 2008, 2010). The most noticeable and probably the most significant change in its working methods has been the introduction of an official pivot translation system. The question arises as to whether an infinite number of languages can continue to be absorbed by the language regime of the CJEU without certain changes being made to the use of language within that institution. Following on from that, what impact are such changes likely to have on the case law being produced by that Court? The introduction to the Court of such a large cohort of staff from the new member states certainly adds an element of diversity to that institution but it also impacts on the institutional balance, which in turn may have implications for the development of the case law<sup>17</sup>.

### **The European Convention on Human Rights**

The system of human rights protection which has developed on the basis of the European Convention on Human Rights (ECHR) stands as one of the earliest and most important achievements of the process of European integration. The Convention system has further emerged as an exemplar on the wider international stage, a comparatively rare instance of the successful judicial enforcement of individual rights beyond the state which has served as a source of inspiration for other regional systems. A burgeoning legal literature has accompanied the development of the system, largely focused on the exposition of

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<sup>17</sup> These questions are currently the focus of an ERC-funded study on the Court (2013-2017) (McAuliffe 2014).

the expansive case law of the Strasbourg institutions.<sup>18</sup> In sharp contrast to the situation of the Court of the Justice of the European Union, however, a corresponding political science literature has not taken shape.

One may certainly point to a number of important political science contributions to understanding the development and the dynamics of the Convention system. Andrew Moravcsik, for example, has brought liberal intergovernmental theory to bear on the ECHR, highlighting the importance of a logic of 'democratic delegation' as an explanation both for the origins of the system (Moravcsik 2000) and for the foundations of its comparative success (Moravcsik 1995). Helen Keller and Alec Stone Sweet (2008) coordinated a major interdisciplinary research project, assembling an international team of collaborators to examine the complex sets of legal and political factors accounting for the differential reception of the ECHR across a representative sample of eighteen member states. More recently, Jonas Christoffersen and Mikael Rask Madsen (2011) brought many of the (few) political scientists working on the Convention system together with leading legal practitioners to look at the law and politics of the ECHR at the time of its sixtieth anniversary, tackling such themes as the institutional development of the system, judicial voting patterns, the role of NGOs, and the sociological construction of the regional human rights 'field'. Yet, while these and a limited number of other works undoubtedly point to the promise of political and social science research on the Convention, they remain relatively isolated studies. There is, in terms of

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<sup>18</sup> Major textbook surveys of ECHR case law include: Harris, O'Boyle, Bates and Warbrick (2009); White and Ovey (2010); Janis, Kay and Bradley (2008); and Mowbray (2012).



the development of a sustained body of scholarship, something of a ‘missing political science’ of the Strasbourg system.

Clearly, the present short section cannot address this wider gap. It does, however, outline a broadly political understanding of the two major historical phases in the Convention system’s development to date,<sup>19</sup> in terms suggestive of the potential of a wider interdisciplinary research agenda. Specifically, attention is first turned to understanding the dynamics of the system’s initial ‘success’, focusing on the establishment and legitimation of the Convention as a West European system of human rights protection during the Cold War period. This is followed, in turn, by an examination of the challenges faced by the system in the post-Cold War period. Now the final recourse in human rights matters for a vast pan-European community, the Strasbourg Court has seen its role dramatically transformed as it grapples with processes of democratic transition, and with the situations arising when such transitions have faltered or failed.

### *The Construction of Judicial Legitimacy*

The Convention, as initially agreed in 1950, was a relatively modest document. The list of rights covered was comparatively limited – notably not extending to the social and economic rights covered by the 1948 Universal Declaration of Human Rights. The attendant institutional supervisory mechanisms, bearing the marks of hard-fought political compromise, were also rather restricted. States were initially obliged only to accept an interstate system of complaints, whereby they might bring cases against one another before the

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<sup>19</sup> For an excellent historical overview of the ECHR, see Bates (2010). By way of complement, Goldhaber (2007) engagingly details the background and significance of a selection of landmark cases with a strong emphasis on the personal stories of the individual litigants.

newly established European Commission of Human Rights, which could then issue an advisory opinion. The Convention did, however, also contain two optional provisions whereby states could opt into more expansive control mechanisms. Article 25 provided that states could accept a right of individual petition, allowing individuals to bring cases directly to the Commission once all domestic remedies had been exhausted. Article 46 provided for the establishment of a European Court of Human Rights, which could render full judicial decisions against states accepting its jurisdiction at a second stage of proceedings (after the Commission stage). The strategic 'gamble' of the Convention's drafters was thus that states would progressively come to accept the full system of control around a limited core of classic liberal rights.

The Strasbourg institutions were the central actors in this process of legitimation, with the Commission necessarily making much of the early running, later relayed by the Court. Through the 1960s and 1970s a series of key jurisprudential doctrines were developed which gave practical and often expansive effect to Convention rights, while at the same time displaying a consistent sensitivity to national apprehensions about the emergence of overly intrusive forms of control at the European level. It was this careful balancing which crucially established the credibility of the Convention institutions with member states, litigants and wider stakeholder communities.

From an early stage, the Strasbourg institutions affirmed that the Convention must be read as creating 'objective' rights vested in the individual, and consequently not be subject to conditions of interstate reciprocity. Equally, Strasbourg jurisprudence has insisted that the ECHR be interpreted in line with its 'object and purpose' as a human rights treaty, and correspondingly not be

bound by the conventional international law interpretive canon of reading provisions so as to minimise their impact on state sovereignty. In much the same vein, the implementation of rights at the national level must be 'practical and effective' and not 'theoretical and illusory'. Thus, the right to a fair trial is taken to imply the right of access to a court, including the provision of legal aid where necessary.<sup>20</sup> In a similar vein, Convention rights have been developed through the technique of 'evolutive interpretation', whereby the Strasbourg authorities expand the scope of human rights protection in line with their reading of the evolving consensus of member states. It was, for example, on this basis that the Court found the United Kingdom (as regards Northern Ireland) and the Republic of Ireland to be in violation of the Convention in the seminal 1981 *Dudgeon*<sup>21</sup> and 1988 *Norris*<sup>22</sup> cases, holding that the statutory criminalisation of homosexuality no longer corresponded to contemporary European standards.

Balancing this jurisprudential arsenal, however, the Strasbourg institutions also developed the doctrine of the 'margin of appreciation'. This holds, as regards those rights where states must legitimately balance competing claims, that the European authorities will show a degree of due deference to their national counterparts insofar as the latter 'by reason of their direct and continuous contact with the vital forces of their countries' are better placed to appreciate the necessity of particular measures or restrictions. In an early case of this type, the Court thus found no violation as regards a British ban on the publication of an educational manual for adolescents including frank discussions of drugs and sex, even though the book ('The Little Red Schoolbook') was freely

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<sup>20</sup> See *Airey v. Ireland*, ECtHR decision of 9 October 1979 on application no. 6289/73.

<sup>21</sup> *Dudgeon v. the United Kingdom*, ECtHR decision of 22 October 1981 on application no. 7527/76.

<sup>22</sup> *Norris v. Ireland*, ECtHR decision of 26 October 1988 on application no. 10581/83.

available in a number of other Convention member states.<sup>23</sup> In this, the Court explicitly deferred to the judgment of the national authorities, seen as better placed to make determinations as regards matters of public morals. The application of this principle has, as one would expect, often drawn very sharp criticism. Two prominent ECHR experts have, for example, memorably likened the use of the doctrine to a 'spreading disease' (van Dijk and van Hoof 1990: 604-605). Yet, seen from the point of view of the Strasbourg authorities, the margin of appreciation is a necessary 'constitutional principle' providing for the demarcation of the spheres of primary national and subsidiary European responsibility.

This is consistent with the long term logics which have governed the evolution of the system. The bold jurisprudential strokes of the Court of Justice in Luxembourg find only a partial parallel in Strasbourg. The strategy by which the ECHR has been developed has been rather more one of a 'cautious ambition' – pushing at the bounds of public international law, but not seeking to create a new type of legal order. In this respect, it should be underlined that the relationship between Strasbourg and national authorities is not the same as that which prevails under EU law. There is no preliminary reference mechanism connecting national courts to the European Court of Human Rights. The Convention is also not directly effective in national legal orders, but rather has a differing domestic legal status in function of different national modes of incorporation. The nexus between the national and the European legal order is

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<sup>23</sup> *Handyside v. the United Kingdom*, ECtHR judgment of 7 December 1976 on application no. 5493/72.

thus somewhat more attenuated in the case of the ECHR, and is largely defined by the sanctioning of acts of national authorities, including national courts.

Overall the initial strategic 'gamble' may be seen to have paid off – but also to have shown its limits. The original control system did come to be generally accepted, opening the way for a major reform of the system with the entry into force of Protocol 11 in 1998. This Protocol saw the part-time Court and Commission replaced by a single-tier, full-time Court with a direct right of individual petition. Yet, it should also be noted that the substantive rights covered by the Convention system have only been very modestly expanded since 1950 – with, most notably, the development of both social rights and minority rights within the Council of Europe system having taken place through the creation of separate conventions with no provision for judicial oversight.<sup>24</sup>

### *The Challenges of Enlargement*

The Council of Europe enlarged rapidly in the 1990s. Hungary already became the first post-Communist state to join the organisation in 1990. Further enlargements followed in quick succession, including the controversial accession of the Russian Federation in 1996. By the end of the decade, 17 post-Communist states had joined, on the road to the Council's now near comprehensive pan-European membership of 47 states. This rapid enlargement was facilitated by the adoption of a strategy of what might be termed 'post hoc conditionality'. In contrast to the European Union, the Council of Europe, from 1993 onwards, adopted an explicit strategy whereby states deemed not to meet certain

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<sup>24</sup> The original European Social Charter was adopted in 1961 and first came into force for those states which had ratified it in 1965. A revised treaty was adopted in 1996 and first entered into force in 1999. The Framework Convention for the Protection of National Minorities was adopted in 1995 and first entered into force in 1998. The wider functions of the Council of Europe are surveyed in Bond (2011).

minimum entry criteria as regards democracy and the rule of law were nonetheless permitted to join the organisation, on the condition that they submitted to monitored post-accession processes of reform in order to remedy the specified deficiencies. For proponents of the strategy, it was seen as an effective means of reinforcing processes of democratic transition from within the organisation. The strategy nonetheless also attracted sharp criticism. Most prominently, the then Deputy Secretary General of the Council of Europe, Peter Leuprecht, resigned in protest at what he regarded as an unacceptable dilution of the organisation's core values (cf. Harmsen 2001).

Whatever the merits of the approach, it dramatically changed the landscape within which the ECHR system operates, as accession to the ECHR was made a mandatory condition of Council of Europe membership. Quantitatively, the already marked growth of cases coming to Strasbourg accelerated exponentially. Qualitatively, the ECHR institutions were faced with dramatic new challenges, well beyond the 'fine tuning' of firmly established democratic regimes which had been the normal stock in trade of the Convention system during the first decades of its existence.

The quantitative explosion of the demands placed on the Strasbourg institutions may be illustrated by looking at typical caseload figures prior to the wave of post-Cold War enlargements in comparison to those of the current Court. In 1989, 4,923 new petitions were lodged in Strasbourg, of which 1,445 were allocated to a decisional body. Under the old two-tier system, the Commission that year took 1,338 decisions, finding 1,243 petitions inadmissible and 95 admissible. The Court rendered 25 decisions. By way of contrast, in 2012, the single-tier full-time court received 65,150 petitions. It handed down

86,201 decisions of inadmissibility, as well as 1,678 full judgments on the merits. This left the Court with an accumulated backlog of 128,100 cases, down from a high watermark of over 160,000 cases. Put even more starkly, the Court now typically receives around 50% more petitions every year than the Strasbourg institutions had received during the entire period from 1955 until 1988 (44,199).

The geographical distribution of this exponentially expanding caseload must also be underlined. The 'old' West European democracies now account for only about 20% of the Court's caseload at both the petition and the judgment stage. Conversely, the post-Communist states annually account for around 70% of the petitions received and between 50 to 60% of the judgments rendered.<sup>25</sup> More strikingly, four countries alone – Russia, Ukraine, Romania, and Turkey – routinely account for over half of the judgments handed down by the ECtHR each year (Harmsen 2010: 30-32).

This geographic shift in the focus of the Court's attention has also, of course, seen a qualitative shift in the types of cases coming to Strasbourg. Most immediately, the Court found itself playing an often key role in processes of democratic transition. Narrowly, the ECtHR was called upon to judge the Convention compatibility of transitional measures themselves. Here, the Court has essentially had to establish the extent to which temporary limitations on specific rights (such as lustration or disenfranchisement measures) fall within

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<sup>25</sup> Turkey is something of an anomalous case relative to this broad-brush categorisation, being neither a post-Communist state nor an 'old' democracy. A Council of Europe member since 1949, Turkey participated in the initial drafting of the ECHR and ratified the Convention in 1954. Nonetheless, under the pre-Protocol 11 regime, it only very belatedly accepted the right of individual petition (1987) and the jurisdiction of the Court (1990). This produced, in the mid-1990s, the first major wave of cases coming to Strasbourg in which the Court was confronted with serious, systemic problems of human rights protection, concerned particularly with the treatment of the Kurdish minority. In more recent years, Turkey has generally accounted for around 20% of judgments delivered and 10% of petitions filed. See further Kabağlu and Koutnatzis (2008)."

the national margin of appreciation, insofar as such restrictions could be argued to be in the long term interests of consolidating newly (re-)established democratic regimes (Varju 2009). More widely, the Court has further served as a buttress for the grounding of liberal democratic institutions, in particular enhancing the legitimacy of a number of constitutional courts through the development of strong, mutually reinforcing judicial dialogues (Sadurski 2012: 1-51).

If the Strasbourg Court has played a perhaps underestimated role as a positive agent of change in processes of democratic transitions, one must, however, also acknowledge that the contemporary Convention community further extends to a significant number of countries in which such reform processes have not been successful – at best stalling, if not being subject to direct reversal. The Court must now deal with situations in which an effective, independent judiciary simply does not exist at the domestic level. Still more dramatically, the Court has been confronted with situations of armed conflict, where sovereignty is fundamentally contested and a stable politico-legal order does not exist. Cases stemming from the conflicts in Abkhazia, Chechnya, and Transnistria have all found their way on to its docket.

In dealing with these situations, the Court has demonstrated a noteworthy jurisprudential innovativeness. The development of the ‘pilot judgment’ procedure has, for example, provided the Court with a means to address structural problems, using a single, literally exemplary case to engage both national and European-level authorities in wider reform processes.<sup>26</sup>

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<sup>26</sup> See, for example, *Burdov v. Russia no. 2*, judgment of 15 January 2009 on application no. 33509/04, concerned with the provision of adequate remedies for the non-execution of judicial decisions. See also the discussion of the case in Leach, Hardman and Stephenson (2010).



Confronted with the effective breakdown of the rule of law, the Court too has been willing to innovate. It has thus shown a willingness to assign responsibility for human rights violations to the authorities in de facto control of a particular territory, irrespective of formal jurisdiction.<sup>27</sup> So too has it applied human rights law in conflict situations where public international law would normally dictate that humanitarian law be applied.<sup>28</sup> Yet, despite its creative handling of such situations, it is clear that the Court has been pushed to, if not beyond the limits of that which may reasonably be achieved through a judicial framework in the absence of wider, sustaining political dynamics.

Faced with such major challenges, it is unsurprising that discussions concerning the reform of the ECHR system have become a constant refrain (Harmsen 2011). Much of this discussion has focused on ‘the numbers’, essentially seeking ways to prevent the Court from becoming ‘asphyxiated’ by its growing caseload in the telling terms used by former Court President Luzius Wildhaber (2002: 164). The emphasis here is particularly on procedural measures, intended to allow the Court to dispose (even more) expeditiously of the over 90% of applications ruled to be inadmissible at the first stage of proceedings. Protocol 14, which finally entered into force in 2010 after a lengthy Russian blockage, introduced a modest package of provisions in this direction. Nevertheless, even as this protocol was being adopted, strong views were expressed from both within the Court and the wider expert community that further and deeper reform would be necessary if the system was not to collapse under its own weight. A further round of reform discussions was consequently

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<sup>27</sup> See, notably, *Assanidze v. Georgia*, judgment of 8 April 2004 on application no. 71503/01 and *Ilasçu and Others v. Moldova and Russia*, judgment of 8 July 2004 on application no. 48787/99.

<sup>28</sup> This has been particularly marked in the Court’s handling of the Chechen cases. See further Leach (2008).

opened, beginning with the high-level Interlaken meeting in 2010, and thus far carried forward by two further meetings at Izmir (2011) and Brighton (2012).

Although attention has understandably focused on immediate measures to alleviate caseload pressures, the reform of the Convention system nevertheless cannot be understood only in terms of the 'nuts and bolts' of procedural tinkering. Increasingly, it must also be understood as posing more of an existential question, asking what purposes the ECHR is fundamentally intended to serve in relation to its much enlarged, highly diverse community of member states. Relative to this existential question, recent years have seen the emergence of a debate between distinct 'constitutional' and 'individual justice' interpretations of the Court's role (Greer 2006: 165-174; Harmsen 2007). The 'constitutionalists' argue that the fundamental role of the Court is as that of a European standard setter, with individual cases serving primarily as the 'raw material' from which it shapes these wider principles. The proponents of the 'individual justice' position, conversely, argue that it is the provision of effective remedies in individual cases that is the institution's *raison d'être*, and that to abandon this in favour of a more selective constitutional mission would risk undermining its legitimacy. The debate, interestingly, has engaged members of the Court, academics and practitioners on both sides – marking the first such broad public airing of concerns about the institution's long term direction.

### **Conclusion: Inter-Court Relations and EU Accession to the ECHR**

The previous sections have briefly surveyed the growing importance assumed by the Court of Justice of the European Union and the European Court of Human Rights in wider political processes. Yet, as outlined in the introduction

to this chapter, the European Courts cannot be understood in isolation; the specific roles which they have respectively assumed must be situated relative to European (and international) trends regarding the 'judicialisation of politics'. Each of the previous sections has already touched on elements of this broader canvas, inescapably making reference to the patterns of relationships between the European Courts and their national counterparts, as well as to questions concerned with the levels of member state support or resistance. Nevertheless, one key element in this pattern of relationships has not yet been discussed – that of the relationship between the Luxembourg and Strasbourg Courts themselves. It is the different dimensions of this relationship which are the focus of this concluding section.

Most obviously, the relationship between the two courts concerns the development of case law in areas of intersecting concern. Prompted by national constitutional courts, the Court of Justice has, since the 1970s, developed a human rights jurisprudence in the context of EU law by way of reference to the ECHR, as well as to other international instruments and national constitutional traditions. The adoption of the EU's own Charter of Fundamental Rights, as a declaratory instrument in 2000 and with binding force since 2009, has added a further human rights dimension to the work of the Luxembourg Court.<sup>29</sup> As it has assumed these roles, the possibility of a conflict or divergence with Strasbourg jurisprudence has correspondingly emerged. Historically, a limited number of comparatively prominent instances of such divergence may be identified, usually corresponding to a situation in which the Luxembourg Court

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<sup>29</sup> It should be underlined that the Court of Justice is only empowered to adjudicate on human rights questions within the remit of EU law – i.e. as regards EU institutions and member states when discharging EU obligations. It does not, unlike the ECtHR, have a general human rights jurisdiction.

privileged market regulation concerns over individual rights considerations in the balancing of competing claims (cf. Lawson 1994; Spielmann 1999). Nevertheless, the longer term trend has clearly been one in which the two courts have tended to display a growing awareness of one another's jurisprudence, generally adopting positions which minimise or avoid the possibility of direct conflict (cf. Douglas-Scott 2006).

This evolution of case law in turn relates to the development of the patterns of politico-diplomatic relationships between the two courts. As Laurent Scheeck (2010; 2005) highlights, the two courts have become increasingly 'entangled'. This entanglement in part stems from the direct multiplication of contacts between the members of the two courts, notably at the highest level. It is also grounded in wider processes of 'transnational socialisation', whereby strategically placed legal elites have increasingly redefined themselves in relation to a shared European legal field. Yet, despite this growing sense of common interests, Scheeck further notes that the relationship between Strasbourg and Luxembourg Courts may nonetheless still appear 'relatively brittle' (Scheeck 2011: 179). In effect, the relationship between the two courts reflects the dual character of judicialisation discussed in the introduction. Here as elsewhere, courts may be seen to have a shared interest in the overall enhancement of the judicial role, but also possibly divergent interests as regards their relative status or positions.

This duality is perhaps nowhere more in evidence than in the current negotiations concerning the accession of the European Union to the European

Convention on Human Rights.<sup>30</sup> Overcoming various historical pockets of resistance, the principle of such an accession has now become a matter of broad consensus – as evidenced by the inclusion of general provisions providing for accession in both Protocol 14 to the ECHR and the EU’s Lisbon Treaty. Nonetheless, though the principle has been accepted, the negotiations, formally opened in 2010, have proved to be a predictably thorny affair. Apart from (devilishly complex) technical considerations, one of the main areas of discussion has concerned a demand made by the Court of Justice to establish a ‘prior involvement’ mechanism, whereby it could ensure that it would have the opportunity to pronounce on any possible violation of Convention rights within the remit of EU law before the case is heard in Strasbourg. While there has been an acceptance of such a mechanism in the negotiations to date, the proposed terms of its operation have fuelled more general concerns amongst the non-EU members of the Council of Europe as regards the emergence of a potentially inequitable dual track system.

Indeed, more generally, it should be recalled that the relationship between the Strasbourg and the Luxembourg courts concerns not just the two judicial bodies, but also the broader patterns of relationships between the ‘Europe of the 28’ and the ‘Europe of the 47’. The questions which it raises are thus eminently political ones, not the least concerned with the (often criticised lack of) coordination between the EU’s internal and external human rights dimensions (Alston and Weiler 1999; Williams 2005), as well as with the place of such countries as Russia, Turkey and Ukraine in relation to various forms of

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<sup>30</sup> The background to and main issues posed by accession are surveyed in Gragl (2013) and Kosta, Skoutaris and Tzevelekos (2014 forthcoming).

European cooperation. Ultimately, we are thus led back to a quite traditional geopolitics, delimiting the effective reach of a distinctive European model of governance which has placed sovereignty under the rule of law.

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