

1. Introduction: the European Court of Justice as a political actor

Elise Muir, Mark Dawson and Bruno de Witte

The context within which this volume was developed is the rise, in the last years, of concerns among national authorities and judiciaries, and within European civil society, about alleged judicial activism at the European Court of Justice. The subject of judicial activism has become a fashionable topic of academic commentary once again. This volume does not take sides in this debate, in the sense that it does not seek to offer a simple answer to the question of whether the European Court of Justice (ECJ) is indeed an activist court. Indeed, a simple answer would be misleading when the question itself is underdetermined. Arguing that a court is activist may indeed mean many different things.

We do, however, assume that the Court of Justice is (also) a political actor. It is sometimes claimed by judges of the ECJ that their institution cannot be a political actor for the simple reason that it is a passive institution which has to wait and see which cases will come its way, and which then will try to solve those cases as best it can, without the capacity to steer the evolution of EU law on the basis of political priorities. Although one can understand why members of the Court should claim such a politically neutral status, that claim is not very plausible. Indeed, the *kinds* of cases that will be submitted to the Court are often quite predictable, and some of the 'unexpected' cases (those that arrive at the Court in a surprising manner) may still have strong political connotations, in that they involve contrasting political preferences among the parties to a case regarding the interpretation of an ambiguous norm of EU law.

The national authorities and judiciaries generally do not mind this political role of the Court of Justice. Today still, the dominant perception among political actors is that the Court of Justice plays a useful role in the European integration process. Harsh criticism is sometimes made of single judgments, and sometimes States hesitate to extend the Court's power to new areas of cooperation (most famously, at the time of Maastricht Treaty, in respect of the new areas of cooperation on foreign affairs and home affairs), but only a few governments have ever expressed

a willingness to *reduce* the Court's powers. On those occasions they found no general support among the Member State governments.

Misgivings about the Court seem mostly confined to the legal field of EU law itself. Indeed, two developments in EU law have given greater salience to allegations of judicial activism.

The first of these is the expansion of the scope of EU law in recent years. The internal market always had spill-over effects in non-market policy domains, leading the Court to get involved in policy domains which the Member States saw as their own preserve, such as taxation, social security or education. Nowadays, the European Union has become an all-purpose organization which has a direct impact on sensitive policy domains such as immigration policy and criminal procedures, thus multiplying the occasions in which the Court may be seen as activist when it is called to flesh out the often vague provisions of primary and secondary EU law in such domains. The implications of the EU's role in sensitive policy areas are addressed by a number of our contributions, particularly by Loïc Azoulay in Chapter 8.

The second remarkable development is the reduced scholarly support of EU law-making. One increasingly finds legal writing that criticizes the general direction taken by the integration process (for example, through the drafting and adoption of the Constitutional Treaty), and of particular pieces of legislation and judgments of the European Court of Justice (see for example, Chapter 10 by Anthony Arnall in this volume). Today, legal writing is as critical of EU law-making and judicial interpretation as comparable national legal scholarship, and *la doctrine*, taken as a whole, is more reluctant to throw its weight behind plans for 'more Europe'.

In so far as the work of the Court is concerned, the problem – one emphasized by a number of the chapters here – is that it does not *always* provide good reasoning in its judgments. The quality of the Court's reasoning has become, in the eyes of many observers, more uneven and unpredictable. Thus, for example, the Court of Justice feels free not to answer some of the questions referred to it by a national court if it considers them superfluous in the case at hand, even though they may raise important general questions of EU law.¹ It also feels free to ignore arguments which an interven-

¹ See, for example, Joined Cases C-171/07 and C-172/07, *Apothekerkammer des Saarlandes and others*, judgment of 17 May 2009, [2009] ECR I-4171, in which the Court refused (para. 62) to answer a question from the German court asking it to reconsider its *Costanzo* doctrine, according to which national administrative authorities have a duty to disapply national laws that conflict with directly effective norms of EU law. Although this is a very controversial doctrine (see the critical discussion by M Verhoeven, *The Costanzo Obligation – The Obligations of*

ing State or the Commission have submitted to it. A recent example of this is the *Ruiz Zambrano* judgment in which the Court of Justice mentioned that all eight intervening states, as well as the Commission, proposed one interpretation, but then went on to adopt another interpretation, based on different premises, without discussing the arguments of the states and the Commission.² The lack of sufficient reasoning in what was a rather unexpected and innovative ruling has struck many of the early commentators of this judgment.³ Similar criticisms, focusing more on the lack of sufficient reasoning than on the rulings themselves, were also made of the *Mangold* and *Kücükdeveci* judgments on non-discrimination.⁴

Of course, there have always been strong criticisms of aspects of the Court's case law, but it seems that this criticism is becoming more widespread. It takes the usual form of accusations of judicial activism (particularly in Germany⁵), but increasingly the criticism is focused not so much on the outcomes reached by the Court but on the lack of sustained

National Administrative Authorities in the Case of Incompatibility between National Law and European Law (Antwerp, Intersentia, 2011)), the Court refused to deal with the question, because it had found the German legislation in the case at hand to be compatible with EU law, so that the duty to disapply national law was not triggered in that case.

² Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi*, judgment of 8 March 2011, para. 37 (reference to the views of the governments and the Commission), and paras 39–45 (the Court's own view).

³ See for example the case comment by K Hailbronner and D Thym in (2011) 48 *Common Market Law Review* 1253, 1259–1264, and the editorial comment by N Nic Shuibhne, 'Seven Questions for Seven Paragraphs', (2011) 36 *European Law Review* 161.

⁴ In relation to the implications of those two judgments for the horizontal direct effect of general principles of EU law, Eleanor Spaventa wrote: 'That such a dramatic constitutional development should happen through badly reasoned rulings is then all the more regrettable.' (E Spaventa, 'The Horizontal Application of Fundamental Rights as General Principles of Union Law', in A Arnull, C Barnard, M Dougan and E Spaventa (eds), *Constitutional Order of States. Essays in EU Law in Honour of Alan Dashwood* (Oxford, Hart, 2011) 199, 215.

⁵ See several publications by Fritz Scharpf, among which his recent 'Legitimacy in the Multi-level European Polity', in P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford, OUP, 2010) 89, 109 ff. Also M Höpner, 'Usurpation statt Delegation – Wie der EuGH die Binnenmarktintegration radikalisiert und warum er politische Kontrolle bedarf', *MPIfG Discussion Paper* 08/12. See also the very radical statement by former German president (and chairman of the EU Charter Convention in 2000) Roman Herzog in *Frankfurter Allgemeine Zeitung*, 8 September 2008, and an English-language version of his argument in R Herzog and L Gerken, 'We must cure Brussels of its centralising fever', *Europe's World*, Summer 2007. And yet again: C Budras, 'Der lange Arm des EuGH', *Frankfurter Allgemeine Zeitung*, 2 September 2010.

reasoning leading to those outcomes. It may be that putting too much effort on reducing the duration of proceedings negatively impacts on those other elements of judicial efficiency, such as quality of reasoning and transparency of decision-making. As Advocate General Sharpston recently remarked in an extra-judicial capacity, ‘in a difficult case, speed may come at the expense of quality’.⁶ This may seem a very commonsensical observation, but it was made in a manner and with an emphasis that suggests that, within the Court institution itself, some persons question the currently dominant concern for reduction of the duration of proceedings and take the view that the efficiency of a judicial institution cannot only be measured by its timely delivery of rulings. Indeed, it seems as if the ability of the Court to limit the time taken by its proceedings is accompanied by increasing criticism of the quality of its jurisprudence.⁷ Other institutional factors – such as the need to arrange judges in chamber formations as well as the need to forge compromises between judges from quite different legal and cultural backgrounds – may also be significant in this regard.

The chapters in this volume address three main overlapping questions triggered by the contemporary salience of claims of judicial activism. The first enquires into possible *causes* for the perception or accusation of activism. What institutional, political, societal or other factors create this accusation? Posing the question in this way is intentional – for all of the chapters, judicial activism is largely not a matter of personal agency, i.e. a philosophy determined or rejected by judges themselves, but something that is strongly related to the surrounding political and institutional context in which judges act.

The authors here explore different aspects of this institutional and political context. Mark Dawson in his chapter considers judicial activism as the product of a wide imbalance in the EU between the Union’s legal and political spheres. While the Union has been built on the foundations of a strong legal order providing realizable rights to individuals, the political and collective dimensions to European integration have often lagged behind. As a result, few incentives exist for legal actors to be responsive to political preferences, while political actors often do not have the tools in terms of legislative competence or the necessary understanding of opaque

⁶ E Sharpston, ‘Transparency and Clear Legal Language in the European Union: Ambiguous Legislative Texts, Laconic Pronouncements and the Credibility of the Judicial System’, (2009–10) 12 *Cambridge Yearbook of European Legal Studies* 409, 418.

⁷ For a summary of the current critical debate about the quality of the Court’s jurisprudence, see ‘Editorial Comments – The Court of Justice in the Limelight Again’, (2008) 45 *Common Market Law Review* 1571.

judicial case law to respond to controversial decisions through legislative measures. In this sense, Dawson sees activism as the product of the absence of something often taken for granted at the national level – a regular dialogue between political and legal actors.

While Dawson's chapter locates activism in the relationship between Courts and legislatures, Marcus Höreth's chapter focuses more specifically on the ECJ, illustrating the Court's prominence by pointing to history. In particular, Höreth focuses on the important role of the checks and balances doctrine in framing present debates over the Court. Whereas checks and balances are often considered in terms of the separation of powers between the three main judicial, executive and legislative branches, Höreth sees the EU as providing an additional layer of safeguards through the further separation of powers *within* each governing branch. Whereas the EU's legislative and executive arms achieve a precarious symmetry between supra-national and inter-governmental interests, the Union's founders did not supply the Court with a similar judicial interlocutor, able to articulate and defend national interests in the EU legal order. In echoing – and rejecting – the call of prior authors, such as Joseph Weiler and Roman Herzog, for an EU Court made up of national constitutional judges, Höreth illustrates the quandary of national decision-makers who both rely on a robust EU legal order and underestimated the strong role that its guardian Court would play in expanding that order's outer limits.

While Höreth thereby explores the multi-layered institutional context in which the Court operates, Clemens Kaupa illustrates through his chapter how hidden political and economic choices may influence the debate on the role of the Court. He explores how such choices have framed both the Court's reasoning in constructing the EU legal order and the response of politicians and citizens to the Court. While much of the existing academic literature on the Court has focused on the tensions between 'economic' and 'non-economic' objectives in the context of the internal market, Kaupa illustrates how this very dichotomy masks the lack of unity over what the 'economic' objectives of the Treaty are and how they can best be achieved. While the Court has tended to define the Treaty's internal market objectives in terms of liberalization and market access, Kaupa demonstrates that economic theory carries more than one view of how the Treaty's economic objectives can best be delivered. Through downplaying the feasibility of a second Keynesian interpretation of the market freedoms in its case law – where increasing economic demand and distinguishing between different stages of economic development become more central concerns than removing market access barriers alone – the Court could also be playing into accusations of political bias among its detractors.

Finally in this area, Elise Muir, in her chapter, considers the increasing

prominence of fundamental rights as considerably re-defining the Court's judicial role. She identifies three major changes incurred by the system for the protection of fundamental rights in the European Union in the past decades: a stronger 'constitutional' mandate for the EU in this field, a formalization of the rights to be protected and a politicization of the fundamental rights debate at EU level. Muir argues that these changes are likely to make the ECJ particularly vulnerable to claims of judicial activism. The Court indeed now operates with an enhanced mandate in an increasingly complex inter-institutional setting. She stresses that the Court's actions will increasingly be scrutinized in the light of that of other European fundamental rights institutions each entrusted with fundamental rights issues. Such institutions do not only involve domestic constitutional courts and the European Court for Human Rights but also EU political institutions, who are now increasingly active in shaping EU fundamental rights policy.

In a second strand of the book, the authors invite the reader to conceptualize judicial activism in terms of *interaction* between actors. On the one hand, they question the need for the Court to be responsive to claims of judicial activism by recalling the position of the judiciary and its duty to refrain from involving itself too closely in political decisions. On the other hand, they explore ways in which the Court may address such claims by engaging in a more advanced dialogue with a variety of stakeholders at European as well as national levels; at times pointing to the risks associated with such approaches.

The first form of interaction examined is between the Court and political actors. The first chapter by Vassilis Hatzopoulos casts doubt on the activism claim by cataloguing the various means by which the EU's judiciary actually responds to political guidance. He stresses that the Court's case law is to a large extent well accepted across the European Union. The detailed enquiry led by Hatzopoulos identifies a number of situations in which the Court went beyond or against the will of political actors; nevertheless, the author stresses that such settings are not necessarily problematic. To the contrary, he recalls the constitutional duty of the Court to retain its independence from the political sphere and insists on the Court's role to actually foster, if not provoke, dialogue with and among political institutions.

The chapter by Ellen Vos adds a third player to the list of stakeholders concerned by claims of judicial activism through an enquiry of the interaction between the Court, the political sphere and experts. She analyzes the standard of judicial review of decisions made by political institutions on matters of scientific uncertainty and technicality for which input is increasingly requested from specialists. In this triangle of legitimacies, Vos argues

that the Court's appropriate role is to act as an informational catalyst. Courts should indeed be demanding with regard to evidence submitted, and procedures followed, to come to decisions on matters involving scientific risks. Building on a concept developed by Scott and Sturm, she outlines the tension between the duty of the judiciary to set the parameters for the assessment of scientific risks and the danger of courts themselves behaving as scientific experts.

A third form of interaction is between the Court and its national interlocutors. This is explored by Loïc Azoulay, who suggests a tension between on the one hand 'de-sensitization' – i.e. the need for EU law to act as a bridging device that is blind to particular national agendas – and the drive to 're-sensitize' – i.e. the necessity, as Azoulay puts it, 'of interpreting EU law from the perspective of *actual* political communities' at the national level. In particular he focuses on the difficulties and potential strategies associated with creating a values register for EU law that gives sensitive national interests an inherent rather than secondary value. While Azoulay insists on the need to thereby moralize EU law, he also stresses the risk of judicial paternalism. He therefore calls for greater proceduralization of judicial decision-making and points at the role of intervening parties to provide evidence of the judicial need to protect sensitive interests.

The national dimension is also the focus of Maartje de Visser's chapter, reflecting on both judicial practice and political responses to accusations of activism in a comparative national perspective. De Visser's chapter outlines the factors that may influence claims of activism as well as the techniques that national constitutional courts have used to safeguard their political legitimacy. Just as the chapters of Dawson and Höreth illustrate that, at the EU level, many of the 'levers' of activism relate to institutional conditions outside the Court's control, so de Visser advances a similar thesis with regard to national developments. De Visser's focus on the techniques national courts use in limiting the complete judicial annulment of legislation may also, however, sound a note of warning for the European Courts. While others have argued that the EU Courts may improve their legitimacy through procedural responses (such as opening up their now restrictive rules of standing) such responses may inflame rather than resolve political tensions – for example by bringing more contentious cases in front of the Courts in the first place. In recognition of these trade-offs, de Visser urges the ECJ to learn from national approaches which promote constitutional communication and dialogue between legal and political bodies; encouraging political and not just legal actors to take responsibility for the task of enforcing constitutional or Treaty norms.

De Visser's account of comparative lessons feeds into a third strand in the volume, which focuses on *responses* to activism. If there is such a thing

as judicial activism, or at least a ‘political’ Court, what responsibilities and opportunities does that provide for other, non-judicial, actors?

The first, responsibility-based aspect of this question is addressed by Anthony Arnall in his chapter on the role of academics in holding the EU Courts to account. As Arnall illustrates, there has been a historical evolution in the attitude, posture and role of legal academics towards the EU Courts from an initial qualified enthusiasm towards an increasingly skeptical and critical mood. Arnall associates this move with a methodological shift – while early approaches, dominated by the civil law tradition, saw the role of legal academics as being associated with doctrinal development and the close scrutiny of legal reasoning, the influence of Anglo-American academics and transnational institutes like the European University Institute (EUI) has prompted a wave of more theoretical and contextual literature. For much of this literature, judges themselves have not always been the primary audience. As Arnall aptly notes, while shifting academic roles may have fostered a healthy academic debate over the Court’s social and political functions, it may also have led to some neglect for the impartial commentary, or demand for consistent and well justified reasoning, most likely to directly engage judicial actors or encourage a more coherent body of case law.

The second, opportunity-based aspect is addressed by Sergio Carrera and Bilyana Petkova in their chapter on civil society organizations and human rights oriented organizations. Relating to a suggestion made by Azoulai in his chapter, they point at the important role these organizations may play in addressing third-party petitions to Europe’s highest Courts. This is exemplified by cases involving EU asylum and external border law brought before the ECJ and the ECHR and supported by a survey of repeat players in selected landmark cases. Carrera and Petkova submit that greater access to the European Court of Justice for civil society and human rights organizations would enhance effective judicial protection and foster the potential of the EU Charter of fundamental rights, especially for non-EU citizens. In that sense, it is judicial restraint, i.e. the failure to place individual rights at the core of judicial activity, more than judicial activism that threatens the legitimacy of the Court. They insist upon the Court’s duty to act as an ally of isolated and vulnerable interests.

Finally, both opportunities and responsibilities are apparent in Mielle Bulterman and Corinna Wissels’ account of the strategies of national government representatives in preparing representations to the Court. In a similar way to civil society and human rights organizations, domestic governments may find an ally in the Court. Bulterman and Wissels explain the way national governments design strategies to influence the Court’s rulings. Unlike civil society actors, governments are entitled to submit

observations in preliminary ruling procedures and to intervene in direct actions before the Court. As agents of the Dutch governments before the Court, the authors identify mechanisms of intra and inter-state collaboration and techniques that entitle national governments to address the Court both upstream and downstream from the judicial decision-making process. This chapter thereby illustrates the responsibility for domestic authorities to make the best of the opportunities available for them to bring sensitive and important matters to the Court's attention.

Among the many accounts of judicial activism provided by the chapters in this volume, there is certainly some disagreement. The chapters, taken as a whole, weave a diverse tapestry of different factors – from access rules to institutional design and to substantive functions – influencing the European Court's political role. There are though also important points of overlap and agreement.

One of these concerns the re-location of 'judicial activism' as a political claim. For most, if not all of the authors, understanding judicial activism involves looking well beyond the decisions of the European Courts themselves and into the very foundations of the EU, and even of European society itself. While the accusation of activism can be seen as a product of particular decisions, those decisions also emerge from an institutional context that frames the types of cases the European Courts decide (and the range of possible outcomes from which judges may choose). Whether it is the increasing presence of EU law in sensitive areas of policy, the development of new fundamental rights policies or the limited capacity of other actors (legislatures or vulnerable groups) to politically mobilize around Court decisions, judicial activism is more than a thesis about the European Courts alone but a thesis about the broader structure of the European Union.

A second thesis concerns activism itself. Judicial activism may of course be a positive accusation: a claim that a Court that oversteps its boundaries, either in relation to national law or in relation to functions of the political sphere. But it also appears in the chapters as a negative thesis as well. An 'activist' Court may also be a Court that is seen as failing to act when it has a duty to do so, either to protect vulnerable and marginalized groups, or to provide a robust answer to questions emerging from the national level that raise delicate constitutional issues. In this sense, our chapters present a vivid picture of the delicate line the EU Courts must walk: a line that both demands greater action (e.g. because the EU project taken as a whole continues to expand) and expects significant deference (because the very complexity of the EU ensures that Courts are faced with problems that they may not have the tools to solve alone).

The difficulty for the EU Courts in walking this line encourages us to

reflect on whether the European Court of Justice in particular is fit to take on this challenge in the next decades. In March 2011, the President of the ECJ, Vassilios Skouris, wrote a long letter to the Presidents of the Council and Parliament listing a series of desired amendments to the institutional structure of the Court, designed to address contemporary problems (such as an increased and more complex case-load).⁸ These reforms included suggestions for the creation of a Vice Presidency for the Court of Justice, an increase in the number of General Court judges and the ability to assign temporary judges to specialized Courts. The Court is still waiting for a legislative answer to its proposals.

While institutional changes to the Court's structure may well be important, the chapters in this volume provide food for thought in considering other factors likely to frame the ability of the European Courts to respond to pressing legal challenges. Rising case-loads, and greater complexity, for example, also demand a Court of Justice able to make better use of the resources and knowledge provided by non-judicial actors, from scientific experts to civil society organizations, national Courts and others. While this volume provides no ready-made 'solutions' for the accusation of judicial activism, it aims to provide a better understanding of the structural conditions and political relationships that frame the Court's political role. Understanding both may be vital in order for the European Courts to be successful guardians of the EU project in the years to come.

⁸ Letter of 28 March 2011, available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-04/projet_en.pdf (last accessed 15 October 2012), see Article 281 TFEU.