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Book review: Pierdominici, Leonardo: *The Mimetic Evolution of the Court of Justice of the EU. A Comparative Law Perspective,* Palgrave MacMillan, Cham, 2020*

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Authoring a book on the Court of Justice of the European Union (the Court or CJEU) has its drawbacks, the most prominent one being initial scepticism.

The institution is one of the most important international courts, which has already in the past served as an inexhaustible well for academic interest: how far can a new analysis be extended? The author of the present monograph removes any pre-existing doubts by providing a fresh scientific input.

The book aims at analysing the organizational and institutional evolution of the Court which has, indeed, not yet been approached systematically. Whilst studying the institutional and organizational aspects, it also contemplates the institutional success, and the "self-empowerment" moves of the Court. It proposes to view these developments as a phenomenon of mimetism[1]. The argument is that the Court was able to engage in and internalize selected influences from the EU Member States and their different legal traditions, as well as from the international plane, to respond to the challenges presented. The main hypothesis is that cultural influence was adopted to reach functional (efficiency) goals. The Court adapted itself to bolster its authority and legitimacy. When faced with contrasting challenges, the Court was able to internalize national models and comparative influences to induce deference on the involved actors and thereby feed its authority. The author argues that this mimetic approach is one of the "efficient secrets" of the Court's success, essentially backed by utilitarian and functionalist concerns.

The book itself is a refined version of the author's PhD dissertation; therefore, a level of scientific and methodological rigour permeates the text. The depth of analysis is already clear from extensive referencing and a hefty list of sources. The institutional and organizational aspects of the CJEU may be of interest only to a peculiar crowd of CJEU enthusiasts; however, the book is, by

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showing how the institutional choices reflect but also frame the composite legal order of the EU, a very relevant read for any EU law scholar. Methodologically, the work is inherently tied to the comparative approach devoted to legal cultures and institutions as well as their historical development, merging the functionalist approach, tied to the comparison of legal instruments and institutions, with the culturalist approach, dealing with the context of those legal aspects (p. 23 et. seq.). It deals with both, horizontal and vertical, dimensions of the comparison of legal systems and institutions and is embedded in the research fields of the new critical historical studies of EU law, legitimacy and authority of international bodies and legal pluralism.

To support his thesis, the author divides the book into five parts, each dealing with a specific "case study".

The first chapter is devoted to showing how the formation of the Court was already influenced by comparative considerations. It looks at the prototype, namely the ECSC Court, delving deeply into the Franco-German debates on its structure, which culminated, following the German pressure, in the form of a permanent court, while drawing from the examples of the German Federal Constitutional Court and the US Supreme Court. As regards the powers of the Court, the proverbial French influence is studied in detail – tracing the different powers of the Court, such as the actions for annulment, down to its exact wording, back to the then evolving French judge-made administrative doctrines, transplanted to the emerging supranational level – while also showing how the international, as well as the US and German influences, were important. Considering the original provision, dealing with the competences of the Court (Art. 31 of ECSC Treaty), it is argued that it already entrusted the Court with a "nomophylactic" function, positioning it as the guardian of uniform interpretation of the law and coherence of the legal order to which it belonged (p. 59). This function also marks the common thread, stretched throughout the whole of the book. Especially illuminating is the author's take on the preliminary reference procedure, eventually inspired to become the prime mover of EU integration, pointing to the mimicking of the Italian-made procedural solution of mixed constitutional review (p. 72 et. seq.). This is perhaps the best example of copying national solutions, which eventually worked to the great benefit of the autonomy and authority of the Court.[1] Albeit outside the narrowly constructed framework of this book, pointing out the Dutch constitutional influence (namely the reforms between 1953 and 1956) on the development of the substantive doctrines of primacy and direct effect (p. 75 et. seq.), especially the exact meaning

1 Cf. M. P. Maduro, *We the Court*, Oxford 1998, p. 9 et. seq.

of the latter vis-à-vis its understanding in international law is, in fact, another example of the type of cross-fertilization.[2]

The book further touches on the issue of the appointment of the members of the Court in the second chapter. Starting from the age-old problem of protecting national sovereignty in connection with the selection of international judges, the book provides a very useful stratification of the different models of selection, grounded on comparative examples. Furthermore, this is reflected in the composition of the international tribunals themselves, where the issue of national interest through national representation is presented in detail (p. 113 et. seq.). Here, we approach the core question: the balance between accountability and independence, the scales being balanced in different ways at different international fora. The selection of Luxembourg judges was, until the last Treaty reform, an unusual remnant of intergovernmentalism, staying true to the one country-one judge approach, leaving the choice more or less in the hands of Member States; somewhat ironically, considering the supranational doctrines it developed.[3] In terms of the presented theories, it seems that the Court remains an outlier in other aspects as well: even though the judges' mandate is limited and renewable, there is little evidence that the national interests managed to penetrate the institution's chambers on Kirchberg. Talking about the reform of the procedure by the Treaty of Lisbon, this is the first clear example where the book also establishes the autonomous role of the Court itself – by way of judges participating in preceding Cercle de discussion – being an important mover of its own institutional evolution (p. 125). The role of Court members under Art. 255 TFEU in the selection of judges is, despite the Panel's consultative nature, since then, clear. Whilst this is not the prime purpose of the book, it could still be useful to provide an even more in-depth critical analysis of this model of judicial selection, since it has the potential to spur doubts in some Member States – which, in turn, may be detrimental to the Court's authority and legitimacy. The depicted evolution is, especially in the current state of affairs in the EU, certainly to be applauded in terms of ensuring the competence and independence of the candidates, limiting the discretion of Member States, and improving the Court's authority. However, the lack of transparency, noted in the book, combined with the Panel's notable number of negative opinions, may work the other way around as well. The esprit de corps of the selection procedures may not always be a positive feature.

2 The close relationship between the Dutch constitutional law and the EU concept of direct effect was already sporadically discussed elsewhere; see, for example: S. Prechal, *Does direct effect still matter?* in Common Market Law Review, 2000, p. 1047 ff.

3 Cf. A. von Bogdandy, I. Venzke, *In Whose Name? A Public Law Theory of International Adjudication*, Oxford 2014, p. 37.

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The rising importance of (apex) courts, especially international, rightfully raises the issue of their legitimation and authority – bringing us to the question of deliberation and transparency as important factors in fostering their authority, studied in chapter three. The book divides the issue into (1) access to deliberations and (2) access to the Court's documents. The connection between dissents and the (building of) authority is presented and is very pertinent to the Court of Justice. This issue is also tied with the problem of the selection of judges, described in the previous chapter, since introducing dissents may incur more politicization of the judicial position, noticed to some extent at the Court's Strasbourg counterpart (p. 174 et. seq.). Here, the realization is that no positive evolution occurred over time, despite the several attempts in that direction. What is especially interesting, but understandable from what was already noted above, is that that the author seems to take a more restrained approach (e.g. at p. 184), and, after meticulous examination, comes to the conclusion that the Court may not yet be mature enough to open its internal deliberations more to the public: Probably a valid realization which, however, goes against the identified wave of wider access to information to the public, a demand to which the judicial branch is (or should be?) – despite its specific functions – no exception. The institution of Advocates general is also studied in detail, leading to a persuasive conclusion that they cannot produce results, which could equally substitute the institution of dissenting opinions at the Court. As regards access to documents, the conclusion that the Court is at the forefront of the new trend of internal openness may however be seen as idealistic. As is shown throughout the chapter, history speaks of suspicion towards openness and transparency, both still being limited to the administrative limb of the Court's workings. In this sense, the moves by the CJEU in the direction of transparency, such as the voluntary opening of the historical archives in Florence,[4] may, alternatively, be seen as a move towards a popular appeal. Despite the changes in the Treaties since Maastricht, the situation is probably still sub-optimal.

Especially interesting is the author's take on the "docket control". The rising backlog is an acute issue for most courts, the CJEU being no exception. The latter is, however, unique in its institutional role within the specific legal architecture of the EU. A wonderfully illuminating analysis of the position and function of the CJEU within the system of the Treaties in chapter four provides a more critical approach to the issue. Following the author's rationale of its

4There is an interesting project ongoing at the European University Institute, called The Court of Justice in the Archives, devoted to the study of some of the *dossiers de procédure* (ecjarchives.eui.eu). A special forthcoming issue of European Papers will be devoted to the presentation of the outcomes of research and will provide an insight into the value of the opening of the archives.

nomophylactic role, it is indeed difficult to imagine effective solutions to limiting the caseload without jeopardising the Court's ability to uphold the unity and effectiveness of EU law. This is especially true regarding the delicate balance, established by the preliminary reference procedure, where any change may cause national courts to refer even fewer cases to the Court – again raising the question of the maturity of the EU legal order. Admittedly, the Court has established doctrines adopting new criteria for review of jurisdiction (e.g., in Foglia Novello and CILFIT), which may resemble forms of docket control; however, as well explained, their effects and the Court's interpretation of the doctrines had little or no effect on the inflow of cases (p. 253 et. seq.). It is shown how the only noticeable results in this regard followed from what is named "substantive interpretative choices", the Court adapting its substantive standards to lessen the number of possible disputes arising from the application of EU law. Interestingly, the Court seems to be adapting to the growing docket not by focussing on the broad, supervisory vision of the preliminary ruling procedure, but, conversely, by leaning towards a larger number of less-theorized answers – even in sensitive cases of ample theoretical relevance, such as those dealing with the concepts of constitutional identity or citizenship (p. 265 et. seq.). The book, however, refreshingly shows how this zero-sum-game between the abstractness and the concreteness in preliminary references is importantly driven by the different legal cultures in different jurisdictions. Firstly, there are important differences in the number of preliminary references, as well as the differences in numbers between the different Member States. Secondly, the expectations of courts from different jurisdictions differ importantly. Therein lies another strategy adopted by the Court, which is the use of formulaic language: referencing formulae from its previous case law, which simultaneously lessens the workload and strengthens the authority of the Court. The book shows how the Court addressed the problem of workload by adopting neutral solutions, not to disturb the delicate balance established between the actors involved. It is hard to argue with the conclusion that the given state of things still demands a relatively unchanged role for the Court, limiting the options for docket control to neutral and endogenous solutions. (p. 272, 284) This special position of the Court is also probably the reason why a clear exposition of adoption or mimicking of comparative influences is not evidenced.

The last substantive chapter deals with a seemingly less important topic considering the overall aim of the book. The author looks at the Court's judgments as a product and indicator of its institutional setting. On one hand, it is shown how these are influenced by the legal cultures of the Member States and the EU's inherent diversity. The French legal cultural heritage is studied in detail and shown to have a major and persisting influence, eventually coupled with the

German style as well as the following accession of the United Kingdom, bringing along a more adversarial culture. As regards the link between the style of judgments and the Court's authority, here, especially, one can notice the innate quality of the book, which is in delving deeper behind issues, which are otherwise often only scratched on the surface. One may legitimately presume that the laconic, overly concise, and sometimes cryptic style of the Court's judgments may have an inverse impact on the legitimacy and the authority of the CJEU. However, the author persuasively demonstrates how the formulaic approach may represent a strategic choice, taken by the Court in the last decades, serving the purpose of bolstering its authority while simultaneously easing the use of EU law before national courts by conveying an unequivocal message.

The book promises a novel take on the institutional and organizational aspect of a widely studied institution. It delivers in showing how some preconceptions regarding the topic are too superficial and reveals several principled, as well as pragmatic reasons, looming behind many of the institutional choices made at Kirchberg. Indeed, in its critical approach, the author touches on the neuralgic issues, such as the problem of the Court's continued relevance, of the respect of its case law in national courts and the issue of the overflow of cases. The investigation is conducted by relying on the comparative law method, which is not confined to the use of synchronic comparison. Indeed, Pierdominici also shows a good command of the historical comparative argument, which is very helpful in order to stress how the CJEU has evolved over the years. The overarching idea of the book is the internalization of different influences to deal with those issues, all seen through the lens of the Court's main role: being the guardian of the uniform application of the Treaties. For any critical student or scholar of EU law and comparative law, this book should make the list and will prove beneficial in the understanding of the convoluted and sometimes perplexing structure of the Court of Justice of the European Union.

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