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Book Review: Karen Alter, The European Court's Power Selected Essays

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Academic lawyers long held a monopoly over the literature on legal integration. Long before economists, sociologists and political scientists would start paying attention to the role of courts in the political integration of the continent, they realized the potential impact the Court of Justice jurisprudence could have on the construction of supranational governance. They were the first to document and to analyze how this Court “tucked away in the fairyland Duchy of Luxembourg” had managed to fashion a constitution for an emergent federal European structure. But they were not content with simply describing the advances of legal integration. They also actively promoted it. In part, perhaps, because they had a vested professional interest in the expansion of European law. After all, their prestige and influence as EU law experts could only be enhanced by deeper integration. More importantly though, as a generation that had survived an appalling world war and witnessed the miracle of Franco-German reconciliation, the pioneers of EU law had a steadfast belief in integration as the right thing to do – as God’s plan for Europe, as it were.
Although EU law scholarship has retained some of its pro-integration bias, these days are gone. The literature on the EU multi-level judicial system has become much more diverse and polyphonic – at least as far the Anglophone literature is concerned. More critical, it has also become more interesting. In no small part, this is a result of the work of scholars who have tried to resituate the integration process in its historical, political, social and economic contexts. Karen Alter – an American political scientist, as many other prominent EU scholars – is certainly not the least among them. Her scholarship skillfully applies the tools of modern political science to the study of judicial doctrines, showing how courts are embedded in and judicial outcomes are shaped by social and political circumstances. Avoiding the sterile functionalism vs. intergovernmentalism debate, her writing does not reduce the role of the Court of Justice to that of a mere agent of national government. Nor does she see integration as proceeding somehow automatically from the self-interest of litigants, feedback loops and spill-over effects, as neo-functionalists argue. Instead, she offers an account of the integration process grounded in historical institutionalism, where outcomes are both contingent and underdetermined. In short, legal integration has experienced phases of rapid expansion when the penetration of EU law into national legal systems really began snowballing, but these phases have been punctuated by critical junctures – periods of stagnation and uncertainty – when history could have taken a different path. Bringing together essays published over almost two decades (1994-2009), Alter’s book, *The European Court’s Political Power*, recounts many facets of this story.
with an impressive wealth of contextual details. Seen in the context of the legal and political struggles of the time, many ECJ cases that EU law textbooks have managed to render dull and boring suddenly become captivating. This applies for classics such as Cassis de Dijon (discussed at length in Chapter 7), Defrenne, Van Gend en Loos and Costa v. ENEL. She shows, in particular, the key role played by Euro-law scholars and Commission officials in bringing the cases to courts and in promoting the constitutional narrative that emerged from the ensuing rulings. On this score, Chapter 4 on the jurist advocacy movement and the role of Euro-law associations in the founding period of legal integration is a highlight. In addition to casting a wider light on the context that presided over the genesis of much of the early EU law scholarship, it offers a rich, fascinating account of how a small group of militant lawyers coordinated efforts across Member States to re-launch integration through legal means, at a time when French President de Gaulle and his supporters threatened to thwart the supranational project.

A recurring question in Alter's work and in the book is “why did the ECJ succeed where other international courts failed? In seeking to answer it, she often relies on counter-factual analysis to imagine how legal and political developments would have occurred if one variable had not been present. In the chapter on the EU trade policy, for example, she tries to envision how the banana dispute with the United States would have looked if either the World Trade Organisation or the Lomé Convention did not exist (Chapter 10). This in turn helps her explain how nesting and overlapping
international commitments affect both policy-making and policy outcomes. She also brings the ECJ in a comparative perspective, examining the diverse fortunes of international legal regimes, some of which, such as the Andean Tribunal of Justice, were explicitly modeled after the ECJ (Chapter 2, 11 and 12). We are only beginning to understand, she argues, the factors and institutional attributes that contribute to the success of international judicial bodies and that made the ECJ the mighty, though by no means invulnerable, tribunal it has become.

Besides the book’s fluent prose, lawyers will appreciate Alter’s grasp of legal intricacies and doctrinal arguments as well as the absence, in a monograph by an American political scientists, of regression tables and complicated formal models. Organised along four themes – methods and approaches in the literature on the ECJ, the Court’s early years, its role in the consolidation of European integration from the 1980s onwards and how it compares to other international courts – the dozen essays included in the book are all worth a read for those are not already familiar with Karen Alter’s work. For those who already are, we may just hope there will be more where that comes from.