Supranationalism and Foreign Law at the Court of Justice of the EU Symposium: Foreign Law in Constitutional Courts: Introduction

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Introduction: Supranationalism and Foreign Law at the Court of Justice of the EU

By virtue of its peculiar position as the world's first supranational court, the comparative legal method and the use of foreign law hold a particular significance for the Court of Justice of the European Union (CJEU, or “the Court”). This supranational characteristic, however, places the Court under an intense and unique set of judicial and political pressures. The Court must ensure the autonomy, exclusivity, and functioning of the EU's legal order, while remaining sensitive to the fact that it is positioned as a central node in a network of national, international, and foreign courts that are profoundly affected by its decisions—and whose decisions, in turn, may also affect the Court. Understanding the political and judicial dynamics at play on the Court is not just a compelling intellectual conundrum. The increasing significance of the EU's economy, trade, and political well-being places the CJEU under global judicial and political scrutiny. How it uses—or chooses not to use—foreign legal norms is of worldwide significance.

With a Transatlantic Trade and Investment Partnership (TTIP) agreement in the works at the time of writing, the need for a collaborative relationship and dialogue between the CJEU and the Supreme Court of the United States (SCOTUS) will only increase with time. Just over a decade ago, Supreme Court Justices Antonin Scalia and Stephen Breyer met on the campus of American University, Washington College of Law to discuss the constitutional relevance of foreign law within the United States.1 To mark the tenth anniversary of that event, we invited CJEU Justice Sinisa Rodin, Kathleen
Cutman, a host of other legal scholars, and forty référendaires (law clerks) of the Court to the campus of American University in March 2015 to discuss the CJEU's position on the same question.² The contributions to this volume emerged from that event.

The qualities involved in being a "supranational" institution are key to understanding the difficult and fragile web of pressures facing the Court. The term itself emerged from the early years of European integration and was seen as capturing the originality of the project as something definitively more than a typical international organization; it was also regarded as a more politically acceptable term than its erstwhile predecessor "federal."³ Supranationalism describes a theory of institutions separate from but traversing and integrated with their member states, as opposed to intergovernmentalism, which implies that the institutions in question serve more at the whim of the national governments. Separation and autonomy are therefore the defining characteristics of a supranational institution; still more so for the Court as a neutral umpire and adjudicating judicial body.

The picture is complicated however by the nature of the EU's foundational treaties themselves. As a result of the necessary political compromises of the 1950s, the treaties were considered to outline merely a framework, a traité cadre. Their incomplete or "dynamic" nature connoted that the supranational institutions entrusted with maintaining and enforcing them were equally tasked with pursuing ever more integration under their own volition. The Court has famously taken the biggest strides in this direction, arguing for the direct effectiveness and primacy of the treaties over and against national legislation, with the aspiration of securing the autonomy of EU law that is required for the treaties to be fully functional. This has not come without resistance from national players, notably Germany and Italy, whose constitutional courts have placed clear counter-limits on the supremacy of EU law in sensitive areas of national law.⁴ More recently, the supremacy of

². The conference took place on March 30, 2015 at the Washington College of Law, American University, and was entitled The Use of Foreign Law in Constitutional Adjudication: Global Influence, Judicial Diplomacy and Legal Dialogue in the Court of Justice of the European Union. It involved presentations by Professors Alexandra Kemmerer (Max Planck Institute for Comparative Public Law and International Law), Mark Pollack (Temple University), Christopher McCrudden (Queen's University Belfast), Takis Tridimas (King's College London), and Kathleen Gutman (Leuven University), and a keynote speech by Justice Sinisá Rodin of the CJEU.


EU law over British law enabled by the Westminster Parliament was a central and ultimately highly effective plank in the argument of the "Brexiters" in getting the British electorate to vote against continued EU membership. Maintaining the right balance between supranational autonomy and national resistance has come at a price.

Equally, the Court can be criticized for not pushing the supranational agenda far enough. Ironically, initial public criticism of the Court in Germany began in the 1960s plainly because many thought that the Court had not gone far enough in federalizing the European legal system. More recently, the migration crisis facing Europe has seen the Court often criticized for its double standard vis-à-vis citizens versus third-country immigrants and for not consistently expanding its individual-based supranational approach to affirm the right of free movement to outsiders. Supranationalism cuts both ways: it appears to be a fine line that the Court needs to walk in order not to overstep the authority of the member states and trigger a backlash on the one hand, while it is tasked with expanding individual rights on the other.

This Symposium begins with a historical examination of the Court's relationship to its close neighbor in Strasbourg, the European Court of Human Rights (ECHR). Bill Davies's use of archival materials reveals that the Court's quest for autonomy and exclusive jurisdiction over EU law has been a persistent concern, even from the very earliest days of integration. The historical context reveals how the Court's recent Opinion 2/13, which stalled the EU's accession to the ECHR, should not come as any surprise. Justice Siniša Rodin's discussion makes the distinction between the cognitive and operational impact of foreign law on European judges. He emphasizes that the normative impact of foreign norms and standards derives from "key ontological identities" assigned by the treaties and the Court in their primary role as an integrative force for the Union. Justice Koen Lenaerts and Kathleen Gutman's


5. For discussion of the German press coverage of the Court of Justice and its rulings, see Davies, Resisting, supra note 4, ch. 3.


contribution stresses the delicate balancing act the Court must achieve if it is to successfully use and apply foreign law for the purposes of EU adjudication. They show that although the European and U.S. contexts vary widely, the challenges faced in the application of comparative legal reasoning by “constitutional” courts within complex federal and global fields are analogous enough for lessons to be learned by both the CJEU and SCOTUS. Finally, Fernanda Nicola’s discussion takes us beyond a formalist or static comparative law approach to investigate the legal traditions of the member states that undergird the CJEU’s own reasoning. While such a “legal traditions at work” approach requires a grasp of the inherent conflict and tensions between different traditions, Nicola argues that it can also provide a new lens through which to unpack the much criticized vagueness of the CJEU’s decisions and cast a new light on the Court’s judicial style and its legal reasoning.