Introduction

The ‘judicialization’ 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 has most obviously taken the shape of direct judicial interventions in policy-making processes, with courts generally assuming the role of ‘veto players’, variably influencing both the form and the substance of policy decisions. The effects of this ‘judicialization’, however, also manifest themselves in more subtle or indirect ways, rebalancing the relationship between law and politics. Litigation may thus emerge as a central instrument in the making of public policy, displacing more traditional modes of regulation and governance (Keleman 2011; see also Chapter 8). More generally, political actors may themselves adapt to this shifting balance between law and politics, internalizing a more legally attuned mode of decision-making as an anticipatory strategy to minimize the possibility of subsequent negative judicial intervention. As Alec Stone Sweet (2000: 204) appositely concludes his widely cited survey of the judicialization phenomenon, ‘[i]n the end, governing with judges also means governing like judges’.

The general trend towards judicialization may be seen across different levels of governance. At the national level, as Britta Rehder details in Chapter 22, 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 generalized 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 major 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 generalized legitimation of judicial power in relation to the executive and the legislature. At the same time, however, this generalized logic of empowerment has been tempered
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by the different relative positions of courts. Judicial actors are 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 judicialization phenomenon that the present chapter focuses on the ‘European Courts’. The chapter is divided into two main sections in which the patterns of institutional development of the European Court of Justice and the European Court of Human Rights are examined. Drawing on the relevant political science and critical legal studies literatures, particular attention is paid both to questions of institutional legitimacy and to 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 judicialization discussed above.

The Court of Justice of the European Union

*Enunciating a vision of Europe*

Although it was always intended that the European Coal and Steel Community (ECSC) and the European Economic Community (EEC) should have a supreme court, the jurisdiction of this institution established in the Treaty of Rome was limited: it was an administrative court, based in international law, with the jurisdiction to rule on the misuse of powers by the institutions of the ECSC/EEC. Furthermore, the Treaty made no mention of the type of legal system or principles that it might adopt in ensuring that the law was observed. Thus, through its case law, the Court was able to enunciate a vision of Europe that allowed it to develop and extend its jurisdiction under the Treaties. In effect, the Court has ‘constitutionalized’ the EU legal order; by so doing, it has transformed the Union from a traditional international organization (albeit with supranational elements) into a new type of legal order that 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’.¹ In *Costa v ENEL* in 1964, the Court reaffirmed that this new legal order was distinct from traditional international law and set out the principle that EU law should be supreme over member states’ national laws.² There then followed a series of cases throughout the 1960s and 1970s in which the Court embedded the principle of supremacy in the EU legal order, in particular in its *Internationale Handelsgesellschaft* and *Simmenthal* rulings.³ The principle of supremacy has been termed ‘the most important constitutional issue of the [EU] legal order’ (Eleftheriadis 1998: 257), providing for its extensive reach into the national legal orders of member states on terms well beyond those of traditional international law.

Hand in hand with the 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. This 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’.⁴ In sharp contrast to the classic mechanisms of international law, individuals were thus vested with rights that flowed directly from the Treaties and that national courts were bound to uphold. The Court has continued to broaden the parameters of the principle of direct effect; over the years, it has extended the application of the principle to further Treaty articles, decisions and, most controversially, to directives. With these principles (among some others), the CJEU enunciated a vision of Europe which was vastly
different and more far-reaching than that which the member states might have envisaged when they agreed to create the common market (cf. Lecourt 1976).

Acceptance of the constitutionalization paradigm

The ‘activism’ of the CJEU found strong support in its early years from a community of academic specialists who often assumed an advocacy role with respect to the development of this novel legal order. From the 1980s onwards, however, critical analyses of the Court first appeared and then progressively gained ground within the mainstream literature. Hjalte Rasmussen’s 1986 *On Law and Policy at the European Court of Justice* marked something of a turning point in this regard, launching a sustained (and itself sharply criticized) broadside at what the author regarded as the overly expansive jurisprudence of a ‘run-away court’.

As the legal literature began to take a more critical turn, political scientists also started to take an interest in the Court. The central question motivating much of this political science literature examines why the CJEU’s more ‘radical’ jurisprudence was, and continues to be, accepted and applied by the member states. A number of different explanations have been proposed, principally focusing on the relationship between the CJEU and national courts. The basis of this relationship lies in the procedure for preliminary rulings under Article 267 TFEU. This article is frequently referred to as the ‘keystone’ of EU law, for without it there would be no principle of supremacy, or indeed much EU law at all (Ward 2009: 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. These 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 are raised. All of the constitutional-type principles developed by the CJEU are derived from judgements issued in response to references for preliminary rulings. In other words, the CJEU’s capacity to shape EU law has been dependent on these references from national courts. Most commentators agree that, on the whole, not only have national courts (in particular lower courts) failed to resist this ‘constitutionalization’ of the EU legal order by the CJEU, but they have enthusiastically played a role in the process (Azoulai and Dehousse 2013: 357). Given the impact of the seminal judgements of the CJEU on national legal systems and sovereignty, why have national courts continued to engage with the preliminary ruling mechanism?

Arguably the most influential research scrutinizing the policies and strategies of the CJEU has been conducted by Joseph Weiler (1991, 1999). Applying Albert Hirschman’s famous triptych of ‘loyalty, exit and voice’, Weiler examined the dynamics whereby the Court’s closure of ‘selective exit’ (i.e. national non-compliance with European law) was related in the early years of the EEC to member states’ insistence on the maintenance of ‘voice’ through the Council of Ministers. In so doing, he presented one of the first systematic analyses of the complex and subtle interrelationships between the EEC legal and political orders. As an additional factor in this equation, Weiler investigated the relationship between the European Court of Justice and its national counterparts. Here, a mutually reinforcing dialogue emerged: the Luxembourg Court sought to anchor its position through the crafting of a convincing legal discourse, while national courts were incentivized to follow its lead insofar as this strengthened their own positions relative to the other branches of government.

In a similar vein, Anne-Marie Burley (Slaughter) and Walter Mattli developed a critical account of the development of EU law within an explicitly neo-functionalist framework (Burley and Mattli 1993; Mattli and Slaughter 1995, 1998). This view submits that since law exists within a comparatively autonomous technical sphere, it may allow for the pursuit of an integrationist
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agenda relatively insulated from political pressures. 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 these courts to the CJEU. By empowering individuals and national courts in this way, the CJEU made it advantageous for these actors to use Community norms, thereby fostering legal integration. In this way, law can be perceived as functioning in much the same way as economics in Ernst Haas’ original neo-functionalism model, with individual self-interest propelling a wider integrationist project.

Such analyses are nonetheless limited, as they fail to take account of the fact that not all national courts behave alike; indeed, higher courts tend to be less ‘enthusiastic’ about the role of the CJEU than lower courts (Azoulai and Dehousse 2013). In her work, Karen Alter addresses these differing degrees of ‘enthusiasm’, arguing that the relationship between the CJEU and national courts is based on competition between courts within the legal orders of member states. 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 the decisions of higher national courts. These lower courts would thus seem to have a distinct incentive to embrace their role as ‘EU courts’ – as they have done through the use of Article 267 TFEU. Correspondingly, higher national courts have had to ‘reposition themselves to the new reality’ (Alter 1998: 243), having in effect been ‘cajoled’ by lower courts into accepting the supremacy doctrine (Alter 1998: 242).

The intergovernmentalist view, in contrast, denies the autonomy of the CJEU, claiming that its role is merely that of a guarantor of interstate bargains/agreements. According to scholars such as Geoffrey Garrett (Garrett 1995; Garrett et al. 1998), the Court’s ‘power’ stems 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 granted 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 the member states. In an intergovernmentalist view, the mere possibility that member states could resist CJEU judgements is enough to ensure that the Court’s ambitions remain within a sphere that is acceptable to the member states. However, the intergovernmentalist view is often criticized by legal scholars for not acknowledging the autonomous nature of law (Craig 2003).

Common to most of these theories is the idea that the Court, left to its own devices and ‘tucked away in the fairytale Grand Duchy of Luxembourg’ (Stein 1981), was able to implement its own EU integration agenda, largely flying under the political radar of the member states. Recently, however, a new literature has emerged, based on studies of EU and national archives, focusing on the historical development of EU law. This literature challenges the notion of ‘integration by stealth’, showing that national governments were not only aware of this integration process, but actually – at least in the case of Germany (Davies 2012) – were broadly facilitative of it. Davies and Rasmussen (2013) more generally 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, an evolutionary process they perceive to be primarily shaped by ‘a battle between legal elites’.

A socio-economic Court

Beyond the development of the European Union’s political ‘constitution’, the Court of Justice has also played a central role in the evolution of its economic ‘constitution’. It has been a
significant actor in developing the principles and practices of regulation integral to the completion of the single market, while also increasingly being called upon to strike the balance between such principles and often competing social or labour policy considerations. In this process, questions of structural imbalance have also increasingly come to the fore, as the accelerated development of legal integration relative to political integration may have consequences for the general orientation of policy (cf. Dawson 2013).

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 harmonization. That shift actually originated in the CJEU’s case law, specifically in its principle of mutual recognition of national standards. According to this principle, set out in the 1979 Cassis de Dijon ruling,9 a good that is produced and marketed lawfully under the rules of any one member state must be allowed to circulate freely within the internal market. This ruling has been described as a ‘constitutional innovation’ because it introduced a mode of integration unforeseen by the member states (Stone Sweet 2004: 135). In Cassis, building on its earlier Dassonville decision,10 the Court ruled on the grounds that traders should not suffer because of the absence of legislative harmonization at the EU level; rather, they 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’ in order to prevent investment and production from moving to the member states with the lowest regulatory costs (Stone Sweet 2004: 136). Traders could invoke the 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 (1998) terms the constitutionalization of negative integration, in a situation of significant structural ‘asymmetry’ between positive and negative integration. As a result of the Dassonville/Cassis line of case law, the Court has almost unlimited freedom to scrutinize ever-expanding policy areas for rules that may potentially hinder the exercise of individual rights. However, the Court’s case law can only achieve negative integration (Scharpf 1999: 71–3), as it cannot impose a common European regime to replace discriminatory national rules. Conversely, positive integration (European-level harmonization) may only be achieved through legislation; as such, it is dependent on a broad consensus that may be inhibited by political disagreements. A potentially worrying unidirectional ‘deregulatory dynamics’ (Scharpf 2010) thus emerges: 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,11 illustrate the difficult balance that the Court aims to strike. These cases arose in the context of the Posted Workers Directive,12 which sets out the employment conditions that should apply to workers temporarily posted from one member state to another; it 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 member states with higher levels of social provision, as a means of protecting labour standards from being undermined by posted workers from states with less generous provisions (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 these competing objectives – free movement on the one hand and the adequate social protection of workers on the other. The Laval case concerned industrial action taken by Swedish trade unions against a Latvian company employing Latvian workers in Sweden at wages that were about 40 per cent lower
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than those of Swedish workers. In *Viking*, Finnish trade unions took action to try to prevent a Finnish shipping company from re-registering a ship under an Estonian flag in order to employ workers at lower rates of pay and under less favourable conditions than Finnish workers.

In its judgements in these cases, the Court first stated that it was ultimately for the relevant national courts to answer these 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, observing that it was ‘first’ intended to ‘ensure a climate of fair competition between national undertakings and undertakings which provide services transnationally’.13 As such, the scope within which member states may seek to impose higher national standards appears correspondingly circumscribed, with the minimum standards specified by the directive itself interpreted as more of a ‘ceiling’ than a ‘floor’.

The *Viking* and *Laval* judgements have been heavily criticized 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 in which political processes seem slow or unappealing. However, we should question whether this constitutionalization of negative integration is in fact preferable to softlaw mechanisms of coordination. Here, the ‘socio-economic’ CJEU is attempting to balance conflicting interests, but, as Maduro (1997: 54) notes, it ‘has never clearly addressed the issue of which interests should be balanced’.

**Contemporary challenges**

It is clear that the roles adopted by the CJEU have changed over time. Today’s Court faces a number of 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 its 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 judgements were delivered in that time. However, as the CJEU extended its competences, and with each new enlargement, its workload increased many hundredfold; in 2013 alone, 699 new cases were brought before the CJEU and 790 before the General Court. While this increase is not on a scale comparable to that experienced by the Strasbourg Court (see pp. 272–273), 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 (now the General Court) in 1989 and the adoption of various procedural reforms intended to expedite the handling of cases. In addition, the number of judges at the Court has almost doubled since 2004. Yet, in spite of such efforts, the CJEU remains overloaded and under great pressure. At the end of 2013, there was a backlog of 884 cases pending before the CJEU and 1,325 cases pending before the General Court.14 Moreover, as Maduro and Azoulai (2010: xix) point out, the increased number of judges may allow the Court to increase its judicial output, but at the risk of a loss of institutional memory and a reduction in collegiality.

In the history of the Court’s evolution, the ‘mega-enlargement’ of May 2004 presented a particularly rich combination of opportunities and challenges. While enlargement was as much a pretext for as a cause of some of the changes introduced (including reforms that had been mooted for years), there have been some notable shifts in the working methods of the Court as a consequence of the Union’s expansion. Faced with the sheer scale of the 2004 enlargement, the CJEU streamlined its system of management, progressively implementing a series of measures intended to ‘counteract the expanding average length of proceedings’.15 Between 2004 and 2013, the Court was also confronted with the introduction of 13 new languages and 13 new cultures,
as every new member state other than Cyprus added a further official language and the Irish language was added to that list in 2007. This has produced a marked shift in the dynamics of the institution (McAuliffe 2008, 2010). Whether the growing number of languages can continue to be absorbed by the language regime of the CJEU is still an open question. The influx to the Court of a large cohort of staff from the new member states, while certainly adding an element of diversity, has also had an impact on the institutional balance. These fundamental cultural and linguistic shifts may in turn have (often underestimated) implications for the development of case law.16

The European Court of Human Rights

The ‘missing political science’ of the Convention system

The system of human rights protection that has developed on the basis of the European Convention on Human Rights 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 that 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 expansive case law of the Strasbourg institutions.17 In sharp contrast to the situation of the Court of 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 for both the origins of the system (Moravcsik 2000) and 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 18 member states. More recently, Jonas Christoffersen and Mikael Rask Madsen (2011) brought together many of the (few) political scientists working on the Convention system with leading legal scholars and practitioners on the occasion of the fiftieth anniversary of the establishment of the Court, 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 the development of a sustained body of scholarship, something of a ‘missing political science’ of the Strasbourg system.

Clearly, the present chapter cannot address this wider gap in the literature. It does, however, outline a broadly political understanding of the two major historical phases in the Convention system’s development to date,18 in terms suggestive of the potential for a wider interdisciplinary research agenda. Specifically, attention is first turned to the dynamics of the system’s initial ‘success’, focusing on the establishment and legitimation of the Convention as a Western European system of human rights protection during the Cold War era. This is followed by an examination of the challenges faced by the system in the post–Cold War period. Now serving as the final recourse for the protection of human rights across a vast pan-European community, the Strasbourg Court has seen its role dramatically transformed as it grapples with processes of democratic transition and the situations arising when these transitions falter or fail.
The construction of judicial legitimacy

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The Convention, as initially agreed upon in 1950, was a relatively modest document. The list of rights it encompassed 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 relatively restricted. States were initially obliged only to accept an interstate system of complaints. They could bring cases against one another before the newly established European Commission of Human Rights, which could then issue an advisory opinion. However, the Convention included two optional provisions whereby states could opt in to more expansive control mechanisms. Article 25 provided that states could accept the 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 that could render full judicial decisions against states that accepted 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 structured 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 succeeded by the Court. Throughout 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 act that crucially established the credibility of the Convention institutions among member states, litigants and wider stakeholder communities.

From an early stage, the Strasbourg institutions affirmed that the Convention must be understood as creating ‘objective’ rights vested in the individual, and consequently cannot be subject to conditions of interstate reciprocity. Similarly, Strasbourg jurisprudence has insisted that the ECHR be interpreted in line with its ‘object and purpose’ as a human rights treaty. Correspondingly, it cannot be bound by the conventional international law interpretive canon of reading provisions so as to minimize their impact on state sovereignty. In much the same vein, Convention jurisprudence has required that 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.19 Likewise, Convention rights have been developed through the technique of ‘evolutive interpretation’. Following this interpretive technique, the Strasbourg authorities have expanded the scope of human rights protection in accordance 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 its seminal 1981 Dudgeon20 and 1988 Norris21 cases, holding that the statutory criminalization of homosexuality no longer corresponded to contemporary European standards.

Balancing this jurisprudential arsenal, 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
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with respect to 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 available in a number of other Convention member states. In so doing, the Court explicitly deferred to the judgement of the national authorities, which were considered to be better placed to make determinations as regards matters of public morals. The application of this principle has, as one would expect, often provoked controversy. Two prominent ECHR experts have, for example, memorably likened the use of the doctrine to a ‘spreading disease’ (van Dijk and van Hoof 1990: 604–5). 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 that 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 underlying the development of the ECHR has been rather more one of ‘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 has been 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. In contrast to the status of direct effect and supremacy enjoyed by EU law, the ECHR has a variable domestic legal status based on different national modes of incorporation. The nexus between the national and the European legal order is 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 has also shown its limits. The original control system did come to be generally accepted, paving 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. However, it should also be noted that the substantive rights covered by the Convention system have only been very modestly expanded since 1950. Most notably, the development of both social rights and minority rights within the Council of Europe system has taken place through the creation of separate conventions with no provision for judicial oversight.

The challenges of enlargement

The Council of Europe enlarged rapidly in the 1990s. 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 that 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 minimum entry criteria with regard to democracy and the rule of law were nonetheless permitted to join the organization, 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 organization. The strategy nonetheless also attracted sharp criticism. Most prominently, the then Deputy Secretary-General of the Council of Europe resigned in protest at what he regarded as an unacceptable dilution of the organization’s core values (cf. Harmsen 2001). Yet, 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. This quantitative explosion 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 took 1,338 decisions in that year, finding 1,243 petitions inadmissible and 95 admissible. The Court rendered 25 decisions. By way of contrast, in 2013 the single-tier full-time court received 65,900 petitions. It handed down 87,879 decisions of inadmissibility, as well as 3,659 full judgements on the merits of the case. This left the Court with an accumulated backlog of just under 100,000 cases. Put even more starkly, the Court now typically receives around 50 per cent 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 (cf. Harmsen 2010: 30–2). The ‘old’ West European democracies now account for only about 20 per cent of the Court’s caseload at both the petition and the judgement stage. In contrast, the post-Communist states annually account for around 70 per cent of the petitions received, and between 50 and 60 per cent of the judgements rendered. Moreover, the vast bulk of cases typically originate in only a small number of member states. In 2013, for example, five countries alone – Russia, Ukraine, Turkey, Italy and Serbia – accounted for two-thirds of petitions received.

This geographic shift in the focus of the Court’s attention has further been accompanied by a qualitative shift in the types of cases coming to Strasbourg. Most immediately, the Court found itself playing an important role in processes of democratic transition. Here, the Court has frequently been called upon to establish the extent to which temporary limitations on specific rights (such as lustration or disenfranchisement measures) fall within 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). The Court has further more generally served as a buttress supporting processes of democratic reform, in particular by 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 transition, one must, however, also acknowledge that the contemporary Convention community further extends to a significant number of countries in which 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 light of these major challenges, it is unsurprising that discussions concerning the reform of the ECHR system have become a constant refrain (Harmsen 2011). Much of this debate has focused on ‘the numbers’, essentially seeking ways to prevent the Court from being ‘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 per cent of applications ruled to be
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Protocol 14, which finally entered into force in 2010 after lengthy Russian obstruction, introduced a modest package of provisions in this direction. Nevertheless, even as this protocol was being adopted, strong views were expressed from within both 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 opened, beginning with the high-level Interlaken meeting in 2010, and carried forward by two further meetings at Izmir (2011) and Brighton (2012). This, in turn, led to the opening of two new reform protocols for ratification in 2013.30

Although attention has understandably focused on immediate measures to alleviate caseload pressures, the reform of the Convention system 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 ‘constitutional’ and ‘individual justice’ interpretations of the Court’s role (Greer 2006: 165–74; 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 the provision of effective remedies in individual cases is the institution’s raison d’être, and that to abandon this function in favour of a more selective constitutional mission would risk undermining the Court’s legitimacy. The debate 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, these European Courts cannot be understood in isolation; the specific roles that they have respectively assumed must be situated relative to European (and international) trends regarding the ‘judicialization’ of politics. Each of the previous sections has touched on elements of this broader canvas, with reference to the patterns of relationships between the European Courts and their national counterparts, as well as to questions concerning the levels of member state support or resistance. Nevertheless, one key element in this pattern of relationships has not yet been discussed: the relationship between the Luxembourg and Strasbourg Courts themselves. The different dimensions of this relationship are the focus of this concluding section.

The relationship between the two Courts most obviously 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 with 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.31 As it has assumed these roles, the potential for conflicts or divergences with Strasbourg jurisprudence has heightened. Historically, a limited number of comparatively prominent instances of such divergence may be identified, usually corresponding to a situation in which the Luxembourg Court privileged market...
regulation concerns over individual rights considerations when balancing competing claims (cf. Lawson 1994; Spielmann 1999). Nevertheless, the long-term trend has clearly been one in which the two Courts have displayed a growing awareness of each other’s jurisprudence, generally adopting positions that minimize or avoid the possibility of direct conflict (cf. Douglas-Scott 2006).

This evolution of case law is in turn linked to the development of the patterns of politico-diplomatic relationships between the two Courts. As Laurent Scheeck (2005, 2010) highlights, the two Courts have become increasingly ‘entangled’. This entanglement stems in part 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 socialization’, 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 the Strasbourg and Luxembourg Courts may nonetheless still appear to be ‘relatively brittle’ (Scheeck 2011: 179). In effect, the relationship between the two Courts reflects the dual character of judicialization 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.32 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 this mechanism has largely met with acceptance in the negotiations to date, the proposed terms of its operation have fuelled concerns amongst the non-EU members of the Council of Europe regarding 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 raised are thus eminently political ones, not least concerned with the (often criticized 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 countries such as Russia, Turkey and Ukraine in relation to various forms of European cooperation. Ultimately, we are thus led back to quite traditional geopolitical considerations, in which spheres of influence and power may be seen to delimit the effective reach of a distinctive European model of governance that has placed sovereignty under the rule of law.

Notes
4 See note 1.
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5 The interplay between various professional interests and logics in the creation of a ‘field’ of European law is the subject of an important (predominantly francophone) body of political sociology literature. For an overview, see Vauchez and de Witte (2013).

6 For a prominent critique of Rasmussen (1986), see Weiler (1987). The more general ‘critical turn’ in EU legal studies during this period may also be seen in commentaries such as Coppell and O’Neill (1992) and Mancini (1991).

7 See, for example, Alter (2001), Arnulf (2006), Dehousse (1998) and Slaughter et al. (1998).


13 Laval para. 74.


16 These questions are currently the focus of a study funded by the European Research Council on the Court (2013–17) conducted by Mcauliffe (2014).

17 Major textbook surveys of ECHR case law include: Harris et al. (2009), Janis et al. (2008), Mowbray (2012) and White and Ovey (2010).

18 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.

19 See Airey v Ireland, ECtHR decision of 9 October 1979 on application no. 6289/73, 2 EHRR 205.

20 Dudgeon v the United Kingdom, ECtHR decision of 22 October 1981 on application no. 7527/76, 4 EHRR 149.

21 Norris v Ireland, ECtHR decision of 26 October 1988 on application no. 10581/83, 13 EHRR 186.

22 Handyside v the United Kingdom, ECtHR judgement of 7 December 1976 on application no. 5493/72, 1 EHRR 737.

23 Protocol no. 15, opened for signature in June 2013 (and requiring ratification by all state parties), provides for the inclusion of the ‘margin of appreciation’ principle in the preamble of the Convention itself.

24 Protocol no. 16, opened for signature in October 2013, provides states with the option of allowing their national high courts to request advisory opinions from the Strasbourg Court on questions concerning the interpretation of the Convention. It will come into force for those states that have chosen to ‘opt in’ after ten states have ratified.


26 Turkey is something of an anomalous case relative to this broad-brush categorization, 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 in which the Strasbourg Court was confronted with serious, systemic problems of human rights protection, particularly concerning the treatment of the country’s Kurdish minority. In more recent years, Turkey has generally accounted for around 20 per cent of judgements delivered and 10 per cent of petitions filed. See Kaboğlu and Koutnatzis (2008).

27 See, for example, Burdov v Russia no. 2, judgement of 15 January 2009 on application no. 33509/04, 49 EHRR 2, concerned with the provision of adequate remedies for the non-execution of judicial decisions. See also the discussion of the case in Leach et al. (2010).

28 See, notably, Assanidze v Georgia, judgement of 8 April 2004 on application no. 71503/01, 39 EHRR 653 and Ilasçu and Others v Moldova and Russia, judgement of 8 July 2004 on application no. 48787/99, 40 EHRR 46.

29 On the Chechen cases, see Leach (2008).
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30 See notes 23 and 24.
31 It should be emphasized that the Court of Justice is only empowered to adjudicate on human rights questions within the remit of EU law – i.e. with regard to EU institutions and member states when discharging their EU obligations. Unlike the ECHR, it does not have a general human rights jurisdiction.
32 The background to and main issues posed by accession are surveyed in Gragl (2013) and Kosta et al. (2014).

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