

Book Review: Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice edited by Maurice Adams et al.

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*The aims of this volume are to study the new era in which the European Court of Justice finds itself, following successive waves of EU enlargement. Through eight chapters, **Maurice Adams** and contributors consider the general principles of EU law, external relations, the internal market, and Union citizenship. **Jan Komárek** is somewhat disappointed by the short-sighted character of the thinking about judicial legitimacy in most contributions.*

Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice. Maurice Adams, Henri de Waele, Johan Meeusen and Gert Straetmans (eds.). Hart & Co. Publishing. October 2013.

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It has been a long time since political scientists studying European integration “discovered” law and the European Court of Justice. Yet, lawyers often complain that political scientists do not take law (sufficiently) seriously. This book provides an excellent insight into EU lawyers’ minds and shows that many of them may suffer from an opposite problem: being too serious about what law demands and what is possible to do with it. Read in that way, the impact of the book under review can go far beyond its stated aim, which is, according to the editors, to study the impact of the recent complexity and quantity of issues adjudicated by the Court and to provide an appraisal of its overall performance.

The volume results from a conference organised at the University of Antwerp in November 2011. A number of experts in their respective fields were invited to reflect upon the Court’s contribution to several substantive fields of EU law and the Court’s overall legitimacy. Their chapters, devoted to the Internal Market (Stephen Weatherill), free movement law (Jukka Snell), EU citizenship (Michael Dougan and Daniel Thym) and external relations (Eileen Denza) form the major part of the book. One chapter on general principles of EU law is co-authored by the former ECJ Advocate General Ján Mazák together with his former *référéndaire* Martin Moser. Mazák became famous for his open criticism of *Mangold* – one of the most [controversial decisions](#) of the Court. The judgment significantly redrew the boundaries of EU law and Mazák’s critical stance did not change, as shown by the overview of subsequent developments he offers. Finally, Michal Bobek comes with an original approach to the ECJ legitimacy, suggesting that it should be measured functionally, as the feasibility of its outputs for national courts.

Almost all the authors spend some space on thinking about the general notion of judicial legitimacy and how to assess it. Remarkably, they put emphasis on values dear to all lawyers, particularly consistency and legal certainty. Few endeavour a more substantive analysis of the case law of the Court, although Jukka Snell brings into his assessment of the ECJ’s free movement jurisprudence the notion of the “varieties of capitalism” and calls for more deference towards particular economic models.

Two chapters of the book stand out: an introductory chapter by the current Vice-President of the ECJ, Koen Lenaerts, and an epilogue by Joseph Weiler, which takes issue with it.

Koen Lenaerts is perhaps the most prominent EU lawyer today: having been a European judge since 1989 (first at the Court of First Instance, now the General Court, and from 2003 at the ECJ), he has also been a prolific writer and as a lecturer and later professor of EU law at the KU Leuven since 1979 he influenced the current EU legal elite more than anyone else. Yet his article disappoints a critical reader on many fronts. Lenaerts distinguishes two kinds

of judicial legitimacy: external and internal. The former concerns the boundaries of the judicial function and the relationship between adjudication and politics, whereas the latter relates to the 'quality of the judicial process'. It is internal in the sense that it is oriented towards other courts and legal discourse.

Lenaerts asserts: 'if courts go beyond the duty of saying "what the law is", they lack legitimacy as they intrude into the political process' (p. 13). This is however something the highest courts do all the time and some might agree that we have moved beyond rather unproductive debates on whether courts 'make law'— in Europe as elsewhere. 'Saying what the law is' is as unhelpful a criterion as is to assert that judges act as umpires. It is perhaps no coincidence that while a prominent ECJ judge proposes the former, the current President of the US Supreme Court, [John Roberts](#), said the latter in the appointment hearings. Roberts was rightly criticised and Lenaerts deserves the same: this is manifestly **not** what most lawyers think today about courts, on both sides of the Atlantic.

This relates to portraying the ECJ as having 'no choice' when making controversial rulings – an excuse which appears in many contributions to the book. In this narrative the Court is not an active agent that shapes or even makes the choice necessary, in spite of the fact that it is well known that it was the Court (in concert with the Commission and legal academia) that initiated the process of "constitutionalisation" of the EU. Thanks to the work of sociologists, such as Antoine Vauchez, and legal historians (see the special issue of the [Contemporary European History](#) edited by Morten Rasmussen and Bill Davies) such simplistic accounts are no more tenable – even within the legal field.

How the 'traditional' legal narrative, liberating the Court of all responsibility, works, is nicely illustrated by Lenaerts' elaboration of the Court's mandate provided by the EU Treaty. In his own words, 'as a result of [constitutionalisation], which transformed the European Union from an international organization into a "composite legal order" [note the absence of the agent responsible for this transformation in this sentence], the ECJ has continuously been called upon to uphold the "rule of law", as provided for by Article 19 TEU' (pp. 14-15). Lenaerts notes the absence of the definition of 'the law' in the Treaties, but explains that 'in order to honour the constitutional mandate' (which, as we know, but Lenaerts does not mention, was not 'imposed' on the Court but rather self-created by it in the foundational rulings in *Van Gend en Loos*, *Costa v ENEL* and *Internationale Handelgesellschaft*), 'the ECJ could not limit itself to a formalistic understanding of the rule of law. It then *had no choice* but to complete the constitutional lacunae left by the authors of the Treaties' (p. 15, emphasis added).

Weiler is rightly critical of Lenaerts and elaborates on some of the points made above. But then again, his contribution seems to suffer from the same deficit as most others: it acknowledges the difficulty with the concept of legitimacy (if I remember well, at the conference Weiler even suggested that it is not used at all in the debates on the Court, due to the lack of specificity of and agreement on legitimacy's meaning), but then does not look too far from law to examine its meaning. It was perhaps not the role of the epilogue to elaborate on that notion, although one may note that most concepts of political theory are contested (think of democracy or justice – yet they are both used in the debates on particular political regimes, including the EU).

What strikes the reader most, then, is the myopic character of the thinking in most contributions about judicial legitimacy (and courts in general). Few, if any, references to political theory appear, in spite of the now abundant literature on the topic. It is lawyers talking to lawyers, with almost complete exclusion of others. It can be self-evident to lawyers that legal certainty and coherence are the principal values (or even the feasibility of law for other lawyers), but one wonders, how these values relate to the legitimacy and authority (another contested concept!) of (EU) law, where they have to compete with justice and democracy (and many others, to be sure).

Possibly, someone else, not so attached to law and the ECJ, must do this work. If they do, this volume provides an excellent starting point.

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