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The judiciary as legislator? How the European Court of Justice shapes policy-making in the European Union

Fabio Wasserfallen

ABSTRACT The question of whether, and if so, how the European Court of Justice influences European integration has been a matter of long-standing academic dispute. Several more recent empirical studies have shown that the Court influences the integration path, but scholars have also documented that member states can successfully limit the practical relevance of activist Court decisions. Drawing on this literature, this paper argues that the Court eventually impacts integration in salient policy fields effectively when the legislator incorporates judicial considerations in the policy-making process. The theoretical section conceptualizes the leverage of the Court in the legislation process and the empirical section elucidates how the judiciary shaped legislation in the development of exchange students' social rights. Findings show that the Court can successfully promote distinct legislative outcomes.

KEY WORDS European Court of Justice; ECJ; judicial law-making; judicial politics; legal integration; European social co-ordination.

INTRODUCTION

The process of European integration faces the existential dilemma ... of reaching an equilibrium between, on the one hand, a respect for the autonomy of the individual unit, ... pluralism and diversity of action, and, on the other hand, the societal need for cooperation, integration ... and, at times, unity. (Cappelletti *et al.* 1986: 4)

For more than 50 years, integration has been restructuring the political landscape in Europe. During this process, decision-makers in Europe faced a dilemma: how should the European countries be united in diversity? The tension between unity and diversity was the driving force behind the European project and several empirical studies have shown that the European Court of Justice (ECJ) has been a crucial actor in the integration process (e.g., Martinsen 2003, 2009). However, distinct theoretical arguments about how the judiciary effectively influences the integration path are still missing.

Neither the intergovernmental nor the neo-functional approach provides an adequate analytical scheme on the importance of the ECJ for integration. To bridge this gap, this paper conceptualizes the Court's impact for the

advancement of European integration. I argue that the judiciary has direct influence on integration, when its considerations and doctrines become incorporated in the policy-making process. And it is through use of the power of constitutional review that the Court can promote distinct European policies and eventually shape legislation outcomes.

The mechanism of direct judicial influence on legislation is one way of legal integration. It contrasts the dynamic of the Court's major landmark, namely the introduction of the doctrines of direct effect and supremacy, which entitled individuals to raise violations of European law in national courts (Weiler 1991). This legal transformation has been slowly backed up by national high courts, against the will of national governments (Alter 2001). Yet, during the last decades, European rules advanced from economic co-operation to a broad set of common policies. Supranational rules have also become important in salient policy fields, such as social or health policy. Because these policies are implemented domestically and member states can effectively constrain the general effects of activist judicial decisions, the Court cannot, like in the case of the legal transformation of Europe, substantially advance integration in these fields without explicit legislative and political support.

However, ECJ rulings in salient policy fields can become a decisive point of orientation in legislation and may thus directly influence the integration path. This direct legal influence on integration has been particularly critical in the evolution of European social co-ordination. While the ECJ advocated far-reaching European co-ordination rules, member states defended national prerogatives in social politics. The trade-off between unity and diversity was omnipresent in those debates. By taking activist decisions, the Court forced reluctant member states to overcome their resistance against co-ordination policies. This way, the judiciary paved the way towards complex social co-ordination legislation.

My argument is that Court decisions impact integration effectively when the Council takes up judicial considerations in policy-making. As long as this is not the case, the implementation of case law is uncertain. Following this, we have to focus on whether and how the Court can shape legislation. I will discuss this legal influence on policy-making theoretically. In a detailed case study, which analyses the recent evolution of European co-ordination law, I will subsequently elucidate this mechanism empirically. But beforehand, I will summarize the main points and developments in European social co-ordination. Although this paper will exclusively focus on social policy, the broader notion about judicial influences on legislation is applicable to other policy areas too.

EUROPEAN SOCIAL CO-ORDINATION LAW

The most important part of European social policy is the co-ordination of social security schemes. Its origins stem from the free movement of people. Historically, the primary goal of co-ordination rules was to foster mobility of the production factor labour. In 1971 the Council adopted Regulation 1408/71,¹ the Community's 'most advanced social policy achievement' (Martinsen 2003: 2).

Two doctrines, incorporated in this Regulation, shall guarantee that intra-European migrants can move freely inside the Union: first, European migrants are entitled to *equal social rights* compared to nationals in their state of residence; and second, *acquired welfare entitlements* have to be *exported*. In other words, European co-ordination law forces member states to export welfare entitlements and to treat nationals and European migrants equally. Even though national governments were reluctant to export welfare payments abroad and keen on keeping their autonomy in defining the personal scope of their welfare clientele, the Council adopted a complex legislation of mutual welfare responsibility, not least because the ECJ pushed integration along this path.

A longstanding legal–political dispute arose around the question of which welfare entitlements are exportable and which not. The Court advocated a wide application of their exportability, but member states were reluctant to pay welfare entitlements to people living abroad. Regulation 1408/71 distinguishes between *social assistance* and *social security schemes*.² The latter have to be exported, while member states can keep the former territorial. Therefore, the distinction between those categories determines to what extent national authorities have to pay welfare payments to people living in other jurisdictions.

Since many benefits contain characteristics of social assistance and social security, the differentiation between these categories became a controversial matter.³ A well-known case from 1983 concerned Paola Piscitello, an elderly woman who had moved from Italy to Belgium. The ECJ ruled that Italian authorities violated supranational law by refusing the payment of her social aid pension.⁴ Likewise, the judges forced France to export a means-tested pension to Italian migrants returning home.⁵

Yet the French government did not accept the Court's judgement, arguing that these pension benefits were in their characteristics social assistance. The French taxpayers were 'de facto subsidizing some poor elderly people in Italy's Mezzogiorno' (Ferrera 2005: 134). However, the Commission issued an infringement procedure against the French resistance to comply with the Court's decision and, not surprisingly, the judiciary confirmed again that France had to export these pension benefits.⁶ But after that, the French government initiated a political response to counter judicial activism and the Council unanimously overruled the Court's jurisprudence.⁷ The Council retained control of a delicate issue, signalling that the Court's jurisprudence was beyond political intentions.

Ten years later, the ECJ declared once again, in its judgements about Jauch and Leclere, that it would not accept the territorialization of social benefits at any rate.⁸ Jauch is a case about an Austrian care allowance and Leclere a case about a Luxembourgian maternity allowance. The Council had decided that both of these entitlements are not exportable. But in the view of the Court, the territorialization of such benefits violates the free movement of workers.

These legal–political controversies about the exportability of welfare schemes highlight how political issues become legal and how judgements are political. By referring to the free movement of people, the Court advocated more co-ordination, while member states defended their autonomy in social politics.

To evaluate whether the judiciary influenced the path of social co-ordination law, one has to take an informed look at the political reactions to the cases at hand. Of course, European governments respect the rule of law. But the implementation of case law is by no means assured. Conant (2002: 187) even concludes that *contained compliance* is 'the dominant response to ECJ decisions on social ... advantages'.

The French case also shows how a government can convince all other member states to *overrule* the Court's doctrine. In effect, when legal considerations and political intentions are too far away from each other, politics will prevail. Thus, to shape integration, the Court has to take decisions which are in line with the preferences of at least some member states. As long as controversial judicial doctrines are not incorporated into legislation the general implementation of case law is on somewhat shaky grounds. The next section analyses the Court's influence on integration in detail.

CONCEPTUALIZING THE COURT'S INFLUENCE ON INTEGRATION

More than 15 years ago, political scientists began to evaluate the judiciary's autonomy in European integration. Neo-functionalists and intergovernmentalists promoted fundamentally different accounts on the importance of the judiciary. The former argued that the ECJ could almost independently pursue its own agenda, while for the latter the judiciary has no autonomous influence on integration whatsoever.

Burley and Mattli provided the first neo-functional arguments about the judiciary. They called the ECJ a 'hero' (1993: 41) who 'signals and paves the way ... on which the political actors can further integration' (1993: 48). Accordingly, the judiciary determines the authority of the European Community, while the Court rules fully independent from political pressures.

It is exactly the denial of member states' importance for European integration which rightly attracted most of the criticism. Neo-functionalists underestimated the role of European governments, celebrating the creativity and autonomy of supranational institutions. Just at the time when Burley and Mattli began to analyse the ECJ from a neo-functional point of view, Garrett explored the judiciary from an intergovernmental perspective. He claimed that the Court has no autonomous influence on integration because its 'decisions ... are consistent with the preferences of France and Germany' (Garrett 1992: 558).

Both neo-functionalists and intergovernmentalists promoted extreme hypotheses about the relevance of the judiciary. Over time their opposing positions slowly converged (Garrett 1995; Mattli and Slaughter 1995). Their discourse was mainly about whether the Court was superior to governments or vice versa. But neither law nor politics is determinant regarding the other. In the late 1990s, scholars from both sides declared that their dispute became 'unproductive' (Garrett *et al.* 1998: 175) and that their 'debate ... reached the limits of its usefulness' (Mattli and Slaughter 1998: 178). Nevertheless,

the broader arguments of those theories are a good starting point to dissolve the puzzle of legal integration.

On one hand, the neo-functional claim that Court decisions influence integration seems to be right, but we have to conceptualize this mechanism more precisely. On the other hand, the intergovernmental argument that European judges cannot decide as entities fully independent from member states' interests seems to be right too. But again, this constraint must be elaborated in more detail. In the following, I will present a distinct conceptualization of the Court's influence on integration, taking into account the Court's powers as well as its limits.

Constitutional review: the Court's power resource

Norms in modern legal systems follow a clear hierarchy. The constitution is at the top and the highest Court ensures that every public act meets constitutional obligations. It is exactly through use of the power of constitutional review that the ECJ can influence integration outcomes. In the European context, the Treaties rank at the constitutional level, while Directives and Regulations constitute secondary law, which has to be compatible with Treaty obligations and constitutional review. The Court impressively demonstrated in several judgements its willingness and ability to advance integration by activist interpretations of the Treaty. Indeed, this mechanism of judicial law-making seems to be exceptionally important in the European Union.

First, this is because the judiciary can take decisions quite independently from political pressure. To limit political control, judges at the ECJ cannot be dismissed during their tenure and they decide by majority voting without publishing dissenting opinions. It is virtually impossible for governments to threaten individual judges with sanctions. Second, the European Treaties can be labelled as an 'incomplete contract' (Stone Sweet 2004: 24) which must be specified not only by legislative but also judicial means. And the four freedoms equip the Court with an almost unrestricted potential to advance integration, as 'there will be hardly any field of public policy for which it will not be possible to demonstrate a plausible connection to the guarantee of free movement of goods, persons, services and capital' (Scharpf 1994: 6).

Hence, at first sight, the Court's ability to advance integration by activist constitutional review seems almost unlimited. That is why many scholars, studying the Court's influence on integration, overestimate its importance. However, when we do not merely focus on the potential of constitutional review but also analyse whether activist decisions effectively impact Europeans' everyday lives, the picture of the Court's power becomes more nuanced.

Limits of judicial law-making

There are several reasons why activist judicial decisions will not be automatically effective. The previously summarized dynamics of co-ordination law support this claim. First, member states often refuse to comply with the Court's

jurisprudence. But as it is impossible to legitimize a total obstruction against judicial interpretations, member states usually vow not to reject undesired jurisprudence *per se*. Instead, governments respect the individual decision and, at the same time, neglect its political consequences as well as its general implications. Such *contained compliance* is a frequently observed political reaction against objectionable legal verdicts (Conant 2002).

Second, European policies are *implemented domestically*, sometimes even at the local level, and every rule, which is not accurately implemented, remains somewhat meaningless. A large and developing literature documents the complex issue of European implementation problems. We could expect that domestic implementation resistance is bigger with regard to case law than to secondary law. Falkner *et al.* (2005) argue that vague and inconsistent wording of European policies is one of the causes of transposition problems. Compared to general-abstract legislation, Court decisions leave often more room for interpretation, which clearly intensifies implementation problems. The broader point is that national civil servants need explicit political instructions to change their policies.

Scholars of European law might argue that individuals can claim their European rights directly at national courts. Thus, as long as national courts respect ECJ jurisprudence, it does not matter whether national governments or administrations back up those decisions. Of course, the support of national courts can make political considerations somewhat irrelevant. Empirically, this was the case in the legal transformation of Europe, where the Court introduced the doctrines of direct effect and supremacy.⁹ The European Council has never explicitly approved this legal transformation, but it was step-by-step backed up by the jurisprudence of national high courts (Alter 2001). Yet it is unlikely that an activist decision of the ECJ in a salient policy field would be implemented without any legislative confirmation.¹⁰

When we take implementation problems and contained compliance seriously, it becomes evident that the potential of judge-made law is limited. *Ipsa facto*, I argue that activist judicial decisions in salient policy fields will influence integration and the everyday lives of Europeans after being incorporated into new legislation. This makes the question of whether and how the Court influences integration more specific, as it turns into whether and how the Court influences the policy-making process. To capture the Court's legislative role, it is worth analysing constitutional review from an actor-centred institutional perspective.

Constitutional review from an institutional perspective

New legislation is 'the outcome of interactions among intentional actors' (Scharpf 1997: 1), while the institutional setting determines the leverage of the involved parties. We can think about the Court as one of several actors in the policy-making process. After an activist constitutional review, which is the Court's main power resource, the legislator has two legislative options: to

amend the constitution; or to *make secondary law compatible* with the Court's interpretation. Following the former option, the legislator reformulates the Treaty in order to clarify the established political consensus and to counter constitutional review. However, threatening the judiciary with an amendment of the Treaty is exceedingly effective, but because of the unanimity requirement it is seldom credible (Pollack 2003).

The second option, to bring secondary law in line with constitutional review, means compliance with the Court's jurisprudence. This can be done usually by a qualified majority and is therefore much more likely to happen. Hence, we should expect the legislator to change secondary law in the light of activist decisions. Next to this power-based institutional argument, constitutional review may also exert influence, as it refers to the core consensus of the Union. It is difficult to counter arguments that derive from this consensus. Schimmelfennig (2001) has shown how important the Community's core values have been for enlargement. The values of the Community entrapped reluctant member states to offer Central European countries accession negotiations, although this was against their own rational self-interests.

Hence, by interpreting and clarifying constitutional norms, the judiciary can shape policy-making because constitutional review advocates distinct policy outcomes, which can become a point of orientation in legislation. In this sense, constitutional review promotes new policy ideas and strengthens the bargaining position of some political groups *vis-à-vis* others.

Besides the described legislative reactions to activist decisions, member states can also decide not to clarify the law and accept some legal uncertainties. This is likely to happen when the general implications of judicial doctrines are rather vague. In such cases member states can react following the discussed strategy of contained compliance, and it is then again up to the judges to specify the rules in case law (Obermaier 2008). Just like vague European law opens the door for activist decisions, the clarity of judicial doctrines determines how strictly national administrations and governments should implement case law.

In a last step, it is necessary to specify the scope conditions under which the judiciary can have a stake in policy-making. There is good reason to assume that the ECJ acts as a unitary, rational competence-maximizer, advocating further integration (Pollack 2003). The Council, however, is a heterogeneous actor without stable and distinct preferences. In many important integration issues, member states promote quite different policies. It is in those topics where the Council lacks leadership by virtue of a missing political consensus that the judiciary can become critical. Yet the Council is not the sole actor in European policy-making. Depending on the policy field, different actors are important for legislation. The broader point is that activist decisions need explicit political support from some of the involved legislative actors. I will illustrate this by focusing on the Commission and the European Parliament within the co-decision procedure.

Nowadays, an absolute majority of the Parliament and a qualified majority in the Council take most legislative decisions. Once again, the legislative reactions

to activist decisions are either the incorporation of the Court's doctrine in policy-making or the amendment of the Treaty. The latter option fails when some member states, theoretically one would be enough, support the Court's jurisprudence. And when a majority of the Parliament and the Commission explicitly advocate judicial decisions, the leverage of reluctant member states is seriously minimized. In that case, it is likely that the legislator will bring secondary law in line with the Court's jurisprudence, even if there is strong resistance within the Council.

In effect, the judiciary can take up the leading role in policy-making, when the Parliament and the Commission share the Court's policy goals and when member states cannot agree on a common position in the Council. Given that, constitutional review can promote distinct policy outcomes and shape new legislation that would not have been in the zone of possible agreement without judicial activism. In particular, the Commission should generally share the policy goals of the Court and take up constitutional review in the legislation process to put through substantial progress in European law. The Commission can not only take up Court decisions, but like private litigants also initiate rulings at the Court. Hence, the concentrated use of the Court's and the Commission's power, exerted in strategic interaction, enhances supra-national influence on policy-making (Schmidt forthcoming 2011).

The discussed limits of judicial law-making and the outlined scope conditions specify the intergovernmental claim that activist decisions need support by member states' governments. However, the above conceptualized legislative influence of the judiciary rather follows a neo-functional narrative, as it attributes to the Court some constrained power to shape integration against the explicit will of important member states. Since I have clarified judicial influence on legislation from a theoretical perspective, I will now highlight this mechanism in a case study.

METHODOLOGY

An important methodological issue for qualitative case studies is the case selection. I will focus on a case, which empirically elucidates the mechanism of judicial influences on policy-making. In such a situation, Gerring (2007: 122) suggests analysing a pathway case 'where the causal effect of one factor can be isolated from other potentially confounding factors'.

The focus of my empirical study is on the recent legislative development of social rights entitled to intra-European exchange students. This case is suitable for an empirical analysis of judicial influences on policy-making, because the ECJ delivered a controversial constitutional review in the initial period of this legislative process, covering the topic under legislative scrutiny. The case at hand follows a perfect temporal variation to study legal influences on legislation. The Court's interpretations became part of the negotiations in the Council, what makes it possible to isolate the implied mechanism of judicial intervention

from other potentially intervening factors. Besides the case selection, the methodology of my qualitative study needs some clarification.

I will draw on within case evidence to assess the Court's importance for the legislation of exchange students' rights. Two main points, namely migrant students' resident conditions and their right to obtain social assistance, were controversial during the policy-making process. As constitutional review was only about the latter, without considering the former, this legislation process encompasses a counterfactual situation within the case. The analysis shows that reluctant member states had to give up their resistance in the issue covered by constitutional review, while in the resident condition question, the advancement of European rights failed.

I will organize my analysis in different judicial and political sequences, from the early 1990s until the formulation of the new Directive in 2004. The methodology of process tracing is suitable for this kind of study, as its focus is on a sequential chain of events in order to assess whether the assumed principles generated the observed outcome (George and Bennett 2005). Throughout my analysis, I will follow Moravcsik's (1998: 80–2) advice to rely on 'hard primary sources', namely, Treaty Articles, Directives, European Parliament documents, European Court judgements and reports on the negotiations in the Council.

RESIDENCE AND SOCIAL ASSISTANCE FOR STUDENTS?

European social co-ordination law builds on two basic principles: first, intra-European migrants can *export* acquired welfare entitlements; and second, they have *equal social rights* compared to nationals in their state of residence. I already summarized the judicial–political dispute over the question of which social benefits have to be exported. The following case study will focus on the second doctrine of co-ordination law, which is about equal treatment in social issues. This doctrine states that Europeans moving to another member state shall have access to the welfare system of their state of residence.

The main divide in this issue culminated around the question of whether member states should only grant welfare benefits to economically active people. Granting social benefits to people in work was uncontroversial because they help financing welfare states. But what about economically non-active people, such as students or pensioners? Would it lead to 'welfare tourism' if people out of work could claim social payments in any member state?

A European citizen can only claim social security rights after having acquired a resident permit. Therefore, a general right of residence, irrespective of any economic activity, would remarkably enhance the personal scope of social co-ordination. The Commission had already presented such a proposal in 1979, provoking fierce resistance. Several member states, notably those with generous welfare systems, shared one major concern: they feared that unrestricted entry and residence would cause 'welfare tourism'. At that time, reluctant member states prevailed.

Directive 93/96

In the early 1990s, however, the Council equipped economically non-active people with the right of residence. The Council's legislation entitled pensioners, students or other people out of work to resident rights as long as they possess sufficient financial resources and medical coverage.¹¹ The approach was clear: students shall have the freedom to move without relying on welfare payments. Such restrictions were disappointing for those who wanted to construct a Community beyond economic reasoning. But according to Directive 93/96, a member state can even withdraw a student's resident rights after she or he has, for whatever reason, no more financial means. This is a severe and controversial consequence.

As I will show, the ECJ ruled that part of the approach chosen in Directive 93/96 would violate basic European rules. In the Maastricht amendment (1992), the heads of state incorporated the concept of Union citizenship into the Community's Treaty.¹² Subsequently, the judiciary advanced, according to the logic of the discussed power of constitutional review, the content of Union citizenship and thereby tackled the political doctrine institutionalized in Directive 93/96. The activist interpretation of Union citizenship introduced exchange students' right to claim welfare payments in their host state, despite the clear wording in secondary legislation.

Constitutional review: the Grzelczyk decision

Social rights are missing from the Treaty Articles about Union citizenship. Hence, at first glance, Union citizenship has nothing to do with the right to obtain welfare benefits. Kostakopoulou (2007: 623) argues that most scholars saw the introduction of Union citizenship 'as a purely decorative and symbolic' act. The 'masters of the Treaties' indeed introduced the concept of Union citizenship with the expectation that it would have only marginal practical effects.

But for integrationists this was the beginning of a major change. For them, the aim of Union citizenship was to move the Community 'beyond the market-oriented objectives of the internal market with respect to the rights of the individual' (O'Leary 1996: 128). Member states, in contrast, argued that the free movement of economically non-active people has to be restricted in order to prevent 'welfare tourism.' It is in the Court's competence to interpret and define the scope of the Treaty. So did the ECJ begin constructing a social dimension to Union citizenship?

The judiciary concluded in 1998 that Union citizenship includes social rights for economically non-active people.¹³ But this ruling was rather vague. Three years later, the Court delivered a more distinct conceptualization of Union citizenship's social dimension in its judgement on the Frenchman Rudy Grzelczyk, who had been studying at the University of Louvain-la-Neuve in Belgium.¹⁴

At the beginning of his education, he was able to make a living with minor jobs. But his fourth and final academic year was more demanding. Rudy

Grzelczyk gave up work and applied for the payment of a minimum subsistence allowance. Belgium refused his request because he was an economically non-active student, but the ECJ ruled that Rudy Grzelczyk had the right to obtain the social support in question.

The conclusions of the Court were based on a constructive reading of the concept of Union citizenship. The judiciary referred to the Treaty section on Union citizenship and to the equal treatment clause,¹⁵ declaring that a Union citizen, having a lawful resident permit, can, under certain conditions, apply for social benefits. This 'landmark judgement' (Martin 2002: 136) re-launched the debate about whether it is legitimate to treat economically non-active people differently to nationals or migrating workers.

The judges elaborated a doctrine balancing the rights of Union citizens and member states' concern about 'welfare migration'. They only granted the right to obtain social assistance to students when they established a certain link to the society of their host state.¹⁶ The Court also argued that Grzelczyk's financial problems were only temporary.

After all, the Court's judgement was revolutionary because it introduced exchange students' right to claim social assistance in their state of residence. Following the power of constitutional review, the Court, as a rational competence-maximizer and integration advocate, signalled to the legislator what kind of secondary law is acceptable in light of the constitution and what course of integration should be taken.

Some European lawyers heavily criticized the Grzelczyk judgement. In a detailed analysis, Hailbronner (2005) argues that the Court created new rights which have basically no fundament in European law. Nonetheless, most European lawyers welcomed the Court's doctrine (Martin 2002; O'Leary 2005). Despite the differences in legal analysis, most scholars agree on the following: the introduced doctrine is neither rational nor coherent (Hailbronner 2005; Martin 2002; O'Leary 2005). The criteria, considering the duration of welfare support and the link between an individual and his or her society, indeed provoke some legal uncertainties.

I argue that the Court established its doctrine to signal how the legislator should advance European law. In this context, it is interesting to take into account member states' opinions about the Grzelczyk case. Governments submitted their legal assignments to the Court in order for judges to be aware of their arguments. Five governments informed the judiciary on their point of view, while four delegations argued that Belgium would not have to grant social benefits to Grzelczyk. The Portuguese government took up the position that such social rights would be part of Union citizenship. Thus, the Court knew that an activist judgement would not be overruled with a Treaty amendment, but the judges also considered the critical opinions submitted by the other four governments.

The judiciary could maximize its influence on policy outcomes by displeasing member states and progressive lawyers. In a legally consistent and coherent judgement, the Court should have declared explicitly that the conditions in

secondary law are in conflict with the constitutional right of Union citizenship. Many legal scholars might have welcomed such a decision, but its financial consequences would have provoked fierce resistance from member states. The judges could also have followed the opinions submitted by most member states. Assuming that, integrationists would have blamed the Court for not advancing free movement rights and for dismissing the potential of Union citizenship. Intergovernmentalists, arguing that the Court strictly follows member states' preferences, would have expected such a decision.

Yet the Grzelczyk verdict is consistent with the assumption that the Court balances legal and political demands. The judges did not declare that exchange students shall have unrestricted welfare access. According to the jurisprudence, a student has to demonstrate a certain degree of integration into the society and his or her financial problems have to be temporary. Thus, the judges considered political concerns at the expense of legal coherence in order to foster the establishment of a new European right. This is, in fact, a very promising strategy to ensure that judicial doctrines will eventually be incorporated into new legislation.

The legislation of Directive 2004/38

The Council and the Parliament advanced Union citizens' free movement rights by agreeing on Directive 2004/38.¹⁷ This new legislation reformulates exchange students' social rights. A few months before the Court published the Grzelczyk verdict, the Commission submitted a Directive proposal to the Council.

Commission officials suggested that migrant students should neither possess financial resources nor medical coverage in order to acquire the right of residence. Surprisingly, they did not equip economically non-active people with social rights, proposing that 'the host member state shall not be obliged to confer entitlement to social assistance on persons other than those engaged in gainful activity'.¹⁸ Hence, the Commission draft intended to advance exchange students' rights by granting them the unconditional right of residence. In this question, the proposal was more progressive than the existing Directive 93/96. The exclusion of migrant students from social assistance, however, marked a setback in the light of the Court's jurisprudence.

At the first meeting in the Council's working party, delegations from several member states declared that they opposed the unconditional right of residence for exchange students and Commission officials reintroduced the condition that students have to be covered by health insurance before applying for a resident permit. Many country representatives also made clear that they would not accept that students could move to another member state regardless of their financial situation. After several negotiation rounds, civil servants of the Commission changed the draft Directive again. According to the new wording, students would have to possess sufficient resources, but only so that they will not burden the social assistance system of their host state. This

specification is quite ambiguous, as it is unclear how a student could burden a social assistance system. But, after all, member states stuck to the conditions of Directive 93/96, forcing the Commission to hold medical coverage and sufficient resources as prerequisites for the right of residence.

Besides the resident conditions, member states also discussed whether they were willing to grant social assistance to migrant students. Commission officials could not consider the Grzelczyk judgement's criteria in their initial proposal, because they submitted the text to the Council before the Court published its verdict. The Commission's initial proposal included member states' right to exclude migrant students from social support. Yet the delegations in the Council's working party immediately requested a judicial analysis on the consequences of the Grzelczyk judgement from their legal service. The legal staff of the Council pointed out that the Grzelczyk decision constrained the legislation of the new Directive.

Based on that, the Commission and the German delegation stated that they would not accept any retrograde movement in relation to the Court's jurisprudence, and also the representative from Austria reminded his colleagues that limits set in case law should be reflected in legislation. However, most delegations declared that they were not willing to pay welfare benefits to exchange students, no matter what the Court said about that.

At this point in the policy-making process the situation was rather confused. The legal expertise and the explicit support from several delegations and the Commission for the Court's conclusion slowly shamed reluctant delegations into acquiescence. The Commission, the Court and progressive member states could legitimize their preferences with the free movement of people, one of the constitutive values of the Community. And the position of reluctant member states became even more uncomfortable when the European Parliament started its consultation on the draft Directive. In the co-decision procedure, a Directive proposal has to be accepted not only from a qualified majority in the Council but also from a majority in the Parliament.

The European Parliament advocated the advancement of migrant students' rights, amending the proposal in order that students do not have to possess sufficient resources but only medical coverage to apply for residence, and that they obtain social assistance just like nationals of their host state. Obviously, the pressure on reluctant member states increased once again. However, national delegations repeated in the Council negotiations, after the Parliament's first reading, that they will only grant resident rights to students possessing sufficient resources. Therefore, Commission officials deleted the Parliament's amendment, reintroducing the conditions of medical coverage and sufficient financial resources, so that migrant students will not burden social assistance systems.

The fact that the Council stuck to these resident conditions highlights that member states can resist pressure from the Commission and the Parliament. The situation in the negotiation on exchange students' right to claim social assistance was in two ways different: first, the Court promoted in its case law

specific legislative outcomes; and second, member states' representatives could not agree on a common position.

The Parliament proposed that every Union citizen, legally residing in a member state, should be entitled to claim social assistance. But some delegations, notwithstanding, entered scrutiny reservations on the right of students to claim social assistance. To reach a consensus on this delicate issue, Commission officials incorporated every aspect of the Grzelczyk judgment into the draft Directive. Consequently, students can claim social assistance only after certain duration of residence and only if their financial problems are temporary. Those criteria, limiting exchange students' access to welfare benefits, were extremely important to convince national representatives.

Eventually, the proposal entitled exchange students to the right to obtain social assistance in their host state under the conditions elaborated in the Grzelczyk judgment. Representatives from Luxemburg, the UK, Belgium, Ireland and Denmark still remained critical about this legislative confirmation of the Court's jurisprudence. But throughout the policy-making process, the leverage of reluctant member states continuously declined to the point where this coalition was too weak to prevent the institutionalization of case law.

In its second reading, a majority in the European Parliament approved the Directive proposal presented by the Council. Progressive members of the Parliament and reluctant member states criticized the political agreement. This indicates that the Court successfully promoted a distinct policy outcome, without going beyond what was politically acceptable.

Table 1 summarizes the development of exchange students' resident conditions and their right to claim social assistance from Directive 93/96 to Directive 2004/38.¹⁹

Table 1 The development of exchange students' social rights

	<i>Under which conditions can students claim the right of residence?</i>	<i>Should students be entitled to obtain social assistance?</i>
Directive 93/96	Medical coverage and sufficient resources	No
Grzelczyk decision	No reference	When students fulfil certain conditions
The preferences of the policy-making actors in the legislation of Directive 2004/38		
Commission	No conditions	Yes
Parliament	Medical coverage	Yes
Council	Medical coverage and sufficient resources	Strong resistance
Directive 2004/38	Medical coverage and sufficient resources	When students fulfil certain conditions

In negotiations concerning the resident conditions, the Parliament, the Commission and progressive member states failed. Several reluctant delegations in the Council successfully stuck to restrictive conditions. In fact, the Council made clear that European law still distinguishes between economically active and non-active people. The opinions about the Grzelczyk case, submitted by member states' governments, signalled to the Court that unconditional free movement rights based on Union citizenship are at present politically too controversial. In the second disputed issue, however, which was about the right to claim social assistance, the legislator incorporated the doctrine of the Grzelczyk decision – what is in fact a substantial advancement from the old to the new Directive.

In respect of students' access to social benefits, the legislator followed the Court's jurisprudence in every aspect. Hailbronner (2005: 1262) concludes that '[i]t is probably common legislative practice to . . . take up phrases used in judgements of the Court to draft Community legislation'. When the legislator lacks leadership by virtue of a missing consensus, the Court can successfully take up the legislative role and effectively advance integration. Yet the explicit support of some member states and other relevant actors in the legislation process is indispensable.

The criteria institutionalized in Directive 2004/38 regarding students' right to obtain social assistance are quite ambiguous. It is, for example, unclear when an exchange student can claim that he or she has established a certain link to the society. The judiciary will again answer these kinds of questions. Indeed, 'vague and ambivalent formulations . . . are effectively invitations to judicial specification' (Scharpf 2007: 12). The more ambiguous European law is, the bigger the Court's influence. And as long as the judges keep considering member states' concerns in their jurisprudence, the odds are good that the judiciary will foreclose policy-making once again.

CONCLUSION

Schmidt (forthcoming 2011) argues that the Commission can change the political power balance in the Council by initiating a Treaty violation proceeding against a member state. Commission officials threaten governments with potentially far-reaching decisions from the ECJ, and, in turn, the Council takes decisions which otherwise may not have been supported by a qualified majority. This way, the Court's influence on policy-making is rather indirect. I argue that the judiciary also influences legislation in a direct way, without loop to the Commission.

Many scholars studying the ECJ do not pay much attention to the limits of judicial law-making. This leads to a one-sided picture of the Court's importance for integration. I argue that we should take seriously the problems of contained compliance and effective policy implementation. In salient policy fields, activist Court decisions cannot by themselves effectively influence Europeans' everyday

lives. Yet we need more systematic research analysing specifically how national administrations react to activist Court decisions.

But even if the effect of judicial activism is constrained by the competences of other institutions, activist Court decisions can provide focal points for the advancement of European policies. Under certain conditions, such decisions change the power balance among the legislative actors and thus shape legislation in a distinct way. I elucidated this mechanism theoretically and empirically in the field of social co-ordination. The Court also influenced legislation on the road to the single market or in the case of the freedom of services. Nowadays, the internal health market is a field where the Court is highly active (Martinsen 2009).

The ECJ is, in salient policy areas, a major centre of policy-making. This is not only interesting for theoretical and empirical studies, but raises normative questions as well. From a democratic point of view, the Court's influence on policy-making is problematic (Scharpf 2009; Schmidt forthcoming 2011). Therefore, Scharpf (2007) convincingly argues that the political modes of legislation should be strengthened at the expense of non-political modes of European policy-making. Of course, activist Court decisions facilitate political agreements in the Council and, hence, constitute an escape route from gridlock and standstill. But Europe's institutional setting should be improved in a way that political questions are, generally speaking, answered in political debates and not in courtrooms.

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NOTES

- 1 In May 2004 Regulation 883/2004 came into force, replacing Regulation 1408/71. But at the time of writing the new Regulation was not yet applicable, as its implementing Regulation was still under discussion.

- 2 Social security payments provide security from social risks like maternity, invalidity or unemployment, whereas social assistance is usually means-tested, non-contributory and financed through taxes.
- 3 For a detailed analysis of this dispute see Conant (2002: 177–212) or Verschueren (2007: 315–19).
- 4 Piscitello: C-139/82 (1983).
- 5 Giletti *et al.*: C-381/85 (1987).
- 6 Commission v. France: C-236/88 (1990).
- 7 Regulation 1247/92.
- 8 Jauch: C-215/99 (2001), Leclere: C-43/99 (2001).
- 9 Van Gend en Loos: C-26/62 (1963), Costa Enel: C-6/64 (1964).
- 10 Alter and Meunier-Aitsahalia (1994) have investigated the impact of the famous Cassis de Dijon verdict (C-120/78, 1979) on integration. Even in this quintessential case, which is often used to illustrate how the judiciary can advance European integration, the authors conclude that the Court decision itself did not create policy consequences. Its contribution has rather been to act as a catalyst, triggering and shaping a legislative reaction, which eventually made the general principles of negative integration and mutual recognition the dominant European market strategy. Moreover, they argue that judge-made law on its own would hardly have any general effect, as it can only ‘be applied on a case-by-case basis’ (Alter and Meunier-Aitsahalia 1994: 549). This might be too strong a claim because Court doctrines exert precedential impact beyond the individual case. However, in a European context, an activist legal decision in a salient policy field will on its own not become a generally applied rule. That is why we should focus on how such decisions impact the legislation process.
- 11 See Directives 90/364, 90/365 and 93/96.
- 12 EC-Treaty: Articles 17–22.
- 13 The judiciary ruled that Miss Martinez Sala, a Spanish mother out of work, should obtain a German child-raising allowance (Sala: C-85/96).
- 14 Grzelczyk: C-184/99 (2001).
- 15 EC Treaty: Article 12.
- 16 In the Grzelczyk decision the Court makes clear that students can claim social assistance only in specific situations. The Court explicitly points to the establishment of a certain link to the society in Collins: C-138/02 (2004) and Bidar: C-209/03 (2005).
- 17 The Interinstitutional file 2001/011 (COD) keeps record on all policy-making documents. A more detailed version of this paper, documenting the legislation of Directive 2004/38 with reference to all the relevant primary sources, is available upon request.
- 18 Commission proposal: Article 21 (2).
- 19 Directive 2004/38 has been published in the Official Journal of the European Union, L 158, 77–123.

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