

Laure Clément-Wilz (Ed.), *Le rôle politique de la Cour de justice de l'Union européenne*. Brussels: Larcier, 2019. 472 pages. ISBN: 9782802761488. EUR 105.

As surprising as it may be for an English-speaking audience, the question of the ECJ's political role received only scant attention in the French *doctrine* until recently. If only for that reason, this collection edited by Clément-Wilz brings a significant added value to the French legal community's writings on EU law. But this innovative work should also be of interest to a wider readership for at least two reasons.

First, in typically French vein, the book explores the political role of the EU judiciary through a *systematic* analysis of its case law. Clément-Wilz has managed to garner the views of renowned scholars in the main areas of EU law, asking them to scrutinize the Court's judgments with a view to determining their political dimension. This survey of the main policies of the EU (internal market, competition, social, environment, CFSP, asylum and immigration) and a few salient topics (EU citizenship, the European Arrest Warrant, the freedom to conduct a business, the enforceability of the Charter) gives the reader a fairly good view of the latest developments in EU law and its disparate levels of "politicization". Overall, the authors provide high-quality and thorough analyses of the case law.

Second, the book seeks to bridge the gap between classic legal analyses (developing an "internal point of view" on the law as H.L.A. Hart would have it) and the abundant literature on the ECJ produced by political scientists (drawing on an "external" viewpoint, in Hart's terminology). This bridge is not superficial by any means: it is one of the main achievements of the book to have managed (or at least tried hard) to overcome the classic divide between a generally trustful and supportive *doctrine* – bound to take legal reasoning seriously – and the critical, deconstructionist ethos of social sciences – inclined to view legal discourse as little more than an *ex post facto* legitimization of political decisions. Writing separately, Clément-Wilz (the lawyer) and Vauchez (the political scientist) join efforts to find a common ground between their respective "epistemic communities". Clément-Wilz considers that "the political role of the judge rests above all on its normative function". She wants this collective research to steer clear of the run-of-the-mill "judicial activism" accusation because, as she claims in a very Kelsenian

perspective, it is the law itself which creates conditions for the exercise of political choices by judges. Hence her mission statement: to “legally examine the political role of the Court” – not *whether* the Court has a political role (which is taken for granted) but *how* it exercises it. Vauchez meets Clément-Wilz halfway. He pledges to “take the law seriously” by trying to discern the “political work of law”, i.e. how law contributes to defining and prioritizing both the actors and the topics that deserve political attention. He notably calls for the identification of the “valuable items” of EU law that emerge from the endless judicial task of reconciling conflicting interests and values.

Unfortunately, as nuanced and subtle as they were in the definition of the ECJ’s political role (or perhaps because of that), these two leading papers proved unable to prevent some degree of misunderstanding and variations in the use of this notion in the other contributions. Several authors traced the ECJ’s political role to the political sensitivity of the disputes (Guiot and Mazille; Martucci; Poirmeur) or to its composition (Poirmeur). Some contributions implicitly or explicitly relied on the assumption that law is a screen designed to maintain an appearance of neutrality (Marzal; Jacqu  ), leading some of them to doubt or even flatly deny the political character of the Court’s case law in specific areas when they considered that the EU judges had simply applied the law (Martucci; De la Rosa). Other authors spotted the political dimension of the case law in situations where there was a gap between the legal text and the interpretation reached by the Court (Barbou des Places), in the instrumentalization of the law (Taupiac-Nouvel), or in the ability of a ruling to upset the balance of powers (Marti, Chevalier) or influence the normative landscape (Mayer-Carpentier). Many of them sought to unearth the political orientations underpinning the case law (Iliopoulou; Dubout; Cartier-Bresson; Guillaud and Mazille; Taupiac-Nouvel; Maddalon).

Such discrepancies in the understanding of the “political role” of the Court and in its defining criteria can probably be explained by the polysemy of the word “*politique*” in French. When translated into English, this notion can be broken down into three different concepts: politics, policy and polity. Arguably, this richer lexicon sheds new light on the contributions gathered in this volume. In that respect, I would like to make the claim that, whilst several authors considered the “*policy-cal*” role of the Court, some others actually inquired into its “*politics-cal*” function, whereas other yet examined its “*polity-cal*” activity.

The authors who searched for the *policy-cal* dimension of the case law sought to track down the Court’s contribution to the definition of the EU’s political choices. Unsurprisingly, some identified a pro-integration bias in the case law (Marti, Pailler, Chevalier, Guillot and Mazille), while others discussed the alleged neo-liberal inclination of the Court (Dubout, De la Rosa, Iliopoulou) or criticized the priority given to security over respect for fundamental rights (Taupiac-Nouvel). Although these analyses contain many fruitful insights, they seem irremediably stranded in an “impressionistic” style. It is utterly difficult indeed, if at all possible, to determine, let alone quantify, the specific contribution of the Court to the major political orientations of the EU. This is even more so when – for perfectly understandable time and space constraints – the analysis is restricted to “landmark cases”. But these investigations remain valuable: not only do they adduce evidence in support of the common claim that the ECJ often acts as a substitute legislator (Jacqu  ), but they also show *how* this is done (through balancing of competing interests, the creation of general principles, ruling on direct effect, teleological interpretation, etc.).

Some papers focus on the *politics* of the Court, wondering how its case law can be linked to broader power relations between political actors. They depict a two-way relationship. Some of the ECJ’s judgments are “politically significant” in the sense that they have an *impact* on the EU constitutional set-up. This appears clearly from the analysis of the disputes regarding the legal basis for EU action (Marti) but also from the (broad) interpretation of the Charter’s scope (Pailler) or from an (increasingly generous) application of the State aid prohibitions (Cartier-Bresson). Conversely, certain (poorly reasoned) rulings appear to be “politically driven” because they seem to *result* from the Court’s acute awareness of the political stakes. *Dano* and its progeny in the field of citizenship (Iliopoulou) and the (in-)famous *X and X v. Belgium* in the asylum area (Pailler) are prime examples of such “suspicious” self-restraint. The

interest of such analyses is self-evident, especially for the growing body of literature on the sociology of organizations applied to the EU.

Finally, a few contributions examine the ECJ's role in the construction of a genuine European *polity*. Some authors lament the Court's role in the "depoliticization" of the debate about the EU's fundamental values and regret the transformation of highly political issues into technical ones (Marzal, Dubout). Dubout expressly calls upon the Court to more daringly engage in proportionality *stricto sensu* assessment in order to spark political debate. Adopting a more substantive angle, Barbou des Places identifies in the Court's case law on immigration and asylum defining elements of what constitutes the "European society" and the European "*vivre-ensemble*". These analyses tie in with (and may feed into) political philosophy analyses of European integration. By placing the emphasis on the "valuable items" (Vachez) of the European project, they also tally with with another – ongoing – collective research aimed at exploring "Europe's judicial narratives".

Overall, this book certainly deserves careful reading. It provides updated and original (albeit sometimes patchy) insights into the political dimension of the Court's case law. And it demonstrates the increasing openness of French mainstream legal *doctrine* to critical approaches to (EU) law. Hopefully *à suivre*...

Antoine Bailleux