



CORE ANALYSIS

‘Integration-through-Law’: grand theory, revisionist history

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Abstract

How has the European Union been integrated in the past? Legal academics have traditionally pointed to the Court of Justice and to the broader idea of an ‘integration-through-law’. Through its supranational jurisprudence, the Court – not the EU legislature – was thus placed at the centre of the European integration project. The underlying reasons for this dominance of constitutional ‘law’ over legislative ‘politics’ have thereby been the subject of three famous explanations: the ‘equilibrium theory’ (Weiler), the ‘asymmetry theory’ (Scharpf) and the ‘over-constitutionalisation theory’ (Grimm). What are the merits of these grand theories of European integration when measured against the historical record? This article hopes to explore this question in the context of the internal market. Its historical revision begins with an analysis of the respective spheres of normative and decisional supranationalism during and after a foundational period (Sections 2 and 3). This is followed by an examination of the meaning and significance of the *Cassis de Dijon* judgment in the late 1970s. Through this revolutionary case, a dialectical relationship between the EU Court (‘law’) and the EU legislator (‘politics’) emerges (Section 4) that ultimately leads to the spectacular rise of EU legislation (Section 5) after the SEA. This transformational relationship will provide the critical lens for a historical revaluation of the three grand theories of legal integration (Section 6).

Keywords: Integration-through-law; equilibrium theory; asymmetry theory; over-constitutionalisation theory; *Cassis de Dijon*

1. Introduction

How has the European Union been integrated in the past; and what are the respective roles of ‘law’ and ‘politics’ in this process? The traditional answer has here insisted on a constitutional dominance of the judicial over the political sphere, with especially legal academics having overwhelmingly pointed to the Court of Justice and the idea of an ‘integration-through-law’.¹

¹The literature on the Court of Justice’s role in the integration of Europe has been extensive. See for example: MP Maduro, *We the Court* (Hart 1998); A Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004); K Alter, *The European Court’s Political Power: Selected Essays* (Oxford University Press 2009); D Sindbjerg Martinsen, *An Ever More Powerful Court: The Political Constraints of Legal Integration in the European Union* (Oxford University Press 2015); S Saurugger and P Terpan, *The Court of Justice of the European Union and the Politics of Law* (Red Globe Press 2016); SK Schmidt, *The European Court of Justice and the Policy Process* (Oxford University Press 2018); and very recently: M Dawson et al (eds.), *Revisiting Judicial Politics in the European Union* (Elgar 2024). For an overview of the ‘integration-through-law’ school specifically: A Vauchez, ‘Integration-through-Law: Contribution to a Socio-history of EU Political Commonsense’ (EUI Working Paper, RSCAS 2008/10); D Augenstein, *Integration through Law? Revisited: The Making of the European Policy* (Ashgate 2012); I Azoulai, ‘Integration through Law’ and Us’ 14 (2016) *International Journal of Constitutional Law* 449; and

The Law In Political Integration

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